

NO. 42893-8

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

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL DEROUEN, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Beverly G. Grant

No. 10-1-01192-9

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. The trial court's admission of defendant's prior sexual conduct with young teenage girls was proper pursuant to ER 404(b).
2. The Supreme Court has declared has since declared RCW 10.58 unconstitutional, therefore it was error to admit the defendant's prior sexual conduct on that basis, however the error in this case was harmless.
3. The limiting instruction given regarding defendant's past sexual conduct with young teenage girls was proper.
4. The defendant's sentence, including community custody, exceeds the statutory maximum and should be remanded to the sentencing court for resentencing in accord with RCW 9.94A.701(9).
5. Since the defendant used his children to maintain contact with the victims, the court's imposition as a condition of his sentence that he not initiate contact with his minor children and that any contact be at the children's request was a lawful exercise of the trial court's sentencing authority.

B. STATEMENT OF THE CASE.

1. Procedure

On April 1, 2010 the defendant, Michael Derouen, was arraigned on two counts of rape of a child in the third degree in Pierce County Superior Court cause 10-1-01192-9. The State alleged the defendant had sexual intercourse with B.D., his young female teenage neighbor. CP 1-2

On September 23, 2010 an Omnibus Hearing was held and an Omnibus Order entered which included the notation there were “2 potential 10.58.090 witnesses.” CP 259. In addition to that notation, the defendant formally endorsed his defense as “general denial.” CP 258.

Six months later a status conference was held and another order entered. CP 260-61. In the order the parties noted a need for a “404(b)” and other possible suppression motions. This was the second time the State had provided notice of its intent to offer evidence of the defendant’s prior sexual conduct with two other young teenage girls.

The State amended the charges and re-arraigned the defendant on April 27, 2011. The State added two new counts of rape of a child in the third degree and altered the time of offense in the pre-existing two counts, B.D. remained the sole victim. This was the last amended information.

The case was called for trial on July 13, 2011. The court first heard the parties’ motions. RP 4. The first issue was whether the court

should require the State to produce both uncharged girls to testify in the State's offer of proof. Despite not living locally, the defendant asked the court to order they be present and give testimony. RP 5. After argument the court ordered that only J.S. appear and testify at the hearing, but not D.L.

In its pre-trial briefing, the State provided the trial court with significant and detailed information regarding the anticipated testimony of the girls.

The State had similarly provided defense with significant and detailed information as to the statements and substance of knowledge of both J.S. and D.L., in addition to the defense interviews of the girls.

The trial court ultimately ruled the testimony was relevant and admissible pursuant ER 404(b). RP 29.

In so doing, the Court stated,

I have read the prosecutor's brief and isolated step-by-step each factor in weighing or conducting the balance test dealing with the preponderance of evidence[.]

RP 21.

The Court continued,

When you go through those prongs it is clear to me that he was grooming her, or grooming these young women, and that there are enough similarities among all three of them to show that he had a motive, intent, and plan. They are so similar and consistent, you know, when you look at the

proximate age in which he started the grooming process, when you look at the approximate [age] in which he started the grooming process, when you look at all of them, ...the approaches...are very, very similar.

RP 21-22. Additionally, the Court noted "All of them; DL, BD, and JS were all groomed while they were babysitting for his kids and at his family residence." RP 23.

Lastly, the Court held,

And then when you get into the probative value outweighing the prejudicial effect, I just don't think that the prong -- or I believe that the prongs have been met under 404(b). So just under that alone, even without getting to the 10.58, the motion to suppress should be denied.

RP 23.

Trial continued and the jury heard from all three of the girls, including B.D., the only victim listed in the charges. Following closing, the court gave the jury a limiting instruction dictated in part and agreed in full by defense counsel regarding the use of the testimony of the non-charged girls. RP 731, CP 187.

On July 28, 2011, the jury returned verdicts of guilty as charged; the defendant was taken into custody and a sentencing set and pre-sentence report ordered. The report of Presentence Investigation, CP 266-286, was provided the court and, on November 11, 2011, the defendant was sentenced to 60 months on

each count, to be served concurrently. CP 287-301. In addition to the incarceration term of 60 months, the court also sentenced the defendant to 36 months of community custody. CP 94.

