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DIVISION II

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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION TWO

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State of Washington,

*Respondent,*

v.

ELIJAH GIVENS,

*Appellant.*

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APPELLANT'S REPLY BRIEF

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Elijah Givens  
Appellant

c/o 19206 Vista Drive  
Arlington, Washington 98223

ORIGINAL

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Appellant Givens served 120 days in jail after being accused of a crime he did not commit. The State argues that there is sufficient evidence to convict Givens of attempted luring under RCW 9A.40.090(1) and quoted the trial court's entire oral decision in its Response Brief, stating that the trial court was clear in its oral decision (p.7 of Respondent's Brief) that there was an enticement of a particular child. In its oral decision the trial court stated:

Now, I'm not finding that he offered candy, because I don't have – I cannot find beyond a reasonable doubt that, in fact, he did. But I do find beyond a reasonable doubt that he offered to play games or to play with her. And to a child of that age, that's an enticement.

1RP 250-51. The Court entered written Findings and Conclusions in this case (CP 70). The written decision of a trial court is considered the court's "ultimate understanding" of the issue presented. Diel v. Beekman, 7 Wn. App. 139, 499 P.2d 37 (1972). In State v. Dailey, 93 Wn.2d 451, 610 P.2d 357 (1980), the Court cautioned against relying on the trial court's oral statements. There is no way of knowing whether a trial court's oral statements serve as the entire basis for the court's written findings and conclusions. A trial court's oral decision has no binding or final effect unless it is formally incorporated into findings of fact, conclusions of law, and judgment. Ferree v. Doric Co., 62 Wn.2d 561, 567, 383 P.2d 900 (1963); Clifford v. State, 20 Wn.2d 527, 148 P.2d 302 (1944); Seidler v. Hansen, 14 Wn. App. 915, 547 P.2d 917 (1976). In Quigley v. Barash, 135 Wash. 338, 237 Pac. 732 (1925), the appellate court held that the court's

oral decision was not a finding of fact and that the final ruling was ‘within the breast of the court’ until it entered its formal findings. Also see Guarnero, 152 Wn.2d 51, 59 (2004): “Conclusions of law are reviewed de novo and must flow from the findings of fact.” In this case, there is no witness testimony to support a Finding that Givens offered to play games, as no witness said the word “games.” Therefore, there is no evidence to support a Finding that would support Conclusion of Law #3, as the State has utterly failed to address this Conclusion, which states: “[t]he defendant did attempt to lure D.A.W. by his enticements of playing games.”

The State’s witnesses testified that Givens’ first statement to the children was “come here” and “come talk to me,” and the babysitter immediately moved to where she could plainly see Givens after his first statement (1RP 60); thus, the area where Givens was located was in her view (public view) after the first words. The babysitter could plainly see Givens even though she did not look directly at him in his location (1RP 61) and Givens had not moved from his location during this incident (1RP 37). She saw him drinking and identified that he was drinking beer. 1RP 55-56. There was no enticement offered by Givens. The State’s witnesses (babysitter and Dana) characterized Givens’ statements as “talking” or “calling” in the following testimony from the record:

**(1) BABYSITTER’S TRIAL TESTIMONY<sup>1</sup>**

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<sup>1</sup> Conclusion of Law#2: “that B.T. testimony was particularly credible as to her recollections of the defendant’s statements.”

A. The girls were playing on the playground and I heard somebody **calling** them. And I got up and I politely said, will you please stop **talking** to them? And he said, okay. And not even five minutes later, he proceeded to **talk** to them again. And so I got freaked out and I called [911].

1RP 29. (Emphasis added)

A. I called and let them know that I was at John Ball Park and I told them I was on Kauffman, and they asked what the – what the incident was. And I said that there's a man in the bushes **calling** to the little kids I babysit.

1RP 42. (Emphasis added)

Q. (By Mr. Harvey) When you say he was **calling** out to them, what did he actually say?

A. He said come, here, come here, come play with me; come here, come here, I want to talk to you.

Q. Do you remember what else he said?

A. Nope.

Q. Anything else stand out in your mind?

A. Nope.

1RP 45-46. (Emphasis added)

Q And can you see from there where you would have been standing when you **first talked to Elijah?**

A No.

