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DIVISION III

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STATE OF WASHINGTON

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NO. 399318-II
Cowlitz Co. Cause NO. 08-1-00508-6

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN CLINTON STRIBLING,

Appellant.

BRIEF OF RESPONDENT

SUSAN I. BAUR
Prosecuting Attorney
JASON LAURINE/#36871
Deputy Prosecuting Attorney
Attorney for Respondent

Office and P. O. Address:
Hall of Justice
312 S. W. First Avenue
Kelso, WA 98626
Telephone: 360/577-3080

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I. ANSWERS

- I. THE STATE PROVIDED SUFFICIENT EVIDENCE TO SHOW THAT STRIBLING INVITED A 12 YEAR OLD GIRL TO TAKE SEXUALLY EXPLICIT PHOTOGRAPHS OF HER SELF.**

- II. COUNT II IS A GROSS MISDEMEANOR, BUT IT WAS DETERMINED TO BE SAME CRIMINAL CONDUCT AS COUNT I AND HAD NO AFFECT ON STRIBLING'S OFFENDER SCORE.**

- III. THE CONVICTIONS FOR COUNTS IV THROUGH VIII SHOULD REMAIN FELONIES BECAUSE THE STATE SHOWED THE DEFENDANT MADE HIS COMMUNICATIONS THROUGH ELECTRONIC MEANS AND THE TRIAL COURT DID NOT PERMIT POST TRIAL AMENDMENT OF THE INFORMATION.**

II. STATEMENT OF THE CASE

K.C. was an 11-year-old girl from Longview, Washington, when she started an online friendship with Ben Stribling, a man in his mid 20's, in the beginning of 2008. CP 91, FF 4. The two met in online chat rooms and on Teenspot.com, an online community for people between the ages of 13 and 23. CP 91, FF 15-26. K.C.'s Teenspot home page contained her age and identified her as a 13 year old girl. Exhibit 126; CP 91, FF 25, 26, and 94. The relationship then progressed to personal emails. K.C. used an

email address Twitching911@yahoo.com and Stribling used the email address loving_passionate_guy@yahoo.com. CP 91. No other people used these accounts. This relationship continued through March, 2008, and into April, 2008.

At some point prior to March 5, 2008, K.C.'s mother, Elaine Crabbe, installed spyware onto her home computer. CP 91, FF 2. She did this in order to observe what her daughter was viewing online. She immediately became aware of the emails sent between her daughter and Stribling. CP 91, FF 3. Concerned about the content of the emails, she contacted the Cowlitz County Sheriff's Office. CP 91, FF 6.

Elaine Crabbe provided printouts to sheriff deputies of the 125 emails she observed sent between K.C. and Stribling. CP 91, FF 10-11; Exhibits 1-125. During a series of emails sent between March 11, 2008 and March 12, 2008, Stribling discussed human needs. He informed K.C. that he had not had "sex in 2 years now. We humans have needs that we need to meet. What would you do to meet my needs?" To which K.C. replied "IDK.....what would you want me to do?" Exhibit 43. Stribling later asked "would you have sex with me?" And K.C. replied "maybe.....yes." Exhibit 46. Stribling then asked "Why maybe?" K.C. replied that the "yes" was the actual answer. Exhibit 47. In the next email, Stribling states "O.K. Well, I miss talking to you when you go.

Since we aren't close to each other, what can you do? Can you send some pictures?" K.C. replies "I will as soon as I upload some to my computer...but only if you send me some. Deal? NO NUDITY. Deal?" Exhibit 48. Disappointed, Stribling then states "Well, I want the pictures to help me out with my needs." Exhibit 49. In response, K.C. stated that her mom would find out and she would be "dead meat." Exhibit 49.

Later on that day, K.C. attempted to contact Stribling. She sends an email asking if he was around because she needed to talk after a bad day. He consoles her, telling her that if he was there he would give her a foot massage and make her some soup. K.C. thinks that is sweet. Immediately, Stribling asks "So, can you send me some pictures?" When denied, he asks K.C. "why not?" She then tells him "I DON'T WANT TO TAKE PICS OF MYSELF LIKE THAT!!!!!!!!!!!!!!!!!!!!!! Sorry" Stribling then pursued further, stating "you won't get caught, because the pictures will be gone before your mom see them. Truth me, babe! I just want you to help me since we aren't close enough to help me in person." He then continued, writing "I thought you were a good friend, but I guess you were lying to me when you said you would help me. It's pretty easy to say you would help me out in person, because we don't live close to each other. But when I find a way for you to help me on her [sic], it's a flat NO."

