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NO. 65935-9-1

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

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King County Prosecutor
Appellate Unit

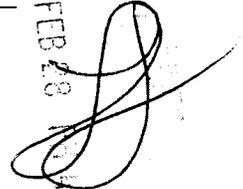
STATE OF WASHINGTON,

Respondent,

v.

JOHN ERICKSON,

Appellant.

2011 FEB 28 10:32


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

The Honorable John Erlick, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by admitting evidence of appellant's alleged prior bad act with a third party as evidence of a common scheme or plan under ER 404(b). RP 85-86.¹

2. The court erred in admitting testimony regarding sexually explicit images found on a computer in appellant's home as evidence of a common scheme or plan under ER 404(b). RP 85-86.

3. The trial court erred when it found evidence of the alleged prior bad acts was more probative than prejudicial. RP 83-86.

4. The trial court erroneously prohibited appellant from purchasing or possessing alcohol without approval from his corrections officer as a condition of community custody. CP 69.²

5. The trial court erroneously prohibited appellant from accessing the Internet without approval from his corrections officer and treatment provider as a condition of community custody. CP 69.

¹ This brief refers to the verbatim report of proceedings as follows: RP – April 22, 2010, April 29, 2010, May 3, 2010, May 4, 2010, May 5, 2010, May 6, 2010, May 10, 2010, May 11, 2010, May 12, 2010, May 13, 2010, and July 23, 2010.

² The Judgment and Sentence is attached as Appendix A.

Issues Pertaining to Assignments of Error

1. Appellant was charged with one count of first-degree child molestation. The complaining witness was the daughter of the girlfriend of appellant's son. At trial, the State introduced testimony of appellant's former girlfriend who once found appellant in a locked bathroom with his daughter five years before the charged incident. The witness saw no sexual contact between appellant and his daughter in the bathroom. Did the trial court err under ER 404(b) when it concluded the allegation was sufficiently similar to the charged offense to constitute evidence of a common scheme or plan?

2. At trial, the State also introduced testimony of appellant's former girlfriend who said she had previously found sexually explicit images on a computer in appellant's home. No evidence suggested the images depicted the complaining witness or that appellant used them to lure the complaining witness or anyone else into a sexual encounter. Did the trial court err in concluding the testimony was relevant evidence of a common scheme or plan?

3. Even if appellant's alleged prior bad acts were relevant to a common scheme or plan, did the trial court err in finding the probative value of the evidence outweighed its prejudicial effect?

4. The sentencing court imposed community custody conditions prohibiting appellant from purchasing or possessing alcohol and from accessing the Internet without approval from his community corrections officer and sex offender treatment provider. Where the state did not show appellant's conviction had any relation to substance abuse or the Internet, did the sentencing court exceed its statutory sentencing authority in imposing conditions related thereto?

B. STATEMENT OF THE CASE

1. Procedural History

On March 2, 2009, The King County prosecutor charged John Erickson with one count of first-degree child molestation, occurring between June 1, 2007 and November 15, 2008. CP 1-9.

On April 29, 2010, the Honorable John Erlick conducted a pre-trial hearing on the complaining witness, J.S.' competency to testify at trial. RP 95-111. J.S. was found competent to testify. RP 110-11. No written findings of fact and conclusions were entered. Trial commenced on May 5, 2010. RP 395.

A jury found Erickson guilty. CP 41; RP 1127. The court imposed an indeterminate sentence of 68 months to life in prison, with 36 months of community custody. CP 60-70; RP 1149. Erickson timely appeals. CP 71.

2. Charged Offense

In November 2008, Shaun Erickson (Shaun) lived with his father, John Erickson (Erickson), stepmother Riana, and two half-siblings at Erickson's house in Renton. RP 402-04, 462. Also living in the house five to six days a week was five-year-old J.S., the daughter of Shaun's long-time girlfriend, Lindsay Smith. RP 408, 519-20, 536, 671-73; CP 1. J.S. was not Shaun's biological daughter but he looked after her when Smith worked. RP 405, 459, 674. J.S. slept in Shaun's room when Smith worked nights. RP 420, 484, 512, 520. Erickson and Riana cared for J.S. in Shaun's absence. RP 685. Smith had no concerns about Erickson and Riana watching J.S. RP 681, 685.

On November 15, 2008, Shaun left J.S. asleep in his room while he went to run errands. RP 427-29, 489. When Shaun returned to the house he said he saw Erickson, Riana and his two half-siblings downstairs, but did not see J.S. Shaun went up to his bedroom and found the door closed. When he opened the door, Shaun said J.S. was watching one of Shaun's adult pornographic films that depicted a woman masturbating a man. RP 431-32, 493-95, 500-01, 540-44. J.S. was clothed and red in the face and perspiring and "seemed like she was enjoying the movie." J.S. was startled and flustered when Shaun entered the room. RP 431, 438, 489-90.

Shaun said he turned off the television and told J.S. the movie was for adults only and inappropriate for her to watch. Shaun said J.S. appeared confused and said that she and Erickson “do stuff like that.” RP 431, 437-39, 489. Shaun said he immediately left the house with J.S. RP 439. Shaun never discussed the incident with Erickson. RP 445. After leaving the house, Shaun called J.S.’ grandmother, Katherine Vangog, to explain what happened. RP 439, 647, 650, 660-61. Vangog’s husband went to Smith’s house and woke Smith up and told her J.S. had been hurt. RP 677-79, 685. As Shaun drove with J.S. to Vangog’s house, J.S. asked him what was wrong. RP 439-40, 496-97.

At Vangog’s house, Shaun, Smith, and Vangog discussed what to do. Smith said J.S. “seemed okay” but she decided to take J.S. to Providence Hospital. RP 651, 662-63, 678, 685. Shaun did not go with J.S. to the hospital because “he had something to do.” RP 441, 497, 651, 667.

Nurse Colette Dahl, examined J.S. at the hospital. Dahl testified J.S. showed no symptoms of physical distress and did not disclose any sexual abuse during the examination. RP 593-94, 607. Dahl said J.S. had some redness on her genitals, but no obvious signs of trauma, such as tearing or bleeding. RP 609-10, 620-21. Dahl could not attribute the redness to anything specific. RP 611. Dahl testified Smith told her J.S.

was depressed because Smith and Shaun had separated. Smith also told Dahl she had not noticed any temperaments or behavioral or emotional changes in J.S. RP 618-19.

Following the hospital visit, Smith said she spoke with J.S. about the alleged incident, but testified she could not remember what J.S. said. RP 683-84. Two to three weeks after taking J.S. to the hospital, Smith and Shaun went to the Renton Police Department to file a police report. RP 441-42, 498, 679-80. Smith said medical staff at the hospital told her they would report the alleged incident to police, but Smith said police never contacted her. RP 679-80.

Detective Gregory Barfield was assigned the case shortly after Smith and Shaun filed the police report. RP 708. Barfield said he tried contacting Shaun and Smith several times to schedule a child interview for J.S. but his messages were not returned. Barfield eventually contacted child protective services in order to talk to Smith. RP 710-14.

Child interviewer Carolyn Webster interviewed J.S. three months after her allegations. RP 712, 717-18, 736. According to Webster, J.S. told her she had seen "Pepper John" "rub his pee pee and the seeds come out." Webster said J.S. told her the seeds were brown and felt cold on her body. RP 818-20. Webster did not ask J.S. to identify when or how many times the alleged incidents occurred. RP 743. Webster could not recall if

she had been told before the interview that J.S. had watched pornography. Webster admitted she would have liked to know that J.S. viewed pornography in order to have J.S. describe what she saw. RP 820.

At trial, J.S. repeatedly said she could not remember the “pee pee thing” or what she and Erickson did together. RP 521-23. J.S. said Erickson had on a shirt, but no pants or underwear during the “pee pee thing,” and that she could see Erickson’s private part. RP 524-25. J.S. said “white stuff” from Erickson’s private part and touched her private part ten times. RP 529-30, 537-38. J.S. said during the “pee pee thing” she was lying down on Erickson’s bed and no one else was home. RP 526, 531. J.S. said she never touched Erickson’s private part. RP 525.

