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THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
CAMDEN COUNTY
LAW DIVISION, CIVIL PART
DOCKET NO. L-000797-19

STATE OF NEW JERSEY,

Plaintiff,

v.

TYRELL JOHNSON,

Defendant.

APPROVED FOR PUBLICATION
September 19, 2019
COMMITTEE ON OPINIONS

Decided: April 12, 2019

Kaitlyn Compari, Assistant Prosecutor, for plaintiff (Mary Eva Colalillo, Camden County Prosecutor, attorney).

Eric Liszewski, Assistant Deputy Public Defender, for defendant (Joseph E. Krakora, Public Defender, attorney).

SILVERMAN KATZ, A.J.S.C.

INTRODUCTION

On March 7, 2018, J.T. (hereinafter "J.T."),[1] a senior at LEAP Academy University Charter School in Camden, New Jersey (hereinafter "LEAP

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[1] The victim in this case is referred to by the initials, J.T., to protect the victim's privacy.

Academy"), received an Instagram message from defendant, a middle school guidance counselor at the same school. That message asked J.T. to "[s]how me them huge rockets of your [sic] . . . ." Defendant was subsequently charged and indicted with third-degree endangering the welfare of a child under N.J.S.A. 2C:24-4(a)(1).

Presently before the court is an application by defendant to dismiss this prosecution as de minimis pursuant to N.J.S.A. 2C:2-11(b) to (c). Defendant contends that this prosecution should be dismissed because: (1) J.T. was seventeen years and eight months old at the time that she received the message; (2) the message at issue, while broadly sexual in nature, "is more in line with a joke than a sincere, legitimate request" and, accordingly, is "the 21st century version of a cat call"; (3) this charge constitutes overzealous prosecution; (4) defendant's character and the context in which the offense occurred are relevant and weigh in favor of dismissing this action; and (5) should this application be denied, the impact of defendant's prosecution on the community would be minor.

In opposition, the State contends that: (1) J.T. was a minor at the time of the offense and therefore was a child under N.J.S.A. 2C:24-4(a)(1); (2) defendant's message was neither a joke nor a cat call; (3) defendant's claim of overzealous prosecution is a "bald, unsupported assertion"; (4) defendant's

reliance on character and context is unpersuasive because these factors are irrelevant; and (5) permitting the dismissal of this prosecution would harm society.

At oral argument on the application, defendant argued that: (1) J.T.'s age at the time of the offense is relevant in determining whether to grant the instant application; and (2) pursuant to subsection (b) of N.J.S.A. 2C:2-11, the court should consider the severity of any resulting punishment when determining whether to dismiss a prosecution as de minimis. In response, the State argued that: (1) because J.T. was under the age of majority at the time she received the message, she was a "child" within the meaning of N.J.S.A. 2C:24-4(a)(1) and therefore was within the protected class; and (2) defendant's message did not constitute a cat call because he was in a position of authority as a guidance counselor at J.T.'s school.

For the reasons articulated hereinbelow, this court denies defendant's motion for a de minimis dismissal.

PROCEDURAL HISTORY

On April 17, 2018, defendant was charged pursuant to Warrant No. W-2018-002382-0408 with endangering the welfare of a child under N.J.S.A. 2C:24-4(a)(1), a third-degree offense. Thereafter, in July 2018, a Camden County Grand Jury returned Indictment No. 2620-11-18-I, presenting that

defendant "did endanger the welfare of J.T. . . . by engaging in sexual conduct which would impair or debauch the morals of a child . . . by sending [her] messages asking her to send photographs of her breasts."[2]

On February 15, 2019, seven months after the indictment, defendant filed a notice of motion for a de minimis dismissal under N.J.S.A. 2C:2-11, returnable before the Honorable Thomas J. Shusted, J.S.C., the judge assigned to hear the criminal matter. This application was thereafter docketed with the assignment judge, as required by N.J.S.A. 2C:2-11.[3] Although a return date of March 15, 2019, was scheduled, because of the untimely filing of the moving papers, the matter was adjourned to March 29, 2019. Defendant's request for oral argument was granted, and, on March 29, 2019, the court heard argument from the parties.

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[2] Although neither briefed nor argued, court records indicate that defendant applied for admission into the pre-trial intervention program; his application was denied on June 26, 2018. Defendant appealed this decision, and the Honorable Edward J. McBride, Jr., P.J.Cr., denied his appeal by order dated September 6, 2018.

