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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 35362-1-III
(consolidated with No. 35363-0-III)

STATE OF WASHINGTON, Appellant,

v.

BRADLEY LEITH MERSON, Respondent.

APPELLANT'S BRIEF

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I. INTRODUCTION

In these consolidated cases, the State tried Bradley Merson for various sex crimes arising from allegations that he seduced two underage girls, K.F. and J.M. The trials were severed to address ER 404(b) concerns. In the course of the investigation, police recovered a cell phone that Merson had given K.F. to communicate with him. Police searched the phone with the apparent consent of K.F.'s parents, and messages found on the phone provided the basis for the State to charge Merson with communicating with a minor for immoral purposes. Merson moved prior to trial to exclude the contents of the phone, on the grounds that Merson was the owner and did not consent to the warrantless search. The trial court denied the motion, finding that Merson voluntarily abandoned his expectation of privacy in the phone by giving it to K.F. Following his conviction, Merson now appeals and asserts that the trial court erred in denying his motion to suppress and allowing the State to introduce contents of the cell phone obtained as the result of a warrantless search, and further alleges that the electronic messages introduced at trial were insufficient to prove the charge of communicating with a minor for immoral purposes, and that the trial court erred in imposing medical costs and costs of incarceration after finding he lacked the ability to pay more than the mandatory legal financial obligations ("LFOs").

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The trial court erred in denying Merson's motion to suppress the contents of the Samsung phone Merson gave K.F. to use in communicating with him.

ASSIGNMENT OF ERROR NO. 2: The evidence was insufficient to establish the charge of communicating with a minor for immoral purposes as a matter of law.

ASSIGNMENT OF ERROR NO. 3: The trial court erred in imposing medical costs and costs of incarceration after finding only mandatory LFOs were appropriate in light of Merson's financial circumstances.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether Merson abandoned his privacy interest in the cell phone that he purchased and paid for service when he gave it to K.F. to communicate with him.

ISSUE NO. 2: Whether the text messages introduced at trial contained content about sexual misconduct sufficient to sustain the conviction.

ISSUE NO. 3: Whether the text messages introduced at trial concerned activity that would be legal if performed.

ISSUE NO. 4: Whether the trial court implicitly found that Merson lacked the ability to pay more than the mandatory LFOs before it imposed discretionary medical costs and costs of incarceration.

IV. STATEMENT OF THE CASE

The State charged Merson with a variety of offenses arising from sexual relationships with K.F. and J.M., who were both underage at the time. CP 64, 269. Because most of the facts are not relevant to the issues on appeal, they will be only briefly summarized here. Merson met both K.F. and J.M. through a social networking app called Whisper. I RP 128-29, 139-40. In both cases, the relationship developed through chats on Whisper, phone calls, and text messages, eventually leading to meeting in person. III RP 403-04, 426-28; VI RP 925, 943. As the relationships progressed, they became romantic, and eventually led to sexual contact. III RP 42, 415-16, 417, 422-26, 430-33; VI RP 929-38. Both K.F. and J.M. testified against Merson in the respective trials, leading to his convictions for third degree rape of a child, communicating with a minor for immoral purposes, and possessing a controlled substance (as to K.F.) along with third degree child molestation, third degree rape of a child, sexual exploitation of a minor, and second degree depictions of a minor engaged in sexually explicit conduct (as to J.M.). CP 64, 109-112, 269,

316-18. Only the conviction for communicating with a minor for immoral purposes is at issue in this appeal.

The communicating with a minor for immoral purposes charge was based upon text messages Merson exchanged with K.F. in the course of their relationship. II RP 266. Pretrial, the court presided over hearings to address the admissibility of various pieces of evidence, including the text messages at issue. I RP 6-7. Sergeant Chad Janis, the lead investigator, testified that he received written consent from K.F.'s parents to search her iPhone, which was owned by her family. I RP 29-30. However, Merson had given K.F. a Samsung phone to use to communicate with him. I RP 36, 145-46. Janis did not obtain written consent to search that phone, although he said K.F. knew the phone would be searched and did not object. I RP 30, 32. He also admitted that police did not attempt to ascertain ownership of the phone through the carrier, although another police officer later testified at trial that the contract associated with the phone was under Merson's name. I RP 108, III RP 396.

