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Court of Appeals No. 39931-8-II
Cowlitz County No. 08-1-00508-6

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STATE OF WASHINGTON,

Respondent,

vs.

BENJAMIN CLINTON STRIBLING

Appellant.

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

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II. MR. STRIBLING'S CONVICTION FOR COUNT II MUST BE VACATED AND JUDGMENT RE-ENTERED FOR THE SAME CRIME, BUT AS A GROSS MISDEMEANOR.

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C. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS

Ben Stribling had a Yahoo email account with the email address loving_passionate_guy@yahoo.com. Finding of Fact (F.F.) No. 39, CP 30. Through this email account, as well as a social networking website called Teenspot.com, Ben began an email friendship with K.C., who used

the email address Twitching911@yahoo.com. F.F. 9-16, C.P. 27. K.C. was eleven when the email exchanges with Ben began, but she had represented her age to him, through Teenspot.com, as thirteen. F.F. 12, 17, 18, 20, 25, CP 27-28. K.C. turned twelve shortly after the email exchanges began. F.F. 12, CP 27. K.C. lived in Cowlitz County while Ben lived in Colorado. F.F. 4, 6, 31, CP 26, 29.

The State contended that certain exhibits, namely exhibits 29, 30, 41, 42, 43, 46, 47, 48, 49, 50 and 51 supported Counts I and II, sexual exploitation of a minor and attempted possession of depictions of a minor engaged in sexually explicit conduct. F.F. 95, CP 38, 43. Exhibit 29, an email dated March 11, 2008 with a time stamp of 13:06:37, contained a question by Ben: “Well, a guy can masturbate a girl. So, would you let me masturbate you while...”¹ K.C. replied “Yes.” Exhibit 29.

Exhibit 30, an email dated March 11, 2008 with a time stamp of 15:44:16, contained a question by Ben: “Would you give me a blowjob for the \$500 too?” K.C. replied “Yes.” Exhibit 30.

Exhibit 41, an email dated March 11, 2008 with a time stamp of 18:41:34 contained a question from Ben: “If I was dating one of your friends and she told you that she and I want to have a 3some and she

¹ The copy of this exhibit stops at the word “while.” Appellate counsel did not view the original exhibit because a Superior Court clerk was required by, local procedure, to copy the exhibits for me without allowing me to handle them. I don’t know if the original contains more words after “while.”

wanted you to join, would you?" K.C. replied

"ummmmmmm.....I don't know what that is. Well I think I do, but I'm not sure." Exhibit 41.

Exhibit 42, an email dated March 11, 2008 with a time stamp of 18:47:11 contained a statement from Ben: "It's where 3 people join in for sex fun." K.C. replied "I wouldn't do it...sorry. But that's what I thought, but I wasn't sure." Exhibit 42.

Exhibit 43, an email dated March 11, 2008 with a time stamp of 18:50:49, contained a question from Ben: "Okay, I haven't had sex in 2 years now. We (humans) have needs that we need to meet. What would you do to meet my needs?" K.C. replied "IDK."² Exhibit 43.

Exhibit 46, an email dated March 11, 2008 with a time stamp of 19:08:54 contained a question from Ben: "Would you have sex with me?" K.C. replied "maybe.....yes." Exhibit 46.

Exhibit 47, an email dated March 11, 2008 with a time stamp of 19:17:34, contained a question from Ben: "Why maybe?" K.C. replied, in pertinent part, "The 'yes.....' is the actual [sic] answer. I only have 10 more minutes to talk." Exhibit 47.

Exhibit 48, an email dated March 11, 2008 with a time stamp of 19:21:46, contained a question from Ben: "Since we aren't close to each

² "IDK" means "I don't know."

other, what can you do? Can you send some pictures?" K.C. replied "I will as soon as I upload some to my computer...but only if you send me some. Deal? NO NUDITY. Deal?" Exhibit 48.

Exhibit 49, an email dated March 11, 2008 with a time stamp of 19:26:47, contained a statement from Ben: "Well, I want the pictures to help me out with my needs." K.C. replied "Dude, my mom would find out and I would be DEAD MEAT. The best I could do would be shorts and a tank top." Exhibit 49.