[3] N.J.S.A. 2C:2-11 provides that "[t]he assignment judge may dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, [she] finds that the defendant's conduct [satisfies the requirements of the de minimis statute]. . . ." (emphasis added).

FACTUAL BACKGROUND

"In considering whether an infraction is de minimis due to triviality, the judge must assume that the conduct charged actually occurred." State v. Evans, 340 N.J. Super. 244, 249 (App. Div. 2001). Accordingly, the court assumes, for purposes of the present application, that the following facts as alleged are true:

On April 16, 2018, J.T. disclosed to her guidance counselor at LEAP Academy, Ms. Stephanie Depew, that she had received several messages from a male staff member at the same school. This staff member was later identified as defendant, a guidance counselor for middle school students. J.T. reported that on March 7, 2018, the seniors had a snow day and, therefore, did not have school. On that day, she received an Instagram[4] message from defendant under the username "Sun_of_a_gun," asking her to "[s]how me them huge rockets of your [sic] on this snowy day." J.T. understood that "huge rockets" referred to her breasts.

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[4] Instagram is a social media application, or "app," where users may post and share photographs and videos with other users. See Posting Photos and Videos, Instagram, https://help.instagram.com/ (last visited April 10, 2019). It also provides a direct messaging service. See Direct Messaging, Instagram, https://help.instagram.com/ (last visited Apr. 10, 2019). A "direct message" is one that is privately sent from one Instagram user to another user through the app. See ibid.

Prior to that interaction, J.T. had reported thinking that defendant was "cool," but following the request that she show him her breasts, she blocked him on Instagram.[5] She also reported that although she and other students would periodically eat lunch in defendant's office, she began to feel uncomfortable, and it became awkward.[6]

Defendant never admitted sending the message to J.T. and alleged that his Instagram account had been hacked on numerous occasions. Specifically, defendant claimed that a friend of his whom he was seeing that day must have sent the message.[7] Nonetheless, defendant did admit that the message referencing J.T.'s "huge rockets" referred to her breasts.

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[5] To "block" another Instagram user means to prevent the blockee from finding and/or viewing the information that the blocker shares through the Instagram app. See Blocking People, Instagram, https://help.instagram.com/ (last visited Apr. 10, 2019).

[6] Although the prosecution does not allege when J.T.'s feelings of discomfort began, it is presumed for purposes of this application that she began to feel this way after receiving the request to show defendant a photograph of her breasts.

[7] Although defendant initially refused to identify this individual, he later identified his friend as Mercel Randolph. Mr. Randolph admitted that he was friends with defendant and that he was with defendant on the day in question. Although Mr. Randolph conceded that he had used defendant's Instagram account in the past to send direct messages, he denied that he had sent any message to J.T.

LEGAL BACKGROUND

I. De Minimis Dismissal

Pursuant to the de minimis statute, N.J.S.A. 2C:2-11, the assignment judge may dismiss a prosecution if, upon consideration of the "nature of the conduct charged" and the "nature of the attendant circumstances," she finds that the defendant's conduct:

> (a) Was within a customary license or tolerance, neither expressly negated by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense;
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> (b) Did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or
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> (c) Presents such other extenuations that it cannot reasonably be regarded as envisaged by the Legislature in forbidding the offense. The assignment judge shall not dismiss a prosecution under this section without giving the prosecutor notice and an opportunity to be heard. The prosecutor shall have a right to appeal any such dismissal.
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> [N.J.S.A. 2C:2-11.]

Subsection (a) is satisfied where the conduct in question is so trivial that it is unlikely to ever be prosecuted or to have motivated the Legislature to

enact the law. See State v. Smith, 195 N.J. Super. 468, 476 (Law Div. 1984).[8] Smith provided, as a hypothetical example of such conduct, "stealing a penny dropped in the street." See ibid. (citing State v. Hegyi, 185 N.J. Super. 229, 233 (Law Div. 1982)).

Section (b) is intended to abort prosecutions of more serious import. Ibid.

The de minimis statute "vests the assignment judge with discretion to dismiss certain charges to avoid an absurd application of the penal laws." State v. Evans, 340 N.J. Super. 244, 248 (App. Div. 2001). "The purpose of the de minimis statute is to provide assignment judges with discretion similar to that exercised by the police, prosecutors, and grand jurors who constantly make decisions as to whether it is appropriate to prosecute under certain circumstances." State v. Wells, 336 N.J. Super. 139, 141 (Law Div. 2000).

