68815-4

68815-4

No. 68815-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

PETER JAMES CARR,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Federal Decision

Washington Constitution

United States Constitution

Washington Statutes

Court Rules & Evidence Rules

Other Authorities

A. INTRODUCTION

Peter Carr was convicted of child molestation in the first degree for a one-second touch of a girl's chest over her clothing, and he argues the State did not prove beyond a reasonable doubt that the touching was for the purpose of sexual gratification. He was also convicted of communicating with a minor for immoral purposes because he briefly exposed his undergarment in view of a girl. He argues the State did not prove beyond a reasonable doubt that he acted with an immoral purpose and that the communication statute is unconstitutionally vague as applied to his conduct.

In addition, Mr. Carr's attorney failed to prove the effective assistance of counsel guaranteed by the Sixth Amendment when he failed to renew Mr. Carr's motion to sever the two counts for trial. The prosecutor also violated Mr. Carr's Fourteenth Amendment right to a fair trial by misstating the State's burden of proof, using language that misstated the facts, and by an inflammatory argument that appealed to the jurors' fear and prejudice against sex offenders.

B. ASSIGNMENTS OF ERROR

1. The State did not prove beyond a reasonable doubt that Peter Carr committed the crime of child molestation in the first degree, RCW 9A.44.083.

2. The State did not prove beyond a reasonable doubt that Mr. Carr committed the crime of communicating with a minor for immoral purposes, RCW 9.68A.090(1).

3. The communicating with a minor for immoral purposes statute, RCW 9A.44.083, is unconstitutionally vague as applied to Mr. Carr's conduct.

4. Mr. Carr's attorney provided ineffective assistance of counsel contrary to the Sixth Amendment when he failed to renew his meritorious motion to sever the two charges for trial.

5. The trial court erred by denying Mr. Carr's pre-trial motion to sever the two charges for trial.

6. The prosecutor's misconduct in closing argument denied Mr. Carr the fair trial he was guaranteed by the Fourteenth Amendment.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant may not be convicted of a crime unless the State proves every element of that crime beyond a reasonable doubt. Peter Carr was convicted of child molestation in the first degree for brushing his hand across a girl's chest outside her clothing for one second. When touching is over the clothing, the State must produce additional evidence of sexual gratification. Viewing the evidence in the light most favorable to the State, must Mr. Carr's conviction for child molestation in the first degree

be dismissed in the absence of proof beyond a reasonable doubt that he touched the child's breast for the purpose of sexual gratification?

2. The crime of communicating with a minor for immoral purposes requires the State to prove beyond a reasonable doubt that the defendant communicated with a minor for the predatory purpose of promoting the child's exposure to or involvement in sexual misconduct. Mr. Carr asked a child in a retail store if she liked the garment he was examining. Later the child saw Mr. Carr's pants down part-way, showing the swimsuit underneath his pants. Viewing the evidence in the light most favorable to the prosecution, must Mr. Carr's conviction be reversed in the absence of evidence he communicated with a minor for an immoral sexual purpose?

3. Due process requires that statutes be drawn precisely enough that citizens have fair warning of what conduct is prohibited and the law will not be arbitrarily enforced by law enforcement or the courts. As interpreted by Washington courts, the communication with a minor for immoral purposes statute prohibits communication with a minor for and immoral purpose of a sexual nature. Where Mr. Carr was convicted of communicating with a minor for immoral purposes when he inadvertently exposed his underwear to a minor, is the statute unconstitutionally vague as applied to his conduct?

4. The accused's Sixth Amendment right to counsel includes the right to effective assistance of counsel. Mr. Carr's attorney moved to sever the trials of the two charges against him, but waived the issue by not renewing it at or before the close of the evidence. Mr. Carr's severance motion would have been granted at the close of the evidence because it was then apparent that he was raising separate defenses to each count and that the evidence of the two counts was not cross-admissible. Had the counts been severed, it is likely that the guilty verdicts would have been different. Must Mr. Carr's convictions be reversed and remanded for separate trials because his constitutional right to effective assistance of counsel was violated?

5. The defendant has a Fourteenth Amendment right to a fair trial, and a prosecutor's improper arguments may violate that right. The prosecutor committed misconduct by misstating the State's burden of proof beyond a reasonable doubt, misrepresenting the facts of the case, and appealing to the jurors' fears and prejudices about sex offenders. Must Mr. Carr's convictions be reversed where the prosecutor's misconduct in closing argument was so flagrant and ill-intentioned that it could not be cured by timely objections and curative instructions?

D. STATEMENT OF THE CASE

Peter Carr was born and raised in Federal Way where his family was active in competitive swimming. 3/29/12 RP 873-74. He worked at the SeaTac MasterPark as a valet for $10 per hour and lived in a trailer in Federal Way owned by his parents. 3/29/12 RP 888-89; 4/2/12 RP 4-5. Mr. Carr regularly shopped at the thrift stores near his home, Deseret Industries and Goodwill. 4/2/12 RP 7, 33-34, 40.

Mr. Carr enjoyed gardening, playing the piano, reading, and watching television when he was not at work. 4/2/12 RP 6. His sexual relationships were with heterosexual adults, but he purchased two women's one-piece bathing suits that he wore under his clothing when he was at home and occasionally in public. Id. at 31, 78-79, 83, 86.

On July 7, 2011, Mr. Carr was arrested in connection with two separate incidents at Federal Way thrift stores involving young girls. 3/29/12 RP 723; 3/29/12 RP 795, 802. The King County Prosecutor charged him with one count of child molestation in the first degree and one count of communicating with a minor for immoral purposes. CP 47-48.

1. Count 1. In June 2011, eight-year-old M.L. shopped at the Deseret Industries thrift store with her mother and two sisters several times a week. 3/21/12 RP 176-78; 3/26/12 RP 458; 3/27/12 RP 533, 536-

37. Her mother, Alma Lopez Ochoa, always kept M.L. and her little sister Sharon close to her when they were in the store. 3/21/12 RP 175, 179-80; 3/27/12 RP 540-41.

One day a man in the store touched one side of M.L's chest area with his hand; the touch was outside her clothing and lasted only one second. 3/27/12 RP 545-56, 584-85; Ex. 3; Ex. 4 at 9.[1] The man did not look at M.L., say anything to her, or make any sounds. 3/27/12 RP 585; Ex. 3 at 9-10.

M.L. went to her mother and asked to leave the store. Ex. 3 at 10-11. Mrs. Lopez continued shopping for about 30 minutes, but M.L. did not calm down. 3/21/12 RP 198; 3/26/12 RP 412-13, 465-66. M.L. told her mother at the store and again that evening at home that a man touched her and demonstrated how his hand grazed her chest area. 3/21/12 RP 191-95, 199-210; 3/26/12 RP 471-72. She was unable to describe the man. 3/21/12 195, 201; 3/26/12 RP 473. Her mother did not report the incident to the police or store personnel. 3/26/12 RP 469.

Mrs. Lopez decided to return to Deseret Industries with her three daughters three days later to see if M.L. would recognize the man.

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[1] Exhibit 4 is the CD of M.L's interview with a King County Prosecutor's child interview witness specialist, which was viewed by the jury. 3/22/12 RP 290. The transcript of that interview was marked as Exhibit 3 but not admitted as evidence. 3/22/12 RP 286, 289. It is used here for the court's convenience. M.L.'s physical description of how the man touched her can be seen in the CD, Ex. 4 at 11:51:32, 11:53:08; 11:53:49; 11:54:15.

3/21/12 RP 202-03. When she learned where they were going, M.L. was upset and did not want to go into the store. 3/21/12 RP 204; 3/26/12 RP 475. Inside, she pointed out Mr. Carr, who was wearing a striped shirt and sweat pants. 3/21/12 RP 205-06; 3/26/12 RP 477.

