

FILED
Court of Appeals
Division II
State of Washington
3/12/2020 9:27 AM

NO. 53269-7

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

MINGO GUILLERMO,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Jerry T. Costello

No. 18-1-02686-7

BRIEF OF RESPONDENT

MARY E. ROBNETT
Prosecuting Attorney

Robin Sand
Deputy Prosecuting Attorney
WSB # 47838
930 Tacoma Ave., Rm 946
Tacoma, WA 98402
(253) 798-7400

TABLE OF CONTENTS

I. INTRODUCTION 1

II. RESTATEMENT OF THE ISSUES 2

 A. Did the trial court properly admit Guillermo’s electronic messages to the victim under Evidence Rule 404(b) as evidence of motive, intent, and lustful disposition where the messages were relevant, highly probative, not unduly prejudicial, and the court issued a limiting instruction?..... 2

 B. Does Guillermo misstate the basis for his charge of Communicating with a Minor for Immoral Purposes?..... 2

III. STATEMENT OF THE CASE..... 2

IV. ARGUMENT 8

 A. The trial court properly admitted Guillermo’s electronic messages to the victim under Evidence Rule 404(b) as evidence of motive, intent, and lustful disposition where the messages were relevant, highly probative, not unduly prejudicial, and the court issued a limiting instruction..... 8

 1. Guillermo cannot argue the limiting instruction was improper where he agreed to the language of the instruction below..... 13

 2. Any admission of the messages, if error, was harmless where the evidence proved Guillermo exposed his genitals to C.J. to show her that he was masturbating. 15

B.	Guillermo misstates the basis for his charge of Communicating with a Minor for Immoral Purposes.	17
V.	CONCLUSION.....	21

TABLE OF AUTHORITIES

State Cases

<i>State v. Camarillo</i> , 115 Wn.2d 60, 794 P.2d 850 (1990).....	9, 19
<i>State v. Cannon</i> , 120 Wn. App. 86, 84 P.3d 283 (2004).....	19
<i>State v. Cardenas-Flores</i> , 189 Wn.2d 243, 401 P.3d 19 (2017).....	19
<i>State v. Crowder</i> , 119 Wn.2d 450, 205 P. 850 (1922).....	10
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980)	19
<i>State v. Ferguson</i> , 100 Wn.2d 131, 667 P.2d 68 (1983).....	9
<i>State v. Gonzales</i> , 1 Wn. App. 2d. 809, 408 P.3d 376 (2017)	8, 9, 10, 12
<i>State v. Gower</i> , 179 Wn. 2d 851, 321 P.3d 1178 (2014)	15
<i>State v. Homan</i> , 181 Wn.2d 102, 330 P.3d 182 (2014)	19
<i>State v. Johnson</i> , 188 Wn.2d 742, 399 P.3d 507 (2017).....	13
<i>State v. Luther</i> , 65 Wn. App. 424, 830 P.2d 674 (1992).....	17
<i>State v. Martinez</i> , 123 Wn. App. 841, 99 P.3d 418 (2004).....	19
<i>State v. McCracken</i> , No. 47277-5-II, 2016 WL 3702672 at *1 (Wash. Ct. App. July 6, 2016)	16
<i>State v. Medcalf</i> , 58 Wn. App. 817, 795 P.2d 158 (1990)	9
<i>State v. O’Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009)	14
<i>State v. Perez-Cervantes</i> , 141 Wn.2d 468, 6 P.3d 1160 (2000)	19
<i>State v. Pietrzak</i> , 100 Wn. App. 291, 997 P.2d 947 (2000).....	17

