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APR 25, 2017

Court of Appeals
Division III
State of Washington

No. 340911

WASHINGTON STATE COURT OF APPEALS
DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

SCOTT R. WATSON,

Appellant.

REPLY BRIEF OF APPELLANT

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I. SUMMARY OF REPLY

In its Brief, the State takes the position that certain text messages are strict liability crimes under RCW 9.68A.090 (the “CMIP statute”). This is incorrect. Additionally, the State ignores the precedent regarding admission of evidence under ER 404(b) and the impact that the trial court’s errors in this case had on the conviction of Scott Watson. Mr. Watson’s conviction should be reversed.

II. REPLY

- a. **The CMIP statute is not a strict liability statute, and there is no evidence of an immoral purpose in this case.**

In its Brief, the State characterizes Mr. Watson’s alleged transmission (by text message) of a picture of a penis as a per se violation of the CMIP statute. (Br. of Resp., p. 12) Under the State’s theory, there can be no purpose for an adult man to send such a photograph to a minor female *other* than an immoral one. But this interpretation of RCW 9.68A.090 contradicts the CMIP statute’s own language and the case law interpreting it.

First, the statute itself only criminalizes the behavior of “a person who communicates with a minor for immoral purposes.” RCW 9.68A.090(1). The communication must serve a purpose of the sender, and that purpose must be immoral. “Purpose” is defined as “something set up

as an object or end to be attained: Intention.” www.merriam-webster.com. By the plain language of the statute, the State must provide evidence beyond a reasonable doubt that the sender had an immoral purpose in communicating with the recipient.

The cases interpreting the CMIP statute have defined “immoral purpose” to mean “sexual misconduct.” State v. Schimmelpfennig, 92 Wn. 2d 95, 102, 549 P.2d 442 (1979). Conduct, and communication about conduct, is “sexual misconduct” if it is otherwise illegal conduct; and it is not “misconduct” if it is otherwise legal conduct. State v. Luther, 65 Wn. App. 424, 830 P.2d 674 (1992).

In this case, there was no conduct implied by the communication in question that was or would have been illegal. Therefore, there was no “sexual misconduct” and, thus, no violation of the CMIP statute.

Over the last 38 years of case law, courts have found CMIP violations when the accused did things like solicit sex from children under ten years old or cause a minor to engage in sexual acts in exchange for housing (see Schimmelpfennig, at 97; State v. Pietrzak, 100 Wn. App. 291, 997 P.2d 947 (2000)), but did not find CMIP violations when the accused suggested legal conduct or no conduct at all (see Luther, at 425; State v. Danforth, 56 Wn. App. 133, 782 P.2d 1091 (1989)).

Faced with this body of law, the State argues it should be permitted to prosecute thought crimes. Since there is no evidence of *actual* contact or solicitation in this case (in fact, the evidence presented by the State is to the contrary), the State argues that it can prove a CMIP violation by demonstrating the communication in question was intended as part of future, as yet unplanned, conduct that would be illegal if ever performed.

There are three fatal problems with this theory. First, the State absolutely must prove that Scott Watson's "purpose" *at the time he sent the text* was immoral. There is no such evidence in this case. Second, if the future conduct turns out to be legal, it cannot be a CMIP violation. The uncontroverted testimony offered by the State was that no sexual conduct of *any kind* ever occurred and that no sexual *misconduct* was ever intended by Mr. Watson or H.R.B. (CP 18)

Finally, the State's argument that Mr. Watson's text was an "invitation" akin to the conduct in State v. Hosier, 124 Wn. App 696, 103 P.2d 217 (2004), is disingenuous on its face when the State concedes that H.R.B. testified that she and Mr. Watson had an understanding that no illegal conduct would ever occur between them. (CP 18) (Br. of Resp., p. 10) There are additional problems with analogizing to Hosier. The accused in that case maintained close physical access to, if not contact with, his victims. Id. at 702. Mr. Watson was separated from H.R.B. by thousands

of miles. And the defendant in Hosier purposely terrorized the child victims, where Mr. Watson's conversations with H.R.B. were consensual.

The State is using the CMIP statute as a sword independent of the purpose for which it was drafted. Taken in context of the Act within which it appears, the CMIP statute is a tool for the prosecution of crimes related to the sexual exploitation of children, especially child prostitution and pornography. See RCW 9.68A.001; see also Br. of App., 15-16. In the litany of cases cited by Mr. Watson in his opening brief, the accused predated children for their own sexual gratification. (Br. of App., 15-16)

Here, no such facts exist. There was no statutory rape, as the State suggests was the purpose of Mr. Watson's text (Br. of Resp., p. 8), no quid pro quo, no proof of Mr. Watson's gratification in sending the text. There is only the texted picture and the State's desire to punish Mr. Watson.

The State did not meet its burden in this case. Further, the purpose of the CMIP statute is not served by the prosecution of this case. Mr. Watson's conviction should be reversed.

b. The ER 404(b) evidence admitted was far more prejudicial than probative and failed every standard for admission.

"To admit evidence of a person's prior misconduct, the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be

introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.” State v. Vy Thang, 145 Wn. 2d 630, 642, 41 P.3d 1159 (2002). This balancing test must be conducted on the record. State v. Everybodytalksabout, 145 Wn. 2d 456, 465-66, 39 P.2d 1365 (2002).

The State admits the trial court failed to conduct the proper weighing test on the record. (Br. of Resp., p. 19) But if the court had conducted the required balancing test, it would have had to disallow the evidence.

That this evidence was crucially prejudicial is beyond dispute. The State’s entire case, as is carefully described in its Brief, was based upon Mr. Watson’s contacts with H.R.B. before and after the date the offending text was sent. Permitting the jury to hear that Mr. Watson provided H.R.B. with a sex toy *one year after* sending a text message the State contends was sexual in nature could leave the jury with no other impression but that Mr. Watson intended to engage in sexual conduct with H.R.B. Even worse, the jury could only see Mr. Watson as a criminal after learning that he violated a no contact order to deliver the gift. The prejudice is obvious.

The evidence also fails the first prong of the ER 404(b) test because it is not “logically relevant to a material issue before the jury.” State v. Stanton, 68 Wn. App. 855, 861, 845 P.2d 1365 (1993). The State

argues subsequent conduct can be admitted under ER 404. (Br. of Resp., p. 19) But that is not the issue. The problem for the State is that the delivery of the gift bears no relationship to Mr. Watson's "purpose" or intent *at the time he allegedly sent the text message*. It argues the evidence shows Mr. Watson saw H.R.B. "as a sexual object." (Br. of Resp., p. 17) But it has no relation back to one year earlier.

The State told the jury that Mr. Watson is a criminal, as evidenced by his violation of a no contact order, who also had sexual intentions with respect to H.R.B., because he gave her a sex toy. The State wanted to, and did, get the benefit of an inference by the jury that, with those things being true, Mr. Watson had to have had an "immoral purpose" one year earlier as well. This was improper and catastrophic.

III. CONCLUSION

For the foregoing reasons, Mr. Watson requests that his conviction be reversed.

DATED this 25th day of May, 2017.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington as follows: That on May 25, 2017, I served the foregoing document on the counsel/party shown below by causing a true and correct copy of said document to be delivered at the address shown below in the manner(s) indicated:

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DATED at Spokane, Washington, on May 25, 2017.

Cheryl Hansen

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Court of Appeals Case Number: 34091-1

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Reply Brief of Appellant

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