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Court of Appeals
Division III
State of Washington
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NO. 36591-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

YASIR MAJEED,

Appellant.

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

The Honorable Alexander Ekstrom, Judge

APPELLANT'S REPLY BRIEF

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A. STATEMENT OF CASE IN REPLY

The State does not dispute any of the facts on which appellant relies in his brief.

B. ARGUMENT IN REPLY

1. THE STATE MISPERCEIVES APPELLANT'S FIRST ASSIGNMENT OF ERROR: IT DID NOT OMIT AN ESSENTIAL ELEMENT FROM THE CHARGE, BUT IT CHARGED FACTS THAT DO NOT CONSTITUTE THE CRIME.

The State cites *State v. Kjorsvik*, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991), in response to appellant's first issue: that the State failed to charge a crime in Count II.

Appellant does not claim the State failed to allege an essential element of the crime. It initially quoted the elements of the statute. RCW 9.68A.100(1)(b); CP 14-15. But it then alleged the facts it was charging to be that crime -- facts that do not meet the statutory elements:

"to wit: did agree to pay a person the defendant believed was a thirteen (13) year old female \$100 for sexual conduct ..."

CP 14-15. Unlike *Kjorsvik*, the State did not omit an essential element; it based the charge on facts that could not constitute the crime. CrR 2.1(a)(1). App. Br. at 13-15.

2. THE STATE IMPROPERLY RELIES ON AN UNPUBLISHED OPINION THAT DOES NOT SUPPORT ITS CLAIM.

The State relies on an unpublished portion of the opinion in *State v. Racus*, 7 Wn. App. 2d 287, 290, 433 P.3d 830, review denied, 193 Wn.2d 1014 (2019). Resp. Br. at 10. It does not comply with GR 14.1. Appellant moves to strike this citation. *Crosswhite v. Dep't of Soc. & Health Services*, 197 Wn. App. 539, 544, 389 P.3d 731, review denied, 188 Wn.2d 1009 (2017). This Court should disregard this citation. *Condon v. Condon*, 177 Wn.2d 150, 165, 298 P.3d 86 (2013).

Furthermore, the published portion of this opinion shows the *Racus* court did not address the issue before this Court. *Racus*, 7 Wn. App. 2d at 289. Indeed, the trial court there dismissed the charge of commercial sexual abuse of a child at the close of the State's case. *Id.* at 292 n.3. That conviction, therefore, was not before the Court on appeal.

3. THE STATUTE AND JURY INSTRUCTIONS REQUIRE AN ACTUAL MINOR.

This court's duty is to "give effect to the Legislature's intent." ... The clearest indication of legislative intent is the language enacted by the legislature itself. ... Therefore, "if

the meaning of a statute is plain on its face, we 'give effect to that plain meaning.'" ... However, we will not read a statute in isolation; we determine its plain meaning by taking into account "the context of the entire act" as well as other related statutes.

State v. Gray, 189 Wn.2d 334, 340, 402 P.3d 254 (2017) (citations omitted). Addressing the meaning of RCW 9.68A.050 in *Gray*, the Supreme Court held the following statutes to be unambiguous:

A "minor" is "any person under eighteen years of age." RCW 9.68A.011(5). ... [A] "person" is any "natural person," whether an adult or a minor. RCW 9A.04.110(17), .090. Therefore, when any person, including a juvenile, develops, publishes, or disseminates a visual depiction of any minor engaged in sexual conduct, that person's actions fall under this statute's provisions.

Gray, 189 Wn.2d at 341.¹ In the same opinion, the Court held that RCW 9.68A.050 did not include depictions "that appeared to be minors," including "computer generated images and depictions of legal adults pretending to be minors." *Id.* at 346. The

¹ **RCW 9.68A.011. Definitions.**

Unless the context clearly indicates otherwise, the definitions in this section apply throughout this chapter.

...
(5) "Minor" means any person under eighteen years of age.

statute "regulates only sexually explicit images of actual children." *Id.* at 347.²

The State argues "such" is the controlling word from the statute, as used in "such minor." RCW 9.68A.100(1)(b); Resp. Br. at 8-10.³ "Such" refers back to the "minor" previously mentioned.⁴ It is a definite, as opposed to indefinite, adjective, specifying which minor and incorporating the qualities previously attributed to that minor.

