No. 31820-6-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

State of Washington, Respondent,

v.

Jason Lee Dutcher, Appellant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Dutcher has asked for his conviction to be overturned on two bases: first, that there was insufficient evidence to support one of the elements of the charge of Child Molestation in the Third Degree and, second, that the jury's verdict was not unanimous.

Dutcher also asks the Court to strike two conditions of his sentence: first that he not possess or view pornographic material, and, second, that he submit to plethysmograph testing at the direction of his community custody official.

The Court should decline to overturn Dutcher's conviction. Dutcher argues that the State failed to provide sufficient evidence that a reasonable trier of fact could find beyond a reasonable doubt that he acted with the purpose of sexual gratification because he was asleep at the time of the offense. Given the similarity of the child molestation statutes to the rape of a child statutes and the Court made "sleep sex" an affirmative defense in *State v. Deer*, 175 Wn.2d 725, 731-732, 287 P.3d 539 (2012), the Court should find that Dutcher did not present evidence that would permit a reasonable juror to find by a preponderance of evidence that he performed the sexual actions while sleeping, nor did they do so in finding him guilty of Child Molestation in the Third Degree.

Should the Court not find that Dutcher had to prove that he was asleep when he performed the sexual actions, the conviction still should not be overturned as there was substantial evidence that Dutcher was not asleep due to the directed and specific nature of the actions, and thus a reasonable juror could find Dutcher guilty beyond a reasonable doubt of acting with the purpose of sexual gratification.

The Court should also decline to overturn Dutcher's conviction on the basis of lack of unanimity because the sexual conduct was part of a continuous course of conduct. All of the actions that Dutcher performed were within the span of a few minutes, against the same victim, and in the same location. Though Dutcher states that there was more than one act within that course of conduct which could independently support a conviction for child molestation, courts have continuously held that even multiple actions which could support a conviction can be part of a course of conduct and does not destroy unanimity.

The Court should strike Dutcher's condition that he not possess or view pornography. Such conditions have been held to be unconstitutionally vague and ripe for review in *State v. Bahl*, 164 Wn.2d 739, 758, 193 P.3d 678 (2008).

The Court should decline to strike Dutcher's condition that he submit to plethysmograph testing at the direction of his community

custody official. This condition is not ripe for review as the testing will only be unlawful if not ordered as part of a treatment program. Dutcher has not been ordered to submit to plethysmograph testing and the Court cannot know whether he ever will be, let alone whether it will be ordered outside of a treatment context. Such matters are better left to the violations court who may have the specific facts of the individual order to consider.

II. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Was there insufficient evidence to support Dutcher's conviction for child molestation when Dutcher claims he was asleep at the time of the sexual touching?

2. Did the jury's verdict lack unanimity when the acts consisted of a continuing course of conduct?

3. Did the sentencing court err in imposing a condition that Dutcher not purchase, possess, or view any pornographic material?

4. Should the Court review the sentencing condition that Dutcher submit to plethysmograph testing at the direction of his community custody official when Dutcher has not yet been ordered to do so and only certain contexts directing he submit are unlawful?

III. STATEMENT OF THE CASE

Dutcher went to trial before a jury on June 12, 2013. 2RP 1. He faced charges of Child Molestation in the Third Degree and Indecent

Liberties for events occurring on January 2, 2012 through January 3, 2012, in rural Moses Lake. 2RP 3, 50. The victim, H.N.D. testified that she was born February 10, 1997, which meant that she was fourteen-years-old on January 2, 2012.

H.N.D. testified that Dutcher came to her house during the night of January 2, 2012 to spend the night. 2RP 50. Another witness placed the time at around nine p.m. 2RP 147. H.N.D. also hd a friend from school over, S.V. 2RP 50.

The plan was for Dutcher to sleep on the couch in the living room. 2RP 146. Instead, early in the morning of the third, when H.N.D. and S.V. went up to H.N.D.'s room to watch a movie, Dutcher went with them. 2RP 52. This was sometime between 12 and 2:30 a.m. 2RP 58. All three of them were on the bed. 2RP 53. The order was S.V., H.N.D., and Dutcher, with H.N.D. in the middle. 2RP 52-53. H.N.D. and Dutcher's heads were facing in the opposite orientation from S.V.

