IN THE SUPREME COURT OF IOWA

NO. 16-1684

STATE OF IOWA, Plaintiff-Appellee, vs. **BRADLEY ELROY WICKES,** Defendant-Appellant.	CLINTON COUNTY, NO. FECR071368
APPEAL FROM THE SEVENTH JUDICIAL DISTRICT COURT HONORABLE STUART WERLING, DISTRICT COURT JUDGE	

APPELLANT'S REPLY BRIEF

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy was served on **August 4, 2017** on the Attorney General's Office by EDMS as well as provided to the Defendant-Appellant, Bradley Wickes, via MyCase.

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I. Substantial Evidence Does Not Support the Conclusion that Sexual Conduct under Iowa Code Section 709.15(3) Occurred.

In its brief, the Appellee argues that substantial evidence exists to support the trial court's findings that the hugs constituted sexual conduct. (Appellee's Brief, p. 24). In support thereof, the Appellee states that the trial court found the hugs occurred daily and perhaps multiple times a day. (Appellee's Brief, p. 25; A19-A20). The Appellant disagrees with the trial court's factual finding on this issue, which is not supported by the record that was actually made at the trial court.

The record reveals that Mr. Wickes and A.S. exchanged a hug after he had proofread a paper that she had written. (Bench Trial Tr. p. 25, lines 1-11). Subsequently, at a trip to Walmart, Mr. Wickes and A.S. exchanged a hug. (Bench Trial Tr. p. 64, lines 19-22). Finally, Mr. Wickes and A.S. exchanged a few hugs at the homecoming bonfire and dance. (Bench Trial Tr. p. 34, lines 4-6 & p. 38, lines 5-8; A704, and A705). The Facebook messages that the Appellee and the trial court reference for the large part talk about wanting, needing, or desiring to exchange a hug, not discussing hugs that have actually been exchanged. (A90-91, A96, A113, A121, A128-29, A179, A205, A244-45, A292-93, A300, A370-71, A377, A390, A395, A525,

A559, A591-92). There is no support in the record for the Appellee's claim and the trial court's finding that the hugs were exchanged on a daily basis. The record reveals that a few hugs were actually exchanged.

Furthermore, the record does not support the Appellee's argument and the trial court's finding that the hugs were sexual in nature or served some sort of grooming function. (Appellee's Brief, pp. 27-28; A18-A19). The photos from the homecoming bonfire and dance do not show an embrace but mere hugs. (A704, A705). There is nothing sexual about the hugs depicted in these pictures—they do not show Mr. Wickes touching A.S.'s body in a sexual manner, such as groping her body or body parts. Regarding the Facebook messages regarding the hug exchanged at the homecoming bonfire, the messages should be read in proper context—A.S. was having a particularly bad day and needed a hug for comfort and support. (A575). Similarly, the messages discussing the hug at the homecoming dance were not sexual in nature. (A592).

In terms of the hug on Gender Bender Day, the Facebook messages discuss a picture of a hug was exchanged between A.S. and a friend, both of whom were dressed up as males at school. (A523-25). The message and picture was not about a hug that Mr. Wickes and A.S. had exchanged, as the

Appellee suggests. (Appellee's Brief, p. 27).

In terms of Mr. Wickes' Facebook message about how sneaking over for a hug would be criminal charges, this message must be taken into proper context. (A244). Mr. Wickes offered a hug in response to A.S. being upset about a personal issue, and the comment was meant to give A.S. comfort and encouragement. (A244).

Regarding the Facebook messages about the hug that was exchanged at Walmart, the messages in proper context show that the hug was not sexual in nature. Rather, the hug was given and received for comfort and encouragement, as Mr. Wickes and A.S. were going through personal issues at the time. (A634-35).

Finally, regarding the messages discussing the song “Hold Each Other” that was played at the homecoming dance, Mr. Wickes stated that the song reminded him of the hugs that they exchanged. (A597). There is nothing about this discussion of the song and the hug exchanged at the homecoming dance that is sexual in nature.

In sum, there is no evidence that the hugs were for any reason other than an expression of comfort and encouragement during tough times, considering the context of the photos and messages that discuss the hugs

themselves. Nothing in the pictures or the messages' context indicate the hugs themselves were sexual or meant to be sexual.

