74815-7

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Court of Appeals
Division I
State of Washington

NO. 74815-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

ARTHUR BENSON,

Appellant.

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

The Honorable Ellen Fair, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. One of appellant's convictions for first degree child molestation violates double jeopardy because the jury instructions exposed him to multiple punishments for the same criminal act.

2. The community custody condition requiring appellant to "not frequent areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer" is unconstitutionally vague.

Issues Pertaining to Assignments of Error

1. Appellant was convicted of one count of first degree child rape and three counts of first degree child molestation as to one of the complaining witnesses. Did inadequate jury instructions expose appellant to multiple punishments for one offense, violating double jeopardy and necessitating dismissal of one of the child molestation convictions?

2. Is the community custody condition requiring appellant to "not frequent areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer" unconstitutionally vague?

B. STATEMENT OF THE CASE

On October 23, 2015, the State charged Arthur Benson by amended information with seven counts of child rape and child molestation. CP 93-94. The charges were as follows: two counts of first degree child

molestation against Alice (Counts 1-2), one count of first degree child rape against Andrea (Count 3), three counts of first degree child molestation against Andrea (Counts 4-6),[1] and one count of first degree child rape against K.P. (Count 7). CP 93-94.

Andrea, born January 24, 1994, and Alice, born September 2, 1995, are sisters. CP 93; 1RP 27.[2] The charging period was January 1, 2001 to January 23, 2006 for Andrea and was January 1, 2001 to September 1, 2007 for Alice. CP 93-94. The trial court severed the count against K.P. and Benson ultimately pled guilty to fourth degree assault with sexual motivation. CP 54, 91-92. Benson proceeded to a jury trial on the remaining six counts in December 2015.

Andrea's and Alice's mother, A.I., testified she dated Benson from approximately 2002 to 2006. 1RP 150. During their relationship, Benson moved into the family's two bedroom apartment in Lynnwood. 1RP 150-52. Benson often watched the girls at night while A.I. worked. 1RP 89, 153.

Andrea testified that one night while she, her sister, and Benson were watching television, Benson suggested a game of Truth or Dare. 1RP 89-90.

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[1] Alice and Andrea are pseudonyms. The girls involved in this case have very similar initials: A.J.F. and A.L.F. CP 93; 2RP 169-70. This brief therefore uses pseudonyms to avoid confusion.

[2] This brief refers to the verbatim reports of proceedings as follows: 1RP – December 14 & 15, 2015; 2RP – December 16 & 17, 2015 (marked volume 2 – third and fourth days of trial); 3RP – December 16, 2015 (remaining morning session); 4RP – February 10, 2016.

Andrea thought she might have been eight or nine years old at the time. 1RP 91. Andrea said she dared Benson to show them his penis, and "first he was hesitant about it, but then he did it eventually." 1RP 89-90.

Andrea testified they played Truth or Dare again after that, which she said led to her "pok[ing]" Benson's penis with her finger and "gripping it" another time. 1RP 91-93. Andrea could not recall how many times this happened, but testified it was more than once. 1RP 93. Andrea also testified that one time during the game, Benson dared her to put his penis in her mouth and count to 100 in her head. 1RP 93. Andrea said that during this incident, Benson's penis was soft at first but then became erect. 1RP 103.

Andrea testified the "next main thing" she remembered was undressing in her mother's room while Benson showered. 1RP 94. She said Benson then came in the room, laid a towel down on the bed while she got on all fours, and "had his penis and rubbed it against my vagina" from behind. 1RP 94. She claimed this was Benson's idea and that it happened "several times," but was not sure as to an exact number. 1RP 95-96.

Andrea testified to two other incidents. She said one time Benson laid on the bed with her on top of him, "and then he had held his penis in his hand and was rubbing it like more inside of my clit area." 1RP 96. Though Andrea emphasized this was "[m]ore inside," she said his penis did not go inside her body. 1RP 96. Andrea testified this happened only once because

the body position "was just awkward." 1RP 97. The final incident Andrea testified to was when she asked to join Benson in the shower. 1RP 132-33. She said he washed her breasts and she washed his penis. 1RP 97. Andrea said the "attention from someone" "felt great." 1RP 97.

