Court of Appeals No. 34091-1-III

WASHINGTON STATE SUPREME COURT

STATE OF WASHINGTON,

Respondent,

vs.

SCOTT R. WATSON,

Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The petitioner is Scott R. Watson, the individual appellant in the case below and defendant at trial.

II. CITATION TO COURT OF APPEALS DECISION

The Court of Appeals, Division III, issued a decision on October 12, 2017, affirming the trial court's verdict finding Mr. Watson guilty of Communication with a Minor for Immoral Purposes under RCW 9.68A.090(2).

III. ISSUES PRESENTED FOR REVIEW

1. Does RCW 9.68A.090 require proof of a defendant's present intent to engage in sexual misconduct at the time of the communication in question?

2. Is RCW 9.68A.090 unconstitutional where it is applied to prohibit communications with a minor for purposes of any sexual nature, even if that conduct is not itself illegal and, therefore, not misconduct?

3. Does ER 404(b) permit introduction of alleged "grooming" behavior that occurs nearly one year **after** the alleged crime as evidence of the defendant's intent at the time of the communication?

IV. STATEMENT OF THE CASE

The State charged Scott Watson with one count of Communication with a Minor for Immoral Purposes, a class C felony, under

RCW 9.68A.090(2) (the "CMIP statute"). The State alleged that Mr. Watson, an adult, sent two photos depicting male genitalia by text message to a 15-year old female, H.R.B. Prior to trial, Mr. Watson moved to dismiss the count on the grounds that, if proven as the State alleged, his conduct did not amount to a crime under the CMIP statute. The trial court denied the motion.[1]

Also prior to trial, the court granted the State's motion in limine permitting it to introduce certain evidence it alleged proved Mr. Watson was "grooming" H.R.B. for sexual predation.[2] All of the evidence sought by the State in its motion related to events that occurred subsequent to Mr. Watson's alleged violation of the CMIP statute, and none of the events were, themselves, criminal acts. The State argued the evidence was admissible under ER 404(b) because it showed a "sort of preparation" (CP 199) and that this evidence was probative of Mr. Watson's intent at the time he committed the alleged crimes. (RP 8, 9) The trial court allowed the testimony at trial.

Mr. Watson was convicted by a jury. This timely appeal followed.

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[1] The State initially charged two counts under the CMIP statute. (CP 2-3) The trial court did dismiss one count prior to trial. (CP 152-54) This appeal only addresses the one count that went to trial.

[2] Some of the evidence that the State sought to introduce was denied by the trial court. (CP 198-99) This appeal only addresses the evidence that was admitted at trial.

V. ARGUMENT

The Supreme Court should accept review per RAP 13.4(b)(3) and (4) because RCW 9.68A.090, as applied in this case, violates the Washington Constitution. Further, review should be granted under RAP 13.4(b)(1) because Division Three's opinion is in conflict with (a) State v. Schimmelpfennig, 92 Wn. 2d 95, 102, 594 P.2d 442 (1979), and its progeny interpreting the CMIP statute, in that Division Three holds no intent is required to be proven beyond a reasonable doubt, and (b) State v. Jackson, 102 Wn. 2d 689, 693, 689 P.2d 76 (1984), and its progeny interpreting ER 404(b), in that Division Three excuses this Court's express requirement that the balancing test be performed on the record.

Mr. Watson's communications were not criminal acts under RCW 9.68A.090(2) as a matter of law because they were not sent for an immoral purpose, as that term is defined in Schimmelpfennig, at 102, and State v. McNallie, 120 Wn. 2d 925, 932, 846 P.2d 1358 (1993). The statute is unconstitutionally vague as applied to Mr. Watson in this case. Mr. Watson's conviction should be overturned and the charges dismissed.

The trial court abused its discretion when it allowed the State to introduce evidence at trial that Mr. Watson gave H.R.B. an adult sex toy nearly one year after sending his allegedly criminal communications in order to prove that Mr. Watson had criminal intent at the time he sent the

text messages in question. That evidence was extremely prejudicial and not probative of an ultimate issue at trial. Further, the trial court failed to conduct the appropriate balancing test, identify the purpose of admitting the testimony, and find the requisite intent, all on the record, as required by State v. Stanton, 68 Wn. App. 855, 861, 845 P.2d 1365 (1993) (quoting Jackson, at 693). Mr. Watson's conviction should be overturned and a new trial granted.

1. Statutory background and case law.

RCW 9.68A.090(2) makes any person "who communicates with a minor for immoral purposes" guilty of a Class C felony.[3] Mr. Watson contends he did not communicate with H.R.B. for an "immoral purpose," as that term is defined by Washington case law.

