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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 BRIEF

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A. ASSIGNMENTS OF ERROR

1. The State failed to charge a crime in Count II.

2. There was insufficient evidence as a matter of law to support the conviction on Count II, commercial sexual abuse of a minor.

3. The court's instruction setting out the elements of Count III failed to include one essential element, making the verdict invalid.

4. Appellant assigns error to Instruction No. 17:

INSTRUCTION NO. 17

> 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:
> (1) That on or about July 7-8, 2017, the defendant communicated with another person for immoral purposes of a sexual nature;
> (2) That the defendant believed the other person was a minor;
> (3) The defendant sent another person an electronic communication for immoral purposes; and
> (4) That this act occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these

elements, then it will be your duty to return a verdict of not guilty.

5. Appellant assigns error to Instruction No. 18 as an unconstitutional comment on the evidence, Const., art. IV, § 16:

INSTRUCTION NO. 18

> You have heard testimony from undercover officers who were involved in the government's investigation in this case. Law enforcement officials may engage in stealth and deception, such as the use of undercover agents, in order to investigate criminal activities. Undercover agents may use false names and identities.

Issues Pertaining to Assignments of Error

1. Does the statute criminalizing commercial sexual abuse of a minor require an actual minor, or may it be committed based on a person the defendant believes is a minor?

2. Where there is no dispute that no actual minor was involved, has the State proven the crime of commercial sexual abuse of a minor, according to the elements in the to-convict instruction?

3. Must the crime of communicating with a minor for immoral purposes by means of an electronic device require that the communication by electronic device be with the person the defendant believes to be the minor?

4. Where factual issues at trial turn on the defendant's credibility and whether a crime occurred, and law enforcement officers used lies and deception to create a crime with no advance evidence that the defendant was in any way involved in criminal activity, is it an unconstitutional comment on the evidence for the Court to instruct the jury the officers' deceptions are permitted "to investigate criminal activity?"

B. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS

> "You can be anyone you want online."
>
> "Anybody can portray they're anybody on the Internet. You need some type of proof of life."
>
> -- WSP Sgt. Carlos Rodriguez, RP 488, 390.
>
> "You can't tell anything from the digital world unless you meet that person."
>
> -- Yasir Majeed, RP 512.

Yasir Majeed served the United States Army as an interpreter in very hostile territory in his home country of Iraq 2006-2011. He put his life on the line for the United States. His honorable service won him the support of many United States officers who relied on him. They assisted him in immigrating to the United States, and to the Tri-

Cities, where some of the officers themselves live. Supp. CP [Subno. 61] at 2.

Mr. Majeed has a bachelor's degree in civil engineering and an associate's degree in information technology. He made his living as a consultant in IT. Supp. CP [Subno. 61] at 2.

Mr. Majeed used Craigslist to find work. He bought and sold a car and computer equipment on Craigslist. Spending most of his time before an electronic screen, occasionally he communicated with people seeking contact with other people. The "personals" section of Craigslist included many subcategories. All were restricted to people over age 18. He met some people for sex, but he also met people with whom he shared other interests. RP 504-010. Scanning the "personals" section included ads posted under the "casual encounters" subsection as well as many other subcategories. RP 508-09.

On Friday, July 7, 2017, he saw this ad:

> **young looking for older daddy - w4m** (Richland)
> I am young looking for older daddy to take care of this young baby girl. Be real. Be nice, your pic gets mine. let's get lit! I have a daddy fetish and love to take showers, very clean. let's talk. DDF

Ex. 3. The ad was placed by the Washington State Patrol. When Mr. Majeed responded, two troopers in their 40s engaged in communications with him, pretending to be a 13-year-old runaway. RP 391, 438. They sent him photos of another trooper in her 20s, having applied an app filter, pretending that was their 13-year-old self. Exs. 5, 9, 10. Their policies prohibited using real children in their operations. RP 372-73.

Mr. Majeed perceived an adult role-playing as a 13-year-old. A teenaged runaway would not use the term "daddy fetish;" that phrase conveyed to Mr. Majeed an adult playing a child.[1] Other things "she" said persuaded him it was an adult: discussing "anal," "preggo," and "kinky" when she claimed she'd only been sexual once; requesting "strawberry lube" as her "favorite;" liking "Fireball whiskey;" having a "friend's apartment" to herself for the weekend. RP 438-48. The photos, supposedly made to look more "youthful" and which he recognized as having gone through a

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[1] Even Sgt. Rodriguez, who wrote the ad, acknowledged he'd never seen a 13-year-old use that phrase; it was more common for an adult to use it. RP 394.

filter, did not look like a 13-year-old. Exs. 5, 9, 10. He engaged in the role play, occasionally trying to break out of it to see if the person wanted to be "real," and occasionally playing along, pretending to be a "sugar daddy." He used a different name himself, and provided a phone number that went via an app, so as not to disclose his cell phone number. RP 515-34; Ex. 8.