Police investigators performed forensic extractions on the Samsung phone and recovered text messages between Merson and K.F. I RP 116, 125, 146, II RP 325, 328, CP 322. The State ultimately read some of those messages into the record at trial, along with a series of

messages recovered from K.F.'s iPhone, to prove the communicating with a minor for immoral purposes charge. III RP 405, 409, 410-16 (iPhone messages, CP 322, III RP 323), 417-26 (Samsung messages, CP 322, III RP 325, 328).

At the pretrial hearing, Merson argued that K.F.'s parents lacked authority to consent to the search of the iPhone because they had no interest in the phone. I RP 190-91. He also contended that the phone belonged to Merson, not to K.F. I RP 202. The State argued that Merson abandoned his interest in the phone by giving it to K.F., and K.F.'s parents could consent to the search on her behalf as her guardians. I RP 193, 198. Relying primarily on *State v. Granville*, 423 S.W.3d 399 (Ct. App. Tex. 2014), a case that considered a warrantless search of a cell phone under a Fourth Amendment "reasonable expectation of privacy" analysis, rather than an article I, section 7 "private affairs" analysis, the trial court concluded that Merson abandoned his interest in the cell phone when he gave it to K.F. and that K.F.'s parents could consent to the search on her behalf. II RP 205-13.

Following his convictions, the trial court sentenced Merson to a standard range sentence of 41 months on the case involving K.F. and to an exceptional sentence of 180 months on the case involving J.M., with the

sentences in both cases running concurrently. CP 175, 177-78, 371-72. During the sentencing for K.F.'s case, which proceeded first, Merson asked the court to waive all discretionary LFOs, pointing out that he was facing a minimum sentence of 7 years in the other case. VII RP 1199. The court heard evidence that Merson had recently gone through a divorce and lost a home through foreclosure, resulting in his loss of all assets. VII RP 1204. It also heard that Merson had child support obligations and that while he had employment history in skilled labor as a power machinist, due to the publicity associated with his case, he would not be able to be rehired in Yakima. VII RP 1205. The court did not expressly find Merson able or unable to pay discretionary LFOs, but stated:

> On 4(d)(3), restitution, costs, assessments and fines, given your financial situation, I'm only going to impose the mandatory of 500 for a crime penalty assessment, 200 for the criminal filing fee, and 100 for the DNA cost. I'm going to strike through the $600 for court-appointed counsel. It's no reflection on the excellent job Mr. Dold did for you in defending you, it's just to save you some money. I'm also going to strike through the $250 jury fee. For a total of $800 under 4(d)(3).
>
> I'm going to cap the costs of incarceration at $250. I'm going to -- under 4(d)(4) I'm going to cap the costs of medical care under 4(d)(5) at $1,000. No more than that.

VII RP 1208.

Thereafter, during the sentencing in the case involving J.M., the trial court stated that it would waive discretionary LFOs "as in the previous case." VII RP 1229. But in this sentencing, the trial court waived all medical costs and costs of incarceration. VII RP 1230.

Merson now timely appeals, and both cases were consolidated for review. CP 188, 382, *Letter from Court of Appeals dated July 13, 2017.* Merson has been found indigent on appeal. CP 206, 307.

V. ARGUMENT

On appeal, Merson alleges that trial errors affect his conviction for communicating with a minor for immoral purposes, which should be reversed. As a result of these errors, as well as errors in imposing discretionary LFOs after implicitly finding that Merson lacked the ability to pay them, both cases should be remanded for resentencing.

1. Merson's motion to suppress the text messages recovered from a warrantless search of the Samsung phone he gave to K.F. to communicate with him should have been granted because the State failed to prove he abandoned his privacy interest in the phone.

In reviewing the denial of a defendant's motion to suppress evidence, the Court of Appeals determines whether the factual findings are supported by substantial evidence and reviews de novo the trial court's conclusions of law. *State v. Aase*, 121 Wn. App. 558, 564, 89 P.3d 721 (2004). Unchallenged findings are treated as verities on appeal so long as they are supported by substantial evidence. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Here, the trial court did not enter findings of fact and conclusions of law in support of its ruling as required under CrR 3.6(b). Thus, remand may be appropriate for the trial court to enter findings and conclusions. However, the failure to enter written findings and conclusions may be harmless when the oral opinion is so clear and comprehensive that written findings would be a mere formality. *State v. Smith*, 68 Wn. App. 201, 208, 842 P.2d 494 (1992). Here, the trial court gave an extensive oral ruling describing the case law it reviewed and the view of the facts it adopted in concluding that Merson abandoned his privacy interest in the

cell phone by giving it to K.F. II RP 204-13. Thus, on this record, the court may find the absence of written findings and conclusions to be harmless.

