

NO. 47676-2-II

93758-3

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

FILED  
COURT OF APPEALS  
DIVISION II

2016 OCT 24 AM 8:57

STATE OF WASHINGTON

BY cm  
DEPUTY

STATE OF WASHINGTON,

Plaintiff,

vs.

SHANNON EDWARD MEYER,

Defendant,

E FILED  
OCT 26 2016  
WASHINGTON STATE  
SUPREME COURT

PETITION FOR REVIEW

Respectfully submitted by

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A. IDENTITY OF MOVING PARTY

Shannon Edward Meyer ask for the relief designated in part B.

B. STATEMENT OF RELIEF REQUESTED

Mr. Meyer respectfully request that this Court grant review of the issue presented for review by the petitioner.

C. COURT OF APPEALS DECISION

Pursuant to RAP 13.5A(b) Mr. Meyer seeks review of Division Two's decision in State v. Meyer, No. 47676-2-00.

A copy of the decision is attached to the Appendix at 1 through 9.

D. ISSUE PRESENTED FOR REVIEW

1. Should this Court accept review of this case where Division Two found the State presented sufficient evidence to establish Mr. Meyer's took a substantial step toward having sexual intercourse conflicts with Division One decision in State v. A.M., 163 Wn.App. 414 where this Court held sexual intercourse required "penetration"?

E. STATEMENT OF THE CASE

The State charged Meyer's with first degree child rape and second degree child rape, and, as alternatives, two counts of first degree child molestation. Meyers elected to have a bench trial. Enl P.1. The Court of Appeals recitation of the facts are adopted herein.

The trial Court found Meyer guilty of attempted first degree child rape and attempted second degree rape, but dismissed the attempted second degree rape conviction for sentencing purposes. The trial Court entered finding of fact that defendant pulled his pants down, grabbed K.J.C. and according to K.J.C. shoved her face into his privates. K.J.C. struggled and tried to pull away from defendants grip and also pushed against the defendants stomach to get away from him. While still holding K.J.C., the defendant again pulled her back and shoved her face into his penis. Finding of Fact 3(c).

The trial court entered the following conclusion of law. Defendant took a substantial step toward having sexual intercourse with K.J.C pursuant to RCW 9A.23.020 and RCW 9A.44.073, when he smashed his penis into K.J.C.'s face and attempted to shove his penis onto K.J.C.'s mouth. Defendant took a substantial step toward sexual intercourse by forcible compulsion with K.J.C. when he smashed his penis into K.J.C. face and attempted to shove his penis into K.J.C.'s mouth, and when she struggled to push him away he again force her back onto his penis and again attempted to force his penis into her mouth Conclusion (1) and (3).

F. GROUND AND ARGUMENT

RAP 13.4(b) sets out the criteria which a petition for review must meet for this Court to accept review. The Court of Appeals must conflict with a decision of this Court, or the Court of Appeals or the petition must present a significant question of constitutional law or an issue of substantial public interest.

1. This Court Should Accept Review Where The Court of Appeals, Division Two's decision conflicts with the Court of Appeals, Division One's decision.

Mr. Meyer contends that "shoving E.J.C.'s face into his private" is insufficient evidence to sustain a conviction for attempted first degree rape of a child because such conduct does meet the statutory definition of sexual intercourse or the intent to accomplish the criminal result, to have sexual intercourse.

Due process requires the State to prove beyond a reasonable doubt every essential element of a crime. *State v. Marohl*, 170 Wn.2d 691, 246 P.3d 177 (2010). The Statute that defines the offense of rape in the first degree requires, among other things, that the perpetrator have "sexual intercourse" with the child.

