NO. 99419-6
Court of Appeals No. 79353-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SEATTLE,

Respondent,

v.

JOSE RODRIGUEZ,

Petitioner.

APPELLANT'S PETITION FOR REVIEW

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TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER

Jose Rodriguez, Petitioner and Defendant below, respectfully requests that this Court review the published decision of the Court of Appeals in *City of Seattle v. Rodriguez*, No. 79353-5-I (December 14, 2020), a copy of which is attached. *See* Appendix at 1. This Court should accept review pursuant to RAP 13.4(b)(3) because the case presents a significant question of law under both the Washington State Constitution and the Constitution of the United States.

B. ISSUES PRESENTED FOR REVIEW

1. Is SMC § 12A.10.040 unconstitutionally overbroad because it proscribes content-based speech— agreeing to pay money for sex— while also expressly prohibiting any consideration of the defendant's intent or knowledge?

C. STATEMENT OF THE CASE

Mr. Rodriguez was charged with sexual exploitation under Seattle Municipal Code § 12A.10.040 based on an interaction between Mr. Rodriguez and an undercover police officer on February 2nd, 2016 where Mr. Rodriguez was alleged to have offered the undercover officer $80 for sex.

The offense of SMC § 12A.10.040 required the City of Seattle to prove that Mr. Rodriguez "agreed to pay a fee to another person pursuant to an understanding that in return therefor that person would engage in sexual

conduct" with him. Although "sexual conduct" is defined elsewhere in the Seattle Municipal Code, there is no codified definition for "agree," "agreement," or "pursuant to an understanding." An additional provision in SMC § 12A.10.040, added to the ordinance in 2010, states that "liability for sexual exploitation does not require proof of any of the mental states described in Section 12A.04.030," which in turn defines intent, knowledge, recklessness, and criminal negligence.

1. PRETRIAL PROCEEDINGS

Prior to trial, the defense moved to dismiss the prosecution as a violation of the First Amendment to the U.S. Constitution and Article I § 5 of the Washington Constitution. The defense argued that the sexual exploitation ordinance was unconstitutionally vague and overbroad due to the fact that it prohibited speech without requiring that the speech be expressed in intentional furtherance of the commission of an illegal act.[1] The trial court denied the motion, relying on a previous ruling by another judge in an unrelated Seattle Municipal Court case.[2]

The City moved *in limine* to exclude any argument by the defense regarding Mr. Rodriguez's intent.[3] The prosecutor argued that sexual exploitation is "essentially … a strict liability crime," such that "mentioning

[1] VRP 4/13 at 4-8.
[2] VRP 4/13 at 7.
[3] VRP 5/23 at 20.

to the jury that Mr. Rodriguez did not intend to commit this crime is not relevant to the crime at hand."[4] Defense counsel objected, pointing out that "the intent…goes to whether or not someone was joking," which was relevant because "in order to get to an agreement, that's something that requires intent."[5] The trial court granted the City's motion.[6]

2. TRIAL TESTIMONY

Detective Tammie Case was the first to testify. Detective Case works for the Seattle Police Department and conducts undercover prostitution operations.[7] On February 2nd, 2016, Detective Case was posing as an undercover prostitute at a private condo in Seattle.[8] According to Detective Case, in previous days she had received a number of text messages expressing interest in meeting up "for sex."[9] Detective Case text messaged an address to the number and at some point later called the number and Mr. Rodriguez answered.[10] Detective Case met Mr. Rodriguez outside of the condo.[11] She waved at him and he approached her outside of the building.[12] Detective Case told Mr. Rodriguez that he was cute and he smiled at her.[13]

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[4] VRP 5/23 at 20.
[5] VRP 5/23 at 22.
[6] VRP 5/23 at 22.
[7] VRP 5/24 at 46-48.
[8] VRP 5/24 at 51.
[9] VRP 5/24 at 52-53.
[10] VRP 5/24 at 54-55.
[11] VRP 5/24 at 54-55.
[12] VRP 5/24 at 55.
[13] VRP 5/24 at 55.

Mr. Rodriguez followed her into the elevator and up to the room.[14] She asked whether he wanted an "hour or a half hour," to which he responded a half hour.[15] Detective Case asked Mr. Rodriguez "what he wanted" and he responded "Just sex."[16] She said "$80 bucks," and he shook his head in a "yes" motion and held up eight fingers.[17] Detective Case asked Mr. Rodriguez if he wanted two girls and he said "no, just one girl" and held up one finger.[18] Mr. Rodriguez told Detective Case that he "was at work" and when she asked where he worked he responded "restaurant."[19] Mr. Rodriguez handed Detective Case $80, at which point Case left with the money and the arrest team took Mr. Rodriguez into custody.[20] Detective Case also told the jury that she was able to communicate with Mr. Rodriguez.[21] Regarding Mr. Rodriguez's "just sex" statements, Detective Case was permitted to state, over defense objection, that "in this case I believe it would be penis to vaginal sex."[22] No video or audio recording was made of the interaction.[23]

During cross-examination, Detective Case admitted that, when

[14] VRP 5/24 at 55.
[15] VRP 5/24 at 55.
[16] VRP 5/24 at 55-56.
[17] VRP 5/24 at 56.
[18] VRP 5/24 at 56.
[19] VRP 5/24 at 56, 84-85.
[20] VRP 5/24 at 56-57.
[21] VRP 5/24 at 60.
[22] VRP 5/24 at 62.
[23] VRP 5/24 at 48-49, 83.

working as an undercover, it was "solely at [her] discretion" whether the crime of sexual exploitation had been committed and arrest was warranted.[24] Although Detective Case was permitted to testify about what she thought Mr. Rodriguez meant by saying "just sex",[25] there was no other testimony about what Mr. Rodriguez may have meant or understood. Mr. Rodriguez was not permitted to elicit testimony about his limited ability to speak English or how that may have affected his understanding of the interaction.[26]

During defense counsel's opening statement, the trial judge sustained objections to statements referencing Mr. Rodriguez's limited ability to speak English, presumably due to the court's pretrial ruling that Mr. Rodriguez's subjective understanding or intent was irrelevant.[27]

Officer Marion testified that he was part of the arrest team in the sting operation.[28] Defense counsel attempted to cross-examine Officer Marion about the fact that Marion was unable to communicate with Mr. Rodriguez due to the language barrier.[29] The trial judge sustained the prosecutor's objection, finding that testimony from Officer Marion about Mr. Rodriguez's English-language skills was "irrelevant."[30]

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[24] VRP 5/24 at 79.
[25] VRP 5/24 at 57.
[26] VRP 5/24 at 126-32, 161.
[27] VRP 5/23 at 44.
[28] VRP 5/24 at 100
[29] VRP 5/24 at 126-32.
[30] VRP 5/24 at 131-32.

