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NO. 35651-1-II

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

STATE OF WASHINGTON,

Respondent,

vs.

WINN ROBERT GRIFFEE, SR.,

Appellant.

BRIEF OF APPELLANT

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DM 7-20-07

ORIGINAL

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ASSIGNMENT OF ERROR

Assignment of Error

1. Trial counsel's failure to object when the state called three witnesses whose testimony was irrelevant and prejudicial denied the defendant effective assistance of counsel. RP 154-162, 174-215.

2. The trial court denied the defendant a fair jury when it failed to assure that the remaining eleven jurors had not been prejudiced by one juror's misconduct in telling them that she thought the defendant had followed her out to her car after the first evening of deliberation. RP 394-423.

3. The trial court erred when it imposed community custody conditions not authorized by the legislature. RP 134-136, 144-145.

Issues Pertaining to Assignment of Error

1. Does a trial counsel's failure to object when the state called three witnesses whose testimony was irrelevant and prejudicial deny a defendant effective assistance of counsel?

2. Does a trial court deny a defendant a fair jury when it fails to assure that the remaining eleven jurors have not been prejudiced by one juror's misconduct in telling them that she thought the defendant had followed her out to her car after the first evening of deliberation?

3. Does a trial court have inherent authority to impose community custody conditions not authorized by the legislature?

STATEMENT OF THE CASE

Factual History

In 2006, the defendant Winn Griffee was a 44-year-old truck driver who lived in the City of Vancouver with his wife Roberta and their two children Robyn and Winn Jr. (called Bobby). RP 64-66, 69-70.¹ Robyn was born on 8-26-92. RP 215-217. Prior to 2006 the defendant drove long-haul routes up and down the I-5 corridor between Washington in Seattle. RP 67-70, 291-292. This job only allowed him to be home for the weekends. *Id.* In 2006 he got a job with a local trucking company doing day hauling. This job allowed him to be home every night. RP 292. Roberta works Thursday through Friday in the garden department at one of the local Fred Meyer stores. RP 217-219.

The defendant was the primary disciplinarian in the family and had a number of conflicts with his daughter Robyn. RP 309-310. They would particularly argue about her hairstyles, the makeup she used, the music she listened to, and the clothes she would wear. RP 123-124, 305-306. The defendant was particularly concerned about the explicit lyrics of the music she played, as well as music with lyrics about suicide. RP 305-306. However, according to Robyn's mother, and a number of family friends who

¹The record in this case includes three volumes of continuously numbered verbatim reports referred to herein as "RP [page number]".

either lived with the Griffees or visited in the home, Robyn did not appear to be afraid of her father or try to avoid his presence. RP 249-250, 273, 288.

In December of 2006 Robyn made some comments to her friend Miranda Sams about contemplating suicide and first claimed that her father had molested her. RP 143-144. Miranda Sams relayed this information to their Middle School counselor, who then called in a CPS caseworker. RP 157-158. According to Robyn, when she was eight-years-old her father asked for a back rub while her mother was gone and during the back rub the defendant started fondling her breasts and vagina, sometimes over her clothes and sometimes under her clothes. RP 74-75. Robyn also repeated these statements to a police officer and a prosecutor, adding that this abuse continued when they moved into their current home. RP 82. She further stated that as time went by the abuse worsened in that the defendant began to digitally penetrate her and make her touch his penis. RP 76-79. According to Robyn this also happened in their home while her mother was at work and happened on one occasion when she went on a long-haul truck ride with her father. RP 76, 80-83. For his part the defendant denied ever touching Robyn in any type of sexual manner. RP 309-310.

Procedural History

By information filed April 28, 2006, the Clark County Prosecutor charged defendant Win Robert Griffiee with one count each of rape of a child

in the first degree, child molestation in the first degree, rape of a child in the second degree, and child molestation in the second degree. CP 1-2. The state information alleged that the defendant committed each of these offenses against his daughter. *Id.* On October 23, 2006, the court called the case for jury trial. CP 87. Over the next two days the state called six witnesses and the defense called four, including the defendant. *Id.* These witnesses testified to the facts note in the preceding *Factual History*. See Factual History.

During its case in chief the state called Dr. John Sterling, a pediatrician who specializes in examining and diagnosing child sexual abuse. RP 174-175. He then went on to testify to the procedures he uses when examining a child referred to him as victim of sexual abuse. RP 175-177, 196-199. The court then allowed Dr. Sterling to testify that in March of 2006 CPS referred the defendant's daughter to his office for diagnosis of sexual abuse, that he took a history from her and her mother, and that she refused to submit to a physical examination. RP 201-203. The court received all of the evidence with only one objection by the defense as to relevance. *Id.*

In addition, the defense made no relevance objection when the state called Miranda Sams to testify that the defendant's daughter had told her that the defendant had molested her, and that she had reported this to the school counselor. RP 141-142. Neither did the defense make a relevance objection

when the state called Adrienne Campbell to testify that (1) when students report sexual abuse to her she is state mandated to report it to CPS and the police, (2) that the defendant's daughter and Miranda Sams made reports to her, and (3) that these reports were of the type for which she is state mandated to call CPS and the police. RP 154-162.

Following the close of the state's case the defense called four witnesses. CP 87. The court then instructed the jury without objection, and counsel presented closing argument. RP 321-377. At 4:29 p.m. on October 24, 2006, the jury retired for deliberations. CP 87, 94. At 5:55 p.m., after about 90 minutes of deliberation, the court excused the jury for the evening and ordered them to return at 9:00 a.m. the next day to resume deliberations, which they did. RP 388-390. At about 9:50 a.m. the next day the jury set out the following question:

The CPS, Detective and Doctor's reports were quoted during trial. May we, the jury, see these documents (in whole or in part)?

CP 97.

