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IN THE
COURT OF APPEALS OF INDIANA

Cory Chapman,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 23, 2022

Court of Appeals Case No.
21A-CR-421

Appeal from the Greene Superior Court

The Honorable Dena A. Martin, Judge

Trial Court Cause No.
28D01-1912-F6-261

Shepard, Senior Judge.

[1] In this interlocutory appeal, Cory Chapman appeals the trial court's preliminary determination that the matter he allegedly disseminated to a former student via text messages is probably harmful to minors.[1] We affirm.

Facts and Procedural History

[2] Chapman was previously Student's band director. Following his resignation, Chapman allegedly sent her messages telling her he loved her and missed her. Appellant's App. Vol. 2, p. 14. He also sent Student numerous memes via text message that involved sexual jokes, including:

- A picture of the clothed buttocks of three females with the words "Netflix adaptation," "Anime," and "Manga"
- A picture of a woman's face and bare shoulder with the words "When I see someone displaying positivity" . . . "Oh f**k yeah spread it"
- A picture of a straw hovering above the lid of a cup that has no hole and the words "When she likes you but only as a friend"
- A picture of a chalkboard with the title "Anime Tiddies Pros and Cons" and a list in the Pros column containing "Big AF," "2D," "Jiggle Physics," "On ur waifu," "No effort required"
- A picture of a cartoon character with white liquid on its stomach and the caption "When he taking his sweet ass time getting the cum rag"
- A picture of Spiderman with the caption "A teen boy's body changes & he discovers he can shoot a white sticky liquid out of his body"
- Two pictures of a woman holding a chalkboard – in one picture the chalkboard states "Moms should get a fast pass to the front of the line at

[1] We heard oral argument in this case on November 18, 2021, at Purdue University Fort Wayne. We commend counsel for their presentations and thank Purdue University for its hospitality.

coffee shops. Honey, you're 22 & slept 10 hours last night? Get to the back of the line" – in the second picture the chalkboard states "Moms should wait in line like everybody else. You're not special because you let somebody cum inside you"

- A list stating "Make her p***y wet not her eyes," "Make his d**k hard not his life," "Break her bed not her heart," "Play with her boobs not her feelings," and "Get on his d**k not his nerves"
- A text stating "Day 26 without sex: threw the neighbors' cat in the pool just so I can tell the homies I got some p***y wet over the weekend."
- A text stating "Day 147 without sex: ate fruit gushers so I could feel something squirt in my mouth"
- A text stating "Day 42559 without sex: got hit by a car and said: 'You know I can take it harder'"

Appellant's Ex. Vol. III, pp. 4-10, 12-14.

[3] After the memes were disclosed by Student, the State charged Chapman with disseminating matter harmful to minors, a Level 6 felony. Ind. Code § 35-49-3-3 (2014). Pursuant to Indiana Code section 35-49-2-4 (1983), Chapman then moved for a preliminary determination of whether the matter involved in the memes is probably harmful to minors. Following a hearing, the trial court determined that the matter involved is "probably harmful to minors." Appellant's App. Vol. 2, p. 86.

Issues

I. Whether the preliminary hearing procedure provided for in Indiana Code section 35-49-2-4 is inapplicable in this case;

II. Whether the trial court erred by determining the memes are "probably harmful to minors;" and

III. Whether, alternatively, Indiana Code section 35-49-3-3 violates the First Amendment.

Discussion

I. Applicability of Indiana Code § 35-49-2-4

[4] As an initial matter, the State asserts the preliminary hearing procedure provided for in Section 35-49-2-4 is inapplicable in this case. The statute states:

> (a) Within ten (10) days after:
>
> (1) matter is obtained by seizure or by purchase under this article; or
>
> (2) the defendant is arrested under this article;
>
> whichever is later, and before trial, the state, the defendant, an owner, or any other party in interest of any matter seized or purchased may apply for and obtain a prompt adversary hearing for the purpose described in subsection (b).
>
> (b) At the adversary hearing, the court shall make a preliminary determination of whether the matter is:
>
> (1) probably obscene; or
>
> (2) probably harmful to minors.

[5] The State argues the statute is inapplicable here because inasmuch as no material was seized, prompt judicial review is not required to avoid an ongoing restraint of free speech. It further urges that regardless of whether material was seized or the defendant was arrested, the determination that results from this procedure is only preliminary, not final, and therefore not a mechanism for obtaining dismissal of a charge prior to trial if it is preliminarily determined that the matter is probably not harmful.