During trial, Vangog testified that in early November 2008, J.S. had told her “Papa showed me how to have a baby,” and that “he [Erickson] got on top of me.” RP 638-40,659. Vangog never contacted police about J.S.’ comments because she believed it was Smith’s responsibility. RP 653, 660. According to Vangog, Erickson had previously told her that children should learn about sex early on. RP 635.

Erickson testified on his own behalf. He explained J.S. had been curious about Riana’s pregnancy, so he explained it to her in simple terms, using the word “seeds.” RP 967-68, 1016-19, 1034, 1045-46. Erickson said he felt the burden of explaining the pregnancy to J.S. fell to him since

he and Riana were primarily responsible for J.S.' care. RP 1018, 1034. Erickson denied ever having said children should be exposed to sex at an early age. RP 1019, 1031-33, 1043. Erickson also denied molesting or touching J.S. inappropriately. RP 1042-43.

3. Prior Acts

At trial, the State introduced evidence of Erickson's alleged prior acts with J.S. and his daughter, B.E., through testimony of Erickson's friend Shannon Casey and ex-girlfriend Karen Skaggs. RP 67.

a. Skaggs' Testimony

Skaggs lived with, and dated, Erickson from 2000 to 2002. RP 828. Skaggs testified that while living with Erickson she came home and found Erickson in a locked bathroom with B.E., who was visiting from Arizona. Skaggs said when Erickson opened the door B.E. was in the bathtub and Erickson was standing outside the bathtub and was wet and had a towel on. RP 832, 834, 855-57, 863-66, 868. Skaggs did not see Erickson in the bathtub with B.E. There is no evidence Skaggs saw any sexual contact between Erickson and B.E. in the bathroom. RP 855-57, 866.

Skaggs said Erickson later told her he was in the bathtub with B.E. and that it was important and natural for daughters to see their father's naked. Skaggs said B.E. was approximately kindergarten age at the time

of the alleged bathroom incident. RP 835-36, 840, 843-44, 861, 866, 869. B.E. did not testify at trial. RP 707. Erickson said he sometimes bathed B.E., but denied it was for sexual purposes. Erickson also denied ever locking the bathroom door or bathing with, or molesting, B.E. RP 991, 1010-13, 1020, 1031, 1042-43.

Skaggs also testified to finding “disturbing images” on a shared computer in Erickson’s home. Skaggs said when she confronted Erickson about the images he cried and begged her not to report them. RP 848-50, 854-55. Erickson said he had an argument with Skaggs about the images, but he said he did not know the images existed before Skaggs confronted him. Erickson denied the images were his. RP 1022-24.

b. Casey’s Testimony

Casey met Erickson through Shaun. RP 884-86. Casey lived in Erickson’s house for two years and periodically visited Erickson when in town. RP 888, 891. Casey testified that she once stopped by the house and Erickson was in the bathroom with J.S. and the daughter of Riana’s friend. Riana told Casey that Erickson was giving the girls a bath. Casey said she saw Erickson come out of the bathroom dressed with wet hair and a wet beard. RP 892.

Casey also testified that on a separate occasion she heard children laughing and splashing in the bathroom. When Casey opened the

bathroom door she said Erickson had no shirt on and his chest and hair was wet. Casey did not see Erickson from the waist down. Casey saw Erickson and J.S. come out of the bathroom clothed. RP 893-97. Casey admitted she was not concerned by the bathroom incidents because she believed it was common for grandfather's to bathe granddaughters. RP 899, 905. Erickson said he sometimes bathed J.S. and his daughter, E.E., but denied Casey had ever seen him bathing the girls. RP 996-99, 1036. Erickson also denied ever being in the bathtub with J.S. RP 1035, 1042.

c. Court's Finding of Common Scheme or Plan

Prior to trial, defense counsel objected to the testimony of Erickson's alleged incidents with J.S. and B.E. as evidence of a common scheme or plan. Defense counsel argued the alleged incidents were not relevant to the charged incident, too remote in time, and not corroborated by any other evidence. RP 65-67, 76-77. Counsel also argued evidence of the incidents should be suppressed on the basis they more prejudicial than probative. RP 77.

The court believed Erickson's statements to Skaggs after the incident with B.E. were more relevant than the incident itself since Skaggs did not observe any nefarious activity. Nonetheless, the court recognized the "jury could reach certain inferences" if evidence of the incident was presented. RP 74, 76.

The court likewise expressed concern about the prejudice potential of the computer images, noting they were “highly inflammatory,” and could result in “substantial prejudice to the defendant.” RP 82. The court also questioned whether the images could even be admitted under any exception to ER 404(b). As the court noted, “what does this go to, intent, common scheme and plan? Is it even another act?” RP 79, 82. The prosecutor admitted the admissibility of the images was “kind of a muddy area.”

Notwithstanding its concerns of potential prejudice, the court ruled Skaggs could testify to finding “concerning images” on the computer without testifying to what the images actually depicted. The court also found Erickson’s alleged incident with B.E. was relevant evidence of a common scheme or plan to groom young girls for sexual purposes. RP 83-86. The court made no finding as to whether Erickson’s alleged incident with B.E. was too remote in time to be relevant evidence of a common scheme or plan. The court gave an oral and written limiting instruction to the jury following Casey and Skaggs’ testimony. RP 872-75, 878-79, 906-07.

C. ARGUMENT

1. THE TRIAL COURT ERRED BY ADMITTING ERICKSON'S ALLEGED PRIOR BAD ACTS WITH B.E. AS EVIDENCE OF A COMMON SCHEME OR PLAN

a. Caution is Required when Admitting Prior Bad Act Evidence to Show a Common Scheme or Plan.

It is well settled the accused must be tried only for those offenses actually charged. State v. Aho, 137 Wn.2d 736, 744, 975 P.2d 512 (1999). Consistent with this rule, evidence of other bad acts must be excluded unless relevant to a material issue and more probative than prejudicial. State v. Wilson, 144 Wn. App. 166, 177, 181 P.3d 887 (2008); State v. Saltarelli, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982). ER 404(b)³ prohibits admission of prior acts evidence to prove the defendant's propensity to commit the charged offense. State v. Mendoza, 139 Wn. App. 693, 713, 162 P.3d 439 (2007), aff'd, 165 Wn.2d 913, 205 P.3d 113 (2009). In other words, evidence of other misconduct may not be admitted merely to show the accused is a "criminal type." State v. Brown, 132 Wn.2d 529, 570, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998). It is presumed, therefore, that evidence of prior bad acts is

³ ER 404(b) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

inadmissible. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

Because of the high potential for risk of prejudice, the State must meet a substantial burden before evidence is admitted to show a common scheme or plan. DeVincentis, 150 Wn.2d at 17. The court must (1) find by a preponderance of the evidence the accused committed the prior acts; (2) identify the purpose for which the evidence is meant to be introduced; (3) decide whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value of the evidence against its prejudicial effect.⁴ State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995).

The court must be particularly careful when completing steps (3) and (4) in a sex case, because the “prejudice potential of prior [sexual] acts is at its highest.” Saltarelli, 98 Wn.2d at 363. In close cases, the balance must be tipped in favor of the accused. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986); Wilson, 144 Wn. App. at 177.

This Court reviews the trial court’s interpretation of an evidentiary rule de novo. State v. Sanchez-Guillen, 135 Wn. App. 636, 642, 145 P.3d 406 (2006). If the court correctly interprets the rule, its decision to admit

⁴ Similarly, ER 403 provides, “Although relevant, evidence may be excluded if its probative value is substantially outweighed by danger of unfair prejudice, confusion of the issues, or misleading the jury”

or exclude the evidence is reviewed for an abuse of discretion.
DeVincentis, 150 Wn.2d at 17.

b. The Alleged Prior Act did Not Demonstrate a Common Scheme or Plan.

The requisite cautious approach to evidence of criminal propensity demonstrates the alleged bathroom incident between Erickson and B.E. was not part of a common scheme or plan with the current charged offense.

Admission of evidence of a common scheme or plan requires substantial similarity between the prior bad acts and the charged crime. DeVincentis, 150 Wn.2d at 21. Random similarities are not enough. DeVincentis, 150 Wn.2d at 18. To be admissible, the prior bad acts must show a pattern or plan with marked similarities to the facts in the case before it, such that the various acts are naturally to be explained as caused by a general plan. DeVincentis, 150 Wn.2d at 13, 21. “Sufficient repetition of complex common features leads to a logical inference that all of the acts are separate manifestations of the same overarching plan, scheme, or design.” State v. Burkins, 94 Wn. App. 677, 689, 973 P.2d 15 (1999), rev. denied, 138 Wn.2d 1014 (1999).

