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Division III
State of Washington

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STATE OF WASHINGTON

Supreme Court No. 92024-9
Court of Appeals No. 32168-1-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/ Respondent,

vs.

MAXIMINO CASTILLO-MURCIA,
Appellant /Petitioner.

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT
Honorable Carrie L. Runge, Judge

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner, Maximino Castillo-Murcia, is the appellant below and asks this Court to review the decision referred to in Section II.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals, Division III, published opinion filed June 25, 2015, affirming his convictions and sentence. A copy of the opinion is attached as Appendix A.[1]

III. ISSUE PRESENTED FOR REVIEW

The evidence was insufficient to establish an essential element of the crime of luring where Mr. Castillo-Murcia was "known" to the minor child.

IV. STATEMENT OF THE CASE

The court convicted appellant, Maximino Castillo-Murcia, of luring, communication with a minor for immoral purposes, and indecent exposure.[2] CP 1–2.

The testimony at trial established 13-year-old J.M.A.-H. and two friends were at Monopoly Park in Kennewick, Washington. RP 37[3]; CP

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[1] The current online version is found at *State v. Castillo-Murcia*, ___ P.3d ___, No. 32168-1-III, 2015 WL 3915765 (Wash. Ct. App. June 25, 2015).

[2] Contrary to RCW 9A.40.090, 9.68A.090 and 9A.88.010, respectively. CP 1–2.

[3] The bench trial and sentencing hearing are contained in one volume and will be cited to as "RP __".

54.[4] Mr. Castillo-Murcia, who had run an ice cream truck business for years, arrived as scheduled near the park. He and J.M.A.-H. exchanged greetings as the three girls approached the truck. RP 37, 80–82, 85–86. J.M.A.-H. recognized Mr. Castillo-Murcia at the park because she'd seen him before selling ice cream at this park and also near an apartment complex. She called him the "ice cream man". RP 10, 33–34. She'd met his son once, when he was in the truck with his father. RP 50. She'd also talked to Mr. Castillo-Murcia in the past—once while buying treats for herself and a nephew and another time when she thanked him for giving her and a friend a free ice cream cone because they had no money. RP 34–36.

J.M.A.-H. testified. While they waited for Maggie Solorio to return from going to get money to buy Hot Cheetos, Mr. Castillo-Murcia again gave free ice cream to her and 7-year-old H.A.[5] RP 37–38.

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[4] Finding of Fact 1.

[5] Assignment of Error 2 and 4. Finding of Fact 5 states: "J.M.A.-H. was waiting for her friends to come back. While she was waiting, the defendant gave her a free ice cream." CP 55. The record instead reflects Mr. Castillo-Murcia gave the free cones to J.M.A.-H. and H.A., who together were waiting for their friend Maggie to return. RP 37–38. Finding of Fact 10 states: "[H.A.] returned and [Mr. Castillo-Murcia] gave her a free ice cream to get her to go away". CP 55. The record does not support this finding. Only the one cone was given to H.A. and then J.M.A.-H. told her not to leave. RP 37–40, 52. H.A. did not leave until after the incident.

According to the 13-year-old witness, after H.A. left to get pizza, Mr. Castillo-Murcia told J.M.A.-H. she was pretty, she had a nice body and he wished she was his son's girlfriend. RP 38–40. When H.A. returned, Mr. Castillo-Murcia asked J.M.A.-H. to turn around. RP 39. He said she should tell H.A. to leave, but J.M.A.- H. told her not to go. RP 39–40, 52. J.M.A.-H. looked around several times to see if Maggie was coming back and Mr. Castillo-Murcia asked her a second time to turn around. RP 40–41. J.M.A.-H. said no when he asked if she wanted something else or wanted to come inside the truck, and he gave her Hot Cheetos. RP 42, 44–45. He asked her a third time to turn around and when she did J.M.A.-H. saw movement inside the truck as she looked through the clear Plexiglas pane beneath the service window. She said his pants were down and he appeared to be masturbating. RP 40–42, 68–71. J.M.A.-H. threw the cone and Hot Cheetos at him, grabbed H.A. and ran to Maggie's house. RP 12–13, 44–45, 54–56. H.A. testified she overheard Mr. Castillo-Murcia and J.M.A.-H. talking during the incident but couldn't understand what he was saying because he spoke in Spanish. RP 56.

