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NO. 76802-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

NAZIYR YISHMAEL,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BARBARA LINDE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The supreme court has exclusive authority to define the practice of law, and has done so by publishing General Rule (GR) 24. Does it violate the separation of powers doctrine to use that definition in a criminal prosecution for unlawful practice of law?

2. Is RCW 2.48.180 unconstitutionally vague as applied to Yishmael?

3. Is unlawful practice of law a strict liability offense?

4. Did the trial court comment on the evidence by instructing the jury with the GR 24 definition of “practice of law”?

5. Does sufficient evidence support Yishmael’s conviction?

6. Did the trial court violate Yishmael’s right to present a defense by refusing his proposed jury instructions on practice of law and knowledge?

B. STATEMENT OF THE CASE

Naziyr Yishmael is not a lawyer and has never been to law school. RP 854-55. Nevertheless, in 2013 and 2014, Yishmael charged fees to advise clients on how to “legally” occupy and obtain title to vacant homes through “homesteading” and adverse possession. RP 322-23, 512-15, 547. Yishmael held free seminars

at churches and libraries to give attendees information on “what is adverse possession, and how to obtain a home, the documents that you need [and] definitions of the law.” RP 323-25, 513, 604. He offered to help people who wanted to obtain homes through adverse possession and suggested there were “certain steps that had to be taken to make it legal.” RP 325, 515. For \$7,000 - \$8,000 (payable in monthly payments of \$500, following a down payment), Yishmael provided a list of legally-vulnerable properties,¹ legal research,² legal-seeming documents he claimed were necessary to the adverse possession and homesteading process,³ and step-by-step instructions about how to select houses to occupy, document their occupation and intent to exclusively possess the home, and deter police interference. RP 326-32, 361, 366, 388, 520-21, 620, 648, 847, 849. In brief, the steps were as follows: (1) review a list Yishmael provided of homes he claimed

¹ Yishmael encouraged his clients to choose vacant homes in foreclosure, and particularly those in which MERS was involved, because he perceived those foreclosure actions to be unlawful. RP 328. Yishmael's expert witness discussed the MERS issue. RP 736-44.

² Yishmael provided his clients legal definitions, judicial opinions, statutes, and “an accurate presentation of the basic doctrine of adverse possession.” RP 325, 327, 370-71, 518-19, 590-96, 769.

³ These documents included a “Notice of Intent to Homestead,” which Yishmael suggested gave his clients the right to occupy vacant homes. RP 330-32, 360-61. Yishmael advised his clients to have the notice notarized, post the notice on the door of the home, mail it to the title owners at the home's address, and file it with the recorder's office. RP 331, 335-36, 351-52, 646-47.

had been illegally foreclosed; (2) drive by the home to ensure it is vacant; (3) post a "Notice of Intent to Homestead" on the door for a certain number of days, mail it to the title holder at the house's address, and keep the returned correspondence as confirmation the house is abandoned; and (4) record "Notice of Intent to Homestead" and "Notice of Adverse Possession Claim of Property" with the public records office. RP 328, 520-21.

Once the documents were recorded, Yishmael advised, the clients could enter the property,⁴ change the locks, and "act as if it's yours by paying the taxes, doing remodeling like landscaping." RP 323. Yishmael explained that, after seven or ten years,⁵ "you can go to court with all your paperwork that you filed, and that you provided when you first obtained the house along with the receipts to – the taxes and the receipt, and you can request for the – basically for the house to be yours." RP 323. Yishmael assured

⁴ Yishmael sometimes recruited his friend "Hero" to break the vacant home's existing locks and install new ones. RP 338, 353, 529, 857. When Hero was involved, Yishmael had the client "write up a letter or something that says I give ... his friend[] permission to break my locks, and change my locks[.]" RP 338, 353. Other times, the clients entered the homes and changed the locks themselves. RP 540.

⁵ Yishmael's expert testified about a statutory provision shortening the time needed to establish adverse possession from the usually-required 10 years to seven "if you occupy under a defective title ... and you pay your property taxes[.]" RP 721, 789.

his clients that “with filing all of your documentation you won’t be considered criminal trespassing.” RP 371, 385-86, 524.

Yishmael’s clients believed him and what he told them about the law. RP 327, 525, 604, 624, 647. Several of those who paid his fees, followed his advice, and moved into vacant homes, were eventually arrested for criminal trespass and/or residential burglary. RP 419, 441-45, 463, 542, 621, 629-31. After their arrests, Yishmael started providing advice on how to handle the criminal proceedings.⁶ RP 656. Once investigators understood they were all members of Yishmael’s “homesteading” program, all charges against the clients were dismissed. RP 542, 632.