Ms. Lopez said she and her daughters returned to Deseret Industries several more times and the man in the striped shirt was there every time. 3/21/12 RP 216, 218. M.L.'s older sister Angelina, however, testified there were three trips to the store – the time M.L. said she was touched, a second time, and the time the police were called.[2] 3/26/12 RP 478-79, 530.

On June 17, 2011, the Lopez family saw Mr. Carr in the store and notified a store employee who called the manager. 3/21/12 RP 219-21; 3/22/12 RP 389-90; 3/26/12 RP 397; 3/27/12 RP 592. The manager approached Mr. Carr, who left the store. 3/21/12 RP 226; 3/26/12 RP 490-91; 4/2/12 RP 12-13. Police officers came to the store and spoke to M.L.'s family. 3/27/12 RP 596-97.

Mr. Carr testified that he did not touch M.L. in the Deseret thrift store. 4/2/12 RP 13. Neither Mrs. Lopez nor Angelina knew the date of the incident. Mrs. Lopez, however, was certain it was on a Saturday at about 11:30 AM to noon. 3/26/12 RP 424-25. Mr. Carr's employer

[2] M.L. said that after the incident, she saw the man in the store more than one time. 3/27/12 RP 562, 570.

testified Mr. Carr was working from 5 AM to 2 PM on June 4 and June 11, the two Saturdays that preceded June 17. 3/29/11 RP 893-94; Ex. 56.

2. Count 2. Nine-year-old K.W. was shopping with her mother at Goodwill in Federal Way on June 21, 2011. 3/28/12 RP 647-48, 686. K.W. was in the girl's clothing section while her mother was looking at women's clothing nearby. 3/28/12 RP 650, 687. A man showed her a gymnastics leotard on a hanger he was looking at and asked K.W. if she liked it or not, adding that he liked it. 3/28/12 RP 689, 691. K.W. did not respond and went to a different aisle, and the man moved away. 3/28/12 RP 691-93.

Later K.W. saw the man from about ten feet away with his pants lowered about a foot scratching his buttocks. 3/28/12 RP 694, 706. She could see his underwear but not his legs or stomach. 3/28/12 RP 695-697. The man was looking down, not at K.W., and then stood up. 3/28/12 RP 696-97. After glancing at the man, K.W. joined her mother. 3/28/12 RP 701.

K.W. described the man's underwear as a sparkly pink bikini bottom. 3/28/12 RP 695-96. The underwear was tight-fitting, but she did not see the man's privates. 3/28/12 RP 701. K.W. told her mother what she saw in the car as they drove away from the store to pick up her older

sister. 3/28/12 RP 703. Her mother reported the incident to the police when they got home. 3/28/12 RP 657.

K.W. provided a description of the man and the clothing he was wearing, but she did not identify Mr. Carr in court. 3/28/12 RP 703-05, 708. Mr. Carr testified he saw a girl looking at him when he shopping for women's swimming suits at Goodwill. 4/2/12 RP 15. He felt awkward and asked her if she liked the one-piece suit he had in his hand. 4/2/12 RP 15, 17-19. Mr. Carr was wearing his pink one-piece swim suit under his clothing that day, and his sweat pants tended to slip down because the draw string was broken. 4/2/12 RP 21, 37-38. Mr. Carr explained the swim suit had ridden up painfully when he crouched down to look at clothing. He briefly adjusted the swim suit and he did realize anyone was watching. 4/24/12 RP 20, 65-68.

3. Verdict and Sentence. The trial court denied Mr. Carr's motion to sever the two counts for trial. 3/15/12 RP 5. He was convicted as charged. CP 68-69. Mr. Carr received a life sentence for child molestation with a 68 month minimum term and a consecutive 364-day suspended sentence for communicating with a minor for immoral purposes. CP 74, 80.

E. ARGUMENT

1. **Mr. Carr's conviction for child molestation in the first degree must be dismissed because the State did not prove the element of sexual gratification beyond a reasonable doubt.**

To convict Mr. Carr of child molestation in the first degree, the State had to prove beyond a reasonable doubt that he had contact with a sexual part of M.L.'s body for the purpose of sexual gratification. Evidence of a fleeting touch of a child's intimate parts over clothing is not sufficient by itself to prove the purpose of sexual gratification. The State did not prove beyond a reasonable doubt that the fleeting touch over clothing was for purposes of sexual gratification, and Mr. Carr's conviction must be reversed and dismissed.

a. The State must prove every element of the crime beyond a reasonable doubt. The due process clauses of the federal and state constitutions require the State prove every element of a crime beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); U.S. Const. amends. VI, XIV; Const. art. I §§ 3, 22. The critical inquiry on appellate review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 334, 99 S. Ct. 2781,

61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

Mr. Carr was convicted of child molestation in the first degree, RCW 9A.44.083. CP 47, 68. As charged here, the State was required to prove that he had sexual contact with a child under the age of 12 who was not his wife or domestic partner and was at least 36 months younger than him. RCW 9A.44.083(1); CP 47. "Sexual contact" is defined as the touching of the sexual or other intimate parts of a person done for the purpose of sexual gratification. RCW 9A.44.010(2). The State was thus required to prove Mr. Carr touched the sexual or intimate parts of a child under the age of 12 for the purpose of sexual gratification. RCW 9A.44.010(2); RCW 9A.44.083(1); State v. Stevens, 158 Wn.2d 304, 309-10, 143 P.3d 817 (2006).

b. The State did not prove the fleeting touch of the front of M.L.'s shirt was done for sexual gratification.[3] M.L. testified that Mr. Carr touched her left breast outside of her clothing one time for approximately one second. 3/27/12 RP 543-46, 574-74, 584-85; accord Ex. 3 at 7, 9-10. M.L. thought it was "on purpose," but she did not know why she believed that. 3/27/12 RP 572-73. M.L. also demonstrated the motion of Mr.

[3] Mr. Carr raised an alibi defense and proved he was at work on the date and time the incident occurred. In light of the standard of review, however, this argument assumes Mr. Carr was the person who touched M.L.

Carr's hand. 3/27/12 RP 543, 545. While the prosecutor referred to the touch as "rubbing," 3/27/12RP 545-56, M.L.'s demonstration shows one quick swipe of the hand across her chest. Ex. 4 at 11:51:32, 11:53:08, 11:53:49, 11:54:15.[4] M.L. said Mr. Carr never said anything to her and did not make any sounds. Ex. 3 at 9, 11. This evidence does not prove that Mr. Carr had sexual contact with M.L. for purposes of the child molestation statute.

As mentioned above, "sexual contact" is "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party of a third party." RCW 9A.44.010(2). An inference that touching of a child's sexual or intimate parts by an adult was for the purpose of sexual gratification arises when the adult is not related to the child and is not performing a caretaking function. State v Powell, 62 Wn. App. 914, 917, 816 P.2d 86 (1991), rev. denied, 118 Wn.2d 1013 (1992). However, when the touching is over the child's clothing or not in a primary erogenous area, additional evidence of sexual gratification is required. Id. (and cases cited therein).

> Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touching was for sexual gratification. However, in those cases in which the evidence shows touching through clothing, or touching of intimate parts of

[4] This Court can easily view M.L.'s demonstration of the swipe of a hand across her chest on the CD of the child interview specialist's interview of M.L., Ex. 4.

> the body other than the primary erogenous areas, the courts have required some additional evidence of sexual gratification.

Id. (Internal citations, footnote omitted).

In Powell, a man visiting a child's home was lifting the child off his lap when he placed his hand on the "'front' and bottom of her underpanties under her skirt." 62 Wn. App. at 916. Another time he touched her thighs outside all of her clothing. Id. This Court concluded the State was unable to prove sexual gratification and reversed the conviction for first degree child molestation, noting the first touch was "fleeting" and both were outside the girl's clothing . Id. at 918. Mr. Carr's case involves even less contact than in Powell, as he swiped his hand one time across M.L.'s chest. The touch was over M.L.'s clothing and lasted only a second.

