Supreme Court No. 101539-9
Court of Appeals No. 82739-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SEATTLE,

Respondent,

v.

DARYL RUDRA SHARMA,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Daryl Rudra Sharma requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in City of Seattle v. Sharma, No. 82739-1-I, filed on October 24, 2022. The Court of Appeals entered an order denying the City's motion to publish on November 15, 2022. A copy of the Court of Appeals' opinion is attached as an appendix.

B. ISSUE PRESENTED FOR REVIEW

While waiting at a bus stop, Daryl Sharma engaged in a conversation with a Seattle Police detective walking the street posing as a prostitute. When the detective asked Mr. Sharma if he was looking for a "date," he said "yes." He said he was looking for a "a blow job or something." He said he had no money and asked the detective for her phone number so he could call her later. Officers nearby immediately arrested Mr. Sharma and the City charged him with one count of sexual exploitation in violation of former SMC 12A.10.040 (2015).

In fact, Mr. Sharma had no intention of calling the detective later or paying her for sex. Instead, he had merely enjoyed talking "dirty" with her and pretending he was interested in sex. But Mr. Sharma was never allowed to present his defense to the jury. The Seattle ordinance explicitly stated the City need not prove Mr. Sharma actually intended to pay for sex. Based on the language of the ordinance and the City's motion prior to trial, the trial court precluded Mr. Sharma from arguing he acted without intent.

Merely engaging someone in a conversation about paying for sex, without actually intending to pay for sex, is essentially innocent conduct. Jesting and idle talk are protected by the First Amendment. The Seattle ordinance violated due process because it allowed the City to punish Mr. Sharma for engaging in essentially innocent conduct and was not reasonably or substantially related to the harm the Legislature intended to prevent. This is a significant question of constitutional law and

an issue of substantial public interest warranting review by this Court. RAP 13.4(b)(3), (4).

C. STATEMENT OF THE CASE

One early evening in June 2017, Daryl Sharma was sitting at a bus stop in Seattle. CP 310-12, 314, 333. Ashley Fitzgerald, an undercover Seattle Police detective, was walking the street posing as a prostitute. CP 310-12.

As Detective Fitzgerald walked by the bus stop, Mr. Sharma made eye contact with her and smiled. CP 314. Detective Fitzgerald stopped and asked Mr. Sharma if he was looking for a "date." CP 314, 336. Mr. Sharma said "yes," and stood up and approached her. CP 314. He took out his cell phone and asked for her phone number so that he could "call [her] later." CP 314, 337. He said he had no money and needed to "go home and get [his] shit." CP 314, 337. Detective Fitzgerald gave Mr. Sharma a fake phone number and watched as he apparently entered the number into his phone. CP 316.

Detective Fitzgerald asked Mr. Sharma what he was looking for and according to her, he replied, “maybe a blow job or something.” CP 315, 337. The detective responded she “could give him a blow job for $20.” CP 315. At that point, she gave a pre-arranged “good buy” signal to the surveillance officers located nearby. CP 315, 333.

The detective continued to engage Mr. Sharma in conversation. CP 316. Mr. Sharma asked what her name was and she provided a fake name, “Candy.” CP 316. According to the detective, Mr. Sharma replied, “oh, that’s good. So, you should taste good then.” CP 316. The detective then told Mr. Sharma “to call [her] later and to meet [her] back at the bus stop.” CP 338. She said he replied, “yes.” CP 317. But they never discussed a particular time to meet up later. CP 338. Mr. Sharma never gave the detective any money. CP 338.

A team of officers approached and arrested Mr. Sharma. CP 317. They placed him in the back of a patrol car and drove him to the precinct. CP 346.

The patrol car was equipped with audio and video recording equipment that captured several statements Mr. Sharma made to the officers on the way to the precinct. CP 346-48. Mr. Sharma insisted he had done nothing wrong and was "just being arrested for talking to a random woman." CP 350, 352. He said "she was offering sexual favors," and he told her "okay sure I will do that," but he did not intend to follow through with it. CP 351. Instead, he just enjoyed being "turned on" by "[a] beautiful woman talking to [him] dirty like that." CP 351. He never intended to go anywhere with her or give her any money. CP 351.

Although Mr. Sharma told Detective Fitzgerald he had no money, in a search incident to arrest, the officers indeed found money on his person, although the record does not reveal how much. CP 354.

The City charged Mr. Sharma with one count of "sexual exploitation" under former SMC 12A.10.040 (2015). CP 96.

Prior to trial, the City moved to preclude the defense from arguing Mr. Sharma did not actually intend to hire a prostitute. CP 75, 147. The City argued this was a strict liability offense and therefore Mr. Sharma could not argue he lacked any particular mental state. CP 75, 147. The trial court agreed and granted the motion. CP 75, 152.

The jury found Mr. Sharma guilty as charged. CP 33. At sentencing, the court imposed 90 days in jail, with 30 days suspended, and a $500 fine. CP 14, 406-08.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Seattle's sexual exploitation ordinance violated due process because it criminalized innocent conduct as a result of its failure to include a *mens rea* element. This is a significant question of constitutional law and a matter of substantial public interest warranting review by this Court. RAP 13.4(b)(3), (4).