Article 1, section 7 of the Washington Constitution and the Fourth Amendment to the US Constitution establish that warrantless searches of property are *per se* unreasonable, unless the State proves that the search falls within an exception to the warrant requirement. *State v. Link*, 136 Wn. App. 685, 695, 150 P.3d 610, *review denied*, 160 Wn.2d 1025 (2007). The totality of the circumstances said to justify a warrantless search are closely scrutinized. *State v. Bean*, 89 Wn.2d 467, 472, 573 P.2d 1102 (1978). The State bears the burden of proving the exception. *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996).

Consent is one of the established exceptions. *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). "Consent to a search establishes the validity of that search if the person giving consent has the authority to so consent." *State v. Leach*, 113 Wn.2d 735, 738, 782 P.2d 1035 (1989) (*quoting State v. Mathe*, 102 Wn.2d 537, 541, 688 P.2d 859 (1984)). Actual authority "requires a sufficient relationship to or 'mutual use of the property by persons generally having joint access or control for most purposes.'" *State v. Rison*, 116 Wn. App. 955, 961, 69 P.3d 362 (2003),

review denied, 151 Wn.2d 1008 (2004) (*quoting U.S. v. Matlock*, 415 U.S. 164, 171 & n. 7, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974)). Because consent operates as a kind of waiver of a constitutional right, only the person who possessed the right may waive it. *State v. Morse*, 156 Wn.2d 1, 8, 123 P.3d 832 (2005).

Here, the State alleged that police could search the Samsung phone without a warrant because they obtained consent to the search from K.F.'s parents. II RP 189, 193. It was undisputed that the Samsung phone was not theirs; Merson bought it, and the contract associated with it was in his name. I RP 146, II RP 396. However, the trial court concluded that Merson abandoned his interest in the phone by giving it to K.F. II RP 209-10.

When property is abandoned, the owner loses ownership interest in it, and therefore also relinquishes any expectation of privacy in the property. *State v. Kealey*, 80 Wn. App. 162, 171-72, 907 P.2d 319 (1995), *review denied*, 129 Wn.2d 1021 (1996). As such, no warrant is required to search voluntarily abandoned property, under both the Fourth Amendment and article 1, section 7 of the Washington Constitution. *State v. Evans*, 159 Wn.2d 402, 407-08, 150 P.3d 105 (2007). Whether property is voluntarily abandoned depends upon the owner's intent, words spoken,

acts done, and other objective facts and circumstances at the time of separation from the property. *See id.* at 408. Although normally article 1, section 7 provides broader protection of individual privacy than the Fourth Amendment, in the context of abandoned property, the Washington Supreme Court has adopted a "reasonable expectation of privacy" analysis rather than the broader "private affairs" analysis. *See id.* at 408-09.

The test to determine whether a reasonable expectation of privacy exists requires the owner to show (1) he exhibited a subjective expectation of privacy by seeking to preserve it as private, and (2) society recognizes that expectation as reasonable. *Id.* at 409. Denial of ownership does not in itself amount to an abandonment of one's privacy interest. *Id.* at 412.

With respect to cell phones, both State and federal courts have recognized that significant privacy interests attach to their use and possession. *See Riley v. California*, __ U.S. __, 134 S. Ct. 2473, 2489-91, 189 L. Ed. 2d 430 (2014) (describing how type and quantity of information found on a cell phone far exceeds what would typically be found in the search of a home; *State v. Samalia*, 186 Wn.2d 262, 268, 375 P.3d 1082 (2016). These privacy interests extend to messages sent and received on a cell phone, which are equivalent to sealed letters, phone calls, and other forms of communication that have traditionally received

strong constitutional protection. *State v. Hinton*, 179 Wn.2d 862, 869-70, 319 P.3d 9 (2014). Moreover, the privacy interest in the text message is not lost after it is sent, simply because the sender has no control over the receiving device. *Id.* at 873. "Just as subjecting a letter to potential interception while in transit does not extinguish a sender's privacy interest in its contents, neither does subjecting a text communication to the possibility of exposure on someone else's phone." *Id.*

Here, police searched the phone Merson gave to K.F. to retrieve the messages they sent to each other. The trial court's oral ruling focused on Merson's lack of physical control over the phone, without acknowledging his interest in the privacy of the messages it contained under *Hinton*. In *Hinton*, the fact that a third-party intercepted the phone messages by obtaining possession of the phone did not destroy Hinton's privacy interest in the messages. 179 Wn.2d at 873-74. Similarly here, even though Merson lost immediate control over the phone when he gave it to K.F., his lack of physical control over the phone does not diminish his expectation of privacy in the messages sent to it.

