No. 45996-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

EUGENE ANDREW YOUNG,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 12-1-03740-1
The Honorable Ronald Culpepper, Judge

OPENING BRIEF OF APPELLANT

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3. The prosecutor committed misconduct during closing argument when he repeatedly misstated the law of accomplice liability.
4. The prosecutor's misconduct during closing argument deprived Eugene Young of his constitutional right to a fair trial.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the trial court err when it found that text messages sent to a minor were properly authenticated, and when it allowed the State to present text messages in order to establish the crime of communicating with a minor for immoral purposes, where there was no evidence that the sending telephone belonged to or was ever possessed by Eugene Young and where the messages did not contain any unique information indicating

that they were composed and sent by Eugene Young rather than a third party? (Assignment of Error 1)

2. Did the State fail to present sufficient evidence to prove all of the elements of the crime of communicating with a minor for immoral purposes, when there was no evidence to establish that Eugene Young composed and sent the text messages containing the immoral communication? (Assignment of Error 2)

3. Did the prosecutor commit prejudicial misconduct during closing argument when he repeatedly misstated the law of accomplice liability by telling the jury that it could convict Eugene Young as an accomplice to rape if he was "merely present?" (Assignment of Error 3 & 4)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Eugene Andrew Young with one count of rape in the second degree (RCW 9A.44.050); one count of promoting sexual abuse of a minor (RCW 9.68.101); one count of first degree robbery (RCW 9A.56.190, .200); one count of first degree kidnapping (RCW 9A.44.020); and one count of communication with a minor for immoral purposes (RCW 9.68A.090). (CP 33-35)

Young was tried with co-defendant Claude Hutchinson. (CP 1; 1RP 4)[1] A jury found Young guilty of second degree rape, promoting commercial sexual abuse of a minor, attempted second degree theft, and communication with a minor for immoral purposes. (CP 41-46; 9RP 1547-49) The trial court imposed concurrent standard range sentences, with a total term of incarceration of 250 months to life. (03/07/14 RP 17; CP 110) This appeal timely follows. (CP 125)

B. SUBSTANTIVE FACTS

In the Summer of 2012, C.B. was 16 years old, and was rebelling against authority by running away from home, failing to attend school, taking drugs, lying to her parents, and sneaking out of the house to meet boys. (1RP 167-68, 169; 2RP 216, 223; 3RP 465-66) C.B.'s mother felt C.B. was "out of control," and sought help from the Juvenile Court's Youth at Risk program. (2RP 237-38) C.B.'s parents eventually entered her in a residential treatment program to address her behavior issues, but C.B. returned to her old habits soon after her release. (1RP 168; 2RP 216) By September of 2012, her

[1] The transcripts labeled volumes 1 through 9 will be referred to by their volume number (#RP). The remainder of the transcripts will be referred to by the date of the proceeding.

mother became so frustrated with C.B.'s behavior that she sent C.B. to live with her father. (1RP 168-69)

At the time, C.B. was enrolled in the Running Start program for high school students, run by Highline Community College. (2RP 204, 247) On September 25, 2012, as C.B. was walking home from the bus stop, two men approached her and started talking to her. (2RP 250-51; 3RP 475) The men, who she identified as Eugene Young and Claude Hutchinson, asked her to cash a check for them because they did not have identification. (2RP 253, 266) C.B. agreed, and they went together to a bank, where C.B. deposited the check and withdrew $100 in cash, which she gave to the men. (2RP 256-57, 260) C.B. told Young and Hutchinson that she was 19 years old and a college student. (2RP 258-59) Young and Hutchinson then walked C.B. home. (2RP 261) C.B. gave Young her cellular telephone number before they parted ways. (2RP 261, 265-66)

C.B. received a text later that night, sent from the phone number that Young had given her. (2RP 268-70; Exh. P11A) C.B. and Young also spoke by telephone, and arranged to meet so that she could withdraw the remainder of the money that she had deposited for him. (2RP 269-7)