There are few published decisions on this statute in New Jersey. Evans is the seminal authority on this issue.[9] In Evans, the Appellate Division

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[8] Although not precedential, Law Division cases can be informative. See, e.g., Bussell v. Dewalt Products Corp., 259 N.J. Super. 499, 519 (App. Div. 1992) (finding a Law Division matter to be well-reasoned and informative on a particular issue).

[9] 340 N.J. Super. at 246. It appears that only one other published opinion by the Appellate Division has been rendered on same. See State v. Vitiello, 377 N.J. Super. 452 (App. Div. 2005) (dismissing an appeal under N.J.S.A.

reversed and remanded a Law Division determination that a shoplifting prosecution should be subject to a de minimis dismissal where the defendant had purchased $592.30 in merchandise but had failed to pay for a $12.90 hair bow. Id. at 247-48. As relevant here, Evans found that "there is no adequate definition of triviality." Id. at 252. Despite this, Evans adopted the holding of State v. Zarrilli[10] that the most important factor in determining whether an offense is trivial is "the risk of harm to society [caused by the] defendant's conduct." Id. at 253. Some subordinate factors relevant to determining the risk of harm to society may include:

(a) The circumstances surrounding the commission of the offense;

(b) The existence of contraband;

(c) The amount and value of the property involved;

(d) The use or threat of violence; and

(e) The use of weapons.

Evans, 340 N.J. Super. at 250 (citing Zarrilli, 216 N.J. Super. at 240).

However, as Evans recognized, these factors are not relevant in all cases, and the absence thereof need not negate the seriousness of an offense. See

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2C:2-11 because the victim, rather than the prosecutor, brought the appeal, in contrast to the procedural requirements of the statute).

[10] 216 N.J. Super. 231, 239 (Law Div. 1987).

Evans, 340 N.J. Super. at 252 ("While those [subordinate] factors may indeed be relevant in certain circumstances, they are generally unlikely in typical shoplifting cases and their absence hardly indicates triviality.").

Although there are several published Law Division decisions on this issue, they, too, are rare.[11] Despite this, both the Appellate and Law Division cases carry a common theme: the preeminent factor in determining whether to dismiss a prosecution as de minimis is whether the conduct in question caused the harm sought to be prevented by the statute underlying the defendant's charge. See State v. Cabana, 315 N.J. Super. at 89-90 (Law Div. 1997) (dismissing a simple assault charge as de minimis where a politician incidentally struck another politician during a heated confrontation during a political function); Zarrilli, 216 N.J. Super. at 240 (finding that the consumption of a single sip of beer in a cup purchased by a friend at a church function "was so minimal as not to warrant the condemnation of a conviction"); State v. Nevens, 197 N.J. Super. 531, 538-39 (Law Div. 1984) (finding that the defendant's theft of several pieces of fruit from a buffet was insufficient to warrant prosecution); Smith, 195 N.J. Super. at 472-73 (dismissing a shoplifting prosecution of three pieces of bubble gum as de

[11] Although Law Divisions cases are not precedential, they can be informative. See supra note 8.

minimis, based on the amount stolen, the fact that the defendant had no criminal record, the public embarrassment he had already suffered, the damage to his reputation as an aspiring engineer, and the legal expenses he had already incurred).

Other factors that may be relevant in determining whether to dismiss a prosecution as de minimis include:

(1) The defendant's background, experience, and character as indications of whether he or she knew or should have known that the law was being violated;

(2) The defendant's knowledge of the consequences of the act;

(3) The circumstances surrounding the offense;

(4) The harm or evil caused or threatened;

(5) The probable impact of the violation on the community;

(6) The seriousness of the punishment;

(7) Possible improper motives of the complainant or prosecutor; and

(8) Any other information that may reveal the nature and degree of culpability.

See State v. Brown, 188 N.J. Super. 656, 664 (Law Div. 1983) (quoting State v. Park, 525 P.2d 586 (Haw. 1974)). See also Evans, 340 N.J. Super. at 253 (providing that criminal history should also be considered alongside background, experience, and character). Evans specifically noted that a

defendant's prior criminal history may be relevant, particularly where the ruling calls for or involves some discretion. Evans, 340 N.J. Super. at 253.

