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Division II  
State of Washington  
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NO. 53025-2-II

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

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STATE OF WASHINGTON, Respondent

v.

JACE THOMAS HAMBRICK, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-00384-1

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BRIEF OF RESPONDENT

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## RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The state agrees there is no evidence in the record of Hambrick's personal waiver of his right to a jury trial; accordingly, the conviction should be reversed and the matter remanded for a new trial.**
- II. **The trial court's findings are sufficient to support the conviction for Attempted Rape of a Child in the Second Degree.**
- III. **The State concedes that the community custody condition that states "[n]o unauthorized use of electronic media" is invalid because it is void for vagueness and/or constitutionally overbroad.**

## STATEMENT OF THE CASE

Jace Hambrick was convicted, after a bench trial, of one count of Attempted Rape of a Child in the Second Degree and Communication with a Minor for Immoral Purposes. CP 63-66, 321. At trial, the State presented evidence from four witnesses that Hambrick communicated with an undercover officer, whom he believed to be a thirteen-year-old female.

Detective Robert Givens is a detective with the Vancouver Police Department. RP 47. He works as a detective with the digital evidence cybercrime unit, which is a taskforce comprised of units from homeland security and Vancouver Police Department which investigates computer and online crimes. RP 48-49. Detective Givens was working as a detective in the digital evidence cybercrime unit in February 2017. RP 49. In that

capacity he worked a sting operation to identify individuals who had a sexual interest in children and who wished to contact them. RP 49.

Detective Givens' role in the operation was to engage in communication with potential suspects, portraying a 13-year-old female. RP 49. Detective Givens has received special training to be the detective that participates in such electronic communications with potential suspects. RP 50. In that role, Detective Givens communicated with Hambrick. RP 50. Detective Givens was physically located in a house in the City of Vancouver, State of Washington, where he used a computer to chat with individuals. RP 51.

Detective Givens created a posting on Craigslist and waited for a response. RP 51. This posting was admitted as Exhibit 1. RP 51-52.

Detective Givens placed the ad on the casual encounter section of Craigslist; the ad was titled "w4m," listed the location as Vancouver. RP 52. The casual encounter section of Craigslist is where people go to meet people. RP 52. The "w4m" title meant woman for male. RP 54. That portion of the ad is something Craigslist requires. RP 54. While creating the post, Detective Givens used language associated with a younger person and chose non-sexual language to avoid entrapment issues. RP 54. His habit is not to bring up sexual conversations; he lets the subject engaging with him lead the content of the conversation. RP 54. Hambrick responded to the posting via an email exchange that went through

Craigslist. RP 51, 55. The email exchange was admitted as Exhibit 2. RP 55-56.

The email exchange between Detective Givens and Hambrick went as follows:

Hambrick: What game you playing?

Det. Givens: If I tell you, you gotta promise not to laugh. [winking emoji].

Hambrick: Hmm, ok, shoot let's hear if its Nkopara will make my day.

Det. Givens: I am hooked on Alien Isolation right now. I suck, but I'm hooked. [tongue emoji].

Hambrick: forget sex, let me come watch. I haven't gotten that one yet. I'm on Overwatch and the Witcher 3 [laughing emoji].

Hambrick: I'm a 20 year old white guy that's sore from work and wants to relax and watch the alien kill you, maybe more. [tongue emoji].

Det. Givens: I'm 13 and this alien is fucking tearing me up.

Hambrick: PFT. [smiling emoji]. Why did you post an ad on Craigslist if you're thirteen. You mean twenty-three? Also, yeah, man, I want to watch with another [smiling emoji].

Det. Givens: Sorry, I like college guys [tongue emoji].

Hambrick: I already went through college. It was boring. I left and got an apprenticeship in construction. More hands on [winking emoji].

Det. Givens: Construction is cool too. [dollar sign]?

Hambrick: So far it's getting there, \$12.75 an hour, forty plus hours a week. \$19 an hour on over-time.