In admitting Skaggs’ testimony under this exception, the trial court relied on Lough, 125 Wn.2d 847, and State v. Krause, 82 Wn. App. 688,

919 P.2d 123 (1996), rev. denied, 131 Wn.2d 1007 (1997). RP 77-87. But a review of the circumstances of Lough and Krause does not support application of the exception here. See Lough, 125 Wn.2d at 856 (the admissibility of prior misconduct to prove a common scheme or plan is “largely dependent on the facts of each case[.]”).

Lough was charged with attempted second-degree rape, indecent liberties, and first-degree burglary for allegedly drugging and raping a woman with whom he was personally acquainted. Lough, 125 Wn.2d at 849. Lough was a paramedic with special expertise with drugs. The trial court permitted testimony from four women who claimed while they had been in relationships with Lough, he slipped them drugs in drinks and raped them. Lough, 125 Wn.2d at 850

Lough told three women they would not be believed if they reported the assaults. He told the fourth they engaged in consensual sex. Lough, 125 Wn.2d at 850-51. The Supreme Court found the evidence of these prior assaults admissible as showing a common scheme or plan. Specifically, the Court held Lough’s actions “evidence[d] a larger design to use his special expertise with drugs to render them unable to refuse consent to sexual intercourse.” Lough, 125 Wn.2d at 861.

In Krause, the repetition of complex common features also established a common scheme or plan. Krause was charged with one

count of first-degree child rape and five counts of first-degree child molestation. Krause, 82 Wn. App. 690. Krause had a history of sexually molesting young boys. In each case, with five different boys, he gained the confidence of the adults who were in positions of trust over the boys. He then established a relationship with the boys by playing games and going on outings with them before molesting them over their protest. Krause, 82 Wn. App. at 692, 694-95.

Unlike the congruity between the acts in Lough and Krause, the incident with B.E. is neither substantially similar, nor involves complex features comparable to Erickson's alleged acts against J.S.

First, unlike the multiple alleged incidents and victims in Lough and Krause, Skaggs' testimony concerned an event alleged to have occurred one time at least five years before the charged offense. This single isolated event with B.E. militates against a finding the alleged conduct was part of a single plan, rather than two completely separate occurrences. See Lough, 125 Wn.2d at 860 ("to be admissible, evidence of a defendant's prior sexual misconduct offered to show a common plan or scheme must be sufficiently similar to the crime with which the defendant is charged and not too remote in time."); State v. Irving, 24 Wn. App. 370, 373-74, 601 P.2d 954 (1979), rev. denied, 93 Wn.2d 1007 (1980) (holding that testimony concerning attempted rape in 1972 was

inadmissible to show proof of a common scheme or plan to commit rape five years later upon a different woman in a different location).

Moreover, Erickson's alleged incident with B.E. is neither complex nor unusual. Erickson denied ever bathing with B.E. or engaging in any sexual conduct with her. RP 1041-42. But, as the father of a young child, Erickson needed to be in the bathroom to monitor B.E.'s bathing to ensure she did not injure herself, drown, or become frightened. RP 1043. Indeed, Vangog, testified she also stayed in the bathroom to monitor J.S. while she bathed. RP 638, 646, 659. Furthermore, Skaggs admitted she saw no sexual conduct between Erickson and B.E. when she entered the bathroom. RP 834, 855-57, 861, 866.

Finally, Erickson's incident with B.E. was considerably different and far less advanced than his alleged molestation of J.S. J.S. described incidents of genital touching and ejaculation. In contrast, no evidence suggests sexual abuse ever occurred between Erickson and B.E. B.E. did not testify, and Skaggs saw no nefarious conduct between Erickson and B.E. in the bathroom. J.S. alleged the sexual abuse occurred ten times. Skaggs saw Erickson in the bathroom with B.E. once. J.S. claimed the sexual abuse always occurred in Erickson's bedroom. There is no evidence Erickson's incident with B.E. occurred anywhere other than the bathroom.

Erickson's incident with B.E. shows stark differences even when compared with his uncharged bathroom incident with J.S. Skaggs said the door was locked when Erickson and B.E. were in the bathroom. The door was unlocked when Casey saw Erickson in the bathroom with J.S. Skaggs said Erickson and B.E. were alone in the bathroom. Casey said Erickson was with J.S. and his daughter, E.E., in the bathroom. Finally, Skaggs said Erickson and B.E. were home alone before she entered the bathroom. Riana was at the house when Erickson was in the bathroom with J.S.

The similarities between B.E. and J.S. are limited to the facts that both lived periodically in the same household as Erickson and both were approximately the same age. These rather ordinary circumstances are not sufficient to constitute evidence of a common scheme or plan.

First, the fact that B.E. was approximately the same age as J.S. should not be considered because the age of the child is an element of the crime of child molestation. RCW 9A.44.083. If the elements of the crime were sufficient to show a common scheme or plan, then every prior incidence of the same offense would be admissible as a common scheme or plan. This would defeat the purpose of the narrow exceptions to ER 404(b). The commonality must be a fact that is not already inherent in the crime.

Similarly, the fact each girl lived at times in the same household as Erickson is also not sufficient. The common scheme or plan exception contemplates a planned occurrence, not just a spontaneous act. Lough, 125 Wn.2d at 856, 860. The similarity must be not merely coincidental, but indicates that the conduct was directed by design. Lough, 125 Wn.2d at 860. This case shows no such design or plan. The fact that each girl was living in Erickson's home merely shows the opportunity for some sort of spontaneous or even accidental conduct.

Skaggs' allegations regarding B.E. were not sufficiently similar to the charged offense to demonstrate a common scheme or plan. The trial court erroneously admitted evidence of the B.E. incident to prove a common scheme or plan.

c. The Probative Value of the Alleged Prior Act Evidence did Not Clearly Outweigh its Prejudicial Effect.

Even if the trial court properly found Skaggs' testimony was relevant to show a common scheme or plan, prior bad act evidence must be excluded unless "its probative value clearly outweighs its prejudicial effect." Lough, 125 Wn.2d at 862; ER 403. The trial court erred when it found Skaggs' testimony met this standard.

The prejudice potential of prior bad acts evidence is at its highest in sex abuse cases. State v. Coe, 101 Wn.2d 772, 780-81, 684 P.2d 668

(1984). “Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise.” Saltarelli, 98 Wn.2d at 363.

In Lough, the Court considered three factors in deciding the probative value of the testimony clearly outweighed its prejudicial effect. Krause, 82 Wn. App. at 696 (citing Lough, 125 Wn.2d at 864). First, the Court found the evidence highly probative because it showed the same design or plan on a number of occasions. Krause, 82 Wn. App. at 696. This is not true in Erickson’s case. As discussed above, even accepting Skaggs’ testimony as true, the incident with B.E. was significantly different than Erickson’s alleged acts with J.S. and occurred only once, five years earlier. Moreover, in Lough, there were five victims testifying to substantially similar acts, making the existence of a common scheme or plan significantly more likely. Here, J.S. was the only alleged victim, and Skaggs’ admitted she saw no sexual conduct between Erickson and B.E.

Second, the Court determined the need for the evidence was especially great because the alleged victim was drugged during the attack and not entirely capable of testifying to Lough’s actions. Krause, 82 Wn. App. at 696. Again, this is not true in Erickson’s case. J.S. was able to

provide detailed testimony about the events in question and where they alleged occurred.

Finally, the Court believed the use of a limiting instruction had prevented the evidence from being used to prove Lough's bad character. Krause, 82 Wn. App. at 696. While such an instruction undoubtedly minimizes prejudice to some extent, "[c]ourts have often held that the inference of predisposition is too prejudicial and too powerful to be contained by a limiting instruction." Krause, 82 Wn. App. at 696 (citing Saltarelli, 98 Wn.2d at 363; State v. Parr, 93 Wn.2d 95, 107, 606 P.2d 263 (1980)). It was too prejudicial here. While the act was not sufficiently similar to constitute a common scheme or plan, it was sufficiently similar to portray Erickson as a person of "abnormal bent" and bad character. No limiting instruction could undo the prejudice of Skaggs' testimony, particularly once the State asked the jury to compare Erickson's uncharged bathroom incidents with J.S. and B.E. to conclude that he had a sexual propensity for "young girls." RP 1078.