Mr. Castillo-Murcia brought the ice cream truck business from California to Kennewick a number of years before. He and family members drove the ten trucks during the summer months with help from

other seasonal employees. RP 78–81. He recalled talking with and seeing J.M.A.-H. often on the Monopoly Park and Amistad routes. He said about eighty percent of the time they'd see the same people. RP 84. He'd given her free ice cream three to four times in the past and gave some to her this time when she asked for it saying she had no money. RP 84–87, 98. Mr. Castillo-Murcia denied asking J.M.A.-H. to turn around or attempting to lure her into the truck. On other occasions she'd asked about his son. This time she asked where his son was and said she wanted to go out with him. RP 87–89. Mr. Castillo-Murcia told her she was very pretty but his son was too old for her. As she talked about his son J.M.A.-H. was turning herself around by moving back and forth in a general flirting way. RP 89–90, 96–97. She handed her new phone to Mr. Castillo-Murcia and asked him to give the phone number to his son. RP 88–89. She became angry when he refused. RP 89. When he gave her the Hot Cheetos she had asked for, she threw them at him and called him "stupid". RP 89.

The following day when police drove J.M.A.-H. around the area to look for the suspect and truck, she immediately recognized Mr. Castillo-Murcia. RP 65.

In closing, defense counsel argued the State failed to prove Mr. Castillo-Murcia as the alleged perpetrator was unknown to the victim, a

required element of the crime of luring. RP 112–13. The court acknowledged there is no case law addressing this particular issue. The court determined the element was proven, because "the victim in this case only knew the defendant, Mr. Murcia, as the ice cream man. So while [J.M.A.-H.] may have recognized Mr. Murcia as the ice cream man, this was not someone that she particularly knew, certainly did not know his name nor [*sic*] where he lived. Only knew him, essentially, as the operator of the ice cream truck." RP 117.

The court found Mr. Castillo-Murcia guilty as charged. RP 120. The court entered written findings of fact and conclusions for bench trial. CP 54–57.

V. ARGUMENT IN SUPPORT OF REVIEW

Review should be granted in a matter of first impression to decide what the element of being "unknown" to the victim means for purposes of the crime of luring. The considerations which govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes this court should accept review of this issue because the decision of the Court of Appeals is in conflict with other decisions of this Court and the Court of Appeals (RAP 13.4(b)(1) and (2)), involves a significant question of law under the Constitution of the United States and state constitution (RAP 13.4(b)(3)),

and involves an issue of substantial public interest that should be determined by the Supreme Court (RAP 13.4(b)(4)).

The evidence was insufficient to establish an essential element of the crime of luring where Mr. Castillo-Murcia was "known" to the minor child.

In all criminal prosecutions, due process requires that the state prove every fact necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970); *State v. Crediford*, 130 Wn.2d 747, 749, 927 P.2d 1129 (1996). Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* "Substantial evidence" in the context of a criminal case, means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)). While circumstantial evidence is no less reliable than direct

evidence, *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 491, 670 P.2d 646 (1983).

A reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, when viewing the evidence in a light most favorable to the state, could have found the elements of the crime charged beyond a reasonable doubt. *State v. Hundley,* 126 Wn.2d 418, 421–22, 894 P.2d 403 (1995).

The State charged Mr. Castillo-Murcia with luring, contrary to RCW 9A.40.090(1)(a), (b), (c). A person commits the crime of luring if that person

> (1)(a) Orders, lures, or attempts to lure a minor or a person with a developmental disability into any area or structure that is obscured from or inaccessible to the public, or away from any area or structure constituting a bus terminal, airport terminal, or other transportation terminal, or into a motor vehicle;
>
> (b) Does not have the consent of the minor's parent or guardian or of the guardian of the person with a developmental disability; and
>
> (c) Is unknown to the child or developmentally disabled person.