<i>State v. Ray</i> , 116 Wn.2d 531, 806 P.2d 1220 (1991).....	9
<i>State v. Rice</i> , 48 Wn. App. 7, 737 P.2d 726 (1987).....	11
<i>State v. Rich</i> , 184 Wn.2d 897, 365 P.3d 746 (2016).....	19
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	18, 19
<i>State v. Smith</i> , 155 Wn.2d 496, 120 P.3d 559 (2005).....	18
 Statutes	
RCW 9.94A.525(5)(a)(i).....	18
 Rules	
ER 401	10
ER 404(b).....	1, 2, 5, 8, 13, 15, 18
ER 404(b), and (2)	12
GR 14.1(a).....	16
RAP 2.5(a)	14

I. INTRODUCTION

During the summer of 2017, Mingo Guillermo video chatted his girlfriend's seventeen-year-old niece, C.J., at midnight in his underwear, turned the camera around exposed his erect penis to her, and began masturbating. In the following months, Guillermo sent C.J. messages complimenting her appearance, and asking her to be his girlfriend and wife. The State charged Mingo Guillermo with Communicating with a Minor for Immoral Purposes and Indecent Exposure with sexual motivation.

Guillermo objected to the text messages as the basis for the Communicating charge, as the messages contemplated future relationships, potentially when C.J. was of the age of consent. The State conceded and instead sought admission of the text messages as ER 404(b) evidence, to prove the video chat was for an immoral purpose, and that the exposure was sexually motivated. Guillermo challenges the relevance of the messages to his Indecent Exposure charge but fails to recognize the trial court admitted the messages for the limited purpose of proving the aggravating circumstance. The trial court properly admitted the messages for its limited purpose as evidence of intent, motive, and lustful disposition.

A jury convicted Guillermo as charged. Guillermo challenges the evidence supporting his Communication charge but raises an irrelevant

argument about evidence that was not the basis of his charge at trial. Sufficient evidence proved beyond a reasonable doubt that Guillermo Communicated with C.J., a minor, for an immoral purpose during his late-night video chat where he masturbated at her. This appeal is without merit.

II. RESTATEMENT OF THE ISSUES

- A. Did the trial court properly admit Guillermo's electronic messages to the victim under Evidence Rule 404(b) as evidence of motive, intent, and lustful disposition where the messages were relevant, highly probative, not unduly prejudicial, and the court issued a limiting instruction?
- B. Does Guillermo misstate the basis for his charge of Communicating with a Minor for Immoral Purposes?

III. STATEMENT OF THE CASE

Defendant Mingo Guillermo began dating Cindy Joseph in 2013. RP¹ 178. Ms. Joseph has a large family with many nieces and nephews, but she was closest with her niece, C.J. RP 76-77. C.J. was born on December 6, 2000. RP 77. Ms. Joseph helped provide for C.J., including buying her phones and paying for the services. RP 183-84.

C.J. used her phone to access social media websites like Facebook, Instagram, and Snapchat. RP 181-82. During June of 2017, C.J. had a Galaxy S4 that only worked when it was connected to Wi-Fi. RP 184. At

¹ The Verbatim Report of Proceedings is contained in dated volumes. The transcripts of trial testimony are contained in consecutive pagination and will be referred to by "RP" and the corresponding page number. The sentencing hearing will be referred to by "04/19/19 RP" and the corresponding page number.

the end of July 2017, C.J. had a Galaxy S7 phone that had data abilities for texting and calling. RP 184.

C.J. used Instagram to take pictures of herself and post them to her account. RP 181-82. She used Facebook to post “statuses” and pictures. RP 182. C.J. had friends and family members as “friends” on her accounts, including Guillermo. RP 182, 186. Guillermo’s Facebook account was listed as “Mingo Rodriguez,” but C.J. recognized the picture associated with the account as Guillermo and her aunt, Ms. Joseph. RP 187. C.J. and Guillermo occasionally talked over a messaging application attached to Facebook called “Messenger.” RP 187. Messenger operated like text messaging, but one can “video chat” on the application as well. RP 187, 190. C.J. also had Guillermo’s phone number programmed into her phone, and the two would occasionally text message. RP 185-86.

