

No. 88339-4

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

(Court of Appeals No. 42529-7-II)

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**STATE OF WASHINGTON,**

Respondent,

vs.

RUSSELL D. HOMAN,

Appellant.

**FILED**  
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STATE OF WASHINGTON  
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PETITION FOR REVIEW

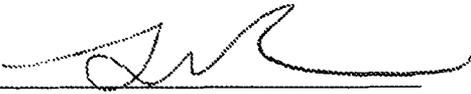
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On review from the Court of Appeals, Division Two,  
And the Superior Court of Lewis County

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A. IDENTITY OF PETTIONER

Petitioner State of Washington was the Respondent in the Court of Appeals.

B. COURT OF APPEALS DECISION

The Petitioner seeks review of the published opinion in *State v. Russell D. Homan*, Court of Appeals, Division II, cause number 42529-7-II, filed December 18, 2012.

A copy of the opinion is attached hereto for the Court's reference and is cited as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Did the State present sufficient evidence, that Homan enticed a child by offering the child candy and inviting the child to his home by telling the child the candy was at his house, to sustain Homan's conviction for Luring?

D. STATEMENT OF THE CASE

On August 4, 2010 C.C.N., a nine year old, went to the store to purchase milk for his mother. RP 10-12, 33-34; CP 3-4. While walking to the store C.C.N. was approached by a man who was riding a bike with a Superman logo on it. RP 35-38; CP 4. C.C.N. was walking near two other children, but they were about 10 feet behind C.C.N. RP 49-50. The man asked C.C.N. "[D]o you want some candy? I've got some at my house." RP 36; CP 4. C.C.N. did not know that man. RP 36-38; CP 4. C.C.N. was scared and did not

respond. RP 36; CP 4. The man continued to ride his bike away from C.C.N. and did not look back. CP 4.

C.C.N. went to the store, purchased the milk and ran home. CP 4. C.C.N. told his mother what had happened. CP 4. C.C.N. and his mother got into her car and she drove in the direction of the general store. CP 4. C.C.N.'s mother saw a man, who fit the description C.C.N. had given of the man who offered him candy. CP 4. C.C.N. also identified the man to his mother. RP 38; CP 4. The man was identified as Russell Homan. RP 38.

The State charged Homan with one count of Luring pursuant to RCW 9A.40.090(1). CP 1-2. After a bench trial, the trial court found Homan guilty of one count of Luring. CP 5. Homan timely appealed his conviction. CP 15-24.

The Court of Appeals held that the State had not presented sufficient evidence to sustain a conviction for Luring, reversed the conviction and remanded the case back to the trial court to dismiss with prejudice. Appendix A, page 4. The Court of Appeals opined that, "there [was] no conduct that elevates these statements to either an invitation or an enticement." Appendix A, page 4. Judge Hunt respectfully dissented and found that under the current case

law the offer of candy was sufficient enticement for a nine year old child. Appendix A, pages 6-7.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The published Court of Appeals' decision in this case has significant consequences regarding the protection of children and people with developmental disabilities from predators. The public has a substantial interest in the protection of people with developmental disabilities and children. The Court of Appeals' decision mistakenly requires conduct in addition to words in order to prove enticement. This is in direct conflict with *State v. Dana*, a Division I case. *State v. Dana*, 84 Wn. App. 166, 926 P.2d 344 (1996). This Court should determine if the offer of candy or other similarly desirable object, located in a home, structure, vehicle or other place out of public view is sufficient to prove the element of enticement.

1. The Offer Of Candy To A Child Is Sufficient Evidence Of Enticement To Sustain Homan's Conviction Of The Crime Of Luring.

The State presented sufficient evidence that Homan attempted to lure C.N.N. into Homan's house by offering C.N.N. candy, an enticement to a nine year old child.

Sufficiency of evidence is reviewed in the light most favorable to the State to determine if any rational jury could have found all the essential elements of the crime charged beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). An appellant challenging the sufficiency of evidence presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury’s by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the purview of the jury and not

subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Further, "the specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability." *Delmarter*, 94 Wn.2d at 638.

