No. 43741-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

vs.

**Robert Sanders,**

Appellant.

---

Thurston County Superior Court Cause No. 11-1-00440-0

The Honorable Judge Lisa L. Sutton

# Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

**BACKLUND & MISTRY**
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### FEDERAL CASES



### WASHINGTON STATE CASES



### CONSTITUTIONAL PROVISIONS

**WASHINGTON STATUTES**

## ASSIGNMENTS OF ERROR

1. Mr. Sanders's convictions violated his constitutional right to adequate notice of the charges against him under the Sixth Amendment and Wash. Const. art. I, §22.

2. The Information was deficient as to count three because it failed to allege that Mr. Sanders had sexual intercourse with S.T.S.

3. The Information was deficient as to count four because it failed to allege that Mr. Sanders was 36 months older than S.T.S.

4. The Information was deficient as to count four because it failed to allege that S.T.S. was less than 14 years old.

5. The Information was deficient as to count four because it failed to allege that Mr. Sanders was not married to S.T.S.

6. The sentencing court erred by requiring Mr. Sanders to submit to urinalysis upon request.

7. The sentencing court erred by requiring Mr. Sanders to avoid bars, taverns, and cocktail lounges.

8. The sentencing court erred by finding that Mr. Sanders has the ability or likely future ability to pay his legal financial obligations.

## ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A criminal Information must set forth all of the essential elements of an offense. The Information failed to allege (in count three) that Mr. Sanders had sexual intercourse "with" S.T.S., and failed to allege (in count four) that he was 36 months older than S.T.S., that S.T.S. was less than 14, and that he was not married to S.T.S. Did the Information omit essential elements of the charged crimes in violation of Mr. Sanders's right to adequate notice under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §22?

2. A sentencing court's authority is limited to that granted by statute. Here, the sentencing court imposed conditions of community custody that were not authorized by statute. Did the sentencing court exceed its authority by ordering Mr. Sanders to submit to random urinalysis and to avoid bars, taverns, and cocktail lounges?

3. A court may not find that an offender has the ability or likely future ability to pay legal financial obligations, absent some support in the record for the finding. Here, the sentencing court made such a finding without any supporting evidence. Was the sentencing court's finding clearly erroneous?

## STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Robert Sanders and his wife Rachel Sexsmith took an alternative approach to parenting: a home birth (with midwife in attendance), cloth diapers with hand-knit covers, and "co-sleeping," which involved the whole family sharing a king-sized bed. RP 482. Sexsmith, who described herself as having a "crunchy, evergreen, kind of alternative way of doing things," introduced Mr. Sanders to co-sleeping. RP 482. The co-sleeping arrangement was one the kids were used to. RP 482.

In 2007, the couple went through a split characterized by bitterness and hostility. RP 91, 491-492. For a short period, Mr. Sanders continued to reside in the family home in Centralia. RP 476. He closed off a portion of the house to save on heat, moved the king-sized bed next to the house's pellet stove, and continued with the co-sleeping arrangement with his stepdaughter (S.T.S.) and son (Caden). RP 479-481.

The couple divorced and lost the family home in foreclosure proceedings. RP 477-478. Mr. Sanders moved into a crowded single-wide on a farm in rural Thurston County. RP 48, 479-481. He had bunk beds for the children, but did not set them up; instead, when he had visitation, he continued to co-sleep with his son and step-daughter in a queen-sized bed. RP 483-484.

Although S.T.S. wanted to maintain her relationship with Mr. Sanders, she came to find the visits boring after he moved to Thurston County. RP 65, 91-92, 101-102. Her school and friends were in Centralia. RP 59. She spent a great deal of her time on a computer Mr. Sanders had set up for her. RP 486, 488. Her computer sessions lasted four hours without a break, and sometimes went late into the night. RP 488. She resisted when Mr. Sanders tried to limit her computer time, and was very upset when he "unfriended" people on her Facebook and made a rule that she couldn't "friend" people unless they were known to him or to her mother. RP 496-498; 523-524.

In March of 2011, a boy named Caleb told S.T.S. (over Facebook) about a confusing sexual dream he'd had. RP 196. S.T.S. responded by laughing, giggling, and teasing Caleb. RP 197. She later told him "that her stepdad, Robert, did that to her."[1] RP 198. Caleb then accompanied S.T.S. to the school counselor and told the counselor that S.T.S. "had been sexually molested by her stepdad." RP 198-199.

Mr. Sanders was charged with first-degree child rape and child molestation (occurring before S.T.S.'s 12th birthday)[2] and second-degree

---

[1] At some point, Caleb made a statement indicating that S.T.S. had said she "thought" it had happened. RP 206-208.

