ONE HOUR CLE CREDIT

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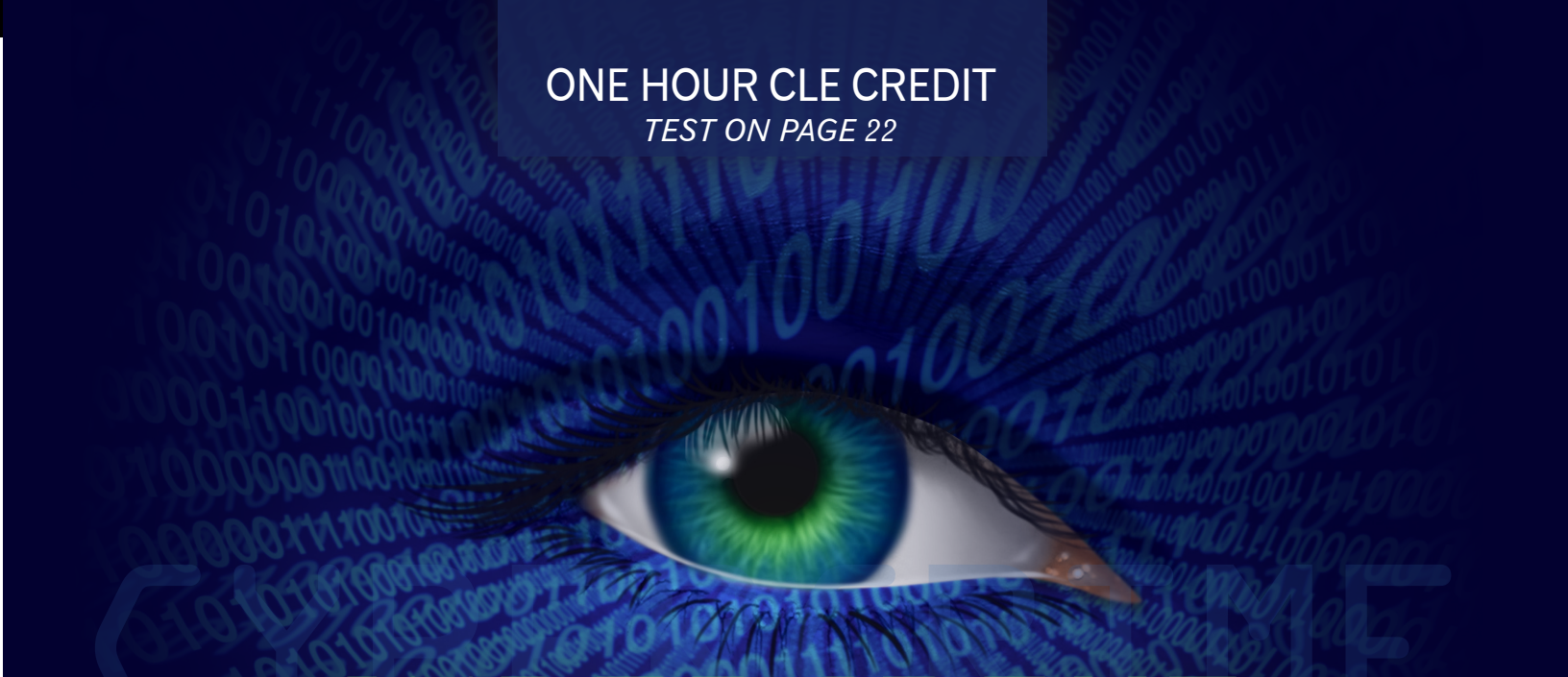

CYBERCRIME AND CHILD EXPLOITATION

BY JOHN CALVERT, ESQ.

Cybercrime is an act committed with a criminal motive, involving the use of computers and modern telecommunications networks such as internet chat rooms, email and mobile smart phones. The sexual exploitation of children is aided by the use of these devices. Nevada laws actually do address the use of computers and other such network devices when used in the commission of luring children and child pornography. This article discusses these laws.

Luring Children

The prohibition against luring children is contained in NRS 201.560, which states in pertinent part (Emphasis added):

1. Except as otherwise provided in subsection 3, a person commits the crime of luring a child if the person knowingly contacts or communicates with or attempts to contact or communicate with:

   (b) Another person whom he or she **believes to be a child who is less than 16 years of age** and at least 5 years younger than he or she is, **regardless of the actual age** of that other person, with the intent to solicit, persuade or lure the person to engage in sexual conduct...