To convict Homan of the crime of luring, the State was required to prove the following:

A person commits the crime of luring if the person:

(1)(a) Orders, lures, or attempts to lure a minor or a person with a developmental disability into an area or structure that is obscured from or inaccessible to the public or into a motor vehicle;

(b) Does not have the consent of the minor's parent or guardian of the person with a development disability; and

(c) Is unknown to the child or developmentally disabled person.

RCW 9A.40.090(1). "Lure" is defined by case law as an invitation to a minor or developmentally disabled person which is accompanied by an enticement. *Dana*, 84 Wn. App. at 176. An invitation, alone, is not enough to sustain a conviction for luring. *Id.* at 175-76. "[T]he invitation must include some other enticement or conduct constituting an enticement." *Id.* at 175.

The Court of Appeals incorrectly required there to be conduct in addition to the offer of candy to constitute enticement. Appendix A, page 4. The Court of Appeals even went so far as to hold that, "do you want some candy? I've got some at my house" is merely a statement and not even an invitation. Appendix A, page 4. This is an incorrect evaluation of the evidence presented to the trier of fact in this case and substitutes the Court of Appeals' judgment for that of the trial court, which found that this statement, under the circumstances was an attempt to lure. The Court of Appeals did not apply the correct standard of review, that all reasonable inferences found from the evidence are drawn in favor of the state. *Goodman*, 150 Wn.2d at 781.

In her dissent, Judge Hunt noted that although Homan did not directly ask C.N.N. to his house, "[w]ith his words, Homan impliedly invited the child to a 'structure...obscured from or inaccessible to the public.'" Appendix A, page 7, *citing* RCW 9A.40.090(1)(a). Homan told C.N.N. that he had candy at his house and asked C.N.N. if he wanted some. Judge Hunt, applying the correct standard of review, found, "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." Appendix A, page 7.

There are few things more enticing to a child than candy. The offering of candy is one of the classic ruses used by predators of children to entice them away from public areas. Contrary to the Court of Appeals' opinion, a statement is not required to be accompanied by conduct for it to constitute enticement. *Dana*, 84 Wn. App. at 175. A person can, by words alone, entice another person to do something. A child or developmentally disabled person does not need to be strong-armed into leaving a public area with a stranger.

Applying the Court of Appeal's analysis of what constitutes enticement and an invitation, a man could drive up in a van, open the door and say, "Do you want some candy? I have some in my van" and this would not be sufficient to sustain a conviction for the crime of luring. What if the man, after telling the child the candy was in the van stated, "It's hidden in the back. You will have to come inside to get the candy"? Under the Court of Appeals' reasoning this still would not be sufficient because it is words alone and not conduct. Further, by not asking the child to come into the van, the Court of Appeals' would find this interaction lacked an invitation,

which is also required for the crime of luring. Both examples are obvious invitations to the child to come inside the van with the enticement that the child will be given candy once inside the van. An invitation and enticement by words alone, without conduct, constitute the crime of luring.

A developmentally disabled person or child is intrinsically vulnerable to suggestion and enticement. This is why it is a crime for a stranger to extend an invitation, accompanied with an enticement, to a child or developmentally disabled person to leave a public area with the stranger. The Court of Appeals' decision sets a precedent that would require a child be more seriously violated for the crime of luring to be committed. This State has already codified more serious crimes proscribing such conduct. If the level of violation the Court of Appeals is requiring is necessary to commit the crime of luring the statute would not include attempting to lure as one of the possible ways to commit the crime of luring.

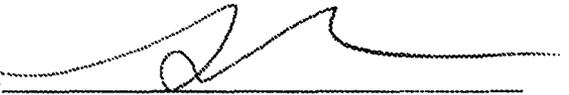
The conduct by Homan in this case, offering candy located in his home to an unknown child, is precisely the type of conduct the luring statute seeks to punish. There is a substantial public interest in protecting children and people with developmental disabilities from predators.