Q Okay. Can you tell us where Elijah was standing from this picture?

A Not really, because this is kind of in the way, between this and the tree.

Q Okay. So he was standing where, now?

A He was standing, like, right there.

Q Can you point that out to the judge? I know it's hard. Can you point out – because you've got that thing?

A Right there.

Q Okay. All right. You said you got up, went over and talked to him, but you didn't look at him. Is there a reason you didn't look at him?

A (the witness gestured).  
Q Okay.  
THE COURT: You have to answer out loud.  
MR. KURTZ: Yeah, you do.  
THE WITNESS: No.  
Q (By Mr. Kurtz) Is there a -- you said he said something to **Dana, Taylor, and Cassidy. When he initially started talking to them**, or where you believe he started talking to them, were you still sitting at the park bench?  
A Yes.  
Q **Okay. And when you first told him, please stop talking to them, you said you told him twice?**  
A Yes.  
Q Where were you when you **first** told him that?  
A I moved from the bench to the beam.  
Q Okay. How come you did that?  
A To get closer to them.  
Q To get closer to the girls?  
A Yes.  
Q Okay. And is that when you said, please don't talk to them?  
A Yes.  
Q **And you said you recall him saying what to them?**  
A **Come here, come here, come talk to me, come talk to me.**  
Q And just like that? That was what he said?  
A (The witness gestured).  
THE COURT: I'm sorry, you have to answer out loud.  
THE WITNESS: Yes. Sorry.  
Q (By Mr. Kurtz) Then, after you said that, and he said okay --  
A Uh-huh, yes.  
Q -- was he angry?  
A It didn't sound like it.  
Q Okay. At that point, did you see him at that point when he said okay, or you still hadn't looked at him?  
A I hadn't looked at him yet.  
Q **So then did you walk back or did you stay there?**  
A **I stayed there.**  
Q **To where you were when you initially said that?**

A Yes.

Q (By Mr. Kurtz) So in Defense Proposed Exhibit No. 2, you were standing there, and you went there to be closer to the girls?

A Yes.

Q And from the balance beam there where you and the girls were, can you show us where Elijah was?

A Over there in the corner.

Q Okay. Can you hold it up and show the judge? Okay. **After you talked to him the first time and he said okay, did you stay there at the balance beams?**

A Yes.

Q Then you said a few minutes later he started talking to you guys again?

A Yes.

Q Okay. You were still at the balance beams?

A Yes.

Q With the girls?

A The girls were playing.

Q Where were they playing.

A On the playground, on the structure.

Q Okay. Is the balance beam on the playground?

A It's kind of away, just like the swings.

Q Okay.

A But it's in the same area.

Q Okay. So what you talking, five, ten feet away?

A Probably.

Q **So the second time, he said that, what did he say?**

A **He said come here, come here – he basically said the same thing.**

Q **Same thing. Okay.**

A **Yeah.**

Q **Okay. And you said what?**

A **And I said, please stop talking to them. And then I called the cops.**

Q. **Okay. So after that you called 911?**

A Yes.

Q Can I ask you, Briannah, in either of the conversations you had with Elijah, when you said stop, please stop, did you – did any of the girls come up to you and say anything?

A They're all, what's going on; I was all, it's okay, just go play.

Q What do you mean?

A Like, they came up to me and they're all, what's going on? I was all, I'm just asking him to stop talking to you. It's okay.

Q So when they came up and said, what's going on, what did they mean, do you know?

MR. HARVEY: Objection, calls for speculation.

THE COURT: I'll sustain. You can rephrase.

Q (By Mr. Kurtz) Okay. Well, did they come up to you and what's going on, meaning why are you talking to this man?

A Yeah.

1RP 59-65. (Emphasis added)

THE WITNESS: There's an older black man in the corner, and he **called** my three – the three girls I'm with over there twice and he's over there. And I think he's going to come back a third time.

