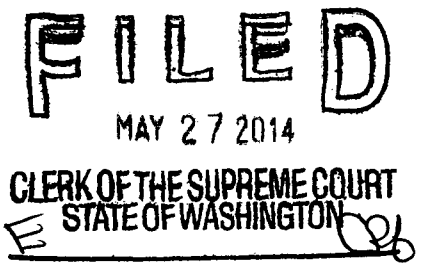
No. 90208-2

(Court of Appeals No. 68815-4-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON



STATE OF WASHINGTON,

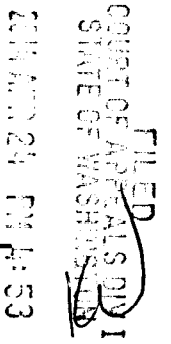
Respondent,

v.

PETER CARR,

Petitioner.

PETITION FOR REVIEW
OF COURT OF APPEALS DECISION
TERMINATING REVIEW



ELAINE L. WINTERS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER

Peter James Carr, defendant and appellate below, seeks review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Carr seeks review of the Court of Appeals decision affirming his convictions for child molestation in the first degree and communicating with a minor for immoral purposes. State v. Peter Carr, No. 68815-4-I.

A copy of the Court of Appeals decision, dated February 18, 2104, is attached as Appendix A. A copy of the March 26, 2014, order denying Mr. Carr's motion for reconsideration is attached as Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. A defendant may not be convicted of a crime unless the State proves every element of that crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV. Peter Carr was convicted of child molestation in the first degree based upon testimony that he brushed his hand across a girl's clothed chest for one second while passing her in a retail store. Did the Court of Appeals unconstitutionally affirm Mr. Carr's conviction by finding sexual motivation based upon an inference from equivocal evidence, and is the Court of Appeals decision therefore in conflict with

this Court's opinion in State v. Vasquez, 178 Wn.2d 1 (2013) and the Court of Appeals decision in State v. Powell, 62 Wn. App. 914 (1991)?

2. Prosecutorial misconduct may violate the defendant's due process right to a fair trial. U.S. Const. amends. VI, XIV; Const. art. I, § 22. The prosecutor appealed to the juror's prejudices and fears of sex offenders by adding her interpretation of Mr. Carr's thoughts and motivations to her discussion of the facts of the case, her descriptions of the facts were not supported by the evidence, and she told the jury that it had to convict Mr. Carr if it believed the two victims, thus misrepresenting her burden of proof. The Court of Appeals found that the prosecutor committed misconduct by appealing to the juror's fears and prejudices about sex offenders and misstating the State's burden of proof beyond a reasonable doubt, but concluded that misconduct was not so flagrant and ill-intentioned that it could not have been cured with a limiting instruction. The Court of Appeals also held that the prosecutor did misrepresent the facts of the case. Was Mr. Carr's constitutional right to a fair trial violated where the prosecutor's repeated misconduct was so flagrant and ill-intentioned that the prejudice could not be erased by curative instructions?

3. The Sixth Amendment guarantees the right to effective assistance of counsel. Mr. Carr's attorney moved to sever the two charged counts for trial, but waived the issue by not renewing it at or before the

close of the evidence. The Court of Appeals rejected Mr. Carr's argument that counsel was ineffective, finding that trial counsel had tactical reasons not to renew the motion. Mr. Carr was prejudiced by the jury's use of the evidence of one count to prove criminal intent in the other, and he was embarrassed by raising separate defenses to each count. Where any conscious decision not to renew Mr. Carr's motion to sever was not reasonable, was Mr. Carr's constitutional right to effective assistance of counsel violated?

4. The crime of communicating with a minor for immoral purposes requires the State to prove beyond a reasonable doubt that the defendant communicated with a minor for the predatory purpose of promoting the child's exposure to or involvement in sexual misconduct. A child in a retail store saw Mr. Carr's pants part-way down, revealing his undergarment. Mr. Carr had asked her an innocuous question earlier, but the girl did not know if Mr. Carr knew she was nearby. Viewing the evidence in the light most favorable to the prosecution, must Mr. Carr's conviction be reversed in the absence of evidence he communicated with a minor for an immoral sexual purpose? U.S. Const. amends. VI, XIV.

5. Due process requires that statutes be drawn precisely enough that citizens have fair warning of what conduct is prohibited and the law will not be arbitrarily enforced by law enforcement or the courts. U.S.

Const. amend. XIV. Mr. Carr was convicted of communicating with a minor for immoral purposes when he inadvertently exposed his underwear to a minor. Is the statute unconstitutionally vague as applied to his conduct?

D. STATEMENT OF THE CASE

Peter Carr resided in Federal Way, worked at an airport parking facility, and regularly shopped at nearby thrift shops including Deseret Industries and Goodwill. 3/29/12 RP 888-89; 4/2/12 RP 4-5, 7, 33-34, 40. He was convicted of first degree child molestation and communicating with a minor for immoral purposes for two separate incidents occurring in thrift shops in June 2011. CP 68-69. He is currently serving a life sentence for child molestation, with a 68 month minimum term, and he received a consecutive 364-day suspended sentence for communicating with a minor for immoral purposes. CP 74, 80. The Court of Appeals affirmed both convictions, and Mr. Carr seeks review in this Court.

1. Count 1. Eight-year-old M.L. shopped at the Deseret Industries thrift store with her mother and two sisters several times a week. 3/21/12 RP 176-78; 3/26/12 RP 458; 3/27/12 RP 533, 536-37. Her mother, Alma Lopez Ochoa, always kept M.L. and her little sister close to her when they were in the store. 3/21/12 RP 175, 179-80; 3/27/12 RP 540-41.

On June 4 or June 11, 2011, a man in the store touched M.L's chest area with his hand; the touch was outside her clothing and lasted only one second. 3/26/12 RP 424; 3/27/12 RP 545-56, 584-85; Ex. 4 at 9. The man did not look at M.L., say anything to her, or make any sounds. 3/27/12 RP 585.

M.L. went to her mother and asked to leave the store, but Mrs. Lopez continued shopping for about 20 minutes. 3/21/12 RP 198; 3/26/12 RP 412-13, 465-66. At the store and later that evening M.L. told her mother what happened, but she could not describe the man. 3/21/12 RP 191-95, 199-210; 3/26/12 RP 471-73. Instead of reporting the incident to the police or store personnel, Mrs. Lopez brought M.L. and her sisters back to the store two or three times in hopes that M.L. would recognize the man. 3/21/12 RP 202-04, 216; 3/26/12 RP 469, 475. On June 17, 2011, M.L. pointed out Mr. Carr, and her family notified store personnel. 3/21/12 RP 205-06, 219-20; 3/26/12 RP 477, 490-91, 3/26/12 RP 397; 3/27/12 RP 592. She also identified Mr. Carr in court. 3/27/12RP 573-74.

. Mrs. Lopez was certain the incident was on June 4 or June 11 between about 11:30 a.m. and noon. 3/26/12 RP 424-25. Mr. Carr worked from 5 a.m. to 2 p.m. on both days. 3/29/11 RP 893-94; Ex. 56. Mr. Carr testified that he did not touch M.L. in the Deseret thrift store. 4/2/12 RP 13.

2. Count 2. Nine-year-old K.W. was shopping with her mother at Goodwill in Federal Way on June 21, 2011. 3/28/12 RP 647-48, 686. K.W. was in the girls' clothing section within view of her mother, who was shopping nearby. 3/28/12 RP 650, 687. When K.W. arrived in the girls' clothing area, she saw a man looking at a gymnastics leotard, and he asked K.W. if she liked the garment. 3/28/12 RP 689, 691. K.W. did not respond and went to different aisle, and the man moved away. 3/28/12 RP 691-93.

Later K.W. saw the man from about ten feet away scratching his buttocks with his pants lowered so that underwear was visible. 3/28/12 RP 694-97, 706. K.W. described the underwear as a sparkly pink bikini bottom. 3/28/12 RP 695-96. The man was looking down, not at K.W., and then he stood up. 3/28/12 RP 696-97. After glancing at the man, K.W. joined her mother. 3/28/12 RP 701.

