NO. 32168-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

MAXIMINO CASTILLO-MURCIA, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 13-1-00450-3

BRIEF OF RESPONDENT

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II. STATEMENT OF FACTS

On April 17, 2013, 13-year-old J.M.A.-H., was in Monopoly Park, a small recreation area managed by the City of Kennewick, in Benton County. (CP 4; RP[1] at 38). She was with two friends playing basketball. (RP at 37). The defendant, Maximino Castillo-Murcia, approached the park in an ice cream truck. *Id.* J.M.A.-H. had spoken with the defendant on two prior occasions. (RP at 35-37). She only knew him as the "ice cream man." (RP at 34). She did not know his name, address, phone number, or any other form of identifying information besides the simple fact that he drove an ice cream truck. On those two prior occasions, the defendant inquired where J.M.A.-H. lived and gave her free ice cream. (RP at 36).

On this occasion, J.M.A.-H. and another minor approached the

[1]Unless otherwise indicated, "RP" refers to the Verbatim Report of Proceedings entitled "Bench Trial 12-2-13 / Sentencing 12-9-13" by Court Reporter Patricia L. Adams.

truck. (RP at 37-38). The defendant again gave J.M.A.-H. a free ice cream, as well as one to her friend. *Id.* The friend left, leaving J.M.A.-H. alone with the defendant. *Id.* The defendant told J.M.A.-H. she was pretty, had a nice body and that he wished she was his son's girlfriend. (RP at 38-39). J.M.A.-H. was not acquainted with the defendant's son. (RP at 40). He asked to see her phone and tried to hold her hand when she handed it to him. (RP at 41). He asked J.M.A.-H. to turn around several times. (RP at 39-40). He then invited J.M.A.-H. into the ice cream truck. (RP at 42). He indicated he would give J.M.A.-H. Hot Cheetos with cheese on them if she would get in, as well as anything else in the truck. (RP at 44). J.M.A.-H.'s friend returned. (RP at 39). He told J.M.A.-H. to ask her friend to leave, but J.M.A.-H. refused. *Id.* At this point, J.M.A.-H. saw him masturbating. *Id.* J.M.A.-H. reacted to seeing him masturbate by throwing the ice cream and the Cheetos at the defendant and running away. *Id.* J.M.A.-H. elected to reveal what had occurred to Mr. Christopher Oatis, a security guard employed by Park Middle School. (RP at 6, 9, 47). Mr. Oatis then contacted the Kennewick Police Department. (RP at 9, 47).

The defendant was charged with a three count indictment of Luring, Communicating with a Minor for Immoral Purposes, and Indecent Exposure. (CP 1-2). The defendant elected to proceed with a bench trial

and was found guilty on all three counts. (CP 21, 25-36; RP 120). The defendant spoke through an interpreter at trial, though it was apparent that he could understand English, as he was answering questions before the interpreter could interpret them. (RP at 83). He had to be cautioned to wait for interpretation before answering. *Id.* He was sentenced to eight months imprisonment. (CP 25-36). He now appeals. At sentencing, the defendant gave an extended speech without the use of an interpreter. (RP at 129).

III. ARGUMENT

1. THE COURT'S FACTUAL FINDINGS WERE ALL WELL-GROUNDED.

The defendant has six assignments of error. Three assignments of error relate to factual findings not necessary to the case. However, the State will address them because the Findings of Fact do illuminate the ruling, as well as the defendant's state of mind. From the outset, while challenging them, the State will note the defendant cites no case law, provides no standard of review, and addresses them only in a brief footnote. (*Brief of Appellant* at 5-6). "It is well settled that a party's failure to assign error to or provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error." *Escude ex rel. Escude v. King*

Cnty. Pub. Hosp. Dist. No. 2, 117 Wn. App. 183, 190, 69 P.3d 895 (2003). Given that the defendant has utterly failed to do so, the Court should strike Assignments of Error 2, 3, and 4 in the *Brief of Appellant*.

If the court elects to consider them, the assignments of error are still ill-placed.

> We determine whether substantial evidence supports a trial court's challenged findings of fact and, in turn, whether they support the conclusions of law. Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. We treat unchallenged findings of fact as verities on appeal.

State v. Madarash, 116 Wn. App. 500, 509, 66 P.3d 682 (2003) (citations omitted).