The same definitions of "person" and "minor" held unambiguous in *Gray, supra*, apply to the statute here, RCW 9.68A.100. Thus it requires a "natural person" "under eighteen years of age."

² See also *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-46, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002) (distinguishing between actual children and depictions that appeared to be children).

³ Although the State argues that "such" means an "undefined thing," its citations do not support that assertion. Resp. Br. at 9.

⁴ Statutes frequently use this term for precisely this purpose, referring back to the aforementioned minor with all previously stated qualifications. See, e.g.: *Seattle v. Pullman*, 82 Wn.2d 794, 795 n.1, 514 P.2d 1059 (1973) (quoting Seattle Municipal Code 12.40.020 creating a curfew); *Wildman v. Taylor*, 46 Wn. App. 546, 549 n.1, 731 P.2d 541 (1987) (quoting RCW 5.60.030); *Baughn v. Malone*, 33 Wn. App. 592, 594, 656 P.2d 1118 (1983) (quoting RCW 66.44.270).

This definition was quoted in jury instruction No. 14, CP 32. There is no context of RCW 9.68A.100(1)(b) that "clearly indicates" it means something else. RCW 9.68A.011, *supra*, n.1. The legislative findings are consistent with these definitions. They refer to "children," not to "implied, undefined, or nonexistent" children. Resp. Br. at 8-10.

The State cites no legal authority for its other arguments. Indeed, there is none. If the commercial sexual abuse of a child involves "a minor [who] is under the thumb of a pimp" or "a mother [who] would really force her child into prostitution," Resp. Br. at 11 and 14, in either event there is an actual minor. As in *Gray*, that natural person under age 18 falls within the statute's definition. A nonexistent child does not.

The State's other comparisons are equally unavailing for its arguments. The mere agreement does not fully constitute the crime. See *Ohnemus v. State*, 195 Wn. App. 135, 141, 379 P.3d 142, review denied, 186 Wn.2d 1031 (2016) (State

incapable of violating RCW 9.68A.100 because it is unable to "engage in sexual conduct").

Based on the plain language of the statute, the State cannot engage in "sexual intercourse" or "sexual contact" because the State is incapable of "penetration," the State does not have "sex organs," nor anything that could "contact" another's "sex organs," nor could anyone be "the same or opposite sex" as the State. RCW 9A.44.010(1)(a)-(c), (2). Being incapable of "sexual intercourse" or "sexual contact," the State is thereby incapable of "engag[ing] in sexual conduct."

Id. at 141-42. Violating the statute requires "having engaged in," or the intent to "engage in," "sexual conduct with a minor." Because the State is incapable of such conduct, the Court held the State cannot violate RCW 9.68A.100. *Id.* at 142.

Just as the statute requires a genuine person to violate the statute, it also requires a genuine minor for a violation. As the *Ohnemus* court dismissed the civil action in that case, this Court should reverse and dismiss the conviction in this case.

4. THE STATE APPLIES THE INCORRECT GRAMMAR RULE TO JURY INSTRUCTION NO. 17.

Instruction No. 17 required the jury to find "the defendant sent **another person** an electronic communication for immoral purposes," instead of

sending it to the specific person (the minor or the person the defendant believed was a minor). The State argues this expanded element was correct because of the "last antecedent rule." Resp. Br. at 15. It cites *State v. Bunker*, 169 Wn.2d 571, 578, 238 P.3d 487 (2010) - which in fact rejected the last antecedent rule in its statutory interpretation.⁵

The grammatical issue here is between a definite and indefinite article: "the other" vs. "another."

The *Graham* court interpreted "another" as a "compound of 'an + other,' and the indefinite article 'an' means 'a,' the letter n being an addition before a following vowel sound."

State v. Ose, 156 Wn.2d 140, 148, 124 P.3d 635 (2005), quoting *State v. Graham*, 153 Wn.2d 400, 406 n.2, 103 P.3d 1238 (2005).

