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COURT OF APPEALS
DIVISION II

NO. 37212-03 MAY 7 AM 8:13

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

STATE OF WASHINGTON
BY _____
DEPUTY

STATE OF WASHINGTON,

Respondent,

v.

ELIJAH GIVENS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Robert A. Lewis, Judge

BRIEF OF APPELLANT

CATHERINE E. GLINSKI
Attorney for Appellant

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering findings of fact 9 and 15¹.
2. The trial court erred in entering conclusions of law 3, 6, 7, and 8.
3. The trial court erred in concluding appellant was guilty of luring.
4. The trial court failed to enter findings of fact or conclusions of law as to the statutory defense.

Issues pertaining to assignments of error

1. Following a bench trial, appellant was convicted of one count of luring. Where the evidence failed to establish that he attempted to entice a child into an area obscured from public view, must his conviction be reversed?
2. Although appellant presented evidence to establish the statutory defense to luring, the trial court entered no findings of fact or conclusions of law regarding that defense. Where there is no indication in the record that the trial court considered appellant's statutory defense, is remand for entry of findings and conclusions appropriate?

¹ The court's findings of fact and conclusions of law are attached as an appendix to this brief.

B. STATEMENT OF THE CASE

1. Procedural History

On September 27, 2007, the Clark County Prosecuting Attorney charged appellant Elijah Givens with three counts of luring. CP 1-2; RCW 9A.40.090(1). Givens waived his right to a jury trial, and the case proceeded to a bench trial before the Honorable Robert A. Lewis. CP 19. The court found Givens guilty on one count and not guilty on the other two counts, entering findings of fact and conclusions of law consistent with its decision. CP 64-67, 70. The court imposed a sentence of 120 days confinement with 12 months of community custody. CP 72, 74. Givens filed this timely appeal. CP 82.

2. Substantive Facts

On September 23, 2007, after meeting with a VA representative to discuss his homelessness and need for alcohol treatment, Elijah Givens bought a couple of beers and went to John Ball Park to drink them. 1RP² 197-98. He did not want to sit on the benches in the middle of the park to drink because there were children around. 1RP 216. He also did not want to be hassled by police for drinking in public, so he moved to an area near

² The Verbatim Report of Proceedings is contained in two volumes, designated as follows: 1RP—12/21/07; 2RP—1/4/08.

the edge of the park by a fence and squatted down to drink his beer. 1RP 199-200.

Givens noticed several children playing in the park that day. 1RP 200. A boy Givens recognized from Sharehouse rode up on his scooter, said hello to Givens, and started climbing a tree nearby. 1RP 201. Givens was concerned that the boy was alone, so he called out to some other children at the park to come play with him. 1RP 202-03.

The teenaged babysitter of three girls playing at the park was concerned that Givens was speaking to the children, and she asked him to stop. She called 911 when he continued to speak to them. 1RP 29. Givens was arrested and charged with luring. 1RP 220.

At trial, the babysitter testified that she saw Givens sitting in the corner inside the park, and he never moved from that location. 1RP 37. Although she could not really see him when she was sitting on the bench, he was visible when she walked closer to the play area. 1RP 54. The babysitter chose not to look directly at Givens, but even out of the corner of her eye she could see that he was sitting down and that he had a beer with him. 1RP 55-57. She was able to describe Givens to the 911 dispatcher as an older black man with a beard wearing blue jeans and a long-sleeved shirt. 1RP 69. She also saw him talking to the little boy who rode up on his scooter. 1RP 73.

The babysitter testified that he heard Givens say, “come play with me” and “come here, come here, come talk to me.” 1RP 45, 60. The girls’ mothers testified that they did not know Givens and did not give him permission to be with their children. 1RP 80, 84.

One of the girls testified that she remembered being at the park when her babysitter called the police because a man was talking to them. 1RP 89. She could not remember what the man said, however. 1RP 98-99. Another girl remembered only playing at the park and talking to the police. She said that no grownups tried to talk to her while she played. 1RP 136-38.

The third girl, nine-year-old D.A.W., testified that she could not remember what the man at the park looked like, but he kept saying come here, and “he told us to come here and play with him.” 1RP 108-09. With some prompting by the prosecutor, D.A.W. remembered that she had said in an interview that the man offered to give them candy. 1RP 111. Neither she nor anyone else had reported this to the police, however, and the court was not persuaded that Givens made that offer. 1RP 119-20, 250.

