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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JANE ROE, etc., et al., Plaintiffs and Respondents, v. JACK JUSTIN McCLELLAN, etc., et al., Defendants and Appellants.	B203651 (Los Angeles County Super. Ct. No. PS010050)

APPEAL from an order and a judgment of the Superior Court of Los Angeles County, Melvin D. Sandvig, Judge. Affirmed.

Law Office of Richard Mario Procida and Richard Mario Procida for Defendants and Appellants.

Law Offices of Anthony D. Zinnanti and Anthony D. Zinnanti for Plaintiffs and Respondents.

I.

INTRODUCTION

Appellant Jack Justin McClellan (McClellan) appeals from a restraining order and a judgment of permanent injunction. We affirm.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Underlying facts.*

McClellan is a self-proclaimed pedophile and member of the internet community that refers to themselves as "child lovers," "girl lovers," or "boy lovers." He claims that most members of this community are not engaged in illegal conduct. He openly admits his sexual attraction to prepubescent girls, which he believes is loving and healthy.

In early 2007, McClellan operated two internet websites, STEGL.ORG and STEGL.INFO. STEGL stands for Seattle-Tacoma-Everett Girl Love. STEGL.ORG is promoted as the "premier site of the girl-love revolution . . . ." The websites promote McClellan's belief that sexual relations with children is positive and healthy. The website includes: (1) McClellan's reviews of "LG" (Little Girl) events and hangouts, such as festivals and parades, and reports on the number of girls in attendance; (2) lists of international cities where unsupervised girls can be found on the streets; (3) discussions of "techniques to enhance the sense of touch and intensify feelings of love;" (4) lists of Washington state and Canadian laws pertaining to prepubescent girls, rape, and sexual conduct with underage children; (5) links to "other girl-love resources;" (6) resources relating to psychedelic drugs, as well as McClellan's discussion of his own use of illegal drugs; and (7) links to promote McClellan's view that involuntary circumcision should be stopped.

McClellan sees nothing wrong with posting on his websites photographs of children. The photographs show clothed children whose faces are discernable, in many different public places.

McClellan admits he has used hallucinogens, including psilocybin (magic mushrooms), mescaline, LSD, and marijuana. He brags about how he has evaded police authorities to smuggle such items aboard a domestic and an international flight. For example, he reports cooking marijuana into soy milk to avoid airport security.

In May 2007, McClellan visited the Orange County Fair a number of times, and in June 2007, he went to a festival in Santa Monica, and a bowling alley and a fair in Santa Clarita.

McClellan has never been charged with or convicted of any sex-related crime. He denies ever having sex with a child. However, in a July 2007 interview with FOX news, he "insisted he was doing nothing wrong by posting photos of children as young as 3, [and he admitted] that he would have sex with little girls if it weren't against the law." When interviewed for a television program on July 31, 2007, McClellan admitted being attracted to girls between the ages of 3 and 11, as they are "a lot cuter than women" and "there is kind of an erotic arousal there." He also told the interviewer, that it made him happy to attend events where children frequented and "if it was legal and if it was a completely consensual thing, I could see myself taking it all the way to a sexual [level]." He further admitted that he cuddled children in Argentina and on another occasion thought about enticing children into his car, but he did not do so because the children never separated from their parents.

In a July 30, 2007, radio interview with an attorney, McClellan stated that although his websites had been shut down, he was going to find another website host. McClellan also said that "his presence, visiting or loitering around minor children is for the purpose of collecting information about them and disseminating such information to other pedophiles to advance the pedophilic interests of others."

In the summer of 2007, respondents Jane Roe and Jane Roe 2 were 13 and 12 years old, respectively. They lived in the City of Santa Clarita where they

participated in activities and entertainment at such places as the local bowling alley, the park, the ice rink, a swap meet, and a shopping center. Both restricted their activities because they feared being harassed, annoyed, molested, surreptitiously photographed, and defamed by McClellan.

A July 2007, Santa Monica Police Department public information bulletin informed the public that McClellan was reported to have traveled throughout Washington state photographing young girls in public settings. The bulletin warned citizens to monitor their children, even though McClellan was not a registered sexual offender and was not wanted at that time for any crime.

B. *Procedure.*

On July 31, 2007, respondents filed a petition for injunction against McClellan, also known as Peter John Hyland, Jack Hyland, and John Hyland, and against STEGL.ORG, and STEGL.INFO. Respondents sought a preliminary and permanent injunction restraining McClellan and his two websites from obtaining images of them or other minor children, posting the images on the internet or other media, and enjoining McClellan from frequenting locations in the city of Santa Clarita where minor children are known to congregate. Respondents alleged standing on the basis of being in the category of individuals targeted by McClellan's activities and as minors who frequented the establishments and activities where McClellan surveilled children for the purpose of advocating sex with them.[1]

On August 2, 2007, Jane Roe and Jane Roe 2 sought a temporary restraining order and permanent injunction against McClellan and his two websites. On August 3, 2007, the trial court issued a preliminary injunction and temporary restraining order. McClellan was arrested for violation of the temporary orders and served 10 days in jail.

