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

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

TIMOTHY CHARLES MILLER,

Appellant

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

NO. 15-1-00559-0

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. There was sufficient evidence in the light most favorable to the State for a rational jury to conclude the defendant was guilty.
- B. The State will not seek appellate costs.

II. STATEMENT OF FACTS

A. Cast of Characters:

T.H.: Alleged victim. Date of birth: March 5, 2004, which would mean she was 11-years-old on April 30, 2015, the date of offense. RP at 116-17.

Tia Hunter: Her mother. RP at 116. She called the police after hearing T.H. RP at 120.

Jamie Larson: T.H.'s father. RP at 74.

Leslie Jessop: Older brother of T.H.'s best friend, and friend of the defendant. RP at 81, 126. First individual T.H. told of incident with the defendant. RP at 127.

Marshall Almarode: Allowed defendant to live on his property in a motorhome. RP at 54. Neighbor to the Jessops and the Hunters. RP at 56-57.

Craig Hanson: Kennewick Police Officer and first to respond to Tia Hunter's call. RP at 88, 90. Interviewed the defendant. RP at 91.

B. Events of April 30, 2015

T.H., who was 11-years-old on April 30, 2015, testified that when she was alone with the defendant, he asked if she ever played “truth or dare.” RP at 127. She said yes. *Id.* The defendant responded, “How dirty would you get,” and “how nasty would [she] get with him.” RP at 127-28. He kept repeating these comments and lowered his voice when doing so. RP at 128. He was rubbing her back at the time. RP at 127. He gave her cash and told her not to tell anybody about the conversation. *Id.* Nevertheless, she ran home and told Leslie Jessop and then her mother. RP at 127-28.

At some point prior to this date, the defendant told Leslie Jessop that he thought T.H. was hot and he would like to f— her. RP at 82. On April 30, 2015, Leslie was helping the defendant strip copper wire when Mr. Almarode drove up. RP at 83. Leslie went over to talk to Mr. Almarode, leaving the defendant and T.H. alone. *Id.* Leslie could not hear what was said between the defendant and T.H. *Id.* He left with Mr. Almarode and went back to his residence. *Id.*

T.H. came to his residence, shaking hard. *Id.* She was crying and scared and had a ten-dollar bill which she handed him. RP at 84. She said the defendant wanted to be nasty with her. *Id.* He gave the ten-dollar bill

to Mr. Almarode. RP at 86. Mr. Almarode stated he confronted the defendant who admitted the ten-dollar bill was his. RP at 64.

In the meantime, T.H. told her parents what occurred. Her father stated T.H. was crying and upset to the point that she was not speaking in complete sentences. RP at 74. Her mother confirmed that T.H. came home crying. RP at 119. That was not normal for T.H. RP at 120. She called the police after finding out why T.H. was upset. *Id.*

The defendant testified and denied any inappropriate conversation with T.H., denied that he touched her, denied that he said she was hot and that he wanted to f— her. RP at 156. He denied giving her the ten-dollar bill but did admit that he took the ten-dollar bill from Mr. Almarode, although he did not know if it was his money. RP at 153, 159. He did admit that when he spoke to T.H., no one overheard the conversation. RP at 161. He claimed that he cut his hand on an X-ACTO blade and said, “Man, that’s nasty.” RP at 152. However, he also admitted that he did not tell Officer Hanson about the cut or about saying the word “nasty.” RP at 158-59. He also admitted he had two crimes of dishonesty, Theft in 2010 and 2013. RP at 162.

III. ISSUES

- A. Was there sufficient evidence to convict the defendant of Communication with a Minor for Immoral Purposes where the

defendant asks an 11-year-old girl if she plays “Truth or Dare”, asks how dirty and nasty she will be, and gives her \$10 in exchange for a promise not to tell others, when he has previously said she is hot and that he wants to f— her?

1. What is the standard on review for sufficiency of evidence claims?
2. Was there sufficient evidence to convict the defendant?

B. Should costs on appeal be awarded?

IV. ARGUMENT

A. There was sufficient evidence for a jury to convict the defendant.

- 1. Standard on appeal for sufficiency of evidence claims**

Evidence is sufficient to convict, if, after it is viewed in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

- 2. A rational jury could have found the defendant guilty.**

In the light most favorable to the State, the jury could have believed T.H. beyond a reasonable doubt and disbelieved the defendant’s version. Consider the following evidence.

Leslie Jessop testified that the defendant said T.H. was hot and that he wanted to f— her. RP at 82. Mr. Jessop said he was friends with the defendant, that they had hung out and gone fishing together. RP at 81. The defendant offered no explanation for Jessop’s testimony.

T.H. was emotionally distraught after the defendant’s conversation with her and immediately reported it. She immediately told the brother of her best friend, Leslie Jessop. RP at 126-27. Jessop stated she was crying and shaking. RP at 83-84. Her mother stated that T.H. came home crying, which was not normal for her. RP at 119-20. Ms. Hunter called the police when she found out why T.H. was crying. RP at 120. Her father said that T.H. was crying and upset to the point of not being able to speak in complete sentences. RP at 74. Mr. Almarode said T.H. reacted violently—shaking and yelling, “That’s not what he said” when Almarode related what the defendant told him. RP at 66.

The jury could also credit T.H. and discredit the defendant about the cash that he allegedly gave T.H. T.H. said he gave her a five-dollar bill in exchange for a promise not to tell anyone of their encounter. RP at 127. She gave this cash to Leslie Jessop because she did not want it and wanted Leslie to give it back to the defendant. RP at 127-28.

