

74356-2

74356-2

FILED
October 13, 2016
Court of Appeals
Division I
State of Washington
COURT OF APPEALS OF THE STATE OF WASHINGTON

NO. 74356-2-I

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MARTIN AMAYA-ONTIVEROS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE JOHN H. CHUN

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

AMY R. MECKLING
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	3
1. PROCEDURAL FACTS	3
2. SUBSTANTIVE FACTS	3
C. <u>ARGUMENT</u>	6
1. AMAYA-ONTIVEROS' CONVICTIONS FOR THIRD-DEGREE CHILD MOLESTATION AND THIRD-DEGREE CHILD RAPE DO NOT VIOLATE PRINCIPLES OF DOUBLE JEOPARDY ...	6
a. Third-Degree Child Molestation And Third- Degree Child Rape Are Not Identical Offenses And Multiple Punishments Are Authorized	7
b. Based On The Entire Record, It Was Manifestly Apparent To The Jury That The Child Molestation Counts Were Predicated On Acts Separate And Distinct From The Child Rape Counts	14
2. THE TRIAL COURT PROPERLY IMPOSED COMMUNITY-CUSTODY CONDITIONS REGARDING SEX-RELATED BUSINESSES, SEXUALLY EXPLICIT MATERIALS, AND ALCOHOL	23
a. Additional Relevant Facts	24
b. The Court Properly Prohibited Amaya- Ontiveros From "Using" Alcohol	25

c.	Relevant Legal Standard For Crime-Related Prohibitions	26
d.	The State Agrees That The Curfew Condition Of Community Custody Should Be Stricken Because It Is Not Crime-Related.....	27
e.	The Conditions Pertaining To Sex-Related Businesses And Sexually-Explicit Materials Were Properly Entered As Reasonably Related To The Circumstances Of The Crime	27
3.	THE COMMUNITY CUSTODY CONDITION REQUIRING AMAYA-ONTIVEROS TO DISCLOSE DATING RELATIONSHIPS IS NOT IMPERMISSIBLY VAGUE	28
4.	THE COURT DID NOT EXCEED ITS STATUTORY AUTHORITY BY PROVIDING ERRONEOUS ADVICE REGARDING THE DUTY TO REGISTER AS A SEX OFFENDER	33
5.	THE CLERICAL MISTAKE ON THE JUDGMENT AND SENTENCE SHOULD BE STRICKEN.....	35
6.	APPELLATE COSTS SHOULD NOT BE FORECLOSED	35
D.	<u>CONCLUSION</u>	38

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Grayned v. Rockford, 408 U.S. 104,
92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)..... 30

Kolender v. Lawson, 461 U.S. 352,
103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)..... 29, 30

United States v. Gallo, 20 F.3d 7
(1st Cir. 1994)..... 32

United States v. Reeves, 591 F.3d 77
(2d Cir. 2010) 32

Washington State:

City of Seattle v. Eze, 111 Wn.2d 22,
759 P.2d 366 (1988)..... 29

In re Pers. Restraint of Reed, 136 Wn. App. 352,
149 P.3d 415 (2006)..... 13

State v. Bahl, 164 Wn.2d 739,
193 P.3d 678 (2008)..... 29

State v. Blank, 131 Wn.2d 230,
930 P.2d 1213 (1997)..... 37

State v. Borsheim, 140 Wn. App. 357,
165 P.3d 417 (2007)..... 9

State v. Calle, 125 Wn.2d 769,
888 P.2d 155 (1995)..... 8, 11

State v. Caver, No. 73761-9-1, slip op.
(filed Sept. 6, 2016) 38

<u>State v. Davis</u> , 160 Wn. App. 471, 248 P.3d 121 (2011).....	35
<u>State v. Eilts</u> , 94 Wn.2d 489, 617 P.2d 993 (1980).....	33
<u>State v. French</u> , 157 Wn.2d 593, 141 P.3d 54 (2006).....	9, 10, 11, 13
<u>State v. Fuentes</u> , 179 Wn.2d 808, 318 P.3d 257 (2014).....	10, 11, 20
<u>State v. Hayes</u> , 177 Wn. App. 801, 312 P.3d 784 (2013).....	35
<u>State v. Hughes</u> , 166 Wn.2d 675, 212 P.3d 558 (2009).....	11, 12
<u>State v. Irwin</u> , 191 Wn. App. 644, 364 P.3d 830 (2015).....	26
<u>State v. Jones</u> , 71 Wn. App. 798, 863 P.2d 85 (1993).....	9, 10, 11, 13
<u>State v. Kelley</u> , 168 Wn.2d 72, 226 P.3d 773 (2010).....	8
<u>State v. Kier</u> , 164 Wn.2d 798, 194 P.3d 212 (2008).....	13
<u>State v. Kinzle</u> , 181 Wn. App. 774, 326 P.3d 870 (2014).....	26, 27
<u>State v. Land</u> , 172 Wn. App. 593, 295 P.3d 782 (2013).....	10, 11, 13, 14
<u>State v. Lorenz</u> , 152 Wn.2d 22, 93 P.3d 133 (2004).....	13
<u>State v. Maciolek</u> , 101 Wn.2d 259, 676 P.2d 996 (1984).....	30

<u>State v. Mutch</u> , 171 Wn.2d 646, 254 P.3d 803 (2011).....	7, 8, 9, 10, 22
<u>State v. Noltie</u> , 116 Wn.2d 831, 809 P.2d 190 (1991).....	10
<u>State v. O’Cain</u> , 144 Wn. App. 772, 184 P.3d 1262 (2008).....	28
<u>State v. Sanchez Valencia</u> , 169 Wn.2d 782, 239 P.3d 1059 (2010).....	29, 30, 31
<u>State v. Sinclair</u> , 192 Wn. App. 380, 367 P.3d 612, <u>review denied</u> , 185 Wn.2d 1034 (2016).....	37
<u>State v. Smith</u> , 165 Wn. App. 296, 266 P.3d 250 (2011), <u>aff’d on other grounds</u> , 177 Wn.2d 533, 303 P.3d 1047 (2013).....	13
<u>State v. Theroff</u> , 33 Wn. App. 741, 657 P.2d 800 (1983).....	33

Constitutional Provisions

Federal:

U.S. CONST. amend. V.....	8
---------------------------	---

Washington State:

CONST. art. I, § 9.....	8
-------------------------	---

Statutes

Washington State:

Former RCW 9A.44.140.....	34
RCW 9.68.011.....	25

RCW 9.68.050.....	24
RCW 9.68.130.....	24
RCW 9.94A.030	26
RCW 9.94A.703	25, 26
RCW 9A.44.079	12
RCW 9A.44.089	12
RCW 9A.44.128	34
RCW 9A.44.130	34
RCW 9A.44.140	34
RCW 9A.44.141	34
RCW 9A.44.142	34
RCW 26.50.010.....	31

Rules and Regulations

Washington State:

RAP 2.5.....	7
--------------	---

Other Authorities

Merriam Webster's Online Dictionary, http://www.merriam-webster.com/dictionary/consume (accessed on October 12, 2016)	25
Merriam Webster's Online Dictionary http://www.merriam-webster.com/dictionary/date (accessed on October 12, 2016)	31

A. ISSUES PRESENTED

1. Double jeopardy protects a defendant against multiple punishments for offenses that are the identical in law and fact.

Amaya-Ontiveros was convicted of two counts of third-degree child molestation and two counts of third-degree rape of a child. The jury was instructed that it must base each child molestation conviction on an incident separate and distinct from the other, and was similarly instructed with respect to the child rape charges. The jury was not provided with a “separate and distinct acts” instruction as between the child molestation and the child rape counts. Because third-degree child molestation and third-degree child rape are not the same in law, did the court properly instruct the jury? When the entire record makes manifestly apparent that the molestation counts were based on conduct distinct from the rape counts, has Amaya-Ontiveros failed to establish a double jeopardy violation?

2. Amaya-Ontiveros was found guilty based on his sexual abuse of a 15-year-old boy whose family he temporarily lived with. Did the trial court properly impose community custody conditions prohibiting Amaya-Ontiveros from entering sex-related businesses and from possessing or viewing sexually explicit materials as valid crime-related prohibitions?

3. Is the community custody condition requiring Amaya-Ontiveros to inform his community corrections officer of any “dating relationship” of sufficient definiteness such that ordinary people can understand what it requires, and does it provide ascertainable standards to protect against arbitrary enforcement?

4. The trial court instructed Amaya-Ontiveros that his duty to register as a sex offender did not end until he received a court order or written notification from the sheriff. In reality, Amaya-Ontiveros’ registration requirement expires by operation of the law after ten years spent crime-free in the community. Despite its erroneous instruction, the trial court properly imposed a term of sex offender registration in accordance with the relevant statutes. Did the court properly exercise its sentencing authority?

5. Amaya-Ontiveros was gainfully employed up until the time of his arrest. At the time of sentencing, he was forty-three years old; he received a 60-month sentence. There is no evidence that he will never be able to pay toward an appellate cost award. Should this Court refuse Amaya-Ontiveros’ request to foreclose appellate costs?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Following a jury trial, appellant Martin Amaya-Ontiveros was convicted of two counts of third-degree child molestation and two counts of third-degree child rape. CP 38-41. He was sentenced to 60 months of incarceration and community custody for any period of earned early release. CP 46. He now appeals his convictions for third-degree child molestation on double jeopardy grounds, and he challenges certain conditions of community custody imposed by the court.

2. SUBSTANTIVE FACTS

In the fall of 2014, 15-year-old A.A.E. lived with his parents and little sister in a two-bedroom apartment in Bellevue. RP 62, 109, 149-50, 156. A.A.E. was a responsible, quiet, and shy sophomore at Interlake High School, who enjoyed sports and got good grades. RP 59-61, 150-51. Tony's parents both worked long hours. RP 56-57, 67-68, 105-06, 115, 162. Appellant Amaya-Ontiveros was an acquaintance of A.A.E.'s parents. RP 64-65, 111, 158. In the latter part of the previous year, 2013, Amaya-Ontiveros had needed a place to live, and A.A.E.'s father agreed to let him move into the family's apartment. RP 65, 112-13, 159-60.

Amaya-Ontiveros was 42-years-old at the time. CP 49; RP 159. A.A.E. began sleeping in his parents' bedroom, and Amaya-Ontiveros stayed in the other bedroom. RP 66, 115, 160. Amaya-Ontiveros worked as well, but there were times when he would arrive home prior to A.A.E.'s parents, and he had one day off per week. RP 69-70, 116-17, 161. A.A.E. would return from school before his parents got home from work.¹ RP 69-70.

For the first months after Amaya-Ontiveros moved into the apartment, he had little interaction with A.A.E. RP 164-65. However, that changed in October of 2014. RP 169. One day, A.A.E. was lying down on the sofa, watching movies, when Amaya-Ontiveros sat down next to him. RP 168. Amaya-Ontiveros put A.A.E.'s legs on his lap, began touching them, and ultimately fondled A.A.E.'s penis by putting his hand up the leg of his shorts. RP 168-72. A.A.E. was frozen in shock, wondering what had happened, and why. RP 168, 172.

After the initial incident on the couch, Amaya-Ontiveros sexually abused A.A.E. multiple times over the course of the next month and a half. A.A.E. described for the jury an incident where

¹ A.A.E.'s four-year-old sister was cared for outside of the home by friends. RP 69.

Amaya-Ontiveros came home from work, changed into pajamas, and then led A.A.E. into the hallway of the apartment. RP 174. There, Amaya-Ontiveros put his mouth on A.A.E.'s penis. RP 174-76. A.A.E. described another incident where Amaya-Ontiveros pulled A.A.E. into the hallway again, and performed oral sex on him. RP 175-78. A.A.E. described an incident in the kitchen, where Amaya-Ontiveros sat A.A.E. on the counter, placed A.A.E.'s legs over Amaya-Ontiveros' shoulders, and fondled A.A.E.'s body and his penis. RP 179-84. A.A.E. described an incident that occurred in Amaya-Ontiveros' bedroom, where Amaya-Ontiveros placed A.A.E. on the bed and performed oral sex on him. RP 184-87. A.A.E. told the jury about another incident that occurred in Amaya-Ontiveros' bedroom, where Amaya-Ontiveros masturbated A.A.E. and then performed oral sex on him. RP 180-81.

