

Supp. Reply Brief

NO. 39274-7-II

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

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STATE OF WASHINGTON,

Respondent,

v.

FREDRICK K. HAACK,

Appellant.

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COURT OF APPEALS  
DIVISION TWO  
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STATE OF WASHINGTON  
BY Ked  
ATTORNEY

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

The Honorable James W. Lawler, Judge

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SUPPLEMENTAL REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE STATE FAILED TO PROVE HAACK COMMUNICATED WITH B.G. FOR IMMORAL PURPOSES.

Fredrick Haack appeals from convictions for six counts of communicating with a minor for immoral purposes under RCW 9.68A.090 based on a series of email messages he sent to 16-year-old B.G. The state now acknowledges that when viewed individually, "each message may not establish a prima facie case that Pastor Haack communicated with a minor for immoral purposes." Brief of Respondent (BOR) at 6. The state also admits that "no single message" from Haack to B.G. "expressly propositioned" B.G. to engage in sexual misconduct. BOR at 9. According to the state, however, "the volume of [the] suggestive statements was probative of [Haack's] intentions to expose or involve B.G. in sexual misconduct . . . ." BOR at 9. In short, the state admits it could not sustain its burden of proving Haack communicated with B.G. for immoral purposes by relying on any one individual email message.

This is the opposite position the state took during sentencing. In arguing against Haack's assertion the six counts constituted the same criminal conduct, the prosecutor said, "I think here we have six different e-mails that were sent at different times. Each e-mail had different content, required a different thought process, different intent as to what

was going to go into each e-mail." RP (5/1/2009) 3. "It's the state's argument that the e-mails were not part of a simultaneous event. But even if they were, I think they're sufficiently separate in time that a different intent was formed every time he decided to send a separate communication to the victim." RP (5/1/2009) 4.

The trial court agreed with the state in part. The court found counts four through six constituted the same criminal conduct because they were based on email messages sent one after the other on the same night. But the court considered all other counts separate because they were "broken up by time." RP (5/1/2009) 11-12. Haack's offender score was calculated as nine. Id. at 12.

But now the state wants this Court to consider all the emails together in determining whether there was sufficient evidence to sustain the six convictions. This Court should not condone such duplicity. Judicial estoppel precludes a party from asserting one position in a court proceeding and then later, in a different court, seeking an advantage by taking a clearly inconsistent position. Cunningham v. Reliable Concrete Pumping, Inc., 126 Wn. App. 222, 224-25, 108 P.3d 147 (2005). The rule preserves respect for judicial proceedings by avoiding inconsistency and duplicity, and prevents a party from playing "'fast and loose'" with the

courts. Haslett v. Planck, 140 Wn. App. 660, 665, 166 P.3d 866 (2007) (citations omitted).

Haack recognizes our Supreme Court questioned whether the theory of equitable estoppel, of which judicial estoppel is a subset, should be extended to criminal prosecutions and rejected its application to plea negotiations. State v. Yates, 161 Wn.2d 714, 738, 168 P.3d 359 (2007), cert. denied, 128 S.Ct. 2964 (2008). Haack is not, however, asking this Court to summarily reject the state's contrary argument presented here. Instead, Haack points out the state's reversal of field as its own admission it cannot sustain the six convictions based on the evidence. By asking this Court to consider all the emails to answer the sufficiency question, the state essentially argues the evidence is sufficient to affirm one conviction, not six. At the least, then, this Court should reverse five of the six convictions.

But for reasons previously discussed, all the convictions should be reversed because the state's remaining contentions do not defeat Haack's sufficiency challenge. Citing State v. McNallie, 120 Wn.2d 925, 933, 846 P.2d 1358 (1993), the state argues RCW 9.68A.090 prohibits communication with children "for the predatory purpose of promoting their exposure to and involvement in sexual misconduct." BOR at 5. The state and Haack agree this is the holding in McNallie. BOA at 6. Where

the parties differ, however, is in the interpretation of Haack's email messages as applied to this statute. More specifically, Haack disagrees with the state's claim that "[w]hen viewed as connected communications with B.G., the messages reveal their veiled, unwritten substance." BOR at 6.

The state reaches this conclusion by reasoning that (1) the statute does not require proof Haack "expressly invited" B.G. to engage in sexual misconduct; and (2) a jury need not confine itself to the literal wording of the communication. BOR at 6. In support of the second assertion, the state relies on State v. Wissing, 66 Wn. App. 745, 747-748, 833 P.2d 424, review denied, 120 Wn.2d 1017 (1992).

