

68745-0

68745-0

No. 68745-0

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

STATE OF WASHINGTON,

Respondent,

v.

NORMA JUDITH DEDIOS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON

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A. ASSIGNMENT OF ERROR

The State failed to prove beyond a reasonable doubt the elements of the crime of communication with a minor for an immoral purpose.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

In order to prove the crime of communication with a minor for an immoral purpose, the State must prove beyond a reasonable doubt that the accused communicated with a minor for the predatory purpose of promoting the child's exposure to and involvement in sexual misconduct. The evidence must show the communication consisted of an offer to engage in illegal sexual activity for the personal gratification or commercial gain of the accused. In this case, on two brief occasions, Norma Dedios passively allowed a 13-year-old boy to touch the intimate parts of her body. There was no evidence that she communicated any offer to the boy or acted with an intent to achieve personal gratification or commercial gain. Did the State fail to prove the elements of the crime beyond a reasonable doubt?

C. STATEMENT OF THE CASE

Norma Dedios grew up in a traditional, strict, Catholic family in California. 2/22/12RP 64. While she was still a teenager, she married

a man who was abusive and often hit her. 2/22/12RP 67-69. The two divorced. 2/22/12RP 69. Soon afterward, Ms. Dedios married another man who was also physically and sexually abusive. 2/22/12RP 70-74. Any time he wanted to have sex, she would comply. Id. Ms. Dedios was taught by her mother that she had to do whatever her husband told her to do, including anything he wanted sexually. Id.

On at least two occasions, Ms. Dedios's husband forcefully raped her. 2/22/12RP 74-76. She did not consider these incidents to be rape at the time because she was raised to believe she had to submit to her husband's demands. Id.

Eventually Ms. Dedios moved to Washington State to get away from her husband and obtained a restraining order against him. 2/22/12RP 77-81. She took parenting classes and received counseling for both herself and her children. 2/22/12RP 84. She has continued to attend counseling off and on for the past 10 years. 2/22/12RP 79.

In summer 2009, Ms. Dedios was 33 years old and living with her three children in Bellevue. 2/22/12RP 63; 2/23/12RP 160. Around that time, she met Irma Escobar at the Goodwill store where Ms. Escobar worked. 2/22/12RP 85. The two spoke Spanish together and became friends. Id. Ms. Escobar's son, 13-year-old S.R., went to the

same middle school as Ms. Dedios's daughter, D.B. 2/15/12RP 52.

Ms. Escobar would complain to Ms. Dedios about S.R., who was often rebellious and made her angry. 2/15/12RP 53; 2/22/12RP 85.

One day in June 2009, Ms. Dedios happened upon Ms. Escobar and S.R. at the Goodwill store and offered them a ride home.

2/15/12RP 53-54; 2/22/12RP 88-89. In the car on the way home, S.R. and his mother argued about S.R.'s problems. Id. Ms. Dedios told Ms. Escobar she could give her information about parenting classes and suggested that both she and S.R. get counseling. 2/22/12RP 90. Ms. Dedios gave Ms. Escobar her telephone number and told her she could call her if she needed someone to talk to. 2/22/12RP 91.

After that day, and for the next several weeks, S.R. would often come over to Ms. Dedios's house. In the beginning, the family invited him over but after a while he would show up uninvited. 2/22/12RP 95. S.R. was not really welcome but Ms. Dedios did not want to be cruel. 2/22/12RP 100; 2/23/12RP 17. She continued to allow him to come over because his mother said she was glad he was getting help. 2/22/12RP 100. Ms. Dedios was trying to arrange a counselor for S.R. through his school. 2/22/12RP 97-98; Exhibit 5 at 17; Exhibit 10 at 12.

When S.R. came over, he would play with Ms. Dedios's young sons and follow her around the house. 2/22/12RP 101; Exhibit 5 at 4, 20.

One night in June, S.R. had a fight with his parents and stormed out of the house. 2/15/12RP 56. He walked to Crossroads Mall. 2/15/12RP 83. His mother called Ms. Dedios and asked her to pick him up and bring him to Ms. Dedios's house to spend the night. 2/15/12RP 56-57, 83; 2/22/12RP 105-06. Ms. Escobar did not want him at home. 2/22/12RP 106.