Even assuming the allegations regarding Erickson and B.E. were sufficiently similar to the charged offense to be relevant, the prejudice of Skaggs' testimony far outweighed any probative value. The trial court erred in finding otherwise.

d. The Erroneous Admission of the Prior Act Evidence was Not Harmless.

Evidentiary error is grounds for reversal if it results in prejudice. Smith, 106 Wn.2d at 780. An error is not harmless if, “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” Smith, 106 Wn.2d at 780. Here, the outcome of Erickson’s trial was materially affected by evidence of his alleged incident with B.E.

The State’s proof of guilt in this case was not overwhelming. There were no eyewitnesses to the alleged touching, nor any physical evidence. Thus, the credibility of J.S. vis-à-vis that of Erickson was crucial to the jury’s determination of guilt. Erickson denied molesting J.S. and there was evidence casting doubt on J.S.’ credibility.

More than once, J.S. said she did not know or could not remember whether Erickson touched her. RP 521-23. J.S.’ trial testimony was also inconsistent with prior statements she made about the extent of the alleged incidents and how many times they occurred. For example, although J.S. testified at trial “white stuff” came from Erickson’s private part, she previously said the “seeds” were “brown and cold.” RP 529-30, 537-38, 818-20.

Furthermore, the allegations against Erickson first arose after J.S. was found watching a pornographic movie. RP 431-32, 437-39, 489, 493-95, 500-01. Because J.S. admitted she knew she was not supposed to be watching the movie, reasonable minds could conclude J.S. fabricated the allegations against Erickson to avoid being reprimanded. RP 540-44.

But, the impact of Skaggs' testimony regarding the alleged incident with B.E. undermined the credibility of Erickson's defense. Having heard evidence that Erickson engaged in questionable behavior with B.E. previously, the jury was much more inclined to discredit Erickson's denial that he molested J.S. See State v. Dawkins, 71 Wn. App. 902, 909-10, 863 P.2d 124 (1993) (finding evidence of prior sexual activities admitted under ER 404(b) especially prejudicial in case where no eyewitnesses to the touching, nor any physical evidence, because the relative credibility of the accuser and the accused is dispositive and evidence portraying accused as "a person of abnormal bent" makes the accused appear less credible). The jury should never have heard evidence of Erickson's alleged incident with B.E., but once it did, the damage to Erickson's defense was done.

The prejudice of Skaggs' testimony took its full toll on Erickson during closing argument. A prosecutor exacerbates the prejudicial nature of erroneously admitted prior acts evidence by commenting on it in

closing argument. State v. Thang, 145 Wn.2d 630, 645, 41 P.3d 1159 (2002). The prosecutor in Erickson's case did just that.

The prosecutor referred to the incident with B.E. as strikingly similar to the charged incident during closing argument: "this is not some innocent father bathing with a daughter. . .it was the same design that he had for Britney, it was the same design that he had for Judy." RP 1078. The prosecutor also emphasized the incident with B.E. to suggest the jury should find guilt based on Erickson's sexual propensity for "young girls." The prosecutor asserted, "the purpose of him [Erickson] being in the bath with Britney and being in the bath with Judy served multiple purposes. One, obviously for his gratification. There is something about young girls that appeals to the defendant." RP 1078.

Because the prosecution emphasized the alleged incident with B.E. on numerous occasions and the remainder of its case allowed rational jurors to have a reasonable doubt, the error is prejudicial. This Court should reverse.

2. THE TRIAL COURT ERRED BY ADMITTING TESTIMONY OF SEXUALLY EXPLICIT IMAGES FOUND ON ERICKSON'S COMPUTER BECAUSE THEY WERE IMPROPER EVIDENCE OF A COMMON SCHEME OR PLAN

For reasons similar to those discussed in argument one, the court also improperly permitted Skaggs' to testify about sexually explicit

images found on a shared computer in Erickson's home as evidence of a common scheme or plan.

As stated above, under ER 404(b), prior act evidence must demonstrate a "common plan" to be admissible. DeVincentis, 150 Wn.2d at 17; Lough, 125 Wn.2d at 852. The prior bad acts must show a pattern or plan with marked similarities to the charged offense. DeVincentis, 150 Wn.2d at 13, 21. No such marked similarities existed here. There is no evidence Erickson accessed the images before the alleged incident or used them to lure J.S. or anyone else into an illegal sexual encounter. Moreover, there is no evidence the images depicted J.S., or that Erickson took the images at issue. Furthermore, the remoteness in time between the discovery of the images and the charged offense does not support a finding they were part of a common scheme or plan.

The same prejudicial error analysis argued above also applies here. Testimony regarding sexually explicit images permitted the jury to convict Erickson using an improper inference: because Erickson had sexually explicit images in the past, he must be a person of "abnormal bent" with a sexual propensity for young girls, and thus likely to commit the charged offense.

This prejudice was further exacerbated by the fact that while the jury had knowledge of the past images, there was no evidence as to who or

what the images depicted. Thus, in keeping with their improper inferences of Erickson's sexual propensity, the jury was free to speculate the images showed J.S. or other young girls in a sexually suggestive manner.

The jury likely relied on this reasoning to find Erickson guilty. Just as with Skaggs' testimony regarding Erickson's alleged incident with B.E., the impact of Skaggs' testimony regarding the images undermined the credibility of Erickson's defense. Having heard that Erickson had sexually explicit images the jury was much more inclined to discredit Erickson's denial that he molested J.S.

The testimony regarding the pictures was not relevant evidence of a common scheme or plan and impermissibly allowed the jury to convict Erickson on the basis of an improper inference. The error was prejudicial. This Court should reverse.

3. THE SENTENCING COURT ACTED OUTSIDE ITS AUTHORITY BY IMPOSING COMMUNITY CUSTODY CONDITIONS NOT REASONABLY RELATED TO THE CIRCUMSTANCES OF THE OFFENSE

A trial court may only impose a sentence authorized by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007); State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). An illegal or erroneous sentence may therefore be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); State

v. Julian, 102 Wn. App. 296, 304, 9 P.3d 851 (2000), rev. denied, 143 Wn.2d 1003 (2001). An accused has standing to challenge conditions even though he has not been charged with violating them. State v. Riles, 86 Wn. App. 10, 14-15, 936 P.2d 11 (1997), aff'd, 135 Wn.2d 326, 957 P.2d 655 (1998); see also Bahl, 164 Wn.2d at 750-52 (accused may bring pre-enforcement challenge to vague sentencing condition).

At the time of Erickson's alleged offense, first-degree child molestation offenders were sentenced according to Former RCW 9.94A.712.⁵ That statute authorized a trial court to impose a term of community custody. RCW 9.94A.712(5). Here the court imposed a community custody term of 36 months. CP 60-70; RP 1149.

Under Former RCW 9.94A.712(6)(a)(i), the following conditions, unless waived by the court, were required under Former RCW 9.94A.700(4):⁶

⁵ The provision was recodified as RCW 9.94A.507 by Laws 2008, ch. 231, § 56, effective August 1, 2009. It applies to Erickson, who committed the alleged offense between June 1, 2007 and November 15, 2008, by operation of the saving statute, RCW 10.01.040. See also RCW 9.94A.345 (Any sentence imposed under the authority of the Sentencing Reform Act must be in accordance with the law in effect at the time the offense was committed).

⁶ Former RCW 9.94A.700 was re-codified as RCW 9.94B.050 by Laws 2008, ch. 231, § 56, effective August 1, 2009.

- (a) The offender shall report to and be available for contact with the assigned community corrections officer as directed;
- (b) The offender shall work at department-approved education, employment, or community restitution, or any combination thereof;
- (c) The offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions;
- (d) The offender shall pay supervision fees as directed by the department; and
- (e) The residence location and living arrangements shall be subject to the prior approval of the department during the period of community placement.

