

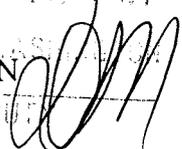
COURT OF APPEALS
DIVISION II

NO. 37212-6-II

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

STATE OF WASHINGTON
DEPUTY



STATE OF WASHINGTON, Respondent

v.

ELIJAH GIVENS, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROBERT A. LEWIS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 07-1-01710-1

BRIEF OF RESPONDENT

Attorneys for Respondent:

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Clark County, Washington

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I. STATEMENT OF FACTS

The State accepts the Statement of Facts as set forth by the defendant.

II. RESPONSE TO ASSAIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that the State has failed to provide sufficient evidence to prove the elements of the felony of Luring beyond a reasonable doubt.

By Information (CP 1) the defendant was charged with three counts of Luring under RCW 9A.40.090. In a non-jury trial, the Court found the defendant guilty of committing the felony Luring in Count 1 only. That Count reads as follow:

Count 1- Luring- 9A.40.090

That he, ELIJAH GIVENS, in the County of Clark, State of Washington, on or about September 23, 2007 being unknown to D.A.W., a person under the age of 16 or with a developmental disability as defined in RCW 71A.10.020, and acting without the consent of D.A.W.'s parent or guardian did order, lure, or attempt to lure D.A.W. into an area or structure that was obscured from and inaccessible to the public and/or a motor vehicle; contrary to Revised Code of Washington 9A.40.090(1).

-(Found at Information, Count 1, CP 1).

To establish the facts of its case, the prosecution called D.A.W. as a witness in its case in chief (RP 103). She indicated that at the time of the incident she was approximately nine years of age (RP 104). She indicated that she was in the park with her sister, an eight year old friend, and the fourteen year old babysitter. (RP 106 – 107). She remembers that she was playing on the monkey bars and that there was a man also present in the park who kept saying to her “come here.” (RP 108). She further clarified that what the man was saying to her was “come here and play with me.” (RP 109; 110; 111).

Photographs were introduced showing the general area where this took place. Also the child, on cross examination, indicated that the man was walking around in the area (RP 124).

The babysitter (B.T.) was also called as a witness in the State’s case in chief (RP 26; 36). She indicated that when they were in the playground she heard someone calling to the children. She couldn’t see him clearly because of objects and shrubbery in the way so she got up and politely asked him to stop. Five minutes later he would continue to do the same thing. She testified that she got freaked out and called 911. (RP 29; 45). Pictures were shown to her of the general area and she was able to describe it to the court (RP 33 – 34). She also recalls hearing him say to

the children to “come here and play with me” (RP 45). She called 911 and officers responded to the scene, found the defendant, and arrested him.

The defendant testified in his own behalf and acknowledged he was talking to the girls but was indicating that he was asking them if they wanted to play with a child that was up in the tree and play on his scooter (RP 203).

After both sides rested and arguments were given, the court discussed, orally, its findings. These findings were later reduced to Findings of Fact and Conclusions of Law on the Bench Trial (CP 64). A copy of the Findings of Fact and Conclusions of Law on Bench Trial is attached hereto and by this reference incorporated herein.

The trial judge began his discussion of the facts by indicating that this was a credibility question between the children and the defendant. (RP 246, L. 17 – 24).

The court indicated as follows:

(Trial Court’s Oral Opinion...)

But it is fairly clear to me in reviewing the evidence that certain things occurred. And I will find that on September 23, 2007, in the State of Washington, specifically in John Ball Park, that Mr. Givens was present. He’d left an appointment that he had and went to the park for the purpose of drinking some alcohol; he went over by a fence, which was near a play structure where children were playing; specifically the three children that have testified

here today, Briannah was also playing and watching them, and Cory was there in the park area as well.

The area is depicted in a number of photos, some of them taken at a time that's closer, none of them taken at exactly the same moment for obvious reasons. But the area that's depicted where Mr. Givens was seated and which is fairly uncontested that he was in that given area, he may have moved around to some extent or he may have sat still, but at some point he was in this area that's depicted in the photograph. The area is behind a little rise next to a fence. There's sort of foundation that sits by the fence, there's some foliage there, some trees and shrubs. Those shrubs had leaves on them in September, I find, because they had leaves on them in October when the pictures closest in time were taken. There's also a garbage can and some other materials there.