Since 1979, Washington courts have struggled with the undefined terms of RCW 9.68A.090.[4] In Schimmelpfennig, the Supreme Court affirmed the conviction of a man accused of violating the statute by explicitly soliciting sex from three young girls, aged 4, 6, and 7. Schimmelpfennig, 92 Wn. 2d at 97. Schimmelpfennig challenged the statute as unconstitutionality vague on its face, arguing the terms "communication" and "immoral purposes" were "insufficient to provide

[3] Mr. Watson does not dispute that the sending of a text message is an "electronic communication" as defined by RCW 9.61.260. See RCW 9.68A.090(2) and (3).
[4] That statute was formerly found at RCW 9A.88.020. See gen. Schimmelpfennig.

ascertainable standards to guide conduct." Id. at 102. The Court analyzed the statute to determine whether "persons of common intelligence and understanding have fair notice of the conduct prohibited, and ascertainable standards by which to guide their conduct." Id.

After analyzing the structure of the statute, the Court found that the legislature's intent in enacting the CMIP statute was "to prohibit sexual misconduct." Id. The Court went on to find that "any person of common understanding, contemplating asking a small child to climb into a van and engage in sexual activities need not guess as to the proscription and penalties of the statute." Id. at 103. Thus, the Court held "immoral purposes" was not unconstitutionally vague, and, because "the only language prohibited by the statute is language directed toward sexual misconduct with a minor," the CMIP statute was not unconstitutionally overbroad. Id.

As to "communicate," the Court found the common term "denotes both a course of conduct and the spoken word." Id. The Court held "any spoken word or course of conduct with a minor for purposes of sexual misconduct is prohibited." Id. at 103-04. In short, the Court found the obvious: attempting to lure small children into your van so that you can have sex with them is criminal behavior.

Ten years later, Division One was faced with a very different challenge to the statute in State v. Danforth, 56 Wn. App. 133, 782 P.2d 1091 (1989). In that case, Danforth solicited group sex from two minor males, aged 16 and 17. Id. at 134-35. Danforth was charged with and convicted of two counts of violating the CMIP statute. Id. After trial, Danforth moved to dismiss on the basis of unconstitutional vagueness as applied to him, which was denied and appealed. Id. at 135. Specifically, Danforth argued that his conduct could not be illegal under RCW 9.68A.090 because consensual sex between an adult and persons aged 16 and 17 years is not, itself, illegal. Id. at 137.

That court held that the Schimmelpfennig definition of "immoral purposes" formed the "constitutional 'core' of conduct prohibited by RCW 9.68A.090"; specifically, "communication for purposes of [the] sexual exploitation and abuse of children." Id. at 136. Because Danforth's communications did not fall into any of the categories of communications prohibited by the core of RCW 9.68A.090, the court reversed his conviction. Id. at 137. This ruling makes sense: if it is not illegal for an adult and a 16-year old minor to engage in consensual sex, it cannot be illegal for the adult to communicate with that minor about that sex.

The differences between Schimmelpfennig and Danforth are important to consider. The former defined "immoral purposes" as "sexual

misconduct with a minor." Schimmelpfennig, at 103. The latter found that communications with a minor cannot be "for an immoral purpose" if the resulting sexual act would not be illegal, and therefore not "misconduct." Danforth, at 137.

Three years later, Division Two was faced with a situation similar to Danforth in State v. Luther, 65 Wn. App. 424, 830 P.2d 674 (1992). In that case, Luther, who was himself a minor, was convicted on two counts of communication with a minor for immoral purposes for asking a 16-year old female if she was going to perform fellatio on him, as she had previously offered. Id. at 425. The court held that "the legislature never intended that RCW 9.68A.090 proscribe communications about sexual conduct that would be legal if performed" and reversed the convictions. Id. at 428.

In so holding, the Luther court first analyzed Schimmelpfennig, finding that the "Supreme Court held that the legislature's intent in enacting [RCW 9.68A.090] was to proscribe **communications about immoral sexual conduct made criminal by other statutes**." Id. at 425 (emphasis added). The Court found that RCW 9.68A.090 was ambiguous in that it could apply both to prohibit communications about immoral sexual conduct that was not criminal if actually performed, and conduct that would be illegal if performed. Id. at 427. The Court presumed that the

legislature cannot intend something unconstitutional, found that criminalizing communications "about peaceful, consensual conduct" would be unconstitutional, and held that the statute did not proscribe the communications in Luther's case. Id. at 428.

Luther, like Danforth, interprets Schimmelpfennig's definition of "immoral purposes" to require that the communication "be about" conduct; specifically, sexual misconduct. If the conduct is not illegal, then it cannot be misconduct.