Use of a definite rather than indefinite article is a recognized indication of statutory meaning. ... The rules of grammar ... provide that the definite article, "the", is used before nouns of which there is only one or which are considered as one.' "

⁵ "Contrary to the defendants' assertions, the last antecedent rule and its comma corollary do not apply here."

Dillon v. Seattle Deposition Reporters, LLC, 179 Wn. App. 41, 74-75, 316 P.3d 1119 (2014) (citations omitted).

Had the legislature intended to limit the ongoing pattern to incidents involving only the victim of the current charged offense, it would have substituted "the" for "a" and not included the word "multiple" in front of victims.

State v. Sweat, 180 Wn.2d 156, 162, 322 P.3d 1213 (2014).⁶

By using the word "another," the jury instruction expanded the range of possible persons this element defines beyond what the statute narrowly requires for the crime. It did not limit the jury's verdict to the essential elements of the crime. It therefore was unconstitutional.

Nor does the instruction comply with WPIC 47.06, as the State argues. Resp. Br. at 16. The pattern instructions provide:

To 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:

⁶ Holding aggravating circumstance of RCW 9.94A.535(3)(h)(i) permitted evidence of prior domestic violence acts against victims other than the one for the current charged crime.

(1) That on or about (date), the defendant communicated with [(name of person)] [another person] for immoral purposes of a sexual nature;

(2) [That the defendant believed [(name of person)] [the other person] was a minor;] and

(3) That this act occurred in the [State of Washington].

(4) [That the defendant sent (name of person) an electronic communication for immoral purposes.]

...

WPIC 47.06 (as applicable to this case). The overly broad term "another person" is not provided even as an option to elements 2 or 4. As the statute requires, it must refer back to the same person communicated with in element 1.

5. AN INSTRUCTION THAT IMPROPERLY COMMENTS ON THE EVIDENCE DOES NOT CEASE TO BE A CONSTITUTIONAL ERROR IF THE DEFENSE FAILS TO SEEK SOME SIMILARLY IMPROPER INSTRUCTION THE PROSECUTOR CAN IMAGINE.

The State concedes a claim that the court's instruction is a comment on the evidence can be raised for the first time on appeal. Resp. Br. at 17. Nonetheless, it then argues that the defense's failure to request a separate instruction that would have been equally a comment on the evidence "should prevent the defendant from making the argument on appeal." Resp. Br. at 18. It cites no

authority. This Court should soundly reject such a concept.

Appellant's "complaint" about the instruction is not that he didn't get a similar instruction. Resp. Br. at 17-18. It's that the court may not convey to the jury its preference or focus on the testimony of some witnesses or on matters of fact.

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

Washington Constitution, article IV, section 16.

6. JURY INSTRUCTION NO. 18 WAS A COMMENT ON THE EVIDENCE.

The State cites *State v. Enriquez*, 45 Wn. App. 580, 585, 725 P.2d 1384 (1986), and *State v. Smith*, 101 Wn.2d 36, 43, 677 P.2d 100 (1984), for the proposition that police officers may lie in the course of their investigations. Resp. Br. at 17. Both of those cases involved entrapment. In neither of those cases did the court instruct the jury regarding officers' approved conduct for entrapment. Entrapment was not at issue here, below or on appeal; Mr. Majeed denied he committed any crime.

The State wants to parse the instruction given here. It admits the first sentence refers directly

to the undercover officers who testified in this case. Resp. Br. at 19. It claims the second sentence is somehow completely removed from the first; it does not refer to the specific officers who testified, just mentioned in the first sentence, but to "law enforcement officers in general." *Id.*

Comments on the evidence turn not on the court's intent, but on the jury's reasonable perception. *State v. Lampshire*, 74 Wn.2d 888, 892, 447 P.2d 727 (1968) (inadvertent remark by judge nonetheless unconstitutional and prejudicial comment on the evidence). The first sentence of this instruction specifically refers the jury back to the testimony of undercover officers "in this case." The second and third sentences cannot be considered separately from it.

The State relies on *State v. Faucett*, 22 Wn. App. 869, 593 P.2d 559 (1979), that an instruction on how to consider the testimony of any witness was "held to be appropriate." Resp. Br. at 19. In fact, the Supreme Court warned the language "is fairly viewed as a comment on the State's testimony when the defendant elects not to take the stand,

and its use should be avoided." 22 Wn. App. at 877. It held in light of other instructions, it was not prejudicial error there.

