Supreme Court No. 98493-0
(Court of Appeals No. 51923-2-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER JOHNSON,

Petitioner.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Rules

Other Authorities

A. INTRODUCTION

In its published opinion in this case, Division Two of the Court of Appeals expressly disagreed with Division One regarding the constitutionality of a common community custody condition restricting internet access. The condition orders defendants: "Do not use or access the World Wide Web unless specifically authorized by CCO through approved filters." Mr. Johnson argued this condition was overbroad in violation of the First Amendment and vague in violation of the Fourteenth Amendment. Division Two rejected these arguments but stated, "We recognize that Division One of this court recently came to a different conclusion regarding a similar community custody condition." This Court should grant review to resolve the conflict on this important constitutional question.

This Court should also grant review of two other issues. The trial court rejected Mr. Johnson's request for a jury instruction on the defense of entrapment, and appellate opinions are inconsistent in their descriptions of the quantum of evidence necessary to support jury instructions on affirmative defenses. The Court of Appeals also rejected Mr. Johnson's argument that all three crimes constituted the same criminal conduct for sentencing purposes, even though Mr. Johnson's objective intent for all three offenses was the same.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Christopher Johnson, through his attorney, Lila J. Silverstein, asks this Court to review the published opinion of the Court of Appeals in *State v. Johnson,* No. 51923-2-II (published April 7, 2020), attached as Appendix A.

Mr. Johnson was convicted of three crimes after responding to a "women for men" advertisement in the Casual Encounters section of Craigslist. The ad was posted by a police officer who later falsely claimed to be a 13-year-old. Although Craigslist prohibited people under 18 years of age from using the Casual Encounters section, and Mr. Johnson testified he did not intend to have sex with a child, the trial court denied his request to instruct the jury on the defense of entrapment.

The Court of Appeals affirmed. It held trial courts need not instruct juries on a defense unless "substantial evidence" supports the defense, rejecting the "any evidence" standard set forth in some opinions. It also rejected Mr. Johnson's argument that the three crimes initiated by the State constituted the same criminal conduct for sentencing purposes. Finally, it expressly disagreed with another division of the court regarding the constitutionality of a sentencing condition severely restricting internet access.

C. ISSUES PRESENTED FOR REVIEW

1. The sentencing court imposed the following lifetime condition of community custody: "Do not use or access the World Wide Web unless specifically authorized by CCO through approved filters."

    a. Is the condition overbroad in violation of the First Amendment?

    b. Does the condition vest unbridled discretion in the community corrections officer in violation of the vagueness doctrine of the Fourteenth Amendment?

    c. Should this Court grant review because these are significant questions of constitutional law and Division Two acknowledged its disagreement with Division One? RAP 13.4(b)(2), (3).

2. A defendant has a constitutional right to present a defense and is entitled to a jury instruction on his theory of the case if there is evidence to support that theory. Did the trial court err in denying Mr. Johnson's request for a jury instruction on the entrapment defense, and should this Court grant review to clarify the quantum of evidence necessary to support the instruction? RAP 13.4(b)(3), (4).

3. Was Mr. Johnson deprived of his constitutional right to the effective assistance of counsel at sentencing when his attorney failed to argue the three crimes constituted the same criminal conduct, and did the Court of Appeals err in rejecting the argument based on differences among the three statutes rather than considering the objective intent for the crimes? RAP 13.4(b)(4).

D. STATEMENT OF THE CASE

Christopher Johnson is a husband and father who had no criminal history prior to this case. CP 82. He served in the Navy for 10 years, then

joined Progeny Systems, a primary Department of Defense contractor, where he performed computer work on U.S. submarines for another 10 years. CP 82. He provided for his family, which includes his wife, their biological son, their adopted daughter, and his wife's children from a prior relationship. RP (3/27/18) 656-57.

In October of 2017 Mr. Johnson responded to a post on the "Casual Encounters" section of Craigslist. RP (3/27/18) 553, 610-11. The section is for adults only, and users must confirm they are 18 or over when logging in. RP (3/27/18) 576, 637, 686. A police officer had posted the advertisement and titled it "crazy and young. Looking to explore – w4m Bremerton." RP (3/27/18) 552. The phrase "w4m" means "women for men." RP (3/27/18) 552.

A different police officer, Detective Kristl Pohl, exchanged e-mail messages with Mr. Johnson. RP (3/27/18) 547-94. She eventually falsely described herself as a 13-year-old named Brandi, asked Mr. Johnson if he could "help out with $$ or something," and arranged for them to meet at an address in Bremerton. RP (3/27/18) 549, 553-54, 558, 567.

Police stopped Mr. Johnson in Bremerton and arrested him. RP (3/26/18) 487. The officers seized his wallet, which contained just a little over $40. RP (3/26/18) 480.

The State charged Mr. Johnson with one count of attempted rape of a child in the second degree, one count of attempted commercial sexual abuse of a minor, and one count of communicating with a minor for immoral purposes. CP 1-4. At trial, the State introduced the lurid e-mail and text message exchanges, and police witnesses testified about their false claims and Mr. Johnson's responses. RP (3/27/18) 547-600, 606-45.

