No. 42529-7-I

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Russel Homan,

Appellant.

Lewis County Superior Court

Cause No. 11-1-00036-7

The Honorable Judge Nelson Hunt

Appellant's Supplemental Brief

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ARGUMENT

I. RCW 9A.40.090 IS FACIALLY OVERBROAD IN VIOLATION OF THE FIRST AMENDMENT BECAUSE IT CRIMINALIZES A SUBSTANTIAL AMOUNT OF PROTECTED SPEECH.

A. Standard of Review

Constitutional violations are reviewed *de novo. LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 48, 66, 331 P.3d 1147 (2014). Under the First Amendment, the state bears the burden of justifying a restriction on speech.[1] *State v. Immelt*, 173 Wn.2d 1, 6, 267 P.3d 305 (2011).

Facial challenges are evaluated without reference to the facts. *City of Seattle v. Webster,* 115 Wn.2d 635, 640, 802 P.2d 1333 (1990), *cert. denied,* 500 U.S. 908, 111 S.Ct. 1690, 114 L.Ed.2d 85 (1991). Thus, any person charged with violating a criminal statute may bring an overbreadth challenge. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 26, 992 P.2d 496 (2000).

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[1] Ordinarily, in cases challenging statutes based on other constitutional provisions, the burden is on the party challenging the statute to show beyond a reasonable doubt that it is unconstitutional. *Washington Educ. Ass'n v. Washington Dep't of Ret. Sys.*, --- Wn.2d ---, ___, 332 P.3d 428 (Wash. 2014).

B. A statute violates the First Amendment if it criminalizes a substantial amount of protected speech.

The First Amendment protects both speech and expressive conduct.[2] *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). The government may not burden speech or expressive conduct through an overbroad statute. *United States v. Stevens*, 559 U.S. 460, 473, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010).

"Pure speech" is expression unaccompanied by conduct. *Cox v. State of La.*, 379 U.S. 559, 564, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965). Pure speech is entitled to "comprehensive protection." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).

A criminal statute is overbroad if it reaches a "substantial amount" of constitutionally protected speech or conduct. *Immelt*, 173 Wn.2d at 6. Protected speech or expressive conduct "does not become unprotected merely because it resembles [unprotected speech]." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002).

To meet its burden of justifying restrictions on speech, the state must show that any restraint on protected speech is insubstantial compared to the statute's legitimate sweep. *Immelt,* 173 Wn.2d at 11-12 (citing

[2] The state constitution also protects free speech. Wash. Const. art. I, § 5. The analysis is the same under both constitutions. *Immelt*, 173 Wn.2d at 6.

United States v. Williams, 553 U.S. 285, 292, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008) (Williams I)). The comparison must be made without reference to any affirmative defenses. Affirmative defenses cannot cure an overbreadth problem. *Ashcroft v. ACLU*, 542 U.S. 656, 670-671, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004); *see also Hodgkins ex rel. Hodgkins v. Peterson*, 355 F.3d 1048, 1056 (7th Cir. 2004) ("[A] realistic threat of arrest is enough to chill First Amendment rights.")

C. RCW 9A.40.090 criminalizes a substantial amount of protected speech.

The luring statute criminalizes pure speech[3] as well as expressive conduct that is "akin to 'pure speech.'"[4] *Tinker,* 393 U.S. at 508. It imposes liability on anyone who "[o]rders, lures, or attempts to lure" a child or developmentally disabled person[5] into a specific non-public place without a parent or guardian's consent. RCW 9A.40.090(1); *State v. Dana*, 84 Wn. App. 166, 172, 926 P.2d 344 (1996).

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[3] *See, e.g., Cox*, 379 U.S. at 564 (distinguishing "pure form[s] of expression" from "expression mixed with particular conduct"). *See also, e.g., State v. Johnston*, 156 Wn.2d 355, 360, 127 P.3d 707 (2006) (RCW 9.61.160 "regulates pure speech"); *State v. Kilburn*, 151 Wn.2d 36, 41, 84 P.3d 1215 (2004) *as amended* (Feb. 17, 2004).