Mr. Sharma was convicted of "sexual exploitation" in violation of former SMC 12A.10.040 (2015). CP 14, 96. The ordinance explicitly provided that the crime included no *mens rea* element:

> A. A person is guilty of sexual exploitation if:
>
> 1. Pursuant to a prior understanding, he or she pays a fee to another person as compensation for such person or a third person having engaged in sexual conduct with him or her; or
>
> 2. He or she pays or agrees to pay a fee to another person pursuant to an understanding that in return therefor such person will engage in sexual conduct with him or her; or
>
> 3. He or she solicits or requests another person to engage in sexual conduct with him or her in return for a fee.
>
> . . . .
>
> C. As authorized by Section 12A.04.100, *liability for sexual exploitation does not require proof of any of the mental states described in Section 12A.04.030*.

Former SMC 12A.10.040 (2015) (emphasis added).

Mr. Sharma was convicted of violating section (A)(2) of the ordinance. That is, the City bore the burden to prove he "agreed to pay a fee to another person pursuant to an understanding that in return therefor that person would engage in sexual conduct with the defendant." CP 24 (to-convict jury instruction); Former SMC 12A.10.040(A)(2) (2015).

In light of the language of the ordinance and the City's pretrial motion, the trial court specifically precluded Mr.

Sharma from arguing he merely engaged Detective Fitzgerald in conversation but had no actual intent to pay her for sex. CP 75, 147, 152. In this way, the trial court prevented Mr. Sharma from presenting his principal defense. As he explained to the officers at the time of his arrest, he had enjoyed talking "dirty" with the detective, and was titillated by her offer of "sexual favors," but he did not intend to go anywhere with her or give her any money for sex. CP 350-52. All he did was "talk to a woman," without any criminal intent. CP 352.

As demonstrated by the facts of this case, the Seattle sexual exploitation ordinance criminalized mere speech without requiring the City to prove any culpable mental state. But engaging in a conversation with someone about paying for sex, without an actual intent to pay for sex, is innocent conduct. It is also protected by the First Amendment. Because the ordinance criminalized essentially innocent conduct, it violated due process.

1. The Legislature may not criminalize essentially innocent conduct.

The Due Process Clauses of the state and federal constitutions limit the Legislature's power to criminalize and punish conduct. State v. Blake, 197 Wn.2d 170, 173, 481 P.3d 521 (2021); U.S. Const. amend. XIV; Const. art. I, § 3. Our state constitution provides even greater protection than the Fourteenth Amendment against "the reach of the State's police power." Id. at 181.

The Due Process Clause protects individuals by prohibiting the government from criminalizing essentially innocent conduct. Id. at 179-80.

Although states have a legitimate interest in restraining harmful conduct and are empowered to do so under their police powers, the police power is not infinite. Id. at 177-78. The Due Process Clause requires that a criminal statute have "a reasonable and substantial relation to the accomplishment of some purpose fairly within the legitimate range or scope of the police power and . . . not violate any direct or positive mandate

of the constitution." Id. at 178 (quotation marks and citations omitted).

Requiring proof of *mens rea* is central to Anglo-American criminal jurisprudence. Id. at 179, 189. That the government must prove the accused acted with criminal intent was accepted practically without qualification in the English common law. Morrisette v. United States, 342 U.S. 246, 250-51, 72 S. Ct. 240, 96 L. Ed. 288 (1952).

The traditional rule that crimes must contain a *mens rea* element has exceptions. Blake, 197 Wn.2d at 179. The Legislature may create strict liability offenses to protect the public from certain kinds of harms by putting the burden of care on those in the best position to avoid those harms. Id. Strict liability is accepted in the narrow categories of public welfare offenses and crimes where the circumstances make it reasonable to charge the accused with knowledge of the facts that make the conduct illegal. State v. Moser, 884 N.W.2d 890, 897 (Minn. Ct. App. 2016).

Strict liability public welfare offenses reflect the Legislature's judgment that "the doing of the act itself imperils the public safety or welfare." Seattle v. Gordon, 54 Wn.2d 516, 519, 342 P.2d 604 (1959).

Washington courts have upheld the following strict liability public welfare offenses: the unlawful practice of law, State v. Yishmael, 195 Wn.2d 155, 167-68, 456 P.3d 1172 (2020); unlawful possession of a loaded rifle in a vehicle, State v. Pinkham, 2 Wn. App. 2d 411, 416, 409 P.3d 1103 (2018); carrying a concealed pistol without a license, Seattle v. Briggs, 109 Wn. App. 484, 493, 38 P.3d 249 (2001); changing the occupancy of an apartment building without first securing a permit from the City Building Department, Seattle v. Koh, 26 Wn. App. 708, 714, 614 P.2d 665 (1980); and possession of explosives without a license, State v. Arita, No. 46948-1-II, 2016 WL 3514175, at *4 (Wash. Ct. App. June 21, 2016) (unpublished opinion cited under GR 14.1).

Legislatures may also create strict liability offenses in a narrow category of situations where the doing of the act itself is inherently risky and blameworthy. For example, the Court of Appeals upheld the DUI vehicular homicide statute even though it required no proof of *mens rea* because drunk driving is inherently blameworthy and "requires the choice to consume alcohol and drive, an unquestionably dangerous combination." State v. Vanderburgh, 18 Wn. App. 2d 15, 21 n.4, 489 P.3d 272, review denied, 198 Wn.2d 1022 (2021).