Moreover, the Appellee argues that even if no sexual conduct actually occurred Mr. Wickes' conviction would still stand as the trial court found that Mr. Wickes used Facebook messages and other interactions to entice A.S. into an intense emotional bond, intending for sexual contact to follow. (Appellee's Brief, p. 30). The Appellee's argument misses the point: Under Iowa Code section 709.15(3), the State must prove that Mr. Wickes engaged in "sexual contact" in order to be guilty of committing a pattern, practice, or scheme of sexual contact, the class D felony version of the crime of sexual exploitation by a school employee. Stated another way, a defendant cannot be convicted of the pattern, practice, or scheme felony version of the offense if the State cannot prove that sexual conduct occurred in the first instance. Otherwise, a defendant would be guilty of the class D felony version of sexual exploitation by pattern, practice, or scheme of sexual conduct without also having actually committed sexual conduct.

If no sexual conduct actually occurred, which is Mr. Wickes' position, then his conviction for sexual exploitation under the pattern, practice, or scheme theory cannot stand on the Facebook messages alone. This is

supported by the trial court's lack of finding and conclusion that the Facebook messages by themselves constituted sexual conduct; the trial court only found and concluded that the hugs constituted sexual conduct under the statute. (A23).

Moreover, the statute requires the commission of "sexual conduct" and not "sexual conduct intended to be committed in the future" as the Appellee suggests. (Appellee's Brief, p. 30). Section 907.15 provides that sexual exploitation by a school employee occurs when the employee commits "[a]ny sexual conduct with a student for the purpose of arousing or satisfying the sexual desires of the school employee or the student." The purpose of statutory interpretation is to discern the legislature's intent. *State v. Romer*, 832 N.W.2d 169, 176 (Iowa 2013). A statute's terms are given their ordinary and common meaning, considering the context in which they are used, unless there is a statutory definition or an established meaning in law. *Id.* In addition, in interpreting a statute, a court must examine the statute in its entirety, not just isolated words or phrases. *Id.* The court is prohibited from extending, enlarging, or otherwise changing the meaning of a statute under the guise of statutory construction. *Id.* Under the statute's plain terms and meaning, actual sexual conduct is required by statute, not sexual conduct

intended to be committed in the future. Otherwise, Mr. Wickes would be guilty of thoughts alone without a guilty act or acts in support thereof. *See, e.g.*, *United States v. Muzii*, 676 F.2d 919, 920 (2nd Cir. 1982) ("The reach of the criminal law has long been limited by the principle that no one is punishable for his thoughts. Accordingly, not only has a criminal state of mind, or mens rea, been a general condition of penal liability, but the imposition of the criminal sanction has required a guilty act, or actus reus, by the person sought to be held liable."); *State v. Dinh Loc Ta*, 290 P.3d 652, 660-61 (Kan. 2012) (stating that "the law does not punish criminal thoughts" and both actus reus, a guilty act, and mens rea, criminal thoughts, are required for an offense to occur) (quotations omitted); *Young v. State*, 493 A.2d 352 (M.D. Ct. App. 1985) (stating that "bad thoughts do not constitute a crime").

It is also important to note that Mr. Wickes was not charged with conspiracy or attempt to commit sexual exploitation by a school employee. The State could have charged Mr. Wickes with attempt to commit sexual exploitation by a school employee but chose not to do so. Therefore, the Appellee's discussion of criminal conspiracies and attempt to commit a crime misses the point entirely. (Appellee's Brief, pp. 30-33).

Because the hugs do not constitute sexual conduct under the statute, insufficient evidence exists to support the trial court's findings and conclusions on the sexual exploitation by a school employee conviction. A remand, as the Appellee suggests, is not appropriate. Rather, Mr. Wickes' conviction should be reversed and remanded for entry of judgment of acquittal. *See, e.g., State v. Westeen*, 591 N.W.2d 203, 212 (Iowa 1999) (concluding that when insufficient evidence exists regarding an element of the crime the defendant is entitled to a judgment of acquittal and a remand to the district court for the dismissal of the charge); *State v. Cox*, 500 N.W.2d 23, 26 (Iowa 1993) (reversing and remanding for entry of judgment of acquittal on a charge that was not supported by sufficient evidence).

II. Substantial Evidence Does not Support the Conclusion that Mr. Wickes Implemented "a Pattern or Practice or Scheme" to Engage in Sexual Conduct with A.S.

