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Division III
State of Washington

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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

GLENN E. SAPP, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering Finding of Fact 6:

The testimony of Detective Bechtold and exhibits 11, 12, 35, 36, 37 establish the defendant Glenn Sapp's date of birth as January 3, 1960.

(CP 184).

2. The trial court erred in entering Finding of Fact 8:

The defendant pled guilty on April 22, 1999 to two counts of possession of depictions of minors engaged in sexually explicit conduct (Ex.#10,11). The defendant was sentenced for those convictions on May 12, 1999. (Ex. # 12).

(CP 184).

3. The trial court erred in entering Finding of Fact 9:

As to Count I the testimony and exhibit #13 (video) established the following:

- a. The testimony of Lisa White established that the defendant is the male visible in the video.
- b. Lisa White identified her granddaughter [J.G.] as the child in the video.
- c. Lisa White identified the location seen in the video as the master bedroom of the defendant's apartment in Spokane Valley, Washington.
- d. The defendant is seen and heard in exhibit 13 asking [J.G.] to display her genitals and to touch herself.
- e. [J.G.] is wearing a plain [sic] white tee in the video.

(CP 184).

4. The trial court erred in entering Finding of Fact 10:

As to Count II the testimony and exhibit #14 (video) established the following:

- a. The testimony of Lisa White established that the child in the video is [J.G.].
- b. [J.G.] is wearing a yellow dress and polka dot underwear in the video.
- c. The testimony of Lisa White established that the defendant is the male speaking to [J.G.].
- d. The defendant refers to himself as “Uncle Glenn.”
- e. The testimony of Lisa White established that the location of the video in exhibit #14 is the children’s room in the defendant’s apartment located in Spokane Valley, Washington.
- f. The defendant is heard on the video telling [J.G.] to spread her legs.
- g. The defendant is heard on the video threatening to anally rape [J.G.].

(CP 184-185).

5. The trial court erred in entering Finding of Fact 11:

As to Count III the testimony and exhibit #15(video) established the following:

- a. The testimony of Lisa White established that the child in the video is [J.G.].
- b. The The testimony of Lisa White established that the male in the video is the defendant.
- c. The testimony of Lisa White established that the location in the video is the defendant’s apartment living room located in Spokane Valley, Washington.
- d. [J.G.] is wearing a purple shirt and orange shorts in the video.
- e. The defendant asks [J.G.] to touch herself and to display her genitals.

- f. The defendant is having sex with an adult he refers to as April and is explaining his sexual acts to [J.G.] as she watches.

(CP 185).

6. The trial court erred in entering Finding of Fact 12:

As to Count IV the testimony and exhibit #16 establish the following:

- a. The testimony of Lisa White established that the child in the video is [J.G.].
- b. The testimony of Lisa White established that the male in the video is the defendant.
- c. The defendant's face and body are visible in the video.
- d. The testimony of Lisa White established that the location in the video is the master bedroom in the defendant's apartment located in Spokane Valley, Washington.
- e. [J.G.] is seated on a bed next to a DVD player.
- f. An adult pornographic video is playing on the DVD player.
- g. The defendant tells [J.G.] to watch the video and talks to her about the content.

(CP 185-186).

7. The trial court erred in entering Finding of Fact 13:

As to Count V the testimony and exhibit #17 establish the following:

- a. The testimony of Lisa White established that the child in the video is [J.G.].
- b. The testimony of Lisa White established that the male in the video is the defendant.
- c. The defendant's face and body are visible in the video.

- d. The testimony of Lisa White established that the location in the video is the children's room in the defendant's apartment located in Spokane Valley, Washington.
- e. [J.G.] is seated on a wearing [sic] a pair of jeans and a pink and white shirt.
- f. The defendant is masturbating in front of [J.G.] and asking her to watch his cum and to see it squirt.

(CP 186).

8. The trial court erred in entering Finding of Fact 14:

As to Count VI the testimony and exhibit #18(video) establish the following:

- a. The testimony of Lisa White established that her granddaughter [J.G.] is being filmed and present in the video.
- b. The testimony of Lisa White established that the male in the video is the defendant.
- c. The defendant's face and body are visible in the video.
- d. The testimony of Lisa White established that the location in the video is the living room in the defendant's apartment located in Spokane Valley, Washington.
- e. The defendant asks [J.G.] to show him her "hot pussy" while she is being videotaped.
- f. [J.G.] is naked in the video with a towel wrapped around her.