The final witness was Detective Brundage, who testified that he organized the sting operation.[31] In cross examination, defense counsel attempted to ask about whether a Spanish speaking officer was requested to deal with Mr. Rodriguez, but the trial judge sustained the City's objection, again stemming from the trial court's pretrial ruling that Mr. Rodriguez's subjective knowledge or intent was irrelevant to the charge.[32] The City rested after Detective Brundage's testimony and the defense did not present evidence.[33]

3. JURY INSTRUCTIONS AND CLOSING ARGUMENTS

In the discussion of jury instructions, the trial judge denied the defense request for an instruction that read as follows:

> An agreement requires intent. A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.[34]

The final instructions included the following definitional instruction for sexual exploitation:

> A person commits Sexual Exploitation when he or she agrees to pay a fee to another person pursuant to an understanding that in return therefor that person will engage in sexual conduct with him or her.[35]

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[31] VRP 5/24 at 139, 143.
[32] VRP 5/24 at 161.
[33] VRP 5/24 at 162-63.
[34] VRP 5/24 at 168.
[35] Court's Instructions to the Jury #7.

Although "sexual conduct" was defined in the instructions, neither "agree" nor "understanding" were. The trial court also instructed the jury as follows:

> Liability for sexual exploitation does not require proof of the defendant's intent or knowledge to commit sexual exploitation.[36]

In closing argument, the defense attempted to address Mr. Rodriguez's mental state. He argued, "this crime…basically criminalizes speech. It's an agreement. To come to an agreement there must be an understanding. What did Mr. Rodriguez understand? What was going through his mind?"[37]

The prosecutor's rebuttal argument zeroed in on defense counsel's assertions about Mr. Rodriguez's understanding. She told the jury that "the exchange of money, physical money, is not even required to be guilty of sexual exploitation. It's just the words**.** It's just the words of someone offering sex and someone offering it for a certain price. And another person agreeing to it."[38] The prosecutor directed the jury's attention to instruction #10, arguing that Mr. Rodriguez should be found guilty

[36] Court's Instructions to the Jury #10.
[37] VRP 5/24 at 189.
[38] VRP 5/24 at 196.

regardless of his "intent or knowledge to commit sexual exploitation."[39]

Mr. Rodriguez was found guilty of the crime of sexual exploitation and timely appealed. His conviction was upheld on RALJ, and again by Division I of the Court of Appeals.

D. ARGUMENT

1. SMC § 12A.10.040 is unconstitutionally overbroad because it proscribes content-based speech while prohibiting the trier of fact from considering the defendant's intent or knowledge, thus criminalizing a substantial amount of protected speech.

The City of Seattle's Sexual Exploitation ordinance, SMC § 12A.10.040, provides as follows:

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.[40]

The ordinance, as amended in 2010, now additionally provides that "liability for sexual exploitation does not require proof of any of the mental states described in Section 12A.04.030."[41] SMC 12A.04.030 in

[39] VRP 5/24 at 197.
[40] *See* Appendix at 9: SMC § 12A.10.040.
[41] *Id.*

turn describes intent, knowledge, recklessness, and criminal negligence.[42]

SMC § 12A.10.040 previously was identical to Washington's prostitution statute, RCW § 9A.88.030, which proscribes engaging, agreeing, or offering to engage in sexual conduct with another person in return for a fee.[43] In 2010 the City of Seattle amended SMC § 12A.10.040 to add a provision expressly removing any requirement that the words of solicitation be uttered with any intent to further an unlawful act of prostitution.[44] This legislative maneuver removed the requirement to prove the words were "directed toward persuading someone to enter into an illegal agreement" and so created a strict liability offense.

A law restricting speech may be invalidated on its face if the law is "substantially overbroad".[45] A law is overbroad if it sweeps within its prohibitions constitutionally protected free speech.[46] Criminal statutes require particular scrutiny and may be facially invalid if they "make unlawful a substantial amount of constitutionally protected conduct ... even if they also have legitimate application."[47] A facial overbreadth

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[42] *See* Appendix at 10: SMC § 12A.04.030.
[43] *See* Appendix at 11: RCW § 9A.88.030(1)- Patronizing a Prostitute.
[44] See Appendix at 12: Seattle City Ordinance 123395, § 8 (2010).
[45] *City of Seattle v. Huff*, 111 Wash. 2d 923, 925, 767 P.2d 572, 573 (En Banc 1989); *Houston v. Hill*, 482 U.S. 451, 458, 107 S. Ct. 2502, 2508, 96 L.Ed.2d 398, 410 (1987); *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 1111 (9th Cir. 1999).
[46] *Huff*, 111 Wash.2d at 925; *City of Tacoma v. Luvene*, 118 Wash.2d 826, 839, 827 P.2d 1374, 1381 (1992).
[47] *Huff*, 111 Wash.2d at 925.

challenge does not require that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.[48]

The court will generally presume that legislative enactments are constitutional.[49] Usually the party challenging an enactment bears the burden of proving its unconstitutionality.[50] However, in the free speech context, the burden shifts and the State bears the burden of justifying a restriction on speech.[51] Content-based restrictions that touch on protected speech are presumptively unconstitutional and are thus subject to strict scrutiny.[52] Under that stringent level of review, the government must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.[53]

It is inarguable that Seattle's Sexual Exploitation ordinance proscribes pure speech. It criminalizes verbal agreements that sexual conduct will occur in exchange for a fee, as well as solicitations or requests for the same. Such agreements, solicitations, or requests, can only

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[48] *State v. Immelt*, 173 Wash. 2d 1, 7, 267 P.3d 305, 308 (En Banc 2011).
[49] *State v. Bahl*, 164 Wash.2d 739, 753, 193 P.3d 678, 686 (2008).
[50] *Voters Educ. Comm. v. Pub. Disclosure Comm'n*, 161 Wash.2d 470, 481, 166 P.3d 1174, 1180 (2007).
[51] *Id*. at 482; *Ino Ino, Inc. v. City of Bellevue*, 132 Wash.2d 103, 114, 937 P.2d 154, 162 (1997); *Immelt*, 173 Wash. 2d 1, 6 (2011).
[52] *Collier v. City of Tacoma*, 121 Wash.2d 737, 748-49, 854 P.2d 1046, 1052 (1993).
[53] *Id*. at 749; *City of Bellevue v. Lorang*, 140 Wash.2d 19, 29-30, 992 P.2d 496, 501 (2000).

take place through speech and expression, and no "overt act" is required to complete the agreement.[54]

While it is generally true that the crime of soliciting a prostitute is not protected speech, this exception exists only pursuant to the "well-defined and narrowly limited" category of "speech integral to criminal conduct."[55] Seattle's Sexual Exploitation ordinance, however, does not merely prohibit "speech integral to criminal conduct," because without any required mental state (i.e. any requirement that the speaker actually intend for an exchange of sex for money to take place), the law's broad scope also encompasses legal speech protected by the First Amendment.