And although the area is not totally obscured in the sense that a person walking in certain areas would be able to see into that area, even at this time of the day or at this time of the year, it is an area which is somewhat obscured from public view, more so than the other areas of the park, which are open grassy areas or playground areas, which are much more visible from other areas in the park. That's significant, because while obviously I'm not trying to say it's inaccessible, it's a public place, so it's not inaccessible to the public, I do find that the particular area that was dealt with here was obscured from public view.

And I'm not required in reviewing the elements of the offense to find that the person is particularly good at picking an area that might be totally obscured or that they were smart in the choice of location. That's simply not required. It's anticipated that people who are charged with luring are perhaps in public areas. For example, a person can lure someone into a vehicle, which is on a public street and may be visible to a large number of people.

But that doesn't - - that's not the test. The test is whether the area where the person is or is attempting to get the minor to be in obscured from public view, and I find that it was in this case because of its layout and because of the testimony of witnesses who sat at the picnic table, and other areas where they were located, that the area was in

fact obscured from their view. Both Briannah and the officer who came said, when they were at the picnic table, they couldn't see this area until they walked over closer to it. And, of course, if the babysitter is sitting in one area and the allegation is that the person is trying to lure them to an area that they can't see, that would be important in determining whether it's obscured for purposes of the statute. So the area where Mr. Givens was, was obscured in the sense that we're talking about for luring.

The three people who testified and were present at the park with Briannah, Cody, Dana, and Taylor, were all under the age of 16. Mr. Givens did not know them, doesn't know them now, they don't know him; the parents involved don't know him, and any contact that he had with them was without their - - without the parents' consent.

So the focus is on the actions that Mr. Givens took at that time - - the volitional actions that he took, and that's what I meant in my earlier rulings regarding intent. I do not agree that the statute says that if someone is doing something and it happens to lure children over to them that that person is guilty of the crime. The person must be trying to entice or lure or attempt to lure the people or the children involved over to the area. What the statute and what Dana says is, if they're trying to do that, it doesn't make any difference why they're trying to do that, whether they're doing it because they have some evil purpose or because they think they're going to do the kids a favor by bringing them over there, or because they're concerned for their welfare and want them over there. Initially, the State doesn't have to prove that. If the defendant thinks that - - I mean, once the State establishes luring, if the defendant thinks they have good reason for luring, they can assert that affirmative defense.

But we do need some volitional conduct by Mr. Givens. With regard to Dana, I find that volitional conduct occurred. He did not order her to the area, he did not, in fact, lure her to the area, because all of the children ignored his request to come over to the area. But I find that he did attempt to bring her over to the area, he did speak to her and ask her to come over to the area, and not only invited her to the area but offered an enticement for doing that.

Now, 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. But I do find beyond a reasonable doubt that he offered to play games or to play with her. And to a child of that age, that's an enticement. The words, not only just come over here, but come over here and we'll play or play games, are an attempt to entice the person over to the area to do something that a child would perceive to be fun. The fact that she didn't perceive it to be fun and the fact that she, in fact, didn't go for the lure was not - - is not relevant to these proceedings.

That conduct was volitional by Mr. Givens because I find persuasive Briannah's testimony that she spoke to Mr. Givens and asked him not to do what he was doing. That he was trying to get Briannah to come over - - or Dana to come over. She asked him to stop, he said okay, sure, no problem; a few minutes later, he started up again. She asked him to stop again. He said sure, no problem. And then he started up for a third time and she called the police, which she had indicated to him that she would.

He may not remember that now, either because he didn't hear it or because of the effects of alcohol, but I'm convinced that she did, in fact, tell him that. And that Dana heard exactly what she said she heard, that he tried to get her to come over and play.

And so as to count 1, I find beyond a reasonable doubt that Mr. Givens engaged in luring as that crime is defined by Washington law.

