

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

NO. 37212-6-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

State of Washington,

Respondent,

v.

ELIJAH GIVENS,

Appellant.

APPELLANT'S STATEMENT OF ADDITIONAL GROUNDS

Elijah Givens
Appellant

19206 Vista Drive
Arlington, Washington 98223
(360) 474-1758

A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding appellant guilty of attempted luring under RCW 9A.40.090(1) because appellant Givens (“Givens) did not order, lure or attempt to lure anyone but was merely exercising his constitutional rights to free speech.

2. Givens’ trial counsel erred in his failure to impeach D.A.W. [D.A.W. or Dana] regarding her prior inconsistent statements, which statements by D.A.W. further corroborate Givens’ testimony regarding this case.

3. Givens’ trial counsel erred in his failure to immediately move for dismissal where there was no probable cause for Office Millard to arrest Givens.

4. The trial court erred in its finding of fact #9 – that Givens was in a place that was obstructed from public view?

5. The trial court erred in its finding of fact #10 – that Givens’ invitation was an enticement specifically addressed D.A.W.

6. The trial court erred in its finding of fact #11 – that B.T. [“babysitter” or “Brianna”] asked Givens to stop calling out to D.A.W. on at least three occasions.

7. The trial court erred in its finding of fact #15 – that

D.A.W. testified that the defendant's location was in an area that was obscured from her view.

8. The trial court erred in entering conclusion of law # 3 – that Givens attempted to lure D.A.W. by enticements of playing games.

9. The trial court erred in entering conclusion of law # 6 – that Givens attempted to lure D.A.W. to a place where he was located.

10. The trial court erred in entering conclusion of law # 7 – that Givens was located in a place that was obscured from and inaccessible to the public.

11. The trial court erred in entering conclusion of law # 8 – that Givens is guilty beyond a reasonable doubt.

12. The trial court's erred in sentencing Givens for attempted luring under RCW 9A.40.090.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Givens was arrested for saying “come here . . . come talk to me.” Were Givens' constitutional rights to freedom of speech guaranteed by the First Amendment and Article 1, Section 4 of the

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B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Givens was arrested for saying “come here . . . come talk to me.” Were Givens' constitutional rights to freedom of speech guaranteed by the First Amendment and Article 1, Section 4 of the

Washington Constitution violated when he was arrested for pure speech and no other conduct was involved, *i.e.*, there was no statement by the witnesses involved to the arresting officer of any inducement or enticement to accept the invitation to come here, come talk to me, and was RCW 9A.40.090(1) overbroad as applied to Givens because he was arrested for pure speech in violation of his constitutional rights to free speech? [Assignment of Error (“AE”) # 1]

2. Givens was arrested by a police officer and held in jail for four months even though there was no evidence or statements whatsoever to support a luring charge at the time of arrest. Is RCW 9A.40.090(1) void for vagueness as applied to Givens because it allowed the arresting officer virtually untrammelled discretion in his enforcement of this statute – thereby violating defendant’s first amendment rights – when he presumed there was an attempted luring without any evidence or witness statements whatsoever to support the charge of luring and then took Givens into custody without probable cause? The arresting officer did not know the commonly understood use of the word “lure” or what conduct the

statute proscribed and as a result, Givens was arrested for exercising his first amendment rights. [AE #1]

3. D.A.W. testified in a deposition on November 21, 2007 that she saw other people in the park at the time of the incident giving rise to this case, including adults and children; some of these individuals seen Givens or were present at the time Givens spoke to children in the park, including D.A.W., which D.A.W. testified to herself. Did Givens' trial counsel provide ineffective assistance of counsel when he failed to impeach D.A.W. regarding her prior inconsistent statement that she saw other people in the park, including adults and children, who were present at the relevant times Givens spoke to children in the park, which deficiency constitutes a denial of Givens' Sixth Amendment right to effective representation of counsel? [AE #2]

4. Whether the trial court erred in its finding of fact #9 – that Givens was in a place that was obstructed from public view when the Court stated in its ruling that the place in question was only partially obstructed from view but that it doesn't matter whether an area is partially obstructed from public view or obstructed from

public view? [AE #4]

5. Did the trial court erred in finding Givens guilty of attempted luring under RCW 9A.40.090(1) where Givens was only exercising his constitutional right of freedom speech and there was no criminal conduct or criminal attempt proven?

