"THE FEDERAL CORNER"

A Child Pornography Case with Unusual Facts

Buck Files

Michael Thorvald Laursen was 45 years of age and having a sexual relationship with J.B. who was only16. Because the age of consent is 16 in the State of Washington, Laursen was not in violation of state law. On occasion, Laursen and J.B. would take sexually explicit "selfie" photographs. It never occurred to Laursen that this could cause him to be a defendant in a federal criminal case.

Unfortunately for him, though, local law enforcement officers received a report that J.B. was being sexually abused and, in the course of their investigation, discovered some of those images of J.B. and Laursen on his digital camera and on his laptop. Eventually, Laursen was indicted by a federal grand jury for violations of 18 U.S.C. §§ 2251(a) and (e) and 18 U.S.C. §§ 2252A(a)(5)(B) and (b)(2).

Laursen waived his right to a jury and proceeded to trial before Senior United States District Judge Robert J. Bryan of the Western District of Washington. After being found guilty by Judge Bryan, he gave notice of appeal to the United States Court of Appeals for the Ninth Circuit. On January 30, 2017, a panel of the Circuit [Circuit Judges Hawkins, Rawlinson and Callahan (opinion by Rawlinson; concurring opinion by Hawkins)] affirmed Laursen's convictions, holding that the evidence was sufficient to support his convictions.*United States v. Laursen*, ___F.3d___, 2017 WL 460660 (9th Cir. Jan. 30, 2017)Judge Rawlinson's opinion reads, in part, as follows:

[An Overview of the Opinion]

> In this appeal we address whether taking consensual nude 'selfies' involving a forty-five-year-old man and a sixteen-year-old girl is sufficient to support a conviction for production and possession of child pornography. We conclude that this evidence was sufficient to support the conviction, and *we specifically reject the argument made by defendant Michael ThorvalLaursen (Laursen) that the legality of his sexual relationship with a sixteen-year-old under Washington state law precluded prosecution under federal law.* (emphasis added)

* * *

[Judge Bryan's Concern About Federal Jurisdiction]

> Prior to trial, the district court agreed with Laursen that federal jurisdiction in the case was predicated on 'a pretty narrow nexus' because there was 'no production of pictures over the Internet here, for example, to third parties or anything like that[.]' Nevertheless, the court ultimately determined that production of child pornography with a cell phone that traveled across state lines satisfied 'the federal nexus under 2251 and 2252(a) (sic).'

[The Photographs, J.B.'s Testimony and the Federal Nexus]

The Government's case against Laursen focused on two sets of photographs. The first set of photographs were found on the hard drive for J.B.'s Toshiba laptop. The second set of photographs came from the memory card for the digital camera.

J.B.'s testimony was an integral part of the government's case. She testified that she met Laursen in March, 2012, when she was sixteen, and around the time she suffered a drug relapse. J.B. admitted that her memory of that time period was 'pretty cloudy,' and it was hard to remember details. J.B's and Laursen's sexual relationship began the second time they saw each other. Their relationship became serious when J.B. ran away from home in July, 2012, and commenced living with Laursen. During this period, J.B. and Laursen interacted intimately in a variety of locations, including motels and the homes of Laursen's friends and family. When Laursen took J.B. to the police in July, 2012, J.B. told detectives that Laursen was her best friend and hero. However, J.B. acknowledged at trial that she often skipped school to see Laursen, obtained drugs from Laursen, and ran away from home because of Laursen's influence.

J.B. recalled that she took the sexually explicit photographs found on the Toshiba hard drive with her cell phone before a motel room mirror in August, 2012. J.B. identified Laursen as the man standing next to her in the 'selfie' photographs. J.B. testified that she took the photographs with Laursen because he told her they 'looked good together' and said 'he wanted to take pictures.'[2] Although J.B. stated that she did not like 'taking pictures like that,' she and Laursen took sexually explicit photographs each time they saw each other. However, J.B. deleted some photographs at Laursen's request. J.B. transferred the sexually explicit photographs from her cell phone to her Toshiba hard drive days after the photographs were taken. J.B. also sent some of the photographs to Laursen's cell phone.

[[2] The photographs depicted both J.B. and Laursen displaying full frontal nudity and other pornographic poses.]

[3]J.B. also identified herself in the sexually explicit photographs found on the memory card. J.B. assumed that Laursen took the photographs because her hair was dyed red in the pictures, which was the same time period when she and Laursen were in a relationship and living together. J.B. also identified a red blanket and brown pillow in the picture that she said belonged to Laursen. In addition, J.B. identified the digital camera in evidence as belonging to Laursen because it had a burn mark on it.

[[3] The photographs were close-ups of J.B.'s vaginal area, including some photographs displaying blood from menstruation.]

J.B. was adamant that she had never taken sexually explicit photos with anyone other than Laursen.

* * *

To satisfy the jurisdictional element of the offenses, the government called a Toshiba representative who testified that the hard drive in J.B.'s computer was shipped from another country. A Kingston Technology representative similarly testified that the company's camera memory cards are made in Japan and shipped to California.