RCW 9A.40.090. Thus, to convict Mr. Castillo-Murcia of luring, the State had to prove beyond a reasonable doubt he attempted to lure the minor,

into a motor vehicle, he did not have the consent of her parent, and Mr. Castillo-Murcia was unknown to J.M.A-H. 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 39.41 (3d Ed).

The statute does not define "unknown". Webster's Encyclopedic Unabridged Dictionary of the English Language defines the adjective "unknown" as: "1. not known; not within the range of one's knowledge, experience or understanding; strange; unfamiliar." [6]

No Washington cases discuss the meaning of "unknown" for purposes of the luring statute. However, a sampling of published cases affirming convictions for luring confirms the person alleged to be luring must be someone who is a stranger to the victim or whom the victim has not seen before. See, e.g., *State v. Dana*, 84 Wn. App. 166, 169, 926 P.2d 344, 345 (1996) ("Dana stopped his car in Edmonds near a McDonald's restaurant and spoke to two girls, A.K. and C.F. They were 12 and 11 years old, respectively. Dana and the girls had never met before."); *State v. Homan*, 181 Wn.2d 102, 330 P.3d 182 (2014) ("The parties do not dispute that Homan was a stranger to C.C.N."). Accord, *State v. McSorley*, 128 Wn. App. 598, 600, 605, 116 P.3d 431 (2005) (10-year-old D.J. "did not know the man behind the wheel"; case remanded for retrial where trial

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[6] 2079 (Thunder Bay Press 2001).

court improperly issued instruction on statutory affirmative defense); *State v. McReynolds*, 142 Wn. App. 941, 944, 947–48, 176 P.3d 616, 617 (2008) ("11–year–old L.S. while walking home from volleyball practice at her school first saw Jesse McReynolds, whom she did not know, at a stop sign ..."; appellate court affirmed trial court dismissal after state's case-in-chief).

Here, Mr. Castillo-Murcia was known and familiar to J.M.A.-H. Based on the State's evidence, she recognized Mr. Castillo-Murcia at the park because she'd seen him before selling ice cream at this park and also near an apartment complex. She called him the "ice cream man". RP 10. She'd met his son once, when he was in the truck with his father. RP 50. She'd also talked to Mr. Castillo-Murcia in the past—once while buying treats for herself and a nephew and another time when she thanked him for giving her and a friend a free ice cream cone because they had no money. RP 34–36. She exchanged greetings with Mr. Castillo-Murcia upon encountering him this time at Monopoly Park. RP 37. J.M.A.-H. immediately recognized Mr. Castillo-Murcia the following day when police drove her around the area to look for the suspect and truck. RP 65.

Statutes which define crimes must be strictly construed according to the plain meaning of their words to assure that citizens have adequate notice of the terms of the law, as required by due process. "Men of common intelligence cannot be required to guess at the meaning of the enactment." *State v. Shipp*, 93 Wn.2d 510, 515-16, 610 P.2d 1322, 1326 (1980), citing *Winters v. New York*, 333 U.S. 507, 515, 68 S.Ct. 665, 670, 92 L.Ed.2d 840 (1947); *Seattle v. Pullman*, 82 Wn.2d 794, 797, 514 P.2d 1059 (1973).

The word "unknown" has an ordinary and accepted meaning: not known. The trial court concluded, and the Court of Appeals agreed, that "unknown" instead means some lesser degree of the word "known." The trial court reasoned "this was not someone that [J.M.A.-H.] particularly knew, certainly did not know his name nor [*sic*] where he lived. Only knew him, essentially, as the operator of the ice cream truck." RP 117. But the record additionally shows multiple interactions between the two. A statutory redefinition of unknown to mean "someone known and familiar through interactions in the recent past but not by name or address" would completely contradict the accepted meaning.

The Court of Appeals concluded "unknown" means "lacking an established or normal status." *Slip Opinion* at 7. It reasons the word "unknown" is unambiguous. *Slip Opinion* at 5–6. The court further reasons that even if ambiguous, by using the word "unknown" the legislature intended a meaning different from that of the word "stranger"[7]—which the SRA defines in RCW 9.94A.030(50) as someone the victim did not know 24 hours before the offense. *Slip Opinion* at 6.