Young and Hutchinson arrived in a taxi to pick up C.B. around

noon on September 26, 2012. (2RP 270-71; 3RP 475) According to C.B., Young suggested that C.B. could make large amounts of money quickly by becoming a prostitute. (2RP 275) C.B. agreed, so she and Young and Hutchinson went to the Motel 6 in Fife. (2RP 273, 277) On the way, they stopped at the Tacoma train station and picked up another woman, N.H. (2RP 279-80; 4RP 675) N.H. rented a motel room on the second floor, and all four went inside. (2RP 281, 283; 4RP 678)

C.B. and N.H. got undressed and posed on the bed together while Young took pictures. (2RP 283, 284, 285, 286; RP4 688) Then, according to C.B., Young uploaded the photographs and created an advertisement for C.B.'s services that he then posted on an online dating site called Backpage.com. (2RP 283, 284, 285, 286, 288-90; 4RP 688, 693; 6RP 986; Exh. P6A-1) Within minutes, C.B. received calls and texts on her cellular phone from men asking to pay her for sex. (2RP 310) Natasha advised C.B. on how to negotiate and behave, and that afternoon C.B. met and had sex with her first customer. (2RP 312-13; 3RP 442)

Over the next two days, C.B. engaged in sex acts for money with 10 to 15 men. (2RP 314-15) C.B. testified that she gave Young the money she received from the customers in exchange for sex.

(2RP 313-14) According to C.B., Young and Hutchinson stayed in a motel room downstairs, and C.B. kept in contact with Young, coordinated her activities with him, and gave him the money she earned. (2RP 316; 3RP 396-97; 4RP 538-40, 583-87; Exh. P11A)

On September 28, 2012, C.B. was arrested by an undercover officer who had seen her add on Backpage.com and believe her to be underage. (2RP 328-30; 6RP 986, 990, 995) She was released to her father, but within a few days she returned to the motel and began seeing clients again. (2RP 2RP 327, 335; 6RP 993)

N.H. was also conducting prostitution activities during this time period. (2RP 330, 331) On one occasion, however, Hutchinson became angry with N.H. and demanded that she make money for him and not for Young. (3RP 447; 4RP 694-95) Hutchinson beat and raped N.H., then forced her to have sex with a third man who was also present at the time. (3RP 448, 449, 450-51, 453-54; 4RP 697, 702-05) Young and C.B. watched and did nothing, though at one point Young did try unsuccessfully to get Hutchinson to stop assaulting N.H. (3RP 452, 504-05, 561; 4RP 700, 700-01, 706, 707-08; 5RP 811)

Later, Hutchinson ordered N.H. to perform oral sex on Young. (4RP 708) Young told N.H. not to do it, but Hutchinson began

beating N.H. so she decided to do it anyway. (4RP 708) N.H. testified that Young allowed her to do it so that Hutchinson would stop beating her. (4RP 708, 709) N.H also testified that she and Young were in a romantic relationship at the time, so she felt that the sex act with Young was consensual. (4RP 708; 5RP 777, 780)

On October 2, 2012, C.B. unknowingly arranged a date with an undercover police officer, and was subsequently arrested. (3RP 459, 461; 7RP 1128, 1132, 1133; 8RP 1202-04, 1205) The officers also arrested Young in one of the motel rooms. (7RP 1033)

Earlier, on September 18, 2012, Hutchinson approached 17 year old R.E. as she waited at the Kent Station bus stop. (5RP 883, 840, 841-42) He commented on how pretty R.E. was, and began telling her that he wanted to perform oral sex on her. (5RP 841-42) R.E. did not know Hutchinson and was afraid that he planned to assault her. (5RP 846, 859) Then another man, who R.E. later identified as Young, approached and told Hutchinson to back off. (5RP 846-47) R.E. was relieved, and thanked Young for helping her. (5RP 8)

