SUPREME COURT NO. _____

NO. 74358-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

HAI MINH NGUYEN,

Petitioner.

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

The Honorable Mary E. Roberts, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Hai Minh Nguyen, the appellant below, seeks review of the appended Court of Appeals decision in State v. Nguyen, No. 74358-9-I, filed July 17, 2017.

B. ISSUES PRESENTED FOR REVIEW

1. The trial evidence showed numerous acts of oral-genital contact before and after T.P. turned 12. The jury was not instructed that it was required to rely on separate and distinct acts to convict of first degree child rape and first degree child molestation. Nor was the jury instructed it was required to rely on separate and distinct acts to convict of second degree child rape and second degree child molestation. May a prosecutor's election as to the different acts in closing argument remedy jury instructions that allow for a double jeopardy violation to occur?

2a. There is no evidence that sexually explicit or erotic materials played any role in the crimes. Does the community custody condition banning sexually explicit materials exceed the trial court's sentencing authority because it is not crime-related?

2b. Is the community custody condition banning sexually explicit materials void for vagueness?

C. STATEMENT OF THE CASE

The State charged Nguyen with first degree rape of a child, first degree child molestation, second degree rape of a child, and second degree child molestation. CP 21-22.

According to T.P., who lived with her parents, younger sister, and Nguyen, Nguyen massaged and sucked on her breasts, inserted his fingers into her vagina, and performed oral sex on her on an almost weekly basis when she was between ages six and 13. RP 67-68, 134, 138-40, 143-55. T.P. also testified Nguyen penetrated her vagina with his penis on one occasion when she was 11. RP 157-58.

T.P.'s sister testified she witnessed one occasion in the kitchen during which T.P.'s underwear was pulled down and Nguyen's hand was in her crotch area. RP 231-34. T.P. also said she saw Nguyen lying on top of T.P. on a treadmill on another occasion. RP 235-37.

The jury was provided four to-convict instructions for each count. CP 38, 41, 44, 47. The jury was also instructed that it "must unanimously agree as to which act has been proved" for each count. CP 39, 42, 45, 48. However, the trial court did not instruct the jury that each count must arise from a separate and distinct act in order to convict.

The State argued in closing that the jury should rely on the digital penetrations and oral-genital contact for the child rape charges and the breast touching for the child molestation charges. RP 482-84.

The jury returned guilty verdicts on all counts. CP 51-54; RP 525-28. For first degree child rape, first degree child molestation, and second degree child rape, the trial court imposed concurrent indeterminate sentences of 279, 173.5, and 245 months to life, respectively, and lifetime community custody. CP 60; RP 557. The court imposed a concurrent determinate 101.5-month sentence for the second degree child molestation conviction along with a 36-month community custody term. CP 59; RP 557.

The trial court also imposed a community custody condition restricting access to sexually explicit and erotic materials:

> Do not possess, use, access or view any sexually explicit material as defined by RCW 9.68.130 or erotic materials as defined by RCW 6.68.050 or any material depicting any person engaged in sexually explicit conduct as defined by RCW 9.68.050 or any material depicting any person engaged in sexually explicit conduct as defined by RCW 9.68A.011(4) unless given prior approval by your sexual deviancy provider.

CP 65.

Nguyen appealed, asserting that the jury instructions permitted the jury to rely on the same act of oral-genital contact for first degree child rape and first degree child molestation and the same act of oral-genital contact for

second degree child rape and second degree child molestation, thereby violating his Fifth Amendment and article I, section 9 rights to be free from double jeopardy. Br. of Appellant at 4-14. Nguyen also asserted that the prohibition on sexually explicit materials is both unconstitutionally vague and not crime-related. Br. of Appellant at 21-30.

The Court of Appeals acknowledged that, under State v. Land, 172 Wn. App. 593, 600, 295 P.3d 782 (2013), when acts of oral-genital contact are at issue, the acts constitute both child molestation and child rape, and are not separately punishable. Appendix at 4. The court also acknowledged that "jury instructions must require that the rape of a child and child molestation counts be based on separate and distinct acts" and that "the absence of such language [in jury instructions] presents the potential for double jeopardy." Appendix at 4. However, the Court of Appeals found no double jeopardy violation, concluding it was manifestly apparent to the jury that the State was not seeking to impose multiple punishments for the same offense. Appendix at 4-5. The Court of Appeals came to this conclusion by focusing solely on the prosecutor's closing argument, which distinguished between various conduct.[1] Appendix at 6-7.

[1] The Court of Appeals claimed it did "not rely on the State's closing argument in isolation. As discussed, other factors recognized in the 'manifestly apparent' cases are also present." Appendix at 8. Aside from listing these other factors, however, the Court of Appeals provided no discussion of the presence or absence of these factors in this case. Given that the jury instructions did not include the required separate-and-distinct

The Court of Appeals concluded that simply because Nguyen had been convicted of sex crimes, it was crime-related to impose a community custody ban on accessing, viewing, use, and possession of all sexually explicit materials. Appendix at 11-12. Although the Court of Appeals could point to nothing specific that related sexually explicit materials to the circumstances of the crime, it nonetheless concluded that "acts of sexual deviancy involving the inability to control sexual conduct" was "reasonably related to restricting access to sexually explicit or erotic material." Appendix at 12.

As for vagueness, despite Nguyen's arguments and authority that various statutory definitions led to arbitrary enforcement and failed to provide fair notice of the prohibited materials, Br. of Appellant at 21-27, the Court of Appeal claimed Nguyen cited no authority. Appendix at 11 n.35. Thus, without even a hint of analysis regarding the statutory definitions, the court concluded, "Consistent with the statutory definitions, the terms are not beyond the understanding of an ordinary person." Appendix at 11.

