IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. FREDERICK KARL HAACK, Appellant.	No. 39274-7-II UNPUBLISHED OPINION

Van Deren, J. — Frederick Karl Haack appeals his convictions on six counts of communication with a minor for immoral purposes. First, he argues, and the State concedes, that the trial court erred in sentencing him as a class C felon under RCW 9.68A.090 because, at the time Haack committed the offense of communicating with a minor for immoral purposes, former RCW 9.68A.090 (2003) defined it as a gross misdemeanor. Next, Haack argues that the State's evidence was insufficient for the jury to convict him of the six counts because (1) "[t]he [S]tate failed to prove beyond a reasonable doubt that [he] communicated with a minor for immoral purposes," (2) the statute "does not prohibit communications about sexual conduct that would be legal if performed," and (3) if it does proscribe communication about conduct that would be legal if performed, then the statute is unconstitutionally vague as applied to him. Supp. Br. of

Appellant at 1. We remand for resentencing based on the State's concession and our own review of the sentencing error, otherwise we affirm.

FACTS

In 2005, Haack was the pastor at the Family Worship Center in Randle, Washington. In September 2005, BJG's[1] mother moved to Randle. That same year, BJG, who was 16, moved in with her mother and began attending Haack's church. BJG became friends with the Haack family and visited their home almost every day to use their personal computer.

In December 2005, BJG visited her father in Lake Tapps[2] and BJG and Haack began e-mailing each other. Haack's e-mail address is "frederickhaack@hotmail.com"; BJG's e-mail address is "basballbaby89@aol.com." Report of Proceedings (RP) at 76. BJG saved Haack's e-mail messages to her.

On November 17, 2007, BJG told her mother about Haack's e-mail messages. After reviewing the messages, BJG's mother called the Lewis County Sheriff's Office. Lewis County Detective Bruce Kimsey met with BJG and her mother at their home. He also reviewed e-mails Haack had sent to BJG during late December 2005.

Following his meeting with BJG and her mother, Kimsey questioned Haack at the sheriff's office and Haack admitted to having inappropriate e-mail conversations with BJG. Haack stated that he deeply regretted sending the e-mails and he had "no reason to believe that [he] didn't write

[1] We refer to child victims by their initials to protect their privacy.

[2] BJG's mother testified that in December 2005 BJG's father lived in Lake Tapps. BJG stated that in December 2005 her father lived in Sumner. Kimsey testified that Haack told him that BJG had gone to her father's house in Buckley in December 2005.

them." RP at 130.

The State charged Haack with six counts of communicating with a minor for immoral purposes under RCW 9.68A.090. Counts one through three are for communication "on or about December 25, 2005," count four is for communication "on or about December 26, 2005," and counts five and six are for communication "on or about December 27, 2005." Clerk's Papers (CP) at 95-97.

At trial, Kimsey, BJG, and her mother testified as described above. Haack testified that he did not remember sending the e-mails. The trial court admitted exhibits 1 through 27 and 32 through 35 that included 22 e-mail messages sent from Haack to BJG between December 25, 2005, and December 27, 2005. These e-mails were printed by Kimsey from BJG's America Online account.

A jury found Haack guilty on all six counts of communication with a minor for immoral purposes. The trial court sentenced Haack as a class C felon to the statutory maximum of 60 months per count, to be served concurrently, along with community custody for a term "equal to the amount of earned early release time." CP at 21. Haack appeals.

ANALYSIS

I. Sentencing

Haack argues, and the State concedes, that the trial court erred in sentencing him as a class C felon because, at the time Haack committed the offenses, communicating with a minor for immoral purposes was a gross misdemeanor. Our Supreme Court has held that, to determine a defendant's sentence, a court must use the statute that was in effect at the time the alleged

misconduct occurred. *State v. Varga*, 151 Wn.2d 179, 191, 86 P.3d 139 (2004). The jury convicted Haack of six counts of communication with a minor for immoral purposes for e-mail messages he sent to BJG from December 25 to December 27, 2005. In December 2005, former RCW 9.68A.090 (2003) provided:

> (1) Except as provided in subsection (2) of this section, 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.
>
> (2) A person who communicates with a minor for immoral purposes is guilty of a class C felony punishable according to chapter 9A.20 RCW if the person has previously been convicted under this section or of a felony sexual offense under chapter 9.68A.9A.44, or 9A.64 RCW or of any other felony sexual offense in this or any other state.