[4] Although a person may violate the statute through communicative gestures, the First Amendment would necessarily protect such conduct as well: any gesture that communicated a message would necessarily qualify as expressive conduct. *Immelt,* 173 Wn2d at 7.

[5] The state must also prove that the accused person was unknown to the child or developmentally disabled person. RCW 9A.40.090(1)(c).

The "lures, or attempts to lure" prongs have been interpreted to require proof of an invitation accompanied by an enticement. *State v. McReynolds*, 142 Wn. App. 941, 948, 176 P.3d 616 (2008) (citing *Dana*, 84 Wn. App. at 172). The "orders" prong does not require enticement. RCW 9A.40.090.

The statute proscribes a large amount of constitutionally protected speech. As in *Immelt,* "[a] moment's reflection brings to mind" many instances of protected speech that fall within the luring statute's reach. *Immelt*, 173 Wn.2d at 9. *ACLU*, 542 U.S. at 670-671. Examples include:

1. Political speech. A student who creates a flyer or Facebook page inviting other students to a private residence to discuss school district policies and offering additional "enticement" in the form of cupcakes to all who attend.

2. Statements made in jest. A Google image search for the phrase "Want some candy, little girl?" will reveal many attempts at humor.[6]7 A student comedian making a similar joke would risk arrest, even if the joke came during a school talent show.

3. Genuine offers of help. Lacking permission from a child's parent or guardian, a Good Samaritan—or an ambulance driver—cannot offer to drive an injured child to the hospital without violating the statute (unless the person is known to the child).

4. Statements misunderstood as orders. Absent parental consent and acquaintance with the child, a school bus driver would violate the statute by saying "Hop in!" when she encounters a child walking on a busy road.

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[6] *See, e.g.*, http://cheezburger.com/1431776512.

[7]

5. Innocent invitations from one child to another. A ten-year-old who invites a fifteen-year-old stranger inside to play is just as guilty as one who extends that invitation to another pre-teen.

The affirmative defense (RCW 9A.40.090(2)) does not cure the problem posed by each of these examples. The risk of arrest has the potential to chill protected speech, even if the accused person could later meet the burden imposed by the affirmative defense.[8] *Hodgkins* 355 F.3d at 1051, 1064.

Nor can promises of prosecutorial restraint save the statute. Courts will not "uphold an unconstitutional statute merely because the Government promise[s] to use it responsibly." *Stevens*, 559 U.S. at 480.

The statute's breadth is more than substantial. By its plain language, RCW 9A.40.090 reaches a vast amount of pure speech. As the examples show, potential criminal liability attaches to common, everyday statements, invitations, jokes, and offers to help.

By contrast, the core of criminal behavior the statute seeks to address is limited. The essential purpose of the law is to prevent predatory strangers from gaining control over vulnerable people. *See Dana*, 84 Wn. App. at 172-173. When compared to this narrow legitimate purpose, the statute's overbreadth is significant.

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[8] The dissent in the Court of Appeals overlooks this problem. Opinion, pp. 7-8 n. 1 (Hunt, J., dissenting).

D. The *Dana* court failed to properly analyze the overbreadth issue; its decision should not be followed.

Division I erroneously concluded that the statute was not overbroad. *Dana*, 84 Wn. App. at 169, 174, 177. The *Dana* court incorrectly found the impact on protected speech to be "minimal." *Id.,* at 175. The court reasoned that the requirement that the state prove enticement narrows the statute's reach. *Id.*

The *Dana* court made three mistakes.

First, the *Dana* court applied the wrong legal standard. The court improperly required the defendant to show the statute's unconstitutionality beyond a reasonable doubt. *Dana,* 84 Wn. App.at 175. This allocation of the burden does not apply to First-Amendment challenges. *Immelt,*173 Wn.2d at 7. In the free speech context, the government bears the burden of justifying a restriction on speech. *Id.*

Second, the *Dana* court completely neglected luring by means of an order.[9] *See* RCW 9A.40.090(1). As written, the statute prohibits a homeowner from ordering a trespassing child to leave his fenced yard, if the departure requires passing through the house or garage. It prohibits a

[9] The dissent in the Court of Appeals made this error as well. Opinion, pp. 7-8 n. 1 (Hunt, J., dissenting).

police officer from ordering a juvenile arrestee into a patrol car.[10] The *Dana* court's "enticement" requirement does nothing to cure the statute's overbreadth problem under the "orders" prong of RCW 9A.40.090(1).