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language, the only thing the Court of Appeals could have relied on in finding no double jeopardy violation was the prosecutor's closing argument.

D. ARGUMENT IN SUPPORT OF REVIEW

1. THE CASE LAW OF THIS COURT AND THE COURT OF APPEALS IS INCONSISTENT ABOUT WHETHER A PROSECUTOR'S CLOSING ARGUMENT MAY REMEDY JURY INSTRUCTIONS THAT PERMIT A DOUBLE JEOPARDY VIOLATION

Can a prosecutor's closing argument cure jury instructions that plainly permit a double jeopardy instruction to occur? Nguyen was under the impression that this court already answered this question in State v. Kier, 164 Wn.2d 798, 814, 194 P.3d 312 (2008), and that the answer was no.

In Kier, the State asserted second degree assault and first degree robbery convictions did not merge because they were committed against two different victims. Id. at 808. This court concluded it was unclear whether the jury believed Kier committed the crimes against the same or different victims, analogizing "to a multiple acts case." Id. at 811. Because the instructions and the evidence at trial permitted the jury to consider a single person as the victim of both the assault and the robbery, the verdict was ambiguous. Id. at 814. Therefore, the assault merged with the robbery. Id.

This was so notwithstanding the prosecutor's argument that one man was the robbery victim and the other man was the assault victim. Id. The State claimed the risk that the jury would believe the same man was the victim of both crimes "was eliminated because the prosecutor made a 'clear election' of which act supported each charge, as is allowed in a multiple acts

case." Id. at 813. This court disagreed: "While the prosecutor at the close of the trial attempted to require this finding, the jury was properly instructed to base its verdict on the evidence and instructions and not on the arguments of counsel." Id. The court determined there was a double jeopardy violation because the instructions allowed the jury to find either man to be the victim of the robbery and assault "notwithstanding the State's closing argument."[2] Id. at 814.

Kier, and not the prosecutor's election of specific conduct, should control the disposition of this case. T.P. alleged penile penetration, digital penetration, oral-genital contact, and oral and digital contact with the breasts. RP 140, 144-46, 151-54, 163-64. There were far more acts alleged than charges. Several of the acts involved penetration and oral-genital contact, which the State argued were the child rapes, and several of the acts involved touching T.P.'s breasts, which the State argued were the child molestations. But the jury instructions drew no such distinction. The evidence presented drew no such distinction. Nothing except for the State's closing argument suggested the jury should not rely on the same act of oral-genital contact for first degree child rape and first degree child molestation. Nothing except for

[2] This conclusion was consistent with how the jury was instructed in this case and how it is instructed in every other case. CP 28 (instructing jury that lawyers' arguments are not the law); Kier, 164 Wn.2d at 813 (despite prosecutor's argument, "the jury was properly instructed to base its verdict on the evidence and instructions and not on the arguments of counsel").

the State's closing argument suggested the jury should not rely on the same act of oral-genital contact for second degree child rape and second degree child molestation. Under Kier, the State's arguments did not overcome the potential for double jeopardy, so both child molestation convictions must be vacated. Because the Court of Appeals decision conflicts with Kier on the constitutional question of double jeopardy, review is warranted under RAP 13.4(b)(1) and (3).

In an attempt to distinguish Kier, the Court of Appeals claimed it did not rely solely on the prosecutor's argument Appendix at 8. Instead, according to the Court of Appeals, "other factors recognized in the 'manifestly apparent' cases are also present." Appendix at 8. The Court of Appeals did not discuss the application of these other factors, however; it just listed them without analysis.[3] Appendix at 6.

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[3] Going through these factors, separate to-convict instructions are of marginal value because they still fail to specify that the jury must rely on separate and distinct acts. State v. Borsheim, 140 Wn. App. 357, 367-68, 165 P.3d 417 (2007), clearly held the principal error was failing to instruct with the separate-and-distinct language, and that the failure to use separate to-convict instructions merely "compounded" this error.

The evidence presented at Nguyen's trial was nebulous as to the various acts—while there was one specific act of penile penetration T.P. testified about, she testified about all the other acts only in general terms. Thus, this was not a case where the "clarity of evidence" presented would have naturally or necessarily led the jury to rely on separate and distinct acts for the rapes and molestations.

As for the factor pertaining to whether the defense challenged the credibility of the victim rather than the number of acts or whether the acts overlapped, no court has ever explained why the nature of the defense makes any difference when considering a defendant's exposure to double jeopardy. If the instructions permit the jury to rely on the same act to find both child rape and child molestation, defense arguments cannot overcome the potential for double jeopardy any more than the State's arguments can.

The Court of Appeals also relied primarily on State v. Peña Fuentes, 179 Wn.2d 808, 318 P.3d 257 (2014). Appendix at 5-7. But Peña Fuentes is also inconsistent with Kier. In addressing whether the failure to give the separate-and-distinct act instructions, this court relied on the prosecutor's closing argument, concluding that it was "manifestly apparent that the convictions were based on separate acts because the prosecution made a point to clearly distinguish between the acts that would constitute rape of a child and those that would constitute child molestation." Peña Fuentes, 179 Wn.2d at 825. As discussed, in Kier this court said a prosecutor's argument could not cure a double jeopardy problem. Peña Fuentes says the opposite, highlighting the conflict between the Court of Appeals decision and Kier on a constitutional issue. RAP 13.4(b)(1), (3).