At 10:09 a.m. the court returned the jury note with the following answer:

No exhibits were offered into evidence in this case. You must rely on your collective memory of the testimony presented at trial.

Id.

After the bailiff returned the court's reply to a jury's question, the

court and the bailiff revealed the following to counsel:

THE COURT: . . . It's my understanding that as the bailiff returned the note to the jury with my response, she received some oral additional information. and would you first identify yourself for the record and then advise me of what you . . .

THE BAILIFF: Susan, the bailiff. And I delivered the question and actually I shut the door and about one minute later they knocked. And I entered and one of the female jurors said that the defendant followed her out of the building last night to her car and she thought he was writing down her license plate number. And a couple of the other jurors stated that the defendant poked his head in the jury room this morning when the door was open while they were waiting for all the jurors.

RP 396-397.

At this point the court and counsel discussed the matter and defense counsel stated that the defendant could not have “poked his head in the jury room” because he did not even get to the courthouse until about 9:20 a.m. which was after the jury resumed deliberation. RP 397-399. Specifically, the bailiff stated that he shut the door to the jury room at 9:00 a.m. with all of the jurors present, RP 398, and the defendant stated that he did not arrive at the court house until 9:15 or 9:20 a.m., having first stopped at the credit union which opened at 9:00 a.m. RP 399.

After consideration, the judge informed counsel that he would call in the juror who made the claim that the defendant had followed her out into the parking lot. The judge then ruled that he and he alone would question the juror about the incident. The court's exact words on this issue were as

follows:

THE COURT: I would urge all parties. However, I will do the questioning of this juror. There will not be any reaction or attempts at comments from anyone. And that includes you, Mr. Griffiee. The jury is in deliberation, it's a very delicate matter for me to question any of them.

RP 400.

The court's questioning of this juror proceeded as follows:

THE COURT: All right. First of all, I do not want you to tell me anything that you and the jury have been discussing with regard to the deliberations in this case. I'm going to ask you some specific questions because it's my understanding from the bailiff that you relayed some information about Mr. Griffiee. And apparently you had – Mr. Griffiee was in proximity to you last night; is that correct?

JUROR NO. 1: He followed me. He came out as I was walking to my car. Actually, it wasn't just me, it was more than me – to the car.

THE COURT: All right. So some of you were headed to – is this the juror parking lot over here?

JUROR NO. 1: Yes.

THE COURT: All right. And what door did you all exit out of?

JUROR NO. 1: The one between the jail and the Courthouse. Or – well, it's the one on 13th and –

THE BAILIFF: The west side?

JUROR NO. 1: The west side. There we go.

THE COURT: All right. And when you say that he followed you, you mean he came out the same door?

JUROR NO. 1: He just came out behind us, yes.

THE COURT: And about how closely was he to you?

JUROR NO. 1: Little bit further than he is right now. Well, he walked right past my car, so I guess he was closer.

THE COURT: All right. And did he communicate with you or any –

JUROR NO. 1: He didn't say a word.

THE COURT: – other juror?

JUROR NO. 1: I just saw him turn around and look.

THE COURT: All right.

JUROR NO. 1: It was just – it was just uncomfortable.

THE COURT: All right. Other than turning around and looking, did he take any other actions, make any other communication? Now, there was some reference to the bailiff about him writing down a license number?

JUROR NO. 1: No. He didn't write anything down.

THE COURT: Okay.

JUROR NO. 1: Just turned around and looked.

THE COURT: So he walked past you, looked, and then continued walking?

JUROR NO. 1: And then he turned around, yeah.

THE COURT: All right. Thank you very much. You can resume – oh, I guess the only other question is basically, the information that you've relayed to me, have you relayed it to the other jurors as well?

JUROR NO. 1: Just now, yeah. Yes.

THE COURT: Okay. Don't discuss it any further. I may have the entire jury back out in a moment, but you can rejoin the rest of them.

RP 400-402.

At this point the court had the bailiff bring in the jury, and the court gave the following oral instruction:

THE COURT: All right. Bring in the jury. Good morning, ladies and gentlemen of the jury and welcome back. I'm sorry to interrupt your deliberations, but I needed to give you an additional instruction. It's come to my attention that last evening and perhaps this morning one or more of you may have had inadvertent contact with the defendant, in terms of his being in proximity to areas where you were. I'm not advised that any communication or attempted communication took place, only contact. And of course, as I advised you at the beginning of the proceedings, the parties, the defendant, and any witnesses are instructed not to discuss or to communicate with you on any subject outside of the courtroom to avoid the appearance of impropriety.

I'm instructing you now that inadvertent contacts and being in physical proximity of the defendant, the witnesses, and the parties to these proceedings is a normal course of being in the same building in the same area. It is not evidence in the case. The evidence you are to consider is the testimony of the witnesses presented in court. Inadvertent contacts are not evidence, should not be discussed, and should have no part in your deliberations.

With that instruction, I'll allow you to return with the bailiff and resume your deliberations.

RP 403-404.

After the jury again retired for further deliberations. CP 95. This occurred at 10:33 a.m. *Id.* In a little more than an hour the jury informed the

bailiff that it had reached a verdict. *Id.* However, prior to bringing the jury back into the courtroom, the defense moved for a mistrial, arguing that Juror No. 1 had admitted that she had already discussed the claimed contact with the defendant before the court gave its oral instruction, that this discussion had tainted the remaining jurors, and that the only appropriate remedy was a mistrial. RP 404-405. The court denied the motion and had the jury returned to the courtroom. RP 405. At this point the jury returned verdicts of guilty on Count II (first degree child molestation) and not guilty on the remaining three counts. CP 49-52.