D.A.W. testified that she was by the monkey bars by the swings when she heard Givens speaking to them, and she saw him in the corner

drinking. 1RP 109, 113, 126. She also saw the little boy climbing trees and talking to Givens. 1RP 123.

The police officer who arrested Givens testified that when he contacted the babysitter, she pointed out where Givens was sitting. 1RP 144. He could not see Givens from where he was standing with the babysitter about 40 feet away, but when he walked closer, he saw Givens sitting on a raised ledge. 1RP 145-46. The officer noticed a can of beer next to Givens and thought Givens's statements were incoherent and his speech slurred. 1RP 149.

Like the state, the defense offered into evidence photographs of the park and the location where Givens was sitting. 1RP 177-84. The little boy Givens had spoken to also testified for the defense. He said that he remembered riding his scooter to the park and speaking to a man he recognized from Sharehouse. 1RP 190, 192-93. He did not remember what they spoke about or if the man spoke to anyone else. 1RP 193.

Givens testified in his defense, explaining why he was in the park and why he called out to the children. 1RP 198-203. Givens did not remember the babysitter telling him not to talk to the children or that she was calling the police. 1RP 204, 210. He explained that if he had heard her, he would have left the park to avoid being hassled by the police. 1RP 204. Givens testified that he did not speak with the children with the

intent to harm their health, safety, or welfare. 1RP 207. He did not try to lure anyone over to him, and he did not have an evil intent. 1RP 207-08. He spoke to the children only because he was concerned for the little boy, and he called out for the other children to play with him. 1RP 215.

Defense counsel argued in closing that Givens did not lure or attempt to lure anyone. He offered no enticement to the children, and he was not in an obscured location inaccessible to the public. 1RP 238-40. He merely felt compassion for a little boy who was playing by himself and tried to get the other kids to come over and play with him. 1RP 238. Counsel argued that Givens's actions were reasonable under the circumstances, and Givens did not act with intent to harm the children. 1RP 241.

The trial court found that Givens went to the park to drink, and he sat by a fence near the play structure where three girls were playing. It found that the little boy was at the park as well. 1RP 247. The court found that the area in which Givens was sitting was not inaccessible to the public because it was in a public place. 1RP 248. Although the area was not totally obscured from public view, the court found it significant that the area was less visible than other areas of the park. 1RP 248-49.

While Givens was charged with luring as to all three girls, the court found that the evidence supported only one charge. 1RP 252. It

concluded that Givens attempted to lure D.A.W. into an area obscured from public view, finding that his offer to play with her was sufficient enticement to establish the crime. 1RP 250-51.

C. ARGUMENT

1. THE STATE FAILED TO PROVE THE ELEMENTS OF LURING BEYOND A REASONABLE DOUBT.

In every criminal prosecution, the state must prove all elements of a charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). On appeal, a reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); State v. Chapin, 118 Wn.2d 681, 826 P.2d 194 (1992); State v. Green, 94 Wn. 2d 216, 616 P.2d 628 (1980).

In order to convict Givens of luring in this case, the state had to prove beyond a reasonable doubt that Givens ordered, lured, or attempted to lure a minor into any area or structure that is obscured from or

inaccessible to the public, that he did not have the consent of the minor's parent, and that he was unknown to the child. See RCW 9A.40.090(1)³.

While the terms "lure" and "luring" are not defined in the statute, Washington courts have held that "lure" is commonly understood to mean "entice" and implies leading another into a course of action that is wrong or foolish under the circumstances. State v. McReynolds, 142 Wn. App. 941, 947-48, 176 P.3d 616 (2008); State v. Dana, 84 Wn. App. 166, 172, 926 P.2d 344 (1996), review denied, 133 Wn.2d 1021 (1997). Luring and invitation are not the same, however, and to constitute luring, an invitation

³ RCW 9a.40.090 provides as follows:

A person commits the crime of luring if the person:

(1) (a) Orders, lures, or attempts to lure a minor or a person with a developmental disability into any area or structure that is obscured from or inaccessible to the public or into a motor vehicle;

(b) Does not have the consent of the minor's parent or guardian or of the guardian of the person with a developmental disability; and

(c) Is unknown to the child or developmentally disabled person.