RCW 9A.44.073(1). The term sexual intercourse, for purposes of chapter 9A.44 RCW (sex offenses), has its ordinary meaning and occurs upon penetration, however slight. RCW 9A.44.010(1)(a) There are additional and more specific terms which are more applicable. "Any act of sexual contact between persons involving the sex organs of one person an the mouth or anus of another whether such persons are the same or opposite sex. RCW 9A.44.010(c)

From RCW 9A.44.010(c)'s statutory definition it is easily to see why the trial court did not reach the conclusion that Mr. Meyers action constituted first degree child rape because Meyer's penis did not contact with K.C.J.'s mouth.

Q. WHERE DID HIS PRIVATES GO? A. IN MY FACE  
Q. DO YOU KNOW WHERE ON YOUR FACE? A. MY CHEEKS, MY CHIN  
Q. DID IT GO I YOUR EAR? A. NO. Q. IN YOUR NOSE? A. NO  
Q. GO IN YOUR MOUTH? A. NO

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Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the information, and guilty of any degree inferior thereto, or of an attempt to commit the offense. RCW 10.51.003 (emphasis added).

A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime. RCW 9A.28.020(1). While the underlying crime of rape of a child requires no proof of intent, there is an intent element in attempted rape of a child. State v. Chhon, 128 Wa.2d 730, 911 P.2d 1014 (1996). "When coupled with the attempted rape statute, the intent required for attempted rape of a child is the intent to accomplish the criminal result, "to have sexual intercourse." Chhon, 128 Wa.2d at 742.

As in A.M. the trial court made no finding concerning Meyer's intent. The Court made the necessary findings concerning the respective ages of the victim and defendant, that they were not married, and that the act occurred in Washington, but the only finding about what actually happen was that Meyer pulled K.J.C. face into his privates, but not her mouth. These findings do not necessarily constitute a finding that Meyer's acted with the objective of having "sexual intercourse." At best, they indicate that Meyer's acted with the objective of placing his penis in K.J.C.' dace, an act which is not sexual intercourse..

In A.M., he argues that penetration of the buttocks, but not the anus was insufficient to sustain a conviction for first degree rape of a child because such conduct did not meet the statutory definition of sexual intercourse. The Court of Appeals agreed. The State then argued if the rape conviction is reversed, the case should be remanded for entry of a conviction for attempted child rape in the first degree. The Court denied the States request to remand for entry of a conviction for attempted first degree rape of a child because the trial court made no finding concerning A.M.'s intent. The trial court made the same findings as in Mayer's, findings concerning the respective ages, they were not married, and the act occurred in Washington, and the finding about what A.M. actually did , put his penis inside Dee's buttocks, but not his anus. The Court of Appeals found that these findings did not constitute a finding that A.M. acted with the objective of having sexual intercourse. At best, they indicate that A.M. acted with the objective of placing his penis in between DD's buttocks, an act which is not sexual intercourse.



As in A.M. Meyers intend to have sexual sexual intercourse with C.J.C. does not necessarily follow from the court's findings. The conviction must be reversed.

G. CONCLUSION

For the reasons stated herein the Court of Appeals, Division two's decision conflict with Division One. This Court should accept review and reverse and remand to the trial court.

DATED this 18 day of OCTOBER, 2016

Shannon Meyer  
SHANNON E. MEYER/PETITIONER

CERTIFICATE OF SERVICE  
THE UNDERSIGNED CERTIFIES THAT ON THE DATE BELOW  
I CAUSED A TRUE AND CORRECT COPY OF THE  
DOCUMENT TO WHICH THIS CERTIFICATE IS ATTACHED  
TO BE MAILED TO RESPONDENTS ATTORNEY OF RECORD  
10-18-16 Shannon Meyer  
DATE SIGNATURE

FILED  
COURT OF APPEALS  
DIVISION II  
2016 OCT 24 AM 8:57  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

October 4, 2016

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**  
**DIVISION II**

STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
SHANNON EDWARD MEYER,  
  
Appellant.