Mr. Johnson testified he did not believe the person who posted the ad was actually 13 years old and would not have had sex with a real 13-year-old. RP (3/27/18) 672-75, 684-86. He asked the court to instruct the jury on the affirmative defense of entrapment, but the court denied the request. CP 39-40; RP (3/28/18) 752-62. The State argued in closing that Mr. Johnson was not credible and that it had proved he intended to pay a 13-year-old 40 dollars for sex. RP (3/28/18) 809-26. Mr. Johnson argued he was only seeking casual sex with a woman, that infidelity is not a crime even if it is dishonorable, and that he happened to have a little over $40 in his wallet, which is not an amount one would pay for sex. RP (3/28/18) 826-33.

The jury entered guilty verdicts on all three counts. CP 66. At sentencing, defense counsel requested an exceptional sentence below the standard range, but did not ask the court to count the three crimes as the "same criminal conduct." CP 80-85. The court denied the requested

exceptional sentence and imposed an indeterminate life sentence with a minimum term of 10 years. CP 94-96. A person who actually molested a real child under 12 years old would face only a determinate range of 51-68 months. CP 82; RCW 9.94A.510, .515.

The court also imposed a lifetime ban on internet access absent approval of a community corrections officer. CP 97, 99. The Court of Appeals affirmed in all respects. App. A.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. This Court should grant review because Division Two expressly disagreed with Division One regarding the constitutionality of a common community custody condition severely restricting internet access.

a. Divisions One and Two disagree as to the constitutionality of frequently imposed internet restrictions.

The sentencing court imposed the following condition of community custody for the rest of Mr. Johnson's life: "Do not use or access the World Wide Web unless specifically authorized by CCO through approved filters." CP 97, 99. The condition, with only slight modifications, was pre-printed on a standardized form. CP 99. The condition is unconstitutional because it vests unbridled discretion in the community corrections officer and prohibits a much broader swath of First Amendment activity than necessary.

Division Two disagreed, but stated: "We recognize that Division One of this court recently came to a different conclusion regarding a similar community custody condition." Slip Op. at 13 n.6. Although the Division One opinion the court cites is unpublished, the opinion in this case is published. Division Two's express recognition of the disagreement in a published opinion will result in disparate outcomes in different regions of the state, warranting review under RAP 13.4(b)(2). Moreover, the issues represent significant questions of constitutional law, warranting review under RAP 13.4(b)(3).

b. Division Two conflated the two prongs of the vagueness analysis under the Fourteenth Amendment.

Division Two reached the wrong result. A sentencing court has the discretion to impose "crime-related prohibitions" as conditions of community custody. RCW 9.94A.703(3)(f). A crime-related prohibition must be related to the circumstances of the crime for which the offender is being sentenced. RCW 9.94A.030(10); *State v. Land*, 172 Wn. App. 593, 605, 295 P.3d 782 (2013).

But satisfying the statute is insufficient. The court must avoid vague conditions that violate due process by either (1) failing to provide adequate notice of what conduct is prohibited, or (2) vesting too much discretion in community corrections officers to engage in arbitrary

enforcement. *State v. Bahl,* 164 Wn.2d 739, 753, 193 P.3d 678 (2008); *United States v. Scott,* 316 F.3d 733, 736 (7th Cir. 2003); U.S. Const. amend. XIV. The second prong of the vagueness doctrine is at issue here, and Division Two erred by conflating the two requirements.

The court stated:

> Regarding the second prong, the condition does not allow for arbitrary enforcement. The condition does not rely on Johnson's CCO to define or give meaning to terms in the condition. Rather, the CCO merely approves or rejects Johnson's use of the internet before he accesses it. Prior approval from a CCO to access the internet is a sufficiently ascertainable standard.

Op. 13-14.

But the question under the second prong is not whether a *defendant* can understand the phrase "prior approval from a CCO." This understanding satisfies only the first prong. Under the second prong, the *community corrections officer* must be given clear standards, in order to avoid arbitrary enforcement. *Bahl*, 164 Wn.2d at 758 (in addressing condition limiting travel Court noted that where CCO could "direct what falls within the condition [that] only makes the vagueness problem more apparent, since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement.") .

Thus, in *Scott*, the court reversed the imposition of a condition like the one at issue here: "The defendant shall be prohibited from access to

any Internet Services without prior approval of the probation officer." *Scott*, 316 F.3d at 736. The court noted that such open-ended delegations "create opportunities for arbitrary action – opportunities that are especially worrisome when the subject concerns what people may read." *Id.* The court ruled, "Terms should be established by judges *ex ante*, not probation officers acting under broad delegations and subject to loose judicial review *ex post*[.]" *Id.* Because this did not occur in Mr. Johnson's case, the condition is vague in violation of the Fourteenth Amendment.

c. Division Two wrongly ruled the condition prohibiting all internet access without CCO approval was valid under the First Amendment.

Just as courts may not impose unconstitutionally vague conditions, they must also avoid conditions that infringe a defendant's First Amendment right to communicate and receive information, unless the limitation is narrowly tailored to serve a significant government interest. *Bahl*, 164 Wn.2d at 757-58; *see also Packingham v. North Carolina*, ___ U.S. ___, 137 S. Ct. 1730, 198 L. Ed. 2d 273 (2017); U.S. Const. amend. I.

In *Packingham*, the U.S. Supreme Court held that a limitation on internet access violated the First Amendment – even though the limitation was much narrower than the one at issue here. North Carolina made it a felony for a registered sex offender "to access a commercial social

networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal web pages." *Packingham*, 137 S. Ct. at 1733 (citing N.C. Gen. Stat. Ann. §§14-202.5 (2015)). The law exempted websites that provided only e-mail, chat, or instant messenger services, and exempted websites whose primary purpose was commercial transactions. *Id.* at 1734.