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[1] On appeal, McClellan does not suggest respondents lacked standing.

On August 24, 2007, a hearing was held at which time McClellan appeared.[2] No witnesses testified. An attorney for Jane Roe represented to the trial court that he had additional material he could present. The attorney made the following offer of proof: (1) one witness would testify that on June 4, 2007, she encountered McClellan in the girls' changing room at Northridge Park where no males were allowed; (2) a security guard at the Thousand Oaks Civic Center would testify that on June 14, 2007, McClelland misrepresented himself as a parent in an attempt to gain access to the backstage area where there were little girls; (3) a witness would testify that on June 6, 2007, he saw McClellan loitering around the Santa Clarita bowling alley and a festival across the street from the bowling alley; and (4) an off-duty officer would testify that on May 29, 2007, he and his wife saw McClellan at the Strawberry Festival.

At the end of the hearing, the trial court determined there was a credible threat of violence and harm to minor children. The court issued a restraining order and permanent injunction. McClellan and his two internet websites (STEGL.ORG and STEGL.INFO) were prohibited from: (1) harassing, attacking, threatening, assaulting (sexually or otherwise), hitting, following, stalking, keeping under surveillance, blocking the movement, loitering, with or around Jane Roe, Jane Roe 2, or any minor child; (2) contacting (directly or indirectly), telephoning, sending messages, mailing, e-mailing, photographing, videotaping, and otherwise or recording or publishing any image of Jane Roe, Jane Roe 2, or any minor child without the parent or guardian's written consent; (3) taking any action, directly or through others, to obtain the addresses or locations of Jane Roe, Jane Roe 2, or any minor child; (4) being within 10 yards of any place where children congregate, including schools, playgrounds, and child care centers; and (5) loitering where

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[2] An attorney made a special appearance for McClellan to ask for a continuance. The trial court impliedly denied the request and the matter proceeded with McClellan representing himself.

minor children congregate, including, but not limited to schools, parks, and playgrounds.

McClellan appealed. No notice of appeal was filed on behalf of the two websites.

III.

DISCUSSION

1. *Standard of review.*

" 'A permanent injunction is a determination on the merits that a plaintiff has prevailed on a cause of action . . . against a defendant and that equitable relief is appropriate.' [Citation.] The grant or denial of a permanent injunction rests within the trial court's sound discretion and will not be disturbed on appeal absent a showing of a clear abuse of discretion. [Citation.] The exercise of discretion must be supported by the evidence and, 'to the extent the trial court had to review the evidence to resolve disputed factual issues, and draw inferences from the presented facts, [we] review such factual findings under a substantial evidence standard.' [Citation.] We resolve all factual conflicts and questions of credibility in favor of the prevailing party and indulge all reasonable inferences to support the trial court's order. [Citation.]" (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 390.) Likewise, " 'the decision to grant [a restraining order] rests in the sound discretion of the trial court.' [Citation.]" (*Church of Christ in Hollywood v. Superior Court* (2002) 99 Cal.App.4th 1244, 1251.)

However, "[i]n *Bose Corp. v. Consumers Union of U. S., Inc.* (1984) 466 U.S. 485, 499, the United States Supreme Court explained that 'in cases raising First Amendment issues . . . an appellate court has an obligation to "make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion on the field of free expression." ' [Citation.] 'Independent review is not the equivalent of de novo review "in which a reviewing court makes an original appraisal of all the evidence

to decide whether or not it believes" the outcome should have been different. [Citation.] Because the trier of fact is in a superior position to observe the demeanor of witnesses, credibility determinations are not subject to independent review, nor are findings of fact that are not relevant to the First Amendment issue. [Citations.] [U]nder independent review, an appellate court exercises its independent judgment to determine whether the facts satisfy the rule of law.' [Citation.]" (*People v. Lindberg* (2008) 45 Cal.4th 1, 36-37.)