[2] Mr. Sanders was acquitted of the former charge, and the jury could not reach a verdict on the latter charge. Verdict Forms I and II, Supp. CP.

child rape and child molestation (occurring after her 12th birthday). CP 2. With regard to the second-degree rape and molestation charges (of which Mr. Sanders was ultimately convicted), the Information provided in relevant part as follows:

> Count III…
> [T]he defendant… did engage in sexual intercourse S.T.S. [sic]…
>
> Count IV…
> [T]he defendant… did engage in sexual contact with S.T.S., and was at least thirty-six months older than a person who was at least twelve years of age but less than fourteen years of age and not married to the defendant.
> CP 2.

At trial, S.T.S. testified that Mr. Sanders had repeatedly raped and molested her while her younger brother Caden slept beside them. RP 37-44, 55-56. According to her, Mr. Sanders never said anything, never threatened her, and never told her to keep it secret. RP 70-71.

Mr. Sanders was convicted of counts three and four following a jury trial. Verdict Forms I-IV, Supp. CP; CP 4. At sentencing the court found that Mr. Sanders had the ability or likely future ability to pay his legal financial obligations. CP 6. The court imposed a term of 136 months to life on count three,[3] and ordered a life term of community custody. CP 8-9. Conditions of community custody included a

[3] This sentence was concurrent with a 41 month term on count four. CP 4-6.

requirement that Mr. Sanders submit to random urinalysis and that he avoid bars, taverns, and cocktail lounges. CP 10, 16-18.

Mr. Sanders timely appealed. CP 19.

## ARGUMENT

### A. MR. SANDERS'S CONVICTIONS VIOLATED HIS RIGHT TO ADEQUATE NOTICE UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND WASH. CONST. ART. I, §22.

#### A. STANDARD OF REVIEW

Constitutional questions are reviewed de novo. McDevitt v. Harborview Med. Ctr., ___ Wn.2d___, ___, 291 P.3d 876 (2012). A challenge to the constitutional sufficiency of a charging document may be raised at any time. State v. Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). Where the Information is challenged after verdict, the reviewing court construes the document liberally. Id, at 105. The test is whether the necessary facts appear or can be found by fair construction in the charging document. Id, at 105-106.

If the Information is deficient, prejudice is presumed and reversal is required. State v. Courneya, 132 Wn. App. 347, 351 n. 2, 131 P.3d 343 (2006); State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). On the other hand, if the missing element can be found by fair construction of the charging language, reversal is required only upon a showing of prejudice. Kjorsvik, at 104-106.

B. The Information was deficient because it failed to allege essential elements of counts three and four.

The Sixth Amendment to the federal constitution guarantees an accused person the right "to be informed of the nature and cause of the accusation." U.S. Const. Amend. VI.[4] A similar right is secured by the Washington State Constitution. Wash. Const. art. I, §22. All essential elements—both statutory and nonstatutory—must be included in the charging document. State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992). An essential element is "one whose specification is necessary to establish the very illegality of the behavior." Id (citing United States v. Cina, 699 F.2d 853, 859 (7th Cir.), cert. denied, 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983)).

1. The Information failed to properly charge second-degree child rape.

A conviction for second-degree child rape requires proof that the accused person had "sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.076(1). The gravamen of the offense is sex "with"

[4] This right is guaranteed to people accused in state court, through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; Cole v. Arkansas, 333 U.S. 196, 201, 68 S.Ct. 514, 92 L.Ed. 644 (1948).

an underaged person. It is insufficient to prove that the accused person had sex next to or near a young person.

In this case, the Information omitted the word "with" from count three, alleging that Mr. Sanders "did have sexual intercourse S.T.S...." CP 2. The charge is devoid of grammatical sense, and does not inform the reader of the requirement that sex be with the young person, rather than near or within sight of such person. Nor can the word "with" be fairly implied from the charging language.

Because the Information is deficient, the conviction violated Mr. Sanders's right to notice under the Sixth Amendment and art. I, §22. Kjorsvik, at 104-106. The conviction must be reversed and the case dismissed without prejudice. Id.

2. The Information failed to properly charge second-degree child molestation.

To obtain a conviction for second-degree child molestation, the prosecution must prove that the accused person had "sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.086. In this case, the charging document did not track this statutory language, and failed to charge the crime.

Instead of outlining these essential elements, the Information alleged that Mr. Sanders "did engage in sexual contact with S.T.S., and was at least thirty-six months older than a person who was at least twelve years of age but less than fourteen years of age and not married to the defendant." CP 2 (emphasis added). Although the language makes grammatical sense, it does not connect S.T.S. with the "person" whose age and relationship to Mr. Sanders are described. Because of this, it does not provide notice of the elements of the offense and fails to charge any crime.

Because the Information is deficient, the conviction violated Mr. Sanders's rights under the Sixth Amendment and art. I, §22. The conviction must be vacated and the charge dismissed without prejudice. Kjorsvik, at 104-106.