II. Child Endangerment

Pursuant to N.J.S.A. 2C:24-4(a)(1), child endangerment is defined as:

> Any person having a legal duty for the care of a child or who has assumed responsibility for the care of a child who engages in sexual conduct which would impair or debauch the morals of the child is guilty of a crime of the second degree. Any other person who engages in conduct or who causes harm as described in this paragraph to a child is guilty of a crime of the third degree.
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> [N.J.S.A. 2C:24-4(a)(1).]

A "child" is defined as "any person under 18 years of age." N.J.S.A. 2C:24-4(b)(1).[12]

The term "sexual conduct" is not defined in this statute. However, it is recognized that the statute does not require direct sexual contact. See State v. Hackett, 323 N.J. Super. 460, 472 (App. Div. 1999) (holding that "sexual conduct" includes showing nude explicit photographs to children), aff'd as modified, 166 N.J. 66 (2001). Sexual conversations or encouragement of sexual conduct may be sufficient for a jury's finding of "sexual conduct"

[12] In 2013, the Legislature broadened the scope of N.J.S.A. 2C:24-4(a) by raising the age of statutorily protected children from sixteen to eighteen. See State v. Fuqua, 234 N.J. 583, 595 (2018) (citing L. 2013, c. 51, § 13).

within the meaning of N.J.S.A. 2C:24-4. See State v. McInerney, 428 N.J. Super. 432, 451 (App. Div. 2012) ("[T]here can be no question that defendant's encouragement of boys to accept payment for reporting on sexual behavior directed by him was conduct clearly falling within the statute as conduct that would debauch their morals."). See also State v. Maxwell, 361 N.J. Super. 502, 518 (Law Div. 2001)[13] ("There is nothing in [N.J.S.A. 2C:24-4(a)(1)] which requires physical presence and . . . [accordingly,] sexually explicit conversation which rises to the level of 'sexual conduct' can indeed be communicated by telephone.").

The plain language of N.J.S.A. 2C:24-4(a)(1) prohibits "conduct which would impair or debauch the morals of the child" (emphasis added). When construing a statute, the primary goal is to discern the meaning and intent of the Legislature. State v. Gandhi, 201 N.J. 161, 176 (2010). "In most instances, the best indicator of [legislative intent] is the plain language chosen by the Legislature." Ibid. "If the plain language leads to a clear and unambiguous result, then [the court's] interpretive process is over." Richardson v. Bd. of Trs., Police & Firemen's Ret. Sys., 192 N.J. 189, 195 (2007). The plain language of N.J.S.A. 2C:24-4(a)(1) unambiguously

[13] See supra note 8.

indicates that the Legislature intended for the preeminent inquiry to be the effect of the conduct in question on the child.

Despite the foregoing analysis as to legislative intent, it has been held that the second element of the child endangerment statute need not actually impair or debauch the victim's morals to satisfy this standard. See Hackett, 166 N.J. at 80. Rather, "[t]he legislative language prohibits any sexual conduct that would result in the impairing or debauching of an average child in the community." Ibid. Hackett noted that "[t]he word 'would' signals the futurity of a likely event; it does not require the event's actual occurrence." Ibid. Further, this standard can be satisfied "without proof that the defendant was aware [that] his conduct would cause such a result." State v. Bryant, 419 N.J. Super. 15, 27-28 (App. Div. 2011).

CONCLUSIONS OF LAW

A de minimis dismissal is warranted if the defendant's conduct:

> (a) Was within a customary license or tolerance, neither expressly negated by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense;
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> (b) Did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or
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> (c) Presents such other extenuations that it cannot reasonably be regarded as envisaged by the

> Legislature in forbidding the offense. The assignment judge shall not dismiss a prosecution under this section without giving the prosecutor notice and an opportunity to be heard. The prosecutor shall have a right to appeal any such dismissal.
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> [N.J.S.A. 2C:2-11 (emphasis added).]

When construing a statute, the primary goal is to discern the intent of the Legislature, which, in most cases, is revealed by the plain language of the statute. Gandhi, 201 N.J. at 176. Here, the Legislature has placed the word "or" between subsections (b) and (c) only, which indicates that these subsections, and only these subsections, are to be read disjunctively. Thus, a de minimis dismissal is warranted only if the conduct in question satisfies subsection (a); and subsection (b) or subsection (c).

For the reasons set forth below, the court finds that dismissal of defendant's prosecution is not warranted under any subsection of the statute.