But even cell phones and the vast information they contain can be abandoned, subjecting the owner to the risk that its contents could be voluntarily exposed to anybody who may come across it. *Samalia*, 186

Wn.2d at 276. In *Samalia*, the defendant was driving a stolen car and ran away when stopped by police, employing no security measures to protect the phone. *Id.* at 276-77. Throwing away items to prevent the police from finding them is a classic example of abandonment; by contrast, when the defendant exhibits an intent to recover the property, it is not abandoned. *Id.* at 277-78.

The circumstances present in *Samalia* are distinctly different from the circumstances present here, which are more comparable to *Hinton*. In its ruling, the trial court cited a conversation between Merson and K.F. discussing what would happen if K.F.'s parents recovered the phone and that Merson would deny all involvement as evidence that Merson lacked a protectible interest in the phone. II RP 210-11. But to the contrary, the conversation anticipates a breach of privacy if the phone were intercepted, not a willing acceptance to expose the contents of the phone to others. *See* II RP 213-14 (argument of defense counsel about expectations concerning use and possession of phone). As in *Hinton*, the fact that the item could be stolen or intercepted by another, resulting in the exposure of private communications, is not equivalent to actually leaving the item somewhere that manifests acceptance that anybody may find it and look in it, as was the case in *Samalia.*

Here, Merson intended for K.F. to possess the phone to communicate with him, precisely so that those communications could remain private. At no point did he throw the phone away or agree to get rid of it; he clearly intended that the phone should remain in K.F.'s possession and should be used for a specific purpose, which reflects his continued interest in and dominion over the phone. Under these facts, the trial court's conclusion that Merson abandoned his privacy interest in the phone is erroneous. Accordingly, the finding does not support the conclusion that the warrantless search was lawful and the evidence admissible at trial, and that ruling should be reversed.

Moreover, the error was not harmless. An error that admits evidence obtained in violation of a defendant's constitutional rights is presumed to be prejudicial, unless the State demonstrates beyond a reasonable doubt that the error is harmless. *State v. Finch*, 137 Wn.2d 792, 859, 975 P.2d 967 (1999). When the State would have "essentially no evidence" without the evidence improperly admitted, the error is not harmless. *State v. Smith*, 80 Wn. App. 535, 543, 910 P.2d 508, *review granted and remanded on other grounds*, 129 Wn.2d 1022, 908 P.2d 916 (1996). Here, the text messages obtained from the Samsung phone comprised a substantial portion of the State's case against Merson for communicating with a minor for immoral purposes. Moreover, the

Samsung phone included a specific conversation between Merson and K.F. discussing K.F.'s body, which contained arguably the most explicit conversation between the two about sexual desire. Absent the conversation being introduced, it is reasonably likely the jury would have reached a different verdict, or that the remaining evidence would be insufficient to convict as a matter of law. *See* Section 2, *infra*.

Because the error was not harmless, Merson's conviction for communication with a minor for immoral purposes should be reversed.

2. <u>The text messages introduced at trial fail to prove the charge of communicating with a minor for immoral purposes because they do not contain content seeking to induce K.F. to engage in sexual misconduct.</u>

Merson next challenges the sufficiency of the evidence introduced at trial to prove the charge of communicating with a minor for immoral purposes. In reviewing the sufficiency of the evidence, the court views the evidence in the light most favorable to the state and inquires whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). Reasonable inferences from the evidence are drawn in favor of the State and interpreted against the defendant. *Id.*

To support the charge of communicating with a minor for immoral purposes, the State asked K.F. to read several of the text messages into the record. Those communications were as follows:

> A. Okay. It's "4-17-2015, 5:01. And I still look like a fool when you don't" -- I don't really know what that word was.
>
> "4-17-2015, 5:01. It's whatever you want, babe.
>
> "4-17-2015, 5:02. Text.
>
> "4-17-2015, 5:02. I'm going to come.
>
> "4-17-2015, 5:02. That's what you said last night.
>
> "4-17-2015, 5:02. I'm not going to lay down. I'm not going to relax or anything. I'm going to stay awake and I'm going to see you tonight and I mean it.
>
> "4-17-2015, 5:05. You said that last night.
>
> "4-17-2015, 5:06. I haven't seen you in a long time and I miss you. I will make it tonight, I promise. And forget what I said last night. I'm saying it now. You can doubt it all you want. But I'm going to show up.
>
> "4-17-2015, 5:10. Okay.
>
> "4-17-2015, 5:11. No.
>
> "4-17-2015, 5:12. Why no?
>
> "4-17-2015, 5:15. Driving by in two minutes.
>
> "4-17-2015, 5:15. In the Dodge.
>
> "4-17-2015, 5:16. I'm looking out my window for you.
>
> "4-17-2015, 5:20. Text me when you're at work. I don't want you texting and driving.
>
> "4-17-2015, 5:21. That will probably be the last time.

"4-17-2015, 5:22. What do you mean?

"4-17-2015, 5:22. Don't do this again, please. I can't lose you. I fell asleep. Don't leave me because I fell asleep.

"4-17-2015, 5:27. What happened to being my wife, my mother of my children?

"4-17-2015, 5:27" -- am I allowed to cuss?

Q. (By Ms. McDaniel) Yes, please.

A. Okay. "I fucking loved the thought of that.

"4-17-2015, 5:32. Did that whole conversation mean nothing to you? Because it meant a lot to me.

"4-17-2015, 5:34. It meant something. If it didn't, this would not be painful.

"4-17-2015, 5:34. It would be easy.

"4-17-2015, 5:34. Then don't do it.

"4-17-2015, 5:34. I believe I do love that thought.

"4-17-2015, 5:35. As much as I hate the thought that you're not serious, or don't have time for me.

"4-17-2015, 5:35. Won't make time for me.

"4-17-2015, 5:36. I will. I am. I'll pick you over Addy or Yanas any day. I swear to you. I won't choose them over you. I won't choose anyone over you. You're my top priority. Just please." And then "4-17-2015, 5:39" is blank.

III RP 410-12 (iPhone message).

It's "162015914." It's read. "But where does marriage fit in or does it fit at all?

"4162015914. Sent. Fits in before kids.

"4162015914. Hum.

"4162015915. Read. Still thinking of me?

"4162015915. Sent. Of course.

"4162015916. Read. You, my wife, my mother of my children.

"4162015916. Read. I fucking never thought of that.

"4162015917. Read. The only thing I'd like better would be for life.

"4162015917. Read. Till death?

"4162015918. Read. I love you so much. I don't even know this was possible.

"4162015918. Awe.

"4162015920. Read. Who the fuck ever would have guessed that hanging out drinking one night would have become this."

. . .

A. "4162015920. Sent. I know, right, Hannah" – it looks like they tried to say ha ha.

"4-16-2015, 9:20. Sent. Ha ha. Correction.

"4-16-2015, 9:21. Read. You never know when or where it will happen. And that alone is why I try not to be judgmental.

"4-16-2015, 9:21. Read. I came so close to saying no.

"4-16-2015, 9:22. Read. Because of the age difference?

"4-16-2015, 9:22. Sent. But you said yes, and it turned into something good.

"4-16-2015, 9:23. Read. And you guys had your own alcohol.

"4-16-2015, 9:23. Read. Even though we weren't talking about doing anything but drinking.

"4-16-2015, 9:24. Read. I know what I used to do when I was 16, 17 and 18 too, though."

III RP 415-16 (on iPhone).

"4-21-2015, 4:39. Read. Right here.

"4-21-2015, 4:40. Sent. Can you not screenshot them? Is it too hard? If it is, I'll take them on my phone then send you them through my phone, because I hate taking pics on this one.

"4-21-2015, 4:41. Read. Yes, take them on here.

"4-21-2015, 4:41. Sent. LOL, fine.

"4-21-2015, 4:42. Read." Blank.

"4-21-2015, 4:42. Sent. I hate this camera. It's just a pic of me in this skirt. LOL, enjoy it because I don't wear skirts often.

. . .

"4-21-2015, 4:43. Sent. LOL.

"4-21-2015, 4:50. Read. You're fucking gorgeous. You can wear anything you want and look great.