* * *

[Judge Bryan's Findings]

The court found Laursen guilty of production and possession of child pornography. The court found that Laursen knowingly 'used [J.B.] to take part in sexually explicit conduct for the purpose of producing a visual image of such conduct.'The court concluded that Laursen produced or aided and abetted J.B. in producing the photographs, and knew that J.B. was sixteen years old.

* * *

[At the Sentencing Hearing]

At sentencing, Laursen argued that the district court should have dismissed his case due to a lack of jurisdiction, *because under state law J.B. was 'a young woman of legal consensual age and is therefore, by definition, not a child.'*The court overruled his objection and sentenced Laursen to fifteen years' imprisonment for the production of child pornography, and ten years' imprisonment for possession of child pornography. The judge told Laursen that the sentence was the only one 'available' because the judge was 'bound by the law, whether I agree with it or not.'Laursen filed a timely notice of appeal. (emphasis added)

* * *

[Laursen's Argument on the Sufficiency of the Evidence
And the Court's Response]

Laursen contends that the Government's evidence was insufficient to support a conviction for production of child pornography in violation of 18 U.S.C. § 2251(a). To secure a conviction under that statute, the government was required to prove beyond a reasonable doubt that: (1) J.B. was a minor (less than eighteen years old); (2) Laursen employed, used, persuaded, induced, enticed, or coerced J.B. to take part in sexually explicit conduct for the purpose of producing a visual depiction of that conduct; and (3) that visual depiction was produced using materials that had been transported in interstate or foreign commerce. … Laursen's challenge regarding the sufficiency of the evidence is limited to the second element: he contends that he did not 'use' J.B. to take part in sexually explicit conduct 'for the purpose' of producing visual images.

'The question of whether the pictures fall within the statutory definition is a question of fact as to which we must uphold the district court's findings unless clearly erroneous....'

* * *

Adopting the plain meaning of the term 'use,' we agree with the district court that the evidence presented by the government sufficiently established that Laursen used or employed J.B. to produce sexually explicit images. The pornographic photographs were produced after Laursen told J.B. that the two 'looked good together' and that '***he*** wanted to take pictures.' (emphasis added). Importantly, J.B. testified that she did not enjoy taking pornographic pictures. J.B. also deleted pictures at Laursen's request. This evidence established that Laursen directed J.B.'s actions, at a minimum engaging in active conduct that resulted in the production of child pornography. *See* *Overton*, 573 F.3d at 692 (requiring proof of active *or* coercive conduct).Laursen is correct that there was no evidence presented of physical coercion. However, in view of the disjunctive language contained in *Overton*, active conduct alone suffices to sustain a conviction under § 2251(a). *See* *id.*

* * *

[Laursen'sConstiutional Challenges]

Laursen contends that 18 U.S.C. §§ 2251 and 2252A as applied are vague, overbroad, violate the Tenth Amendment, and exceed Congress' power under the Commerce Clause. These challenges are primarily predicated on Laursen's belief that his conduct with J.B. was legal under Washington law. The governing Washington statute provides that '[a] person is guilty of rape of a child in the third degree when the person has sexual intercourse with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim.'Wash. Rev. Code § 9A.44.079. Thus, Laursen's sexual relationship with J.B. was legal under state law because she was not 'less than sixteen years old.'*Id.However, a separate Washington statute provides that '[a] person is guilty of sexual exploitation of a minor' if the person '[a]ids, invites, employs, authorizes, or causes a minor to engage in sexually explicit conduct, knowing that such conduct will be photographed ...'Wash. Rev. Code § 9.68A.040. Consequently, in the state of Washington, Laursen's sexual relationship with J.B. was legal but the production of pornography stemming from that relationship was not.* (emphasis added)

* * *

[Laursen's Privacy Issue Argument]

Laursen contends that the child pornography statutes at issue are overbroad because he has a protected privacy interest in taking intimate photographs in the

course of a consensual sexual relationship. We disagree. A consensual sexual relationship between adults is constitutionally protected. *See, e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 453, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972).*However, that constitutional protection has not been extended to sexual relationships between adults and children.* (emphasis added)

* * *

Given that J.B. was a minor, using her to produce pornography is unquestionably prohibited conduct, and Laursen'soverbreadth challenge fails.

* * *

[The Court's Conclusion]

Sufficient evidence was presented by the government to sustain Laursen's convictions for the production and possession of child pornography. The fact that Laursen's sexual relationship with J.B. was legal under Washington law did not legitimize the production and possession of child pornography under state or federal law. Laursen's constitutional challenges lack merit, and the district court's evidentiary rulings were sound.

[My Thoughts]

- While *Laursen* is certainly an atypical child pornography case, it reminds us that a defendant doesn't have to use a computer in order to wind up as a defendant in a child pornography prosecution.
- Lauren's lawyer gave it his all, but he never had a chance --you could see what the end result was going to be.