That night, S.R. slept on the hide-a-bed in the playroom at Ms. Dedios's house. 2/15/12RP 87-88. Ms. Dedios slept on the same bed with him because she did not trust him and was afraid he might try to get together with her daughter D.B. if she left him alone. 2/15/12RP 88-89; 2/22/12RP 122-23. They were both fully clothed. Id.

Ms. Dedios and S.R. gave two different accounts of what happened that night. According to S.R., he and Ms. Dedios were talking on the bed when she leaned over and kissed him on the lips. She then began touching his penis and the two had sexual intercourse. 2/15/12RP 89, 92-94. According to S.R., neither of them initiated it. It just happened and they both participated. 2/16/12RP 56, 59.

Ms. Dedios said that as she was falling asleep S.R. kissed her on the lips. She told him to go to sleep and nothing more happened. 2/22/12RP 124. She ignored the incident and did not consider it to be serious. 2/22/12RP 126.

Soon afterward, S.R. spent the night again. 2/22/12RP 127. This time, he slept in the playroom and she slept in her own room. 2/22/12RP 128. After Ms. Dedios fell asleep, she felt a hand on her breast and woke up to see S.R. pulling down her pants. 2/22/12RP 130-34. She tried to stop him but he got on top of her and raped her. Id. Ms. Dedios did not make a scene because she did not want her young son to see the two of them naked together. Id. Her son had knocked on the door during the incident and asked if she was okay; she told him she was fine and to go back to bed. Id. Afterward, S.R. put his clothes on and left. Id. As he was leaving, he told Ms. Dedios that if she said anything, she would be the one to get in trouble. Id.

Ms. Dedios felt invaded, ashamed and helpless. 2/22/12RP 136-39. She believed she deserved the rape because she had let S.R. into her house. Id. She did not invite him back, but he came over anyway. Id. She continued to let him in because she had told his mother she would help him and she was still trying to arrange a counselor for him.

Id. S.R. spent the night again and tried to touch her while she was sleeping but this time she was able to stop him. Id.

One day around this time, S.R. was at Ms. Dedios's house using the computer. 2/22/12RP 165-69; Exhibit 10 at 5-9. He told her that D.B. had a "MySpace" account that she had not told her mother about. Id. D.B. was not supposed to have a MySpace account. Id. Ms. Dedios leaned over to look at the computer and as she did so, S.R. put his hands under her clothes and touched her breasts and vaginal area. Id. Ms. Dedios tried to push his hands away but did not leave because she wanted to see the MySpace page and did not know how to access it without S.R.'s assistance. Id. S.R. kept moving the mouse out of her reach. Id. Ms. Dedios did not invite S.R. to touch her or say that he could; he did not ask for permission. Id.

On the morning of July 6, Ms. Dedios went to school and left S.R. alone in the house with D.B. and her two brothers. 2/22/12RP 140-43. D.B. testified that when she woke up, S.R. went into the playroom and told her to follow him. 2/23/12RP 177-83. When she did, he started kissing her. Id. She tried to leave but he tugged her arm and pulled her to the floor. Id. He forcefully raped her. Id. She tried to stop it but could not; when she tried to scream, he covered her mouth

with his hand. Id. Afterward, she took a shower and joined S.R. and the boys in the living room to watch television. Id. S.R. then turned to her and said “I really like your mother.” Id. D.B. was not surprised because it seemed he had a crush on Ms. Dedios. Id.

Later, D.B. told her mother that she had had sex with S.R. but did not say she was raped. 2/22/12RP 147. D.B. did not understand at the time that she had been raped. 2/23/12RP 181. D.B. also told her mother that afterward, S.R. said he liked her mother. 2/22/12RP 150-53; 2/23/11RP 187. This made Ms. Dedios angry. She called S.R.’s mother and arranged for him to come over and apologize to D.B. Id.

While waiting for S.R. to come over to apologize, Ms. Dedios drove to the 7-Eleven by Crossroads Park to get some milk. 2/22/12RP 154-61; Exhibit 5 at 8-9, 25-27. She saw S.R. walking in the park toward her house and got out of her car. Id. She and S.R. talked about what had happened between him and D.B. and S.R. started to cry. Id. He put his head on Ms. Dedios’s shoulder and kissed her. Id. She kissed him back. Id. She did not push him away because she felt responsible for the situation. Id.

Ms. Dedios drove S.R. to her house, where he apologized to D.B. Id. Afterward, she drove him back to the park, where he kissed

her again. Id. As he kissed her, he put his hand inside her blouse and touched her breasts. Id. She grabbed his arm and told him to stop. Id.

