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RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court properly exercised its discretion in admitting video evidence of the defendant's motive and intent.

2. Defense counsel herein was effective; his failure to object at certain times was blameless as the evidence was admissible and in any event such evidence harmonized with the defense's theory of the case.

3. The trial court had statutory authority to require the defendant to live more than 880 feet from school grounds.

RESPONSE TO ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The video evidence herein was not more unfairly prejudicial than it was probative.

2. The evidence referred to by the defense on appeal was entered without objection by the defense at trial and was not unfairly prejudicial; in fact, besides being admissible, it was consistent with the defense's theory of the case.

3. The change in the law referred to by the defense on appeal required the trial court to make it a condition of sentences under RCW 9.94A.712 that the defendant not live near schools. While that change happened after Field committed his crime and before sentencing, the court was empowered to

order the same condition of Field's sentence under the law as it existed when Field committed the crime. The court was just not required to do it. It did so by choice rather than out of obligation.

STATEMENT OF THE CASE

While fourteen-year-old L.C. of Vancouver, WA was in the care of her grand-uncle Terence Field and the two were alone in his house in Wahkiakum County, an intoxicated Field approached her as she used the computer in his bedroom, slid his hand down her back, and grabbed one of her buttocks. RP 38. When L.C. moved his hand away and told him to stop, he put his hand on her knee and moved it up to her crotch. Id. L.C. pushed his hand away again and, standing up and raising her voice, told Field to stop. RP 39-41. But Field just laughed and grabbed her breast. Id. L.C. pushed him away again and threatened to strike him if he tried again, to which Field responded that she would not do a thing like that to her uncle. Id. Then Field grabbed her and drew her to him, kissing her on the mouth while she struggled against him. Id. But L.C. managed to push Field out into the living room, where he stumbled to the couch while L.C. closed the door to the bedroom. Id. When she heard the intoxicated Field begin to snore, she crept through the living room to the exit. RP 44-45. Seeing his cell phone in the living room, she took it so she could call for a ride back home. Id. And recalling a cryptic comment Field earlier made about the phone, she viewed

two videos on it that proved to her shock to be videos Field took of himself masturbating while calling L.C.'s name. *Id.* After she got a ride back to her immediate family in Vancouver, she and her mother turned the video over to the police.

On the strength of this, a warrant issued for Field and he was soon placed into custody in Portland, Oregon. There he was interviewed by Dep. Gary Howell of the Wahkiakum County Sheriff's Office. After initially denying molesting L.C., he broke down and admitted that he was very drunk that night and "could have gone too far." RP 92-3.

Based on this information as it was elicited at trial, a jury found Terence Field guilty of attempted indecent liberties with forcible compulsion. CP 78. Field was sentenced under RCW 9.94A.712. CP 106.

ARGUMENT

ADMISSIBILITY OF VIDEO EVIDENCE

The trial court's determination in balancing the probative value of evidence against its prejudicial impact is reviewed for abuse of discretion. State v. Greathouse (2002) 113 Wash.App. 889, 56 P.3d 569, reconsideration denied, review denied 149 Wash.2d 1014, 69 P.3d 875.

Field never actually conceded, as implied by his brief, that if the events of the evening in question did in fact occur, they were not a misunderstanding. He never conceded that if those events occurred, then he

had the requisite intent to commit indecent liberties by forcible compulsion. Rather than make such concessions, he pled not guilty and therefore placed at issue every element of the crime charged. E.g., State v. Farley, 48 Wn.2d 11, 19, 290 P.2d 987 (1955), cert. denied, 352 US 858 (1956). The State could not anticipate a concession as to intent or identity and was therefore entitled to prove these things. Motive is relevant to such proof and Mr. Field's videos are evidence tending to prove motive, intent, and identity, as Field concedes in his brief. But even if his trial defense had conceded some element of the crime, doing so does not affect the admissibility of evidence tending to prove that element. Farley, supra.

Evidence of motive can be used to prove "the doing of the criminal act." State v. Roth, 75 Wn.App. 808, 820, 881 P.2d 268, citing McKormick on Evidence, sec. 190. McKormick notes,

Evidence of motive may be probative of the identity of the criminal or of malice or specific intent. This reasoning commonly is applied in cases in which a husband charged with murdering his wife had previously assaulted or threatened her, evincing not merely a general disposition toward violence, but a virulent hostility toward a specific individual. It should not apply when the 'motive' is so common that the reasoning that establishes relevance verges on ordinary propensity reasoning.

Id., footnotes omitted.