In another email to K.C., Stribling asked her if she would let him touch her while she was nude. Exhibit 3. He later asked her if she would strip nude in front of him for \$100. Exhibit 5. Stribling then asked K.C. "If someone dared me to go down on you, what would you say and do?" Stribling then states, "I hope you are a good friend to me. So, would you let me go down on you?" Exhibits 19-22. He asked her whether she would let him masturbate her for \$500, Exhibit 27, and whether she would have sex with him for \$500. Exhibit 31. Stribling later asked K.C. if she would give him a blow job. Exhibit 45.

After viewing the emails, Detective Schallert contacted Yahoo! regarding the email account loving_passionate_guy@yahoo.com, which had a user name of Ben K. CP 91, FF 29. She determined that several IP addresses were assigned to a particular phone number with a billing address in Elbert, Colorado. CP 91, FF 31. The names on the billing address were Richard and Greta Stribling, who were later determined to be Stribling's parents. CP 91, FF 30. Detective Schallert determined that Ben Stribling lived at the same Elbert, Colorado address. Detective Schallert then contacted Detectives Clay Blackwell in Colorado Springs.

On May 14, 2008, Detective Blackwell and other Internet Crimes Against Children (ICAC) officers executed a search warrant on the Elbert, Colorado address. CP 91, FF 32. They found several items indicating that

Ben Stribling lived at the residence, including a letter addressed to him. They also found several computers, which were seized. CP 91, 33-35.

Detective Blackwell observed the seizure of the computers and personally delivered them Detective Scott Grinstead for computer forensic analysis. CP 91, 35. Detective Grinstead performed the forensic analysis of the computers. CP 91, FF 62. He first made a mirror image copy of the hard drive in order to prevent any error or destruction of the original evidence. Detective Grinstead then used several computer forensic programs, including ITK, to read the information on the hard drive. During his analysis, Detective Grinstead looked for several key terms, but “twitching 911” and “loving_passionate_guy” were the primary terms he sought. “Twitching911” resulted in 434 hits out of 80 files searched within the hard drives of the computers found in Stribling’s home. The search for “loving_passionate_guy” resulted in 42,609 hits out of 1700 files. CP 91, FF 63.

In addition to the file hits, Detective Grinstead found several complete emails sent between “loving_pasionate_guy” and “twitching911”. In fact, the email in exhibit 22, “I hope you are a good friend to me. So, would you let me go down on you?” was found in a complete state on the hard drive of a Sony Vaio laptop. CP 91, FF 64.

Simultaneous to the execution of the search warrant, Ben Stribling was arrested. After obtaining the evidence from the house, Detective Blackwell interviewed Stribling. CP 91, FF 36. Stribling admitted to using the email account loving_passionate_guy@yahoo.com. Stribling then discussed the difficulty of meeting women. CP 91, FF 39. He admitted that he preferred a specific type of genitalia likely to be found in younger girls. He said that he preferred to talk to younger, teen females. CP 91, FF 41.

Detective Blackwell then asked Stribling about his conversations with twitching911@yahoo.com. CP 91, FF 44. He questioned about asking a 12-year-old girl whether she would give him a blow job for a hundred dollars, or whether she would have sex with him for a hundred dollars. Stribling replied that “those types of questions all connect trying to help me.” CP 91, FF 45. Stribling admitted to telling Twitching911@yahoo.com that he would take a bus out to Washington to see her. CP 91, FF 46. Detective Blackwell then confronted Stribling about his actions, stating “I think you understand this very well, is that talking to an underage girl on line and asking her to send pictures of herself naked, asking her to give you a blowjob, or have sex with you is illegal, you can’t do that.” Stribling replied: “I thought asking wouldn’t hurt, it’s doing that does.” CP 91, FF 46-49.

Detective Blackwell did not agree. He accused Stribling of planning to go to Washington to have sexual encounters with an underage girl. Stribling responded that he did not understand how other people can do that and not get in trouble. Stribling then stated that if the situation happened, he probably would not have sex with her. Blackwell again cornered Stribling, stating “you were talking about, and trying to figure out, how you could afford a bus ticket to Washington to not have sex with her?” Stribling then responded “I honestly was thinking, I was considering, if I went out there and things didn’t work out as planned, I could be in trouble.” CP 91, FF 50-51.

At trial, Chanteel Sadley testified that she had email conversations with Ben K, who used the email address loving_passionate_guy@yahoo.com. She testified that she had received a series of emails from Ben K, and that the emails were identical to ones within the 125 emails entered into evidence. CP 91, FF 92, 93. She also testified that Ben K informed her that his real name was Ben Stribling, she identified a photograph sent to her by Ben K. Exhibit 133. She then made an in court identification of Stribling as the same person in the photograph. CP 91, FF 54-61.