6. Did the trial court err in its finding of fact #10 – that Givens' invitation was addressed to a specific person – where the testimony from all witnesses was that Givens was speaking to a group of children?

7. Did the trial court err in its finding of fact #11 – that the babysitter of the children asked defendant to stop calling out to D.A.W. on at least three occasions – where the babysitter testified that she told Givens to stop talking to the children twice and also confirmed the accuracy of the 911 tape for this incident, which 911 recording evidences the fact that the babysitter stated that Givens called children over twice but she thought he might call a third time.
[AE #6]

8. Did the trial court erred in its finding of fact #15 – that D.A.W. testified that the defendant's location was in an area that

was obscured from her viewing – where D.A.W. testified that (1) she saw Givens walking, standing and sitting, (2) she saw what he was wearing and was able to describe him, and (3) she was able to see what he was drinking. [AE #7]

9. Did the trial court erred in entering conclusion of law # 3 – that Givens attempted to lure D.A.W. by enticements of playing games – where there was no testimony whatsoever from any witness that Givens offered to play games, and there was no evidence of any enticement offered? [AE #8]

10. Did the trial court err in entering conclusion of law # 6 – that Givens attempted to lure D.A.W. to a place where he was located – where there is no evidence that Givens intended or attempted to lure anyone? [AE #9]

11. Did the trial court err in entering conclusion of law # 7 – that Givens was located in a place that was obscured from and inaccessible to the public – where there is testimony indicating otherwise? [AE #10]

12. Did the trial court err in entering conclusion of law # 8 – that Givens is guilty beyond a reasonable doubt – where there is

substantial evidence that Givens did not offer an enticement, had no intention to lure anyone, and his location was not obscured from public view? [AE #11]

13. Did the trial court err by sentencing Givens for attempted luring? [AE #12]

C. STATEMENT OF THE CASE

1. Procedural History

On September 27, 2007, the Clark County Prosecuting Attorney charged Givens Elijah Givens (“Givens”) with three counts of luring, CP 1-2; RCW 9A.40.090(1). Because it did not apply to this charge, the Clark County Prosecuting Attorney did not file a special allegation of sexual motivation pursuant to RCW 9.94A.835, which the prosecuting attorney shall file in every criminal case, felony, gross misdemeanor, or misdemeanor, other than sex offenses as defined in RCW 9.94A.030(38) (a) or (c) when sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding of sexual motivation by a

reasonable and objective fact-finder. CP 4, 6.¹ Givens waived his right to a jury trial, and the case proceeded to a bench trial, after two continuances, before the Honorable Robert A. Lewis on December 21, 2007. CP 19. The Court found Givens guilty on one count of luring, not guilty on the other two counts, and entered findings of fact and conclusions of law. CP 64-67, 70.

2. Substantive Facts

On September 23, 2007, after meeting with a VA representative to discuss his homelessness and need for alcohol treatment, appellant Elijah Givens (“Givens”) bought some beer and then went to a public park, John Ball Park, (“the park”) for the purpose of drinking his beer. IRP 197-200. Givens had learned he could not stay at the Sharehouse (a homeless shelter) that day and went to the park to drink some beer and wondered where he would sleep that night. IRP 219-223.² Givens was going to sit on the benches in the middle of the park to drink his beer but did not

¹ Luring, a kidnapping offense, is located under the kidnapping statute, RCW 9A.40, *et seq.*, and is not a sex offense unless there is a finding of sexual motivation.

² The Verbatim Report of Proceeding is contained in two volumes designated as IRP-12/21/08 and 2RP-1/4/08.

because there were children around, and he did want people in the park to know that he was drinking beer. 1RP 215, 216. He knew the police might roll by and see him drinking his beer, and he did not want to be hassled by the police for drinking in public, so he moved to the edge of the park by a chain link fence that separates the park from several houses that closely border the park and squatted down to drink his beer. 1RP 199-200. Brianna was the babysitter (“babysitter”) of the three girls – Dana (9), Cassidy (8), and Taylor (6) – who were also at the park at the same time Givens was drinking his beer. 1RP 51, 107. The babysitter Brianna and Dana also saw Givens drinking his beer. 1RP 56, 57, 113, 126.