State v. Carothers, 84 Wn.2d 256, 525 P.2d 731 (1974), similarly does not help the State. The instruction there cautioned the jury regarding the testimony of an accomplice, "a rule which has long found favor in the law, **evolved for the protection of the defendant.**" *Id.* at 269 (emphasis added). Thus it could not prejudice the defendant.

State v. Hansen, 46 Wn. App. 292, 730 P.2d 706 (1986), did not involve a jury instruction, but the court's interjection during a witness's testimony. It held the court's words did not weigh on a disputed fact, and so was not a comment on the evidence. *But see: State v. Coella*, 3 Wash. 99, 28 P. 28 (1891) (trial judge reading newspaper solely during defendant's testimony conveyed to jury his disregard for defendant's testimony and so preference for other witnesses; reversed for comment on the evidence).

The other cases the State cites support appellant's claim here.

7. THE STATE HAS NOT ESTABLISHED THE COMMENT ON THE EVIDENCE WAS HARMLESS ERROR.

The State acknowledges a comment on the evidence is presumed prejudicial, and the State bears the burden of showing there was no prejudice. Resp. Br. at 24. It fails to meet this burden.

The prosecutor broached this issue during jury selection. A juror responded they accepted police working undercover if they were acting within the law. RP 279-83; App. Br. at 8. Thus this concept was in the jury's minds.

The instruction conveyed the court's approval of the officers' testimony and their use of deception, and by implication, its disapproval or disbelief of the defendant's deception. See: *State v. Vaughn*, 167 Wash. 420, 9 P.2d 355 (1932) (judge said within jury's hearing he was confident prosecutor, testifying as witness, would not answer anything that he shouldn't; conviction reversed); *Lampshire*, *supra* (court's comment during defendant's testimony conveyed lack of credence in testimony; reversed); *State v. Miller*, 72 Wash. 174, 176, 130 P. 356 (1913) (proper to deny proposed instruction regarding police officer's testimony, as comment on evidence). As in these

cases, the unconstitutional instruction here demonstrated the court's preference for the officers' testimony it mentions in the instruction, over the defendant's. App. Br. at 25-26.

Furthermore, the instruction conveyed the court's belief that the officers were investigating "criminal activities," an issue that was in dispute here. App. Br. at 27-29. The State does not address this aspect.

This is not a case of overwhelming untainted evidence of guilt. Having condoms and money did not convey a belief he was dealing with an actual minor instead of a role-playing adult. The comment of this instruction could have influenced the verdict. The convictions therefore must be reversed.

C. CONCLUSION

For the reasons stated above and in the Brief of Appellant, this Court should reverse and dismiss with prejudice Count II; it must reverse and remand for a new trial Count III; and the unconstitutional

comment on the evidence requires reversal and remand of both counts if not already reversed.

DATED this 26th day of February, 2020.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lenell Nussbaum", written over a horizontal line.

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

STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 36591-3-III
)	
Vs.)	DECLARATION OF SERVICE
)	OF APPELLANT'S REPLY
YASIR MAJEED,)	BRIEF ON APPELLANT
)	
Appellant.)	
_____)		

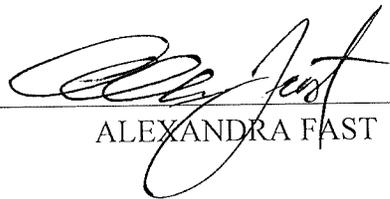
ALEXANDRA FAST declares:

On February 26, 2020, I caused a copy of the Appellant's Reply Brief in this case to be served on the appellant by depositing it in the United States Postal Service, postage prepaid, addressed as follows:

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I declare under penalty of perjury under the laws of the state of Washington that the above statement is true and correct to the best of my knowledge.

2-26-2020 - SEATTLE, WA
Date and Place



ALEXANDRA FAST

LAW OFFICE OF LENELL NUSSBAUM PLLC

February 26, 2020 - 11:12 AM

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