The "13-year-old" asked him to bring $100 and condoms to meet her. He agreed. Ex. 8.

He drove about ten minutes from his home to a carwash "she" specified. When she did not give him a precise address, he drove into the apartment complex parking lot and kept driving out and back to the highway. The police stopped him on the highway. Mr. Majeed had condoms and $100 in his pocket, which he often carried with him. He did not buy the Slurpee and strawberry lube she had requested. Ex. 12; RP 535-45, 468-71, 484, 494-99.

Mr. Majeed testified he never believed he was communicating with an actual minor; he was just curious to see how far this "scam" went. He was not attracted to children, but preferred to spend his time with people older than himself, in their

40s, 50s and 60s. If a 13-year-old had come out to meet him, he would have called the police. RP 512-13, 544-47.

2. PROCEDURAL FACTS

a. *Charges*

The State charged Mr. Majeed by Third Amended Information as follows:

> "COMMERCIAL SEXUAL ABUSE OF A MINOR, RCW 9.68A.100(1)(b);
>
> COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES, RCW 9.68A.090(2), committed as follows:
>
> ...
>
> COUNT II
>
> That the said YASIR M MAJEED in the County of Benton, State of Washington, during the time intervening between the 7th day of July, 2017, and the 8th day of July, 2017, in violation of RCW 9.68A.100(1)(b), did pay or agree to pay a fee to a minor or a third person pursuant to an understanding that in return therefore such minor will engage in sexual conduct with him, to wit: **did agree to pay a person the defendant believed was a thirteen (13) year old** female $100 for sexual conduct, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Washington.
>
> COUNT III
>
> That the said YASIR M MAJEED in the County of Benton, State of Washington, during the time intervening between the 7th day of July, 2017, and the 8th day of

> July, 2017, in violation of RCW 9.68A.090(2), did communicate with a person the defendant believed was thirteen year old "Denise," a minor, for immoral purposes, to wit: email and text message regarding sexual intercourse, and that communication was through the sending of an electronic communication, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Washington.

CP 14-15 (emphasis added).[2]

b. *Voir Dire*

During jury selection, the State inquired about attitudes toward police working undercover. One juror responded it would be all right if they were acting within the law. The prosecutor went on to discuss how to determine credibility. RP 279-83.

c. *Jury Instructions*

The Court instructed the jury, as the State proposed,[3] as follows:

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[2] The State also charged him with Count I, attempted rape of a child in the second degree. The jury was unable to reach a verdict on that count, voting 11-1 to acquit. CP 43; Supp. CP [Subno. 61] at 1-2. On the State's motion, the Court dismissed that count. RP 652; CP 49.

[3] Supp. CP [Subnos. 46, 48]; RP 567-80, 628.

INSTRUCTION NO. 12

A person commits the crime of commercial sexual abuse of a minor when he pays or agrees to pay a fee to **a minor** or a third person pursuant to an understanding that in return therefore **such minor** will engage in sexual conduct with him.

CP 30.

INSTRUCTION NO. 14

"Minor" means any person under eighteen years of age.

INSTRUCTION NO. 15

To convict the defendant of the crime of commercial sexual abuse of a minor, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about July 7-8, 2017, the defendant agreed to pay a fee to **a minor** or a third person pursuant to an understanding that in return therefore **such minor** will engage in sexual conduct with him; and

(2) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 16

A person commits the crime of communication with a minor for immoral purposes when he communicates with someone the person believes to be a minor for immoral purposes of a sexual nature.

Communication may be by words or conduct.

INSTRUCTION NO. 17

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:

(1) That on or about July 7-8, 2017, the defendant communicated with another person for immoral purposes of a sexual nature;

(2) That the defendant believed the other person was a minor;

(3) The defendant sent another person an electronic communication for immoral purposes; and

(4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 18

You have heard testimony from undercover officers who were involved in the government's investigation in this case. Law enforcement officials may engage in stealth and deception, such as

> the use of undercover agents, in order to investigate criminal activities. Undercover agents may use false names and identities.