K.W. told her mother what she saw as they left the store, and her mother reported the incident to the police. 3/28/12 RP 657, 703. K.W. provided a description of the man, but she did not identify Mr. Carr in court. 3/28/12 RP 703-05, 708.

Mr. Carr testified he saw a girl looking at him when he shopping for women's swimming suits at Goodwill. 4/2/12 RP 15. He felt awkward and asked her if she liked the one-piece suit he had in his hand.

4/2/12 RP 17-19. Mr. Carr was wearing a women's pink one-piece swim suit under his clothing that day, and he crouched down to adjust it because it had ridden up and was painful. He did not realize anyone was watching. 4/24/12 RP 21-22, 65-68.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. **Mr. Carr's child molestation conviction is based upon an unsupported inference of sexual motivation, raising an important constitutional issue. The Court of Appeals decision affirming the conviction is in conflict with State v. Vasquez, 178 Wn.2d 1 (2013) and State v. Powell, 62 Wn. App. 914 (1991).**

The intent to commit a crime may be proved by circumstantial evidence, but this Court has made it clear that intent may not be inferred from equivocal evidence. State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013); State v. Bergeron, 105 Wn.2d 1, 20, 711 P.2d 1235 (1991); see State v. Randhawa, 133 Wn.2d 67, 77-78, 941 P.2d 661 (1997) (addressing evidence required for inference of intent instruction). The Court of Appeals determination that a reasonable juror could find Mr. Carr touched an intimate part of M.L.'s body for purposes of sexual gratification is based upon an inference that is unsupported by the evidence. Review should be granted because this is an important constitutional issue and the Court of Appeals decision is in conflict with Vasquez and a decision of the Court of Appeals, State v. Powell, 62 Wn.

App. 914, 917, 816 P.2d 86 (1991), rev. denied, 118 Wn.2d 1013 (1992). RAP 13.4(b)(1), (2).

It is well settled that due process requires the State to prove every element of a crime beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amends. VI, XIV; Const. art. I § 22. On appellate review, the court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) (emphasis omitted); Vasquez, 178 Wn.2d at 6.

The essential elements of child molestation in the first degree are that the defendant touched the sexual or intimate parts of a child under the age of 12 for the purpose of sexual gratification. RCW 9A.44.010(2); RCW 9A.44.083(1); State v. Stevens, 158 Wn.2d 304, 309-10, 143 P.3d 817 (2006). M.L. testified that Mr. Carr touched her clothing above her left breast area one time for approximately one second. 3/27/12 RP 543-46, 574-74, 584-85; accord Ex. 3 at 7, 9-10.

A child interview specialist interviewed M.L. and asked her to demonstrate the motion of the man's hand five times during their

interview. Ex. 4. Four times, M.L. made a quick swipe of her hand high across her chest; the remaining time she quickly moved her hand back and forth once. Ex. 4. M.L's older sister saw M.L.'s earlier demonstration, and she described the touch as a "swipe." 3/26/12 RP 472, 507-08. The man did not say or make any sounds. Ex. 3 at 9, 11.

The intent to commit a crime is often proved by circumstantial evidence, but "intent may not be inferred from evidence that is 'patently equivocal.'" Vasquez, 178 Wn.2d at 8 (quoting State v. Woods, 63 Wn. App. 588, 591, 821 P.2d 1235 (1991), in turn quoting Bergeron, 105 Wn.2d at 20). Instead, criminal intent may be inferred only if "the defendant's conduct and surrounding facts and circumstances plainly indicate such as intent as a matter of logical probability." Id. (quoting Woods, 63 Wn. App. at 592).

In Mr. Carr's case the eight-year-old complaining witness said that a man briefly brushed his hand over her clothed chest in a public area. Relying on Harstad, the Court of Appeals found a rational juror could conclude from this evidence that Mr. Carr acted for purposes of sexual gratification. Slip Op. at 8 (citing State v. Harstad, 153 Wn. App. 10, 21-22, 218 P.3d 624 (2009)). In Harstad, however, there was ample evidence of sexual gratification, as the defendant was "breathing hard" as he moved his hands around one child's "private area" while they were under a

blanket on the couch, and the child also described the defendant masturbating in the kitchen and said he asked to see her "pussy." Id. at 19-20. Unlike Harstad, the evidence in Mr. Carr's case is equivocal, and the Court of Appeals decision is in conflict with Vasquez.

The Court of Appeals previously held that an inference of the sexual gratification element arises when an unrelated adult touches a child's sexual or intimate parts when not performing a caretaking function. Powell, 62 Wn. App. at 917. When the touching is over the child's clothing or not in a primary erogenous area, however, additional evidence of sexual gratification is required to ensure that the touching was not equivocal. Id. In Powell, a man visiting a child's home placed his hand on her underpants when he was lifting her off his lap and also touched her thighs outside her clothing another time. Id. at 916. The Court of Appeals reversed the defendant's convictions due to the absence of proof of sexual gratification, noting the first touch was "fleeting" and both were outside the girl's clothing. Id. at 918.

The facts and circumstances of this case – a one-second touch of a child's clothed chest area in public store – do not establish that the touching was for purposes of sexual gratification as a matter of logical probability. The Court of Appeals opinion affirming Mr. Carr's conviction for first degree child molestation is thus in conflict with this

Court's decision in Vasquez and the Court of Appeals decision in Powell. In addition, whether a shopper may be convicted of first degree child molestation when he brushes a clothed child with his hand is an important constitutional issue. This Court should accept review. RAP 13.4(b)(1), (2), (3).

2. **Prosecutorial misconduct in closing argument denied Mr. Carr a fair trial, and this Court should review the Court of Appeals decision that the prejudice could have been cured by an instruction.**

Mr. Carr contends the prosecutor committed misconduct in closing argument by appealing to the jurors' passions and prejudice against sex offenders, using language that misstated the evidence, and misstating the burden of proof. The Court of Appeals agreed that the prosecutor's inflammatory argument and misstatement of the burden of proof was improper, but denied relief because defense counsel did not interpose an objection to the misconduct. Slip Op. at 15-20. This Court should accept review because the prosecutor's argument was so prejudicial that it could not have been cured by additional jury instructions, thus violating Mr. Carr's constitutional right to a fair trial. RAP 13.4(b)(3).

The Due Process Clause protects a criminal defendant's right to a fair trial. U.S. Const. amend. XIV; Const. art. I, § 22. The prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict

free from prejudice and based on reason. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935); State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). When the prosecutor commits misconduct in closing argument, the defendant's constitutional rights to due process and a fair trial may be violated. In re Personal Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012); Monday, 171 Wn.2d at 676.

In reviewing a claim of prosecutorial misconduct, the appellate court must first decide if the comments were improper and, if so, whether a "substantial likelihood" exists that the comments affected the jury verdict. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Where the defendant does not object to the improper argument, the reviewing court may still reverse the conviction if the misconduct is so flagrant and ill-intentioned that the resulting prejudice would not have been cured with a limiting instruction. Id. at 760-61. This case presents the Court with an excellent vehicle to address whether misconduct could have been cured with jury instruction when the prosecutor outrageously appeals to the juror's prejudices and fear, uses inflammatory language the misrepresents the evidence, and misstates the burden of proof.

A prosecutor may not appeal to the passions and prejudices of the jury or ague based upon facts not in evidence. Glasmann, 175 Wn.2d at

704; Monday, 171 Wn.2d at 678; State v. Belgarde, 110 Wn.2d 504, 508-10, 755 P.2d 174 (1988); RPC 3.4(e). In Mr. Carr's case, the prosecutor began her closing argument with an inflammatory discussion in which she purported to explain Mr. Carr's thoughts and actions to the jury, picturing him as a predator seeking vulnerable girls. 4/3/12 RP 3-9.