Wissing showed a 12-year-old boy "Playboy-type" magazines, asked him to view the magazines in the bathroom, asked him questions about the photographs in the magazines, if he knew how to masturbate, and whether he could see the boy's pubic hair. Wissing, 66 Wn. App. at 747-48. The issue before the court was whether RCW 9.68A.090 was unconstitutionally vague as applied to the defendant's conduct. Wissing, 66 Wn. App. at 747. Along the way to finding it was vague, the court found it was "reasonable to infer from the boy's testimony that Wissing invited the minor to engage in sexually explicit conduct for purposes of his own sexual gratification." Wissing, 66 Wn. App. at 752.

According to the state, this statement suggests a jury is not limited to "a literal reading of the messages content" to determine whether the communication is for "immoral purposes." BOR at 6. As often happens with statements taken out of context, however, the state here misrepresents the Wissing court's holding. The context of the court's conclusion follows:

We reject Wissing's argument that the record contains no evidence supporting an inference that the alleged communication was for purposes of sexual gratification. It is reasonable to infer from the boy's testimony that Wissing invited the minor to engage in sexually explicit conduct for purposes of his own sexual gratification.

Wissing, 66 Wn. App. at 752. Therefore, the issue was whether Wissing uttered the statements for purposes of sexual gratification, not whether they were for immoral purposes. This is not the issue here.

The second case upon which the state relies is State v. Hosier, 157 Wn.2d 1, 133 P.3d 936 (2006). The communication at issue there was the following message written on child-sized pink underwear and stuck in a fence at a day-care center:

"I love baby sitting this little girl 7 yr old and already as nasty as most big girls ever get she does everything but fuck and real soon I'll be getting it all she is ready and willing just got to open up the gold mine to heaven ... daddy.

State v. Hosier, 124 Wn. App. 696, 701, 103 P.3d 217 (2004). The Supreme Court found the message sexually explicit. It also held it was a

symbolic message using little girl's underpants, bright pink in color to attract children. The conduct of placing attractive and sexual objects directed at children, combined with the sexual message, written in black marker and plainly visible, illustrates Hosier's overall intent: to convince a young girl to take off her underpants to engage in sexual misconduct.

Hosier, 157 Wn.2d at 14.

The state claims Hosier is important because the court found the message was displayed for "immoral purposes" even though it contained no "literal invitation to engage in sexual contact." BOR at 8. Again, the state distorts the Court's holding by taking it out of context. The Court was not considering whether the messages were for immoral purposes. Instead, the question was whether there was insufficient evidence to support the conviction because the minors who received the communication were too young to be able to read the message. Hosier, 157 Wn.2d at 12-14. The Court concluded the evidence was sufficient:

Viewing the evidence in the light most favorable to the State, we hold that Hosier's message, both a written message and a symbolic message, was transmitted and received by the children. Accordingly, we hold that there was sufficient evidence to support Hosier's conviction for communicating with the minors at the day care for an immoral purpose.

Hosier, 157 Wn.2d at 14.

For these reasons, neither Wissing nor Hosier stands for the propositions for which the state cites them. The state's assertion that the derived meaning from communications considered under RCW 9.68A.090

"is between the lines, not within them" is unsupported by authority and should therefore be rejected. BOR at 9.

In any event, the state's attempt to establish Haack's implicit "overall intent" when reading the email messages together was to engage in sexual misconduct falls short. When read individually or in combination, the messages pale in comparison to those in cases relied upon by the state. Hosier (desired intent to have sexual intercourse with 7-year-old girl); McNallie, 120 Wn.2d at 927-28 (appellant asked where he could get "hand jobs" for money and gave live demonstration to young girls); State v. Aljutily, 149 Wn. App. 286, 290-91, 202 P.3d 1004 (appellant described how he and purported 13-year-old email message recipient would have oral sex, vaginal sex, and anal sex, and sent her pictures of his penis using his webcam and of him masturbating), review denied, 166 Wn.2d 1026 (2009); State v. Schimmelpfennig, 92 Wn.2d 95, 97, 594 P.2d 442 (1979) (appellant stopped a group of three young girls, attempted to lure 4-year old in group into his van, and asked her in explicit terms to engage in various sexual acts with him); Wissing (appellant wanted to see boy's pubic hair and discussed masturbation); State v. Luther, 65 Wn. App. 424, 830 P.2d 674 (1992) (before each of two acts of fellatio, 16-year-old appellant asked 16-year-old girl whether she was going to perform fellatio as she had previously offered).

None of Haack's messages or pattern of messages, even when read in the light most favorable to the state, suggests a desire to have sexual intercourse with B.G., to see B.G.'s intimate body parts, to expose B.G. to sexually explicit content, or otherwise to have her join him in sexual misconduct. Because Haack detailed the nature of the messages in his opening brief at 9-12, he need not repeat himself here. All the communications "of a sexual nature" sent by Haack to B.G. involved conduct that would be legal if performed. Under this Court's decision in Luther, the convictions must therefore be reversed. In addition, the "implied" meaning of the emails does not constitute an invitation to engage in "sexual misconduct." In summary, the state failed to prove any violations of RCW 9.68A.090. The convictions should be reversed.

