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

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION III

STATE OF WASHINGTON, RESPONDENT

v.

BRADLEY LEITH MERSON, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY

RESPONDENT'S BRIEF

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I. ISSUES PRESENTED FOR REVIEW

1. An individual can both voluntarily abandon a cell phone and lose any independent privacy interest in transmitted text messages if the recipient willingly discloses those communications to a third party. After Merson gave K.F. a Samsung Galaxy smartphone to facilitate their illicit relationship, K.F. and her parents voluntarily consented to a law enforcement data extraction that included text messages sent by Merson. Did Merson retain a constitutionally protected privacy interest in the smartphone after gifting the device to K.F. and assuming the risk that any electronic communications would be disclosed?
2. To support a conviction for communicating with a minor for immoral purposes, the State must demonstrate that the defendant's communications concerned sexual misconduct that would be illegal if actually performed. Merson sent K.F. text messages describing conduct that, if acted upon, would constitute voyeurism, child molestation in the third degree, and rape of a child in the third degree. Did sufficient evidence support Merson's conviction for communicating with a minor for immoral purposes?

II. STATEMENT OF THE CASE

On May 11, 2015, and May 14, 2015, Merson was charged in separate Yakima County Superior Court cause numbers with offenses arising out of relationships with two underage females, K.F. and J.M. *See* Clerk's Papers (hereinafter "CP") at 4–5, 221–22.

Cause number 15-1-00679-2, the charges involving K.F., ultimately alleged that Merson committed (1) possession of a controlled substance, oxycodone, with intent to deliver; (2) child molestation in the third degree; (3) rape of a child in the third degree; (4) communication with a minor for immoral purposes; and (5) possession of a controlled substance, oxycodone. *Id.* at 269–71.

Arising from his relationship with J.M., Merson was charged under cause number 15-1-00700-4 with (1) child molestation in the third degree; (2) rape of a child in the third degree; (3) sexual exploitation of a minor; and (4) possession of depictions of a minor engaged in sexually explicit conduct in the second degree. *Id.* at 64–65.

As only Merson's conviction for communicating with a minor for immoral purposes is challenged, the State will restrict its discussion of the facts to that allegation. K.F. met Merson when she was a fourteen year old high school freshman through a cellphone application, Whisper. VRP 3/23/17 at 401–02. K.F. and Merson were born, respectively, on June 18,

2000, and October 22, 1966. *See* VRP 3/23/17 at 400; VRP 3/27/17 at 593; SE-31. As such, Merson was forty-eight years old at the time of the alleged offenses.

Over time, Merson and K.F. began communicating via text message. VRP 3/23/17 at 403–04. K.F. had both an iPhone 5C as well as a Samsung Galaxy provided to her by Merson. *Id.* at 404. K.F. and Merson began texting using the Samsung Galaxy on April 17, 2015. *See* SE-3 at line 1. Merson gave K.F. the Galaxy so that their relationship could remain hidden from K.F.’s parents. *See* VRP 3/15/17 at 145–46; VRP 3/23/17 at 404 (K.F. noting that Merson gave her a white Samsung smartphone); SE-3 at line 8–11 (Merson texting “Just Don’t let ur know who see it,” “Hide it well,” K.F. responding “I won’t let them see it,” “They don’t come in my room without knocking most of the time so I should be fine.”); SE-3 at line 981, 983–84 (K.F. asking “Do I Take this phone with me to school . . . so they can’t find it in my room or do I just hide it well,” Merson responding “Taking it would be best,” “Then they can’t find it”).

During their text conversations, Merson frequently discussed marrying and having children with K.F. *See* SE-1 at line 783 (“Mmmm! My wife! Mother of my children!”); SE-3 at line 1176 (“Hmm, I also think we should be married, and have children!”); SE-3 at line 1365 (“I love the

thought of u having my babies!”). Merson also repeatedly requested photographs of K.F. *See* SE-3 at line 86, 88 (“U can take a couple selfie right quick,” “They don’t gotta be perfect pics, just something to kick it off with!”); *id.* at line 1146–47 (“I want ur pics,” “Quit teasing me”); *id.* at line 1188, 1190 (“I wanna see ur butt in a skirt though,” “I wanna see what all the boys r gonna be staring at!”). Merson implied that the desired photos were of a sexual nature. *See id.* at line 94 (“R u gonna send sexy pics to other guys?”). Merson also stated that he wanted to both “play doctor” with K.F., *see id.* at line 1470 (“I’ll play Dr with u too!”), and walk in unannounced on K.F. using the bathroom. *See id.* at line 152, 156 (K.F. complaining “For some reason the people in my house decided that when the bathroom door is closed that means no one is in there. I’ve had people walk in three times this week when I was in the shower or using the bathroom,” Merson responding “I want a turn!”).