4. A person who violates or attempts to violate the provisions of this section through the use of a **computer, system or network...**

6. As used in this section:

   (a) "Computer" has the meaning ascribed to it in NRS 205.4735…

The language emphasized above was not always part of NRS 201.560. In *State v. Colosimo,* 122 Nev. 950, 142 P.3d 352 (2006), the defendant (Colosimo) was charged with committing the offense of

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luring a child after he "corresponded through the Internet with an undercover police detective from the Washoe County Sheriff's Office whom Colosimo believed to be a 14-year-old girl named 'Sammi.' Colosimo arrived at a prearranged meeting place with condoms and lubricant, allegedly intending to have sex with the girl. He was arrested and charged with violating Nevada's 'using technology to lure children' statute."[1]

The court concluded that:

1. The defendant was charged with the actual crime and not merely an attempt;
2. "Penal statutes require that provisions which negatively impact a defendant must be strictly construed, while provisions which positively impact a defendant are to be given a more liberal construction"[2]
3. NRS 201.560 is "plain and clear," along with being constitutional, and
4. "A defendant's intended victim must be "less than 16 years of age" and that victim must have actual parents or guardians whose express consent was absent or avoided.[3]

Therefore, the court held that, since the defendant's intended victim was actually a 41-year-old sheriff's deputy: "it was legally impossible for the prosecution to prove that element of the crime charged."[4]

This apparent loop-hole was closed by the Nevada Legislature's 74th Session in 2007 through addition of the verbiage "***believes to be*** a child who is less than 16 years of age"—language contained in the current version of NRS 201.560.

In *Johnson v. State,* 159 P.3d 1096 (Nev., 2007), the court again dealt with interpreting the statutory language of NRS 201.560. In *Johnson,* the defendant was charged with an attempt to commit luring a child and not with the actual crime, as was the case in *Colosimo*. The court distinguished committing the actual crime, as in *Colosimo*, from attempting to commit the crime, as in Johnson, by analyzing the plain language of NRS 193.330(1), which defines the attempt to commit a crime as a specific intent to commit that crime.

The court held that "(w)hen he entered his guilty plea, Johnson admitted that he used a computer in an attempt to contact children and suggest they meet for sexual conduct. This was sufficient to establish that Johnson intended to violate NRS 201.560."[5] Johnson's conviction was upheld.

Child Pornography

The prohibition against child pornography is contained in NRS 200.700 to 200.760, inclusive (Pornography Involving Minors). NRS 200.727 prohibits use of the internet to control such pornography, and NRS 200.737 prohibits minors from using electronic devices to transmit a sexual image of themselves to another.

In *Wilson v. State*, 121 Nev. 345, 114 P.3d 285 (2005), the defendant was convicted of four separate counts of using a child in a sexual performance (NRS 200.710) during which he took four separate photos of the child within a single photo session. The defendant argued that the four charges based upon four separate photos were redundant, because all four photos were taken during a single session. The court held that the legislative intent of the:

> [C]hild pornography statutes is to protect children from the harms of sexual exploitation and prevent the distribution of child pornography. As such, the intent of the Legislature in passing NRS 200.700 to 200.760, inclusive, was to criminalize the use of children in the production of child pornography, not to punish a defendant for multiple counts of production dictated by the number of images taken of one child, on one day, all at the same time.

Therefore, the court dismissed three of the four counts.

The court also addressed whether the Double Jeopardy Clause was implicated by the defendant's conviction on four counts of possession of child pornography under NRS 200.730. The defendant argued that the possession charges were lesser offences included in the production charges. The court held that under the Blockburger[6] test, in which the elements of one offense are entirely included within the elements of a second offense, production of child pornography and possession of child pornography were separate offenses; this is because the production in question, under NRS 200.710, required utilizing a minor to perform or portray sexual acts, while possession, under NRS 200.730, required a separate element: the defendant maintaining possession of the photograph/s depicting the pornographic acts. As a result, the Double Jeopardy Clause was not invoked.