It is well-recognized that a criminal statute will be subject to overbreadth analysis if the law's scope extends to protected speech, even if the law primarily addresses criminal conduct. For example, in *State v. Williams*, the defendant challenged a harassment statute that prohibited making threats to harm someone's physical or mental health or safety.[56] This Court held that, although the statute in question "clearly prohibits true threats," it implicated the First Amendment and was subject to an overbreadth analysis because "it prohibits *at least some* constitutionally

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[54] *City of Yakima v. Emmons*, 25 Wn. App. 798, 801, 609 P.2d 973 (1980).
[55] *See, e.g., Rynearson v. Ferguson*, 355 F. Supp. 3d 964, 969 (W.D. Wash. 2019*); see also United States v. Alvarez*, 567 U.S. 709, 717–18, 132 S. Ct. 2537, 2544, 183 L. Ed. 2d 574 (2012).
[56] 144 Wash.2d 197, 26 P.3d 890 (2001).

protected speech."[57] The Court then held that because the statues was a content-based regulation that touched on protected speech, it was "presumptively unconstitutional and … thus subject to strict scrutiny."[58] Similarly, in *Rynearson v. Ferguson*, the District Court for the Western District of Washington found that Washington's criminal cyberstalking statute was facially unconstitutional because, despite its clear application to criminal behavior, the law's "breadth—by the plain meaning of its words—includes protected speech that is not exempted from protection by any of the recognized areas [of Constitutional Law]."[59]

Seattle Sexual Exploitation Ordinance suffers the same deficiency. Although the law as originally enacted clearly proscribes prostitution, the 2010 amendment removing any mens rea requirement extended the scope beyond actual, intended agreements to exchange money for sex. It is precisely the element of intent, or mental state, that separates the crime of prostitution (soliciting a prostitute) from protected speech. As in *Williams* and *Rynearson*, because the speech proscribed by SMC § 12A.10.040 extends to encompass protected speech as well as criminal agreements, it is subject to an overbreadth analysis under the First Amendment.

Further, the amount of protected speech implicated by Seattle's

[57] *Id*. at 208 (emphasis added).
[58] *Id*. at 208.
[59] 355 F.Supp.3d 964, 969 (2019).

Sexual Exploitation ordinance is substantial. Unless an "agreement pursuant to an understanding" to engage in sexual conduct for money is coupled with actual intent that such an act occur, the ordinance could affect a multitude of written or spoken artistic productions where the content involved scenes or depictions of money exchanged for sex. The actors in a local adaptation of "Les Miserables" or "Pretty Woman" would be susceptible to criminal prosecution, despite the obvious lack of intent to form any true agreement or understanding. Indeed, a simple internet search for musicals with prostitution narratives comes up with similar examples such as "The Best Little Whorehouse in Texas" (opened on Broadway in 1978, U.S. Tour 1980), "Miss Saigon" (opened on Broadway in 1991, first U.S. tour 1992), "Jekkyl & Hyde" (opened in Houston in 1990, first U.S. tour in 1995) and "Moulin Rouge" (opened on Broadway in 2019).

This potential for curtailing artistic expression has been compelling to other courts. In *Ford v. State*, the Nevada Supreme Court considered a prostitution pandering law, which did not expressly include a requisite culpable mental state.[60] The court interpreted the statute as requiring a culpable mental state to avoid punishing otherwise innocent conduct:

> Ford's examples of the overprotective mother, the young man looking for love, and movie star Julia Roberts [in her role in Pretty

[60] *Ford v. State*, 127 Nev. 608, 262 P.3d 1123 (2011).

> Woman] convince us that reading NRS 201.300(1)(a) as not requiring specific intent would do just that: Criminalize innocent conduct and, at the same time, cast the statute into constitutional doubt under the First Amendment and due process principles.[61]

The court in *Ford* upheld the statute by reading in an implied specific intent element, but reversed the defendant's conviction because the jury instructions had "created the misimpression that Ford could be convicted based simply on a showing that he intended to speak the words he did, rather than that he spoke them specifically intending" to persuade another to become a prostitute.[62]

The Oregon Supreme Court has also held that prostitution solicitation laws require criminal intent or could otherwise be violated by actors performing on stage:

> The issue raised by defendant's attack on the complaint really concerns the meaning of "agree." Obviously, more than an exchange of words of gestures signaling assent is required, or the statute would be violated if actors performed a scene depicting such an agreement in a play, although neither means to act on the pretended agreement.[63]

Another concerning and broad impact of SMC § 12A.10.040 would be the law's effect on non-native English speakers. As currently written, the ordinance would prohibit the trier of fact from assessing whether a defendant's limited English abilities might have affected their

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[61] *Id*. at 618-19.
[62] *Id*. at 625-26.
[63] *State v. Huie*, 292 Or. 335, 338, 638 P.2d 480 (1982).

ability to form a "agreement" or "understanding", or even testimony as to whether the defendant understood what was being said at all. These constitutional implications were on full display in Mr. Rodriguez's case, where throughout the trial the defense was prohibited from eliciting testimony about Mr. Rodriguez's limited English abilities because, as the City argued and the trial court agreed, Mr. Rodriguez's ability to speak or understand English was "irrelevant" by the express terms of the ordinance itself.[64] It is a well-known phenomenon that non-English speaking individuals will often nod politely or respond "yes" despite not understanding the conversation. If an undercover officer posing as a prostitute approaches a non-English speaking person on the street and offers that person sex in exchange for money, and the person politely responds "yes," "okay," or even simply nods their head, they would be criminally liable under the express terms of SMC § 12A.10.040. As discussed during trial, the Seattle Police Department engages in hundreds of undercover sting operations where police officers pose as prostitutes and initiate such conversations with individuals on the street.[65] Seattle is a diverse city— twenty-one percent of its residents do not speak English at

[64] VRP 5/23 at 44, 5/24 at 126-32, 161.
[65] VRP 5/24 at 46-51.

home.[66] Thus, SMC § 12A.10.040 implicates a real and substantial amount of protected speech.

