

**In the Court of Appeals  
for the  
Fifteenth District of Texas,  
Toyahville, Texas**

**Lee Dewayne Rexington  
Appellant**

**versus**

**The State of Texas  
Appellee**

**On Appeal from the 82<sup>nd</sup> District Court  
Luna County, Texas  
The Honorable Grace Bouquett**

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Before Chief Justice Baird, Justice Orange, and Justice Shepperd

*Opinion of the Court*

Baird, J. Justice: Lee Dewayne Rexington appeals his conviction for on-line solicitation of a minor. Rexington was sentenced to twenty (20) years following a jury trial. Rexington raises two issues on appeal.

First, Rexington contends that the trial court's application of TEXAS PENAL CODE §33.021 violated his constitutional right to First Amendment by infringing on his right to free speech. Second, Rexington appeals the trial court's decision alleging that the trial court's allowance of spectators at his trial wearing suggestive t-shirts violated his Sixth and Fourteenth Amendment rights. We affirm the trial court's ruling on both issues.

*Background*

On May 3, 2006, Rexington, 58, was arrested for on-solicitation of a minor under TEX. PEN. CODE §33.021. The local law enforcement sexual crimes unit had been conducting an undercover sting operation of internet sexual predators and Rexington's arrest was the result of months of contact between Rexington and an undercover agent posing as a 13 year-old girl whose screen name was "Sexxy13."

Rexington is a recovering drug addict who recently found religion and contends that he was merely attempting to contact "Sexxy13" in an effort to persuade her to stop engaging in internet chat rooms where dirty old men prey on children. Rexington and his organization "Men for Children Having A More Ethical Reality (or M.C. HAMER)," formed in Spring 2004, in an effort to protect and educate children about sexual predators. Believing that local police enforcement were

falling behind on their job of stopping internet predators, Rexington and his organization set up their own sting operation. He maintains that he came up with the idea after watching a program on television where predators were lured into a similar situation by a television producer working in conjunction with local law enforcement. Rexington set up a similar sting operation that, he believed, would scare children engaging in on-line chat rooms and get them to stop engaging in the risky and dangerous behavior.

Rexington and M.C. HAMER began holding meetings early in 2004 to discuss ways in which they could protect children from the dangers of a world where ethics were valued less and less. After many meetings they determined that the increased use of the internet by children and persons with bad intentions made the internet a good place to focus their efforts in promoting a safer and more ethical world for children.

At the close of the State's case in Rexington's trial and in the presence of the jury, two of the spectators burst out and accused Rexington of molesting them during the early 1980's. The trial judge responded: "That may be the case, but it's too late now. We are not here today to discuss Rexington's guilt for illegal sexual contact with minors from the 80's during this trial. Unless you have more information regarding how guilty he is of his latest sexual misconduct with minors - over the internet, you will need to sit quietly or leave." The individuals sat down and remained in the courtroom for the remainder of the trial. The trial judge did not instruct the jury to disregard any portion of the outburst; he instead told the defense to proceed with their case.

While his trial was on going, a local newspaper and news station ran an article on previous allegations of sexual molestation by Rexington. A few of the jurors mentioned in the post-trial interviews that they had heard the rumors reported by the newspaper and news station. The news stories stemmed from allegations that occurred while Rexington was a bus driver at a middle school. Between 1980 and 1984, Rexington was a bus driver for the Fort Leeton ISD. In February of 1984 Rexington was fired for inappropriate conduct after a long debate during a Fort Leeton ISD school board meeting. The school board meeting discussed in detail Rexington's history of holding Duran Duran "fan parties" for numerous middle school female students, as well as allegations of Rexington giving female athletes back rubs after sports practice. At the school board meeting and in his defense Rexington explained that he was the President of the DuranDuran fan club and throwing fan parties was a normal role for the President of the fan club. Additionally, Rexington explained that he was studying to get his massage therapist's license and often practiced sports massage techniques as much as possible and whenever possible. Out of fear that Rexington was a pedophile many parents protested Rexington's continued employment and the school district fired Rexington for inappropriate conduct.

During the trial of the cause, Rexington challenged the constitutionality of Tex. Penal Code § 33.021 and asserted that both the U.S. and Texas constitutions guarantee him a constitutional right to engage in on-line conversations with whomever he chose. *See* U.S. CONST. amend. I; TEX. CONST. art. I, § 8. The trial court held that the speech Rexington asserted was constitutional was in fact obscene, used to peak prurient interests and therefore was not covered by either constitution.