In June and July of 2017, C.J. was seventeen years old. RP 188. At the end of June 2017, C.J. broke her Galaxy S4 phone and had been talking to Guillermo about needing a replacement. RP 189-90. Guillermo “video chat[ted]” C.J. on Messenger around midnight to talk about her phone. RP 190-93. Ms. Joseph was in the background of the video watching TV and did not participate in the call with Guillermo; instead, C.J. spent about 30 minutes talking with Guillermo about needing a new phone. RP 191-93.

Guillermo was wearing only underwear when he called C.J. RP 192. C.J. disregarded his lack of clothing, reasoning that it was bedtime. RP 192-93. The video call started as a normal conversation, but at the end of the call, Guillermo turned the camera around and showed C.J. his exposed penis, and he was masturbating. RP 193-95.

Guillermo had his hand on his penis and was moving his hand “back and forth.” RP 195. His penis was hard. RP 195. C.J. did not know the term for what he was doing. RP 195.

C.J., upset, uncomfortable, and scared, did not say anything and ended the call. RP 195-97. She messaged a friend and started crying. RP 196. This call was the only time C.J. had ever “video chatted” Guillermo. RP 197.

The State charged² Guillermo with Indecent Exposure for the video call. CP 1-2, 196. Guillermo was also charged with Communicating with a Minor for Immoral Purposes, originally for messages he sent C.J. following the video chat. CP 1-2, 195. The parties litigated the basis for the charge of Communicating with a Minor for Immoral Purposes being the

² The State originally charged Guillermo with three counts of Child Molestation in the Second Degree and one count of Indecent Liberties relating to a different minor niece of Ms. Joseph, in addition to the Indecent Exposure count. CP 1-4, 12-13. After further case preparation, the State did not feel it could prove the charges relating to the other minor beyond a reasonable doubt, and proceeded only on the charges at issue in this appeal. CP 195-96; RP 6.

subsequent messaging. RP 36-48. Ultimately, the State transitioned theories to the video chat being the basis for both charges and sought admission of the subsequent messages under Evidence Rule (ER) 404(b) to prove that the video chat was sexually motivated, and that the communication was for an immoral purpose. RP 61-67.

The court required an offer of proof from C.J. before ruling on the admission of the text messages. RP 134. C.J. explained her cell phone situation to the court, and how she knew the messages at issue came from either Guillermo's Facebook Messenger account or phone number. RP 138-40. The court ruled the messages were admissible under ER 404(b), concluding: (a) the State proved by a preponderance of the evidence that Guillermo sent the messages, (b) the messages, standing alone and without context, were arguably of an innocent or joking nature, (c) the messages were later in time than the video chat, thus may indicate the video chat was "sinister in nature" and become more corroborative of the state of mind the State must prove Guillermo had for the communicating with a minor for immoral purposes charge, and (d) the messages tend to show Guillermo was imagining sexual contact with C.J. at some future point. RP 158-62.

Regarding the Indecent Exposure charge, the court concluded the messages tended to prove the aggravating circumstance that the indecent exposure was done for purposes of sexual gratification. RP 162-63. The

court also concluded the risk of unfair prejudice was low, as the messages were unlikely to cause an emotional reaction from the jury, particularly with an appropriate limiting instruction. RP 163-64.

After the video chat, C.J.'s broken phone was replaced with the Galaxy S7 that had texting capabilities. RP 197. C.J. started receiving messages from Guillermo that she thought were inappropriate. RP 198-99. The court gave the following oral limiting instruction prior to the messages being introduced into evidence:

You're about to hear evidence about screen shots regarding communications. I'm going to allow this evidence to be presented to you, but you may consider this evidence only for the purpose of determining whether the alleged live video chat that you've heard testimony about was of a sexual nature and for the purpose of determining whether the alleged indecent exposure was for the purpose of sexual gratification. You may not consider the evidence you're about to hear for any other purpose.