Because SMC § 12A.10.040 prohibits a particular subject of speech in public, it is a content-based proscription that must survive a strict scrutiny analysis to be upheld. Under the First Amendment, the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[67] As the U.S. Supreme Court has held, "Content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people. To guard against that threat the Constitution demands that content-based restrictions on speech be presumed invalid…and that the Government bear the burden of showing their constitutionality."[68]

For SMC § 12A.10.040 to be upheld, the City must prove that it is narrowly tailored to serve compelling government interests.[69] This, Seattle cannot do. The City may have a compelling interest in stopping acts of prostitution. But because the ordinance authorizes prosecution due to the

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[66] *See* https://www.seattle.gov/opcd/population-and-demographics/about-seattle#raceethnicity (accessed 1/11/2021).
[67] *Reed v. Town of Gilbert, Ariz.*, 576 U.S. __,135 S.Ct. 2218, 2226 (2015) (internal citations omitted).
[68] *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 660, 124 S.Ct. 2783, 2788 (2004) (internal citations omitted). See also *Ino Ino, Inc.*, 132 Wn.2d at 114 ("The State bears the burden of justifying a restriction on speech.").
[69] *Reed*, 135 S.Ct. at 2226.

content of the speech, without regard for whether the speech was intended to advance an act of prostitution, it is not "narrowly tailored" and must be held invalid.

The U.S. Supreme Court has repeatedly held that a scienter requirement is necessary to overcome an overbreadth challenge. In *New York v. Ferber*, the Court required a scienter element to uphold a child pornography statute against a First Amendment overbreadth challenge: "[a]s with obscenity, criminal responsibility may not be imposed without some element of scienter on the part of the defendant."[70] The Court later stressed the same point in *U.S. v. X-Citement Video*: "[a] statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts."[71] In *Mishkin v. State of New York*, the Court again explained in the First Amendment context that "the Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material."[72] In *Virginia v. Black*, the Court held that even an act of cross burning, despite its long history of association with race-based terror, may only be criminalized if the "intent to intimidate" is an element of the offense.[73]

[70] *New York v. Ferber*, 458 U.S. 747, 765, 102 S.Ct. 3348, 3358 (1982).
[71] *U.S. v. X-Citement Video*, 513 U.S. 64, 78, 115 S.Ct. 464, 472 (1994).
[72] *Mishkin v. State of New York*, 383 U.S. 502, 511, 86 S.Ct. 958, 965 (1966).
[73] *Virginia v. Black*, 538 U.S. 343, 123 S.Ct. 1536 (2003).

Our state constitution requires nothing less. This Court has held that speech protections contained in the First Amendment and Article I § 5 require the presence of *mens rea*, or scienter, before acts of speech can be proscribed.[74] In *City of Seattle v. Slack*, the Court held that a scienter element was required to uphold a city ordinance prohibiting "prostitution loitering."[75] In that case, the defendant was convicted of prostitution loitering, which required proof that the person "intentionally solicits, induces, entices, or procures another to commit prostitution."[76] Although loitering was a constitutionally protected activity, the Washington Supreme Court denied the overbreadth challenge because "[t]he element of specific criminal intent save[d] (the ordinance) from being unconstitutionally overbroad."[77] The Supreme Court reaffirmed this requirement in *City of Tacoma v. Luvene* where it found that Tacoma's drug loitering ordinance was not constitutionally overbroad because it "contain[s] a mens rea component, specifically the "purpose" to engage in drug-related activity."[78] The Court construed the word "purpose" as contained in the ordinance to "require the mental state of intent."[79] The

[74] *See, e.g.*, *State v. Luther*, 157 Wn.2d 63, 71, 134 P.3d 205, 210 (2006) (charges of child pornography, despite the compelling government interest in preventing exploitation and abuse of children, required a scienter element to be constitutional.)
[75] *City of Seattle v. Slack*, 113 Wn.2d 850, 784 P.2d 494 (1989).
[76] *Slack*, 113 Wn.2d at 854.
[77] *Slack*, 113 Wn.2d at 855.
[78] *Luvene*, 118 Wash.2d at 842.
[79] *Id.*

court went on to explain:

> "[W]e reject the interpretation of the ordinance to prohibit conduct that only appears to be drug related, regardless of the person's actual intent. *To be constitutional the ordinance must prohibit loitering while possessing the intent to engage in unlawful drug activity*."[80]

Recent appellate case law in Washington has reaffirmed the requirement of a mens rea element to uphold proscriptions on acts of speech. For example, in *State v. Homan*, Division II of the Court of Appeals reversed a conviction for luring on overbreadth grounds because the statute, as instructed at trial, lacked a requirement that the defendant acted "with the intent to harm the health, safety and welfare of the minor or person with a developmental disability."[81]

By contrast, in *State v. Aljutily*, Division III of the Court of Appeals upheld a prosecution of communicating with a minor for immoral purposes against an overbreadth challenge precisely because:

> The requirements that the communication be made with the *intent* to reach a minor, and done with the immoral or predatory *purpose* of exposing or involving a minor in sexual misconduct, sufficiently limits the amount of speech or conduct that the statute regulates and ensures that a substantial amount of protected expressive activity is not deterred.[82]

The government has a legitimate interest in regulating or proscribing

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[80] *Id*.
[81] *State v. Homan*, 191 Wn.App. 759, 778, 364 P.3d 839, 849-50 (2015).
[82] *State v. Aljutily*, 149 Wn.App. 286, 297, 202 P.3d 1004, 1009 (2009) (emphasis added).

prostitution. But SMC § 12A.10.040 proscribes speech about prostitution regardless of whether such speech is actually intended to further the unlawful act of prostitution. While the legislature has authority to create strict liability crimes, it can only do so within the confines of the Constitution. As the Ninth Circuit noted, "the first amendment does not permit the imposition of criminal sanctions on the basis of strict liability where doing so would seriously chill protected speech."[83]

Because Seattle has explicitly rejected a mens rea element in SMC § 12A.10.040, the ordinance is substantially overbroad and, thus, invalid under the First Amendment and Article I § 5.

E. CONCLUSION

For the foregoing reasons, this Court should accept review of Mr. Rodriguez's case to resolve the constitutional questions raised in his appeal. RAP 13.4(b)(3).

Respectfully submitted this 12th day of January, 2021,

/s/ Whitney H. Sichel
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[83] *U.S. v. U.S. District Court for Cent. Dist. Of California*, 858 F.2d 534, 540 (9th Cir. 1988).

APPENDIX

FILED
12/14/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CITY OF SEATTLE,

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v.

JOSE RODRIGUEZ,

Petitioner.

No. 79353-5-I

DIVISION ONE

PUBLISHED OPINION

LEACH, J. — Jose Rodriguez appeals his conviction for sexual exploitation. He claims that Seattle Municipal Code 12A.10.040(A)(2)[1] (SMC 12A.10.040) is unconstitutional because it is overbroad and vague. He also claims two conflicting jury instructions denied him a fair trial.