The State charged Yishmael with unlawful practice of law and several counts of theft, attempted theft, and conspiracy to commit theft. CP 1-27. The conspiracy counts were dismissed without prejudice before trial. RP 57. At trial, the State presented testimony from several of Yishmael’s clients about the advice and documents he provided and the fees he charged. The State also called retired Seattle University School of Law Professor David

⁶ Following the arrests, Yishmael advised his clients that they could be charged with criminal trespass after all, as well as “filing false and forged documents into public record,” but claimed they could not be charged with burglary “because all have established residency by receiving mail and putting utilities into your name, or control. Breaking and entering is overcome by your recorded document.” RP 649.

Boerner to give an expert opinion about whether Yishmael's conduct amounted to the practice of law. Professor Boerner testified about how the Washington Supreme Court defines "practice of law" and opined that Yishmael was engaged in the practice of law when he drafted documents purporting to affect legal rights and provided advice to others about what to do with the documents. RP 480-85. Professor Boerner also identified a Washington State Bar Association document certifying that Yishmael has never been admitted to the Bar. RP 486.

In his defense, Yishmael called Seattle University School of Law Professor Gregory Silverman as an expert witness. RP 701. Professor Silverman did not testify about the practice of law or provide any opinion as to whether Yishmael's conduct amounted to the practice of law. Rather, he provided an overview of property law and explained the concepts of abandoned property, adverse possession, and homesteading. RP 703-21. Professor Silverman's testimony established that none of the documents Yishmael counseled his clients to post or record had any legal effect and that Yishmael's understanding of abandonment, adverse possession, and homesteading was incomplete at best. RP 749, 770-800.

Yishmael also testified. RP 820. He did not dispute his former clients' testimony, but insisted he had never claimed to be a lawyer and did not intend to deceive his clients. RP 840-41, 846-47. Yishmael said that he had reviewed the unlawful practice of law statute, but not the definition of "practice of law" promulgated by the supreme court. RP 863. He claimed that he did not "knowingly" practice law. RP 863-64. He believed that "unauthorized practice of law was assisting someone with court documents and representing them in court[.]" RP 863.

The jury acquitted Yishmael of theft and convicted him of the unlawful practice of law. RP 1011-12. The trial court imposed a suspended sentence. CP 564.

C. ARGUMENT

1. THE USE OF GR 24 TO DEFINE "PRACTICE OF LAW" DOES NOT VIOLATE THE DOCTRINE OF SEPARATION OF POWERS.

Yishmael contends that the use of a supreme court-promulgated rule to define an element of a criminal offense is a violation of the separation of powers doctrine and an unlawful delegation of legislative authority to the judiciary. This Court should reject the argument. The supreme court has sole authority to define the practice of law. The legislature delegated nothing, and

instead properly provided sanctions for conduct that is inherently unlawful.

As the party arguing that the legislature's enactment of RCW 2.48.180 violates the separation of powers doctrine, Yishmael "bears a heavy burden, for we presume that legislative enactments are constitutional." State v. Gresham, 173 Wn.2d 405, 428, 269 P.3d 207, 217 (2012). Yishmael's burden is to establish the statute is unconstitutional beyond a reasonable doubt. State v. Wadsworth, 139 Wn.2d 724, 734, 991 P.2d 80 (2000).

Under Washington's constitution, governmental authority is divided into three branches: legislative, executive, and judicial. State v. Rice, 174 Wn.2d 884, 900-01, 279 P.3d 849 (2012); WASH. CONST. arts. II, II, IV. The separation of powers doctrine "serves mainly to ensure that the fundamental functions of each branch remain inviolate." Carrick v. Locke, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). The doctrine "was never intended to create, and certainly never did create, utterly exclusive spheres of competence" within each branch. Zylstra v. Piva, 85 Wn.2d 743, 750, 539 P.2d 823 (1975). Rather, the three branches "must remain partially intertwined if for no other reason than to maintain an effective system of checks and balances, as well as an effective

government.” Id. Such “[h]armonious cooperation between the three branches is fundamental to our system of government.” Id. Accordingly, the separation of powers doctrine is “grounded in flexibility and practicality, and rarely will offer a definitive boundary beyond which one branch may not tread.” Carrick, 125 Wn.2d at 135 (citing In re Juvenile Director, 87 Wn.2d 232, 240, 552 P.2d 163 (1976)).