2. *The trial court's orders did not violate McClellan's fundamental rights.*

McClellan raises two arguments based upon his fundamental rights. First, he contends that the temporary restraining order and injunction were improper as they were based on the content of his speech that promotes sexual relations with children as being healthy. Second, McClellan contends the restraining order and injunction must be vacated because they constituted prior restraints on his publishing activities. We are not persuaded by either argument.[3]

As McClellan states, the First Amendment and the California Constitution generally prevent governments from issuing an injunction that proscribes speech, or even expressive conduct, because of the disapproval of the ideas expressed. (*R. A. V. v. City of St. Paul* (1992) 505 U.S. 377, 381-382; Cal. Const., art. I, § 2, subd. (a).) The government cannot criminalize "the peaceful expression of unpopular views" (*Edwards v. South Carolina* (1963) 372 U.S. 229, 237) and generally cannot "regulate speech based on its substantive content or the message it conveys. [Citation.]" (*Rosenberger v. Rector and Visitors of Univ. of Va.* (1995) 515 U.S. 819, 828.) Also, the government usually may not issue prepublication sanctions or restraints. (*Pines v. Tomson* (1984) 160 Cal.App.3d 370, 393-398; *South Coast Newspapers, Inc. v. Superior Court* (2000) 85 Cal.App.4th 866 [improper for court to issue prior restraint order in high publicity

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[3] On appeal, McClellan does not argue that the order or injunction were overbroad.

criminal case that prohibited newspapers from publishing legally obtained photographs of defendants].)

In addition to the right of free speech, persons have the right of association (*N.A.A.C.P. v. Alabama* (1958) 357 U.S. 449, 460; *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 617-618) and the right to "peaceable assembly for lawful discussion . . . ." (*De Jonge v. Oregon* (1937) 299 U.S. 353, 365.)

However, "[a]lthough stated in broad terms, the right to free speech is not absolute." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 134; accord, *Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141, 1147.) Governments are not foreclosed from prohibiting conduct that incidentally restricts speech. (*Arcara v. Cloud Books, Inc.* (1986) 478 U.S. 697 [adult bookstore can be closed where the store was a front for prostitution].) Additionally, the First Amendment does not extend to situations where the ideas have slight social values and any benefit derived therefrom is outweighed by " ' "the social interest in order and morality." [Citation.]' " (*Balboa Island Village Inn, Inc., supra,* at p. 1147.)

The use of a plaintiff's likeness in a publication may be actionable and an injunction may issue if the speech constitutes an invasion of privacy. (*Gill v. Curtis Publishing Co*. (1952) 38 Cal.2d 273; cf. *Balboa Island Village Inn, Inc. v. Lemen, supra,* 40 Cal.4th 1141 [post trial injunction may issue to prohibit repeating statements found to be defamatory].) An invasion of privacy exists if the defendant publishes a person's name or likeness without permission and with knowledge of its falsity or with knowledge that it would be offensive to persons of ordinary sensibilities. To be an actionable appropriation, the plaintiff must prove, in addition to other elements, "That the privacy interests of [the plaintiff] outweigh the public interest served by [the defendant's] use of [his/her] name, likeness, or identity. [¶] In deciding whether [the plaintiff's] privacy interest outweighs the public's interest, [the trier of fact] consider[s] where the information was used, the

extent of the use, the public interest served by the use, and the seriousness of the interference with [the plaintiff's] privacy." (CACI No. 1803, Dec. 2007.)

Publications, even if true, may constitute an invasion of privacy if they are presented in a lurid or indecent manner. Even if photographs are accurate and taken in public places, there can be a cause of action for invasion of privacy when they are exploitative. (*Wood v. Hustler Magazine, Inc.* (5th Cir. 1984) 736 F.2d 1084 [applying Texas law, woman's privacy invaded where nude photograph published in coarse and sexually exploitative magazine in conjunction with false caption attributing to plaintiff a lewd and promiscuous fantasy]; *Martin v. Johnson Publishing Co.* (1956) 157 N.Y.S.2d 409 [plaintiff entitled to damages for an unauthorized use of photograph].)

For example, in *Gill v. Curtis Publishing Co., supra,* 38 Cal.2d 273, a happily married couple was photographed in an affectionate pose when they were at their place of business. A magazine used the photograph in an article on different types of love as an example of mere sexual attraction. The California Supreme Court examined the context in which the article was used. The Court held that even though the couple had been in a public place when the photograph was taken, the plaintiffs had stated a cause of action because the use of the photograph could be actionable as an invasion of privacy. The photograph had been used to portray what the article characterized as the "wrong" kind of love. And, a trier of fact could conclude that the article was seriously humiliating and disturbing to the couple's sensibilities as there was no legitimate public interest in using the couple's likeness in the article. (Compare with, *Gill v. Hearst Publishing Co.* (1953) 40 Cal.2d 224; cf. *Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200 [newsworthiness is bar to common law liability for public disclosure of private fact; videotape of plaintiffs being rescued by helicopter crew was newsworthy and protected by free speech rights; but there were triable issues of fact as to if plaintiff had reasonable expectation of privacy regarding conversations with medical rescue personnel and thus, if media could publish

those conversations, a determination that turned on whether disclosure would be offensive and objectionable to reasonable person].)