The same reasoning applies here, although the motive proved by the evidence in this case is not, as in McKormick's example, hatred. The videos that Field took of himself showed, not a "general disposition" towards child

molestation (which the State does not concede would be inadmissible), but a specific desire to have sex with one particular person. And that particular person is one who, under ordinary circumstances, one would not expect Field to feel sexual desire for. Thus, this is not a "common" motive under McKormick's analysis.

Since this is the state of the law, the trial court was well within its discretion to admit the relevant and probative evidence that Terence Field had intent and a particular motive to desire sexual contact with his grand-niece, the victim in this case. Furthermore, the court issued an instruction cautioning the jury against improper use of the video evidence. See the court's instruction #6 at CP 148. Juries are presumed to follow the court's instructions. State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).

INEFFECTIVE ASSISTANCE:

TESTIMONY NOT OBJECTED TO AS HEARSAY

Field argues by fiat that the victim's father, having just been informed by the victim that her great-uncle molested her, "was not" excited and therefore his statements to the victim's mother would not qualify under the excited utterance hearsay exception at ER 803(a)(2). Field does not refer to the part of the record at which it is revealed that this presumably unwelcome news was greeted with equanimity. Absent evidence of this, Field's argument on this subject lacks basis. (Similarly, the defense assumes without showing

that the victim was not excited when she made the other statements related by others.)

Furthermore, and even if the victim's father did possess the sangroid Field assumes he did, testimony that he told the victim's mother what the victim told him was admissible for another purpose. It shows why her mother made the nighttime rendezvous with the victim at which she received the cell phone containing the videos Field made of himself. This tracing of the phone's journey was relevant to show the jury a chain of custody for the video they eventually viewed. Hearsay is only inadmissible when it is admitted to prove the truth of the matter asserted. ER 801(c).

To prevail in an ineffective assistance of counsel claim, a defendant must show: “(1) defense counsel's representation was deficient; i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defense, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.” State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (applying the two-prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). A failure to prove either element defeats this claim. Strickland, 466 US at 700. “Competency of counsel is determined based upon the entire record below.” McFarland, 127 Wn.2d at 335. There is a strong presumption that the representation was not

deficient. Id. In addition, there is no ineffective assistance if “the actions of counsel complained of goes to the theory of the case or to trial tactics.” State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

Passing references to the reason why the victim's family and friends mobilized at her phone call do not constitute dispositive evidence that Field committed the acts he was accused of. The defense focused the jury effectively on the source of these statements, which was the victim herself. The defense on appeal concedes that Field's theory at trial was that everything the victim said was a lie from the very beginning; that she was lying to the court and had previously lied to every other witness in the case. If the defense had been able to discredit the victim during her exhaustive cross-examination, then the jury would not only have found a reasonable doubt as to what she said to the jury, but also as to what she told her family and friends, which would have been part of the same scheme. There is no tactical reason the defense should have objected to the admission of statements that harmonized with the defense's theory of the case and which stood or fell based on a single cross-examination that the defense pursued zealously.

Since the defense has failed to show that (a) hearsay objections would have succeeded; (b) there was no tactical reason to fail to make such objections even though the statements harmonized with the defense's theory of the case; and (c) that the error was not harmless when the source of all

these statements was available and thoroughly cross-examined; the defense's request for remand based upon these grounds should be denied.

TESTIMONY DEFENDANT WAS JAILED

The defense cites Warren v. Hart, 71 Wn.2d 512, 429 P.2d 873 (1967), for the proposition that to reveal that the defendant was arrested is the same thing as eliciting a police opinion on the guilt of the suspect. Warren v. Hart was a civil case involving a car accident. One party elicited testimony that no traffic citation was issued in the case, and relied on this information to show that no driving error had occurred. Id., 71 Wn.2d 514-15. The defense states that "the same principle applies in criminal cases." Brief, 23. There are several reasons it does not and at least one reason it is not "the same principle," but this court should take no notice of this assignment of error in any event.

As recently ruled in State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007), allegations that the State has offered opinion as to guilt are not allegations of "manifest error" unless an opinion as to guilt is directly expressed as such. Kirkman, 159 Wn.2d at 934. Therefore, they can only be raised on appeal if raised first in the trial court. "Failure to object deprives the trial court of this opportunity to prevent or cure the error. The decision not to object is often tactical. If raised on appeal only after losing at trial, a retrial may be required with substantial consequences." Id., 159 Wn.2d at 935. This

is particularly true where, as a trial tactic, the defense may have decided not to object to testimony that the defendant was in custody so that the jury might think of him as having been intimidated at the time of his confession.

