No. 42529-7-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RUSSELL DAVID HOMAN,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

---

Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

By: _____
SARA I. BEIGH, WSBA No. 35564
Senior Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

TABLE OF CONTENTS

TABLE OF AUTHORITES ii

I. ISSUES 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT .....

A. THERE WAS SUFFICIENT EVIDENCE PRESENTED TO SUSTAIN A CONVICTION AGAINST HOMAN FOR LURING 2

B. RCW 9A.40.090 DOES NOT CRIMINALIZE CONSITUTIONALLY PROTECTED SPEECH AND IS THEREFORE NOT OVERBROAD 5

IV. CONCLUSION 14

TABLE OF AUTHORITIES

Washington Cases

City of Bellevue v. Lee, 166 Wn.2d 581, 210 P.3d 1011 (2010) 5

City of Bellevue v. Lorange, 140 Wn.2d 19, 992 P.3d 496 (2000) ...5

Island County v. State, 135 Wn.2d 141, 955 P.2d 377 (1998).....5

Lummi Indian Nation v. State, 170 Wn.2d 247, 241 P.3d 1220 (2010) 5

State v. Aljutily, 149 Wn. App. 286, 202 P.3d 1004 (2009) 14

State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850 (1990).....3

State *v. Colquitt*, 133 Wn. App. 789, 137 P.3d 893 (2006) 2

State v. Dana, 84 Wn. App. 166, 926 P.2d 344 (1996) 4, 5, 7, 9, 13, 14

State v. Delmarter, 94 Wn.2d 634, 618 P.2d 99 (1980) 3

State v. Goodman, 150 Wn.2d 774, 83 P.2d 410 (2004) 3

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).....3

State v. Halstien, 122 Wn.2d 109, 857 P.2d 270 (1993).....7

State v. Myers, 133 Wn.2d 26, 941 P.2d 1102 (1997) 3, 9

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992) 2

Federal Cases

Ashcroft v. ACLU, 542 U.S. 656, 124 S. Ct. 2783, 159 L.Ed.2d 690 (2004) 10, 11, 13

Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S. Ct. 1389, 152 L.Ed.2d 403 (2002) 10

Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 109 S. Ct. 3028, 106 L.Ed.2d (1989) 6

Broadrick v. Oklahoma, 413 U.S. 601, 93 S. Ct. 2908, 37 L.Ed.2d 830 (1973) 6

In re Winship, 397 U.S. 358, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970) 2

New York v. Ferber, 458 U.S. 747, 102 S. Ct. 3348, 73 L.Ed.2c 1113 (1982) 7, 9

United States v. Williams, 553 U.S. 285, 128 S. Ct. 1830, 170 L.Ed.2d 650 (2008) 5, 6, 14

Virginia v. Hicks, 539 U.S. 113, 123 S. Ct. 2191, 156 L.Ed.2d 148 (2003) 6

Washington Statutes

RCW 9A.40.090 .....7, 8, 9, 13, 14

RCW 9A.40.090(1) 4

RCW 9A.40.090(2) 9

Constitutional Provisions

U.S. Constitution, Amendment 1 .....5, 10, 11

U.S. Constitution, Amendment 14 2

I. ISSUES

A. Was there sufficient evidence presented to convict Homan of Luring?

B. Does RCW 9A.40.090 criminalize protected speech and conduct and is therefore unconstitutionally overbroad?

II. STATEMENT OF THE CASE

On the evening of August 4, 2010 C.N., whose date of birth is March 10, 2001, went to the Doty General Store to purchase some milk for his mother E.P.[1] RP 10-12, 33-34; CP 3-4. C.N. was walking on Stevens Road, towards the Doty General Store, in Lewis County, Washington, when he was approached by Homan. RP 35-36; CP 4. Homan asked C.N. "Do you want some candy? I've got some at my house." RP 36; CP 4. C.N. was scared and did not respond. RP 36; CP 4. There were two other kids behind C.N. but they were more than ten feet behind C.N. and facing a different direction. RP 49-50. C.N. did not know the man who offered him the candy but described him as not having a shirt, with a dark hat on backwards and riding a bike with a Superman logo on it. RP 37-38; CP 4. C.N. said he had never met the man before and did not know the man's name. RP 38; CP 4. C.N. identified

[1] To protect the identity of the minor victim in this case the State will be referring not only to the minor victim through his initials, C.N., but also to his mother through her initials, E.P.