M. G. v. Time Warner, Inc. (2001) 89 Cal.App.4th 623 (*M. G.*) provides another example of the potential misuse of photographs. In *M. G.* a magazine and a television program used a "team photograph of a Little League team to illustrate stories about adult coaches who sexually molest[ed] youths playing team sports. Plaintiffs, all of whom appear[ed] in the photograph, were formerly players or coaches on the Little League team. The team's manager . . . pleaded guilty to molesting five children he had coached in Little League. Plaintiffs have [the media defendants] for invasion of privacy and infliction of emotional distress." (*Id.* at p. 26.) *M. G.* held that the plaintiffs had demonstrated a prima facie case for invasion of privacy under the theories of public disclosure of a private fact and false light. Like *Gill v. Curtis Publishing Co., supra,* 38 Cal.2d 273, the juxtaposition of the photograph with the content of the article created offensive impressions. In *M. G.* the use of the photograph and the text linked those in the photograph to "child molestation as either victims, perpetrators, or collaborators." (*M. G., supra,* at p. 632.) In affirming the trial court's denial of an anti-SLAPP motion, *M. G.* noted that "[s]tate law contains many statutes prohibiting the disclosure of the identity of both minors and victims of sex crimes. Public policy favors such protection -- as does the journalism profession." (*Id.* at p. 635, fn. omitted.)

Here, McClellan states that the photographs he took of children were mundane, content neutral, and nonsexual because the children were in public places and fully clothed.[4] He also suggests that even if his personal philosophy is objectionable and vile, his websites and the posting of photographs do not

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[4] Among others, McClellan cites *Sipple v. Chronicle Publishing Co.* (1984) 154 Cal.App.3d 1040, a case discussing invasion of privacy for disclosing private facts in which the court states "there can be no privacy with respect to a matter which is already public. [Citation.]" (*Id.* at p. 1047.)

encourage illegal behavior. In raising these arguments, McClellan states that his activities are not illegal. For example, he states that attending public events is not illegal, publishing photographs is permissible, and engaging in public advocacy for those attracted to prepubescent girls is legal. McClellan misses the point.

McClellan is not prohibited from espousing his controversial views. Rather, he is prohibited from his continuing course of conduct to harass, attack, assault, stalk, and keep under surveillance minor children, as to do so places the children in danger and is threatening to them. McClellan is not prohibited from attending public events, but rather only prohibited from being within 10 yards of any place where children congregate. He is prohibited from tracking young girls by obtaining their addresses or locations so he can post their photographs on his website and he is precluded from recording or publishing any image of any minor child without the parent or guardian's written consent. The prohibited activities are offensive to persons of ordinary sensibilities and threatening. The photographs he posts are not part of a discussion of newsworthy events. Rather, McClellan tracks children all over the world, admitting to have cuddled them in Argentina, and to have thought about enticing others into his vehicle. McClellan surveilled children's events, chronicled their actions, surreptitiously photographed them, and published the photographs in conjunction with his advocacy of romantic and erotic relations with young children. He provides a roadmap for pedophiles and appeals to their prurient interest. The photographs establish the subjects of the photographs as victims of the sexual acts promoted by McClellan. He also presents the children in a false light because the photographs portray the children as being available to pedophiles. The voyeur and stalking nature of McClellan's activities, and his attendance at functions where children congregate, in conjunction with his use of photographs of small children is offensive, frightening, menancing, and not protected by McClellan's free speech or assembly rights. Although McClellan states that he is being punished for his thoughts and the hostile reaction to them, he ignores the response to the victims of his actions who

fear for their safety. He ignores his admission that he collected information about minor children for the purpose of disseminating the information to pedophiles. McClellan is not being punished for abstract thoughts that are controversial or vile. (Cf. *Collin v. Chicago Park District* (7th Cir. 1972) 460 F.2d 746 [denial of parade permit to Nazi group an unlawful restraint on speech].) The stalking of the children and placement of seemingly innocent photographs of the young girls on his website makes McClellan's actions and photographs threatening. McClellan's actions, photographs, and personal philosophy make the children targets and make other children fearful when they attend functions open to the public. McClellan's actions create an inherent threat of immediate harm. The trial court's restraining order and injunction protected the rights of children. There is a significant societal interest in protecting children from predators. (*Terry v. Davis Community Church* (2005) 131 Cal.App.4th 1534, 1547.)

Further, the protective order did not preclude McClellan from associating with other persons who share his beliefs or with other pedophiles. He is not prevented from discussing his beliefs with others or expressing those beliefs. He has no constitutional right, however, to frequent places where children congregate as those appearances are threatening to children.

IV.

DISPOSITION

The restraining order and judgment of permanent injunction are affirmed. McClellan is to pay all costs on appeal.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.