Third, the *Dana* court inaccurately compared the statute's affect on free speech with its legitimate reach.[11] RCW 9A.40.090's legitimate targets fall within a narrow category: predatory strangers seeking control over vulnerable victims for improper purposes. By contrast, the amount of protected speech that falls within the statute's reach is vast. The politically active teenager, the comic at a school talent show, and the others in the examples above all have legitimate reasons for engaging in activity prohibited by the statute.

The statute is substantially overbroad. It criminalizes an enormous amount of protected speech in its effort to reach a narrow category of behaviors. The *Dana* erred in concluding otherwise. *Immelt*, 173 Wn.2d at 7-9. RCW 9A.40.090 violates the First Amendment. *Id.*

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[10] As noted above, neither prosecutorial discretion nor the availability of an affirmative defense solves the problem. *Stevens*, 559 U.S. at 480; *ACLU*, 542 U.S. at 670-671; *Hodgkins* 355 F.3d at 1064.

[11] Similarly, Judge Hunt mischaracterized the infringement on protected speech as "minimal." Opinion, p. 8 n. 1 (Hunt, J., dissenting). Judge Hunt also erroneously implied that prosecutorial discretion could cure the overbreadth problem. Opinion, pp. 7-8 n. 1 (Hunt, J., dissenting). Prosecutorial discretion cannot cure a statute's overbreadth. *Stevens*, 559 U.S. at 480.

E. The Court of Appeals must either impose a limiting construction or invalidate the statute.

Where possible, a court addressing an overbreadth challenge must construe the challenged statute to avoid overbreadth problems. *Immelt,* 173 Wn.2d at 7. If such a limiting construction proves impossible, the overbroad provisions must be invalidated. *Id.*

The judiciary has the power to recognize implied elements of an offense.[12] *See, e.g., State v. Anderson*, 141 Wn.2d 357, 362, 5 P.3d 1247 (2000); *State v. Crediford*, 130 Wn.2d 747, 755, 927 P.2d 1129 (1996). Such non-statutory elements may be implied to "avoid the constitutional defect that arises if the statute has an overly broad scope." *Crediford*, 130 Wn.2d at 755.

This court can only save RCW 9A.40.090 by implying two additional elements required for conviction. First, the court must require proof of a "true" attempt, similar to the "true threat" requirement applied to harassment and other similar statutes.[13] *See, e.g., State v. Schaler*, 169

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[12] In fact, the judiciary may define all the elements of a crime where necessary. *See State v. Chavez,* 163 Wn.2d 262, 180 P.3d 1250 (2008) (upholding judicially created definition of assault against a separation of powers challenge).

[13] A "true threat" is "a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted ... as a serious expression of intention to inflict bodily harm upon or to take the life of [another individual]." *State v. Williams*, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001) (Williams II) (citation and internal quotation marks omitted, alterations in original).

Wn.2d 274, 283, 236 P.3d 858 (2010) (reversing conviction for failure to instruct jurors on the state's burden to prove a "true threat.").

Implying a "true" attempt requirement would eliminate luring prosecutions for mere jests, idle talk, and other similar protected speech. An appropriate formulation might mirror the definition of a "true threat." *Schaler,* 169 Wn.2d at 283. A "true" attempt would be an order or an invitation and enticement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious effort to persuade the listener to enter the non-public space. *Cf. Schaler,* 169 Wn.2d at 283. As with a "true threat," the state would be required to establish a "true" attempt under "an objective standard which is, given the First Amendment values at issue, a difficult standard to satisfy." *Kilburn*, 151 Wn.2d at 53.