Less than one year later, the Supreme Court was faced with another constitutional challenge to the CMIP statute in State v. McNallie, *infra*. In that case, McNallie was charged with three counts of violating RCW 9.68A.090 for sexually soliciting three young girls, ages 10, 11, and 11. Id. at 926-27. The jury specifically convicted McNallie on the two counts relating to the two girls to whom McNallie offered money in exchange for a sex act, but acquitted on the third in which he did not. Id. at 928.

McNallie challenged the to-convict instruction, arguing it was inconsistent with Danforth by failing to limit "immoral purposes" to "communications where a defendant involves a minor in activity expressly defined as 'sexual exploitation'" by RCW 9.68A.090. Id. at 929. In considering Schimmelpfennig and Danforth, the Court found that

Danforth was overly-limiting and that Schimmelpfennig controlled. Id. at 931-32. The Court held that RCW 9.68A.090 "prohibits communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct," and "immoral purposes" was not limited to those "specific offenses delineated" elsewhere in Ch. 9.68A. Id. at 932-33. The Court upheld McNallie's convictions. Id. at 935.

McNallie makes it clear that actual exploitation or compensation is not necessary to convict under RCW 9.68A.090. Id. at 933. But the "sexual misconduct" standard of Schimmelpfennig does require some "predatory purpose" on behalf of the communicator. Id. at 922-23.

Division Three had occasion to analyze the CMIP statute in State v. Pietrzak, 100 Wn. App. 291, 997 P.2d 947 (2000). In that case, Pietrzak, an adult, was involved in a consensual sexual relationship with his 16-year old niece. Id. at 293. He photographed his niece in the nude and was charged with communication with a minor for immoral purposes. Id. Pietrzak made a constitutional vagueness challenge to the statute, and the trial court denied it, finding Pietrzak photographed his niece for his own gratification and "as part of a quid pro quo for housing, food, beer and money." Id. Pietrzak was convicted and appealed. Id.

On appeal, the court affirmed the conviction, relying on Schimmelpfennig and McNallie to define "immoral purposes" as "sexual

misconduct." Id. at 295. Specifically, the court held that photographing a minor "for the purposes of sexual stimulation, or as part of a quid pro quo" violated the statute. Id. at 295-96. The Court did not point out that photographing minors and sexual exploitation (quid pro quo) are both specifically defined as "sexually explicit conduct" by RCW 9.68A.011(4).

To violate RCW 9.68A.090, the communication at issue must have a purpose. That purpose must be immoral. The purpose is immoral if it is about sexual misconduct. Schimmelpfennig, at 102; McNallie, at 932. The purpose is not immoral if it is about behavior that is not made illegal by some other statute. Luther, at 425; Danforth, at 136. Therefore, communications that either have no purpose or are not about illegal sexual conduct do not violate the CMIP statute.

2. If RCW 9.68A.090 does proscribe Mr. Watson's conduct, it is unconstitutional.

a. Standard for an as-applied constitutional challenge.

When a defendant contends that a statute is unconstitutionally vague with respect to his individual conduct, "the court must look to [his] conduct to determine whether the statute, as applied to that conduct, is unconstitutional. This is because, while a statute may be vague or potentially vague as to some conduct, the statute may be constitutionally applied to one whose conduct clearly falls within the statutory 'core' of

the statute." Danforth, at 136 (internal citations and quotations omitted). "The choice, interpretation, and application of a statute or other legal principles are matters of law that we review de novo." Pietrzak, at 293-94. "Statutes are presumed constitutional," and a challenge must prove "invalidity beyond a reasonable doubt." Id. at 294.

b. RCW 9.68A.090, as applied to this case, is unconstitutionally vague.

The stated legislative intent of Chapter 9.68A RCW, Sexual Exploitation of Children, is the "prevention of sexual exploitation and abuse of children" by "those who seek commercial gain or personal gratification based on the exploitation of children." RCW 9.68A.001.[5] The Schimmelpfennig decision interpreted the legislature's intent as "prohibit[ing] **conduct** relating to exposure of the person, prostitution, and certain indecent liberties. . . . The scope of the statutory prohibition is thus limited by its context and wording to communication for the purpose of sexual misconduct." Schimmelpfennig, at 102; quoted by McNallie at 931-32 (emphasis added).

The structure of Ch. 9.68A supports these holdings. The Act criminalizes certain conduct relating to depictions of minors, RCW 9.68A.040-080, and the commercial sexual abuse of minors,

[5] Ch. 9.68A used to be titled "Child Pornography."

RCW 9.68A.100-103. All of those statutes deal with conduct by a defendant that engages a minor in "sexually explicit conduct," which is defined in RCW 9.68A.011(4).