After K.F. informed her parents about the relationship, the family contacted Officer Adam Schilperoort of the Yakima Police Department. VRP 3/23/17 at 387. Officer Schilperoort met with K.F. as well as K.F.’s parents, Glenn and Jennifer Fitzsimmons. *Id.* at 388. Glenn Fitzsimmons provided Officer Schilperoort with two phones: K.F.’s iPhone and the Samsung Galaxy given to K.F. by Merson. *Id.* at 388–89. Officer

Schilperoort was told by the family that the Galaxy “was a gift to [K.F.]”.
Id. at 393. Merson’s name appeared on the phone contract. *Id.* at 396.

Following Officer Schilperoort’s initial contact, Sergeant Chad Janis with the Yakima Police Department met with K.F. and her parents. VRP 3/15/17 at 29. Sergeant Janis explained to K.F.’s parents that law enforcement wanted to forensically examine both the iPhone and Samsung Galaxy. *Id.* at 55. K.F.’s parents signed consent-to-search forms pertaining to K.F.’s iPhone. *Id.* at 29–30. Additionally, K.F.’s parents consented to and expressed no concern about Sergeant Janis examining the second phone, the Samsung Galaxy provided by Merson. *Id.* at 32. K.F. was also aware that the Samsung Galaxy would be searched. *Id.*

After Sergeant Janis obtained consent, Detective Kevin Lee of the Yakima Police Department used a Cellebrite program to extract data from both K.F.’s smartphones. *Id.* at 80–81. Among other information, Detective Lee was able to recover text message conversations between K.F. and Merson. *See* SE-1, SE-3.

On March 15, 2017, the allegations involving K.F. proceeded to trial. During pre-trial, Merson challenged the search of the Samsung Galaxy arguing that K.F.’s parents had no authority to consent to the search. VRP 3/16/17 at 192. After considering argument from counsel, the trial court denied Merson’s motion to suppress. *Id.* at 204–13. The court

ruled that Merson voluntarily abandoned the smartphone as he “did not evidence a continued property or ownership interest in that phone.” *Id.* at 211.

At the conclusion of the trial, Merson was convicted of rape of a child in the third degree, communicating with a minor for immoral purposes, and possession of a controlled substance. CP at 314–19; *see also* VRP 3/29/17 at 868–69.

On April 4, 2017, the allegations involving J.M. proceeded to trial. Merson was convicted of child molestation in the third degree, rape of a child in the third degree, sexual exploitation of a minor, and possession of depictions of a minor engaged in sexually explicit conduct in the second degree. CP at 109–12; *see also* VRP 4/10/17 at 1086.

Merson was sentenced for both cause numbers on May 26, 2017. On 15-1-00679-2, Merson was sentenced as follows: forty-one months for rape of a child in the third degree, sixteen months for communicating with a minor for immoral purposes, and twelve months for possession of a controlled substance. CP at 371–81. On 15-1-00700-4, Merson was sentenced to sixty months for child molestation in the third degree, sixty months for rape of a child in the third degree, 180 months for sexual exploitation of a minor, and sixty months for possession of depictions of a

minor engaged in sexually explicit conduct in the second degree. *Id.* at 175–84. All counts were to run concurrently. *Id.* at 178, 373.

Following Merson’s filing of his notices of appeal, cause number 15-1-00700-4 was remanded to correct a sentencing error. On May 22, 2018, Merson was re-sentenced to 120 months for sexual exploitation of a minor. *See id.* at 411.

Merson timely appealed both sentences. *Id.* at 188, 382.