Cases upholding convictions for child molestation for contact on clothing also demonstrate that the evidence necessary to prove the purpose of sexual gratification is not present in Mr. Carr's case. In Harstad this Court addressed convictions for molesting two sisters occurring when the defendant was residing in their mother's home. State v. Harstad, 153 Wn. App. 10, 15-16, 218 P.3d 624 (2009). The defendant moved his hands around one child's "private area" while they were under a blanket on the couch, and he was "breathing hard" while he touched her. The child also

described the defendant apparently masturbating in the kitchen and said he asked to see her "pussy." Id. at 19-20. This Court upheld the child molestation conviction even though there was no evidence Harstad touched the child under her clothing. "While the evidence does not show that Harstad touched [the child] under her clothing, Harstad's moving his hand back and forth and his heavy breathing, 'like a whole bunch,' support an inference of sexual purpose to satisfy the sexual contact element of first degree child molestation." Id. at 22-23.

The defendant also rubbed the other girl's inner thigh very close to her vagina while she was wearing underwear. This evidence was supplemented by her statements that she saw the defendant play with his penis, he wanted her to touch his penis, and he asked to see her "pussy." Harstad, 153 Wn. App. at 16, 18 19. This Court concluded the evidence also supported the jury's conclusion that the touching was intended to promote his sexual gratification. Id. at 22.

A juvenile defendant touched a girl on the school bus by reaching over the seat and touching her private area three times in State v. Whisenhunt, 96 Wn. App. 18, 19-20, 980 P.2d 232 (1999). The touching was under her skirt but over her body suit, but Division Three found the contact was not equivocal or fleeting and the finding of sexual gratification was supported by the evidence. Id. at 24. See also State v.

Young, 123 Wn. App. 854, 99 P.3d 1244 (2004) (attempted child molestation conviction affirmed when defendant put his hand underneath child's pants to try to feel her buttocks, repeatedly tried to place money in her belt, told her "you know what you have to do for it," and tried to undo her belt), aff'd 160 Wn.2d 799, 161 P.3d 967 (2007); State v. Price, 127 Wn. App. 193, 196-97, 110 P.3d 1171 (2005) (pinching a 4-year-old's vagina on the outside of her clothing was not fleeting or inadvertent when it caused redness and swelling), aff'd, 158 Wn.2d 630, 146 P.3d 1183 (2006).

c. Mr. Carr's child molestation conviction must be reversed. The State presented evidence of a one-second touching in a public place outside M.L.'s clothing. This evidence does not prove beyond a reasonable doubt that his action was intentional, let alone sexually motivated. The only other evidence presented by the State was that, after the incident, Mr. Carr shopped at the Deseret Industries store at the same time as M.L.'s family and, on one occasion, he observed the family after they had an unusual reaction to him. This evidence does not provide the additional support needed to prove Mr. Carr acted with the purpose of sexual gratification. Evidence of the incident with K.W. was not properly admitted in this case, see Argument 4 below, but it also does not support the element of sexual gratification. Mr. Carr's first degree child

molestation conviction must be reversed and dismissed. Powell, 62 Wn. App. at 918.

2. **Mr. Carr's conviction for communicating with a minor for immoral purposes must be dismissed because the State did not prove beyond a reasonable doubt the communication was for an immoral sexual purpose.**

Mr. Carr was convicted of communicating with a minor for immoral purposes. The State produced evidence that Mr. Carr asked K.W. if she liked an item of clothing he was examining in a retail store and that K.W. later noticed Mr. Carr in the store with his pants part-way down revealing his under garment. The communicating statute prohibits communication with a minor "with the predatory purpose of promoting their exposure to and involvement in sexual misconduct." RCW 9.68A.090(1); State v. McNallie, 120 Wn.2d 925, 933, 846 P.2d 1358 (1993). In the absence of proof that Mr. Carr's conduct was not designed to involve K.W. in sexual misconduct, his conviction for communicating with a minor for immoral purposes must be reversed and dismissed.

a. The State was required to prove Mr. Carr communicated with K.W. for immoral purposes of a sexual nature. Mr. Carr was convicted of communicating with a minor for immoral purposes, RCW 9.68A.090. CP 48, 69. The statute reads in relevant part:

> . . . [A] person who communicates with a minor for immoral purposes, or a person who communicates with

> someone the person believes to be a minor for immoral purposes, is guilty of a gross misdemeanor.

RCW 9.68A.090(1). The purpose of RCW Chapter 9.68A is to prevent the sexual exploitation and abuse of children. RCW 9.68A.001.

The terms "immoral purposes" and "communicate" are not defined by statute. RCW 9.68A.011, .090. Washington courts, however, have found the statute is limited to "communication for the purpose of sexual misconduct." State v. Schimmelpfennig, 92 Wn.2d 95, 594 P.2d 442 (1979); accord McNallie, 120 Wn.2d at 933 ("the statute prohibits communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct."); State v. Jackman, 156 Wn.2d 736, 132 P.3d 136 (2006) (a defendant communicates with a minor under RCW 9.68A.090 if he or she invites or induces the minor to engage in prohibited conduct.") (emphasis in original). The statute does not apply to communication about sexual conduct that would be legal. State v. Luther, 65 Wn. App. 424, 830 P.2d 674 (1992).

Communication "denotes both a course of conduct and the spoken word." Schimmelpfennig, 92 Wn.2d at 103; accord State v. Hosier, 157 Wn.2d 1, 11, 133 P.3d 936 (2006). Thus, the elements of communicating with a minor for immoral purposes are that the defendant (1) communicate by words or conduct (2) to a minor (3) to promote the minor's exposure to

or involvement in sexual misconduct. Hosier, 157 Wn.2d at 9; McNallie, 120 Wn.2d at 933. Mr. Carr's conviction may only be upheld if, viewing the evidence in the light most favorable to the State, a rational tier of fact would have found these elements beyond a reasonable doubt. Jackson, 443 U.S. at 334; Hosier, 157 Wn.2d at 8.

b. The State did not prove beyond a reasonable doubt Mr. Carr communicated with K.W. for an immoral purpose. K.W. was shopping with her mother at Goodwill when she saw Mr. Carr in the girls clothing section. 3/28/12 RP 689. He showed her a leotard he was looking at and asked if she liked it, added that he did. 3/28/12 RP 654, 690-91; 4/2/12 RP 61-62; Ex. 6 at 11.[5] K.W. then walked away. When she saw Mr. Carr about five minutes later, his pants were part way down and he was scratching "his butt." 3/28/12 RP 694-95, 698, 706; Ex. 6 at 12. K.W. saw pink underwear for a few seconds. 3/29/12 RP 701, 706; Ex. 6 at 12-13. K.W. could not say that Mr. Carr was even looking at her when this occurred. 3/29/12 RP 696-97, 708. Mr. Carr explained that he was adjusting the pink swimming suit he was wearing underneath his clothing and was unaware that anyone could see him. 4/2/12 RP 30, 65-68, 100.

[5] K.W.'s interview with the prosecutor's child interview specialist was admitted as Exhibit 5. The transcript of the interview DVD was marked as Exhibit 6, and is referenced here for this Court's convenience.

Mr. Carr's words and actions do not prove he was communicating for "immoral purposes of a sexual nature." CP 63. Asking K.W. if she liked a swim suit or leotard that was for sale does not demonstrate any immoral purpose. Nor does standing in the store with his undergarment partially exposed for a few seconds.

Cases addressing the communication statute are instructive. The Washington Supreme Court upheld the statute from a vagueness challenge in Schimmelpfennig by limiting the statute's coverage to communication with a minor concerning sexual misconduct. Schimmelpfennig, 92 Wn.2d 101-04. In that case the defendant attempted to lure a 4-year-girl into his van and asked her "in explicit terms to engage in various sexual acts with him." Id. at 97.