"4-21-2015, 4:51. Read. And this does look great?

"4-21-2015, 4:54. Sent. Really?

"4-21-2015, 4:57. Read. Yes, baby.

"4-21-2015, 4:57. Read. I don't like it.

"4-21-2015, 4:57. Sent. You sure I look okay?

"4-21-2015, 4:58. Sent. It's for a presentation that's really important and I don't want to look like one of those girls who tried really hard and it's noticeable. I want it to be smooth and effortless.

"4-21-2015, 5.00. Read. I believe it will be.

"4-21-2015, 5.00. Read. Take a couple more, I'll tell you.

"4-21-2015, 5:00. Read. Some side view, et cetera.

"4-21-2015, 5:01. Sent. Okay.

"4-21-2015, 5:05. Read. I'll never look effortless if you keep hiding your face.

"4-21-2015, 5:06. Read. I think it looks good though.

"4-21-2015, 5:14. Sent. Huh?

"4-21-2015, 5:18. Read. I also think we should be married and have children.

"4-21-2015, 5:18. Read." It's blank.

"4-21-2015, 5:18. Read." Is also blank.

"4-21-2015, 5:18. Send. LOL, Brad.

"4-21-2015, 5:18. Read. What?

"4-21-2015, 5:18. Sent. Me too.

"4-21-2015, 5:19. Read." Is also blank.

"4-21-2015, 5:19. Read." Is blank as well.

"4-21-2015, 5:19. Read." Is blank.

"4-21-2015, 5:20. Sent. I hate my knees.

"4-21-2015, 5:23. Read. It's great.

"4-21-2015, 5:23. Read. I like it.

"4-21-2015, 5:23. Read. I want to see your butt in a skirt, though.

"4-21-2015, 5:23. Sent. LOL.

"4-21-2015, 5:24. Read. I want to see what all the boys are going to be staring at.

"4-21-2015, 5:24. Read. LOL.

"4-21-2015, 5:24. Read. Juicy skirt, baby.

"4-21-2015, 5:24. Read. Huh?

"4-21-2015, 5:24. Send. I have no juicy skirt boots.

"4-21-2015, 5:25. Sent. Bootie?

"4-22-2015, 5:25. Read. I'll be the judge of that.

"4-21-2015, 5:25. Read. I'm betting you do.

"4-21-2015, 5:26. Sent. Now my butt isn't big enough. It's a flowy skirt.

"4-21-2015, 5:28. Read. I like your butt.

"4-21-2015, 5:28. Read. It's pretty imperfect.

"4-21-2015, 5:28. Read. I want it.

"4-21-2015, 5:34. Sent. Ha ha, thanks.

"4-21-2015, 5:37. Read. I should be thanking you, baby.

"4-21-2015, 5:38. Sent. Ha ha.

"4-21-2015, 5:38. Read. I'm serious, it could not be more perfect for me.

"4-21-2015, 5:38. Read. It's exactly how I like it.

"4-21-2015, 5:40. Sent. Made for you.

"4-21-2015, 5:43. Read. Yup, you were made for me.

"4-21-2015, 5:43. Read. I could believe that very easy.

"4-21-2015, 5:43. Read. I'm hoping for a soulmate though.

"4-21-2015, 5:44. Send." Is blank.

III RP 418-22 (on Samsung phone).

"4-21-2015, 9:49. Read. I don't even know how to express it.

"4-21-2015, 9:49. Sent. A?

"4 21-2015, 9:52. Read." Is blank.

"4-21-2015, 9:53. Sent." Is blank.

"4-21-2015, 9:53. Read." Is "I've never been so happy to be with a woman ever."

"4-21-2015. Read." Is "Yes."

"4-21-2015 9:54. Sent. Is "Will you spend the rest of your life with me?"

"4-21-2015, 9:55. Read." Is "I would love to."

"4-21-2015, 9:55." Is blank.

"4-21-2015, 9:57. Read." Is "The question is, will you?"

"4-21-2015, 9:57. Read." Is "Because I'm old.

"4-21-2015. Read." Is "You're young and beautiful.

"4-21-2015. Sent. Your age does not matter, because to me age comes with knowledge. Not like how to solve a math equation or write a conclusion, but knowing about life like what you've been told -- been to, for example. I grew up too fast. My parents don't pay attention to me and I don't think they ever did. I learn life lessons quicker than most people my age, so putting it that way, I think we're about the same age."