No. 47676-2-II

UNPUBLISHED OPINION

MAXA, A.C.J. – Shannon Meyer appeals his conviction following a bench trial of attempted first degree child rape,<sup>1</sup> and also challenges two community custody conditions included in his sentence. He argues that there was insufficient evidence to support his conviction and that his defense counsel was ineffective in failing to object to certain evidence and conducting an inadequate cross-examination of the victim. He also argues, and the State concedes, that the trial court erred in imposing community custody conditions requiring a dependency evaluation and a drug and alcohol evaluation because his offense did not involve drugs or alcohol.

We hold that sufficient evidence supports Meyer’s conviction and that defense counsel provided effective representation. But we hold that the trial court improperly imposed the

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<sup>1</sup> The trial court also convicted Meyer of attempted second degree rape. But the trial court vacated that conviction for sentencing purposes on double jeopardy grounds, subject to being revived after appeal. Meyer appealed this conviction even though it was dismissed. Because we affirm the attempted first degree child rape conviction, Meyer’s appeal of the attempted second degree rape conviction is moot.

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challenged community custody conditions because there was no evidence showing that drugs or alcohol contributed to the offense. Accordingly, we affirm Meyer's conviction of attempted first degree child rape, but we remand for correction of his judgment and sentence by striking the challenged community custody conditions.

#### FACTS

In June 2011, Meyer stayed with his sister, Teresa Meyer, for about three weeks. Teresa<sup>2</sup> lived with her five-year-old daughter, KJC. During this time, Meyer took KJC into the kitchen, lowered his sweat pants, and shoved her face into his "privates." Clerk's Papers (CP) at 11. KJC tried to push Meyer away, but he again pulled her face into his penis.

In 2012, KJC began living with foster parents, Rob and Sandy Carpenter. In 2013, KJC disclosed to Whitney Hall, her counselor, that her uncle had "shoved her face into his privates." CP at 11. KJC then disclosed the incident to Sandy Carpenter. KJC later participated in a forensic interview with Emily Watson.

The State charged Meyer with first degree child rape and second degree rape, and, as alternatives, two counts of first degree child molestation. Following a hearing on the admissibility of child hearsay, the trial court allowed Sandy Carpenter, Hall, and Watson to testify as to statements KJC made to them about the incident. During the bench trial, the State played a video recording of Watson's forensic interview of KJC.

The trial court found Meyer guilty of attempted first degree child rape and attempted second degree rape, but dismissed the attempted second degree rape conviction for sentencing

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<sup>2</sup> We refer to Teresa Meyer by her first name to avoid confusion. No disrespect is intended.

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purposes. As part of its sentence, the trial court imposed community custody conditions requiring Meyer to complete a chemical dependency treatment evaluation and attend a drug and alcohol evaluation and obtain any recommended treatment.

Meyer appeals his conviction and the imposition of the community custody conditions.

## ANALYSIS

### A. SUFFICIENCY OF THE EVIDENCE

Meyer argues that there was insufficient evidence to support his conviction for attempted first degree child rape.<sup>3</sup> We disagree.

The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). We assume the truth of the State's evidence and draw all reasonable inferences from the evidence in favor of the State. *Id.* at 106. We defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence. *Id.*

The trial court found Meyer guilty of attempting to violate RCW 9A.44.073, which requires proof that the defendant had sexual intercourse with someone less than 12 years old who was not married to the defendant, and that the defendant was at least 24 months older than the victim. Attempted child rape requires, among other things, proof that the defendant intended to have sexual intercourse with a child and took a substantial step toward having such intercourse. RCW 9A.28.020(3)(a); *State v. Johnson*, 173 Wn.2d 895, 907-08, 270 P.3d 591 (2012). The

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<sup>3</sup> Meyer raises this same claim in his statement of additional grounds (SAG), therefore we do not address his SAG claim separately.

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only disputed element here is whether the proof shows that Meyer intended to have sexual intercourse with KJC and took a substantial step toward that end.

Meyer argues that the evidence was insufficient because KJC gave inconsistent testimony, there was evidence of coaching, there was no corroborative evidence, and there was no evidence of grooming or luring the victim. But the evidence introduced at trial was sufficient to support the trial court's finding of attempted sexual intercourse.

