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THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

vs.

RUSSELL DAVID HOMAN,

Respondent.

Review from Court of Appeals, Division Two, Case No. 42529-7-II

Petitioner's Corrected Supplemental Brief

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I. ISSUES

- A. Is Homan still raising an overbreadth argument regarding RCW 9A.40.090, and if so is the argument facial or as-applied?
- B. Is RCW 9A.40.090 unconstitutionally overbroad?

II. STATEMENT OF THE CASE

The Court of Appeals published opinion was issued on December 18, 2012. The State filed its petition for review on January 16, 2013. Homan did not file an answer to the State's petition. The Court granted review on July 11, 2013. Homan filed his supplemental brief on September 16, 2013. The State informed the Court by a letter on September 13, 2013 that it would not be filing a supplemental brief in this matter.

This brief is in response to a letter received by the State on December 26, 2013 from the Court requesting supplemental briefing that addresses the following two issues:

- 1) Whether defendant still is raising an overbreadth argument, and if so, whether it is a facial or as-applied challenge to RCW 9A.40.090?; and
- 2) Whether RCW 9A.40.090 is unconstitutionally overbroad?

III. ARGUMENT

A. HOMAN ABANDONED HIS ARGUMENT THAT RCW 9A.40.090 WAS UNCONSTITUTIONALLY OVERBROAD.

The State filed its petition for review January 16, 2013 and Homan chose to not file an answer to the petition. By failing to raise the overbreadth issue in an answer to the State's petition Homan abandons the argument.

1. Homan Abandoned His Overbreadth Challenge To RCW 9A.40.090 By Failing To Assert The Issue In An Answer To The State's Petition For Review.

Homan argued in his briefing to the Court of Appeals that RCW 9A.40.090 was unconstitutionally overbroad because it criminalized a substantial amount of protected speech and conduct. The Court of Appeals did not reach the issue because it reversed Homan's case after finding insufficient evidence to sustain the conviction. *State v. Homan*, 172 Wn. App. 488, 493, 290 P.3d 1041 (2012).

The State's petition for review did not address the overbreadth challenge. Homan did not answer the petition. Had Homan answered the petition he could have raised the issue regarding his argument that RCW 9A.40.090 was overbroad. RAP 13.3(d). "If the party [answering the petition] wants to seek review of any issue that is not raised in the petition for review, including

any issues that were raised but not decided by the Court of Appeals, the party **must** raise those new issues in an answer.” RAP 13.3(d) (emphasis added). Homan chose to abandon his overbreadth argument by not answering the State’s petition for review and raising the issue.

While RAP 13.7(b) allows the Court to consider the overbreadth challenge if the Court reverses the Court of Appeals decision, the Court should decline to do so. An overbreadth challenge to a statute proscribing an act, especially a crime involving the luring of children and vulnerable adults, is of significant public interest. Had Homan not abandoned the issue and the Court accepted review of an overbreadth challenge to RCW 9A.40.090 there would have been significant interest from several potential Amici on both sides of the issue. The Washington Defenders Association, Washington Association of Criminal Defense Attorneys, ACLU, Washington Association of Prosecuting Attorneys, and victim advocacy groups would all potentially request permission to file Amicus briefs with the Court. The Amici could add valuable view points and arguments for consideration by the Court in regards to the constitutionality of luring statute, RCW 9A.40.090.

Therefore, if the Court were to reverse the Court of Appeals decision and find the State presented sufficient evidence to sustain the conviction, the Court should remand the case to the Court of Appeals to allow it to decide the overbreadth argument raised by Homan in the initial appellate briefing. Once the Court of Appeals issues its decision on the matter, if adverse to Homan's argument, Homan would be free to determine if he wished to now pursue the issue by filing a petition for review or continue his abandonment of his overbreadth argument.

2. Homan's Overbreadth Argument Appears To Be A Facial Challenge to RCW 9A.40.090.

The State maintains that the overbreadth challenge has been abandoned by Homan, arguendo, it appears from the briefing in the Court of Appeals that the challenge is a facial challenge to RCW 9A.40.090.

B. RCW 9A.40.090 IS NOT UNCONSTITUTIONALLY OVERBROAD.

The State continues to maintain that the constitutionality of RCW 9A.40.090 was abandoned and that if necessary, any decision on the issue should be made by the Court of Appeals. Arguendo, the luring statute, RCW 9A.40.090 is not unconstitutionally overbroad because it does not criminalize a

substantial amount of protected speech. Therefore, Homan's facial challenge to RCW 9A.40.090 fails.

1. Standard Of Review.

Constitutional challenges are reviewed de novo. *Lummi Indian Nation v. State*, 170 Wn.2d 247, 257-58, 241 P.3d 1220 (2010).