The test for determining whether a separation of powers violation has occurred reflects both concern for the independence of each branch and the fact that some overlap is inevitable. State v. Moreno, 147 Wn.2d 500, 505, 58 P.3d 265 (2002).

The question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.

Id. at 505-06 (quoting Carrick, 125 Wn.2d at 135). “In adjudging the potential damage to one branch of government by the alleged incursion of another, it is helpful to examine both the history of the practice challenged as well as that branch’s tolerance of analogous practices.” Carrick, 125 Wn.2d at 136. “[A] long history of cooperation between the branches in any given instance tends to militate against finding any separation of powers violation.” Id.

At issue here is whether the overlap between the judiciary's authority to define and regulate the practice of law and the legislature's authority to define the criminal offense of unlawful practice of law is more properly considered "harmonious cooperation" between the branches, or an invasion of the fundamental functions of the legislative branch by the judiciary.

The supreme court has exclusive authority to define and regulate the practice of law. Short v. Demopolis, 103 Wn.2d 52, 62, 691 P.2d 163 (1984); State v. Cook, 84 Wn.2d 342, 345, 525 P.2d 761 (1974); State v. Janda, 174 Wn. App. 229, 235, 298 P.3d 751 (2012). The court exercised this authority by adopting GR 24 to define "practice of law." Janda, 174 Wn. App. at 235; GR 24. The purpose of adopting and publishing the rule was to "protect the public from untrained and unregulated persons who hold themselves out as able to offer advice and counsel in matters customarily performed by lawyers that affect individuals' legal rights, property, and life." 2 Wash. Prac. Rules Practice GR 24 (8th ed.) (Drafters' Cmt.). Although the phrase had been rather

broadly defined in case law,⁷ a “more specific definition ... may enable the enactment of consumer protection legislation; it may aid in securing funding for legal services; it may assist the criminal prosecution of unlawful practitioners; and it will eliminate uncertainty for persons working in law-related areas about the propriety of their conduct.” Id.

As Professor Boerner testified, GR 24 is essentially a codification of existing caselaw. RP 489-90. It generally defines practice of law as “the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) which require the knowledge and skill of a person trained in the law,” including but not limited to “[g]iving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration” and the “[s]election, drafting, or completion of legal documents or agreements which affect the legal rights of an entity or person(s).” GR 24. The rule also sets out certain exceptions and exclusions, including for the “[s]ale of legal forms in any format.” Id.

⁷ The drafters of GR 24 noted one early attempt to define the practice of law: “it means doing or practicing that which an attorney or counselor at law is authorized to do and practice.” 2 Wash. Prac. Rules Practice GR 24 (8th ed.) (Drafters’ Cmt.) (quoting State v. Chamberlain, 132 Wash. 520, 323 P. 337 (1925)).

While the judiciary has the authority to define the practice of law, it is for the legislature to define the criminal offense of the unlawful practice of law. State v. Ramos, 149 Wn. App. 266, 271, 202 P.3d 383 (2009) (citing Wadsworth, 139 Wn.2d at 734). The legislature has done this by setting forth the elements, defenses to, and applicable punishments in RCW 2.48.180. The elements of the crime, as relevant here, are (1) defendant is a “nonlawyer” as that term is defined in the statute, and (2) defendant “practices law.” RCW 2.48.180(1)(b), (2)(a). The statute provides an affirmative defense that “at the time of the offense, the conduct alleged was authorized” by other rules or statutes. RCW 2.48.180(7). It further provides that a single violation of the statute constitutes a gross misdemeanor, and each subsequent violation is a class C felony. RCW 2.48.180(3)(a), (b).

Yishmael argues that by failing to further define “practice of law”, the legislature improperly delegated to the judiciary the authority to define an element of the crime. But “[t]he Legislature has an established practice of defining prohibited acts in general terms, leaving to the judicial and executive branches the task of establishing specifics.” Wadsworth, 139 Wn.2d at 743. For example, the legislature enacted a statute making it a crime to

knowingly possess or control a weapon in designated weapons-free areas, but left to local judicial authority the decision about which areas of a courthouse to designate as weapons-free. Id. at 734, 738. After noting several other areas in which the legislature appropriately deferred specifics to the branch better suited to articulate them, our supreme court rejected a separation of powers challenge. Id. at 736-39, 743.