1RP 69 (911 call). (Emphasis added)

(2) **DANA'S TRIAL TESTIMONY (State's witness)**

Q. . . .Do you know why you're here today?

A. Yes.

Q. Why?

A. Because the guy at the park was **talking** to us.

1RP 105. (Emphasis added)

A. He told us to come here and play with him. And that's about all.

1RP 130.

Respondent accepts Appellant's Statement of Facts, which says the babysitter testified Givens said "come here" and "come talk to me." 1RP

61 (App.'s Brief, p.4). A review of trial testimony at 1RP 59-65 (quoted above) shows (1) the babysitter testified at trial that Givens when he initially called the children over said "come here" and "come talk to me," (2) babysitter moved closer to Givens after the initial call (the invitation) and had him in her view thereafter (in public view), and (3) Givens called a second time, saying basically the same thing. As the record clearly indicates, the babysitter testified that Givens initially said, "come here" and "come talk to me" to the children. After this initial invitation/calling over, she moved to where she could see Givens (this is "in public view") and had him in her view until the police came. 1RP 60, 61, 63.

Dana also testified that when Givens first spoke to the girls, he said "to come here." The exact trial testimony of Dana is as follows:

Q Okay. When you got to the park, did you first see the man there or did you – or were you playing and you didn't see him at first?

A We were playing, we didn't see him at first.

Q Okay. So **when was the first time you noticed him? What happened?**

A **He told us to come here.**

1RP 121, 122 (Emphasis added). The focus must be placed on what Givens first said to the children because the first statement is not luring and he was without a doubt in the babysitter's view (public view) after the initial invitation. Accordingly, the Double Jeopardy Clause requires reversal and remand for judgment of dismissal with prejudice. Burks v. United States, 437 U.S. 1, 17-18, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

RCW 9A.40.090(1) states that:

A person commits the crime of luring if the person:

(1)(a) Orders, lures, or attempts to lure a minor or a person with a developmental disability into any area or structure that is obscured from or inaccessible to the public

The word “public” is not defined in the statute, but “public” means the people in the community and includes men, women and children – no matter what their age or gender. The plain, ordinary, commonly understood meaning of “public” is defined in *The American Heritage® Dictionary of the English Language, Fourth Edition*.<sup>2</sup> Thus, in the luring statute the word “public” means any member of the public (man, woman or child) because the Court may not create ambiguity as to the meaning of the word “public.” If the Washington legislature required that an area, for purposes of the luring statute, be obscured from or inaccessible to an adult, it would have drafted the statute as such. A word used in a statute that the statute does not define is given its plain and ordinary meaning as determined from a dictionary in use at the time the statute was enacted. Am. Cont’l Ins. Co. v. Steen, 151 Wn.2d 512 (2004). If words are not

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1. <sup>2</sup> Of, concerning, or affecting the community or the people: *the public good*.
  2. Maintained for or used by the people or community: *a public park*.
  3. Capitalized in shares of stock that can be traded on the open market: *a public company*.
  4. Participated in or attended by the people or community: *"Opinions are formed in a process of open discussion and public debate" (Hannah Arendt)*.
  5. Connected with or acting on behalf of the people, community, or government: *public office*.
  6. Enrolled in or attending a public school: *transit passes for public students*.
  7. Open to the knowledge or judgment of all: *a public scandal*.
- n.
1. The community or the people as a whole.
  2. A group of people sharing a common interest: *the reading public*. ...

defined by the legislature, courts look to a dictionary in use at the time the statute was adopted to give them [the words] their plain and ordinary meanings. Id. An unambiguous statute is not subject to judicial construction, and the courts will not add language to an unambiguous statute even if they believe the legislature intended something else but did not adequately express it. State v. Watson, 146 Wn.2d 947, 955 (2002). Courts simply do not have the power to create new criminal liability by changing the plain, ordinary meaning of words in a statute. Similarly, the word “obscured” is not defined in the luring statute. If the legislature wanted to include areas “partially obscured” from or inaccessible to “an adult” they not have drafted the luring statute as such. Here, the State’s witnesses saw Givens at his location in the park, clearly seen that he was drinking beer, etc. - his location that was not obscured from public view.