I. Subsection (a) of the De Minimis Statute

N.J.S.A. 2C:2-11(a) provides that, for dismissal to be warranted, the conduct in question must be within a customary license or tolerance, neither expressly negated by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense. Defendant failed to articulate, in either his moving papers or at oral argument, whether dismissal is warranted under subsection (a), thus conceding that this subsection is either

not applicable or is present but that dismissal is still warranted. Despite this, the court finds that defendant's conduct does not fall under subsection (a). Sending a request to a child for a photograph of her breasts is neither within a customary license or tolerance, nor was the request legally tolerated. Accordingly, dismissal of the prosecution is not warranted under subsection (a).

II. Subsection (b) of the De Minimis Statute

N.J.S.A. 2C:2-11(b) provides that dismissal is warranted where the defendant's actions did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction. Defendant argues that he is entitled to a de minimis dismissal under subsection (b), because the conduct ascribed to him is so minor that assuming it did occur,[14] it is outside the scope that the Legislature intended. In the alternative, defendant argues that the alleged offense was to such a minor degree that he should not suffer further prosecution and be "branded with a felony conviction."[15] Ibid. Specifically,

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[14] Under the statute, the court assumes that the behavior did occur. See Evans, 340 N.J. Super. at 249 ("In considering whether an infraction is de minimis due to triviality, the judge must assume that the conduct charged actually occurred.").

[15] The court notes that this state has discontinued the use of the antiquated terms "misdemeanor" and "felony." Specifically, this

defendant moves for dismissal because: (1) J.T. was seventeen years and eight months old at the time of the offense, and, so "was clearly not the type of victim envisioned by the [L]egislature when drafting N.J.S.A. 2C:24-4"; and (2) the message at issue "is more in line with a joke than a sincere, legitimate request"--that is, it is "the 21st century version of a cat call"--and, accordingly, was neither "sexual conduct" nor that which would "debauch the morals of a child" within the meaning of N.J.S.A. 2C:24-4(a)(1).

In opposition, the State argues that: (1) J.T. was a minor at the time of the offense and therefore a child under N.J.S.A. 2C:24-4(b)(1); and (2) defendant's message was neither a joke nor a cat call because "an adult male--in a position of authority to the minor victim--sending a message to the victim seeking a photograph of her breasts is sexual conduct."

Defendant's argument pertaining to J.T.'s age at the time of the offense is unpersuasive.[16] The child endangerment statute clearly defines a "child" as

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practice ended in 1978, with the enactment of N.J.S.A. 2C:43-1. The present prosecution concerns a third-degree offense, not a "felony." See N.J.S.A. 2C:24-4(a)(1) ("Any other person who engages in conduct or who causes harm as described in this paragraph to a child is guilty of a crime of the third degree.") (emphasis added).

[16] In making this argument, defendant relies on an unpublished decision from the Appellate Division: State v. Ashley, 2017 N.J. Super. Unpub. LEXIS 140, *21 (App. Div. Jan. 23, 2017). Any argument based on this decision is unpersuasive. See R. 1:36-3 ("No unpublished opinion shall constitute precedent or be binding upon any court."). Moreover, defendant did not attach

"any person under 18 years of age." N.J.S.A. 2C:24-4(b)(1) (emphasis added). Importantly, this statute did not always apply to such victims. In fact, it was not until 2013 that the Legislature broadened the scope of N.J.S.A. 2C:24-4(a) by raising the age of statutorily protected children from sixteen to eighteen. See Fuqua, 234 N.J. at 595 (citing L. 2013, c. 51, § 13). This amendment clearly demonstrates that the Legislature intended for the statute to cover seventeen-year-old children like J.T. See State v. Sumulikoski, 221 N.J. 93 (2015) (dismissing on other grounds a child endangerment prosecution brought on behalf of seventeen-year-old victims). As J.T. was seventeen years and eight months old at the time of the offense, she was "under 18 years of age." Thus, despite defendant's assertions to the contrary, J.T. was precisely the type of victim envisioned by the Legislature when drafting N.J.S.A. 2C:24-4.

Defendant next argues that his prosecution should be dismissed under N.J.S.A. 2C:2-11(b) because the action complained of was a joke or cat call. This, too, is unpersuasive. For the reasons set forth hereinbelow, defendant's message was neither, but rather constituted "sexual conduct" that "impair[ed] or debauch[ed]" J.T.'s morals.