## 2. Facts

The victim in the charging document, B.D., [D.O.B. 3/27/89] was the defendant's neighbor. They had limited contact until B.D. was 14 years old at which time the defendant hired her to babysit his three children. RP 79. The defendant cultivated a peer-type relationship with B.D. and encouraged a relationship atypical of a then 14-15 year old neighbor and a married, father of three. He ultimately persuaded her through assorted promises and gifts to repeatedly engage in sexual acts with him during the period of June 1, 2004 through March 26, 2005, when B.D. was 15 years old. RP 92. The defendant knew B.D. was a virgin prior to engaging in sex with him. RP 86. B.D. testified she and the defendant first had sexual intercourse on June 27, 2004, just months after she turned 15. RP 93. She recalls the specific date because she wrote it in her personal calendar that day. RP 356-57. These acts and this time period form the basis for the charges and ultimate convictions.

During the course of the investigation, detectives learned the defendant had had similar encounters, or 'relationships,' with two other

young teenage girls, D.L.[D.O.B. 10/24/90] and J.S. [D.O.B. 10/11/89]. The investigation revealed that D.L.'s experience with the defendant, both in the development of the 'relationship' and in the sexual encounters were dramatically similar to those described by B.D. D.L. also looked after the defendant's three boys for a time and actually lived in defendant's home.

Their investigation further revealed the defendant developed yet another 'relationship' with J.S. J.S. was a reluctant girl who the defendant encountered through their mutual participation in the same Veterans' of Foreign Wars post. Like both B.D. and D.L., J.S. was young, had not previously engaged in sexual intercourse, and was distant from her family. Each of the girls was in their own way isolated; B.D. enjoyed living in a home with her parents, but did not get along well with her deaf sister and enjoyed living the style commonly referred to as "Goth." She did not make friends easily and when she did, she had a tendency to become intensely tied to them.

Similarly, D.L. had never engaged in sexual intercourse before meeting the defendant and was living in a turbulent home filled with poverty and damaged family relationships. She was friendly and outgoing, but yearned for a family. Like with B.D., the defendant cultivated a relationship with D.L. that also included promises of marriage and gifts. D.L. was flattered to receive the attention but more importantly,

the promise of a permanent family. She ultimately moved into the defendant's home under the auspices of looking after his three children while he and his wife were out. She engaged in repeated sexual acts with the defendant when she was 13-15 years old. It continued for nearly a year and a half. She is also the one who the jury and court heard in the phone conversation with the defendant taped by law enforcement during the investigation. CP 262.

The VFW held conferences out of town twice a year and usually encountered J.S. These conferences were well attended and well known to the members. The defendant, like J.S.'s family, was intensely involved in the local VFW post. RP 267. Over the years, the defendant held several leadership roles at the same post where J.S. was a member of the woman's auxiliary. During one conference in Eastern Washington, the defendant and J.S. had occasion to converse more than usual. J.S. testified she and the defendant engaged in sexual intercourse; she testified it was the only time it occurred. RP 322-23. Eventually, J.S. came to live in the defendant's home as an apparent babysitter. J.S. testified she was 16 or 17 when she and the defendant had intercourse. RP 103.

The detectives contacted the defendant in the course of the investigation. Two detectives, including Det. Quilio, were present at the time when the defendant was interviewed and adamantly denied ever

having sexual intercourse with any of the girls, including J.S. RP 647, 653. However, during his trial testimony, he admitted to engaging in sexual intercourse with J.S., but claimed it was her idea. He also told them J.S. managed to locate him in his hotel room during the VFW conference without any information or encouragement from him. RP 315-16. At trial, he testified the detectives were incorrect in their testimony he denied having intercourse with J.S. during their interview of him. RP 618. He was adamant he told them of his sexual encounter with J.S. *Id.*

The defendant offered a number of explanations for the promises the girls' claimed he made and the gifts they said he gave them. He also provided divergent accounts how both J.S. and D.L. came to live in his home. He did, however, acknowledge he had offered both D.L. and J.S. to live in his home and they accepted his invitation. RP 591 (J.S.), RP 603 (D.L.).

C. ARGUMENT.

I. THE TRIAL COURT'S ADMISSION OF THE DEFENDANT'S PRIOR SEXUAL CONDUCT WITH YOUNG TEENAGE GIRLS WAS PROPER UNDER ER 404(b).