In State v. Dana, 84 Wn. App. 166 (1996), the court held that the luring statute gives clear notice of the proscribed conduct and further held that: “the luring statute targets conduct that falls short of the force necessary to constitute abduction.” It proscribes only a narrow range of illegal activity – conduct that falls just short of abduction – and anything else is outside its legitimate sweep. One cannot lure by accident; there has to be an intent to lure, and there is an important difference between (1) something that may be enticing to another and (2) offering an enticement with the intent to lure for a specific, unlawful purpose. (A person could go to a certain location without having being lured there, and if a defendant

intends to or does harm to the person who voluntarily goes to that certain location, a crime other than luring, such as restraint or assault for example, could be charged.). The court in Dana also stated that luring is a crime under the kidnapping statute, and RCW 9A.40.010(2) defines “abduct” as “to restrain a person by either (a) secreting or holding him . . . or (b) using or threatening to use deadly force.” The luring statute regulates conduct – not speech. “Conduct” means an action or omission and its accompanying state of mind. MODEL PENAL CODE §1.13 (5). While the rule that every sane man is presumed to intend the usual and probable consequences of his acts applies to attempts, the existence of the intent may not be inferred from the overt act alone. Both elements must coincide. They must be coupled with each other. They must be considered together. As is stated in 1 Bishop on Criminal Law (9th ed.) 525, Attempts, § 735 (2): "A further view is that in reason we cannot first draw an evil intent from an act, and then enhance the evil of the act by adding this intent back again to it." See, also, §§ 729 and 731 therein; and 22 C. J. S. 139, Criminal Law, § 75. State v. Leach, 36 Wn.2d 641 (1950). Conduct is not a substantial step as far as attempts go 'unless it is strongly corroborative of the actor's criminal purpose.'" State v. Workman, 90 Wn.2d 443, 451, 449, 584 P.2d 382 (1978) (quoting Model Penal Code § 5.01(2) (Proposed Official Draft 1962)). The Washington State Supreme Court reaffirmed its reliance on these principles in State v. Smith, 115 Wn.2d 775, 782, 801 P.2d 975 (1990). The State did not introduce

evidence that would prove that Givens attempted to lure anyone in this case, as it did not prove that Givens' invitation was strongly corroborative of the proscribed criminal purpose. There was no "conduct" or "words" by Givens in addition to the "invitation" proven by the State.

Givens simply cannot be convicted of attempted luring for saying "come here" or "come talk to me," which is what the State's witnesses testified Givens first said to the children. The babysitter Brianna testified that she had Givens in her side view after the initial invitation. 1RP 61. Givens called/invited the children over a second time and said basically the same thing. 1RP 64. The babysitter testified that Givens did not move during the time he called out to the children 1RP 36, 37. When the arresting officer arrived, the babysitter testified that Givens was still in the corner and testified that he had not moved. 1RP 43. The babysitter kept Givens in her view because she did not see him move around and testified to this several times during trial. The babysitter also testified that she thought there were other adults in the park walking around the time of this incident, but she does not remember exactly when she seen them, and "they had left already" by the time Officer Millard arrived. 1RP 44. She was not fully aware or observant of everything and everyone in the park because she had been talking on her cell phone to Dana's mom when she arrived at the park, and she did not look directly at Givens' location (she used her side view) in the park when she got up from the bench she was sitting on to speak to Givens. 1RP 117, 1RP 57. Givens testified that there

were other adults in the park when he spoke to the children. 1RP 216. He invited some children to come play with Cory (the boy), was very loud in calling the children (could be heard by the babysitter 40 feet away), made no attempt not to be heard, and was not secretive or attempting to avoid detection when calling/inviting the children – precisely because he did not have a sinister purpose. Givens' intent was to, and he did, call the children over to play with Cory, a little boy who had been playing by himself at the park, after speaking with Cory. **Dana testified at trial that Cory was climbing a tree and talking to Givens when Givens called the children over, as follows:**

Q The little boy, I mean, did you see him there?

