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Court of Appeals  
Division III  
State of Washington  
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Nº. 36116-1-III

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

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STATE OF WASHINGTON  
Respondent,

v.

TIMOTHY MILLER,  
Appellant.

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REPLY BRIEF OF APPELLANT

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Appeal from the Superior Court of Benton County,  
Cause No. 15-1-00559-0  
The Honorable Cameron Mitchell,  
Presiding Judge

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A. ARGUMENT

1. **The State fails to cite any evidence in the record from which the jury could have inferred that Mr. Miller’s communication with T.H. on April 30, 2015 was done for an immoral purpose.**

As pointed out in Mr. Miller’s Opening Brief, the State charged Mr. Miller with communication with a minor for immoral purposes in violation of RCW 9.68A.090(2).<sup>1</sup> RCW 9.68A.090(2) provides, in pertinent part,

A person who communicates with a minor for immoral purposes is guilty of a class C felony punishable according to chapter 9A.20 RCW if the person has previously been convicted under this section or of a felony sexual offense under chapter 9.68A, 9A.44, or 9A.64 RCW or of any other felony sexual offense in this or any other state.

For purposes of RCW 9.68A.090, “immoral purpose” refers to sexual misconduct.<sup>2</sup> Thus, the State had the burden of presenting sufficient evidence to support an inference that the purpose for his communications with T.H. on April 30, 2015 was related to sexual misconduct.

In response to Mr. Miller’s argument on appeal that the State presented no evidence that suggested Mr. Miller’s communication with T.H. on April 15, 2015 was done for an immoral purpose, the State misrepresents the testimony presented at trial and relies on evidence not

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<sup>1</sup> CP 1-2.

<sup>2</sup> *State v. Pietrzak*, 100 Wn. App. 291, 295, 997 P.2d 947 (2000).

presented in the trial court to support its argument that the State met its burden.

*a. The State misrepresents Mr. Miller's testimony at trial.*

At page 5 of its Response Brief, the State claims that Mr. Miller “offered no explanation” for D.J.’s testimony claiming that Mr. Miller told D.J. that T.H. was “hot” and that Mr. Miller wanted to “fuck her.” However, Mr. Miller did offer an “explanation” for this testimony- he denied having said those comments.<sup>3</sup> The State misrepresents Mr. Miller’s testimony.

*b. The State relies on evidence not admitted at trial to argue that it met its burden.*

At trial, the State never presented evidence or testimony linking the game “truth or dare” to sexual misconduct. Despite this, on appeal the State cites evidence not introduced at trial to make exactly that link and to argue that the jury could use this link to infer that Mr. Miller communicated with T.H. for purposes of sexual misconduct.<sup>4</sup> This is improper and violates RAP 10.3(a)(8) and 10.4(c).

Under RAP 10.3(a)(8), “An appendix [to a brief] may not include materials not contained in the record on review without permission from the appellate court, except as provided in rule 10.4(c).”

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<sup>3</sup> RP 156; 5-23-2018.

<sup>4</sup> State’s Response, p. 7, Appendix A.

RAP 10.4(c) permits a party to include in an appendix, without prior permission for the Court of Appeals, a “statute, rule, regulation, jury instruction, finding of fact, exhibit, or the like,” if the party presents an issue which requires study of the same.

We...admonish appellants for inappropriately including in the appendix to their...brief...materials not of record, without indicating to the court in the brief that those materials were not part of the record and that a motion was pending to allow their consideration. This violates the intention of RAP 10.3 that factual statements in briefs must be referenced to the record. *See* RAP 10.3(4), (7).<sup>5</sup>

Mr. Miller has filed a motion to strike Appendix A from the record and requesting this court ignore all arguments made by the State that refer to or rely on Appendix A. This court should grant the motion to strike and disregard the State’s improper argument that relies on evidence not already part of the record.

*c. The evidence actually introduced at trial is insufficient to support a finding that Mr. Miller communicated with T.H. for the purpose of committing sexual misconduct.*

“A person being tried on a criminal charge can be convicted only by evidence, not by innuendo.”<sup>6</sup>

A jury may draw inferences from evidence so long as those inferences rationally relate to the proven facts. *State v. Jackson*, 112 Wn.2d 867, 875, 774 P.2d 1211 (1989). A

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<sup>5</sup> *Harbison v. Garden Valley Outfitters, Inc.*, 69 Wn. App. 590, 594–95, 849 P.2d 669 (1993).