Peña Fuentes also conflicts with the principal decision it relied on, State v. Mutch, 171 Wn.2d 646, 254 P.3d 803 (2011). Peña Fuentes, 179 Wn.2d at 825 (discussing Mutch). In Mutch there were five alleged incidents, five charges, and five convictions, leading this court to conclude that it was manifestly apparent to the jury that it was to rely on separate and distinct acts for each count. 171 Wn.2d at 665. This was a "rare circumstance." Id. The court also noted that such double jeopardy "review is rigorous and is among the strictest." Id. at 664.

The Peña Fuentes decision did not heed Mutch's admonitions. Instead, it concluded that it was manifestly apparent to the jury that it must rely on separate and distinct acts given the prosecutor "divided Peña Fuentes's behaviors into two categories—the acts involving penetration, which constituted rape, and the other inappropriate acts, which constituted molestation." 179 Wn.2d at 825. The court concluded, "Because of the clarity in the prosecutor's closing argument, we believe it is 'manifestly apparent' that the jury convicted Peña Fuentes based on separate and distinct acts." Id. at 826.

The rigorous and strict review the Mutch court endorsed cannot be squared with Peña Fuentes. The "rare circumstance" where deficient instructions do not effect a double jeopardy violation has somehow become the pervasive circumstance. See, e.g., State v. Benson, No. 74815-7-I, 2017 WL 3017517, at *5 (Jul. 17, 2017) (unpublished) (finding no double jeopardy violation primarily because "the State's closing argument was clear"); State v. Duenas, No. 48119-7-II, 2017 WL 2561589, at *15 (Jun. 13, 2017) (unpublished) (finding no double jeopardy violation where the prosecutor conflated child rape and child molestation in closing, but thee "evidence and jury instructions made it manifestly apparent to the jury that each count involved distinct acts of sexual assault, even if the acts were part of the same incident"); State v. Miller, No. 33252-7-III, 2017 WL 959539, at

*5 (Mar. 7, 2017) (unpublished) (no double jeopardy violation because "the prosecutor repeatedly distinguished between the acts the State alleged as a basis for the rape charge and the acts the State alleged as a basis for the molestation charge").

These cases, alongside Nguyen's, show that the exception in Mutch has become the rule. The courts are not applying the holding of Kier, either. The decisions of the Washington courts are in disarray and should be resolved by granting review of this case pursuant to RAP 13.4(b)(1) and (3).

Finally, as an important policy matter, courts should be protecting against any risk of effecting double jeopardy, not indulging flimsy presumptions to blind themselves to constitutional violations. For more than 20 years, the courts have stated how to protect against the violation that occurred here—by including separate-and-distinct-act language in the jury instructions. See State v. Hayes, 81 Wn. App. 425, 431, 914 P.2d 788 (1996). The State also has another tool—the special verdict form—to ensure the jury relies on separate and distinct acts. The State did not make use of these tools, indicating that it was at best indifferent about whether it was "seeking to impose multiple punishments for the same offense." Mutch, 179 Wn.2d at 664. Because there is no way to determine in fact that the jury did not rely on the same acts, the benefit of the doubt regarding a potential double jeopardy violation should be given to the accused, not to the State.

See Kier, 164 Wn.2d at 813-14; State v. DeRyke, 110 Wn. App. 815, 824, 41 P.3d 1225 (2002) (because there was no way to determine the jury had not in fact considered the kidnapping as the elevating element, the rule of lenity applied to merge kidnapping into attempted rape). Review of this issue is warranted under every RAP 13.4(b) criterion.

2. THE DECISION CONFLICTS WITH THE VAGUENESS PRINCIPLES AT ISSUE IN STATE v. BAHL[4] AND WITH SEVERAL COURT OF APPEALS DECISIONS HOLDING THAT A BAN ON SEXUALLY EXPLICIT MATERIALS IS NOT CRIME-RELATED

a. A ban on sexually explicit materials is not crime-related and therefore exceeds the trial court's sentencing authority

The trial court has authority to require an offender to comply with "any crime-related prohibitions." RCW 9.94A.703(3)(f). A crime-related prohibition means "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted . . . ." RCW 9.94A.030(10) (emphasis added).

The prohibition on sexually explicit and erotic materials has nothing to do with this case. There was no evidence or information presented that possessing, viewing, using, or accessing sexually explicit or erotic materials directly related to any circumstance of the crime.

[4] State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008).

The Court of Appeals principally relied on State v. Magana, 197 Wn. App. 189, 201, 389 P.3d 654 (2016), to conclude, "Conditions regarding 'access to X-rated movies, adult book stores, and sexually explicit materials' are crime-related and properly imposed for sex offenses." Appendix at 12. The court also indicated that "Viewed in the light most favorable to the State, [Nguyen's acts] constituted acts of sexual deviancy involving the inability to control sexual conduct." Appendix at 12. This does not represent valid legal reasoning but prudish presumptions regarding sexual materials and sexuality. The decision assumes that the commission of a sex crime renders an offender ipso facto incapable of reasonably or responsibly possessing and using sexually explicit materials, even where such materials played absolutely no role in the crime and no evidence suggests they would cause difficulty controlling behavior. The decision also usurps the role of the legislature, which has indicated that community custody prohibitions must directly relate to the circumstances of the crime. RCW 9.94A.030(10). And, it might very well be that having access to certain materials might enable an offender to *better control* sexual conduct. The legislature, not the Court of Appeals, should be making these policy decisions. Review of this issue is warranted under RAP 13.4(b)(4).