Over the following days, Ms. Dedios noticed that D.B. was quiet and isolating herself. 2/22/12RP 149. She asked D.B. for more details about what had happened between her and S.R. 2/22/12RP 163-65. Upon learning the details, Ms. Dedios concluded D.B. had been raped. Id. She told her daughter, “he raped me too.” 2/22812RP 33. She called police and an investigation ensued. 2/16/12RP 93; 2/22/12RP 171.

In September, S.R. told a counselor that he had had sexual intercourse with Ms. Dedios. 2/16/12RP 101-02. The counselor contacted Child Protective Services, which notified the police. Id.

The State charged Ms. Dedios with one count of second degree rape of a child, one count of third degree rape of a child, and one count of communication with a minor for immoral purposes (CMIP). CP 131-32. The State never charged S.R. for the rape of D.B., even though police had no doubt the rape actually occurred. 2/21/12RP 116. D.B. felt betrayed by police because S.R. was never charged. 2/28/12RP 28.

At trial, S.R. testified he and Ms. Dedios had sexual intercourse at her house several times that summer, both while he was 13 and after

he turned 14 on June 23. 2/15/12RP 97-99; 2/16/12RP 54. But he did not provide any details of any incidents other than the first one.

S.R. also testified that he touched Ms. Dedios's breasts over her clothing one day while she was looking for D.B.'s MySpace page on the computer. 2/15/12RP 103-05. He could not remember if he touched any other intimate part of her body on that occasion. Id. Ms. Dedios did not say anything as he touched her. Id. S.R. could not remember if he touched Ms. Dedios at Crossroads Park on the day that he apologized to D.B. 2/15/12RP 35-36.

In closing argument, the deputy prosecutor stated that the CMIP charge was based on two incidents: the MySpace incident and the Crossroads Park incident. 2/29/12RP 32-33. The jury was given a "Petrich"¹ unanimity instruction for the charge. CP 154.

During deliberations, the jury submitted the following written inquiry about the CMIP charge:

Regarding jury instruction on page 14, does
'communication' involve intent?
Is there more to this law that we can see for our
clarification?
Does 'for immoral purposes' include intent?

CP 161. Defense counsel asked the judge to instruct the jury that the CMIP charge required the State to prove intent but the judge refused.

3/02/12RP 4-5. The judge responded in writing, “The jury has all the instructions on the applicable law.” CP 162.

The jury acquitted Ms. Dedios of third degree rape of a child and could not agree on a verdict for second degree rape of a child. CP 163-64. The jury found Ms. Dedios guilty of CMIP. CP 165, 172-73.

After the verdict, juror number two submitted the following affidavit to the court:

Myself, and other jurors expressed confusion regarding the jury instruction regarding Communication with a Minor for an Immoral Purpose. Specifically, there was considerable confusion as to whether the crime required any intent and, if so, what intent was required. We the jury requested clarification of the law on this issue of intent but were not provided with a statement of the law and told to refer back to our original jury instructions. It is my opinion that this lack of clarification caused great confusion, and ultimately affected the verdict. Based on my direct discussion with other jurors during the deliberations, it is my opinion that the jury voted guilty because we believed that the crime did not require any intent, as the instruction did not include that as an element.

CP 172-73.

¹ State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984).

D. ARGUMENT

THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MS. DEDIOS COMMUNICATED AN OFFER TO S.R. TO ENGAGE IN SEXUAL MISCONDUCT FOR HER OWN PERSONAL GRATIFICATION

1. Standard of review.

It is a fundamental principle of criminal procedure that an accused is presumed innocent of a criminal charge and the State has the burden of proving guilt beyond a reasonable doubt. State v. Copeland, 130 Wn.2d 244, 294, 922 P.2d 1304 (1996). Constitutional due process requires the State to prove every element of the charged offense beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477, 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. amend. XIV; Const. art. I, § 3.

In reviewing the sufficiency of the evidence to uphold a criminal conviction, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential 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); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628

(1980). In a sufficiency of the evidence challenge, the reviewing court presumes the truth of the State's evidence and all reasonable inferences that can be drawn from that evidence. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). But the existence of a fact cannot rest upon guess, speculation, or conjecture. Id.