A Yes.

...

Q What was he doing there near the man?

A He was climbing a tree.

Q Was he talking to the man?

A Yes.

Q Was the man talking to him?

A Yes.

Q Okay. So when he was calling out, do you know he was calling out to you or the little boy?

A **Well, the boy was climbing the tree and he was looking at us and tells us to come here.**

1RP 123. (Emphasis added). Givens did not offer any inducement or attempt in any way to trick, persuade, entice or lure the children to accept his invitation. Givens made no promise to the children of playing games or that they would have fun or some other benefit for accepting the invitation, and he did not threaten or order the children. Givens merely

invited children over to play with Cory because he felt compassion for Cory, who was playing alone; this reminded Givens of his five-year old son who did not like to play alone. (1RP 202) The children were not scared and just ignored Givens (1RP 128), and they did not run away or leave the park, which is in stark contrast to all published cases where a defendant was convicted of luring or attempted luring. See State v. Dana, 84 Wn. App. 166 (1996), State v. McReynolds, 142 Wn. App. 941 (2008). Givens did not attempt to or have the intention to harm children or engage in conduct that falls short of abduction/kidnapping. 1RP 207. When Officer Millard accused Givens of luring, Givens was understandably angry and taken aback when he learned that was being accused of luring because he had no intention to and did not attempt to lure the children – he was at the park to drink. 1RP 220, 230 (ln.8). Givens did not attempt to leave the park at any time even when he seen the police arriving at the park. He believed the Officer was coming over to his location to charge him with an open container infraction. 1RP 206. Givens merely spoke to the children, and there was no conduct by Givens in addition to the invitation that would constitute luring. He cannot be prosecuted for lawful conduct. It is not illegal for someone to invite children over to play with another child. Many people have had a few drinks too many and, under the influence of alcohol, spoke to others who may or may not have wanted the intoxicated person to speak to them. We may find a person annoying, repulsive, or perhaps even scary, but it is not illegal to have someone we

don't like speak to us. People don't always think before they speak, especially if under the influence of alcohol, but that does not mean they are up to no good. Here, Givens testified that his purpose in calling the children over was exactly as he has stated all along: he invited them to play with Cory after having a conversation with Cory (the trial court based its written findings and conclusions on what the State's witnesses testified to). Givens has a very shy son (same age as Cory), who does not like to play alone, and thought Cory did not want to play alone either, so he called the children over for Cory (Dana testified to a conversation occurring – see p.13 of this brief). Givens failed to realize that in today's society men are likely to be presumed as predators if someone accuses them of a crime against a child; the mandatory presumption of innocence is lost and the trier of fact will convict even if the evidence is insufficient. Here, the trial court found that the babysitter's testimony as to Givens' statements were particularly credible and entered written Findings based on her testimony, but those Findings totally ignore the babysitter's and Dana's trial testimony and do not support the written Findings or Conclusions. **There was no testimony from any of the witnesses that Givens offered to play games (Judge Lewis was only person to mention games)** or that Givens attempted to persuade, entice, lure, coax or induce the children to accept his invitation for them to play with Cory. Based on this insufficiency of evidence to support the Findings and Conclusion, this case must be dismissed.

There was plenty of testimony from the State's witnesses that they could see Givens, as follows (Finding #s 9, 15):

**BABYSITTER'S TESTIMONY:**

**Q.** And did Elijah move any time during the time he was calling out to the children? Did he go to the play structure of anything like that?

**A.** No.

1RP 36.

**Q.** (By Mr. Harvey) . . . – do you recall seeing him in any location other than what you described so far as sitting in the corner?

**A.** Sitting in the corner is **where I saw him** basically.

**THE COURT:** I'm sorry, you have to restate your answer with your voice up.

**THE WITNESS:** Sitting in the corner is **where I saw him**.

**THE COURT:** Okay.

**THE WITNESS:** **I didn't see him move around the park.**

1RP 37. (Emphasis added)

**Q.** So do you recall if – when he arrived, when Officer Millard arrived, do you remember where the person you're calling Elijah, do you remember where he was?