[6] While we acknowledge the preliminary nature of a determination under this statute, we also envision the possibility that a defendant might use such a determination as a basis for a motion to dismiss. The grounds on which a defendant may seek dismissal are numerous, including any "other ground that is a basis for dismissal as a matter of law." Ind. Code § 35-34-1-4(a)(11) (1983).

[7] That being said, we make no decision on the resolution of such a motion as that issue is not before us in this case. Therefore, we cannot entirely rule out the applicability of Section 35-49-2-4 here, and we proceed to the merits of the parties' claims.

II. Determination of Probably Harmful

[8] The State has charged Chapman with knowingly or intentionally disseminating matter that is harmful to minors. *See* Ind. Code § 35-49-3-3(a)(1). Indiana Code section 35-49-2-2 (1983) characterizes matter as harmful to minors if:

> (1) it describes or represents, in any form, nudity, sexual conduct, sexual excitement, or sado-masochistic abuse;
>
> (2) considered as a whole, it appeals to the prurient interest in sex of minors;
>
> (3) it is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable matter for minors; and
>
> (4) considered as a whole, it lacks serious literary, artistic, political, or scientific value for minors.

Following a hearing pursuant to Section 35-49-2-4 at which copies of the memes were admitted into evidence, the trial court subsequently ruled that

pursuant to the criteria listed in Section 35-49-2-2, the memes are matter that is probably harmful to minors.

[9] We caution that the pre-trial preliminary determination under Section 35-49-2-4 is just that—preliminary. As such, it does not require conclusive proof or proof beyond a reasonable doubt of the criteria listed in Section 35-49-2-2. Further, on appeal, we generally review interlocutory orders for an abuse of discretion. *Yeager v. Deutsche Bank Nat'l Tr. Co.*, 64 N.E.3d 908 (Ind. Ct. App. 2016). An abuse of discretion occurs when the court's decision is clearly against the logic and effect of the facts and circumstances before it, or if the court has misinterpreted the law. *Id.* With these standards in mind, we turn to Chapman's challenge to the court's determination that the memes are probably harmful to minors.

A. Criterion #1

Describes or represents, in any form, nudity, sexual conduct, sexual excitement, or sado-masochistic abuse

[10] Focusing on the statutory definitions of the terms nudity,[2] sexual conduct, sexual excitement, and sado-masochistic abuse,[3] Chapman contends that none of the memes satisfy this criterion. Yet, he acknowledges that "all the memes

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[2] Indiana Code section 35-49-1-5 (1983) defines "nudity" as the showing of genitals, pubic area, buttocks, or nipple of the female breast with less than a fully opaque covering, or the depiction of covered male genitals in a discernibly turgid state.

[3] Indiana Code section 35-49-1-8 (1983) defines "sado-masochistic abuse" as flagellation or torture by or upon a person as an act of sexual stimulation or gratification.

are of a sexual nature" and can lead to a "sexual interpretation." Appellant's Br. pp. 10, 11.

[11] While we agree the memes do not show any nudity or sado-masochistic abuse, the same cannot be said of sexual conduct or sexual excitement. "Sexual conduct" is defined as:

> sexual intercourse, acts involving the sex organ of one person and the mouth or anus of another, the penetration of the sex organ or anus of a person by an object, the exhibition of uncovered genitals in the context of masturbation or other sexual activity, the exhibition of the uncovered genitals of a person under the age of sixteen, or sexual intercourse or other sexual conduct with an animal.

Ind. Code § 35-49-1-9 (2014). "Sexual excitement" is the condition of human genitals in a state of sexual stimulation or arousal. Ind. Code § 35-49-1-10 (1983).

[12] Section 35-49-2-2(1) does not require explicit depiction of the acts or condition defined in these statutes. Instead, it allows for these acts and/or condition to be described or represented in any form. "Describe" is defined as "to represent or give an account of in words" and "to represent by a figure, model, or picture." MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/describe (last visited March 16, 2022). To "represent" is "to bring clearly before the mind"; "to serve as a sign or symbol of"; "to portray"; and "depict." MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/represent (last visited March

16, 2022). When these words are combined with the phrase "in any form," Subsection (1) encompasses anything that causes an image in the mind, serves as a sign or symbol, represents a figure, model, or picture, or constitutes a portrayal of sexual conduct or sexual excitement. Accordingly, almost all, if not all, the memes here can be said to describe or represent sexual conduct or sexual excitement.