Following a presentence investigation report the court sentenced the defendant within the standard range. CP 128-146. This sentenced included a term of 36 to 48 months community custody, and included the following community custody conditions, among others:

- ☒ Defendant shall not reside in a community protection zone (within 880 feet of the facilities or grounds of a public or private school if the offense was committed on or after July 24, 2005. (RCW 9.94A.030(8)).
- ☒ Defendant shall not possess, use or deliver drugs prohibited by the Uniform Controlled Substances Act. or any legend drugs, except by lawful prescription. The defendant shall notify his/her community corrections officer on the next working day when a controlled substance or legend drug has been medically prescribed.
- ☒ Defendant shall enter into, cooperate with, fully attend and successfully complete all in-patient and outpatient phases of a sexual deviancy treatment program as established by the

community corrections officer and/or the treatment facility. Defendant shall not change sex offender treatment provides or treatment conditions without first notifying the Prosecutor, community corrections officer and shall not change providers without court approval after a hearing if the prosecutor or community corrections officer object to the change. "Cooperate with" means the offender shall follow all treatment directives, accurately report all sexual thoughts, feelings and behaviors in a timely manner and cease all deviant sexual activity.

- ☒ Defendant shall, at his or her own expense, submit to periodic polygraph examinations at the direction of his/her community corrections officer to ensure compliance with the conditions of community placement/custody.

CP 134-136.

The court also imposed the following crime related conditions as part of appendix F attached to the judgment and sentence:

5. You shall not possess, use or own firearms, ammunition or deadly weapons. Your community Corrections Officer shall determine what those deadly weapons are.
9. You shall take Antabuse per your Community Corrections Officer's direction, if so ordered.

CP 144-145.

Following imposition of this sentence the defendant filed timely notice of appeal. CP 154, 160.

ARGUMENT

I. TRIAL COUNSEL’S FAILURE TO OBJECT WHEN THE STATE CALLED THREE WITNESSES WHOSE TESTIMONY WAS IRRELEVANT AND PREJUDICIAL VIOLATED THE DEFENDANT’S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is “whether counsel’s conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel’s assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel’s performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel’s conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is “whether there is a reasonable probability that, but for counsel’s professional errors, the result in the proceeding would have been different. A reasonable probability is a

probability sufficient to undermine confidence in the outcome.” *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel’s ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance for defense counsel’s failure to object to the admission of the testimony of Robyn’s friend Miranda Sams, Adriane Campbell, the school counselor and Dr. Sterling as irrelevant under ER 401 and ER 402 and unfairly prejudicial. The following presents this argument.

Under ER 401, “relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Under ER 402, “all relevant evidence is admissible” with certain limitations. By contrast, under this same rule “[e]vidence which is not relevant is not admissible.” Thus, before testimony can be received into evidence, it must be shown to be relevant and material to the case. *State v. Wilson*, 38 Wn.2d 593, 231 P.2d 288 (1951). Finally, the “existence of any fact” as that term is used in these two rules cannot rest upon guess,

speculation, or conjecture. *State v. Golladay*, 78 Wn.2d 121, 470 P.2d 191 (1970) .

For example, in *State v. Thamert*, 45 Wn.App. 143, 723 P.2d 1204 (1986), the defendant was charged with two counts of robbery, and he offered a diminished capacity defense, arguing that his voluntary drug usage prevented him from forming the requisite intent to commit the crime. During trial, he attempted to call a jail nurse as a lay witness to testify concerning her personal observations of the defendant following his arrest. However, the court excluded this witness and the defendant was convicted. The defendant then appealed, arguing that the trial court denied him a fair trial when it excluded his proposed witness.

In addressing the defendant's arguments, the court first noted that lay witnesses may testify concerning the mental capacity of a defendant so long as the witness' opinion is based on facts the witness personally observed. The court then noted that the trial court did not abuse its discretion when it excluded the defendant's proposed witness because she did not meet these criteria as she had never observed the defendant when it was abusing drugs.

In the case at bar, the state charged the defendant with first and second degree rape of a child under RCW 9A.44.073 and RCW 9A.44.076, and first and second degree child molestation under RCW 9A.44.083 and RCW 9A.44.086. The first degree child rape statute reads as follows:

(1) A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.

RCW 9A.44.073(1).

The second degree child rape statute is identical to the first degree statute with the exception of the age of the child and the age of the perpetrator. It reads as follows:

(1) A person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

RCW 9A.44.076(1).

Under these two statutes, the state has the burden of proving the following elements:

- (1) That the defendant had “sexual intercourse” with another person,
- (2) That the other person was 11-years-old or younger (first degree) or 12 or 13-years old (second degree),
- (3) That the defendant was at least 24 months older (first degree) or 36 months older (second degree), and
- (4) That the defendant and other person were not married.

The first degree child molestation statute reads as follows;

(1) A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than

twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

RCW 9A.44.083.

As with the rape statutes, the distinction between first and second degree child molestation lies within the age of the child and the defendant.

The second degree child molestation statute reads:

(1) A person is guilty of child molestation in the second degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

RCW 9A.44.086.

Under these two statutes, the state has the burden of proving the following elements:

- (1) That the defendant had or knowingly caused another person under 18-years-old to have sexual contact with another person,
- (2) That the other person was 11-years-old or younger (first degree) or 12 or 13-years old (second degree),
- (3) That the defendant was at least 36 months older, and
- (4) That the defendant and other person were not married.

In an attempt to meet its burden of proving each of these elements beyond a reasonable doubt, the state called a number of witnesses, including the defendant's daughter, the defendant's son, and the defendant's wife. The testimony of each of these witnesses was relevant in that it had a "tendency

to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” For example, the defendant’s daughter testified to her age, the defendant’s access, the defendant’s age, and the instances of alleged abuse including times, dates and locations of that alleged abuse. The defendant’s son and wife also testified concerning the age of the complaining witness, the defendant’s access to her, as well as dates and locations where the family lived. All of the evidence certainly meets the standard for relevancy. However, the following cannot be said of the state’s other three witnesses, Dr. Sterling, Miranda Sams, and Adrienne Campbell. The following reviews this testimony.