Homan as the man who offered C.N. the candy. RP 38; CP 4. E.P. said she had not ever met Homan before, had not spoken to him, did not know where he lived and she had never given Homan permission to speak with C.N. or invite C.N. into Homan's house. RP 24-25; CP 4. C.N. immediately told his mother what happened upon arriving home. RP 17-21; CP 4.

Homan was charged with and convicted of luring at a bench trial. CP 1, 3-5. Homan timely filed his notice of appeal. CP 15.

III. ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE PRESENTED TO SUSTAIN A CONVICTION AGAINST HOMAN FOR LURING.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const., amend. XIV; *In re* Winship, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); State *v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). When determining whether there is sufficient evidence to support a conviction, the evidence must be viewed in the light most favorable to the State. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). If "any rational jury could find the essential elements of the crime beyond a reasonable doubt", the evidence is deemed

sufficient. *Id*. An appellant challenging the sufficiency of evidence presented at a trial "admits the truth of the State's evidence" and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman,* 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury's by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers,* 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Further, "the specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability." *State v. Delmarter*, 94 Wn.2d at 638.

To convict Homan of the crime of luring the State must prove the following:

> 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 an 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 of the person with a development disability; and
>
> (c) Is unknown to the child or developmentally disabled person.

RCW 9A.40.090(1). The testimony was unequivocal. C.N. stated that Homan, whom he had never met before, offered C.N. candy and stated it was at Homan's house. RP 36. C.N. immediately told his mother, E.P. who also testified that her son told her "a man on a Superman bike offered him candy and that he had candy at his house if he wanted the candy." RP 17; CP 4. E.P. also testified that she had never met Homan and did not give Homan permission to speak to, let alone invite C.N. to Homan's house. RP 24-25, CP 4.

The evidence clearly shows that Homan attempted to lure C.N. to his home. C.N., who was born on March 10, 2001, is under the age of 16. RP 11; CP 3. C.N. did not know Homan. RP 36. Homan did not have E.P.'s consent to have C.N. at Homan's home or even to invite C.N. to Homan's house. RP 24-25. Lure is defined by case law as an invitation to a minor or developmentally disabled person which is accompanied by an enticement. *State v.*

Dana, 84 Wn. App. 166, 176, 926 P.2d 344 (1996). The enticement in this case was the offer of candy. The evidence, viewed in the light most favorable to the state, was sufficient for any jury to find Homan guilty beyond a reasonable doubt of the crime of luring. Homan's conviction should be affirmed.

B. RCW 9A.40.090 DOES NOT CRIMINALIZE CONSITUTIONALLY PROTECTED SPEECH AND IS THEREFORE NOT OVERBROAD.

A statute is presumed constitutional and it is the burden of the party attacking the statute to prove the statute is unconstitutional beyond a reasonable doubt. *City of Bellevue v. Lee*, 166 Wn.2d 581, 585, 210 P.3d 1011 (2010), *citing Island County v. State*, 135 Wn.2d 141, 146, 955 P.2d 377 (1998). Constitutional challenges are reviewed de novo. *Lummi Indian Nation v. State*, 170 Wn.2d 247, 257-58, 241 P.3d 1220 (2010).

A statute is unconstitutionally overbroad if it infringes on a substantial amount of constitutionally protected speech. U.S. Const., amend. I; *United States v. Williams,* 553 U.S. 285, 292, 128 S. Ct. 1830, 170 L.Ed.2d 650 (2008). A person may make an overbreadth challenge even if the statute could be constitutional as applied to the person because an overbreadth challenge is a facial challenge. *City of Bellevue v. Lorange*, 140 Wn.2d 19, 26, 992

P.3d 496 (2000). A person challenging a statute for overbreadth "bears the burden of demonstrating, 'from the test of [the law] and from actual fact,' that substantial overbreadth exists." *Virginia v. Hicks*, 539 U.S. 113, 122,123 S. Ct. 2191, 156 L.Ed.2d 148 (2003) (citation omitted) (brackets original). While it is important that laws do not deter people from engaging in their right to constitutionally protected speech, "invalidating a law that in some of its applications is perfectly constitutional-particularly a law directed at conduct so antisocial that it has been made criminal", is a harsh remedy, therefore, the United States Supreme Court has required "that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *United States v. Williams*, 553 U.S. at 292-93, *citing Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 485, 109 S. Ct. 3028, 106 L.Ed.2d (1989); *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L.Ed.2d 830 (1973) (emphasis original). The United States Supreme Court has also recognized the consequences of striking down a statute for facial invalidity and stated "that the overbreadth doctrine is 'strong medicine' and have [therefore] employed it with hesitation, and then 'only as a last resort.'" *New*

York v. Ferber, 458 U.S. 747, 769, 102 S. Ct. 3348, 73 L.Ed.2c 1113 (1982) (citation omitted).