Likewise, courts generally uphold child rape statutes that require no proof of *mens rea* because child rape is not wholly innocent conduct. Blake, 197 Wn.2d at 193-94. And young children need special protection against sexual exploitation. United States v. Ruggiero, 791 F.3d 1281, 1287 (11th Cir. 2015). The choice to engage in sexual conduct with a child without verifying the child's age is "the failure to act under circumstances that should alert the doer to the consequences of his deed." Id. at 1288; cf. Moser, 884 N.W.2d at 903 (holding it

was not reasonable to charge defendant with knowledge of child's age in child solicitation case where solicitation occurred solely over the Internet and child represented to defendant that they were 16 or older).

If a criminal statute is silent on the issue of *mens rea* and the crime does not fall into one of the two narrow categories described above, courts generally will construe the statute as containing a *mens rea* element in order to avoid constitutional doubt. Blake, 197 Wn.2d at 188-90.

But if the Legislature made clear it intended to create a strict liability offense, the Court may not read a *mens rea* element into the statute. Blake, 197 Wn.2d at 188. In that situation, the Court must determine whether the statute violates due process. The test is whether the area of regulation is within the government's scope of authority and whether the particular ordinance is a reasonable regulatory measure in support of the area of concern. Id. at 181. A law violates due process if it does not adequately distinguish between conduct calculated to harm

and that which is essentially innocent, and does not bear a sufficient relationship to the stated objective. Id. at 182.

For example, in Blake, the Court addressed a statute criminalizing the mere possession of drugs without requiring proof of *mens rea*. Id. at 176. The Legislature had already made clear it intended to criminalize unknowing possession. Id. at 188. The Court concluded the statute violated due process because the unknowing possession of drugs is essentially innocent conduct. Id. at 183. Criminalizing unknowing possession was insufficiently related to the objective of regulating drugs. Id. at 186. Further, the crime carried the harsh penalties of felony conviction, including imprisonment, stigma, and the many collateral consequences that accompany every felony drug conviction. Id. at 174, 184. Also relevant was the fact that Washington was apparently the only state that continued to criminalize unknowing possession. Id. at 186.

Washington courts have similarly invalidated other strict liability statutes that criminalized essentially innocent conduct,

even where the crimes were misdemeanors and did not carry the harsh penalties of felony conviction. See, e.g., State v. Pullman, 82 Wn.2d 794, 795, 514 P.2d 1059 (1973) (holding Seattle ordinance that criminalized accompanying a minor outdoors during curfew hours violated due process because it made no distinction between conduct calculated to harm and that which was essentially innocent, and bore no real or substantial relationship to the protection of minors); Seattle v. Drew, 70 Wn.2d 405, 410, 423 P.2d 522 (1967) (holding Seattle ordinance making it unlawful "for any person wandering or loitering abroad" after dark to fail to give a satisfactory account of himself upon the demand of a police officer violated due process because it "ma[de] no distinction between conduct calculated to harm and that which is essentially innocent").

2. The sexual exploitation ordinance violated due process because it criminalized essentially innocent conduct, carried harsh penalties, and was unusual among the states.

Seattle's sexual exploitation ordinance explicitly provided that the crime contained no *mens rea* element. Former

SMC 12A.10.040(C) (2015). Therefore, this Court may not read a *mens rea* element into the statute in order to save it from constitutional infirmity. See Blake, 197 Wn.2d at 188.

The crime did not fall under one of the narrow exceptions to the general rule that the government must prove the criminalized conduct was committed with a guilty mind. Sexual exploitation cannot be characterized as a public welfare offense. The "doing of the act itself" did not imperil the public safety or welfare. Gordon, 54 Wn.2d at 519. Unlike practicing law without a license, or possessing a loaded rifle in a vehicle, telling someone you will pay a fee in exchange for sex does not endanger the public at large.

Moreover, the conduct the ordinance criminalized was not inherently risky or blameworthy. Engaging in a conversation with someone about paying for sex, without actually paying for sex, is inherently innocuous, unlike having sex with a child, or driving while drunk.

a. The ordinance criminalized essentially innocent conduct.

Former SMC 12A.10.040(A)(2) (2015) criminalized essentially innocent conduct. Merely pretending to agree to pay someone for sex, or joking about paying for sex, without any intent to pay for sex, is essentially harmless.

The ordinance bore no reasonable or substantial relationship to the harm the Legislature intended to prevent. Seattle's crime of "sexual exploitation" was similar to the crime of "patronizing a prostitute" recognized by legislatures in many other states. Natalia Benitez et al., Prostitution and Sex Work, 19 Geo. J. Gender & L. 331, 338-39 (2018). Such statutes and ordinances typically criminalize paying, offering to pay, or agreeing to pay compensation for criminal activity. Id. The purpose of such laws is to deter persons from paying for sexual conduct. 73 C.J.S. Prostitution and Related Offenses § 19 (2022).