A.A.E. told the jury about a time in the hallway where Amaya-Ontiveros masturbated himself until he ejaculated onto A.A.E. RP 190-91. A.A.E. told the jury that Amaya-Ontiveros had done this three times – twice in the hallway and once in the bedroom.² RP 192-93. On another occasion in the bedroom,

² The last of these three incidents appears to have occurred after A.A.E.'s 16th birthday. RP 193.

Amaya-Ontiveros rubbed his penis on the outside of A.A.E.'s anal area and then ejaculated onto A.A.E.'s stomach. RP 194-97.

The abuse went on for about a month and a half. RP 198. A.A.E. told a friend what was happening, and she indicated that if he did not tell his parents what was happening by a certain day, she would. RP 198. However, prior to that "deadline," one of A.A.E.'s teachers emailed the school counselor because she was concerned that A.A.E.'s behavior had changed. RP 200-01, 251-52, 267. The counselor met with A.A.E, who appeared quiet, sad, and depressed. RP 253. A.A.E. disclosed what Amaya-Ontiveros had been doing. Id. The authorities and A.A.E.'s parents were notified, and Amaya-Ontiveros was arrested. RP 205, 254, 260-61, 285.

C. ARGUMENT

1. AMAYA-ONTIVEROS' CONVICTIONS FOR THIRD-DEGREE CHILD MOLESTATION AND THIRD-DEGREE CHILD RAPE DO NOT VIOLATE PRINCIPLES OF DOUBLE JEOPARDY.

Despite agreeing with the trial court's instructions to the jury, Amaya-Ontiveros now alleges that he was exposed to multiple punishments for the same offense because the jury was not explicitly instructed that it must find the acts constituting child

molestation to be separate and distinct from the acts constituting child rape. However, no “separate and distinct acts” instruction was required between the child rape and child molestation charges because the offenses are different, and multiple convictions can stand. Moreover, even if the jury instructions potentially exposed Amaya-Ontiveros to impermissible multiple punishments, in light of the full record, it was manifestly apparent to the jury that each of counts one through four represented a separate and distinct incident. No double jeopardy violation occurred, and Amaya-Ontiveros’ convictions must be affirmed.

a. **Third-Degree Child Molestation And Third-Degree Child Rape Are Not Identical Offenses And Multiple Punishments Are Authorized.**

Amaya-Ontiveros did not object to the court’s instructions below. RP 326-27. In the absence of manifest constitutional error, this Court generally does not consider arguments on appeal that were not raised in the trial court. RAP 2.5. The Washington Supreme Court has held that a double jeopardy claim such as this one may be addressed for the first time on appeal.³ State v. Mutch,

³ This Court could decide to address the issue on appeal despite Amaya-Ontiveros’ failure to raise the issue below, or it could conclude that because Amaya-Ontiveros fails to establish a double jeopardy violation, there was no manifest constitutional error, and thus review is inappropriate under RAP 2.5.

171 Wn.2d 646, 661-62, 254 P.3d 803 (2011). This Court reviews a double jeopardy claim *de novo*. Id. at 662.

The constitutional guaranty against double jeopardy protects a defendant against multiple punishments for offenses that are identical in both law and fact. U.S. CONST. amend. V; WASH. CONST. art. I, § 9; State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). A defendant's conduct may violate more than one criminal statute, and double jeopardy is implicated only when the court exceeds its legislative authority by imposing multiple punishments where multiple punishments are not authorized. Calle, 125 Wn.2d at 776. The question of whether multiple punishments are authorized is ultimately a question of the legislature's intent. State v. Kelley, 168 Wn.2d 72, 77, 226 P.3d 773 (2010).

In order to determine whether multiple punishments are authorized, courts use the "same evidence" test, which asks if the crimes are the same in law and in fact. Id. at 777-78. If each offense contains an element not included in the other, then the offenses are not the same in law under this test. Id. at 777.

Applying this test, this Court has held that convictions for first-degree rape of a child and first-degree child molestation, even if based upon the same act, are not the same in law and do not

violate double jeopardy. State v. Jones, 71 Wn. App. 798, 824-26, 863 P.2d 85 (1993). The court explained:

Child molestation requires that the offender act for the purpose of sexual gratification, an element not included in first degree rape of a child, and first degree rape of a child requires that penetration or oral/genital contact occur, an element not required in child molestation. Each offense requires the State to prove an element that the other does not, and therefore the offenses are not the "same offense" for double jeopardy purposes.

Id. at 825 (footnotes omitted).

In State v. French, 157 Wn.2d 593, 610, 141 P.3d 54 (2006), the Washington Supreme Court affirmed the reasoning of Jones. After examining the elements of first-degree rape of a child and first-degree child molestation, the court concluded that they were not the same in law, and that convictions for both crimes thus did not violate double jeopardy. "The two crimes are separate and can be charged and punished separately." French, 157 Wn.2d at 611.

In sexual abuse cases where the State charges more than one *identical count* within the same charging period, the jury should be instructed that a conviction on each count must arise from a separate and distinct act. State v. Borsheim, 140 Wn. App. 357, 165 P.3d 417 (2007). Otherwise, the defendant is potentially exposed to multiple punishments for a single offense. Mutch, 171

Wn.2d at 663. However, the mere potential for a double jeopardy violation is not sufficient to warrant reversal; the defendant must have actually received multiple punishments for the same offense. Mutch, 171 Wn.2d at 663 (quoting (State v. Noltie, 116 Wn.2d 831, 848, 809 P.2d 190 (1991))). Even if the instructions are insufficient, there is no error when, based on a review of the entire record, it was manifestly apparent to the jury that each count represented a separate and distinct act. Mutch, 171 Wn.2d at 664-66; State v. Fuentes, 179 Wn.2d 808, 824, 318 P.3d 257 (2014).

