

Teen “Sexting” is a Problem, but is it a Crime?

Last week, a local news outlet reported that the 17-year-old quarterback of a Cumberland County high school was benched when school officials learned he was under investigation for allegedly sending “sexually explicit” photos of himself to his 16-year-old girlfriend. According to the [report](#), officers took the teenager’s phone while investigating another incident and discovered photos of himself and his girlfriend on the phone. Now, both the teenager and his girlfriend are facing charges for “sexting” in what appears to have been a consensual exchange of nude photos between two teens in a dating relationship. Judging by the string of harsh comments to this report (which use various derogatory words to describe the charges), many people are outraged that such behavior, while improper, is a crime. Instead, they suggest that the behavior is a discipline issue that should be privately addressed by parents at home. In response to these concerns, this post examines the criminal laws in NC that *possibly* cover sexting and discusses their application to minors.

Sexting, which typically involves sending sexually explicit photos or messages via cell phone, is a recently new phenomenon that emerged with the increased use of cell phone cameras by teens. Despite growing attention to the issue in NC (see Jeff Welty’s 2009 blog post on [sexting](#)), lawmakers have not yet enacted a law that specifically addresses teen sexting. As a result, teens who engage in sexting are often charged with violating laws that prohibit child pornography and obscenity, which were designed to punish adult predators who sexually victimize children.

The quarterback in the Cumberland County case, for example, is charged with sexual exploitation of a minor, a felony which requires mandatory sex offender registration upon conviction. See [G.S. 14-208.6\(5\)](#) (defining sexual exploitation of a minor as a “sexually violent offense” which requires registration under [G.S. 14-208.6A](#)). Surely, lawmakers could not have intended such a harsh consequence for a teen who sends a nude selfie to his girlfriend or vice versa. There are certainly less serious offenses that would provide appropriate consequences for the conduct without giving a 17-year-old a sentence as both a convicted felon and registered sex offender.

What Are the Options for Charging Sexting in NC?

It appears that there are three categories of criminal offenses that can possibly be used to charge minors (under the age of 18) with sexting: obscenity, disseminating material harmful to minors, and sexual exploitation of a minor.

- **Obscenity**

Disseminating Obscenity, [G.S. 14-190.1](#), is a Class I felony committed by intentionally disseminating obscenity or creating, procuring, or possessing obscene material with the intent to disseminate it. Material is obscene if it includes any depiction of “sexual conduct,” which includes

“lewd exhibition of uncovered genitals.” See [14-190.1\(c\)\(2\)](#). Federal child pornography law, [18 U.S.C. 2256\(2\)\(A\)\(v\)](#), similarly defines “sexually explicit conduct” to include the “lascivious exhibition of the genitals or pubic area of any person.” In determining whether a visual depiction of a minor meets this definition, federal courts consider factors such as whether: the image is focused on the child’s genitals or pubic area, the setting is sexually suggestive, and the child is fully or partially clothed, or nude. *U.S. v. Dost*, 636 F.Supp. 828, 832 (S.D.Cal. 1986). Applying this interpretation to our statute, it’s likely that “sexual conduct” includes some nude selfies that are focused on the genital area, while excluding other nude selfies.

Preparing Obscene Photographs, [G.S. 14-190.5](#), is a Class 1 misdemeanor committed by one who models, poses for, or photographs oneself or any other person for the purpose of making an obscene film or photograph to disseminate. For example, in the Cumberland County case, both the quarterback and his girlfriend could potentially be charged under this statute for taking nude selfies for the purpose of sexting, assuming the images satisfy the definition of “obscene,” as described above.

- **Disseminating Material Harmful to Minors**

Disseminating Material Harmful to Minors, [G.S. 14-190.15](#), is a Class 1 misdemeanor committed when a person knowingly presents or distributes to a child under 18 material that is harmful to minors. Material is harmful to minors if it depicts “sexually explicit nudity” or “sexual activity.” See [G.S. 14-190.13](#) (defining “sexually explicit nudity” as the showing of “[u]ncovered, or less than opaquely covered, human genitals, pubic area, or buttocks, or the nipple . . . of the human female breast, . . . or [c]overed human male genitals in a discernibly turgid state”). This definition appears to be broad enough to include any nude selfie that shows the genital area, and probably comes closest to covering the consensual sharing of bare naked photos between teens.

- **Sexual Exploitation of a Minor (Child Pornography)**

Sexual exploitation of a minor, commonly referred to as child pornography, requires a visual representation of a minor engaging in “sexual activity.” The crime is punishable in varying degrees, all of which require sex offender registration upon conviction. See [G.S. 14-208.6\(5\)](#), and [G.S. 14-208.6A](#).

First-Degree Sexual Exploitation, [G.S. 14-190.16](#), is a Class C felony committed by one who knowingly “encourages, or facilitates a minor to engage in . . . sexual activity . . . for the purpose of producing material that contains a visual representation depicting this activity.” Sexual activity, as defined by [G.S. 14-190.13\(5\)](#), includes any touching of the genitals “in an act of apparent sexual stimulation” or “the lascivious exhibition of the genitals or pubic area of any person.” If the Cumberland County teen induced his girlfriend to take nude photos of herself before they engaged in sexting, he could potentially be prosecuted for this Class C felony, if the photos depict sexual activity.

Second-Degree Sexual Exploitation, [G.S. 14-190.17](#), is a Class E felony committed by one who records, photographs, duplicates, or receives material that depicts a minor engaged in sexual activity. Receiving a text message containing images of a minor engaged in sexual activity or duplicating such material would subject a minor to prosecution for this offense. The NC Court of Appeals recently held that downloading images from the Internet onto one's computer constitutes "duplication" within the meaning of the statute. See [State v. Williams](#), 754 S.E.2d 418 (2014). It's unclear whether this holding would extend to downloading a copy of a photograph or video transmitted via text message.

Third-Degree Sexual Exploitation, [G.S. 14-190.17A](#), is a Class H felony committed by mere possession of materials that depict a minor engaged in sexual activity.

Because 16 and 17-year-olds are prosecuted as adults in NC, the consequences for a minor charged with child pornography can be devastating, as illustrated by the case of the Cumberland County teen facing possible registration as a sex offender. In juvenile court, the teen would not be labeled a convicted felon nor be required to register as a sex offender, if adjudicated delinquent for sexual exploitation of a minor. Instead, the court would enter a disposition that would include appropriate consequences for the behavior, and the record of the juvenile's adjudication would be confidential.

This case also highlights a likely unintended but harsh inconsistency in the way minors are treated by NC criminal law. The child pornography [statutes](#) define a "minor" as any individual under 18. However, 16 and 17-year olds are, simultaneously, considered adults for purposes of criminal prosecution. As a result, a minor can be criminally prosecuted for sexually exploiting him or herself.

Could this case, which is [reportedly](#) receiving national attention, potentially be the impetus for a legislative change? Should teens be *criminally* prosecuted for consensual sexting, and if so, are any of these charges appropriate? Are there other possibilities that I missed? Please share your thoughts.