Givens was able to see the entire park from his vantage point in the park, 1RP 200, and he observed several other people, including adults, in the park. 1RP 216. The babysitter indicated that she saw other adults walking in the park as well, but she did not remember exactly when she saw them. 1RP 44. The babysitter had been talking on her cell phone to Dana’s mom when she first arrived at the park, and she did not look directly toward Givens at his location in the park when she got up from the bench she was sitting

on to speak to Givens. 1RP 117, 1RP 57. Dana also remembers seeing two other children at the park, Machala and McKenzie, a guy playing basketball, and a guy walking a dog. CP 64, D.V-W, p. 7.

Approximately 5-10 minutes after arriving at the park, the babysitter Brianna heard Givens calling the girls. 1RP 29. The babysitter testified that Givens said "Come here, come here, come talk to me, come talk to me." 1RP 60, 61. Dana testified that (1) she didn't see Givens at first when she arrived at the park and first noticed him when he spoke to the girls and said "to come here" and (2) that the boy [Cory] was climbing the tree and Givens was looking at the children and told them to come here. 1RP 122, 123. Dana also testified that her statement to Officer Millard at the time of the incident was correct – that Givens said "come here little girls I need to talk to you, come here little girls." 1RP 118, 119.

Immediately after Givens first called the girls, the babysitter moved closer to Givens to tell Givens not to talk to the girls and so she could be closer to the girls; the babysitter then stayed where she could see Givens and kept Givens in her view thereafter. 1RP 29, 60, 61.

A few minutes later, Givens spoke to the girls a second time and said “come here, come here,” “basically the same thing.” 1RP 64. The babysitter had and kept Givens in her side view after he called children the first time. 1RP 61. The babysitter then called 911 and reported that Givens had called her three girls over twice. 1RP 69, 70. Givens was not angry during this encounter. 1RP 61. The children asked the babysitter what was going on after she spoke to Givens, 1RP 64. The babysitter told the children “it’s okay, just go play.” 1RP 64. The girls just ignored Givens and kept playing when he was talking to them. 1RP 128. The babysitter and children did not leave the park. 1RP 127.

Givens testified that he went to the park for the purpose of drinking some beer. While at the park, Givens had a conversation with a little boy named Cory (a 5 year-old listed as the victim on the police report) (“Cory”), but Cory could not remember the details of his conversation with Givens, as he is very young and it was three months between the incident and trial. After speaking with Cory, Givens indicated to Cory that he would call a group of children over to play with Cory. 1r 202, 203. Givens felt some compassion for

Cory because he was playing alone and this reminded him of his 5-year old son who was often concerned about playing alone. 1RP 203 Givens did not have any intent to harm the children in calling over play with Cory. 1RP 207. Givens only spoke to the children because he was calling them over to play with Cory. 1RP 203.

D. ARGUMENT

1. THE STATE FAILED TO PROVE THAT GIVENS WAS GUILTY OF ATTEMPTED LURING; GIVENS SHOULD NOT HAVE BEEN SENTENCED FOR A CRIME HE DID NOT COMMIT.

a. Background and standard of review.

As a matter of due process, the State must introduce evidence that would prove all essential elements of a crime charged beyond a reasonable doubt. On appeal, a reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 98, 915 P.2d (1996).

Under the relevant facts of this case, the State did not prove beyond a reasonable doubt that Givens invitation from some children

to come play with Cory was an attempt to lure a minor into an area that was obscured from the public.

RCW 9A.40.090(1) states that:³

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 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.

(2) It is a defense to luring, which the defendant must prove by a preponderance of the evidence, that the defendant's actions were reasonable under the circumstances and the defendant did not have any intent to harm the health, safety, or welfare of the minor or the person with the developmental disability.

³ For this particular case, he trial court Judge ruled that the area in question was accessible to the public because it is a public park, the alleged victim is a minor and was not lured, and appellant did not have alleged victim's parents' consent to bring minor into an area obscured from the public. These elements are not the subject of appellant's appeal.

b. The Elements of the Alleged Crime Are Not Proven by State, as the Findings Are Not Supported by Substantial Evidence, and are In Fact Contradicted By the Record.

(1) ATTEMPT (Not Proven)

A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.

RCW 9A.28.020.