Det. Givens: Fuck, that's bank, excuse me, you must have lots of games.

Hambrick: Over two hundred on steam [tongue emoji]. Still going too. So let's say you underage girl, want to hang out [grinning emoji]

Det. Givens: maybe. Let's ditch this shit and text. What's your number?

Hambrick: gonna say hi or not?

Det. Givens: I sent a message, didn't get your number.

Hambrick: 813-635-6431

Hambrick: 813-635-6431.

RP 57-59. The conversation then continued via text message. RP 62. Exhibit 3 is the record of text messages exchanged between Detective Givens and Hambrick. RP 62. The conversation continued as follows:

Det. Givens: Hey, it's gamer girl.

Hambrick: sup?

Det. Givens: wassup? What's your name. My real name is Julie.

Hambrick: Julie, huh? Nice. I'm Jace.

Hambrick: Your ad was flagged, btw.

Det. Givens: Hi Jace, it's cool chatting you, right?

Hambrick: damn right. So what you look like so I can put a face to the name.

Det. Givens: hang on, I'll find a good pic.

Det. Givens [sends photo of Officer Janisch admitted as Exhibit 4] This is me, gaming.

Det. Givens: HBU [how about you]? Gotta pic?

Hambrick: [photograph sent – Exhibit 5]

Det. Givens: cool headset, you look serious dude.

Hambrick: that's me.

Hambrick: it's turtle beach.

Hambrick: oh you're cute.

Det. Givens: ah, you're sweet.

Hambrick: Like honey or sugar.

Det. Givens: like a nice fella saying nice things  
[smile emoji]

Hambrick: oh yeah, I like the cute gamer girl with similar interests.

Det. Givens: I am what I am.

Hambrick: ha ha, so were you interested in hanging out or was this more of a text buddy thing?

Det. Givens: I'm down for whatever. What you thinking?

Hambrick: you live alone? Cause I can drive up and we can chill for a few hours.

Det. Givens: I live with my nosey ass mom.

Hambrick: oh yeah, doesn't bother me if you lock the door [smile emoji] just in case.

Det. Givens: what you thinking?

Hambrick: I don't know. I personally love to eat a woman out, but I want to meet you first and talk to you cause I think this could be more if you wanted it to be [smile emoji]

Det. Givens: wow, you cool with that? I'm blushing man.

Hambrick: ha ha, I don't get out much and I love to game. I feel like if we got to talking it might go somewhere. You're beautiful and a gamer. I have no problem hanging out with you. [smile emoji].

Det. Givens: that's cool, what about that eating out stuff [tongue emoji]

Hambrick: Yes, I will still do that [smile emoji]

Det. Givens: oh, my naughty boy.

Hambrick: I can be real bad if you're into bondage.

Det. Givens: Ooh, tell Julie more.

Hambrick: One sec, dear.

Hambrick: I have a blindfold, ball gag, some bed restraints so I can tease your bodey [smile emoji] and you can't do a think about it.

Det. Givens: oh my.

Hambrick: wanna do this tonight? You have me eager.

Det. Givens: hmm, maybe. Mom sometimes goes out with her bf on weekends.

Hambrick: if you like it we don't have to do it again [smile emoji]

Hambrick: cause if you like it, I'm gonna ask to come back [smiling emoji]

Det. Givens: wow, you sure you're cool with this?

Hambrick: Why wouldn't I be?

Det. Givens: cause I'm thirteen, plus I can't drive.

Hambrick: ha ha, well if you want we can do this in the car.

Det. Givens: I'm cool. Let me find out what my mom is doing. You ain't a crazy guy, right?

Hambrick: I honestly thought you were joking about being thirteen.

Hambrick: no

Det. Givens: I'm not, so we still cool?

Det. Givens: Not joking I mean

Hambrick: You won't call the cops, will you?

Det. Givens: Fuck no, FTP [fuck the police]

Hambrick: Yeah, then sure. Does your mom know you're gonna lose your virginity?