In addition, in cases where there is no evidence or information indicating sexually explicit or erotic materials related to the crime, the Court

of Appeals has consistently struck community custody conditions, until now. In State v. Kinzle, 181 Wn. App. 774, 785, 326 P.3d 870 (2014), the defendant was convicted of molesting two children. The trial court imposed a community custody prohibition on possessing sexually explicit materials and Kinzle challenged this condition on appeal, asserting it was not crime-related. Id. The Court of Appeals agreed, striking the condition because no evidence suggested such materials were related to or contributed to his crime. Id.

The Court of Appeals has struck down several similar community custody conditions because they are not crime-related. See, e.g., State v. O'Cain, 144 Wn. App. 772, 776, 184 P.3d 1262 (2008) (holding that ban on accessing sexual material on internet was not crime-related because there "is no evidence that O'Cain accessed the internet before the rape or that internet use contributed in any way to the crime"); State v. Stewart, noted at 196 Wn. App. 1046, 2016 WL 2649834, at *3 (2016) (unpublished) (holding trial court exceeded statutory authority imposing prohibition on possessing sexually explicit material because "there was no evidence before the trial court that Stewart's use or possession of sexually explicit material related to his crime of indecent liberties"); State v. Hasselgrave, noted at 184 Wn. App. 1021, 2014 WL 5480364, at *12 (2014) (unpublished) (prohibition on going to establishments promoting "commercialization of sex" not reasonably

crime-related where no evidence suggested such establishments related to crime defendant's crime of child rape); State v. Clausen, noted at 181 Wn. App. 1019, 2014 WL 2547604, at *8 (2014) (unpublished) (conditions prohibiting possessing sexually explicit material and patronizing establishments that promote commercialization of sex not crime-related because no evidence suggested Clausen possessed sexually explicit material in connection with crime of child rape); State v. Whipple, noted at 174 Wn. App. 1068, 2013 WL 1901058, at *6 (2013) (unpublished) (prohibition on possessing and frequenting establishments that deal in sexually explicit materials not crime-related where nothing in record suggested child rape offenses involved such materials or establishments).

Because the Court of Appeals decision here conflicts with Kinzle, O'Cain, and several other cases, review is warranted under RAP 13.4(b)(2).

b. The Court of Appeals decision neglects any meaningful vagueness analysis and otherwise conflicts with *Bahl* and common sense

In State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008), this court struck down a community custody ban against possessing pornography because it was unconstitutionally vague. The Bahl court declined to decide whether the statutes defining "sexually explicit material," "erotic material," and "depictions of a minor engaged in sexually explicit conduct" would provide sufficient notice. Id. at 762.

The Court of Appeals stated that the statutory definitions were not unconstitutionally vague without analyzing them, dismissing Nguyen's arguments that the statutory definitions could lead to uncertain because he "cite[d] no authority for his hypothetical scenarios. See Appellant's Br. at 23-26." Appendix at 11 & n.35. On the contrary, Nguyen relied on the statutory language, Bahl's analysis, and the authority cited in Bahl to argue that the statutory definitions fail to provide fair notice of what is permitted and what is prohibited. Br. of Appellant at 21-27. The Court of Appeals just failed to address these arguments.

As this court stated in Bahl, pornography may "include any nude depiction, whether a picture from *Playboy Magazine* or a photograph of Michelangelo's sculpture of David." 164 Wn.2d at 756. The same is true of the sexually explicit or erotic materials defined in the statutes at issue here.

To qualify as "sexually explicit material" under RCW 9.68.130(2), the material must "emphasize the depiction" of the genitals. Thus, a simple nude might or might not qualify under this definition, depending on who thinks the genitals were emphasized. Reasonable minds also surely would differ on whether a particular depiction shows "flagellation or torture in the context of a sexual relationship." And the statute exempts "works of art or of anthropological significance"—how would an ordinary person know

whether a depiction fell inside or outside this exception? The statutory definition leads to more questions than answers. It is not fair notice.

Several definitions of "sexually explicit conduct" in RCW 9.68A.011(4) lack specificity as well. It would be difficult to fairly identify images that showed masturbation or sadomasochistic abuse—does Pablo Picasso's *Rape of the Sabine Women* qualify? Does Luis Buñuel's *Belle de Jour*? And under RCW 9.68A.011(4)(e), (f), and (g), the depictions must be created "for the purpose of sexual stimulation of the viewer." Without knowing the purpose for which a depiction was created, it is impossible to know whether the depiction shows sexually explicit conduct under the statutory definition.

To be "erotic material" under RCW 6.68.050(2), the material must be "utterly without redeeming social value." This definition could never provide fair notice in advance to distinguish between permitted and proscribed materials.

The Bahl court relied heavily on the Third Circuit's decision in United States v. Loy, which stated,

> we could easily set forth numerous examples of books and films containing sexually explicit material that we could not absolutely say are (or are not) pornographic . . . . It is also difficult to gauge on which side o the line the film adaptations of Vladamir Nabokov's *Lolita* would fall, or if Edouard Manet's *Le Dejeuner sur L'Herbe* is pornographic (or even some of the Calvin Klein advertisements) . . . .