(2) It is a defense to luring, which the defendant must prove by a preponderance of the evidence, that the defendant's actions were reasonable under the circumstances and the defendant did not have any intent to harm the health, safety, or welfare of the minor or the person with the developmental disability.

(3) For purposes of this section:

(a) "Minor" means a person under the age of sixteen;

(b) "Person with a developmental disability" means a person with a developmental disability as defined in RCW 71A.10.020.

(4) Luring is a class C felony.

must be accompanied by some form of enticement, by words or conduct.

Dana, 84 Wn. App. at 175-76; see also McReynolds, 142 Wn. App. at 948 (citing Dana).

In Dana, the defendant stopped his car near a McDonald's restaurant and spoke to two girls, ages 11 and 12, whom he had never met before. When he asked the girls if they would like to get into his car, the girls could see that his genitals were partially exposed. The girls were shocked, and they ran away. The defendant was convicted of two counts of luring. Dana, 84 Wn. App. at 169.

On appeal, the defendant challenged the statute as vague and overbroad, but the Court of Appeals affirmed the statute's constitutionality. Although the statute did not specifically define the term "lure," the court held that the term was commonly understood to mean "entice." Dana, 84 Wn. App. at 172. Moreover, the court held that the statute was not overbroad because it required more than a mere invitation:

The impact on protected speech is minimal because a mere invitation, as noted above, is not sufficient. In order to constitute a lure in violation of the statute, the invitation must include some other enticement or conduct constituting an enticement (or attempted enticement)... [L]uring and inviting are not the same. Luring requires something more than an invitation. The enticement accompanying the invitation, be it conduct or words, for example, sufficiently narrows the scope of the statute in relation to its plainly legitimate sweep.

Dana, 84 Wn. App. at 175-76.

The Court of Appeals also held that the evidence was sufficient in that case. It noted the defendant did not merely invite the girls to get into his car; he also exposed his genitals in an attempt to entice them to do so. Even though he was unsuccessful, and the girls were upset rather than enticed, the court held that this combination of invitation and enticement was sufficient to establish guilt under the statute. Dana, 84 Wn. App. at 179.

In stark contrast to Dana, there is no evidence of enticement in this case. The state's witnesses testified that they heard Givens say "come play with me" and "come here, come here, come talk to me." 1RP 45, 60, 108-09. D.A.W., the alleged victim, testified, "He told us to come here and play with him. And that's about all." 1RP 110. This mere invitation to come play does not constitute luring because no enticement was offered. See McReynolds, 142 Wn. App. at 947 (evidence that defendant signaled girl to come over to his truck and that girl believed defendant was following her was insufficient to establish luring where there was no evidence of enticement accompanying invitation).

D.A.W. also testified that before he left, Givens said he would give her some candy. 1RP 111. This is the type of enticement which, when accompanying an invitation, could establish luring. The trial court did not

find that Givens offered this enticement however. See CP 64-67⁴. In its oral ruling, the court explained, “I’m not finding that he offered her candy, because I don’t have – I cannot find beyond a reasonable doubt that, in fact, he did.” 1RP 250.

The trial court concluded that Givens was guilty of luring based solely on the invitation to come over and play. CP 67. This conclusion ignores the nature of the crime as described in Dana. As the Dana court explained, luring requires not only an offer but also an inducement to accept the offer. Here, while there was evidence that Givens invited the child to come over and play, the state did not establish that he attempted to induce her to accept this invitation. Because the invitation was not accompanied by words or conduct which could be taken as an attempted to enticement, the evidence is insufficient to establish the crime of luring.

The evidence is also insufficient to establish that Givens invited the child into an area that was obscured from or inaccessible to the public. See RCW 9A.40.090(1)(a). There was no dispute that the incident occurred in a public park and thus, as the court found, the area was not inaccessible to the public. 1RP 248. It is also clear from the evidence that the area was not obscured from the public. Although Givens’s location was not immediately apparent from the benches about 40 feet away, the

⁴ The court found that D.A.W. testified Givens offered her candy, but it did not find that Givens in fact made that offer. CP 66.

babysitter was able to discern where his voice was coming from, and she could see him when she moved a little closer. 1RP 37, 54, 146. There was foliage in the area, but even so, Givens was visible enough that the babysitter could see, without looking directly at him, that he was sitting down, drinking a beer. 1RP 55-57. She was also able to provide a description of him to the 911 dispatcher, and she could see that he was talking to the boy who was playing nearby. 1RP 69, 73. D.A.W. could also see Givens from where she was playing on the play structure, and she, too, saw that he was drinking and talking to the boy. 1RP 123-26, 128. This evidence does not support the court's finding or conclusion that Givens was in an area obscured from the public.