But even this comparatively limited prohibition was invalid, and the court reversed the conviction of a child rapist who had violated the internet ban. *Id.* at 1734-35. The Court explained: "A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more." *Id.* at 1735. The Court described the "vast democratic forums of the Internet" as the "most important places" for the exchange of ideas. *Id.* (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997)). On social networking sites, users "debate religion and politics[,]" "look for work[,]"and "petition their elected representatives[.]" *Id.* Thus, courts "must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks" online. *Id.* at 1736.

Acknowledging that child sexual abuse is a most serious crime and that states may pass laws to protect children, the Court emphasized such

laws "must not burden substantially more speech than is necessary" to further that legitimate goal. *Packingham*, 137 S. Ct. at 1736. It is permissible to enact "narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor." *Id.* at 1737. But the law at issue was unconstitutionally overbroad because it barred access to "the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." *Id.* The Court concluded, "the State may not enact this complete bar to the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture." *Id.* at 1738.

Following *Packingham*, the Third Circuit invalidated a condition of supervised release that is the same as that imposed on Mr. Johnson. *United States v. Holena*, 906 F.3d 288 (3d Cir. 2018). The defendant was convicted of "using the internet to try to entice a child into having sex." *Id.* at 290. As in Mr. Johnson's case, the sentencing judge in *Holena* imposed a condition of supervised release forbidding the defendant from using the internet without his probation officer's approval. *Id.* The court later added a ban on all computer use. *Id.* at 290. The Court of Appeals reversed

because the two conditions contradicted each other and because each ban was impermissibly broad. *Id.* at 291-95.

As to the internet condition like the one at issue here, the court said, "The goal of restricting Holena's internet use is to keep him from preying on children. The District Court *must tailor its restrictions to that end*." *Id.* at 293 (emphasis added). The court ruled the trial judge "may not prevent Holena from doing everyday tasks that have migrated to the internet, like shopping, or searching for jobs or housing. The same is true for his use of websites conveying essential information, like news, maps, traffic, or weather." *Id.* at 294. "Under *Packingham*, blanket internet restrictions will rarely be tailored enough to pass constitutional muster." *Holena*, 906 F.3d at 295. "Their 'wide sweep precludes access to a large number of websites that are most unlikely to facilitate the commission of a sex crime against a child.'" *Id.* (quoting *Packingham*, 137 S. Ct. at 1741 (Alito, J., concurring)). And although the condition permitted internet use with the probation officer's prior approval, the sentencing court "gave the probation office no guidance on the sorts of internet use that it should approve." *Id.* at 293.

Similarly here, the blanket prohibition on internet use without prior authorization of the CCO is unconstitutional. Division Two should have reversed and remanded for imposition of a significantly more tailored

condition. Instead it claimed, "[t]his community custody condition is sufficiently tailored to Johnson's crimes because Johnson is prohibited from using the medium through which he committed his crimes." Slip Op. at 12. But the same was true in *Holena,* where the defendant "was convicted of using the internet to try to entice a child into having sex." *Id.* at 290.

Division Two further stated that Johnson's condition was less restrictive than that in *Holena* because he "may use the internet with the permission of his CCO and through approve filters." Slip Op. at 12-13. This is also wrong. In *Holena*, "as a special condition of that supervised release, [the defendant] was forbidden to use the internet without his probation officer's approval. … And he had to let the probation office install monitoring and filtering software on his computer." *Holena*, 906 F.3d at 290. The conditions are the same, and Division Two should have reversed.

In sum, this Court should grant review to address the significant constitutional questions raised by internet restrictions, and to resolve the conflict between Divisions One and Two of the Court of Appeals. RAP 13.4(b)(2), (3).

2. This Court should grant review to clarify the quantum of evidence necessary to support a jury instruction on an affirmative defense.

This Court should also grant review of the instructional issue. Defendants have a constitutional right to present a defense and there is confusion regarding the quantum of evidence necessary to support a jury instruction on a defense. RAP 13.4(b)(3), (4).

a. The accused has a constitutional right to present a defense, and Mr. Johnson proposed a jury instruction on his defense of entrapment.

The Sixth and Fourteenth Amendments and article I, sections 3 and 22, "guarantee a criminal defendant a meaningful opportunity to present a defense." *State v. Ortuño-Perez*, 196 Wn. App. 771, 783-84, 385 P.3d 218 (2016); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22.

The entrapment defense is at issue here. It originated at common law and was later codified as follows:

> In any prosecution for a crime, it is a defense that:
>
> (a) The criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and
>
> (b) The actor was lured or induced to commit a crime which the actor had not otherwise intended to commit.

RCW 9A.16.070(1). A defendant bears the burden of proving the defense to the jury by a preponderance of the evidence. WPIC 18.05. Mr. Johnson

asked the court to instruct the jury on the entrapment defense, and proposed the pattern instruction. CP 40.

b. The trial court did not allow the question to go to the jury, stating, "I don't believe it has been established by sufficient evidence at trial.".

The question never even went to the jury, because the trial court refused to instruct the jury on the defense of entrapment. RP (3/28/18) 753-62. The court acknowledged there was evidence of the first prong: "the criminal design originated in the mind of the law enforcement official." RP (3/28/18) 753-54. But the court believed Mr. Johnson did not present sufficient evidence on the second prong, which is commonly known as the "predisposition prong": "that the actor was lured or induced to commit a crime he did not otherwise intend to commit." RP (/3/28/18) 754-62.