F. CONCLUSION

This Court should accept review of the State's petition and hold that the Court of Appeals erred when it found that Homan's conduct, asking an unknown child if he likes candy and then stating the candy was at Homan's house, did not constitute an invitation and enticement. This Court should find that the State did present sufficient evidence to sustain the conviction and affirm the conviction for Luring, overturning the Court of Appeals decision to the contrary.

RESPECTFULLY submitted this 16<sup>th</sup> day of January, 2013.

JONATHAN MEYER  
Lewis County Prosecuting Attorney

by: 

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Attorney for Plaintiff

# Appendix A

Published Opinion, COA No. 42529-7-II,

*State v. Russell D. Homan*

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**  
**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

RUSSELL D. HOMAN,

Appellant.

No. 42529-7-II

PUBLISHED OPINION

BRIDGEWATER, J., (Pro Tem) – Russell David Homan appeals his luring conviction, arguing that the State produced insufficient evidence to support his conviction and that the luring statute, RCW 9A:40:090, is unconstitutionally overbroad. Because the evidence is insufficient to support Homan’s conviction for luring, we reverse and remand for dismissal with prejudice.

**FACTS**

Early one summer evening, nine-year-old C.C.N. went to the store to buy some milk for his mother. He was walking along the road toward the general store when Homan rode a child’s Superman BMX bicycle past him. As Homan rode by, he said, “Do you want some candy? I’ve got some at my house.” Report of Proceedings at 36. C.C.N. said nothing and continued walking; Homan rode on without slowing, stopping, or looking back. There were two other children nearby, but Homan was closest to C.C.N. when he spoke.

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C.C.N. did not know Homan and told his mother about the incident when he got home. She drove him back into town where they saw Homan on his Superman bicycle. C.C.N.'s mother called the sheriff's office, and Sergeant Robert Snaza spoke with Homan, who admitted riding his bicycle in the general store's vicinity.

The State charged Homan with one count of luring. During his bench trial, Homan moved for dismissal based on insufficiency of the evidence. The trial court denied his motion and found Homan guilty as charged. After denying Homan's motion for reconsideration, again based on a sufficiency challenge, the trial court imposed a standard range sentence of 120 days.

#### ANALYSIS

##### Sufficiency of the Evidence

Homan argues initially that the evidence was insufficient to support his conviction. A challenge to the sufficiency of the evidence presented at a bench trial requires us to review the trial court's findings of fact and conclusions of law to determine whether substantial evidence supports the challenged findings and whether the findings support the conclusions. *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). We review challenges to a trial court's conclusions of law de novo. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). Evidence is sufficient to support a conviction if, after viewing the evidence and all reasonable inferences from it in the light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Under RCW 9A.40.090, a person commits the crime of luring if the person:

(1)(a) Orders, lures, or attempts to lure a minor or a person with a developmental disability into any area or structure that is obscured from or inaccessible to the public or into a motor vehicle;

(b) Does not have the consent of the minor's parent or guardian or of the guardian of the person with a developmental disability; and

(c) Is unknown to the child or developmentally disabled person.

(2) It is a defense to luring, which the defendant must prove by a preponderance of the evidence, that the defendant's actions were reasonable under the circumstances and the defendant did not have any intent to harm the health, safety, or welfare of the minor or the person with the developmental disability.

(3) For purposes of this section:

(a) "Minor" means a person under the age of sixteen;

(b) "Person with a developmental disability" means a person with a developmental disability as defined in RCW 71A.10.020.

(4) Luring is a class C felony.

As pertinent here, RCW 9A.40.090 is intended to prohibit a defined class of persons (one unknown to the minor and without the consent of the minor's parents) from enticing or attempting to entice the minor into a nonpublic structure. *State v. Dana*, 84 Wn. App. 166, 172, 926 P.2d 344 (1996), *review denied*, 133 Wn.2d 1021 (1997). "Because of the vulnerability of children . . . strangers are prohibited from luring them out of public view." *Dana*, 84 Wn. App. at 173. To prove the crime of luring, the State must establish "more than an invitation alone; enticement, by words or conduct, must accompany the invitation." *State v. McReynolds*, 142 Wn. App. 941, 948, 176 P.3d 616 (2008).