III. ARGUMENT

A. Merson did not have a reasonable expectation of privacy in the Samsung Galaxy as (1) Merson voluntarily abandoned the smartphone when gifting the device to K.F. and (2) Merson assumed the risk that K.F. would disclose their communications to law enforcement

Appellate courts review constitutional issues and conclusions of law *de novo*. *State v. Samalia*, 186 Wn.2d 262, 269, 375 P.3d 1082 (2016). By contrast, factual determinations are reviewed for substantial evidence. *Id.* at 276.

The Washington State Constitution provides that “[n]o person shall be disturbed in his private affairs . . . without authority of law.” WASH. CONST. art. I, sec. 7. “Article I, section 7 encompasses the privacy expectations protected by the Fourth Amendment . . . and, in some cases, may provide greater protection than the Fourth Amendment because its

protections are not confined to the subjective privacy expectations of citizens.” *Samalia*, 186 Wn.2d at 268.

Cell phones and information contained therein are private affairs under article 1, section 7. *Id.* at 269. An individual also has a limited privacy interest in text message communications transmitted to a third party. *State v. Hinton*, 179 Wn.2d 862, 873, 319 P.3d 9 (2014).

“[C]itizens may lose their constitutional protections in a private affair under the abandonment doctrine.” *Samalia*, 186 Wn.2d at 268. “A person who abandons property loses any ownership interest in the property, and relinquishes any reasonable expectation of privacy in it.” *State v. Kealey*, 80 Wn. App. 162, 171–72, 907 P.2d 319 (1995). The abandonment doctrine applies equally to cell phones as to any other personal property. *Samalia*, 186 Wn.2d at 276. “Voluntary abandonment is an ultimate fact or conclusion based generally upon a combination of act and intent.” *State v. Evans*, 159 Wn.2d 402, 408, 150 P.3d 105 (2007). “Intent may be inferred from words spoken, acts done, and other objective facts, and all the relevant circumstances at the time of the alleged abandonment should be considered.” *State v. Dugas*, 109 Wn. App. 592, 595, 36 P.3d 577 (2001). The primary question is “whether the defendant in leaving the property has relinquished [their] reasonable expectation of

privacy.” *Id.* (quoting *United States v. Hoey*, 983 F.2d 890, 892–93 (8th Cir. 1993)).

“The test to determine if a person has a reasonable expectation of privacy is twofold”: (1) “Did the person exhibit an actual (subjective) expectation of privacy by seeking to preserve something as private?” and (2) “Does society recognize that expectation as reasonable?” *Kealey*, 80 Wn. App. at 168. Considering both Merson’s gift of the smartphone to K.F. as well as Merson’s description of the device while in K.F.’s possession, Merson has not demonstrated that he had a subjective expectation of privacy in the Samsung Galaxy. Further, while an individual has a recognized expectation of privacy in transmitted text messages, *see Hinton*, 179 Wn.2d at 873, article 1, section 7 does not shield Merson from the potential hazard of a text message recipient voluntarily disclosing such communications to third parties.

1. Merson did not exhibit a subjective expectation of privacy in the Samsung Galaxy as Merson described the smartphone as K.F.’s possession and no evidence supports Merson’s assertion that he limited K.F.’s use of the device

While Merson provided K.F. the Samsung Galaxy to hide their communications from K.F.’s parents, no evidence in the record supports the proposition that Merson intended to retain direct control over the smartphone. In fact, Merson’s text messages and recorded statements

demonstrate that Merson provided the Samsung Galaxy to K.F. as a gift without any conditions governing use.

During recorded one party consent calls, K.F. referred to the Samsung Galaxy as “my phone” without any correction from Merson. *See* SE-A1 at 2, 3. As noted by the trial court, Merson also stated that the Samsung Galaxy was “your phone” when discussing the smartphone with K.F. *Id.* at 2; VRP 3/16/17 at 210.

Additionally, when complaining via text message that K.F. mistreated him, Merson wrote “I try to do everything I can for u! Buy booze, weed, phone, u name it!” SE-3 at line 2065. By including the smartphone on a list with other items Merson gave K.F. to consume with, by inference, no expectation of return, Merson demonstrated his intent that the device was a permanent gift.