The prosecutor claimed, for example, that Mr. Carr went to Deseret Industries to find a little girl, chose ML because she spoke Spanish, waited for the perfect opportunity to "claim his treasure" and then "slithered away." Id. at 3-4. The prosecutor also posited "how excited [Mr. Carr] must have been" when he found KW at the Goodwill store, having picked the store because of the low income clientele. Id. at 7-8. She argued that the two incidents showed Mr. Carr's overall desire to grope and expose himself to young girls. Slip Op. at 20. None of these arguments were supported by the evidence. Finally, the prosecutor concluded her rebuttal closing argument by telling the jury, "He is the guy that parents warn their kids about. Find him guilty." Id. at 44.

Division Two found that a prosecutor committed misconduct when he describing the defendant's purported thought processes in the first person. State v. Pierce, 169 Wn. App. 533, 542, 553-54, 280 P.3d 1158, rev. denied, 175 Wn.2d 1025 (2012). "By arguing in the first person singular, the prosecutor inflamed the prejudice of the jury against Pierce

by attributing repugnant and amoral thoughts to him – thoughts that were based on the prosecutor's speculation and not the evidence." Id. at 554. Similarly, the prosecutor's mind-reading and baseless interpretation of Mr. Carr's mental state to depict Mr. Carr as a predator was misconduct. Slip Op. at 20. The Court of Appeals, however, found the conduct would have been cured if counsel had objected. Slip Op. at 20.

The prosecutor also committed misconduct by using inflammatory words in her closing argument that exaggerated the evidence. See 4/3/12 RP 9 ("We're here because this guy likes to grope little girls, and he gets a thrill from exposing himself to them, and that is all. Plain and simple.") The prosecutor repeatedly argued that Mr. Carr "groped" M.L.'s breast. 4/3/12 RP 4, 9, 11, 20, 42. The evidence, however, does not support the use of the word "grope," which is a slang term for sexually fondling. Dictionary.com.[1] The prosecutor also repeatedly argued that Mr. Carr "exposed himself" to K.W. 4/3/12 RP 9, 12, 18, 21, 42. K.W. testified that she saw the man's underwear and not his privates. 3/18/12 RP 701.

The prosecutor's repeated use of words like "exposed himself" and "groped" in closing argument misstated the facts presented at trial in an effort to appeal to the juror's fears and prejudices. The Court of Appeals,

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[1] www.dictionary.reference.com/browse/grope?s=ts (based on Random House Dictionary) (last viewed 4/24/14).

however, found that the prosecutor fairly characterized the evidence presented at trial. Slip Op. at 18-19

In addition, the prosecutor committed misconduct by misstating the burden of proof, arguing that the jury had to convict Mr. Carr if they believed the two girls:

> If, as you sit in that deliberation room, you can say, "I believe M[.] or I believe K[.] that is enough to end your inquiry. That is enough to convict the defendant.

4/3/12 RP 25. It is misconduct to argue in a manner that reduces the government's high burden of proof beyond a reasonable doubt. State v. Warren, 165 Wn.2d 17, 26-27, 195 P.3d 940 (2008), cert. denied, 556 U.S. 1192 (2009); Emery, 174 Wn.2d at 759-60. The Court of Appeals agreed the argument constituted misconduct, but the misconduct would not have been prejudicial if defense counsel had objected and the court given a curative instruction. Slip Op. at 16-18.

The prosecutor's appeal to the jurors' prejudices against sex offenders who prey on children by relating her personal interpretation of Mr. Carr's thoughts and actions and her use of emotionally-charged language that misrepresented the facts of the case was flagrant misconduct. Given the facts and issues in this case, it would be difficult, if not impossible, to cure this problem with a jury instruction, as it defies human nature to expect jurors to put these powerful emotions aside,

especially in a case involving children. See Belgarde, 110 Wn.2d at 507-08; Pierce, 169 Wn. App. at 556.

The prosecutor's misstatement of the burden of proof was also flagrant and ill-intentioned. The prosecutor was certainly aware of both her burden of proof beyond a reasonable doubt and the importance of not denigrating that burden of proof in closing argument.[2] She nonetheless urged the jury to decide the case based upon its view of the complaining witnesses' credibility alone. A jury instruction would not cure the prejudice given the attraction of this simplistic form of decision-making to the jurors.

The Court of Appeals looked at each instance of alleged misconduct individually. The cumulative impact of repetitive prejudicial misconduct may be so flagrant that no instruction can erase the combined prejudicial effect. State v. Case, 49 Wn.2d 66, 73, 298 P.2d 500 (1956); Pierce, 169 Wn. App. at 556. Here, too, Mr. Carr was so prejudiced by the cumulative

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[2] Not only did this Court address the issue in Warren, which also involved a deputy in the King County Prosecutor's Office, Division Two had issued a string of decisions prior to closing argument in this case addressing prosecutorial misconduct in shifting the burden of proof to the defendant, again alerting prosecutors to the issue. See State v. Evans, 163 Wn. App. 635, 543-44, 260 P.3d 934 (2011); State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010), rev. denied, 171 Wn.2d 1013 (2011); State v. Venegas, 155 Wn. App. 507, 534-24, 228 P.3d 813, rev. denied, 170 Wn.2d 1003 (2010); State v. Anderson, 153 Wn. App. 417, 431-32, 220 P.3d 1273 (2009), rev. denied, 170 Wn.2d 1002 (2010).

impact of the different instances of misconduct that curative instructions could not have mitigated the prejudice.

This was a close case. The prosecutor improperly portrayed Mr. Carr as a devious and secretive sex offender, used inflammatory language that misrepresented the facts, and urged the jury to decide the case based upon their belief in the girls' testimony rather than proof beyond a reasonable doubt. This Court should accept review to address this important constitutional issue and provide continued guidance to judges and lawyers involved in the criminal justice system. RAP 13.4(b)(3), (4).

3. **By failing to renew Mr. Carr's motion to sever as required by the court rules, his attorney did not provide the effective assistance of counsel guaranteed by the Sixth Amendment.**

Mr. Carr was charged with first degree child molestation and communicating with a minor for immoral purposes in incidents occurring at different times and places and involving different alleged victims. His trial attorney moved to sever the two counts for trial, but waived the issue by failing to renew the severance motion before or at the close of the evidence The Court of Appeals rejected Mr. Carr's argument that his counsel was ineffective on the grounds that there was a tactical reason for trial counsel's failure. This Court should accept review because it is an

important constitutional issue and an opinion will provide guidance to criminal practitioners. RAP 13.4(b)(3), (4).

Mr. Carr has the constitutional right to effective assistance of counsel. U.S. Const. amends. VI, XIV; Const. art. I, § 22; Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. A.N.J., 168 Wn.2d 91, 98, 225 P.3d 956 (2010). In addition to other ethical responsibilities, defense counsel "has a duty to bring to bear such skill and knowledge as will render the trial an adversarial testing process." Strickland, 466 U.S. at 688.

When reviewing a claim that trial counsel was not effective, appellate courts utilize the two-part test announced in Strickland. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). The appellate court must determine (1) if defense counsel's performance fell below objective standards of reasonable representation, and, if so, (2) whether counsel's deficient performance prejudice the defendant. Strickland, 466 U.S. at 687-88; Sutherby, 165 Wn.2d at 883.

The State may charge two or more offenses in a single information if the offenses are based upon the same conduct or if they are of a "similar character." CrR 4.3(a). When the defendant moves to have charges severed for trial, the motion must be granted if the court determines severance "will promote a fair determination of the defendant's guilt or

innocence of each offense." CrR 4.4(b). Severance should be granted "if the defendant is embarrassed in the presentation of separate defenses, or if the use of a single trial invites the jury to find guilt or infer a criminal disposition." State v. Russell, 125 Wn.2d 24, 62-63, 882 P.2d 747 (1994, cert. denied, 514 U.S. 1129 (1995); accord Sutherby, 165 Wn.2d at 883.

Mr. Carr's attorney's motion to sever Counts 1 and 2 was denied prior to trial. CP 22-25; 3/13/12 RP 3-4; 3/15/12 RP 5. Trial counsel never renewed the motion to sever the counts, thus waiving the issue. CrR 4.4(a)(2) (severance waived if not renewed "before or at the close of all the evidence"); State v. McDaniel, 155 Wn. App. 829, 859, 230 P.3d 245, rev. denied, 169 Wn.2d 1027 (2010). On appeal, Mr. Carr argued that his lawyer's failure to renew the severance motion was ineffective assistance of counsel.

