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Division III
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NO. 33988-2-III

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

STATE OF WASHINGTON,

Respondent,

v.

NICOLAS MENDOZA VERA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CHELAN COUNTY

The Honorable Alicia H. Nakata, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE INFORMATION FAILED TO CONVEY THE ESSENTIAL ELEMENT OF INTENT TO HARM THE HEALTH, SAFETY OR WELFARE OF A CHILD.

An information charging a criminal offense must fairly convey to the accused all the essential elements of that offense. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). The offense of luring includes, as an essential element, the intent to harm the health, safety, or welfare of a child. State v. Homan, 191 Wn. App. 759, 777, 364 P.3d 839 (2015). The State argues this element need not be included in the information or, alternatively, it is sufficiently implied by the language “unlawfully and feloniously attempt to lure.” Brief of Respondent at 6-7. These arguments should be rejected.

The authority cited by the State does not support its claim that, in this case, the mens rea for the offense need not be stated in the information. The State relies on State v. Hopper, 118 Wn.2d 151, 158, 822 P.2d 775 (1992), holding that the word “assault” impliedly includes an element of knowledge. Brief of Respondent at 4. This holding has little bearing on this case. In Hopper, the court concluded that the common understanding of the word assault does not refer to an unknowing or accidental act. Hopper, 118 Wn.2d at 158. At issue in this case is not merely the existence of a knowing or intentional act, but whether Mendoza Vera possessed the specific intent required by law to accomplish the criminal offense of luring.

If the missing element in this case were merely the question of an intentional act, Hopper might be applicable. But it is not. A person may attract a child's attention and compliance with good or bad intentions. Homan, 191 Wn. App. at 769-70. The Homan court pointed out that, without the intent to harm a child element, the statute would criminalize the following innocent conduct:

(1) political speech, where a student invites minors or developmentally disabled people to his or her house to discuss school district policies with an enticement of cupcakes; (2) a statement made in an attempt at humor by a student comedian at a talent show; (3) a genuine offer of help, where a good Samaritan offers to drive an injured child to the hospital for aid; (4) statements misunderstood as orders, where a school bus driver would be in violation for telling a child to "Hop in!" absent parental consent; and (5) an invitation from one child to another to play inside his or her home. . . . (1) an offer of help directing a lost child to an administrative office with the enticement of hot chocolate once they arrive, (2) a retail clerk asking a wandering child to come inside her store to play with the latest toys on sale, (3) a responsible person directing a bullied developmentally disabled person to a safe place and telling the person that he could watch his favorite movie until his guardian arrived, and (4) a librarian directing a minor patron to take the elevator to a different floor of the library to locate a book the minor is excited about reading.

Homan, 191 Wn. App. at 769-70. Under Homan, and with good reason, these intentional acts of luring are not crimes. The crime requires the additional element that the person intend to harm the health, safety, or welfare of the child. Id. at 777.

Assuming, under Hopper, that the information impliedly includes the element of an intentional act of luring, that does not resolve the issue raised in Mendoza Vera's appeal. The information still does not allege the specific criminal intent to cause harm to a child's health, safety, or welfare.

The State also relies on State v. Tunney, 129 Wn.2d 336, 340-41, 917 P.2d 95 (1996), where the court built on the Hopper precedent to find the information sufficiently implied the element that the defendant knew the victim was a police officer. Brief of Respondent at 4. In Tunney, the court held the implied knowledge for the assault included not just the act of assault but the result, which the information clearly described as an assault on a police officer. 129 Wn.2d at 340-41. The information in Tunney referred to the victim's status as a police officer three times. Id. at 341. The court held this was sufficient to give notice that the defendant's knowledge of that status was a required element. Id. Tunney stands for the proposition that when the intent or knowledge pertaining to the act itself is fairly implied from the information, then the intent or knowledge regarding the result of that act is also fairly implied.

Tunney does not apply to this case. No harm was caused to the child's health, safety, or welfare. And such harm was not mentioned in the information. In Tunney, the fact (that the victim was a police officer) was in the information; it merely failed to mention knowledge of that fact. 129

Wn.2d at 340-41. By contrast, here, the circumstance of harm to the child was not mentioned in any way. CP 8-9. Therefore, the intent to cause such harm cannot be fairly implied under Tunney.