During its case in chief the state called Dr. John Sterling. He testified to the following: (1) he is a pediatrician who specializes in examining and diagnosing child sexual abuse, (2) he uses specific procedures when examining a child referred to him as victim of sexual abuse, (3) in March of 2006, CPS referred the defendant’s daughter to his office for a diagnosis of a claim of sexual abuse, (4) he took a history from her and her mother, and (5) she refused to submit to a physical examination. In addition, the state called Miranda Sams to testify that the defendant’s daughter had told her that the defendant had molested her, and that she had reported this to the school counselor. RP 141-142. Finally , the state called Adrienne Campbell to

testify that (1) when students report sexual abuse to her she is state mandated to report it to CPS and the police, (2) that the defendant's daughter and Miranda Sams made reports to her, and (3) that these reports were of the type for which she was state mandated to call CPS and the police.

The problem with this testimony is that it is all irrelevant. The fact that the defendant's daughter made a claim to Miranda Sams that the defendant abused her, that Miranda Sams and the defendant's daughter repeated this claim to Adrienne Campbell, that Adrienne Campbell was state mandated to pass this claim along to CPS, and that CPS then referred the defendant's daughter to Dr. Sterling for an examination on this claim did not make any fact at issue in the trial any more or less likely. Thus, it was all irrelevant. In addition, it was all unfairly prejudicial because it constituted the inadmissible opinions of Miranda Sams, Adrienne Campbell, some unnamed CPS worker, and Dr. Sterling that the defendant's daughter was telling the truth about her claims of sexual abuse.

Under the facts of this case there was not possible tactical reason for defense counsel to fail to object to testimony that was at the same time irrelevant and unfairly prejudicial. Thus, counsel's failure to make a motion to exclude all of this evidence as irrelevant fell below the standard of a reasonable prudent attorney. As a result, the defendant has proven the first prong of a claim of ineffective assistance.

In addition, as an examination of the record in this case reveals, the state's case rested solely on a question of credibility between the defendant and his daughter. She claimed he sexually abused her and he denied it. No witness observed the conduct. No physical evidence supported the claim nor would you expect such evidence because the claimed abuse was of a type that would not result in injury. Indeed, the verdicts of the jury indicate that they were troubled that the state had not proven its case beyond a reasonable doubt. Normally in such a case one would expect the jury to return all of the verdicts as "guilty" or "not guilty." In failing to do this, and in returning only one guilty verdict, it would appear that the jury had great difficulty with making the obvious credibility determination. In such a case the admission of any improper evidence can well tip the balance from a verdict of acquittal to a verdict of guilt. The defense argues that this is precisely what the admission of the irrelevant evidence of Miranda Sams, Adriane Campbell, and Dr. Stirling did in this case. Thus, trial counsel's failure to object denied the defendant his right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

II. THE TRIAL COURT'S FAILURE TO GRANT THE DEFENDANT'S MOTION FOR A MISTRIAL BASED UPON JUROR MISCONDUCT DENIED THE DEFENDANT HIS RIGHT TO A FAIR JURY UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 21 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under Washington Constitution, Article 1, § 21, and under the Sixth Amendment to the United States constitution, every person charged with a felony in the state of Washington has the right to a fair trial in front of an impartial jury of 12 persons who must reach a unanimous verdict before a conviction can be entered. *State v. Seagull*, 124 Wn.2d 719, 881 P.2d 979 (1994); *Smith v. Phillips*, 455 U.S. 209, 71 L.Ed.2d 78, 102 S.Ct. 940 (1982). The trial judge is encumbered with the duty to be watchful for juror irregularities, and to take steps to determine that a defendant's right to a fair trial has not been prejudiced. *Id.* As the United States Supreme Court has stated: "Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith*, 455 U.S. at 217.

In *United State v. Bagnariol*, 665 F.2d 877 (9th Cir.1981), the Ninth Circuit Court of Appeals squarely put the duty upon the trial court to hold an evidentiary hearing upon hearing of possible juror misconduct. In this case, the court learned after trial that one of the jurors had conducted his own investigation at a Seattle library. In addressing how the court should have

proceeded upon receiving this information, the Ninth Circuit stated:

The trial court, upon learning of a possible incident of juror misconduct, must hold an evidentiary hearing to determine the precise nature of the extraneous information. The defendant is entitled to a new trial if the judge finds a “possibility that the extrinsic material could have affected the verdict.”

United States v. Bagnariol, 665 F.2d at 885.

In *State v. Murphy*, 44 Wn.App. 290, 721 P.2d 30 (1986), the court of appeals clarifies the fact that communications by or with jurors are per se misconduct. Furthermore, once established, such misconduct gives rise to a presumption of prejudice which the State has the burden of disproving beyond a reasonable doubt. *State v. Murphy*, 44 Wn.App. at 296 (citing *Remmer v. United States*, 347 U.S. 227, 229, 98 L.Ed.654, 74 S.Ct. 450 (1954); *State v. Rose*, 43 Wn.2d 553, 557, 262 P.2d 194 (1953)).

For example, in *State v. Rose, supra*, the defendant was convicted of manslaughter, and appealed arguing that the trial court erred in refusing to grant a mistrial upon his complaint of juror misconduct. In support of his motion, the defendant had presented the affidavits of people who had seen communications between jurors and others during the trial and during deliberations. However, the trial court summarily denied the motion. On appeal, the Washington Supreme Court reversed and remanded for new trial, finding that there was a “prima facie presumption of prejudice” and that the burden was on the state to disprove it beyond a reasonable doubt. Since the

state had failed to do so, reversal was required.