According to R.E., Young demanded that she repay him by cashing a check for him. (5RP 847-48) R.E. initially declined, but eventually agreed to do it in exchange for $40.00. (5RP 848-49, 6RP

929-30) R.E., and Young began walking together towards a nearby bank, and Hutchinson joined them. (5RP 849, 851)

R.E. deposited the check and gave Young whatever cash she was able to withdraw. (5RP 858, 860, 861) Then Young programmed his phone number into her phone under the contact name "YG," and they went their separate ways. (6RP 873-74) A few days later, after Young's check failed to clear, R.E. went to the police to report the incident. (6RP 876-77) She also showed police texts she received from "YG" describing sex acts that he wanted to do with her and implying that she could make money quickly as a prostitute. (6RP 878-80, 943-44; Exh. 26)

IV. ARGUMENT & AUTHORITIES

A. THE TRIAL COURT ERRONEOUSLY ADMITTED EVIDENCE OF TEXT MESSAGES SENT TO R.E.'S CELLULAR TELEPHONE BECAUSE THE MESSAGES WERE NOT SUFFICIENTLY IDENTIFIED OR AUTHENTICATED, AS REQUIRED BY ER 901(A).

Over repeated objection, the trial court allowed the State to present the content of text messages received by R.E. that expressed a desire to engage in sexual activity and suggested a way that she could earn extra money. (6RP 878-80, 883, 884, 886, 886, 943-44; Exh. 26) The State asserted that these texts were sent by Young, and that they proved he communicated with R.E. for immoral

purposes. (6RP 878-80; 9RP 1433, 1528-29) Young unsuccessfully argued that the State had not presented sufficient proof of authenticity of the texts or the identity of the sender. (6RP 886)

A trial court's admission of evidence is reviewed for abuse of discretion. State v. Magers, 164 Wn.2d 174, 181, 189 P.3d 126 (2008). Abuse of discretion occurs when a trial court's decision is manifestly unreasonable or based on untenable grounds. Magers, 164 Wn.2d at 181.

The purpose of authentication is to establish that "the thing" authenticated is what it purports to be. State v. Monson, 113 Wn.2d 833, 837, 784 P.2d 485 (1989). Pursuant to ER 901(a), "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." This requirement is met "if sufficient proof is introduced to permit a reasonable trier of fact to find in favor of authentication or identification." State v. Bradford, 175 Wn. App. 912, 928, 308 P.3d 736 (2013), review denied, 179 Wn.2d 1010, 316 P.3d 494 (2014) (citing State v. Danielson, 37 Wn. App. 469, 471, 681 P.2d 260 (1984)).

For example, in Bradford, Division 1 found that the State

introduced sufficient evidence to support a finding that text messages read to the jury and contained in an examination report had been authenticated and were what the State purported them to be, namely text messages written and sent to a stalking victim's friend by the defendant. Bradford, 175 Wn. App. at 928. The evidence included testimony that: for a substantial period of time, Bradford telephoned the victim and appeared at her place of employment on a frequent basis; Bradford also regularly appeared outside of the victim's house; and the content of the text messages themselves indicated that Bradford was the individual who sent them. Bradford, 175 Wn. App. at 928-29.

Unlike in Bradford, the State did not provide sufficient supporting evidence that Young was the individual responsible for sending the text messages to R.E.'s cellular telephone. R.E. testified that she met Young for the first time on September 18, 2012 and that Young programmed a phone number into her smart phone under the contact name "YG." (5RP 8406RP 873-74) Then, over the course of the next few days, she received and responded to text messages sent from the number associated with "YG." (6RP 878)

However, R.E. agreed that the fact that the message came from "YG" does not mean that the text was actually written and sent

by Young. (6RP 932-33) There is nothing in the content of the messages from "YG" that would establish that Young, as opposed to Hutchinson or some other party, sent the texts.[2] (Exh. 26) And the State presented no evidence that Young owned or ever possessed the phone that the text messages were sent from.[3]

There was simply no evidence to establish that the text messages were actually what they purported to be. The State failed to sufficiently authenticate the text messages, and the trial court erred by admitting them over defense objection.