The Appellee in its brief argues that substantial evidence exists that Mr. Wickes committed a pattern, practice, or scheme to engage in sexual conduct. (Appellee's Brief, p. 34-37). In support thereof, the Appellee cites to a case from Maryland, *Walker v. State*, 47 A.3d 590 (Md. Ct. Spec. App. 2012). Mr. Wickes argues that this case is distinguishable and is, therefore, of minimal value to this case.

In *Walker*, the defendant was charged with "sexual abuse" and not "sexual contact" with a minor student. *Walker*, 47 A.3d at 606. In Maryland, there is a substantial difference between these charges. Under a "sexual abuse" charge, the State must prove that the defendant commits "an act that involves sexual molestation or exploitation of a minor, whether physical injuries are sustained or not." Md. Code § 3-602(a)(4)(i). A person who has "responsibility for the supervision of a minor may not cause sexual abuse to a minor." *Id.* § 3-602(b)(1). The Maryland courts have broadly construed sexual abuse of a minor and interpreted exploitation to include a person supervising a minor either taking advantage of or unjustly or improperly using the child for his or her own benefit. *Walker*, 47 A.3d at 608. On the other hand, under a "sexual contact" charge, "a person in a position of authority may not engage in a sexual act or sexual contact with a minor who, at the time of the sexual act

or sexual contact, is a student enrolled at a school where the person in a position of authority is employed." Md. Code § 3-308(c)(1). The Maryland Court of Appeals found in *Walker* that there was no evidence that the defendant's letters and hugs to the student fell within the scope of "sexual contact" for a sexual offense; however, his actions did constitute sufficient evidence to convict him under the more broadly written statute of sexual abuse of a minor. *Walker*, 47 A.3d at 613. Additionally, the *Walker* case also did not specifically deal with the issue involved in this case—whether the defendant engaged in a pattern, practice, or scheme to commit sexual conduct.

For all these reasons as well as the reasons discussed in the Appellant's Brief, the *Walker* case is distinguishable, and insufficient evidence exists that Mr. Wickes engaged in a pattern, practice, or scheme to commit sexual conduct.

III. The Five-Year Prison Sentence Imposed in this Case Constitutes Cruel and Unusual Punishment.

Under section two of argument five of the Appellee's brief, the Appellee argues that the legislature calibrated the punishment to fit the crime for sexual exploitation by a school employee. (Appellee's Brief, pp. 50-53). In support thereof, the Appellee claims that it is unable to locate a case in Iowa where the appellate court found that a five-year prison sentence was disproportionate. (Appellee's Brief, p. 51). The Appellant specifically challenges the five-year prison sentence for sexual exploitation by a school employee, despite the Appellee's claim to the contrary. *See State v. Ostrander*, No. 0-309/09-0976, Google Scholar ¶ 24 (Iowa Ct. App. July 14, 2010) (Appellee's Brief p. 56). Although the Appellant has found no Iowa cases holding that a five-year prison sentence is unconstitutional as cruel and unusual punishment, the Iowa Supreme Court has held that slightly longer prison sentences are unconstitutional as cruel and unusual punishment.

In *State v. Lyle*, the defendant challenged the seven-year minimum on his ten-year prison sentence for robbery in the second degree as violative of the cruel and unusual provision of Iowa's Constitution. *State v. Lyle*, 854 N.W.2d 378, 380 (Iowa 2014). The Iowa Supreme Court agreed and held that "a statute mandating a sentence of incarceration in a prison for juvenile offenders with no opportunity for parole until a minimum period

of time has been served is unconstitutional under article I, section 17 of the Iowa Constitution." *Id.* Although *Lyle* dealt with a juvenile offender with a mandatory minimum sentence, the maximum prison term involved was relatively short, like the prison term imposed in Mr. Wickes' case.