Andrea thought Benson moved out of their apartment when she as around 10 years old because she started menstruating for the first time shortly thereafter. 1RP 99-100. However, Andrea explained a lot of the incidents blended together, so "sometimes I don't remember certain things and sometimes I do." 1RP 127.

Alice testified Benson lived with them around the time she was in fifth to seventh grade, making her 11 to 13 years old. 1RP 31, 62-63. Alice testified that during Truth or Dare, Benson would show them his penis and dare them to touch it. 1RP 33-35. Alice said she could not remember how many times she touched his penis with her hand, but it was more than once. 1RP 35. Alica also claimed there were a "few times" when she would sit on Benson's lap in her pajamas and "he would reach down and pull the hairs of my vagina since I was going through the puberty stage." 1RP 37.

Neither Andrea nor Alice told their mother or anyone else until several years later. 1RP 38-39, 51, 99. The allegations came to light when Alice told her counselor in 2012, who made a mandatory report to Child Protective Services. 1RP 39-40, 59-61; 2RP 189-95.

Detective Elizabeth Wareing. first investigated. 2RP 191-92. Wareing contacted A.I., who told Wareing she could not recall Benson's last name and they dated for only six months to a year, inconsistent with her trial testimony. 2RP 196. Wareing never spoke to Alice and Andrea because they did not want to participate. 2RP 191-92, 197. Detective Brian Jorgensen next investigated the case. 1RP 76. Though he talked to both Alice and Andrea on the phone, they did not give formal statements because they were not interested in coming forward. 1RP 78-81, 106-07.

Detective Jacqueline Arnett was assigned the case in January 2014. 1RP 199. She interviewed both Alice and Andrea, as well as A.I. 2RP 204. Also inconsistent with her trial testimony, A.I. said she dated Benson from 2004 to 2008, making the girls potentially older than 12 when Benson lived with them.[3] 2RP 204. A.I. likewise said in a defense interview that she dated Benson in 2007 or 2008. 2RP 178-80, 183.

The jury found Benson guilty as charged. CP 57-62. Benson had no prior felony history. 4RP 290-91. The trial court imposed 198 months on the child molestation counts and 280 months on the child rape count, to run concurrently to each other but consecutively to the 364-day sentence on the fourth degree assault conviction. 4RP 292; CP 31, 41. The court also

[3] First degree child rape and first degree child molestation both require the State to prove the victim is less than twelve years old at the time of the sexual intercourse or sexual contact. RCW 9A.44.073(1); RCW 9A.44.083(1).

imposed 36 months of community custody. CP 42. Benson filed a timely notice of appeal. CP 1.

C. ARGUMENT

1. INADEQUATE JURY INSTRUCTIONS VIOLATED BENSON'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY BECAUSE THEY EXPOSED HIM TO MULTIPLE PUNISHMENTS FOR THE SAME OFFENSE.

The trial court must clearly instruct the jury so that it does not convict the accused more than once on the basis of a single act. The instructions given in Benson's case failed to make this manifestly apparent, thereby subjecting Benson to double jeopardy. One of Benson's convictions for child molestation must accordingly be vacated.

a. Failing to instruct the jury that it must find separate and distinct acts of child rape and child molestation creates a potential double jeopardy violation.

The right to be free from double jeopardy "is the constitutional guarantee protecting a defendant against multiple punishments for the same offense." State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007) (citing U.S. CONST. amend. V; CONST. art. I, § 9). A double jeopardy claim is reviewed de novo and may be raised for the first time on appeal. State v. Mutch, 171 Wn.2d 646, 661-62, 254 P.3d 803 (2011).