Here, the legislature defined the crime of unlawful practice of law in general terms, leaving specifics of what constitutes the practice of law to the branch responsible for defining that term. There was no intrusion by the judiciary into the legislature's core functions.

This case is unlike Ramos, on which Yishmael relies. There, the legislature delegated sex offender risk classification to county sheriffs and criminalized the failure of offenders with certain classifications to report to sheriffs every 90 days. 149 Wn. App. at 271-72. Division Two of this Court concluded that the classification of sex offenders was a legislative function, and that the legislature's delegation of the task to the executive branch was improper because it failed to provide adequate direction. Id. at 275-75. Here, in contrast, defining the practice of law is not a legislative

function; it is a judicial one. The legislature delegated nothing and thus had no reason to provide guidance.

Unlawful practice of law is an example of harmonious cooperation between the branches where their spheres of authority overlap. The legislature exercised its constitutional authority to define the crime in general terms, leaving the judiciary to exercise its constitutional authority to define the practice of law. Indeed, any effort by the legislature to provide a contrary definition would itself violate the separation of powers doctrine. Washington State Bar Ass'n v. State, 125 Wn.2d 901, 906-09, 890 P.2d 1047 (1995).

Because Yishmael fails to demonstrate beyond a reasonable doubt that RCW 2.48.180 represents an unlawful delegation of legislative authority or otherwise offends the separation of powers doctrine, his argument should be rejected.

2. YISHMAEL FAILS TO ESTABLISH THAT RCW 2.48.180 IS UNCONSTITUTIONALLY VAGUE.

Yishmael contends that the unlawful practice of law statute is unconstitutionally vague because it fails to define "practice of law." Division Two of this Court held that the undefined phrase "practice of law" is not unconstitutionally vague when properly considered together with existing law, ordinary usage, and the general purpose

of the statute. State v. Hunt, 75 Wn. App. 795, 880 P.2d 96, rev. denied, 125 Wn.2d 1009 (1994). Yishmael's efforts to distinguish Hunt are unavailing. His vagueness challenge fails.

The constitutionality of a statute is a question of law, reviewed de novo. State v. Watson, 160 Wn.2d 1, 5, 154 P.3d 909 (2007). Statutes are presumed constitutional and the party challenging a statute has the burden to establish it is unconstitutional beyond a reasonable doubt. Wadsworth, 139 Wn.2d at 734. Unless the challenger claims a violation of First Amendment rights,⁸ vagueness challenges are evaluated by "inspecting the actual conduct of the party who challenges the ordinance and not by examining hypothetical situations at the periphery of the ordinance's scope." Spokane v. Douglass, 115 Wn.2d 171, 182-83, 795 P.2d 693 (1990).

Under the due process clause of the Fourteenth Amendment, a statute is void for vagueness if either: (1) the

⁸ At the trial level, Yishmael claimed the unlawful practice of law statute violated his First Amendment rights. CP 525. He has evidently abandoned the claim, except as a means to distinguish Hunt. Brief of Appellant at 22. While Yishmael suggests that his "actions implicate the First Amendment" such that "the scope of the inquiry is not merely on the facts as applied," he makes no facial vagueness argument. A facial vagueness challenge asserts that the statute is impermissibly vague in all of its applications. Douglass, 115 Wn.2d at 182 & n.7, 8. Yishmael can make no such assertion here, since he admitted that he knew the statute prohibited him from "assisting someone with court documents and representing them in court in that fashion." RP 863. Accordingly, this Court should evaluate Yishmael's vagueness claim as applied to the facts in this case.

statute “does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed”; or (2) the statute “does not provide ascertainable standards of guilt to protect against arbitrary enforcement.” Watson, 160 Wn.2d at 6. Some measure of vagueness is inherent in the use of language; accordingly, courts “do not require impossible standards of specificity[.]” Id. at 7 (internal quotations omitted). The vagueness doctrine “is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.” Arnett v. Kennedy, 416 U.S. 134, 159, 94 S. Ct. 1633, 40 L. Ed. 2d 15 (1974). Thus, “a statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his [or her] actions would be classified as prohibited conduct.” Watson, 160 Wn.2d 7 (alteration in original; quotation omitted).

When a criminal statute does not define words alleged to be unconstitutionally vague, “The reviewing court may look to existing law, ordinary usage, and the general purpose of the statute to

determine whether the statute meets constitutional requirements of clarity.” Hunt, 75 Wn. App. at 801. As the Hunt court observed, existing law includes several Washington court decisions defining “practice of law.” Id. at 802-03 (citing cases). Since Hunt’s actions clearly fell within these definitions, the court held that “an ordinary person would understand that Hunt’s actions constituted the practice of law.” Id. at 804.