Thus, absent "a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case," this court should not review this assignment of error. Id. The defense has already conceded that the heart of the case was the credibility, and therefore the cross-examination, of the victim. Therefore, whether Field was in or out of custody at the time of the interview at which he confessed cannot be considered to be a manifest constitutional question. Rather, it is a simple reiteration of what everyone in the jury already knew (and was cautioned at jury instruction #1 to disregard): that Field stood accused of a crime.

An accurate representation of factual events does not constitute an opinion of guilt or innocence in the first place. In State v. Velasquez, 67 Wn.2d 138, 406 P.2d 772 (1965), the defendant objected to tags on exhibits introduced in court on the grounds that those tags were marked with the defendant's name and address and therefore constituted an opinion that the defendant was guilty. First dryly noting, "Only by the most extreme construction could the tags be said to have a testimonial content," 67 Wn.2d at 143, the Supreme Court went on to hold any potential error harmless due to the minimal effect it would have on the jury. The similar objection in this case can hardly be considered "manifest error."

EX POST FACTO ISSUE

It is true that RCW 9.94A.712(6)(a)(ii) was not effective until the month after Field had committed his crime. That means the trial court was not required to prohibit Field from living in a community protection zone. But it does not mean that the court was prohibited from requiring Field not to live in a community protection zone.

The version of RCW 9.94A.712 in force as of the date of the crime provided, at (6)(a), that "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 and the board shall enforce such conditions..." The full text of the statute as it read on the date Field committed the offense, May 18, 2005, is attached hereto as Appendix A.

This statute permits the court to sentence a defendant to any crime-related, prevention-related, and community-safety-related conditions. As early as 1999, the court was permitted to impose such conditions at its discretion. *E.g.*, State v. Johnson, 97 Wn.App. 679, 683-4, 988 P.2d 460 (1999) (court's discretion to create conditions for first-time offenders as provided by statute, including RCW 9.94A.120). Crime-related prohibitions ruled permissible pursuant to the pre-July 2005 version of RCW 9.94A.120

include polygraph and plethysmograph testing. State v. Riles, 135 Wn.2d 326, 957 P.2d 655 (1998). The Riles court also upheld orders requiring no contact with minors and prohibiting the defendant from going to "places where children congregate."

A "community protection zone" as defined in RCW 9.94A.030(8) is "the area within eight hundred eighty feet of the facilities and grounds of a public or private school." Here, Field was convicted of attempting to molest a school-age minor while two younger minors were nearby and entrusted to his custody. The precedent of the Riles case would have permitted the trial court herein to order a far greater prohibition against Field's movements than it actually did: he could have been prohibited from going near any place where minors congregate, rather than merely being required not to live near schools.

It should be noted that Field only challenges the court's statutory authority to prohibit Field from living near schools. He raises no constitutional issue, nor does he argue that this prohibition is unrelated to "the circumstances of the offense, the offender's risk of reoffending, or the safety of the community," in the language of RCW 9.94A.712 (both as of May 2005 and in the modern version). And he does not raise the question whether the trial court knew it was voluntary rather than mandatory on the trial court's part to order him not to live near schools. Much less does he address whether the trial court would have done anything different under

different circumstances. None of these issues have been raised. This court will not address issues not raised. St. John Medical Center v. State ex rel DSHS, 110 Wn.App. 51, 38 P.3d 383 (2002) (at fn. 9); State v. Walden, 131 Wn.2d 469, 932 P.2d 1237 (1997) (fn. 2). The only question before this court is whether the trial court had the statutory authority to make it a condition of Field's sentence that Field should not live within 880 feet of schools, and the answer to that question is that the trial court had such authority.

CONCLUSION

Mr. Field interposes three obstacles between himself and the jury verdict against him for attempted indecent liberties by forcible compulsion, and one objection to the conditions of his judgment and sentence.

The first is the contention that his video of himself, introduced to show that he had the desire and intent to molest his grandniece, was more unfairly prejudicial than probative. But any prejudice was not unfair: it was perfectly legitimate for the State to prove intent in this way. Any evidence that a person has the intent to molest children is prejudicial, but the State is entitled to prove its case even if it makes the defendant look bad.

The second is that testimony that the victim called for help, and that her father told her mother of the call for help, was inadmissible and it was ineffective assistance of counsel for Field's attorney not to have objected to it. The illegality of the statements has not been proved, but rather taken as

read; in any event, there was a legitimate tactical reason for any failure to object and error was harmless in the light of the defense's theory of the case.