Former RCW 9.94A.700(5) permitted a sentencing court to impose

any or all of the following conditions of community custody:

- (a) The offender shall remain within, or outside of, a specified geographical boundary;
- (b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;
- (c) The offender shall participate in crime-related treatment or counseling services;
- (d) The offender shall not consume alcohol; or
- (e) The offender shall comply with any crime-related prohibitions.

In addition, a trial court may order participation in rehabilitative programs or to otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community. Former RCW 9.94A.712(6)(a)(i).

a. The Court Erred in Prohibiting Erickson from Purchasing or Possessing Alcohol as a Condition of Community Custody

Although Former RCW 9.94A.700(5)(d) authorized the trial court to prohibit alcohol consumption, the court went further and required that Erickson not purchase or possess alcohol and submit to monitoring of that prohibition. CP 69 (condition 22). Because these conditions are not included in Former RCW 9.94A.700(5), the trial court had no authority to impose them unless they reasonably related to the circumstances of the offense. Former RCW 9.94A.712(6)(a)(i). Under State v. Jones,⁷ they do not.

Jones pled guilty to first-degree burglary and other crimes. During the plea hearing, Jones' attorney said Jones was bipolar, off of his medication, and using methamphetamine during his crimes. Counsel contended this combination caused Jones to offend. Jones, 118 Wn. App. at 202. There was no evidence alcohol played a role in Jones' crimes.

The court sentenced Jones after accepting his pleas. The sentence included community custody, a condition of which was abstinence from alcohol and participation in alcohol counseling. The court made no finding alcohol contributed to Jones' crimes. Jones, 118 Wn. App. at 202-03. The Court of Appeals held the trial court could not require Jones to

⁷ 118 Wn. App. 199, 76 P.3d 258 (2003).

participate in alcohol counseling given the lack of evidence alcohol contributed to his crimes. Jones, 118 Wn. App. at 207-08.

In reaching its conclusion, the court first observed Former RCW 9.94A.700(5)(c) authorizes a trial court to order an offender to “participate in crime-related treatment or counseling services.” Jones, 118 Wn. App. at 207. The court held that because the evidence failed to show alcohol contributed to Jones’ offenses or the trial court’s alcohol counseling condition was “crime-related,” the trial court erred by ordering Jones to participate in alcohol counseling. Jones, 118 Wn. App. at 207-08.

The Court also acknowledged, however, Former RCW 9.94A.715(2)(b) permitted a trial court to order an offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community[.] Jones, 118 Wn. App. at 208. The Court held:

If reasonably possible, [RCW 9.94A.715(2)(a)] must be harmonized with RCW 9.94A.700(5)(c), so that no part of either statute is rendered superfluous. . . . If we were to characterize alcohol counseling as “affirmative conduct reasonably related to the offender’s risk of reoffending, or the safety of the community,” with or without evidence that alcohol had contributed to the offense, we would negate and render superfluous RCW 9.94A.700(5)(c)’s requirement that such counseling be “crime-related.” Accordingly, we hold that alcohol counseling “reasonably relates” to the offender’s risk of reoffending, and to the

safety of the community, only if the evidence shows that alcohol contributed to the offense.

Jones, 118 Wn. App. at 208 (footnote omitted).

Although Jones was sentenced to community custody under Former RCW 9.94A.715, whereas Erickson was sentenced under Former RCW 9.94A.712, the statutes contain the same “reasonably related” language. Therefore, the analysis of Jones should be applied here.

Just as there was no evidence alcohol contributed to Jones’ offenses, there was likewise no evidence alcohol contributed to Erickson’s alleged offense. No evidence suggests Erickson consumed any alcohol before or during the offense, has an alcohol problem, or has any prior alcohol related offenses. Furthermore, the court made no finding alcohol contributed to the offense.

The community custody condition prohibiting Erickson from purchasing or possessing alcohol is too broad and not reasonably related to the circumstances of his alleged offense. See State v. Parramore, 53 Wn. App. 527, 531, 768 P.2d 530 (1989) (trial court erred by imposing condition requiring submission to breathalyzer because there was no evidence of any connection between alcohol use and Parramore’s conviction for delivering marijuana).

In response, the State may argue the prohibition should be characterized as a “monitoring tool,” which the court may order to monitor Erickson’s compliance with the statutorily authorized condition he not consume alcohol. Any such argument should be rejected.

This Court in Riles held polygraph testing is a monitoring tool, rather than a crime-related prohibition, because it does not prohibit any conduct. Riles, 86 Wn. App. at 16. In Parramore, this Court held urinalysis testing is a monitoring tool, rather than affirmative conduct, because submission to testing is merely passive, uncommitted conduct. Parramore, 53 Wn. App. at 532. In contrast, the condition to refrain from purchasing and possessing alcohol prohibits conduct. It is thus not a passive monitoring tool.

For these reasons, the community conditions prohibiting the purchase and possession of alcohol should be stricken from Erickson’s judgment and sentence. Jones, 118 Wn. App. at 207-08, 212.

b. The Court Erred in Prohibiting Internet Access as a Condition of Community Custody.

The court also erred when it prohibited Erickson, as a condition of community custody, from accessing the Internet without the prior approval of his community corrections officer and sex offender treatment provider. CP 69 (condition 23). There is no evidence the Internet contributed to

Erickson's offense. Absent such a connection, the trial court lacked authority to prohibit Erickson from accessing the Internet.

To prohibit access to published information, the condition must be crime-related. State v. O'Cain, 144 Wn. App. 772, 184 P.3d 1262 (2008). A crime-related prohibition is an order prohibiting conduct that directly relates to the circumstances of the crime. State v. Zimmer, 146 Wn. App. 405, 413-14, 190 P.3d 121 (2008) (prohibition on possession of cell phones and electronic storage devices was unlawful where no evidence and no findings showed Zimmer used such items in committing her crime), rev. denied, 165 Wn.2d 1035 (2009); State v. Autrey, 136 Wn. App. 460, 466, 150 P.3d 580 (2006). See also, State v. Riley, 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993) (restriction on Riley's computer use and communication with other hackers was crime-related where he was convicted of computer trespass).

O'Cain was convicted of second-degree rape. As a condition of community custody, the trial court prohibited O'Cain from accessing the Internet without prior approval from his supervising Community Corrections Officer and sex offender treatment provider. O'Cain, 144 Wn. App. at 774.

Rejecting the State's argument the condition was necessary to prevent access to sexual material that would increase O'Cain's risk of

reoffending, this Court held access prohibition cannot be upheld where no evidence shows Internet use contributed to the crime. This Court held:

There is no evidence that O’Cain accessed the internet before the rape or that internet use contributed in any way to the crime. This is not a case where a defendant used the internet to contact and lure a victim into an illegal sexual encounter. The trial court made no finding that internet use contributed to the rape.

O’Cain, 144 Wn. App. at 775.

Like O’Cain, no evidence or finding shows Erickson’s alleged child molestation offense in any way involved Internet websites, domains, or other Internet publications. As discussed in argument two, infra, while Skaggs testified she found concerning images on a shared computer in Erickson’s home five years before the alleged incident, there is no evidence Erickson accessed the Internet before the alleged incident or used it to lure J.S. or anyone else into an illegal sexual encounter.

There is no evidence the Internet contributed to Erickson’s alleged offense. Because the prohibition is not crime-related, it should also be stricken from the judgment and sentence.

D. CONCLUSION

The trial court committed reversible error by admitting evidence of sexually explicit photographs and alleged sexual improprieties between Erickson and B.E. as part of a common scheme or plan. Additionally, the trial court exceeded its statutory sentencing authority by imposing community custody conditions that were not crime-related. This Court should reverse Erickson's convictions and remand for a new trial. In the alternative, this Court should remand the judgment and sentence for vacation of the unlawful conditions.