In State v. Land, 172 Wn. App. 593, 295 P.3d 782 (2013), an appellate court applied the requirement of a “separate and distinct acts” instruction to *non-identical* counts. Despite the holdings of Jones and French that child molestation and child rape are not the same in law because each includes an element not required to establish the other, Land looked beyond the *elements* of the two offenses and considered the *definition* of “sexual contact” as it relates to child molestation. 172 Wn. App. at 600-01. The court concluded that based on the statutory definition of “sexual contact,” when the only evidence of sexual intercourse is oral/genital sexual

contact, child rape is the “same in law” as child molestation.⁴

172 Wn. App. at 600.

The State respectfully submits that the question of whether two offenses are the same in law for purposes of instructing the jury on “separate and distinct acts” should be answered by a comparison of the legal elements themselves, not by considering the definitions of terms included in those elements. By looking to the definition of “sexual contact,” the court in Land conflated the requirement that the crimes be the “same in fact” with the requirement that they be the “same in law.” Jones and French clearly establish that child molestation and child rape each contain an element not included in the other, that the offenses are not the same in law, and that double jeopardy is not offended when convictions are obtained for each based on the same incident.

Only clear evidence of contrary legislative intent can override the same evidence test results. Calle, 125 Wn.2d at 780. In State v. Hughes, 166 Wn.2d 675, 684-86, 212 P.3d 558 (2009), the

⁴ Later, in Fuentes, the Washington Supreme Court addressed a similar claim by concluding that based on the entire record, it was manifestly apparent that rape counts were based on acts separate and distinct from molestation counts. 179 Wn.2d at 824-26. Fuentes cited approvingly its prior decision in French, noting, “In another case, this court found that a ‘pattern of molestation and rape’ that spanned several years was sufficient to support multiple counts of child molestation and child rape.” Fuentes, 179 Wn.2d at 825 (quoting French, 157 Wn.2d at 612).

Washington Supreme Court found such a contrary legislative intent with regards to the statutes at issue by considering legislative history, the structuring of the statutes themselves, their purposes, and other sources. Hughes reasoned that the purposes of the statutes were the same; second-degree rape based on incapacity to consent and second-degree rape of a child both establish strict liability based on the victim's inability to consent due to status (age or mental/physical incapacity). 166 Wn.2d at 684-85. The court also found important that the offenses were located in the same portion of the criminal code, albeit in different subsections, and that previous court decisions had recognized a legislative intention that one act of sexual intercourse not violate both rape and statutory rape provisions. Id. at 685-86 (citations omitted).

When considering whether contrary legislative intent exists to override the same elements test in this case, the only similarity to Hughes is that the third-degree child molestation and third-degree rape statutes are contained in different subsections of the same portion of the criminal code. See RCW 9A.44.089; 9A.44.079. But “[t]he codification of two crimes in the same chapter in and of itself does not demonstrate a clear legislative intent to treat the two crimes as the same offense for double jeopardy purposes.”

State v. Smith, 165 Wn. App. 296, 323-24, 266 P.3d 250 (2011),
aff'd on other grounds, 177 Wn.2d 533, 303 P.3d 1047 (2013).

Child rape punishes different conduct than child molestation (intercourse vs. other forms of sexual contact). Child rape requires no mental state, while child molestation requires that the defendant act with the specific purpose of his or her sexual gratification. And in both Jones and French, supra, the appellate courts have recognized a legislative intent to authorize multiple punishments for child rape and child molestation. See also State v. Lorenz, 152 Wn.2d 22, 34, 93 P.3d 133 (2004) (differentiating between sexual contact and sexual intercourse by holding that child molestation is not a lesser included offense of child rape). The Legislature is deemed to acquiesce in the court's interpretation of a statute if no change is made for a substantial time after the decision. In re Pers. Restraint of Reed, 136 Wn. App. 352, 361, 149 P.3d 415 (2006); see also State v. Kier, 164 Wn.2d 798, 805, 194 P.3d 212 (2008) (holding that the legislature had acquiesced in a previous decision on double jeopardy). This Court should disagree with the Land analysis, and conclude that no "separate and distinct acts" instruction was required as between the child rape and child molestation counts in this case.

- b. Based On The Entire Record, It Was Manifestly Apparent To The Jury That The Child Molestation Counts Were Predicated On Acts Separate And Distinct From The Child Rape Counts.

However, even if this Court follows the decision in Land, reversal in this case is unnecessary. The court gave a “separate and distinct acts” instruction as between the two counts of child molestation individually, CP 22, 26, and gave a “separate and distinct acts” instruction as between the two counts of child rape individually, CP 29, 31. However, the court did not explicitly tell the jury that the acts constituting the child molestation counts had to be separate and distinct from the acts constituting the child rape counts. Nevertheless, considering the evidence, arguments, and instructions, it was manifestly apparent to the jury that the State was not seeking to impose multiple punishments for the same offense, and that each of the four counts was based on a separate act. There was no double jeopardy violation.

A.A.E. testified to multiple incidents of abuse spanning a period of more than one month. The evidence was clear that there were incidents of child molestation separate from incidents of child rape. A.A.E. testified that there were at least four occasions of sexual abuse where Amaya-Ontiveros did not have oral/genital

contact (or any other form of sexual intercourse) with him. See RP 168-71 (Amaya-Ontiveros put his hand up A.A.E.'s shorts on the living room couch and fondled his penis); RP 191 (Amaya-Ontiveros masturbated himself in the hallway until he ejaculated on A.A.E.'s penis); RP 181-84 (Amaya-Ontiveros fondled A.A.E.'s penis in the kitchen); RP 195-97 (Amaya-Ontiveros rubbed his penis on A.A.E.'s anal area, but did not penetrate it, until he ejaculated near A.A.E.'s stomach).

In addition to the evidence, the prosecutor's argument clearly articulated that the molestation counts were predicated on separate incidents from the child rape counts. Speaking to the jury, the prosecutor addressed counts one and two (child molestation), the definition of "sexual contact" that applied to them, and the specific conduct that the State alleged satisfied that definition:

A person commits the crime of child molestation in the third degree, as charged in Count I and Count II, when they have sexual contact with a child who is 15 years old, who is not married to the person, and who is at least 48 months younger than the person.

Your jury instructions help to define sexual contact for you. It means touching of the sexual or intimate parts of a personm [sic] done for the purpose of gratifying the sexual desires of either party.

Here what we're talking about is gratifying the sexual desires of the defendant. ***And for purposes of***

Count I and II, what we're talking about is the defendant's fondling of [A.A.E.]'s penis, we're talking about the defendant masturbating and ejaculating on [A.A.E.].

What we're saying when we talk about sexual contact is contact that is not accidental, contact that is purposeful, that is intentional, contact that's not between an adult and a child for bathing purposes or medical purpose, but it is done for the purpose of sexual gratification.