III RP 422-24 (on Samsung phone).

"4-21-2015, 11:03. Sent. I don't know about that.

"4-21-2015, 11:03. Read. I do.

"4-21-2015, 11:03. Read. Do you think I love you because you're a loser?

"4-21-2015, 11:03. Sent. Thank you, babe.

"4-21-2015, 11:03. Read. You're the best I've ever known.

"4-21-2015, 11:04. Read. And I want you to be mine forever.

"4-21-2015, 11:04. Sent." Is blank.

"4-21-2015, 11:05. Read. Is "I want babies with you.

"4-21-2015, 11:05. Sent. I love babies.

"4-21-2015, 11:05. Sent. I also love the thought of being pregnant.

"4-21-2015, 11:06. Read. I love the thought of you having my babies.

"4-21-2015" -- sorry, I lost my place. "11:07. Read. Are they checking on you yet?

"4-21-2015, 11:07. Sent. Yeah. My dad checked on me not too long ago.

"4-21-2015, 11:08. Read. It's not looking good for tonight then, is it?

"4-21-2015, 11:08. Sent. No.

"4-21-2015, 11:08. Sent. I'm sorry, babe.

"4-21-2015, 11:10. Read." Is blank.

"4-21-2015, 11:10. Read." Is also blank.

"4-21-2015, 11:10. Sent." Is also blank.

"4-21-2015, 11:10. Sent. Is "We'll try tomorrow then?

"4-21-2015, 11:11. Read. Is "What a shitty night.

"4-21-2015, 11:11. Sent. I know, babe.

"4-21-2015, 11:11. Read." Is "Everything is going wrong.

"4-21-2015, 11:13. Sent." Is "I know, babe. It will get better, but I'm very tired.

"4-21-2015, 11:13. Sent." Is "I'm going to bed, babe.

> "4-21-2015, 11:13. Sent." Is "I love you so, so much.
>
> "4-21-2015, 11:14. Read." Is "I love you, too. And "4-22-2015. Sent." Is "Good morning, babe. I just wanted to let you know that I love you and you're pretty much the best thing that's ever happened to me. I've never been as happy as I have been with you. No one else can make me feel this way and I plan to be with you forever."

III RP 424-26 (on Samsung phone).

Under RCW 9.68A.090(b), a person is guilty of a class C felony if the person communicates with a minor for immoral purposes through the sending of an electronic communication. The purpose of the statute is to prohibit "communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct," and the reach of the statutory language is limited to that purpose to prevent intrusion into protected First Amendment activity. *State v. McNallie*, 120 Wn.2d 925, 933, 846 P.2d 1358 (1993); *State v. Scheimmelpfennig*, 92 Wn.2d 95, 102, 594 P.2d 442 (1979); *State v. Aljutily*, 149 Wn. App. 286, 296-97, 202 P.3d 1004, *review denied*, 166 Wn.2d 1026 (2009). However, communication about sexual activity that would be legal if performed is not prohibited by the statute. *See State v. Luther*, 65 Wn. App. 424, 830 P.2d 674 (1992).

Viewing the electronic messages comprising the evidence in this case in the light most favorable to the State, the messages fail to establish

the types of communications that are prohibited by RCW 9.68A.090(b). The messages can be categorized into three types: messages about being in love, getting married, and having children, messages about meeting, and messages discussing the appearance of K.F.'s clothed body. None of these messages promote, solicit, or otherwise encourage K.F. to engage in illegal sexual misconduct.

First, with respect to the messages about love, marriage, and babies, these messages arguably imply sexual intent because sex is necessary to have children with K.F. But the messages also clearly reflect Merson's intent that marriage to K.F. precede childbirth. III RP 415. Marriage is a legal process that requires the participants to be 18 years of age or 17 with parental consent. RCW 26.04.010. Sexual activity with one's spouse is not illegal, nor it is sexual misconduct. To the extent Merson's messages to K.F. about getting married and having babies could be construed as an invitation to engage in sex with him, the invitation is to activity that would be lawful if performed. *See generally Luther*, 65 Wn. App. 424. Thus, these communications do not meet the requirement of "sexual misconduct" necessary for a conviction.

Likewise, concerning the messages about meeting and the messages discussing K.F.'s clothed body, neither of these messages

propose or concern sexual misconduct. Although perhaps inappropriate, it is not illegal for a minor girl to meet with an older man, nor to exchange and discuss fully clothed images. Because the activity discussed in those messages would be lawful if performed, it does not fit within the constitutional core of the statute.