The State charged and instructed the jury that Young communicated with R.E. for immoral purposes "by means of electronic communication."[4] (CP 35, 94) Thus, without the text messages, there was no factual support for this charge or conviction. Accordingly, the error in admitting them without proper authentication or identification was not harmless, and Young's conviction for communicating with a minor for immoral purposes must be reversed.

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[2] At their initial meeting, in fact, it was Hutchinson who made lewd sexual comments to R.E., not Young. (5RP 844-45)

[3] It is generally recognized that unauthorized persons may have access to an electronic device. *See* Loraine v. Markel American Ins. Co., 241 F.R.D. 534, 584 (D.Md. 2007) (citing Jack B. Weinstein & Margaret A. Berger, WEINSTEIN'S FEDERAL EVIDENCE §900.01(4)(a) (2nd ed. 1997)).

[4] Communicating with a minor for immoral purposes is elevated to a class C felony if the communication is conducted "through the sending of an electronic communication." RCW 9.68A.090(2).

B. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE THAT YOUNG WAS THE INDIVIDUAL WHO COMMUNICATED THE IMMORAL TEXT MESSAGES TO R.E.

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201.

RCW 9.68A.090 is designed to prohibit "communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct." State v. McNallie, 120 Wn.2d 925, 933, 846 P.2d 1358 (1993). It is a class C felony to communicate with a minor for "immoral purposes . . . through the sending of an electronic communication." RCW 9.68A.090(3). Thus, to convict Young of this crime, the State had to prove that Young communicated with R.E. for immoral purposes through electronic

messages. (CP 35, 94)

As argued above, the State's evidence did not establish that Young was the person who sent the text messages. The State presented no evidence linking Young to the telephone from which the messages originated. The State presented no evidence that Young had previously discussed sexual matters with R.E. And the content of the messages did not contain any information that would identify Young, as opposed to a third party, as the writer and sender.

The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996). The State failed to prove that Young communicated with R.E. after their initial in-person meeting, and failed to prove that the text messages R.E. subsequently received were written and sent by Young. The State therefore failed to prove an essential element of the crime of communicating with a minor for immoral purposes, and this conviction should be reversed and dismissed.

C. THE PROSECUTOR'S MISCONDUCT DURING CLOSING ARGUMENT DEPRIVED YOUNG OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); State v. Finch, 137 Wn.2d 792, 843, 975 P.2d 967 (1999). Prosecutors have a duty to see that those accused of a crime receive a fair trial. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978).

A prosecutor's argument to the jury must be confined to the law stated in the trial court's instructions. State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). A prosecutor's misstatement of the law is a serious irregularity having the grave potential to mislead the jury. State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984).

The law regarding accomplice liability is well settled. A person is an accomplice of another person in the commission of a crime if: "[w]ith knowledge that it will promote or facilitate the commission of the crime, he or she . . . [s]olicits, commands, encourages, or requests such other person to commit it; or . . . [a]ids or agrees to aid such other person in planning or committing it[.]" RCW 9A.08.020(3).

Mere knowledge or presence of the defendant is not sufficient to establish accomplice liability. State v. Rotunno, 95 Wn.2d 931, 933, 631 P.2d 951 (1981); In re Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979). Even if accompanied by knowledge that one's presence will aid in the commission of the crime, a person will not be subject to accomplice liability unless the person is also "ready to assist" in the commission of the crime. Rotunno, 95 Wn.2d at 933.