Hambrick: [grinning emoji]

Det. Givens: who says I'm a virgin, LOL.

Hambrick: oh damn, so you're used to this?

Det. Givens: I don't kiss and tell [winking emoji]

Hambrick: Ok then yeah, so do you want me in the house? Does your mom know about this?

Det. Givens: Uh, no, my mom would freak, dude.

Hambrick: so car?

Det. Givens: if she goes out with her bf she won't be back til morning

Det. Givens: we're cool here, just gotta see if she's going out.

Hambrick: Ok.

Det. Givens: if not, can you pick me up?

Hambrick: yeah.

Det. Givens: cool. Give me a sec to see what my mom is doing.

Hambrick: K.

Hambrick: verdict?

Det. Givens: still checking, hold on.

Det. Givens: shit, she's dragging ass. How long til you can be here?

Hambrick: address?

Det. Givens: she's still home, can you pick me up?  
There's a 7/11 close to me.

Hambrick: sure. I'll text you when.

Det. Givens: ok, the 7/11 is at Mill Plain and 97<sup>th</sup>.  
Where are you coming from?

Hambrick: Portland

Det. Givens: oh fuck, how long til I should leave? I  
live in Vancouver.

Hambrick: What's your address so I can see where  
I'm headed

Hambrick: LOL, NVM, it's like twenty-five  
minutes, but let me shower and get ready. K?

Det. Givens: Ok, cool. I'll be down there about  
forty-five. What's your car look like?

Hambrick: red prius.

Det. Givens: k, I'm wearing a grey American Eagle  
sweatshirt and torn jeans.

Hambrick: K.

Hambrick: showering now.

Det. Givens: k, I'll bail in a bit. See you soon.

Det. Givens: text me when you're close so I don't  
get in the wrong fucking prius, LOL.

Hambrick: when I get there, I'm gonna go in and  
get some condoms.

Hambrick: so wait til I leave, then follow

Det. Givens: cool, cause I don't got any [tongue emoji]

Hambrick: I would think not.

Det. Givens: I'll walk in a bit.

Hambrick: I'm fifteen minutes away

Det. Givens: okay.

Hambrick: walk outside and hang out there, K dear?

Det. Givens: holy shit, my mom just took off for boyfriends. Can you come here?

Hambrick: sure

Hambrick: address?

Det. Givens: I'm still home, cool.

Det. Givens: 900 SE 95<sup>th</sup> Avenue. Our apartment is under the house.

Det. Givens: Park in front and there are lights and a path, stone path leads around the house to the white door. That's our door.

Hambrick: K, mom's gone, right?

Hambrick: and be ready

Hambrick: I want you in panties and bra.

Det. Givens: yeah, I'm ready

Det. Givens: mom long gone

Hambrick: K.

Det. Givens: park behind silver Nissan.

Hambrick: okay, here.

Hambrick: through gate?

Det. Givens: no, look for stone path.

Hambrick: open your door so I know it's the right house.

Det. Givens: k, one sec.

RP 63-72.

Officer Heather Janisch works as a police officer for the City of Vancouver. RP 16. She testified that the image admitted as Exhibit 4 was an image of her taken about a year prior to trial when she was 24 years old. RP 17-18. She was dressed in clothes typical to teenagers and she was dressed as "a gamer." RP 18. Detective Givens worked with her to have the photograph taken; put her in low light in a location with video games. RP 61. She was made to appear to be a teenager. RP 61.

Officer Janisch was present when Hambrick arrived at the agreed-upon residence; she waved him in and he came down a stairwell where he was contacted by other officers. RP 19.

Trooper Makayla Morgan works as a detective with the Washington State Patrol. RP 39. Trooper Morgan is a certified forensics examiner through IACIS, and handles computer and cellphone forensics.