(CP 186-187).

9. The trial court erred in entering Finding of Fact 15:

As to Count VII the testimony and exhibit #1(video) establish the following:

- a. The testimony of Lisa White established that the child being photographed in the video was her granddaughter [J.G.].

- b. The testimony of Lisa White established that the male in the video is the defendant.
- c. The defendant's face and body are visible in the video.
- d. The testimony of Lisa White established that the location in the video is the master bedroom of the defendant's apartment located in Spokane Valley, Washington.
- e. The defendant is seen and heard telling [J.G.] to display her genitals while she is being videotaped.
- f. The defendant asks [J.G.] to touch herself and to display her genitals.
- g. [J.G.]'s vagina is exposed in the video.

(CP 187).

10. The trial court erred in entering Finding of Fact 16:

As to Count VIII the testimony and exhibits 22-27 establish the following:

- a. Lisa White identified the child's body in the photograph as belonging to her grand-daughter [J.G.].
- b. The defendant's face is visible in the photograph.
- c. Lisa White identified the defendant from the photograph.
- d. Lisa White identified the location in the photographs as the defendant's apartment in Spokane Valley, Washington.
- e. The defendant is placing his tongue on the vagina of [J.G.].

(CP 188).

11. The trial court erred in entering Finding of Fact 17:

As to Count IX, the testimony and exhibits 28-33 establish the following:

- a. Lisa White identified the child's face in the photographs as [J.G.].

- b. Lisa White identified the defendant's hand in the photographs.
- c. Lisa White identified the defendant from the photograph.
- d. Lisa White identified the location in the photographs as the defendant's apartment in Spokane Valley, Washington.
- e. The defendant is touching his penis to the mouth of [J.G.].
- f. In each of the photographs [J.G.] is wearing a different white top: short sleeve exhibit #28; cap sleeve in exhibit #30; long sleeve in exhibit #32.
- g. The defendant's watch is visible in exhibit #32.

(CP 188).

12. The trial court erred in entering Finding of Fact 18:

As to Count X the testimony and exhibits 34-42 establish the following:

- a. Lisa White identified the body and face of the child in the photographs as [J.G.]
- b. The fingerprint analysis conducted by Trayce Bonecki and Carrie Johnson established that the finger touching [J.G.]'s vagina as seen in exhibit #34 is the defendants.
- c. Lisa White identified the location of the pictures in the exhibits as the apartment of the defendant in Spokane Valley, Washington.
- d. The defendant's finger is touching the vagina of [J.G.].

(CP 188-189).

13. The trial court erred in entering Finding of Fact 19:

As to Count XI the testimony and exhibit #13 establish the following:

- a. The testimony of Lisa White established that the defendant is the male visible in the video.

- b. Lisa White identified her granddaughter J.G. as the child in the video.
- c. Lisa White identified the location seen in the video as the master bedroom of the defendant's apartment in Spokane Valley, Washington.
- d. The defendant is seen and heard in exhibit 13 asking [J.G.] to display her genitals and to touch herself.
- e. [J.G.] is wearing a plain [sic] white tee in the video.
- f. The defendant touches [J.G.]'s vagina with his finger and it is seen on the video.

(CP 189).

14. The trial court erred in entering Conclusion of Law 4:

The defendant's prior convictions are defined as sex offenses under RCW 9.94A.030(46)(a)(iii).

(CP 189).

15. The trial court erred in entering Conclusion of Law 5:

The State has proven beyond a reasonable doubt each of the elements of communication with a minor for immoral purposes.

(CP 189).

16. The trial court erred in entering Conclusion of Law 6:

The State finds the defendant guilty on Communication with a minor for immoral purposes as charged in Counts I-V.

(CP 190).

17. The trial court erred in entering Conclusion of Law 7:

The State has proven beyond a reasonable doubt each of the elements of Sexual Exploitation of a Minor.

(CP 190).
18. The trial court erred in entering Conclusion of Law 8:

The Court finds the defendant guilty of Sexual Exploitation of a Minor as charged in Counts VI and VII.

(CP 190).
19. The trial court erred in entering Conclusion of Law 9:

The State has proven beyond a reasonable doubt each of the elements of the crime of First Degree Rape of a Child.

(CP 190).
20. The trial court erred in entering Conclusion of Law 10:

The Court finds the defendant guilty of First Degree Rape of a Child as charged in Counts VIII and IX.

