SUPREME COURT NO. 92993.9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CLAUDE HUTCHINSON,

Petitioner.

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS,
DIVISION TWO

Court of Appeals No. 45996-5-II
Pierce County No. 12-1-03741-0

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, CLAUDE HUTCHINSON, by and through his attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the March 1, 2016, part-published decision of Division Two of the Court of Appeals affirming his convictions and sentence.

C. ISSUES PRESENTED FOR REVIEW

1. Where there was no evidence that Hutchinson communicated with a minor regarding an illegal sexual act, did the State fail to prove all the elements of communication with a minor for immoral purposes?

2. Did the prosecutor commit prejudicial misconduct when introducing evidence for the purpose of impugning defense counsel's integrity and misstating the law on accomplice liability in closing argument?

3. Hutchinson seeks review of the assertions of error in his statement of additional grounds for review.

D. STATEMENT OF THE CASE

CB met Eugene Young on September 25, 2012, at a bus stop in Renton. Claude Hutchinson was with Young at the time. 6RP[1] 250-51; 7RP 475. Although CB was 16 years old, she was in the habit of lying about her age, and she told Young she was 19. 6RP 258. Young and Hutchinson asked her to cash a check for them, and she agreed. 6RP 253, 255. CB deposited the $800 check in her account using an ATM and withdrew $100, which she gave to the men. 6RP 260. They all then walked to CB's house, and CB invited them inside. 6RP 261, 267. CB exchanged phone numbers with Young, and they agreed to meet the next day. 6RP 266, 268.

Young texted CB the next morning, saying he needed to get the rest of his money, and Young and Hutchinson met CB at her house in a taxi. 6RP 270-71. CB gave Young her debit card and PIN, and Young withdrew money from her account. 6RP 272-73. Young then suggested that CB could make money through prostitution. As with everything else Young suggested, CB readily agreed. 6RP 275. They headed to a motel in Fife. 6RP 279.

[1] The Verbatim Report of Proceedings is contained in 16 volumes, designated as follows: 1RP—5/21/13; 2RP—8/13/13; 3RP—10/2/13; 4RP—10/8/13; 5RP—12/3, 4, 5, 9/13; 6RP 12/10/13; 7RP 12/11/13; 8RP 12/12/13; 9RP 12/16/13; 10RP 12/17/13; 11RP—1/7/14; 12RP—1/8-9/14; 13RP—1/10/14; 14RP—1/13-14/14; 15RP—3/7/14; 16RP—3/13/14.

On the way to motel, they met NH at a train station. 6RP 279. NH was a 24 year old woman who had met Young and Hutchinson in June 2012. 8RP 706. She considered Young her boyfriend. 8RP 707. NH purchased some tequila and rented a room at the motel. 8RP 677-78.

Inside the motel room, Young took photographs of CB and NH in their underwear and created ads which he posted on Backpage.com. 6RP 283-86. Within 15 minutes CB started receiving text messages and calls in response to the ad. 6RP 310. NH gave CB advice about what to charge for various sex acts when she met with customers. 6RP 312. Over the next few days, CB committed ten to 15 acts of prostitution with customers responding to the ad. 6RP 315. According to CB, she gave the money she received for these acts to Young. 6RP 313; 7RP 427. During this time CB had conversations with Young by text message, phone call, and in person relating to prostitution. 6RP 318-21, 326. She was not communicating with Hutchinson, however. 6RP 326.

CB and NH shared one room in the motel which they both used for acts of prostitution. 6RP 330-31; 8RP 721-22. Young and Hutchinson stayed in another room at the motel, rented by Hutchinson. 6RP 316; 11RP 1074. When CB and NH were not with customers, they spent time in Young and Hutchinson's room, eating and hanging out. 6RP 333. NH testified that while she was in that room, Hutchinson slapped her

repeatedly and forced her to have sex with him, Young, and another man. 8RP 694, 697. She left the room at times to meet with prostitution customers, and she returned to the room shared by the men. 8RP 696.

At some point when Young and Hutchinson were away from the motel, NH called her parents to pick her up, and she left. 8RP 715. She maintained her relationship with Young after that and continued to talk to him regularly after his arrest. 8RP 718, 721; 9RP 742-43.

On September 28, 2012, CB was arrested at the Fife motel by officers investigating the Backpage.com ad. 6RP 329; 10RP 989-90, 992. She was released to her parents, but within a few days she voluntarily returned to Young. 6RP 335; 7RP 438, 477; 8RP 576. She committed additional acts of prostitution at a motel in SeaTac, until she was detained by undercover police officers on October 2, 2012, after agreeing to have sex with them for money. 7RP 459, 477; 11RP 1139, 1151. Young was arrested at the same motel, and Hutchinson was arrested in King County. 10RP 996; 11RP 1033.

On October 5, 2012, RE, who was 16 years old, went to the Kent police station and reported that she had been robbed by two men on September 18, 2012. 11RP 1085. RE said she was at a transit station when Hutchinson, whom she had never met, approached her. 9RP 842. RE said he walked her into a corner, telling her she was pretty and talking

about performing oral sex on her. 9RP 844-45. She told him to back off and said she was just waiting for a bus. At that point, Young stepped forward and told Hutchinson to back off, and Hutchinson walked away. 9RP 846-47. When RE thanked Young for his help, Young told her he wanted her to cash a check for him in return. 9RP 847-48. RE claimed that she refused at first and only changed her mind because Young lifted his shirt, showing what she thought was a gun. 9RP 848-49.

RE and Young walked from the transit station to the bank, with Hutchinson joining them as they walked. 9RP 849-50. She deposited a check Young gave her in an ATM and withdrew some cash, which she gave to Young. 9RP 853, 858. She and Young then went to another ATM, and RE withdrew some more cash. 9RP 858. She gave it to Young, and Young paid her $40. 10RP 873, 938.

Young entered his phone number into RE's phone, and the next day they communicated by text message. 10RP 874, 878. RE was willing to work with Young to make some fast money, believing she would be selling drugs. 10RP 910-11. When she received texts referring to sexual acts, she responded that she was 16 years old and not interested. 10RP 879, 934-36.