Jury instructions "'must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average

juror.'" Borsheim, 140 Wn. App. at 366 (quoting State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006)). The reviewing court considers insufficient instructions "in light of the full record" to determine if they "actually effected a double jeopardy error." Mutch, 171 Wn.2d at 664. A double jeopardy violation occurs if it is not "manifestly apparent to the jury that each count represented a separate act." Id. at 665-66.

The Borsheim court held an instruction that the jury must find a "separate and distinct" act for each count is required when multiple counts of sexual abuse are alleged to have occurred within the same charging period. 140 Wn. App. at 367-68. Without this instruction, the accused is exposed to multiple punishments for the same offense, violating his right to be free from double jeopardy. Id. at 364, 366-67. This Court vacated three of Borsheim's four child rape convictions for this instructional omission. Id. at 371.

In Mutch, the State charged five counts of rape, all within the same charging period. 171 Wn.2d at 662. There was sufficient evidence of five separate acts of rape, but the jury was not instructed that each count must arise from a separate and distinct act in order to convict. Id. at 662-63. The possibility that the jury convicted Mutch on all five counts based on a single criminal act created a potential double jeopardy problem. Id. at 663.

However, the Mutch court held the case "presented a rare circumstance where, despite deficient jury instructions," it was nevertheless

manifestly apparent the jury based each conviction on a separate and distinct act. Id. at 665. Specifically: (1) the victim, J.L., testified to precisely the same number of rape episodes (five) as there were counts charged and to convict instructions; (2) the defense was consent rather than denial; (3) Mutch admitted to a detective that he engaged in multiple sex acts with J.L.; and (4) during closing, the prosecutor discussed each of the five alleged acts individually and defense counsel did not challenge the number of episodes, but merely argued consent. Id. The court concluded, "[i]n light of all of this, we find it was manifestly apparent to the jury that each count represented a separate act." Id. at 665-66. Thus, the Mutch court was convinced beyond a reasonable doubt that a double jeopardy violation did not follow from the deficient jury instructions. Id. at 666.

In State v. Land, this Court considered whether it violated double jeopardy where the jury was not instructed it must find separate and distinct acts of child rape and child molestation. 172 Wn. App. 593, 598-603, 295 P.3d 782 (2013). Land was convicted of one count of child rape and one count of child molestation, both involving the same child and the same charging period. Id. at 597-98. Land argued these convictions violated double jeopardy because they might have been based on the same act of oral-genital intercourse. Id. at 598-99. The State countered that the jury did not

have to find separate and distinct acts because child molestation is not the "same offense" as child rape for double jeopardy purposes. Id. at 599.

Two offenses are not the same when "'there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other.'" Id. (quoting State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983)). Child rape and child molestation do not have identical elements. Id. Child molestation requires proof of "sexual contact," which means "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.089(1); RCW 9A.44.010(2). Child rape requires proof of "sexual intercourse," which includes "any penetration, however slight," as well as "any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another." RCW 9A.44.079(1); RCW 9A.44.010(1)(a), .010(1)(c) (emphasis added).

The Land court explained that where the evidence of sexual intercourse supporting a count of child rape is evidence of penetration, "rape is not the same offense as child molestation." 172 Wn. App. at 600. The touching of sexual parts for sexual gratification constitutes molestation until the point of actual penetration. Id. At that point, the act of penetration alone supports a separately punishable conviction for child rape. Id.

However, where the evidence of sexual intercourse is evidence of oral-genital contact, "that single act of sexual intercourse, if done for sexual gratification, is both the offense of molestation and the offense of rape." Id. In such a circumstance, the two offenses "are the same in fact and in law because all the elements of the rape as proved are included in molestation, and the evidence required to support the conviction for molestation also necessarily proves the rape." Id. Because of this potential double jeopardy problem, the court considered Land's claim that the jury instructions exposed him to multiple punishments for the same offense. Id.