Judicial scrutiny of defense counsel's performance is deferential, and the defendant must show that his attorney's decisions were inconsistent with "sound trial strategy." Strickland, 466 U.S. at 689; accord Sutherby, 165 Wn.2d at 883. While an attorney's tactical decisions are treated with deference, a decision is not tactical if it is not reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000); see Wiggins v. Smith, 539 U.S. 510, 533, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) ("[t]he proper measure of attorney performance

remains simply reasonableness under prevailing professional norms" (quoting Strickland, 466 U.S. at 688)); Sutherby, 165 Wn.2d at 884 (no legitimate tactical reason not to raise severance motion).

The Court of Appeals concluded that trial counsel may have had a legitimate tactical reason to want the cases tried together. Slip Op. at 13-15. The Court of Appeals reasoned that the parties were surprised when Mrs. Lopez's testimony established the two possible dates of the crime, and defense counsel may not have wanted to risk retrying the case later when the State "might have been better prepared to meet" Mr. Carr's alibi defense. Slip Op. at 14 n.8. Mrs. Lopez, however, could have been impeached if she changed her testimony, and a new jury would not have heard about the communicating count.

The potential for prejudice when a jury learns of the defendant's other bad acts is especially high in sex cases given their inflammatory nature. Sutherby, 165 Wn.2d at 886-87. The Court of Appeals theory ignores the serious prejudice Mr. Carr suffered as a result of the joinder. The jury in his case was free to use the evidence of each count in deciding the other, and the prosecutor argued that the two charges proved a pattern of conduct that demonstrated the mental elements of each count. In addition, a jury hearing only the child molestation charge would not have learned that Mr. Carr wore a women's bathing suit under his clothing,

which the prosecutor used to argue he was secretive and deceitful. 4/3/12 RP 20. Mr. Carr's ability to present his defenses was also compromised by joinder of the offenses, as he had an alibi defense for Count I, but acknowledged he was present in the store for the incident underlying Count II.

There is no evidence that defense counsel made a conscious decision not to renew Mr. Carr's motion to sever the two counts for trial. Even if he did, such a decision was not a reasonable one in light of the prejudice to Mr. Carr caused by the joint trial. The Court of Appeals decision that Mr. Carr's attorney made a reasonable and tactical decision not to renew the motion to sever raises a constitutional issue that should be reviewed by this Court. RAP 13.4(b)(3). In addition, a published opinion will educate defense counsel about CrR 4.4's requirement that severance motions be renewed. RAP 13.4(b)(4).

4. **The State did not prove beyond a reasonable doubt that Mr. Carr was guilty of communicating with a minor for immoral purposes.**

The communicating statute prohibits communication with a minor "with the predatory purpose of promoting their exposure to and involvement in sexual misconduct." RCW 9.68A.090(1); State v. McNallie, 120 Wn.2d 925, 933, 846 P.2d 1358 (1993). The Court of Appeals upheld Mr. Carr's conviction, finding that he followed K.W.

around a thrift store and then pulled down his pants, revealing the shape of his genitals. This Court should accept review because the evidence presented at trial does not prove beyond a reasonable doubt that Mr. Carr's conduct was designed to involve K.W. in sexual misconduct. RAP 13.4(b)(3).

RCW 9.68A.090 prohibits communicating with a minor "for immoral purposes. RCW 9.68A.090(1). This Court interpreted the statute to forbid "communication for the purpose of sexual misconduct." State v. Schimmelpfennig, 92 Wn.2d 95, 102, 594 P.2d 442 (1979); accord McNallie, 120 Wn.2d at 933 ("the statute prohibits communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct."). The elements of communicating with a minor for immoral purposes are that the defendant (1) communicate by words or conduct (2) to a minor (3) to promote the minor's exposure to or involvement in sexual misconduct. State v. Hosier, 157 Wn.2d 1, 9, 133 P.3d 936 (2006); McNallie, 120 Wn.2d at 933.

K.W. was shopping with her mother at Goodwill and went to the children's clothing section where she saw Mr. Carr looking at clothing. 3/28/12 RP 689. He asked her if she liked a leotard he was looking at, and K.W. walked away. 3/28/12 RP 654, 690-91; 4/2/12 RP 61-62. When she saw Mr. Carr about five minutes later, his pants were part way down and

he was scratching "his butt." 3/28/12 RP 694-95, 698, 706; Ex. 6 at 12. K.W. saw pink underwear for a few seconds. 3/29/12 RP 701, 706; Ex. 6 at 12-13. Mr. Carr explained that he was adjusting the women's swimsuit he was wearing underneath his clothing because it was painful, and he was unaware that anyone could see him. 4/2/12 RP 30, 65-68, 100.

The Court of Appeals conclusions about the evidence are inaccurate. K.W. did not testify that the man was following her. 3/28/12 RP 692-93. In fact, the man was about ten feet away from her and in front of her when she observed that his pants were slightly down. 3/28/12 RP 694, 697. It is unclear if Mr. Carr knew K.W. was in the area, as she did not say the man was even looking at her when this occurred. 3/29/12 RP 696-97, 708.

While the Court of Appeals held that Mr. Carr revealed the shape of his genitals when his pants were down, K.W. related only that she could see the man's pink bikini bottom for a few seconds. Slip Op. at 10; 3/28/12 RP 696-97, 701, 706; Ex. 6 at 9. K.W.'s mother was the only witness to state that K.W. saw an outline of the man's genitals during this brief period of time. Mr. Carr was wearing a long green polo shirt that would have covered much of his body. Ex. 6 at 13, Ex. 39, Ex. 33.

This Court's cases addressing the communication with a minor statute demonstrate the lack of evidence of criminal intent in this case. In

Schimmelpfennig, the defendant attempted to lure a 4-year-girl into his van and asked her "in explicit terms to engage in various sexual acts with him." Schimmelpfennig, 92 Wn.2d 97, 101-04. In McNallie, the defendant accosted three girls, ages 10 and 11, as they were walking home from school and asked if anyone in the neighborhood that gave "hand jobs," demonstrating by touching his own penis. McNallie, 120 Wn.2d at 926-28, 933. He told the girls that people made money for performing "hand jobs" and offered one of them money to do so. Id. at 928. And in Hosier, the defendant wrote messages fantasizing about sexual contact with a 7-year-old girl on girls' underpants and placed them on a fence at children's eye level at a day care center's playgrounds, where they were found by children between the ages of 3 and 5. Hosier, 157 Wn.2d at 4-5. He also wrote sexually explicit notes that were found in front yard of house where a 13-year-old girl resided. Id. at 5-6.

Mr. Carr's words and actions do not prove he was communicating with a minor for the purpose of "promoting their exposure to and involvement in sexual misconduct" as required by this Court. McNallie, 120 Wn.2d at 933. Mr. Carr did not invite or induce K.W. to participate in sexual misconduct, and it is not clear that he even knew she saw his brief exposure as he adjusted his swim suit.

The constitution requires the State to prove every element of the crime beyond a reasonable doubt. Apprendi, 530 U.S. at 476-77; U.S. Const. amends. VI, XIV; Const. art. I § 22. Whether the State proved beyond a reasonable doubt that Mr. Carr communicated with a minor for immoral purposes is an important constitutional issue, and a decision will provide guidance to criminal practitioners and judges throughout the state. This Court should accept review. RAP 13.4(b)(3), (4).

5. **The communicating with a minor for immoral purposes statute is unconstitutionally vague as applied to Mr. Carr's conduct.**

After affirming Mr. Carr's communication with a minor for immoral purposes conviction, the Court of Appeals concluded that the statute was not vague as applied to his conduct. Slip Op. at 10-12. A person of ordinary intelligence, however, would not understand that briefly exposing his underwear in public is communication of an immoral purpose. This Court should also accept review of this constitutional issue. RAP 13.4(b)(3).