Karoline Borrega-Kearns and Leif Strunk, both testified at trial. Borrega-Kearns was Stribling’s juvenile probation officer, and Strunk was

Stribling's current probation officer. They testified that Stribling was provided a deferred sentence for aggravated incest and that the deferred sentence had been revoked. CP 91, FF 65-71.

Finally, Stribling's parents testified at trial. They both agreed that Stribling resided at the Elbert, Colorado residence during the time the emails had been sent. They also denied ever using the email address `loving_passionate_guy@yahoo.com`. Stribling's father testified that the computers removed from the residence belonged only to Stribling and that he never used them. CP 91, FF 72-89.

Procedural history

The State brought charges against Stribling on May 12, 2008. CP 1. The original charging information charged one count of sexual exploitation of a minor, one count of attempted possession of depictions of a minor engaged in sexually explicit conduct, and eight counts of felony communication with a minor for immoral purposes. CP 1. In the eight counts of communication with a minor for immoral purposes, the State charged Stribling with two alternatives: 1) that he had been convicted of a prior sex offense, or 2) the communications were made through electronic means. CP 1; RP 138. The original charging information also listed same, but separate "on or about" dates for each charged alternative means in the

eight charges of felony communication with a minor for immoral purposes. CP 1.

On June 25, 2009, the trial court required the State to disclose the evidence it intended to use at trial. RP 130. At the same time, defense counsel requested a bill of particulars. On July 6, 2009, the State moved to amend the original charges. It amended the charges to include one count of sexual exploitation of a minor, one count of attempted possession of depictions of a minor engaged in sexually explicit conduct seven counts of felony communication with a minor for immoral purposes. CP 37. Along with amended charges, the State also filed a document entitled “Evidence Pertaining to Amended Charges.” CP 38; RP 135. This document enumerated specific emails and email threads the State intended on using to prove its case; it included dates and times of the specific emails. Stribling accepted the amended charges and the document “Evidence Pertaining to Amended Charges” without objection. RP 136.

The State based Counts 1 and 2 on emails sent between March 11, 2008, and March 12, 2008, which included Exhibits 29, 30, 41, 42, 43, 46, 47, 48, 49, 50, and 51, the basis for the trial court’s finding of guilt. CP 37 and 71; CP 91, FF 95. The State based Count 3 on Exhibit 3; Count 4 on Exhibit 5; Count 5 on Exhibits 19, 20, 21, and 22; Count 6 on Exhibit 27; Count 7 on Exhibit 45; Count 8 on Exhibit 31. CP 37, 71 and 91.

Mr. Stribling waived a jury trial. Trial began on July 27, 2009 and lasted four days. On the third day of trial, the State filed a new document entitled "Evidence Pertaining to Amended Charges," which only changed a term used within the evidence presented. CP 71; RP 503. The term was changed from "IP address" to "time stamp." CP 37 and 71; RP 504. The State did not change the dates or the times associated with the emails. CP 37 and 71; RP 504. Defense counsel accepted the document and did not object to its entry into the record. RP 504.

On July 30, the State rested and proceeded to closing arguments. The State argued the emails associated with the documents entitled "Evidence Pertaining to Amended Charges." CP 37 and 71. The trial court then found Mr. Stribling guilty of eight of the nine charged counts, acquitting him of the final count of felony communication with a minor. RP 675-703. During trial, the State had entered 125 emails into evidence, and the trial court found that Exhibits 29, 30, 41, 42, 43, 46, 47, 48, 49, 50, and 51 satisfied Counts 1 and 2. CP 91, FF 95. It also found that all the emails were electronic communications, sent over the internet. CP 91, FF 27. The trial court found that the emails sent between Stribling and K.C. were electronic communications. CP 91, FF 28; RP 722-732.

On September 25, 2009, the State did request the trial court to allow it to amend the information to conform to the "Evidence Pertaining

to Amended Charges.” RP 1-8. The trial court did not consider the issue at that time, but set over for argument. RP 9. At no time prior to this hearing did defense counsel object to the charging information.

On October 9, 2009, Mr. Stribling was sentenced to concurrent sentences. The trial court determined that the counts one and two were same criminal conduct. The trial court then found that counts three through eight were not same criminal conduct. RP 803-04. Based on Mr. Stribling’s offender score of 19, the trial court ordered the defendant to serve 120 months on count one, no time on Count two, because it was same criminal conduct as count one, and 60 months on counts three through eight. RP 803-04; CP . The trial court ordered the sentences to run concurrent; consequently, Mr. Stribling was ordered to 120 months of total confinement. CP ; RP 803-04.