Land's jury was not instructed that the two counts involving the same child, S.H., required proof of separate and distinct acts. Id. at 601. However, S.H. did not testify Land's mouth came in contact with her sex organs. Id. The only evidence of rape was S.H.'s testimony that Land penetrated her vagina with his finger. Id. at 602. Consistent with this testimony, the prosecutor argued in closing that S.H.'s testimony about penetration was the "crucial element proving rape." Id. The prosecutor also emphasized that S.H.'s testimony about sexual contact proved molestation and her testimony about penetration proved rape. Id. Given all these factors, the Land court concluded the lack of a separate and distinct instruction "did not violate Land's right to be free from double jeopardy." Id. at 603.

b. It is not manifestly apparent from the record that the jury based the child rape and child molestation convictions on separate and distinct acts, violating Benson's right to be free from double jeopardy.

This case presents the same issue as Land: Benson was convicted of one count of child rape and three counts of child molestation as to Andrea within the same charging period. Like Land, Benson's jury was not instructed that the child rape and child molestation counts must be based on separate and distinct acts. CP 74-77. Unlike Land, however, Andrea testified to oral-genital contact. Specifically, she said she put Benson's penis in her mouth and counted to 100 during Truth or Dare. 1RP 93. Because oral-genital contact constitutes both rape and molestation, this creates a potential double jeopardy problem. Considering the full record, it is not manifestly apparent that the jury based the child rape and child molestation convictions on separate and distinct acts.

Benson's jury was instructed it must find separate and distinct acts of child molestation as to Andrea. CP 75-77. For instance, count 4 specified the jury must find Benson had sexual contact with Andrea "in an act separate and distinct from Counts V and VI." CP 75. The jury was not instructed the act of child rape needed to be separate and distinct from the acts of child

molestation.[4] CP 74 (child rape to-convict instruction stating only that the jury must find "the defendant had sexual intercourse with [Andrea]").

The jury received the complete statutory definition of sexual contact. CP 78. The jury did not, however, receive the complete statutory definition of sexual intercourse. Instead the instruction omitted penetration, specifying only that sexual intercourse "means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same of opposite sex." CP 79; RCW 9A.44.010(1)(c). Because this definition of sexual intercourse was not objected to, it is of the law of the case. 3RP 7-12; Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 113, 829 P.2d 746 (1992).

Benson allegedly penetrated Andrea's mouth with his penis. 1RP 93. Penetration is the different legal and factual element between child rape and child molestation. 172 Wn. App. at 600. As this Court recognized in Land, where there is evidence of penetration, child rape is not the same offense as child molestation. Id. But Benson's jury was not instructed on penetration, only oral-genital contact. Under the law of the case, then, child rape and child molestation were the same in both fact and law. The alleged oral-

[4] The logical conclusion would then be that the jury did not have to find separate and distinct acts of rape and molestation. This is similar to the canon of statutory construction that "to express one thing in a statute implies the exclusion of the other. Omissions are deemed to be exclusions." In re Det. of Williams, 147 Wn.2d 476, 491, 55 P.3d 597 (2002) (citation omitted).

genital contact met the definition, as given, of both sexual intercourse and sexual contact, and the evidence required to support molestation also necessarily proved rape.

Benson's case is also distinguishable from Mutch. For instance, Benson's defense was denial, not consent. Benson denied ever having sexual contact or sexual intercourse with Andrea and Alice. See 2RP 233-63 (defense closing argument). Also unlike Mutch, Andrea did not testify to the same number of incidents as were charged. She testified to one incident of oral-genital contact, which the State argued in closing corresponded to the rape charge. 2RP 227-28. However, Andrea testified to more than three instances of sexual contact: more than once touching Benson's penis with her hand during Truth or Dare; several times where she was on all fours and Benson rubbed his penis against her vagina from behind; once where Andrea was on top of Benson and he rubbed his penis against her clitoral area; and once when they showered together. 1RP 91-97. In Mutch, there were five alleged incidents, five charges, and five convictions. 171 Wn.2d at 651-52. Not so in Benson's case.