A few days later, RE learned that her bank account had been debited for the amount of the check she deposited for Young, and she

contacted him about getting her money back. 10RP 877-78. They arranged to meet on September 25, but Young did not show up. 10RP 908-09. Eventually, RE's aunt and father learned about the money missing from RE's account, and to convince them that she did not use the money to purchase drugs, she filed a report with the Kent police. 10RP 919, 923.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. THE COURT OF APPEALS'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND THE COURT OF APPEALS. RAP 13.4(b)(1), (2).

In every criminal prosecution, the State must prove all elements of a charged crime beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). Therefore, as a matter of state and federal constitutional law, a reviewing court must 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); State v. Chapin, 118 Wn.2d 681, 826 P.2d 194 (1992); State v. Green, 94 Wn. 2d 216, 616 P.2d 628 (1980).

Hutchinson was charged with communication with a minor for immoral purposes relating to his comments to RE at the transit center on September 18, 2012. CP 157. The charge was based on RCW 9.68A.090, which provides in relevant part that "a person who communicates with a minor for immoral purposes ... is guilty of a gross misdemeanor." There is no question that RE was a minor for the purpose of this offense, because she was under 18 years of age. See RCW 9.68A.011(5). And RE testified that Hutchinson spoke to her at the transit center. The issue is whether that communication was "for immoral purposes."

Washington courts have determined that "the statute prohibits 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 not enough that the State prove communication of a sexual nature, however. The communication must be related to sexual misconduct. State v. Pietrzak, 100 Wn. App. 291, 295, 997 P.2d 947 (2000). The statute does not proscribe a person from communicating about immoral sexual conduct that would be legal if performed. State v. Luther, 65 Wn. App. 424, 427, 830 P.2d 674 (1992) (reversing conviction where 16 year old defendant asked 16 year old girl if she would perform fellatio, because the act would not be illegal if performed).

Here, RE testified that Hutchinson started telling her she was really pretty and talking about stuff he wanted to do to her. 9RP 845. When asked specifically what he said, RE testified that she did not remember the specific words, "but talking about performing oral sex on [her], stuff like that." 9RP 845. Because RE was 16 years old, it would not have been illegal for Hutchinson to have sexual intercourse with her. There was no evidence at trial, and no contention that Hutchinson talked to RE about prostitution or any other illegal act of a sexual nature.

The parties seemed to be under the impression that any communication of a sexual nature with someone under the age of 18 would violate the statute. See 14RP 1432-33 (Prosecutor argued in closing that Hutchinson was guilty because he communicated in strong sexual overtones with a minor). This interpretation has been specifically rejected, however. See Luther, 65 Wn. App. at 427. The statute does not prohibit communicating about an act where it would be perfectly legal for the parties to participate in that act. Doing so would violate substantive due process. Luther, 65 Wn. App. at 427-28. Because the sexual act about which Hutchinson communicated with RE was not illegal, the State failed to prove that Hutchinson communicated with a minor for immoral purposes. His conviction must therefore be reversed. The Court of

Appeals' decision to the contrary conflicts with the decisions in McNallie and Luther. RAP 13.4(b)(1), (2).

2. THE COURT OF APPEALS' DECISION THAT PROSECUTORIAL MISCONDUCT DID NOT DENY HUTCHINSON A FAIR TRIAL CONFLICTS WITH DECISIONS OF THIS COURT, PRESENTS A SIGNIFICANT CONSTITUTIONAL QUESTION, AND RAISES AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE. RAP 13.4(b)(1), (3), (4).

The prosecutor, as an officer of the court, has a duty to see that the accused receives a fair trial. State v. Carlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). Prosecutorial misconduct may deprive the defendant of a fair trial, and only a fair trial is a constitutional trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend. V and XIV; Wash. Const. art. 1, § 3.

A defendant is deprived of a fair trial when there is a substantial likelihood that the prosecutor's misconduct affected the verdict. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). When the defendant establishes misconduct and resulting prejudice, reversal is required. State

v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996); State v. Suarez-Bravo, 72 Wn. App. 359, 366, 864 P.2d 426 (1994).

a. The prosecutor impugned the integrity of defense counsel.

On cross examination, defense counsel asked CB about statements she had made during her defense interview, which were inconsistent with her testimony and with her other statements. 7RP 468-71, 507, 509-10; 8RP 554-56. Then, during redirect examination of CB, the prosecutor made a point of establishing that neither Hutchinson's attorney nor an investigator from her office was present at the defense interview. 8RP 571-72. Defense counsel objected, arguing that that information was not relevant, but the court overruled the objection. 8RP 572. When the prosecutor started asking CB about defense counsel's method of impeachment, counsel asked to take the issue up outside the jury's presence. 8RP 590-91. The jury was excused, and counsel moved for a mistrial. Counsel argued that there was no legitimate purpose for the prosecutor's questions about whether she had attended the defense interview and the line of questioning was intended simply to disparage counsel, suggesting her preparation was unsatisfactory and she did not care about Hutchinson's defense. 8RP 593-94, 600. The court denied the

motion, finding the prosecutor was simply trying to establish who was present at the interview. 8RP 598.

It is serious misconduct for the prosecutor to disparage defense counsel's role or to impugn counsel's integrity. State v. Thorgerson, 172 Wn.2d 438, 451, 258 P.3d 43 (2011); State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984); State v. Gonzales, 111 Wn. App. 276, 283-84, 45 P.3d 205 (2002), review denied, 148 Wn.2d 1012 (2003). The state and federal constitutions guarantee an accused the right to counsel, and comments by the prosecutor that permit the jury to nurture suspicions about defense counsel's integrity can violate this right. U.S. Const. amend. VI; Wash. Const. art. 1, § 22; Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983), cert. denied, 469 U.S. 920 (1984). Implying that counsel is wrongfully trying to deceive the jury goes beyond the bounds of acceptable prosecutorial behavior. Thorgerson, 172 Wn.2d at 452.