Yishmael appears to argue that the Hunt court erred by relying on cases involving disciplinary proceedings and civil matters to conclude that the phrase “practice of law” was not unconstitutionally vague as used in the criminal statute. BOA at 22. He cites no authority for that proposition. Courts have long recognized that authoritative judicial construction of an otherwise vague statutory term may provide sufficient notice to pass constitutional muster. See Winters v. New York, 333 U.S. 507, 514-15, 68 S. Ct. 665, 92 L. Ed. 840 (1948) (“The interpretation by the Court of Appeals puts these words in the statute as definitively as if it had been so amended by the legislature”; thus, “the defendant, at the time he acted, was chargeable with knowledge of the scope of the subsequent interpretation”). See also State v. Wees, 138 Idaho 119, 58 P.3d 103, 107-08 (Idaho Ct. App. 2002)

(“The Idaho Supreme Court’s clarifying identification of activities that constitute the practice of law in [three cases], as discussed above, leaves no uncertainty as to whether the acts Wees is alleged to have committed fall within the proscription of the statute.”).

In this case, it is especially appropriate to look to prior judicial interpretations of “practice of law” because the GR 24 definition, which Yishmael concedes provides a sufficient definition of the phrase for some purposes, BOA at 23, is “simply a codification of existing case law.” RP 489. As GR 24’s drafters point out, Washington courts have identified the following as included in the “practice of law”: “performing services in court; legal advice and counsel; selection, drafting, and completions of legal documents; settling claims, legal research, assisting with pro se legal filings.” 2 Wash. Prac., Rules Practice GR 24 (8th ed.) (Drafters’ Cmt.). Yishmael provided legal advice and counsel; he selected and drafted legal documents; he performed legal research and assisted with pro se filings. He charged a fee for these services. All of this conduct falls within the definition of practice of law that has been “generally understood” for decades. See In re Droker, 59 Wn.2d 707, 719, 370 P.2d 242 (1962) (“It is now a

generally acknowledged concept that the term 'practice of law' includes ... legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured."); Ferris v. Snively, 172 Wash. 167, 174, 19 P.2d 167 (1933) (noting an early statute defining the practice of law as follows: "According to the generally understood definition of the practice of law in this country, it embraces ... conveyancing, the preparation of legal instruments of all kinds, and in general, all advice to clients, and all action taken for them in matters connected with the law").

Courts across the country have rejected vagueness challenges to unlawful practice of law statutes. See Hunt, 75 Wn. App. at 800 ("We note initially that the federal courts have refused to find similar statutes impermissibly vague under the federal constitution."); State v. Foster, 674 So. 2d 747, 751 (Fla. Dist. Ct. App. 1996) (noting "that foreign courts that have reviewed comparable 'unlicensed practice of law' provisions consistently have found no unconstitutional vagueness") (citing cases); Wees, 58 P.3d at 108 ("Our conclusion that this statute, prohibiting the unlicensed practice of law, is not unconstitutionally vague finds seemingly unanimous support in the courts of our sister states.") (citing cases). Yishmael's conduct in providing legal advice and

drafting legal documents is plainly encompassed in the ordinary, common understanding of “practice of law,” in the cases interpreting that phrase over decades, and in GR 24. His vagueness challenge fails.

3. UNLAWFUL PRACTICE OF LAW IS A STRICT LIABILITY OFFENSE.

Yishmael contends that “knowledge” is an implied essential element of the offense of unlawful practice of law, and the trial court erred by refusing to so instruct the jury. There are solid policy reasons for treating the unlawful practice of law as a strict liability offense. Yishmael’s argument fails.

The legislature is empowered to define crimes and is entitled to enact strict liability offenses. State v. Rivas, 126 Wn.2d 443, 452, 896 P.2d 57 (1995). Where a statute does not specify any mental element, courts look to statutory language and history to ascertain legislative intent. State v. Bash, 130 Wn.2d 594, 605, 925 P.2d 978 (1996). Where, as here, neither the statutory language nor legislative history clarifies the matter, a reviewing court balances several considerations in reaching its assessment of legislative intent:

(1) a statute's silence on a mental element is not dispositive of legislative intent; the statute must be construed in light of the background rules of the common law, and its conventional mens rea element; (2) whether the crime can be characterized as a "public welfare offense" created by the Legislature; (3) the extent to which a strict liability reading of the statute would encompass seemingly entirely innocent conduct; (4) and the harshness of the penalty. Other considerations include: (5) the seriousness of the harm to the public; (6) the ease or difficulty of the defendant ascertaining the true facts; (7) relieving the prosecution of difficult and time-consuming proof of fault where the Legislature thinks it important to stamp out harmful conduct at all costs, "even at the cost of convicting innocent-minded and blameless people"; and (8) the number of prosecutions to be expected.