H.N.D. fell asleep during the movie. 2RP 58. She believed that the other two were awake when she fell asleep. 2RP 88. H.N.D. was unsure how long she slept, but the television was on when she fell asleep and off when she was awakened. 2RP 122.

H.N.D. woke up because Dutcher was touching her on her left side with his hand, right below her ribs. 2RP 59-60, 90. H.N.D. was facing

away from Dutcher at the time, toward S.V. 2RP 60. She moved a little toward S.V. and Dutcher removed his hand. 2RP 90-92. His hand was there for seconds. 2RP 91. After, "maybe a minute," Dutcher's hand came back. 2RP 92.

H.N.D. had gone to sleep wearing shorts, "panties," a tank top, and sports bra. 2RP 61. When D's hand moved back to H.N.D.'s body, he reached around her front and moved his hand under her shorts and under her panties. 2RP 61, 93. Dutcher then touched her "vaginal area." 2RP 62. When the State asked H.N.D. to clarify which area she meant, H.N.D. stated, "He touched my clitoris." 2RP 63-64. She reiterated that Dutcher had touched her clitoris on cross-examination. 2RP 93.

H.N.D.'s first reaction to Dutcher touching her clitoris was to cringe. 2RP 64. Dutcher continued touching her clitoris for a least a few seconds. 2RP 97. H.N.D. responded by pulling her knees toward her chest and Dutcher once again pulled his hand away. 2RP 96-97.

Dutcher took H.N.D.'s blanket off. 2RP 98. He moved closer to her and H.N.D. stated that she knew that Dutcher, "pulled his penis out of his pants, because I heard his zipper, and his arms moving." 2RP 64. H.N.D. heard the zipper, but did not hear or feel Dutcher take his pants off. 2RP 99-100. Dutcher next "grabbed" H.N.D.'s side and moved toward her, slowly thrusting his hips and groin into her lower back as he held her. 2RP

64, 99, 102-104. While the thrusting was slow, it was hard enough that it caused the bed to move, causing H.N.D. to sink in closer to Dutcher. 2RP 64, 100, 105. H.N.D. testified that as he thrust, she could feel Dutcher's penis. 2RP 65. Later, in response to questioning about feeling his penis with her hands or against her bare skin, H.N.D. stated she was not, "certain" she felt his penis. 2RP 102.

H.N.D. balled up, crossing her arms in front of her chest, so Dutcher could not reach up her shirt. 2RP 65. H.N.D. next said out loud, "Jason [Dutcher], I suggest you keep your hands to yourself." 2RP 66. In response, Dutcher rolled over and "acted like he was sleeping." 2RP 66.

H.N.D. moved closer to S.V. 2RP 66. She stayed there for a while, which felt to her like two hours. 2RP 67. Then, scared, she stated out loud, "I have to go to the bathroom" and got up to leave the bedroom. 2RP 67. As she left, Dutcher was saying, "No, no, I didn't do it." 2RP 134. H.N.D. believed D to be awake as she was leaving the room because of his prior actions and words. 2RP 134-135.

H.N.D. went across the hall to Stephanie Long's room around 5:30 to 6 a.m. 2RP 67, 149. H.N.D. asked Long to make Dutcher leave, and why. 2RP 67, 150. Long observed H.N.D. to be scared, "freaked out," upset, and crying. 2RP 67, 149, 201. H.N.D. next went to her mother's

room after Dutcher had left and also told her what had happened. 2RP 68, 205.