-(RP 247, L. 1 – 251, L. 25).

Neither RCW 9A.40.090, nor chapter 9A.40 RCW, explicitly define the terms “lure” or “luring”, but Washington case law has determined that a commonly understood use of the word is to “entice.” State v. Dana, 84 Wn. App. 166, 172, 926 P. 2d 344 (1996). Luring is not an invitation alone; enticement, by words or conduct, must accompany the

invitation. Dana, 84 Wn. App. at 176. The Appellate Court's have also determined that the intent of the perpetrator is not an element of Luring. RCW 9A.40.090; Dana, 84 Wn. App. at 177.

The trial court is very clear in its oral decision (which is later reduced to Findings of Fact) that there was an enticement of this particular child. Because of her young age, the prospects of playing with someone or (as the defendant indicates) the possibility of playing on a scooter would be an enticement. Further, the Court goes into great detail in looking at the photographs and discussing the area where the child was supposed to go. This was not an area of the park opened, but was secreted or hidden to a certain extent. This was obvious because people had to change their positions to be able to see where he was at various times. In other words the area that he was trying to get the child into was obscured from the public view. The other elements of the crime dealing with not having the consent of the minor's parent or guardian was also touched on by the court. There was testimony concerning that which is part of the transcript. (RP 79 – 81). In assessing the sufficiency of the evidence, the appellate court must view the evidence in a light most favorable to the State and decide whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. State v. Luther, 157 Wn. 2d 63, 77, 134 P. 3d 205 (2006); State v. Mines, 163 Wn. 2d 387,

391, 179 P. 3d 835 (2008). Further, a reviewing Court will reverse a conviction for insufficient evidence only where no rational trier of fact could find all the elements of the crime were proved beyond a reasonable doubt. State v. Smith, 155 Wn. 2d 496, 501, 120 P. 3d 559 (2005). The Appellate Court will infer criminal intent from conduct, and circumstantial evidence as well as direct evidence carries equal weight. State v. Varga, 151 Wn. 2d 179, 201 86 P. 3d 139 (2004). Determinations of credibility are for the fact finder and are not reviewable on appeal. State v. Camarillo, 115 Wn. 2d 60, 71, 794 P. 2d 850 (1990).

The State submits that there was sufficient evidence produced at the trial to convince a rational trier of fact that the defendant has committed all of the elements of the crime in count 1 beyond a reasonable doubt.

III. RESPONSE TO ASSAIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant is a claim that the trial court failed to enter Findings of Fact and Conclusions of Law as to the statutory defense. By doing so it precluded the meaningful appellate review.

This claim deals with RCW 9A.40.090(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 developmentally disability.”

The State submits that because the trial court found the defendant guilty beyond a reasonable doubt as to count 1, that precludes the Court from having seriously considered the reasonableness of the defendant's actions under the circumstances or that he did not have an intent to harm the child. For example, the defendant continually was calling out to the children to come and play with him. This was done at least two times after the babysitter had specifically asked him not to do it and, further, when she threatened that she was going to call the police, he didn't stop.

The Trial Court's Finding of Fact are reviewed under a clearly erroneous standard and will be reversed only if not supported by substantial evidence. State v. Grewe, 117 Wn. 2d 211, 218, 813 P. 2d 1238 (1991). Great deference is given to the trial court's factual findings. State v. Cord, 103 Wn. 2d 361, 367, 693 P. 2d 81 (1985).

In the absence of a written finding on a particular issue, the Appellate Court may look to the Oral Opinion to determine the basis for the trial court's resolution of the issue. In Re Marriage of Griffin, 114 Wn. 2d 772, 777, 791 P. 2d 519 (1990). If no inconsistency exists, the

Appellate Court may use the Trial Court's oral ruling to interpret written Findings and Conclusions. State v. Bynum, 76 Wn. App. 262, 266, 884 P. 2d 10 (1994).

In the preceding section, the State has set forth verbatim the pertinent part of the oral decision by the trial court. The State submits that the Findings of Fact that have been entered together with the oral opinion clearly gives enough information for the Appellate Court to make an appropriate ruling.