In *McReynolds*, the defendant's act of slowing his truck beside a child walking along a road and signaling her to come over was insufficient to prove that he was attempting to get her into the truck, and Division Three of this court reversed his conviction for luring. *McReynolds*, 142 Wn. App. at 944, 948. In *Dana*, by contrast, the defendant stopped his car near two girls and asked them to get into his car while exposing his genitals. *Dana*, 84 Wn. App. at 169-70. That

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the girls were upset rather than enticed did not undermine the sufficiency of the evidence supporting the defendant's luring conviction. *Dana*, 84 Wn. App. at 179.

In concluding that Homan committed the crime of luring, the trial court made these findings of fact:

1.3 While C.C.N. was walking on Stevens Rd. toward the Doty General Store, the Defendant rode a bicycle past C.C.N. while traveling in the same direction as C.C.N. C.C.N. did not notice the Defendant until he passed by on the bicycle. While riding past C.C.N., the Defendant asked C.C.N., "do you want some candy? I've got some at my house." C.C.N. did not say anything in response and continued to walk toward the store. The Defendant continued to ride his bike away from C.C.N. and did not look back at C.C.N. During the encounter, C.C.N. observed that the Defendant was riding a bike with a superman logo on the front.

1.4 Prior to this encounter, C.C.N. had never spoken to the Defendant, did not know the Defendant's name, and did not know where the Defendant lived. [C.C.N.'s mother] had never met the Defendant, had never spoken to the Defendant, and had never given the Defendant permission to speak with C.C.N. or to invite C.C.N. to the Defendant's house.

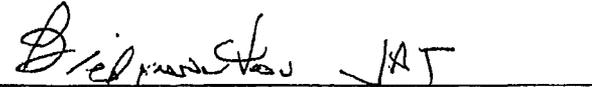
Clerk's Papers at 4.

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. Rather, they show an offer of candy and a statement regarding its location. Furthermore, there is no conduct that elevates these statements to either an invitation or an enticement. Homan was riding by C.C.N. as he made the statements, and he did not slow or stop as he made them or even look back afterward. While Homan's statements were ill-advised, they did not constitute a felony, and we remand to the trial court to reverse his conviction with prejudice.

Our resolution of Homan's sufficiency challenge makes it unnecessary to address his overbreadth argument. *See State v. Hall*, 95 Wn.2d 536, 539, 627 P.2d 101 (1981) (reviewing

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courts should not pass on constitutional issues unless absolutely necessary to the determination of the case). Accordingly, we reverse and remand for dismissal with prejudice.

  
Bridgewater, J.P.T.

I concur:

  
Van Deren, J.

HUNT, P.J. — I respectfully dissent from the majority's holding that the evidence is insufficient to support Homan's conviction for luring. Looking at the facts in the light most favorable to the State post conviction, as we must, (1) Homan, a stranger, attempted to lure a nine-year-old child to his house; (2) he enticed this child, walking home from the store without an adult, with an offer of candy; (3) this conduct meets the requirements of luring under RCW 9A.40.090. I would affirm Homan's conviction.

RCW 9A.40.090 provides, in pertinent part:

A person commits the crime of luring if the person:

(1)(a) [A]ttempts to lure a minor or a person with a developmental disability into any area or structure that is obscured from or inaccessible to the public or into a motor vehicle;

(b) Does not have the consent of the minor's parent or guardian or of the guardian of the person with a developmental disability; and

(c) Is unknown to the child or developmentally disabled person.

(3) For purposes of this section:

(a) "Minor" means a person under the age of sixteen;

(b) "Person with a developmental disability" means a person with a developmental disability as defined in RCW 71A.10.020.

(4) Luring is a class C felony.

The majority holds that Homan's asking the child, "[D]o you want some candy? I've got some at my house," is insufficient to constitute luring under this statute. Majority at 4 (quoting Clerk's Papers at 4). I disagree.