The State also argues that, because the court construed the statute as implying an element of intent to harm a child, the mere use of the word luring in the information must necessarily also convey that requirement to the average person. Brief of Respondent at 7. The State fails to appreciate the difference between an appellate court analyzing the constitutionality of a statute and an average lay citizen reading a criminal charging document. This argument should be rejected.

In Homan, the court concluded that the luring statute, as written, was unconstitutionally overbroad. 191 Wn. App. at 775. To cure the overbreadth, the court added an implied element of criminal intent to harm the health, safety, or welfare of the child to avoid rendering the entire statute unconstitutional. Id. at 775-78. If the very word “luring” inherently conveyed the requirement of criminal intent, the court would not have needed to add that element to avoid striking down the statute as unconstitutional.

In other contexts, courts have found the information insufficient when it omitted an implied element added by judicial construction. For example, in State v. Sutherland, 104 Wn. App. 122, 132, 15 P.3d 1051 (2001), the court determined the felony offense of hit and run must

necessarily include the non-statutory element of knowledge. Id. at 130-31 (discussing State v. Bourne, 90 Wn. App. 963, 969, 954 P.2d 366 (1998) and State v. Martin, 73 Wn.2d 616, 625, 440 P.2d 429 (1968)). After concluding that knowledge was an implied element, the court determined the information was defective because it did not mention it. Sutherland, 104 Wn. App. at 132. The court declared, “[N]o one of common understanding reading the information would know that knowledge of an accident is an element of the charge of felony hit and run.” Id.

Similarly, knowledge that the property was stolen is a judicially implied, non-statutory element of possession of stolen property. State v. Moavenzadeh, 135 Wn.2d 359, 362, 956 P.2d 1097 (1998). But the failure to include it in the information renders the information defective. Id. at 363-64. The court held there was no reason anyone reading the information would understand that knowledge that the property is stolen is an element of first-degree possession of stolen property. Id. The court, therefore, reversed the conviction. Id. at 364.

Even if, as the State claims, the word “luring” implies an intentional act, the information does not include the specific criminal intent to harm a child. Because the information does not mention this essential element in any way, reversal is required.

2. THE FACTS FAIL TO SHOW THE CORPUS DELICTI BECAUSE MENDOZA VERA'S STATEMENT IS THE ONLY SIGN OF AN INTENTIONAL ACT OF LURING.

The State lists several facts that it argues show the corpus delicti for luring. Brief of Respondent at 10-11. But none of these facts indicates any act on Mendoza Vera's part that could be construed as an order or attempt to lure the child. Asking the mother a question about the child does not show any luring or commanding action on his part. Neither does returning in the direction of the park with the child on his shoulders. The apparent reactions of others such as the child, the mother, and others in his house have no bearing on whether Mendoza Vera engaged in any luring conduct. None of those persons witnessed any luring conduct by Mendoza Vera. With no evidence that he lured her, or that he did so for any improper purpose, the evidence is insufficient to support admission of his statements under the corpus delicti rule. Without his statements, the evidence is further insufficient to support a conviction.

3. THE CASES CITED BY THE STATE DO NOT SUPPORT IMPOSING AN EXCEPTIONAL SENTENCE FOR THE FIRST TIME ON A CRR 7.8 MOTION.

The State argues none of the cases cited in Mendoza Vera's brief on this issue addressed the context of a CrR 7.8 motion. Brief of Respondent at 13. Mendoza Vera is compelled to point out that neither State v. Toney, 149 Wn. App. 787, 205 P.3d 944 (2009), nor State v. Harvey, 109 Wn. App. 157,

34 P.3d 850 (2001), cited by the State, addresses a CrR 7.8 motion either. This procedural posture appears to be a new question.