Bash, 130 Wn.2d at 605-06, 610 (quoting 1 Wayne R. LaFave & Austin W. Scott, *Substantive Criminal Law* § 3.8, at 341 (1986)).

Balancing the Bash factors in this case leads to the conclusion that unlawful practice of law is a strict liability offense. First, while the statute contains no mental element, its creation of an affirmative defense to the crime is an indication that the legislature intended strict liability. Cf. State v. Anderson, 141 Wn.2d 357, 362-63, 5 P.3d 1247 (2000) (legislature's failure to provide affirmative defense of unwitting conduct indicates its intent to make knowledge an element of offense).

Second, unlawful practice of law is a public welfare offense. Public welfare offenses differ from traditional crimes in several

ways. Morrisette v. United States, 342 U.S. 246, 255-56, 72 S. Ct. 240, 96 L. Ed. 288 (1952). While most traditional crimes prohibit aggressions or invasions, public welfare offenses usually proscribe acts of “neglect when the law requires care, or inaction when it imposes a duty.” Id. While traditional crimes are likely to result in direct injury to a specific victim, many public welfare offenses simply create the danger or probability of injury. Id. at 256. Public welfare offenses are regarded as offenses against the government’s authority. “In this respect, whatever the intent of the violator, the injury is the same,” so legislation applicable to such offenses typically contains no intent element. “The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities.” Id.

The unlawful practice of law is a public welfare offense because it represents the failure to obtain a law license when the law requires that action. It creates a probability of danger: injury to people and entities from poor or unethical performance of legal functions by nonlawyers who lack extensive and current legal education, are not required to follow standards of ethical behavior,

and are not subject to discipline by the Bar. 2 Wash. Prac., Rules Practice GR 24 (8th ed.) (Drafters' Cmt). In terms of harm to the public, it makes no difference whether one dispensing faulty legal advice and drafting faulty legal documents knows that her conduct constitutes the practice of law—any injuries flowing from her incompetence are in no way mitigated by the fact that she did not intend to practice law. See State v. Pinkham, __ Wn. App. __, No. 34438-0-III (Feb. 6, 2018), slip op. at 5 (concluding statute prohibiting loaded firearms in vehicles is a strict liability offense in part because the potential harm from the accidental discharge of weapon in a vehicle is not mitigated by the fact that it was not intended). This factor favors strict liability.

The third Bash factor is whether a strict liability reading of the statute would encompass entirely innocent conduct. Yishmael asserts that such a reading would criminalize “basic teaching of constitutional rights in school classrooms” and “legal forms and computer programs that are sold.” BOA at 46-47. That is not so. First, GR 24 contains an exception to the definition of practice of law for “sale of legal forms in any format.” Second, GR 24, and the cases it codified, establish that advising others about their legal rights and responsibilities constitutes the practice of law only when

done “for fees or other consideration.” GR 24(a)(1). Thus, the statute does not criminalize, for example, the free seminars in which Yishmael gave basic information on adverse possession. It was only when Yishmael charged clients for advice and documents pertaining to their ostensible legal rights and responsibilities that he ran afoul of the law. This factor favors strict liability.

Fourth, the penalty for unlawful practice of law is not especially harsh. Yishmael claims it is, pointing out that second and subsequent violations are Class C felonies, punishable by up to five years in prison and/or a fine of up to \$10,000. But a first violation is only a gross misdemeanor, punishable by up to 364 days in jail and/or up to \$5,000 fine. RCW 2.48.180(3)(a); 9A.20.021. In this case, Yishmael received a suspended sentence and no fine. CP 564-66. Yishmael faces no felony unless he commits this crime again, at which time he certainly cannot claim ignorance. This factor favors strict liability.