Prior to sentencing, the State argued the issue of the inconsistent dates on the charging information. RP 738-44. The State argued that the inconsistencies were scrivener’s errors and the errors did not prejudice Stribling. RP 738-44. The trial court considered the fact Stribling did not object to the amended charging information, in determining that it should review it in favor of validity and find it legally sufficient. RP 752 and 756. The trial court noted that each count was separate and distinct. RP 754-55. The trial court then ruled that the “Evidence Pertaining to Amended

Charges” apprised Stribling of the specific emails or electronic communications and the dates that would be relied upon. RP 754-55. Consequently, the trial court held that Stribling could not deny the fact he was aware of that the charging date was the first date set forth in each count. RP 755. Also, the trial court pointed to the fact both the State and defense counsel argued the dates within the supplemental document, “evidence pertaining to amended charges,” which indicated knowledge of the dates relied upon by the State and a lack of prejudice to Stribling. RP 755. Moreover, the trial court determined that the date and time were not essential elements of the crime. CP 87, FF 9; RP 754-55. Finally, the trial court ruled that while the inconsistencies were not strictly scrivener’s error, Stribling was not misled by the errors in the charging language. CP 87, FF 13-15; RP 756. The court did not allow a post verdict amendment of the charging document.

III. ARGUMENT

I. IT IS SUFFICIENT TO CONVICT STRIBLING SEXUAL EXPLOITATION OF A MINOR WHEN THE STATE PRESENTED EVIDENCE TO SHOW THAT STRIBLING INVITED A MINOR GIRL TO TAKE SEXUALLY EXPLICIT PHOTOGRAPHS OF HERSELF.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wash.2d 192, 201, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all the inferences that can reasonably be drawn from the evidence. *State v. Theroff*, 25 Wash.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wash.2d 385, 622 P.2d 1240 (1980). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Partin*, 88 Wash.2d 899, 906-07, 567 P.2d 1136 (1977).

Stribling was charged and convicted of one count of sexual exploitation of a minor. RCW 9.68A.040. The State did not charge the alternative means of committing the crime because it was not required to do so, but did pursue a theory that the defendant was guilty under RCW

9.68A.040(1)(b) for inviting a minor girl to take nude photographs of her self. The trial court found that Stribling invited K.C., a minor female, to take and then send to him nude photographs of her self. It also found that any nude photograph of minor female is sufficient to meet the definition of sexually explicit conduct. CP 91.

Under RCW 9.68.040(1)(b), a person is guilty of sexual exploitation of a minor if the person: aids, invites, employs, authorizes, or causes a minor to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance. Sexually explicit conduct includes, but is not limited to, depictions of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer. RCW 9.68A.011(4)(f). Furthermore, it is not necessary that the minor know that she is participating in the described conduct, or any aspect of it. RCW 9.68A.011(4)(f).

In *State v. Chester*, 133 Wash.2d 15, 940 P.2d 1374 (1997), the Supreme Court affirmed the reversal of the defendant's conviction for sexual exploitation of a minor. There the State presented evidence that the defendant only placed a video camera in positions within his stepdaughter's room in order to obtain video of her undressing. 133 Wash.2d at 17-18. The Court held this was insufficient because the State

failed to show that the defendant aided, invited, employed, authorized, or caused his stepdaughter to engage in sexually explicit conduct. 133 Wash.2d at 22-23.

The Court held that, necessarily, the defendant must assist, interact, influence or communicate with the minor victim in order to have her engage in sexually explicit conduct. 133 Wash.2d at 22. Because the acts of “aid, invite, employ, authorize, or cause” were not defined by the statute, the Court considered their dictionary definitions. “Invite” means to offer an incentive or inducement or to request the participation or presence of a person. *Id. citing* Webster’s third New International Dictionary 1190 (1986). The Court considered the plain meaning of each act, noting that when a defendant invites a minor to engage in sexually explicit conduct he does so either by request or inducement. 133 Wash.2d at 23. The Court noted that nowhere in the record did the defendant invite (request or induce), or cause (brought about, induced or compelled) his stepdaughter to engage in sexually explicit conduct. *Id.* at 23. Clearly, the Court felt that any one of the enumerated acts would have been sufficient to commit the crime.

Unlike *Chester*, the State presented evidence at trial sufficient to show that Stribling tried to influence K.C., a minor female, when he requested that she send him nude photographs of herself to help him with

his sexual needs. Stribling argues that something more is required than inviting a minor female to take a nude photograph of herself. However, the statute states clearly that a person is guilty of the crime when they either “aid, invite, employ, authorize or cause” the sexually explicit conduct to be photographed. RCW 9.68A.040(1)(b).

In *State v. Keena*, 121 Wash.App. 143, 87 P.3d 1197 (2004) a case involving broad statutory language, the Court held that the evidence was sufficient to support a finding of guilt for manufacturing methamphetamine based on evidence that showed numerous items consistent with production were present at the defendant’s home despite the fact no evidence existed to show that methamphetamine was produced. The defendant argued that “without a controlled substance there cannot be a violation of the statute.” 121 Wash.App. at 146. The Court disagreed.