Furthermore, the State used a Petrich[5] instruction instead of electing specific acts of child molestation. The constitutional right to a unanimous

[5] State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984), overruled in part by State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988).

jury verdict guarantees the individual may be convicted only when a unanimous jury concludes the charged criminal act has been committed. Borsheim, 140 Wn. App. at 365. This means the jury "must be unanimous as to which act or incident constitutes a particular charged count of criminal conduct." Id. Thus, in cases like Benson's where the number of acts alleged exceeds the number of charges, either the State must elect the act on which it relies or the trial court must instruct the jury to unanimously agree the State proved the same criminal act beyond a reasonable doubt—a Petrich instruction. Kitchen, 110 Wn.2d at 411.

Benson's jury was given the following Petrich instruction:

> Similarly, the State alleges that the defendant committed acts of child molestation in the first degree against [Andrea] on multiple occasions. To convict the defendant of any count of child molestation in the first degree against [Andrea], one particular act of child molestation in the first degree against [Andrea] must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of child molestation in the first degree against [Andrea].

CP 80. This instruction allowed the State to simply point to all the acts of child molestation, without specifying which three the jury should rely on to convict. 2RP 229-31. This Court therefore cannot be sure which three acts the jury relied on in convicting Benson of child molestation.

Nor does a Petrich instruction cure a double jeopardy violation. The trial court in Borsheim gave a similar unanimity instruction:

> There are allegations that the Defendant committed acts of rape of child on multiple occasions. To convict the Defendant, one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt. You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.

140 Wn. App. at 364. This unanimity instruction, like the one in Benson's case, did not "convey the need to base each charged count on a 'separate and distinct' underlying event." Borsheim, 140 Wn. App. at 367. Although the instruction adequately informed jurors they had to be unanimous on the act that formed the basis for any given count, it failed to protect against double jeopardy. Id. at 367, 369.

Furthermore, the jury did not specify which acts it relied on to convict for molestation. See State v. Kier, 164 Wn.2d 798, 814, 194 P.3d 212 (2008) (holding a verdict is ambiguous are multiple acts were alleged but the jury does not specify which act it relied on to convict). This Court has no way of knowing or guaranteeing that the jury did not rely on the same act of oral-genital contact to convict for both rape and molestation. This case is not the "rare circumstance" where the jury plainly based each conviction on a separate and distinct act. Mutch, 171 Wn.2d at 665.

The prosecutor's closing argument also did not protect against double jeopardy. The prosecutor emphasized the "mouth on penis" incident "is rape of a child in the first degree," based on the given definition of sexual intercourse. 2RP 228. The prosecutor then went on to discuss the multiple acts of sexual contact that could support child molestation convictions. 2RP 229-31. With regard to the incident where Andrea was on top of Benson on the bed, the prosecutor argued, "it's not rape because there was no penetration," reiterating, "that's sexual contact, but it's short of penetration, so that would be child molestation." 2RP 230-31. However, as discussed, the jury was never instructed on penetration. CP 78-79. The distinction between penetration and contact, then, did nothing to clarify the kind of proof necessary for child rape versus child molestation.

Moreover, tt is the judge's "province alone to instruct the jury on relevant legal standards." State v. Clausing, 147 Wn.2d 620, 628, 56 P.3d 550 (2002). Benson's jury was accordingly instructed to "disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." CP 65. The prosecutor's argument about penetration was not supported by the law in the jury instructions. Courts presume the jury follows the court's instructions. State v. Ervin, 158 Wn.2d 746, 756, 147 P.3d 567 (2006). This Court must therefore presume the jury disregarded the prosecutor's distinction between penetration and contact.

See Kier, 164 Wn.2d at 813 (holding prosecutor's election of a specific act in closing was insufficient to cure double jeopardy violation because jurors are told to rely on evidence and instructions rather than counsel's arguments).