Exhibit 50, an email dated March 11, 2008 with a time stamp of 19:33:44, contained a statement from Ben: "Your mom won't find out if you did it in secret." K.C. replied "She uses D.O.S. to find out almost everything I do. You know, If my mom doesn't tell me to get off the computer and you don't have to go, I think I'm gonna keep talking to you." Exhibit 50.

Exhibit 51, an email dated March 11, 2008 with a time stamp of 19:41:03 contained a question from Ben: "What is D.O.S.?" Exhibit 51.

At a non-jury trial, the trial court found Ben guilty of sexual exploitation of a minor and attempted possession of depictions of a minor engaged in sexually explicit conduct (Counts I and II) based solely on the exhibits outlined above. F.F. 95, Conclusions of Law (C.L.) 5, CP 38, 41.

Mr. Stribling was originally charged with felony communicating with a minor by both means, namely communicating with a minor for immoral purposes while having previously been convicted of a felony sex offense and communicating with a minor for immoral purposes through the sending of an electronic communication. CP 2-4. After the non-jury trial the State conceded that it could not prove Mr. Stribling had a prior qualifying sex offense and moved to proceed only on the second alternative of communicating through the sending of an electronic communication. RP (9-25-09), p. 3.

The State based the allegation in Count IV, communicating with a minor for immoral purposes by sending an electronic communication, on Exhibit 5, an email dated March 4, 2008 with a time stamp of 15:21:38. F.F. 100, CP 39. However, the amended information as to Count IV alleged that Ben had committed the offense of communicating with a minor for immoral purposes by the sending of an electronic communication based on an email dated March 8, 2008, not March 4th. The March 8th, 2008 emails are found in exhibits 13-22. The court based its finding of guilt as to this count on Exhibit 5. F.F. 100, CP 39.

The State based the allegation in Count V, communicating with a minor for immoral purposes by sending an electronic communication, on Exhibits 19, 20, 21 and 22. F.F. 101, CP 39. Those four exhibits are

emails dated from March 8th, 2008 with times stamps of 20:01:48, 20:16:58, 20:28:30, and 20:36:38, respectively. Exhibits 19-22. However, the amended information as to Count V alleged that Ben had committed the offense of communicating with a minor for immoral purposes by sending an electronic communication based on an email from March 9th, 2008, not March 8th. CP 3. The March 9th, 2008 emails are found in Exhibits 23-27. The court based its finding of guilt as to this count on Exhibits 19, 20, 21 and 22. F.F. 101, CP 39.

The State based the allegation as to Count VI, communicating with a minor for immoral purposes by sending an electronic communication, on Exhibit 27, an email dated March 9th, 2008 with a time stamp of 15:23:18. F.F. 102, CP 39. However, the amended information as to Count VI alleged that Ben committed the offense of communicating with a minor for immoral purposes by sending an electronic communication based on an email from March 11th, 2008, not March 9th. CP 3. The March 11th, 2008 emails are found in Exhibits 29-51. The court based its finding of guilt as to this count on Exhibit 27. F.F. 102, CP 39.

The State based the allegation as to Count VII, communicating with a minor for immoral purposes by sending an electronic communication, on Exhibit 45, an email dated March 11th, 2008 with a time stamp of 19:02:18. F.F. 103, CP 39. However, the amended

information as to Count VII alleged that Ben committed the offense of communicating with a minor for immoral purposes by sending an electronic communication based on an email from March 12th, 2008, not March 11th. CP 3. The March 12th, 2008 emails are found in Exhibits 52-70. The court based its finding of guilt as to this count on Exhibit 45. F.F. 103, CP 39.

The State based the allegation as to Count VIII, communicating with a minor for immoral purposes by sending an electronic communication, on Exhibit 31, an email dated March 11th, 2008 with a time stamp of 15:49:50. F.F. 104, CP 39. However, the amended information as to Count VIII alleged that Ben committed the offense of communicating with a minor for immoral purposes by sending an electronic communication based on an email from March 16th, 2008, not March 11th. CP 3. The March 16th, 2008 emails are found in Exhibits 71-88. The court based its finding of guilt as to this count on Exhibit 31. F.F. 104, CP 39.

The trial court found Ben guilty of Counts I through VIII, and acquitted him of Count IX. C.L. 1-13, CP 40-41.

The incorrect dates outlined above were brought to the trial court's attention by the State after the verdict was rendered. CP 67. The State moved to conform the amended information to the proof presented at trial.