In its analysis, the Court looked to RCW 69.50.101(p) which defines manufacturing. “Manufacturing” is defined as “the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly, or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container.” The evidence showed the defendant possessed several objects and substances necessary to “prepare”

or “process” methamphetamine. 121 Wash.App at 147. The Court felt that a rational trier of facts, applying RCW 69.50.101(p)’s broad definition of manufacture, could find that, given the evidence presented, it was reasonable to find that the defendant was preparing or processing methamphetamine, even though the defendant did not possess the completed drug. 121 Wash.App. at 147-48. The Court held that it was unnecessary for a defendant to possess the final product in order for him to engage in the preparation and processing of a controlled substance. 121 Wash.App. at 148, *citing State v. Davis*, 117 Wash.App. 702, 708, 72 P.3d 1134 (2003); *State v. Todd*, 101 Wash.App. 945, 952 6 P.3d 86 (2000).

RCW 9.68A.040(b) is a similarly broad statute. A person is guilty of sexual exploitation of a minor if he “aids, invites, employs, authorizes, or causes a minor to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance.” RCW 9.68A.040(b). The statute sets out several ways a defendant can commit the crime of sexual exploitation. A defendant could either “aid”, “invite”, “employ”, “authorize”, or “cause”, the minor to engage in sexually explicit conduct. The statute does not require that a defendant both invite and cause, or invite and authorize. The surest indication of legislative intent is the language enacted by the legislature. *State v. Jacobs*, 154 Wash.2d 596, 600, 115 P.3d 281 (2005). Similar to RCW 69.50.101(p), it

is sufficient to prove the crime of sexual exploitation of a minor to show that a defendant only used one of the means available. This is made clear by the word “or” placed between “authorize” and “cause.”

“Invite” is not defined by RCW 9.68A.040(b), therefore, it is given its plain and ordinary meaning unless a contrary legislative intent is indicated. *Ravenscroft v. Wash. Water Power Co.*, 136 Wash.2d 911, 920-21, 969 P.2d 75 (1998). “Invite” means to offer an incentive or inducement or to request the participation or presence of a person. *Chester*, 133 Wash.2d at 22, *citing* Webster’s third New International Dictionary at 1190. If the legislature had intended that a request or an invitation were insufficient to complete the crime of sexual exploitation of a minor, it would have indicated through the statutory language rather than included the word “invite” in the statute.

In the current case, the state showed that Mr. Stribling “invited” the minor K.C. to take photographs of herself. RCW 9.68A.040(b) requires only that Mr. Stribling invite K.C., a minor, to engage in sexually explicit conduct, and that he knew the conduct would be photographed. The statute does not require the completion of the photography session, nor does it require that Stribling possess photographs of the sexually explicit conduct. Indeed, the possession of the sexually explicit

photographs of a minor is a distinct crime, Possession of depictions of a minor engaged in sexually explicit conduct. RCW 9.68A.070.

Consequently, when over a series of emails, Mr. Stribling requested or invited K.C., a minor, to take nude photographs of herself, he committed the crime of sexual exploitation of a minor. While he did not sit down with K.C., or help her pose, or focus a camera, he did invite her on multiple occasions to provide him with photographs to help him with his sexual needs. Moreover, he used increasing sexual language in his emails with her, grooming K.C. in hopes of eventually convincing her to take nude photographs of herself. He knew that K.C. did not have such photographs, yet he persisted to request that she provide them to him, eventually resorting to the use of guilt. In one email, Stribling states:

“I thought you were a good friend, but I guess you were lying to me when you said you would help me. It’s pretty easy to say you would help me out in person, because we don’t live close to each other. But when I find a way for you to help me on her [sic], it’s a flat NO.”

Taken in a light most favorable to the State, these facts are sufficient to show that Stribling committed the crime of sexual exploitation of a minor. The State satisfied its burden.

II. STRIBLING’S CONVICTION ON COUNT II IS A GROSS MISDEMEANOR HOWEVER IT WAS DETERMINED TO

BE SAME CRIMINAL CONDUCT AND DID NOT AFFECT HIS OFFENDER SCORE.

The State concedes that Stribling was convicted of attempted possession of depictions of a minor engaged in sexually explicit conduct under RCW 9.68A.070(2)(a), and that crime is a gross misdemeanor. However, the State classified Count 2 as same criminal conduct as Count 1, sexual exploitation of a minor, and the trial court also found Count II to be same criminal conduct as Count I.