The CMIP statute stands out in the Act as the only provision regarding communicating with a minor. None of the terms of art in the CMIP statute are defined in RCW 9.68A.011(4). But, as Schimmelpfennig and McNallie hold, the CMIP statute exists to further the legislative intent to prevent **conduct**; specifically, sexual misconduct.

The CMIP statute is ambiguous. Luther, at 427. The rule of lenity requires that its ambiguities be construed in favor of the defendant. State v. McGee, 122 Wn. 2d 783, 787, 864 P.2d 912 (1993). "Constru[ing] RCW 9.68A.090 as including [communications about peaceful, consensual conduct that will itself be legal if performed] would cause it to violate substantive due process." Luther at 428.

Mr. Watson's text messages were either not communications about future "sexual misconduct" or were "communications about peaceful, consensual conduct." Luther clearly excepted the latter from the CMIP statute. Construing the CMIP statute to include communications that are not about conduct at all would equally run afoul of due process. This Court cannot construe a statute to be unconstitutional. Therefore, it must

construe the CMIP statute not to include the communications in this case. The charges should be dismissed.

Mr. Watson's case is very different from the RCW 9.68A.090 cases of the last 38 years. Each of those cases clearly involves the present intent of the communicating-defendant to engage in some kind of sexual conduct with the minor during or after the communication. In Schimmelpfennig, the defendant communicated with children to get them into his van so that he could have sex with them. In Danforth, the defendant solicited two minors for sex. In Luther, a minor discussed consensual sex with another minor before having sex. In McNallie, the defendant attempted to pay children for sexual favors. And in Pietrzak, the defendant photographed his minor niece in the nude to use the pictures for his gratification and her exploitation.

None of those facts exist in this case. There is no question in the record at the time of Mr. Watson's motion to dismiss that the photographs he sent were of an adult, not a minor; that they were sent at the request of the minor-recipient; that they were not used for the personal gratification of Mr. Watson; and that they were not part of any quid pro quo to obtain anything from H.R.B. (CP 153) It was undisputed that no sexual contact ever occurred and that Mr. Watson and H.R.B. had previously agreed that none would occur before H.R.B. was 18 years old. (CP 18, ln. 8-16)

As the Luther court held 25 years ago, "there can be no rational reason for prohibiting communications about peaceful, consensual conduct that will itself be legal if performed. To construe RCW 9.68A.090 as including such communications would cause it to violate substantive due process . . .." Luther, at 428. As applied in this case, RCW 9.68A.090 is unconstitutional.

To offer a prima facie case under RCW 9.68A.090(2), the State must show facts that the communication in question was made "for an immoral purpose." A purpose is immoral if it is for "the predatory purpose of promoting [a minor's] exposure to and involvement in sexual misconduct." McNallie, at 933. The State presented no evidence, on the motion to dismiss or at trial, that Mr. Watson's communications with H.R.B. were predatory or that any sexual misconduct occurred. Instead, the State argues that the communications **were** the misconduct.

But that interpretation of RCW 9.68A.090 reads "immoral purposes" out of the statute and cannot be correct. The statute itself, and the cases interpreting it, require proof of a specific intent to engage in illegal sexual misconduct as a result of the communication. Luther, at 425; McNallie, at 932; Schimmelpfennig, at 102; Danforth, at 136. The State offered no proof of Mr. Watson's intent to engage in some specific future sexual misconduct as a result of his sending the text messages in this case.

The State did argue that Mr. Watson was "grooming" H.R.B. for some nebulous, undefined future purpose. (CP 227-28) But the State did not show what that purpose is and that it amounts to illegal sexual misconduct. Thus, the State is without probative, admissible evidence of Mr. Watson's intent to engage in "sexual misconduct."

The sole fact that Mr. Watson sent H.R.B. photos of a penis is not, alone, enough to charge under RCW 9.68A.090. The State is required to show that there was some "course of conduct with a minor for purposes of sexual misconduct." Schimmelpfennig, at 103-04. The intent must go beyond the intent to communicate. It must be an intent to engage in illegal sexual misconduct. Danforth, at 136; Luther, at 425.

The record in this case is clear. Mr. Watson did not intend any sexual misconduct with his communications. And no sexual conduct of any kind ever occurred. More specifically, no illegal conduct of any kind ever occurred. The charges should be dismissed as a matter of law.

3. Admission of subsequent conduct evidence was an abuse of discretion.

a. Standards of admission and of review on appeal.