CP 32-36 (emphases added).

d. *Closing Arguments*

The State argued in closing that the jury must decide whether Mr. Majeed believed he was communicating with a minor or with an adult who was role playing. He emphasized that the police did not intend to communicate with people who were role playing. He referred the jury to instructions on how to determine credibility. RP 585-89.

Defense counsel emphasized to the jury on Count II: "There is no actual minor, right? It says pay a fee to a minor. There is no minor in this case." RP 615.

In rebuttal, the State argued: "We never stated that this had to be a minor. This was always someone the defendant believed to be a minor. That's what's alleged. That's what's clear." RP 622.

e. *Verdicts, Judgment and Sentence*

The jury found Mr. Majeed guilty of Counts II and III. CP 44-45.

The court sentenced him to 42 months on Count II and 12 months on Count III, to run concurrently. CP 46-60.

This appeal timely follows. CP 61-77.

C. ARGUMENT

1. INTRODUCTION

Appellant was convicted of two counts. In Count II, the State alleged a non-existent element and so charged an "offense" that is not a crime; and failed to present evidence of an essential statutory element, that "a minor" was involved. In Count III, the court instructed the jury on an inaccurate element, thus permitting conviction without a unanimous jury verdict on every essential element of the charged crime. The court concluded with an improvised jury instruction that was an unconstitutional comment on the evidence.

These errors are all constitutional, can be raised for the first time on appeal, RAP 2.5(a), are presumed prejudicial, and require reversal of both counts in this case.

2. THE STATE FAILED TO CHARGE A CRIME IN COUNT II.

> [A]n accusation which lacks any particular fact which the law makes essential to the punishment is .... no

> accusation within the requirements of the common law, and it is no accusation in reason.

Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), quoting 1 J. Bishop, CRIMINAL PROCEDURE § 87, p. 55 (2d ed. 1872).

This Court reviews questions of law and jury instructions de novo. *State v. Miller*, 156 Wn.2d 23, 27, 123 P.3d 827 (2005).

The Legislature defines elements of crimes, and so determines the elements that the prosecution must prove to sustain a conviction. *State v. Williams*, 162 Wn.2d 177, 183, 170 P.3d 30 (2007); *Miller*, 156 Wn.2d at 27.

> Since it is the legislature that defines crimes, we first look to the relevant statute to determine the elements of a crime. The purpose of looking to the statute is to determine the legislature's intent in defining the elements of a crime. Where the plain words of a statute are unambiguous, we do not construe the statute.

State v. Gonzalez-Lopez, 132 Wn. App. 622, 626, 132 P.3d 1128 (2006). Due process does not permit the prosecutor to create new elements to redefine

statutory crimes. U.S. Const., amends. 5, 14; Const., art. I, § 3.[4]

> The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

CrR 2.1(a)(1). The State alleged in Count II that the defendant "did agree to pay a person the defendant believed was a thirteen (13) year old female $100 for sexual conduct," alleging it violated RCW 9.68A.100(1)(b). CP 14-15.

The Legislature defined commercial sexual abuse of a minor:

> **9.68A.100. Commercial sexual abuse of a minor -- Penalties -- Consent of minor does not constitute defense.**
>
> (1) A person is guilty of commercial sexual abuse of a minor if:
>
> ...
>
> (b) *He or she pays or agrees to pay a fee to* ***a minor*** *or a third person pursuant to an understanding that in return therefore* ***such minor*** *will engage in sexual conduct with him or her;*
>
> ...

---

[4] Constitutional texts are contained in Appendix B.

RCW 9.68A.100 (2016) (emphases added).[5] Thus the Legislature defined this crime to involve "a minor," not "a person the defendant believed was" a minor.

The State did not charge this crime. CP 14-15. As the State conceded to the jury, and as the undisputed evidence established, there was no minor, no person under 18, involved here. RP 622.

If the Legislature intended to permit prosecution of commercial sexual abuse of a minor using an imaginary minor, it could have done so. It specifically added language to the crime of communication with a minor for immoral purposes to include communicating with "a minor" or "someone the person believes to be a minor." RCW 9.68A.090.[6] No similar provision appears in RCW 9.68A.100 (2016).

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[5] This was the statute in effect at the time of the charged activity; the statute has since been amended. The full texts of this statute and all statutes cited below are contained in Appendix A.