Evidence of prior bad acts is admissible for a number of purposes, including to prove a common scheme or plan. The protocol for admission of any evidence pursuant to ER 404(b) is as follows:

- 1) The acts must be proved by a preponderance of the evidence,
- 2) The acts are admitted for the purpose of proving a common scheme of plan (or other stated purpose),
- 3) The acts are relevant to prove an element of the crime charged or to rebut a defense, and
- 4) The evidence is more probative than prejudicial.

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

The offering party, in this case the State, bears the burden of proof for admissibility. The State must prove these acts by a preponderance of the evidence. *Id.* While a trial court's interpretation of ER 404(b) is reviewed de novo, once the trial court correctly interprets the rule, the trial court's decision to admit or exclude the evidence is reviewed for an abuse of discretion. *State v. Fisher*, 165 Wn.2d 277, 2020 P.3d 937 (2009). In this case, the State identified the purpose of the evidence as common scheme or plan. There is significant law that allows such evidence for this purpose in sex cases. (*State v. Sexsmith*, 138 Wn. App. 497, 157 P.3d 901 (2007), *State v. Krause*, 82 Wn. App. 688, 919 P.2d 123 (1996), review denied, 131 Wn.2d 1007 (1997), *State v. Kennealy*, 151 Wn. App. 861, 214 P.3d 200 (2009)). However, the appellate court may, "consider bases mentioned by the trial court as well as other proper bases on which the trial court's admission of evidence may be sustained." *State v. Powell*,

126 Wn.2d 244, 259, 893 P.2d 615 (1995). The court may affirm on any ground adequately supported by the record, even if the trial court did not consider that ground. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

The trial court had several options in how to consider the necessary facts for ruling on admissibility. The court could have required both girls to be present and provide testimony, or the court could have relied on the State's offer proof. The trial court did both in this case.

When the subject matter of the prior bad acts is sexual and the defendant has not been convicted of those past acts, the trial court retains the discretion to hold an evidentiary hearing or rely on the offer of proof. *State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). Requiring an evidentiary hearing in any case where the defendant contests a prior bad act would serve no useful purpose and would undoubtedly cause unnecessary delay in the trial process. It would also likely degenerate into a court-supervised discovery process for the defendant. The defendant has the right to confront witnesses who testify against him at trial, but the court should be slow to allow the defendant to confront the witnesses twice. The final analysis lies with the trial court as it is in the better position to fairly decide the issue. There are times the trial court needs live testimony to meaningfully decide whether to allow evidence of prior

bad acts and in such cases an evidentiary hearing with testimony is needed. This decision, however, is left to the sound discretion of the trial court. *State v. Kilgore*, 147 Wn.2d 288, 294-95, 53 P.3d 974 (2002).

In this case, the court accepted the State's offer of proof of one of the witnesses, but required the other witness to testify. J.S. testified and was subject to cross examination, but not D.L. RP 90-97.

On appeal, if any substantial evidence in the record supports a finding that the prior act(s) occurred, the evidence has met the standard of proof. *State v. Roth*, 75 Wn. App. 816, 881 P.2d 268 (1994). In this case there is substantial evidence as to the defendant's acts with both D.L. and J.S. Additionally, the defendant testified at trial and admitted to one act of intercourse with J.S. He impliedly did the same with D.L. where he acknowledged a sexual relationship with her during their taped phone conversation. CP 262.

D.L.: And that we kissed and touched each other. And I just was asking were you even in love with me, did you even feel...

Def: I still am. (pause.) I still am. There's not a day that does not go by that I don't think about you, okay. (pause). ...I guess it really hurts to hear that you're getting married. That just like threw me for a loop.

...  
D.L.: Even thought [sic] I was underage?

Def: (Laugh)

D.L.: That didn't bother you?

Def: ...age is number, okay. I look at your mentality, I

looked at what made me happy[,] what made you  
happy. ...

....

D.L.: ... You know that you were my first.

Def: Right, I understand that.

....

CP 91.

The acts which the State sought to admit were ultimately established by the defendant himself, thereby undermining his claim of unfair prejudice.

Next, the State explained it sought to admit the evidence as evidence of a common scheme or plan. RP 20, 25, 25, CP 61-80.

However, as stated earlier, the evidence may be admissible for more than one purpose.