RP 334-35 (emphasis added). The prosecutor then immediately moved on to separately discuss the rape charges:

For Counts III and IV, the defendant is charged with rape of a child in the third degree. . . . A person commits the crime of rape of a child in the third degree when a person has sexual intercourse with a child who is at least 14, but under 16, who is not married to the person, who is at least 48 months younger than the person.

Your jury instructions define the term "sexual intercourse" for you, as well. Sexual intercourse means any act of sexual contact involving the mouth of one and the sexual organs of the other, **for purposes of Counts III and IV, what we're talking about here is the defendant performing oral sex on [A.A.E.].**

RP 335 (emphasis added).

The prosecutor reminded the jury of A.A.E.'s testimony about the first time that Amaya-Ontiveros "molested" him – how Amaya-Ontiveros had approached A.A.E. while he watched movies on the couch, put his hands up the pant leg of his shorts, and

fondled his penis. RP 337. The prosecutor continued by discussing each separate incident of abuse that A.A.E. had testified about. She discussed the first incident where Amaya-Ontiveros performed oral sex on A.A.E. in the hallway. RP 338, lines 8-16. She discussed the incident where Amaya-Ontiveros approached A.A.E. in the kitchen while he was preparing food, sat A.A.E. on the counter, and fondled his penis. RP 338-39. She discussed how A.A.E. had described Amaya-Ontiveros masturbating and eventually ejaculating onto A.A.E. RP 339, lines 3-5. She discussed the incident A.A.E. had described for the jury where Amaya-Ontiveros pulled A.A.E. into his bedroom and performed oral sex on him, telling him, "I can't wait until you turn 18." RP 339, lines 6-12.

The deputy prosecutor then discussed the jury instructions in relation to the evidence:

[A.A.E.] told you that these things happened to him on several occasions. As I've said, he was able to articulate at least nine here in court.

The charging dates that you have for all four counts are October 1st through November 6th of 2014. The instruction number 12 and number 17 tells you that you need not decide beyond a reasonable doubt on every single incident that [A.A.E.] described for you. You need not decide on a particular date that each of those incidents happened. **You must simply agree**

that two separate and distinct acts of child molestation in the third degree happened within that charging period, and similarly, you must agree that two separate and distinct acts of rape of a child in the third degree happened within those charging periods.

RP 342-43 (emphasis added). The prosecutor immediately went on and described for the jury how any of the three specific incidents A.A.E. described as involving only fondling/masturbation could constitute the child molestation counts:

I have some suggestions for you on how you can become clear about that as you read that instruction. [A.A.E.] described for you the first time this happened. You could decide beyond a reasonable doubt that that incident is one for which you want to rest your verdict on, Count I or II.

He gave you a detailed account of the defendant molesting him in the kitchen. You could describe beyond a reasonable doubt that that incident is one upon which you want to rest your verdict.

He described for you the defendant ejaculating on him in the hallway. You could decide beyond a reasonable doubt that that is an incident upon which you want to rest your verdict for Counts I and II.

RP 343. The prosecutor then specifically distinguished the rape counts:

With respect to Counts III or IV, again, [A.A.E.] described these happening on many different times, but he described to you the first time in the hallway. He described for you it happening in his bedroom, on his bed. You could describe beyond a reasonable

doubt that either one of those incidents is one upon which you want to rest your verdict, on Counts III or IV.

RP 343-44. Then, the prosecutor *again* distinguished the acts that would constitute the child molestation counts as opposed to the child rape counts:

Any one of the many occasions that [A.A.E.] described where the defendant fondled him or ejaculate on him constitutes sexual contact for purposes of Counts I or II.

RP 344. Based on the totality of her remarks, the prosecutor clearly used the terms “rape” and “molestation” to describe separate and distinct acts. She divided Amaya-Ontiveros’ behavior between acts that involved oral intercourse and acts that did not – such as fondling and masturbating.

Amaya-Ontiveros downplays the prosecutor’s argument, contending that she “never *told* the jury that it could not rely on an act of rape (oral sex) as the basis for finding guilt on a child molestation count.” Brf. of Appellant at 24-25 (emphasis added). But that argument ignores that the whole of the prosecutor’s closing argument, in context, made clear that the rape charges were based on oral intercourse and the child molestation charges were based

on Amaya-Ontiveros' fondling A.A.E. and masturbating himself to ejaculation on A.A.E.

Additionally, Amaya-Ontiveros did not challenge the number of incidents or whether they overlapped; rather he denied the allegations in their entirety, and instead focused on attacking A.A.E.'s credibility generally. Fuentes, 179 Wn.2d at 825. Amaya-Ontiveros testified and specifically denied having any sexual contact with A.A.E. whatsoever. RP 311-12. And although Amaya-Ontiveros alleges on appeal that his trial counsel challenged A.A.E.'s account of the number of sexual acts that occurred, he did so only in an attempt to prove that A.A.E. could not be believed at all.⁵

Defense counsel's clear strategy during cross-examination of A.A.E. and during closing argument was to portray A.A.E.'s testimony and prior statements as so vague, inconsistent, and confusing that there was a reasonable doubt about whether Amaya-Ontiveros had committed any of the crimes charged:

Credibility, precisely. Exactly, without question, credibility is the issue. . . central to whether someone is telling the truth is consistency, right? Should the truth change? Should the truth develop? Should the

⁵ Amaya-Ontiveros also argued that law enforcement failed to look for any forensic proof that the abuse occurred, and that the lack of such evidence constituted reasonable doubt. RP 358-59.

truth become a better story? Should the truth expand?

...

[H]ow do we examine [A.A.E.'s testimony]? . . .
[S]omebody who is assaulted in a bar and they tell you that they were assaulted in this way. Then they come back and they tell you they were assaulted in this way. Then they come back and tell you that they weren't assaulted in this way and then come back and tell you they were assaulted in this way and then expand the number of times that they were assaulted. I bet in that circumstance that reaction to the allegation would be the same.

RP 348-49. Counsel told the jury, "[I]t's a bit like walking up to the ocean, putting your toe in, see how that works, and then it will be okay to make further allegations." RP 351.