B. Criterion #2

Appeals to the prurient interest in sex of minors

[13] The parties agree that the term "prurient" refers to that which is "marked by or arousing an immoderate or unwholesome interest or desire," especially sexual desire. MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/prurient (last visited March 16, 2022). Chapman argues the memes are simply humorous and do not fit this definition. Yet, the memes all suggest or use explicit language to refer to sexual activities or sexual situations in crude, vulgar, and degrading terms. Thus, we conclude that the trial court fairly determined that the memes appeal to the prurient interest in sex of minors.

C. Criterion #3

Patently offensive to prevailing standards in the adult community with respect to what is suitable matter for minors

[14] Regarding this factor, Chapman contends the court's determination is erroneous because of the widespread availability of the memes on social media platforms to which minors have access. However, widespread availability does

not equate to being acceptable to adults of a community as it pertains to what they believe is suitable for the minors in their community. We find no error with this preliminary determination, especially given that the trial judge, a member of the community, reviewed the memes and deemed them patently offensive under this standard.

[15] Ultimately, whether these memes are patently offensive by community standards is a question of fact for trial. *See State v. Thakar*, 82 N.E.3d 257 (Ind. 2017) (stating that third element of Section 35-49-2-2 is not question of law for court but fact to be determined at trial). As there apparently will be a trial in this case, the parties should provide evidence of whether and in what way the internet and social media platforms have altered the community standard on this subject in order to aid the factfinder in determining whether this particular matter violates the statute.

D. Criterion #4

Lacks serious literary, artistic, political, or scientific value for minors

[16] Finally, Chapman asserts the memes have some serious literary, artistic, political, or scientific value for minors because they comment on and/or mock current society, are popular on the internet, and require a level of artistry/creativity to create. For its part, the State maintains the memes are simply crude sexual jokes that have no such value for minors. In light of our discussion of the content of the memes, we find that the court did not abuse its discretion in preliminarily determining that this factor was fulfilled.

[17] We therefore conclude the court was well within its discretion to determine the memes constitute matter that is probably harmful to minors. Because the ruling obtained under this statute is not final, potential prejudice must be prevented by prohibiting its disclosure to the jury. Thus, we caution that a judge's preliminary determination under Section 35-49-2-2 is not evidence on which the parties can rely at trial or relay to the jury. The bottom line: the jury should not be made aware of the trial court's decision.

[18] Moreover, given the pervasive nature of the internet and social media in today's society, especially with teens, we think it not only prudent but also necessary for our statutory scheme to reflect the existence and use of these platforms. The current version of the statute was enacted in 1983—over two decades before many popular websites and social media platforms were even created. (For example, Facebook was launched in 2004, YouTube in 2005, Twitter in 2006, Instagram in 2010, and Snapchat in 2011). It would be valuable for the General Assembly to examine the operation of this statute and give any additional guidance that would recognize the impact of the vast expansion of internet communication in the years since this statute was enacted.

III. Constitutional Challenge

[19] Alternatively, Chapman claims that if memes involving sexual jokes are determined to be matter harmful to minors, then Section 35-49-3-3 violates the First Amendment by placing an unacceptably heavy burden on protected speech. As the State points out, however, Chapman did not raise this issue in the trial court. Failure to challenge the constitutionality of a statute in the trial

court generally results in waiver of review on appeal. *Breda v. State*, 142 N.E.3d 482 (Ind. Ct. App. 2020). We find that Chapman's constitutional challenge is waived. In addition, we note this is an interlocutory appeal in which we are tasked with considering only the court's preliminary determination under Section 35-49-2-2; it is not a final judgment of conviction under Section 35-49-3-3.

Conclusion

[20] We conclude the applicability of Section 35-49-2-4 cannot be entirely ruled out as a procedure for litigating cases such as this one. As to the substantive merits, the trial court did not abuse its discretion by determining, preliminarily, that the matter involved here is probably harmful to minors, and Chapman waived his constitutional challenge.

[21] Affirmed.

Mathias, J., concurs with separate opinion.

Robb, J., dissents with opinion.

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Trial Court Cause No. 28D01-1912-F6-261

Mathias, Judge.

[22] I concur fully in Senior Judge Shepard's opinion in this case.