When evaluating an overbreadth challenge the reviewing court first analyzes the statute to determine if it reaches constitutionally protected speech. *State v. Dana*, 84 Wn. App. at 174, *citing State v. Halstien*, 122 Wn.2d 109, 122-23, 857 P.2d 270 (1993). If the court concludes the statute does reach constitutionally protected speech it next determines "whether the amount of protected conduct the statute reaches is 'real and substantial'...in contrast to the statute's plainly legitimate sweep." *Id.* at 174-75 (citation omitted). Homan argues to this Court that RCW 9A.40.090 is unconstitutionally overbroad because it "criminalizes statements that are made in jest, statements that are misunderstood as orders, statements that are genuine offers to help, or friendly invitations from one child to another, if accompanied by an enticement." Brief of Appellant 7. Homan further asserts that the affirmative defense laid out in section two of the luring statute is not a solution to the overbreadth issue. Brief of Appellant 8. Finally, Homan urges this Court not to follow Division One's decision in *Dana.* Brief of Appellant 8-9.

The luring statute is not substantially overbroad and is therefore constitutional. While the statute may reach some constitutionally protected speech, the amount of speech is not substantial and real in contrast to its plainly legitimate sweep.

> 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 an 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 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.

RCW 9A.44.090. The crux of Homan's overbreadth attack on RCW 9A.44.090 is that innocent invitations or necessary orders to a minor or developmentally disabled person would subject a person to prosecution under the statute. This is an oversimplification of RCW 9A.44.090 and it does not take into account the affirmative defense. Luring requires there be an order or an invitation to a minor or developmentally disabled person which is accompanied by

an enticement. *State v. Dana*, 84 Wn. App. at 176. The legitimate reach of the luring statute is to prevent children and those with developmental disabilities from being taken to a secluded location by strangers who intend them harm. *See* RCW 9A.40.090; *State v. Dana*, 84 Wn. App. at 175. Homan argues that an invitation to go to one's home from one child to another with the "enticement" of a sugary treat would violate RCW 9A.40.090 and this exemplifies the overbreadth of the statute by criminalizing constitutionally protected speech. The Washington State Supreme Court has previously held that "[e]ven if some protected expression would fall prey to the statute, under *Ferber*, if the statute's legitimate reach far surpasses its arguably impermissible applications the statute is not overbroad." *State v. Myers*, 133 Wn.2d 26, 34, 941 P.2d 1102 (1997).

The affirmative defense set forth in subsection two of the luring statute clearly defines the purpose of the statute and what conduct does not constitute luring. *See* RCW 9A.40.090(2). If the person's actions are reasonable under the circumstances and there was no intent to harm the welfare, safety or health of the minor or person with the developmental disability then the person has not committed the act of luring. RCW 9A.40.090(2). Homan argues

that the affirmative defense does not solve the overbreadth problem and cites to two United States Supreme Court cases as authority.[2] In both of these cases there were serious difficulties and inequities in regards to the affirmative defenses provided by the challenged statutes. *See, Ashcroft v. ACLU,* 542 U.S. 656, 124 S. Ct. 2783, 159 L.Ed.2d 690 (2004)*; Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 122 S. Ct. 1389, 152 L.Ed.2d 403 (2002).

