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No. 88339-4

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

vs.

Russell Homan,

Respondent.

Lewis County Superior Court Cause No. 11-1-00036-7

The Honorable Judge Nelson Hunt

Respondent's Supplemental Brief

Jodi R. Backlund
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www.experiencewa.com/cities/doty (Sept. 14, 2013, 11:30 a.m.) 2

ISSUE PRESENTED

A conviction for luring requires proof that the defendant attempted to lure a child into a nonpublic area or structure. Here, Russell Homan bicycled past C.C.N. (and two other unidentified children) without stopping or looking at C.C.N. and said "Do you want some candy? I've got some at my house." Did the prosecution present insufficient evidence of luring?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

On a summer day in 2010, Russell Homan rode his Superman BMX bicycle past 9-year-old C.C.N. and two other children in the small town of Doty, Washington.¹ CP 3-4; RP 46-47; 49. Mr. Homan did not stop or slow down. While riding by he asked “Do you want some candy? I’ve got some at my house.” CP 4; RP 36. C.C.N. said nothing, but continued walking. Mr. Homan rode by C.C.N. without looking back. CP 4.

The state charged Mr. Homan with luring. CP 1. He waived his right to a jury and submitted his case to a judge. CP 3, 6.

At trial, the state proved that C.C.N. did not know Mr. Homan. CP 4. It did not establish the identity of the other two children, or their relationship to Mr. Homan. *See RP generally*; CP 3-5. Nor did it prove that either of Mr. Homan’s residences (his girlfriend’s house and his sister’s trailer) sat on property obscured from or inaccessible to the public.² *See RP generally*; CP 3-5.

¹ Doty is an unincorporated area with a population of approximately 250. www.experiencewa.com/cities/doty (Sept. 14, 2013, 11:30 a.m.).

² In fact, testimony suggests that a cluster of houses surrounded Mr. Homan’s girlfriend’s house. RP 58.

Following conviction, Mr. Homan appealed,³ and the Court of Appeals reversed his conviction, finding the evidence insufficient. CP 5, 15; Opinion, pp. 4-5.

ARGUMENT

THE PROSECUTION PRODUCED INSUFFICIENT EVIDENCE OF LURING.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *State v. Zillyette*, 87614-2, 2013 WL 3946066, at *2 (Wash. Aug. 1, 2013). A conviction must be reversed for insufficient evidence unless, when viewed in the light most favorable to the state, the evidence would permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Vasquez*, 87282-1, 2013 WL 3864265, at *2 (Wash. July 25, 2013).

B. The prosecution failed to prove that Mr. Homan attempted to lure C.C.N. into an area or structure obscured from or inaccessible to the public.

Due process prohibits conviction in the absence of sufficient evidence. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 361, 90 S.Ct. 1068, 1071, 25 L.Ed.2d 368 (1970). To be sufficient, evidence must

³ He also filed a motion for reconsideration, which was denied.

be more than substantial. *Vasquez*, 2013 WL 3864265, at *2.. On review, inferences drawn in favor of the prosecution may not rest on evidence that is “patently equivocal.” *Id.* (addressing inference of intent). Indeed, to establish even a *prima facie* case, the prosecution must present evidence that is consistent with guilt and inconsistent with a hypothesis of innocence. *State v. Brockob*, 159 Wn.2d 311, 328-29, 150 P.3d 59 (2006) (addressing *corpus delicti* rule).⁴

Where the language of a statute is clear, legislative intent is derived from the language of the statute alone. *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009). Plain language does not require construction. *State v. Punsalan*, 156 Wn.2d 875, 879, 133 P.3d 934 (2006).

In this case, conviction required proof that Mr. Homan “order[ed], lure[d], or attempt[ed] to lure a minor... into any area or structure that is obscured from or inaccessible to the public...” RCW 9A.40.090. Under the statute’s plain language, it is not enough to lure a minor *to* a nonpublic structure. Rather, the statute requires proof of an attempt to lure the minor *into* the structure. RCW 9A.40.090.

⁴ In *Brockob*, the Supreme Court noted that the evidence required under the *corpus delicti* rule “need not be sufficient to support a conviction, but it must provide *prima facie* corroboration” of the crime described in an accused person’s statement. *Id.*, at 328.

Here, the testimony established that Mr. Homan rode his Superman BMX bicycle past C.C.N. without stopping. As he passed C.C.N., he said “Do you want some candy? I’ve got some at my house.” RP 36.

This evidence does not establish luring for three reasons.

First, Mr. Homan made no attempt to lure C.C.N. *into* an area or structure obscured from or inaccessible to the public. Even taking the evidence in a light most favorable to the prosecution, nothing about the brief communication proves an attempt to lure C.C.N. inside a house. At most, the evidence shows an invitation *to* a house. It does not show an invitation to *enter* the house.⁵

The Court of Appeals addressed a similar deficiency in *State v. McReynolds*, 142 Wash.App. 941, 948, 176 P.3d 616 (2008). In that case, the defendant signaled an 11-year-old girl to come to his truck. The court found this “insufficient in and of itself to prove that Mr. McReynolds was trying to get L.S. into his truck.” *Id.*, at 948.⁶

As in *McReynolds*, the evidence here does not establish an attempt to lure C.C.N. *into* an area or structure obscured from or inaccessible to

⁵ The evidence might support conviction if the house in question were situated on property obscured from or inaccessible to the public. No evidence showed that either of Mr. Homan’s residences met this discretion. See RP, *generally*; CP 3-5.