As counsel argued below, the prosecutor impugned her integrity by drawing the jury's attention to the irrelevant fact of her absence from the defense interview, suggesting that counsel's preparation was lacking and she was not to be trusted. The prosecutor's focus on defense counsel's absence implied that defense counsel was being deceptive when confronting CB with her statements from that interview, because counsel was not even present to hear them. The Court of Appeals' conclusion that

the prosecutor did not impugn defense counsel's integrity conflicts with this Court's decision in Thorgerson. RAP 13.4(b)(1).

While the court overruled defense counsel's objection to the line of questioning at the time it was made and denied counsel's motion for a mistrial, it offered to fashion some sort of curative instruction. 8RP 572, 598. Defense counsel declined. Had the court sustained the contemporaneous objection, an instruction to disregard would have been effective to quell any speculation as to the reasons for counsel's absence. But revisiting the issue after the court had overruled the objection and further evidence had been presented ran the risk of highlighting the prejudicial testimony. 8RP 596, 599-600; see State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (recognizing that decision not to seek instruction limiting use of damaging evidence can be legitimate tactical choice).

There is a substantial likelihood that the prosecutor's misconduct prejudiced the defense. Hutchinson's defense rested on challenging the credibility of the prosecution witnesses, and the closing argument focused on inconsistencies in various statements made by these witnesses. See 14RP 1453-54, 1459, 1480. The prosecutor's deliberate introduction of irrelevant facts likely had the intended effect of convincing the jury to disregard any impeachment relating to the defense interview and look with

suspicion on the defense argument. Whether they type of prosecutorial misconduct that occurred here deprives the defendant of a fair trial is a significant constitutional question this Court should address. RAP 13.4(b)(3).

b. The prosecutor misstated the law regarding accomplice liability during closing argument.

Hutchinson was charged with promoting the commercial sexual abuse of CB. The evidence at trial was that Young talked to CB about committing acts of prostitution, Young communicated with her by text message about prostitution, Young took CB's photographs and created the Backpage.com ad to solicit customers, and CB gave all the money she earned from prostitution to Young. 6RP 270, 275, 277, 283-86, 313, 326, 331. Hutchinson was present with Young during many of these events, but CB testified she had no communications with Hutchinson regarding prostitution. 6RP 316, 326. Although there was evidence that Hutchinson rented a motel room, it was the room he and Young stayed in, not the room used by CB for prostitution. 6RP 316, 11RP 1074. Thus, the State's case against Hutchinson on this charge depended on the jury finding accomplice liability.

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.

Despite this well settled law, the prosecutor informed the jury in closing argument that "mere presence is sufficient for accomplice liability." 14RP 1439-40. Even after the court suggested to the prosecutor that he had misspoken, the prosecutor repeated that mere presence was enough. 14RP 1440.

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). It is misconduct for a prosecutor, with all the weight of the office behind him, to misstate the applicable law when

arguing the case to the jury. Such misstatement of the law carries the grave potential to mislead the jury. Davenport, 100 Wn.2d at 762, 764.

The prosecutor was arguing about Young's complicity in the charged rape when he made these erroneous statements, but the State's case against Hutchinson on the promoting charge relied equally on accomplice liability. After the court sustained the initial objections to the prosecutor's misstatements, the prosecutor responded that "By his presence he's giving the stamp of approval to what is occurring here." 14RP 1440. Hutchinson's counsel joined the objection, but at that point the court overruled and told the prosecutor to proceed. 14RP 1440.

The Court of Appeals held that the prosecutor's "stamp of approval" argument did not misstate the law but rather communicated that something more than presence was required. Opinion, at 18-19. This holding conflicts with the holding in Rotunno that 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. See Rotunno, 95 Wn.2d at 933. Whether the prosecutor's argument misstated the law as to accomplice liability is an issue of substantial public importance this Court should address. RAP 13.4(b)(4).

3. HUTCHINSON'S ASSERTIONS OF ERROR IN HIS STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW SHOULD BE REVIEWED BY THIS COURT.

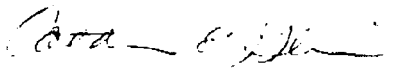
Hutchinson filed a statement of additional grounds for review, which the Court of Appeals rejected as meritless. He asks this Court to grant review on those grounds and reverse his convictions.

F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse the Court of Appeals' decision.

DATED this 31st day of March, 2016.

Respectfully submitted,



CATHERINE E. GLINSKI
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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, a properly stamped and addressed envelope containing a copy of this Petition for Review directed to:

Claude Hutchinson DOC# 340721
Washington State Penitentiary
1313 N 13th Ave
Walla Walla, WA 99362

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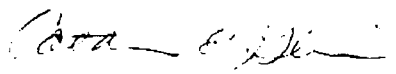

Catherine E. Glinski
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Division Two

March 1, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. EUGENE A. YOUNG, Appellant.	No. 45996-5-II (Consolidated with No. 46113-7-II) PART PUBLISHED OPINION
STATE OF WASHINGTON, Respondent, v. CLAUDE A. HUTCHINSON, Appellant.	No. 46113-7-II

BJORGEN, A.C.J. — Eugene Young and Claude Hutchinson appeal their convictions for second degree rape, promoting commercial sexual abuse of a minor, communication with a minor for immoral purposes, and second degree attempted theft.

Young argues that (1) the trial court abused its discretion in ruling that there was sufficient evidence to support authenticating text messages from "Y.G." and "Papi," and that without those messages, there is insufficient evidence to support his conviction of communicating with a minor for immoral purposes. Hutchinson argues that (2) there is insufficient evidence to support his conviction of communicating with a minor for immoral purposes and (3) the prosecutor improperly impugned the integrity of his defense counsel when he asked a witness about whether his defense counsel was present at a pretrial interview. Both Young and Hutchinson (4) argue that the prosecutor misstated the law on accomplice liability during closing argument, which amounted to prosecutorial misconduct, and (5) raise additional arguments in their statements of additional grounds (SAG).