The fifth factor is the seriousness of the harm to the public. Yishmael does not address this element, arguing only that the availability of civil and injunctive remedies weighs in favor of requiring knowledge. BOA at 47-48. But as the facts of this case demonstrate, the unlawful practice of law can cause very serious

harm indeed. Several of Yishmael's clients were arrested and jailed when they followed his advice, putting their jobs and families in peril. Crystopher Smith was in jail for several days, nearly lost his job, and struggled to explain the situation to his children. RP 631, 658. Carrie Bouwkamp explained that, as a result of following Yishmael's advice, her family became homeless and lost everything they owned. CP 590. This factor favors strict liability.

Sixth, the person engaged in the practice of law is in the best position to ascertain whether he is in fact a lawyer entitled and competent to do so. Indeed, Yishmael testified that he did not consider himself to be practicing law because he had reviewed the practice of law statute and interpreted it to bar other conduct. RP 863. It is reasonable to infer that Yishmael consulted the statute because he knew he might be practicing law. After he consulted the statute, he was on notice that it contained no knowledge element. See LaFave and Scott, 1 Subst. Crim. L. § 5.5(c) (3d ed.) (noting that strict liability offenses may be effective deterrents because "a person engaged in a certain kind of activity would be more careful precisely because he knew that this kind of activity was governed by a strict liability statute"). This factor favors strict liability.

The seventh factor is whether making the offense a strict liability offense relieves the prosecution of difficult and time-consuming proof of fault. Yishmael argues that it is not too much of a burden to require the State to prove that a person knew they were engaged in the practice of law. BOA at 48. Of course, he also argues that the State could not have proven its case here if it had had to prove knowledge. Knowledge can be a difficult element to prove because the defendant is the best—and sometimes the only—source of that information. He can simply deny it. This factor weighs in favor of strict liability.

The final factor pertains to the number of prosecutions that might be expected. The fewer prosecutions expected, the more likely some mental element is required. Anderson, 141 Wn.2d at 365. While one may infer from the dearth of appellate opinions that there have been few prosecutions for unlawful practice of law, this may not always be the case. As the drafters of GR 24 pointed out, there is a “growing presence of legal services by nonlawyers.” 2 Wash. Prac., Rules Practice GR 24 (8th ed.) (Drafters’ Cmt). To the extent that these efforts are not sanctioned by the profession, courts, or legislature, it is reasonable to expect an increase in criminal prosecution of unlawful practice of law. Even so, unlawful

practice of law is unlikely to be frequently prosecuted. This factor weighs against strict liability.

On the whole, the Bash factors weigh in favor of strict liability. This Court should conclude that the trial court did not err by refusing to instruct the jury that knowledge is an essential element of unlawful practice of law.

4. THE TRIAL COURT DID NOT COMMENT ON THE EVIDENCE BY USING GR 24 TO INSTRUCT THE JURY ON THE PRACTICE OF LAW.

Yishmael argues that the trial court violated the constitutional prohibition on judicial comments on the evidence by using GR 24 to define the practice of law in the jury instructions. Because GR 24 is an accurate statement of the law and suggests nothing about the judge's personal view of the case, the argument fails.

Article 4, section 16 of the Washington Constitution prohibits the trial court from commenting on the evidence. State v. Deal, 128 Wn.2d 693, 703, 911 P.2d 996 (1996). The purpose of prohibiting such comments is to prevent the judge's opinion from influencing the jury's verdict. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995).

"An instruction that does no more than accurately state the law pertaining to an issue in the case does not constitute an

impermissible comment on the evidence by the trial judge under Const. art. 4 § 16.” State v. Ciskie, 110 Wn.2d 263, 282-83, 751 P.2d 1165 (1988). Rather, an impermissible comment is “an indication to the jury of the judge’s attitudes toward the merits of the cause.” Id. It must “either reveal the court’s evaluation of a particular witness or indicate whether the judge personally believed any of the testimony.” State v. Carr, 13 Wn. App. 704, 710, 537 P.2d 844 (1975).

When an instruction “does not accurately state the law, and instead essentially resolves a contested factual issue, it constitutes an improper comment on the evidence.” State v. Sinrud, 200 Wn. App. 643, 650, 403 P.3d 96 (2017) (citing State v. Brush, 183 Wn.2d 550, 557, 353 P.3d 213 (2015)). In Brush, there was a contested factual issue about whether abuse had occurred over “a prolonged period of time” where the evidence showed that abuse occurred during a two-month period. 183 Wn.2d at 555. The trial court there instructed the jury that “prolonged period of time means more than a few weeks.” Id. Thus, the instruction resolved the factual dispute. “As long as the State showed that the abuse lasted longer than a few weeks, the jury was instructed to find that the abuse occurred over a ‘prolonged period of time.’” Id. at 559.