Rodriguez fails to show how SMC 12A.10.040 impermissibly burdens innocent or constitutionally protected activity, how an ordinary person would not be able to understand what conduct is prohibited, or how the ordinance provides unascertainable standards of guilt to protect against arbitrary enforcement. Also, Rodriguez failed to object to the jury instructions below and does not show any constitutional error regarding the instructions. We affirm.

[1] Former SEATTLE MUNICIPAL CODE 12A.10.040(A)(2) (2015).

FACTS

On February 2, 2016, Seattle Police Department Detective Tammie Case worked undercover as a prostitute. Jose Rodriguez text messaged Case to meet her for sex. Case sent Rodriguez the address. Case told Rodriguez she would meet him outside her apartment. When she opened the door, Rodriguez was not there. After calling him, she saw Rodriguez across the street sitting on some steps. After she started waving at him, he walked toward her from across the street. Both Case and Rodriguez entered the elevator to go upstairs. Rodriquez stated he wanted a half hour. While they were walking in the hallway, Case asked him what he wanted and he responded, "[j]ust sex." She said, "Okay, $80 bucks." He shook his head and said, "[y]es" and held up eight fingers. When they entered the room, Officer Garner was there. Case asked Rodriguez if he wanted two girls. He responded, "No, just one girl" and held up one finger. Officer Garner left and Rodriguez handed Case $80. He was arrested and charged with sexual exploitation or patronizing a prostitute under SMC 12A.10.040.

Before trial, Rodriguez asked the trial court to dismiss the charge because the sexual exploitation statute was "content-based speech regulation in violation of the United States and Washington state constitutions." The trial court denied his request. After trial, the jury found Rodriguez guilty of sexual exploitation. Rodriguez appeals.

ANALYSIS

Constitutionality of SMC 12A.10.040

Rodriguez challenges the constitutionality of SMC 12A.10.040 on the grounds of vagueness and overbreadth. We review these claims de novo. A court usually presumes

a statute is constitutional.[2] The party challenging its constitutionality has the burden of proving otherwise beyond a reasonable doubt.[3]

Overbreadth

Rodriguez contends Seattle's sexual exploitation ordinance SMC 12A.10.040 is unconstitutionally overbroad because it proscribes content based speech while prohibiting the trier of fact from considering the defendant's intent or knowledge. As a result, it criminalizes both protected and unprotected speech.

A statute is overbroad if it impermissibly burdens innocent or constitutionally protected activity.[4] A court will only declare a law unconstitutional on overbreadth grounds if that overbreadth is "substantial."[5] When a challenge involves conduct rather than speech, we judge the overbreadth of the law in relation to its legitimate sweep.[6] Rodriguez was convicted of violating SMC 12A.10.040, which provided in part,

> 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.
> . . .

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[2] Madison v. State, 161 Wn.2d 85, 92, 163 P.3d 757 (2007).
[3] Madison, 161 Wn.2d at 92.
[4] State v. O'Neill, 103 Wn.2d 853, 700 P.2d 711 (1985).
[5] State v. Myers, 133 Wn.2d 26, 32, 941 P.2d 1102 (1997) (citing New York v. Ferber, 458 U.S. 747, 767, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982)); City of Seattle v. McConahy, 86 Wn. App. 557, 569, 937 P.2d 1133 (citing O'Day v. King County, 109 Wn.2d 796, 803, 749 P.2d 142 (1988), rev. denied, 133 Wn.2d 1018 (1997)).
[6] Myers, 133 Wn.2d at 32.

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.[7]

Rodriguez correctly notes the ordinance does not require an intent element, and he claims this shows it is not narrowly tailored, making it unconstitutional. Here, SMC 12A.10.040 adequately defines criminal conduct as soliciting another to engage in sexual conduct in return for a fee. This clearly proscribes prostitution. The First Amendment does not protect prostitution.[8] So, we reject his claim that this ordinance must survive a strict scrutiny analysis to be constitutional.

This court has previously stated, "the mere act of offering to engage in sexual intercourse for a consideration is a violation of the law. No overt act is required to complete the offense."[9] And, "[o]ur Supreme Court repeatedly has stated that the legislature has the authority to create strict liability crimes that do not include a culpable mental state."[10] So, SMC 12A.10.040 does not impermissibly burden innocent or constitutionally protected activity.

Rodriguez claims the court in City of Seattle v. Slack[11] held a scienter element was required to uphold limitations on speech even for laws related to prostitution. We disagree. In Slack, the relevant ordinance "prohibits an individual, including a 'known prostitute,' from loitering in a public place while possessing the criminal intent to solicit, induce, entice, or procure another to commit prostitution."[12] And, the court there held that

[7] Former SMC 12A.10.040(A)(2).
[8] State v. Carter, 89 Wn.2d 236, 240-41, 570 P.2d 1218 (1977).
[9] City of Yakima v. Emmons, 25 Wn. App. 798, 801, 609 P.2d 973 (1980).
[10] State v. Schmeling, 191 Wn. App. 795, 801, 365 P.3d 202 (2015).
[11] 113 Wn.2d 850, 784 P.2d 494 (1989).
[12] 113 Wn.2d at 855.

4

the intent element saved the ordinance from being unconstitutionally overbroad. Loitering in a public place is constitutionally protected, and the status alone of being a "known prostitute," cannot by itself be a crime.[13] Without the intent element, the ordinance would criminalize constitutionally protected acts of loitering and being a known prostitute. Here, there is no similar need for an intent element to prevent the ordinance from being unconstitutionally overbroad because SMC 12A.10.040, prohibits asking an individual to exchange sexual conduct for money, which is not a constitutionally protected activity.[14] Rodriguez cites no relevant or controlling authority that supports his claim. The challenged ordinance is not overbroad.

Vagueness

Rodriguez next contends SMC 12A.10.040 is unconstitutionally vague because an ordinary person would not be able to reconcile the terms "agreement" and "pursuant to an understanding" with the additional language prohibiting the trier of fact from considering the defendant's intent or knowledge.