RP 40. She also assists in any other tasks that may arise in her role as a detective for the Washington State Patrol. RP 40. She worked the sting operation which led to Hambrick's arrest. RP 40-41. The operation was to put out online advertisements to see if people would answer them as they had had reports people were using social media such as Craigslist to lure children and ask them for sexual favors. RP 41. In Hambrick's case, Trooper Morgan's job was to handle the evidence; she collected everything at the scene, took photographs, documented it and put it into the State Patrol evidence system. RP 41. Trooper Morgan was present at the residence when Hambrick was arrested. RP 41. She was given pieces of evidence by other officers and she took photographs. Exhibit 8 depicted the defendant, Hambrick, at the time of his arrest. RP 42. Exhibit 9 is a photograph of Hambrick's driver's license. RP 43. Exhibit 10 is a photograph of the items taken from Hambrick's person during the search incident to arrest. RP 43. This photograph depicted a box of Trojan condoms, a wallet, keys, and a cellphone. RP 44.

When the team takes a suspect into custody, they send a test message to the person they had been communicating with to see if it shows up on the suspect's phone. RP 45. Trooper Morgan took a photograph of that test message showing up on Hambrick's phone. RP 45.

Trooper Matt Wood is a Detective Sergeant with the Washington State Patrol. RP 21. As a Detective Sergeant, Trooper Wood supervises three different units, including identity theft, partnering with the Department of Licensing, working with the Insurance Commission, and general investigations. RP 23. Trooper Wood was involved in a sting operation that occurred in February 2017. RP 23. He was assigned to partner with the Washington State Missing and Exploited Children's task force; the operation involved communicating via computer with individuals who were making contact with individuals they believed to be minors. RP 24. Trooper Wood was supervisor of the arrest team; his responsibilities were to supervise two other individuals as the subject would arrive at a residence- they would take the subject into custody, do a search incident to arrest, and then transfer them to the detective who would handle the interviews. RP 24. On the particular day when Hambrick was arrested, there were surveillance cameras on the exterior and interior of the residence they used; Hambrick's arrest was recorded and admitted as Exhibit 6. RP 25.

Trooper Wood knew little of the actual sting operation involving Hambrick; his role was to detain and arrest the subjects as they came to the residence, along with the team he supervised. RP 27-28. As Hambrick arrived at the residence he was placed under arrest. RP 28-33. He was then

informed of his constitutional rights and indicated he understood those rights. RP 33. During the search incident to arrest, Trooper Wood found a box of Trojan brand condoms in Hambrick's left pants pocket. RP 34.

In a statement Hambrick gave to police, he indicated he was coming to the residence for sex. RP 112. Hambrick admitted that the person he was chatting with said she was thirteen. RP 112. However, Hambrick claimed that he wasn't sure if the person was actually thirteen and if it did turn out to be an underage girl he was going to turn around and leave. RP 120, 146.

#### ARGUMENT

**I. The state agrees there is no evidence in the record of Hambrick's personal waiver of his right to a jury trial; accordingly, the conviction should be reversed and the matter remanded for a new trial.**

Hambrick alleges he did not personally waive his right to a jury trial and accordingly, his conviction following a bench trial should be reversed. The State agrees with Hambrick that the record does not evidence his personal waiver of his right to a jury trial and according to case law in our State this warrants reversal of his conviction and remand for a new trial.

This Court reviews a jury trial waiver de novo. *State v. Ramirez-Dominguez*, 140 Wash.App. 233, 239, 165 P.3d 391 (2007). The record must adequately establish that the defendant waived his right knowingly,

intelligently, and voluntarily. *State v. Pierce*, 134 Wash.App. 763, 771, 142 P.3d 610 (2006). A written waiver “is strong evidence that the defendant validly waived the jury trial right,” and an attorney’s representation that the defendant knowingly, intelligently and voluntarily waived the right is also relevant. *Pierce*, 134 Wash.App. at 771 (citing *State v. Woo Won Choi*, 55 Wash.App. 895, 904, 781 P.2d 505 (1989), *review denied*, 114 Wash.2d 1002, 788 P.2d 1077 (1990)). Washington law does not require an extensive colloquy on the record; but it requires “a personal expression of waiver from the defendant.” *Pierce*, 134 Wash.App. at 771 (citing *State v. Stegall*, 124 Wash.2d 719, 725, 881 P.2d 979 (1994)).