The defendant's first assignment of error regards Finding of Fact 5, which states that the defendant gave an ice cream to J.M.A.-H. while she was waiting for her friends to return. (CP 55). The defendant indicates that he gave ice cream to both her and another minor friend. (*Brief of Appellant* at 5). The fact that the defendant also gave ice cream to another minor does not render the finding incorrect. J.M.A.-H. was standing with that minor friend, waiting for the return of a third friend. (RP at 37). Given J.M.A.-H.'s testimony, the finding was based on substantial evidence. While the defendant testified otherwise, the court weighed the testimony and found J.M.A.-H. more credible. The appellate court will

not upset the findings on the credibility of witnesses. *State v. B.J.S.*, 140 Wn. App. 91, 98, 169 P.3d 34 (2007).

Assignment of Error 4 states that the judge was in error in finding that the ice cream was given to H.A., one of J.M.A.-H.'s minor companions, in order to get her to go away. (*Brief of Appellant* at 1; CP 55). The reason given is that one ice cream cone was given to her, and she did not go away. (*Brief of Appellant* at 5). This ignores the record. Finding of Fact 10 states that the defendant gave the ice cream to H.A. in a deliberate attempt to get her to leave J.M.A.-H. alone with him. (CP 55). The finding relates to the motivation behind the defendant's actions. In this case, the defendant gave the ice cream to H.A., who then left. (RP at 38). When H.A. returned, the defendant told J.M.A.-H. to ask her to leave. (RP at 39). The defendant's conduct is strong circumstantial evidence of his intent. He was working to get J.M.A.-H. alone, and every action he took was in furtherance of that plan. "Circumstantial evidence is as trustworthy as direct evidence." *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1324 (1981). In this case, the circumstances provided substantial evidence that the defendant intended to get rid of J.M.A.-H.'s friends, and that providing them with ice cream was one way to do so.

Assignment of Error 3 relates to a proposed conflict between Findings of Fact 6 and 9. (*Brief of Appellant* at 1; CP 55). While

unartfully written, there is no conflict. The defendant did ask J.M.A.-H. to turn around at least three times, and he did ask her to turn around, and she refused. These findings of fact are not contradictory in any fashion. While it might give rise to the impression the defendant asked her to do so four times, that is simply an impression one may draw. It matters very little if the defendant asked her to spin about three or four times for his sexual gratification. The appropriate time for the defendant to ask to clarify the phrasing of the Findings of Fact was when they were entered. By neglecting to do so, the defendant waived his right to participate in their drafting. Both Finding of Fact 6 and Finding of Fact 9 are correct. The defendant asked J.M.A.-H. to spin around three times. He asked her to spin around, and she refused. The findings are both well-supported by the evidence.

2. THE DEFENDANT WAS UNKNOWN TO J.M.A.-H.

The defendant argues that the State provided insufficient evidence to prove he was unknown to J.M.A.-H, as required to prove the crime of Luring. "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. Joy*, 121 Wn.2d 333, 339, 851 P.2d 654 (1993) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). Looking at that, the extent

of the J.M.A.-H.'s acquaintance is clearly bound by what she said. She had met him twice before. (RP at 34-37). She did not know his name, address, phone number, or any identifying information. The defendant suggests that, nevertheless, he was known to the child.

The State can find no case law interpreting the word "unknown" as it appears in the Luring statute.

> Questions of statutory interpretation are questions of law that are reviewed de novo. Our goal is to effectuate the legislature's intent. If the statute's meaning is plain, we give effect to that plain meaning as the expression of the legislature's intent. Plain meaning is determined from the ordinary meaning of the language used in the context of the entire statute in which the particular provision is found, related statutory provisions, and the statutory scheme as a whole.

Bostain v. Food Express, Inc., 159 Wn.2d 700, 708, 153 P.3d 846 (2007) (citations omitted). As a result, the court here must engage in the task of statutory interpretation. The legislature has provided clear guidelines as to the purposes behind the provision in Chapter 9A.

> (1) The general purposes of the provisions governing the definition of offenses are: (a) To forbid and prevent conduct that inflicts or threatens substantial harm to individual or public interests; (b) To safeguard conduct that is without culpability from condemnation as criminal; (c) To give fair warning of the nature of the conduct declared to constitute an offense; (d) To differentiate on reasonable grounds between serious and minor offenses, and to prescribe proportionate penalties for each.

RCWA 9A.04.020.