A trial court's determination of what constitutes the same criminal conduct for purposes of calculating an offender score will not be reversed absent an abuse of discretion or misapplication of the law. *State v. Tili*, 139 Wash.2d 107, 122, 985 P.2d 365 (1999). For multiple crimes to be treated as the same criminal conduct at sentencing, the crimes must have (1) been committed at the same time and place; (2) involved the same victim; and (3) involved the same objective criminal intent. 139 Wash.2d at 123.

Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed "other current offenses" within the meaning of RCW 9.94A.589. RCW 9.94A.525(1). RCW 9.94A.589(1)(a) directs the sentencing court to treat all other current offenses as prior offenses when calculating an

offender score. “The sentencing range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: provided, that if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.” RCW 9.94A.589(1)(a).

In addition, when determining scores for sex offenses, each prior conviction for a sex offense is worth 3 points on the offender score. RCW 9.94A.525(17). All other non-sex offense felony convictions count as one point on the offender score.

In the present case, the state conceded at sentencing that counts 1 and 2 were same criminal conduct. The court further found that counts 3 through 8 were not same criminal conduct. RP 773; CP 83 and 91. It reasoned that they were not committed on the same dates, nor were they committed at the same time. RP 773.

The standard range for sexual exploitation is 120 months for an offender score of 9. Stribling’s offender score was determined to be 19, which was based on his comparable, Colorado conviction for extortion and the seven separate convictions for sexual offenses. RP 771. Stribling’s offender score for the sex offenses, excluding the Colorado conviction for extortion, is 18. RCW 9.94A.525(17). Stribling was sentenced to 120

months on Count 1 and no time on Count 2, given they were same criminal conduct. RP 804.

Given the fact the attempted conviction was not included in his offender score Stribling cannot show error or prejudice. However, the judgment and sentence should reflect the conviction for a gross misdemeanor.

III. STRIBLING’S CONVICTIONS FOR FELONY COMMUNICATION WITH A MINOR SHOULD REMAIN BECAUSE THE TRIAL COURT NEITHER MADE A POST TRIAL AMENDMENT OF THE INFORMATION, NOR DID IT CONFORM THE INFORMATION TO THE EVIDENCE PRESENTED AT TRIAL, FURTHERMORE, THE STATE PRESENTED SUFFICIENT EVIDENCE TO SHOW THAT STRIBLING MADE THE COMMUNICATIONS THROUGH ELECTRONIC MEANS.

“In a criminal proceeding, the accused shall have the right...to demand the nature and cause of the accusation against him.” Art. 1, section 22, Const. Moreover, a defendant cannot be tried for an offense not charged. Consequently, it is fundamental that a criminal defendant is provided with notice of all the charged crimes he will meet at trial. *State v. Schaffer*, 120 Wash.2d 616, 619-20, 845 P.2d 281 (1993).

Stribling now challenges the amended information filed on July 6, 2009, claiming the state was allowed to amend after the completion of the

state's case in chief. In the amended information, the State charged two alternative means for the charged seven counts of felony communication with a minor for immoral purposes. The first alternative alleged that Mr. Stribling was a prior sex offender, and the second alternative alleged that the communication occurred through electronic means. In several counts, the State mistakenly alleged two separate "on or about" dates. While the information contained several inconsistencies within the "on or about" language for each charge, the trial court found Stribling had not been prejudiced. Moreover, the trial court did not permit the State to amend the charges following trial.

a. The charging information did not prejudice Stribling because the "on or about" dates were within the statute of limitations.

A charging document is constitutionally adequate only if all essential elements of a crime, statutory and non-statutory, are included in the document. *State v. Vangerpen*, 125 Wash.2d 782, 788, 888 P.2d 1177 (1995). Convictions based on charging documents which contain only technical defects usually need not be reversed. 125 Wash.2d at 790. Moreover, an error in the date of the crime is not reversible error. *State v. Hooper*, 118 Wash.2d 151, 160, 822 P.2d 775 (1992).

A challenge to the constitutional sufficiency of a charging document may be raised initially on appeal. *State v. Leach*, 113 Wash.2d 679, 697, 782 P.2d 552 (1989). However, challenges made for the first time on appeal are liberally construed in favor of validity. *State v. Kjorsvik*, 117 Wash.2d 93, 105, 812 P.2d 86 (1991). When a challenge to the charging document is made, the Court shall first consider whether all the necessary facts appear in any form, or by fair construction can they be found, in the charging document, and, if so, can the defendant show that he was nonetheless actually prejudiced by the in-art-full language which caused a lack of notice. 117 Wash.2d at 105-06.

In the present case, all essential elements exist within the charging language. Stribling was charged under RCW 9.68A.090(2) with seven counts of felony communication with a minor for immoral purposes, a class C felony. CP 37. RCW 9.68A.090(2) states:

“A person who communicates with a minor for immoral purposes is guilty of a class c felony punishable according to chapter 9A.20 RCW if the person has previously been convicted under this section or of a felony sexual offense under 9.68A, 9A.44, or 9A.64 RCW or of any other felony sexual offense in this or any other state or if the person communicates with a minor or with someone the person believes to be a minor for immoral purposes through the sending of an electronic communication.”