Long "woke" Dutcher by standing in the doorway and saying his name with an "elevated voice" not "screaming" or "hollering." 2RP 187. Long confronted Dutcher with H.N.D.'s allegations 2RP 180-181. Dutcher told Long he had been sleeping and did not know what she was talking about. 2RP 181. Dutcher, at that time, was acting "half tired and kind of fidgety." 2RP 181. Long told Dutcher to leave the house and he did, relatively quickly. 2RP 181. Deputy Gregg met with Dutcher at the Airway Deli later on January 3, 2012. 2RP 223. Deputy Gregg told Dutcher of H.N.D.'s allegations. 2RP 225. Dutcher was advised of his rights and Dutcher waived those rights to write and sign a statement. 2RP 223, 227. Dutcher stated he was born September 21, 1991, meaning he was twenty years old on January 2 through 3, 2012.

Dutcher confirmed that he had watched a movie in H.N.D.'s bedroom. 2RP 225. He stated Long had awakened him and told him to get out and that Long accused him of grabbing H.N.D. 2RP 225-2RP 226. Dutcher also stated that he sometimes pulls people close to him when he sleeps. 2RP 226. Dutcher denied touching H.N.D. 2RP 231. Deputy Gregg arrested Dutcher. 2RP 229.

James Kindred, private investigator, was called to impeach what H.N.D. stated in her direct examination with statements she had made in an interview with him. 2RP 283. Though that testimony may cast doubt on H.N.D.'s memory and testimony, his recitation of her earlier statement is not evidence of the truth of those earlier statements. 2RP 283.

Dutcher did not testify. 2RP 305. Neither attorney objected to any of the jury instructions nor failure of the court to give an instruction. 2RP 315. The instructions contained no unanimity instruction. 2RP 317-327.

The jury found Dutcher guilty of Child Molestation in the Third Degree. 2RP 386.

The court order that a "PSI" (pre-sentence investigation) be completed to help the court determine sentencing conditions. 2RP 393-394. Both parties had this report at sentencing, which took place July 23, 2013. RP 88. The State requested the Court sentence Dutcher based on the recommendations in the PSI. RP 88-89. Dutcher was placed on 12 months of community custody "on the conditions that the Department of Corrections sought, which included, "do not purchase, possess, or view any pornographic material in any form," " attend and participate in a crime-related treatment counseling program, if ordered to do so by the supervising Community Corrections Officer" and "submit to plethysmograph as directed by supervising Community Corrections

Officers." RP 95. He was also sentenced to nine months in custody. RP 100.

IV. ARGUMENT

1. The jury's verdict was not based on insufficient evidence on the subject of "purpose of sexual gratification" when Dutcher claims he was asleep because that defense is one that should be an affirmative defense and Dutcher's actions indicated he was awake.

A. "Sleep sexual contact" like "sleep sex" should be an affirmative defense that Dutcher must prove by a preponderance of evidence under Deer.

RCW 9A.44.089, Child Moletation in the Third Degree, states, "A person is guilty of child molestation in the third degree when the person has...sexual contact with another who is at least fourteen years old but less than sixteen years old...and the perpetrator is at least forty-eight months older than the victim." Sexual contact has a specific definition under this section: "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2).

Dutcher's claim that the evidence at trial was insufficient to convict centers entirely on whether there was touching done for the purpose of gratifying sexual desire of either Dutcher or H.N.D. If someone is unconscious, it would stand to reason that they cannot perform an action with a "purpose" toward doing anything.

Sexual contact while asleep, like "sleep sex" should be an affirmative defense that the defendant must prove by a preponderance of evidence. In *State v. Deer*, 175 Wn.2d 725, 731-732, 287 P.3d 539 (2012), Deer argued at trial that once she produced evidence of a lack of a voluntary action in a child rape case, due to being asleep, the State had the burden of proving volition beyond a reasonable doubt. The Court rejected this argument and found that "sleep sex" or sleep sexual intercourse was an affirmative defense to child rape requiring the defendant to prove the defense by a preponderance of evidence. *Id.* at 733.

The Court began by noting that "elements are the essential components of a criminal charge." *Id.* The State need only prove each *element* beyond a reasonable doubt and the defendant has no burden of disproving elements. *Id.* However, the defendant bears the burden of proving, by a preponderance of evidence, a defense that does not "negate[] an *element* of the charged offense." *Id.* at 734 (emphasis added). The Court stated that Deer's "sleep sex" defense did not fall within the category of negating defenses because rape of a child only requires the State to prove the element of, *inter alia*, sexual intercourse.