Because the evidence was insufficient to establish the elements of the crime, this court should reverse Mr. Givens's conviction and dismiss the prosecution.

2. THE TRIAL COURT'S FAILURE TO ENTER FINDINGS AND CONCLUSIONS AS TO THE STATUTORY DEFENSE PRECLUDES MEANINGFUL APPELLATE REVIEW.

Although the state is not required to prove the defendant acted with an evil intent in order to establish the crime of luring, the statute provides that

It is a defense to luring, which the defendant must prove by a preponderance of the evidence, that the defendant's actions were

reasonable under the circumstances and the defendant did not have any intent to harm the health, safety, or welfare of the minor or the person with the developmental disability.

RCW 9A.40.090(2).

Here, Givens denied that he was guilty of luring and argued that the state failed to prove any attempt to entice or that he was in an area obscured from public view. 1RP 237-38, 239-40. Moreover, he presented evidence to establish the statutory defense. Givens testified that he called out for the children on the play ground to come over and play with the little boy who was talking to him, because he was concerned that the boy was alone. 1RP 215. He further testified that he had no intent to harm the health, safety, or welfare of any child. 1RP 207.

Despite this evidence, the trial court did not address the statutory defense in either its written findings of fact and conclusions of law or its oral ruling. It made no findings regarding Givens's testimony, the reasonableness of his actions under the circumstances, or his lack of intent to harm.

In a bench trial, the trial court is required to enter findings of fact and conclusions of law. CrR 6.1(d). Each element of the offense must be addressed separately, setting out the factual basis for each conclusion of law. State v. Banks, 149 Wn.2d 38, 43, 65 P.3d 1198 (2003). These findings and conclusions enable an appellate court to completely review

the case on appeal. State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998).

The trial court's failure to enter findings and conclusions as to the statutory defense precludes meaningful appellate review. This Court cannot assume from the trial court's conclusions that the elements in subsection (1) of the statute are met that the court rejected the statutory defense set out in subsection (2), because that defense applies even though the elements of the offense are established. Because there is no indication in the record that the court considered the evidence Givens presented in support of the statutory defense, this Court should remand for entry of findings and conclusions as to that defense. See Head, 136 Wn.2d at 626 (remand for entry of findings and conclusions as required by CrR 6.1(d) is appropriate remedy).

D. CONCLUSION

The evidence was insufficient to establish that Givens attempted to lure a child into an area obscured from public view, and his conviction must be reversed. Moreover, the court's failure to enter findings of fact and conclusions of law as to the statutory defense requires remand.

DATED this 6th day of May, 2008.

Respectfully submitted,


CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Appellant

APPENDIX

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Sherry W. Parker, Clerk, Clark Co.

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK**

STATE OF WASHINGTON,

Plaintiff,

v.

ELIJAH GIVENS,

Defendant

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW on Bench Trial
before Hon. Robert Lewis**

No. 07-1-01710-1

THIS MATTER having come before the court on the 21ST of December, 2007, the State of Washington represented by Deputy Prosecuting Attorney Alan E. Harvey and the Defendant, present and represented by Defense Attorney Dave Kurtz and the Court having heard the testimony of Rebeccah Roberto, Becky A. Vancleve, C.L.K. ,D.A.W., T.R.W., Adam Millard VPD, B. R. T. (B.T.), Jack Jones, and the defendant , as well as arguments of counsel. The Court makes the following:

FINDINGS OF FACT

1. There on 09/23/07 Officer Millard of the Vancouver Police Department responded to John Ball Park, 2300 Kauffman, Vancouver, Washington for a report of an adult black male calling little girls over to him.