But convicting and punishing someone who did not patronize a prostitute, and had no intention of doing so, does

not deter actual patrons. Seattle's ordinance was overbroad in scope and not reasonably related to the goal of curtailing prostitution.

Moreover, joking and idle talk, as well as "dirty" talk, are protected by the First Amendment. "The First Amendment prohibits criminalization of communications that are 'merely jokes, idle talk, or hyperbole.'" State v. Homan, 191 Wn. App. 759, 770, 364 P.3d 839 (2015) (quoting State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010) (addressing "true threat" requirement)). And "[s]exual expression which is indecent but not obscene is protected by the First Amendment." Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 126, 109 S. Ct. 2829, 106 L. Ed. 2d 93 (1989).

Here, Mr. Sharma was punished for pretending to agree to pay someone posing as a prostitute for sex. His intent was not to follow through on this supposed "agreement" but rather to engage with "[a] beautiful woman talking to [him] dirty like that." CP 351. Mr. Sharma's conduct amounted to joking and

idle talk, and non-obscene sexual expression, which was protected by the First Amendment. This is relevant to the due process analysis because "[u]nder both the state and federal constitutions, a statute must have a reasonable and substantial relation to the accomplishment of some purpose fairly within the legitimate range or scope of the police power and [must] not violate any direct or positive mandate of the constitution." Blake, 197 Wn.2d at 178 (quotation marks and citations omitted). By criminalizing conduct protected by the First Amendment, Seattle's sexual exploitation ordinance violated a direct mandate of the constitution.

b. The sexual exploitation ordinance carried harsh penalties.

Imposing harsh penalties for innocent conduct exceeds the government's police power. See Blake, 197 Wn.2d at 174, 184.

Sexual exploitation was a misdemeanor offense. But this does make the ordinance constitutional. "[N]o one can be convicted of a crime punishable by imprisonment" for

committing an act without culpability. Moser, 884 N.W.2d at 901.

The crime of sexual exploitation was punishable by imprisonment. The trial court sentenced Mr. Sharma to 90 days in jail, with 30 days suspended. CP 14. The court also imposed a $500 fine. CP 14. This was a harsh punishment for an act committed without any culpability.

Further, as the superior court found, the crime carried significant stigma. CP 514. Due to the title of the offense, "sexual exploitation," the crime could easily be confused with the felony crime of "sexual exploitation of a minor" found in RCW 9.68A.040.

Indeed, some men convicted of sexual exploitation under the Seattle ordinance have had difficulties finding and keeping employment because of errors in their criminal background checks. Sara Jean Green, Name Change for Prostitution Charge in Seattle Brings Errors in Background Checks, The Seattle Times (June 14, 2017), https://www.seattletimes.com/seattle-

news/law-justice/name-change-for-prostitution-charge-in-seattle-brings-errors-in-background-checks. For some men, employment-related criminal background checks erroneously showed they had been convicted of a sex-related felony. Id. For other men, the crime was listed on background checks as "classification unknown," instead of a misdemeanor. Id.

A conviction for sexual exploitation also carries potential immigration consequences. Patronizing a prostitute is a crime of "moral turpitude" for purposes of the immigration laws. Rohit v. Holder, 670 F.3d 1085, 1090 (9th Cir. 2021). Any alien convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, is deportable, regardless of whether the person received jail time for the convictions. 8 U.S.C. § 1227(a)(2)(A)(ii).

Seattle's sexual exploitation ordinance imposed the harsh penalties of jail time, monetary fine, social stigma, and potential immigration consequences for essentially innocent conduct. This supports the conclusion it violated due process.

c. Seattle's ordinance was an outlier.

Whether a statute is unique among the states in criminalizing conduct without proof of *mens rea* is also relevant to the due process analysis. Blake, 197 Wn.2d at 186.

Although the crime of "patronizing a prostitute" is common among the states, criminalizing the act of "agreeing" to pay someone posing as a prostitute for sex, without requiring proof of *mens rea*, is not. Generally, other states' statutes either contain explicit *mens rea* elements, courts read such elements into the statutes, or the statutes require proof the defendant committed some kind of overt act. In other states with statutes similar to Seattle's, the courts have simply not addressed whether the absence of a *mens rea* element violates due process. It is impossible to conclude those statutes do *not* violate due process.

Many state statutes that criminalize patronizing a prostitute contain an explicit *mens rea* element. See, e.g., Cal. Penal Code § 647(b)(2) (person guilty of disorderly conduct

who "solicits, or who agrees to engage in, or who engages in, any act of prostitution with another person . . . . An individual agrees to engage in an act of prostitution when, with specific intent to so engage, the individual manifests an acceptance of an offer or solicitation by another person . . . ."); Colo. Rev. Stat. Ann § 18-7-205(1)(b) (person guilty of patronizing a prostitute who "[e]nters or remains in a place of prostitution with intent to engage in an act of sexual intercourse or deviate sexual conduct"); Ind. Code Ann. § 35-45-4-3(a)(1) (person guilty of patronizing a prostitute who "knowingly or intentionally pays, or offers or agrees to pay, money or other property to another person . . . on the understanding that the other person will engage in, sexual intercourse or other sexual conduct . . . with the person or with any other person"); La. Rev. Stat. Ann. § 82.2(A) ("It shall be unlawful for any person to knowingly give, agree to give, or offer to give anything of value to another in order to engage in sexual intercourse with a person who receives or agrees to receive anything of value as

compensation for such activity"); Tex. Penal Code Ann. § 43.021(a) (person commits crime of solicitation of prostitution who "knowingly offers or agrees to pay a fee to another person for the purpose of engaging in sexual conduct with that person or another"); Parrott v. Anchorage, 69 P.3d 1, 5 (Alaska Ct. App. 2003) (Anchorage ordinance AMC 8.65.030(A) makes it unlawful for any person to "knowingly solicit, induce, entice, invite or procure another for the purpose of prostitution").