237 F.3d 251, 264 (3d Cir. 2001). The Bahl court also emphasized that prohibitions on materials implicated by First Amendment protections "must be narrowly tailored and directly related to the goals of protecting the public and promoting the defendant's rehabilitation." Bahl, 164 Wn.2d at 757. The community custody condition at issue here carries a very real risk that reading a certain book, viewing a certain film or painting, or listening to a certain song will result in violation. It places a prior restraint on Nguyen's ability to create his own writings and depictions. Neither the State nor the courts have attempted to show how the prohibition is narrowly tailored to protect the public or promote Nguyen's rehabilitation. Because the Court of Appeals does not even attempt to address these constitutional concerns, its decision conflicts with Bahl necessitating review. RAP 13.4(b)(1), (3).

The Court of Appeals decision also conflicts with Bahl because it incorrectly assesses whether the conditions would lead to arbitrary enforcement. Where a condition gives enormous discretion to an individual to define the parameters of a prohibition, the condition is unconstitutionally vague. Bahl, 164 Wn.2d at 758. The Court of Appeals claims the "condition allows a sexual deviancy provider to give Nguyen prior approval to possess such material, but does not give the provider or community corrections officer the authority to determine the definition of the prohibited material." Appendix at 11. But, by extending authority to allow or disallow

certain material, the provider or community custody officer is necessarily determining whether the material falls within or without the prohibition. This still allows a third part to "direct what falls within the condition" which "only makes the vagueness problem more apparent since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement." Bahl, 164 Wn.2d at 758. RAP 13.4(b)(1) and (3) review are appropriate given the Court of Appeals conflict with Bahl's analysis of arbitrary enforcement.

The condition also assumes Nguyen will receive guidance from a sexual deviancy provider as to which materials he may or may not possess. This additionally conflicts with Bahl, which struck down a similar condition not to "possess or control stimulus material for your particular deviancy as defined by the supervising Community Corrections Officer and therapist except as provided for therapeutic purposes." Bahl, 164 Wn.2d at 761. As the Bahl court explained, "The condition cannot identify materials that might be sexually stimulating for a deviancy when no deviancy has been diagnosed, and this record does not show that any deviancy has yet been identified." Id. The same is true here. The condition at issue assumes Nguyen will have a sexual deviancy provider because he has a sexual deviancy, even though there is no evidence of a deviancy diagnosis or

provider. As in Bahl, "the condition is utterly lacking in any notice of what behavior would violate it." Id.

In sum, the community custody condition contains no limits. The various statutory definitions exacerbate the risk of arbitrary enforcement rather than mitigate it. The ban on "pornography" struck down in Bahl provides fairer notice than a ban on all "sexually explicit" and "erotic" materials, even in light of the statutory definitions, given that an ordinary person would understand "pornography" to cover a much narrower set of materials. This court should grant review pursuant to RAP 13.4(b)(1) and (3).

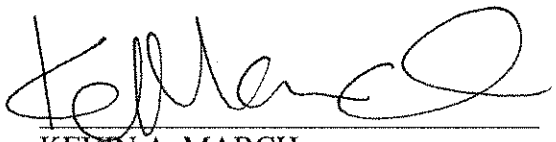
E. CONCLUSION

Because he meets all RAP 13.4(b) criteria, Nguyen asks that this petition be granted.

DATED this 16th day of August, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. HAI MINH NGUYEN, Appellant.	)	No. 74358-9-I UNPUBLISHED OPINION FILED: July 17, 2017

VERELLEN, C.J. — Hai Minh Nguyen was charged with one count of first degree rape of a child and one count of second degree rape of a child based on acts of oral-genital contact and other acts of sexual intercourse. Nguyen was also charged with one count of first degree child molestation and one count of second degree child molestation based on other incidents not involving oral-genital contact. The jury was not instructed that it must find Nguyen committed each count as a separate and distinct act from the other counts charged. But because it was manifestly apparent to the jury that the State was not seeking multiple punishments against Nguyen for the same act, there was no double jeopardy violation.

The trial court imposed a community custody condition prohibiting Nguyen from possessing, using, accessing, or viewing any sexually explicit material, erotic material, or any material depicting any person engaged in sexually explicit conduct. Because the

condition adequately warns Nguyen of the prohibited conduct and it is reasonably related to the circumstances of his crimes, his challenge fails.

The trial court imposed a community custody condition that imposed a curfew on Nguyen. We accept the State's concession that this condition was not crime-related and should be stricken.

The trial court also imposed a community custody condition that Nguyen cannot enter areas where minors are known to congregate as defined by the community corrections officer. We agree with the parties that this portion of the condition is not sufficiently definite to apprise Nguyen of the prohibited conduct and allows for arbitrary enforcement by his community corrections officer.

Therefore, we affirm and remand with instructions to strike special condition 7 and the unconstitutionally vague portion of crime-related prohibition 18.

FACTS

T.P. lived with her parents and little sister in a house in South Seattle.[1] T.P.'s mother worked long hours, and her father picked T.P. and her sister up from school each day. Nguyen rented a bedroom in their house. Nguyen was employed, but he would usually get home shortly after T.P. and her sister returned from school.

Nguyen sexually abused T.P. for the first time when she was approximately six years old. While T.P. was sitting on Nguyen's lap at the table, he massaged her breasts underneath her shirt. When T.P. was six or seven years old, Nguyen put his mouth on

[1] Because the victim in this case was a minor, she will be referred to by her initials.

her breasts.

Beginning when T.P. was eight or nine years old, Nguyen began sexually assaulting her on a regular basis. He performed oral sex on T.P. He penetrated her vagina with his fingers.

When T.P. was eleven years old, Nguyen followed T.P. into a spare bedroom and penetrated her with his finger and penis.