2. RCW 9A.40.090 Is Not Unconstitutionally Overbroad Because It Does Not Infringe Upon Protected Speech And Conduct.

A statute is presumed constitutional and it is the burden of the party attacking the statute to prove the statute is unconstitutional beyond a reasonable doubt. *City of Bellevue v. Lee*, 166 Wn.2d 581, 585, 210 P.3d 1011 (2010), citing *Island County v. State*, 135 Wn.2d 141, 146, 955 P.2d 377 (1998). A statute is unconstitutionally overbroad if it infringes on a substantial amount of constitutionally protected speech. U.S. Const., amend. I; *United States v. Williams*, 553 U.S. 285, 292, 128 S. Ct. 1830, 170 L.Ed.2d 650 (2008). A person may make an overbreadth challenge even if the statute could be constitutional as applied to the person because an overbreadth challenge is a facial challenge. *City of Bellevue v. Lorange*, 140 Wn.2d 19, 26, 992 P.3d 496 (2000).

A person challenging a statute for overbreadth “bears the burden of demonstrating, ‘from the text of [the law] and from actual fact,’ that substantial overbreadth exists.” *Virginia v. Hicks*, 539 U.S. 113, 122,123 S. Ct. 2191, 156 L.Ed.2d 148 (2003) (citation omitted) (brackets original). While it is important that laws do not deter people from engaging in their right to constitutionally protected speech, “invalidating a law that in some of its applications is perfectly constitutional-particularly a law directed at conduct so antisocial that it has been made criminal”, is a harsh remedy, therefore, the United States Supreme Court has required “that a statute’s overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute’s plainly legitimate sweep.” *United States v. Williams*, 553 U.S. at 292-93, *citing Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 485, 109 S. Ct. 3028, 106 L.Ed.2d (1989); *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L.Ed.2d 830 (1973) (emphasis original). The United States Supreme Court has also recognized the consequences of striking down a statute for facial invalidity and stated “that the overbreadth doctrine is ‘strong medicine’ and have [therefore] employed it with hesitation, and then ‘only as a last resort.’” *New*

York v. Ferber, 458 U.S. 747, 769, 102 S. Ct. 3348, 73 L.Ed.2d 1113 (1982) (citation omitted).

When evaluating an overbreadth challenge the reviewing court first analyzes the statute to determine if it reaches constitutionally protected speech. *State v. Dana*, 84 Wn. App. 166, 174, 926 P.2d 344 (1996) *citing* *State v. Halstien*, 122 Wn.2d 109, 122-23, 857 P.2d 270 (1993). If the court concludes the statute does reach constitutionally protected speech it next determines “whether the amount of protected conduct the statute reaches is ‘real and substantial’...in contrast to the statute’s plainly legitimate sweep.” *Id.* at 174-75 (citation omitted).

Homan argues RCW 9A.40.090 is unconstitutionally overbroad because it “criminalizes statements that are made in jest, statements that are misunderstood as orders, statements that are genuine offers to help, or friendly invitations from one child to another, if accompanied by an enticement.” Opening Brief of Appellant 7. Homan asserts that the affirmative defense laid out in section two of the luring statute is not a solution to the overbreadth issue. Opening Brief of Appellant 8. Finally, Homan urges the Court to not follow Division One’s decision in *Dana*. Opening Brief of Appellant 8-9.

The luring statute is not substantially overbroad and is therefore constitutional. While the statute may reach some constitutionally protected speech, the amount of speech is not substantial and real in contrast to the statute's plainly legitimate sweep.

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 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.

RCW 9A.40.090. The crux of Homan's overbreadth attack on RCW 9A.40.090 is that innocent invitations or necessary orders to a minor or developmentally disabled person would subject a person to prosecution under the statute. This is an oversimplification of RCW 9A.44.090 and it does not take into account the affirmative defense set forth in subsection two.

Luring requires there be an order or an invitation to a minor or developmentally disabled person which is accompanied by an enticement. *Dana*, 84 Wn. App. at 176. The legitimate reach of the luring statute is to prevent children and those with developmental disabilities from being taken to a secluded location by strangers who intend them harm. See RCW 9A.40.090; *Dana*, 84 Wn. App. at 175. Homan argues that an invitation to go to one's home from one child to another with the "enticement" of a sugary treat would violate RCW 9A.40.090, which he asserts exemplifies the overbreadth of the statute by criminalizing constitutionally protected speech. The Court has previously held that "[e]ven if some protected expression would fall prey to the statute, under *Ferber*, if the statute's legitimate reach far surpasses its arguably impermissible applications, the statute is not overbroad." *State v. Myers*, 133 Wn.2d 26, 34, 941 P.2d 1102 (1997).

The affirmative defense found in subsection two of the luring statute defines the purpose of the statute and what conduct does not constitute luring. See RCW 9A.40.090(2). If the person's actions are reasonable under the circumstances and there was no intent to harm the welfare, safety or health of the minor or person

with the developmental disability then the person has not committed the crime of luring. RCW 9A.40.090(2).

In his opening brief to the Court of Appeals Homan argues the affirmative defense does not solve the overbreadth problem and cites to two United States Supreme Court cases as authority.¹ In both of these cases there were serious difficulties and inequities in regards to the affirmative defenses provided by the challenged statutes. *See, Ashcroft v. ACLU*, 542 U.S. 656, 124 S. Ct. 2783, 159 L.Ed.2d 690 (2004); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389, 152 L.Ed.2d 403 (2002).