2. The State failed to prove Ms. Dedios acted with the purpose or motive of gratifying her own personal desires.

The CMIP statute provides: “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.” RCW 9.68A.090. Here, the jury was instructed it could convict Ms. Dedios if it found beyond a reasonable doubt that she “communicated with [S.R.] for immoral purposes of a sexual nature.” CP 155.

Because the CMIP statute treads close to the arena of constitutionally protected speech, it must be narrowly construed. The Washington Supreme Court has held that the scope of the statutory prohibition is limited by its context and wording to “communication for the purposes of sexual misconduct.” State v. McNallie, 120 Wn.2d 925, 931-32, 846 P.2d 1358 (1993). The statute does not prohibit

communications about sexual conduct that would be legal if performed. State v. Luther, 65 Wn. App. 424, 428, 830 P.2d 674 (1992). Because the statute prohibits only communications that constitute offers to engage in illegal activity, and such communications are not protected by the First Amendment, the statute is not unconstitutionally overbroad. Schoening v. McKenna, 636 F.Supp.2d 1154, 1157 (W.D. Wash. 2009).

In order to satisfy substantive due process, the CMIP statute must also be construed in a manner to prohibit only those activities the Legislature intended to proscribe. Luther, 65 Wn. App. at 427-28. The placement of the statute within the criminal code indicates the Legislature's intent to target attempts to entice children into engaging in sexual misconduct for one's own personal gratification or commercial gain. The CMIP statute is found in RCW chapter 9.68A, entitled "Sexual Exploitation of Children." Other crimes contained in that chapter include dealing in depictions of a minor engaged in sexually explicit conduct, RCW 9.68A.050, and commercial sexual abuse of a minor, RCW 9.68A.100. The Legislature explicitly stated its intent in enacting chapter RCW 9.68A:

The legislature finds that the prevention of sexual exploitation and abuse of children constitutes a

government objective of surpassing importance. The care of children is a sacred trust and should not be abused by those who seek commercial gain or personal gratification based on the exploitation of children.

RCW 9.68A.001.

In light of the Legislature’s stated intent, the Washington Supreme Court has held that the statute “prohibits communication with children for the *predatory* purpose of promoting their exposure to and involvement in sexual misconduct.” McNallie, 120 Wn.2d at 933 (emphasis added). “Predatory” means “disposed or showing a disposition to injure or exploit others for one’s own gain.” Webster’s Third New International Dictionary 1785 (1993). Thus, “the statute is aimed at protecting children from exposure to sexual misconduct for the gratification of another”—either for personal sexual gratification or commercial gain. State v. Hosier, 157 Wn.2d 1, 9-10, 133 P.3d 936 (2006).

The statute requires the State to prove the defendant’s actions were deliberate and purposeful and committed with an actual intent to achieve such nefarious ends. As an element of the crime, the State must prove the defendant communicated with the minor “for immoral *purposes*.” RCW 9.68A.090 (emphasis added). “‘Purpose’ refers to a defendant’s mental state.” State v. Halstien, 122 Wn.2d 109, 118-19,

857 P.2d 270 (1993).² The presence of the term in a criminal statute indicates a *mens rea* element that the State must prove beyond a reasonable doubt. *Id.* “Motive,” “purpose” and “intent” are closely related terms. *Id.* Thus, the presence of the term “purpose” in the CMIP statute indicates the State must prove beyond a reasonable doubt the defendant acted with the actual purpose or motive of enticing the child to engage in unlawful sexual activity in order to achieve the defendant’s own commercial gain or personal gratification.

The State failed to prove that Ms. Dedios acted with the predatory purpose of gratifying her sexual desires. The CMIP charge was based on either the MySpace incident or the Crossroads Park incident. 2/29/12RP 32-33. Regarding the MySpace incident, S.R. supposedly touched the intimate areas of Ms. Dedios’s body while she was leaning over trying to see what was on the computer screen. 2/22/12RP 165-69; Exhibit 10 at 5-9. She did not encourage S.R. to touch her or tell him that he could; he did not ask for permission. *Id.* In fact, she attempted to push his hands away. *Id.* S.R. testified that

² The statute at issue in *Halstien* is similar to the CMIP statute in that it requires the State to prove beyond a reasonable doubt the juvenile respondent committed the crime with “sexual motivation,” that is, “for the purposes of his or her sexual gratification.” *Halstien*, 122 Wn.2d at 118; RCW 13.40.020(31).