Another issue that arises with regard to NRS 200.730 (Possession of Child Pornography), is that the defendants and/or their defense teams are often "in possession" of the child pornography in preparation of their cases. In *State v. Second Judicial District Court (Epperson),* 120 Nev. 254, 89 P.3d 663 (2004), the court dealt with this possession issue. The state argued that, because NRS 200.735 only allows law enforcement personnel to be in possession of child pornography, the district attorney's office violated the child pornography laws by copying and distributing the video tape evidence to the defense team. The court held that due process requires the state to divulge material evidence to the defense. The defense established the materiality of the video tape, in that the court found:

> [T]he videotape might contain information favorable to the *Epperson* defendants. They argue that they have a right to present the videotape in a manner that supports their theories of defense. The *Epperson* defendants contend that to present their side of the case, they need the videotape

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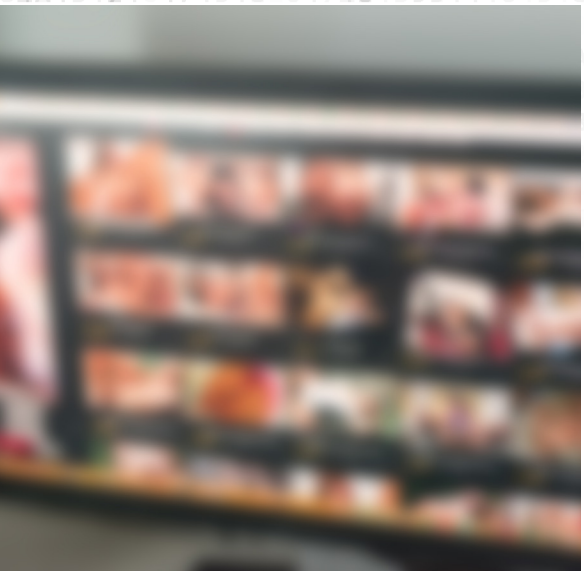

to enhance certain images to show their absence in the videotape. They also want to use the videotape to show that E.R. consented to the sexual activity and that she was physically and mentally capable of resisting the activity. The result of the trial might be affected if the defense does not have a copy of the videotape. Therefore, the videotape is material evidence.

The court ordered that the video be given to the defense but placed stringent restrictions on the defense's use of the video:

1. The defendant cannot possess a copy of the videotape, however, the defendant may view it with counsel in preparing the defense;
2. Counsel cannot make additional copies of the videotape;
3. Only the attorneys, legal staff, defendants, an audio/video technician and expert witnesses may view the videotape;
4. The attorneys must keep the videotape safe at their place of business;
5. No one may mail or transport the videotape by any third-party commercial carriers;
6. No one may transport the videotape across state lines without a written court order; and
7. (After trial) at the conclusion of the case, defense counsel must promptly return the copy directly to the prosecutor who will destroy it.

In *Wilson*, supra, the defendant also requested possession of photos during the trial. The defendant had possession of those photos for trial preparation, during which they were available through his stand-by counsel, so that experts could examine them in preparation for trial. The defendant cited to *Epperson,* maintaining that he also needed them during the trial; however, the court denied that request, because he did not state a further need for the photos after his trial preparation, and because the photos were available from the court clerk and could be quickly supplied if the defendant demonstrated a valid reason for them to be back in his possession.

Space limitations prevent a more in-depth examination of the topic, but those seeking more information can find it in the Department of Justice Citizen's Guide to U.S. Federal Law on Child Pornography and on the FBI's website on violent crimes against children. NL

1. *Id.* at P.3d 354.
2. *Id.* at P.3d 359 (citing *Mangarella v. State,* 117 Nev. 130, 134, 17 P.3d 989, 992 (2001) (citing *State v. Wheeler*, 23 Nev. 143, 152, 44 P. 430, 431-32 (1896)).
3. *Id.* at P.3d 359.
4. *Id.*
5. *Johnson v. State supra* at 159 P.3d 1097.
6. *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

JOHN CALVERT has been a member of the State Bar of Nevada (SBN) since 1989, and has also been a member of the Maryland and District of Columbia state bars. He is a partner at The Law Office of Calvert & Hubach, LLC in Reno, where he practices primarily in the area of criminal defense. Calvert is a member of the National Association of Criminal Defense Lawyers and the National Organization for the Reform of Marijuana Laws. He is a previous chair of the SBN's Advertising Review Committee and a member of the SBN's Continuing Legal Education Committee.