RP (9-25-09), p. 7, 8. Defense counsel did not initially raise any objection to the sufficiency of the information, but objected to the State's motion to conform the amended information to the proof presented at trial. RP (9-25-09), p. 8, Trial RP Vol. 4, 745-748. Defense counsel argued that these mistakes went far beyond scrivener's error, and that the State was not entitled to amend the information after the verdict. *Id.* Defense counsel did not seek dismissal of counts IV through VIII, but rather argued that judgment should be entered on each of those counts to reflect that Ben had committed the offense as a gross misdemeanor under RCW 9.68A.090 (1). *Id.* This is so because the State proved the base allegation of communicating with a minor for immoral purposes as charged in the *first* alternative for each count, which bore the correct dates which matched the proof presented at trial, but merely failed to prove that Ben had a prior conviction for a qualifying felony sex offense. *Id.*, CP 1-4. Because the trial court had found the essential elements of the crime, defense counsel sought to have judgment entered on the lesser included and inferior degree offense of communicating with a minor for immoral purposes under RCW 9.68A.090 (1) (gross misdemeanor).

The trial court granted the State's motion to conform the amended information to the proof presented at trial, holding that because the incorrect dates were not brought to light until after the verdict, the

information must be liberally construed in favor of validity and the court was “required to construe the charging document in favor of the State.” CP 68. The court also held that Mr. Stribling was required to demonstrate prejudice and failed to do so. CP 69. Last, the court held that the error was not simply a scrivener’s error, but that the error was harmless. CP 69.

2. PROCEDURAL FACTS

Mr. Stribling was charged, by amended information, with sexual exploitation of a minor (Count I); attempted possession of depictions of a minor engaged in sexually explicit conduct (Count II); and six counts of communicating with a minor for immoral purposes (Counts III through IX). CP 1-4. Mr. Stribling was convicted of counts I through IX and given standard range sentences as to each count. CP 12. Counts I and II were held to encompass same criminal conduct. CP 12. This timely appeal followed. CP 23.

D. ARGUMENT

I. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN MR. STRIBLING’S CONVICTION UNDER COUNT I BECAUSE MR. STRIBLING DID NOT COMPLETE THE CRIME, AND SEXUAL EXPLOITATION OF A MINOR IS NOT AN INCHOATE OFFENSE.

Constitutional due process requires that in any criminal prosecution, every fact necessary to constitute the crime charged must be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 25

L. Ed. 2d 368 (1970). On appeal, a reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, viewing the evidence in the light most favorable to the State, could find that all the elements of the crime charged were proven beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 220-2, 616 P.2d 628 (1980). When sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

Under Count I, Mr. Stribling was convicted of sexual exploitation of a minor. RCW 9.68A.040 provides:

- (1) A person is guilty of sexual exploitation of a minor if the person:
 - (a) Compels a minor by threat or force to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance;
 - (b) Aids, invites, employs, authorizes, or causes a minor to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance; or

(c) Being a parent, legal guardian, or person having custody or control of a minor, permits the minor to engage in sexually explicit conduct, knowing that the conduct will be photographed or part of a live performance.

(2) Sexual exploitation of a minor is a class B felony punishable under chapter 9A.20 RCW.

Although the Information failed to state which subsection of RCW 9.68A.040 Mr. Stribling was alleged to have violated, it is clear from the record as a whole and the trial court's findings that he was convicted of violating RCW 9.68A.040 (1) (b), for having invited K.C. to take nude photographs of herself and transmit them to him. See F.F. 95-98, CP 38-39. The trial court found that Mr. Stribling did no more than invite K.C. to send him nude photographs of herself, and found that he was wholly unsuccessful in obtaining those photographs. RP 726-27, F.F. 95-98, CP 38-39. The trial court opined, in its oral ruling, that he felt it was an open question as to whether one could be guilty of this offense without having succeeded in getting the minor to engage in sexually explicit conduct, or obtaining the photograph depicting the sexually explicit conduct or causing the live performance of sexually explicit conduct. RP 726-27.