After the communicating statute was placed in a different section of the criminal code, the court reiterated that the statute prohibited communication with a minor for the purpose of "promoting their exposure to and involvement in sexual misconduct." McNallie, 120 Wn.2d at 933. McNallie accosted three girls, ages 10 and 11, as they were walking home from school and asked if anyone in the neighborhood that gave "hand jobs," demonstrating by touching his own penis. Id. at 926-28. He told the girls that people made money for performing "hand jobs" and offered one of them money to do so. Id. at 928.

The Court also found there was sufficient evidence to support a conviction for communicating with a minor for immoral purposes where the defendant wrote messages fantasizing about sexual contact with a 7-year-old girl on girls' underpants and placed them on a fence at children's eye level at a day care center's playgrounds, where they were found by children between the ages of 3 and 5. Hosier, 157 Wn.2d at 4-5. He also wrote sexually explicit notes that were found in front yard of house where a 13-year-old girl resided. Id. at 5-6. See also C.J.C. v. Corp. of the Catholic Bishop of Yakima, 138 Wn.2d 699, 705, 715-16, 985 P.2d 262 (1999) (conduct of priests who fondled and masturbated 15-to-16-year-old boy fell within indecent liberties statutes in effect at time); State v. Pietrzak, 100 Wn. App. 291, 293-94, 997 P.2d 947 (2000) (defendant observed and photographed his nude 16-year-old niece and had sexual intercourse with her as a "quid pro quo for housing, food, beer and money").

Each of these cases involves communication concerning sexual conduct. Mr. Carr, however, did not invite or induce K.W. to participate in sexual misconduct. K.W. briefly saw a portion of the swimming suit Mr. Carr was wearing underneath his clothing. He did not exposure his genitalia, and it is not illegal to inadvertently show your underwear in public. See RCW 9A.88.010 (person guilty of indecent exposure if he

"intentionally makes any open and obscene exposure" of his person); State v. Vars, 157 Wn. App. 482, 490-91, 237 P.3d 378 (2010) (indecent exposure requires exposure of male genitalia). The State did not prove beyond a reasonable doubt that Mr. Carr's communication was of a immoral sexual purpose.

The State also failed to prove Mr. Carr acted intentionally. Mr. Carr said he was trying to adjust his swimsuit and was unaware anyone could see him. Communicating with someone requires an intentional transmission of information. See Hosier, 157 Wn.2d at 8-9 ("communication" requires both transmission and receipt of information); Webster's Third New International Dictionary of the English Language (Unabridged) at 460 (Miriam Webster 1993) ("communicate" means "to make known: inform a person of: convey knowledge or information" or "to impart or transmit."). To commit this offense, the defendant must invite or induce a minor to engage in prohibited sexual conduct. Jackman, 156 Wn.2d at 748. There is no evidence Mr. Carr intended to communicate anything when he briefly adjusted his swim suit in the Goodwill aisle, and the State failed to prove beyond a reasonable doubt that he invited or induced K.W. to engage in sexual misconduct.

If K.W. had attended a triathlon or diving competition, she would have seen more of the male anatomy than when she saw a portion of the

swimsuit Mr. Carr wore under his clothing. It would also be possible for her to see young men's underwear walking down the streets of many urban neighborhoods. The color of the swimsuit, while relevant to identity, does not prove an intent to encourage or engage children in sexual misconduct. Men can be seen wearing hot pink at golf tournaments, soccer games, or in their daily life. The State did not prove beyond a reasonable doubt that Mr. Carr communicated with K.W. for an immoral sexual purpose.

c. Mr. Carr's conviction must be dismissed. Viewing the evidence in the light most favorable to the prosecution, the State did not prove beyond a reasonable doubt that Mr. Carr communicated with K.W. for a sexual and immoral purpose. His conviction for communicating with a minor for immoral purposes must therefore be reversed and dismissed. See State v. Homan, 172 Wn. App.488, 492-93, 290 P.3d 1041 (2012) (reversing and dismissing luring conviction due to insufficient evidence).

3. **The communicating with a minor for immoral purposes statute is unconstitutionally vague as applied to Mr. Carr's conduct.**

If this Court does not reverse Mr. Carr's communication with a minor for immoral purposes conviction based upon the lack of sufficient evidence to convict him, it must also address whether the statute is unconstitutionally vague as applied to his conduct.

a. A statute is constitutionally vague if it does not provide adequate notice of what conduct is proscribed or allows for arbitrary enforcement. Due process requires that citizens be given fair warning of what conduct is illegal and that criminal statutes be carefully drawn to avoid arbitrary enforcement. U.S. Const. amend. XIV; Const. art. I, §§ 3, 22; Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). A criminal statute is void for vagueness if either:

> (1) the statute does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed or (2) the statute does not provide ascertainable standards of guilt to protect against arbitrary enforcement.

State v. Williams, 144 Wn.2d 197, 203, 26 P.3d 890 (2001) (internal quotation marks omitted) (quoting City of Bellevue v. Lorang, 140 Wn.2d 19, 30, 992 P.2d 496 (2000)). Courts are especially cautious in interpreting statutes that implicate First Amendment interests. Williams, 144 Wn.2d at 204 (quoting Lorang, 140 Wn.2d at 31).

b. The communicating with a minor for immoral purposes statute is unconstitutionally vague as applied to Mr. Carr's conduct.. This Court reviews the constitutionality of a statute de novo. City of Spokane v. Neff, 152 Wn.2d 85, 88, 93 P.3d 158 (2004). The Supreme Court upheld prior versions of the communication with a minor for immoral purposes from vagueness challenges by interpreting "immoral purposes" to mean "the

predatory purpose of promoting children's exposure to and involvement in sexual misconduct." McNallie, 120 Wn.2d at 931-32; see Schimmelpfennig, 92 Wn.2d at 102. Similarly, Division Three determined the statute was ambiguous and construed it to exclude communication about legal sexual conduct. Luther, 65 Wn. App. at 427-28.

The jury was instructed that an essential element of the crime of communicating with a minor for immoral purposes was that the defendant communicated with K.W. for "immoral purposes of a sexual nature." CP 61, 63. Confused, the jury asked the judge to define "immoral purpose of a sexual nature." SuppCP __ (Clerk's Minutes, sub no. 111A, at page 23) (hereafter Minutes). The court declined to further define the term and told the jury it could not refer to a dictionary for guidance. 4/4/12 RP 2; Minutes at 24. The jury's search for a definition of "immoral purposes of a sexual nature" demonstrates the vagueness of the term when applied to Mr. Carr's case.

Ordinary people must be able to "understand what is allowed and not allowed." State v. Valencia, 169 Wn.2d 782, 791, 785, 239 P.3d 1059 (2010). Thus, a statute outlawing telephone calls made with the intent to disturb another person "without purpose of legitimate communication" was so highly subjective that it failed to provide the standards for citizens

or law enforcement required by due process. Lorang, 140 Wn.2d at 30. Similarly, a harassment statute outlawing threats to harm another person's physical or "mental health" was unconstitutionally vague because it failed to provide a definition of "mental health." Williams, 144 Wn.2d at 204-06.

The Schimmelpfennig Court held that "any person of common understanding" would understand that it is illegal to ask a small child to climb into a van and engage in sexual activities. Schimmelpfennig, 92 Wn.2d at 102-03. Similarly, this Court found the average person knows that observing and photographing a nude 16-year-old for sexual stimulation is proscribed by the communication statute. Pietrzak, 100 Wn. App. at 295-96. Mr. Carr's conduct, however, is not clearly illegal.