<sup>6</sup> *State v. Yoakum*, 37 Wn.2d 137, 144, 222 P.2d 181 (1950).

rational connection must exist between the initial fact proved and the further fact presumed. *State v. Jackson*, 112 Wn.2d at 875. An inference should not arise when other reasonable conclusions follow from the circumstances. *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999). The jury may infer from one fact the existence of another essential to guilt, if reason and experience support the inference. *Tot v. United States*, 319 U.S. 463, 467, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943). Nevertheless, essential proofs of guilt cannot be supplied by a pyramiding of inferences. *State v. Bencivenga*, 137 Wn.2d at 711; *State v. Weaver*, 60 Wn.2d 87, 88, 371 P.2d 1006 (1962).<sup>7</sup>

The “essential proof of guilt” the State failed to address at trial was Mr. Miller’s intent when he spoke to T.H. The State argues that the jury could infer that Mr. Miller was referring to sexual misconduct when he spoke with T.H. but is unable to cite any evidence introduced at trial that supports such an inference. Instead, the State argues the jury could rely on contradictions in the testimony of witnesses to infer that Mr. Miller was lying, on a statement made at an unknown time prior to the incident and that Mr. Miller denied making to infer that he had a lustful disposition towards T.H., that Mr. Miller had asked T.H. to play “truth or dare” with him, and T.H. was upset after speaking to Mr. Miller to conclude that Mr. Miller’s communication with T.H. was done with the intent and purpose of pursuing sexual misconduct.<sup>8</sup> However, assuming arguendo that these facts were proven at trial, none of these facts support a rational inference

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<sup>7</sup> *State v. Caron*, 199 Wn. App. 1043 (2017), review denied, 189 Wn.2d 1021, 404 P.3d 492 (2017).

<sup>8</sup> State’s Response, p. 4-9.

that Mr. Miller's communication with T.H. was done for purposes of sexual misconduct.

Absent any evidence introduced at trial that "truth or dare" is a game played specifically for engaging in sexual activity, the State presented no evidence that supports the inference that Mr. Miller's intent in speaking to T.H. was to pursue sexual misconduct. Reason and experience do not support this inference in the absence of evidence linking "truth or dare" to sexual conduct. The facts proven at trial do not support any inference about Mr. Miller's intent in speaking to T.H. The only way the jury could leap to the conclusion that Mr. Miller spoke with T.H. for purposes of engaging in sexual misconduct is by improperly pyramiding inferences from other proven facts, none of which spoke to Mr. Miller's intent.

The State clearly convicted Mr. Miller on the basis of innuendo, not evidence, as is proven by the fact the State felt it necessary to support its arguments on appeal with evidence not introduced at trial. The State presented insufficient evidence at trial to support the inference that Mr. Miller communicated with T.H. for purposes of engaging in sexual misconduct.

B. CONCLUSION

For the reasons stated above and in Mr. Miller's Opening Brief,

this court should vacate Mr. Miller's conviction and remand for dismissal of the charges with prejudice.

DATED this 11<sup>th</sup> day of January, 2019.

Respectfully submitted,



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Reed Speir, WSBA No. 36270  
Attorney for Appellant

CERTIFICATE OF SERVICE

Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the 11<sup>th</sup> day of January, 2019, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Andrew Kelvin Miller  
Benton County Prosecutors Office  
7122 W. Okanogan Place, Building A  
Kennewick, WA 99336-2359

And to:

Timothy Charles Miller, DOC No. 245431  
Coyote Ridge Correctional Center  
PO Box 769  
Connell, WA 99326

Signed at Tacoma, Washington this 11<sup>th</sup> day of January, 2019.



Reed Speir, WSBA No. 36270

# LAW OFFICE OF REED SPEIR

January 11, 2019 - 9:04 AM

## Transmittal Information

**Filed with Court:** Court of Appeals Division III  
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### Comments:

Corrected Reply to include tables. Initial version of Appellant's Reply brief was filed without completed tables.

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