In State v. Workman, 90 Wn.2d 443, 449, 584 P.2d 382 (1978), the court adopted the Model Penal Code approach to the definition of a substantial step: "Under the code, conduct is not a substantial step 'unless it is strongly corroborative of the actor's criminal purpose.'" Workman, 90 Wn.2d at 451 (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). "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.

The State did not introduce evidence – that is evidence strongly corroborative of a criminal purpose and its accompanying state of mind – that would prove that Givens **attempted** to lure anyone in this case, as it did not prove that Givens' invitation was strongly corroborative of an intended criminal purpose. There was no "conduct" or "words" by Givens, in addition to the "invitation," proven by the State. Givens testified that he was at the park for the purpose of drinking his beer, that he is homeless and did not want to be hassled by the police, or have someone call the police, for

drinking in public. The State's witnesses all seen Givens drinking his beer. 1RP 56, 57, 113, 126. The State had to prove beyond a reasonable doubt that Givens' intent in calling some children over to play was to lure them into an area obscured from public view. A public park is one of the few places a homeless person can go to without being hassled for loitering or trespassing, and a public park is for everyone's use, including homeless men.

The State's witnesses saw Givens drinking his beer, sitting, standing, etc. in an area of the park that was not the most readily seen area of the park but at the same time could be seen by the State's witnesses and any other member of the public who happened to be in the park.

Givens called some children to play with a boy named Cory (a member of the public), who had had a conversation with Givens and was in close proximity to Givens. Cory was playing alone and Givens felt compassion for Cory because Cory was playing by himself, and this reminded Givens of how sad his son sometimes felt about playing alone. After talking with Cory, Givens decided to call a group of children over to play with Cory; he told Cory he was

going to do this. 1RP 198-203. Givens explained to Officer Millard at the time of the incident that he told Cory this; Officer Millard testified as follows:

Q. (By Mr. Harvey) And did Mr. Givens indicate to you in any way having a discussion with any boys 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. Givens made other statements to Officer Millard, but Officer Millard could not understand what Givens was saying. 1RP 226.

See also CP 64. D.V-W [Dana] testified at her deposition at page 4 as follows.

Kurtz: Okay. Who what, what did he say do you recall? Um do you remember his exact words or something close?

D.V-W: All he really did was say come here little girls and come and play with me.

Kurtz: Okay is that what he said, is that what you remember?

D.V-W: **He said, he told (inaudible) the little boy he told us to come over there because he knows us from somewhere and we don't know him.**

Dana also testified at trial 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.**

IRP 123.

Both Dana's and Officer Millard's testimony are strongly corroborative of and support Givens' testimony that he had a conversation with Cory and called a group of children to play with

Cory. Givens called children to come play with Cory because he felt compassion for Cory, who was playing alone. Givens has a son about the same age as Cory who is always concerned about playing by himself, so he was in turn concerned about Cory sitting by himself, and playing by himself, thinking that maybe Cory did not want to be by himself. 1RP 202-203. Although in hindsight Givens' actions may have been inappropriate or foolish in this day and age, his only intention in calling children over was to invite them over to play with Cory. As Givens explained to his trial attorney, he comes from a different generation where fears of "stranger danger" were not so prevalent, it was common for adults (strangers) to speak to children, for children to go trick or treating and walk places by themselves, etc., so he did not stop to think at the time that calling children over to play with Cory may have been inappropriate or not well received. Such an invitation, however, was neither unlawful nor attempted luring.

Givens' intent in coming to the park was to drink his beer – he had no other place to go after all. 1RP 197-200. Givens' intent in calling the children over was not an intent to lure but was done out

of compassion for Cory. 1RP 202, 203. There is more than enough reasonable doubt as to the truth of Givens' testimony that he called children over to play with Cory.

Cory could see the area in question where Givens was located in the park when Givens called out to the children because he was climbing a tree next to Givens. Dana, a State witness, corroborated this and testified as follows in this case:

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. There is more than reasonable doubt that Cory, a member of the public, could see Givens from his vantage point in the park, and that Cory was present when Givens called the children over, a

fact testified to by Dana IRP 123. Thus, the State did not prove an element of its case that it was required to prove in order to convict Givens, and the trial court's conviction of Givens should be reversed and the case against him dismissed.