Due process requires that citizens be given fair warning of what conduct is illegal and that criminal statutes be carefully drawn to avoid arbitrary enforcement. U.S. Const. amend. XIV; Const. art. I, §§ 3, 22; Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). A criminal statute is void for vagueness if "(1) the

statute does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed or (2) the statute does not provide ascertainable standards of guilt to protect against arbitrary enforcement." State v. Williams, 144 Wn.2d 197, 203, 26 P.3d 890 (2001) (internal quotation marks omitted) (quoting City of Bellevue v. Lorang, 140 Wn.2d 19, 30, 992 P.2d 496 (2000)).

In Mr. Carr's case, the jury was instructed that an essential element of the crime of communicating with a minor for immoral purposes was that the defendant communicated for "immoral purposes of a sexual nature." CP 61, 63. Confused, the jury asked the judge to define that term. CP 143. The court declined to further define "immoral purposes of a sexual nature" and forbade the jury from referring to a dictionary for guidance. CP 124. The jury's search for a definition of "immoral purposes of a sexual nature" demonstrates the vagueness of the term when applied to Mr. Carr's case.

The Schimmelpfennig Court held that "any person of common understanding" would understand that it is illegal to ask a small child to climb into a van and engage in sexual activities. Schimmelpfennig, 92 Wn.2d at 102-03. Additionally, a person of common understanding would know that it is illegal to openly and obscenely expose male genitalia to the public. RCW 9A.88.010(1); State v. Galbreath, 69 Wn.2d 664, 669, 419

P.2d 800 (1966). An ordinary person, however, would not expect that briefly exposing their underwear in public is a criminal offense.

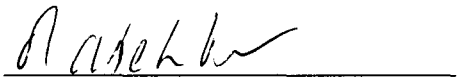
By outlawing any form of communication for an "immoral purpose of a sexual nature," the communication statute is too subjective to inform ordinary people of what conduct is prohibited or provide the standards necessary to prevent arbitrary enforcement. This Court should accept review to determine if the statute is unconstitutionally vague as applied to the described conduct. RAP 13.4(b)(3).

F. CONCLUSION

Peter Carr asks this Court to accept review of the Court of Appeals affirming his convictions.

DATED this 24 day of April 2014.

Respectfully submitted,



Elaine L. Winters – WSBA # 7780
Washington Appellate Project
Attorneys for Petitioner

APPENDIX A

COURT OF APPEALS DECISION TERMINATING REIVEW

February 18, 2014

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. PETER JAMES CARR, Appellant.	)	DIVISION ONE No. 68815-4-I UNPUBLISHED OPINION FILED: February 18, 2014

DWYER, J. — Peter Carr was arrested in connection with two incidents involving young girls, both of which occurred in June 2011 at Federal Way thrift stores. The first incident occurred when Carr rubbed his hand across 8-year-old M.L.'s breast area. The second occurred when Carr asked 9-year-old K.W. whether she liked the leotard he was holding, followed her from aisle to aisle, and lowered his pants to expose his genitals encased in a "pink, sparkly bikini bottom." Carr was charged with one count of child molestation in the first degree and one count of communicating with a minor for immoral purposes. Immediately prior to trial, Carr's attorney unsuccessfully moved to sever the counts for trial. However, he did not renew this motion before or at the close of the evidence. A jury convicted Carr on both counts. We conclude that there was sufficient evidence to support his convictions, that he received effective

assistance of counsel, and that the offense of communicating with a minor for immoral purposes is not unconstitutionally vague. Thus, we affirm.

I

In June 2011, when 8-year-old M.L. was shopping at the Deseret Industries thrift store with her mother and her two sisters, a man in the store touched M.L.'s breast area over her shirt. M.L. testified that it was Carr who touched her left breast with his right hand and that his hand "went across" her breast for a period of one second. M.L. stated that Carr did not look at her, did not say anything to her, and did not make any sounds during the encounter.[1] After demonstrating in court the manner in which she had been touched and, in response to the prosecutor's question, "[a]nd what you just demonstrated was rubbing one hand across your breast?" M.L. answered affirmatively. Additionally, prior to testifying in court, M.L. met with a child interview witness specialist and, in a recorded interview, demonstrated five times how the man touched her. During four of the demonstrations, M.L. quickly ran her hand over her breast area, applying minimal pressure.[2] However, during one of the demonstrations, M.L. appeared to apply more pressure, and to move her hand back and forth across her breast area. Also, during this interview, when asked how she was touched, M.L. said, "He just rubbed like that." This recorded interview was

[1] Exhibit 4 is the compact disc recording of M.L.'s interview with a King County Prosecutor's child interview witness specialist, which was viewed by the jury. The transcript of that interview was marked as Exhibit 3 but not admitted into evidence.

[2] After the incident, but before being interviewed by the witness specialist, M.L. also demonstrated to her older sister how she had been touched, who described it as follows: "She took her right hand and swiped it across her chest."

shown to the jury.

After the incident, M.L. found her mother, Alma Lopez, at the store and told Lopez that a man had touched her. Her mother did not report the incident to the police or to store personnel at that time. Three days later, Lopez decided to return to Deseret Industries with her daughters to see if M.L. would recognize the man who had touched her. Although M.L. did not want to go to the store and was visibly upset, once they were inside, she told Lopez that the man who had touched her was in the store; however, she did not identify him.

Subsequently, Lopez returned to the store with her children several times. During one visit, Lopez discovered that a man in the store was following them and was staring at M.L. During a later visit, on June 17, 2011, M.L. identified Carr as the man who had touched her, and Lopez notified a store employee who called the manager. The manager approached Carr and said, "it's been reported that you caused a disturbance in the store." Carr hastily left the store. The police were called and officers came to the store and spoke to M.L. and her family. One of the officers asked M.L. to show him how the man had touched her and, obliging, she "used her right hand, open hand, and then rubbed it across her breast line . . . [b]ack and forth a few times."

With regard to the touching of M.L., the State charged Carr by information with child molestation alleged to have occurred between June 1 and June 10, 2011. At trial, Carr asserted an alibi defense but also testified that he had not touched M.L. in the thrift store. Although neither Lopez nor Angelina—M.L.'s older sister—could pinpoint the date of the incident during which M.L. was

touched, Lopez testified that it was on a Saturday between 11:30 a.m. and noon. The testimony of two thrift store employees supported the conclusion that the date of the incident had to have been either Saturday, June 4 or Saturday, June 11. The State requested, and was allowed, to amend the information to allege that the crime took place between June 1 and June 14, 2011. In support of the alibi defense, Carr's employer testified that Carr was working from 5 a.m. to 2 p.m. on both June 4 and June 11.

Soon after the incident involving M.L., a man lowered his pants and exposed part of a women's bathing suit he was wearing to nine-year-old K.W. while she was shopping at a Goodwill store with her mother. This took place on either June 21 or June 29, 2011. K.W. was shopping in the girl's clothing section and her mother was looking at women's clothing nearby. K.W. encountered a man who showed her a leotard on a hanger and asked her if she liked it, adding that he liked it. K.W. did not say anything to the man and walked away. She went to a different aisle and the man followed her; she again went to a different aisle and again the man followed her. At that point, K.W. testified, the man, who was about 10 feet away, looked down and pulled his pants down to the end of his underwear, which K.W. described as a "pink, sparkly bikini bottom." K.W. stated that his pants were down for a few seconds, that he appeared to be "scratching his butt," and that he was grinning. Additionally, K.W. thought he had pulled his pants down on purpose. In response to the prosecutor's question, "Could you see the man's privates?" K.W. said that she could not. However, K.W.'s mother, in response to the prosecutor's question as to whether K.W. had been able to

see the man's genitalia, said that K.W. "said she could see the shape of it, with the tight-fitting bikini bottom."

Following this incident, K.W. walked quickly back to her mother, who was in the women's section of the store. Although she told her mother that a man had talked to her, she waited until they had left the store to report that the man had showed her his underwear. She waited, she explained, because she considered it a private subject that was "weird" to talk about. Once they returned home, K.W.'s mother called the police.