**A.** **He was still in the corner.**

**Q.** **Se he had not moved?**

**A.** **He hadn't.**

1RP 43. (Emphasis added)

**Q.** Was he sitting on anything?

**A.** Yes.

**Q.** Can you describe the thing he was sitting on?

- A. The brick.  
Q. It's brick there?  
A. Yes, the bricks.

1RP 47.

- Q. **Okay. So when did you see him?**  
A. **Probably when I got up and walked over.**

1RP 54. (Emphasis added)

- Q. Okay. Can you pick that up and show the judge?  
Okay. Can you now look at the photograph and tell me at that point where you saw Elijah?  
A. Right there.  
Q. Can you point exactly to it and show the judge? I know it's hard.  
**THE COURT:** All right.  
Q. (By Mr. Kurtz) Okay. So was he standing up or sitting down?  
A. Sitting.  
Q. He was sitting when you saw him. Okay. And can you show me one more time where he was? Okay.  
A. In the corner.  
Q. Okay. In the corner. And he was sitting there. And did he have anything?  
A. Yes.  
Q. Okay. What did he have?  
A. He had alcohol on him.  
Q. What specifically?  
A. It was beer. I don't know exactly what kind it was.  
Q. And you saw him with this?  
A. Yes.  
Q. Was that when you walked over to the beam here?  
A. Yes.  
Q. To the play area? And when you walked over there, he was sitting down?  
A. Yes.

1RP 55-56.

Q. Well, you said you saw him when you were over here.

A. Yeah. . . .

Q. Okay. But you said you saw him with a beer can?

A. I did. Like, I could see it out the corner of my eye. Like, I wasn't, like, sitting there staring right at him, I was looking off to the side.

1RP 57.

#### DANA'S TRIAL TESTIMONY

Q. (By Mr. Harvey) Now, when you say you heard him talking to you from over there, did you see him in any other parts of the park?

A. No.

Q. Okay. When you said he was sitting by the fence, do you remember if he moved around over there or do you remember, you know, what he was doing over there besides talking to you?

A. He was drinking.

Q. Okay. **Did you see him drinking?**

A. **Yes.**

1RP 113.

Q. When you say the man was walking around, can you show me where he was walking around?

A. Well, he wasn't walk out here, he was walking just, like, near here.

Q. Did he go down here at all?

A. No.

Q. He never did. So he was walking around here?

A. Just right there.

Q. Okay. And talking to the boy?

A. Uh-huh.

Q. And did he have anything with him? The man?

A. Yes.

- Q. What did he have?  
A. He was just drinking.  
Q. What was he drinking?  
A. Beer.  
Q. Okay. **And did you see him drinking the beer?**  
A. **Yes.**  
Q. Okay. Even when he was walking around?  
A. **No. He set it down when he was walking around.**  
Q. I'm sorry, say that again?  
A. **He set it down when he was walking around.**  
Q. Okay. So had the beer, but when he was walking around, he put it down on the ground?  
A. **Yes.**  
Q. **Did you see him do that?**  
A. **Yes.**  
Q. Okay. **So you could clearly see him do that?**  
A. **Uh-huh.**  
Q. Did he ever come out from there? Did he ever come out to the path right in front, you know, the little path that you can walk?  
A. No.

1RP 125, 126. (Emphasis added) Without a doubt, the evidence from the record does not support Findings of Fact Nos. 9 and 15, so Conclusion of Law # 7 that the area was obscured from the public is not supported.

At page 2 of its Response Brief, the State misconstrues what both Dana and the babysitter testified to in an attempt to misconstrue Dana's trial testimony and was done in a failed attempt to support Finding #13. In fact, both the babysitter and Dana (State's witnesses) testified that Givens was talking to all the girls when he called them over. Following is the exact testimony at 1RP 108, 109, and 110, which testimony indicates Givens was not speaking specifically to Dana:

Q. Okay. Do you remember – you said something happened. What happened? Can you tell the judge what happened?

A. He kept saying to come here.

1RP 108. (no testimony at 1RP 108 that Dana testified Givens' invitation was specifically addressed to her.)