(2) OBSCURED FROM PUBLIC VIEW (Not Proven)

“Public” is not defined by the luring statute but is commonly understood to mean people in a community, state, or nation. For example, when discussing a public park, a public restroom, or public safety, etc., the plain, ordinary meaning of “public” is that a public park or public restroom is for all members of the community. Public health and safety means for the health and safety of all members of the community – the public. Public means the people in the community and includes men, women and children, no matter what their age or gender is, all of whom are members of the “public.” The plain, ordinary, commonly understood meaning of “public” is defined in *The American Heritage® Dictionary of the English Language, Fourth Edition*.⁴ Thus, in this statute the word “public’

1. ⁴ Of, concerning, or affecting the community or the people: *the public good*.

means any member of the public, whether it be a man, woman or child, and the Court may not create ambiguity as to the meaning of the word “public.” If the Washington legislature required that an area, for the purposes of the luring statute, be obscured from or inaccessible to an adult, it would have drafted the statute as such. The legislature’s purpose in enacting the luring statute is to prevent conduct that falls short of kidnapping, *i.e.*, to prevent the danger of a child being “lured” out of sight of any member of the public – presumably the legislature drafted the luring statute this way because any member of the public, whether it be a man, woman or child (the public), is capable of alerting someone to the danger of what might be an attempt to kidnap a child by first luring the child if the child

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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.*
1. The community or the people as a whole.
 2. A group of people sharing a common interest: *the reading public. ...*

were in their view and a perpetrator ordered, lured, or attempted to lure a minor into any area or structure that is obscured from or inaccessible to the public or into a motor vehicle. In any case, if an area is visible or not obscured from the public's (any member of the public) view, an element of luring is not proven.

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 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 we [courts] will not add language to an unambiguous statute even if we [courts] believe the legislature intended something else but did not adequately express it. Watson, 146 Wn.2d at 955. 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” would they not have drafted the luring statute as such?

At trial 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.

Cory [the boy] had the children in his view when Givens spoke to the children because he was climbing a tree by Givens. Dana also remembers seeing two other children at the park, Machala and McKenzie, a guy playing basketball, and a guy walking a dog at

the time of the incident. CP 64, D.V-W, page 8. The area Givens was located in the park was next to a chain link fence with several houses directly behind the chain link fence. 1RP 199. Givens testified that he had seen approximately six or seven children at the park and adults as well. 1RP 209, 216. Officer Millard had sent an older kid [who was at the park] to get Cory's father. The babysitter Brianna indicated that she saw other adults walking in the park as well, but she did not remember exactly when she saw them, 1RP 44, as she had been talking on her cell phone to Dana's mom when she first arrived at the park, and later she did not want to look directly at Givens at his location in the park when she got up from the bench she was sitting. Brianna was not really paying close attention to other people in the park before Givens spoke to the children because she was talking on her cell phone and later blocked a portion of the park out of her view after Givens spoke to the children because she only wanted to use her side view when looking at Givens to avoid looking directly at Givens at his location in the park. 1RP 55-57.

As the State's witnesses testified, Cory was climbing a tree right next to Givens, there were other adults walking in the park, a

guy playing basketball, Machala and McKenzie [two children], a guy playing basketball [possibly the guy Officer Millard sent to get Cory's father], and a guy walking a dog at the time of the incident. All of these members of the public would have been able to see the Givens at the area in question, and Cory, Taylor and Cassidy definitely seen Givens at his location when he called the children; therefore, the State has not proven this element of attempting luring because members of the public could see Givens at his location in the park. Givens was convicted of one attempt of luring as to Dana. Cassidy and Taylor were playing alongside Dana. Dana could see Givens in the area in question, but she was not paying attention. She could see him walking, standing, sitting and drinking his beer 1RP 29, 36, 37, 43, 56, . The other children also testified that they could see Givens. Cory could see Givens because he was playing close to Givens, talked to Givens and was climbing a tree by Givens. 1RP 123. The area Givens was located in the park was not obscured from public view because members of the public could see him at his location in the park.

Using the plain and ordinary meaning of the words "public"

and “obscured,” in the luring statute, the State has not proven that Givens attempted to lure Dana into an area obscured from public view because members of the public could or did see Givens in his location, the area in question.