Further, when discussing the Samsung Galaxy with K.F., Merson repeatedly cautioned K.F. against revealing the smartphone’s existence to her parents. Merson instructed K.F. to “[h]ide that phone” and to not “get it confiscated.” *Id.* at line 957–58. When K.F. asked Merson what she should do with the smartphone while at school, Merson stated that “[t]aking it would be best” as “[t]hen they can’t find it.” *Id.* at line 983–84. By his own admission, Merson appreciated the strong possibility that the smartphone would be discovered and confiscated. Merson cannot claim a

genuine subjective expectation of privacy in an item he expressly acknowledged risked search and seizure by K.F.'s parents in the likely event the smartphone was discovered.

Finally, Merson discussed the Samsung Galaxy in a manner indicating that he had not restricted K.F.'s use of the smartphone solely to contacting him. As Merson stated,

[s]o if your parents did get ahold of this phone and started callin' numbers and shit and texting people, messaging people trying to figure out who's who and what's what, they're not gonna get anything from me, I'm not gonna admit to nothin' or nothin' until I know who I'm talking to.

SE-A1 at 5. Merson's statement assumes the possibility that additional contacts beyond himself might be stored on the phone. For example, Merson used plural grammatical phrasing such as "numbers" and "people." *See id.* Further, if Merson was the sole contact stored on the Samsung Galaxy, K.F.'s parents would presumably not have as much difficulty as Merson assumed in determining "who's who." *See id.* Given Merson's acknowledgment that K.F. would use the Samsung Galaxy for communicating with other people, Merson cannot credibly claim that he intended the smartphone solely for communication between K.F. and himself.

Merson nevertheless asserts that he “clearly intended that the phone should remain in K.F.’s possession and should be used for a specific purpose.” Br. of Appellant at 14. Merson, however, did not testify during the hearing. As a result, Merson’s intent can only be derived from his communications with K.F. In contrast to Merson’s claim, Merson’s statements, in a variety of different contexts, support the conclusion that Merson did not exhibit an actual, subjective expectation of privacy in the Samsung Galaxy smartphone.

Merson intended the Samsung Galaxy to be K.F.’s possession for her to use as she saw fit. Merson referenced “your phone” and included the smartphone on a list of other items he provided as gifts to K.F. Further, Merson gave the smartphone to K.F. with knowledge that the device would be confiscated and searched if discovered. Finally, no evidence in the record supports Merson’s assumption that he intended to maintain control and ultimately regain possession of the Samsung Galaxy. Accordingly, Merson has failed to establish that he had a subjective expectation of privacy in the Samsung Galaxy smartphone.

2. Merson did not have an expectation of privacy in the transmitted text messages as Merson assumed the risk that K.F. might voluntarily disclose those communications to third parties

In asserting that society recognizes his expectation of privacy, Merson argues that his case is akin to *Hinton*. In *Hinton*, a detective impersonated an arrestee while communicating with Hinton via text message. *Hinton*, 179 Wn.2d at 866. The detective, posing as the arrestee, arranged a drug transaction with and subsequently arrested Hinton. *Id.*

The Court ruled that “Hinton retained a privacy interest in the text messages he sent, which were delivered to [the arrestee’s] phone but never received by [the arrestee].” *Id.* at 873. Noting that “the mere fact that an individual shares information with another party and does not control the area from which that information is accessed does not place it outside the realm of article I, section 7’s protection,” the Court found that Hinton did not lose his privacy interest in the text messages by transmitting them to a recipient’s phone over which he exercised no control. *Id.*

However, the Court distinguished between a third party intercepting text messages and the recipient voluntarily disclosing those messages to a third party. The Court left undisturbed the longstanding rule that an individual lacks an expectation of privacy when one party to the communication consents to the conversation being recorded. *Id.* at 874;

see also State v. Corliss, 123 Wn.2d 656, 663–64, 870 P.2d 317 (1994); *State v. Salinas*, 119 Wn.2d 192, 197, 829 P.2d 1068 (1992). Noting that “Hinton certainly assumed the risk that [the arrestee] would betray him to the police,” the Court reaffirmed that “[t]he risk that one to whom we impart private information will disclose it is a risk we ‘necessarily assume whenever we speak.’” *Hinton*, 179 Wn.2d at 874 (quoting *Hoffa v. United States*, 385 U.S. 293, 303, 87 S. Ct. 408 (1966)).