A statute is void for vagueness if it either fails to define a criminal offense with sufficient definiteness, so that ordinary people can understand what conduct is prohibited, or it does not provide ascertainable standards of guilt to protect against arbitrary enforcement.[15] But, "[t]he fact that some terms in a statute are not defined does not mean the enactment is unconstitutionally vague."[16] Also, "some measure of vagueness is inherent in the use of language [so] impossible standards of specificity are not

[13] Slack, 113 Wn.2d at 855.
[14] Carter, 89 Wn.2d at 240-41.
[15] State v. Williams, 144 Wn.2d 197, 203, 26 P.3d 890 (2001).
[16] State v. Lee, 135 Wn.2d 369, 393, 957 P.2d 741 (1998).

required."[17] Simply because the legislature could have drafted the statute with more precision, the court does not invalidate the statute for vagueness.[18]

The court may rely upon the dictionary when statutory terms are undefined.[19] "Agree" is defined as "to indicate willingness: consent,"[20] and "understanding" is defined as "a mutual agreement not formally entered into but in some degree binding on each side."[21]

Rodriguez claims a plain reading of "agreement" and "understanding" suggests a consistent, subjective intent that sexual conduct for a fee would occur. But, neither of the cited definitions requires a subjective intent. An agreement to do something and an understanding can both be objectively communicated. For example, if someone asks another to exchange money for sexual conduct, both the agreement to pay and the understanding that the payment is for sexual conduct have been articulated in an objective manner with the very words spoken.[22]

Neither of these definitions, when read together with the provision that a trier of fact is not required to consider a defendant's mental state, prohibits an ordinary person from understanding what conduct is prohibited. SMC 12A.10.040 is not "so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its applicability."

Rodriguez also claims, "[b]y excising the requirement for any proof of a person's

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[17] City of Seattle v. Abercrombie, 85 Wn. App. 393, 399, 945 P .2d 1132 (1997).
[18] State v. Harrington, 181 Wn. App. 805, 824-25, 333 P.3d 410 (citing to State v. Watson, 160 Wn.2d 1, 11, 154 P.3d 909 (2007).
[19] Armantrout v. Carlson, 166 Wn.2d 931, 937, 214 P.3d 914 (2009).
[20] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 43 (2002).
[21] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2490 (2002).
[22] Such as responding "yes" to an offer of sexual conduct for money.

knowledge or intent, Seattle left the enforcement of the law entirely to the discretion of the police" and the officer's ability to make a subjective evaluation of whether the ordinance applies in a given situation. He claims this makes the ordinance vague.

The mere fact that a law may require some degree of subjective evaluation by a police officer to determine whether a statute applies does not make the law unconstitutionally vague.[23] "Under the due process clause, the enactment is unconstitutional only if it invites an inordinate amount of police discretion."[24]

Here, Rodriguez fails to fully explain how the officer's discretion in deciding whether to arrest a suspect for prostitution, based on their observation of an objective act of offering money for sexual conduct, "invites an inordinate amount of police discretion" outside of the normal level of police officer discretion.[25] The ordinance is not impermissibly vague.

Jury Instructions

Rodriguez claims that the "vagueness inherent in" SMC 12A.10.040 resulted in contradictions between Instructions No. 7 and No. 10. Because Rodriguez never objected to either jury instruction,[26] we only address his constitutional claim that the instructions denied him a fair trial.[27] He supports this claim with the same vagueness argument that we rejected above. So, his constitutional challenge to the instructions fails.

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[23] State v. Harrington, 181 Wn. App. 805, 825, 333 P.3d 410 (2014) (citing to In re Detention of Danforth, 173 Wn.2d 59, 74, 264 P.3d 783 (2011) (citation omitted).

[24] Harrington, 181 Wn. App. at 825 (citing to Danforth, 173 Wn.2d at 74) (citation omitted).

[25] Harrington, 181 Wn. App. at 825.

[26] State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995).

[27] State v. Grimes, 165 Wn. App. 172, 185-86, 267 P.3d 454 (2011) (quoting State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009)).

CONCLUSION

We affirm. Rodriguez fails to show that SMC 12A.10.040 criminalizes protected speech or that an ordinary person would not be able to understand it. He also fails to show that the ordinance invites an inordinate amount of police discretion. So, he fails to show the ordinance is unconstitutionally overbroad or unconstitutionally vague. Finally, Rodriguez did not object to the challenged jury Instructions and fails to show any constitutional error in them.

Leach, J.

WE CONCUR:

12A.10.040 - Sexual exploitation

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.

B. Sexual exploitation is a misdemeanor. Every person convicted of sexual exploitation shall have a biological sample collected for purposes of DNA identification analysis, as provided in RCW 43.43.754, and shall pay a fee of $100, as provided in RCW 43.43.7541. When sentencing or imposing conditions on a person convicted of or given a deferred sentence or a deferred prosecution for sexual exploitation, the court must require that the person:

1. not be subsequently arrested for sexual exploitation or a similar statute or local ordinance or commercial sexual abuse of a minor;
2. remain outside the geographical area, prescribed by the court, in which the person was arrested for this crime, unless this requirement would interfere with the person's legitimate employment or residence or otherwise be infeasible; and
3. fulfill the terms of a program, if a first-time offender, designated by the court, designed to educate offenders about the negative costs of prostitution.

These requirements are in addition to the penalties set forth in Section 12A.10.070.

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.

D. The crime of sexual exploitation may be committed in more than one location. The crime is deemed to have been committed in any location in which the defendant commits any act under subsection 12A.10.040.A that constitutes part of the crime. A person who sends a communication as part of any act under subsection 12A.10.040.A is considered to have committed the crime both at the place from which the contact was made pursuant to subsection 12A.10.040.A and where the communication is received, provided that this Section 12A.10.040 must be construed to prohibit anyone from being prosecuted twice for substantially the same crime.

(Ord. 125345, § 4, 2017; Ord. 124684, § 9, 2015; Ord. 123944, § 4, 2012; Ord. 123633, § 8, 2011; Ord. 123395, § 8, 2010; Ord. 123191, § 6, 2009; Ord. 122789, § 10, 2008; Ord. 114635 § 6, 1989: Ord. 102843 § 12A.12.080, 1973.)

12A.04.030 - Kinds of culpability defined.

A. Intent. A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime.

B. Knowledge. A person knows or acts knowingly or with knowledge when:

1. He or she is aware of a fact, facts, or circumstances or result described by an ordinance defining an offense; or

2. He or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by an ordinance defining an offense.

C. Recklessness. A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

D. Criminal Negligence. A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

E. Requirement of Wilfulness Satisfied by Acting Knowingly. A requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements plainly appears.

(Ord. 115649 § 2, 1991: Ord. 109674 § 1(part), 1981: Ord. 109433 § 1(part), 1980: Ord. 102843 § 12A.02.030(2), 1973.)

RCW 9A.88.110

Patronizing a prostitute.

(1) A person is guilty of patronizing a prostitute if:

(a) 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

(b) 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

(c) He or she solicits or requests another person to engage in sexual conduct with him or her in return for a fee.