The final time Nguyen sexually assaulted T.P., she was thirteen years old. T.P. testified Nguyen digitally penetrated her and put his mouth on her genitals.

The State charged Nguyen with one count of first degree rape of a child, one count of first degree child molestation, one count of second degree rape of a child, and one count of second degree child molestation.

The jury was provided separate to-convict instructions for each of the four counts. Following each to-convict instruction, the jury was instructed it must "unanimously agree as to which act has been proved."[2] But none of the instructions required the jury to find "an act separate and distinct" from the other counts. The jury returned guilty verdicts on all counts.

Nguyen appeals.

ANALYSIS

Double Jeopardy

Nguyen contends the jury instructions violated his right against being placed in double jeopardy because they allowed multiple punishments for the same act.

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[2] Clerk's Papers (CP) at 39, 42, 45, 48.

"The constitutional guaranty against double jeopardy protects a defendant against multiple punishments for the same offense."[3] This court reviews a double jeopardy claim de novo, and it may be raised for the first time on appeal.[4] We "may consider insufficient jury instructions 'in light of the full record' to determine if the instructions 'actually effected a double jeopardy error.'"[5]

In State v. Land, this court recognized when an act of sexual intercourse involves oral-genital contact only, if done for sexual gratification, that conduct is both molestation and rape.[6] Because they are the same in fact and in law, they are not separately punishable.[7] When both are charged, the jury instructions must require that the rape of a child and child molestation counts be based on separate and distinct acts.[8] The absence of such language presents the potential for double jeopardy.[9] But there is no violation of the defendant's guarantee against double jeopardy if, considering the evidence, arguments, and jury instructions in their entirety, it is "*manifestly apparent* to the jury that the State [was] not seeking to impose multiple punishments for the same offense."[10]

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[3] State v. Land, 172 Wn. App. 593, 598, 295 P.3d 782 (2013) (citing U.S. CONST. amend. V; WASH. CONST. art. I, § 9).

[4] Id.

[5] State v. Peña Fuentes, 179 Wn.2d 808, 824, 318 P.3d 257 (2014) (quoting State v. Mutch, 171 Wn.2d 646, 664, 254 P.3d 803 (2011)).

[6] 172 Wn. App. 593, 600, 295 P.3d 782 (2013).

[7] Id.

[8] Id. at 600-01.

[9] Id.

[10] Mutch, 179 Wn.2d at 664 (quoting State v. Berg, 147 Wn. App. 923, 931, 198 P.3d 529 (2009)).

The State argues the rape of a child and child molestation crimes are not identical offenses, and multiple punishments are authorized. The State asks us to disagree with this court's "same in fact and in law" analysis in Land. But we need not reach the State's argument disputing Land because we resolve this case under the "manifestly apparent" theory.

Nguyen contends it was not manifestly apparent to the jury that each conviction was based on a separate and distinct act. We disagree.

In State v. Peña Fuentes, the defendant was convicted of one count of first degree rape of a child and two counts of first degree child molestation.[11] The jury instruction for the one count of rape of a child did not require that the conduct must have occurred on an occasion separate and distinct from the child molestation charges.[12] Our Supreme Court held "it was manifestly apparent that the convictions were based on separate acts because the prosecution made a point to clearly distinguish between the acts that would constitute rape of a child and those that would constitute child molestation."[13]

The Peña Fuentes court focused upon the clear election by the State in closing argument:

> In the prosecutor's closing argument, he *addressed count I (child rape)* and *identified the two specific acts that occurred* at the condo that supported a child rape conviction. The prosecutor *then addressed counts III and IV, which involved child molestation that occurred during the same time period as count I.* The prosecutor *clearly used "rape" and "child molestation" to describe separate and distinct acts.* He divided Peña Fuentes's behaviors into two categories—the acts involving penetration,

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[11] 179 Wn.2d 808, 823, 318 P.3d 257 (2014).

[12] Id.

[13] Id. at 825.

> which constituted rape, and the other inappropriate acts, which constituted molestation. And again, the defendant did not challenge the number of acts or whether the acts overlapped; he challenged only J.B.'s believability. The jury ultimately believed J.B.'s testimony regarding the various acts that occurred at the condo.[14]

In addition to the clear election in closing argument, the "manifestly apparent" cases recognize other factors such as clear and distinct references to rape of a child and molestation, separate to-convict instructions, the clarity of the evidence presented at trial, and whether the defense challenged the credibility of the victim rather than the number of acts or whether the acts overlapped.[15]

Consistent with Peña Fuentes, the evidence, jury instructions, and closing argument made it manifestly apparent to the jury that the State was not seeking to punish Nguyen multiple times for a single act. T.P.'s testimony was clear about separate instances of rape during the charging period before she was twelve and the charging period after she was twelve. She testified that Nguyen digitally penetrated her multiple times, the first time when she was eight or nine years old, and the last time when she was thirteen. T.P. testified to one incident of penile penetration that occurred when she was eleven years old. She also testified that Nguyen put his mouth on her genitals on several occasions between the ages of nine and thirteen.

In closing argument, the State clearly elected the acts it relied on for each count and distinguished between the different charging periods:

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[14] Id. at 825-26 (emphasis added) (citations omitted).

[15] See id. at 825; Land, 172 Wn. App. at 602-03; State v Borsheim, 140 Wn. App. 357, 368, 165 P.3d 417 (2007); State v. Wallmuller, 164 Wn. App. 890, 898-99, 265 P.3d 940 (2011); State v. Daniels, 183 Wn. App. 109, 118-21, 332 P.3d 1142 (2014).