[23] I write separately to point out that the statutory criterion in 35-49-2-2(3) has undergone major, and for the most part regrettable, change since it was enacted in 1983. This change should be carefully considered and weighed by judges (in a preliminary determination like the one before us in this case) and juries (when

deciding whether conduct charged under this statute amounts to a crime). This change should also be considered by our General Assembly.

[24] The relevant language in the statute, written in the conjunctive with three other criteria, defines matter harmful to minors as that which is:

" . . . patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable matter for minors . . ."

[25] *Lewis v. State*, 726 N.E.2d 836, 841 (Ind. Ct. App. 2000) (quoting Ind. Code § 35-49-2-2 (1993)), *trans. denied*.

[26] "[T]he prevailing standards" of the values in our communities and in our society at large have been deeply coarsened and diminished by the Internet since this criterion became law in 1983. That such coarsening has extended to teenagers, such as the alleged victim in this case, is undeniable. Just ask any high school teacher about students' language in the hallways during passing periods. A search of teenagers' cellphones for content not "suitable for minors" would easily and sadly confirm this as well.

[27] The Internet can be a powerful force for good, but it is too easy to misuse it as a force for bad, and even for evil. The ubiquity of smartphones for teenagers, together with the instant availability and almost completely uncensored nature of content on the Internet have been at the heart of this coarsening of values for minors, and indeed for us all. One need look no further than to websites or blogs that are just one click away, and especially to social media applications

such as Facebook, Twitter, Instagram, SnapChat and TikTok[4], all of which provide addictive "free" features and essentially uncensored and unmoderated information of all types to the user. The "only" cost for these applications is social media's unlimited search and download of users' personal information for the benefit of the applications and for sale to the highest bidder.

[28] The issue becomes what are realistic and true "prevailing standards" at any given point in time? What is matter "not suitable for minors" in 2022? Most importantly in a criminal context, what are the actual "prevailing standards," rather than those we might aspire to?

[29] Is sharing just the URL for a horrible website "offensive to the prevailing standards," since the recipient cannot reach the website without the affirmative act of selecting it? Are the social media apps cited above which are on most, if not all, of minors' smartphones "not suitable matter for minors" in and of themselves because of the "matter [not] suitable for minors" they provide unfettered access to? These are considerations that every judge and juror must undertake when deciding upon and enforcing "the prevailing standards."

[30] What are we to make of the fact that minors exchange matter not "suitable for minors" every day, especially teenagers in high school? Should that fact be considered in defining "the prevailing standards of the adult community with respect to what is matter suitable for minors?" What if a classmate, sibling or

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[4] This list is partial and current as of the date of this opinion. Certainly, there will be others in the future.

cousin who is just over the age of 18 shares "matter [not] suitable for minors" with a minor friend or relative who is just under age 18? This happens every day during students' senior year of high school, as some students reach the age of majority while in high school while others do not. How should such and similar conduct inform the determination of "the prevailing standards?"

[31] These are among the questions that all of us, including our General Assembly, need to ask. We must also ask where the freedom of speech guaranteed by the First Amendment to the Constitution of the United States and by Article 1, Section 9 of the Constitution of the State of Indiana begin and end with regard to this and similar alleged criminal conduct. Are these rights the same, or are they different, and if they are different, in what manner are they different? Finally, under Article 1, Section 9 of the Constitution of the State of Indiana, what constitutes "abuse" of freedom of speech, and is defining "abuse" the most important component of defining "the prevailing standards?"

[32] "[T]he prevailing standards . . ." must be defined as what is factual, rather than what is aspirational. Once this is done, it will be clear that "the prevailing standards in the adult community with respect to what is suitable matter for minors" in 2022 are not the same as they were in 1983.

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Trial Court Cause No. 28D01-1912-F6-261

Robb, Judge, dissenting.

[33] I respectfully dissent.

[34] I begin by noting that I disagree with the majority that Chapman's constitutional challenge is waived. Chapman's entire argument, from the motion for preliminary determination until now, is that Indiana Code section 35-49-2-2 and the First Amendment are entwined because matter is presumptively protected by the First Amendment unless the State can prove it is matter harmful to minors as defined in section 35-49-2-2. *See* Appellant's Appendix, Volume 2 at 52. Section 35-49-3-3 criminalizes dissemination of matter that meets the prerequisites listed in section 35-49-2-2. Thus, the very purpose of requesting a preliminary determination was to address whether the

charge passes constitutional muster. To the extent a constitutional analysis would be necessary, I would not consider it waived.