DATED this 28th day of February, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



JARED B. STEED

WSBA No. 40635

Office ID No. 91051

Attorneys for Appellant

Appendix A

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
)	Plaintiff,
)	
)	No. 09-1-02513-1 KNT
)	
Vs.)	JUDGMENT AND SENTENCE
)	FELONY (FJS)
JOHN EDWIN ERICKSON)	
)	
)	
)	Defendant,

I. HEARING

I.1 The defendant, the defendant's lawyer, JENNIFER CRUZ/TERI R KEMP, and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were: Shawn Erickson
Catherine Van Goy, Lindsay Smith

II. FINDINGS

There being no reason why judgment should not be pronounced, the court finds:
2.1 CURRENT OFFENSE(S): The defendant was found guilty on 5/13/2010 by jury verdict of:

Count No.:	<u>I</u>	Crime:	<u>CHILD MOLESTATION IN THE FIRST DEGREE</u>
RCW	<u>9A.44.083</u>	Crime Code:	<u>01070</u>
Date of Crime:	<u>6/1/2007 TO 11/15/2008</u>	Incident No.	_____
Count No.:	_____	Crime:	_____
RCW	_____	Crime Code:	_____
Date of Crime:	_____	Incident No.	_____
Count No.:	_____	Crime:	_____
RCW	_____	Crime Code:	_____
Date of Crime:	_____	Incident No.	_____
Count No.:	_____	Crime:	_____
RCW	_____	Crime Code:	_____
Date of Crime:	_____	Incident No.	_____

[] Additional current offenses are attached in Appendix A

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SPECIAL VERDICT or FINDING(S):

- (a) While armed with a **firearm** in count(s) _____ RCW 9.94A.510(3).
- (b) While armed with a **deadly weapon** other than a firearm in count(s) _____ RCW 9.94A.510(4).
- (c) With a **sexual motivation** in count(s) _____ RCW 9.94A.835.
- (d) A **V.U.C.S.A** offense committed in a **protected zone** in count(s) _____ RCW 69.50.435.
- (e) **vehicular homicide** Violent traffic offense DUI Reckless Disregard.
- (f) **vehicular homicide** by DUI with _____ prior conviction(s) for offense(s) defined in RCW 41.61.5055, RCW 9.94A.510(7).
- (g) **Non-parental kidnapping** or unlawful imprisonment with a minor victim. RCW 9A.44.130.
- (h) **Domestic violence** offense as defined in RCW 10.99.020 for count(s) _____.
- (i) Current offenses **encompassing the same criminal conduct** in this cause are count(s) _____ RCW 9.94A.589(1)(a).

2.2 **OTHER CURRENT CONVICTION(S):** Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): _____

2.3 **CRIMINAL HISTORY:** Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.525):
 Criminal history is attached in **Appendix B**.
 One point added for offense(s) committed while under community placement for count(s) _____

2.4 SENTENCING DATA:

Sentencing Data	Offender Score	Seriousness Level	Standard Range	Enhancement	Total Standard Range	Maximum Term
Count I	0	X	51 TO 68 MONTHS	/	51 TO 68 MONTHS	LIFE AND/OR \$50,000
Count						
Count						
Count						

Additional current offense sentencing data is attached in **Appendix C**.

2.5 EXCEPTIONAL SENTENCE (RCW 9.94A.535):

Substantial and compelling reasons exist which justify a sentence above/below the standard range for Count(s) _____. Findings of Fact and Conclusions of Law are attached in **Appendix D**. The State did did not recommend a similar sentence.

III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and **Appendix A**.

The Court **DISMISSES** Count(s) _____

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

4.1 RESTITUTION AND VICTIM ASSESSMENT:

- Defendant shall pay restitution to the Clerk of this Court as set forth in attached Appendix E.
 Defendant shall not pay restitution because the Court finds that extraordinary circumstances exist, and the court, pursuant to RCW 9.94A.753(2), sets forth those circumstances in attached Appendix E.
 Restitution to be determined at future restitution hearing on (Date) _____ at _____ m.
 Date to be set.
 Defendant waives presence at future restitution hearing(s).
 Restitution is not ordered.
 Defendant shall pay Victim Penalty Assessment pursuant to RCW 7.68.035 in the amount of \$500.

4.2 OTHER FINANCIAL OBLIGATIONS: Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed. The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability to pay them. Defendant shall pay the following to the Clerk of this Court:

- (a) \$ _____, Court costs; Court costs are waived; (RCW 9.94A.030, 10.01.160)
 (b) \$100 DNA collection fee (RCW 43.43.754)(mandatory for crimes committed after 7/1/02);
 (c) \$ _____, Recoupment for attorney's fees to King County Public Defense Programs;
 Recoupment is waived (RCW 9.94A.030);
 (d) \$ _____, Fine; \$1,000, Fine for VUCSA; \$2,000, Fine for subsequent VUCSA;
 VUCSA fine waived (RCW 69.50.430);
 (e) \$ _____, King County Interlocal Drug Fund; Drug Fund payment is waived;
 (RCW 9.94A.030)
 (f) \$ _____, State Crime Laboratory Fee; Laboratory fee waived (RCW 43.43.690);
 (g) \$ _____, Incarceration costs; Incarceration costs waived (RCW 9.94A.760(2));
 (h) \$ _____, Other costs for: _____

4.3 PAYMENT SCHEDULE: Defendant's TOTAL FINANCIAL OBLIGATION is: \$ 600. The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms: Not less than \$ _____ per month; On a schedule established by the defendant's Community Corrections Officer or Department of Judicial Administration (DJA) Collections Officer. Financial obligations shall bear interest pursuant to RCW 10.82.090. **The Defendant shall remain under the Court's jurisdiction to assure payment of financial obligations: for crimes committed before 7/1/2000, for up to ten years from the date of sentence or release from total confinement, whichever is later; for crimes committed on or after 7/1/2000, until the obligation is completely satisfied.** Pursuant to RCW 9.94A.7602, if the defendant is more than 30 days past due in payments, a notice of payroll deduction may be issued without further notice to the offender. Pursuant to RCW 9.94A.760(7)(b), the defendant shall report as directed by DJA and provide financial information as requested.

- Court Clerk's trust fees are waived.
 Interest is waived except with respect to restitution.

4.4 The defendant, having been convicted of a **FELONY SEX OFFENSE**, is sentenced to the following:

(a) **DETERMINATE SENTENCE** : Defendant is sentenced to a term of confinement in the custody of the
 King County Jail King County Work/Education Release (subject to conditions of conduct ordered
this date) Department of Corrections, as follows, commencing: immediately;
 Date: _____ by _____ a.m. / p.m.

_____ months/days on count _____; _____ months/days on count _____; _____ months/days on count _____;
_____ months/days on count _____; _____ months/days on count _____; _____ months/days on count _____;
_____ months/days on count _____; _____ months/days on count _____; _____ months/days on count _____.

ALTERNATIVE CONVERSION - RCW 9.94A.680 (LESS THAN ONE YEAR ONLY):

_____ days of total confinement are hereby converted to:
 _____ days/ hours **community restitution** (for nonviolent offense) under the supervision of the
Department of Corrections to be completed: on a schedule established by the defendant's Community
Corrections Officer; or as follows: _____. If the defendant is not
supervised by the Department of Corrections, this will be monitored by the Helping Hands Program.
 Alternative conversion was not used because: Defendant's criminal history, Defendant's
failure to appear, Other: _____.

**COMMUNITY CUSTODY for FAILURE TO REGISTER AS A SEX OFFENDER under RCW
9A.44.130(11)(a) committed on or after 6-7-2006 as to Counts _____ is ordered
pursuant to RCW 9.94A.545(2) and RCW 9.94A.715 for the range of 36 months.**

APPENDIX H, Community Custody conditions, is attached and incorporated herein.

**COMMUNITY CUSTODY (CONFINEMENT LESS THAN ONE YEAR except for Failure to
Register as a Sex Offender under RCW 9A.44.130(11)(a) committed on or after 6-7-06) as to Counts
_____, for crimes committed on or after 7-1-2000, is ordered for a period of 12 months. The
defendant shall report to the Department of Corrections within 72 hours of this date or of his/her release if
now in custody; shall comply with all the rules, regulations and conditions of the Department for
supervision of offenders; shall comply with all affirmative acts required to monitor compliance; and shall
otherwise comply with terms set forth in this sentence. Sanctions and punishments for non-compliance will
be imposed by the Department of Corrections or the court.**

APPENDIX _____: Additional Conditions are attached and incorporated herein.

**COMMUNITY CUSTODY (CONFINEMENT OVER ONE YEAR) as to Counts _____:
pursuant to RCW 9.94A.700, for qualifying crimes committed before 6-6-1996, is ordered for 24 months
or for the period of earned early release awarded pursuant to RCW 9.94A.728, whichever is longer, up to
36 months. Sanctions and punishments for non-compliance will be imposed by the Department of
Corrections or the court.**

APPENDIX H, Community Custody conditions, is attached and incorporated herein.