(CP 190).
21. The trial court erred in entering Conclusion of Law 11:

The State has proven beyond a reasonable doubt each of the elements of the crime of Child Molestation in the First Degree.

(CP 190).

22. The trial court erred in entering Conclusion of Law 12:

The Court finds the defendant guilty of Child Molestation in the First Degree as charged in Counts X and XI.

(CP 190).

23. The trial court erred in admitting State's Exhibits 13, 14, 15, 16, 17, 18, 19, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 38, 39, 40, 41, 42.

24. The trial court erred in finding Mr. Sapp guilty of Count I, Communication with a Minor for Immoral Purposes, where the evidence was insufficient.

25. The trial court erred in finding Mr. Sapp guilty of Count II, Communication with a Minor for Immoral Purposes, where the evidence was insufficient.

26. The trial court erred in finding Mr. Sapp guilty of Count III, Communication with a Minor for Immoral Purposes, where the evidence was insufficient.

27. The trial court erred in finding Mr. Sapp guilty of Count IV, Communication with a Minor for Immoral Purposes, where the evidence was insufficient.

28. The trial court erred in finding Mr. Sapp guilty of Count V, Communication with a Minor for Immoral Purposes, where the evidence was insufficient.
29. The trial court erred in finding Mr. Sapp guilty of Count VI, Sexual Exploitation of a Minor, where the evidence was insufficient.
30. The trial court erred in finding Mr. Sapp guilty of Count VII, Sexual Exploitation of a Minor, where the evidence was insufficient.
31. The trial court erred in finding Mr. Sapp guilty of Count VIII, Rape of a Child in the First Degree, where the evidence was insufficient.
32. The trial court erred in finding Mr. Sapp guilty of Count IX, Rape of a Child in the First Degree, where the evidence was insufficient.
33. The trial court erred in finding Mr. Sapp guilty of Count X, Child Molestation in the First Degree, where the evidence was insufficient.
34. The trial court erred in finding Mr. Sapp guilty of Count XI, Child Molestation in the First Degree, where the evidence was insufficient.

B. ISSUES

1. The trial court admitted numerous video recordings and photographs into evidence, over Mr. Sapp's objection that there was insufficient foundation. No witness testified that the video recordings and photographs accurately portrayed the scenes they depicted, or when, where, and under what circumstances they were made. Were the video recordings and photographs properly authenticated, as required for admission into evidence, or did the trial court abuse its discretion in admitting this evidence?
2. The challenged video recordings and photographs were the only evidence that the alleged crimes occurred. If the trial court erred in admitting the challenged video recordings and photographs, was the evidence sufficient to find Mr. Sapp guilty on all counts?
3. The State charged Mr. Sapp with five counts of felony communication with a minor for immoral purposes. An essential element of these counts is a prior felony sexual offense. To establish the prior conviction element, the State offered certified copies of a prior felony sexual offense for a Glenn E. Sapp. There was no independent

evidence that this individual was the same person on trial here. Was the evidence sufficient to establish the prior conviction element of the counts of felony communication with a minor for immoral purposes?

C. STATEMENT OF THE CASE

In February 2011, a police report was filed, stating that a residential burglary had occurred at Mr. Sapp's apartment. (RP 146-150, 364-365¹). The report mentioned that a digital camera, with a memory card inside, may have been taken during the burglary. (RP 146-150, 365). The police made arrests in response to this report. (RP 149). Some of the property listed in the police report was recovered, but not a digital camera. (RP 149).

Around the same time as the burglary report, Angela Chapman called Ms. White and said that she had photographs of J.G. being molested. (RP 389). According to Ms. Chapman, she obtained the photographs, on a digital camera, from an individual named Aaron Palmer. (RP 150-151). Ms. White went to Ms. Chapman's house and looked at the photographs, on a digital camera. (RP 390-391). Ms. White testified she recognized J.G. and Mr. Sapp in the photographs. (RP 391).

¹ The report of proceedings consists of six volumes. The references to "RP" herein refer to the three consecutively paginated volumes, labeled Volume I, II, and III.

Ms. White and Ms. Chapman called the police. (RP 364-365, 392). Ms. Chapman turned the memory card over to the police. (RP 147-148, 364-367). Ms. Chapman also obtained a digital camera and turned it over to the police. (RP 147-148, 367). The police obtained a search warrant for the memory card and the digital camera obtained from Ms. Chapman. (CP 43-51; RP 150).