The definition of "sexual intercourse" includes "any act of *sexual contact* between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite

sex." RCW 9a.44.010(1)(c) (emphasis added). In, *State v. Brown*, 78 Wn. App. 891, 896 780 P.2d 880 (1989), *review denied*, 114 Wn.2d 1014, 791 P.2d 897 (1990) the court found that, even though the State relied on this alternative of "sexual intercourse" which contained the words "sexual contact," defined later in the same statute, the words "sexual contact" do not make "intent" an element of second degree rape, *Brown* was another case where the defendant claimed that he was unconscious or blacked out and because of the definition of "sexual contact" the State was required to prove intent. *Id.* at 892-893.

Neither "[F]or the purpose of sexual gratification" nor "sexual gratification" is an "essential element" of the crime of child molestation. *State v. Lorenz*, 152 Wn.2d 22, 34-35, 93 P.3d 133 (2004). "Rather, the definition of 'sexual contact' clarifies the meaning" of the phrase for the jury. *Id.* at 34. This part of the definition makes clear that the legislature does not intend to punish inadvertent touching. However, affirmative defenses exist "in order to avoid an unjust conviction" in the context of crimes where *mens rea* need not be proved. *Deer*, 175 Wn.2d at 735. Had the legislature meant to make a *mens rea* an essential element of child molestation, they would have added it to the statute itself: there is no *mens rea* within the child molestation statute when the contact takes place between the defendant and the child, rather than a third party and the child

(i.e. the statute states "when the person has," not, "when the person knowingly has" or "when the person intentionally has."

The Court in *Deer* gave many policy reasons for why "sleep sex" should be an affirmative defense. First, the Court found no reason to treat "sleep sex" differently than involuntary intoxication in sex cases, which is an affirmative defense. *Id.* at 736. Such a distinction would "lead to inconsistency and confusion" since unconsciousness is often connected to claims of intoxication. *Id.* at 737. Second, the Court noted that being asleep during sexual intercourse (like being asleep during sexual contact) does not change whether the harm, the sexual intercourse itself, has occurred. *Id.* at 739. Affirmative defenses contemplate that the offense "occurred, but offers an excuse." *Id.* Third, as with similar affirmative defenses, proof that the defendant engaged in "sleep sex" is, "far more likely to be within the defendant's knowledge and ability to establish." *Id.* at 740. After all, "involuntary conduct is a statistical and subjective abnormality; the relevant facts are peculiarly within the knowledge of the accused." *Id.* All of these reasons apply with equal force to a "sleep sexual contact" defense.

As acting with the purpose of sexual gratification is not an element of the offense of Child Molestation in the Third Degree, and Dutcher did not put forth any evidence at trial that he was actually asleep. The jury

found, beyond a reasonable doubt that Dutcher had sexual contact with H.N.D., even though Dutcher's attorney argued that he was asleep at the time of the incident, indicating that they believed even beyond a reasonable doubt that Dutcher acted with the purpose of sexual gratification. Dutcher did not testify, none of the witnesses stated they believed the Dutcher to be asleep during the incident, but instead that he was "pretending" to be asleep. There was no evidence that Dutcher suffered from a sleep disorder that might make involuntary actions during sleep more likely than the average individual. Finally, there was no evidence that Dutcher was under the influence of any substance that might make these actions during sleep plausible.

B. The Court should affirm Dutcher's conviction because a reasonable juror could find that Dutcher was awake during the sexual acts beyond a reasonable doubt.

Even if the Court finds that the State bears the burden of proving beyond a reasonable doubt that Dutcher was not asleep, the Court should still affirm the judgment.

"Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." *State v. Price*, 127 Wn. App. 193, 201, 110 P.3d 1171 (2005) (*citing State v. Tilton*, 149 Wn.2d 775, 786, 72 P.3d 735 (2003)). "A claim of

insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* at 201-202 (*quoting State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). The Court "defer[s] to the trier of fact regarding a witness's credibility or conflicting testimony." *Id.* at 202 (*citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)).

State v. Powell, 62 Wn. App. 914, 917, 816 P.2d 86 (1991) *review denied*, 118 Wn.2d 1013 (1992) found that there was insufficient evidence to support "sexual contact," but noted that the touching was over clothing, "fleeting," and "susceptible of innocent explanation." *Price*, 127 Wn. App. At 202, on the other hand, found that there was sufficient evidence to support the element when the defendant did not just touch the minor, but "rubbed her vagina."

There was sufficient evidence that Dutcher was awake when he touched H.N.D. First, Dutcher did not touch just any area on H.N.D.'s body, he touched her clitoris: an area so small in relation to the rest of the body that even a fully conscious person with a purpose of touching the organ may have difficulty finding it by touch alone. Second, his fingers did not touch her clitoris fleetingly or as part of a larger movement, his fingers touched her clitoris for at least a few seconds. Third, Dutcher's hand would not have gotten to that location by mere chance, he had to go

under her shorts, under her underwear, and between the two sides of her labia. Assuming some type of automatism rather than chance movement, Dutcher's body and lower brain functions would somehow need to be able to figure out that H.N.D. was present, facing away from him, and how to get to the clitoris with the obstacle of clothing.

Fourth, Dutcher responded to H.N.D.'s movements and words with actions specific to her conduct, not in the way one would expect of an involuntary response or automatism. When H.N.D. moved her body closer to S.V., Dutcher took his hand away. He waited, then touched her clitoris. When H.N.D. moved her legs toward her chest, he again moved his hand away. When H.N.D. stated that Dutcher should keep his hands to himself, he immediately stopped touching her as opposed to the pause from before followed by more touching, "waking up," or continuing as if he did not have the ability to process words.

Fifth, Dutcher performed complicated directed motions to pull his penis out of his pants. He had to take down the zipper and pull his penis out through the hole that provided. Again, these are not random actions and if automatism, one would expect to see Dutcher take his pants off or not respond to H.N.D.'s reactions. While Dutcher argues that there is varied evidence on whether H.N.D. felt Dutcher's penis, she stated she did, and an insufficiency claim admits the truth of the State's evidence.

Sixth, the order of the acts disprove the concept that Dutcher was asleep. H.N.D. did not wake up to Dutcher thrusting or taking some action which could have been unconscious, he began with a side, moved to her clitoris, trying to stimulate her, and only after doing that did he pull out his penis and press it against her in a thrusting motion. These are not random actions or the actions of someone unconsciously trying to orgasm by moving in a way that causes immediate sensation. This is a course of action that seems calculated to try to have a consensual encounter with H.N.D. by first stimulating her sexually.

Seventh, the fact that Dutcher's thrusting was slow enough to only slightly move the bed is more consistent with him being awake and trying not to wake the other person in the bed and stimulate H.N.D. rather than an unconscious attempt at sexual release. If he was just sleeping, it is likely that this movement and stimulation would have waken him.

Eighth, it is inconsistent for Dutcher wake up when Long called to him from the doorway with a raised voice and without shouting, and not when H.N.D. stated that he should keep his hands to himself from very close to his head, when H.N.D. stated she needed to go to the bathroom also very close to his head, and when H.N.D. got out of the bed from her position in between Dutcher and S.V.

Ninth, Dutcher stated "No, no, I didn't do it" in response to H.N.D. leaving the room. This is significant both because it was yet another appropriate reaction in response to an action taken by H.N.D., but because it indicates that he was conscious of what he had done and was trying to keep H.N.D. from telling someone or trying to confuse H.N.D.

For these reasons, the Court should affirm the judgment because the evidence permitts a reasonable trier of fact to find Dutcher guilty of Child Molestation in the Third Degree beyond a reasonable doubt.