In one state with a statute criminalizing patronizing a prostitute with no explicit *mens rea* element, the court construed the statute as containing such an element. See State v. Crisp, 175 Ariz. 281, 283, 855 P.2d 795 (1993) (Phoenix ordinance § 23-52(a)(2) provided, "A person is guilty of a misdemeanor who . . . [s]olicits or hires another person to commit an act of prostitution"; court infers ordinance contains intent element, holding "to solicit or hire means that, by one's words and conduct, one intends to bring about the act solicited or the performance requested").

Similarly, several state courts have read *mens rea* elements into statutes criminalizing various other acts related to prostitution, where the statutes did not contain explicit *mens rea* elements. See, e.g., State v. Butkus, 37 Conn. Supp. 515, 518-19, 424 A.2d 659 (Conn. Super. Ct. 1980) (Conn. Gen. Stat. § 53a-82 provided person guilty of prostitution if such person "engages or agrees or offers to engage in sexual conduct with another person in return for a fee"; court holds defendant charged with prostitution must be able to argue she did not have intent to make the offer and was only joking); Moore v. State, 231 Ga. 218, 219, 201 S.E.2d 146 (1973) (Ga. Code Ann. § 26-2012 provided person guilty of prostitution if "he performs or offers or consents to perform an act of sexual intercourse for money"; court holds statute criminalizes "enter[ing] into an agreement to do an illegal act with the intention of committing it"); Ford v. State, 127 Nev. 608, 618-19, 262 P.3d 1123 (2011) (Former Nev. Rev. Stat. § 201.300(1) provided person guilty of "pandering" who "induces, persuades, encourages, inveigles,

entices or compels a person to become a prostitute or to continue to engage in prostitution"; court holds statute contains implicit element of specific intent because otherwise statute would criminalize innocent conduct and cast statute into constitutional doubt under First Amendment and Due Process Clause); State v. Parrish, 12 Ohio St. 3d 123, 124, 465 N.E.2d 873 (1984) (Ohio Rev. Code Ann. § 2907.25(A) defines crime of prostitution as "engag[ing] in sexual activity for hire"; court reads element of intent into statute).

In some states, statutes criminalizing patronizing a prostitute require the prosecution to prove the defendant actually paid for sex or committed some other overt act, in order to avoid criminalizing essentially innocent or ambiguous conduct. See, e.g., People v. Mecano, 214 Cal. App. 4th 1061, 1071, 154 Cal. Rptr. 3d 519 (2013) ("to ease concerns that ambiguous conduct or statements might lead to false arrests" for violations of Cal. Penal Code § 647(b)(2), "the Legislature added the overt act requirement, namely, no agreement to

engage in an act of prostitution shall violate the section unless some clarifying or corroborating act in furtherance of it was committed"); Colo. Rev. Stat. Ann § 18-7-205(1)(a) (person guilty of patronizing a prostitute who "[e]ngages in an act of sexual intercourse or of deviate sexual conduct with a prostitute"); Commonwealth v. Mita, 41 Pa. D. & C.3d 607, 612-14, 14 Phila. Co. Rptr. 643, 1986 WL 3229 (C.P. 1986) (18 Pa. Cons. Stat. § 5902(e) provided, "A person commits a summary offense if he hires a prostitute to engage in sexual activity with him"; court acknowledges statute created strict liability crime with no *mens rea* element but explained, "the quid pro quo for forsaking the *mens rea* requirement of the common law in these statutory offenses, is the mandate that the *actus reus* be present; in other words, the defendant must actually hire a prostitute to engage in sexual activity with him).

In several states with statutes similar to Seattle's ordinance, that criminalize patronizing a prostitute without an explicit *mens rea* element, the courts have not addressed

whether the statutes contained implicit *mens rea* elements or violated due process. Therefore, these statutes cannot be relied upon to conclude that dispensing with a *mens rea* element does *not* violate due process. Further, unlike Seattle's ordinance, none of these statutes explicitly states the crime does *not* contain a mental element. See, e.g., Ark Code Ann. § 5-70-103 ("[a] person commits the offense of sexual solicitation if he or she: (1) Offers or agrees to pay a fee to a person to engage in sexual activity with him or her or another person; or (2) Solicits or requests a person to engage in sexual activity with him or her in return for a fee"); Conn. Gen. Stat. Ann. § 53a-83(a)(2) (person guilty of "Soliciting sexual acts" who "exchanges or agrees to exchange anything of value with another person pursuant to an understanding that such other person or a third person will engage in sexual conduct with such person"); Del. Code Ann. tit. 11, § 1343(a)(2) (person guilty of "patronizing a prostitute" who "pays or agrees to pay a fee to another person pursuant to an agreement or understanding that in return