Accordingly, Merson’s reliance on *Hinton* is misplaced. Merson, by voluntarily sending text messages to K.F., assumed the risk that K.F. would “betray” his confidence and share the communications with a third party. *Hinton*, therefore, forecloses Merson’s proposed societal expectation of privacy in a text message a recipient willingly discloses to law enforcement. As such, Merson has failed to demonstrate that he had a reasonable expectation of privacy in the text messages he transmitted to K.F. once K.F. and her parents consented to the smartphone extraction.

3. As Merson did not exhibit an intent to reclaim possession or assert continued control over the Samsung Galaxy, the trial court’s conclusion that Merson voluntarily abandoned the smartphone was supported by substantial evidence

The trial court, after reviewing Merson’s statements, concluded that Merson voluntarily abandoned the smartphone when gifting the device to K.F. *See* VRP 3/16/17 at 211. As a factual determination, a trial

court's finding of voluntary abandonment is reviewed for substantial evidence. *See Samalia*, 186 Wn.2d at 276. “‘Substantial evidence’ is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise.” *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014).

As noted above, Merson, through his description of the smartphone, exhibited his intent that the Samsung Galaxy was a gift for K.F. *See* SE-A1 at 2, 3, 5; SE-3 at line 957–58, 983–84, 2065. There is no evidence in the record indicating that Merson intended to recover the smartphone from K.F. or continued to exercise control over K.F.’s use of the device. Accordingly, sufficient facts were presented to convince a “fair-minded person of the truth of the asserted premise,” *see Homan*, 181 Wn.2d at 106, and the trial court’s conclusion that Merson voluntarily abandoned the Samsung Galaxy was supported by substantial evidence.

4. As Merson voluntarily abandoned the property to K.F., law enforcement did not require a search warrant to extract data from the Samsung Galaxy

“Needing neither a warrant nor probable cause, law enforcement officers may retrieve and search voluntarily abandoned property without implicating an individual’s rights under the Fourth Amendment or under article 1, section 7.” *State v. Reynolds*, 144 Wn.2d 282, 287, 27 P.3d 200 (2001). Further, as Merson voluntarily abandoned the Samsung Galaxy

into K.F.'s possession, law enforcement had authority to search the phone once K.F. and her parents provided consent. *See State v. Rison*, 116 Wn. App. 955, 961, 69 P.3d 362 (2003) (noting that “a warrantless search is valid if a person with authority consents to it”). As such, the warrantless search of the Samsung Galaxy smartphone was permissible after Merson abandoned the device into K.F.'s custody and possession.

Merson has neither exhibited a subjective expectation of privacy in the Samsung Galaxy nor demonstrated that society recognizes his proposed privacy interest in text messages a recipient willingly discloses to third parties. Further, Merson has failed to show that the trial court's finding of voluntary abandonment was not supported by substantial evidence. As such, Merson's motion to suppress was properly denied by the trial court.

B. Sufficient evidence supports Merson's conviction for communicating with a minor for immoral purposes

Merson argues that insufficient evidence supports his conviction for communicating with a minor for immoral purposes. Br. of Appellant at 24. In particular, Merson contends that the communications did not describe acts which would be sexual misconduct if performed. *Id.*

Under RCW 9.68A.090(1), “a person who communicates with a minor for immoral purposes . . . is guilty of a gross misdemeanor.”

RCW 9.68A.090(1). When an individual communicates with a minor for immoral purposes “through the sending of an electronic communication,” the offense is elevated to a Class C felony. RCW 9.68A.090(2).

Under WPIC 47.06, “[t]o convict the defendant of the crime of communicating with a minor for immoral purposes, each of the following elements of the crime must be proved beyond a reasonable doubt:”

(1) “That on or about [January 1, 2015, and May 6, 2015], the defendant communicated with [K.F.] for immoral purposes of a sexual nature”;
(2) “That [K.F.] was a minor”; (3) “That this act occurred in the State of Washington”; and (4) “That the defendant sent [K.F.] an electronic communication for immoral purposes.” WPIC 47.06.

