State of Tennessee v. David Scott Hall

No. M2015-02402-SC-R11-CD

Attorney Contributor: Victor Johnson

Criminal Law Journal Member: Hannah Roman

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This case began on May 18, 2010, when the defendant, David S. Hall, hid a video camera in the minor victim's bedroom while the victim was showering. The defendant positioned the video camera to record the victim's bed and the area in which she typically changed clothes. After showering, the victim returned to her bedroom fully clothed and after noticing a flashing red dot on her dresser, discovered the defendant's video camera hidden under her bra. The victim's mother turned the video camera over to the police who, in addition to the recording of the victim, discovered a previously deleted "test video" recorded prior to the original video. The "test video" was almost identical to the other video and began by focusing on the victim's fish tank before panning the room and re-focusing on the victim's bed.[1]

In December 2010, the defendant was indicted for attempted especially aggravated sexual exploitation of a minor in violation of T.C.A. §39-17-1005 and §39-12-101(a)(2). The defendant was subsequently convicted of that offense following a bench trial in 2015. On appeal in 2017, the Court of Criminal Appeals affirmed that decision. The appellate court's reasoning relied on the Supreme Court's recent decision in *State v. Whited*, 506 S.W.3d 416 (Tenn. 2016), which also addressed the application of the sexual exploitation of a minor statute to hidden-camera video footage of minors.

[1] *State v. Hall*, No. M2015-02402-SC-R11-CD, 2019 Tenn. LEXIS 5 (Jan. 7, 2019).

The Tennessee Supreme Court granted the defendant's appeal to address the unresolved question in *Whited* of what evidence is sufficient to sustain a conviction of *attempted* especially aggravated sexual exploitation of a minor. T.C.A. §39-17-1005(a)(1) outlines the offense of especially aggravated sexual exploitation of a minor as follows: "It is unlawful for a person to knowingly promote, employ, use, assist, transport or permit a minor to participate in the performance of, or in the production of, acts or material that includes the minor engaging in . . . [s]exual activity." "Sexual Activity" is defined in T.C.A. §39-17-1002(8)(g) as, "[l]ascivious exhibition of the female breast or the genitals, buttocks, anus or pubic or rectal area of any person."

In a 3-2 decision, the Supreme Court determined that the facts were insufficient to support a finding that the defendant attempted to produce material that would include a depiction of a minor in a "lascivious exhibition" of her private body areas, as required under Tennessee's child sexual exploitation statutes and construed in *Whited*. The Court reversed the defendant's conviction, relying on the ruling in *Whited* which stated that images of a minor victim engaging in everyday activities normally performed in the nude were insufficient to constitute a "lascivious exhibition" under the child exploitation statutes.

In the majority opinion, Justice Holly Kirby, who also wrote the majority opinion for *Whited*, determined that the appellate court had misapplied *Whited* to the facts of this case. In *Whited*, the defendant hid his cell phone video camera in the family bathroom as well as his daughter's bedroom where he recorded nine videos of his minor daughter and her friend in various degrees of nudity. It is important to note that, unlike this case, the defendant in *Whited* was initially convicted for the completed offense of especially aggravated sexual exploitation of a minor. The Supreme Court ultimately reversed the lower courts' rulings, holding that the videos did not depict

the minors engaging in "lascivious exhibitions" as defined under the relevant child sexual exploitation statutes.[2]

In this case, the defendant was indicted and convicted under subdivision (a)(2) of the criminal attempt statute, which states, "A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense: Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part . . ."[3] The Court stated that, considering the criminal attempt statute[4] with the child exploitation statutes, "the evidence must show that the defendant knowingly acted (1) with intent to create a video that would include the victim engaging in a lascivious exhibition of her private body areas and (2) with the belief that his conduct would cause the resulting crime intended without further conduct on [his] part."[5]

Analyzed under T.C.A.§39-12-101(a)(2), the majority ultimately concluded that the evidence in this case was simply insufficient to hold that any rational trier of fact could have found that the defendant intended to record and believed he would record anything more than mere nudity. The Court remarked that the evidence in this case did not give rise to an inference that the intended video would have been any more sexualized than those in *Whited*.[6]

In his dissent, Justice Roger A. Page, joined by Chief Justice Jeffrey S. Bivins, disagreed with the majority's reliance on *Whited* because, unlike *Whited*, the defendant in this case was charged with the lesser-included offense of attempt. Also unlike in *Whited*, in this case, it is uncertain what the video could have shown if the victim had not discovered the camera. The

[2] *Whited*, 506 S.W.3d at 448.
[3] Tennessee Code Annotated §39-12-101(a)(2) (West, Westlaw through 2019 Reg. Sess.).
[4] T.C.A. §39-12-101(a)(2).
[5] *Hall*, 2019 Tenn. Lexis 5, at *30.
[6] *Hall*, 2019 Tenn. Lexis 5, at *38-39.