(3) LURE AND LURING (Not Proven)

Lure and Luring are not defined in the statute but have been interpreted by Washington courts. In State v. Dana, 84 Wn. App. 166 (1996), the Court opined as follows:

THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE defines the verb "lure" as "[t]o attract by wiles or temptation; entice." Immediately following this definition is a list of synonyms and an explanatory note indicating a connotation of peril: "These verbs ['lure' and its synonyms] mean to lead or attempt to lead into a wrong or foolish course, as of action." We hold that the word "lure" in this statute is not void for vagueness. It is sufficiently definite to inform a person of ordinary intelligence of what conduct the statute proscribes. It is true that the statute does not define the word "lure." But a commonly understood use of the word that is stated in the dictionary is to "entice." Moreover, the connotation of the word "lure" amplifies that meaning by implying that one who lures another leads that person into a course of action that is wrong or foolish under the circumstances. We think it is plain that the use of the word "lure" in this statute is intended to prohibit a defined class of persons (one unknown to the minor or developmentally disabled person and without the consent of the minor's parents or the disabled person's guardian)

from enticing or attempting to entice a protected person into a specific place (here, a car). This combination of the connotation of the word "lure" and the statutory elements of the offense is sufficient to give fair notice of what conduct is proscribed.

[9] In addition, the location of the luring statute in the criminal code clarifies its meaning. When evaluating constitutional vagueness challenges, we "look at the whole statute in the context in which it appears in the criminal code." . . .

Similar analysis applies to the luring statute. Its location in Chapter 9A.40, entitled, "Kidnapping, Unlawful Imprisonment, and Custodial Interference," adds further clarity to the wording of the statute. Like the second degree attempted kidnapping statute upheld against a vagueness attack in *State v. Billups*, **the luring statute targets conduct that falls short of the force necessary to constitute abduction.** Because of the vulnerability of children and developmentally disabled persons, strangers are prohibited from luring them out of **public view**. The statute gives clear notice of proscribed conduct.

(citations omitted). (Emphasis added) See also State v.

McReynolds, 142 Wn. App. 941 (2008) at 948 (citing Dana).

Givens was arrested for saying "come here . . . come talk to me," which is an invitation and nothing more. Were Givens' constitutional rights to freedom of speech guaranteed by the First Amendment and Article 1, Section 4 of the Washington Constitution violated when he was arrested for pure speech only and no unlawful conduct was involved, *i.e.*, there was no witness statements made to

the arresting officer of any attempt by Givens to induce, entice, persuade or lure a minor to accept the invitation to come here, come talk to me, and was RCW 9A.40.090(1) overbroad as applied to Givens because he was arrested for pure speech in violation of his constitutional rights to freedom of speech? Because the evidence is insufficient to establish all elements of RCW 9A.40.090(1), the trial court erred in finding Givens guilty of attempted luring under RCW 9A.40.090(1), as Givens was only exercising his constitutional rights of free speech and no criminal conduct or criminal attempt was proven.

Approximately 5-10 minutes after arriving at the park, the babysitter Brianna heard Givens calling the girls. 1RP 29. The babysitter testified that Givens said "Come here, come here, come talk to me, come talk to me." 1RP 60, 61. Dana also testified that when Givens first spoke to the girls, he said "to come here." 1RP 111, 122, 123. 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.

After the initial invitation, he called the children one more

time. The babysitter Brianna testified that she had Givens in her side view after this initial invitation. 1RP 61.

Immediately after Givens first called the girls, the babysitter moved closer to Givens to tell Givens not to talk to the girls and so she could be closer to the girls; the babysitter then stayed where she could see Givens. 1RP 29, 60, 61.

A few minutes later, Givens spoke to the girls a second time and said “come here, come here,” “basically the same thing.” 1RP 64. As evidenced by the record, the babysitter testified that she told Givens to stop talking to the children twice [1RP 29, 60, 61] and also confirmed the accuracy of the 911 tape for this incident, which 911 recording evidences the fact that the babysitter stated that Givens called children over twice but she thought he might call a third time. 1RP 69, 70. Givens was not angry during this encounter. 1RP 61. The children asked the babysitter what was going on after she spoke to Givens, 1RP 64. The babysitter told the children “it’s okay, just go play.” 1RP 64. The girls just ignored Givens and kept playing when he was talking to them. 1RP 128.