“The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *Salinas*, 119 Wn.2d at 201. “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.* “Circumstantial evidence and direct evidence are equally reliable.” *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

1. Merson sent K.F. text messages describing sexual content which, if performed, would constitute voyeurism, child molestation in the third degree, and rape of a child in the third degree

For the purpose of RCW 9.68A.090, “‘immoral purposes’ refers to the broad category ‘sexual misconduct.’” *State v. McNallie*, 120 Wn.2d 925, 931, 846 P.2d 1358 (1993). The statute’s purpose is to “protect[] children from being accosted with predatory sexual advances.” *Id.* at 932; *see also State v. Hosier*, 157 Wn.2d 1, 11–12, 133 P.3d 936 (2006) (noting that RCW 9.68A.090 requires a “‘predatory purpose’ of promoting a minor’s exposure and involvement in ‘sexual misconduct’”). “[A] defendant communicates with a minor under RCW 9.68A.090 if he or she *invites or induces* the minor to engage in prohibited conduct.” *State v. Jackman*, 156 Wn.2d 736, 748, 132 P.3d 136 (2006) (emphasis in original). RCW 9.68A.090 “incorporates within its scope a relatively broad range of sexual conduct involving a minor.” *Id.*; *see, e.g., Hosier*, 157 Wn.2d at 5 (defendant describing having sexual intercourse with an underage girl); *McNallie*, 120 Wn.2d at 927–28 (defendant discussing “hand jobs” with underage girls); *State v. Schimmelpfennig*, 92 Wn.2d 95, 97, 594 P.2d 442 (1979) (defendant asking underage girl “in explicit terms to engage in various sexual acts with him”).

While Merson attempts to group his text messages into benign categories, Merson omits several communications which expressly show Merson's intent to promote, invite, or induce sexual misconduct concerning K.F. For example, on April 17, 2015, at 9:05 P.M., K.F. sent Merson the following message: "[f]or some reason the people in my house decided that when the bathroom door is closed that means no one is in there. I've had people walk in three times this week when I was in the shower or using the bathroom." SE-3 at line 152. After a few related messages, Merson responded "I want a turn!" *Id.* at line 156. The only rational interpretation of Merson's text is that he was expressing his desire to observe K.F. in a state of full or partial undress while K.F. was showering or using the bathroom.

Voyeurism criminalizes "knowingly view[ing]" "for the purpose of arousing or gratifying the sexual desire of any person" "[t]he intimate areas of another person without that person's knowledge and consent and under circumstances where the person has a reasonable expectation of privacy." RCW 9A.44.115(2). Merson's response to K.F., exhibiting his wish to take "a turn" illicitly seeing K.F. using the bathroom, expressed Merson's intent to engage in "sexual misconduct" with K.F. Accordingly, viewed in the light most favorable to the State, Merson's text message about bursting in unannounced on K.F. using the bathroom constituted a

communication for an immoral purpose as it described sexual misconduct on Merson's part. *See Salinas*, 119 Wn.2d at 201.

Further, on April 22, 2015, at 3:53 P.M., Merson told K.F. "I'll play Dr with u too!" SE-3 at line 1470. The phrase "playing doctor" has a sexual connotation associated with touching another person's genitals. *See In re Welfare of S.E.*, 63 Wn. App. 244, 246, 820 P.2d 47 (1991) (recounting how two abused children when detailing "vivid and graphic descriptions of various acts of sexual abuse committed upon them by their parents" noted that their parents referred to the abuse as "play[ing] doctor"); *see also play doctor*, WIKTIONARY (May 25, 2017), https://en.wiktionary.org/wiki/play_doctor ("To engage in sexual role-play of a medical nature"); Master Literal, *playing doctor*, URBAN DICTIONARY (June 7, 2004), <https://www.urbandictionary.com/define.php?term=playing%20doctor> ("Toddlers explore their own and each others' genitals," "They call this game 'playing doctor', probably since at the doctor they've had routine examinations of their private parts," and "Adults use the phrase as a 'cutesy' way to say 'sex'").

Merson, by indicating to K.F. that he wanted to "play doctor" with her, demonstrated his desire to have physical contact with K.F.'s genitals. Given that Merson and K.F. were, respectively, forty-eight and fourteen years old at the time the text message was sent, the conduct described by

Merson would constitute child molestation in the third degree if performed. *See* RCW 9A.44.089(1) (“A person is guilty of child molestation in the third degree when the person has . . . sexual contact with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim.”). Viewed in the light most favorable to the State, Merson’s statement that he wanted to have sexual contact with K.F. by “playing doctor” with her constituted a communication for an immoral purpose as the comment can be inferred as inviting sexual misconduct. *See Salinas*, 119 Wn.2d at 201.