Each of the seven counts charged included the statutory and non-statutory elements. The State alleged that Stribling either communicated

with a minor and had been convicted of a felony sex offense, or that the communications were through the sending of an electronic communication. CP 37. In each count, though not required to do so, the State charged Stribling under both alternatives. *State v. Elliott*, 114 Wash.2d 6, 13, 785 P.2d 440, *cert denied*, 498 U.S. 838, 111 S.Ct. 110, 112, L.Ed.2d 80 (1990)(an information does not need to elect between alternative means of committing an offense). In *State v. Noltie*, 116 Wash.2d 831, 842, 809 P.2d 190 (1991), where the defendant argued that the charging document was constitutionally deficient because he was not informed of the specific ways he committed sexual intercourse with his stepdaughter, the Supreme Court agreed with its prior ruling in *Elliott*, holding that it was not necessary to specify the number of ways the crime could have been committed. Because the State does not need to elect between alternative ways of committing a crime at trial, similarly, it should not have to elect those means for charging.

The State concedes it made a mistake when it designated the times for the two alternative means of proving felony communication with a minor. On each count the State alleged that the defendant had been previously convicted of a felony sex offense “and/or” the communication was through electronic means. With each alternative, the State attached an

“on or about” date. On several of the charges the dates did not coincide. CP 37, counts 4, 5, 6 and 7.

RCW 9.68A.090(2) only requires that a communication occur, not that it occur at a specific time or place. Where time is not a material element of the charged crime, the language “on or about” is sufficient to admit proof of the act at any time within the statute of limitations, so long as there is no defense of alibi. *State v. Hayes*, 81 Wash.App. 425, 432, 914 P.2d 788 (1996) *citing State v. Osborn*, 39 Wash. 548, 81 P. 1096 (1906)(prosecution for rape where evidence at trial established that the rape occurred a week or two weeks prior to the date alleged in the information). A charging information is sufficient if it states “that the crime was committed at some time previous to the finding of the indictment or filing of the information within the time limited by law for the commencement of an action.” RCW 10.37.050(5).

Because Stribling chose not to testify in his defense, and did not call any witnesses to suggest an alibi to the commission of the alleged crimes, time was not an issue in his case. Consequently, the “on or about” language is sufficient to inform Mr. Stribling of the nature of the charges because that language is subject to and within the statutory limitations of three years. RCW 9A.04.080(1)(h).

b. Any inconsistencies in the charging dates were nullified by the entry of a bill of particulars.

Stribling cannot show that he was prejudiced by the charging information. On July 7, 2009, at the request of defense counsel, the State provided the court and defense counsel a document entitled “Evidence Pertaining to Amended Charges.” CP 38 and 71. This document acted as a bill of particulars and was incorporated into the amended charging document. All parties referred to this document when going forward in trial.

The function of a bill of particulars is to amplify or clarify matters considered essential to the defense. *Noltie*, 116 Wash.2d at 845. The purpose of the bill of particulars is to give the defendant sufficient notice of the charge so that she can completely defend against it. *State v. Devine*, 84 Wn.2d 467, 471, 527 P.2d 72 (1974). It is appropriate when an information does not allege the nature and extent of the crime which the defendant is accused, so as to enable the defendant to properly prepare his defense. *State v. Bergeron*, 105 Wn.2d 1, 18, 711 P.2d 1000 (1985). Although the bill is not physically part of the information, it is intended to amplify it and aid the defendant in preparation of a proper defense, and, consequently, when entered, it is an integral part of the State’s pleadings

by which the trial court can determine all that the State expects to prove. *State v. Maurer*, 34 Wash.App.573, 578, 663 P.2d 152 (1983).

The inconsistencies in the dates of the alternative means were nullified when the State provided Stribling the “Evidence Pertaining to Amended Charges” documents. Those documents clarified the dates and time stamps of the particular emails the State intended to use when proving each count. Counts IV, V, VI, and VII contain the same dates as those enumerated within CP 38 and 71. Evidence for Count VIII is within one week of the “on or about” date listed in the charging information. Stribling cannot point to specific prejudice on any of the enumerated counts.

c. The trial court did not permit a post trial amendment of the charging information.