The record is also not clear that the oral-genital contact was the only instance of penetration. Andrea testified when she was on top of Benson on the bed, he rubbed his penis "inside of my clit area." 1RP 96. Though she said his penis did not go inside her body, she said the rubbing was "[m]ore inside." 1RP 96. Washington case law is clear that "penetration" of the female includes penetration of the labia or vulva. State v. Delgado, 109 Wn. App. 61, 65-66, 33 P.3d 753 (2001), rev'd on other grounds, 148 Wn.2d 723, 63 P.3d 792 (2003). The bottom line is the jury would be rightfully confused by the prosecutor's closing argument and could have easily relied on the same acts to convict for rape and molestation.

Finally, Benson's jury was instructed, "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 68. The Borsheim court held this instruction is insufficient to guard against double jeopardy because it fails to adequately inform the jury that each crime requires proof of a different act. 140 Wn. App. at 367, 369-70; see also Mutch, 171 Wn.2d at 663 (agreeing with Borsheim).

This Court can presume the jury found three separate and distinct acts of child molestation because the jury was so instructed. But the jury was not instructed that these acts must also be separate and distinct from the child rape. This failure exposed Benson to multiple punishments for a single offense, violating his right to be free from double jeopardy. This Court should remand for the trial court to vacate one of the child molestation convictions. Borsheim, 140 Wn. App. at 371.

2. THE COMMUNITY CUSTODY CONDITION PROHIBITING BENSON FROM FREQUENTING AREAS WHERE MINOR CHILDREN ARE KNOWN TO CONGREGATE IS VOID FOR VAGUENESS.

As a condition of community custody, the trial court ordered Benson: "Do not frequent areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer." CP 52. This condition is unconstitutionally vague because it is not sufficiently definite to apprise Benson of prohibited conduct and allows for arbitrary enforcement by his community corrections officer (CCO).

An illegal or erroneous sentence may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). The due process vagueness doctrine requires the State to provide citizens fair warning of proscribed conduct. Id. at 752. The doctrine also protects against arbitrary, ad hoc, or discriminatory enforcement. State v. Halstien,

122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is unconstitutionally vague if it does not (1) define the offense with sufficient definiteness such that ordinary people can understand what conduct is proscribed; or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53.

There is no presumption in favor of the constitutionality of a community custody condition. State v. Sanchez Valencia, 169 Wn.2d 782, 792-93, 239 P.3d 1059 (2010). Imposition of a vague condition is manifestly unreasonable, requiring reversal. Id. at 791-92.

In State v. Irwin, the trial court imposed a condition identical to the one here. 191 Wn. App. 644, 649, 364 P.3d 830 (2015). This Court struck the condition as being void for vagueness and remanded to the trial court for resentencing. Id. at 652-55. The Irwin court explained, "Without some clarifying language or an illustrative list of prohibited locations[,] . . . the condition does not give ordinary people sufficient notice to 'understand what conduct is proscribed.'" Id. at 655 (quoting Bahl, 164 Wn.2d at 753). This Court acknowledged "[i]t may be true that, once the CCO sets locations where 'children are known to congregate' for Irwin, Irwin will have sufficient notice of what conduct is proscribed." Id. However, this "would leave the condition vulnerable to arbitrary enforcement," rendering it unconstitutional under the second prong of the vagueness analysis. Id.

In State v. Riles, the Washington Supreme Court upheld the constitutionality of a community custody condition almost identical to the one in Irwin and here. 135 Wn.2d 326, 349, 957 P.2d 655 (1998). However, the Riles court presumed the condition was constitutional, a standard later rejected in Sanchez Valencia, 169 Wn.2d at 792-93.

The Irwin court therefore concluded Riles did not control and instead examined the supreme court's more recent decision in Bahl. Irwin, 191 Wn. App. at 653-55. The Bahl court held a condition to be unconstitutionally vague where it prohibited Bahl from possessing or accessing pornographic materials, "as directed by the supervising Community Corrections Officer." 164 Wn.2d at 743. The court explained, "The fact that the condition provides that Bahl's community corrections officer can direct what falls within the condition only makes the vagueness problem more apparent, since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement." Id. at 758.