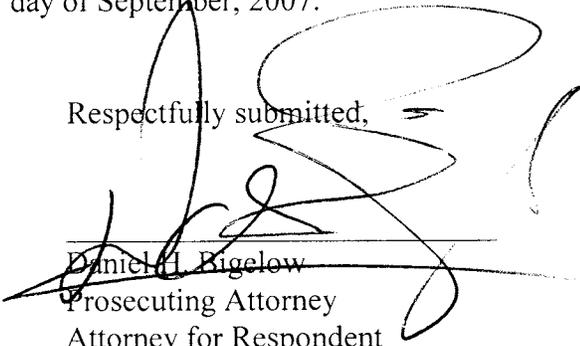
The third is that evidence a suspect was taken into custody is somehow equivalent to impermissible opinion evidence that a suspect is guilty. But this novel view need not be discussed since the objection was not made at the trial level as required.

As far as his sentence goes, the fact that the trial court was not required to prevent him from living near schools does not prove the trial court had no power to prevent him from living near schools.

For these reasons, the jury verdict and sentence of Terence Field should be affirmed.

DATED this 18th day of September, 2007.

Respectfully submitted,


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APPENDIX A

West's RCWA 9.94A.712__WEST'S REVISED CODE OF WASHINGTON
ANNOTATED _TITLE 9. CRIMES AND PUNISHMENTS _Current with
all 2004 legislation_

9.94A.712. Sentencing of nonpersistent offenders (*Effective until July 1, 2005*)_____

(1) An offender who is not a persistent offender shall be sentenced under this section if the offender:

____(a) Is convicted of:

____(i) Rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion;

____(ii) Any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, or burglary in the first degree; or

____(iii) An attempt to commit any crime listed in this subsection (1)(a); committed on or after September 1, 2001; or

____(b) Has a prior conviction for an offense listed in RCW 9.94A.030(32)(b), and is convicted of any sex offense which was committed after September 1, 2001.

____For purposes of this subsection (1)(b), failure to register is not a sex offense.

____(2) An offender convicted of rape of a child in the first or second degree or child molestation in the first degree who was seventeen years of age or younger at the time of the offense shall not be

sentenced under this section.

____(3) Upon a finding that the offender is subject to sentencing under this section, the court shall impose a sentence to a maximum term consisting of the statutory maximum sentence for the offense and a minimum term either within the standard sentence range for the offense, or outside the standard sentence range pursuant to *RCW 9.94A.535, if the offender is otherwise eligible for such a sentence.

____(4) A person sentenced under subsection (3) of this section shall serve the sentence in a facility or institution operated, or utilized under contract, by the state.

____(5) When a court sentences a person to the custody of the department under this section, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody under the supervision of the department and the authority of the board for any period of time the person is released from total confinement before the expiration of the maximum sentence.

____(6)

(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 and the board shall enforce such conditions pursuant to RCW 9.94A.713, 9.95.425, and 9.95.430.

___(b) As part of any sentence under this section, the court shall also require the offender to comply with any conditions imposed by the board under RCW 9.94A.713 and 9.95.420 through 9.95.435.

___ CREDIT(S) ___[2001 2nd sp.s. c 12 § 303.]__

<General Materials (GM) - References, Annotations, or Tables>

___HISTORICAL AND STATUTORY NOTES ___*Reviser's note: This RCW reference has been corrected to reflect the reorganization of chapter 9.94A RCW by 2001 c 10 § 6. ___West's RCWA 9.94A.712, WA ST 9.94A.712___Current with all 2004 legislation_Copr. © 2005 West, a Thomson business._END OF DOCUMENT

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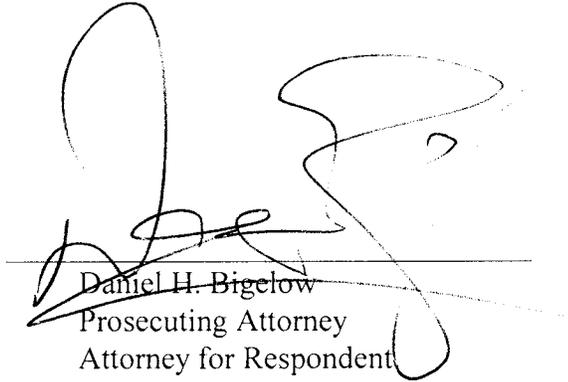
CERTIFICATE

I certify that I mailed a copy of the foregoing Respondent's Brief to the following addresses postage prepaid, on September 18th, 2007.

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