In *State v. Chester*, 133 Wn.2d 15, 22, 940 P.2d 1374 (1997), the Supreme Court addressed the sexual exploitation of a minor statute and observed that “[t]he words ‘aids, invites, employs, authorizes or causes’ are not defined in the statute.” The Court then employed the Webster’s

Third New International Dictionary definition of “invite” and said it means “to offer an incentive or inducement or to request the participation or presence of a person.” *Chester* at 22. Applying this definition to the statute, the Court said: “Each of these words is an active verb. Each requires some affirmative act of assistance, interaction, influence or communication on the part of a defendant which initiates *and results* in a child’s display of sexually explicit conduct.” *Id.* (Emphasis added).

In *State v. Root*, 141 Wn.2d 701, 707, 9 P.3d 214 (2000), the Supreme Court again had occasion to consider the sexual exploitation of a minor statute. Although the precise issue presented in that case was the unit of prosecution for the offense, the Supreme Court took it as fact that “[t]he statute basically consists of two elements: (1) posing a minor in sexually explicit conduct, and (2) knowing that the conduct will be photographed. *Root* at 707. “The crime is arguably complete when the defendant merely *causes* the minor to engage in sexually explicit conduct, knowing the defendant or someone else will take a photograph.” *Root* at 707. (Emphasis added). The following passage further illustrates the axiom that RCW 9.68A.040 requires a completed act:

While photographing is included in this section, one must first compel, aid, invite, employ, authorize, or cause sexually explicit conduct in order to be guilty of sexual exploitation of a minor. This section does not simply describe taking a photograph; it is a combination of *causing a minor to engage in specific activity*, with

knowledge the activity will be photographed, that constitutes the offense.

Root at 708, (emphasis added).

The above cases demonstrate that the trial court's instincts were correct, and sexual exploitation of a minor requires something more than merely asking a minor to send a nude photograph. The crime is not completed by simply making the request. However, making the request is as far as Mr. Stribling got here. He was roundly rejected and K.C. never engaged in sexually explicit conduct, either while posing for a photograph or otherwise. The legislature presumably included the term "invite" because it wanted to cover a situation in which a minor, in response to a mere invitation or request (and without need for any inducement, cajoling, threats, or assistance) engages in sexually explicit conduct (and then poses for a photograph or gives a live performance and the defendant knew that such conduct would be photographed or the subject of a live performance). Assuming the minor *actually engaged* in the sexually explicit conduct requested by a defendant, the legislature presumably didn't want perpetrators to escape liability on the ground that they had only asked or invited the conduct, without more.

In this case, the evidence is insufficient to support the conviction in Count I because K.C. did not actually engage in sexually explicit conduct

in response to Mr. Stribling's mere request that she do so, much less did she pose for a photograph while engaging in sexually explicit conduct. In fact, she stood her ground and told him to back off. No rational trier of fact could have found the essential elements of this crime beyond a reasonable doubt and the conviction under Count I should be reversed and dismissed.

**II. MR. STRIBLING'S CONVICTION FOR COUNT II
MUST BE VACATED AND JUDGMENT RE-ENTERED
FOR THE SAME CRIME, BUT AS A GROSS
MISDEMEANOR.**

The crime of possession of depictions of a minor engaged in sexually explicit conduct is defined in RCW 9.68A.070. The pertinent portions are as follows:

(1) (a) A person commits the crime of possession of depictions of a minor engaged in sexually explicit conduct in the first degree when he or she knowingly possesses a visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011 (4) (a) through (e).

(b) Possession of depictions of a minor engaged in sexually explicit conduct in the first degree is a class B felony...

(2) (a) A person commits the crime of possession of depictions of a minor engaged in sexually explicit conduct in the second degree when he

or she knowingly possesses any visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011 (4) (f) or (g).

(b) Possession of depictions of a minor engaged in sexually explicit conduct in the second degree is a class C felony...

RCW 9.68.011 (4) defines sexually explicit conduct. Subsections (a) through (e) describe conduct ranging from sexual intercourse to penetration of the vagina or rectum to sadomasochistic abuse. See Appendix. The conduct which Mr. Stribling was found to have committed was to attempt to acquire photographs of K.C., a minor, while nude. See Findings of Fact Nos. 95 through 98, CP 38-39. Such a photograph would constitute sexually explicit conduct on K.C.'s part under RCW 9.68A.011 (4) (f), which states that sexually explicit conduct means actual or simulated "Depiction of the genitals or unclothed public or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer."