The State charged Mr. Sapp with five counts of felony communication with a minor for immoral purposes, in violation of RCW 9.68A.090; two counts of sexual exploitation of a minor; two counts of rape of a child in the first degree; and two counts of child molestation in the first degree. (CP 88-90). The five counts of felony communication with a minor for immoral purposes alleged that Mr. Sapp had been “previously convicted of Possession of Depictions of Minor Engaged in Sexually Explicit Conduct (RCW 9.68A.070)[.]” (CP 88-89). Each of the eleven counts also alleged an aggravating factor, that Mr. Sapp “knew and should have known that the victim of the current offense was particularly vulnerable or incapable of resistance, as provided by RCW 9.94A.535(3)(b).” (CP 88-90).

Prior to trial, the trial court held a hearing on the admissibility of the photographs and video recordings recovered from the memory card that Ms. Chapman turned over to the police. (CP 115-120; RP 145-333).

At the pretrial hearing, John Schlosser, who works in the digital forensic unit in the Spokane County Sheriff's Office, testified that he copied several video recordings from the memory card onto disks. (RP 157-164). These video recordings were identified as State's Exhibits 13, 14, 15, 16, 17, and 18. (RP 157-164). Mr. Schlosser also testified that he created still images from video recordings on the memory disk. (RP 164-166, 169-170). These still images were identified as State's Exhibits 19 and 21. (RP 164-166, 169-170). Mr. Schlosser testified he copied several photographs from the memory card. (RP 170-198). These photographs were identified as State's Exhibits 22, 24-34, 39-42. (RP 170-198).

Mr. Schlosser testified he did not make any changes to the files when transferring them from the memory card. (RP 203). He also testified he did not know whether any of the files had been changed or altered prior to his analysis. (RP 203). Mr. Schlosser told the court he could not testify that the images from the memory card came from the exact camera given to the police by Ms. Chapman. (RP 208).

After watching portions of State's Exhibits 13-18, Ms. White told the court the child in the video recording was J.G., that she was between the age of three and four, and that Mr. Sapp was in the video, as well as the voices of J.G. and Mr. Sapp. (RP 236, 252-53, 255-56, 258-62).

In Exhibits 13 and 16, she identified the location of the video as the master bedroom in Mr. Sapp's apartment, and stated she had been in that room from 2008 to 2011. (RP 236-237, 258).

In Exhibits 14 and 17, she identified the location of the video as the children's bedroom in Mr. Sapp's apartment, and stated it was consistent with the way the apartment looked from 2008 to 2011. (RP 236-237, 260).

In Exhibit 15, she identified the location of the video as the living room of Mr. Sapp's apartment, and stated it was consistent with the way the residence looked from 2008 to 2011. (RP 256).

In Exhibit 18, she identified the location of the video as the living room in Mr. Sapp's apartment, and stated it was consistent with the way the residence looked from 2008 to 2011. (RP 262).

The State moved to admit Exhibits 13-18, and Mr. Sapp objected, arguing there was insufficient foundation for their admission. (RP 237-241, 244-245, 254, 256-61, 263). Mr. Sapp argued there was no testimony that what is shown in the video is an accurate depiction of the scene at the time it occurred. (RP 237-241, 244-245). The trial court overruled the objection and admitted State's Exhibits 13, 14, 15, 16, 17 and 18. (RP 249-251, 254, 258-61, 263).

Next, Ms. White was shown the photographs, State's Exhibits 19, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 38, 39, 40, 41, and 42. (RP 263-297). For each exhibit, Ms. White identified the individuals in the photographs. (RP 264, 267-269, 271-272, 274-276, 279-281, 283-285, 287-288, 292-293). Ms. White testified that J.G. was between the ages of three and four in each exhibit. (RP 264, 268-269, 271, 274-277, 280-283, 285, 287-288, 292-293). For State's Exhibits 21, 22, 28, 30, and 33, Ms. White did not identify a location for the photographs. (RP 267-269, 281-286).

Mr. Sapp objected to the admission of the photographs, arguing there was insufficient foundation for admission. (RP 265, 268-269, 277-279, 281-282, 284, 286, 288-289, 291, 293-295, 307-308, 312-313, 315). The trial court overruled the objections and admitted State's Exhibits 19, 21, 22, 24-34, 38-42. (RP 267-268, 270, 277-279, 281-282, 284, 286, 290, 292, 294-295, 308, 312, 314-315).