Defense counsel pointed out that the State presented no evidence of predisposition. RP (3/28/18) 758. "He's lured. He's induced to commit a crime he was not intending to commit." *Id.* Counsel noted the State presented no history, "no child pornography found on his computer … no texts with other young people." *Id.* "We don't even have evidence from the State as to his Craigslist history. There's been no testimony that -- how often he went on this site. There's not been one single shred of evidence presented that he has attraction or interest in children." *Id.*

The court countered, "a reasonable amount of persuasion to overcome reluctance does not constitute entrapment. So even if there's some persuasion and -- and maybe there's some persuasion, but I don't know that we've crossed the line beyond a reasonable amount of persuasion. So I'm – I'm hesitant, Mr. Kelly." RP (3/28/18) 760. The court concluded, "I'm going the deny the defendant's request for that instruction. I don't believe it has been established by sufficient evidence at trial that law enforcement did more than simply afford the defendant an opportunity to commit the crime. There was not anything beyond a reasonable amount of persuasion that might overcome a reluctance that the defendant may have had, and so that would not constitute entrapment." RP (3/28/18) 762.

c. The Court of Appeals held the accused must present *substantial* evidence of a defense before the judge may instruct the jury on a defense, but other opinions properly suggest *any* evidence is enough.

The Court of Appeals affirmed, and cited *O'Dell* for the proposition that there must be "substantial evidence" to support a defense before the jury may even consider it. Slip Op. at 4 (citing *State v. O'Dell*, 183 Wn.2d 680, 687, 358 P.3d 359 (2015)). But other opinions suggest that so long as some evidence is presented that supports the defense, the

accused is entitled to a jury instruction on that defense. *See, e.g.*, *State v. Harvill*, 169 Wn.2d 254, 257 n.1, 234 P.3d 1166 (2010).

The Court of Appeals stated, "*Harvill* is distinguishable on its facts." Slip Op. at 5. But that is beside the point. The question is the *legal standard* – the quantum of evidence required before the court may instruct the jury on a defense. This Court should grant review to resolve that question, and should hold that "some evidence" is sufficient.

The "some evidence" standard is appropriate both because a defendant has a constitutional right to present a defense and because it is for the jury, not the judge, to weigh evidence and evaluate credibility. *See State v. Powell*, 150 Wn. App. 139, 154, 206 P.3d 703 (2009) (counsel was ineffective for failing to request instruction on affirmative defense in rape case, where conflicting evidence "created weight and credibility issues for the jury to determine"). Thus, the Court of Appeals in another entrapment case endorsed the standard this Court applied in *Harvill*: "In the trial of a criminal case, the court must instruct the jury on the law as to any legitimate defense advanced by the defendant when there is evidence to support that theory." *State v. Keller*, 30 Wn. App. 644, 649, 637 P.2d 985 (1981) Indeed, "[t]he defense of entrapment is basically an inquiry into the intention of the defendant, and that intention along with questions of inducement, ready complaisance and other evidence of predisposition,

may raise an issue of fact." *Id.* at 648 (reversing for failure to give entrapment instruction).

Here, Mr. Johnson testified he did not intend to have sex with a child. RP (3/27/18) 674, 684. The evidence showed Mr. Johnson answered an ad on the Craigslist "casual encounters" section, and that only adults are permitted on this website. RP (3/27/18) 553, 576, 610-11, 637, 686. The person who posted the ad was in fact an adult, and described herself as a woman, not a girl. RP (3/27/18) 552. Only after hooking Mr. Johnson did the poster claim to be 13 years old. RP (3/27/18) 556. And Mr. Johnson testified he did not believe the person communicating with him was an actual child; he believed the exchange was a role-play game. RP (3/27/18) 672-75, 684. Thus, evidence was presented that, if believed by the jury, showed Mr. Johnson was *not* predisposed to commit this crime, but was induced by law enforcement.

The judge was unconvinced, but the judge is not the trier of fact. This Court should hold, as it did in *Harvill,* that an instruction on an affirmative defense must be given where there is "evidence that, *if believed by the jury*, would support [the] defense." *Harvill*, 169 Wn.2d at 257 n.1.[1]

[1] The Court of Appeals also wrongly described the "predisposition" prong as the "disposition" prong. Slip Op. at 4 (citing *State v. Lively*, 130

3. This Court should grant review because the three crimes constituted the same criminal conduct.

Finally, this Court should grant review because Mr. Johnson was deprived of his constitutional right to the effective assistance of counsel when his attorney failed to argue the three crimes initiated by the government constituted the same criminal conduct for sentencing purposes.

Multiple current offenses count as only one crime if they constitute the "same criminal conduct." RCW 9.94A.589(1)(a). "'Same criminal conduct' . . . means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." *Id.*

The Court of Appeals ruled the intent for each crime was different because the statutory mental state requirements are different. Slip Op. at 9. But this is the wrong analysis. "Intent, in this context, is not the particular *mens rea* element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime." *State v.*

Wn.2d 1, 9, 921 P.2d 1035 (1996)). The *Lively* opinion correctly states, "entrapment occurs when the crime originates in the mind of the police or an informant and the defendant is induced to commit a crime which he was not predisposed to commit." 130 Wn.2d at 9. And the court faulted Mr. Johnson for pointing not only to his own testimony but to the lack of State's evidence of predisposition. Slip Op. at 6. But proving a negative ("not predisposed") will always involve pointing to a lack of evidence.