At no time did the State allege, or prove, that Mr. Stribling attempted to acquire depictions of K.C. engaged in conduct described in subsections (a) through (e). The State at all times alleged, and the trial court found, that Mr. Stribling attempted to acquire pictures of K.C. while nude. CP 38-39. If completed, Mr. Stribling would have been guilty of

second degree possession of depictions of a minor engaged in sexually explicit conduct, a class C felony, not first degree, which is a class B felony. As such, his conviction for *attempting* to commit this crime is a gross misdemeanor. See RCW 9A.28.020 (3) (d).³

In *State v. Gamble*, 118 Wn.App. 332, 336, 72 P.2d 1139 (2003), the court noted the remedy of resentencing on a lesser included offense is generally only permissible when the jury has been explicitly instructed on that lesser included offense. The court observed, however, that the “proper inquiry is not whether the jury was *instructed* on the lesser included offense but, rather, whether the jury *necessarily found* each element of the lesser included offense beyond a reasonable doubt in reaching its verdict on the crime charged.” *Gamble*, 118 Wn.App. at 336. Here, possession of depictions of a minor engaged in sexually explicit conduct in the second degree is an inferior degree offense of possession of depictions of a minor engaged in sexually explicit conduct in the first degree, but not a lesser included offense. However, the analysis in *Gamble* appears to control Mr. Stribling’s case because the trier of fact

³ The error in the judgment and sentence was not merely that it reflects that Mr. Stribling was convicted of a felony in Count II when it actually should have been a gross misdemeanor, but that the judgment and sentence claims that Mr. Stribling’s conviction under Count II was for a class B felony. Even if the sexually explicit conduct alleged by the State fell within the definition for *first degree* possession of depictions of a minor engaged in sexually explicit conduct, Mr. Stribling’s conviction for merely attempting this crime would automatically drop it down to a class C felony. See RCW 9A.28.020 (3) (c).

here necessarily found each element of the base offense, but merely overlooked the particular subsection under which the particular type of sexually explicit conduct was defined. The court's findings of fact clearly demonstrate that the crime Mr. Stribling was found to have attempted was possession of depictions of a minor engaged in sexually explicit conduct in the second degree, and the attempted commission of that crime is a gross misdemeanor. Mr. Stribling must be resentenced for this gross misdemeanor, and his felony conviction under Count II vacated.

III. THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO AMEND THE INFORMATION TO CONFORM TO THE PROOF PRESENTED AT TRIAL.

After discovering that the second alternative charged in counts IV through VIII did not match the proof that was offered at trial, the State, after the verdict, moved to amend the information to conform to the proof offered at trial.⁴ At the outset, it must be noted that the State did not actually file a written amended information conforming with the proof presented at trial, but the effect of the State's motion to conform to the proof and the court's ruling was the same as if the State had presented a written amendment.

CrR 2.1 allows amendment of the information at any time until the verdict provided the substantial rights of the defendant are not prejudiced.

⁴ Count III is not affected and not challenged in this appeal.

The rule, however, violates article 1, section 22 of the Washington State constitution insofar as it allows amendments to the information after the State rests its case. *State v. Pelkey*, 109 Wn.2d 484, 491, 745 P.2d 854 (1987); *State v. Schaffer*, 120 Wn.2d 616, 845 P.2d 281 (1993); *State v. Vangerpen*, 125 Wn.2d 782, 888 P.2d 1177 (1995); *State v. Ziegler*, 138 Wn.App. 804, 158 P.3d 647 (2007); *State v. Quisumondo*, 164 Wn.2d 499, 192 P.3d 342 (2008).

In *State v. Pelkey*, the Washington Supreme Court articulated a bright-line rule: “A criminal charge may not be amended after the State has rested its case in chief unless the amendment is to a lesser degree of the same charge or a lesser included offense. Anything else is a violation of the defendant’s *article 1, section 22* right to demand the nature and cause of the accusation against him or her.” *Pelkey* at 491. In *Pelkey*, the defendant was charged with bribery. However, the State failed to prove the essential elements of bribery in its case in chief and when *Pelkey* moved to dismiss at the close of the State’s case, the State moved to amend the information to a charge trading in special influence. *Pelkey* at 486. Unlike bribery, trading in special influence did not require the State to prove that the defendant sought to affect a public servant’s official duties by the special influence. *Id.*

Here, it must be noted that the State sought to amend the information to conform the proof not only after it rested its case, but *after the verdict*. CrR 2.1, consequently, would be of no help to the State in this case. The trial court erred here because it employed the legal analysis to be used when a defendant challenges the sufficiency of the information after the verdict is entered. See *State v. Kjorskik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). Here, the State sought to amend the information, after the verdict was rendered, to conform to the proof offered at trial.