Mr. Sapp waived his right to a jury trial, and the case proceeded to a bench trial. (CP 91; RP 145-471). The trial court ruled that J.G. was a competent witness, but she did not testify at trial. (RP 49-51, 138-139, 145-471).

During the State's case in chief, the trial court admitted a certified copy of a Judgment and Sentence for a Glenn E. Sapp, date of birth

January 3, 1960, for two counts of possession of depictions of minors engaged in sexually explicit conduct, under RCW 9.68A.070. (State's Ex. 12; CP 105-112; RP 370-371). The trial court also admitted a certified copy of the statement of defendant on plea of guilty and the amended information for the same crimes, listing a name of Glenn E. Sapp. (State's Ex. 10-11; RP 372-373).

The court found Mr. Sapp guilty as charged. (CP 189-190; RP 556-563). The court entered findings of fact and conclusions of law on the bench trial. (CP 183-190). Mr. Sapp appealed. (CP 236-256).

D. ARGUMENT

1. THE TRIAL COURT ERRED IN ADMITTING STATE'S EXHIBITS THAT PURPORTED TO SHOW THE DEFENDANT'S COMMISSION OF THE ALLEGED OFFENSES.

For purposes of authentication, videotapes are equal to photographs. *State v. Newman*, 4 Wn. App. 588, 593, 484 P.2d 473 (1971); *see also, e.g., State v. Early*, 36 Wn. App. 215, 222, 674 P.2d 179 (1983) (applying the authentication standards for photographs to a videotape). The trial court's admission of photographs into evidence is review for an abuse of discretion. *State v. Tollett*, 12 Wn. App. 134, 136, 528 P.2d 497 (1974) (*citing State v. Rowe*, 77 Wn.2d 955, 468 P.2d 1000

(1970)); *see also State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997) (stating that evidentiary rulings are reviewed for an abuse of discretion). An abuse of discretion occurs “[w]hen a trial court’s exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons[.]” *Stenson*, 132 Wn.2d at 701 (*citing State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). An abuse of discretion can also occur when the trial court applies an incorrect legal analysis or other error of law. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007).

Before a photograph or a videotape can be admitted into evidence, there must be testimony that it “accurately portrays the subject illustrated.” *Toftoy v. Ocean Shores Prop., Inc.*, 71 Wn.2d 833, 836, 431 P.2d 212 (1967); *see also Tollett*, 12 Wn. App. at 136. A witness “must be able to give some indication as to when, where, and under what circumstances the video tape recording was taken and that it accurately portrays the subject illustrated; then the video tape recording is admissible at the trial court’s discretion.” *Saldivar v. Momah*, 145 Wn. App. 365, 399-400, 186 P.3d 1117 (2008).

In *Saldivar*, the plaintiffs argued that the trial court erred in excluding a news broadcast videotape of one of the defendants, for lack of authentication. *Id.* at 399. They argued the videotape could have been authenticated by the testimony of a witness identifying the man on the

videotape as the defendant. *Id.* The court rejected this argument, ruling that because the plaintiffs did not call any witnesses who could testify to “when, where, and under what circumstances the recording was made, it was not properly authenticated and the trial court properly excluded it.” *Id.* at 400.

Here, there was no testimony that the challenged video recordings and photographs admitted into evidence by the trial court accurately portrayed the subject matter illustrated. *See Toftoy*, 71 Wn.2d at 836; *Saldivar*, 145 Wn. App. at 399-400. The subject matter is not J.G. or Mr. Sapp; the scenes depicted are the subject matter in each video recording and photograph. Although Ms. White identified the people in the video recordings and photographs, and for some of them, the location, she could not testify to the accuracy of the subject portrayed. Ms. White was not present when the video recordings and photographs were taken and, therefore, she has no knowledge of their accuracy.

There was no testimony regarding when, where, and under what circumstances the challenged video recordings and photographs were made. *See Saldivar*, 145 Wn. App. at 399-400.

A photograph is properly admitted into evidence if it tends to prove or disprove some disputed matter, illustrates or elucidates some relevant fact or corroborates or disproves some other issue offered or to be offered. *McElroy's Alabama Evidence*, § 123.03(1) (3d ed. 1977); *Myers v.*

State, 431 So.2d 1342 (Ala.Crim.App.), cert. quashed, 431 So.2d 1346 (Ala.1982); *Carpenter v. State*, 400 So.2d 417 (Ala.Crim.App.), writ. den., 400 So.2d 427 (Ala.1981). However, a photograph is not self-proving, and before it may be admitted into evidence, it must be properly authenticated. It is not necessary that the photographer authenticate the photograph. Certainly this is true because in cases such as the one at bar, there is no actual photographer. A photograph may be verified by any person who is familiar with the subject matter of the photograph and can testify that the photograph correctly depicts the scene at the relevant time period.