Phuong, 174 Wn. App. 494, 546, 299 P.3d 37, 64 (2013). Thus in *Phuong*, Division One held the defendant received ineffective assistance of counsel where his attorney failed to argue that his convictions for attempted rape and unlawful imprisonment were same criminal conduct, even though the *statutory* intent for each crime was different. Division Two applied a different standard here, dismissing Mr. Johnson's claims only because the mens rea elements in each statute were different, even though his intent for all three offenses was to have sex with the person who posted the ad. For this reason, too, this Court should grant review.

F. CONCLUSION

In its published opinion, Division Two expressly disagreed with Division One regarding the constitutionality of a sentencing condition severely limiting internet access. It also endorsed withholding a defense from jury consideration, and ruled three crimes that were part of the same government-initiated transaction were not the same criminal conduct. This Court should grant review. RAP 13.4(b)(2), (3), (4).

DATED this 4th day of May, 2020.

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

April 7, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER R. JOHNSON, Appellant.	No. 51923-2-II ORDER GRANTING MOTION TO PUBLISH OPINION AND PUBLISHING OPINION

RESPONDENT State of Washington filed a motion to publish this court's opinion filed on January 28, 2020. After consideration, the court grants the motion. It is now

ORDERED that the final paragraph in the opinion which reads "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 pursuant to RCW 2.06.040, it is so ordered." is deleted. It is further

ORDERED that the opinion will now be published.

FOR THE COURT

PANEL: Jj. Worswick, Sutton, Cruser

Worswick J
PRESIDING JUDGE

Filed
Washington State
Court of Appeals
Division Two

January 28, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER R. JOHNSON, Appellant.	No. 51923-2-II UNPUBLISHED OPINION

WORSWICK, J. — Following an online sting operation, a jury found Johnson guilty of attempted second degree rape of a child,[1] attempted commercial sexual abuse of a minor,[2] and communication with a minor for immoral purposes.[3] On appeal, Johnson argues that (1) the trial court erred by declining to give an entrapment jury instruction, (2) his trial counsel provided ineffective assistance by failing to argue same criminal conduct at sentencing, and (3) a community custody condition restricting his access to and use of the internet is unconstitutional.

We hold that (1) the trial court did not err when it did not include an entrapment jury instruction, (2) Johnson was not deprived of effective assistance of counsel, and (3) the community custody condition is constitutional. Accordingly, we affirm.

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[1] RCW 9A.44.076; RCW 9A.28.020.

[2] RCW 9.68A.100; RCW 9A.28.020.

[3] RCW 9.68A.090(2).

FACTS

Law enforcement created a posting in the Craigslist casual encounters section. The posting was titled, "Crazy and Young. Looking to Explore. W4M Bremerton" and stated, "Bored and home alone. Been watching videos all day. Really looking to meet a clean DDF guy that can teach me what it's like to be an adult. HMU if interested, winking smiley face. I'm lots of fun."[4] 6 Verbatim Report of Proceedings (VRP) at 552.

Johnson responded to the ad, "I'm real and very interested. . . . I lappy [sic] . . . 'to trade pics. I lope [sic] to hear from you. I want to make you feel amazing." 6 VRP at 555. Law enforcement replied with an e-mail address under the name "Brandi," asking, "Do you want to teach me to [be] a grown up?" and attached a photograph of a female. 6 VRP at 555-56.[5] Johnson responded affirmatively and asked how old she was, where she was located, and if they could "use" her place. 6 VRP at 556. "Brandi" stated, "I'm 13 and on my own." 6 VRP at 556. She said she was staying with a friend in Bremerton whose mother was gone for a few days, so Johnson could come over.

Johnson replied, "Who all will be at the house. I'm just trying to be cautious as you are underage." 6 VRP at 557. Johnson suggested the two meet in public, and they arranged to meet at a minimart near "Brandi's" location. 6 VRP at 558. "Brandi" asked what Johnson would teach her. Johnson replied, "I want to teach you how to suck my c**k, how to c*m, how to ride

[4] "W4M" stands for woman for man. 6 VRP at 552. "DDF" stands for drug and disease free. 6 VRP at 552. "HMU" stands for hit me up. 6 VRP at 552.

[5] We identify law enforcement by the undercover persona for clarity.

my c**k, how to take my c**k deep. I'll show you many things. Is this what you're looking for?" 6 VRP at 558.

"Brandi" responded affirmatively and asked if Johnson could "help out with" money. 6 VRP at 558. Johnson said, "I can help out a little that way. Have to be honest, I'm already nervous because of your age, and now you're asking for this. . . . I get it. Don't get me wrong. As long as everything you're telling me is true, I'm just trying to let you know what I'm thinking." 6 VRP at 559. Johnson said that he had to make sure work would not conflict with their meet up. When "Brandi" asked if later would be better, Johnson replied, "Nope. I got it all worked out." 6 VRP at 561. Johnson drove to the designated minimart. "Brandi" then gave Johnson the address of the house and he drove toward that location. Law enforcement apprehended Johnson while on his way from the minimart to the house. At the time of his arrest, Johnson was carrying forty dollars.