In the case at bar, more than one jury made a claim that the defendant had improper conduct with them. Juror No. 1 claimed that the defendant had followed her out of the courthouse to her car, had stopped after walking by her, had turned around and had looked at her, and had made her feel very uncomfortable. This juror also state that the defendant had followed other jurors out of the courthouse at the same time. In addition, a number of unidentified jurors claimed that the defendant had “stuck his head in the jury room” prior to their beginning the second day of deliberation. In response to these claims the trial court failed to hold any type of evidentiary hearing. Rather the court merely questioned the one juror while refusing to allow either counsel to question her or any other jurors.

This lack of evidentiary hearing is particularly troubling because (1) the bailiff reported that one of the juror’s claimed the defendant had written down her license plate number, (2) Juror No. 1 admitted she told the other juror’s about he claim that the defendant had followed her out of the courthouse the night before, (3) the defendant denied sticking his head in the jury room on the second day of deliberations, and (4) the defendant was not given an opportunity to explain or rebut the claim that he had followed or harassed any jury members. It may well have been that the defendant did not followed Juror No. 1 out of the courthouse the night previous and that the

defendant did not enter the jury room. However, what is certain is that Juror No. 1 and a number of other unnamed jurors believed that the defendant intentionally had improper contact with them. Absent a proper evidentiary hearing there is no way for the state to rebut the “prima facie presumption of prejudice.” As a result, the trial court’s denial of the defendant’s motion for a mistrial denied the defendant his right to a fair jury under Washington Constitution, Article 1, § 21 and United States Constitution, Sixth Amendment.

III. THE TRIAL COURT ERRED WHEN IT IMPOSED COMMUNITY CUSTODY CONDITIONS NOT AUTHORIZED BY THE LEGISLATURE.

In Washington the establishment of penalties for crimes is solely a legislative function. *See State v. Thorne*, 129 Wn.2d 736, 767, 921 P.2d 514 (1996). As such, the power of the legislature to set the type, amount and terms of criminal punishment is plenary and only confined by constitutional constraints. *Id.* Thus, a trial court may only impose those terms and conditions of punishment that the legislature authorizes. *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937). In the case at bar, the defendant argues that the trial court exceeded its statutory authority when it imposed community custody conditions not authorized in the sentencing reform act. The following sets out this argument.

In the case of *In re Jones*, 118 Wn.App. 199, 76 P.3d 258 (2003), the

court of appeals addressed the issue of what conditions a trial court may impose as part of community custody. In this case the defendant pled guilty to a number of felonies including first degree burglary. The court sentenced him to concurrent prison time and community custody which included the following conditions among others: (1) that the defendant violate no laws, (2) that the defendant not consume alcohol, (3) that the defendant complete alcohol treatment, and (4) that the defendant participate in mental health treatment. At the time of sentencing the court had no evidence before it that alcohol or mental health problems contributed to the defendant's crimes. The defendant appealed the sentence arguing that the trial court did not have authority to impose these conditions.

In addressing these claims the court of appeals first looked to the applicable statutes concerning conditions of community custody and determined that certain statutes in RCW 9.94A specifically allowed the court to order that a defendant not violate the law and not consume alcohol. The court then reviewed the remaining two conditions and determined that the legislature only allowed imposition of alcohol or mental health treatment if it found that alcohol or mental health issues were "reasonably related" to the defendant's commission of the crimes to which the court was sentencing him. Finding no such evidence in the record the court struck these two conditions.

In the case at bar the jury found the defendant guilty of one count of child molestation in the first degree under RCW 9A.44.083. Under RCW 9.94A.030(41)(a)(i) the term “sex offense” is defined to include any “felony that is a violation of chapter 9A.44 RCW other than RCW 9A.44.130(11).” Thus, a violation of RCW 9A.44.083 is a sex offense. The imposition of community custody for sex offense sentences of confinement for one year or more is controlled by RCW 9.94A.715. This statute states in part:

(1) When a court sentences a person to the custody of the department for a sex offense not sentenced under RCW 9.94A.712. . . . committed on or after July 1, 2000, the court shall in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728 (1) and (2), whichever is longer. . . .

RCW 9.94A.715(1).

As this statute explicitly states it applies to when the court sentences a person “to the custody of the department for a sex offense not sentenced under RCW 9.94A.712.” Thus the trial court in the case at bar had authority to impose community custody. Subsection 2 of this statute states the following concerning the conditions of community custody the trial court may impose:

(2)(a) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the 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, and the department shall enforce such conditions pursuant to subsection (6) of this section.

(b) As part of any sentence that includes a term of community custody imposed under this subsection, the court shall also require the offender to comply with any conditions imposed by the department under RCW 9.94A.720. The department shall assess the offender's risk of reoffense and may establish and modify additional conditions of the offender's community custody based upon the risk to community safety. In addition, the department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.

(c) The department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court imposed conditions. The department shall notify the offender in writing of any such conditions or modifications. In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function.

RCW 9.94A.715(2).

As RCW 9.94A.715(2)(a) states, "the conditions of community custody shall include those provided for in RCW 9.94A.700(4)." In addition, "[t]he conditions may also include those provided for in RCW 9.94A.700(5)." Herein one finally finds the actual conditions. Subsection 4 of RCW 9.94A.700 states:

(4) Unless a condition is waived by the court, the terms of any community placement imposed under this section shall include the following conditions:

(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 determined 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.

RCW 9.94A.700(4).

Section (5) of this same statute provides the trial court with authority to impose further conditions. It states:

(5) As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions:

(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.

RCW 9.94A.700(5).