ER 404(a) prohibits the admission of "evidence of a person's character or a trait of character . . . for the purpose of proving action in conformity therewith on a particular occasion." ER 404(b) prohibits the

admission of "evidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

To admit evidence under ER 404(b), "the trial court must identify on the record the purpose for which it is admitted. ER 404(b) evidence must be relevant to a material issue and its probative value must outweigh its prejudicial effect." State v. Everybodytalksabout, 145 Wn. 2d 456, 465-66, 39 P.2d 1365 (2002). The word "acts" in ER 404(b) includes "any acts used to show the character of a person to prove the person acted in conformity with it on a particular occasion." Id. at 466.

On appeal, a trial court's decision to admit ER 404(b) evidence is reviewed for an abuse of discretion. State v. Acosta, 123 Wn. App. 424, 431, 98 P.3d 503 (2004). Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons." State v. Michielli, 132 Wn. 2d 229, 240, 937 P.2d 587 (1997) (internal citations and quotations omitted).

b. The trial court abused its discretion in admitting evidence that Mr. Watson delivered a sex toy to H.R.B. nearly one year after sending the text messages at issue.

Prior to trial, the State moved in limine to admit evidence that, on June 16, 2014, Mr. Watson met H.R.B. at Kadlec Hospital to give her an adult sex toy as a birthday gift. (RP 14, ln. 24 – 16, ln.8, 46; CP 198-99) Mr. Watson objected (CP 225-28). The trial court allowed the evidence. (RP 16) At trial, Det. Nunez and H.R.B. each testified regarding the delivery of the toy by Mr. Watson. (RP 162, 231) The State argued to the jury that Mr. Watson's gift proved his immoral purpose in communicating with H.R.B. a year prior in both its opening and closing statements. (RP 129, 336-38)

The trial court committed two errors with respect to this evidence. First, the court failed to make the proper record required by ER 404(b). Before admitting ER 404(b) evidence, the court is required to demonstrate, on the record, (1) how the uncharged conduct admitted into evidence (here, the delivery of the gift) "is logically relevant to a material issue before the jury," Stanton, 68 Wn. App. at 861, (2) that its probative value outweighs its potential for prejudice, id., and (3) find by a preponderance of the evidence that the defendant acted with a criminal state of mind during the uncharged act, id. at 865.

Here, the court did none of the above. The record contains no discussion of the balancing of the ER 404(b) factors or whether Mr. Watson had any criminal intent when he delivered the toy to H.R.B. (RP 16) Even more concerning, the court did not explain how Mr. Watson's alleged intent on the uncharged occasion could lead to a logical, appropriate inference of his intent on the occasion charged, with nearly one year of intervening time. It is not surprising that the State offered no explanation for Mr. Watson's criminal intent when delivering the toy, since what he did was not a crime. Under similar circumstances, the Stanton court found an error as a matter of law in admitting ER 404(b) evidence. Stanton, 68 Wn. App. at 862-63.

Obviously, the State wanted to, and did, argue to the jury that, because Mr. Watson gave H.R.B. a sex toy nearly a year later, the jurors should infer that he wanted to have illegal sex with her when he sent the text messages. But this is exactly the kind of evidence prohibited by ER 404(b).

Which brings us to the second error by the trial court. The uncharged conduct evidence is catastrophically prejudicial to Mr. Watson. As his counsel argued, the probability that the jury would immediately conclude that Mr. Watson intended to have some kind of sexual encounter with H.R.B. after hearing this evidence is nearly 100%. (RP 13-14) But

the probative value of the evidence is extremely low. The gift was given nearly one year after the text messages were sent. (RP 46, ln. 18-19) The jury was never instructed how to consider evidence of a person's actions after the alleged crime. (CP 248-263)

The evidence was also cumulative. The State introduced testimony from H.R.B.'s mother that she had witnessed what she thought was "inappropriate behavior" between H.R.B. and Mr. Watson. (RP 190, 205) That alleged conduct occurred near in time to the text messages. (Id.) Any additional probative value gained by introducing the uncharged occasion evidence was minor, especially when compared to its prejudicial effect.

The conviction should be overturned and a new trial ordered.

VI. CONCLUSION

For the foregoing reasons, Mr. Watson's conviction should be overturned and the case dismissed. In the alternative, the conviction should be overturned and the case remanded.

DATED this 13th day of November, 2017.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington as follows: That on November 13, 2017, I served the foregoing document on the counsel/party shown below by causing a true and correct copy of said document to be delivered at the address shown below in the manner(s) indicated:

Shawn P. Sant Franklin County Prosecutor's Office 1016 N. 4th Avenue Pasco, WA 99301 *appeals@co.franklin.wa.us*	VIA REGULAR MAIL VIA EMAIL HAND DELIVERED BY FACSIMILE VIA FEDERAL EXPRESS	☐ ☒ ☐ ☐ ☐
Scott R. Watson 22401 NE 37th Avenue Ridgefield, WA 98642	VIA REGULAR MAIL VIA EMAIL HAND DELIVERED BY FACSIMILE VIA FEDERAL EXPRESS	☒ ☒ ☐ ☐ ☐

DATED at Spokane, Washington, on November 13, 2017.