Webster's New Collegiate Dictionary 1271 (1981) defines "unknown," in part, as "one that is not known or not well-known, esp: a person who is little known." "As pertinent here, RCW 9A.40.090 is intended to prohibit a defined class of persons (one unknown to the minor and without the consent of the minor's parents) from enticing or attempting to entice the minor into a nonpublic structure." *State v. Homan*, 172 Wn. App. 488, 491, 290 P.3d 1041 (2012), *review granted on other grounds*, 177 Wn.2d 1022, 303 P.3d 1064 (2013), *rev'd*, 181 Wn.2d 102, 330 P.3d 182 (2014).

Looking at all this, it is clear that the definition of luring that the defendant proposes is incorrect. By the defendant's proposed understanding, showing yourself on a single prior occasion to a child obviates all worries about you taking them to an isolated area. It is clearly at odds with the common definition. Just because you have seen someone once does not mean they are "known" to you. The dictionary definition states: "a person of whom little is known." In this instance, J.M.A.-H. knew that at times, the defendant drove an ice cream truck through a part of town near her home. She had spoken to him twice. There is no rational reason why the defendant would be excluded from the statute, and thus he presumes the legislature irrationally excluded him from the statute's ambit.

Looking at the clear statutory guidance, does the definition of "unknown" to exclude an individual like the defendant, who briefly spoken with this child twice, further any of the purposes? It does not work to prevent substantial harm. The danger the Luring statute seeks to prevent is the harm that an individual who lures a minor or developmentally disabled individual to an isolated location may inflict. The defendant was masturbating while watching a 13-year-old child. He was attempting to get her to enter his vehicle. It is crystal clear that the defendant is the exact kind of individual whom the statute was aimed at criminalizing.

Does it safeguard conduct that is without culpability? Herein lies the purpose of the "unknown" requirement, most likely. Parents, teachers, trusted mentors, all manner of adults may wish to speak to a minor in a private location. These interactions should not be criminalized. However, the State is unclear about any situation in which a purveyor of food would be inculpable in attempting to entice a minor into the back of his vehicle. There does not seem to be any innocent reason for the behavior. Again, the defendant is the exact individual against whom this law was intended to apply. The other two purposes do not appear to affect this matter.

This is an understanding that is in accord with the legislative history of the statute. When the Luring statute was first drafted, the

language regarding "unknown" was part of it. S.B. 5186, 53rd Leg., 1993 Regular Session (Wash. 1993)[2]. The problem the statute was meant to address was "Police receive numerous reports that strangers have attempted to order or entice children into cars. This occurs outside of schools, on public streets, etc." *Luring*, Ch. 509 § 1, 1993 Wash. Legis. Serv. (S.S.B. 5186) (to be codified at RCW 9A.40.090)[3]. The core of the statute seems to be at addressing the danger from "strangers." These are opposed to people that the child was familiar with, who would not be covered by the statute. From a child's perspective, would an ice cream vendor they had spoken with twice in their 13 years of life be considered a stranger, or familiar? Is the danger of this person ordering or enticing them into the car any less? The defendant is the exact individual, engaging in the exact conduct the legislature sought to bar. It would be a strange, altogether unreasonable exclusion to draw the line at saying "hello" to a person once. "[W]e must avoid constructions that yield unlikely, strange or absurd consequences." *State v. McDonald*, 333 P.3d 451, 454 (Wash. Ct. App. 2014) (quoting *State v. Contreras*, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994)). The construction the defendant advocates actively undercuts the purpose of the statute, excerpting a large

[2]See Appendix A.
[3]See Appendix B.

set of individuals who are still dangers when they attempt to lure children into an isolated area. This construction offers no benefits whatsoever. Whether or not an individual is known or unknown to a child is not subject to a bright line rule, but calls on the finder of fact to make a determination based on the circumstances. This standard accurately respects the legislature's intent and purpose.

Furthermore, the use of the word "unknown" should be significant. While the legislature has never defined "unknown," they have defined the word "stranger" which could have been used in the statute. "(50) 'Stranger' means that the victim did not know the offender twenty-four hours before the offense." RCW 9.94A.030. The legislature elected to not use that clearly defined term. "Where the legislature uses different terms we deem the legislature to have intended different meanings." *In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 842, 215 P.3d 166 (2009). If the legislature wished to be as restrictive as the defendant argues they were, they could have used the term clearly defined within the statute. That they elected not to shows that they intended for the word "unknown" to have a different meaning. There is no reason to presume that they intended to use it in a more restrictive manner, and every reason to believe that they intended it to be a more inclusive term.