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a copy of this decision, as is required by rule. Ibid. ("No unpublished opinion shall be cited to any court by counsel unless the court and all other parties are served with a copy of the opinion and all contrary unpublished opinions known to counsel."). For these reasons, this court cannot and will not cite to, or rely on, such a decision.

a. Sexual Conduct

In arguing that the message in question was nothing more than a joke or modern-day cat call,[17] defendant contends that it was not "sexual conduct."[18] He concludes that "[t]o include such a facially facetious statement in the same realm as the sexual abuse of young children was not the legislative intent [of the child endangerment statute]."

Such an argument is unpersuasive. J.T. indicated and defendant conceded that "huge rockets" referred to the child's breasts. See supra at pp. 5-6. Such a request, in light of all the circumstances, was neither facetious nor couched in humor. It was made by an adult male to an underage female, based upon a relationship developed in a school hierarchy. Moreover, defendant's suggestion that his message cannot constitute "sexual conduct" because it was not an actual act is unpersuasive as well, as it is well recognized that sexual conduct need not be limited to actual contact. See supra at pp. 11-12. The content of the message, and the manner in which it was sent, constitutes "sexual conduct" within the meaning of N.J.S.A. 2C:24-4(a)(1). Through his

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[17] A "cat call" is defined as "a loud, sexually suggestive call or comment directed at someone publicly (as on the street)." See Merriam Webster Dictionary, "catcall", https://www.merriam-webster.com/dictionary/catcall (last visited April 8, 2019).

[18] Defendant cites, as an example, State v. Miller, 108 N.J. 112 (1987).

Instagram message, defendant, an adult male, sent a child a message for the sole purpose of seeking a photograph of her breasts. Asking a child to "send nudes" is unequivocally sexual conduct. See Maxwell, 361 N.J. Super. at 506-07, 518 (holding that instructing a child to engage in sexual behavior over the telephone constitutes "sexual conduct" within the meaning of N.J.S.A. 2C:24-4). See also State ex rel. A.B., 328 N.J. Super. 96, 97 (Law Div. 1999) (finding that a male juvenile who took and distributed nude photographs of a female juvenile violated N.J.S.A. 2C:24-4(b)(3), which prohibits child pornography). Further, defendant's request that the court accept his interpretation of his message as being a joke or cat call and nothing more, is belied by the fact that a Camden County Grand Jury returned an indictment against him, and, in so doing, clearly found that the message constituted "sexual conduct."[19] The message at issue was the exact type of conduct that the statute was enacted to prohibit.

b. Impair or Debauch the Morals of the Child

Defendant further argues that this court must examine whether his message impaired or debauched the morals of an average seventeen-year-old in

[19] This is especially true given that "[o]nce the grand jury has acted, an indictment should be disturbed only on the clearest and plainest ground, and only when the indictment is manifestly deficient or palpably defective." State v. Hogan, 144 N.J. 216, 228-29 (1996).

the community, rather than J.T. specifically. Using this standard, defendant argues that the morals of an average seventeen-year-old are "far from corrupted" by receiving "the 21st century version of a cat call." In doing so, it appears that defendant presents the argument that J.T. is an overly sensitive child, and, because of this, her reaction to his message is irrelevant in determining whether he violated the "impair or debauch" standard. An average child, the court is told, would not have responded in the same way.

Again, the plain language of N.J.S.A. 2C:24-4(a)(1) prohibits "conduct which would impair or debauch the morals of the child," in this case, J.T. (emphasis added).[20] Hackett held that the statute prohibits conduct that "would result in the impairing or debauching of an average child in the community." 166 N.J. at 80. Regardless of which standard is applied, defendant's act was clearly prohibited by the statute.

1. "The Child" Standard

Under the plain language of the statute, defendant's message "impair[ed] or debauch[ed]" J.T.'s morals. Despite defendant's assertions to the contrary, J.T.'s reaction to his message is far from irrelevant in determining whether her

[20] N.J.S.A. 2C:24-4 was enacted in 1978 and most recently amended in 2017, with an effective date of February 1, 2018. See N.J.S.A. 2C:24-4 (2018). Hackett, which adopted the "average child" standard, was decided in 2001. See 166 N.J. at 80.

morals were impaired or debauched, and, in fact, her actions upon receipt of the message clearly and unequivocally indicate that she was so affected. J.T., "the child," was harmed by defendant's conduct.