Finally, although many of Merson’s texts concerning having children with K.F. were preconditioned by Merson’s desire to marry K.F., Merson did send messages to K.F. about having a baby together without referencing marriage. On April 21, 2015, at 11:05 P.M., Merson texted K.F. “I want babies with you!” and followed up at 11:06 P.M. with “I love the thought of u having my babies!” SE-3 at line 1362, 1365. As Merson concedes, such “messages arguably imply sexual intent because sex is necessary to have children with K.F.” Br. of Appellant at 25. Under RCW 9A.44.079(1),

[a] person is guilty of rape of a child in the third degree when the person has sexual intercourse with another who is at least

fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim.

RCW 9A.44.079(1). As these comments were divorced from text messages describing marriage, a reasonable inference can be drawn that Merson was indicating his desire to have sexual intercourse with K.F. while K.F. remained between fourteen and sixteen years old. *See Salinas*, 119 Wn.2d at 201.

Merson sent multiple communications via text message that, viewed in the light most favorable to the State, constituted “predatory sexual advances” on K.F. *See McNallie*, 120 Wn.2d at 932. By transmitting the above electronic communications, Merson was both inviting K.F. to engage in as well as promoting K.F.’s exposure to sexual misconduct. As such, sufficient evidence demonstrates that Merson sent K.F. communications concerning acts that fall within the “relatively broad range” of sexual conduct criminalized by RCW 9.68A.090. *See Jackman*, 156 Wn.2d at 748.

2. In addition to the immoral nature of Merson’s text messages, sufficient evidence supports the remaining elements of communicating with a minor for immoral purposes

At the time the text messages were transmitted, K.F. was fourteen years old. VRP 3/23/17 at 402. K.F. was thus a “minor.” *See*

RCW 9.68A.011(5) (defining “minor” as “any person under eighteen years of age”). Merson was forty-eight at the time of the offense. SE-31. The communications were sent via text message, a form of electronic communication. *See* SE-1, SE-3. As described above, Merson sent K.F. electronic communications of an immoral nature promoting sexual misconduct that would be illegal if performed. Accordingly, the State presented sufficient evidence to allow a rational trier of fact to conclude that Merson communicated with K.F. for an immoral purpose.

C. Although Merson waived his challenge to the imposed legal financial obligations on appeal, the State will agree to amend the judgment and sentence in the interest of judicial economy

Merson argues that the trial court erred in imposing costs of incarceration and medical costs after finding Merson lacked the ability to pay. Br. of Appellant at 27.

Merson waived the issue on appeal when he failed to object to the imposition of medical costs and the costs of incarceration imposed in cause number 15-1-00679-2. Under RAP 2.5(a), this Court should deny Merson’s request that this Court consider the issue for the first time on appeal.

However, in order to preserve the resources of this Court, the trial court, and the State, the State would request leave of this Court to file an

order, *ex parte*, amending the Judgement and Sentence to strike the offending discretionary costs. The State proposes this solution to avoid the unnecessary expense of transporting Merson back to Yakima County's custody.

IV. CONCLUSION

Merson did not exhibit a reasonable expectation of privacy in either the Samsung Galaxy smartphone or text messages he sent to K.F. The search of that device was therefore valid. Further, the State presented sufficient evidence that Merson's text messages sufficiently concerned sexual misconduct to support Merson's conviction for communicating with a minor for immoral purposes. As such, this Court should affirm Merson's conviction for communicating with a minor for immoral purposes.

Dated this 6th day of August, 2018.

STATE OF WASHINGTON

 /s/Michael J. Ellis
MICHAEL J. ELLIS, WSBA # 50393
Deputy Prosecuting Attorney
Attorney for Respondent

DECLARATION OF SERVICE

I, Michael J. Ellis, state that on August 6, 2018, by agreement of the parties, I emailed a copy of BRIEF OF RESPONDENT to Ms. Andrea Burkhart at Andrea@2arrows.net.

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

DATED this 6th day of August, 2018, at Yakima, Washington.

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