The State charged Johnson with (1) attempted second degree rape of a child, (2) attempted commercial sexual abuse of a minor, and (3) communication with a minor for immoral purposes. During the trial, witnesses testified to the above facts.

Johnson testified on his own behalf. He stated that he believed the Craigslist posting was an "age-role-play fetish." 6 VRP at 672. Johnson testified that he wanted to meet the person and was "playing detective" to discern who this person was because he did not believe the person was a thirteen-year-old girl. 6 VRP at 682. He also acknowledged that no one forced him to respond to the posting.

The trial court denied Johnson's request to include a jury instruction on the affirmative defense of entrapment. The jury found Johnson guilty as charged.

At sentencing, Johnson's counsel did not argue that Johnson's three crimes constituted the same criminal conduct. The trial court placed community custody restrictions on Johnson, including, "Do not use or access the World Wide Web unless specifically authorized by CCO [(community corrections officer)] through approved filters." Clerk's Papers (CP) at 99. Johnson appeals his judgement and sentence.

ANALYSIS

I. ENTRAPMENT JURY INSTRUCTION

Johnson argues that the trial court erred by not including an entrapment jury instruction. We disagree.

To obtain a jury instruction regarding a party's theory of the case, there must be substantial evidence in the record supporting the requested instruction. *State v. O'Dell*, 183 Wn.2d 680, 687, 358 P.3d 359 (2015). To prove the affirmative defense of entrapment, a defendant must show, by a preponderance of the evidence, that he committed a crime, that the State or a State actor lured or induced him to commit the crime, and that the defendant lacked the disposition to commit the crime. *State v. Lively*, 130 Wn.2d 1, 9, 921 P.2d 1035 (1996); RCW 9A.16.070. A defendant may not point to the State's absence of evidence to meet his evidentiary burden for an affirmative defense. *State v. Fisher*, 185 Wn.2d 836, 850-51, 347 P.3d 1185 (2016).

Entrapment is not a defense if law enforcement "merely afforded the actor an opportunity to commit a crime." RCW 9A.16.070(2). We review a trial court's factual determination of whether a jury instruction should be given for an abuse of discretion. *State v. Condon*, 182 Wn.2d 307, 315-16, 343 P.3d 357 (2015).

As an initial matter, Johnson appears to argue that an instruction on an affirmative defense is required when there is *any* evidence that, if believed by the jury, would support that defense. Johnson cites only *State v. Harvill*, 169 Wn.2d 254, 257 n.1, 234 P.3d 1166 (2010) to support his argument.

But *Harvill* is distinguishable on its facts. Harvill's testimony, if believed by the jury, would have established the duress defense. *Harvill*, 169 Wn.2d at 257 n.1. The trial court refused to instruct the jury on the affirmative defense despite there being contradictory evidence of duress, and our Supreme Court reversed. *Harvill*, 169 Wn.2d at 256.

Here, Johnson points to no evidence to support an entrapment instruction. Law enforcement created a Craigslist posting purporting to be a woman looking for a man to teach her how to be an adult. Johnson initiated contact by answering the posting. Johnson testified that no one forced him to answer the posting. Although Johnson stated he wanted to be cautious because "Brandi" was underage, he steered the conversation into explicitly sexual territory by graphically explaining his sexual desires to the purported thirteen-year-old. When "Brandi" suggested meeting at a later time, Johnson declined, stating that he was available to meet. There is no evidence that law enforcement lured or induced Johnson.

Johnson argues that he was entitled to an entrapment instruction because the State failed to show he had a predisposition to commit the crimes against children, and there was no evidence of a history regarding perverse activity towards children. But pointing to the State's absence of evidence does not meet Johnson's evidentiary burden for his affirmative defense. *Fisher*, 185 Wn.2d at 850-51. Instead, the evidence shows that law enforcement merely afforded Johnson the opportunity to commit his crimes. Johnson willingly responded to the posting, steered the conversation to explicitly sexual topics, testified that he wanted to meet the person, and drove to the agreed locations. Because Johnson failed to show any evidence entitling him to a jury instruction on entrapment, we hold that the trial court did not err by refusing to instruct the jury on entrapment.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Johnson argues that he was deprived of effective assistance of counsel during sentencing when counsel failed to argue that Johnson's convictions were the same criminal conduct. Specifically, he argues that his intent for all three crimes was to "have sex with the person who posted the ad." Br. of Appellant at 14. We disagree.

A. *Legal Principles*

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). Defense counsel's obligation to provide effective assistance applies to sentencing. *State v. Rattana Keo Phuong*, 174 Wn. App. 494, 547, 299 P.3d 37 (2013). To demonstrate that he received ineffective assistance of counsel, Johnson must show

both (1) that defense counsel's performance was deficient and (2) that the deficient performance resulted in prejudice. *State v. Linville*, 191 Wn.2d 513, 524, 423 P.3d 842 (2018). Defense counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). Prejudice ensues if the result of the proceeding would have been different had defense counsel not performed deficiently. *Estes*, 188 Wn.2d at 458. Because both prongs of the ineffective assistance of counsel test must be met, the failure to demonstrate either prong will end our inquiry. *State v. Classen*, 4 Wn. App. 2d 520, 535, 422 P.3d 489 (2018). We strongly presume that defense counsel's performance was not deficient. *State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012).