Leslie Jessop testified that the bill was actually a ten-dollar bill. RP at 85. T.H. handed him that bill and asked him to give it back to the

defendant. RP at 86. Mr. Jessop gave the cash to Mr. Almarode, who also remembers it as a ten-dollar bill. RP at 61. He confronted the defendant and asked if the ten-dollar bill was his. RP at 64. The defendant said it was his ten-dollar bill and put it in his pocket. *Id.*

And yet the defendant denied giving any money to T.H. RP at 159. This conduct contradicts T.H.'s testimony because he would not have accepted the money if he did not believe it was his. The defendant also contradicts Mr. Almarode, who said that the defendant admitted the ten-dollar bill was his money. RP at 64. On the witness stand, the most the defendant would say was that, while he did snatch the money from Mr. Almarode, he did not know if it was his money. RP at 159. A jury could have reasonably concluded that the defendant gave T.H. cash hoping that she would keep quiet about his immoral comments.

Finally, the jury could have also considered the defendant's two convictions for Theft in deciding what weight or credibility to give his testimony. CP 159.

Would the State's evidence, if believed, coupled with the defendant's testimony, if disbelieved, be sufficient for a reasonable jury to convict? For the reasons stated below, the answer is yes.

The purpose of the statute prohibiting communication with a minor for immoral purposes is to prevent communication with a child for the

predatory purpose of promoting his or her exposure to and involvement in sexual misconduct. *State v. Hosier*, 157 Wn.2d 1, 9, 133 P.3d 936 (2006).

“Sexual misconduct” is a term which is not limited to the specific sex crimes listed in RCW 9A.44 or 9.68A. *State v. Schimmelpfennig*, 92 Wn.2d 95, 102, 594 P.2d 442 (1979).

“Speech directed at engaging minors in acts of sexual misconduct is therefore subject to regulation by the State, even though the words, spoken to an adult, may not be obscene.” *Id.* at 103.

Because a reasonable jury could believe T.H. beyond a reasonable doubt, they could have convicted the defendant based solely on T.H.’s testimony alone. To repeat, she immediately reported the conversation, and everyone described her as highly emotional. T.H. testified that when alone with her and out of earshot of anyone else, the defendant started to ask if she played “Truth or Dare”. RP at 127. He asked how dirty T.H. would get, and how nasty she would get with him. RP at 127-28. He would lower his voice as he asked her these questions. RP at 128. This occurred while he was rubbing her back. RP at 127. Add to these facts that the defendant gave T.H. cash and told her to promise not to tell anyone about the conversation. *Id.*

Add to that the evidence that the defendant had a lustful disposition toward T.H. RP at 82.

Finally, add in the defendant's own testimony. The jury could easily disbelieve the defendant. For the first time when testifying, he came up with the story about him cutting his hand and saying, "Man, that is nasty." He never mentioned that to the police, to Mr. Almarode, to Leslie Jessop, or T.H.'s father as an explanation. And, would T.H. really conjure from this statement a series of comments about "Truth or Dare" and whether she would get dirty or nasty with him?

Whether the prosecution met its burden to prove that the defendant "communicated with [T.H.] for immoral purposes of a sexual nature" is a question for the jury. CP 164. In this case, the jury reasonably could believe that he asked T.H. to play "Truth or Dare". His voice went lower as he repeatedly asked T.H. what dirty things she would do with him to avoid others from overhearing and to make it seem like a game to T.H. He was rubbing her back while this happened to make her feel comfortable with touching him if it came to that. He gave her cash in exchange for her promise not to tell anyone.

The defendant's testimony contradicts Mr. Almarode's about whether he owned the ten-dollar bill. RP at 64, 159. He contradicted Leslie Jessop's testimony about his lustful disposition for T.H. RP at 82, 156. He contradicted T.H.'s testimony.

The defendant argues on appeal that there was no evidence about what he meant by the words “dirty” or “nasty”, and that being dared to pick one’s nose could constitute being “dirty” for an 11-year-old. Br. of Appellant at 11. Correct, but the defendant denied mentioning “Truth or Dare” or directing the words “dirty” or “nasty” to T.H. If he had testified that he did indeed offer to play “Truth or Dare” with T.H. and that he was going to dare her to roll in mud, he might have had some credibility with the jury. But by contradicting key witnesses, denying any such conversation with T.H., and denying giving her hush money, the jury could reasonably conclude that he had a lot to hide.

Putting all the facts together, there was more than sufficient evidence to convict the defendant of Communication with a Minor for Immoral Purposes.

B. The State will not seek appellate costs.

Given the length of the defendant’s sentence and his indigency, it will not be fruitful to seek appellate costs.

V. CONCLUSION

The jury could reasonably be assured that the defendant was communicating with a minor for immoral sexual purposes when he asked 11-year-old T.H. if she wanted to play “Truth or Dare” and asked how dirty and nasty she would be. He offered her a ten-dollar bill in exchange

for not telling anyone about the conversation. She immediately reported this to an older peer, Leslie Jessop, and her mother. Both describe T.H. as being very upset.

The defendant did not help his cause when he had no explanation for why T.H. would report this conversation, for denying he gave T.H. \$10, but admitting he took the ten-dollar bill back, and failing to explain why a friend, Leslie Jessop, would say that he was speaking about T.H. in sexual terms earlier.

The conviction should be affirmed.

RESPECTFULLY SUBMITTED on February 28, 2019.

ANDY MILLER

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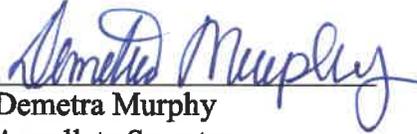
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on February 28, 2019.


Demetra Murphy
Appellate Secretary

BENTON COUNTY PROSECUTOR'S OFFICE

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