therefor that person or a third person will engage in sexual conduct with the person"); Idaho Code Ann. §18-5614(1)(a) (person guilty of "patronizing a prostitute" who "[p]ays or offers or agrees to pay another person a fee for the purpose of engaging in an act of sexual conduct or sexual contact"); N.Y. Penal Law § 230.02(1)(b) (person guilty of "patronizing a person for prostitution" who "pays or agrees to pay a fee to another person pursuant to an understanding that in return therefor such person or a third person will engage in sexual conduct with him or her"); Utah Code Ann. § 76-10-1303(1)(a) (person guilty of "patronizing a prostitute" who "pays or offers or agrees to pay a prostitute, or an individual the actor believes to be a prostitute, a fee, or the functional equivalent of a fee, for the purpose of engaging in an act of sexual activity").

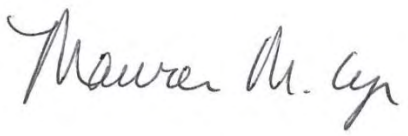
In sum, former SMC 12A.10.040 (2015) criminalized essentially innocent conduct because it required no proof of *mens rea*. It was not reasonably or substantially related to the goal of reducing prostitution. Further, the ordinance carried

harsh consequences and was unusual among the states. Therefore, it violated due process.

E. CONCLUSION

For the reasons provided, this Court should grant review and reverse the Court of Appeals.

Respectfully submitted this 13th day of December 2022. I certify this brief complies with RAP 18.17 and contains 4,951 words.



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

CITY OF SEATTLE, Appellant, v. DARYL RUDRA SHARMA, Respondent.	No. 82739-1-I UNPUBLISHED OPINION

BOWMAN, J. — A jury convicted Daryl Rudra Sharma in Seattle Municipal Court of sexual exploitation under former Seattle Municipal Code (SMC) 12A.10.040(A)(2) (Seattle Ordinance (SO) 125345, § 4 (July 14, 2017)).[1] Sharma appealed to the superior court, arguing that the ordinance is unconstitutionally overbroad and vague and that sufficient evidence did not support his conviction. The court did not address those arguments. Instead, it determined the jury instructions were constitutionally deficient and reversed Sharma's conviction. The city of Seattle (City) appealed. On appeal, we reversed the superior court and remanded the case for the court to consider Sharma's constitutional and sufficiency arguments. On remand, the superior court again did not address Sharma's arguments. It determined that former SMC 12A.10.040(A)(2) amounts to a strict liability crime that punishes wholly innocent and passive nonconduct and violates due process under State v. Blake, 197

[1] Repealed by SO 125881, § 12 (Aug. 9, 2019).

Wn.2d 170, 481 P.3d 521 (2021). The City again appeals. We conclude that former SMC 12A.10.040(A)(2) does not violate due process because agreeing to pay for sex is conduct that bears a reasonable and substantial relation to the objective of regulating prostitution. We reverse and remand for the superior court to decide the constitutional and sufficiency issues raised in Sharma's appeal.

FACTS

In July 2017, Seattle Police Detective Ashley Fitzgerald was working undercover as a sex worker. On the evening of July 30, as Fitzgerald walked along Aurora Avenue North, she saw Sharma sitting at a bus stop. She asked him if he "was looking for a date." Sharma said, " 'Yes, actually I was wondering if I could give you a call. I don't have any money right now.' " Fitzgerald said, " 'Sure,' " and asked Sharma, " '[W]hat are you looking for.' " Sharma responded, " 'I don't know. Maybe a blow job or something.' " Fitzgerald told him she "could do that for $20."

Fitzgerald signaled other officers to arrest Sharma while the conversation continued. She testified:

> He asked me what my name was. I told him my name was Candy and then he said, "Oh, well that should taste good then." And then he asked for my phone number, and I provided him a fake phone number which I saw him put into his phone. And then I confirmed, "So, I'll meet you back here later then, a blow job for $20." And he said yes.

Fitzgerald then left and the other officers arrested Sharma.

The City charged Sharma with sexual exploitation under former SMC 12A.10.040(A)(2) for "agreeing to pay a fee to another person pursuant to an understanding that in return therefor such person will engage in sexual conduct

with him." The jury convicted Sharma as charged. The court imposed a 90-day jail sentence with 30 days suspended and granted Sharma's request to stay the sentence pending an appeal.

Sharma appealed to King County Superior Court, arguing that former SMC 12A.10.040(A)(2) is unconstitutionally overbroad and vague. He also challenged the sufficiency of the evidence to prove each element of sexual exploitation beyond a reasonable doubt. But the superior court did not reach these issues. Instead, the court decided that the jury instructions denied Sharma a fair trial under the due process clause of the Washington Constitution, article I, section 3. The court reversed the jury verdict and remanded the case to the Seattle Municipal Court for a new trial.

