SUPREME COURT NO._____
COURT OF APPEALS NO. 86208-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

FRANK JOSEPH SANDOVAL,

Petitioner.

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

The Honorable George Appel, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Frank Sandoval asks this Court to grant review of the Court of Appeals' decision in State v. Sandoval, No.86208-1-I, filed on June 6, 2025. A copy is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Did the State present sufficient evidence to prove Mr. Sandoval's conduct was communication with a minor for immoral purposes?

2. Is the communication with a minor for immoral purposes statute, RCW 9.68A.090, unconstitutionally vague as applied to Mr. Sandoval's conduct?

C. STATEMENT OF THE CASE

a. Charges and Conviction

Mr. Sandoval was charged with two counts of second degree child molestation and one count of communication with

a minor for immoral purposes (CMIP). CP 60. E.B. was named as the named victim of all three offenses. Id.

The jury acquitted Mr. Sandoval of the two molestation charges but found him guilty of CMIP. CP 79, 80, 81.

b. Facts

Angela Burns, her husband, and their two daughters, E.B. and K.B., regularly frequented the SnoTown Brewery owned by Mr. Sandoval and Keri Jensen. The Brewery was described as family friendly where kids were welcome. RP 395-397, 565. E.B. and K.B. even helped wash dishes and buss tables. RP 399.

The Burns's eventually became good friends with Mr. Sadoval. Mr. Sandoval occasionally took trips with their family and attended parties and events at their home. RP 443-445, 566-557.

In late 2020 E.B. also started helping Mr. Sandoval and his son can the beer that Mr. Sandoval made at the Brewery. RP 400, 411, 438. Mr. Sandoval's friend's daughter initially helped him

and his son with the canning but she left for college. Because Mr. Sandoval knew E.B. was home schooled and had a flexible schedule he enlisted her to help. RP 699. He paid her $20 each time she helped. RP 700.

E.B. was excited to help Mr. Sadoval can beer. She enjoyed it and was proud of herself for having a job. RP 452. Mr. Sandoval would pay E.B. for her work in cash. RP 456. Mr. Sandoval's son always canned beer at the Brewery with E.B. and Mr. Sadoval. He said E.B. never appeared uncomfortable. RP 671-672.

As time went on, Ms. Burns and Mr. Sandoval started sending each other Facebook messages and speaking daily. RP 421, 451. Ms. Burns eventually started flirting with Mr. Sadoval. She started sending sexual photographs of herself and their conversations became sexual. By the summer of 2021, the two embarked on a sexual relationship. RP 412, 466-467.

Ms. Burns would tell E.B. she was having breakfast with Mr. Sandoval and then meet him at the Brewery where they would have sex. RP 466. At least once she and Mr. Sandoval were intimate at the Burns's home after Ms. Burns's husband went to work and while E.B. and her sister were present. RP 467-468.

Ms. Burns tried to hide the relationship from her husband but he learned she had been sending Mr. Sadoval sex photos. RP 467. They fought over her relationship with Mr. Sadoval. RP 562, 568-570.

E.B. testified she too noticed her mother texting Mr. Sadoval daily. RP 520, 533. Her mother always wanted to see Mr. Sandoval and would go to the Brewery alone. RP 533. E.B. said her father became upset with her mother because of the time she spent talking with Mr. Sandoval and sending him photos. RP 539-540. Her mother also told E.B. that her father was upset about her relationship with Mr. Sadoval. RP 543. E.B. told the

forensic interviewer her father and mother would fight about Mr. Sandoval in front of her because her father did not want to share her mother with Mr. Sandoval. RP 541-542.

It was when her parents started fighting about Ms. Burns's relationship with Mr. Sandoval that E.B. no longer liked Mr. Sandoval. RP 469. E.B. testified she had become bitter and was rude to Mr. Sandoval because she felt that Mr. Sandoval had become the center of her family's life. Her mother would scold her for her behavior toward Mr. Sandoval. RP 534.

When Ms. Burns and Mr. Sandoval began their affair and throughout the summer of 2021 and early autumn Mr. Sandoval was not canning beer so he did not need E.B.'s help. RP 484. On October 19, 2021, when Mr. Sadoval was going to again can beer he asked E.B. to help but E.B. refused. When her mother insisted that she help Mr. Sadoval E.B. told her mother Mr. Sandoval molested her. RP 523.

E.B. testified that Mr. Sandoval sometimes went into the Brewery's backroom with her and pulled her waistband open and put the $20 she earned helping him can beer in her waistband. RP 501, 503. She also recalled him putting the money in her back pocket. RP 502.