KJC testified that Meyer pulled her into the kitchen, pulled down his pants, shoved her face onto his privates, and rubbed his privates on her face. Sandy Carpenter testified that KJC told her after disclosing the abuse to Hall that Meyer had pushed her head into his lap or crotch. Hall testified that KJC disclosed during counseling that Meyer "put her face in his nut sack." Report of Proceedings (RP) at 218-19. Finally, the State presented a video recording of Watson's forensic interview, in which KJC described Meyer pulling his pants down, shoving her face into his privates, and telling her not to tell anyone.

Meyer denied that this incident happened and Teresa denied KJC's claim that she told Teresa immediately afterward. But the trial court's decision rested on its assessment of KJC's credibility. We defer to that assessment and do not make our own credibility determinations. *Homan*, 181 Wn.2d at 106. Similarly, the lack of corroborative testimony other than KJC's statements and the lack of grooming behavior are merely factors the trial court could have considered in assessing the evidence.

Viewing the evidence in a light most favorable to the State, any rational trier of fact could have found that Meyer took a substantial step toward having sexual intercourse with KJC when

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he thrust his penis twice into KJC's face. We hold that the evidence was sufficient to support the conviction.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Meyer argues that his defense counsel provided ineffective assistance of counsel by failing to (1) object to the admissibility of statements KJC made during her forensic interview about Meyer lying, and (2) extensively cross-examine KJC about and emphasize during closing argument her statements that she did not remember the incident. We hold that defense counsel's failure to object to the statements about Meyer lying was not prejudicial and his tactical decisions regarding cross-examination and closing argument did not constitute ineffective assistance of counsel.

We review claims of ineffective assistance of counsel de novo. *State v. Hamilton*, 179 Wn. App. 870, 879, 320 P.3d 142 (2014). To prevail on a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). Representation is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *Id.* at 33. Prejudice exists if there is a reasonable probability that except for counsel's errors, the result of the trial would have been different. *Id.* at 34.

We begin our analysis with a strong presumption that counsel's performance was effective. *Id.* at 33. To rebut this presumption, the defendant must establish the absence of any " 'conceivable legitimate tactic explaining counsel's performance.' " *Id.* (emphasis added) (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). If defense counsel's

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conduct can be considered to be a legitimate trial strategy or tactic, counsel's performance is not deficient. *Grier*, 171 Wn.2d at 33.

1. Statements About Meyer Lying

Meyer argues that trial counsel improperly failed to object to the admission of the statements from KJC's forensic interview indicating that Meyer lied. We disagree.

In her forensic interview, KJC stated that Meyer lied to Teresa after the incident and also stated that Meyer was the person who was lying, not KJC. Meyer argues that these statements were objectionable because a witness is not allowed to offer opinion testimony about the veracity of the defendant. *State v. King*, 167 Wn.2d 324, 331, 219 P.3d 642 (2009). The reason for this rule is that weighing the credibility of witnesses is the province of the fact-finder and not the witnesses. *State v. Rafay*, 168 Wn. App. 734, 805, 285 P.3d 83 (2012).

Even if defense counsel should have objected to these statements, Meyer fails to show any prejudice. This was a bench trial and a trial court judge is presumed to ignore inadmissible evidence. *State v. Read*, 147 Wn.2d 238, 242, 53 P.3d 26 (2002). So we assume that the trial court gave no improper weight to this testimony in assessing witness credibility. Further, this is not a situation that carried the aura of credibility as when a police officer expresses his or her opinion about the truthfulness of another witness's testimony. *See State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). As a result, defense counsel's failure to object to the admission of KJC's statements did not have any prejudicial effect on the fairness of his trial. Therefore, we hold that Meyer's ineffective assistance of counsel claim on this basis fails.