Therefore, while the right to a jury trial may be easier to waive than some other constitutional rights, an actual waiver, personally done by the defendant, is required. *See Pierce*, 134 Wash.App. at 772 (citing *State v. Brand*, 55 Wash.App. 780, 786, 780 P.2d 894 (1989), *review denied*, 114 Wash.2d 1002, 788 P.2d 1077 (1990)).

In Hambrick’s case, no colloquy was ever done with him regarding his right to a jury trial. At no appearance the State could find prior to trial, nor at trial, did the Court go over his right to a jury trial and confirm that Hambrick wished to proceed via a bench trial. While Hambrick’s attorney filed a waiver of jury trial document, that document is signed only by the

attorney and not by Hambrick. Also, Hambrick never utters a word regarding his right to a jury trial, though sits silently while his attorney confirms the waiver was entered. *See* RP 6-7. However, mere acquiescence is insufficient to constitute a defendant's "personal expression of waiver." *See State v. Hos*, 154 Wn.App. 238, 250-51, 225 P.3d 389 (2010); *see also State v. Wicke*, 91 Wn.2d 638, 644, 591 P.2d 452 (1979). Just as in *Wicke*, while it may seem implicit that Hambrick waived his right to a jury trial, "the record we have before us does not demonstrate this fact to the extent of the constitutional standard seemingly demanded by the United States Supreme Court and assuredly demanded in other jurisdictions," and now demanded by the Washington Supreme Court in *Wicke*. *Wicke*, 91 Wn.2d at 645.

Just as in *Hos*, *supra* and *Wicke*, *supra*, the record before this Court compels this result. There is no personal expression of waiver of jury trial by Hambrick. Accordingly, the matter should be reversed and remanded for a new trial where Hambrick may exercise his right to a jury trial.

The State submits the following arguments in case the Court chooses to address the remaining issues despite that issue I is dispositive in this case.

**II. The trial court's findings are sufficient to support the conviction for Attempted Rape of a Child in the Second Degree.**

Hambrick alleges the trial court's findings are insufficient to support his conviction for Attempted Rape of a Child in the Second Degree because the trial court did not find that he believed that the alleged victim was younger than fourteen. However, the trial court's findings show that Hambrick knew the alleged victim was thirteen years old, and the trial court expressly found the defendant's testimony not credible. CP 65. The trial court's findings are sufficient to support the crime of Attempted Rape of a Child in the Second Degree.

In reviewing a claim of sufficiency of the evidence, this Court looks at all the evidence, and inferences that can reasonably be drawn therefrom, and reviews it in the light most favorable to the State. *State v. Joy*, 121 Wn.2d 333, 338-39, 851 P.2d 654 (1993); *State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). In reviewing this evidence, this Court determines whether any rational trier of fact could have found all the elements were proven beyond a reasonable doubt. *Joy*, 121 Wn.2d at 338. Deference is given to the trier of fact who resolved conflicting testimony and evaluated the credibility of the witnesses and persuasiveness of the evidence. *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989) (citing *State v. Green*, 94 Wn.2d 216, 616

P.2d 628 (1980) and *State v. Lawson*, 37 Wn.App. 539, 543, 681 P.2d 867 (1984)).