[6] *See also*: RCW 9A.28.020, defining criminal attempts ("it is no defense to a prosecution of such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission").

The Legislature also did not add that language to the many other provisions in this chapter. *See* RCW 9.68A.040 (sexual exploitation of a minor); RCW 9.68A.050 (dealing in depictions of a minor engaged in sexually explicit conduct); RCW 9.68A.060 (bringing into state depictions of minor engaged in sexually explicit conduct); RCW 9.68A.070 (possession of depictions of minor engaged in sexually explicit conduct); RCW 9.68A.075 (viewing depictions of a minor engaged in sexually explicit conduct); RCW 9.68A.101 (promoting commercial sexual abuse of a minor); RCW 9.68A.102 (promoting travel for commercial sexual abuse of a minor); RCW 9.68A.103 (permitting commercial sexual abuse of a minor); RCW 9.68A.104 (advertising commercial sexual abuse of a minor). All of these crimes require an actual minor, not an imaginary one.

Because the charge in Count II is not a crime, the conviction must be reversed and dismissed.

3. THERE WAS INSUFFICIENT EVIDENCE AS A MATTER OF LAW TO SUPPORT A CONVICTION ON COUNT II.

Due process requires sufficient evidence to support a conviction. *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979);

In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const., amends. 5, 3.

> In reviewing the sufficiency of evidence in a criminal case, the question is whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt after viewing the evidence in the light most favorable to the State.

State v. Aten, 130 Wn.2d 640, 927 P.2d 210 (1996); *State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980); *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).[7]

As shown above, the statute defining commercial sexual abuse of a minor requires proof of "a minor." RCW 9.68A.100. Likewise, the jury instructions the State proposed and the court gave require proof of "a minor," defined as "a person under eighteen years old." Instructions Nos. 12, 14-15; CP 30, 32-33. Instruction No. 15, the to-convict instruction, did not include all the "elements" alleged in the charge. Specifically, it did not include the provision "a person the defendant believed was a thirteen (13) year old." CP 33.

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[7] This issue may be raised for the first time on appeal. RAP 2.5(a); *State v. Hickman*, 135 Wn.2d 97, 103 n.3, 954 P.2d 900 (1998).

As shown above, the State conceded there was no minor involved in this case in any way. RP 622.

Instruction No. 15 became the law of the case when the court gave it without the State objecting. The State then bore the burden of proving beyond a reasonable doubt all the elements in the instruction. *State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998); *State v. Johnson*, 188 Wn.2d 742, 399 P.3d 507 (2017); *State v. Dreewes*, 192 Wn.2d 812, 432 P.3d 795 (2019).

Because there was no evidence of a minor, the conviction on Count II must be reversed and dismissed with prejudice. *Hickman*, 135 Wn.2d at 99, 103; *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

4. THE TO-CONVICT INSTRUCTION ON COUNT III, COMMUNICATING WITH A MINOR FOR IMMORAL PURPOSES, ALLOWED CONVICTION WITHOUT PROOF OF ALL ESSENTIAL ELEMENTS OF THE CRIME, IN VIOLATION OF DUE PROCESS AND THE RIGHT TO A JURY TRIAL.

> "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." This rule reflects two longstanding tenets of common-law

> criminal jurisprudence: that the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours," 4 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, 343 (1769), and that "an accusation which lacks any particular fact which the law makes essential to the punishment is .... no accusation within the requirements of the common law, and it is no accusation in reason," 1 J. Bishop, CRIMINAL PROCEDURE § 87, p. 55 (2d ed. 1872).

Blakely v. Washington, *supra*, 542 U.S. at 301.

> Where the trial court attempts to define the offense, for the commission of which an accused is being tried, it is the duty of the court to instruct the jury as to each and every essential element of the offense charged and a charge attempting to define the offense which does not cover material elements of the offense is necessarily misleading and prejudicial to the accused.

State v. Emmanuel, 42 Wn.2d 799, 820-21, 259 P.2d 845 (1953). The to-convict instruction serves as a "'yardstick' by which the jury measures the evidence to determine guilt or innocence." *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

The instruction here makes this rule particularly essential because in the concluding paragraphs it requires the jury to return a guilty verdict if it finds each listed element has been proved beyond a reasonable doubt. CP 35. It certainly violates due process to require the jury

to return a guilty verdict when it has not found every element of the charge.