**FINDINGS OF FACT AND CONCLUSIONS OF
LAW : BENCH TRIAL- 1**

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2. That John Ball Park is located in the State of Washington.
 3. Officer Millard reported that he arrived at the park and saw B.T
 4. That B.T. was born on 1/28/1993 .
 5. That B.T. (D.O.B. 1/28/1993) was baby sitting 3 young girls who were all at the table with her.
 6. That Officer Millard identified the girls as D.A.W. (dob: 6/4/98), T.R.W. dob: (3/2/01) and C.L.K. dob: (8/19/99). B.T. (D.O.B. 1/28/1993) pointed to the wooded area in the southwest portion of the park. Where a male had been calling out to the girls.
 7. That the Officer Millard contacted and identified the male subject, as the defendant.
 8. That the defendant was located in an area was on sloping terrain behind some trees, bushes, and a large wooden sign.
 9. That the defendant's located was a place that was obstructed from public viewing.
 10. That the testimony of B.T. , as to here hearing the defendant call out to the girls to entice them to come and play with him was specifically addressed as to D.A.W. (dob: 6/4/98).
 11. That B.T. did ask the defendant to stop calling out to D.A.W. (dob: 6/4/98) on at least 3 separate occasions. That the defendant acknowledged her but continued to call out to D.A.W.
 12. That B.T. did call 911.
 13. That D.A.W. was able to testify at trial that she recalled the defendant calling out to her.
 14. That D.A.W. testified that the defendant was calling to her from the area depicted in the admitted photographic exhibits.
 15. That D.A.W. testified that the defendant's location was in an area that was obscured from her viewing behind trees and bushes.
 16. That D.A.W. testified that she could hear the defendant call out to her more than once to come over and play with him.

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2 17. That D.A.W. also testified that she heard the defendant indicate that he said that
3 would give her candy if she went over to him.

4 18. That Adam Millard identified the defendant in court as the individual that he
5 contacted on the 23rd of September 2007 in John Ball Park.
6

7 19. That B.T. identified the defendant in court as the individual that who called out to
8 the girls on the 23rd of September 2007 in John Ball Park.
9

10 20. That D.A.W, identified the defendant in court as the individual that who called
11 out to the girls on the 23rd of September 2007 in John Ball Park.
12

13 21. That C.L.K identified the defendant in court as the individual that who called
14 out to the girls on the 23rd of September 2007 in John Ball Park.
15

16 22. Becky A. Vancleve testified that she is the parent of D.A.W., and that at no time
17 had she given permission to the defendant to come into contact of any nature
18 with her daughter, D.A.W.
19

20 **CONCLUSIONS OF LAW**
21

- 22 1. That B.T. testimony was particularly credible as to her recollections of the
23 defendant's location.
24 2. That B.T. testimony was particularly credible as to her recollections of
25 the defendant's statements.
26 3. The defendant did attempt to lure D.A.W by his enticements of playing
27 games.
28 4. That D.A.W. is a person under the age of 16.
29 5. That the defendant was acting without the consent D.A.W.'s parent or
guardian .

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6. That the defendant attempted to lure D.A.W. to a place where he was located.
 7. That the defendant was located in a place that was in a place that was obscured from and inaccessible to the public.
 8. That the defendant is guilty beyond a reasonable doubt, as to Count 1 of the information as charged, pursuant to Revised Code of Washington 9A.40.090(1).

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DONE in Open Court this 9th day of January, 2008

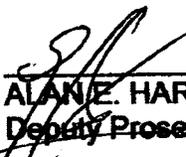
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HONORABLE ROBERT A. LEWIS
Judge of the Superior Court

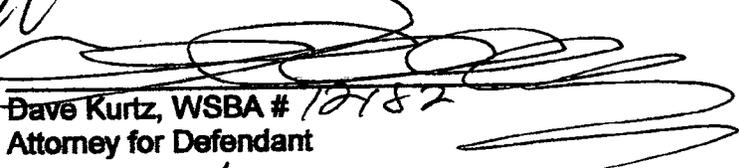
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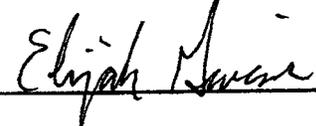
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Defendant

FINDINGS OF FACT AND CONCLUSIONS OF
LAW : BENCH TRIAL- 4

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DIVISION II

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in

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STATE OF WASHINGTON
BY DEPUTY

State v. Elijah Givens, Cause No. 37212-6-II directed to:

Alan Edward Harvey
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Vancouver, WA 98666-5000

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
May 6, 2008