Under these provisions no causal link need be established between

the condition imposed and the crime committed so long as the condition relates to the circumstances of the crime. *State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). A condition relates to the “circumstances” of the crime if it is “an accompanying or accessory fact.” Black’s Law Dictionary 259 (8th ed. 2004). On review, objections to these conditions can be raised for the first time on appeal. *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003); *State v. Julian*, 102 Wn. App. 296, 304, 9 P.3d 851 (2000), *review denied*, 143 Wn.2d 1003 (2001) (“sentences imposed without statutory authority can be addressed for the first time on appeal”). Imposition of crime-related prohibitions are reviewed for an abuse of discretion and will only be reversed if the decision is manifestly unreasonable or based on untenable grounds. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

In the case at bar the trial court imposed the following conditions among others:

- ☒ Defendant shall no reside in a community protection zone (within 880 feet of the facilities or grounds of a public or private school if the offense was committed on or after July 24, 2005. (RCW 9.94A.030(8)).
- ☒ Defendant shall not possess, use or deliver drugs prohibited by the Uniform Controlled Substances Act. or any legend drugs, except by lawful prescription. The defendant shall notify his/her community corrections officer on the next working day when a controlled substance or legend drug has been medically prescribed.
- ☒ Defendant shall enter into, cooperate with, fully attend and

successfully complete all in-patient and outpatient phases of a sexual deviancy treatment program as established by the community corrections officer and/or the treatment facility. Defendant shall not change sex offender treatment providers or treatment conditions without first notifying the Prosecutor, community corrections officer and shall not change providers without court approval after a hearing if the prosecutor or community corrections officer object to the change. "Cooperate with" means the offender shall follow all treatment directives, accurately report all sexual thoughts, feelings and behaviors in a timely manner and cease all deviant sexual activity.

- ☒ Defendant shall, at his or her own expense, submit to periodic polygraph examinations at the direction of his/her community corrections officer to ensure compliance with the conditions of community placement/custody.

CP 134-136.

Just why the court marked the first condition noted above is uncertain.

In the case at bar the state alleged that the defendant committed Count II between 8-26-2000 and 8-24-2004. Thus, by the very restriction noted under RCW 9.94A.030(8), the court has no authority to impose the community protection zone requirement on the defendant. However, the court did leave the box in front of the condition crossed, and thereby improperly imposed this condition on the defendant.

As concerns the second condition noted above, under RCW 9.94A.700(4)(c) the court does have authority to prohibit a defendant from possessing or consuming controlled substances "except pursuant to lawfully issued prescriptions." Thus, the court did not err when it imposed these

conditions. However, there is nothing in this section that allows the court to require that the defendant notify the department upon receiving a valid prescription for a controlled substance. As a result, the trial court erred when it included this requirement.

The last two conditions of community custody noted above deal with the requirement that (1) the defendant undergo and cooperate with sexual deviancy treatment, and (2) that the defendant submit to periodic polygraphs to help determine his compliance with his sexual deviancy treatment. These provisions are specifically allowed under RCW 9.94A.700(5)(c) “as “crime-related treatment or counseling services.” Periodic polygraphs are certainly an integral part of that treatment. The decision in *State v. Combs*, 102 Wn.App. 949, 10 P.3d 1101 (2000), illustrates this point.

In *Combs*, the defendant pled to a charge of child molestation. As part of the judgment and sentence the court ordered the defendant to submit to periodic polygraph examinations in order to monitor his compliance with his conditions of community custody. He then appealed, arguing that the trial court erred when it ordered the polygraph examinations because the order does not state the purpose or limit the subject matter of the examinations. The defendant maintained that under the decision in *State v. Riles*, 135 Wn.2d 326, 957 P.2d 655 (1998), the scope of the polygraph examination must be limited to the authorized purpose of monitoring his compliance with the

court's order and that it could not be used by the state to search for other criminal violations. In addressing this argument, the court held as follows:

Relying on *Riles*, we conclude that the language of Mr. Combs's judgment and sentence, taken as a whole, impliedly limits the scope of polygraph testing to monitor only his compliance with the community placement order and not as a fishing expedition to discover evidence of other crimes, past or present. While not discouraging the use of pre-printed sentencing forms, we want to take this opportunity to strongly encourage the parties to carefully tailor them to conform to the particular nuances of each case. Here, Mr. Combs's judgment and sentence should have explicitly contained the monitoring compliance language. As a policy matter, cautious attention to detail in the sentencing forms will serve to better inform offenders of their rights, insure protection of those rights, and prevent confusion amongst judges, defendants and community corrections officers regarding the applicable legal standard.

State v. Combs, 102 Wn.App. at 952-953.

In the case at bar the specific polygraph language in the judgment and sentence does contain appropriate limiting language where it states that the purpose of the polygraph will be "to ensure compliance with the conditions of community placement/custody." Thus, the court did not err when it imposed this condition by itself. However, this provision must be seen in conjunction with the preceding treatment requirement, wherein the court requires the defendant to "cooperate" with treatment, and then defines the term "cooperate" as "follow all treatment directives, accurately report all sexual thoughts, feelings and behaviors in a timely manner and cease all deviant sexual activity."

The problem with this language is that one of the requirements of sexual deviancy treatment is for the patient to reveal all prior and current deviant sexual thought and acts. Thus, a reasonable sexual deviancy treatment provider and a reasonable community corrections officer would interpret these two provisions to require the defendant to reveal all of his prior deviant sexual acts, including those unknown to the state and which will subject him to further criminal liability. In essence then, these two provisions seen in conjunction to each other will require the defendant to waive his Fifth Amendment right against self-incrimination. To the extent these provisions do require such a waiver, they exceed the court's authority.

In this case the court also imposed the following crime related conditions as part of appendix F attached to the judgment and sentence:

5. You shall not possess, use or own firearms, ammunition or deadly weapons. Your community Corrections Officer shall determine what those deadly weapons are.

9. You shall take Antabuse per your Community Corrections Officer's direction, if so ordered.

CP 144-145.

That portion of part 5 that prohibits the defendant from possessing "deadly weapons" is not only unworkable but invalid. While the court does have authority to prohibit a defendant from possessing firearms, it does not have the authority to prohibit a defendant from possessing "deadly weapons."