Under that definition, someone who was known to the victim more than 24 hours before the offense would not be considered a stranger. Mr. Castillo-Murcia would therefore not be considered a stranger under the definition because he was known to the victim more than 24 hours before the offense. If he is not a stranger and is known to the victim, the element of the crime of luring that Mr. Castillo-Murcia be "unknown to the child" is not met. RCW 9A.40.090(1)(c). Contrary to the Court of Appeals' analysis, the legislature's definition of "stranger" in the SRA instead lends support to Mr. Castillo-Murcia's position. Cf., *Slip Opinion* at 6.

[7] The legislature appears to have provided a definition for "stranger" (RCW 9.94A.030(50) in the SRA to further define the word "predatory" (RCW 9.94A.030(39)(a)) for purposes of a penalty enhancement. The penalty enhancement applies to the offenses of first and second degree rape of a child and first degree child molestation. The penalty for these offenses is enhanced if the State proves beyond a reasonable doubt that the offense was predatory. RCW 9.94A.836.

The legislature chose the word "unknown". It did not define the chosen word. A reviewing court "[does] not read into a statute matters which are not there, nor do we modify a statute by construction or read into the statute things which we may conceive that the Legislature unintentionally left out." *State v. Hursh*, 77 Wn. App. 242, 246, 890 P.2d 1066 (1995) (citing *State v. Enloe,* 47 Wn. App. 165, 170, 734 P.2d 520 (1987)), abrogated by *State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196 (2005); *Addleman v. Board of Prison Terms and Paroles,* 107 Wn.2d 503, 509, 730 P.2d 1327 (1986); *State v. Taylor,* 97 Wn.2d 724, 728, 649 P.2d 633 (1982). Furthermore, any ambiguity in a statute must be resolved in favor of the defendant. *State ex rel. McDonald v. Whatcom County District Court*, 92 Wn.2d 35, 593 P.2d 546 (1979).

The meaning of the word "unknown" is ambiguous. The State produced insufficient evidence of an essential element of the crime of luring by failing to establish the element that the perpetrator was unknown to the minor child. Mr. Castillo-Murcia was known to J.M.A.-H. and his luring conviction should be reversed.

VI. CONCLUSION

For the reasons stated herein, Defendant/Petitioner respectfully asks this Court to grant the petition for review and reverse the decision of the Court of Appeals.

Respectfully submitted on July 27, 2015.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on July 27, 2015, I mailed to the following, by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of appellant's petition for review:

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CASE # 321681
State of Washington v. Maximino Castillo-Murcia
BENTON COUNTY SUPERIOR COURT No. 131004503

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and <u>two copies</u> of the motion. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be <u>received</u> (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 32168-1-III
Respondent,	)	
v.	)	
MAXIMINO CASTILLO-MURCIA,	)	PUBLISHED OPINION
Appellant.	)	

BROWN, J. — Maximino Castillo-Murcia appeals his convictions for luring, communicating with a minor for immoral purposes, and indecent exposure. Mr. Castillo-Murcia contends (1) insufficient evidence supports the "unknown" element of RCW 9A.40.090(1)(c) to establish luring and (2) his jury waiver is invalid. We disagree with both contentions and affirm.

FACTS

On April 17, 2013, 13-year-old J.M.A.-H. was playing basketball in a Kennewick, Washington park with M.S. and H.A. Mr. Castillo-Murcia, an ice cream truck operator, drove to the park. J.M.A.-H. recognized Mr. Castillo-Murcia as the ice cream man. J.M.A.-H. testified she had spoken with Mr. Castillo-Murcia on two prior occasions, but beyond exchanging greetings, she knew nothing about him. On one of those

occasions, Mr. Castillo-Murcia gave J.M.A.-H. a free ice cream. Mr. Castillo-Murcia testified his interactions with J.M.A.-H. were more detailed and numerous.