Moreover, without evidentiary foundation, counsel appeared to argue that perhaps A.A.E. had mental health issues that caused him to fabricate the abuse:

Now whether there's a mental health issue, there's a lie that was told and then trapped by a lie. Remember his friend? We don't know. But that's not Amaya-Ontiveros's obligation, to disprove a motive. . . . [W]e heard [A.A.E.] say that his mind, that his mental processes – there's been no forensic expert testimony establishing any sort of causation between any allegation and counseling, which the prosecutor presented witnesses, but I can't talk to you about, she said, but he said, "My mind is dark, with a pinpoint of light." That's what he said, right? Who knows what the issue is?

RP 350.

Amaya-Ontiveros pointed out the inconsistencies in A.A.E.'s testimony and various statements, how he gave new details in subsequent statements to different people and in court, and used it all to argue that none of what A.A.E. said could be believed. See, e.g., RP 353 (“[A]re the inconsistent statements proof of the matter charged, or do they cast doubt on the allegation charged?”); RP 357 (“Does the continuing allegation, if you tell ten people, does that make it more so? . . . That’s corroboration of nothing.”). Amaya-Ontiveros did not challenge the number of acts or whether they overlapped, but instead argued that none of the acts occurred. The jury clearly believed A.A.E., who testified to a pattern of multiple incidents of abuse spanning a period of over a month.

Finally, the jury was also instructed that “[a] separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.” CP 20. While courts have held that this instruction is insufficient to guard against double jeopardy in the absence of a “separate and distinct acts” instruction,⁶ here, “separate and distinct acts” instructions were given with respect to the molestation

⁶ Mutch, 171 Wn.2d at 663.

charges individually, and the rape charges individually. CP 22, 26, 29, 31.

These instructions, in combination with the evidence presented, and the prosecutor's closing argument, made manifestly apparent that the two child rape counts were based on acts of oral contact, while the molestation counts were based on fondling, masturbation, or inappropriate behavior other than oral contact. Based on the entire record, the lack of a "separate and distinct acts" instruction between the molestation and the rape charges did not actually effect a double jeopardy violation.

**2. THE TRIAL COURT PROPERLY IMPOSED
COMMUNITY-CUSTODY CONDITIONS
REGARDING SEX-RELATED BUSINESSES,
SEXUALLY EXPLICIT MATERIALS, AND
ALCOHOL.**

Next, Amaya-Ontiveros argues that the conditions of community custody that require him to abide by a curfew, prohibit him from entering sex-related businesses such as adult bookstores and strip clubs, prohibit him from possessing and viewing sexually explicit materials, and prohibit the "use" of alcohol, must all be stricken because they are not related to his crime of molesting and raping A.A.E.

The State concedes that the curfew prohibition is unrelated to the circumstances of Amaya-Ontiveros' crime and should be stricken. However, the other conditions are valid. A sentencing court has the statutory authority to prohibit the consumption of alcohol, and no legitimate distinction can be drawn between the consumption and use of alcohol. Finally, the prohibitions regarding sex-related businesses and sexually explicit materials are reasonably related to Amaya-Ontiveros' crime.

a. Additional Relevant Facts.

As part of Amaya-Ontiveros' judgment and sentence, the trial court signed an appendix establishing conditions of community custody. CP 51-52. Under "Special Conditions" related to sex offenses, the court specified that while on community custody, Amaya-Ontiveros may not "enter sex-related businesses, including: x-rated movies, adult bookstores, strip clubs, and any location where the primary source of business is related to sexually explicit material." CP 51. It also specified that Amaya-Ontiveros may not "possess, use, access or view any sexually explicit material as defined by RCW 9.68.130 or erotic materials as defined by RCW 9.68.050 or any material depicting any person engaged in sexually

explicit conduct as defined by RCW 9.68.011(4) unless given prior approval by your sexual deviancy provider.” CP 52.

The “Special Conditions” further state that Amaya-Ontiveros must “abide by a curfew of 10pm-5am unless directed otherwise,” and is to “[r]emain at registered address or address previously approved by CCO [Community Corrections Officer] during these hours.” CP 51. Finally, the “Special Conditions” order Amaya-Ontiveros not to “use or consume alcohol.” CP 52.

b. The Court Properly Prohibited Amaya-Ontiveros From “Using” Alcohol.

Amaya-Ontiveros concedes that the court had the authority under RCW 9.94A.703(3)(e) to prohibit him from consuming alcohol. He takes issue with the court’s prohibition on the “use” of alcohol. However, “consume,” among other things, means “to use.” Merriam Webster’s Online Dictionary, <http://www.merriam-webster.com/dictionary/consume> (accessed on October 12, 2016). Although redundant and likely unnecessary in light of the court’s prohibition on “consumption,” the court properly prohibited Amaya-Ontiveros from “using” alcohol pursuant to RCW 9.94A.703(3)(e).

c. Relevant Legal Standard For Crime-Related Prohibitions.

Trial courts have authority to impose “crime-related prohibitions” as conditions of community custody. RCW 9.94A.703(3)(f). “Crime-related prohibitions” must “directly relate[] to the circumstances of the crime for which the offender has been convicted[.]” RCW 9.94A.030(10). “Directly related” includes conditions that are “reasonably related” to the crime. State v. Irwin, 191 Wn. App. 644, 656-57, 364 P.3d 830 (2015).

This court reviews the factual basis for crime-related conditions under a “substantial evidence” standard. Irwin, 191 Wn. App. at 656. Reviewing courts will strike community custody conditions when there is “no evidence” in the record that the circumstances of the crime related to the community custody condition. Id. at 657. On the other hand, courts will uphold crime-related community custody decisions when there is some basis for the connection; there is no requirement that the prohibited activity be factually identical to the crime. Id. For example, in State v. Kinzle, a child molestation case, the court upheld a prohibition on dating women with minor children, even though the defendant had

not molested any children of the women that he dated. 181 Wn. App. 774, 785, 326 P.3d 870 (2014).

d. The State Agrees That The Curfew Condition Of Community Custody Should Be Stricken Because It Is Not Crime-Related.

Here, there was no evidence that Amaya-Ontiveros' criminal conduct occurred between the hours of 10:00 p.m. and 5:00 a.m. Moreover, as Amaya-Ontiveros points out, the crimes occurred in the residence that the defendant and the victim shared. Therefore, Amaya-Ontiveros is correct that the curfew condition is not reasonably related to the circumstances of his crime, and the trial court lacked authority to order a curfew as a condition of his community custody. As a result, Special Condition number 7 on Appendix H of the judgment and sentence should be stricken.

e. The Conditions Pertaining To Sex-Related Businesses And Sexually-Explicit Materials Were Properly Entered As Reasonably Related To The Circumstances Of The Crime.