Mr. Sandoval testified that when he was initially contacted by the police about E.B.'s allegations he was shocked, confused, and surprised. RP 702-703. Mr. Sandoval confirmed the affair with Ms. Burns that began in the summer of 2021 and it continued until the day E.B. made her allegations. RP 727. Mr. Sadoval denied E.B.'s allegations of sexual molestation and denied he put the money E.B. earned in her waistband. RP 731-732.

D. ARGUMENTS

1. **This Court should accept review because the Court of Appeals decision conflicts with decisions from this Court and other appellate courts and it erroneously concluded the evidence was sufficient to support Mr. Sandoval's CMIP conviction.**

In every criminal case, due process requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068 (1970); U.S. Const. amend 14; Const. art. I, sec. 3. Evidence is sufficient to support a conviction only if, after viewing the evidence and all reasonable inferences in a light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

"[A] defendant communicates with a minor under RCW 9.68A.090 if he or she *invites* or *induces* the minor to engage in prohibited conduct." State v. Jackman, 156 Wn.2d 736, 748, 132 P.3d 136 (2006) (emphasis in original). To be convicted, the

State had to prove that Mr. Sandoval communicated with E.B. "'for the predatory purpose of promoting [her] exposure to and involvement in sexual misconduct.'" State v. Hosier, 157 Wn.2d 1, 9, 133 P.3d 936 (2006) (quoting State v. McNallie, 120 Wn.2d 925, 933, 846 P.2d 1358 (1993)).

There is no evidence that Mr. Sandoval spoke to E.B. about anything sexual or sent E.B. any messages of a sexually explicit nature. The sole evidence supporting the CMIP conviction was E.B.'s testimony that:

> And he would, like, pull the waistband of my pants out and, like, stuff the cash in the waistband of my pants.
> But he would, like, kind of hold the waistband out for a longer time and, like, look down in my pants. And I felt like he was looking at my underwear.

RP 501.

> And maybe a couple times he put the money in my back pocket…I feel like he kind of lingered his hand there for a little bit, but nothing too much.

RP 502.

Based on E.B.'s testimony the Court of Appeals found it could be inferred that Mr. Sandoval put the money in E.B.'s waistband so he could see her underwear and put the money in her back pocket as an excuse to touch her buttocks. Based on those inferences it could be further inferred the conduct was to satisfy a sexual purpose or desire. Slip Op. at 3.

"[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation." State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). While the State may argue reasonable inferences from the evidence—and the jury may draw such inferences—no element may be established by speculation. State v. Garcia, 179 Wn.2d 828, 841, 318 P.3d 266 (2014).

It is not reasonable to infer that Mr. Sandoval tucked money into E.B.'s waistband to see her underwear or that he stuffed money in her back pocket as an excuse to touch her based on how she "felt." One would have to further speculate those acts

support the inference he was communicating a sexual purpose to satisfy his sexual gratification. It does not logically follow that more likely than not Mr. Sandoval's conduct communicated an immoral purpose of a sexual nature for the predatory purpose of promoting E.B.'s exposure to and involvement in sexual misconduct or of inviting or inducing her to engage in any prohibited conduct.

In his opening brief, Mr. Sandoval pointed out that a survey of cases holding the defendant's conduct rationally supported the inference the conduct communicated a purpose to satisfy sexual gratification were all based on objective facts supporting the inference. See Appellant's Opening Brief ("AOB"), at 17-18 (citing State v. Scheimmelpfennig, 92 Wn.2d 95, 97, 594 P.2d 442 (1979), where the defendant asked a four-year-old child in explicit terms to engage in various sexual acts with him; State v. Aljutily, 149 Wn. App. 286, 290-291, 202 P.3d 1004, *review denied*, 166 Wn.2d 1026 (2009), where the

defendant described various sex acts he desired to perform on a girl he believed to be 13 years old, and sent her a photograph of his penis, pictures of him masturbating and links to pornographic videos; McNallie, 120 Wn.2d at 926-27, where the defendant asked minor girls if there was anybody in the area who gave hand jobs, suggested people could earn money for doing them, and handled his penis in front of the girls; Hosier, 157 Wn.2d at 4-5, where the defendant placed children's underwear on the fence of a playground on which he had written a message fantasizing about sexual contact with a 7-year-old, and left two notes in the neighboring yard of a 13-year-old girl explicitly describing having sex with her).

Unlike those cases, the State presented no objective facts to support a reasonable inference that Mr. Sandoval's conduct was for the purpose of satisfying his sexual gratification much less for promoting E.B.'s exposure to and involvement in sexual misconduct or of inviting or inducing her to engage in any

prohibited conduct. To infer that based on E.B.'s subjective feelings necessarily rests on conjecture and speculation. See State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006) (when assessing sufficiency of evidence, a court may not rest on guess, speculation, or conjecture).