Murry v. State, 453 So. 2d 774, 775 (Ala. Crim. App. 1984).

A photograph is admissible in evidence if the photograph's subject matter or contents are depicted truly and accurately at a time pertinent to the inquiry and the photograph has probative value as relevant evidence. See, Neb.Evid.R. 401, Neb.Rev.Stat. § 27-401 (Reissue 1989) (relevant evidence defined); *State v. McCaslin*, 240 Neb. 482, 482 N.W.2d 558 (1992); *State v. Red Kettle*, 239 Neb. 317, 476 N.W.2d 220 (1991); *State v. Stephenson*, 199 Neb. 362, 258 N.W.2d 824 (1977).

State v. Garza, 241 Neb. 256, 261-62, 487 N.W.2d 551, 556 (1992).

Under *Salvidar*, Ms. White's identification of the people in the video recordings and photographs is not enough for authentication. See *Saldivar*, 145 Wn. App. at 400.

There is no way to know if changes were made to the challenged video recordings and photographs. Mr. Schlosser testified he did not know whether any of the files had been changed or altered prior to his analysis. (RP 203). He stated he could not testify that the images from the memory card came from the exact camera given to the police by Ms.

Chapman. (RP 208). In addition, the memory card and digital changed hands several times before they were given to the police. They went from Mr. Palmer, to Ms. Chapman, to Ms. White and, finally, to the police. (RP 147-148, 150-151, 364-367, 389-391).

Ms. White identified elements in the video recordings and photographs that she was familiar with, but she could not testify to the accuracy of the scenes portrayed. Although there was insufficient foundation to admit all of the challenged video recordings and photographs, the foundation was especially lacking for the photographs in State's Exhibits 21, 22, 28, 30, and 33, where Ms. White did not identify a location for the photographs. (RP 267-269, 281-286). State's Exhibits 13, 14, 15, 16, 17, 18, 19, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 38, 39, 40, 41, 42 were not properly authenticated. *See Toftoy*, 71 Wn.2d at 836; *Saldivar*, 145 Wn. App. at 399-400. The trial court abused its discretion in admitting these video recordings and photographs.

2. WITHOUT THE CHALLENGED STATE'S EXHIBITS, THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT MR. SAPP'S CONVICTIONS ON ALL COUNTS.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068,

25 L. Ed. 2d 368 (1970). When a defendant challenges the sufficiency of the evidence, the proper inquiry 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 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Furthermore, “[a] claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.* (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff’d*, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

Here, the challenged video recordings and photographs were the only evidence that the alleged crimes occurred. All of the testimony presented by the State at trial related to the video recordings and photographs. (RP 356-471). Therefore, if this Court rules the trial court erred in admitting State’s Exhibits 13-19, 21-22, 24-34, 38-42, then there was insufficient evidence to support Mr. Sapp’s convictions on all counts. The convictions should then be reversed and the charges dismissed with prejudice. *See State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005) (stating “[r]etrial following reversal for insufficient evidence is

‘unequivocally prohibited’ and dismissal is the remedy.’”) (*quoting State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998)).

3. IF THIS COURT DETERMINES THE CHALLENGED STATE’S EXHIBITS WERE PROPERLY ADMITTED, THEN THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT MR. SAPP’S CONVICTIONS FOR FELONY COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES IN COUNTS I-V.

Pursuant to RCW 9.68A.090, “a person who communicates with a minor for immoral purposes, or a person who communicates with someone the person believes to be a minor for immoral purposes, is guilty of a gross misdemeanor.” RCW 9.68A.090(1). This crime of communication with a minor for immoral purposes is elevated to a felony, however, if the person has a prior conviction for a felony sexual offense under RCW chapter 9.68A. *See* RCW 9.68A.090(2).