Amaya-Ontiveros' crimes – molesting and raping an underage teenage boy – directly involved sexual arousal, sexual deviancy, sexual predation, and the sexual objectification of young men. Keeping him away from sexually explicit businesses, performances, and materials that primarily involve sexual arousal

and sexual objectification is directly and reasonably related to the circumstances of the crime.

In cases where the courts have stricken community-custody conditions as lacking any connection to the crime, the prohibitions were on broad activities of otherwise normal life. See State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (prohibition on Internet use generally). By contrast here, the conditions keeping Amaya-Ontiveros away from places and materials that sensationalize and celebrate the sexual objectification of others is clearly connected to his crimes of rape and molestation.

This Court should affirm those community custody conditions because there is a basis for a connection between these conditions and Amaya-Ontiveros' crimes. This is especially true when A.A.E. testified that he observed sexually explicit photographs and videos on Amaya-Ontiveros' cellular phone, which Amaya-Ontiveros specifically gave to A.A.E. on at least one occasion. RP 231.

**3. THE COMMUNITY CUSTODY CONDITION
REQUIRING AMAYA-ONTIVEROS TO
DISCLOSE DATING RELATIONSHIPS IS NOT
IMPERMISSIBLY VAGUE.**

Appendix H to the Judgment and Sentence also requires Amaya-Ontiveros to "[i]nform the supervising CCO and sexual

deviancy treatment provider of any dating relationship.” CP 51. Amaya-Ontiveros challenges this condition as unconstitutionally vague. His argument fails.

This court reviews community custody conditions for abuse of discretion, and will reverse only if they are “manifestly unreasonable,” which an unconstitutionally vague condition clearly is. State v. Sanchez Valencia, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010). Laws are unconstitutionally vague if they fail to provide ordinary people with fair warning of proscribed conduct or lack standards that are definite enough to protect against arbitrary enforcement. State v. Bahl, 164 Wn.2d 739, 751, 193 P.3d 678 (2008).

However, “a community custody condition is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.” Sanchez Valencia, 169 Wn.2d at 793, 239 P.3d 1059 (internal quotation marks omitted) (quoting State v. Sanchez Valencia, 148 Wn. App. 302, 321, 198 P.3d 1065 (2009)). Impossible standards of specificity are not required. City of Seattle v. Eze, 111 Wn.2d 22, 26-27, 759 P.2d 366 (1988) (citing Kolender v. Lawson, 461 U.S. 352, 361,

103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)). “Condemned to the use of words, we can never expect mathematical certainty from our language.” Grayned v. Rockford, 408 U.S. 104, 110, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). “[I]f men of ordinary intelligence can understand a penal statute, *notwithstanding some possible areas of disagreement*, it is not wanting in certainty.” State v. Maciolek, 101 Wn.2d 259, 265, 676 P.2d 996 (1984) (emphasis added).

For example, In Sanchez Valencia, our supreme court found a community-custody prohibition on possessing “any paraphernalia” was unconstitutionally vague because the phrase encompassed a virtually limitless variety of commonplace items. 169 Wn.2d at 793-95. But the court noted that the more-specific phrase “drug paraphernalia” would not have been unconstitutionally vague. Id. at 794 (explaining that the mistake in affirming the condition was erroneously reading the adjective “drug” into the condition). See also id. at 795 (J.M. Johnson, J., concurring) (“[a] ban on drug paraphernalia is sufficient to inform the petitioners of what is proscribed and prevent arbitrary enforcement”).

The term “dating relationship,” along with the terms “date,” and “to date,” are common terms of ordinary understanding. “Date” has an ordinary dictionary definition in this context: “a social

engagement between two persons that often has a romantic character.” Merriam Webster’s Online Dictionary <http://www.merriam-webster.com/dictionary/date> (accessed on October 12, 2016). The term “dating relationship” has a similar and commonsensical statutory definition: “a social relationship of a romantic nature.” RCW 26.50.010 (emphasis added).

The term “dating relationship” is not an indecipherable phrase for ordinary people. While the term “relationship” – as with “paraphernalia” in Sanchez Valencia – is an expansive term encompassing a wide range of situations, the term “*dating* relationship” – as with “*drug* paraphernalia” – sufficiently narrows the field so as to provide fair warning of what Amaya-Ontiveros must report, and is definite enough to protect against arbitrary enforcement.

Amaya-Ontiveros imagines a string of scenarios that he worries might confuse him or his CCO, but conditions of community custody are “not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.” Sanchez Valencia, 169 Wn.2d at 793. The law does not say that a prohibition is vague any time it is subject to hair-splitting.

Amaya-Ontiveros cites to United States v. Reeves, 591 F.3d 77 (2d Cir. 2010) as “instructive.” However, in Reeves, the offensive condition was to notify a probation officer of any “significant romantic relationship.” Id. at 80. The court found that the layers of adjectives left too much room for confusion about the scope of the requirement: “What makes a relationship ‘romantic,’ let alone ‘significant’ in its romantic depth, can be the subject of endless debate that varies across generations, regions and genders.” Id. at 81 (citing Mozart, Jane Austen, and Hollywood romantic comedies of the 1980’s and 2000’s).

Here, Amaya-Ontiveros is simply required to disclose any “dating relationship,” which is a commonly understood term. There is no extra layer of subjectivity here. “[F]air warning is not to be confused with the fullest, or most pertinacious, warning imaginable.” United States v. Gallo, 20 F.3d 7, 12 (1st Cir. 1994). “Conditions of probation do not have to be cast in letters six feet high, or to describe every possible permutation, or to spell out every last, self-evident detail.” Id. While the term “dating relationship” is not mathematically precise and does not specifically address the details of every “what if,” that does not make it unconstitutionally vague. Amaya-Ontiveros’s argument fails.

4. THE COURT DID NOT EXCEED ITS STATUTORY AUTHORITY BY PROVIDING ERRONEOUS ADVICE REGARDING THE DUTY TO REGISTER AS A SEX OFFENDER.