Similarly, in Sinrud, the trial court instructed the jury that it may not infer intent to deliver a controlled substance from mere possession absent “substantial corroborating evidence,” and that the law requires “at least one additional corroborating factor.” 200 Wn. App. at 650. This Court held that the instruction was a comment on the evidence because it “could be read to resolve for the jury that evidence of one corroborating factor was necessarily substantial corroborating evidence.” Id. at 651.

This case is not like Brush or Sinrud. The instructions in those cases were not accurate statements of the law. But here, the supreme court’s definition of the practice of law in GR 24 is an accurate statement of law by the only governmental branch empowered to make it. As such, it cannot be considered a comment on the evidence. Brush, 183 Wn.2d at 557; Sinrud, 200 Wn. App. at 650. Further, there was no factual dispute in this case about what is encompassed in the definition of “practice of law.” The only evidence on that point was Professor Boerner’s testimony that GR 24 was the supreme court’s definition and the copy of GR 24 that was admitted as an exhibit. GR 24 identifies giving advice about legal rights for a fee and preparing legal documents as the practice of law. That was not contested. What was

contested was whether the information Yishmael shared with his clients amounted to advice about the legal rights and responsibilities of others and whether it was provided for a fee. The instruction defining the practice of law according to GR 24 did not resolve any factual dispute. It was not a comment on the law.

5. SUFFICIENT EVIDENCE SUPPORTS YISHMAEL'S CONVICTION.

Yishmael contends the State presented insufficient evidence to support his conviction for unlawful practice of law. He is mistaken.

The test for determining the sufficiency of the evidence 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). A claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. Id.

To prove Yishmael committed the unlawful practice of law, the State had to prove that Yishmael was not an active member of the Washington State Bar and that he engaged in the "practice of law" as defined by GR 24. CP 552-53. As indicated above, that

definition includes “giving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or consideration,” and “selection, drafting, or completion of legal documents or agreements which affect the legal rights of an entity or person(s).” GR 24; CP 552.

As Yishmael repeatedly asserts, the facts of this case were not in dispute. He advised clients about how to gain legal ownership of a house (and dissolve title in current owners) and charged a fee. This is giving advice to others about their legal rights or the rights of others; it is the practice of law. Yishmael also drafted documents asserting claims to real property. As Professor Boerner testified, these documents “all purport to assert legal rights and affect legal rights of others. And to do that – to draft a document which purports to do that for a fee is the practice of law[.]” RP 485. “It is the combination of both the providing advice and of drafting the documents. And giving advice about the documents, and how to use them, and what to do with them. That would be the practice of law. That is, in my opinion, the practice of law.” RP 485.

Viewed in the State's favor, the evidence is plainly sufficient to support Yishmael's conviction. This Court should reject his argument.

6. REFUSAL TO PROVIDE YISHMAEL'S PROPOSED JURY INSTRUCTIONS DID NOT VIOLATE HIS RIGHT TO PRESENT A DEFENSE BECAUSE HIS INSTRUCTIONS WERE NOT ACCURATE STATEMENTS OF LAW.

Yishmael contends the trial court denied him the right to present a defense by refusing to provide the jury with his proposed instructions on "practice of law" and "knowledge."

A criminal defendant is generally entitled to a jury instruction on the defense theory of the case if the evidence supports it. State v. Ager, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). "However, a defendant is not entitled to an instruction which inaccurately represents the law or for which there is no evidentiary support." Id. Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law. State v. Irons, 101 Wn. App. 544, 549, 4 P.3d 174 (2000).

As argued above, GR 24 presents an accurate statement of law on what constitutes the practice of law. The instruction did not preclude Yishmael from arguing his case. Rather, it allowed

Yishmael to argue that he did not advise others as to their legal rights, but merely gave them general information about adverse possession.

Also as argued above, knowledge is not an element of unlawful practice of law. Yishmael was not entitled to an instruction to the contrary because that would not be an accurate statement of the law. Although this did have the effect of precluding Yishmael from arguing he was not guilty because he did not know he was practicing law, that argument was not a legally available defense.

D. CONCLUSION

The trial court properly instructed the jury. It did not deny Yishmael his right to present a defense. Yishmael was found guilty of unlawful practice of law because the evidence clearly established his guilt. This Court should affirm.

DATED this 15th day of February, 2018.

Respectfully submitted,

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