Second, the court must imply a mental element, requiring some proof of malicious intent. A mental element is necessary under the First Amendment, because without one, the statute would still reach a substantial amount of protected speech. This flaw would remain even if the court imposes a limiting construction restricting the statute's reach to "true" attempts. An implied intent element would foreclose luring prosecutions for speech such as the student's invitation to a political

meeting or the good Samaritan's offer of a ride to the hospital, outlined in the examples above.[14]

The Supreme Court addressed a similar problem in *Virginia v. Black*, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003). The *Black* court upheld a statute criminalizing cross burning performed with the intent to intimidate. *Black,* 538 U.S. at 362-63. A four-justice plurality invalidated a provision of the statute that made cross burning *prima facie* evidence of intent to intimidate.[15] *Black,* 538 U.S. at 365-367 (O'Connor, J.). The plurality found this provision unconstitutional on its face.[16] *Id.*

Even if the court imposes a limiting construction in this case, it must reverse Mr. Homan's conviction. His conviction rests on an unconstitutional application, because the trial court instructed jurors on the current statute, without requiring proof of a "true" attempt or a culpable mental state. *See, e.g., Johnston*, 156 Wn.2d at 366 (remanding for a new

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[14] This issue will likely be resolved when the Supreme Court issues its decision in *Elonis v. United States*, 134 S.Ct. 2819 (2014).

[15] Three other justices would have invalidated the entire statute. *Black,* 538 U.S.at 380-387 (Souter, J., concurring in part and dissenting in part). Accordingly, the plurality opinion appears to be the narrowest grounds for the court's decision, and thus represents the holding of the court. *See Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977).

[16] The *Dana* court should have reached a similar conclusion with respect to the luring statute. Instead, the court decided no mental element need be implied. *Dana*, 84 Wn. App.at 176-177. However, as outlined above, the *Dana* court applied the wrong legal standard and failed to recognize the statute's overbreadth in the first place. *Id.*, at 175-176. Had the *Dana* court found the statute overbroad, it might have sought a saving construction involving a mental element.

jury trial with proper instructions); *but cf. State v. Pauling*, 149 Wn.2d 381, 392, 69 P.3d 331 (2003) (reinstating judgment and sentence based on trial court's adequate written findings).

The Court of Appeals must impose a limiting construction, narrowing the scope of RCW 9A.40.090. Mr. Homan's conviction must be reversed and the case remanded to the trial court. If Mr. Homan is retried, the jury must be instructed on the "true attempt" requirement and the state's burden to prove a culpable mental state.

II. RCW 9A.40.090 VIOLATES THE FIRST AMENDMENT AS APPLIED TO MR. HOMAN.

A. Standard of Review

Constitutional issues are reviewed *de novo. LK Operating,* 181 Wn.2d at 66. An as-applied challenge under the First Amendment will succeed whenever application of a statute to the specific facts of the case violates the constitution.[17] *See, e.g., Spence v. State of Wash.*, 418 U.S. 405, 413-14, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974). If a statute is held unconstitutional as applied, it cannot be applied in a similar context in the future. *Washington State Republican Party v. Washington State Pub.*

[17] The distinction between facial and as-applied challenges under the First Amendment goes to the breadth of the remedy imposed by the court. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010). If a statute is held unconstitutional as applied, it cannot be applied in the future in a similar context, but it is not rendered completely inoperative.

Disclosure Comm'n, 141 Wn.2d 245, 282 n. 14, 4 P.3d 808 (2000) (addressing vagueness challenge).

B. The statute is unconstitutional as applied because the state lacks a compelling reason to prohibit speech of the type Mr. Homan engaged in.

Even if a statute is facially valid, a litigant may bring an "as-applied" challenge under the First Amendment. *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 476, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007). To resolve an as-applied First Amendment challenge, the court applies strict scrutiny. *Id.,* at 464. The state must prove that applying RCW 9A.40.090 to Mr. Homan's words and conduct furthers a compelling interest and is narrowly tailored to achieve that interest. *Id.*

By enacting RCW 9A.40.090, the legislature sought to address a compelling interest—victimization of vulnerable people by predatory strangers. To the extent Mr. Homan "fit[s] this description, the [state's] burden is not onerous." *Id.,* at 465. On the other hand, if Mr. Homan does not fall within the core class of people targeted by the statute, the state must demonstrate that his conviction "is narrowly tailored to serve a compelling interest." *Id.*

The statute here violates the First Amendment as applied to Mr. Homan's case. Mr. Homan did not engage in speech or conduct that

brought him within the core of the statute. The state did not prove that he is a predatory person with a desire to gain control over vulnerable people who do not know him.