The average person knows that it is illegal to openly and obscenely expose male genitalia to the public. RCW 9A.88.010(1); State v. Galbreath, 69 Wn.2d 664, 669, 419 P.2d 800 (1966). An ordinary person, however, would not expect that briefly exposing their underwear in public is a criminal offense. The prosecutor argued that Mr. Carr was guilty of communicating with a minor for immoral purposes because he "exposed himself" to K.W. 4/3/12 RP 18 (incorrectly arguing Mr. Carr pulled down his pants "so that his genitals were exposed."), 42 (pulling pants down means Mr. Carr "exposed himself" to K.W.). According to the prosecutor,

Mr. Carr could show his swimsuit at the beach, but not in a retail store. 4/3/12 RP 42. Based upon this argument and the language of the statue, the jury incorrectly concluded that Mr. Carr was guilty of communicating with a minor for an immoral purpose.

The facts of this case also show the communication statue's language is susceptible to arbitrary enforcement. As in Lorang, the term "immoral purposes," provides law enforcement with "no guide beyond the subjective impressions of the person responding to a citizen complaint." Lorang, 140 Wn.2d 311; accord Neff, 152 Wn.2d at 91 (Spokane prostitution loitering statute lacked standards for enforcement in the absence of a definition of "known prostitute.").

In a free society, people have widely divergent views of what is moral or immoral. By outlawing any form of communication for an "immoral purpose," even when that language is tempered with the limitation that the purpose be of a "sexual nature," the communication statute is too subjective. The communication statute is not definite enough to inform ordinary people of what conduct is prohibited and lacks the standards necessary to prevent arbitrary enforcement, and it is thus unconstitutionally vague.

c. Mr. Carr's conviction for communicating with a minor for immoral purposes must be dismissed. Mr. Carr was convicted under a

statute that was unconstitutionally vague. His conviction must therefore be reversed and dismissed. Luther, 65 Wn. App. at 428.

4. **Mr. Carr did not receive the effective assistance of counsel guaranteed by the federal and state constitutions.**

Mr. Carr's trial attorney moved to sever the two charged counts for trial, but waived the issue by failing to renew the severance motion before or at the close of the evidence. At that point, the motion would have been granted because it was then clear that the evidence of each count was not admissible in the trial of the other, and Mr. Carr developed an alibi defense when the date of the first offense was narrowed down as a result of witness testimony. Mr. Carr's counsel was ineffective, and his convictions must be reversed.

a. Mr. Carr had the constitutional right to effective assistance of counsel. A criminal defendant has the constitutional right to the assistance of counsel. U.S. Const. amends. VI, XIV; Const. art. I, § 22; State v. A.N.J., 168 Wn.2d 91, 96-97, 225 P.3d 956 (2010). Counsel's critical role in the adversarial system protects the defendant's fundamental right to a fair trial. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); United States v. Cronic, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984); "The very premise of our adversary system of criminal justice is that partisan advocacy on both

sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Cronic, 488 U.S. at 655 (quoting Herring v. New York, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975)). The right to counsel therefore necessarily includes the right to effective assistance of counsel. Kimmelman v. Morrison, 477 U.S. 365, 377, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); A.N.J., 168 Wn.2d at 98; see State v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987) ("The purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial.").

When reviewing a claim that trial counsel was not effective, appellate courts utilize the two-part test announced in Strickland. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009); Thomas, 109 Wn.2d at 226. Under Strickland, the appellate court must determine (1) if defense counsel's performance fell below objective standards of reasonable representation, and, if so, (2) whether counsel's deficient performance prejudice the defendant. Strickland, 466 U.S. at 687-88; Sutherby, 165 Wn.2d at 883. Ineffective assistance of counsel is a mixed question of law and fact reviewed de novo. Strickland, 466 U.S. at 698; Sutherby, 165 Wn.2d at 883.

While an attorney's tactical decisions are treated with deference, a decision is not tactical if it is not reasonable. Roe v. Flores-Ortega, 528

U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000); see also Wiggins v. Smith, 539 U.S. 510, 533, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) ("[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms" (quoting Strickland, 466 U.S. at 688)); Sutherby, 165 Wn.2d at 884 (no legitimate tactical reason not to raise severance motion); State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (no tactical reason not to bring meritorious suppression motion); State v. Powell, 150 Wn. App. 139, 155, 206 P.3d 703 (2009) (no tactical reason for counsel to fail to request instruction on affirmative defense that was consistent with the facts and the defense theory of the case).

b. Defense counsel moved to sever the two counts for trial but waived the issue by failing to renew the motion. The prosecutor may charge two or more offenses in the same charging document if they are based upon the same conduct or if they are of a "similar character." CrR 4.3(a). When the defendant moves to have charges severed for trial, the motion must be granted if the court determines severance "will promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b).

"Severance of charges is important when there is a risk that the jury will use the evidence of one crime to infer the defendant's guilt for

another crime or to infer a general criminal disposition." Sutherby, 165 Wn.2d at 883 (citing State v. Russell, 125 Wn.2d 24, 62-63, 882 P.2d 747 (1994), cert denied, 514 U.S. 1129 (1995)). Severance is required (1) when trying counts together will embarrass or confound the defendant in presenting separate defenses, (2) so that the jury will not cumulate the evidence of charged offenses to finds guilt when it would not do so if the counts were considered separately, and (3) to avoid the prejudice that arises by the charging of several crimes. State v. Harris, 36 Wn. App. 746, 750, 677 P.2d 202 (1984) (quoting Drew v. United States, 331 F.2d 85, 88 (D.C.Cir. 1964)).

At the beginning of trial, Mr. Carr's attorney filed a motion to sever Counts 1 and 2, arguing the evidence on Count 1 was substantially stronger than the evidence of Count 2, there was a danger the jury would use evidence of both incidents to infer a criminal disposition, and evidence of the two counts were not cross-admissible. CP 22-25; 3/13/12 RP 3-4. The trial court, however, denied the motion. The court first found that ER 404(b) did not prevent the use of the evidence of one count in determining guilt or innocence of the other count because each incident was relevant to prove motive, intent or common scheme or plan. 3/15/12 RP 4-5. The court then denied Mr. Carr's severance motion, finding that, with the inclusion of the ER 404(b) evidence, the evidence of each count was

strong; the evidence of each count was admissible in the trial of the other; and the court would give a limiting instruction if requested. 3/15/12 RP 5.

Trial counsel never renewed his motion to sever the counts, thus waiving the issue.[6] CrR 4.4(a)(2) (severance waived if not renewed "before or at the close of all the evidence"); State v. McDaniel, 155 Wn. App. 829, 859, 230 P.3d 245, rev. denied, 169 Wn.2d 1027 (2010). Counsel's failure to renew the motion to sever was ineffective.

c. Defense counsel's performance was deficient. The first prong of the Strickland test requires the appellant to show his lawyer's representation fell below an objective standard of reasonableness. Sutherby, 165 Wn.2d at 883. Defense counsel is expected to investigate both the facts and the law of the case. A.N.J., 168 Wn.2d at 110-11 (counsel must investigate facts); Thomas, 109 Wn.2d at 226-31 (counsel ineffective for failing to investigate applicable jury instructions or qualifications of defense expert witness). Defense counsel is reasonably expected to be familiar with the Rules of Criminal Procedure and note the waiver provisions of CrR 4.4(a) when preparing a motion to sever counts.

In Sutherby, defense counsel did not move to sever charges of possession of child pornography from charges of child rape and

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[6] Counsel also arguably waived the issue by not raising it pre-trial. CrR 4.4(a)(1); Harris, 36 Wn. App. 746 at 748-49 (severance motion made on the morning of trial untimely).

molestation even though the court mentioned the possibility of a severance motion at a pretrial hearing. Sutherby, 165 Wn.2d at 876. The Supreme Court found there was no possible legitimate or tactical reason not to raise a severance motion because trying the cases together would not benefit the defense, especially in light of the prosecutor's intent to use the pornography counts to show a predisposition to molest children. Id. at 884.