It is not reasonable to presume that the legislature, when using the word "unknown," intended to exclude any individual who had ever been seen by a child. In this instance, the defendant elected to engage in conduct analogous to grooming. *State v. Quigg*, 72 Wn. App. 828, 833, 866 P.2d 655 (1994). He caused the minor child to become used to being complimented on her appearance, and gathered information about where she lived. That he suggests that such activity places him outside the bounds of the statute is difficult to reconcile with either the purpose of the statute, redressing the harm that strangers who lure children into vehicles pose, or the declared intentions for criminal statutes. "The test for sufficiency of the evidence is well settled. After viewing the evidence in the light most favorable to the State, we must determine whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt." *City of Spokane v. Carlson*, 96 Wn. App. 279, 287, 979 P.2d 880 (1999). It is clear that a reasonable trier of fact, after weighing the evidence, could come to the decision that the defendant was unknown to J.M.A.-H.

3. THE DEFENDANT'S WAIVER OF HIS JURY TRIAL RIGHT WAS KNOWING, INTELLIGENT AND VOLUNTARY.

CrR 6.1 governs if trial shall be by jury, or by the court. "Cases required to be tried by jury shall be so tried unless the defendant files a

written waiver of a jury trial, and has consent of the court." CrR 6.1. The defendant filed such a waiver in this case. (CP 21). However, the defendant wishes to argue that, even though a written waiver was filed, his waiver of his jury trial rights was not knowing, intelligent, and voluntary. He alleges as a Spanish speaker, a written waiver is insufficient.

From the beginning, the defendant has failed to show any inability to speak English. While, at times, he did have a translator provided, he continually showed throughout this process that he could speak and understand the English language with a high degree of proficiency. The defendant conducted an interview with the police that was entirely in English. (RP at 102). He indicated that his primary difficulty was not his ability to understand English, but to express himself through it at trial. (RP at 103). His conduct at trial backs up this view. The defendant had to be cited for responding to questions before they could be translated. (RP at 83). During the colloquy with the court, the defendant responded, apparently with no interpreter, to each of the court's questions appropriately. (RP at 5-6). Finally, the defendant gave an extended speech in English during sentencing. (RP at 129-30). While the defendant requested an interpreter, the record makes it clear that his primary difficulty was in expressing himself, especially in regards to complex matters. At no point did he ever demonstrate any difficulty to understand

the English language. And, when given time, he proved amply capable of expressing himself in it. The defendant has presented no record whatsoever that would give the court reason to doubt that the defendant had any more difficulty understanding the language of the Waiver of Jury Trial than any other non-lawyer confronted with a legal document.

"Although a written waiver does not conclusively show that a defendant validly waived a jury trial, it can be regarded as strong evidence of the validity of the waiver." *State v. Brand*, 55 Wn. App. 780, 788, 780 P.2d 894 (1989). The State bears the burden of proving waiver by a preponderance of the evidence. *State v. Whitaker*, 133 Wn. App. 199, 215, 135 P.3d 923 (2006). "As a result, the right to a jury trial is easier to waive than other constitutional rights." *State v. Benitez*, 175 Wn. App. 116, 129, 302 P.3d 877 (2013). "Washington law does not require an extensive colloquy on the record; instead 'only a personal expression of waiver from the defendant' is required." *Benitez,* 175 Wn. App at 128-29.

The defendant cites two cases for proposition that this waiver should be invalidated. The first, *State v. Ramirez-Dominguez*, is entirely inapposite, as the waiver in that case was only oral in form. *State v. Ramirez-Dominguez*, 140 Wn. App. 233, 241, 165 P.3d 391 (2007). In view of the lack of that "strong evidence of validity," the court embarked on an extended review of the circumstances of the entirely oral waiver. *Id.*

The court in this matter walked through the difference between a bench trial and jury trial with the defendant, on the record. (RP at 5-6). He understood that the court would make the decision, not a jury. *Id.* He understood that the jury would have to be unanimous in their verdict. The colloquy here is identical to the colloquy in *State v. Pierce*. *State v. Pierce*, 134 Wn. App. 763, 767, 142 P.3d 610 (2006). The only right that the court did not outline for the defendant was that he was waiving his right to participate in the jury selection process. "*Pierce* explicitly rejected the contention that a defendant is required to be informed of the right to participate in jury selection in order for the jury trial waiver to be valid." *State v. Benitez*, 175 Wn. App. at 130.