The City appealed. We determined that the superior court erred by concluding that the jury instructions violated Sharma's due process rights. City of Seattle v. Sharma, No. 80022-1-I, slip op. at 7-8 (Wash. Ct. App. Dec. 14, 2020) (unpublished), https://www.courts.wa.gov/opinions/pdf/800221.pdf. We reversed and remanded for the superior court to consider Sharma's overbreadth, vagueness, and sufficiency claims. Id. at 8.

On remand, the superior court again did not reach these issues. Instead, it instructed the parties to provide supplemental briefing on the "impact of the Washington Supreme Court's recent decision in State v. Blake." Sharma argued that under Blake, former SMC 12A.10.040(A)(2) is invalid because it is a strict liability ordinance that criminalizes wholly innocent and passive nonconduct. The superior court agreed. It stated that the decision in Blake "profoundly changed

the legal landscape in Washington when it comes to strict liability offenses." And it concluded that former SMC 12A.10.040(A)(2) violates due process because it "criminalizes wholly innocent and passive nonconduct" by punishing the "mere agreement" to pay for sex without the exchange of money. The superior court again reversed the jury verdict and remanded to the municipal court.

The City appeals.

ANALYSIS

The City argues that the superior court erred in determining that Seattle's sexual exploitation ordinance violates due process under Blake. We agree.

The interpretation of constitutional provisions and legislative enactments, including municipal ordinances, presents a question of law we review de novo. State v. Immelt, 173 Wn.2d 1, 6, 267 P.3d 305 (2011); City of Spokane v. Rothwell, 166 Wn.2d 872, 876, 215 P.3d 162 (2009). We presume an ordinance is constitutional, and the challenging party must prove otherwise beyond a reasonable doubt. Kitsap County v. Mattress Outlet, 153 Wn.2d 506, 509, 104 P.3d 1280 (2005).

The government has a legitimate interest in restraining harmful conduct, and its police powers enable it to do so. See State v. Talley, 122 Wn.2d 192, 199, 858 P.2d 217 (1993). But the "constitutional protection afforded [to] certain personal liberties" limits those powers. Id. For example, a criminal conviction generally requires the government to prove a mens rea—a "guilty mind." Blake, 197 Wn.2d at 179-81; Staples v. United States, 511 U.S. 600, 605, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994).

But the government may enact strict liability laws to " 'protect the public from the harms that have come with modern life by putting the burden of care on those in the best position to avoid those harms.' " Blake, 197 Wn.2d at 179 (quoting State v. Yishmael, 195 Wn.2d 155, 164, 456 P.3d 1172 (2020)). Such laws must bear " 'a reasonable and substantial relation to the accomplishment of some purpose fairly within the legitimate range or scope of the police power and [must] not violate any direct or positive mandate of the constitution.' " Id. at 178[2] (quoting Ragan v. City of Seattle, 58 Wn.2d 779, 783, 364 P.2d 916 (1961)). A strict liability law that criminalizes wholly passive and innocent nonconduct is unrelated to accomplishing a legitimate government purpose and violates due process. Id. at 182-83.

Under former SMC 12A.10.040(A)(2), a person is guilty of sexual exploitation if he "pays or agrees to pay a fee to another person pursuant to an understanding that in return therefor such person will engage in sexual conduct with him."[3] Citing Blake, Sharma argues that former SMC 12A.10.040(A)(2) violates due process because it is a strict liability law that criminalizes wholly innocent and passive nonconduct.

[2] Alteration in original.

[3] Sharma argues that former SMC 12A.10.040(A)(2) is an "outlier" among the states because other statutes either "contain explicit mens rea elements, courts read such elements into the statutes, or the statutes require proof the defendant committed some kind of overt act." But former SMC 12A.10.040(A)(2) uses language identical to Washington's patronizing a prostitute statute, RCW 9A.88.110(1)(b). ("A person is guilty of patronizing a prostitute if . . . [h]e . . . agrees to pay a fee to another person pursuant to an understanding that in return therefor such person will engage in sexual conduct with him.") And the City cites over two dozen other state statutes that contain similar language.

In Blake, police arrested the defendant and found a bag of methamphetamine in the coin pocket of her jeans. 197 Wn.2d at 174. The State charged her under former RCW 69.50.4013(1) (2015), which made it " 'unlawful for any person to possess a controlled substance.' " Id. at 175-76. The defendant testified that she did not use methamphetamine, that a friend gave her the jeans, and that she did not know there were drugs in the pocket. Id. at 175.

Our Supreme Court framed the issue before it as "whether the legislature possesses the power to punish [a person] for innocent conduct—or, more accurately, nonconduct—without proving any mental state at all." Blake, 197 Wn.2d at 176-77. The court determined that it does not. Id. at 182-83. And it held that former RCW 69.50.4013(1) violates due process because it criminalized "unknowing, and hence innocent, passivity and therefore 'has an insufficient relationship to the objective of' regulating drugs." Id. at 186 (quoting City of Seattle v. Pullman, 82 Wn.2d 794, 802, 514 P.2d 1059 (1973)).

The Supreme Court listed examples of innocent and passive nonconduct that the former drug possession statute could criminalize:

> "[A] letter carrier who delivers a package containing unprescribed Adderall; a roommate who is unaware that the person who shares his apartment has hidden illegal drugs in the common areas of the home; a mother who carries a prescription pill bottle in her purse, unaware that the pills have been substituted for illegally obtained drugs by her teenage daughter, who placed them in the bottle to avoid detection."