Cases in which community custody is erroneously imposed have come up in other procedural postures. In those cases, courts have simply stricken the erroneous community custody term, rather than remand for resentencing. See, e.g., State v. Wilcox, 196 Wn. App. 206, 213, 383 P.3d 549 (2016); In re Sentence of Jones, 129 Wn. App. 626, 120 P.3d 84 (2005).¹

The trial court in Wilcox erroneously imposed a three-year community custody term because it erroneously deemed the conviction for failure to register as a sex offender to be a sex offense. 196 Wn. App. at 213. On direct appeal, this Court held the offense was not a sex offense and a subsequent legislative amendment did not apply retroactively to make it one. Id. at 211-13. As a remedy, the court opted to “remand this matter for the trial court to strike the sex offender registration requirement and the three-year community custody term, and to impose the proper term of community

¹ See also State v. Campos, noted at 199 Wn. App. 1038, 2017 WL 2704144 (2017) (unpublished) (“We remand this appeal to the trial court to strike the requirement of community custody.”); State v. Duenas, noted at 199 Wn. App. 1027, 2017 WL 2561589 (2017) (unpublished) (holding trial court imposed a sentence exceeding the statutory maximum and remanding “for the trial court to amend the community custody term”); State v. Oster, noted at 185 Wn. App. 1031, 2015 WL 249765, review denied, 184 Wn.2d 1021 (2015) (unpublished) (“The parties agree that the trial court erred by imposing a term of community custody. We agree and remand the case with directions to strike the term of community custody.”). These unpublished decisions, cited under GR 14.1, have no precedential value, are not binding on any court, and are cited only for such persuasive value as the court deems appropriate.

custody.” Id. at 213. The court did not remand for a full resentencing. It remanded solely to fix the erroneous term of community custody. Id.

The same result ensued when the erroneous term of community custody was raised on a post-sentence review petition in Jones, 129 Wn. App. 626. Because the trial court exceeded its statutory authority in imposing the community custody terms, the court concluded, “We therefore remand these cases with directions that the superior court strike the terms of community custody from the sentences.” Id. at 628.

Mendoza Vera asks this Court to require the same remedy in this case, and remand for the court to reinstate the original sentence but strike the unlawful term of community custody.

4. THE AGGRAVATING FACTOR OF A PARTICULARLY VULNERABLE VICTIM IS PARTICULARLY VAGUE WHEN THE OFFENSE CAN ONLY BE COMMITTED AGAINST CHILDREN UNDER THE AGE OF 16.

The State argues it is common sense that age may play a role in vulnerability. Brief of Respondent at 15. But this is precisely why the particularly vulnerable victim aggravator is vague in the context of luring. The offense of luring can only be committed against persons who are either (a) minors under the age of 16 or (b) persons with developmental disabilities. RCW 9A.40.090. Thus, all victims of luring could be viewed as particularly vulnerable. If most luring victims are near in age to K.P., then she is not

particularly vulnerable as compared to typical luring victims. By contrast, if many or most luring victims are approaching age 16, then K.P., at age 4, could be viewed as particularly vulnerable based on her age. But the jury has no way to assess whether this is so.

The term “vulnerable” was held to be unconstitutionally vague in the context of a condition of sentence prohibiting contact with “physically or mentally vulnerable individuals.” State v. Johnson, 180 Wn. App. 318, 325, 327 P.3d 704 (2014). The court held the term “vulnerable” was “inherently subjective” and, therefore, failed to provide adequate safeguards against arbitrary enforcement. Id. at 327-28. The court remanded the case for the trial court to either clarify the meaning of “vulnerable” or strike the condition of sentence prohibiting contact with vulnerable individuals. Id. at 329.

The term is equally vague when used as an aggravating factor in sentencing. Mendoza Vera therefore asks this Court to reverse the exceptional sentence.

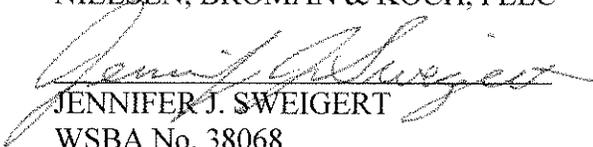
B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Mendoza Vera asks this Court to reverse his conviction or, alternatively, reverse the exceptional prison term imposed in the amended judgment and sentence.

DATED this 13th day of November, 2017.

Respectfully submitted,

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