This deficiency is highlighted by comparing the communications involved in the present case with the types of communications held to be sufficient to convict, all of which concern sexually explicit language. In *Luther*, the court consider a minor boy's question to a minor girl about whether she was going to engage in fellatio with him. 65 Wn. App. at 425. In *Schimmelpfennig*, the defendant asked a four-year-old child in explicit terms to engage in various sexual acts with him. 92 Wn.2d at 97. In *Aljutily*, the defendant described various sex acts he desired to perform on a girl he believed to be 13 years old, and also sent her a photograph of his penis, pictures of him masturbating, and links to pornographic videos. 149 Wn.2d at 290-91. In *McNallie*, the defendant asked three minor girls if there was anybody in the area who gave hand jobs, suggested people could earn money for doing them, and handled his penis in front of two of them. 120 Wn.2d at 926-27. And in *Hosier*, the defendant placed children's underwear, on which he had written a message fantasizing about sexual contact with a 7-year-old, on the fence of a playground, and

also left two notes in the neighboring yard of a 13-year-old girl explicitly describing having sex with her. 157 Wn.2d at 4-5.

By contrast, the messages in the present case are not sexually explicit, do not describe sex acts, and do not invite sexual activity at all except indirectly, through proposing marriage and children. While unquestionably Merson's *acts* of a sexual nature with K.F. were unlawful and punishable, his words to her cannot be construed as promoting her exposure to or involvement in sexual misconduct. Because his words fall outside the recognized constitutional core of the statute, they are insufficient to establish a violation of the statute. Accordingly, the conviction for communicating with a minor for immoral purposes must be reversed and dismissed.

3. <u>The trial court's imposition of costs of incarceration and medical costs after finding Merson lacked the ability to pay more than the mandatory LFOs was erroneous.</u>

In *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Washington Supreme Court held that to comply with RCW 10.01.160, trial courts must conduct an individualized inquiry into the defendant's ability to pay legal financial obligations (LFOs) before imposing them. Under *Blazina*, signing a judgment containing boilerplate language is

insufficient; the record must demonstrate that the court considered "the financial resources of the defendant and the nature of the burden that payment of costs will impose," including the defendant's incarceration and other debts. Id. at 838. The *Blazina* Court further recognized that if a defendant meets the GR 34 standard for indigency, "courts should seriously question that person's ability to pay LFOs." *Id.* at 839.

A finding of ability to pay is reviewable under a "clearly erroneous" standard. *State v. Bertrand*, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011), *review denied*, 175 Wn.2d 1014 (2012). Under RCW 10.01.160(3), "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them."

In the present case, the trial court apparently found Merson unable to pay discretionary LFOs, but still imposed discretionary costs of incarceration and costs of medical care in cause no. 15-1-00679-2. CP 375. It heard about Merson's recent divorce, foreclosure, and financial destitution, his prior employment as a skilled laborer, his inability to obtain similar work in the Yakima area after his release, and the prospect that he would be incarcerated for at least seven years, until he was about 60 years old. It also stated, when sentencing him for the charges involving J.M., that it would "do just like I did before, leave in the mandatory and

strike the discretionary." III RP 1229. If, as it stated, the trial court's intent was to impose only mandatory LFO's based on Merson's inability to pay more, then its imposition of discretionary costs of incarceration and medical care, even if capped, is erroneous and unsupported by RCW 10.01.160(3).

Accordingly, the medical costs and costs of incarceration imposed in cause no. 15-1-00679-2 should be stricken from the judgment and sentence.

VI. CONCLUSION

For the foregoing reasons, Merson respectfully requests that the court REVERSE and DISMISS his conviction for communicating with a minor for immoral purposes and REMAND the case for resentencing.

RESPECTFULLY SUBMITTED this 5th day of March, 2018.

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Attorney for Appellant

CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Bradley Leith Merson, DOC #928483
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Connell, WA 99326

And, pursuant to prior agreement of the parties, by e-mail to the following:

Tamara A. Hanlon
Deputy Prosecuting Attorney
Tamara.hanlon@co.yakima.wa.us

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 5th day of March, 2018 in Walla Walla, Washington.

Andrea Burkhart

BURKHART & BURKHART, PLLC

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