Mr. Stribling's case is analogous to *State v. Laramie*, 141 Wn.App. 332, 341-42, 169 P.3d 859 (2007). In that case, the State sought to amend the information to conform to the proof offered at trial after it rested its case but before the verdict was rendered. *Id.* Like Mr. Stribling's case, it was not the defendant who first alerted to the fact that the information did not match the proof offered at trial. *Laramie* at 341. When the court noticed, after reading the instructions to the jury, that Mr. Laramie was not actually charged with one of the means of committing second degree assault on which it had instructed the jury, the State moved to amend the information to conform to the proof. *Laramie* at 341. The court granted the motion. *Laramie* at 341-42.

On appeal, Laramie argued that his rights under the Sixth Amendment and Article 1, Section 22 of the Washington Constitution had

been violated, and the State responded that Mr. Laramie had invited the error because his attorney failed to object to the erroneous instruction at trial and refused the State's alternate proposal of having the judge re-instruct the jury. *Laramie* at 342.

The Court of Appeals held that this error was a manifest error affecting a constitutional right that could be raised on appeal. *Laramie* at 342. The Court further held that Mr. Laramie did not bear responsibility for the mistake, and did not invite the error by rejecting the unsavory solutions offered by the State. *Laramie* at 342. The Court held: “[A]llowing the amendment [to conform to the proof] was error...,” and went on to cite the *Pelkey* rule that amendment of the information after the State has rested its case is prohibited, under Article 1, Section 22, unless the amendment is to a lesser degree of the same charge or a lesser included offense.” *Laramie* at 343-44. A defendant is entitled to be informed of the accusation against him. *Laramie* at 344.

Similarly here, the litany of mistakes in the charging of this case cannot be laid on Mr. Stribling's doorstep. He has no duty to author the charging document or to help the State present proof which matches the allegations in the charging document. This case involved nearly 200 exhibits, 125 of which were email messages. They were not marked or admitted in chronological order. The defendant is not required to establish

or even assert prejudice to defeat a motion to amend the information after the State rests. Unless the amendment is to a lesser included or inferior degree offense, the amendment is prohibited. The trial court erred by allowing the amendment.

The appropriate remedy, as argued by defense counsel below, is to vacate the judgments rendered in counts IV through VIII and enter judgment on each of those counts for gross misdemeanor communicating with a minor for immoral purposes under RCW 9.68A.090 (1). This is the appropriate remedy because the *first* alternative charged in each of these counts contained the correct date which conformed to the proof offered at trial. The first alternative was proven by the State with the exception of their failure to prove that Mr. Stribling had a prior conviction for a qualifying sex offense. In other words, the State proved the base offense under the first alternative, which is a gross misdemeanor, but failed to prove the enhancing factor (prior conviction) which would have elevated the crime to a felony.

E. CONCLUSION

The conviction in Count I should be reversed and dismissed with prejudice. The conviction in Count II should be vacated, and judgment re-entered to reflect that attempted possession of depictions of a minor engaged in sexually explicit conduct in the second degree is a gross

misdemeanor. The convictions in Counts IV through VIII should be vacated and judgment re-entered on those counts for gross misdemeanor communicating with a minor for immoral purposes under RCW 9.68A.090 (1).

RESPECTFULLY SUBMITTED this 1st day of July, 2010.


ANNE M. CRUSER, WSBA No. 27944
Attorney for Mr. Stribling

APPENDIX

1. 9.68A.040. Sexual exploitation of a minor--Elements of crime-- Penalty

(1) A person is guilty of sexual exploitation of a minor if the person:

(a) Compels a minor by threat or force to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance;

(b) Aids, invites, employs, authorizes, or causes a minor to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance; or

(c) Being a parent, legal guardian, or person having custody or control of a minor, permits the minor to engage in sexually explicit conduct, knowing that the conduct will be photographed or part of a live performance.