Cheryl Hansen

Appendix

FILED
OCTOBER 12, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent,	)	No. 34091-1-III
v.	)	
SCOTT ROBERT WATSON, Appellant.	)	UNPUBLISHED OPINION

KORSMO, J. — Scott Watson appeals from his conviction for communication with a minor for immoral purposes, arguing that the trial court erred in denying his pretrial motion to dismiss, the statute is unconstitutionally vague, and the court erred in admitting evidence of an additional incident. We affirm.

FACTS

Mr. Watson and his wife were friends of the parents of H.R.B. when the two families lived in California. H.R.B. became close to the Watsons. In 2010, when H.R.B. was about 12, she and her family moved to Pasco, Washington. The Watsons remained in California. The child continued to have a close relationship with the California couple.

When she turned 15, the nature of her relationship with Mr. Watson changed. The two exchanged text messages about her returning to California and, over time, about living as an adult with Watson. The couple texted about sexual topics. In response to requests from H.R.B., Mr. Watson eventually sent two pictures of his erect penis to the 15-year-old via a text message. The child's mother later became concerned about Watson's relationship with her daughter when, during a visit to Pasco, she observed him with his hand on H.R.B.'s upper thigh during a pool party. Watson was sent back to California and the child's phone was turned over to the police.

A felony charge of communicating with a minor for immoral purposes was filed in Franklin County Superior Court based on the two pictures. A protection order issued prohibiting Watson from contacting H.R.B. Watson, however, violated the order several times. Two days after her 16th birthday, he left items for her to pick up at her Pasco bus stop. A few weeks later he sent another picture of his penis to H.R.B. The following week, he met her in Richland and gave her a vibrator as a birthday present. A second count of communicating with a minor was filed over the latest picture transmission, and two counts of violating the restraining order were also filed. The latter two counts were later severed and venue changed to neighboring Benton County.

Watson moved to dismiss the two Franklin County charges pursuant to *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986). He argued that sending pictures of his penis did not constitute a crime because it did not amount to a request to engage in sexual

misconduct. The trial court granted the motion as to count II, the charge arising after H.R.B.'s 16th birthday, but denied the motion on count I. The court reasoned that the child was under the age of consent at the time of the first charge, but was legally able to consent to the second picture.

The case proceeded to trial eleven months later. The two pictures that formed the basis for the charge in count I were admitted into evidence, as was information about the delivery of the vibrator. H.R.B. testified that she and Mr. Watson had discussed sexual actions they intended to perform together and that she had sent naked pictures of herself to the defendant. Mr. Watson did not testify.

The jury convicted as charged. Mr. Watson timely appealed to this court. A panel considered the case without argument.

ANALYSIS

Mr. Watson presents three challenges in this appeal. In order, we will consider his arguments concerning the denial of the *Knapstad* motion, the constitutionality of the communicating with a minor statute, and whether the court erred in admitting evidence of the other incidents.

Knapstad Ruling

Mr. Watson first challenges the trial court's refusal to dismiss count I after his pre-trial motion to dismiss both of the communicating charges. Since the matter has gone to trial, this issue is not reviewable on appeal.

Knapstad created a pretrial process, akin to summary judgment under the civil rules, authorizing dismissal without prejudice of criminal charges that lacked sufficient evidence to proceed to the jury. *Knapstad*, 107 Wn.2d at 356-357. The decision subsequently was codified in CrR 8.3(c). The denial of a *Knapstad* ruling is not appealable as a matter of right. CrR 8.3(c)(3).

"The purpose of summary judgment is to avoid a useless trial when there is no genuine issue of any material fact." *Olympic Fish Prod., Inc. v. Lloyd*, 93 Wn.2d 596, 602, 611 P.2d 737 (1980) (citing *Ohler v. Tacoma Gen. Hosp.*, 92 Wn.2d 507, 598 P.2d 1358 (1979). Thus, if a case proceeds to trial, in most instances the pretrial ruling on the summary judgment motion is not reviewable. *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 35 n.9, 864 P.2d 921 (1993).[1] The purpose behind granting summary judgment is no longer served once trial has occurred.