Here, having raised the severance motion once, there was no possible tactical reason not to renew it at the close of the evidence. At that point, the court had a much more detailed understanding of the evidence than could be gleaned from the parties' trial memos. In addition, the evidence presented at trial changed Mr. Carr's defenses. Prior to trial, defense counsel announced Mr. Carr's defense was general denial, but he noted the possibility of an alibi defense for Count 1 if the witnesses could determine the date of the alleged offense. 3/13/12 RP 6. The evidence produced at trial did narrow the possible dates, as Mrs. Lopez testified she was certain it happened on a Saturday between 11:30 and 12:00, and Mr. Carr had alibis for the two possible Saturdays at that time. There was no tactical reason not to renew the severance motion when these changes because apparent.

d. Mr. Carr was prejudiced by his attorney's deficient performance because there is a reasonable possibility a renewed motion to sever would have been granted. The second prong of the Strickland test requires the defendant to show he was prejudiced by his counsel's deficient performance. Sutherby, 165 Wn.2d at 883. When the defendant alleges deficient performance for failing to raise a severance motion, he must show the motion likely would have been granted and that, had it been granted, there is a reasonable probability the jury would not have found him guilty beyond a reasonable doubt. Id. at 884.

When deciding a motion to sever criminal counts for trial, the court considers:

> (1) the strength of the State's evidence on each count, (2) the clarity of the defenses as to each count, (3) court instructions to the jury to consider each count separately, and (4) the admissibility of evidence of the other charges even if not joined for trial.

Sutherby, 165 Wn.2d at 884 (quoting Russell, 125 Wn.2d at 63).

i. *Factor One – Strength of the State's Evidence on Each Count.* As argued in Arguments 1 and 2, the evidence supporting each charge was not particularly strong. See Arguments 1, 2 above. M.L. testified Mr. Carr briefly swiped the front of her chest above her clothing. V.W. said a man asked her if she liked a leotard and she later saw his underwear when his pants came part way down, but she did not identify

Mr. Carr as that man. The State thus had little evidence of sexual gratification for Count 1 or evidence of an immoral purpose of a sexual nature for Count 2.

ii. *Factor Two- Clarity of the Defenses*.. Mr. Carr had different defenses to each count. He proved he was working at the time and possible dates someone touched M.L.'s chest, although he was in the store on other dates the Lopez family was in the Deseret Industries store. 4/2/12 RP 8, 13. In contrast, Mr. Carr acknowledged that he was the person K.W. saw in the Goodwill store, but provided an innocent explanation for why his underwear was briefly exposed to her view. 4/2/12 RP 13, 18, 21-22.

Trying the two counts together gave the prosecutor the opportunity to use Mr. Carr's habit of wearing a woman's swimsuit to prejudice the jury against him, arguing he was secretive and had an interest in girls that he kept from his family and friends. 4/2/12 RP 76-79, 85-86; 4/3/12 RP 19-20. She also discredited both of Mr. Carr's defenses by asking him on cross-examination if each incident was just a "big misunderstanding." 4/2/12 RP 81-82. And she was able to impeach Mr. Carr's testimony concerning only the second incident with his responses to police interrogation. 4/2/12 RP 72, 92-100, 103-04. Mr. Carr's ability to present his defense was thus prejudiced by the joinder of the two counts.

iii. *Factor Three- Court Instructions to Consider Each Count Separately*. The trial court gave the pattern instruction telling the jury to consider each count separately. CP 67. The prosecutor, however, argued that the two charges showed a pattern of behavior that demonstrated the sexual gratification element of Count 1 and the immoral purpose element of Count 2. 4/3/12 RP 3-9, 42-44.

The Sutherby Court found the same instruction was not sufficient when the prosecutor urged the jury to use evidence from one crime, possession of child pornography, to prove the other charges of child molestation. Sutherby, 165 Wn.2d at 885-86, 885 n.6. And, as in Sutherby, defense counsel did not propose a more specific instruction informing the jury that evidence of one crime could not be used to decide guilt in the other. Id. at 886. The court's instruction was inadequate in this circumstance.

iv. *Factor Four – Admissibility of Evidence of Other Charges even if not Joined for Trial*. ER 404(b) prohibits the use of other acts or misconduct to prove the character of the defendant in order to show he acted in conformity with that character. Sutherby, 165 Wn.2d at 886; State v. Fisher, 165 Wn.2d 727, 744, 202 P.3d 937 (2009); State v. Everybodytalksabout, 145 Wn.2d 456, 464, 39 P.3d 294 (2002); State v. Smith, 106 Wn.2d 772, 775, 725 P.2d 951 (1986).

Evidence of prior misconduct may not be used to demonstrate the defendant is a dangerous person or the type of person who would commit the charged offense. Everybodytalksabout, 145 Wn.2d at 466. The rule permits evidence of other misconduct only when relevant to prove an ingredient of the offense charged.[7]

In determining if evidence of prior misconduct is admissible under ER 404(b), the trial court must

> (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purposes for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, (4) weigh the probative value against the prejudicial effect.

Fisher, 165 Wn.2d at 745. In doubtful cases, the evidence should be excluded. Sutherby, 165 Wn.2d at 886-87.

ER 404(b) is read in connection with ER 402 and 403, which prohibit the introduction of evidence which is not relevant or is unfairly prejudicial. Fisher, 165 Wn.2d at 745; Smith, 106 Wn.2d at 775-76. Even otherwise relevant evidence should be excluded if it is highly prejudicial.

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[7] ER 404(b) reads:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of the person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Smith, 106 Wn.2d at 776; Sutherby, 165 Wn.2d at 886-87. This is especially true in cases involving sexual offenses. Sutherby, 165 Wn.2d at 886 (citing Coe, 101 Wn.2d at 780-81); Smith, 106 Wn.2d at 776. Noting the "inflammatory nature of the crimes," the Sutherby Court held that evidence of the defendant's possession of child pornography would not have been admissible in a separate trial for child molestation and rape, and that the molestation and rape offenses would not be admissible in a trial for child pornography. Id. at 887.

Other misconduct may be admitted for a purpose other than propensity. ER 404(b); State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). Here, the trial court held that the facts of the child molestation and communicating with a minor for immoral purposes charges were cross-admissible to show motive, intent, and common scheme or plan.

Two incidents are not part of a common scheme or plan if they "are merely similar in nature." Harris, 36 Wn. App. at 751. Evidence of other offenses may only be admitted to show a common scheme or plan when (1) several crimes "constitute constituent parts of a plan in which each crime is but a piece of the larger plan" or (2) "an individual devises a plan and uses it repeatedly to perpetrate separate but similar crimes."

Gresham, 173 Wn.2d at 422 (quoting State v. Lough, 125 Wn.2d 847, 854-55, 889 P.2d 487 (1995)).

The State claimed the evidence of each count in Mr. Carr's case fit the second category because the two charged offenses were remarkably similar and showed his plan "for stalking young girls in public and groping them if he can get close enough." SuppCP __ (State's Trial Memo, sub. no. 110, 3/13/13 at 24). The court agreed with the State's analysis. 3/15/12 RP 4. The evidence, however, was not admissible.

The facts of each count do not establish an overarching plan to grope young girls. The first count involved a one-second grazing touch outside a girl's clothing. The brief nature of this touch is more indicative of an inadvertent touch rather than a plan to grope young girls. Mr. Carr did not touch K.W. in the second incident, and the brief time during which his underwear was exposed to her view does not demonstrate a plan to grope young girls. The fact that each occurred in a thrift store also does not show a common plan, as Mr. Carr was a man of limited means and understandably shopped at thrift stores near his home.

The Gresham Court found prior sexual misconduct was admissible as evidence of a common scheme of plan where the prior incidents and the charged offense were all similar. Each involved a young female relative who was traveling with or visiting the defendant and his wife. Each time

the defendant went to where the child was sleeping in the middle of the night, got into bed with her, and engaged in some form of sexual contact. Gresham, 173 Wn.2d at 414-15, 419. In Lough, evidence that the defendant drugged and raped four other women was admissible as evidence of a common scheme or plan at his trial for attempted second degree rape, indecent liberties, and burglary when he drugged a woman he was dating in her home and she awoke to find herself nude from the waist down. Lough, 135 Wn.2d at 849-52.