2. Dutcher's conviction was unanimous under the doctrine of continuous course of conduct.

A defendant may be convicted only "when a unanimous jury concludes the criminal act charged in the information has been committed." *State v. Crane*, 116 Wn.2d 315, 324–25, 804 P.2d 10 (1991) (*citing State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984)). Where the State presents evidence of several distinct acts that could form the basis of the count charged, it must tell the jury on which act it must unanimously agree on to convict the defendant. *Id.* at 325.

In *State v. Hanson*, 59 Wn. App. 651, 800 P.2d 1124 (1990), the court held that when determining whether a unanimity instruction should be offered, the reviewing court should consider: first, what must be proven under the applicable statute; second, what the evidence disclosed; and

third, whether the evidence disclosed more than one violation of the statute. *Id.* at 656–57.

However, the courts have repeatedly held that a unanimity instruction is not required where the underlying conduct supporting the charge constitutes a "continuing course of conduct." *See, e.g., Petrich*, 101 Wn.2d at 571. The court applies a commonsense evaluation of the facts to determine whether the conduct was "continuous." *Petrich*, 101 Wn.2d at 571; *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). In the *Petrich* itself, the Court found important that the acts occurred in "separate time frame[s] and identifying place[s]" with the only connection being the victim. 101 Wn.2d at 571. The events were not "one transaction." *Id.*

In the context of an assault, there are many examples where the courts have determined that several ongoing acts of assault can constitute a continuous course of conduct. For example, in *State v. Craven*, 69 Wn. App. 581, 849 P.2d 681 (1993), the court held a continuous course of conducted existed where the defendant had repeatedly assaulted a child over the course of a three-week period. *Id.* at 589. As a result of the extended assault, the child had suffered bruising on his arms, legs, head, one of his eyes, and head, whip marks on his back from a rope or telephone cord, multiple arm fractures, two burn marks, and abrasions to his ankle and nose. *Id.* at 584. The reviewing court held that the trial court

did not err in failing to give a unanimity instruction because case authority amply "recognize[d] that the continuing course exception can be applied to an assault prosecution in a factually appropriate case." *Id.* at 589.

In *State v. Crane*, 116 Wn.2d 315, the court found a continuous course of conduct existed where the defendant had repeatedly hit and violently shook a child several times over the course of two hours before the boy died from the injuries. *Id.* at 319–24, 330.

In *Handran*, the defendant was charged with burglary in the first degree, with assault as the underlying crime. 113 Wn.2d at 17. The defendant had broken into his ex-wife's apartment in order to secure sexual relations with her. *Id.* at 12, 17. His ex-wife awoke to defendant leaning over her in the nude and kissing her. *Id.* at 12. When she asked him to leave immediately, he pinned her down and hit her in the face. Id. The court upheld the trial court's refusal to issue a unanimity instruction because the assaults (e.g., the kissing, restraint, and punch) occurred in one place during a short period of time, involved the same aggressor and victim, and occurred within the same location. *Id.* at 17.

Here, there is no claim that Dutcher's sexual contacts with a minor occurred with more than one victim, in more than one place, or were separated by any amount of time lasting longer than possibly a few minutes. Dutcher's actions toward H.N.D. consisted of one continuous

transaction during which he tried to stimulate himself and H.N.D. sexually. To hold otherwise would possibly subject defendants to being charged with a count of child molestation for each thrust or individual touch.

The Court should affirm the conviction because the trial court did not err in failing to give a unanimity instruction because the acts in question were part of an single course of conduct.

3. The Court should strike the sentencing condition of possessing, viewing, or purchasing "any pornographic material in any form" because it is unconstitutionally vague.

Under the SRA, the court may impose crime-related prohibitions, against "conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(13), 505(8). Imposition of crime-related prohibitions is at the discretion of the trial judge and will only be reversed if manifestly unreasonable. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). "[A] statute or condition is presumed to be constitutional unless the party challenging it proves that it is unconstitutional beyond a reasonable doubt." *State v. Smith*, 130 Wn. App. 721, 726-27, 123 P.3d 896 (2005).