In the published portion of this opinion, we hold that the trial court reasonably exercised its discretion in ruling there was sufficient evidence to permit a reasonable juror to find that the text messages were authenticated or identified as from Young. In the unpublished portion, we address and reject Young's remaining arguments and Hutchinson's arguments. Accordingly, we affirm Young's and Hutchinson's convictions.

FACTS RELATING TO TEXT MESSAGES

In 2012, Young and Hutchinson promoted and directed two young women, N.H. and 16-year-old C.B.,[1] in prostitution activities. To facilitate her prostitution, C.B. communicated with

[1] "[I]n all opinions . . . in sex crime cases, [we] shall use initials . . . in place of the names of all witnesses known to have been under the age of 18 at the time of any event in the case." Gen. Order 2011-1, Division II, *In Re The Use Of Initials Or Pseudonyms for Child Witness in Sex Crime Cases*,

Young through telephone calls and text messages. C.B. named the contact information for Young in her phone as "Papi." Report of Proceedings (RP) at 317-20.

Young and Hutchinson also forced 16-year-old R.E. to participate in a fraudulent check transaction for them. When the check transaction involving R.E. was concluded, Young put the contact name "Y.G." into R.E.'s cell phone. RP at 874. Later, Y.G. texted R.E. asking if she would be interested in prostitution. Y.G. was unsuccessful in persuading R.E. into prostitution, but the two continued to communicate about how she could get her money back after the fraudulent check transaction. *Id.*

The State subsequently charged both Young and Hutchinson with second degree rape, promoting commercial sexual abuse of a minor, first degree robbery, first degree kidnapping, and communication with a minor for immoral purposes. At trial, evidence was introduced describing these features of the text messages. The jury returned verdicts finding both Young and Hutchinson guilty of second degree rape,[2] promoting commercial sexual abuse of a minor,[3] communication with a minor for immoral purposes,[4] and second degree attempted theft.[5] Young and Hutchinson appeal their convictions.

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http://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=2011-1&div=II.

[2] RCW 9A.44.050.

[3] Former RCW 9.68A.101 (2010) was amended in 2012 and 2013. These amendments do not affect the issues in this matter.

[4] Former RCW 9.68A.090 (2006) was amended in 2013. This amendment does not affect the issues in this matter.

ANALYSIS

Young argues that the trial court abused its discretion when it determined that the State had presented sufficient evidence to authenticate that texts from Papi to C.B. and from Y.G. to R.E. were from Young. This argument fails because R.E. and C.B. both had personal knowledge that these contacts were Young and the contents of the text messages corroborate their interactions with him. Accordingly, the trial court reasonably exercised its discretion when it admitted the text messages.

I. STANDARD OF REVIEW AND LEGAL PRINCIPLES

We review a trial court's admission of evidence for an abuse of discretion. *State v. Bradford*, 175 Wn. App. 912, 927, 308 P.3d 736 (2013), *review denied*, 179 Wn.2d 1010 (2014). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Id.*

"The 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." ER 901(a). In *State v. Bashaw*, 169 Wn.2d 133, 140-41, 234 P.3d 195 (2010) (quoting *State v. Payne*, 117 Wn. App. 99, 106, 69 P.3d 889 (2003)), *overruled on other grounds by State v. Guzman Nunez*, 174 Wn.2d 707, 285 P.3d 21 (2012),[6] the Supreme Court held that to meet this requirement

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[5] Former RCW 9A.56.040 (2009) was amended in 2012 and 2013. These amendments do not affect the issues in this matter.

[6] The *Nunez* court expressly noted that it was not overruling *Bashaw*'s authenticity holding. *Nunez*, 174 Wn.2d at 709 n.1.

> [t]he party offering the evidence must make a prima facie showing consisting of proof that is sufficient "to permit a reasonable juror to find in favor of authenticity or identification."

"'[T]he proponent of offered evidence need not rule out all possibilities inconsistent with authenticity or conclusively prove that evidence is what it purports to be.'" *In re Det. of H.N.*, 188 Wn. App. 744, 751, 355 P.3d 294 (2015) (alteration in original) (quoting *State v. Andrews*, 172 Wn. App. 703, 708, 293 P.3d 1203 (2013)).

"'Because under ER 104 authenticity is a preliminary determination, the court may consider evidence that might otherwise be objectionable under other rules.'" *Id.* (quoting *Rice v. Offshore Sys., Inc.*, 167 Wn. App. 77, 86, 272 P.3d 865 (2012)). "'A trial court may, therefore, rely upon such information as lay opinions, hearsay, or the proffered evidence itself in making its determination.'" *Id.* (quoting *State v. Williams*, 136 Wn. App. 486, 500, 150 P.3d 111 (2007)). "Such information must be reliable, but need not be admissible." *Id.* The rules of evidence provide a number of illustrative examples that demonstrate methods of authentication, including testimony of a witness with knowledge, ER 901(b)(1), and the contents of a message. *See* ER 901(b)(10)(iii). "'Once a prima facie showing has been made, the evidence is admissible under ER 901.'" *H.N.*, 188 Wn. App. at 751-52 (quoting *Rice*, 167 Wn. App. at 86).

Both parties rely on *Bradford* from Division One of our court. In *Bradford*, the court found under ER 901(a) that there was sufficient evidence introduced at trial to support a finding that text messages were what the State contended they were: text messages written and sent by Bradford. 175 Wn. App. at 928-29. The *Bradford* court drew on several pieces of evidence that supported authentication of the text messages, including evidence showing that: (1) Bradford's text messages were consistent with his desperate desire to communicate with the victim, (2) the

content of the texts in tandem with Bradford's corroborating behavior demonstrated that he was the one who sent them, (3) the timing of the texts was consistent, since the victim only received texts when Bradford was out of jail and did not receive texts when he was in jail, and (4) the victim and another witness testified that they believed the text messages were from Bradford. *Id.* at 929-30.