Rexington also objected to the trial court's handling of three courtroom events - a court room

outburst in which two spectators accused Rexington of molesting them, the trial judge's subsequent commentary in response to the spectators, and the appearance of spectators wearing t-shirts suggestive of a pedophile during the trial. On the final day of trial, six spectators wore shirts with a picture depicting an old disheveled man in a trench coat holding a lolly-pop offering it to a young girl in pig-tails. The trial judge asked the spectators to either leave the courtroom or the cover up their shirts. The spectators agreed to cover their shirts and remained in the courtroom. Rexington's attorney made an oral motion for a mistrial on the basis that the outburst and the appearance of the spectators prejudiced his client's due process right to a fair trial under the Sixth and Fourteenth Amendments. The trial judge ruled against the motion for a mistrial.

### **I. Violation of First Amendment Right**

The pivotal point in this case is whether the statute at issue, as applied, attempts to regulate a certain type of language and if it does attempt to regulate a certain type of language what type of language is at issue. In cases involving mixed questions of law and fact the trial court's ruling are reviewed *de novo*. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997).

TEX. PENAL CODE § 33.021 is an attempt to regulate obscene speech being communicated to minors by sexual predators and thus is a means of protecting minors from sexually explicit and solicitous on-line conversations. Further, the means utilized by the State to regulate this speech is a constitutionally permissible method of protecting the welfare of the general public.

While the dissent correctly recognizes that neither the U.S. or Texas constitution protects obscene language, it falls short by not recognizing the speech at issue as obscene. In turning to the language of the statute, it is easy to determine that the purpose of the statute is to protect minors from speech that: (1) appeals to the prurient interest, using the contemporary community standards of an average person; (2) describes sexual conduct as defined by state law, that is patently offensive; and (3) taken as a whole, lacks serious literary, artistic, or scientific value. *Miller*, 413 U.S. at 24. Excerpts of Rexington's on-line conversations demonstrate that Rexington's on-line conversations meet each of these criterion. An exchange recorded on April 10, 2006, between Rexington and Sexxy 13 follows below:

Sexxy13: So, what do u do for fun?  
Rexington: I like to play ;-)>  
Sexxy13: ;-O What r ur favor8 games?  
Rexington: I like to play doctor & teacher - I REALLY like to discipline bad lil girlz.  
Sexxy13: Soundz gud...  
Rexington: u up for a play date? ;-)  
Sexxy13: y  
...  
Sexxy13: Whacha wearing?  
Rexington: What should I be wearing when I chat w/ u?  
Sexxy13: u tell me - u like to teach - don't u?  
Rexington: I'd like to teach u a lesson or 2

sexxy13:        bout what?  
Rexington:     What a bad girl u've been.  
Sexxy13:        what do u have planned?  
Rexington:     I wanna show u how a real man disciplines a bad girl like u - show u  
                  my discipline stick...  
Sexxy13:        and then?  
Rexington:     have u seen Blue Velvet?  
Sexxy13:        ?  
Rexington:     it's a movie... w/ great luv scene...go rent it and tell me what u thk.

Rexington's on-line conversations clearly indicate an appeal to prurient interests, the material panders and is used to titillate, is patently offensive and lacks any literary, artistic, or scientific value. Rexington asserts first that the language at issue is not obscene, but in the alternative, if it is obscene he asserts that there should be an additional exception to the lacking literary, artistic or scientific value - that of language that is socially beneficial. However, the law does not provide such an exception and thus is, obscene language and not constitutionally protected.

The dissent also misses the mark in finding that the State failed to meet its burden of demonstrating the second prong of the content-based restrictions analysis. The State correctly argues that its interest in enacting TEX. PENAL CODE § 33.021 is constitutionally valid because the statute meets strict scrutiny. Internet sexual predators are an increasing threat to children using the internet. The State has a duty to protect the public from threats to the general welfare that endanger the most innocent of society. The Supreme Court has acknowledged that there may be times when society must restrict certain activities of the public for the betterment of society as a whole. *See Buck v. Bell*, 274 U.S. 200, 207 (1927) (stating "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.").