> So what we're talking about in Count I is the times that the Defendant penetrated [T.P.], penetrated her vagina with his finger, prior to her turning twelve years old, and any of the many times the Defendant performed oral sex on [T.P.] prior to her turning twelve years old.[16]

The State also clearly elected the acts it relied on to support the first degree child molestation count: "So for Count II, what we're talking about here are the many times that the Defendant rubbed, massaged [T.P.]'s breasts prior to her twelfth birthday."[17]

As to the second degree rape of a child count involving the second charging period, the State noted, "Again, we talked about what sexual intercourse means. For this particular charging period, again, we're talking about the many times the Defendant penetrated [T.P.]'s vagina with his finger after she turns twelve and before he moves out of the house in March 2013."[18]

Finally, the State addressed the child molestation count based on the second charging period:

> What we're talking about in Count [IV] are the times the Defendant touched, massaged, rubbed [T.P.]'s breasts after her twelfth birthday and before he left the house. That the Defendant himself admitted to in his statement when he said he rubbed her breasts [when] she was thirteen.[19]

Similar to the prosecutor's closing remarks in Peña Fuentes, the State drew a clear distinction between the alleged acts of rape of a child and child molestation. The jury received separate to-convict instructions for each count, and the evidence presented at trial did not blur or confuse the acts of sexual intercourse by oral-genital

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[16] Report of Proceedings (RP) (Oct. 27, 2015) at 482.

[17] Id. at 483.

[18] Id. at 484.

[19] Id.

contact with acts of other sexual contact. And, except for his admission of a single act of touching T.P.'s chest through her clothes, Nguyen attacked T.P.'s credibility instead of challenging the number of acts or whether the acts overlapped.

Nguyen's attempts to distinguish Peña Fuentes are not persuasive. Nguyen suggests the Peña Fuentes court relied on the prosecutor's division of the acts into two categories: "'acts involving penetration, which constituted rape, and the other inappropriate acts, which constituted molestation.'"[20] But Peña Fuentes is not so narrow. The court emphasized the clarity of the State's closing remarks, not the specific categories described by the prosecutor.[21]

Relying on State v. Kier,[22] Nguyen argues an election in closing cannot cure a double jeopardy violation. But the Kier court merely noted that it could not "consider the closing statement *in isolation*."[23] Here, we do not rely on the State's closing argument in isolation. As discussed, other factors recognized in the "manifestly apparent" cases are also present.

Alternatively, Nguyen contends the State's use of a unanimity instruction does not cure a double jeopardy violation. Nguyen relies on State v. Borsheim.[24] In that case, this court held a unanimity instruction did not cure a double jeopardy violation where the jury was given one single to-convict instruction for four separate identical

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[20] Appellant's Reply Br. at 7-8 (quoting Peña Fuentes, 179 Wn.2d at 825).

[21] Peña Fuentes, 179 Wn.2d at 826 ("*Because of the clarity of the prosecutor's closing argument*, we believe . . . .") (emphasis added).

[22] 164 Wn.2d 798, 194 P.3d 212 (2008).

[23] Id. at 813 (emphasis added).

[24] 140 Wn. App. 357, 165 P.3d 417 (2007).

counts.[25] But here, we do not rely on a unanimity instruction to resolve a separate and distinct act requirement for *identical counts*, as was the case in Borsheim.

Nguyen was not charged with identical counts, the jury received separate to-convict instructions for each count, and the jury reached individual verdicts for each count. Importantly, the State elected the acts on which it relied for each count. This narrowed the jury's consideration to specific instances during two charging periods. None of the acts the State elected for child molestation included oral-genital contact.[26]

In conclusion, the State's closing argument was clear. There was no suggestion, direct or indirect, that acts of sexual intercourse including oral-genital contact were the basis for any of the counts of child molestation. The State clearly referred to the rape charges and child molestation charges as distinct counts. And the defense focused on the credibility of the victim rather than the number of acts or whether the acts overlapped. It was manifestly apparent to the jury that the State was not seeking to impose multiple punishments for the same act. Nguyen was not denied his right to be free from double jeopardy.

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[25] Id. at 370.

[26] Nguyen's assignment of error and arguments address the lack of instruction and need for the rape charges to be supported by acts separate and distinct from the molestation charges. Nguyen does not assert a need for separate and distinct acts to support multiple identical counts as addressed in Borsheim. See Borsheim, 140 Wn. App. at 367; see Appellant's Br. at 1.

Community Custody Conditions

We review community custody conditions for abuse of discretion and "will reverse them only if they are 'manifestly unreasonable.'"[27] "Imposing an unconstitutional condition will always be 'manifestly unreasonable.'"[28]

(A) Special Condition 11: Sexually Explicit Material

Nguyen argues the community custody provision prohibiting him from possessing, using, accessing, or viewing sexually explicit and erotic materials is unconstitutionally vague and is not crime related.

The guarantee of due process in the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution requires that laws not be vague.[29] "The laws must (1) provide ordinary people fair warning of proscribed conduct, and (2) have standards that are definite enough to 'protect against arbitrary enforcement.'"[30] A community custody condition is unconstitutionally vague if it fails to do either.[31] "However, 'a community custody condition is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.'"[32]

Special condition 11 provides:

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[27] State v. Irwin, 191 Wn. App. 644, 652, 364 P.3d 830 (2015) (quoting State v. Sanchez Valencia, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010))

[28] Id. (quoting Sanchez Valencia, 169 Wn.2d at 791-92).