**COMMUNITY CUSTODY (CONFINEMENT OVER ONE YEAR) as to Counts _____:
pursuant to RCW 9.94A.715 for qualifying crimes (non RCW 9.94A.507 offenses) is ordered for 36
months. Sanctions and punishments for non-compliance will be imposed by the Department of Corrections
or the court.**

APPENDIX H, Community Custody conditions, is attached and incorporated herein.

(b) **INDETERMINATE SENTENCE – QUALIFYING SEX OFFENSES** occurring after 9-1-2001:
The Court having found that the defendant is subject to sentencing under RCW 9.94A.507, the defendant is sentenced to a term of total confinement in the custody of the Department of Corrections as follows, commencing: immediately; (Date): _____ by _____ .m.

Count I : Minimum Term: 60 months/days; Maximum Term: _____ years/life;
Count _____ : Minimum Term: _____ months/days; Maximum Term: _____ years/life;
Count _____ : Minimum Term: _____ months/days; Maximum Term: _____ years/life;
Count _____ : Minimum Term: _____ months/days; Maximum Term: _____ years/life.

COMMUNITY CUSTODY: pursuant to RCW 9.94A.507 for qualifying **SEX OFFENSES** committed on or after September 1, 2001, is ordered for any period of time the defendant is released from total confinement before the expiration of the maximum sentence as set forth above. Sanctions and punishments for non-compliance will be imposed by the Department of Corrections or by the court.
APPENDIX H: Community Custody conditions, is attached and incorporated herein.

4.5 ADDITIONAL CONDITIONS OF SENTENCE

The above terms for counts _____ are consecutive / concurrent.

The above terms shall run CONSECUTIVE CONCURRENT to cause No.(s) _____

The above terms shall run CONSECUTIVE CONCURRENT to any previously imposed sentence not referred to in this order.

In addition to the above term(s) the court imposes the following mandatory terms of confinement for any special **WEAPON** finding(s) in section 2.1: _____

which term(s) shall run consecutive with each other and with all base term(s) above and terms in any other cause. (For crimes committed after 6-10-1998.)

The enhancement term(s) for any special **WEAPON** findings in section 2.1 is/are included within the term(s) imposed above. (For crimes before 6-11-1998 only, per In Re Charles)

The **TOTAL** of all terms imposed in this cause is 60 months.

Credit is given for time served in King County Jail or EHD solely for confinement under this cause number pursuant to RCW 9.94A.505(6): 106 day(s) or days determined by the King County Jail.
 Jail term is satisfied and defendant shall be released under this cause.

4.6 NO CONTACT: For the maximum term of LIFE years, defendant shall have no contact, direct or indirect, in person, in writing, by telephone, or through third parties with: J.S. (aka Japo)

Any minors without supervision of a responsible adult who has knowledge of this conviction, and

approval of CCO during supervision.
During incarceration, defendant may have contact with his minor children, if supervised by an adult who has knowledge of this conviction.

4.7 DNA TESTING: The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing, as ordered in APPENDIX G.

HIV TESTING: For sexual offense, prostitution offense, drug offense associated with the use of hypodermic needles, the defendant shall submit to HIV testing as ordered in APPENDIX G.

4.8 SEX OFFENDER REGISTRATION: The defendant shall register as a sex offender as ordered in APPENDIX J.

4.9 ARMED CRIME COMPLIANCE, RCW 9.94A.475,.480. The State's plea/sentencing agreement is attached as follows:

The defendant shall report to an assigned Community Corrections Officer within 72 hours of release from confinement for monitoring of the remaining terms of this sentence.

Date: 7/23/10

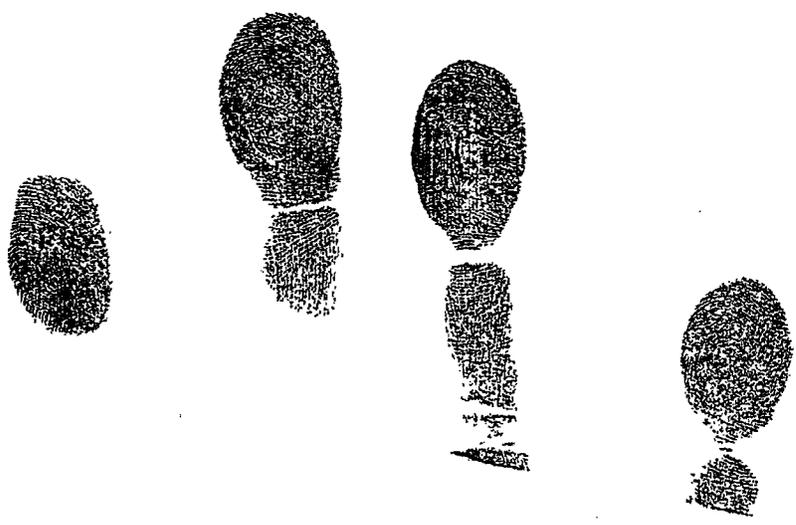
Joan P. Etrich
JUDGE
Print Name: JOAN P. ETRICH

Presented by:
[Signature] 35411
Deputy Prosecuting Attorney, WSBA#
Print Name: _____

Approved as to form:
[Signature] 24201
Attorney for Defendant, WSBA#
Print Name: TELLER, KATHLEEN

FINGERPRINTS

BEST IMAGE POSSIBLE



RIGHT HAND
FINGERPRINTS OF:

DEFENDANT'S SIGNATURE: *John E Erickson*
DEFENDANT'S ADDRESS: — DOC —

JOHN EDWIN ERICKSON

DATED: 7/23/10
John P. Ernot
JUDGE, KING COUNTY SUPERIOR COURT

ATTESTED BY: BARBARA MINER,
SUPERIOR COURT CLERK
BY: *Barbara Miner*
DEPUTY CLERK

CERTIFICATE

OFFENDER IDENTIFICATION

I, _____,
CLERK OF THIS COURT, CERTIFY THAT
THE ABOVE IS A TRUE COPY OF THE
JUDGEMENT AND SENTENCE IN THIS
ACTION ON RECORD IN MY OFFICE.
DATED: _____

S.I.D. NO. WA24975955
DOB: NOVEMBER 30, 1954
SEX: M
RACE: W

CLERK

BY: _____
DEPUTY CLERK

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
JOHN EDWIN ERICKSON
Defendant,

No. 09-1-02513-1 KNT
APPENDIX G
ORDER FOR BIOLOGICAL TESTING
AND COUNSELING

(1) DNA IDENTIFICATION (RCW 43.43.754):

The Court orders the defendant to cooperate with the King County Department of Adult Detention, King County Sheriff's Office, and/or the State Department of Corrections in providing a biological sample for DNA identification analysis. The defendant, if out of custody, shall promptly call the King County Jail at 296-1226 between 8:00 a.m. and 1:00 p.m., to make arrangements for the test to be conducted within 15 days.

(2) [X] HIV TESTING AND COUNSELING (RCW 70.24.340):

(Required for defendant convicted of sexual offense, drug offense associated with the use of hypodermic needles, or prostitution related offense.)

The Court orders the defendant contact the Seattle-King County Health Department and participate in human immunodeficiency virus (HIV) testing and counseling in accordance with Chapter 70.24 RCW. The defendant, if out of custody, shall promptly call Seattle-King County Health Department at 205-7837 to make arrangements for the test to be conducted within 30 days.

If (2) is checked, two independent biological samples shall be taken.

Date: 7/23/10

[Signature]
JUDGE, King County Superior Court

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
Plaintiff,)	
v.)	No. 09-1-02513-1 KNT
ERICKSON, John Edwin)	APPENDIX H
Defendant,)	COMMUNITY CUSTODY
)	

The Court having found the defendant guilty of offense(s) qualifying for community custody, it is further ordered as set forth below.

4.5 Community Custody: Defendant additionally is sentenced on convictions herein, for each sex offense and serious violent offense committed on or after 1 July 1990 to community custody for three years or up to the period of earned release awarded pursuant to RCW 9.94A.150(1) and (2) whichever is longer and on conviction herein for an offense categorized as a sex offense or a serious violent offense committed after July 1, 1988, but before July 1, 1990, assault in the second degree, any crime against a person where it is determined in accordance with RCW 9.94A.125 that the defendant or an accomplice was armed with a deadly weapon at the time of commission, or any felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 1988, to a one-year term of community custody.