The Court of Appeals decision that sufficient evidence supported the verdict Mr. Sandoval committed CMIP conflicts with the above cases holding inferences must be reasonable and cannot be based on speculation or conjecture. Review is appropriate under RAP 13.4(b)(1), (2) and (3).

2. **This Court should accept review to determine whether RCW 9.68A.090 is unconstitutionally vague as applied to Mr. Sandoval's conduct.**

Mr. Sandoval argued that the CMIP statute, RCW 9.68A.090, was unconstitutionally vague as applied to his conduct. AOB at 19-25; Appellant's Reply Brief at 19-21. The Court of Appeals reasoned that under this Court's decision in Scheimmelpfennig, supra, and the facts in Mr. Sandoval's case,

a person of common intelligence and understanding would have fair notice his conduct was prohibited by the statute. Slip. Op. at 4-5. Scheimmelpfennig does not support the court's reasoning.

In Scheimmelpfennig, the defendant asked a four-year-old child to climb into a van and in explicit terms engage in various sexual acts with him. Scheimmelpfennig, 92 Wn.2d at 103. The defendant did not assert the CMIP statute was unconstitutionally vague as applied to his conduct. He asserted the statute is overbroad on its face because it prohibited speech which is protected by the First Amendment. Id. Mr. Sandoval, on the other hand, contends the statute is unconstitutionally vague as applied to his conduct.

Due process requires the government to afford citizens fair warning before punishing their conduct. Spokane v. Douglass, 115 Wn.2d 171, 178-79, 795 P.2d 693 (1990) (citing Rose v. Locke, 423 U.S. 48, 96 S. Ct. 243 (1975); U.S. Const. amend 14; Const. art. I, sec. 3. In ascertaining whether a statue is vague as

applied to a defendant's conduct, the reviewing court examines the particular facts of the case rather than hypothetical applications of the statute. State v. Leatherman, 100 Wn. App. 318, 322, 997 P.2d 929 (2000) (citing Douglass, 115 Wn.2d at 182). In this analysis, the court asks whether "persons of ordinary intelligence would agree" that the statute prohibited the defendant's conduct." Id. at 324. And it must also ask whether the statute provides "ascertainable standards of guilt to protect against arbitrary enforcement." Id.

Statutes are unconstitutionally vague when they rely upon "inherently subjective terms" that are amendable to varying and arbitrary interpretations. State v. Evans, 177 Wn.2d 186, 207, 298 P.3d 724 (2013); State v. Coria, 120 Wn.2d 156, 839 P.2d 890 (1992). RCW 9.68A.090 does not define the phrase "immoral purposes." The undefined phrase "immoral purposes" is too inherently vague to satisfy constitutional due process standards without context. See State v. Carter, 89 Wn.2d 236,

240–41, 570 P.2d 1218 (1977) (where the court stated it "might not hesitate to agree…that the words 'immoral purposes'…were too vague under constitutional standards were we looking at these words in a vacuum" but finding they were not vague given the context of the statute at issue in the case). "Absent some intelligible and clear reference to which the phrase 'immoral purposes' can be tied, the statute would not provide notice of the conduct sought to be prohibited and therefore would be unconstitutionally vague." State v. Wissing, 66 Wn.App. 745, 755, 833 P.2d 424 (1992). Thus, because of the absence of any legislative definitions, the prohibition of communication with a minor for immoral purposes is unconstitutionally vague without context.

To save the constitutionality of the statute this Court has provided that context. The Scheimmelpfennig court held under the former similarly worded statute, RCW 9A.88.020, the statutory prohibition is "any spoken word or course of conduct

with a minor for purposes of sexual misconduct" and that context saves it from unconstitutional vagueness.[1] Scheimmelpfennig, 92 Wn.2d at 102, 104-105. In McNallie, this Court specifically addressed the phrase "immoral purposes" in RCW 9.68A.090 where it was challenged as unconstitutionally vague. In rejecting the challenge, the court applied its reasoning in Schimmelpfennig and held that in context the statute prohibits "communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct." McNallie, 120 Wn.2d at 933.