In 2006, the Washington Legislature amended the statute, effective June 7, 2006, making it a class C felony for a person to communicate with a minor for immoral purposes through electronic communication. *See* former RCW 9.68A.090 (2006); Laws of 2006, ch. 139, § 1. Because the 2006 amendment was not in effect when Haack sent BJG the subject e-mails in December 2005, the sentencing court erred by sentencing him as a class C felon. We accept the State's concession that the sentencing court erred by not sentencing Haack under the statute in effect when he committed the crime. We remand for resentencing under former RCW 9.68A.090 (2003).

II. Haack's Conviction Under RCW 9.68A.090

Next, Haack argues that the State's evidence was insufficient for a jury to find Haack guilty of communicating with a minor for immoral purposes under former RCW 9.68A.090 (2003) because (1) "[t]he [S]tate failed to prove beyond a reasonable doubt that [he]

communicated with a minor for immoral purposes" and (2) the statute "does not prohibit communications about sexual conduct that would be legal if performed." Supp. Br. of Appellant at 1. We disagree.

A. Standard of Review

"When reviewing a challenge to the sufficiency of the evidence, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). On appeal, "[a]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Hosier*, 157 Wn.2d at 8. "A claim of insufficiency admits the truth of the State's evidence" and all reasonable inferences that can be drawn from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We will reverse a conviction for insufficient evidence only when no rational trier of fact could have found that the State proved all of the elements of the crime beyond a reasonable doubt. *State v. Smith*, 155 Wn.2d 496, 501, 120 P.3d 559 (2005). "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer "to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970, *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004).

B. Sufficiency of the Evidence

Former RCW 9.68A.090(1) (2003) provides that "a person who communicates with a minor for immoral purposes . . . is guilty of a gross misdemeanor." This statute applies to the e-mail messages sent by Haack to BJG.

BJG testified that Haack initiated the conversations of a sexual nature. Kimsey testified that Haack acknowledged that he had sent the e-mails to BJG and that they were inappropriate. Additionally, Kimsey read from a transcribed report of his interview with Haack wherein Haack stated that he "made the very, very poor decision to engage in these e-mail conversations with her, uh, and allowed [him]self to get caught up in things of a sexual nature." RP at 125. Moreover, the e-mails admitted at trial demonstrate that Haack's communications with BJG were of a sexual nature.[3] Haack was BJG's pastor when the communication occurred, thus, he was in a

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[3] Haack suggests that "the [S]tate admits it could not sustain its burden of proving Haack communicated with [BJG] for immoral purposes by relying on any one individual e[-]mail message." Suppl. Br. of Appellant at 1. But, we disagree with Haack's characterization and the State's minimization of the e-mail communication presented at trial. From December 25 to December 27, Haack sent BJG 22 e-mails, the content of which supports the conviction of 6 counts of communication with a minor for immoral purposes. On December 25, the following e-mails were sent from Haack to BJG:

> [12:02 am:] Hey sweet baby sister. Ya, I've seen some chicks fight on a Miller Beer comercial [sic]. Is that what you mean? Kinda' sexy really. Have you ever been in a cat fight?

Ex. 18.

> [12:26 am:] So you get ugly as in down & dirty? Tell me, what's the worst thing you've done to anyone (guy or chick)? Big bubba wants to know what his little sister's been up to.

Ex. 19.

> [12:53 am:] U mentioned the sex scene. BUBBA (there I spelled it right!) just wants to know what little sister is watching…….are u 2 embarrased [sic]?

Ex. 20.

> [1:08 am:] No problem sweetie sister, I'll take you swimming with me. Do you like to sauna? It's really hot.
> How 'bout jaccuzi [sic]? Can I watch you go of[f] the board & down the slide? Huh?! Ya, it'll be fun.