J.M.A.-H. and H.A. approached the truck while M.S. left to get money. After Mr. Castillo-Murcia gave J.M.A.-H. and H.A. free ice cream, H.A. left, leaving J.M.A.-H. alone with Mr. Castillo-Murcia. Mr. Castillo-Murcia then told J.M.A.-H. she was pretty, had a nice body, and he wished she was his son's girlfriend. He asked to see her phone and tried to hold her hand when she handed it to him. He asked her to turn around several times before inviting her into his truck. He offered her hot Cheetos or anything she wanted if she got into the truck, but, despite her refusal to get in the truck, he gave her the Cheetos. When H.A. returned, Mr. Castillo-Murcia told J.M.A.-H. to ask H.A. to leave, but J.M.A.-H. refused. At this point, J.M.A.-H. saw Mr. Castillo-Murcia masturbating through a window shelf. J.M.A.-H. threw her ice cream and Cheetos at Mr. Castillo-Murcia, grabbed H.A., and ran away.

The following day, J.M.A.-H. reported the incident to her school's security officer. When two police officers picked J.M.A.-H. up to drive her around the area so she could identify the man, she identified Mr. Castillo-Murcia.

Mr. Castillo-Murcia signed a jury waiver. Despite the fact a Spanish interpreter was present during pretrial proceedings and was requested for trial, the court questioned Mr. Castillo-Murcia about his waiver without an interpreter present. The court convicted Mr. Castillo-Murcia of luring, communication with a minor for immoral purposes, and indecent exposure. Mr. Castillo-Murcia appealed.

ANALYSIS

A. Whether Mr. Castillo-Murcia was "unknown" to J.M.A.-H.

The issue is whether sufficient evidence supports Mr. Castillo-Murcia's luring conviction. He contends the State failed to prove he was "unknown" to J.M.A.-H. as required by RCW 9A.40.090(1)(c). Mr. Castillo-Murcia assigned error to findings of fact 5, 6, 9, and 10 but does not separately argue them; the facts are included in our facts recitation because each is supported by evidence in our record.

Evidence is sufficient to support a guilty finding if "'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) (emphasis omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). An evidence sufficiency challenge "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We defer to the fact finder's assessment of conflicting testimony, witness credibility, and evidence weight. *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989).

A person commits the crime of luring if he attempts to lure a minor into a motor vehicle, does not have the consent of the minor's parent, and is unknown to the minor. RCW 9A.40.090(1). The sole element at issue in this appeal is whether Mr. Castillo-Murcia was "unknown" to J.M.A.-H. Neither RCW 9A.40.090 nor any Washington cases

discuss the meaning of "unknown." Thus, we must interpret what the legislature meant by using the word "unknown."

"Questions of statutory interpretation are questions of law that are reviewed de novo." *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007). Statutory interpretation is used "to determine and give effect to the intent of the legislature." *State v. Reeves*, 184 Wn. App. 154, 158, 336 P.3d 105 (2014) (quoting *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013)). To determine the intent of the legislature, appellate courts "first look to the plain language of the statute considering the text of the provision in question, the context of the statute, and the statutory scheme as a whole." *Id.* Undefined terms are given "their plain and ordinary meaning unless a contrary legislative intent is indicated." *Id.* Dictionary definitions help when dealing with nontechnical statutory terms. *State v. Kintz*, 169 Wn.2d 537, 547, 238 P.3d 470 (2010).

A statute is ambiguous if its plain language is susceptible to more than one reasonable interpretation. *Reeves*, 184 Wn. App. at 158. In resolving the ambiguity, appellate courts "resort[ ] to other indicia of legislative intent, including principles of statutory construction, legislative history, and relevant case law." *Id.* If legislative intent still cannot be determined, we must interpret the ambiguous statute in favor of the defendant pursuant to the rule of lenity. *Id.* at 158-59.

"Unknown" is defined as "not known: such as strange, unfamiliar." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2502 (1993). This definition seemingly supports

Mr. Castillo-Murcia's argument that he is not unknown to J.M.A.-H. because he is familiar to her. But another definition of "unknown" is "lacking an established or normal status[;] having no formal recognition." *Id.* This definition supports the State's argument that Mr. Castillo-Murcia was unknown to J.M.A.-H. because she merely recognized him as the "ice cream man" and had two limited interactions with him. Without more, RCW 9A.40.090 could be considered ambiguous.

However, when we look to the statutory context of RCW 9A.40.090, it is clear the legislature intended "unknown" to be interpreted in the manner posited by the State. RCW 9A.04.020 states:

> (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;
> . . . .
> (2) The provisions of this title shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this title.