The babysitter indicated that she saw other adults walking in

the park, but she did not remember exactly when she saw them. 1RP 44. The babysitter had been talking on her cell phone to Dana's mom when she first arrived at the park, and she did not look directly toward Givens at his location in the park when she got up from the bench she was sitting on. 1RP 117, 1RP 57. Dana also remembers seeing two other children at the park, Machala and McKenzie, a guy playing basketball, and a guy walking a dog. CP 64, D.V-W, p. 7. Givens was able to see the entire park from his vantage point in the park, 1RP 200, and he observed several other people, including adults, in the park. 1RP 216. Givens' location in the park was not obscured from or inaccessible to the public.

Givens invited some children to come play with Cory; he was very loud in calling the children and could be heard by the babysitter 40 feet away, he made no attempt not to be heard, he was not surreptitious in his manner of calling the children, and there was no secrecy or attempts to avoid detection when Givens called the children – precisely because he did not have a sinister purpose in calling the children. 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. Dana testified that Cory was climbing a tree when Givens called the children over. 1RP 123. Givens did not offer any inducement or attempt in any way to trick, persuade, entice or lure the children to accept his invitation to come play with Cory. 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 living in Snohomish County who did not like to play alone. The children were not scared and just ignored Givens, 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. Further, Cory (who was listed as a victim on the police report) testified that Givens did not harm him in any way. 1RP . Givens' did no attempt to or have the intention to harm children or engage in conduct that falls short of kidnapping. When Officer Millard accused Givens of this, he was understandably angry because he had no intention to and did not lure the children. 1RP

220, 230. Givens believed Millard was coming over to his location in the park to charge him with an open container infraction and made not attempt to leave the park. 1RP 206.

In summary, **there was no testimony from any of the witnesses that Givens offered to play games** (Judge Lewis was the only person to mention games) **or that Givens attempted to persuade, entice, lure, coax or induce Dana to accept his invitation for children to play with Cory.** Therefore, the state has not proven all elements of its case beyond a reasonable doubt, and Givens cannot be found guilty of attempted luring.

Finally, it is important to note that an invitation can be two-parted because a two-part invitation does not turn an invitation into “luring.” Judge Lewis himself said to Dana at trial, “come on up here and have a seat.” 1RP 102. Would these words have been attempted luring if Judge Lewis was not in public view? No. This would be an invitation because there was no enticement, promise, inducement, or attempt to persuade Dana to accept to offer to “come up here and have a seat.” You cannot lure or attempt to lure by accident. There must be an intent to lure. To commit a crime, you

must both have a guilty mind (mens rea) and a guilty act (actus rea). Society should not force a person to examine every possible situation before speaking. People sometimes make errors in judgment in who they speak to, especially after a few drinks. Such errors in judgment are not always criminal, however. Is it against the law to speak to someone who does not want you to speak to them where there is no criminal conduct? Is it against the law to speak to children you do not know? There are people who do not want certain individuals to speak to them –perhaps they are perceived as creepy, they do not like their race or their appearance, etc. Mere public intolerance or animosity cannot be the basis for abridgement of the constitutional rights of freedom of speech, however, and the State should not be permitted to make criminal the exercise of the right to freedom of speech merely because its exercise may be "annoying" or "creepy" to some people. If this were not the rule, the right of the people to speak freely in public places, where there is no criminal intent, would be an invitation to discriminatory enforcement against those we find "annoying," "creepy" or "scary" merely because their physical appearance or race is resented by a fellow citizen.

c. Sentence

It was established at the October 5 hearing that this case did not involve sexual motivation; hence, the prosecutor's decision not to file a special allegation of such. Yet the prosecutor added conditions related to sex crimes and drug crimes to Givens' community custody conditions. These conditions that are not crime-related, but the Court entered them as part of Givens' sentence. See Judgment and Sentence. These conditions were not discussed by the Court or ordered at the sentencing hearing. Givens has requested that the trial court modify these conditions. RCW 9.94A.505(5).