After *Bradford* was decided, ER 901(b) was amended to add a specific section illustrating some methods for authenticating e-mail:

> Testimony by a person with knowledge that (i) the email purports to be authored or created by the particular sender or the sender's agent; (ii) the email purports to be sent from an e-mail address associated with the particular sender or the sender's agent; and (iii) the appearance, contents, substance, internal patterns, or other distinctive characteristics of the e-mail, taken in conjunction with the circumstances, are sufficient to support a finding that the e-mail in question is what the proponent claims.

ER 901(b)(10).[7]

When Division One of our court examined the admissibility of text messages again in *H.N.*, it relied on ER 901(b)(10) by analogy. 188 Wn. App. at 759. In *H.N.*, the trial court allowed the State's expert medical witness to read into the record a set of e-mailed screen shots of text messages used as part of her opinion testimony to support the State's case in committing H.N. to involuntary treatment. *Id.*at 755-57. The trial court also allowed the screenshots of the text messages to be admitted as substantive evidence. *Id.* at 757. The *H.N.* court found this to be a proper exercise of the trial court's discretion in admitting the evidence for five reasons: (1)

[7] The trial court's rulings on the authenticity of the text messages occurred on December 10, 2013 or afterwards. The effective date of amendment for ER 901(b)(10) was December 10, 2013.

H.N. had admitted to the expert witness that she had sent the text messages, (2) identifying information, including her phone number and full name, was displayed on the top of the text messages, (3) the contents of the text messages suggested H.N. was the sender, (4) the text messages were consistent with certain events that happened in H.N.'s life, and (5) the timing of the text messages was consistent with H.N.'s hospitalization on the night of the incident. *Id.* at 758-59.

II. TEXTS FROM Y.G. TO R.E.

Turning to the present appeal, we hold that, similar to *Bradford* and *H.N.*, sufficient proof supported the trial court's ruling that the text messages from Y.G. to R.E. were what they purported to be: text messages from Young to R.E. First, R.E. had personal knowledge that the sender of the text messages was Young. R.E. testified that after Young used her phone to call someone, he put his number in her phone. R.E. also testified that Young had put "Y.G." as the contact name under that phone number. She further testified that the text messages she received from Y.G. were from the same number that Young had put in her phone.

Second, the content of some of the texts supports a finding that the texts in question are from Young. R.E. testified that Young forced her to participate in a fraudulent check transaction. Some of the texts corroborate this testimony as R.E. texted with Y.G. that she wanted some of her money back and Y.G. was agreeable. The text messages also show that Y.G. was interested in getting R.E. to engage in prostitution. Consistently, with *Bradford* and *H.N.*, R.E.'s personal knowledge, in tandem with the contents of the texts, is sufficient evidence to permit a reasonable trier of fact to find that Young was the one texting R.E.

Although it is true, as Young argues, that there is evidence showing that Hutchinson or some other person wrote the texts from Y.G., the trial court "considers only the evidence offered by the proponent and disregards any contrary evidence offered by the opponent" in determining whether evidence has been authenticated. *Rice*, 167 Wn. App. at 86. Young was free to bring up any contrary evidence, but this goes to weight, not admissibility. *State v. Tatum*, 58 Wn.2d 73, 76, 360 P.2d 754 (1961). For these reasons, the trial court did not abuse its discretion when it admitted the text messages under ER 901.

III. TEXTS FROM PAPI TO C.B.

Similarly, Young contends that the text messages from Papi to C.B. were not properly authenticated. However, the record here also shows that the trial court did not err in ruling that Young was the one texting C.B. through the contact, Papi.

C.B. testified that she put Young's name and number into her phone, reflecting her personal knowledge that this person was Young. C.B. testified that she continued receiving text messages from Young and renamed him "Papi" in her phone. RP at 319-20. The subject matter of the text messages is consistent with C.B.'s testimony that she and Young worked together in prostitution. C.B.'s personal knowledge in tandem with the subject matter of the texts is sufficient evidence for a reasonable trier of fact to find that these texts came from Young. Accordingly, we hold the trial court did not abuse its discretion in admitting these text messages.

CONCLUSION

The text messages at issue were properly authenticated under ER 901(a), and the trial court did not abuse its discretion in admitting them.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

ADDITIONAL FACTS

IV. DEFENDANTS' INITIAL CONTACT WITH C.B.

In September 2012, 16-year-old C.B. met Young and Hutchinson at a bus stop. They asked C.B. to cash a check for them, which she did. However, because the automated teller machine had a withdrawal limit, C.B. was only able to get a portion of the deposited check. Young and Hutchinson walked with C.B. to her home and exchanged phone numbers and contact information with her.

The next morning, Young and Hutchinson contacted C.B. and picked her up to get the rest of the money. While riding with C.B., Young explained that C.B. could make "more money" by "hav[ing] sex with guys." RP at 275-76. C.B. agreed to Young's proposition. Young and Hutchinson also picked up Young's girlfriend, N.H., and the four of them went to a motel.

At the motel, N.H. rented a room for her and C.B. Young and Hutchinson had their own room in the motel, but maintained contact with C.B. Young asked N.H. and C.B. to take their clothes off, and either Young or Hutchinson took pictures of them lying on the bed. Young then posted them to Backpage.com[8] to generate customers for their prostitution. N.H. instructed C.B. in how to engage in prostitution.

[8] Backpage.com is an online classifieds company that offers adult advertisements.

V. RAPE OF N.H.

During N.H.'s and C.B.'s prostitution, N.H. was beaten by Hutchinson over a couple of days. Hutchinson slapped and choked N.H. repeatedly, and forced her to perform oral sex on him, Young, and another man. N.H. believed that her sexual activity with Young was consensual. Not long after the repeated beatings and rape, N.H. fled from the motel.

VI. C.B.'S PROSTITUTION

C.B. engaged in prostitution with at least 10 to 15 men. Young would receive the money C.B. obtained through her prostitution and in exchange would buy her food and take care of her. A few days after the prostitution started, C.B. was arrested by an undercover police officer. About two days after her arrest, she contacted Young and began prostitution again. Not long after, an undercover police officer posed as a client to C.B., resulting in the end of her prostitution.