[29] State v. Bahl, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008).

[30] Irwin, 191 Wn. App. at 652-53 (quoting id.).

[31] Id. at 653 (citing Bahl, 164 Wn.2d at 753).

[32] Id. (quoting Sanchez Valencia, 169 Wn.2d at 793).

> Do not possess, use, access or view any sexually explicit material as defined by RCW 9.68.130 or erotic materials as defined by RCW 9.68.050 or any material depicting any person engaged in sexually explicit conduct as defined by RCW 9.68A.011(4) unless given prior approval by your sexual deviancy provider.[33]

Nguyen contends the prohibition in the condition is broad and gives no context that would enable an ordinary person to understand what is disallowed. But the special condition expressly references the statutory definitions for "sexually explicit materials," "erotic materials," and "material depicting any person engaged in sexually explicit conduct."

Unlike State v. Bahl, where our Supreme Court held that a community custody condition allowing the supervising community corrections officer to define "sexual stimulus material" was unconstitutionally vague,[34] the condition in this case does not require further definition. Here, the condition allows a sexual deviancy provider to give Nguyen prior approval to possess such material, but does not give the provider or community corrections officer the authority to determine the definition of the prohibited material. Consistent with the statutory definitions, the terms are not beyond the understanding of an ordinary person.[35]

Alternatively, Nguyen argues the condition is not crime-related.

We review the factual basis for crime-related conditions under a "substantial evidence" standard.[36] Reviewing courts will strike community custody conditions when

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[33] CP at 65.

[34] 164 Wn.2d 739, 761, 193 P.3d 678 (2008).

[35] Nguyen contends the statutory definitions of "sexually explicit material," "sexually explicit conduct," and "erotic material" could lead to uncertainty, but cites no authority for his hypothetical scenarios. See Appellant's Br. at 23-26.

[36] Irwin, 191 Wn. App. at 656.

there is no evidence in the record that the circumstances of the crime related to the community custody condition.[37] Courts will uphold crime-related community custody decisions when there is some basis for the connection.[38] There is no requirement that the prohibited activity be factually identical to the crime.[39] Conditions regarding "access to X-rated movies, adult book stores, and sexually explicit materials" are crime-related and properly imposed for sex offenses.[40]

Here, Nguyen was convicted of rape of a child and child molestation based on numerous acts over several years. Viewed in a light most favorable to the State, these constituted acts of sexual deviancy involving the inability to control sexual conduct. Whether viewed under the sufficiency of the evidence or abuse of discretion standard, Nguyen's criminal conduct is reasonably related to restricting access to sexually explicit or erotic material because of the inherent sexual nature of the materials.

We conclude that the condition prohibiting Nguyen from possessing, using, accessing, or viewing any sexually explicit material, or erotic material, or any material depicting any person engaged in sexually explicit conduct as defined by statute is not unconstitutionally vague and is reasonably related to the circumstances of Nguyen's crimes.

(B) Special Condition 7 and Crime-Related Prohibition 18

The State concedes that special condition 7 requiring Nguyen to abide by a curfew is not sufficiently crime-related and should be stricken. We agree.

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[37] Id. at 656-57.

[38] Id. at 657.

[39] Id. at 656-57.

[40] State v. Magana, 197 Wn. App. 189, 201, 389 P.3d 654 (2016).

Nguyen argues crime-related prohibition 18 is unconstitutionally vague because it insufficiently apprises him of prohibited conduct and allows for arbitrary enforcement. The condition provides, "Do not enter any parks/playgrounds/schools and or any places where minors congregate."[41]

A condition that orders a defendant not to frequent areas where minor children are known to congregate without specifying the exact off-limits locations is unconstitutionally vague.[42]

The State concedes that the "or any place where minors congregate" portion of the prohibition should be stricken, but argues the first clause, "Do not enter any parks/playgrounds/schools" is sufficiently definite and need not be stricken. We agree. "Parks," "playgrounds," and "schools where children congregate" are commonly understood terms.

We conclude the portion of prohibition 18 reading, "any places where minors congregate" shall be stricken on remand,[43] but the trial court may preclude Nguyen from entering parks, playgrounds, or schools where children congregate.[44]

Appellate Costs

Appellate costs are generally awarded to the substantially prevailing party.[45] However, when a trial court makes a finding of indigency, that finding remains

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[41] CP at 65.

[42] Irwin, 191 Wn. App. at 655.

[43] State v. Johnson, 180 Wn. App. 318, 329, 327 P.3d 704 (2014) (Division Two of this court remanded and ordered the trial court to either clarify a term in the condition, or strike the portion of the condition using that term.).

[44] See Irwin, 191 Wn. App. at 654-55.

[45] RAP 14.2.

throughout review "unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency."[46]

Here, Nguyen was found indigent on appeal by the trial court. If the State has evidence indicating Nguyen's financial circumstances have significantly improved since the trial court's finding, it may file a motion for costs with the commissioner. Otherwise, the State is not entitled to appellate costs.

Statement of Additional Grounds for Review

In his statement of additional grounds for review, Nguyen denies that the events occurred, asserts he has not threatened or harmed anyone, and believes the jury already believed he was guilty. But these general statements do not support any relief on appeal.

We affirm and remand with instruction to strike special condition 7 and the unconstitutionally vague portion of crime-related prohibition 18 from appendix H of the judgment and sentence.

WE CONCUR:

[46] Id.

NIELSEN, BROMAN & KOCH P.L.L.C.

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