IV. CONCLUSION

The Trial Court should be affirmed in all respects.

DATED this 1 day of July, 2008.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By:


MICHAEL C. KINNIE, WSBA#7869
Senior Deputy Prosecuting Attorney

APPENDIX "A"

INFORMATION

FILED
SEP 27 2007

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.

INFORMATION

No. 07-1-01710-1
(VPD 07-19339)

COMES NOW the Prosecuting Attorney for Clark County, Washington, and does by this inform the Court that the above-named defendant is guilty of the crime(s) committed as follows, to wit:

COUNT 01 - LURING - 9A.40.090

That he, ELIJAH GIVENS, in the County of Clark, State of Washington, on or about September 23, 2007 being unknown to D.A.W., a person under the age of 16 or with a developmental disability as defined in RCW 71A.10.020, and acting without the consent of D.A.W.'s parent or guardian did order, lure, or attempt to lure D.A.W. into an area or structure that was obscured from and inaccessible to the public and/or a motor vehicle; contrary to Revised Code of Washington 9A.40.090(1).

COUNT 02 - LURING - 9A.40.090

That he, ELIJAH GIVENS, in the County of Clark, State of Washington, on or about September 23, 2007 being unknown to T.R.W., a person under the age of 16 or with a developmental disability as defined in RCW 71A.10.020, and acting without the consent of T.R.W.'s parent or guardian did order, lure, or attempt to lure T.R.W. into an area or structure that was obscured from and inaccessible to the public and/or a motor vehicle; contrary to Revised Code of Washington 9A.40.090(1).

COUNT 03 - LURING - 9A.40.090

That he, ELIJAH GIVENS, in the County of Clark, State of Washington, on or about September 23, 2007 being unknown to C.L.K, a person under the age of 16 or with a developmental disability as defined in RCW 71A.10.020, and acting without the consent of C.L.K's parent or guardian did order, lure, or attempt to lure C.L.K into an area or structure that was obscured from and inaccessible to the public and/or a motor vehicle; contrary to Revised Code of Washington 9A.40.090(1).

ARTHUR D. CURTIS
Prosecuting Attorney in and for
Clark County, Washington

Date: September 27, 2007

BY:


Alan E. Harvey, WSBA #25785
Deputy Prosecuting Attorney

INFORMATION - 1
CC

Child Abuse Intervention Center
P.O. Box 61992
Vancouver Washington 98666
(360) 397-8002

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DEFENDANT: ELIJAH GIVENS			
RACE: W B	SEX: M	DOB: 6/28/1966	
DOL:		SID: WA18249818	
HGT: 511	WGT: 150	EYES: BRO	HAIR: BLK
WA DOC:		FBI: 497562TA2	
LAST KNOWN ADDRESS(ES):			
O - PO BOX 1209, VANCOUVER WA 98666			

INFORMATION - 2
CC

Child Abuse Intervention Center
P.O. Box 61992
Vancouver Washington 98666
(360) 397-6002

APPENDIX "B"

FINDINGS OF FACT AND CONCLUSIONS OF LAW on Bench Trial

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FILED

JAN 04 2008

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 Rebecca 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:**