In *State v. Johnson*, 173 Wn.2d 895, 270 P.3d 591 (2012) the Supreme Court considered the sufficiency of the evidence for an attempted promoting commercial sexual abuse of a minor. Like Hambrick's case, *Johnson* involved the use of an undercover officer pretending to be a minor. *Johnson*, 173 Wn.2d at 909. The Supreme Court found that in the context of a criminal attempt charge such as this, "the victim's age is [] material to proving the defendant's intent to accomplish the criminal result of promoting commercial sexual exploitation of minors." *Id.* As the victim was fictitious and consisted of undercover police officers pretending to be a minor, the defendant's "knowledge of their stated ages was material." *Id.* The Court stated, "the State was required to prove that Johnson believed his victims to be minors to prove that he intended to advance or profit from the commercial sexual exploitation of a minor." *Id.* At Johnson's trial, the officer testified that she told Johnson she was 17, that Johnson acknowledged it, and afterward he asked the officer to work for him as a "ho." *Id.* The Court found that evidence was sufficient.

Likewise, Hambrick's case contains sufficient evidence to show that he had knowledge of the age of the fictitious victim involved in his

case. In an online conversation, Hambrick and the officer engaged in the following exchange:

Officer: "Im 13..."

Hambrick: "why did you post an ad in craigslist if your 13? You mean 23?"

Hambrick: "So what say you young underage girl. Wanna hang out?"

Officer: "wow. U sure u cool with this?"

Hambrick: "Why wouldn't I be?"

Officer: "cuz Im 13, plus I cant drive."

Hambrick: "Honestly, I thought you were joking about being 13."

Officer: "No. uhhh Im not. so we still kewl? Not joking i mean."

Hambrick: "You wont call the cops will you?"

Officer: "fuk no. FTP lol."

Hambrick: "Yea? Then sure. Does your mom know your gonna lose your virginity?"

Hambrick: "When I get there imam go in and get some condoms."

Officer: "kewl cuz i don't got any."

Hambrick: "I would think not."

CP 64-65. The officer clearly stated the age of the fictitious victim: 13. The officer said, "Im 13." CP 64. And again said, "cuz Im 13, plus I cant drive." CP 64. And in response to Hambrick saying he thought she was joking, she said, "No. uhhh Im not. so we still kewl? Not joking i mean." CP 64. The conversation made it abundantly clear that the fictitious victim was 13 years old and that Hambrick knew it was not a joke. Hambrick showed his knowledge and belief that the victim was 13 by presuming her virginity and that she would not have condoms. CP 66. Hambrick then showed up to the residence where he thought the victim was going to be with a box of condoms. CP 66. The court expressly found the defendant's testimony that he believed he was communicating with an adult to be not credible. CP 66. Instead, the Court found that Hambrick "clearly expressed by words and conduct that he intended to have sex with a 13 year old." CP 66. This finding incorporates that Hambrick knew the person involved was a 13 year old. Hambrick's claim that the trial court did not find that he had knowledge of or belief that the victim was 13 years old is not accurate. The court's finding that Hambrick intended to have sex with a 13 year old incorporate his knowledge and belief that the victim was 13 years old, as one cannot intend to have sex with a 13 year old without believing the victim is 13. This case has more evidence than what was presented and affirmed in *Johnson*. Accordingly, this Court

should follow the Court’s reasoning in *Johnson* and find sufficient findings were entered and proven in this case.

**III. The State concedes that the community custody condition that states “[n]o unauthorized use of electronic media” is invalid because it is void for vagueness and/or constitutionally overbroad.**

The State concedes that the community custody condition that states “[n]o unauthorized use of electronic media” is invalid because it is void for vagueness and/or constitutionally overbroad. Said condition provides no guidance to Hambrick as to what electronic media is authorized or unauthorized, could prohibit activities that are not crime-related, and could lead to arbitrary enforcement. This Court should remand for the condition to be stricken and corrected with a constitutionally permissible condition.

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**CONCLUSION**

As Hambrick did not give a personal expression of his desire to waive his right to a jury trial, the matter must be reversed and remanded for a new trial wherein Hambrick may assert his right to a jury trial.

DATED this 10<sup>th</sup> day of October, 2019.

Respectfully submitted:

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## Transmittal Information

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