Failure to argue same criminal conduct at sentencing may constitute ineffective assistance of counsel. *Rattana Keo Phuong*, 174 Wn. App. at 547. To establish that defense counsel was ineffective when he failed to argue same criminal conduct, Johnson must demonstrate that there is a reasonable probability that the trial court would have found same criminal conduct. *See State v. Munoz-Rivera*, 190 Wn. App. 870, 887, 361 P.3d 182 (2015); *Rattana Keo Phuong*, 174 Wn. App. at 547-48.

B. *Same Criminal Conduct*

For the purpose of calculating a defendant's offender score, multiple current offenses that encompass the same criminal conduct are counted as a single offense. RCW 9.94A.589(1)(a). Crimes constitute the same criminal conduct when they "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). If any requirement is not present, the offenses are not the same criminal conduct. *State v.*

Chenoweth, 185 Wn.2d 218, 220, 370 P.3d 6 (2016). The definition of "same criminal conduct" is applied narrowly to disallow most same criminal conduct claims. *State v. Aldana Graciano*, 176 Wn.2d 531, 540, 295 P.3d 219 (2013). A defendant bears the burden of establishing that two or more offenses are the same criminal conduct. *Aldana Graciano*, 176 Wn.2d at 540.

Regarding the criminal intent prong, the relevant inquiry is to what extent, viewed objectively, did Johnson's criminal intent change from one crime to the next. *State v. Tili*, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). We look to the relevant statutes to identify the objective intent requirement for each crime. *Chenoweth*, 185 Wn.2d at 223.

In *Chenoweth*, the defendant had been convicted of six counts each of child rape and incest, with each pair of charges based on the same physical act. *Chenoweth*, 185 Wn.2d at 220. Citing the applicable statutes for child rape and incest, the court stated that "objectively viewed, under the statutes, the two crimes involve separate intent. The intent to have sex with someone related to you differs from the intent to have sex with a child." *Chenoweth*, 185 Wn.2d at 223. As additional support, the court noted that the legislature had expressly intended to punish incest and rape as separate offenses. *Chenoweth*, 185 Wn.2d at 224. "[W]here legislative intent is clearly indicated, that intent controls the offender score." *Chenoweth*, 185 Wn.2d at 224.

C. *Johnson's Counsel Was Not Ineffective*

The jury found Johnson guilty of (1) attempted second degree rape of a child, (2) attempted commercial sexual abuse of a minor, and (3) communication with a minor for immoral purposes. We must examine the criminal intent required for each crime.

Regarding Johnson's first conviction, attempted second degree rape of a child occurs when a person, not married to and at least three years older than the child, attempts to have sexual intercourse with a child between the ages of twelve and fourteen. RCW 9A.44.076. The crime requires the intent to have sexual intercourse. *State v. Wilson*, 158 Wn. App. 305, 317, 242 P.3d 19 (2010). "Sexual intercourse" is defined as any penetration however slight, or any sexual contact between one person's sex organs and the mouth or anus of another. RCW 9A.44.010(1)(a), (c). "Sexual contact" is "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire." RCW 9A.44.010(2).

Regarding the second conviction, attempted commercial sexual abuse of a minor is the exchange of anything of value as compensation for "sexual conduct" with a minor. RCW 9.68A.100. This requires the intent to engage in sexual conduct with a minor in exchange for something of value. RCW 9.68A.100; *Ohnemus v. State*, 195 Wn. App. 135, 142, 379 P.3d 142 (2016). A minor is someone under the age of 18. RCW 9.68A.011(5). "Sexual conduct" means sexual intercourse or sexual contact as defined by chapter 9A.44 RCW. RCW 9.68A.100(5).

Regarding the third conviction, the intent required for communication with a minor for immoral purposes is the intent to communicate with a minor with a predatory purpose of promoting the minor's exposure to or involvement in sexual conduct. RCW 9.68A.090(2); *State v. Hosier*, 157 Wn.2d 1, 11-12, 133 P.3d 936 (2006).

Here, Johnson's three crimes did not involve the same criminal intent. The intent for second degree rape of a child is the intent to have sexual intercourse, whereas the intent for commercial sexual abuse of a minor is the intent to exchange something of value for sexual

conduct. RCW 9A.44.076; RCW 9.68A.100. Further, the intent required for communication with a minor for immoral purposes requires a different intent than the other two crimes; the intent to communicate with a minor with a predatory purpose of sexualizing the minor. Accordingly, we hold that these three crimes require different criminal intent. An argument for same criminal conduct would have failed. As a result, we hold that Johnson's trial counsel did not provide ineffective assistance because Johnson cannot show prejudice.

III. RESTRICTION ON INTERNET USE

The trial court ordered that Johnson "not use or access the World Wide Web unless specifically authorized by CCO through approved filters." CP at 99. Johnson argues that this condition is unconstitutional because "it vests unbridled discretion in the community corrections officer and prohibits a much broader swath of First Amendment activity than necessary." Br. of Appellant at 14-15. We disagree.

The trial court can only impose community custody conditions authorized by statute. *State v. Kolesnik*, 146 Wn. App. 790, 806, 192 P.3d 937 (2008). If the trial court had statutory authority, this court reviews the trial court's decision to impose the condition for an abuse of discretion. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). An abuse of discretion occurs when a trial court's imposition of a condition is manifestly unreasonable. *State v. Hai Minh Nguyen*, 191 Wn.2d 671, 678, 425 P.3d 847 (2018). The imposition of an unconstitutional condition is manifestly unreasonable. *Hai Minh Nguyen*, 191 Wn.2d at 678.