2. "The Average Child in the Community" Standard

Under the "average child" analysis, defendant's behavior falls within the required finding. The text message sent would impair or debauch the morals of an average child in the community. Defendant's attempt to trivialize the gravity of his message by labeling it a "cat call" is unpersuasive. As stated hereinabove, defendant, an adult, sent a child a message for the sole purpose of obtaining a photograph of her breasts. See supra at p. 18. A message from an adult guidance counselor at the same school as the student, seeking a partially nude photograph of a child, would impair or debauch the morals of an average seventeen-year-old in the community.

c. Dismissal Not Warranted under Subsection (b)

Subsection (b) of N.J.S.A. 2C:2-11 provides that a de minimis dismissal may be warranted where, in contrast to here, the defendant's conduct did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction. In short, this court must examine "the risk of harm to society [caused by the] defendant's conduct." Evans, 340 N.J. Super.

at 252-53. For the reasons articulated hereinabove, namely that defendant's message constituted sexual conduct within the meaning of N.J.S.A. 2C:24-4(a)(1) and that it not only impaired and debauched J.T.'s morals but also would do same for the average seventeen-year-old, it cannot be said that the risk of harm caused by defendant's message is too trivial to warrant dismissal of the prosecution.

Under the first Zarrilli subordinate factor,[21] the circumstances surrounding the commission of the offense further belie defendant's contention that the conduct in question was too trivial to warrant prosecution. As stated hereinabove, defendant, an adult male, sent his message to a young female whom he would not have known but for his position at the school. Although the State does not allege that defendant had a legal duty to J.T. within the meaning of N.J.S.A. 2C:24-4(a)(1), his position as a guidance counselor is not irrelevant. Although the remaining Zarrilli subordinate factors[22] are not

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[21] Evans, 340 N.J. Super. at 250 (citing Zarrilli, 216 N.J. Super. at 240).

[22] The remaining "subordinate" factors relevant to determining the risk of harm to society include:

(a) The existence of contraband;
(b) The amount and value of the property involved;
(c) The use or threat of violence; and
(d) The use of weapons.

Evans, 340 N.J. Super. at 250 (citing Zarrilli, 216 N.J. Super. at 240).

implicated by defendant's conduct, their absence by no means indicates that his action would cause little to no harm to society.[23]

For the foregoing reasons, dismissal is not warranted under N.J.S.A. 2C:2-11(b).

III. Subsection (c) of the De Minimis Statute

N.J.S.A. 2C:2-11(c) provides that dismissal is warranted where the defendant's conduct presents other extenuations that it cannot reasonably be regarded as envisaged by the Legislature in forbidding the offense. Defendant argues that three factors constitute extenuating circumstances mandating dismissal of this action as de minimis: (a) that this is an example of overzealous prosecution; (b) that his outstanding character and the physical setting in which the offense occurred weigh in favor of dismissal; and (c) should this application be denied, the impact of defendant's prosecution on the community would be minor.

a. Overzealous Prosecution

Defendant argues that this prosecution should be dismissed because it is overzealous. Specifically, defendant argues that "[b]etween the [Camden County Prosecutor's] office's decision to charge, and later indict, [him] on a

[23] As with the shoplifting offense at issue in Evans, the remaining subordinate factors are generally unlikely to be implicated in the typical third degree child endangerment case. See Evans, 340 N.J. Super. at 252.

charge that carries the above penalties, and then using the seriousness of the charge and penalties to deny him admission into the prosecutor-run Pretrial Intervention [P]rogram, is a scintilla of an improper motive." Defendant concludes that the State "could have chosen less serious charges or granted admission into Pretrial Intervention."

As stated by the prosecution in opposition thereto, such claims are nothing more than "bald, unsupported assertion[s]." Again, as argued by the State, given defendant's role as a guidance counselor, he could have been charged with child endangerment in the second degree, under the theory that he had a legal duty to J.T. through his position at the school. The State, for whatever reason, chose not to pursue such a charge. Defendant's assertion is further belied by the fact that the grand jury returned the indictment against him for a third degree offense. Accordingly, the court is unpersuaded by his argument that this prosecution is overzealous and should therefore be dismissed.

b. Character and Context

Defendant argues that his outstanding character and the physical setting in which the offense occurred weigh in favor of dismissal. With respect to the former, defendant argues that his background, experience, and character are well-documented in letters submitted by a "wide variety of people", including

the founder and current head of LEAP Academy. He concludes that as "an educated, upstanding man with a strong career and history of law-abiding behavior . . . he was blindsided by the decision to charge him with a Third Degree Offense."