(2) Sexual exploitation of a minor is a class B felony punishable under chapter 9A.20 RCW.

2. 9.68A.070. Possession of depictions of minor engaged in sexually explicit conduct

(1)(a) A person commits the crime of possession of depictions of a minor engaged in sexually explicit conduct in the first degree when he or she knowingly possesses a visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (e).

(b) Possession of depictions of a minor engaged in sexually explicit conduct in the first degree is a class B felony punishable under chapter 9A.20 RCW.

(c) For the purposes of determining the unit of prosecution under this subsection, each depiction or image of visual or printed matter constitutes a separate offense.

(2)(a) A person commits the crime of possession of depictions of a minor engaged in sexually explicit conduct in the second degree when he or she knowingly possesses any visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4) (f) or (g).

(b) Possession of depictions of a minor engaged in sexually explicit conduct in the second degree is a class C felony punishable under chapter 9A.20 RCW.

(c) For the purposes of determining the unit of prosecution under this subsection, each incident of possession of one or more depictions or images of visual or printed matter constitutes a separate offense.

3. 9.68A.011. Definitions

Unless the context clearly indicates otherwise, the definitions in this section apply throughout this chapter.

(1) An “internet session” means a period of time during which an internet user, using a specific internet protocol address, visits or is logged into an internet site for an uninterrupted period of time.

(2) To “photograph” means to make a print, negative, slide, digital image, motion picture, or videotape. A “photograph” means anything tangible or intangible produced by photographing.

(3) “Visual or printed matter” means any photograph or other material that contains a reproduction of a photograph.

(4) “Sexually explicit conduct” means actual or simulated:

(a) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals;

(b) Penetration of the vagina or rectum by any object;

(c) Masturbation;

(d) Sadomasochistic abuse;

(e) Defecation or urination for the purpose of sexual stimulation of the viewer;

(f) Depiction of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer. For the purposes of this subsection (4)(f), it is not necessary that the minor know that he or she is participating in the described conduct, or any aspect of it; and

(g) Touching of a person's clothed or unclothed genitals, pubic area, buttocks, or breast area for the purpose of sexual stimulation of the viewer.

(5) "Minor" means any person under eighteen years of age.

(6) "Live performance" means any play, show, skit, dance, or other exhibition performed or presented to or before an audience of one or more, with or without consideration.

**4. 9.68A.090. Communication with minor for immoral purposes--
Penalties**

(1) Except as provided in subsection (2) of this section, a person who communicates with a minor for immoral purposes, or a person who communicates with someone the person believes to be a minor for immoral purposes, is guilty of a gross misdemeanor.

(2) A person who communicates with a minor for immoral purposes is guilty of a class C felony punishable according to chapter 9A.20 RCW if the person has previously been convicted under this section or of a felony sexual offense under chapter 9.68A, 9A.44, or 9A.64 RCW or of any other felony sexual offense in this or any other state or if the person communicates with a minor or with someone the person believes to be a minor for immoral purposes through the sending of an electronic communication.

5. 9A.28.020. Criminal attempt

(1) A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.

(2) If the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense to a prosecution of such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission.

(3) An attempt to commit a crime is a:

(a) Class A felony when the crime attempted is murder in the first degree, murder in the second degree, arson in the first degree, child molestation in the first degree, indecent liberties by forcible compulsion, rape in the first degree, rape in the second degree, rape of a child in the first degree, or rape of a child in the second degree;

(b) Class B felony when the crime attempted is a class A felony other than an offense listed in (a) of this subsection;

(c) Class C felony when the crime attempted is a class B felony;

(d) Gross misdemeanor when the crime attempted is a class C felony;

(e) Misdemeanor when the crime attempted is a gross misdemeanor or misdemeanor.

CERTIFICATE OF MAILING

I certify that on 07/1/10, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to (1) Susan Baur, Cowlitz County Prosecutor, 312 S.W. 1st, Kelso, WA 98626; (2) David Ponzoha, Clerk, Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, WA 98402; and (3) Mr. Benjamin Clinton Stribling, DOC# 333298, Washington State Penitentiary, 1313 N. 13th Ave., Walla Walla, WA 99362.

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