“[U]nder RCW 9.68A.090(2), a prior sexual offense conviction is an essential element that must be proved beyond a reasonable doubt.” *State v. Roswell*, 165 Wn.2d 186, 192, 196 P.3d 705 (2008); *see also State v. Bache*, 146 Wn. App. 897, 905-06, 193 P.3d 198 (2008). The evidence presented at the trial is sufficient if, when viewed in the light most favorable to the State, the trier of fact can find the essential elements of the charged crimes.” *State v. Bourne*, 90 Wn. App. 963, 968,

954 P.2d 366 (1998). Therefore, the issue here is whether the State produced sufficient evidence of the prior conviction element of the counts of felony communication with a minor for immoral purposes. *See State v. Santos*, 163 Wn. App. 780, 783, 260 P.3d 982 (2011).

“The best evidence of a prior conviction is a certified copy of the judgment.” *Id.* at 784 (*citing State v. Chandler*, 158 Wn. App. 1, 5, 240 P.3d 159 (2010)). However, when criminal liability depends upon the defendant being the person to whom a document pertains, “the State must do more than authenticate and admit the document; it also must show beyond a reasonable doubt ‘that the person named therein is the same person on trial.’” *State v. Huber*, 129 Wn. App. 499, 502, 119 P.3d 388 (2005) (*quoting State v. Kelly*, 52 Wn.2d 676, 678, 328 P.2d 362 (1958)). This burden cannot be met by showing only the identity of names. *Id.* The State “must show, by evidence independent of the record, that the person named therein is the defendant in the present action.” *Id.* (internal quotation marks omitted). This independent evidence “may include otherwise-admissible booking photographs, booking fingerprints, eyewitness identification, or, arguably, distinctive personal information.” *Id.* at 503.

Here, in order to elevate the five counts of communication with a minor for immoral purposes to a felony, the State offered a certified copy

of a Judgment and Sentence for a Glenn E. Sapp, date of birth January 3, 1960, for two counts of possession of depictions of minors engaged in sexually explicit conduct, under RCW 9.68A.070. (State's Ex. 12; CP 105-112; RP 370-371). The State also offered a certified copy of the statement of defendant on plea of guilty and the amended information for the same crimes, listing a name of Glenn E. Sapp. (State's Ex. 10-11; RP 372-373). However, the State did not show, beyond a reasonable doubt, that the Glenn E. Sapp named in State's Exhibits 10, 11, and 12 was the same person on trial here. *See Huber*, 129 Wn. App. at 502 (*quoting Kelly*, 52 Wn.2d at 678). There was no testimony presented that Mr. Sapp's date of birth matched the date of birth listed on the prior convictions. In addition, there was no testimony presented that the fingerprints on the certified copy of the Judgment and Sentence, State's Exhibit 12, matched the fingerprints of Mr. Sapp. There were no photographs submitted of the Glenn E. Sapp named in State's Exhibits 10, 11, and 12 to compare to Mr. Sapp, who appeared at trial. *See Santos*, 163 Wn. App. at 785.

The evidence presented by the State, State's Exhibits 10, 11, and 12, showed only the identity of names, and was insufficient to establish the prior conviction element of the counts of felony communication with a minor for immoral purposes. Mr. Sapp's convictions for felony

communication with a minor for immoral purposes in Counts I-V should be reversed.

E. CONCLUSION

The trial court erred in admitting State's Exhibits 13, 14, 15, 16, 17, 18, 19, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 38, 39, 40, 41, and 42. Without these exhibits, there was insufficient evidence to support Mr. Sapp's convictions on all counts. The convictions should be reversed and dismissed with prejudice.

In the alternative, there was insufficient evidence to support Mr. Sapp's convictions for felony communication with a minor for immoral purposes in Counts I-V. These convictions should be reversed.

Dated this 12th day of August, 2013.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 31354-9-III
)	
vs.)	CERTIFICATE
)	OF MAILING
GLENN E. SAPP,)	
)	
Appellant.)	

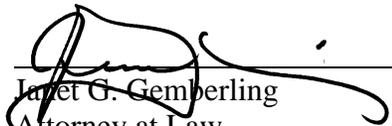
I certify under penalty of perjury under the laws of the State of Washington that on August 12, 2013, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Mark E. Lindsey
kowens@spokanecounty.org

I certify under penalty of perjury under the laws of the State of Washington that on August 12, 2013, I mailed a copy of the Appellant's Brief in this matter to:

Glenn E. Sapp
#795886
Coyote Ridge Correction Center
PO Box 769
Connell WA 99326

Signed at Spokane, Washington on August 12, 2013.


Janet G. Gemberling
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