Similarly, in *State v. McLachlan*, a juvenile defendant argued that the minimum one-third period of incarceration for his ten-year sentence for a class C felony drug conviction violates article I, section 17 of the Iowa Constitution under the principles announced in *Lyle*. *State v. McLachlan*, No. 14-0257, Google Scholar ¶ 1 (Iowa Ct. App. Mar. 25, 2015). The State disagreed and attempted to distinguish *Lyle* because the defendant in *McLachlan* was not subject to a mandatory prison sentence like the defendant in *Lyle*. *Id.* ¶ 8. In *Lyle*, the defendant was convicted of a forcible felony that carried a mandatory ten-year prison term in which he was required to serve seven years before he was eligible for parole. *Id.* On the other hand, the defendant in *McLachlan* could have been granted a deferred judgment, a suspended sentence, or a ten-year indeterminate prison sentence with a minimum one-third sentence before parole eligibility, which the district court could have either imposed or waived based on mitigating circumstances. *Id.* The Iowa Court of Appeals acknowledged that the sentencing scheme under section 124.413 is not as rigid as the sentencing scheme for forcible felonies. *Id.* ¶ 9. Nevertheless, the Court held that the mandatory one-third sentence in *McLachlan*'s case

violated article I, section 17 of the Iowa Constitution under the principles announced in *Lyle*, as the defendant was a juvenile offender. *Id.* ¶ 12. Although *McLachlan* dealt with a juvenile offender with a mandatory minimum sentence, the maximum prison term involved was relatively short, like the prison term imposed in Mr. Wickes' case.

The Appellee's claim that it is unlikely that Mr. Wickes will serve a full five years in prison is not entirely accurate. Although Mr. Wickes would be subject to earned-time provisions making him eligible for a reduction in sentence, there is no guarantee he would actually receive a reduction in his sentence as this is dependent upon demonstrating "good conduct" and satisfactorily participating in programs. *See* Iowa Code § 903A.2(1)(a)(1). Even if a defendant accrues earned time while incarcerated, any earned time is subject to forfeiture. *See id.* § 903A.2(2).

In addition, an inmate who is required to participate in a sex offender treatment program "shall not be eligible for a reduction of sentence unless the inmate participates in and completes a sex offender treatment program established by the director." *Id.* § 903A.2(1)(a)(2). For a defendant who is convicted of sexual exploitation by a school employee, such a defendant is required by the Iowa Department of Corrections to complete the sex offender treatment program before eligibility for a sentence reduction. Iowa Department of Corrections: *Offenders Required to Take SOTP* at 5, https://doc.iowa.gov/sites/default/. . ./op-sop-

10_offenders_required_to_take_sotp.pdf (last visited May 26, 2017). Therefore, it is conceivable that a defendant convicted of sexual exploitation by a school employee could serve his or her entire sentence if the sex offender treatment program is not completed during the sentence. This is borne out by the Appellee's own reference to the Iowa Board of Parole's Annual Report for Fiscal Year 2016: Of the twenty-two inmates released from prison in 2016 for class D felony sex offenses, the inmates served an average of thirty-three months, which is almost three years in prison. Iowa Board of Parole, *Annual Report:* FY2016 at 21, http://www.bop.state.ia.us/Document/1088 (last visited May 26, 2017).

Despite the Appellee's argument that Mr. Wickes may be eligible for parole at any time during his prison sentence, it is entirely speculative as to when and if Mr. Wickes will be eligible for parole before he discharges his five-year prison sentence. *See State v. Astello*, No. 15-0206, Google Scholar ¶ 3 (Iowa Ct. App. June 15, 2016) (generally the appellate courts will not "speculate as to what the board of parole may or may not do at some future date") (Appellee's Brief, p. 52). Despite the Appellee's argument to the contrary, the availability of possible parole does not weigh heavily against a finding of gross disproportionality. (Appellee's Brief, p. 53).

For all these reasons as well as the reasons discussed in the Appellant's Brief, the five-year prison sentence for sexual exploitation by a

school employee constitutes cruel and unusual punishment under the federal and Iowa constitutions.

CONCLUSION

Regarding Argument I, the Appellant requests that his conviction for sexual exploitation by a school employee, a class D felony, be reversed and remanded for entry of judgment of acquittal.

In the alternative, regarding Argument II, the Appellant requests that the class D felony conviction be reversed and remanded for entry of conviction of the lesser-included offense, an aggravated misdemeanor.

Regarding Argument III, the Appellant requests that his sentence be vacated and remanded for resentencing in front of a different judge.

REQUEST FOR ORAL ARGUMENT

The Appellant requests that the matter be submitted for oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned certifies that the true costs of duplicating this document was **$0.**

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font size and contains **2,919** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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