(2) The crime of patronizing a prostitute may be committed in more than one location. The crime is deemed to have been committed in any location in which the defendant commits any act under subsection (1)(a), (b), or (c) of this section that constitutes part of the crime. A person who sends a communication to patronize a prostitute is considered to have committed the crime both at the place from which the contact was made pursuant to subsection (1)(a), (b), or (c) of this section and where the communication is received, provided that this section must be construed to prohibit anyone from being prosecuted twice for substantially the same crime.

(3) For purposes of this section, "sexual conduct" has the meaning given in RCW **9A.88.030**.

(4) Patronizing a prostitute is a misdemeanor.

[2017 c 232 § 1; 1988 c 146 § 4.]

NOTES:

Severability—Effective dates—1988 c 146: See notes following RCW **9A.44.050**.

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Seattle City Council Bills and Ordinances

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LINK

Council Bill Number: 116931
Ordinance Number: 123395

Title
AN ORDINANCE relating to the City's criminal code; amending and adding various sections and subsections in Title 12A of the Seattle Municipal Code to conform with changes in state law, to clarify the elements of the crimes of Prostitution and Patronizing a Prostitute and to define the types of weapons proscribed by the crimes of Unlawful Use of Weapons and Weapons in Public Places.

Status: Passed
Date passed by Full Council: September 20, 2010
Vote: 8-0 (Excused: Clark)
Date filed with the City Clerk: September 29, 2010
Date of Mayor's signature: September 28, 2010
(About the signature date)

Date introduced/referred to committee: July 26, 2010
Committee: Public Safety and Education
Sponsor: BURGESS
Committee Recommendation:
Date of Committee Recommendation:
Committee Vote:

Index Terms: CRIMINAL-LAW, CRIME-PREVENTION, PROSTITUTION, GUN-CONTROL, DOMESTIC-VIOLENCE

Fiscal Note: Fiscal Note to Council Bill No. 116931

Scan of signed legislation: PDF scan of Ordinance No. 123395

Text

AN ORDINANCE relating to the City's criminal code; amending and adding various sections and subsections in Title 12A of the Seattle Municipal Code to conform with changes in state law, to clarify the elements of the crimes of Prostitution and Patronizing a Prostitute and to define the types of weapons proscribed by the crimes of Unlawful Use of Weapons and Weapons in Public Places.

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. Subsection E of Section 12A.06.035 of the Seattle Municipal Code is amended as follows:

12A.06.035 Stalking.

* * *

E. As used in this section:

1. "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. "Course of conduct" includes, in addition to any other form of communication, contact, or conduct, the sending of an electronic communication. Constitutionally protected activity is not included within the meaning of "course of conduct."

2. "Follows" means deliberately maintaining visual or physical proximity to a specific person over a period of time. A finding that the alleged stalker repeatedly and deliberately appears at the person's home, school, place of employment, business, or any other location to maintain visual or physical proximity to the person is sufficient to find that the alleged stalker follows the person. It is not necessary to establish that the alleged stalker follows the person while in transit from one (1) location to another.

3. ((~~2.~~)) "Harasses" means a knowing and willful course of conduct ((~~to engage in an act~~)) directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose. This course of conduct ((~~act~~)) shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the person, or, when the course of conduct ((~~act is contact by a person over age eighteen (18), that~~)) would cause a reasonable parent to fear for the well-being of his or her child.

4. ((~~3.~~)) "Repeatedly" means on two (2) or more separate occasions.

* * *

Section 2. Subsection B of Section 12A.06.115 of the Seattle Municipal Code is amended as follows:

12A.06.115 Malicious harassment.

* * *

B. "Threat" means to communicate, directly or indirectly, the intent to:

1. Cause bodily injury immediately or in the future to another; or

2. Cause damage immediately or in the future to the property of another; or

3. Subject another person to physical confinement or restraint.

* * *

Section 3. Subsection B of Section 12A.06.155 of the Seattle Municipal code is amended as follows:

12A.06.155 Domestic violence prevention.

* * *

B. 1. A person under eighteen (18) years of age who is sixteen (16) years of age or older may seek relief and is not required to seek relief by a guardian or next friend. No guardian or guardian ad litem need be appointed on behalf of a respondent who is under eighteen (18) years of age if such respondent is sixteen (16) years of age or older. The court may, if it deems necessary, appoint a guardian ad litem for a petitioner or respondent.

2. Any person thirteen (13) years of age or older may seek relief by filing a petition with a court alleging that he or she has been the victim of violence in a dating relationship and the respondent is sixteen (16) years of age or older. A person under sixteen (16) years of age who is seeking relief under this subsection is required to seek relief by a parent, guardian, guardian ad litem, or next friend. For the purposes of this subsection "next friend" means any competent individual, over eighteen years of age, chosen by the minor and who is capable of pursuing the minor's stated interest in the action.

* * *

Section 4. Subsection A of Section 12A.06.165 of the Seattle Municipal Code is amended as follows:

12A.06.165 Protection order -Relief.

* * *

9. Restrain the respondent from harassing, following, keeping under physical or electronic surveillance, cyberstalking as defined in Section 12A.06.045, and using telephonic, audiovisual, or other electronic means to monitor the actions, location, or communication of a victim of domestic violence, the victim's children, or members of the victim's household. For the purposes of this subsection, "communication" includes both "wire communication" and "electronic communication" as defined in RCW 9.73.260;

10. Require the respondent to submit to electronic monitoring. The order shall specify who shall provide the electronic monitoring services and the terms under which the monitoring must be performed. The order also may include a requirement that the respondent pay

the costs of the monitoring. The court shall consider the ability of the respondent to pay for electronic monitoring;

11. ((~~10.~~)) Consider the provisions of Section 12A.06.195;

12. ((~~11.~~)) Order possession and use of essential personal effects. The court shall list the essential personal effects with sufficient specificity to make it clear which property is included. Personal effects may include pets. The court may order that a petitioner be granted the exclusive custody or control of any pet owned, possessed, leased, kept or held by the petitioner, respondent or a minor child residing with either the petitioner or respondent and may prohibit the respondent from interfering with the petitioner's efforts to remove the pet. The court may also prohibit the respondent from knowingly coming within or knowingly remaining within a specified distance of specified locations where the pet is regularly found; and

13. ((~~12.~~)) Order use of a vehicle.

* * *

Section 5. Subsection A of Section 12A.06.170 of the Seattle Municipal Code is amended as follows:

12A.06.170 Ex parte temporary protection orders.