A. *The Condition is Constitutionally Permissible*

Johnson argues that the condition is unconstitutionally overbroad and, as a result of this overbreadth, not narrowly tailored to his crimes. We disagree.

A criminal statute that encompasses constitutionally protected speech activities within its prohibitions may be overbroad and violate the First Amendment. *State v. Halstien*, 122 Wn.2d 109, 122, 857 P.2d 270 (1993). However, a defendant's First Amendment right may be restricted if reasonably necessary to accomplish the essential needs of the state and public order, and is sensitively imposed. *State v. Bahl*, 164 Wn.2d 739, 757, 193 P.3d 678 (2008).

To support his argument, Johnson cites *Packingham v. North Carolina*, ___ U.S. ___, 137 S. Ct. 1730, 198 L. Ed. 2d 273 (2017), and *United States v. Holena*, 906 F.3d 288 (3d Cir. 2018). These cases are distinguishable. In *Packingham*, the Supreme Court held unconstitutional a North Carolina statute that prohibited sex offenders from accessing social network websites where the sex offender knows that the website permits minor children to be members or maintain web pages. *Packingham*, 137 S. Ct. at 1737. This blanket restriction impermissibly encompassed more First Amendment activity than was necessary to serve North Carolina's purpose of protecting children from sex offenders. *Packingham*, 137 S. Ct. at 1737.

Following *Packingham*, the Third Circuit in *Holena*, examined probation conditions for a defendant convicted of attempting to entice a minor to engage in sexual acts through the internet. *Holena*, 906 F.3d 290-91. There, the defendant was prevented from possessing or using any computers or other electronic communications. *Holena*, 906 F.3d at 291. At the same time, the defendant was also prevented from accessing the internet without approval of his probation

officer. *Holena*, 906 F.3d at 291. Further, the defendant was required to have monitoring software on his computers and submit to searches of his electronic devices. *Holena*, 906 F.3d at 291. The Third Circuit recognized the contradiction between a blanket ban regarding computer use condition and the merely restrictive conditions. *Holena*, 906 F.3d at 291. On this contradiction alone, the court vacated the conditions and remanded. *Holena*, 906 F.3d at 291. However, the court went on to hold that the blanket ban on using a computer or other electronic device was impermissible. *Holena*, 906 F.3d at 294-95. Regarding the restriction on internet use with monitoring software and approval from a probation officer, the court stated that this restriction resulted in some tailoring, but required clarity from the lower court on remand. *Holena*, 906 F.3d at 293-94.

Here, Johnson's restriction on internet use is different. The prohibition on "use or access the World Wide Web unless specifically authorized by CCO through approved filters" is reasonably necessary to accomplish the essential needs of the State. Johnson was convicted of attempted rape of a child, attempted commercial sexual abuse of a minor, and communication with a minor for immoral purposes resulting from his solicitation of an undercover officer on Craigslist's casual encounters section through the Internet.

This community custody condition is sufficiently tailored to Johnson's crimes because Johnson is prohibited from using the medium through which he committed his crimes. Restricting his future internet use is reasonably necessary to prevent repeated offenses. The condition is also sensitively imposed. Unlike the statute in *Packingham* or condition in *Holena*, Johnson is not absolutely banned from internet-based activities. Johnson may use the internet

with the permission of his CCO and through approved filters. Johnson is subject to a partial deprivation of his interest in having access to the internet after he committed crimes through that medium. We hold that this restriction on Johnson's internet use is reasonably necessary to accomplish the essential needs of the State.[6]

B. *The Condition Is Not Vague*

Johnson also argues that the condition is unconstitutionally vague because of the discretion provided to the CCO. We disagree.

Vague community custody conditions violate due process under the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution. *State v. Irwin*, 191 Wn. App. 644, 652-53, 364 P.3d 830 (2015). It is an abuse of discretion for a sentencing court to impose an unconstitutionally vague condition. *Hai Minh Nguyen*, 191 Wn.2d at 678. A community custody condition is unconstitutionally vague if either "(1) it does not sufficiently define the proscribed conduct so an ordinary person can understand the prohibition or (2) it does not provide sufficiently ascertainable standards to protect against arbitrary enforcement." *State v. Padilla*, 190 Wn.2d 672, 677, 416 P.3d 712 (2018).

Here, Johnson is prohibited from accessing the internet unless he has the approval of his CCO. The proscribed conduct is understandable to an ordinary person. Without his CCO's permission, Johnson cannot access the internet. As a result, the condition is not vague based on the first vagueness prong. Regarding the second prong, the condition does not allow for arbitrary

[6] We recognize that Division One of this court recently came to a different conclusion regarding a similar community custody condition. *State v. Forler*, No. 79079-0-I, slip op. at 27-28 (Wash. Ct. App. June 10, 2019) (unpublished), http://www.courts.wa.gov/opinions/pdf/790790.pdf.

enforcement. The condition does not rely on Johnson's CCO to define or give meaning to terms in the condition. Rather, the CCO merely approves or rejects Johnson's use of the internet before he accesses it. Prior approval from a CCO to access the internet is a sufficiently ascertainable standard. Because the condition does not meet either prong of the vagueness test, we hold that it is not unconstitutionally vague.

We affirm.

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.

Worswick, P.J.

We concur:

Sutton, J.

Cruser, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 51923-2-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent John Cross
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Kitsap County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: May 4, 2020
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