The statute for Count III provides:

> **9.68A.090. Communication with minor for immoral purposes -- Penalties.**
> (1) Except as provided in subsection (2) of this section, a person who communicates with a minor for immoral purposes, or a person who communicates with someone the person believes to be a minor for immoral purposes, is guilty of a misdemeanor.
> (2) A person who communicates with a minor for immoral purposes is guilty of a class C felony ... if the *person communicates* with a minor or *with someone the person believes to be a minor for immoral purposes, including the purchase or sale of commercial sex acts and sex trafficking, <u>through</u> the sending of an electronic communication.*
> (3) For the purposes of this section, "electronic communication" has the same meaning as defined in RCW 9.61.260.

(Emphases added.) Thus it requires that the electronic communication made for immoral purposes be with the minor or "someone the person believes is a minor."

The to-convict instruction required the jury to find:

> (1) That on or about July 7-8, 2017, the defendant communicated with another person for immoral purposes of a sexual nature;
> (2) That the defendant believed the other person was a minor;

> (3) The defendant sent **another person** an electronic communication for immoral purposes; and
> (4) That this act occurred in the State of Washington.

CP 35 (emphasis added). Thus the instruction detached the electronic nature of the communication from the minor or the person the defendant believed was a minor. It required that the defendant sent "another person" apparently another communication for immoral purposes. This is not what the statute requires.

Instruction No. 16 defining this crime did not include the element of an electronic communication. CP 34. Thus the State cannot argue that other instructions somehow incorporated this element into the jury's verdict. *Smith, supra.*

The jury's verdict on Count III was not based on the essential elements of the charge. The conviction therefore is invalid and must be reversed for denial of the right to a jury trial and due process. U.S. Const., amends. 6, 14; Const., art. I, §§ 3, 21, 22.

5. THE COURT'S INSTRUCTION NO. 18 WAS AN UNCONSTITUTIONAL COMMENT ON THE EVIDENCE IN VIOLATION OF CONSTITUTION, ARTICLE IV, § 16.

> 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.

> The object of the constitutional provision, doubtless, is to prevent the jury from being influenced by knowledge conveyed to it by the court of what the court's opinion is on the testimony submitted. The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses, and it is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.

State v. Bogner, 62 Wn.2d 247, 249, 382 P.2d 254 (1963).

> [This provision] of our constitution prohibits a comment on the evidence if it conveys or indicates to the jury a personal opinion or view of the trial judge regarding the credibility, weight, or sufficiency of some evidence introduced at trial.

State v. Painter, 27 Wn. App. 708, 713-14, 620 P.2d 1001 (1980), *review denied*, 95 Wn.2d 1008 (1981); *State v. Eisner*, 95 Wn.2d 458, 462, 626 P.2d 10 (1981); *State v. Alger*, 31 Wn. App. 244, 640 P.2d

44 (1982). Any instruction or comment which conveys to the jury the court's opinion as to the weight or sufficiency of evidence is a comment within the scope of the constitutional prohibition. *See State v. Hayes*, 72 Wn.2d 461, 475, 433 P.2d 884 (1967); *State v. Galbreath*, 69 Wn.2d 664, 414 P.2d 800 (1966); *State v. Owen*, 24 Wn. App. 130, 600 P.2d 625 (1979). Whether or not the instruction was intended as a comment or inadvertently implied is irrelevant. *State v. Lampshire*, 74 Wn.2d 888, 892, 447 P.2d 727 (1968); *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

Jury instructions should do no more than provide "the basic and essential elements of the legal rules necessary for a jury to reach a verdict." *State v. Van Zante*, 26 Wn. App. 739, 741-42, 614 P.2d 214, *review denied*, 94 Wn.2d 1018 (1980).

> It has, for some years, been the policy of our Washington system of jurisprudence, in regard to the instruction of juries, to avoid instructions which emphasize certain aspects of the case and which might subject the trial judge to the charge of commenting on the evidence, and also, to avoid slanted instructions, formula instructions, or any instruction other than those which enunciate the basic and essential elements of the legal rules

> necessary for a jury to reach a verdict. ... Detailed instructions, such as those proposed here, though once common, are now deemed to be instructions which "point up," "underline," or "buttress" portions of counsel's argument.

Laudermilk v. Carpenter, 78 Wn.2d 92, 100, 457 P.2d 1004 (1969).