Ultimately, the luring statute seeks to prevent harm to vulnerable minors from those people with whom the minors have no relationship. If RCW 9A.40.090 is read as Mr. Castillo-Murcia suggests, the statute does not further the general purposes of chapter 9A RCW. RCW 9A.40.090 is clearly aimed at culpable conduct similar to Mr. Castillo-Murcia's, which can and did cause substantial harm to J.M.A.-H. The purposes

of the statute are not furthered by excepting a class of individuals from the luring statute who cultivated a brief superficial relationship with a minor.

Moreover, even if the meaning of "unknown" was ambiguous, the State's interpretation is further supported when looking at principles of statutory construction. First, "[w]here the legislature uses certain statutory language in one statute and different language in another, a difference in legislative intent is evidenced." *In re Forfeiture of One 1970 Chevelle*, 166 Wn.2d 834, 842, 215 P.3d 166 (2009). Thus, when the legislature uses different words, appellate courts "deem the legislature to have intended different meanings." *Id.* The legislature used the word "unknown"; it did not use the word "stranger," which is defined in RCW 9.94A.030(50) as someone the victim did not know 24 hours before the offense. That the legislature did not use the word "stranger" lends further credence to the State's position. Moreover, it would be absurd to draw the line at saying a person is known to a minor merely because they have said "hello" during a business transaction. *See State v. McDonald*, 183 Wn. App. 272, 278, 333 P.3d 451 (2014) (appellate courts "must avoid constructions that yield unlikely, strange or absurd consequences") (quoting *State v. Contreras*, 747, 880 P.2d 1000 (1994)).

Despite this, Mr. Castillo-Murcia relies on four cases to argue "unknown" means a stranger or someone the victim has not seen before. *See State v. Homan*, 181 Wn.2d 102, 330 P.3d 182 (2014); *State v. McReynolds*, 142 Wn. App. 941, 176 P.3d 616 (2008); *State v. McSorley*, 128 Wn. App. 598, 116 P.3d 431 (2005); *State v. Dana*, 84 Wn. App. 166, 926 P.2d 344 (1996). But those cases are all factually dissimilar as no

factual dispute existed over whether the defendants were "unknown" to the victims. *Homan*, 181 Wn.2d at 107; *McReynolds*, 142 Wn. App. at 944, 948; *McSorley*, 128 Wn. App. at 433-39; *Dana*, 84 Wn. App. at 169-70, 174, 177-78. Thus, no need arose to discuss what the legislature intended by using "unknown."

When "unknown" is understood to mean "lacking an established or normal status," Mr. Castillo-Murcia's sufficiency of the evidence challenge fails. Admitting the truth of the State's evidence shows the following: (1) J.M.A.-H. recognized Mr. Castillo-Murcia only as the ice cream man who drove around her house, (2) on two prior occasions, J.M.A.-H. had talked with Mr. Castillo-Murcia but this conversation was limited to him asking her where she lived and giving her a free ice cream, (3) J.M.A.-H. exchanged greetings with Mr. Castillo-Murcia on the day in question, and (4) J.M.A.-H. recognized Mr. Castillo-Murcia two days after the incident. As the trial court noted, J.M.A.-H. solely knew Mr. Castillo-Murcia as the ice cream man and exchanged pleasantries with him; she did not know any other information about him. Mr. Castillo-Murcia was "unknown" to J.M.A.-H. Sufficient evidence supports his luring conviction.

B. Whether Mr. Castillo-Murcia's jury waiver was valid.

The issue is whether Mr. Castillo-Murcia validly waived his right to a jury trial. Mr. Castillo-Murcia contends his waiver was not knowing, intelligent, and voluntary because (1) no interpreter was present during his oral waiver, (2) his signed waiver was in English, and (3) his written waiver was signed shortly after the trial court rejected defense counsel's motion to withdraw.