VII. CONTACT WITH R.E.

R.E. became involved with Young and Hutchinson when Hutchinson approached her at a bus station. R.E. testified that Hutchinson "kind of got [her] in a corner" and talked about "things he wanted to do to [her], kind of like rape kind of things, you know, kind of like oral sex." RP at 841, 845. Hutchinson said R.E. was "really pretty and talk[ed] about stuff that he wanted to do to [her]." RP at 845. As noted, Young and Hutchinson forced R.E. to participate in a fraudulent check transaction, and Young subsequently texted R.E. asking if she would be interested in prostitution.

PROCEDURE

I. REDIRECT OF C.B.

At trial, on redirect of C.B., the prosecutor elicited testimony that Young's attorney, but not Hutchinson's, had attended a pretrial interview of C.B. Each defendant objected on the basis of relevance, which the court overruled. The prosecutor then continued:

> [Prosecutor]: Were there investigators and others on their behalf asking you questions?
> [C.B.]: I don't think so, no.
> [Prosecutor]: Was [Young's attorney] asking you questions?
> [C.B.]: Yeah.
> [Prosecutor]: Was he the only one?
> [C.B.]: Yeah.

RP at 572.

II. CLOSING ARGUMENT

In closing argument, the prosecutor argued that Young was an accomplice to Hutchinson in raping N.H. During his remarks, he made the following argument about the law of accomplice liability and how it applied to Young:

> And he sits there. He's not some guy that just happened to be there. This is during the course and after days or at least a day of his own involvement with [C.B.]. [N.H.] is now nothing more than Mr. Hutchinson's hoe. He's the pimp for her. That's what's occurring here. When you read that accomplice liability instruction, you'll understand. *Mere presence or encouragement. It doesn't even have to be by words. It can be by just mere presence is sufficient for accomplice liability.*

RP at 1439 (emphasis added). Hutchinson's attorney objected and the court stated that the prosecutor "may have misspoken" on that. RP at 1439. The prosecutor then began reading from the jury instructions and stated how Young was an accomplice to Hutchinson's rape of N.H.:

> The instruction[] specifically says, and you'll read it -- it's No. 7 -- "A person who is present at the scene and ready to assist by his or her presence in aiding the commission of the crime." And that word "aid" includes words, acts, encouragement, support, or presence.
>
> I'll read it again. "The word 'aid' means all assistance, whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime."
>
> That's 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.*

RP at 1439-40 (emphasis added). Again, Hutchinson's attorney objected, and the court sustained the objection. The prosecutor then said, "By his presence he's giving the stamp of approval to what is occurring here." RP at 1440. The court overruled the defense attorney's objection to this statement.

The prosecutor then proceeded with his argument, stating how Young was an accomplice:

> And what does the defendant do? What does Mr. Young do? Does somebody force him to take his pants down or pull his penis out? No. He does that. That's assisting. That's being involved. That's not just being an innocent bystander. That's not mere presence. He's an active participant.

RP at 1440-41.

III. VERDICTS

At the close of trial, the jury returned verdicts finding both Young and Hutchinson guilty of second degree rape, promoting commercial sexual abuse of a minor, communication with a minor for immoral purposes, and second degree attempted theft. They appeal their convictions.

ADDITIONAL ANALYSIS[9]

I. SUFFICIENCY OF EVIDENCE

Hutchinson argues that there is insufficient evidence to support his conviction of communication with a minor for immoral purposes[10] because the sexual act about which Hutchinson communicated with R.E., consensual sex with a 16 year old, was not illegal. However, because a rational juror could have found the elements of communication with a minor for immoral purposes beyond a reasonable doubt, Hutchinson's argument fails.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits a rational juror to find the essential elements of the crime beyond a reasonable doubt. *State v. McPherson*, 186 Wn. App. 114, 117, 344 P.3d 1283, *review denied*, 183 Wn.2d 1012 (2015). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that a juror can draw from that evidence. *State v. Notaro*, 161 Wn. App. 654, 671, 255 P.3d 774 (2011). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted strongly against the defendant. *State v. Wilson*, 141 Wn. App. 597, 608,

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[9] The jury also returned verdicts finding both Young and Hutchinson guilty of second degree attempted theft as a lesser included offense to first degree robbery. Both Young's and Hutchinson's appeal of these convictions fail, because any asserted grounds for challenging the theft convictions are without merit, as shown in this opinion. Therefore, we do not further discuss second degree attempted theft.

[10] Young also argues that that there is insufficient evidence to support the charge that he was the one who communicated with R.E. for immoral purposes. However, his entire argument is premised on this court ruling that the text messages from Y.G. were not properly authenticated. Because there was sufficient evidence to support the authentication of those text messages, Young's sufficiency of the evidence challenge fails.

171 P.3d 501 (2007). Circumstantial evidence is no less reliable than direct evidence. *Id.* We must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

The crime of communication with a minor for an immoral purpose is intended to prohibit "'communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct.'" *State v. Hosier*, 157 Wn.2d 1, 9, 133 P.3d 936 (2006) (emphasis omitted) (quoting *State v. McNallie*, 120 Wn.2d 925, 933, 846 P.2d 1358 (1993)). A person, however, cannot be punished for communications to a minor about sexual conduct that would be legal if performed. *State v. Luther*, 65 Wn. App. 424, 427-28, 830 P.2d 674 (1992).

Here, there is sufficient evidence in the record to permit a rational trier of fact to find beyond a reasonable doubt that Hutchinson communicated with R.E. for immoral purposes. R.E. testified that when Hutchinson approached her, he "kind of . . . corner[ed]" her and talked about "things he wanted to do to [R.E.], kind of like rape kind of things, you know, kind of like oral sex." RP at 841, 845. The jury could have also believed that Hutchinson had communicated to R.E. that he wanted to rape her based on the evidence at trial. This communication would involve sexual misconduct with a minor, and therefore, would support a conviction for communicating with a minor for immoral purposes. *Hosier*, 157 Wn.2d at 9.