⁶ Mr. McReynolds followed the child as she walked home, but did not speak or signal further. The court concluded he’d provided no enticement. *Id.*

the public. Although not the focus of its Opinion, the Court of Appeals recognized that Mr. Homan's statements did not constitute an attempt to get C.C.N. inside or away from public view: "We disagree with the State that Homan's statements demonstrate both an invitation and an enticement to lure C.C.N. into a nonpublic structure." Opinion, p. 4.

Even the dissent articulated this deficiency, without apparently recognizing it:

Homan impliedly invited the child *to* a 'structure...obscured from or inaccessible to the public.' ...Although Homan did not expressly ask the child to come *to* his house, a rational trier of fact could find beyond a reasonable doubt that Homan invited the child *to* his house to receive the offered candy.

Opinion, p. 7 (Hunt, J., dissenting) (emphasis added, citation omitted)

(quoting RCW 9A.40.090). A finding by a "rational trier of fact" that

"Homan invited the child *to* his house" would not support conviction.

Opinion, p. 7 (Hunt, J., dissenting) (emphasis added). Evidence that Mr.

Homan invited C.C.N. *to* his home without inviting him to *enter* the home

does not prove luring (unless the house is on property obscured from or

inaccessible to the public). RCW 9A.40.090.

Second, the state failed to prove that Mr. Homan's words were directed at C.C.N. rather than the other two children. Because Doty is such a small community, Mr. Homan may well have known the other kids. His failure to slow down or look at C.C.N. strongly suggests that his

remarks were addressed to the two unidentified children rather than to C.C.N. CP 4. The evidence here does not exclude a hypothesis of innocence, and therefore cannot even establish a *prima facie* case of luring. *Brockob*, 159 Wn.2d at 328-29. Such “patently equivocal”⁷ evidence cannot support an inference that Mr. Homan attempted to lure C.C.N. into his house. RCW 9A.40.090.

Third, as the Court of Appeals recognized, the state presented insufficient evidence to “demonstrate both an invitation and an enticement...” Opinion, p. 4. Even assuming Mr. Homan addressed his statement to C.C.N., his words and conduct did not constitute luring. After making his remark, he did not wait for a response. He didn’t look at C.C.N., didn’t slow down, and continued biking past him. He didn’t point toward his house, or describe where it was. Once he’d passed by, he didn’t look back at C.C.N. CP 4. The state presented no evidence to rule out the possibility that he was making an inappropriate joke or acting on a dare⁸ without any intention of following through by having a child come into his house. Under these circumstances, he did not both invite and entice C.C.N., even if he did direct his remark at him. Opinion, p. 4.

⁷ *Vasquez*, 2013 WL 3864265, at *7.

⁸ To make the remark, not to actually lure a child to his home.

The prosecution failed to prove the essential elements of luring. Accordingly, the conviction must be reversed and the case dismissed with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

CONCLUSION

Mr. Homan's conviction is based on insufficient evidence. The Supreme Court should affirm the Court of Appeals' decision reversing the conviction and remanding for dismissal with prejudice.

Respectfully submitted,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Supplemental Brief, postage prepaid, to:

Russel Homan
180 Stevens Rd
Doty, WA 98539

With the permission of the recipient(s), I delivered an electronic version of the brief, via email to:

Sarah I. Beigh
Lewis Prosecuting Attorney
appeals@lewiscountywa.gov

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 13, 2013.



Jodi R. Backlund, WSBA No. 22917
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Third, as the Court of Appeals recognized, the state presented insufficient evidence to “demonstrate both an invitation and an enticement...” Opinion, p. 4. Even assuming Mr. Homan addressed his statement to C.C.N., his words and conduct did not constitute luring. After making his remark, he did not wait for a response. He didn’t look at C.C.N., didn’t slow down, and continued biking past him. He didn’t point toward his house, or describe where it was. Once he’d passed by, he didn’t look back at C.C.N. CP 4. The state presented no evidence to rule out the possibility that he was making an inappropriate joke or acting on a dare⁸ without any intention of following through by having a child come into his house. Under these circumstances, he did not both invite and entice C.C.N., even if he did direct his remark at him. Opinion, p. 4.

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CONCLUSION

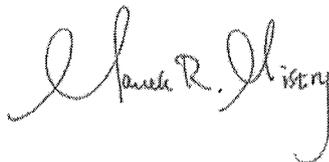
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Respectfully submitted,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Supplemental Brief, postage prepaid, to:

Russel Homan
180 Stevens Rd
Doty, WA 98539

With the permission of the recipient(s), I delivered an electronic version of the brief, via email to:

Sarah I. Beigh
Lewis Prosecuting Attorney
appeals@lewiscountywa.gov

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 13, 2013.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

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I have attached for filing the electronic copy of the Appellant's Supplemental Brief in the case referenced above.

I am providing a copy to opposing counsel via this email.

Thank you.

Jodi Backlund

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