Since a comment on the evidence violates a constitutional prohibition, it may be raised for the first time on appeal. It does not matter that the issue was not raised at trial. *Levy*, 156 Wn.2d at 719-20; *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); RAP 2.5.

An unconstitutional comment on the evidence is presumed prejudicial. The conviction must be reversed "unless the record affirmatively shows that no prejudice could have resulted." *State v. Brush*, 183 Wn.2d 550, 559-60, 353 P.3d 213 (2015).

Here the court instructed the jury:

> You have heard testimony from undercover officers who were involved in the government's investigation in this case. Law enforcement officials may engage in stealth and deception, such as the use of undercover agents, in order to investigate criminal activities. Undercover agents may use false names and identities.

CP 36 (Instruction No. 18).

This instruction commented on the evidence by referring specifically to evidence in the case and advising the jury how to think about it.

This instruction was an impermissible comment on the evidence in two ways: It vouched for the credibility of law enforcement officers over that of the defendant, and conveyed the court's impression that the agents were investigating "criminal activities," when the issues before the jury were the defendant's credibility and whether a crime was committed.

a. *Witness Credibility*

Washington courts have long reversed convictions when the trial court commented on the credibility of one or another witness. *See, e.g.*: *State v. James*, 63 Wn.2d 71, 385 P.2d 558 (1963) (discharging co-defendant after his testimony conveyed court's belief he told the truth, to defendant's detriment); *State v. Jackson*, 83 Wash. 514, 520-23, 145 P. 470 (1915) (court indicated doubt as to witness's credibility); *State v. Yanai*, 128 Wash. 568, 224 P. 15 (1924) (court affirmed witness's credibility); *State v. Bogner*, *supra*

(court's response to objection conveyed belief essential element had been proven by then).

Here, Mr. Majeed testified he never believed the person or persons with whom he exchanged texts and emails was thirteen years old. His credibility was directly at issue.

There is no question that both law enforcement officers lied in their communications with Mr. Majeed. The pattern instructions informed the jury that it alone could determine a witness's credibility. CP 18. The defendant also used a false name and identity in his communications. This instruction tells the jury the court approves of the officers using deception in this manner. By not commenting, it implicitly disapproves of the defendant's similar conduct.

With this instruction, the court conveyed that a police officer's lying was permissible and need not weigh against his or her credibility. The court thus put its thumb on the scales of justice, vouching for the officers's credibility as against the defendant's.

b. *Conclusion That Officers Were Investigating "Criminal Activity"*

A plea of not guilty puts at issue every element of the charged crimes, and whether a crime occurred. Under due process, the defendant has the right to have a jury decide whether a crime was committed. U.S. Const., amends. 6, 14; Const., art. I, §§ 3, 21, 22.

> It is prejudicial error to give an instruction which assumes as true the existence or nonexistence of any material fact in issue in respect of which the evidence is conflicting.

Ulmer v. Ford Motor Co., 75 Wn.2d 522, 533, 452 P.2d 729 (1969).

Here the police were involved in a "sting" operation. There was no evidence that they were investigating an existing crime or criminal activity involving Mr. Majeed. To the contrary, they had no advance information that Mr. Majeed was involved in any criminal activity. *Contrast*: *State v. Townsend*, 147 Wn.2d 666, 670, 57 P.3d 255 (2002) (police had tip that Townsend was using computers to initiate sexual contact with minors before they used sting to investigate him).

A similar instruction was given in *State v. Baun*, 123 Wash. 340, 212 Pac. 553 (1923). There

the defendants were charged as accomplices in a burglary. The jury was instructed:

> If you are convinced beyond a reasonable doubt that any of the defendants in this case aided or abetted in the commission of **the crime**, whether present or absent, or if you are convinced beyond a reasonable doubt that any of the defendants in this case, directly or indirectly counseled, encouraged, hired, commanded, induced or otherwise procured any other of the defendants herein to commit **the crime** you should find any such defendants guilty as charged.

Baun, 123 Wash. at 344 (Court's emphases). The Court held this instruction erroneous.

> It was material for the state to prove that the crime had been committed, and it was error for the trial court to assume this fact in the instruction complained of.