A. He told **us** to come here and play with him.

Q. And play with him?

A. Uh-huh.

Q. Now, can you remember what he said to you?

A. **Told us** to come there and play with him.

Q. Okay. Can you tell the judge how that all happened, where were you?

A. I was by the – I was by the monkey bars and I was in – I was by the swings when **he told us that**.

1RP 109. (Emphasis added) The record is clear – Givens' invitation was to a group of children.

A. **He told us** to come here and play with him. And that's about all.

1RP 110.

The State also fails to offer any evidence whatsoever from the record that that would support Finding of Fact #10: That the testimony of B.T. [babysitter], as to here [sic] hearing the defendant call out to the girls to entice them to come and play with him was specifically addressed to D.A.W. In fact, the record of the babysitter's testimony is as follows:

A. The girls were playing on the playground and **I heard somebody calling them**. And I got up and I politely said, will you please stop talking to **them**? And he said, okay. And not even five minutes later, **he proceeded to talk to them again**. And so I got freaked out and I called.

1RP 29. (Emphasis added)

**Q. And then I asked him if he would stop talking to the girls.**

THE COURT: Young lady, could you show me just where you pointed.

THE WITNESS: Okay. I was sitting on the beams, which is probably, like, over here. **And then I walked over to the third pole and asked him if he would stop talking to the girls.**

1RP 54. (Emphasis added)

The 911 tape (babysitter calls 911):

**THE OPERATOR:** Okay. You're at John Ball Park and what's happening?

**THE WITNESS:** There's an older black man in the corner, and he called my three – the three girls I'm with over there twice and he's over there. And I think he's going to come back a third time.

1RP 69. The State has failed to offer any evidence that Givens was talking specifically to Dana (Finding #10). The witnesses all indicated otherwise, and Findings #s 19-21 also state Givens called the girls.

In State v. Dana, 84 Wn. App. 166 (1996), the court held that the luring statute distinguishes between the innocent intent of merely extending an invitation and the culpable intent to engage in unlawful conduct that falls short of abduction. As interpreted and limited by Dana, the luring statute requires more than an invitation. This requirement prevents the statute from reaching into the arena of constitutionally protected First Amendment speech or conduct. In Dana, the defendant Dana asked the girls in that case whether they would like to get into his

car. This was the invitation in the Dana case. The girls in the Dana case were 11 and 12 and, at that age, could have found it to be enticing/perceived as fun to go for a ride in someone's car – even a stranger's car (many young people like to “joy” ride or “cruise”). However, under the Dana case, the court required that there be more than a mere invitation to constitute a lure or attempted lure in violation of the luring statute. See Dana case at 175-176. The enticement accompanying the invitation in the Dana case was that defendant Dana partially exposed his genitals. In this case, the witness deemed by the Court to be particularly credible testified that appellant Givens initially said “come here” and “come talk to me.” This is a mere invitation. The Court need not go any further because after the initial invitation Givens could definitely be seen in his location by the babysitter, Dana, and all the other children, including Cory who was in the tree (and the other adults walking in the park around the time of the incident) – public view. If the appellant court does examine the case further, however, the case against Givens must still be dismissed because an invitation for the children to play is a mere invitation where there is no further conduct or words that would constitute luring in violation of the statute – that is, an enticement that would constitute conduct falling short of abduction. Compare the prosecution of Givens to the Dana case. In the Dana case, it was possible that the girls in that case may have found defendant Dana's invitation to ride in a car as something they perceive as being fun. (Here, the trial court said the