Read together, Scheimmelpfennig and McNallie stand for the legal proposition that without context RCW 9.68A.090 is

[1] Former RCW 9A.88.020 read: "Any person who communicates with a child under the age of seventeen years of age for immoral purposes shall be guilty of a gross misdemeanor, unless such person has previously been convicted of a felony sexual offense or has previously been convicted under this section or RCW 9.79.130, in which case such person shall be guilty of a class C felony."

unconstitutionally vague. A vague or potentially vague statute may only be constitutionally applied to one whose conduct clearly falls within the constitutional core of the statute. State v. Maciolek, 101 Wn.2d 259, 263, 676 P.2d 996 (1984). Given the context identified in Scheimmelpfennig and McNallie, the statute's "constitutional core" is words or conduct directed to a child for the predatory purpose of promoting their exposure to and involvement in sexual misconduct.

Under the facts in this case, persons of ordinary intelligence would not agree that the statute prohibited Mr. Sandoval's conduct. Pulling out E.B.'s waistband to stuff money into it or stuffing money in her back pocket, *unaccompanied by contemporaneous words or acts* suggesting or implying an invitation or inducement to engage in any sexual misconduct, is not conduct that a reasonable person would agree communicates a predatory purpose of promoting the child's exposure to and involvement in sexual misconduct.

There is no discernable standard to determine if Mr. Sandoval's conduct constituted communication for the predatory purpose of promoting E.B.'s exposure to and involvement in sexual misconduct or was an innocent way of giving E.B. the cash she earned, even if unconventional or viewed by someone as offensive. Depending on their subjective interpretation of what constitutes an immoral purpose of a sexual nature, a prosecutor could charge or a jury convict under the statute any adult, including a parent or relative, who puts money or a toy in a child's pocket or waistband as a gift to surprise or tease the child. The statue as applied to Mr. Sandoval's conduct is too amendable to random enforcement.

The Court of Appeals reliance on Scheimmelpfennig is misplaced. A person of ordinary intelligence would clearly agree the conduct in that case (asking a child to get into a van and in

explicit terms to engage in sexual conduct[2]) was an invitation to engage in any sexual misconduct for the predatory purpose of promoting the child's exposure to and involvement in sexual misconduct. In contrast, Mr. Sandoval's conduct did not clearly fall within that constitutional core of the statute. Thus, the statute as applied to Mr. Sandoval's conduct is unconstitutionally vague.

The Court of Appeals decision conflicts this Court's decisions in Scheimmelpfennig and McNallie and raises a significant question of law under both the Washington State and United States constitutions. Review is appropriate under RAP 13.4(b)(1) and (3).

E. CONCLUSION

Mr. Sandoval respectfully asks this Court to grant his petition and reverse the Court of Appeals decision in his case.

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[2] Scheimmelpfennig, 92 Wn.2d at 97.

I certify that this petition contains 3,061 words excluding those portions exempt under RAP 18.17.

DATED this 24th day of June, 2025.

Respectfully submitted,

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FILED
6/9/2025
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. FRANK JOSEPH SANDOVAL, Appellant.	No. 86208-1-I DIVISION ONE UNPUBLISHED OPINION

FELDMAN, J. — Frank Sandoval appeals his conviction for Communication with a Minor for Immoral Purposes (CMIP). Because the facts of this case are well known by the parties, we do not repeat them here except as necessary to our analysis below. Sandoval challenges both the evidentiary and constitutional underpinnings of the conviction. Finding no error, we affirm.

A. Sandoval argues there is insufficient evidence to support his CMIP conviction because the State failed to show his conduct was communication for immoral purposes of a sexual nature. When analyzing whether evidence is sufficient to uphold a jury's verdict, this court applies a deferential standard of review. *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011). "Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." *State v. Andy*, 182 Wn.2d 294,

303, 340 P.3d 840 (2014) (quoting *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004)). Also, we defer to the jury on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *Thomas*, 150 Wn.2d at 874-75.

Here, the unchallenged jury instructions required the State to prove, "That on a specific date from on or about the 21st day of May 2021 and on or about the 19th day of October 2021, the defendant communicated with E.B. for immoral purposes of a sexual nature." The court also instructed the jury, "Communication may be by words or conduct." As no party objected to these instructions, they are "law of the case" and "'are treated as the properly applicable law for purposes of appeal.'" *State v. Johnson*, 188 Wn.2d 742, 755, 399 P.3d 507 (2017) (quoting *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005)); *see also Millies v. LandAmerica Transnation*, 185 Wn.2d 302, 313, 372 P.3d 111 (2016) ("Unless there is a proper objection, jury instructions become the law of the case. We review the sufficiency of the evidence in light of the instructions given.") (internal citations and footnote omitted).