Id., 123 Wash. at 345. The judgment was reversed and the cause remanded for a new trial. *See also*: *State v. McDonald*, 70 Wn.2d 328, 422 P.2d 838 (1967) (conviction reversed where instruction stated: "Evidence has been offered of the escape of the defendant, or attempted escape, after arrest on the charge on which the defendant is now being tried;" since evidence of flight was conflicting, instruction was comment on the evidence); *Becker*, *supra* (special verdict form conveyed YEP was a

"school," an issue of fact; aggravated sentence reversed); *State v. Belknap*, 44 Wash. 605, 87 Pac. 934 (1906); *State v. Roberts*, 144 Wash. 381, 258 Pac. 32 (1927); *Instructing a Jury in Washington, Comment on the Evidence*, 36 WASH. L. REV. at 400 (1961).

The comment on the evidence of Instruction 18 requires reversal of all convictions and remand for a new trial.

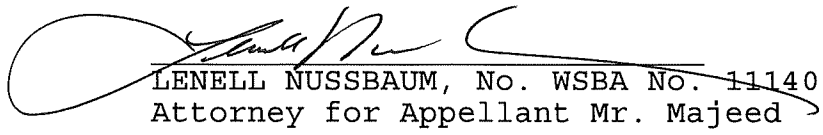
D. CONCLUSION

The State failed to charge a crime in Count II; and there was insufficient evidence to support it as charged in the instructions. This Court must therefore reverse and dismiss with prejudice Count II.

The jury instructions failed to incorporate all the essential elements of Count III. This Court herefore must reverse Count III.

The trial court's unconstitutional comment on the evidence in Instruction No. 18 requires this Court to reverse any count not already reversed.

DATED this 30th day of October, 2019.



LENELL NUSSBAUM, No. WSBA No. 11140
Attorney for Appellant Mr. Majeed

APPENDIX A -- STATUTES

9.68A.040. Sexual exploitation of a minor.

(1) A person is guilty of sexual exploitation of a minor if the person:

(a) Compels a minor by threat or force to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance;

(b) Aids, invites, employs, authorizes, or causes a minor to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance; or

(c) Being a parent, legal guardian, or person having custody or control of a minor, permits the minor to engage in sexually explicit conduct, knowing that the conduct will be photographed or part of a live performance.

...

9.68A.050. Dealing in depictions of a minor engaged in sexually explicit conduct.

(1)(a) A person eighteen years of age or older commits the crime of dealing in depictions of a minor engaged in sexually explicit conduct in the first degree when he or she:

(i) Knowingly develops, duplicates, publishes, prints, disseminates, exchanges, finances, attempts to finance, or sells a visual or printed matter that depicts a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4)(a) through (e); or

(ii) Possesses with intent to develop, duplicate, publish, print, disseminate, exchange,

or sell any visual or printed matter that depicts a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4)(a) through (e).

...

(2)(a) A person eighteen years of age or older commits the crime of dealing in depictions of a minor engaged in sexually explicit conduct in the second degree when he or she:

(i) Knowingly develops, duplicates, publishes, prints, disseminates, exchanges, finances, attempts to finance, or sells a visual or printed matter that depicts a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4)(f) or (g); or

(ii) Possesses with intent to develop, duplicate, publish, print, disseminate, exchange, or sell any visual or printed matter that depicts a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4)(f) or (g).

...

9.68A.060. Bringing into state depictions of minor engaged in sexually explicit conduct.

(1)(a) Except as provided in subsections (3) and (4) of this section, a person commits the crime of sending or bringing into the state depictions of a minor engaged in sexually explicit conduct in the first degree when he or she knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, a visual or printed matter that depicts a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4)(a)

through (e).

...

(2)(a) Except as provided in subsections (3) and (4) of this section, a person commits the crime of sending or bringing into the state depictions of a minor engaged in sexually explicit conduct in the second degree when he or she knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, a visual or printed matter that depicts a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4)(f) or (g).

...

9.68A.070. Possession of depictions of minor engaged in sexually explicit conduct.

(1)(a) Except as provided in subsections (3) and (4) of this section, a person commits the crime of possession of depictions of a minor engaged in sexually explicit conduct in the first degree when he or she knowingly possesses a visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4)(a) through (e).

...

(2)(a) Except as provided in subsections (3) and (4) of this section, a person commits the crime of possession of depictions of a minor engaged in sexually explicit conduct in the second degree when he or she knowingly possesses a visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4)(f) or (g).

...

9.68A.075. Viewing depictions of a minor engaged in sexually explicit conduct.

(1) Except as provided in subsections (5) and (6) of this section, a person who intentionally views over the internet visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4)(a) through (3) is guilty of viewing depictions of a minor engaged in sexually explicit conduct in the first degree, ...