As Division One of our court articulated in *State v. Dana*, luring requires something more than a mere invitation; luring also requires "some other enticement or conduct constituting an enticement (or attempted enticement)." 84 Wn. App. 166, 175, 926 P.2d 344 (1996), *review denied*, 133 Wn.2d 1021 (1997). Words are sufficient to constitute an enticement. *Dana*, 84 Wn. App. at 176 ("The enticement accompanying the invitation, be it conduct or words . . .")

(emphasis added). With his words, Homan impliedly invited the child to a "structure . . . obscured from or inaccessible to the public." RCW 9A.40.090(1)(a). Homan stated that he had candy in his house and asked the child if he wanted some. 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.

This inference is further compelling when viewed in light of the rules that (1) circumstantial evidence receives the same consideration as direct evidence; (2) direct evidence is not essential where reasonable inferences can be drawn from substantial evidence; and (3) we view the evidence in the light most favorable to the State. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980) and *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), respectively. That Homan kept on riding his bicycle when the child did not respond, does not eradicate Homan's luring invitation. Furthermore, Homan's offer of candy met the statutory requirement of enticement, even though it was unsuccessful in attracting this particular child. *See Dana*, 84 Wn. App. at 175-176, 169.

I would hold that the evidence is sufficient to uphold Homan's conviction of luring.<sup>1</sup>

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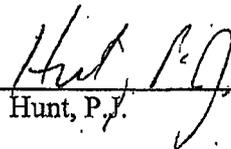
<sup>1</sup> Because the majority reverses Homan's conviction for lack of sufficient evidence, it does not address his constitutional argument that RCW 9A.40.090 is overbroad. Because I would affirm, it is appropriate to comment on the constitutionality issue to show that affirming based on the sufficiency of evidence would not be futile. Without engaging in a full analysis, I touch on a few highlights.

I agree with Division One's constitutional analysis in *Dana* that the luring statute's limitation on protected speech is minimal when balanced against the legislature's objective to protect children and the developmentally disabled from predators. To support this point, *Dana* focused on the statutory requirements:

[L]uring and inviting are not the same. Luring requires something more than an invitation. The enticement accompanying the invitation, be it conduct or words, for example, sufficiently narrows the scope of the statute in relation to its plainly legitimate sweep. In any event, even if this statute results in strangers failing to

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I would affirm.

  
Hunt, P.J.

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offer children rides home in the rain—avoiding getting wet being the inducement—the risk to children from contact with strangers outweighs any perceived harm.

*Dana*, 84 Wn. App. at 175-176. In other words, a mere verbal invitation is not enough; it must be coupled with enticement, namely using something pleasurable to attract the child to come to the private place. See *Dana*, 84 Wn. App. at 175; WEBSTER'S NEW INTERNATIONAL DICTIONARY 757 (3d ed. 1969), definition of "entice."

Homan's proposed hypothetical—that a teenager offering an invitation to her peers to come back to her house for cupcakes could be found guilty of luring—is highly unlikely and, thus, does not pose a viable constitutional challenge. On the contrary, in addition to the above requirements, the statute expressly provides a defense for innocent conduct:

It is a defense to luring, which the defendant must prove by a preponderance of the evidence, that the defendant's actions were reasonable under the circumstances and the defendant did not have any intent to harm the health, safety, or welfare of the minor or the person with the developmental disability.

RCW 9A.40.090(2). Moreover, prosecuting attorneys are vested with discretion to decide whether particular conduct meets the statutory criteria and, if so, whether to file criminal charges. "This 'most important prosecutorial power' allows for the consideration of individual facts and circumstances when deciding whether to enforce criminal laws, and permits the prosecuting attorney to seek individualized justice." *State v. Rice*, 174 Wn.2d 884, 901-902, 279 P.3d 849 (2012) (citation omitted).

Clearly Homan's conduct was not an exercise of innocent free speech. Rather his conduct constituted the very type of potential child endangerment that the legislature sought to curtail with the luring statute—to protect those who because of tender years or developmental delay cannot protect themselves—with minimal, if any, infringement on protected speech.

# LEWIS COUNTY PROSECUTOR

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