Like in Bahl and Irwin, the condition prohibiting Benson from frequenting areas where minors are known to congregate does not provide sufficient definiteness such that Benson knows where he can and cannot go. Some locations are obvious: schools, playgrounds, or public swimming pools. But many other locations are not obvious: public parks, bowling alleys, shopping malls, theaters, churches, hiking trails, grocery stores, and

so on.[6] How is Benson to know which is prohibited and which is not? Because an ordinary person would not know what conduct is prohibited, the condition fails the first prong of the vagueness test.

The condition also fails the second prong of the vagueness test. Both Bahl and Sanchez Valencia involved delegation to the CCO to define the parameters of a condition. Bahl, 164 Wn.2d at 758; Sanchez Valencia, 169 Wn.2d at 794. The Sanchez Valencia court held that where a condition leaves so much discretion to an individual CCO, it is unconstitutionally vague. 169 Wn.2d at 795. The same is true here. The condition gives Benson's CCO unfettered discretion to define where minors congregate. A creative CCO could come up with almost any location where he or she believed minors congregated. This "virtually acknowledges that on its face" that the condition "does not provide ascertainable standards for enforcement." Bahl, 164 Wn.2d at 758.

The condition is unconstitutionally vague and should be stricken because it fails to provide adequate notice as to what conduct is prohibited and exposes Benson to arbitrary enforcement.[7] Irwin, 191 Wn. App. at 655.

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[6] This indefiniteness was fully realized in State v. McCormick, where McCormick was held in violation of the same condition when he went to a food bank that happened to be in the same building as a grade school. 166 Wn.2d 689, 692-96, 213 P.3d 32 (2009).

[7] The Irwin court also held this preenforcement challenge to the sentencing condition was ripe for review. 191 Wn. App. at 651-52.

3. APPELLATE COSTS SHOULD NOT BE IMPOSED.

If Benson does not substantially prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. RCW 10.73.160(1) provides that appellate courts "may require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000) . This Court has ample discretion to deny the State's request for appellate costs. State v. Sinclair, 192 Wn. App. 380, 387-93, 367 P.3d 612 (2016) (exercising discretion and denying State's request for costs).

Benson's ability to pay must be determined before discretionary LFOs are imposed.[8] The trial court made no such finding, instead waiving all discretionary LFOs because "the incarceration is so lengthy." 4RP 292; CP 44. The court also entered an order of indigency, finding Benson "lacks sufficient funds to prosecute an appeal." CP 19. Benson reported having no income, assets, or real estate. Supp. CP__ (Sub. No. 78, Motion for Order of Indigency, at 2). Benson was 40 years old at the time of sentencing. CP 99. He now has six felony sex offenses on his record and is serving 280 months

[8] See State v. Duncan, 185 Wn.2d 430, 436, 74 P.3d 83 (2016) (recognizing "[t]he imposition and collection of LFOs have constitutional implications and are subject to constitutional limitations," and a "constitutionally permissible system that requires defendants to pay court ordered LFOs must meet seven requirements," including "'[t]he financial resources of the defendant must be taken into account'" (quoting State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992)).

on those counts, as well as another 364 days for the fourth degree assault. CP 31, 41. There is very little likelihood Benson will be able to pay thousands of dollars in appellate costs—accruing at a 12 percent interest rate while he is incarcerated over the next 24 years—upon his release.

Finally, there has been no order finding Benson's financial condition has improved or is likely to improve. RAP 15.2(f) specifies "[t]he appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." This Court must therefore presume Benson remains indigent and give him the benefits of that indigency. RAP 15.2(f). For these reasons, this Court should not assess appellate costs against Benson in the event he does not substantially prevail.

D. CONCLUSION

This Court should dismiss one of the child molestations convictions because it violates double jeopardy. This Court should also remand for the trial court to strike the unconstitutional community custody condition.

DATED this 7th day of September, 2016.

Respectfully submitted,

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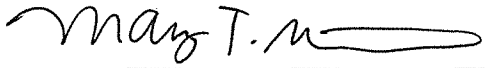

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