[35] Next, with respect to the State's argument that Chapman is not entitled to a preliminary determination pursuant to section 35-49-2-4, I do not agree with the majority's equivocal resolution that it "cannot entirely rule out the applicability" of that section. Slip op. at ¶ 7. First, the State did not object to the preliminary determination proceedings in the trial court. Instead, it actively participated in those proceedings by arguing the merits of whether the matter Chapman is charged with disseminating is probably harmful to minors. Thus, the State's argument made for the first time on appeal is waived. *See Groves v. State*, 823 N.E.2d 1229, 1232 (Ind. Ct. App. 2005) ("Generally, a failure to object to error in a proceeding, and thus preserve an issue on appeal, results in waiver.").

[36] Second, the State's argument on appeal that section 35-49-2-4 is inapplicable because the State has not seized any evidence, *see* Brief of Appellee at 17, ignores the plain language of the statute and the realities of the exchange of information in the internet age. The plain language of the statute states that an adversarial hearing to make a preliminary determination of whether matter is probably harmful to minors may be requested within ten days after matter is seized *or* a defendant is arrested under article 35-49. *Compare* Ind. Code § 35-49-2-4 (1983) *with* Ind. Code § 35-30-10.1-6 (1979) (repealed) (stating, "*At any time after seizure* . . . and prior to trial, the state, defendant, owner, or other party in interest of any matter seized or purchased, may apply for and obtain a

prompt adversary hearing for the purpose of obtaining a preliminary determination of probable obscenity."). Under the current iteration of the statute, the defendant's arrest need not be tied to the seizure of matter in order to request a hearing, Ind. Code § 35-49-2-4(a), and the preliminary determination is not limited to consideration of "seized matter" but applies simply to "matter," Ind. Code § 35-49-2-4(b). Moreover, even if seizure were required, authorities cannot take possession of internet memes like they could take possession of a physical item such as a pornographic movie or magazine. As Chapman notes, "[w]ith the advent of the internet, it is impossible to take any speech out of circulation." Reply Brief at 10. The process of preliminarily determining whether matter is harmful in the twenty-first century should not be limited by our historical notions of "seizure."

[37] Third, to the extent the State's argument on appeal is based on the possible *consequences* of a preliminary determination under section 35-49-2-4, the majority correctly notes that the possibility that a defendant could file a motion to dismiss charges if a preliminary determination is made in his favor is not at issue in this case. *See* slip op. at ¶¶ 6-7. The question for us at this juncture is not, "But what happens if the trial court preliminarily determines the matter is not probably harmful to minors?"[5] The question is simply, "Is the matter

[5] Even though section 35-49-2-4 does not explicitly provide a remedy if the trial court preliminarily determines that matter is not probably harmful to minors, there would be no point to the statute authorizing a preliminary determination if such determination would have no possible effect on the case. As will be discussed further below, the State repeatedly asserted in its brief and at oral argument that the preliminary

probably harmful to minors?" The possible consequences of a preliminary determination made under section 35-49-2-4 do not determine the applicability of the statute in the first instance; the plain language of the statute does. Thus, I cannot agree with the majority's equivocal statement that "the applicability of Section 35-49-2-4 cannot be entirely ruled out as a procedure for litigating cases such as this one." Slip op. at ¶ 11. It clearly can be applied in this situation.

[38] In sum, as explained above, I would either decline to address the State's argument as waived, or I would plainly state that the preliminary determination procedure *is* applicable to Chapman's case.

[39] The heart of my disagreement with the majority decision, however, is whether the matter is "patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors[.]" Ind. Code § 35-49-2-2(3).[6]

[40] In 1957, concerned parents sought to censor Elvis Presley based on what they considered his sexually suggestive hip gyrations. *See* Rolling Stone, *Elvis Presley on TV: 10 Unforgettable Broadcasts* (Jan. 28, 2016), https://www.rollingstone.com/music/music-news/elvis-presley-on-tv-10-

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determination in this case was akin to a probable cause hearing, *see* Brief of Appellee at 12, and there are clear consequences to a judicial finding of a lack of probable cause, *see*, *e.g.*, Ind. Code § 35-33-7-2(b).