## I. THE SENTENCING COURT ERRONEOUSLY IMPOSED CONDITIONS OF COMMUNITY CUSTODY THAT ARE NOT AUTHORIZED BY STATUTE.

### A. Standard of Review

The imposition of crime-related prohibitions is reviewed for abuse of discretion. State v. Cordero, 170 Wn. App. 351, 373, 284 P.3d 773, (2012). Discretion is abused when exercised on untenable grounds or for untenable reasons. Id.

B. The sentencing court exceeded its authority by requiring Mr. Sanders to submit to random urinalysis and to avoid bars, taverns, and cocktail lounges.

A sentencing court may only impose a sentence authorized by the legislature: "[a] court commits reversible error when it exceeds its sentencing authority under the SRA." State v. Winborne, 167 Wn. App. 320, 330, 273 P.3d 454, review denied, 174 Wn.2d 1019, 282 P.3d 96 (2012). A judgment and sentence is invalid if it imposes a sentence in excess of the punishment authorized by law. In re Carrier, 173 Wn.2d 791, 798, 272 P.3d 209 (2012). Unauthorized conditions of a sentence may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

As part of community custody, a sentencing court has authority to order an offender to "[r]efrain from consuming alcohol" and to "[c]omply with any crime-related prohibitions." RCW 9.94A.703(3)(e), (f). A crime-related prohibition is one that "directly relates to the circumstances of the crime..." RCW 9.94A.030(10). The offender may be required to undertake affirmative conduct necessary to monitor compliance with a crime-related prohibition. RCW 9.94A.030(1). The offender may also be required to "perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." RCW 9.94A.703(3)(d).

In this case, there is no indication that the offenses involved drugs or alcohol. Despite this, the sentencing court ordered Mr. Sanders to submit to random urinalysis and to avoid bars, taverns, and cocktail lounges. These conditions did not related to the circumstances of the crime; nor is there anything in the record suggesting they are necessary to reduce the risk of reoffense or ensure the community's safety.

The sentencing court lacked authority to impose these conditions of community custody. Accordingly, these terms of the judgment and sentence are void; they must be vacated and the case remanded for correction of the judgment and sentence. Winborne, at 330.

## II. THE RECORD DOES NOT SUPPORT THE SENTENCING COURT'S FINDING THAT MR. SANDERS HAS THE ABILITY OR THE LIKELY FUTURE ABILITY TO PAY HIS LEGAL FINANCIAL OBLIGATIONS.

Absent adequate support in the record, a sentencing court may not enter a finding that an offender has the ability or likely future ability to pay legal financial obligations. State v. Bertrand, 165 Wn. App. 393, 404, 267 P.3d 511 (2011).

In this case, the sentencing court entered such a finding without any support in the record. CP 6; see RP generally. Indeed, the record suggests that Mr. Sanders lacks the ability to pay the amount ordered, given his lengthy incarceration and the impact his felony conviction will

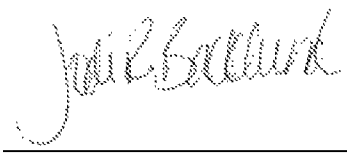
have on his prospects for employment. Accordingly, Finding No. 2.5 of the Judgment and Sentence must be vacated. Id.

## CONCLUSION

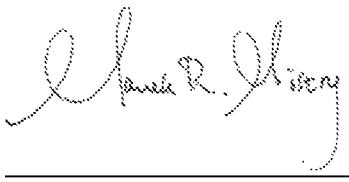
For the foregoing reasons, the convictions must be vacated and the charges dismissed without prejudice. In the alternative, the court's findings on Mr. Sanders's ability to pay must be vacated.

Respectfully submitted on February 12, 2013,

**BACKLUND AND MISTRY**



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

# CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Robert Sanders, DOC #358657
Washington Corrections Center
P.O. Box 900
Shelton, WA 98584

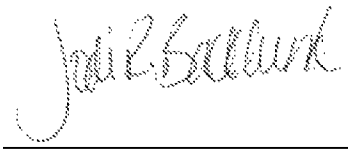
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Thurston County Prosecuting Attorney
paoappeals@co.thurson.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 12, 2013.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

# BACKLUND & MISTRY

# February 12, 2013 - 1:25 PM

**Transmittal Letter**

Document Uploaded: 437414-Appellant's Brief.pdf

Case Name: State v. Robert Sanders
Court of Appeals Case Number: 43741-4

**Is this a Personal Restraint Petition?** ○ Yes ◉ No

**The document being Filed is:**

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ◉ Brief: Appellant's
- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ○ Petition for Review (PRV)
- ○ Other: _____

**Comments:**

No Comments were entered.

Sender Name: Manek R Mistry - Email: backlundmistry@gmail.com

A copy of this document has been emailed to the following addresses:
paoappeals@co.thurston.wa.us