The State has an inherent and compelling interest in protecting the welfare of the general public. In considering the constitutionality of speech restrictions "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978). Here, the clear and present danger of internet sexual predators on the welfare of the general public, and specifically minors, is a compelling interest for which the government is charged with. Further, in *Ginsberg*, the Court recognized a State's right to restrict distribution of objectionable magazines to minors. The *Ginsberg* court stated:

[w]hile the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at

controlling dissemination of such material to adults. . . The state has an interest to protect the welfare of children and to see that they are safeguarded from abuses which might prevent their growth into free and independent well-developed men and citizens

390 U.S. at 640-41. Similarly, while internet usage by children should be closely monitored by parents, this court must recognize that such parental control is not always present and thus society has a transcendent interest in protecting children by justifiable regulation.

Because the State acted in a manner consistent with previous Supreme Court precedent and within its constitutional confines, we hold that the State's compelling interest in protecting children from internet sexual predators was enacted in a narrowly-tailored manner to protect the welfare of the general public and was the least restrictive means possible.

## **II. Violation of Procedural Due Process Right**

During the trial of this case, Appellant contends that the trial court's decision to allow spectators at his trial wearing prejudicial and suggestive shirts as well as the manner in which the judge handled a courtroom outburst unduly violated his Sixth and Fourteenth Amendment right to a fair trial. Rexington re-asserts his the constitutional challenge of his Sixth and Fourteenth Amendment violations of his due process rights on appeal.

Rexington contends that his conviction should be reversed on the basis that he did not receive a fair trial due to the judge's handling of specific prejudicial courtroom activities. In such cases on appeal the Appellant must show that the courtroom "procedure entailed either actual prejudice or inherent prejudice." *See Marx v. State*, 953 S.W.2d 321, 329 (Tex. App.–Austin, 1997). Under the appropriate standard of review Rexington must show that there was either actual or inherent prejudice; "[t]o constitute reversible error, the trial court's comment must be reasonably calculated to prejudice the defendant's rights." *Young v. State*, 691 S.W.2d 757, 759 (Tex. App.–Texarkana, 1985).

### **Right to Fair Trial**

The Sixth Amendment guarantees "in all criminal prosecutions, . . . a right to a speedy and public trial, by an impartial jury. . ." U.S. CONST. amend XI. Similarly, Texas has a constitutional provision addressing a criminal defendant's right to a speedy and public trial by an impartial jury. TEX. CONST. art. I, § 10. Additionally, the Fourteenth Amendment guarantees "no state shall deprive any person life, liberty, or property, without due process of law. . ." U.S. CONST. amend XIV. These guarantees are not an absolute safeguard against the occasional courtroom disturbance during a criminal trial as Rexington would have this court believe. Nonetheless, the courts have provided safeguard provisions for use when such departures from the norm occur. TEX. R. APP. P. 44.2, *see also Holbrook v. Flynn*, 475 U.S. 560 (1986), *Martin v. State*, 987 S.W.2d 577 (Tex. Crim. App. 1999), *Marx*, 953 S.W.2d 321. The Supreme Court has long acknowledged that "[c]entral to the right to a fair trial, . . ., is the principle that one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial." *Id.* at 568 *quoting Taylor v. Kentucky*, 436 U.S. 478, 485 (1978).

Here, Rexington argues that the outburst, the judge's subsequent commentary, and the presence of spectators at his trial wearing prejudicial and suggestive shirts so incurably prejudiced

his trial to the extent that his guilt was determined by the influence of those spectators. However, courts have held that other similar “prejudicial” behavior was constitutional and did not warrant reversal of a conviction. *Compare Martin*, 987 S.W.2d 577, and *Marx*, 953 S.W.2d 321, with *Romero v. State*, 136 S.W.3d 680 (Tex. App.–Texarkana, 2004) *aff’d* 173 S.W.3d 502 (Tex. Crim. App. 2005). In *Romero*, the court recognized that where a particular court practice at trial unmistakably brands the defendant with a mark of guilt, it impairs the presumption of innocence afforded by the Due Process Clause. *Id.* at 689-90. The *Romero* trial court permitted the victim of an aggravated assault to testify against the defendant while wearing a disguise. The defendant was convicted and he appealed his conviction on the basis that the victim’s appearance in court in disguise violated his right to confront his accuser and that the defendant’s presumption of innocence had been unduly compromised because of the disguise. The Texarkana Court of Appeals reversed his conviction and reasoned that the particular court practice prejudiced the jury, and it was so presumptively prejudicial as to violate his Fourteenth Amendment right to a fair trial. *Id.* at 689-91.

Unlike *Romero*, this court finds that the mere presence of spectators in the courtroom while suggestive t-shirts taken in combination with the outburst, and the judge’s commentary, were not presumptively prejudicial because they do not necessarily lead to an unmistakable mark of guilt. Thus, we find that there was no violation of the defendant’s constitutional right to a fair trial and hold that the judgment of the trial court is affirmed.