RP 198. The State then introduced "screen shots"³ of messages C.J. received from Guillermo. RP 199-210; Exh. 1A-1E. The messages began in September 2017, where Guillermo texted C.J. "[t]hat last picture you took on Instagram is beautiful." RP 202; Exh. 1A. The next message came on October 4, 2017. Exh. 1B. Guillermo sent C.J. a photo she had taken of herself, with the phrase "very nice" under the photo. Exh. 1B. In the photograph, C.J. is seated, wearing a low-cut dress and pursing her lips for

³ A "screen shot" is a picture of a message. RP 198-99.

the camera. Exh. 1B. Guillermo sent C.J. a different picture of herself that C.J. posted to Facebook and Instagram. RP 204-06. In that picture, C.J. is wearing a higher cut top than the previous picture, with the messages, “Beautiful, just beautiful”, and “No, I’m not a perv. I just know when I see a beautiful woman.” RP 204-06; Exh. 1C.

Exhibits 1D and 1E showed Guillermo asking C.J. to be his girlfriend “when [he] grow[s] up, when [he] get[s] older,” and telling C.J. he was “going to have to make [her his] future wife.” RP 206-10; Exh. 1D, 1E. Guillermo only sent C.J. photos of herself where she was posing for the camera. RP 211-12. Eventually, C.J. told her mother about the video call and the messages. RP 210-12.

To accompany the court’s oral limiting instruction about the messages, the parties agreed the court should give the following written limiting instruction:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of screen shots of communications. This evidence may be considered by you only for the purpose of determining whether the live video chat that you heard testimony was about was of a sexual nature, and for the purpose of determining whether the alleged indecent exposure was done for the purposes of sexual gratification. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 258; RP 253-55.

The jury convicted Guillermo of Communicating with a Minor for Immoral Purposes, and Indecent Exposure, finding that the exposure was for sexual gratification. RP 311; CP 264-66. The court sentenced Guillermo to 60 months incarceration. CP 365. This appeal follows. CP 390.

IV. ARGUMENT

A. The trial court properly admitted Guillermo's electronic messages to the victim under Evidence Rule 404(b) as evidence of motive, intent, and lustful disposition where the messages were relevant, highly probative, not unduly prejudicial, and the court issued a limiting instruction.

The trial court properly admitted evidence of Guillermo's messages to the minor victim to show his intent, motive, and lustful disposition toward her under ER 404(b). A trial court exercises discretion in the admission of evidence. *State v. Gonzales*, 1 Wn. App. 2d. 809, 819, 408 P.3d 376 (2017). A reviewing court will not disturb a trial court's decision to admit evidence absent an abuse of discretion. *Id.* An abuse of discretion occurs where a trial court's decision is manifestly unreasonable or based on untenable grounds or reasons. *Id.*

Evidence Rule 404(b) provides,

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Washington courts have also consistently held that “lustful disposition” qualifies under admissibility for “other purposes.” *Gonzales*, 1 Wn. App. 2d at 819, citing *State v. Ray*, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991); *State v. Camarillo*, 115 Wn.2d 60, 70, 794 P.2d 850 (1990); *State v. Ferguson*, 100 Wn.2d 131, 133-34, 667 P.2d 68 (1983); *State v. Medcalf*, 58 Wn. App. 817, 822-23, 795 P.2d 158 (1990). “This is because a lustful disposition makes it more likely that the defendant committed the crime charged.” *Gonzalez*, 1 Wn. App. 2d at 819, citing *Ray*, 116 Wn.2d at 547. Evidence of uncharged sexual misconduct occurring after the alleged incident falls within this exception. *Gonzales*, 1 Wn. App. 2d at 819.

Here, Guillermo’s messages to C.J. were properly admitted as evidence of intent, motive, and lustful disposition. First, the messages in and of themselves are not necessarily sexual in nature. The messages do not depict sexual content, expletives, or suggestions of explicit sexual conduct. Rather, the messages include compliments and comments about C.J.’s appearance and Guillermo’s desire for a future relationship with C.J. The messages are therefore evidence of Guillermo’s (1) intent for a romantic, sexual relationship at some point with C.J., (2) his motive to obtain a romantic, sexual relationship with her, and (3) his lustful disposition toward her.