The police obtained surveillance video showing Carr entering the Goodwill store at 3:56 p.m., leaving at 4:29 p.m., re-entering at 5:09 p.m., K.W. and her mother entering at 5:15 p.m., and Carr leaving at 5:20 p.m.[3] Police circulated an alert to retail security with a still picture. On July 7, 2011, after Sears' security staff recognized Carr, the police arrested him in his van in a nearby parking lot. When he was arrested, Carr was wearing a bright pink women's swimsuit under his clothing. Carr owned two women's one-piece bathing suits that he wore under his clothing when he was at home and sometimes in public.

The King County Prosecutor charged Carr with one count of child molestation in the first degree and one count of communicating with a minor for immoral purposes. Prior to trial, Carr's attorney moved to sever the two charged counts for trial. This motion was denied. Carr's attorney did not thereafter renew

[3] Although these times are three hours behind the time stamps reflected by the surveillance video, Officer Kristopher Krusey explained that, during the course of his investigation, he discovered that there was a three-hour discrepancy between the time stamp and the actual time when the video was recorded. Report of Proceedings (March 28, 2012) at 749-50.

the severance motion before or at the close of the evidence. The jury found Carr guilty on both counts. The trial court imposed a sentence of a maximum of life in prison with a minimum of 68 months of incarceration on the child molestation charge and a consecutive 364-day suspended sentence on the charge of communicating with a minor for immoral purposes.

Carr appeals.

II

Carr contends that there was insufficient evidence to support his conviction of child molestation in the first degree. This is so, he avers, because the State failed to prove that the touch over M.L.'s shirt was done for sexual gratification. His contention is unavailing.

When reviewing a sufficiency of the evidence challenge, "'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*.'" State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). This appellate standard of review is designed to ensure that the trial court fact finder reached the "subjective state of near certitude of the guilt of the accused," required by the Fourteenth Amendment's proof beyond a reasonable doubt standard. Jackson, 443 U.S. at 315. When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829

P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, 119 Wn.2d at 201. "Deference must be given to the trier of fact who resolves conflicting testimony and evaluates the credibility of witnesses and persuasiveness of material evidence." State v. Carver, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989).

To convict Carr of child molestation in the first degree, the State was required to prove that Carr had sexual contact with a child under the age of 12 who was not his wife or domestic partner and who was at least 36 months younger than him. RCW 9A.44.083(1). The pertinent statute defines "sexual contact" as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2). The breast area is a sexual or intimate part of a person. State v. Jackson, 145 Wn. App. 814, 819, 187 P.3d 321 (2008). Thus, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt that Carr touched M.L.'s breast area for the purpose of sexual gratification.[4]

[4] Pernicious language has been imported into the standard of review: specifically, that evidence of sexual gratification is insufficient if it is "susceptible of innocent explanation." State v. Powell, 62 Wn. App. 914, 918, 816 P.2d 86 (1991) (although the court recited the proper standard at the beginning of its opinion, it later indicated that the evidence was insufficient because it was "susceptible of innocent explanation"); State v. Whisenhunt, 96 Wn. App. 18, 24, 980 P.2d 232 (1999) (distinguishing Powell by holding that the evidence was not open to innocent explanation); State v. Price, 127 Wn. App. 193, 202, 110 P.3d 1171 (2005) (also distinguishing Powell by holding that the evidence was not "susceptible of innocent explanation"), aff'd on other grounds, 158 Wn.2d 630, 146 P.3d 1183 (2006). If this were the standard, "child molestation convictions would be subject to dismissal or reversal simply because a jury *could* believe a nonsexual explanation for the behavior." State v. Veliz, 76 Wn. App. 775, 779 n.6, 888 P.2d 189 (1995).

Viewing the evidence in the light most favorable to the State, a rational trier of fact could conclude beyond a reasonable doubt that Carr touched M.L.'s breast area for sexual gratification. "Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touching was for the purpose of sexual gratification." State v. Powell, 62 Wn. App. 914, 917, 816 P.2d 86 (1991). However, "we require additional proof of sexual purpose when clothes cover the intimate part touched." State v. Harstad, 153 Wn. App. 10, 21, 218 P.3d 624 (2009). Rubbing of an intimate area is sufficient additional proof to establish a sexual purpose. Harstad, 153 Wn. App. at 22. Here, the additional proof of sexual purpose is supplied by evidence in the record that Carr rubbed his hand back and forth across M.L.'s breast area.[5] Thus, although M.L. was wearing a shirt that covered her breast area, evidence that Carr rubbed his hand back and forth across her breast area was sufficient to allow a rational trier of fact, viewing the evidence in the light most favorable to the State, to conclude beyond a reasonable doubt that Carr touched M.L.'s breast area for sexual gratification.

III

Carr next contends that there was insufficient evidence presented at trial to support his conviction of communicating with a minor for immoral purposes.

We adhere to the view we expressed in Veliz: "the correct test is that recited by the Powell court at the beginning of its opinion: whether, as a matter of law, there is sufficient evidence from which a rational trier of fact could find all the elements of the crime beyond a reasonable doubt. 62 Wn. App. at 916." Veliz, 76 Wn. App. at 779 n.6.

[5] Although evidence as to whether this took place was in conflict, the evidence before the jury was sufficient for the fact finder to find that this occurred. It is for the trial fact finder to resolve conflicts in testimony. Carver, 113 Wn.2d at 604.

This is so, he avers, because there was insufficient evidence admitted to prove that his communication with K.W. was for an immoral sexual purpose. We disagree.

RCW 9.68A.090(1) reads, in pertinent part: "[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 gross misdemeanor." The word "communicate" means spoken word or course of conduct. State v. Schimmelpfennig, 92 Wn.2d 95, 103-04, 594 P.2d 442 (1979). See also State v. Jackman, 156 Wn.2d 736, 748, 132 P.3d 136 (2006) ("a defendant communicates with a minor under RCW 9.68A.090 if he or she *invites* or *induces* the minor to engage in prohibited conduct"). Ultimately, "the statute prohibits communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct." State v. McNallie, 120 Wn.2d 925, 933, 846 P.2d 1358 (1993). Accordingly, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt that Carr communicated with K.W. for the predatory purpose of promoting her exposure to and involvement in sexual misconduct.

Viewing the evidence in the light most favorable to the State, a rational trier of fact could conclude beyond a reasonable doubt that Carr communicated with K.W. for the predatory purpose of promoting her exposure to and involvement in sexual misconduct. Carr held up a leotard for K.W. to see and asked her whether she liked it, adding that he did. When she moved away to a

different aisle without answering, he followed her. When she again moved away to a different aisle, he again followed her. Finally, when he was a short distance away, while grinning, he pulled down his pants and displayed his pink, sparkly[6] women's bathing suit, which revealed the shape of his genitals. Based on this set of circumstances, a rational trier of fact could conclude that Carr's actions were meant to invite or induce K.W. to engage in prohibited conduct, thereby promoting her exposure to and involvement in sexual misconduct.[7]

IV

Carr next contends that we should reverse his conviction on the charge of communicating with a minor for immoral purposes, asserting that the statute is unconstitutionally vague as applied to his conduct. This is evidenced, he argues, by the jury's request for a definition of "immoral purposes of a sexual nature." We disagree.

We review the constitutionality of a statute de novo. City of Spokane v. Neff, 152 Wn.2d 85, 88, 93 P.3d 158 (2004). However, "[t]he mere need for statutory construction does not render a statute unconstitutional." State v. Evans, 177 Wn.2d 186, 203, 298 P.3d 724 (2013). It is presumed that a statute is constitutional unless its unconstitutionality appears beyond a reasonable doubt, a showing which must be made by the challenging party. City of Seattle v. Eze, 111 Wn.2d 22, 26, 759 P.2d 366 (1988).

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[6] The fact that the underwear was pink is relevant as tending to show that Carr was using it to attract children. See State v. Hosier, 157 Wn.2d 1, 13-14, 133 P.3d 936 (2006).

[7] In his statement of additional grounds, Carr asserts that there was insufficient evidence to support his conviction of communicating with a minor for immoral purposes. We reject his duplicative argument.