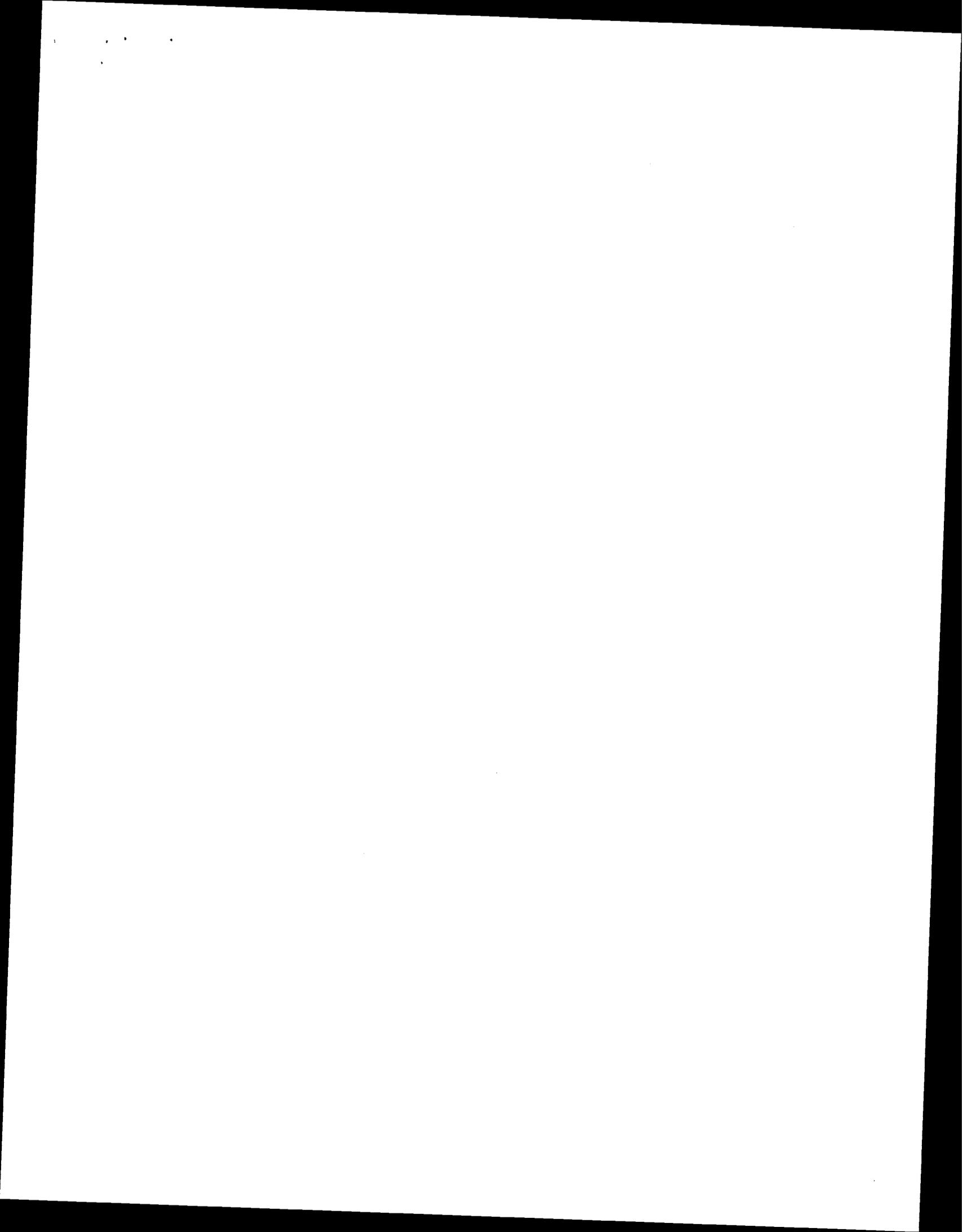
FINDINGS OF FACT

- 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**

**CLARK COUNTY PROSECUTING ATTORNEY
PO BOX 5000
VANCOUVER, WASHINGTON 98666-5000
(360) 397-2261 (TEL)**

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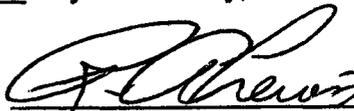
16 22. Becky A. Vancleve testified that she is the parent of D.A.W., and that at no time
17 had she given permission to the defendant to come into contact of any nature
18 with her daughter, D.A.W.
19

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).

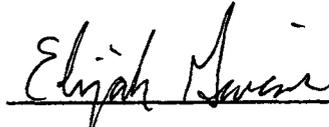
11 DONE in Open Court this 9th day of January, 2008

12
13 
14 HONORABLE ROBERT A. LEWIS
15 Judge of the Superior Court

16 Presented by:

17
18 
19 ALAN E. HARVEY, WSBA #25785
20 Deputy Prosecuting Attorney

21 
22 Dave Kurtz, WSBA # 10782
23 Attorney for Defendant

24 
25

26 Defendant

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

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