Guillermo argues that the messages were improperly admitted because they were irrelevant to the charge of Indecent Exposure under ER 401. Brief of Appellant, 7. Guillermo's argument ignores the limited purpose for which the messages were admitted regarding the Indecent Exposure charge; to prove the "Sexual Gratification" aggravating circumstance. RP 162-63; CP 258 ("Certain evidence has been admitted in this case for only a limited purpose [...] of determining whether the alleged indecent exposure was done for the purposes of sexual gratification.") The messages, which evidenced Guillermo's sexual attraction and desire for a sexual relationship with C.J., i.e., intent, motivation, and lustful disposition, were absolutely relevant to whether he exposed his penis to C.J. and masturbated at her for purposes of sexual gratification.

Moreover, despite Guillermo's contention, the fact that the messages were sent after the video chat does not diminish their relevance to Guillermo's intent, motivation, or lustful disposition toward C.J. *Gonzales*, 1 Wn. App. 2d at 820 ("But an act occurring after the charged abuse is relevant to lustful disposition," quoting *State v. Crowder*, 119 Wn.2d 450, 452, 205 P. 850 (1922)). The messages were relevant to the aggravating circumstance connected to the Indecent Exposure charge, and the trial court did not abuse its discretion in allowing the messages for that limited purpose.

Guillermo next argues that the messages were improperly admitted because their probative value was outweighed by unfair prejudice, resulting only in the argument that Guillermo has a propensity for “sexual misconduct.” Brief of Appellant, 10. Guillermo’s argument fails, where the evidence of the messages has no unfair prejudicial effect and does not establish “sexual misconduct.”

“Almost all evidence is prejudicial in the sense that it is used to convince the trier of fact to reach one decision rather than another.” *State v. Rice*, 48 Wn. App. 7, 13, 737 P.2d 726, 730 (1987). The “linchpin word is ‘unfair’.” *Id.* “Unfair prejudice” is caused by evidence that is likely to arouse an emotional response rather than a rational decision among jurors. *Id.* These messages had no risk of arousing an emotional response from the jurors. The messages do not evidence “sexual misconduct;” they do not contain explicit pictures, language, or discussion of illegal or sexually explicit acts. Guillermo actually concedes this point: “The messages do not discuss the video chat, and there is no mention of any other sexual acts.” Brief of Appellant, 10. Moreover, the jurors were properly instructed on the limited purpose of the evidence, which limited any risk of confusing the issues before the jury. The trial court properly determined that the messages had little risk of unfair prejudice.

In contrast, the probative value of the messages is extremely high to prove that Guillermo intentionally exposed his penis to C.J. and masturbated for purposes of sexual gratification. The messages showed that Guillermo was physically attracted to C.J., and that he imagined them, one day, having a sexual relationship. The fact that Guillermo repeatedly complimented C.J.'s appearance only in photos where she is posing for the camera was probative of his intent, motive, and lustful disposition toward C.J., indicating that he exposed himself to her for sexual gratification.

In other sex offense cases, far more prejudicial evidence has been deemed admissible. For example, in *Gonzales*, the Court of Appeals upheld admission of testimony in a child rape and molestation case that the defendant was found masturbating while holding the victim's bra after the molestation ceased. *Gonzales*, 1 Wn. App. 2d at 813, 820. The court upheld the admission of the evidence, holding that: (1) the testimony went towards the defendant's sexual desire for the victim under ER 404(b), and (2) the evidence was not unfairly prejudicial because the act "was not more inflammatory than the charged crime, and [the victim] was only indirectly victimized by it." *Id.* at 820.