The practice is similar in criminal cases. *State v. Jackson*, 82 Wn. App. 594, 608 n.41, 918 P.2d 945 (1996), *review denied*, 131 Wn.2d 1006 (1997). When an appellate court reviews a sufficiency of the evidence challenge, it does so on the basis of the most complete factual record in existence. *Id.* at 608-609. Thus, if a case proceeds to trial after the denial of a *Knapstad* motion, the court will consider the evidence presented at

[1] This approach also follows from the interlocutory nature of a pretrial ruling. A judge can "reverse or modify a pretrial ruling at any time prior to the entry of final judgment." *Adcox*, 123 Wn.2d at 37.

trial. *Id.* In that circumstance, there is "no right to have us review the sufficiency of the evidence using pretrial *Knapstad* affidavits." *Id.* at 609. Accordingly, the denial of a *Knapstad* motion is not an issue that can be raised on appeal following trial. *Id.*

Here, Mr. Watson does not independently challenge the sufficiency of the evidence presented at trial, except to the extent it is related to his following argument. Thus, we decline to address the trial court's *Knapstad* ruling. *Id.* at 608-609.

Constitutionality of Communicating with a Minor for Immoral Purposes Statute

The factual circumstances of this case do bear on Mr. Watson's argument that the statute is unconstitutional as applied to his case. He essentially argues that because he never asked H.R.B. to engage in an underage sexual act, it is unconstitutional to apply the statute to him. We believe that the motivation behind his actions was a question for the jury, leaving this case within the constitutional core of the statute.

The communication with a minor for immoral purposes statute has long survived challenges to its constitutionality. The current iteration of the statute is straight-forward in its language: "A person who communicates with a minor for immoral purposes is guilty." RCW 9.68A.090(2). Certain prior offenses determine whether the crime is a felony or a gross misdemeanor. RCW 9.68A.090(1), (2).

Mr. Watson's principal argument is that display of his genitalia without more is not a communication for an immoral purpose given the evidence that he did not intend to begin a sexual relationship before H.R.B. turned 18. This claim fails under earlier decisions.

The seminal modern case involving this statute is *State v. Schimmelpfennig*, 92 Wn.2d 95, 594 P.2d 442 (1979).[2] There the court concluded that the word "communicate" was not unconstitutionally vague. *Id.* at 103. Noting that the word was one of common usage, the court determined that it "denotes both a course of conduct and the spoken word." *Id.* The court also concluded that looking at the context of the statute in the criminal codes, the statute gave "ample notice" of legislative intent to prohibit "sexual misconduct." *Id.* at 102. Asking young children to enter a van and engage in sexual activities was immoral conduct. *Id.* at 103.

Our court returned to the statute in *State v. McNallie*, 120 Wn.2d 925, 846 P.2d 1358 (1993). There the defendant asked three young girls, ages 10 and 11, about the availability of "hand jobs" and exposed his penis to them. He was convicted of two counts of communicating for immoral purposes. *Id.* at 926-928. The court rejected the defendant's vagueness argument, determining that "sexual misconduct" was not limited

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[2] At the time of *Schimmelpfennig*, the statute prohibited communications to those under the age of 17. *See* LAWS OF 1975, ch. 260, § 9A.88.020. The age limit was removed by Laws of 1984, ch. 262, § 8.

to activities proscribed in chapter 9.68A RCW. *Id.* at 933. The goal of the communicating statute was to prohibit "communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct." *Id.* To that end, a jury instruction that defined "immoral purposes" as "immoral purposes of a sexual nature" was proper in McNallie's case. *Id.*

This court applied *McNallie* and upheld a conviction for communicating for immoral purposes in *State v. Pietrzak*, 100 Wn. App. 291, 997 P.2d 947 (2000). There the defendant, an adult, asked his 16-year-old niece to strip and pose for sexually explicit pictures. After photographing the young woman, the two engaged in sexual intercourse. *Id.* at 293. The trial court found the behavior to be "quid pro quo for housing, food, beer, and money." *Id.* The defendant stated that the photography was part of a consensual sexual relationship between the two. *Id.* This court confirmed that the statute was not vague despite the defendant's claim of a consensual sexual relationship, concluding that "observing and photographing" a 16-year-old constituted "sexual exploitation and misconduct with persons under the age of 18." *Id.* at 295-296.

Accordingly, we conclude that Mr. Watson's action in sending a picture of his unclothed penis to a 15-year-old girl was sexual misconduct within the meaning of our communicating statute. Exposing one's self is a crime in many circumstances. RCW 9A.88.010. An adult exposing himself to a 15-year-old, even at the child's request, should

reasonably understand he is engaging in misconduct of a sexual nature, particularly since the 15-year-old legally was unable to consent to sexual activity. The communication by photograph was no different than exposing himself in person. The exposure did not have to be accompanied by evidence of a present intent to engage in other sexual activities. *Schimmelpfennig*, 92 Wn.2d at 103. We believing grooming a 15-year-old child for later sexual contact falls within the reach of the communication statute.