2. TRIAL COUNSEL'S FAILURES CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

To prevail on a claim of ineffective assistance of counsel a defendant must prove that his counsel's performance fell below an objective standard of reasonableness and that this deficiency in his counsel's performance prejudiced him. Strickland v. Washington, 466 U.S. 668 (1984). Accord State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

"A defendant need not show that counsel's deficient conduct

more likely than not altered the outcome in the case.” Strickland, 466 U.S. at 693; Thomas, 109 Wn.2d at 226. The Supreme Court recently reaffirmed this point in Woodford v. Visciotti, 537 U.S. 19, 22 (2002).⁵

As stated above, D.A.W. [Dana] testified in a deposition on November 21, 2007 that she saw other people in the park at the time of the incident giving rise to this case, including adults and children; some of these individuals seen Givens or were present at the time Givens spoke to children in the park. Dana also testified at trial and in her deposition that Cory was in the tree next to Givens when he called them over. Did Givens’ trial counsel provide ineffective assistance of counsel when he failed to impeach Dana regarding her prior inconsistent statement that she saw other people in the park, including adults and children, who were present at the relevant times Givens spoke to children in the park, which deficiency constitutes a

⁵ “Strickland held that to prove prejudice the defendant must establish a ‘reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different,’ *id.*, at 694, 80 L.Ed.2d 674, 104 S.Ct. 2052 (emphasis added); *it specifically rejected* the proposition that the defendant had to prove it more likely than not that the outcome would have been altered, *id.*, at 693, 80 L.Ed.2d 674, 104 S.Ct. 2052.” (Bold italics added).

denial of Givens' Sixth Amendment right to effective representation of counsel?

Deficiency Prong. There can be little doubt that trial counsel's failure to impeach witness Dana's trial testimony with her prior inconsistent statements that (1) she saw other people in the park, (2) that she testified that Cory was in the tree when Givens called the children, and (3) that she testified in her deposition that "He said [Givens], he [Givens]told (inaudible) the little boy he told us to come over there because he knows us from somewhere and we don't know him. These statements by State witness Dana at her deposition and in trial corroborate Givens' testimony in this case, and for trial counsel not to impeach Dana was deficient conduct. Trial counsel's failure to impeach witness Millard's trial testimony with his prior inconsistent statement that were other people in the park at the time of the incident is also deficient conduct. Officer Millard stated at trial that there were no other people in the park other than the witnesses. However, in his police report, which he

reviewed during questioning at trial, Officer Millard reported that he had sent an older kid to get Cory's father. It is virtually impossible to think of any strategic reason why trial counsel would not want to impeach the witnesses on these subjects, as it would have helped to further disprove a necessary element of this case -- that there were other children and adults in the park at the time Givens spoke to the children -- exactly what Givens had testified to. In sum, Givens' trial attorney failure to prepare for trial by reviewing important witness testimony in this cases that is based entirely on pure speech and impeach witnesses on very important elements of the alleged crime constitute deficient conduct, was highly prejudicial to the defendant, and constituted a denial of Givens' Sixth Amendment right to effective representation of counsel.

Trial counsel's failure to obtain proof that would have absolutely corroborated Givens' statement of the facts in this case was also deficient. At Givens' initial meeting with trial counsel, he requested that his attorney go see Cory, who could corroborate Givens' statements. When you are dealing with a young child, it is deficient performance on the part of counsel not to immediately

obtain a statement from your child witness. Children's memories fade quickly, and in a case involving pure speech, it is of utmost importance to move as quickly as possible to interview child witnesses.

F. CONCLUSION

Givens' invitation for children to play with Cory was ignorant in this day and age. His invitation may have been well received in a prior generation where speaking to strangers was common. The simple issue, however, is has he committed a crime. It must be proven that Givens had the intent to lure because luring cannot occur by accident, and the law requires that an accused "intend" to lure. Luring cannot occur in a vacuum, and under the facts of this case Givens cannot be found guilty beyond a reasonable doubt. Givens himself has children and completely understands the desire and need for society to protect children at all costs. However, "luring" is but a subset of "exploitation"; they are not co-extensive, and to suggest that Givens' invitation in this case amounts to "luring" would be "throwing the net too wide". It was not proven beyond a reasonable doubt that Givens attempted to lure children into an obscured area

out of public view. Where there is no criminal conduct, a defendant cannot be convicted for something a person thinks they "might" do.

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

DATED this 20th day of June, 2008.



Elijah Givens, Appellant