The same is true here. Evidence of Guillermo's compliments to C.J. were not victimizing of her; she testified she "screen shot" the pictures because she found them inappropriate. Moreover, the content of the

messages is not inflammatory. Exh. 1A-1E. Even if the content could be argued to be inflammatory, the content of the messages is not more inflammatory than the allegation that Guillermo exposed his penis to C.J. and masturbated at her.

The trial court did not abuse its discretion in admitting evidence of Guillermo's messages to C.J. to under ER 404(b) to prove intent, motive, and lustful disposition toward C.J., specifically where the jury was instructed⁴ on the evidence's limited purpose. Guillermo did not suffer unfair prejudice by the introduction of this evidence. Accordingly, this Court should affirm.

1. Guillermo cannot argue the limiting instruction was improper where he agreed to the language of the instruction below.

As an initial matter, Guillermo, for the first time on appeal, argues that the court's limiting instruction allowed the jury to consider the messages as substantive evidence of his intent related to the indecent exposure. Brief of Appellant, 1, 6-10, 12. This argument is improperly raised and should be ignored.

⁴ Guillermo appears to take issue with the court's limiting instruction. Brief of Appellant, 12. His argument is addressed in detail below. However, the parties are bound by the "law of the case" doctrine where this instruction was not objected to. *State v. Johnson*, 188 Wn.2d 742, 399 P.3d 507 (2017) (Jury instructions that are not objected to are treated as the properly applicable law for purposes of an appeal.)

Generally, reviewing courts will not review an issue raised for the first time on appeal. RAP 2.5(a). An exception is where a party alleges a claim of “manifest error affecting a constitutional right.” *State v. O’Hara*, 167 Wn.2d 91, 94, 217 P.3d 756 (2009). To meet RAP 2.5(a) and raise an error for the first time on appeal, an appellant must establish both that the error is manifest, and that the error is truly of constitutional magnitude. *Id.* at 760. Guillermo has alleged neither.

But, even if the instruction is reviewed by this court, Guillermo’s argument fails when looking at the plain language of the court’s instruction. The court allowed the jury to consider, with relation to the Communicating with a Minor for Immoral Purposes charge, the messages to determine whether the “live video chat [...] was of a sexual nature.” CP 258. Then, the court clarified that the messages are only to be considered to “determin[e] whether the alleged indecent exposure was done for the purposes of sexual gratification. You may not consider it for any other purpose.” CP 258. The plain language of the instruction allows the evidence to be considered only for the aggravating circumstance, not Guillermo’s intent in the exposure. There was no error in the limiting instruction.

2. Any admission of the messages, if error, was harmless where the evidence proved Guillermo exposed his genitals to C.J. to show her that he was masturbating.

Even if this Court agrees with Guillermo's argument and finds that the trial court abused its discretion in admitting his messages, any error was harmless. Erroneous admission of ER 404(b) evidence is analyzed under the nonconstitutional harmless error standard. *State v. Gower*, 179 Wn. 2d 851, 854, 321 P.3d 1178 (2014). Reviewing courts inquire whether there is a reasonable probability that, without the evidence, the outcome of the trial would have been materially affected. *Id.* Here, absent evidence of Guillermo's subsequent messages to C.J., any reasonable jury still would have found that Guillermo exposed himself to C.J. with sexual motivation.

The finding of sexual motivation required the jury to find that "one of the purposes for which the defendant committed the crime was for purposes of sexual gratification." CP 263. Absent evidence of the messages, the evidence still proved that Guillermo video chatted C.J. around midnight. During the call, he was only wearing his underwear. Then, at the end of the call, Guillermo turned the camera around, showing C.J. his exposed, erect penis. Guillermo was moving his hand "back and forth" on his exposed, erect penis, actively masturbating. This evidence provides a sufficient basis for any rational finder of fact to conclude that

Guillermo's indecent exposure act was done for purposes of sexual gratification.