"The due process vagueness doctrine seeks to ensure that the public has adequate notice of what conduct is proscribed and to ensure that the public is protected from arbitrary ad hoc enforcement." State v. Saunders, 132 Wn. App. 592, 599, 132 P.3d 743 (2006). "The vagueness doctrine is violated if the provision (1) fails to define the criminal offense so that ordinary people can understand what conduct is proscribed and (2) fails to provide ascertainable standards of guilt to prevent arbitrary enforcement." Saunders, 132 Wn. App. at 599. However, "a statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct." Eze, 111 Wn.2d at 27. Indeed, "'one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.'" Evans, 177 Wn.2d at 203 (quoting Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340, 72 S. Ct. 329, 96 L. Ed. 367 (1952)). Consequently, "the presumption in favor of a law's constitutionality should be overcome only in exceptional cases." Eze, 111 Wn.2d at 28.

This is not an exceptional case. After being instructed that an essential element of the crime of communicating with a minor for immoral purposes was that Carr communicated with K.W. for "immoral purposes of a sexual nature," the jury asked the judge to define "immoral purposes of a sexual nature." The judge declined to instruct the jury further. From this, Carr contends that "[t]he jury's search for a definition of 'immoral purpose of a sexual nature' demonstrates the vagueness of the term when applied to Mr. Carr's case." However, this inference of unconstitutional vagueness that Carr urges us to draw belies the directive that

we presume a statute to be constitutional. The jury's request for a more detailed definition of one of the elements is open to any number of benign explanations. It does not, however, demonstrate beyond a reasonable doubt that the statute fails to define the criminal offense so that ordinary people can understand what conduct is proscribed. Neither does it establish that the statute fails to provide ascertainable standards of guilt to prevent arbitrary enforcement.

Carr spoke to K.W. when they were alone, followed her repeatedly when she moved away from him, and, grinning, pulled down his pants when he was standing close to her, revealing the shape of his genitals encased in his tight pink women's swimsuit bottom. An ordinary person would understand that Carr's conduct was at least "perilously close to an area of proscribed conduct." See Evans, 177 Wn.2d at 203. Accordingly, the statute is not unconstitutionally vague as applied to him in these circumstances.

V

Carr next contends that he received ineffective assistance of counsel. This is so, he avers, because his counsel failed to renew his motion to sever the two charged counts before or at the close of the evidence. Carr fails to establish an entitlement to appellate relief on this claim.

"In order to prevail on an ineffective assistance claim, the defendant must demonstrate '(1) deficient performance, that his attorney's representation fell below the standard of reasonableness, and (2) resulting prejudice that, but for the deficient performance, the result would have been different.'" State v. Mullins, 158 Wn. App. 360, 371, 241 P.3d 456 (2010) (quoting State v. Hassan,

151 Wn. App. 209, 216-17, 211 P.3d 441 (2009)). In evaluating an ineffective assistance of counsel claim, this court "must begin with 'a strong presumption counsel's representation was effective' and must base its determination on the record below." In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002) (quoting State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). "The defendant alleging ineffective assistance of counsel 'must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.'" Hutchinson, 147 Wn.2d at 206 (quoting McFarland, 127 Wn.2d at 336).

The record supports the proposition that Carr's trial counsel had legitimate tactical reasons for not renewing the motion to sever the two counts for trial. First, as the case played out, the evidence against Carr on each count was not overwhelming. On appeal, as to each count, Carr's appellate counsel advances in good faith the argument that the evidence on both counts was constitutionally insufficient. It is easy for us to envision Carr's trial counsel being of a like mind. Carr's trial counsel could have been of the opinion that Carr would be acquitted by the jury on each count—especially given the testimony admitted in support of his alibi defense to the felony count. Given the evidence admitted, which the jury was free to view in a manner beneficial to Carr (unlike an appellate court on appeal), and given appellate counsel's good faith view of the evidence—that it was constitutionally insufficient—Carr's trial counsel, for tactical reasons, may have desired to proceed to a jury, on both counts, rather than risk retrial on either count.

This was especially true with respect to the felony charge. At trial, the testimony came out in a manner not anticipated by the prosecution, which forced the prosecution to seek leave to amend the charging document. This unanticipated testimony was consistent with Carr's alibi defense. Although neither the State nor the court, on its own motion, could have moved to sever the counts during trial without Carr's consent, CrR 4.4(c)(2)(ii), if Carr made such a motion the decision would have been up to the trial judge. Carr could not control the trial court's exercise of discretion as to which of the counts to sever for retrial and which to allow to go to the jury for decision. It was a legitimate tactical decision for Carr to wish to see the felony count—bolstered by the evidence supporting his alibi defense—go to the jury.[8]

In short, trial counsel had reason to believe that the defense of the felony count had gone better than anticipated. Similarly, for the same reasons that appellate counsel possesses a good faith belief that the evidence on both counts was weak, so can we envision Carr's trial counsel being of the same view. Thus, we can envision legitimate tactical reasons for Carr's trial counsel opting to have both counts proceed to verdict. Thus, Carr fails to establish deficient

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[8] On appeal, Carr highlights certain evidence relevant to the communicating with a minor charge: "The evidence that Mr. Carr was wearing a hot pink women's swim suit under his clothing and that [the child] thought she saw him in a sparkly bikini bottom was too inflammatory to be admitted in his trial for child molestation."

Had Carr renewed the motion to sever, the trial court—presented with this very contention—may have agreed and ruled to sever the child molestation charge, allowing the misdemeanor count to go to the jury. However, such a ruling would have deprived Carr of the advantage gained from the unanticipated testimony as to the dates on which the touching of M.L. must have occurred. On a retrial, the State might be better prepared to meet the alibi defense. Carr's trial counsel, who performed ably, could have had such tactical concerns in mind in determining not to renew the motion to sever.

performance on the part of his trial counsel.[9, 10]

VI

Carr next contends that prosecutorial misconduct denied him a fair trial. This is so, he asserts, because during closing argument the prosecutor improperly (1) misstated the burden of proof, (2) misrepresented the facts of the case, and (3) made arguments that appealed to the jurors' fears and prejudices about sex offenders. Again, Carr does not demonstrate an entitlement to appellate relief.

To establish prosecutorial misconduct, Carr must first show that the prosecutor's statements were improper, and then show that Carr was prejudiced as a result. State v. Emery, 174 Wn.2d 741, 759-65, 278 P.3d 653 (2012). However, "[i]f the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." Emery, 174 Wn.2d at 760-61. Accord State v. McKenzie, 157 Wn.2d 44, 53 n.2,

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[9] In his statement of additional grounds, Carr contends that he was prejudiced by virtue of the trial court denial of his original motion to sever. However, where a defendant does not renew his or her motion to sever counts before or at the close of the evidence, the issue is waived and we will address it only within the discussion of ineffective assistance of counsel. CrR 4.4(a); State v. McDaniel, 155 Wn. App. 829, 858-59, 230 P.3d 245 (2010). Carr did not renew his motion to sever before or at the close of the evidence. Thus, we do not consider whether the trial court erred by denying his pretrial motion to sever.

[10] In his statement of additional grounds, Carr asserts an alternate ground for his ineffective assistance claim: specifically, that his counsel did not do as Carr requested on several occasions. These included failing to remind the jury of Carr's time cards showing that he worked on June 4 and June 11, failing to remind the jury of facts relating to Carr's alibi and M.L.'s school schedule, failing to provide Carr with the dates during which Carr's picture appeared on television in relation to law enforcement seeking to apprehend him, and failing to provide Carr with a physical copy of those broadcasts. However, because these arguments are not supported by credible evidence in the record, we do not review them. State v. Alvarado, 164 Wn.2d 556, 569, 192 P.3d 345 (2008) (citing RAP 10.10(c)).

134 P.3d 221 (2006) (recognizing that "the absence of an objection by defense counsel '*strongly suggests* to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial'" (quoting State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990))). "Under this heightened standard, the defendant must show that (1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" Emery, 174 Wn.2d at 761 (quoting State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). In making this determination, we "focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." Emery, 174 Wn.2d at 762.