Stribling also alleges that the trial court made a post trial amendment of the charging information. Under the criminal court rules, a trial court may allow the amendment of the criminal information at any time before the verdict as long as the substantial rights of the defendant are not prejudiced. CrR 2.1. This rule permits liberal amendment of charging information, but is limited by article 1, section 22 of the Washington Constitution which requires that the accused be adequately informed of the charge to be met. *State v. Pelkey*, 109 Wash.2d 484, 487-

90, 745 P.2d 854 (1987). However, a charging information may not be amended after the State has rested its case in chief unless the amendment is to a lesser degree of the same crime or a lesser included offense. 109 Wash.2d at 491. Any other amendment is a *per se* violation of the defendant's right to be informed of the nature and cause of the accusation against him, *Vangerpen*, 125 Wash.2d at 789, and the defendant is not required to show prejudice. *State v. Markle*, 118 Wash.2d 424, 437, 823 P.2d 1101 (1992). A trial court's decision to allow the State to amend the charging information is reviewed for abuse of discretion. *State v. Harner*, 95 Wash.2d 858, 864, 631 P.2d 381 (1981).

In this case, the trial court did not allow an amendment of the charging information after the State had closed its case in chief. While with the understanding that case law prohibits a post trial amendment, the State did make a motion to allow it to conform the dates of the amended information to reflect the dates listed in its document "Evidence pertaining to the Amended Charges," the trial court declined to follow that request. Instead, the trial court held that any in-art-full charging language regarding the "on or about" dates was negligible and did not prejudice Stribling, noting that all parties had followed the dates listed within the "Evidence Pertaining to the Amended Charges" document. Stribling has

failed to show that an illegal amendment of the charging information occurred.

d. Stribling has requested an improper remedy.

Even if the Court finds the trial court allowed an impermissible amendment of the charging document, the remedy is to dismiss without prejudice. Contrary to what Stribling argues, the Court should reverse the convictions and dismiss the charges without prejudice to the State's ability to re-file the charges. *Vangerpen*, 125 Wash.2d at 793. Double jeopardy does not attach if reversal was caused by a defective charging document, because it was an error in the proceedings. 125 Wash.2d at 794, 888 P.2d 1177; citing *Burks v. United States*, 437 U.S. 1, 14, 98 S.Ct. 2141, 2149, 57 L.Ed.2d 1 (1978)(reversal for trial error is not a decision based on the government's failure to prove its case).

Stribling argues that the Court should remand for resentencing on the lesser included offense. The authority for that remedy comes from a series of cases that includes *In re Personal Restraint of Andress*, 147 Wash.2d 602, 56 P.3d 981 (2002). In those cases, the appellants were convicted of crimes that did not exist. Moreover, the suggested remedy is only available if a jury was instructed on the lesser included and necessarily found each element of the lesser included offense beyond a

reasonable doubt. *State v. Green*, 94 Wash.2d 216, 234, 616 P.2d 628 (1980). *State v. Gilbert*, 68 Wash.App. 379, 384, 842 P.2d 1029 (1993).

Stribling confuses the remedy for impermissible amendment of a charging information with the remedy for a conviction for a false crime. This Court and the Supreme Court have been clear that the remedy for an impermissible amendment is reversal of the conviction and dismissal without prejudice. If the Court finds that the trial court allowed amendment after the State rested its case in chief, the appropriate remedy for Stribling is reversal and dismissal without prejudice. However, the State still contends that an illegal amendment did not occur and cannot be found within the record.

IV. CONCLUSION

For the above reasons, the State respectfully requests the Court deny Stribling's appeal. It is sufficient evidence to show that Stribling invited a 12-year-old girl to take sexually explicit photographs of herself in order to prove sexual exploitation of a minor. Stribling was not prejudiced by errors in the "on or about" dates of the amended charging information, because the dates and times were not essential elements of the crime, the dates and times were within the statute of limitations, and the State provided a bill of particulars regarding evidence intended to be

used to prove each count at trial. Finally, the trial court did not permit an illegal amendment of charging information, and Stribling requested an improper remedy.

Respectively submitted this 17th day of September, 2010.

SUSAN I. BAUR
Prosecuting Attorney

By:

JASON LAURINE, WSBA#36871
Representing Respondent

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 BENJAMIN CLINTON STRIBLING,)
)
 Appellant.)
 _____)

NO. 39931-8-II
Cowlitz County No.
08-1-00508-6

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DIVISION II

I, Michelle Sasser, certify and declare:

That on the 24th day of September, 2010, I deposited in the mails

of the United States Postal Service, first class mail, a properly stamped
and address envelope, containing Respondent's Brief addressed to the
following parties:

Anne Cruser
Attorney at Law
P.O. Box 1670
Kalama, WA 98625

Court of Appeals, Clerk
950 Broadway, Suite 300
Tacoma, WA 98402

I certify under penalty of perjury pursuant to the laws of the State
of Washington that the foregoing is true and correct.

Dated this 24th day of September, 2010.

Michelle Sasser
Michelle Sasser