The facts supporting the sexual motivation aggravator in this case are similar to the facts supporting the sexual motivation aggravator in *McCracken*. In *McCracken*, the defendant committed residential burglary, and while inside the house, masturbated in the homeowner's bed. *State v. McCracken*, No. 47277-5-II, 2016 WL 3702672 at *1 (Wash. Ct. App. July 6, 2016).⁵ This Court held that sufficient evidence proved the sexual motivation aggravator, where the defendant remained inside the home to masturbate on the homeowner's bed. *Id.* at *4. Essentially, the act of masturbation alone supported the sexual motivation aggravator. In this case, Guillermo did not just expose himself to C.J., which alone would have constituted Indecent Exposure. Nor did he masturbate while on a video call with C.J. without showing her what he was doing. Instead, Guillermo chose to show C.J. his genitals for the purpose of showing her that he was masturbating.

Under these facts, even without evidence of the messages, any reasonable jury would find that Guillermo exposed himself to C.J. for purposes of sexual gratification. Any error, if error at all, was harmless.

⁵ Unpublished cases have no precedential value and are not binding on any court. An unpublished case filed after March 1, 2013 may be cited as non-binding authority and may be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

B. Guillermo misstates the basis for his charge of Communicating with a Minor for Immoral Purposes.

Guillermo challenges the sufficiency of the evidence supporting his conviction for Communicating with a Minor for Immoral Purposes. Brief of Appellant, 13-16. He alleges that the messages to C.J. cannot be the basis for the charge because the messages, if construed to be for a sexual purpose, discuss sexual conduct that would be legal if performed. Brief of Appellant, 15. While his assertion of the law is correct under *Luther*,⁶ Guillermo misstates the basis for his conviction.

The messages themselves were originally the basis for the State's charge of Communicating with a Minor for Immoral Purposes. See CP 1-2, 195. However, Guillermo's trial counsel made the same argument before the trial court during motions in limine as Guillermo makes in his Opening Brief. RP 36-40, 43-48. Originally the State objected, arguing that the video chat and the messages were a continuing course of conduct. RP 41-42. The court did not initially rule on this motion. RP 47-48.

The next day, the State conceded the error under *State v. Luther*, 65 Wn. App. 424, 830 P.2d 674 (1992) and *State v. Pietrzak*, 100 Wn. App. 291, 997 P.2d 947 (2000). The State then offered an alternative theory: that the video chat constituted both Communicating with a Minor for Immoral

⁶ *State v. Luther*, 65 Wn. App. 424, 830 P.2d 674 (1992).

Purposes and Indecent Exposure with sexual motivation. RP 63-64. The State sought introduction of the messages under ER 404(b), as discussed *supra*. The theory that the video call constituted the basis for both charges was the theory throughout the entire trial.

After the jury convicted Guillermo of both charges, the State conceded at sentencing that the two convictions stemmed from the same criminal conduct. 04/19/19 RP 6. The court found the same. 04/19/19 RP 6. Findings of “same criminal conduct” at sentencing affects the standard range sentence by altering a defendant’s offender score. RCW 9.94A.525(5)(a)(i). Guillermo does not challenge his offender score, which is a “nine plus.” CP 362. There was no error.

Even if this Court construes Guillermo’s challenge to the sufficiency of the evidence to reach the facts that actually supported his conviction, his argument fails. Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. Smith*, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). Evidence is sufficient to support a conviction when, viewing the evidence in the light most favorable to the State, any rational fact finder could find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Cannon*, 120 Wn. App. 86,

90, 84 P.3d 283 (2004). Sufficiency of the evidence is reviewed de novo. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265-66, 401 P.3d 19 (2017). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are considered equally reliable. *Id.* at 201; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In considering the evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Deference must be given to the trier of fact who resolves conflicting testimony and evaluates the credibility of witnesses and the persuasiveness of the evidence presented. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014); *State v. Martinez*, 123 Wn. App. 841, 845, 99 P.3d 418 (2004). Therefore, when the State has produced sufficient evidence of all the elements of a crime, the decision of the trier of fact should be upheld. Finally, when a defendant fails to challenge jury instructions, the jury instructions become the law of the case. *State v. Perez-Cervantes*, 141 Wn.2d 468, 476, 6 P.3d 1160 (2000). Here, Guillermo has not assigned error to any jury instructions in this appeal.