*Conclusion:*

The trial court’s judgment is affirmed as to Appellant’s Issue One and Two.

*Dissent:*

Justice Orange, dissenting in the judgment.

I dissent from the Court's decision as it applies to Issue One. The majority's cursory analysis of this issue ignores the complexity of this issue.

In his first issue, Appellant Rexington contends that the trial court's application of TEXAS PENAL CODE § 33.021 violated his constitutional right to free speech. Appellant argues that TEX. PENAL CODE § 33.021 is unconstitutional and asserts that both the US and Texas constitutions guarantee him a constitutional right to engage in on-line conversations without restriction by the State. U.S. CONST. amend. I; TEX. CONST. art. I, § 8. The trial court held that the speech Rexington asserted was constitutional was in fact obscene, used to peak prurient interests and therefore was not covered by either constitution. I respectfully dissent and believe that TEXAS PENAL CODE § 33.021 is unconstitutional.

*Application of Freedom of Speech Law*

Appellant's first issue raises the issue of freedom of speech under the U.S. and Texas constitutions. U.S. CONST. amend I. The Texas Constitution states in part; "Every person shall be at liberty to speak, write, or publish his opinions on any subject, being responsible for the abuse of that privilege, and no law shall ever be passed curtailing the liberty of speech..." TEXAS CONST. art. I., § 8. However, constitutional guarantees of free speech under the U.S. Constitution and the Texas Constitution are not unlimited guarantees. The Supreme Court has established certain guidelines and standards for assuring the protect of the First Amendment's guarantee.

In general, speech may be proscribable when it falls outside of the First Amendment's protection and thus will be entitled no constitutional protection. The Supreme Court has designated categories of non-protected speech to include: child pornography,<sup>1</sup> "fighting words,"<sup>2</sup> hate speech,<sup>3</sup> and obscenity.<sup>4</sup> Additionally, the Texas Supreme Court has established that the Texas Constitution's free speech guarantee is not without restrictions. *Campbell v. State*, 765 S.W.2d 817, 822 (Tex. App.–San Antonio, 1998) *citing* *Malone v. State*, 339 S.W.2d 666, 667 (Tex. Crim. App. 1960) (holding that the sale of magazines containing obscenity is not constitutional because obscenity is not protected speech under the Texas Constitution). Additionally, under the Fourteenth Amendment the First Amendment's constitutional guarantees and restrictions on speech are made applicable to the States. *Davis v. State*, 658 S.W.2d 572, 577 (Tex. Crim. App. 1983) *citing* *Gitlow v. New York*, 268 U.S. 652 (1925). Thus, any speech that is not obscene warrants constitutional protection under the First Amendment.

Determinations of proscribed speech hinge on whether the law at issue is attempting to regulate a certain type of speech and are triggered by the substance or content of the message being

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<sup>1</sup> *New York v. Ferber*, 458 U.S. 747 (1982)

<sup>2</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

<sup>3</sup> *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

<sup>4</sup> *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976).



conveyed. *See generally, R.A.V. v. St. Paul*, 505 U.S. 377 (1992), *Miller v. California*, 413 U.S. 15 (1973). In the case at bar, TEX. PEN. CODE § 33.021, on its face does not proscribe a particular type of speech *per se*, but at the core of enforcement of the statute is a question of the type of speech that triggers the application of the statute to a particular set of facts. Because this is a content-based regulation of speech, one must analyze this case using a two step process. First, one must determine what type of speech is at issue. Second, one must determine whether the content-based regulation meets constitutional muster.

#### Type of Speech at Issue

Here, the statute does not attempt to regulate obscene speech, but rather it attempts to regulate indecent sexual speech. *See Reno v. ACLU*, 521 U.S. 844, 874-75 (1997). The guidelines for determining whether language is obscene are:

- (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

*Miller*, 413 U.S. at 24.