Here, in contrast, briefly touching a girl's chest is different from momentarily exposing one's underwear, and it is not clear that either incident involves sexual misconduct or even purposeful conduct. The two acts are not so similar that they are naturally explained as "an individual manifestation of a general plan" and thus were not admissible against each other.

The trial court also determined each incident was cross-admissible to show motive or intent. 3/15/12 RP 4. Neither crime has an intent element. For count 1, the jury had to find that the sexual contact was for purposes of sexual gratification, and for Count 2 the jury had to decide if Mr. Carr communicated for an immoral purpose of a sexual nature. In each case, however, there is no evidence of a sexual purpose. Instead, this

evidence came only as an inference from the conduct charged in the other count.

Finally, the use of evidence of each count in the trial of the other counts was more prejudicial than probative. ER 403. The evidence that Mr. Carr was wearing a hot pink women's swim suit under his clothing and that M.W. thought she saw him in a sparkly bikini bottom was too inflammatory to be admitted in his trial for child molestation.

In addition, the jury could use the two counts to prove Mr. Carr's propensity to commit offenses against children. The Harris Court addressed two rapes that had similar features and occurred within weeks of each other. The court found the two counts should not have been tried together because rather than a common scheme or plan they instead showed propensity. Harris, 36 Wn. App. at 747-48, 751.

"In cases where admissibility is a close call, 'the scale should be tipped in favor of the defendant and exclusion of the evidence.'" Sutherby, 165 Wn.2d at 886-87 (quoting Smith, 106 Wn.2d at 776). The evidence of each count in this case should not have been admitted to prove the other count. Had defense counsel renewed his motion to sever after the close of the evidence, it likely would have been granted.

e. Mr. Carr was prejudiced by his attorney's deficient performance because, had severance been granted, there is a reasonable possibility the jury would not have found him guilty of the two crimes beyond a reasonable doubt. Apart from the inflammatory evidence of Count 2, the State had no evidence to show that Mr. Carr acted for the purposes of sexual gratification when his hand briefly grazed M.L.'s breast. Similarly, apart from the evidence supporting the child molestation charge, the State had no evidence that Mr. Carr acted with an immoral purpose of a sexual nature when K.W. saw his undergarment.

There is a reasonable probability that, if counsel had renewed the severance motion, it would have been granted and the outcome of separate jury trials would have been different. Mr. Carr's convictions for child molestation and communication with a minor for immoral purposes must be reversed and remanded for separate trials. Sutherby, 165 Wn.2d at 887-88; Harris, 36 Wn. App. at 752.

5. **Prosecutorial misconduct in closing argument denied Mr. Carr a fair trial.**

The prosecutor misstated the State's burden of proof beyond a reasonable doubt in closing argument, informing the jury it only had to believe M.L. and K.W. to convict Mr. Carr. The prosecutor also used language to describe Mr. Carr's conduct that misrepresented the facts of

the case and made arguments that appealed to their fears and prejudices about sex offenders. This misconduct was so flagrant and ill-intentioned that Mr. Carr's convictions must be reversed despite the lack of an objection.

a. Misconduct by the prosecutor may violate a defendant's constitutional right to a fair trial. A criminal defendant's right to due process of law protects the right to a fair trial. U.S. Const. amend. XIV; Const. art. I, §§ 3, 22. The prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based on reason. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935); State v. Reed, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984). Washington courts have long emphasized the prosecutor's obligation to ensure the defendant receives a fair trial and the resulting need for decorum in closing argument. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); Reed, 102 Wn.2d at 146-49 (and cases cited therein); State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978). When a prosecutor commits misconduct in closing argument, the defendant's constitutional rights to due process and a fair trial may be violated. Monday, 171 Wn.2d at 676; Charlton, 90 Wn.2d at 664-65.

To determine if a prosecutor's comments or argument constitute misconduct, the reviewing court must first decide if the comments were

improper and, if so, whether a "substantial likelihood" exits that the comments affected the jury verdict. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Where the defendant does not object to the improper argument, the reviewing court may still reverse the conviction if the misconduct is so flagrant and ill-intentioned that the resulting prejudice would not have been cured with a limiting instruction. Id. at 760-61.

b. The prosecutor committed misconduct by misstating the State's burden of proof beyond a reasonable doubt. The due process clause of the Fourteenth Amendment protects the right of every criminal defendant to a fair trial before an impartial jury. U.S. Const. amends. V, VI, XIV; Cont. art. 1 §§ 3, 21, 22. The requirement that the government prove every element of the charged offenses beyond a reasonable doubt has consistently played an instrumental role, along with the right to a jury trial, in protecting the integrity of the American criminal justice system. Blakely v. Washington, 542 U.S. 296, 301-02, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2000); Apprendi, 530 U.S. at 476-77; State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977).

> The standard provides concrete substance for the presumption of innocence – that bedrock "axiomatic and elementary" principal whose "enforcement lies at the foundation of the administration of our criminal law."

In re Winship, 397 U.S. 358, 363, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

It is therefore misconduct for the prosecutor to argue to the jury in a manner that removes or reduces its high burden of proof of every element of the crime. State v. Warren, 165 Wn.2d 17, 26-27, 195 P.3d 940 (2008), cert. denied, 129 S. Ct. 2007 (2009); accord Emery, 174 Wn.2d at 759-60 (misconduct for prosecutor to shift the burden of proof to the defendant or argue it is jury's job to "declare the truth"). "[I]t is an unassailable principle that the burden is on the State to prove every element and that the defendant is entitled to the benefit of any reasonable doubt. It is error for the State to suggest otherwise." Warren, 165 Wn.2d at 27.

The prosecutor in Mr. Carr's case undermined the burden of proof by arguing that the jury was required to convict Mr. Carr if it believed M.L. and K.W.:

> If, as you sit in that deliberation room, you can say, "I believe M[.] or I believe K[.] that is enough to end your inquiry. That is enough to convict the defendant.

4/3/12 RP 25. Defense counsel did not object, but when the jury was out of the courtroom, the trial court cautioned the prosecutor that the argument was improper. 4/3/12 RP 39-40. The court pointed out that even when the trier of fact believes one side or the other, it could still have reasonable doubt that the State had met its burden of proof. Id. at 39. "So it's not all

or nothing, it's [not] if I believe them, then, the case is over. The issue is if the State has proven each element of the crime beyond a reasonable doubt." Id.

The trial court was right. The jury's job is to decide if each element of the crime was proven beyond a reasonable doubt. This determination often involves some evaluation of witness credibility, but that evaluation is does not end the inquiry. The jury could not convict Mr. Carr simply because it believed the two girls – it had to determine if each element of each crime was proven beyond a reasonable doubt. The prosecutor's argument was improper misconduct.

c. The prosecutor committed misconduct by making inflammatory arguments based upon facts that were not in evidence. A prosecutor may not argue to the jury in a manner that appeals to their passions or prejudices. Monday, 171 Wn.2d at 678; State v. Belgarde, 110 Wn.2d 504, 508-10, 755 P.2d 174 (1988); State v. Perez-Mejia, 134 Wn. App. 907, 915-16, 143 P.3d 838 (2006). While a prosecutor is permitted to argue reasonable inferences from the evidence, she may not misstate the evidence or argue facts not admitted at trial. Fisher, 165 Wn.2d 559 at 507-08; Belgarde, 110 Wn.2d at 507-08; RPC 3.4(e). Here, the prosecutor's argument violated both of these legal principles.