The jury was instructed on Communicating with a Minor for Immoral Purposes as follows:

To convict the defendant of the crime of Communicating with a Minor for Immoral Purposes as charged in Count I, each of the following elements must be proved beyond a reasonable doubt:

- (1) That on or between June 1, 2017 and July 31, 2017, the defendant communicated with [C.J.] for immoral purposes of sexual nature;
- (2) [C.J.] was a minor;
- (3) That this act occurred in the State of Washington; and
- (4) That the defendant sent [C.J.] an electronic communication for immoral purposes. [...]

CP 252. The jury was instructed that communication can be “by words or conduct.” CP 250. Sufficient evidence proved each of the above elements.

C.J. was born on December 6, 2000. RP 77, 135. She was seventeen in June and July of 2017, making her a minor: a person under the age of eighteen. RP 135. Both C.J. and Guillermo live in Washington State. RP 77, 82. C.J. lived in Lakewood, Washington during June and July 2017. RP 81-82. During the video chat, Guillermo contacted C.J. through a cell phone on a program called Facebook Messenger. RP 190. C.J. testified that her phone only worked through internet by accessing Wi-Fi at that time. RP 183-84. Any reasonable jury would find that that communication was electronic.

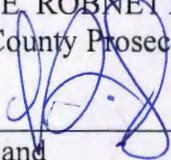
Finally, the evidence proved beyond a reasonable doubt that Guillermo video chatted C.J. and exposed himself to her while masturbating, as discussed at length *supra*. Any reasonable jury would find beyond a reasonable doubt that a person masturbating on camera through a video chat, was acting for a sexual purpose. Sufficient evidence proved that Guillermo Communicated with C.J. through electronic means for an immoral purpose. There was no error.

V. CONCLUSION

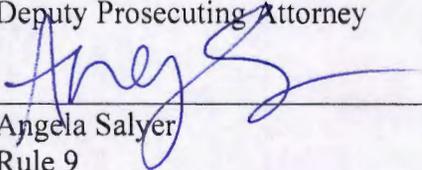
For the above stated reasons, the State requests this Court affirm Guillermo's convictions.

RESPECTFULLY SUBMITTED this 11th day of March, 2020.

MARY E. ROBNETT
Pierce County Prosecuting Attorney



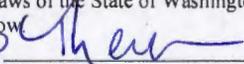
Robin Sand
WSB# 47838
Deputy Prosecuting Attorney



Angela Salyer
Rule 9

Certificate of Service:

The undersigned certifies that on this day she delivered by E-file or U.S. mail to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below

3-12-20 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

March 12, 2020 - 9:27 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53269-7
Appellate Court Case Title: State of Washington, Respondent v Mingo Guillermo, Appellant
Superior Court Case Number: 18-1-02686-7

The following documents have been uploaded:

- 532697_Briefs_20200312092632D2938951_9061.pdf
This File Contains:
Briefs - Respondents
The Original File Name was GUILLERMO RESPONSE BRIEF.pdf

A copy of the uploaded files will be sent to:

- Liseellnerlaw@comcast.net
- babbitts@seattleu.edu
- kristie.barham@piercecountywa.gov
- valerie.liseellner@gmail.com

Comments:

Sender Name: Therese Kahn - Email: tnichol@co.pierce.wa.us

Filing on Behalf of: Robin Khou Sand - Email: robin.sand@piercecountywa.gov (Alternate Email: PCpatcecf@piercecountywa.gov)

Address:
930 Tacoma Ave S, Rm 946
Tacoma, WA, 98402
Phone: (253) 798-7400

Note: The Filing Id is 20200312092632D2938951