As applied to the facts of this case, the communicating with a minor statute is not unconstitutionally vague. The defendant knew that a 15-year-old minor could not engage in sexual activities with him, but nonetheless exchanged a sexually explicit photograph as part of an on-going pattern of sexual conversation. A reasonable adult would understand that this was sexual misconduct. The statute was not vague as applied to this conduct.

Admission of Another Incident

Finally, Mr. Watson argues that the trial court erred by admitting into evidence information about the delivery of the vibrator. The trial court properly weighed the relevance of the evidence against its prejudicial impact. There was no abuse of discretion.

Evidentiary rulings, including those under ER 404(b), are reviewed for abuse of discretion. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Evidence of other bad acts is

permitted to establish specific purposes such as the identity of an actor or the defendant's intent or purpose in committing a crime. ER 404(b). Those purposes, in turn, must be of such significance to the current trial that the evidence is highly probative and relevant to prove an "essential ingredient" of the current crime. *State v. Lough*, 125 Wn.2d 847, 863, 889 P.2d 487 (1995).

When considering ER 404(b) evidence, the proponent of the evidence must first convince a trial court by a preponderance of the evidence that the "misconduct" actually occurred. *Lough*, 125 Wn.2d at 853. A trial court may, but is not required, to conduct a hearing to take testimony. *State v. Kilgore*, 147 Wn.2d 288, 294-295, 53 P.3d 974 (2002). If the court determines that the misconduct occurred, the court then must identify the purpose for which the evidence is offered, determine whether the evidence is relevant to prove an element of the offense, and weigh the probative value of the evidence against its prejudicial effect. *Lough*, 125 Wn.2d at 853. The court may then admit the evidence subject to a limiting instruction telling the jury the proper uses of the evidence. *Id.* at 864.

At trial, the prosecutor sought to admit testimony about both the pool incident and the vibrator delivery as evidence of the defendant's intent. In opposition, the defense argued that the delivery of the device occurred nearly a year after the charged count and was highly prejudicial. Somewhat inconsistently, the defense also argued that there was

nothing improper about giving the device to a 16-year-old.[3] The trial court admitted the evidence, stating:

> With regard to the pool party, I think I will allow it if it's not hearsay. If it's not hearsay with regard to the sex toy it's certainly is prejudicial but it no more prejudicial than the picture that was sent in though was after she turned 16. I think it certainly goes toward the intent so I will allow that.

Report of Proceedings at 16.

On appeal, Mr. Watson argues, and the State agrees, that the trial court did not properly balance the ER 404(b) factors on the record concerning the admission of the vibrator. Although the 404(b) analysis should have included some mention of the importance of the evidence to the State's case in its discussion of relevance, it is easy to see the trial court's reasoning primarily as a response to the defense contention that Mr. Watson did nothing improper in delivering the vibrator. In that context, the trial court understandably focused on the purpose for which the incident was being admitted—the defendant's intent—and the extent of any prejudice from admitting the evidence. Those were the aspects of the rule that the defense was contesting.

The court had tenable reasons for admitting the evidence. The defense theory was that Mr. Watson had shared the photos for the purpose of educating H.R.B. at her request. The State's theory was that the communication was for furthering the development of a

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[3] If the delivery did not constitute a "bad act" under ER 404(b), then the only grounds for challenge would have been ER 401 (relevancy) and ER 403 (undue prejudice).

sexual relationship with the child. In that regard, the *Schimmelpfennig* construction of the statute was critical. Communication can consist of either words or a "course of conduct." *Schimmelpfennig*, 92 Wn.2d at 103. Delivery of a sexual toy to the youth furthered the theory that the earlier photographs were merely a portion of an on-going course of conduct designed to take the relationship to a different level. Even after being charged with a crime for his behavior toward H.R.B., Mr. Watson continued to view the youth as a future sexual partner. The later incident confirmed his intentions. The trial court understandably found the behavior relevant under *Schimmelpfennig*.

The court very clearly expressed its ruling on the prejudice aspect of the evidence. It was prejudicial, but much less prejudicial than the two photographs of an erect penis that formed the basis for the charge.[4] The trial court understandably found that the incremental prejudice from admission of this incident did not justify excluding the evidence. Again, this was a very tenable conclusion.

Although the court did not perform an ideal ER 404(b) balancing on the record, it put enough reasoning on the record for this court (and the parties) to understand its reasoning. The court had tenable grounds for ruling as it did. There was no abuse of discretion.

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[4] In what might be considered "before and after," one of the photographs also shows ejaculate.

The judgment is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Fearing, C.J.

Pennell, J.