Hutchinson argues that because R.E. was 16 years old, it would not have been illegal for him to have sexual intercourse with her. Indeed, Hutchinson is correct that if he only had communicated that he wanted to have oral sex with R.E., this in itself would not be able to

support a conviction for communication with a minor for immoral purposes, since consensual sex with one 16 years of age is not illegal. *See* RCW 9A.44.079.

However, on appeal, we admit "the truth of the State's evidence and all reasonable inferences that a trier of fact can draw from that evidence." *Notaro*, 161 Wn. App. at 671. As shown above, a rational trier of fact could find that Hutchinson's communications were for the purpose of raping R.E. Unlike consensual oral sex, rape would involve sexual misconduct with a minor, and this evidence therefore supports Hutchinson's conviction of communicating with R.E. for immoral purposes.

II. PROSECUTORIAL MISCONDUCT

Hutchinson argues that the prosecutor first committed prosecutorial misconduct because he impugned the integrity of defense counsel by inquiring about her absence at an interview of the victim. Hutchinson and Young both argue that the prosecutor committed prosecutorial misconduct in his characterization of the law on accomplice liability. We find that neither of these comments were improper, and accordingly, their claims fail.

1. Legal Principles

To establish prosecutorial misconduct, the defendant must prove that the prosecuting attorney's remarks were both improper and prejudicial. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). Among other ways, a prosecuting attorney commits misconduct by impugning the integrity of defense counsel or by misstating the law. *Id.*; *State v. Lindsay*, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014). Because we find that the challenged remarks were not misconduct, we do not reach the question of prejudice.

2. Impugning Defense Counsel

Hutchinson first claims that the prosecutor impugned the integrity of defense counsel and that this amounted to prosecutorial misconduct. It is improper for the prosecutor to disparagingly comment on defense counsel's role or impugn the defense lawyer's integrity. Examples include repeatedly referring to defense counsel's tactics as "bogus" and involving "sleight of hand," *State v. Thorgerson*, 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011); referring to defense counsel's closing argument as a "number of mischaracterizations" and "an example of what people go through in a criminal justice system when they deal with defense attorneys," *State v. Warren*, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008); and suggesting that while the prosecution sees that justice is served, defense counsel only has an obligation to a client. *State v. Gonzales*, 111 Wn. App. 276, 283-84, 45 P.3d 205 (2002).

Here, on redirect of C.B., the prosecutor inquired into whether Hutchinson's defense counsel was present at an interview of C.B. The prosecutor asked C.B. who participated in the interview and asked a few questions that established that Hutchinson's defense counsel was not present. After the trial court overruled an objection on the basis of relevance, the prosecutor again pointed out that only Young's attorney asked C.B. questions at the interview.

This is not the sort of blatant impugning of defense counsel found in *Thorgerson*, *Warren*, or *Gonzales*. Rather, the prosecutor merely could have been setting the stage with his witness to allow him to better question her about the interview, which is what he later did. We find that the integrity of defense counsel was not impugned, and Hutchinson does not meet his burden in showing that this was misconduct.

3. Closing Argument on Accomplice Liability

Hutchinson and Young also argue that the prosecutor committed prosecutorial misconduct by misstating the law on accomplice liability while discussing Young's second degree rape charge involving N.H. We hold that the prosecutor's comments did not constitute misconduct.

Accomplice liability requires knowledge of the crime and that the accomplice: (1) solicits, commands, encourages, or requests another person to commit it, or (2) aids or agrees to aid another person in planning or committing it. RCW 9A.08.020(3)(a). "Presence at the scene of an ongoing crime may be sufficient if a person is 'ready to assist.'" *In re Welfare of Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979) (quoting *State v. Aiken*, 72 Wn.2d 306, 349, 434 P.2d 10 (1967)). However, mere presence coupled with assent is insufficient to establish accomplice liability. *Wilson*, 91 Wn.2d at 491; *State v. Everybodytalksabout*, 145 Wn.2d 456, 472, 39 P.3d 294 (2002).

Here, looking at the prosecutor's argument on accomplice liability as a whole, we find that it was not improper. The prosecutor's first statement, that mere presence is sufficient for accomplice liability, was clearly wrong and objectionable. Defense counsel objected and the trial court told the jury that the prosecutor misspoke. As further discussed below, the prosecutor then correctly quoted from the jury instruction and argued that presence plus giving his stamp of approval was enough for accomplice liability. In this full context, the prosecutor's initial misstatement does not rise to the level of impropriety.

The prosecutor then quoted from the jury instruction and said, "By his mere presence and acquiescence to what Mr. Hutchinson is doing, he's assisting; he's giving it his stamp of approval." RP at 1440. The defendant objected and the trial court sustained the objection. However, it is not clear whether this actually misstates the law. Accomplice liability requires knowledge of the crime and, as relevant here, aiding or agreeing to aid in committing it. RCW 9A.08.020(3)(a)(ii). Thus, a person can be an accomplice based on presence if that presence assists in the crime. The jury instruction states that an accomplice is one who, with knowledge that it will promote or facilitate the commission of the crime, "aids" or agrees to aid in the commission of a crime. Clerk's Papers (CP) at 56. The instruction further states: "The word 'aid' means all assistance whether given by words, acts, encouragement, support, *or presence.* A person *who is present* and is ready to assist *by his or her presence* is aiding in the commission of a crime." CP at 56 (emphasis added). The instruction then gives the caveat that "more than mere presence and knowledge of the criminal activity" must be shown. CP at 56.

Based on the instruction and the entire context, we do not find this argument improper. The prosecutor did not argue that Young was aiding by his presence alone, but that by his presence he also gave his "stamp of approval" to the crime. RP at 1440. In some situations, a "stamp of approval" may be little different from presence plus "assent," which is insufficient for accomplice liability. *Wilson*, 91 Wn.2d at 491. Here, however, one may reasonably infer from the evidence that Young was both present and ready to assist with his presence, which is sufficient to satisfy accomplice liability. Thus, the prosecutor's argument and "stamp of approval" characterization is consistent with the instruction's statement that one who is present

and is ready to assist by his or her presence is aiding in a crime. In addition, the prosecutor followed this statement up with the argument that Young was actively assisting by pulling his pants down. He argued: "That's not just being an innocent bystander. That's not mere presence. He's an active participant." RP at 1141.