Criminal defendants have the right to a jury trial under both the Washington and federal constitution. *State v. Ramirez-Dominguez*, 140 Wn. App. 233, 239, 165 P.3d 391 (2007). Because waiver of the right to a jury trial is a constitutional right, our review is de novo. *Id.* A waiver is valid if the defendant acted knowingly, intelligently, and voluntarily. *State v. Pierce*, 134 Wn. App. 763, 771, 142 P.3d 610 (2006). Appellate courts do not presume the defendant waived his right to a jury trial unless there is "an adequate record showing that the waiver occurred." *Id.* Because Washington only requires a personal expression of waiver from the defendant, the right to a jury trial is easier to waive than other constitutional rights. *Id.* at 771-72.

The State must prove the waiver was valid. *Ramirez-Dominguez*, 140 Wn. App. at 240. We consider several factors in deciding whether a defendant validly waived a jury trial: (1) whether the trial court informed the defendant of the right to a jury trial, (2) whether the defendant signed a written waiver, and (3) whether defense counsel affirmatively stated the defendant waived the right. *Pierce*, 134 Wn. App. at 771. As to the first factor, a trial court is not required to conduct an extended colloquy with the defendant. *Id.* As to the second factor, a written waiver "is strong evidence that the defendant validly waived the jury trial right." *Id.* The defendant's experience and capabilities are also taken into consideration. *Ramirez-Dominguez*, 140 Wn. App. at 240.

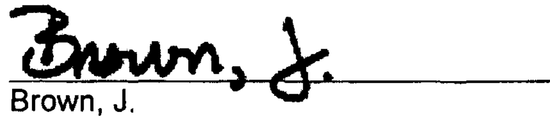
Mr. Castillo-Murcia argues an interpreter needed to be present at the colloquy where he waived his jury trial right because there is nothing in the record to gauge his

comprehension of the English language; to support this, he points to the presence of an interpreter at all pretrial proceedings and trial. Contrary to Mr. Castillo-Murcia's assertion, the record before us indicates he had an adequate grasp of the English language. During the colloquy, he unequivocally answered "yes" to each of the court's questions. He confirmed he wanted to waive his right, he wanted to have his case tried to a judge, and he understood one person instead of a unanimous 12 would decide his case. While on the witness stand, Mr. Castillo-Murcia had to be asked to wait for the interpreter to translate before he answered counsel's questions. At sentencing, without the assistance of an interpreter, Mr. Castillo-Murcia made an extended speech in English where he expressed how the trial affected his family, maintained his innocence, and explained why he thought his trial was unfair. Again without the use of an interpreter, he responded to the court during sentencing. His English language skills, coupled with his written waiver, strongly evidences waiver.

Regarding Mr. Castillo-Murcia's argument the trial court was required to extensively discuss his waiver and ask whether defense counsel explained the waiver to him, Washington law does not require an extended waiver discussion, instead only requiring the defendant personally express his desire to waive his right to a jury trial. The court told him of his right to a jury trial and the principal effect of giving up his right. And inquiring whether defense counsel explained the right is but one factor we consider in determining waiver validity; failure to so inquire is not fatal. Mr. Castillo-Murcia's suggests the timing of his waiver is suspicious considering his lawyer's effort to

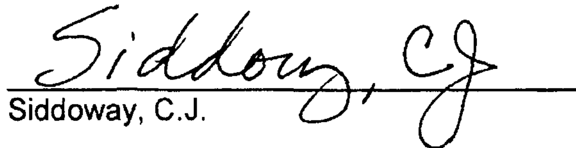
withdraw. A lawyer is ethically required to represent a client with diligence. Rules of Prof'l Conduct R. 1.3 cmt. 4 (2014). Valid reasons exist for not wanting a jury trial. Nothing in the record suggests his lawyer acted without diligence or provided ineffective assistance of counsel. Considering all, we conclude his waiver was valid.

Affirmed.

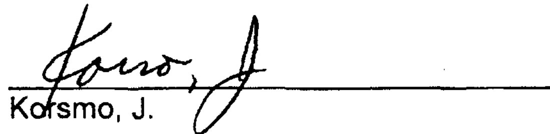


Brown, J.

WE CONCUR:



Siddoway, C.J.



Korsmo, J.

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Division III
State of Washington

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Court of Appeals Case Number: 32168-1
Party Respresented: appellant-petitioner
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