In contrast, indecent sexual speech is speech that “in context, depicts or describes, in terms patently offensive as measured by contemporary community standards . . . sexual or excretory activities or organs.” Morgan J. Lynn, *Constitutional Law Chapter: C. Indecency, Pornography, and the Protection of Children*, 7 GEO. J. GENDER & L. 701, 708 (2006) (discussing the differences between obscene and indecent language). Further, language may be deemed indecent if: (a) its description or depiction is explicit or graphic; (b) the material dwells on or repeats at length descriptions or depictions of sexual or excretory organs; and (c) the material appears to pander or is used to titillate or shock. *Id.* In deed, the Supreme Court has held that “sexual expression which is indecent but is not obscene is protected by the First Amendment.” *Reno*, 521 U.S. at 874-75 quoting *Sable Communications of Calif., Inc. v. FCC*, 492 U.S. 115, 126 (1989). Speech that is otherwise indecent and sexual in nature will still be afforded constitutional protection if it does not meet the *Miller* criterion. *Id.*, see also *FCC v. Pacifica Foundation*, 438 U.S. 726, 749 (1978).

The language of this statute does not ban obscene language. Rather it merely bans language that is sexually explicit and indecent as it relates to minor children. *See* TEX. PEN. CODE §§33.021 (a)(3), 43.25. Specifically, the statute attempts to regulate communication between an adult and a minor, who “with the intent to arouse or gratify the sexual desire of any person, the person, over the Internet or by electronic mail or a commercial online service, [and] intentionally: (1) communicates in a sexually explicit manner with a minor; or (2) distributes sexually explicit material to a minor” TEX. PEN. CODE § 33.021(b). Excerpts of Rexington’s on-line conversations arguably met the statutory criteria of being sexually explicit in describing sexual conduct as statutorily defined. TEX. PEN. CODE § 43.25. Sexual conduct is means “sexual contact, actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola.” *Id.* Nonetheless, the language at issue in this case is indecent and only raises the specter of “obscenity” when

placed in the context of being communicated to a minor. *Gholson v. State*, 667 S.W.2d 168, 174 (Tex. App.–Houston [14th Dist] 1983, writ ref'd) *citing Pacifica*, at 741-42.

*Application of Content-Based Analysis Standard*

The Supreme Court recently recognized that in general criminally punishable content-based restrictions on speech are presumed invalid because they “have the constant potential to be a repressive force in the lives and thoughts of a free people.” *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004). Because such restrictions are presumed invalid, the government bears the burden of showing that the law at issue meets the strict scrutiny standard of constitutional muster. *Id.* Further, because the language at issue in TEX. PEN. CODE § 33.021 is not obscene, the State must prove that the law meets the content-based standard requirements established by the Court.

Strict scrutiny analysis of whether the statute used is constitutional requires a two-prong analysis. First, the government must prove that the objective being pursued was an effort to achieve a compelling state interest. *R.A.V.*, 505 U.S. at 382. In *R.A.V.* the court explained that under the more stringent content-based analysis a statute will pass constitutional muster only where the statute is necessary to serve the asserted compelling state interest. *Id.* at 395-96. Second, the means chosen by the government must be narrowly-tailored to achieve that compelling end. *Ashcroft v. ACLU*, 542 U.S. 656, 666-67 (2004). Narrowly-tailored has been defined as being that there was must no less restrictive alternative means that would accomplish the government’s objective. *Id.*

The State asserts that the compelling objective being pursued in the enactment of TEX. PEN. CODE § 33.021 is the protection of children against internet sexual predators. The Supreme Court has acknowledged that the protection of children’s welfare is a compelling objective. *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, (2000), *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978). Thus, the State’s interest in protecting children from sexual predators is a compelling objective. *See Ginsberg v. New York*, 390 U.S. 629 (1968).

The second prong of the strict-scrutiny analysis requires a determination of whether the means chosen by the government was narrowly-tailored to achieve that compelling end of protection children from internet sexual predators. Here, the State’s method of attempting to protect children against internet sexual predators was not narrowly-tailored or the least restrictive means of achieving their goal. The State’s attempt at regulating on-line conversations between adults and minors over-steps the constitutional boundaries established by the Supreme Court in mandating that the State’s actions are the least restrictive means. In this case, the State is broadly attempting to regulate speech that should otherwise be regulated and monitored by parents. This Court should not presume to intrude into an individual’s home and restrict speech merely because a parent fails to do their duty.

It is my opinion that the language at issue in TEX. PEN. CODE § 33.021 is merely an attempt to regulate indecent speech. Thus the targeted speech is constitutionally entitled to protection against State restriction. Further, because the statute attempts to regulate content-based speech and the State

has failed to meet its burden in demonstrating how the method implemented is **was narrowly-tailored** to protect children from internet sexual predators, I therefore respectfully dissent from the majority and find that the statute is unconstitutional. Lastly, I believe that while Rexington's on-line conversations were misguided in their aim, they did not rise to the level of obscene.