In *Ashcroft v. Free Speech Coalition (FSP)* the United States Supreme Court was tasked with deciding whether the Child Pornography Prevention Act (CPPA) violated the First Amendment. *See, Ashcroft v. Free Speech Coalition*, 535 U.S. at 239. The CPPA prohibited, in some circumstances, people from distributing or possessing sexually explicit images that appeared to depict minors but the images were actually of digitally altered adults. *Id.* 239-40. The challenged portion of the CPPA defined "child pornography to include any sexually explicit image that was 'advertised, promoted, presented, described, or distributed in such a manner that conveys the impression' it depicts a 'minor engaging in sexually explicit conduct.'" *Id.* at 242. The Supreme Court

[2] *Ashcroft v. ACLU*, 542 U.S. 656, 670-71, 124 S. Ct. 2783, 159 L.Ed.2d 690 (2004): *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 256, 122 S. Ct. 1389, 152 L.Ed.2d 403 (2002).

criticized the CPPA for prohibiting speech that does not have a victim or create a record of a crime because the people depicted were not actual children. *Id.* at 250. The Court went on to note that the affirmative defense under the CPPA could be a difficult evidentiary burden. *Id.* at 255. The Court stated,

> [w]here the defendant is not the producer of the work, he may have no way of establishing the identity, or even the existence, of the actors…The statute, moreover, applies to work created before 1996, and the producers themselves may not have preserved the records necessary to meet the burden of proof…Even if an affirmative defense can save a statute from First Amendment challenge, here the defense is incomplete and insufficient, even on its own terms. It allows persons to be convicted in some instances where they can prove children were not exploited in production… Furthermore, the affirmative defense provides no protection to persons who produce speech using computer imaging, or other means that do not involve the use of adult actors who appear to be minors.

Id. at 256. The Court did not state that an affirmative defense cannot save a statute from a finding of overbreadth, it simply found that in this particular case the affirmative defense was greatly lacking and inconsistent. *Id.*

In *Ashcroft v. ACLU* the United States Supreme Court reviewed a challenge to the Child Online Protection Act (COPA) on the basis that it violated the First Amendment. *See, Ashcroft v. ACLU*, 542 U.S. at 659-60. COPA made it a crime to knowingly

post, for commercial purposes, content on the internet that was harmful to minors. *Id.* at 661. COPA defined material that was harmful to minors as:

> any communication, picture, image, graphic image, file, article, recording, writing, or other matter of any kind that is obscene or that-
>
> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
>
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

Id. at 661-62 (internal quotations omitted). A minor in this context was a person under 17 years of age. *Id.* at 662. COPA provided an affirmative defense for people who demonstrate that they have,

> restricted access by minors to material that is harmful to minors-
>
> (A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;
>
> (B) by accepting a digital certificate that verifies age; or

> (C) by any other reasonable measures that are feasible under available technology.

Id. In *Ashcroft v. ACLU* there had been a preliminary injunction imposed by the District Court and affirmed by the Court of Appeals enjoining the government from enforcing COPA pending a trial. *Id.* at 660-61. The Supreme Court upheld the injunction because it reasoned that there had not been a showing that a less restrictive alternative to COPA would not be as effective. *Id.* at 670. The Supreme Court also noted that there were other practical reasons that the preliminary injunction should stand pending a trial. The Supreme Court stated "the potential harms from reversing the injunction outweigh those of leaving it in place by mistake. Where a prosecution is a likely possibility, yet only an affirmative defense is available, speakers may self-censor…" *Id.* at 670-71. The Supreme Court did not hold that an affirmative defense would never save a statute from an overbreadth challenge.

RCW 9A.40.090 has a large plainly legitimate sweep. *Dana* 84 Wn. App. at 175. "The impact on protected speech is minimal because a mere invitation…is not sufficient…the invitation must include some other enticement or conduct constituting enticement." *Id.* Just because someone can conceive of impermissible applications of a statute is not a sufficient justification to render it

susceptible to a challenge for overbreadth. *State v. Aljutily*, 149 Wn. App. 286, 293, 202 P.3d 1004 (2009), *citing United States v. Williams*, 553 U.S. at 303. Homan's illustrations of potential scenarios where RCW 9A.40.090 would infringe on protected speech are not sufficient enough to render the statute unconstitutionally overbroad. The court in *Dana* upheld the statute as constitutional and this court should as well. *See, State v. Dana,* 84 Wn. App. at 177.

IV. CONCLUSION

For the foregoing reasons, this court should affirm Homan's conviction for luring.

RESPECTFULLY submitted this 10th day of January, 2012.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by:_____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

LEWIS COUNTY PROSECUTOR

January 10, 2012 - 9:22 AM

Transmittal Letter

Document Uploaded: 425297-Respondent's Brief~2.pdf

Case Name:

Court of Appeals Case Number: 42529-7

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Teresa L Bryant - Email: **teri.bryant@lewiscountywa.gov**

A copy of this document has been emailed to the following addresses:

backlundmistry@gmail.com