Community Custody is to begin either upon completion of the term of confinement or at such time as the defendant is transferred to community custody in lieu of early release.

(a) Defendant shall comply with the following conditions during the term of community custody:

- (1) Report to and be available for contact with the assigned community corrections officer as directed;
- (2) Work at Department of Corrections-approved education, employment, and/or community service;
- (3) Not consume controlled substances except pursuant to lawfully issued prescriptions;
- (4) While in community custody not unlawfully possess controlled substances;
- (5) Pay community custody fees as determined by the Department of Corrections;
- (6) Receive prior approval for living arrangements and residence location; and
- (7) Do not own, use or possess firearms or ammunitions.

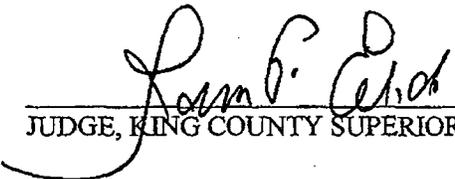
The following conditions listed under 4.5(a) are hereby waived by the court: _____

(b) Defendant shall comply with the following other conditions during the term of community custody:

- (8) Have no direct or indirect contact with Judith Smith.
- (9) Within 30 days of being placed on supervision, complete a sexual deviancy evaluation with a therapist approved by your Community Corrections Officer and follow all treatment recommendations.
- (10) Do not change therapist without the prior approval of your Community Corrections Officer and treatment therapist.
- (11) Have no contact with the victim or any minor-age children without the prior approval of your Community Corrections Officer.
- (12) Do not initiate or prolong physical contact with children for any reason.
- (13) Avoid places where minors are known to congregate without the specific permission of the Community Corrections Officer.
- (14) Hold no position of authority or trust involving children.
- (15) Inform the Community Corrections Officer of any romantic relationships to verify there are no victim-age children involved, and that the adult is aware of your conviction history and conditions of supervision.
- (16) Maintain Community Corrections Officer approved employment and notify your employer regarding your history of sexual deviancy and rules and regulations regarding children and legal status.
- (17) Do not possess or peruse sexually explicit materials unless given prior approval of your sexual deviancy treatment specialist or Community Corrections Officer.

- (18) Do not attend X-rated movies, peep shows or adult bookstores without the prior approval of your sexual deviancy treatment specialist or Community Corrections Officer.
- (19) If directed by your sexual deviancy treatment specialist or Community Corrections Officer, obtain a mental health evaluation from a qualified provider and complete all treatment recommendations.
- (20) If directed by your sexual deviancy treatment specialist or Community Corrections Officer, undergo an evaluation regarding substance abuse at your expense and follow any recommended treatment as a result of that evaluation.
- (21) Do not use or possess illegal or controlled substances without the written prescription of a licensed physician and to verify compliance, submit to testing and reasonable searches of your person, residence, property and vehicle by the Community Corrections Officer to monitor compliance.
- (22) Do not purchase, possess, or use alcohol (beverage or medicinal), and submit to testing and reasonable searches of your person, residence, property and vehicle by the Community Corrections Officer to monitor compliance.
- (23) Do not access the Internet without the prior approval of your supervising Community Corrections Officer and sex offender treatment provider.
- (24) Do not change residence without the prior approval of your Community Corrections Officer.
- (25) Pay for counseling costs for victims and their families.
- (26) Within 30 days of sentencing, submit to DNA and HIV testing as required by law.
- (27) Obey all laws.
- (28) Abide by any additional conditions imposed by the Washington State Department of Corrections.

Date: 7/23/10


 JUDGE, KING COUNTY SUPERIOR COURT

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)
Plaintiff,)
vs.)
John Erickson)
Defendant,)

No. 09-1-02513-1KMT
APPENDIX J
JUDGMENT AND SENTENCE
SEX/ KIDNAPPING OFFENDER NOTICE OF
REGISTRATION REQUIREMENTS

SEX AND KIDNAPPING OFFENDER REGISTRATION. RCW 9A.44.130, RCW 9A.44.140, Laws of 2010, ch. 267, sec. 1-7., RCW 10.01.200. You are required to register your complete residential address with the sheriff of the county where you reside, because you have been convicted of one of the following sex or kidnapping offenses: Child Molestation 1, 2 or 3; Commercial Sexual Abuse of a Minor (formerly Patronizing a Juvenile Prostitute); Communication with a Minor for Immoral Purposes; Criminal Trespass against Children; Custodial Sexual Misconduct 1; Dealing in Depictions of a Minor Engaged in Sexually Explicit Conduct 1 or 2; Failure to Register as a Sex Offender; Incest 1 or 2; Indecent Liberties; Kidnapping 1 or 2 (if victim is a minor and offender is not the minor's parent); Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct 1 or 2; Promoting Commercial Sexual Abuse of a Minor; Promoting Travel for Commercial Sexual Abuse of a Minor; Rape 1, 2, or 3; Rape of a Child 1, 2, or 3; Sending, Bringing Into State Depictions of a Minor Engaged in Sexually Explicit Conduct 1 or 2; Sexual Exploitation of a Minor; Sexual Misconduct With A Minor 1; Unlawful Imprisonment (if victim is a minor and offender is not the minor's parent); Viewing Depictions of a Minor Engaged in Sexually Explicit Conduct 1 or 2; Voyeurism; any gross misdemeanor that is under RCW 9A.28, a criminal attempt, criminal solicitation, or criminal conspiracy to commit an offense that is classified as a sex offense under RCW 9.94A.030 or RCW 9A.44.130 or a kidnapping offense under 9A.44.130; or any felony with a finding of sexual motivation (RCW 9.94A.835 or RCW 13.40.135).

If you are out of custody, you must register within 3 business days of being sentenced.

If you are in custody, you must register within 3 business days from the time of your release.

If you change your residence within a county, you must provide, by certified mail, with return receipt requested or in person, signed written notice of your change of residence to the county sheriff within 3 business days of moving.

If you change your residence to a new county within this state, you must register with the sheriff of the county of your new residence within 3 business days of moving. In addition, you must provide, by certified mail, with return receipt requested, or in person, signed written notice of your change of address to the sheriff of the county where you last registered within 3 business days of moving.

If you plan to attend or work at a public or private school or institution of higher education in Washington, you are required to notify the county sheriff for the county of your residence within 3 business days prior to arriving at the school to work or attend classes.

If you lack a fixed residence, you are required to register as homeless. You must also report in person to the sheriff of the county where you registered on a weekly basis. You must keep an accurate accounting of where you stay during the week and provide it to the county sheriff upon request. If you are under DOC supervision and lack a fixed residence, you must register in the county where you are being supervised. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county within 3 business days.

If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within 3 business days after returning to this state.

If you move to a new state, you must register with the new state within 3 business days after establishing residence. You must also send written notice, within 3 business days of moving to the new state, to the county sheriff with whom you last registered in Washington State.

If you are not a resident of Washington, but attend school, are employed, or carry on a vocation in the State of Washington, you must register with the county sheriff for the county where your school, place of employment, or vocation is located.

Your duty to register does not end until you have obtained a court order specifically relieving you of the duty to register or you have been informed in writing by the sheriff's office that your duty to register has ended. Your duty to register DOES NOT end when your DOC supervision ends.

The King County Sheriff's Office sex offender registration desk is located on the first floor of the King County Courthouse- 516 3rd Avenue, Seattle, WA.

Failure to comply with registration requirements is a criminal offense.

Copy Received:

John E. Erickson 7/23/10
Defendant Date

[Signature]
JUDGE

APPENDIX J Rev. 6/10/2010

Distribution:
Original/White - Clerk
Yellow - Prosecutor
Pink - King County Jail
Goldenrod - Defendant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 65935-9-I
)	
JOHN ERICKSON,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28TH DAY OF FEBRUARY 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOHN ERICKSON
DOC NO. 340487
COYOTE RIDGE CORRECTIONS CENTER
P.O.B XO 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF FEBRUARY 2011.

x *Patrick Mayovsky*