K.W. clearly testified that she saw a man's pink bikini underwear and not any part of his body, and her testimony on that point was consistent with her pre-trial statements. In closing argument, however, the prosecutor stated that Mr. Carr "exposed" himself to K.W. 4/3/12 RP 9, 12, 18, 42. At one point, the prosecutor claimed that K.W. "showed you how he pulled his pants down so that his genitals were exposed." Id. at 18. Later she said that pulling down his pants "means he exposed himself to her" and she assured the jury that evidence that Mr. Carr was "exposing himself" to K.W. meant "he likes little girls." Id. at 24.

In the context of sexual crimes, a man exposes himself when he intentionally exposes his genitals to public view. See RCW 9A.88.010; Vars, 157 Wn. App. at 490-91. Mr. Carr did not expose his genitals, and the facts related by the prosecutor were not in the record. It is not illegal to let one's underwear show in public and doing so does not mean you are sexually attracted to children. The prosecutor's arguments were not based upon the record and were designed to inflame the juror's passions against those who commit sexual offenses against children.

In describing the facts underlying the allegation of child molestation, the prosecutor argued that Mr. Carr "groped" M.L.'s breasts. 4/3/12 RP 4, 9, 42. To "grope" means to feel about blindly or hesitantly with one's hands or to search blindly or uncertainly. In slang, however, it

means sexually fondling another person. Dictionary.com Unabridged;[8] Webster's Third New International Dictionary at 1002. M.L. did not testify that Mr. Carr's touch including fondling for sexual gratification, and instead described a one-second swipe over her clothed chest area. The use of the word "groped" was not supported by the record and was also designed to inflame the juror's fear and hatred of child molesters.

The prosecutor also designed her closing argument to paint Mr. Carr as a frightening pedophile who intentionally trolled the aisles of thrift stores for young girls. She began with a long discussion of what Mr. Carr must have been thinking during the incidents, how exhilarated and excited he must have been, and argued the two incidents and his arrest showed an overall desire to grope and expose himself to girls. 4/3/12 RP 3-9. She even claimed that Mr. Carr, who had a very limited income, may have frequented thrift stores because the customers are low income and might not go to the police and that he chose M.L. because she spoke Spanish and might not be understood. Id. at 3, 6. She ended her rebuttal argument by concluding, "He is the guy that parents warn their kids about. Find him guilty." Id. at 44.

Not only did the prosecutor's language misrepresent the facts presented at trial, it was also inflammatory, part of the prosecutor's design

[8] http://dictionary.reference.com/browse/grope?s=t&path=/ (last viewed 5/16/13).

to show Mr. Carr was a frightening and predatory pedophile. The prosecutor thus improperly used her argument to appeal to the jurors' "fear and repudiation of criminal groups," encouraging a decision based upon their emotions and prejudices rather than the facts of the case. Perez-Mejia, 134 Wn. App. at 916, 920. The prosecutor's appeal to the juror's antipathy for people who molest children and her use of inflammatory language to misrepresent the facts of the case were misconduct.

d. Mr. Carr's conviction should be reversed. Mr. Carr's attorney did not object to the misconduct addressed above. This Court therefore reviews the misconduct in light of the entire record to determine if was so flagrant and ill-intentioned that no objection or instruction could cure the prejudice. Emery, 174 Wn.2d at 760-61.

A curative instruction is not a guarantee that the prejudice caused by prosecutorial misconduct is cured. State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996). A trial court's strongly-worded curative instructions did not cure prejudice caused by the prosecutor's misconduct in a case where the prosecutor mentioned inadmissible bad conduct evidence in closing argument and later assured the jury that probable cause had already been established and the criminal justice system had numerous safeguards to prevent police perjury. State v. Stith, 71 Wn.

App. 14, 21-22, 856 P.2d 415 (1993). This Court found the prejudice was not cured because the comments struck at the heart of the right to a fair trial before an impartial jury. Id. at 23.

The prosecutor's comment that the jury only had to believe M.L. and K.W. to convict Mr. Carr was flagrant and ill-intentioned. The prosecutor was certainly aware of the burden of proof beyond a reasonable doubt. The importance of this concept was addressed by the Washington Supreme Court in Warren, a case which also involved a King County deputy prosecuting attorney.[9] And it was reinforced by a series of Court of Appeals finding misconduct where the prosecutor argued the jury had to state its reason if it had a reasonable doubt about the defendant's guilt, thus shifting the burden of proof to the defendant. See State v. Evans, 163 Wn. App. 635, 543-44, 260 P.3d 934 (2011); State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010), rev. denied, 171 Wn.2d 1013 (2011); State v. Venegas, 155 Wn. App. 507, 534-24, 228 P.3d 813, rev. denied, 170 Wn.2d 1003 (2010); State v. Anderson, 153 Wn. App. 417, 431-32, 220 P.3d 1273 (2009), rev. denied, 170 Wn.2d 1002 (2010). The prosecutor was certainly aware of her burden of proof, but instead urged

[9] Like Warren, the recent ground-breaking Monday decision also involves misconduct by a King County Deputy Prosecuting Attorney. A long-term California study of prosecutorial misconduct concluded that many prosecutors commit misconduct repeatedly and courts need to take a stronger role to stop the cycle of misconduct. Kathleen Ridolfi, Preventable Error: A Report of Prosecutorial Misconduct in California 1997-2002 (Northern California Innocence Project 2010) at 2-5, 17.

the jury to decide the case based upon its view of the complaining witnesses' credibility alone. A jury instruction would not cure the prejudice given the attraction of this form of decision-making to the jurors.

The prosecutor's use of inflammatory language and arguments to misstate the facts of the case and inflame the jurors' fear and hatred of men who sexually abuse children was also flagrant and ill-intentioned. The prosecutor was well-aware of the facts, but used words like "grope" and "expose" to exaggerate them. Especially troubling is her assertion that Mr. Carr intentionally exposed his genitals in a case where the witness clearly testified she only saw his underwear. Given the facts and issues in this case, it would be difficult to cure this problem with a jury instruction, which would redirect the jury's attention to the inflammatory language. The prosecutor's appeal to the prejudice against sex offenders would also be impossible to erase with a curative instruction, as it is difficult to put powerful emotions aside in a case involving children. See Belgarde, 110 Wn.2d at 507-08; Perez-Mejia, 124 Wn. App. at 920.

In addition, the cumulative impact of repetitive prejudicial misconduct may be so flagrant that no instruction can erase the combined prejudicial effect. State v. Case, 49 Wn.2d 66, 73, 298 P.2d 500 (1956); State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011). Mr. Carr was so prejudiced by the cumulative impact of the different instances of

misconduct. The facts of each of these cases leave much room to debate whether Mr. Carr's actions were based upon a gratification of is sexual desires or were innocent. The prosecutor urged the jury to decide the case without determining each element of the crime beyond a reasonable doubt, used inflammatory language that misrepresented the facts of the case, and portrayed Mr. Carr as a secretive sex offender in order to inflame the jurors' fears and prejudices concerning men who abuse young girls. The cumulative impact of this misconduct could not have been cured by repeated instructions. Mr. Carr's conviction must be reversed and remanded for a new trial. Walker, 164 Wn. App. at 738.

F. CONCLUSION

Mr. Carr's convictions for child molestation and communicating with a minor for immoral purposes must be reversed and dismissed because the State did not prove every element of each crime beyond a reasonable doubt and because the communicating with a minor for immoral purposes statute is unconstitutionally vague as applied to Mr. Carr's conduct.

In the alternative, the convictions must be reversed and remanded for separate trials because Mr. Carr's attorney's failure to renew his severance motion violated his constitutional right to effective assistance of counsel. Reversal is also required because Mr. Carr's constitutional right

to a fair trial was violated by prosecutorial misconduct in closing argument.

DATED this 20 day of May 2013.

Respectfully submitted,

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Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 68815-4-I
v.	)	
	)	
PETER CARR,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF MAY, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] PETER CARR 357101 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520-9504	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 20TH DAY OF MAY, 2013.

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