Indeed, this term is so ambiguous as to give the defendant's probation officer blanket authority to prevent the defendant from possessing a steak knife, a bottle of bleach, a motor vehicle, or a razor blade just to name a few items that can qualify as "deadly weapons" depending upon how they are used. The trial court did not have authority to impose this condition. *See e.g., Combs, supra* at 954 ("Although the Sentencing Reform Act of 1981 contains a provision that does not allow a convicted felon to use or possess a firearm and/or ammunition, there is no such provision that allows the court to prohibit the use or possession of any other type of weapon. Accordingly, the court exceeded its authority when this term was included in the sentencing order.)

Finally the trial court also abused its discretion when it ordered that the defendant take antabuse at the direction of his community corrections. First, the trial court had the option to find that the defendant was chemically dependent and that this dependency "related to" the crimes he committed but the trial court declined to do so. This finding is included on page 2 of the judgment and sentence and is unchecked in this case. CP 129. Indeed, there was not evidence to indicate that alcohol had anything to do with the case at bar. Second, the term "antabuse" is a brand name for the prescription drug disulfiram. *See* <http://www.medicinenet.com/disulfiram-oral/article.htm>. Community Corrections Officers are not medical doctors, they did not have

the legal authority to prescribe this drug, and they do not have the medical knowledge necessary to determine whether this drug should or should not be used. The legislature specifically recognized this fact under Washington Deferred Prosecution statute found at RCW 10.05.150(7), wherein the legislature states the following:

A deferred prosecution program for alcoholism shall be for a two-year period and shall include, but not be limited to, the following requirements:

. . .

(7) The decision to include the use of prescribed drugs, including disulfiram, as a condition of treatment shall be reserved to the treating facility and the petitioner's physician;

RCW 10.05.150(7).

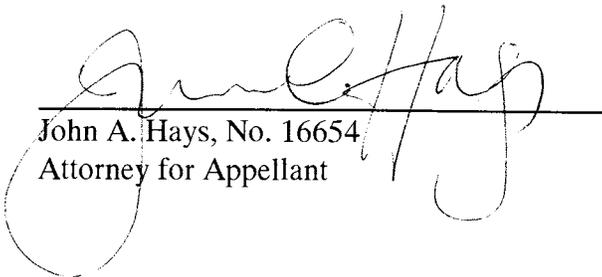
Thus, the trial court abused its discretion when it gave the community corrections officer authority to require the defendant to take antabuse.

CONCLUSION

The defendant is entitled to a new trial based upon trial counsel's failure to object to irrelevant, prejudicial evidence, and based upon the trial court's error in not granting a motion based upon juror misconduct. In the alternative, the trial court erred when it imposed a number of community custody conditions not authorized by law.

DATED this 20th day of July, 2007.

Respectfully submitted,



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Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION ARTICLE 1, § 21

The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases where the consent of the parties interested is given thereto.

WASHINGTON CONSTITUTION ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

UNITED STATES CONSTITUTION, SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**EVIDENCE RULE 401
DEFINITION OF "RELEVANT EVIDENCE"**

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

**RULE 402
RELEVANT EVIDENCE GENERALLY ADMISSIBLE;
IRRELEVANT EVIDENCE INADMISSIBLE**

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

RCW 9.94A.700

When a court sentences an offender to a term of total confinement in the custody of the department for any of the offenses specified in this section, the court shall also sentence the offender to a term of community placement as provided in this section. Except as provided in RCW 9.94A.501, the department shall supervise any sentence of community placement imposed under this section.

(1) The court shall order a one-year term of community placement for the following:

(a) A sex offense or a serious violent offense committed after July 1, 1988, but before July 1, 1990; or

(b) An offense committed on or after July 1, 1988, but before July 25, 1999, that is:

(i) Assault in the second degree;

(ii) Assault of a child in the second degree;

(iii) A crime against persons where it is determined in accordance

with RCW 9.94A.602 that the offender or an accomplice was armed with a deadly weapon at the time of commission; or

(iv) A felony offense under chapter 69.50 or 69.52 RCW not sentenced under RCW 9.94A.660.

(2) The court shall sentence the offender to a term of community placement of two years or up to the period of earned release awarded pursuant to RCW 9.94A.728, whichever is longer, for:

(a) An offense categorized as a sex offense committed on or after July 1, 1990, but before June 6, 1996, including those sex offenses also included in other offense categories;

(b) A serious violent offense other than a sex offense committed on or after July 1, 1990, but before July 1, 2000; or

(c) A vehicular homicide or vehicular assault committed on or after July 1, 1990, but before July 1, 2000.

(3) The community placement ordered under this section shall begin either upon completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned release. When the court sentences an offender to the statutory maximum sentence then the community placement portion of the sentence shall consist entirely of the community custody to which the offender may become eligible. Any period of community custody actually served shall be credited against the community placement portion of the sentence.

(4) Unless a condition is waived by the court, the terms of any community placement imposed under this section shall include the following conditions:

(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 determined 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.

(5) As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions:

(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.

(6) An offender convicted of a felony sex offense against a minor victim after June 6, 1996, shall comply with any terms and conditions of community placement imposed by the department relating to contact between the sex offender and a minor victim or a child of similar age or circumstance as a previous victim.

(7) Prior to or during community placement, upon recommendation of the department, the sentencing court may remove or modify any conditions of community placement so as not to be more restrictive.

RCW 9.94A.715

(1) When a court sentences a person to the custody of the department for a sex offense not sentenced under RCW 9.94A.712, a violent offense, any crime against persons under RCW 9.94A.411(2), or a felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 2000, the court

shall in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728 (1) and (2), whichever is longer. The community custody shall begin: (a) Upon completion of the term of confinement; (b) at such time as the offender is transferred to community custody in lieu of earned release in accordance with RCW 9.94A.728 (1) and (2); or (c) with regard to offenders sentenced under RCW 9.94A.660, upon failure to complete or administrative termination from the special drug offender sentencing alternative program. Except as provided in RCW 9.94A.501, the department shall supervise any sentence of community custody imposed under this section.