Amaya-Ontiveros argues that the court exceeded its statutory authority by informing him that his duty to register as a sex offender continues until he obtains a court order or written notification from the Sheriff to the contrary. While the information provided to Amaya-Ontiveros may not have been accurate, the court did not exceed its authority because the Judgment and Sentence does not require him to register for longer than the law provides.

“A trial court’s sentencing authority is limited to that expressly found in the statutes. If the statutory provisions are not followed, the action of the court is void.” State v. Theroff, 33 Wn. App. 741, 744, 657 P.2d 800 (1983) (citing State v. Eilts, 94 Wn.2d 489, 495, 617 P.2d 993 (1980)). For offenders convicted of a class C felony sex offense, “the duty to register shall end ten years after the last date of release from confinement, if any (including full-time residential treatment), pursuant to the conviction, or entry of the judgment and sentence, if the person has spent ten consecutive years in the community without being convicted of a disqualifying

offense during that time.” Former RCW 9A.44.140(3). RCW 9A.44.142 allows offenders to petition the court for relief from registration, but only “when the person has spent ten consecutive years in the community without being convicted of a disqualifying offense during that time period.” RCW 9A.44.142(1)(b). Offenders with class C felony sex offense convictions typically have no need to petition the court for relief of registration under RCW 9A.44.142 because their duty ends by operation of law once they have met the ten year threshold requirement. RCW 9A.44.141. An offender may have the local sheriff’s office administratively remove the offender from sex offender registration once they have met the ten-year requirement. RCW 9A.44.141.

The court ordered Amaya-Ontiveros to register as a sex offender pursuant to RCW 9A.44.128, .130, and .140. CP 53. As outlined above, those statutory provisions make clear that his duty to register ends after a ten-year crime-free period. While the information imparted to Amaya-Ontiveros about when his duty to register ends may not have been accurate, the court did not exceed its statutory authority because it did not order Amaya-Ontiveros to register for any period of time longer than the law requires. Should

this Court feel it necessary, the offending information may be stricken from the Judgment and Sentence.

5. THE CLERICAL MISTAKE ON THE JUDGMENT AND SENTENCE SHOULD BE STRICKEN.

A clerical error is one that, if amended, “correctly convey[s] the intention of the court based on other evidence.” State v. Davis, 160 Wn. App. 471, 478, 248 P.3d 121 (2011). Amaya-Ontiveros correctly notes that he was not charged or convicted of a crime of domestic violence. The Judgment and Sentence mistakenly indicates that count one was a crime of domestic violence. CP 43. The notation should be stricken, and the mistake does not provide an independent basis for resentencing. State v. Hayes, 177 Wn. App. 801, 811, 312 P.3d 784, 789 (2013).

6. APPELLATE COSTS SHOULD NOT BE FORECLOSED.

Amaya-Ontiveros asks this Court to rule that, if the State prevails on appeal, he should not be required to repay appellate costs on the grounds that he qualified for indigent services on appeal. This claim should be rejected. It is a defendant’s future ability to pay costs, rather than his present ability, that is most relevant in determining whether it would be unconstitutional to

require him to pay appellate costs. Because the record contains information from which this Court could reasonably conclude that Amaya-Ontiveros has the future ability to pay, this Court should not forbid the imposition of appellate costs.

Amaya-Ontiveros obtained an ex-parte Order Authorizing Appeal In Forma Pauperis after presenting a declaration regarding his current financial circumstances. CP 55-56. The declaration contained no information about Amaya-Ontiveros' employment history, potential for future employment, or likely future income, nor did the trial court make any findings regarding his likely future ability to pay financial obligations. Id.

Moreover, as in most cases, Amaya-Ontiveros' ability to pay was not litigated in the trial court because it was not relevant to the issues at trial. As such, the record contains limited information about Amaya-Ontiveros' financial status, and the State did not have the right to obtain information about his financial situation. The record is clear, however, that Amaya-Ontiveros had been gainfully employed up until his arrest in this case. RP 306, 308, 310, 321-22. Indeed, Amaya-Ontiveros is only forty-four years old, and received a 60-month sentence. CP 46, 49. He thus has plenty of working years ahead of him.

It is a defendant's future ability to pay, rather than simply his current ability, that is most relevant in determining whether the imposition of financial obligations is appropriate. See State v. Blank, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997) (indigence is a constitutional bar to the collection of monetary assessments only if the defendant is unable to pay at the time the government seeks to enforce collection of the assessments).

In State v. Sinclair, 192 Wn. App. 380, 393, 367 P.3d 612, review denied, 185 Wn.2d 1034 (2016), this court held that costs should not be awarded because the defendant was 66 years-old and was facing a 24-year sentence, meaning there was "no realistic possibility" that he could pay appellate costs in the future. This Court also recognized, however, that "[t]o decide that appellate costs should never be imposed as a matter of policy no more comports with a responsible exercise of discretion than to decide that they should always be imposed as a matter of policy." Sinclair, 192 Wn. App. at 391.

The record is devoid in this case of any information to support a finding that there is "no realistic possibility" Amaya-Ontiveros will be able to pay appellate costs in the future. Rather, the record contains evidence that Amaya-Ontiveros does have the

future ability to pay appellate costs. In such circumstances, appellate costs should be awarded. State v. Caver, No. 73761-9-1, slip op. at 10-14 (filed Sept. 6, 2016). An exercise of discretion by this Court to prohibit an award of appellate costs in this case would be unreasonable and arbitrary.

D. CONCLUSION

For the above reasons, the State respectfully asks this Court to affirm Amaya-Ontiveros' convictions and sentence, with the exception of the community custody "curfew" condition. Also, the trial court should correct the clerical mistake in the Judgment and Sentence by striking the notation of "domestic violence" from section 2.1.

DATED this 13th day of October, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

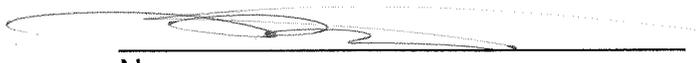
By: 
AMY R. MECKLING, WSBA #28274
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Casey Grannis, the attorney for the appellant, at grannisc@nwattorney.net, containing a copy of the BRIEF OF RESPONDENT, in State v. Martin Amaya-Ontiveros, Cause No. 74356-2, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 13 day of October, 2016.



Name:
Done in Seattle, Washington