Like in *State v. Pierce,* the defendant gave a personal expression of waiver, both in the form of a written document, and his oral representations. He expressed no confusion or difficulty in understanding anything that was said. The defendant's English comprehension was high, though he did appear to have some concerns about his ability to express himself in English. He was able to speak for an extended period with little difficulty entirely in English at sentencing, as he discussed what he saw as wrong with the trial. The defendant was informed of the substance of the right he gave up, both in the written document, and in the oral conversation. The defendant has not suggested that he was misled or that

he misunderstood the right in any fashion. His responses in the colloquy were clear and gave no indication that he misunderstood or had any reservations about his decision. The defendant has no evidence, other than the bare fact that he requested an interpreter due to difficulties in expressing himself in English, that his waiver was invalid. In the face of strong evidence of the written waiver, the defendant's own statements and conduct, and the colloquy held, the State has shown, by a preponderance of the evidence, that the defendant waived his right to a jury trial. Whatever the strategic or tactical reasons for doing so, he cannot, now that he has been convicted, seek to overturn that decision because he did not like the verdict.

IV. CONCLUSION

The defendant has failed to identify any issues meriting remand. The court's findings were well-grounded; the defendant was unknown to the victim; and the defendant made a knowing, intelligent and voluntary waiver of his jury trial right. As a result, the State asks this Honorable Court to affirm the trial court's decision in all respects.

RESPECTFULLY SUBMITTED this 5th day of December, 2014.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on December 5, 2014.

Courtney Sheafer
Legal Assistant

APPENDIX A

S-0071.3

SENATE BILL 5186

State of Washington 53rd Legislature 1993 Regular Session

By Senators von Reichbauer, A. Smith, McCaslin, Prentice, Gaspard, Hargrove, Quigley, Winsley and Erwin

Read first time 01/15/93. Referred to Committee on Law & Justice.

AN ACT Relating to luring; adding a new section to chapter 9A.40 RCW; and prescribing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** A new section is added to chapter 9A.40 RCW to read as follows:

A person who performs any act or communicates in any manner intended to lure a minor child less than sixteen years old or an incompetent person into a vehicle or structure, without the consent of the minor's parent or guardian or the incompetent person's guardian, and the person is unknown to the child or incompetent person, is guilty of a class C felony, punishable under chapter 9A.20 RCW.

For purposes of this section, luring includes promises, deception, offers of gifts or other enticement, threats, or voice authority, as well as acts of physical coercion.

Luring is not unlawful when the defendant's actions are reasonable under the circumstances and intended to protect the health or safety of the minor or incompetent person.

--- END ---

APPENDIX B

FINAL BILL REPORT

ESSB 5186

C 509 L 93

SYNOPSIS AS ENACTED

Brief Description: Prohibiting the luring of minors or incompetent persons into vehicles or structures.

SPONSORS: Senate Committee on Law & Justice (originally sponsored by Senators von Reichbauer, A. Smith, McCaslin, Prentice, Gaspard, Hargrove, Quigley, Winsley and Erwin)

SENATE COMMITTEE ON LAW & JUSTICE

HOUSE COMMITTEE ON JUDICIARY

BACKGROUND:

Sexual offenses are set forth in the Washington Criminal Code and include rape of a child, child molestation, communicating with a minor for immoral purposes, and assault of a child, as well as other offenses.

Police receive numerous reports that strangers have attempted to order or entice children into cars. This occurs outside of schools, on public streets, etc.

SUMMARY:

The crime of luring is created. A person is guilty of luring when he or she, without consent from a guardian or parent, requests or persuades a child or developmentally disabled person to 1) enter an area that is obscured from or inaccessible to the public, and 2) he or she is unknown to the child or developmentally disabled person.

Luring is a crime of strict liability and the defendant bears the burden of proving that his or her actions were reasonable and there was no intent to harm the child or developmentally disabled person.

Luring is a class C felony.

VOTES ON FINAL PASSAGE:

Senate	44	0	
House	96	2	(House amended)
Senate	44	0	(Senate concurred)

EFFECTIVE: July 25, 1993