Blake, 197 Wn.2d at 183 (quoting State v. A.M., 194 Wn.2d 33, 64 n.13, 448 P.3d 35 (2019) (McCloud, J., concurring)). It also analogized the defendant's nonconduct to an ordinance that criminalized " 'accompanying a child during

curfew hours.' " Id. at 182. That ordinance unconstitutionally punished innocent nonconduct because " 'any minor under the age of 18 could be arrested for standing or playing on the sidewalk in front of his home at 10:01 p.m. on a warm summer evening.' " Id. (quoting Pullman, 82 Wn.2d at 795).

Unlike the former drug possession statute in Blake, former SMC 12A.10.040(A)(2) does not punish passive nonconduct. It punishes the affirmative act of agreeing to exchange sexual conduct for money. Nor is an agreement to exchange sex for money wholly innocent conduct. See City of Seattle v. Rodriguez, 15 Wn. App. 2d 765, 770, 477 P.3d 509 (2020), review denied, 197 Wn.2d 1008, 484 P.3d 1265 (2021).

In Rodriguez, the defendant texted an undercover officer asking for sex. 15 Wn. App. 2d at 767-68. After meeting with her, the officer asked the defendant what he was looking for. Id. at 768. He replied, " 'Just sex,' " and the officer responded, " 'Okay, $80.' " Id. The defendant agreed. Id. A jury convicted the defendant under former SMC 12A.10.040(A)(3) (2015),[4] which prohibited " 'solicit[ing] or request[ing] another person to engage in sexual conduct with him or her in return for a fee.' " Id. at 768-69. The defendant argued that the ordinance criminalized innocent conduct protected by the First Amendment to the United States Constitution. Id. at 770. We disagreed:

> [Former] SMC 12A.10.040 adequately defines criminal conduct as soliciting another to engage in sexual conduct in return for a fee.

[4] Our analysis of Rodriguez cites the 2015 version of SMC 12A.10.040. All other citations throughout this opinion are to the 2017 version of the ordinance.

> This clearly proscribes prostitution. The First Amendment . . . does not protect prostitution.

Id. We reasoned that a defendant need not commit an overt act to violate the law; merely offering to engage in sexual conduct for a fee amounts to criminal activity. Id.; see City of Yakima v. Emmons, 25 Wn. App. 798, 801-02, 609 P.2d 973 (1980).[5]

Sharma argues that Rodriguez "is no longer good law." He claims that Rodriguez relies on State v. Schmeling, 191 Wn. App. 795, 801, 365 P.3d 202 (2015), which Blake "effectively overruled." See Rodriquez, 15 Wn. App. 2d at 770. But Rodriguez relies on Schmeling only for the well established concept that " 'the legislature has the authority to create strict liability crimes that do not include a culpable mental state.' " Rodriguez, 15 Wn. App. 2d at 770 (quoting Schmeling, 191 Wn. App. at 801 (citing State v. Bradshaw, 152 Wn.2d 528, 532, 98 P.3d 1190 (2004); State v. Anderson, 141 Wn.2d 357, 361, 5 P.3d 1247 (2000); State v. Rivas, 126 Wn.2d 443, 452, 896 P.2d 57 (1995))). Blake did not hold otherwise. Indeed, our Supreme Court declined to review Rodriguez two months after it issued Blake. See Rodriguez, 197 Wn.2d at 1008 (denying

[5] Sharma also argues that former SMC 12A.10.040(A)(2) is unconstitutional as applied because he told the officers who arrested him that he was just enjoying some " 'dirty' talk" and that he "did not intend to go anywhere with her or give her any money for sex." According to Sharma, the First Amendment protects such "joking," "idle," and "dirty" talk. But the record does not show that Sharma was joking or engaged in idle talk. He told the arresting officers that he "was getting turned on" by a "beautiful woman talking to me dirty like that," but that he committed no crime because he "didn't go with her nowhere," "did not exchange any money," and told Fitzgerald, "I'm not going to do any right now." Sharma ignores the testimony that he had no money to give, asked Fitzgerald for her phone number, and agreed to meet her later when he had the $20.

review April 28, 2021); Blake, 197 Wn.2d at 170 (filed February 25, 2021). Rodriguez remains "good law."

In the alternative, Sharma argues Rodriguez is distinguishable from his case because the defendant in Rodriguez "committed an overt act by going to the undercover officer's apartment and handing her $80," while "Mr. Sharma committed no overt act." But Sharma did commit an act. He agreed to pay $20 in exchange for sexual conduct with Fitzgerald. The agreement itself is an act that violates the law. Former SMC 12A.10.040(A)(2); City of Yakima v. Emmons, 25 Wn. App. 798, 801, 609 P.2d 973 (1980); City of Seattle v. Ross, 77 Wn.2d 797, 798, 467 P.2d 177 (1970).

Because former SMC 12A.10.040(A)(2) punishes conduct that bears a reasonable and substantial relation to the objective of regulating prostitution, it does not violate due process. We reverse and remand for the superior court to consider Sharma's constitutional and sufficiency claims raised in his appeal.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 82739-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Richard Greene
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☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

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