A. Where an application under this section alleges that irreparable injury could result from domestic violence if an order is not issued immediately without prior notice to the respondent, the court may grant an ex parte temporary order for protection, pending a full hearing, and grant relief as the court deems proper, including an order:

* * *

6. Considering the provisions of Section 12A.06.195 ; and

7. Restraining the respondent from harassing, following, keeping under physical or electronic surveillance, cyberstalking as defined in Section 12A.06.045, and using telephonic, audiovisual, or other electronic means to monitor the actions, location, or communication of a victim of domestic violence, the victim's children, or members of the victim's household. For the purposes of this subsection, "communication" includes both "wire communication" and "electronic communication" as defined in RCW 9.73.260 .

* * *

Section 6. Subsection A of Section 12A.06.180 of the Seattle Municipal Code is amended as follows:

12A.06.180 Violation -Penalty -Contempt.

A. Whenever an order is granted under this chapter, RCW Chapter 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, 26.50 or 74.34 or an equivalent ordinance by this court or any court of competent jurisdiction or there is a valid foreign protection order as defined in RCW 26.52.020 and the respondent or person to be restrained knows of the order, a violation of any of the following provisions of the order is a gross misdemeanor:

1. the restraint provisions prohibiting acts or threats of violence against or stalking of a protected party., ((~~or~~)) restraint provisions prohibiting contact with a protected party or restraint provisions prohibiting harassing, following, keeping under physical or electronic surveillance, cyberstalking or monitoring the actions, location or communication of a protected party, a protected party's children or members of a protected party's household ;

* * *

Section 7. Section 12A.10.020 of the Seattle Municipal Code is amended by adding subsection D as follows:

12A.10.020 Prostitution.

* * *

D. As authorized by Section 12A.04.100, liability for Prostitution does not require proof of any of the mental states described in Section 12A.04.030.

Section 8. Section 12A.10.040 of the Seattle Municipal Code is amended as follows:

12A.10.040 Patronizing a prostitute.

A. A person is guilty of patronizing a prostitute if:

1. ((~~A.~~)) 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. ((~~B.~~)) 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. ((~~C.~~)) He or she solicits or requests another person to engage in sexual conduct with him or her in return for a fee.

B. ((~~D.~~)) Patronizing a prostitute is a misdemeanor. Every person convicted of patronizing a prostitute shall have a biological sample collected for purposes of DNA identification analysis, as provided in RCW 43.43.754. When sentencing or imposing conditions on a person convicted of or given a deferred sentence or a deferred prosecution for patronizing a prostitute, the court must require that the person not be subsequently arrested for patronizing a prostitute or commercial sexual abuse of a minor and that the person remain outside the geographical area, prescribed by the court, in which the person was arrested for this crime, unless this requirement would interfere with the person's legitimate employment or residence or otherwise be infeasible. This requirement is in addition to the penalties set forth in Section 12A.10.070.

C. As authorized by Section 12A.04.100, liability for Patronizing a Prostitute does not require proof of any of the mental states described in Section 12A.04.030.

* * *

Section 9. Section 12A.14.010 of the Seattle Municipal Code is amended as follows:

12A.14.010 Definitions.

The following definitions apply in this chapter:

A. "Air gun" means any air pistol or air rifle designed to propel a BB, pellet or other projectile by the discharge of compressed air, carbon dioxide or other gas.

B. "Chako stick" means a device designed primarily as a weapon, consisting of two or more lengths of wood, metal, plastic or similar substance connected by wire, rope, chain or other means so as to allow free movement of a portion of the device while held in the hand and capable of being rotated in such a manner as to inflict injury upon a person by striking.

C. "Dangerous knife" means any fixed-blade knife and any other knife having a blade more than three and one-half inches (3 1/2") in length.

D. ((~~B.~~)) "Fixed-blade knife" means any knife, regardless of blade length, with a blade which is permanently open and does not fold, retract or slide into the handle of the knife, and includes any dagger, sword, bayonet, bolo knife, hatchet, axe, straight-edged razor, or razor blade not in a package, dispenser or shaving appliance.

E. ((~~C.~~)) "Firearm" means a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

F. "Metal knuckles" means any device or instrument made wholly or partially of metal that is worn for purposes of offense or defense in or on the hand and that either protects the wearer's hand while striking a blow or increases the force of impact from the blow or injury to the person receiving the blow. The metal contained in the device may help support the hand or fist, provide a shield to protect it or consist of projections or studs which would contact the person receiving a blow.

G. ((~~D.~~)) "Personal protection spray device" means a commercially available dispensing device designed and intended for use in self-defense and containing a nonlethal sternutator or lacrimator agent, including but not limited to:

1. Tear gas, the active ingredient of which is either chloracetophenone (CN) or O-chlorobenzylidene malonotrile (CS); or

2. Other agent commonly known as mace, pepper mace, or pepper gas.

H. ((~~E.~~)) "Switchblade knife" means any knife having a blade that opens automatically by hand pressure applied to a button, spring mechanism, or other device, or a blade that opens, falls or is ejected into position by force of gravity or by an outward, downward, or centrifugal thrust or movement.

I. "Throwing star" means a multi-pointed metal object designed to embed upon impact from any aspect.

Section 10. Subsection A of Section 12A.14.080 of the Seattle Municipal Code is amended as follows:

12A.14.080 Unlawful use of weapons.

It is unlawful for a person knowingly to:

A. Sell, manufacture, purchase, possess or carry any blackjack, sand-club, metal knuckles, switchblade knife, chako stick ((~~sticks,~~)) or throwing star ((~~stars~~)); or

* * *

Section 11. Subsection C of Section 12A.10.070 of the Seattle Municipal Code is amended as follows:

C. ~~The court may not suspend payment of all or part of the fees required by subsections A and B of this section unless it finds that the person does not have the ability to pay.~~ The court may suspend payment of all or part of the fees required by subsections A and B of this section only if the person presents documentary evidence, such as a tax return, wage receipts or bank statements, showing that the person's annual income before taxes is less than the most recent United States Department of Health and Human Services poverty guidelines for the 48 contiguous states and the District of Columbia.

* * *

Section ~~11~~ 12 . This ordinance shall take effect and be in force thirty (30) days from and after its approval by the Mayor, but if not approved and returned by the Mayor within ten (10) days after presentation, it shall take effect as provided by Municipal Code Section 1.04.020.

Passed by the City Council the ____ day of _____, 2010, and signed by me in open session in authentication of its passage this _____ day of _____, 2010.

_____

President _____of the City Council

Approved by me this ____ day of _____, 2010.

_____

Mike McGinn, Mayor

Filed by me this ____ day of _____, 2010.

_____

City Clerk

RG:rg/BG 2010 criminal 09/17/10 Version #2

Seattle City Council

Office of the Mayor

Office of the City Clerk

Address: 600 4th Ave, 3rd Floor, Seattle, WA, 98104

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KING COUNTY DEPARTMENT OF PUBLIC DEFENSE

January 12, 2021 - 2:05 PM

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