Well now, about that movie…………seems to me you're getting hesitant to tell me about the sex scene….is it that bad? OK, I will watch it with you if think you can handle that.

Ex. 21.

[1:20 am:] Duh! It is meant to be enjoyed. So, what else happened….in the movie? AND what happened with you & what's his name at the movies? Just what exactly did baby sister let him do?

Ex. 25.

[1:36 am:] MMMMMMMMM, so are you watching something right now???? Sounds like it's pretty hot!!!
Tell me more about your make out session with what's his name?

Ex. 26.

[1:50 am:] I like you more all the time ☺ Tell me more….what are you about to do……

Ex. 22.

[2:04 am:] Tell me baby, are you touching yourself?

Ex. 1.

[9:48 pm:] Hey u naughty girl.....mooning me like that (with a witches butt no less!). So, I think we need to talk. You've posed some pretty interesting questions, ya know....about the human anatomy that is. Do you want me to call you after while? Huh??????
Did you have a good christmas [sic].......get some nice things? And what's up with your dad not liking your pants? Little too sexy maybe?

Ex. 2.

[10:26 pm:] were they now. hmmmmmm. does baby sis like that? also you wondered why some people use the word pussy instead of the medical term. Sooooooooooooooooooo what name do you like?

Ex. 3.

[10:39 pm:] No, not the witches butt, sillly [sic]. Let's talk about the other stuff.........like what you like to see, you know.......sexy stuff. So, you wonder why people call it a pussy? maybe it's because it's sort of irresistable [sic]...and it's kinda soft.......and they like to be petted......right?

Ex. 4.

[10:58 pm:] Hey sweet sexy sister. Ya, your big bubba wants to hear more about your favorite memories, movies and moments. Please know & understand most of all, you can tell me anything. Also, know I am concerned for your hurts as well. If it brings back pianful [sic] memories then let's not go there. K?

Ex. 23.

[11:08 pm:] Does my sweet sister like nasty sex?

Ex. 5.

The next day, December 26, Haack sent one e-mail at 11:40 pm that stated, "Listen carefully. You need to relax & get comfortable. OK? You'll have to do the best U can to get

position of trust and confidence, adding to the predatory nature of the e-mails. Haack's, BJG's, and Kimsey's testimony, as well as the e-mails themselves, viewed in the light most favorable to the State, demonstrate that a rational trier of fact could have found that Haack communicated with a minor for immoral purposes beyond a reasonable doubt. Therefore, we hold that the evidence was sufficient to support Haack's convictions.

Next, Haack argues that the State's evidence was insufficient to convict him because RCW 9.68A.090 does not apply to his communications with BJG because the acts discussed in

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comfortable. I'm not able to assist u like I'd like 2. What R U wearing? R your clothes loose? If not, take them off[.]" Ex. 6. On December 27, Haack e-mailed the following to BJG:

> [1:36 am:] Let's be together. It'll be all right. Do you know that we'll be together soon?

[Ex. 24.

> [1:55 am:] U know I care for U. No matter what I'll still be here for you. Tomorrow will be the special day when we'll see each other again. There will be no interruptions. OK?

Ex. 7.

> [2:02 am:] My fingertips can sooth your pain.

Ex. 8.

> [2:37 am:] Hey baby sis, I have a place for U to crash. There's an RV next to the church that is available for U. It will be warm & cozy. OK?"

Ex. 9.

> [2:50 am:] I'm wondering why U R so Messy? Do U need to take off Your dirty shirt?

Ex. 10.

> [3:01 am:] Baby, tell me 'bout your underwear.

Ex. 11.

> [3:12 am:] OK.......Can you try them on for me? Big Bubba will approve baby sister's new panties. OK?
> Maybe you should show the[m] to me one at a time..........Ok maybe tomorrow?

Ex. 12.

> [11:11 am:] If Bubba finds out his sister's been real naughty with her boyfriend………………well, it depends whether or not she tells him about it BEFORE he hears about it from someone else OR catches them in the act. If sister confesses EVERYTHING brother will be much more forgiving.