First, Carr contends that the prosecutor misstated the burden of proof during closing argument by saying, "If, as you sit in that deliberation room, you can say, 'I believe [M.L.],' and you can say, 'I believe [K.W.],' that is enough to end your inquiry. That is enough to convict the defendant." "[I]t is an unassailable principle that the burden is on the State to prove every element and that the defendant is entitled to the benefit of any reasonable doubt. It is error for the State to suggest otherwise." State v. Warren, 165 Wn.2d 17, 26-27, 195 P.3d 940 (2008). Although Carr did not object to the prosecutor's statement, he is correct that the prosecutor's statement was improper. However, prior to closing argument, the jury had been properly instructed as to the burden of proof

and the definition of reasonable doubt.[11] Had Carr interposed an objection and

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[11] The pertinent language from the jury instructions is as follows:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.
>
> . . .
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

Jury Instruction 2.

> To convict the defendant of the crime of child molestation in the first degree, as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That during a period of time intervening between June 1, 2011 through June 14, 2011, the defendant had sexual contact with M.V.L.;
>
> (2) That M.V.L. was less than twelve years old at the time of the sexual contact and was not married to the defendant and was not in a state registered domestic partnership with the defendant;
>
> (3) That M.V.L. was at least thirty-six months younger than the defendant; 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 as to Count I.
>
> 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 as to Count I.

Jury Instruction 8.

> To convict the defendant of the crime of communicating with a minor for immoral purposes, as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about June 29, 2011, the defendant communicated with K.W. for immoral purposes of a sexual nature;
>
> (2) That K.W. was a minor; and
>
> (3) 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 as to Count II.
>
> On the other hand, if, after weighing all of 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 as to Count II.

requested a curative instruction, the court could easily have instructed the jury to be guided by its prior instructions. Because the asserted error could have been remedied by a curative instruction, Carr is not entitled to appellate relief.[12]

Next, Carr contends that the prosecutor misrepresented the facts of the case during closing argument. Specifically, Carr objects to the prosecutor's use of the word "groped" when describing Carr's contact with M.L., and the prosecutor's use of the word "exposed" when describing Carr's lowering of his pants in close proximity to K.W. "The propriety of a prosecutor's conduct is 'reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given.'" State v. Reed, 168 Wn. App. 553, 577, 278 P.3d 203 (quoting State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994)), review denied, 176 Wn.2d 1009, 290 P.3d 995 (2012). "In closing argument, a prosecutor is afforded wide latitude to draw and express reasonable inferences from the evidence." Reed, 168 Wn. App. at 577.

The prosecutor did not misrepresent facts. Carr's claim of error stems from his misapprehension of the evidence in the record. As explained, there was evidence in the record that Carr rubbed his hand back and forth across M.L.'s breast area, and that Carr lowered his pants to reveal the shape of his genitals to K.W. The prosecutor's use of the word "groped" is supported by the evidence of Carr rubbing his hand back and forth across M.L.'s breast area. The prosecutor's use of the word "exposed," taken in context, does not suggest an

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Jury Instruction 11.

[12] In his statement of additional grounds, Carr asserts that the prosecutor misstated the burden of proof. We reject his duplicative argument.

assertion that Carr exposed his bare genitals; instead, K.W.'s mother was asserting that he exposed the shape of his genitals beneath his tight swimsuit, which is supported by evidence in the record. It was reasonable, therefore, for the prosecutor to argue from this evidence that Carr "groped" M.L. and "exposed" himself to K.W. Accordingly, the prosecutor's conduct was not improper.[13]

Next, Carr contends that the prosecutor improperly appealed to the jurors' fears and prejudices about sex offenders when she punctuated her rebuttal argument with the statement: "He is the guy that parents warn their kids about. Find him guilty."

"Prosecutors have a duty to seek verdicts free from appeals to passion or prejudice." State v. Perez-Mejia, 134 Wn. App. 907, 915, 143 P.3d 838 (2006). "Accordingly, a prosecutor engages in misconduct when making an argument that appeals to jurors' fear and repudiation of criminal groups or invokes racial, ethnic, or religious prejudice as a reason to convict." Perez-Mejia, 134 Wn. App. at 916. However, "[t]he propriety of a prosecutor's conduct is 'reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given.'" Reed, 168 Wn. App. at 577 (quoting Russell, 125 Wn.2d at 85-86). Because Carr's counsel did not object at trial, any error was waived "unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." Emery, 174 Wn.2d at 760-61.

[13] In his statement of additional grounds, Carr also objects to the prosecutor's use of the words "groped" and "fondled." We reject his duplicative argument.

Although the prosecutor's conduct here was not as egregious as in Perez-Mejia, where the prosecutor improperly exhorted the jury to convict the defendant in order to send a message to gangs, the prosecutor's statement was improper. While only a small portion of the argument was inflammatory, considered in light of the issues in the case—notably, that the two incidents showed a propensity to prey on children—this appeal to the jurors' aversion toward pedophiles was magnified. Accordingly, the prosecutor's statement was improper.

Nevertheless, Carr is not entitled to appellate relief. Unlike in Perez-Mejia, here there was no objection interposed to the improper argument. Had there been such an objection, the trial court could have issued a proper curative instruction. We are not convinced that the challenged conduct was so flagrant and ill-intentioned that such a curative instruction would not have constituted an adequate remedy.

VII

Carr makes a number of contentions in his statement of additional grounds that were not made by his attorney on appeal. None are availing.

Carr contends that law enforcement officers failed to collect exonerating evidence, requiring that the child molestation case be dismissed. This is so, he asserts, because the officer who was called to Deseret Industries on June 17, 2011, failed to secure the surveillance video from June 3 to June 17. There is no trial court record with respect to this claim. Thus, there is nothing for us to review. No entitlement to appellate relief is established.

Carr next contends that the probable cause determination was improperly

made with respect to the incident involving M.L. This is so, he avers, because the certification for determination of probable cause describes Carr as "rubbing" M.L.'s breast, which is not how the dispatched officer described what happened. However, because Carr did not raise this issue in the trial court, there is no record for us to review. Again, no entitlement to appellate relief has been established.

Carr next raises several issues that, in effect, contend that there was a conspiracy between the prosecutor and his defense attorney to suppress certain evidence. However, because these arguments are not supported by credible evidence in the record, we do not review them. State v. Alvarado, 164 Wn.2d 556, 569, 192 P.3d 345 (2008) (citing RAP 10.10(c)).

Carr next offers affidavits from his sister and mother, wherein they both assert that a juror approached them and spoke with them regarding the jury's deliberation following the verdict. Because these arguments are not supported by credible evidence in the record, we do not review them. Alvarado, 164 Wn.2d at 569 (citing RAP 10.10(c)).

Carr next contends that the charge of communicating with a minor for immoral purpose should be dismissed. The basis for this contention is his assertion that initially the police did not have any evidence that Carr had committed the crime. In essence, Carr appears to be challenging the trial court's denial of his Knapstad[14] motion. However, the denial of a Knapstad motion is not appealable after a trial has been conducted. State v. Olson, 73 Wn. App. 348,

[14] State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986).

357 n.6, 869 P.2d 110 (1994). Thus, we do not further consider Carr's contention.

Finally, Carr contends that M.L.'s mother testified untruthfully. Credibility determinations are the province of the trial court fact finder. Carver, 113 Wn.2d at 604.

Affirmed.

Dwyer, J.

We concur:

Appelwick, J

Becker, J.

APPENDIX B

ORDER DENYING MOTION FOR RECONSIDERATION

March 26, 2014

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

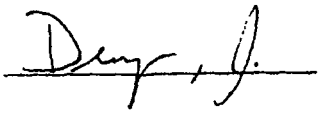
STATE OF WASHINGTON, Respondent, v. PETER JAMES CARR, Appellant.	)	DIVISION ONE No. 68815-4-I ORDER DENYING APPELLANT'S MOTION FOR RECONSIDERATION

The appellant Peter James Carr, appearing pro se, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 26th day of March, 2014.

FOR THE COURT:



DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 68815-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Donna Wise, DPA
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: April 24, 2014