[6] For a matter to be harmful to minors, it must meet all four criteria of Indiana Code section 35-49-2-2. In finding the matter was probably harmful to minors, the trial court presumably concluded all four criteria were met. The majority addresses each criterion in reviewing the trial court's determination and also concludes they are met. But because the failure to show any one of the criteria would cause that conclusion to fail, and because I believe criterion #3 is clearly not shown here, I limit my discussion to criterion #3.

unforgettable-broadcasts-225225/ (last visited Feb. 17, 2022) [https://perma.cc/TP98-D9T6]. In 1985, soon after the Indiana legislature codified the statute at issue, 60 Minutes ran an episode entitled "Is Dungeons and Dragons Evil?" *See* 60 Minutes (Sept. 15, 1985), https://archive.org/details/60_minutes_on_dungeons_and_dragons (last visited Feb. 17, 2022) [https://perma.cc/2G4L-V86V]. At that time, parents were concerned that the role-playing game had a morally degrading effect on youth. In 2022, most adults would consider these concerns quaint as material previously considered vulgar now populates most teenagers' cell phones or is otherwise readily available in a matter of seconds. What was once considered shocking is now barely worthy of notice.

[41] The problem starkly illustrated by this case is that the law has not caught up with the internet age, which has expanded our definition of "community" beyond town limits or county lines to the far reaches of the world. Although the majority acknowledges and laments the cultural shift wrought by the internet, it fails to acknowledge how this shift applies to what it means to be patently offensive under the standard we use to evaluate content today.

[42] The State asserted at oral argument that the preliminary determination should be viewed as akin to a probable cause determination. And indeed, treating it as such is consistent with the definition of "matter harmful to minors" which references the "prevailing standards in the adult community as a whole[.]" The standard for determining probable cause is an objective one that does not vary from community to community or from judge to judge. *District of Columbia v.*

Wesby, 138 S.Ct. 577, 584 (2018).[7] Similarly, the trial court in a preliminary determination is not tasked with deciding what is patently offensive to prevailing standards in the *local* community – that is a question for the jury *if* the charge passes the objective test under Indiana Code section 35-49-2-2(3). Instead, the trial court acts as a gatekeeper against State overreach in this context by employing a more global objective standard for assessing prevailing standards of suitable material. The ubiquity of the internet and the ways in which it is known that minors of varying ages use and interact with others on the internet is an important part of the prevailing standard. *See* slip op., concurring op. at ¶ 6-7. Thus, in 2022, the "adult community as a whole" standard should include consideration of the internet community.

[43] Because the State has, perhaps to its detriment, characterized this hearing as akin to a probable cause determination, the trial court should have employed an objective standard in reviewing the memes Chapman has been charged with disseminating. The trial court's order simply states that "[a]fter careful review" of the statute, "the Court has preliminarily determined the matter is probably harmful to minors" but does not illuminate the standard the trial court applied in reaching that determination. Appealed Order at 1. And the majority's

[7] The parties agreed at the oral argument that the standard was an objective one and also agreed the standard should be narrowed by age, because the age of the minor in question drives how the content would be judged by the adult community as a whole. However, Chapman argued age was the only limiting factor because matter is either harmful or not based on the age of the minor to whom it is disseminated, whereas the State argued the standard could be narrowed by additional factors, such as the relationship between the adult disseminating the matter and the minor.

finding that there is no error in the trial court's preliminary determination "especially given that the trial judge, a member of the community, reviewed the memes and deemed them patently offensive" seems to apply the wrong standard at this stage by focusing on the trial judge and the local community. Slip op. at ¶ 14.

[44] I agree with Judge Mathias that the prevailing standards for what is suitable matter for minors in 2022 are not the same as they were when the statute was written. *See* slip op., concurring opinion at ¶ 11. And yet the majority wishes to pretend the influx of material regularly shared amongst modern youth has not shifted the way we should view what is suitable for minors unless and until the legislature reconsiders the statute. But I cannot ignore these sweeping cultural changes. The sexually suggestive memes at issue are almost certainly in poor taste and I do not support the sharing of them with a seventeen-year-old. Nonetheless, I cannot find this material patently offensive to prevailing standards in the adult community with respect to what is harmful to a teenager on the cusp of adulthood in 2022.

[45] I would reverse the trial court's finding that the matter involved here is probably harmful to minors and remand for further proceedings, whatever they may be.