Viewing the prosecutor's argument as a whole, we find it sufficiently based in the law as expressed in the instructions to avoid characterization as improper.

III. SAG CLAIMS

1. Accomplice Liability Instruction

In his SAG, Young argues that the accomplice liability instruction was erroneous because it refers to "a crime" rather than "the crime." SAG at 3. Our Supreme Court has expressly found that it is error to use "a crime" in the accomplice liability instruction in *State v. Roberts*, 142 Wn.2d 471, 509-11, 14 P.3d 713 (2000) and *State v. Cronin*, 142 Wn.2d 568, 578-79, 14 P.3d 752 (2000). The instruction at issue, though, refers appropriately to "the crime" and mirrors the statute on accomplice liability. CP at 56; RCW 9A.08.020; 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL (WPIC) 10.51. Accordingly, Young's claim fails.

2. Lesser Included Charge/Ineffective Assistance of Counsel

Hutchinson argues that he should have been given a lesser included charge of second degree promoting prostitution to his promoting commercial sexual abuse of a minor charge because he did not know the age of the minor.[11] A defendant is entitled to an instruction on a

[11] Promoting commercial sexual abuse of a minor does not require the State to prove that Hutchinson knew the age of the minor. The Legislature has specifically stated this is not a

lesser included instruction if two conditions are met: (1) each of the elements of the lesser offense are a necessary element of the offense charged and (2) the evidence supports an inference that the lesser crime was committed. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Both the legal[12] and factual prongs are met here.

However, Hutchinson's defense counsel never requested this lesser included instruction. Therefore, the appropriate analysis is whether Hutchison's defense counsel was ineffective in not requesting a jury instruction. *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011), *cert. denied*, 135 S. Ct. 153 (2014) (when defendant had shown he was entitled to lesser included instruction but had not requested it at trial, appropriate analysis was whether it was ineffective assistance of counsel not to request the lesser included instruction).

In order for Hutchinson to prevail on an ineffective assistance claim, he must overcome the presumption that his counsel was effective. *State v. Witherspoon*, 180 Wn.2d 875, 885, 329 P.3d 888 (2014). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To overcome this presumption, Hutchinson must demonstrate that (1) counsel's representation fell below an

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defense. RCW 9.68A.110(3) ("In a prosecution under . . . RCW 9.68A.101 [promoting commercial sexual abuse of a minor] . . . it is not a defense that the defendant did not know the alleged victim's age.").

[12] *Compare* former RCW 9.68A.101 *with* RCW 9A.88.080; *see also State v. Johnson*, 173 Wn.2d 895, 898, 270 P.3d 591 (2012) ("The jury was instructed on both attempted promotion of commercial sexual abuse of a minor and attempted promotion of prostitution, a lesser included offense.").

objective standard of reasonableness and (2) the deficient performance prejudiced the defense. *Id.* at 687-88.

As to the first prong, a criminal defendant can rebut the presumption of reasonable performance by demonstrating that "'there is no conceivable legitimate tactic explaining counsel's performance.'" *Grier*, 171 Wn.2d at 33 (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). In this case, however, there is a conceivable reason for why defense counsel did not request this instruction: an all-or-nothing approach. *Id.* at 43; *Witherspoon*, 180 Wn.2d at 886. Defense counsel could have reasonably thought that it was better to risk the choice between conviction of promoting commercial sexual abuse of a minor or acquittal than it was to give the jury a second option. *State v. Hoffman*, 116 Wn.2d 51, 112, 804 P.2d 577 (1991) ("The defendants cannot have it both ways; having decided to follow one course at the trial, they cannot on appeal now change their course and complain that their gamble did not pay off.").

As to the second prong, the defendant has not met his burden in showing prejudice. We must presume that the jury would not have convicted Hutchinson of promoting commercial sexual abuse of a minor unless the State had met its burden of proof. *Grier*, 171 Wn.2d at 43-44. As such, a compromise verdict would not have changed the outcome of the trial. *Id.* at 44.

Accordingly, Hutchinson's claim fails.[13]

[13] Hutchinson also cites *State v. Daniels* to support his argument. 183 Wn. App. 109, 332 P.3d 1143 (2014). However, this case is about the double jeopardy doctrine, which is irrelevant to this claim.

3. Tampering with a Witness

Hutchinson also states that Young tampered with one of the State's witnesses, N.H., because she talked to Young in the Pierce County Jail. The record indeed indicates that Young and N.H. were involved in a relationship and talked frequently while he was in jail. However, the record contains no evidence of coercion or tampering in these conversations. In fact, N.H. testified that she never minimized anything that Young did or withheld information regarding Young's involvement. It is the province of the jury to determine N.H.'s credibility, and we will not revisit that determination on appeal. *State v. Dietrich*, 75 Wn.2d 676, 677-78, 453 P.2d 654 (1969). Accordingly, we disagree with Hutchinson's claim of witness tampering.

CONCLUSION

We hold that (1) the trial court reasonably exercised its discretion in ruling there was sufficient evidence that the text messages were authenticated or identified as from Young, (2) there was sufficient evidence presented at trial from which a rational trier of fact could have found the elements of communication with a minor for immoral purposes beyond a reasonable doubt for both defendants, (3) the prosecutor's questioning of the witness about a pretrial interview was not improper and did not impugn the integrity of defense counsel, (4) the prosecutor's discussion of accomplice liability during closing argument was not improper, and

(5) none of the SAG claims warrant reversal of the defendants' convictions. Accordingly, we affirm Young's and Hutchinson's convictions.

Bjorgen, A.C.J.
BJORGEN, A.C.J.

We concur:

Maxa, J.
MAXA, J.

Lee, J.
LEE, J.