(2)(a) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the 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, and the department shall enforce such conditions pursuant to subsection (6) of this section.

(b) As part of any sentence that includes a term of community custody imposed under this subsection, the court shall also require the offender to comply with any conditions imposed by the department under RCW 9.94A.720. The department shall assess the offender's risk of reoffense and may establish and modify additional conditions of the offender's community custody based upon the risk to community safety. In addition, the department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.

(c) The department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court imposed conditions. The department shall notify the offender in writing of any such conditions or modifications. In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function.

(3) If an offender violates conditions imposed by the court or the department pursuant to this section during community custody, the department may transfer the offender to a more restrictive confinement status

and impose other available sanctions as provided in RCW 9.94A.737 and 9.94A.740.

(4) Except for terms of community custody under RCW 9.94A.670, the department shall discharge the offender from community custody on a date determined by the department, which the department may modify, based on risk and performance of the offender, within the range or at the end of the period of earned release, whichever is later.

(5) At any time prior to the completion or termination of a sex offender's term of community custody, if the court finds that public safety would be enhanced, the court may impose and enforce an order extending any or all of the conditions imposed pursuant to this section for a period up to the maximum allowable sentence for the crime as it is classified in chapter 9A.20 RCW, regardless of the expiration of the offender's term of community custody. If a violation of a condition extended under this subsection occurs after the expiration of the offender's term of community custody, it shall be deemed a violation of the sentence for the purposes of RCW 9.94A.631 and may be punishable as contempt of court as provided for in RCW 7.21.040. If the court extends a condition beyond the expiration of the term of community custody, the department is not responsible for supervision of the offender's compliance with the condition.

(6) Within the funds available for community custody, the department shall determine conditions and duration of community custody on the basis of risk to community safety, and shall supervise offenders during community custody on the basis of risk to community safety and conditions imposed by the court. The secretary shall adopt rules to implement the provisions of this subsection.

(7) By the close of the next business day after receiving notice of a condition imposed or modified by the department, an offender may request an administrative review under rules adopted by the department. The condition shall remain in effect unless the reviewing officer finds that it is not reasonably related to any of the following: (a) The crime of conviction; (b) the offender's risk of reoffending; or (c) the safety of the community.

RCW 9A.44.073
Rape of a Child in the First Degree

(1) A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.

(2) Rape of a child in the first degree is a class A felony.

RCW 9A.44.076
Child Molestation in the First Degree

(1) A person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

(2) Rape of a child in the second degree is a class A felony.

RCW 9A.44.083
Rape of a Child in the First Degree

(1) A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

(2) Child molestation in the first degree is a class A felony.

RCW 9A.44.086
Child Molestation in the Second Degree

(1) A person is guilty of child molestation in the second degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

(2) Child molestation in the second degree is a class B felony.

RCW 10.05.150
Alcoholism program requirements

A deferred prosecution program for alcoholism shall be for a two-year period and shall include, but not be limited to, the following requirements:

(1) Total abstinence from alcohol and all other nonprescribed mind-altering drugs;

(2) Participation in an intensive inpatient or intensive outpatient program in a state-approved alcoholism treatment program;

(3) Participation in a minimum of two meetings per week of an alcoholism self-help recovery support group, as determined by the assessing agency, for the duration of the treatment program;

(4) Participation in an alcoholism self-help recovery support group, as determined by the assessing agency, from the date of court approval of the plan to entry into intensive treatment;

(5) Not less than weekly approved outpatient counseling, group or individual, for a minimum of six months following the intensive phase of treatment;

(6) Not less than monthly outpatient contact, group or individual, for the remainder of the two-year deferred prosecution period;

(7) The decision to include the use of prescribed drugs, including disulfiram, as a condition of treatment shall be reserved to the treating facility and the petitioner's physician;

(8) All treatment within the purview of this section shall occur within or be approved by a state-approved alcoholism treatment program as described in chapter 70.96A RCW;

(9) Signature of the petitioner agreeing to the terms and conditions of the treatment program.

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 WINN ROBERT GRIFFEE,)
)
 Appellant,)

CLARK CO. NO: 06-1-00834-1
APPEAL NO: 35651-1-II

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) vs.
 COUNTY OF CLARK)

CATHY RUSSELL, being duly sworn on oath, states that on the 20TH day of JULY, 2007,
affiant deposited into the mails of the United States of America, a properly stamped envelope
directed to:

ARTHUR CURTIS
PROSECUTING ATTORNEY
1200 FRANKLIN ST.
VANCOUVER, WA 98668

WINN ROBERT GRIFFEE- #928505
STAFFORD CREEK CORR. CTR.
191 CONSTANTINE WAY
ABERDEEN, WA 98520

and that said envelope contained the following:

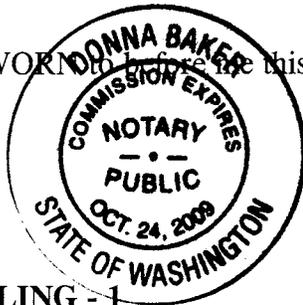
- 1. BRIEF OF APPELLANT
- 2. AFFIDAVIT OF MAILING

DATED this 20TH day of JULY, 2007.

Cathy Russell

CATHY RUSSELL

SUBSCRIBED AND SWORN to before me this 20th day of JULY, 2007.



John A. Hays

NOTARY PUBLIC in and for the
State of Washington,
Residing at: LONGVIEW/KELSO
Commission expires: 10-24-09

AFFIDAVIT OF MAILING - 1

John A. Hays
Attorney at Law
1402 Broadway
Longview, WA 98632
(360) 423-3084