2. Cross-Examination and Closing Argument

Meyer argues that defense counsel was ineffective in failing to extensively cross-examine KJC about and emphasize in closing argument her statements that she did not remember the incident. Specifically, he argues that defense counsel should have questioned KJC about what her foster mother told her before the forensic interview. We disagree.

In her forensic interview, KJC made statements to Watson indicating that she did not remember the incident until her foster mother told her what Meyer allegedly had done. Meyer argues that defense counsel should have cross-examined KJC regarding these statements.

How to cross-examine a witness generally is a matter of judgment and strategy. *See In re Pers. Restraint of Davis*, 152 Wn.2d 647, 720, 101 P.3d 1 (2004). Meyer argues that defense counsel should have questioned KJC about these statements, but there may have been tactical reasons for not confronting KJC. KJC may have emphasized on further cross-examination that she did have a clear memory of the incident, despite her statements in the interview. And even if she did not, aggressively cross-examining the child victim may not be the best strategy in an attempted child rape case. Finally, KJC's statements suggesting that she did not remember the incident were clear in the record even without any cross-examination. We hold that defense counsel was not deficient in failing to cross-examine KJC regarding her statements.

Meyer also argues that defense counsel should have emphasized KJC's statements during closing argument. But again, how to argue a case necessarily involves tactical decisions. *Grier*, 171 Wn.2d at 33–34. During closing argument, defense counsel emphasized the unreliability of KJC's statements, pointed out inconsistent statements, and attributed them to KJC's disorganized, confused, and fragmented thinking. This was consistent with a legitimate defense



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strategy to undermine KJC's credibility. Defense counsel may have had a strategic reason for not emphasizing KJC's forensic interview. Based on the strong presumption that defense counsel's performance was effective, we hold that defense counsel's closing argument was not deficient.

Therefore, we hold that Meyer's ineffective assistance of counsel claim on this basis fails.

### 3. Cumulative Error

Meyer argues that even if any one instance of ineffective assistance of counsel does not warrant reversal, the cumulative effect of defense counsel's conduct does warrant reversal. "The cumulative error doctrine applies when several errors occurred at the trial court level to deny the defendant a fair trial, even though no single error alone warrants reversal." *State v. Lewis*, 156 Wn. App. 230, 245, 233 P.3d 891 (2010). Meyer has failed to show that defense counsel made objectively unreasonable decisions or unfairly prejudiced Meyer in any way. Therefore, we reject his cumulative error argument.

### C. SENTENCING CONDITIONS

Meyer argues, and the State concedes, that the trial court improperly imposed community custody conditions that were unrelated to his offense. We accept the State's concession.

The trial court is authorized to impose "crime-related prohibitions" at sentencing. Former RCW 9.94A.700(5)(e) (2003).<sup>4</sup> A crime-related prohibition is one that "directly relates to the circumstances of the crime for which the offender has been convicted." Former RCW

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<sup>4</sup> Now codified at RCW 9.94B.050(5)(e).

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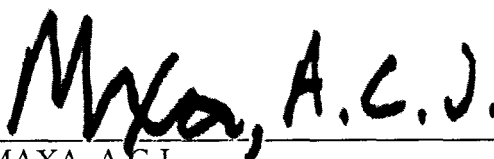
9.94A.030(13) (2006). A trial court abuses its discretion if it imposes a sentencing condition without statutory authority. *State v. Jones*, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003).

Here, the trial court imposed community custody conditions requiring Meyer to complete a chemical dependency treatment evaluation and attend a drug and alcohol evaluation and obtain any recommended treatment. But there was no evidence in the record that alcohol or drug use contributed to the charged offenses. Therefore, we remand for the sentencing court to strike these community custody conditions from Meyer's judgment and sentence.


#### CONCLUSION


We affirm Meyer's conviction of attempted first degree child rape, but we remand for correction of his judgment and sentence by striking the challenged community custody conditions.

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

  
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MAXA, A.C.J.

We concur:

  
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WORSWICK, J.

  
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MELNICK, J.