However, during closing arguments, the prosecutor repeatedly misstated the law of accomplice liability to the jury. First, the prosecutor says: "When you read that accomplice liability instruction, you'll understand. **Mere presence** or encouragement. It doesn't even have to be by words. . . . just **mere presence** is sufficient for accomplice liability." (9RP 1439, emphasis added). Young immediately objected. (9RP 1439) The judge sustained the objection and told the prosecutor that he had misspoken. (9RP 1439)

Despite this, the prosecutor then reads the accomplice instruction to the jury, and follows that by saying:

> That is what the instruction says and that's what I say. He's there with knowledge of what's happening. It's not just that he doesn't do a gentlemanly thing or an honorable thing by forcing Mr. Hutchinson to stop. By his **mere presence and acquiescence** to what Mr.

> Hutchinson is doing, he's assisting; he's giving it his stamp of approval.

(9RP 1440, emphasis added)

Despite a sustained objection and a reminder from the judge that he misspoke, the prosecutor twice told the jury that it could find Young guilty as an accomplice to rape by virtue of his "mere presence." (9RP 1539-40) This was obvious and intentional misconduct.

Because Young immediately objected to the prosecutor's improper argument, his conviction should be reversed if the prosecutor's misconduct "resulted in prejudice that had a substantial likelihood of affecting the jury's verdict." State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) (citing State v. Anderson, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009) (citing State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984))).

The defense position at trial was that Young did not intend to forcibly compel N.H. to have sexual intercourse, and that N.H. felt that the oral sex she performed on Young was consensual. (5RP 777, 780; 8RP 1272; 9RP 1517) This contention was supported by NH's testimony: NH testified that Young tried unsuccessfully to get Hutchinson to stop beating her; that when Hutchinson ordered her to

perform oral sex on Young, he told her she did not have to; that she herself pulled Young's pants down and began to perform the act; and that she cared about Young and felt that her decision to perform oral sex on him was consensual. (4RP 700-01, 708-09; 5RP 777, 832-33) If the jury believed N.H.'s testimony, and did not believe that this sexual act constituted rape or assisting in rape, then the jury would have been left with deciding whether Young's presence in the motel room during the other sexual acts established that he was an accomplice.

But the prosecutor told the jury, incorrectly, that Young was guilty of rape by his mere presence, even if he did not provide support, indicate that he was ready to assist, or share Hutchinson's criminal intent.[5] If the jury was confused by the prosecutor's misleading and legally incorrect argument, then it would not understand that it could find Young not guilty if it believed N.H. and believed that Young was "merely present" in the motel when Hutchinson and the third man beat and raped N.H.

There was a substantial likelihood that the prosecutor's

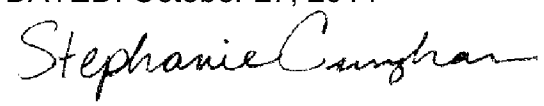
[5] The State must prove that the defendant was ready to assist the principal in the crime and that he shared in the criminal intent of the principal. State v. Castro, 32 Wn. App. 559, 564, 648 P.2d 485 (1982); *see also* Rotunno, 95 Wn.2d at 933; Wilson, 91 Wn.2d at 491.

misconduct effected the jury's verdict and was therefore prejudicial to Young's right to a fair trial. Young's conviction for second degree rape must be reversed.

V. CONCLUSION

The State failed to present sufficient evidence that the texts sent by "YG" to R.E.'s cellular telephone were actually sent by Young. Therefore, there was insufficient proof to authenticate the text messages and admit them into evidence at trial, and insufficient proof to convict Young of the crime of communicating with a minor for immoral purposes. Young's conviction on this count must therefore be reversed and dismissed. Furthermore, the prosecutor's repeated misstatement regarding the law of accomplice liability was misconduct and likely confused the jury into believing they could and should convict Young of rape if even if he was "merely present" in the motel room when N.H. was assaulted and raped by other men. Therefore, Young's conviction for rape must also be reversed.

DATED: October 27, 2014



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CERTIFICATE OF MAILING

I certify that on 10/27/2014, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Eugene A. Young, DOC# 328903, Airway Heights Corrections Center, P.O. Box 1899, Airway Heights, WA 99001.

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSBA #26436

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