In *Ashcroft v. Free Speech Coalition (FSP)* the United States Supreme Court was tasked with deciding whether the Child Pornography Prevention Act (CPPA) violated the First Amendment. *See, Ashcroft v. Free Speech Coalition*, 535 U.S. at 239. The CPPA prohibited, in some circumstances, people from distributing or possessing sexually explicit images that appeared to depict minors but the images were actually of digitally altered adults. *Id.* 239-40. The challenged portion of the CPPA defined “child pornography to include any sexually explicit image that was

¹ *Ashcroft v. ACLU*, 542 U.S. 656, 670-71, 124 S. Ct. 2783, 159 L.Ed.2d 690 (2004); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 256, 122 S. Ct. 1389, 152 L.Ed.2d 403 (2002).

'advertised, promoted, presented, described, or distributed in such a manner that conveys the impression' it depicts a 'minor engaging in sexually explicit conduct.'" *Id.* at 242. The Supreme Court criticized the CPPA for prohibiting speech that does not have a victim or create a record of a crime because the people depicted were not actual children. *Id.* at 250. The Court went on to note that the affirmative defense under the CPPA could be a difficult evidentiary burden. *Id.* at 255. The Court stated,

[w]here the defendant is not the producer of the work, he may have no way of establishing the identity, or even the existence, of the actors...The statute, moreover, applies to work created before 1996, and the producers themselves may not have preserved the records necessary to meet the burden of proof...Even if an affirmative defense can save a statute from First Amendment challenge, here the defense is incomplete and insufficient, even on its own terms. It allows persons to be convicted in some instances where they can prove children were not exploited in production... Furthermore, the affirmative defense provides no protection to persons who produce speech using computer imaging, or other means that do not involve the use of adult actors who appear to be minors.

Id. at 256. The Court did not state that an affirmative defense cannot save a statute from a finding of overbreadth, it simply found that in this particular case the affirmative defense was greatly lacking and inconsistent. *Id.*

In *Ashcroft v. ACLU* the United States Supreme Court reviewed a challenge to the Child Online Protection Act (COPA) on the basis that it violated the First Amendment. See, *Ashcroft v. ACLU*, 542 U.S. at 659-60. COPA made it a crime to knowingly post, for commercial purposes, content on the internet that was harmful to minors. *Id.* at 661. COPA defined material that was harmful to minors as:

any communication, picture, image, graphic image, file, article, recording, writing, or other matter of any kind that is obscene or that-

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

Id. at 661-62 (internal quotations omitted). A minor in this context was a person under 17 years of age. *Id.* at 662. COPA provided an affirmative defense for people who demonstrate that they have,

restricted access by minors to material that is harmful to minors-

(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;

(B) by accepting a digital certificate that verifies age; or

(C) by any other reasonable measures that are feasible under available technology.

Id.

There had been a preliminary injunction imposed by the District Court and affirmed by the Court of Appeals enjoining the government from enforcing COPA pending a trial. *Id.* at 660-61. The Supreme Court upheld the injunction because it reasoned that there had not been a showing that a less restrictive alternative to COPA would not be as effective. *Id.* at 670. The Supreme Court also noted there were other practical reasons the preliminary injunction should stand pending a trial. The Supreme Court stated “the potential harms from reversing the injunction outweigh those of leaving it in place by mistake. Where a prosecution is a likely possibility, yet only an affirmative defense is available, speakers may self-censor...” *Id.* at 670-71. The Supreme Court did not hold that an affirmative defense would never save a statute from an overbreadth challenge.

The luring statute has a large plainly legitimate sweep. *Dana*, 84 Wn. App. at 175. “The impact on protected speech is minimal because a mere invitation...is not sufficient...the invitation must include some other enticement or conduct constituting enticement.” *Id.* Being able to hypothetically conceive of impermissible applications of a statute is not a sufficient justification to render it susceptible to a challenge for overbreadth. *State v. Aljutily*, 149 Wn. App. 286, 293, 202 P.3d 1004 (2009), citing *United States v. Williams*, 553 U.S. at 303. Homan’s illustrations of potential scenarios where RCW 9A.40.090 would infringe on protected speech are not sufficient enough to render the statute unconstitutionally overbroad. This Court, as the court in *Dana* did, should uphold the statute as constitutional. See, *State v. Dana*, 84 Wn. App. at 177.

IV. CONCLUSION

Homan abandoned his overbreadth facial challenge to RCW 9A.40.090, therefore the issue should not be considered by the Court. If the Court were to consider the issue, the facial challenge to RCW 9A.40.090, the luring statute, fails because the statute does not criminalize a substantial amount of protected speech and conduct and is therefore constitutional.

RESPECTFULLY submitted this 9th day of January, 2014.

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Attached for filing in the above referenced case is the Petitioner's Corrected Supplemental Brief. Please note that the only correction is as to the status of the parties and the name of the brief. The State inadvertently used the wrong headings as it is usually the respondent and not the petitioner.

Thanks,

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