children might find an invitation to play as something that could be perceived as fun.) However, it is important to note that further conduct was required (Dana's exposing of his genitals) to prove the requisite intent. Here, there was nothing further/nothing more than the speech/invitation – no conduct that was “luring” in violation of the statute. To be prosecuted for any conduct outside that which falls short of abduction under the criminal luring statute would be overbroad as applied. You cannot be prosecuted for or make illegal acts that are lawful or innocent. The crime of child enticement *does* contain a mens rea intent element. The luring statute is not violated unless it is proven that the attempted act of luring/enticement is committed with the specific, prohibited intent – conduct that falls short of abduction. Luring is a strict liability offense only in the sense that the State need not prove the defendant's knowledge of the child's minority and the defendant cannot use mistake as to the child's minority as a defense. The State still had to prove that appellant attempted to lure. Givens explained to Officer Millard at the time of the incident that he told Cory he was going to invite the children over for him (Cory); Officer Millard testified as follows:

Q. (By Mr. Harvey) And did Mr. Givens indicate to you in any way having a discussion with any boy in the park?

A. Yes.

Q. And what did he say?

A. He said something like, he told the boy something about the girls.

Q. He told the boy something about the girls?

A. Yes.

1RP 226. The State did not introduce evidence that is evidence strongly corroborative of a criminal purpose and its accompanying state of mind. There was no “conduct” or “words” by Givens, in addition to the “invitation,” proven. Givens testified that he was at the park for the purpose of drinking his beer, that he is homeless and did not want to have someone call the police for his drinking in public. Givens conversed with Cory and invited children over for Cory. A public park is one of the few places a homeless person can go to without being hassled for loitering or trespassing; a public park is for public use, including homeless men. Givens had a right to be in a public park, he has a right to speak to people, and he cannot be convicted for speech or conduct that is not unlawful. The State’s witnesses saw Givens drinking his beer, sitting, standing, etc. in an area of the park that wasn’t the most readily seen area of the park but at the same time could still be seen by them and any other member of the public who happened to be in the park. Dana testified as follows:

**Q The little boy, I mean, did you see him there?**

**A Yes.**

...

**Q What was he doing there near the man?**

**A He was climbing a tree.**

**Q Was he talking to the man?**

**A Yes.**

**Q Was the man talking to him?**

**A Yes.**

**Q Okay. So when he was calling out, do you know he was calling out to you or the little boy?**

**A Well, the boy was climbing the tree and he was looking at us and tells us to come here.**

1RP 123. (Emphasis added). Dana and Officer Millard's testimony are corroborative of Givens' testimony. The State failed to introduce evidence sufficient to prove beyond a reasonable doubt all elements of the crime charged.

### CONCLUSION

The simple issue is whether appellant has committed a crime. The law requires that an accused "intend" to lure. Luring cannot occur in a vacuum; "luring" is but a subset of "exploitation"; they are not co-extensive, and to suggest that the "speech" in this case amounts to "luring" would be "throwing the net too wide". The evidence is not sufficient to support the trial court's written Facts and Conclusions, and where there is no criminal conduct, a defendant cannot be convicted for something a person thinks they "might" do. Givens cannot be convicted for saying "come here" or "come talk to me" and there was no evidence of an enticement in addition to the "invitation." No matter which way you look at this case, the evidence does not support the written findings (#s 9, 10, 11, and 15), which do not support the conclusions (#s 3, 6, 7 & 8). Therefore, the Double Jeopardy Clause requires reversal and remand for judgment of dismissal with prejudice.

For the foregoing reasons, Givens respectfully requests that this Court reverse his conviction and dismiss this case.

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of August, 2008 by  
Appellant Elijah Givens.



**DECLARATION OF SERVICE**

I, Elijah Givens, hereby declare and state as follows:

On August 28, 2008, I caused to be served, in the manner identified below, a true and correct copy of the following documents and this Declaration of Service (a copy was also mailed to attorney Glinski):

1. Appellant's Motion for Extension of Time to File Reply Brief; and
2. Appellant's Reply Brief

to the following:

**Attorneys for Respondent (State of Washington):**

Michael C. Kinnie (U.S. Mail)  
Clark County Prosecuting Attorney  
P.O. Box 5000  
Vancouver, WA 98666

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 28<sup>th</sup> day of August, 2008.