"Under the due process clause, a prohibition is void for vagueness if either (1) it does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited, or (2) it

does not provide ascertainable standards of guilt to protect against arbitrary enforcement." *State v. Sansone*, 127 Wn. App. 630, 638-39, 111 P.3d 1251 (2005). Unconstitutional vagueness means that persons of common intelligence must guess at its meaning and differ as to its application." *City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693 (1990).

It has been previously determined in Washington that use of the term "pornography" is unconstitutionally vague in challenges to a similar community custody condition. *Sansone*, 127 Wn. App. at 638; *State v. Bahl*, 164 Wn.2d 739, 758, 193 P.3d 678 (2008). The State concedes that this provision of the sentence should be stricken.

The Court should strike this condition.

4. The Court should not strike the sentencing condition of plethysmograph examination as the matter is not ripe for review.

Plethysmograph testing has been found to be an effective method for both diagnosing and treating sex offenders. *State v. Riles*, 135 Wn.2d 326, 343-344, 957 P.2d 655 (1998). The data can be useful in both getting baseline arousal patterns and to assess response to stimuli during the course of therapy. *Id.* at 344. When imposed along with therapy "approved by …[his] Community Corrections Officer" the Court has held this is a valid condition of sentence. *Id.* at 345. The question in *Riles* was whether

the sentencing court could impose plethysmograph testing without imposing crime-related treatment, which the Court found, it could not. *Id.* Because there are contexts withig Dutcher's sentence in which this testing is lawful, this condition is not "manifestly unreasonable."

This issue is not ripe for review. Unlike possessing pornography, the condition that Dutcher submit to plethysmograph testing does not apply automatically upon release from custody, does not limit his actions in any way, nor is a purely legal challenge (whether the testing is lawful will depend on whether it is ordered as part of treatment). Given that WAC 246-930-310(7)(c) specifies that treatment "[p]roviders shall recognize that plethysmographic data is only meaningful within the context of a comprehensive evaluation and/or treatment process," it is unlikely that plethysmograph testing will ever be required of Dutcher by his Community Custody Official outside of a treatment context. Should this occur, Dutcher has the recourse of refusing the plethysmograph testing and arguing an illegal requirement to the court that reviews the violation, so there is little risk of hardship.

The court should decline to strike this condition.

V. CONCLUSION

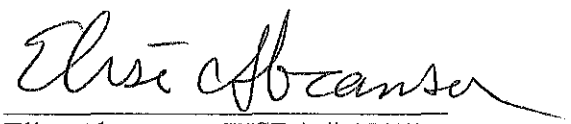
The Court should affirm Dutcher's conviction because there was substantial evidence that Dutcher was awake at the time he molested

H.N.D. and because there was no evidence that Dutcher was asleep when he molested H.N.D. The Court should also affirm Dutcher's conviction as a unanimous decision by the jury because Dutcher's touching of H.N.D., though it consisted of several touches, were part of a continuous course of conduct.

The Court should strike the pornography condition as it is unconstitutionally vague. However, the Court should not strike the plethysmograph testing as the matter is not ripe for review. Whether plethysmograph testing is impermissible is a fact-based inquiry and there are no facts yet as Dutcher has not, and may never be, ordered to undergo plethysmograph testing.

DATED: May 16, 2014

Respectfully submitted:
D. ANGUS LEE,
Prosecuting Attorney



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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 31820-6-III
	)	
vs.	)	
	)	
JASON LEE DUTCHER,	)	DECLARATION OF SERVICE
	)	
Appellant.	)	
	)	

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of Brief of Respondent in this matter by e-mail on Appellant's counsel, receipt confirmed, pursuant to the parties' agreement:

Susan Marie Gasch	Hailey L. Landrus
Gasch Law Office	of Counsel
gaschlaw@msn.com	haileylandrus@yahoo.com

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant containing a copy of the Brief of Respondent in the above-entitled matter.

Jason Lee Dutcher
4815 Airway Dr. - #166
Moses Lake WA 98837

Dated: May 16, 2014.

Kaye Burns