2. THE STATUTE IS VAGUE AS APPLIED TO HAACK'S CONDUCT.

The state declares that McNallie's limiting construction of RCW 9.68A.090 "is not impermissibly vague since it places a person of ordinary intelligence on notice of what conduct is prohibited, and provides a standard of enforcement for law enforcement officials." BOR at 16. The state cites State v. Pietrzak, 100 Wn. App. 291, 295, 997 P.2d 947 (2000) for this proposition. In fact, the Pietrzak court held

Placed in context, a person of common intelligence need not guess as to the meaning of RCW 9.68A.090. He or she is

subject to the proscription and penalties under RCW 9.68A.090 *by observing and photographing a nude 16-year-old for the purposes of sexual stimulation, or as part of a quid pro quo*. RCW 9.68A provides ample notice of the Legislature's intent to prohibit sexual exploitation and misconduct with persons under the age of 18.

Pietrzak, 100 Wn. App. at 295-96 (citations omitted) (emphasis added).

As made evident by the emphasized portion of the above holding, the "context" to which the court referred was the trial court's factual finding.<sup>1</sup> The trial court found Pietrzak "employed, authorized, or caused [C.S.], then age 16, to engage in sexually explicit conduct," by exhibiting her unclothed body for "sexual stimulation of the viewer" and photographs. Pietrzak, 100 Wn. App. at 297. The court found this conduct violated RCW 9.68A.040, which prohibited "a person from compelling, aiding, inviting, employing, authorizing, or causing a minor to engage in sexually explicit conduct with the knowledge that such conduct will be photographed." Pietrzak, 100 Wn. App. at 297.

In other words, a person of common intelligence would know he violates RCW 9.68A.090 when he invites or causes a minor to engage in conduct that constitutes a violation of any other section of RCW 9.68A.

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<sup>1</sup> See City of Spokane v. Douglass, 115 Wn.2d 171, 182, 795 P.2d 693 (1990) ("Vagueness challenges to enactments which do not involve First Amendment rights are to be evaluated in light of the particular facts of each case.").

As Haack stated in his opening brief at 16-17, this is an obvious holding and one easy to apply to like facts.

The problem is the messages in Haack's case were not so sexually explicit. It is therefore much more difficult to conclude a person of common intelligence would know that messages that invite a 16-year-old girl to take her shirt off in some remote location in which she could not be seen, tell whether she is "touching" herself, describe her underwear, or "think about how wonderful it feels to have someone hug you and caress your stressed muscles<sup>2</sup> promote the teen's "exposure to and involvement in sexual misconduct." McNallie, 120 Wn.2d at 933.

To resolve this problem, the state first cites to the dictionary definition of "misconduct" ("improper conduct; wrong behavior"), BOR at 17. This adds nothing to the analysis.

The state then concludes Haack's messages "are not so different" from those in McNallie, Schimmelpfennig, and Pietrzak. BOR at 18. This is a remarkable assertion, for there is one obvious and crucial difference between Haack's communications and those in the published cases – Haack makes no mention of explicit sexual activity, or of any specific sexual activity at all. In other words, Haack's messages fall outside the contemplated scope of the statute.

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<sup>2</sup> These are parts of messages cited in Haack's opening brief at 9-12.

Because of this, the state is forced to stretch the language of RCW 9.68A.090 to fit facts that are not within its scope. When this happens, the statute becomes ambiguous and, in Haack's case, vague. See State v. Chester, 133 Wn.2d 15, 21-22, 940 P.2d 1374 (1997) (in finding accused's conduct fell outside prohibitions of RCW 9.68A.040, Court held, "statute becomes ambiguous, and subject to constitutional challenges for vagueness, only if its language is stretched and twisted to fit facts not clearly within its scope.").

RCW 9.68A.090 is vague as applied to the facts of Haack's case. An ordinary person would not be able to determine Haack's messages were "for the predatory purpose of promoting" B.G.'s "exposure to and involvement in sexual misconduct." As applied to the facts, the statute also invites arbitrary enforcement. This Court should reverse Haack's convictions.

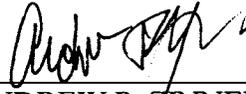
B. CONCLUSION

For the reasons cited herein and in his Brief of Appellant, Haack requests this Court to reverse his convictions and remand for dismissal with prejudice.

DATED this 7 day of April, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 39274-7-II
	)	
FREDERICK K. HAACK,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 7<sup>TH</sup> DAY OF APRIL 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] LORI SMITH  
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**SIGNED** IN SEATTLE WASHINGTON, THIS 7<sup>TH</sup> DAY OF APRIL 2010.

x *Patrick Mayovsky*

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