Ex. 27.

the e-mails would have been legal had BJG performed them. We disagree.

The "immoral purpose" element of RCW 9.68A.090 "refers to sexual misconduct." *State v. Falco*, 59 Wn. App. 354, 358, 796 P.2d 796 (1990). Our Supreme Court has held that the statute prohibits "'communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct.'" *Hosier*, 157 Wn.2d at 9 (emphasis omitted) (quoting *State v. McNallie*, 120 Wn.2d 925, 933, 846 P.2d 1358 (1993)). Specifically, "[t]he *McNallie* court noted that RCW 9.68A.090 is, and its predecessor was, part of a legislative effort to prohibit sexual misconduct." *State v. Pietrzak*, 100 Wn. App. 291, 295, 997 P.2d 947 (2000). In *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, Division One of this court held that "under *McNallie*, the jury could find that an act not specifically proscribed by another criminal statute constitutes communication with a minor for immoral purposes." 88 Wn. App. 70, 75, 943 P.2d 1150 (1997), *aff'd in part, rev'd in part*, 138 Wn.2d 699, 729, 985 P.2d 262 (1999).

Here, a reasonable juror could find that Haack communicated with BJG for an immoral purpose of a sexual nature and that the communication promoted her exposure to sexual misconduct. For example, on December 25, Haack asked BJG, "are you touching yourself?," "[s]o, you wonder why people call it a pussy? maybe it's because it's sort of irresistable [sic]...and it's kinda soft.......and they like to be petted......right?[,]" followed by, "[d]oes my sweet sister like nasty sex?" Exs. 1, 4-5. The next day, Haack suggested to BJG that she take her clothes off. On December 27, Haack asked BJG to try on her new panties for him and tells her to take off her shirt. These communications with BJG were clearly sexual and for an immoral purpose.

Haack's reliance on *State v. Luther*, 65 Wn. App. 424, 830 P.2d 674 (1992) to support his argument is misplaced. In *Luther*, the 16 year old male defendant "engaged in two acts of fellatio" with a 16 year old girl. *Luther*, 65 Wn. App. at 425. Before "each act, Luther asked the girl whether she was going to perform fellatio as she had previously offered." *Luther*, 65 Wn. App. at 425. The court held that statute did not apply to communications regarding sexual conduct which would be legal if performed, namely a consensual sexual act between two minors. *Luther*, 65 Wn. App. at 427-28.

Haack's improper e-mail messages to BJG are distinguishable from the communication by the defendant in *Luther*. The *Luther* court stated that "[a]lthough it is rational to prohibit certain communications designed to further conduct that will be illegal if performed, or that will breach the peace, there can be no rational reason for prohibiting communications about peaceful, consensual conduct that will itself be legal if performed." 65 Wn. App. at 427-28. We disagree with Haack's minimization of the conduct discussed in his e-mail messages to BJG. It is clear that Haack's communications with BJG were not for a legal purpose and were not "about peaceful, consensual conduct that w[ould] itself be legal if performed." *Luther*, 65 Wn. App. at 428.

A pastor's communication with a minor about her panties, nasty sex, and asking her to remove her clothing violates RCW 9.68A.090. The repeated sexual references, including "petting" the female anatomy, are predatory in nature and promote BJG's exposure to sexual misconduct. The evidence admitted at trial, and all reasonable inferences drawn from it in favor of the State, demonstrates that any rational trier of fact could have found Haack communicated with BJG with a "predatory purpose of promoting [her] exposure to and involvement in sexual

misconduct." *Hosier*, 157 Wn.2d at 9. Thus, the jury could have reasonably concluded that the State proved the essential elements of communication with a minor for immoral purposes beyond a reasonable doubt. Haack's arguments fail.

III. Constitutionality of the Statute

Haack also argues that, if the statute applies to the e-mail messages he sent to BJG, then RCW 9.68A.090 is unconstitutionally vague as applied to him. Again, we disagree.