Ms. Dedios did not encourage him to touch her and said nothing when he initiated the contact. 2/15/12RP 103-05. The only reason why Ms. Dedios did not move away was because she wanted to see D.B.'s MySpace page and believed she could not access it without S.R.'s assistance. 2/22/12RP 165-69; Exhibit 10 at 5-9. Her motive, in other words, was to check on D.B. and determine if she had disobeyed her by having a MySpace page. She was not trying to entice S.R. into any illegal activity.

Similarly, the State did not prove that, during the Crossroads Park incident, Ms. Dedios acted with the purpose of gratifying her sexual desires. The prosecutor argued to the jury that Ms. Dedios committed CMIP when she allowed S.R. to touch her breast. 2/29/12RP 32-33. But Ms. Dedios said that when S.R. touched her breast, she grabbed his arm and told him to stop, which he did. Exhibit 5 at 26-27. The State presented no evidence to contradict Ms. Dedios's account. In fact, S.R. testified he could not even remember if he touched her at Crossroads Park. 2/15/12RP 35-36.

Thus, the State did not prove beyond a reasonable doubt that Ms. Dedios's motive in acquiescing to S.R.'s touching on either

occasion was to entice him into engaging in illegal sexual activity for her own personal gratification.

3. The State failed to prove Ms. Dedios “communicated” with S.R. about illegal sexual activity.

The statute requires the State to prove that the defendant “communicated” with the minor for an immoral purpose. RCW 9.68A.090. “Communicate” includes “conduct as well as words.” Hosier, 157 Wn.2d at 11; State v. Falco, 59 Wn. App. 354, 358, 796 P.2d 796 (1990). In the context of the statute, “communicate” means “to make known: inform a person of,” and to “express[]or exchange . . . information by speech, writing, or gestures.” Hosier, 157 Wn.2d at 8 (internal quotation marks and citations omitted). Thus, to prove the accused “communicated” with a minor for an immoral purpose, the State must prove that she expressed or conveyed information to the child—either through words or gestures—about unlawful sexual activity. Id. In other words, the statute proscribes the act of *communicating* about unlawful sexual activity. It does not proscribe the actual unlawful sexual activity itself. If the unlawful sexual activity that is contemplated is actually achieved, it may be punished under a separate—and more serious—penal statute.

In the case law, the statute has been applied to prohibit communications that constitute *offers* or *enticements* to children to engage in illegal activity. For example, in McNallie, the defendant was convicted of CMIP after he accosted three girls on the street and suggested that they could earn money by performing “hand jobs.” 120 Wn.2d at 926-27. In State v. Schimmelpfennig, 92 Wn.2d 95, 97, 594 P.2d 442 (1979), the defendant was convicted after he attempted to lure a four-year-old into his van and asked her to engage in various sexual acts with him. In Hosier, the defendant was convicted after leaving notes on the front lawn of a girl which referred to having sex with a young girl matching her age and description. 157 Wn.2d at 5.

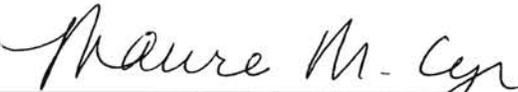
Here, in sharp contrast to those cases, the State presented no evidence to show Ms. Dedios “communicated” with S.R. in an attempt to entice him into performing illegal sexual activity. The State’s theory was that Ms. Dedios committed the crime through her actions rather than through words. 2/21/12RP 3. The State theorized she committed the crime by allowing S.R. to touch the intimate areas of her body. But Ms. Dedios did not “communicate” with S.R. about the touching, either through words or gestures. She did not affirmatively convey any sort of offer or enticement to him. At most, she passively allowed him to

touch her. This was not sufficient to prove she affirmatively “communicated” with S.R. about illegal sexual activity for the purpose of gratifying her sexual desires. Hosier, 157 Wn.2d at 8. Thus, the State did not prove the elements of the crime beyond a reasonable doubt.

E. CONCLUSION

Because the State did not prove beyond a reasonable doubt that Ms. Dedios “communicated” with S.R. for the purpose of gratifying her sexual desires, the conviction for CMIP must be reversed and the charge dismissed.

Respectfully submitted this 29th day of April, 2013.


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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 68745-0-I
v.)	
)	
NORMA DEDIOS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF APRIL, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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