inherent uncertainty present in addressing an attempt makes analysis extremely difficult. However, the dissent argued that, "[T]he [d]efendant failed to carry his burden of showing that *no* rational trier of fact could have found that the [d]efendant intended or believed his hidden camera would capture sexual activity."[7] The dissent concluded that the facts of this case, in light of the deferential standard of review and fact-bound issue, were sufficient to support the defendant's conviction for attempted especially aggravated sexual exploitation of a minor.[8]

The dissent disagreed with the majority's reliance on *Whited* because the defendant in this case was convicted for *attempt* under T.C.A. §39-12-101(a)(2), and it is uncertain what the video camera could have recorded had the victim not discovered it. Unlike the dissent, the majority firmly refused to speculate about what the defendant may have hoped to capture. The Court agreed with the lower courts and the dissent that the defendant's multiple explanations for why his video camera was in the victim's room were not credible. However, the Court stated that, "[T]he [d]efendant's lack of credibility does not substitute for evidence that the [d]efendant intended to capture, or believed his hidden camera would capture, an image of anything more than mere nudity."[9]

The majority concluded that the evidence showed that the defendant would have captured videos nearly identical to those in *Whited*, which the Court in *Whited* ultimately determined to be insufficient to sustain the defendant's conviction. However, the Court in *Whited* determined that, although the videos of the minor daughter and her friend "engaging in everyday activities that are appropriate for the settings and not sexual and lascivious within the ordinary meaning of those terms" precluded the Court from finding the defendant guilty of the *completed* offense, the

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[7] *Hall*, 2019 Tenn. Lexis 5, at *62.
[8] *Id.* at *61-62.
[9] *Hall*, 2019 Tenn. Lexis 5, at *39 n.24.

videos did not preclude the State from retrying the defendant for *attempted* especially aggravated sexual exploitation of a minor. The Court stated:

> The facts of this case present a close question regarding whether the defendant intended to capture exactly what he recorded in the videos—minors engaged in everyday activities ordinarily done nude—or whether he intended to 'cause a result that would constitute the offense' of production of child pornography by recording the minors engaged in lascivious exhibition. Tenn. Code Ann. §39-12-101(a)(3). Considering the entirety of the record, 'the evidence in the record is not so insufficient' so as to preclude a finding of attempted production of child pornography.[10]

Of critical importance, the Court in *Whited* stated that the facts of the case did not preclude a finding of attempted production of child pornography under T.C.A. §39-12-101(a)(3), which states:

> A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense: Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense. [11]

Subdivision (a)(3) determines that attempt responsibility attaches when an individual's intentional acts constitute a "substantial step toward the commission of the offense" beyond mere preparation.

In this case, the majority repeatedly referenced the similarities between the videos recorded in *Whited* and those the defendant in this case was attempting to record. The Court noted that the depictions in this case were similar to those in *Whited*, in which the camera was situated to capture

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[10] *Whited*, 506 S.W.3d at 448.
[11] Tenn. Code Ann. § 39-12-101(a)(3)(West, Westlaw through 2019 Reg. Sess.).

the victims as they walked about in the bedroom or bathroom nude, performing ordinary activities such as grooming or changing clothes.[12] The defendant in this case engaged in "staging" to ensure that placement of the camera would capture close up images of the victim's torso while changing. The Court remarked that the videos in *Whited* included very similar "staging."[13] All these similarities left the majority to conclude that, ". . . it cannot reasonably be inferred that the [d]efendant intended to capture depictions of the [v]ictim that were appreciably different from those in *Whited*."[14]

The majority in *Whited* stated that the facts did not preclude a finding of attempted production of child pornography under T.C.A. §39-12-101(a)(3). This suggests that the nearly identical facts in this case could also have established attempt under the substantial step standard of subdivision (a)(3) of the criminal attempt statute. However, as noted above, the defendant in this case was indicted and convicted under subdivision (a)(2), which imposes responsibility under the "last proximate act" doctrine, a higher threshold than substantial step.[15]

The Defendant was indicted in 2010 and convicted in 2015, both before the Supreme Court decided *Whited* in 2016. The State did not have the information provided by *Whited* when charging the defendant with attempt to produce child pornography under subdivision (a)(2). However, viewing Judge Kirby's majority opinion in *Whited* with her majority opinion in this case, had the State indicted under subdivision (a)(3) rather than (a)(2), the result of this case may have been very different. Instead, the question of what evidence is sufficient to establish the attempt of especially aggravated sexual exploitation of a minor under T.C.A. §39-12-101(a)(3) remains unresolved.

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[12] *Hall*, 2019 Tenn. Lexis 5, at *37.
[13] *Id*.
[14] *Id*.
[15] *See* Sentencing Commission Comments to T.C.A. §39-12-101 (West, Westlaw).