A. Standard of Review

We review the constitutionality of a statute de novo. *State v. Watson*, 160 Wn.2d 1, 5-6, 154 P.3d 909 (2007). "A statute is presumed to be constitutional." *Watson*, 160 Wn.2d at 11. A challenger "bears the burden of proving beyond a reasonable doubt that [a statute] is unconstitutionally vague." *Watson*, 160 Wn.2d at 11. "'[T]he presumption in favor of a law's constitutionality should be overcome only in exceptional cases.'" *Watson*, 160 Wn.2d at 11 (alteration in original) (quoting *City of Seattle v. Eze*, 111 Wn.2d 22, 28, 759 P.2d 366 (1988)).

B. Constitutionality of RCW 9.68A.090

"'[A] statute is void for vagueness if either: (1) the 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 (internal quotation marks omitted) (quoting *State v. Williams*, 144 Wn.2d 197, 203, 26 P.3d 890 (2001)). Haack contends the statute was vague under the first ground, arguing that former RCW 9.68A.090 (2003) did not sufficiently define the prohibited behavior such that persons of common intelligence need not guess as to what conduct the statute proscribed. *See City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693 (1990). "Because of the inherent vagueness of language, citizens may need to utilize other statutes and court rulings to clarify the meaning of a statute." *Watson*, 160 Wn.2d at 8.

These statutes and court rulings are presumed available to all citizens. *Watson*, 160 Wn.2d at 8.

Former RCW 9.68A.090(1) (2003) provided that "a person who communicates with a minor for immoral purposes . . . is guilty of a gross misdemeanor." Our Supreme Court has authoritatively construed RCW 9.68A.090, and its predecessor RCW 9A.88.020. *See McNallie*, 120 Wn.2d at 931-32; *State v. Schimmelpfennig*, 92 Wn.2d 95, 102, 594 P.2d 442 (1979).

"'[C]ommunicate'" includes conduct as well as words, and "'immoral purposes'" refers to sexual misconduct. *Schimmelpfennig*, 92 Wn.2d at 100-01. In *McNallie*, the Court reiterated its previous determination in *Schimmelpfennig* that the term "'immoral purposes'" refers to the "rather broad area of 'sexual misconduct.'" 120 Wn.2d at 932. Additionally, the *Schimmelpfennig* court "noted that strict item-by-item detail is not necessary in describing the prohibited conduct in the context of protecting children from being accosted with predatory sexual advances." *McNallie*, 120 Wn.2d at 932. "[T]he 'structure of this chapter of our criminal code gives ample notice of the legislature's *intent to prohibit sexual misconduct*. . . . The scope of the statutory prohibition is thus limited by its context and wording to communication for the purposes of sexual misconduct.'" *McNallie*, 120 Wn.2d at 930 (emphasis and alteration in original) (quoting *Schimmelpfennig*, 92 Wn.2d at 102). Additionally, we agree with Division Three of this court and its recent interpretation of this statute.

> The requirements that the communication be made with the intent that it reach a minor and done with the immoral or predatory purpose of exposing or involving a minor in sexual misconduct sufficiently limits the amount of speech or conduct that the statute regulates and ensures that a substantial amount of protected expressive activity is not deterred.

State v. Aljutily, 149 Wn. App. 286, 297, 202 P.3d 1014 (2009), *review denied*, 166 Wn.2d 1026

(2009).

Here, the evidence is persuasive that Haack communicated with 16 year old BJG for the predatory purpose of exposing her to sexual misconduct. Haack admitted that the e-mail messages were of a "sexual nature" and that they were "inappropriate." RP at 125. Any person of common understanding, who contemplated e-mailing a 16 year old about such matters as what she is wearing, if she likes "nasty sex," offering to film her in cute outfits, asking if she gets "ugly as in down & dirty," asking "what's the worst thing [she has] done to anyone (guy or chick),"and discussing intimate areas of her body, need not have guessed about the proscription and penalties of the statute. Exs. 5, 19. We conclude that the words "immoral purposes" were sufficiently defined and easily understood by a person of common understanding and were not unconstitutionally vague as applied to Haack's conduct.

We remand for resentencing and otherwise affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Armstrong, J.

Hunt, J.