Applying these principles, the jury's verdict is supported by sufficient evidence. Sandoval was charged with CMIP in connection with several incidents involving E.B., a 12-year-old girl who Sandoval hired to dry and label cans at the brewery he owned in Snohomish. Sandoval was able to hire E.B. because he befriended her parents, who frequented the brewery. E.B. testified Sandoval sometimes paid her while her mother was at the brewery, but he would take her to the back room—where they would be alone—to do so. She added, "he would, like, pull the waistband of my pants out and, like, stuff the cash in the waistband of my pants. But he would, like, kind of hold the waistband out for a longer time and, like,

look down in my pants. And I felt like he was looking at my underwear." E.B. also testified that when Sandoval put the money in her back pocket, rather than putting it in the waistband of her pants, "he kind of lingered his hand there." The foregoing evidence (without considering additional evidence of wrongdoing) was sufficient to show Sandoval communicated with E.B. to satisfy a sexual purpose or desire, such as to look at her underwear or touch her buttocks through her clothing.

Sandoval's contrary arguments lack merit. He argues "the inference [he] tucked money into E.B.'s waistband to see her underwear or that putting the money in her back pocket was an excuse to touch her is speculation." He also argues his conduct is less egregious than the conduct Washington Courts have "held to be sufficient to convict, all of which involved sexually explicit language or conduct." These arguments misunderstand the nature of our review for sufficiency of the evidence. "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Johnson*, 188 Wn.2d at 742 (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). And as the State correctly notes, "Just because [other] cases involved more explicit communications does not mean that no reasonable juror in this case could find the defendant's actions were sufficient to support the charge." Viewing the evidence favorably to the State and drawing all reasonable inferences in its favor, sufficient evidence supports the jury's verdict on the CMIP count.

B. Sandoval next argues we should reverse the CMIP conviction because the underlying criminal statute (RCW 9.96A.090) is unconstitutionally vague as applied to his conduct. "The due process vagueness doctrine seeks to ensure that the public has adequate notice of what conduct is proscribed and to

ensure that the public is protected from arbitrary ad hoc enforcement." *State v. Saunders*, 132 Wn. App. 592, 599, 132 P.3d 743 (2006). "The vagueness doctrine is violated if the provision (1) fails to define the criminal offense so that ordinary people can understand what conduct is proscribed, and (2) fails to provide ascertainable standards of guilt to prevent arbitrary enforcement." *Id.* "The party challenging the prohibition carries the burden of overcoming the presumption that the limitation is constitutional." *Id.* Also relevant here, "We review whether a statute is unconstitutionally vague de novo as a question of constitutional law." *Dep't. of Soc. & Health Servs. v. Zamora*, 198 Wn. App. 44, 71, 392 P.3d 1124 (2017) (citing *State v. Watson*, 160 Wn.2d 1, 5, 154 P.3d 909 (2007)).

State v. Schimmelpfennig, 92 Wn.2d 95, 594 P.2d 442 (1979), is controlling on this issue. The defendant there pointed to the words "communicate" and "immoral purposes" in the CMIP statute and argued they are "insufficient to provide ascertainable standards to guide conduct." *Id.* at 102. Our Supreme Court disagreed. Construing "immoral purposes," the court examined the "whole statute in the context in which it appears in the criminal code" and held the "structure of this chapter of our criminal code gives ample notice of the legislature's intent to prohibit sexual misconduct." *Id.* at 102. Construing "communicate," the court noted it is a term of common usage and held it "denotes both a course of conduct and the spoken word." *Id.* at 103. The court then determined, "In the context of this statute, any spoken word or course of conduct with a minor for purposes of sexual misconduct is prohibited." *Id.* at 103-04. Having so construed the statute, the court held, "A person of common intelligence and understanding has fair notice of the conduct prohibited by [the CMIP statute], and ascertainable standards by

which to guide his or her conduct. The statute is neither vague nor overbroad." *Id.* at 104.

Like the defendant in *Schimmelpfennig*, Sandoval argues "reasonable ordinary people would not agree" his conduct was prohibited by the CMIP statute. He also argues there is "no discernable standard" to determine whether his conduct was "predatory" or was instead "an innocent way of giving E.B. the cash she earned." Neither argument is persuasive. In *Schimmelpfennig*, our Supreme Court stated it was "satisfied that any person of common understanding, contemplating asking a small child to climb into a van and engage in sexual activities need not guess as to the proscription and penalties of the statute." *Id.* at 103. Given the facts at issue here, we are equally satisfied any person of common understanding would know isolating a 12-year-old girl from her parent in order to pull out her waistband, stuff cash into her pants, and look down at her underwear or to cause their hand to linger in her back pocket while placing cash there is prohibited by the CMIP statute as authoritatively construed in *Schimmelpfennig*. It strains credulity, under these circumstances, to argue otherwise.

Affirmed.

Feldman, J.

WE CONCUR:

Díaz, J.

Coburn, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

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