9.68A.100. Commercial sexual abuse of a minor -- Penalties -- Consent of minor does not constitute defense.

(1) A person is guilty of commercial sexual abuse of a minor if:

(a) He or she pays a fee to a minor or a third person as compensation for a minor having engaged in sexual conduct with him or her;

(b) He or she pays or agrees to pay a fee to a minor or a third person pursuant to an understanding that in return therefore such minor will engage in sexual conduct with him or her;

(c) He or she solicits, offers, or requests to engage in sexual conduct with a minor in return for a fee.

(2) Commercial sexual abuse of a minor is a class B felony punishable under chapter 9A.20 RCW.

(3) In addition to any other penalty provided under chapter 9A.20 RCW, a person guilty of commercial sexual abuse of a minor is subject to the provisions under RCW 9A.88.130 and 9A.88.140.

(4) Consent of a minor to the sexual conduct does not constitute a defense to any offense listed in this section.

(5) For purposes of this section, "sexual conduct" means sexual intercourse or sexual contact, both as defined in chapter 9A.44 RCW.

[RCW 9.68A.100 (2016), the statute under which this case was charged.]

RCW 9.68A.101. Promoting commercial sexual abuse of a minor

(1) A person is guilty of promoting commercial sexual abuse of a minor if he or she knowingly advances commercial sexual abuse or a sexually explicit act of a minor or profits from a minor engaged in sexual conduct or a sexually explicit act.

...

(3) For the purposes of this section:

(a) A person "advances commercial sexual abuse of a minor" if, acting other than as a minor receiving compensation for personally rendered sexual conduct or as a person engaged in commercial sexual abuse or a minor, he or she causes or aids a person to commit or engage in commercial sexual abuse of a minor, procures or solicits customers for commercial sexual abuse of a minor, provides persons or premises for the purposes of engaging in commercial sexual abuse of a minor, operates or assists in the operation of a house or enterprise for the purposes of engaging in commercial sexual abuse of a minor, or engaged in any other conduct designed to institute, aid, cause, assist, or facilitate an act or enterprise of commercial sexual abuse of a minor.

(b) A person "profits from commercial sexual abuse or a minor" if, acting other than as a minor receiving compensation for personally rendered sexual conduct, he or she accepts or receives money or anything of value pursuant to an agreement or understanding with any person whereby he or she participates or will participate in the proceeds of commercial sexual abuse or a minor.

(c) A person "advances a sexually explicit act or a minor" if he or she causes or aids a sexually explicit act of a minor, procures or solicits customers for a sexually explicit act of a minor, provides persons or premises for the purposes of a sexually explicit act of a minor, or engages in any other conduct designed to institute, aid, cause, assist, or facilitate a sexually explicit act of a minor.

...

(3) A "patron" is a person who provides or agrees to provide anything of value to another person as compensation for a sexually explicit act of a minor or who solicits or requests a sexually explicit act of a minor in return for a fee.

9.68A.102. Promoting travel for commercial sexual abuse of a minor

(1) A person commits the offense of promoting travel for commercial sexual abuse of a minor if he or she knowingly sells or offers to sell travel services that include or facilitate travel for the purpose of engaging in what would be commercial sexual abuse of a minor or promoting commercial sexual abuse of a minor, if occurring in this state.

...

9.68A.103. Permitting commercial sexual abuse of a minor

(1) A person is guilty of permitting commercial sexual abuse of a minor if, having possession or control of premises which he or she knows are being used for the purpose of commercial sexual abuse of a minor, he or she fails without lawful excuse to make reasonable effort to halt or abate such use and to make a reasonable effort to notify law enforcement of such use.

...

9A.28.020. Criminal attempt.

(1) A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.

(2) If the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense to a prosecution of such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission.

...

APPENDIX B - CONSTITUTIONAL PROVISIONS

> No person shall be ... deprived of life, liberty, or property, without due process of law; ...

U.S. Const., amend. 5.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ...

U.S. Const., amend. 6

> ... [N]or shall any State deprive any person of life, liberty, or property, without due process of law; ...

U.S. Const., amend. 14.

> No person shall be deprived of life, liberty, or property, without due process of law.

Const., art. I, § 3.

> The right of trial by jury shall remain inviolate ... .

Const., art. I, § 21.

> In criminal prosecutions, the accused shall have the right ... to have a speedy public trial by an impartial jury ... .

Const., art. I, § 22.

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