The statute is only constitutional if its application to Mr. Homan is narrowly tailored to serve a compelling interest. *Id.* Under these facts, the application of RCW 9A.40.090 is not narrowly tailored to serve a compelling purpose. *Id.*

The state has no compelling purpose in criminalizing speech that fits within the letter of the statute but that is not a "true attempt" to lure a child or developmentally disabled adult. If a reasonable person would not foresee that speech would be taken as a serious attempt to entice a child into a specific non-public place, the state has no basis to impose criminal sanctions.

Nor is there any compelling reason to criminalize speech that is uttered with no intent to actually lure a vulnerable person out of public view. Statements by a person who lacks such intent pose no risk of harm.

Mr. Homan's conviction did not rest on a "true" attempt. The state presented no evidence proving that Mr. Homan made a "true" attempt to entice C.C.N. into a specific non-public place. *Cf. Schaler*, 169 Wn.2d at 283 (addressing "true" threats.) As he spoke, he rode past C.C.N. without stopping. He did not look at C.C.N. for a response. He did not tell C.C.N.

how to get to his house, nor did he invite C.C.N. to follow him there. RP 32-50. Nor did the factfinder consider whether or not Mr. Homan made a "true" attempt. CP 3-5.

Under the circumstances, a reasonable speaker would not believe that Mr. Homan's words would be taken as a serious attempt to entice a child into a specific non-public place. The statements made here did not constitute a "true" attempt. They may have been a joke, "idle chat" (such as might stem from a dare), or some other form of protected speech.

Furthermore, the state did not prove any facts establishing Mr. Homan's intent. There is no indication that Mr. Homan meant C.C.N. to follow him to a non-public place, much less that he intended to cause harm. Accordingly, there is no compelling reason to punish Mr. Homan for his speech. *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 476, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007).

The statute is unconstitutional as applied to Mr. Homan. *Id.; Spence,* 418 U.S. at 413-14. His conviction for luring cannot stand. *Spence,* 418 U.S. at 413-14.

The remedy in this case is dismissal, not merely remand for a new trial with proper instructions. *Kilburn*, 151 Wn.2d at 53. The state failed to present sufficient evidence of a "true" attempt. A reasonable person in Mr. Homan's shoes would not have foreseen would be interpreted as a

serious effort to persuade the listener to enter a non-public space. *See* RP *generally.* Nor did the state present sufficient evidence establishing that Mr. Homan intended to have C.N.N. accompany him to a non-public place. *See* RP *generally.*

Retrial would violate Mr. Homan's double jeopardy rights under the Fifth and Fourteenth Amendments. *Burks v. United States*, 437 U.S. 1, 18, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). Accordingly, the conviction must be reversed and the case dismissed with prejudice. *Id.*

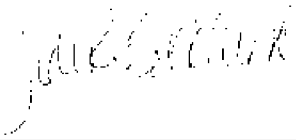
CONCLUSION

The Court of Appeals must either invalidate RCW 9A.40.090 or impose a limiting instruction consistent with the First Amendment. In the alternative, the Court of Appeals must prohibit future applications of the statute under similar facts. *Republican Party,* 141 Wn.2d at 282 n. 14.

Mr. Homan's conviction must be reversed and the case dismissed with prejudice. In the alternative, the charge must be remanded for a new trial with proper instructions.

Respectfully submitted on November 25, 2014.

BACKLUND AND MISTRY



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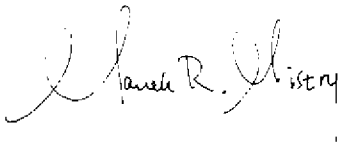

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CERTIFICATE OF SERVICE

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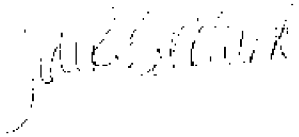

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Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

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