Although there may be instances where a defendant's background, experience, character, and criminal history are relevant in determining whether to dismiss a prosecution as de minimis, such is not the case here. Evans specifically noted that a defendant's prior criminal history is most relevant where the ruling calls for or involves some discretion. Evans, 340 N.J. Super. at 253. No such need for discretion exists here. Because, in an application such as this, all alleged facts are considered to be true, defendant's message was undoubtedly "sexual conduct" that "impair[ed] or debauch[ed]" both J.T.'s morals and those of an average child. Accordingly, defendant's character is not relevant to the present application.

Defendant also argues that the seriousness of the penalties that he would experience should he be found guilty of the offense warrant a dismissal. This argument is similarly unpersuasive. It simply cannot be said that the risk of harm caused by defendant's message is too trivial to warrant dismissal of the prosecution. Although the court does not deny that a conviction of third-degree child endangerment carries serious consequences, it is not this

court's purview to undermine the finding of the Legislature that such consequences are necessary for the protection of our state's children. Accordingly, in the present matter, the seriousness of resulting penalties does not militate in favor of dismissal.

With respect to context, defendant argues that because the message was sent on a snow day when alcohol was likely consumed, these circumstances negate the impact of his message. Voluntary intoxication may be a consideration when determining culpability, but not when determining whether a prosecution should be dismissed as de minimis. See State v. Cameron, 104 N.J. 42, 53 (1986) (noting that voluntary intoxication is admissible as a defense to specific intent crimes).[24] As this is irrelevant to the present application, it does not constitute an extenuation warranting dismissal.

c. Community Impact

Defendant argues that dismissal is warranted because "the prosecution of those who cat call 17 year old women will not alter the behavior of most people, particularly when placed in a semi-anonymous online setting, where there is both literal and figurative distance between the sender and receiver." As a preliminary matter, J.T. was not a "woman" as defendant contends, but

[24] N.J.S.A. 2C:24-4(a)(1) does not prescribe any specific mens rea requirement, and, accordingly, voluntary intoxication is irrelevant in determining culpability under this statute.

rather a "child" under the express terms of N.J.S.A. 2C:24-4(b). Further, through his assertion, defendant again attempts to trivialize the content of his message, this time by arguing that the online setting itself somehow lessens the severity of its content, and, for this reason, a prosecution therefor would not deter future perpetrators. This is simply another iteration of his prior argument that his message does not rise to the level of "sexual conduct" because it was not a physical act. As stated hereinabove, that defendant chose Instagram as the vehicle by which to deliver his message does not, by that very fact, remove it from the realm of sexual conduct. See supra at pp. 11-12. See also Maxwell, 361 N.J. Super. at 518 ("There is nothing in [N.J.S.A. 2C:24-4] which requires physical presence and . . . [accordingly,] sexually explicit conversation which rises to the level of 'sexual conduct' can indeed be communicated by telephone."). Accordingly, the court is not persuaded that a prosecution for the very act against which N.J.S.A. 2C:24-4 seeks to protect would not deter future offenders.

d. Dismissal is Not Warranted under Subsection (c)

N.J.S.A. 2C:2-1(c) provides that dismissal is warranted where the defendant's conduct presents other extenuations that it cannot reasonably be regarded as envisaged by the Legislature in forbidding the offense. The court concludes that no such extenuations exist in the present case. First,

defendant's argument that this constitutes an example of overzealous prosecution is a bald assertion without any evidentiary support and is belied by the fact that he was not charged for a more serious offense. Second, his reliance on character and context is unpersuasive as these factors are irrelevant in the instant application. Lastly, the court is not persuaded that a prosecution for the very act against which N.J.S.A. 2C:24-4 seeks to protect would not deter future offenders. For these reasons, these circumstances do not constitute extenuations and, accordingly, dismissal under subsection (c) is not warranted.

CONCLUSION

For the foregoing reasons, it cannot be said that the risk of harm to society caused by defendant's Instagram message to J.T. asking her to "[s]how me them huge rockets of your [sic]" is so trivial as to warrant dismissal of the prosecution. Accordingly, defendant's motion for a de minimis dismissal is denied with prejudice. The court will issue an order consistent with this decision.