In *DeVincentis* the defendant created a “safe channel” or environment that allowed an apparent safe and isolated environment by gaining a position of trust with each of his underage victims. He created an atmosphere where his deviant behavior was well masked by the atmosphere he created, specifically regarding his underage victims.

In the present matter, the defendant took precisely the same tactic. He befriended young girls and eventually brought them into his home. His behavior also served to isolate them from their families, while simultaneously cultivating an environment where they looked to him for

company, support and guidance. His position substantially facilitated his ability to engage in sexual relationships with the girls. Furthermore, the sexual acts were made even easier as a result of the girls frequently being in his home under a legitimate guise of caring for the children. Having the girls in the home made them even more available to him for repeated sexual encounters. The defendant's actions in this case mirror those of *DeVincentis*, and unfortunately so does the outcome, i.e., the older male adult engaged in unlawful sexual conduct with young females he brought into his home.

In *State v. Griswold*, 98 Wn. App. 817, 991 P.2d 657 (2000) the defendant gained the trust of the children and then used the game, "truth or dare," to manipulate them into doing acts they likely would not have otherwise done. In the present matter, the defendant cultivated a trust relationship in that he provided shelter, support, comfort, and an interested ear to listen to their problems. The girls ultimately felt unusually comfortable with him as opposed to say, any other married adult male neighbor.

Both *DeVincentes* and *Griswold* cultivated trust relationships with underage victims and used that relationship to engage in sexual contact with their victims. Here, like *DeVincentes* and *Griswold*, the defendant used the position of trust he had created to make the girls comfortable

spending significant time in his home and ultimately, to engage in sexual intercourse with him.

There are additional reasons why the stated purpose of common scheme or plan allows the evidence to be admitted. The defendant steadfastly endorsed general denial. The defense of general denial puts every element at issue, including the existence of a committed crime. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). “When the very doing of the act charged is still to be proved, one of the facts which may be introduced into evidence is the person’s design or plan to do it.” *Id.*, 853.

Evidence of defendant’s bad acts may also be admissible to show motive. For purposes of ER 404(b), motive “goes beyond gain and can demonstrate an impulse, desire, or any other moving power which causes an individual to act.” *State v. Baker*, 162 Wn. App. 468, 473-74, 259 P.3d 270, *review denied*, 173 Wn.2d 1004 (2011). The evidence provided by D.L. and J.S. clearly assisted the jury with evaluating the defendant’s “design,” “plan,” and/or “motive,” when assessing his behavior, statements, and actions related to B.D.

When there is no physical or similar objective evidence, credibility is crucial to proving a sex crime. Therefore, where in this case, “...every element of the offense is at issue, credibility is central to the outcome of

the case and supports the admission of common scheme or plan evidence.” *State v. Sexsmith*, 138 Wn. App. 497, 506, 157 P.3d 901 (2007). Here the evidence served to assist the jury in determining credibility, which in turn assisted with the ability to discern whether the alleged crime had been committed and if so, by the defendant and at the time alleged.

The argument and case law outlined above also makes the case for the relevance of the evidence, the third prong of the admissibility test. The defendant challenged every element of the crime, and therefore the State was obligated to prove each element beyond a reasonable doubt. The act of unlawful intercourse, the identity of the victim, the assailant, and the date of occurrence are clearly central to what the State must prove beyond a reasonable doubt. The trial court evaluated and determined the evidence to be admissible under the proper court rule. It was also clearly relevant to the essential elements of this case and to rebut his defense. This prong of the test was also successfully met by the State.

Lastly, the evidence provided by D.L. and J.S. was more probative than prejudicial. *State v. Kraus*, 82 Wn. App. 688, 919 P.2d 123 (1996), *review denied*, 131 Wn.2d 107 (1997), succinctly delineates the test: “[T]he probative value outweighs the prejudice where: 1) the evidence is highly probative because it tends to show a common design or plan [or motive], 2) the need for evidence is great given the nature of the

allegations [and defense], and 3) the trial court gives the appropriate limiting instruction to the jury.” *Id.* As will be discussed below, the Court properly instructed the jury regarding the evidence offered by D.L. and J.S.

Based upon the facts of this case and the applicable law, the Court properly allowed the testimony of both girls pursuant to ER 404(b). The trial court may be affirmed on any ground adequately supported by the record, even if the trial court did not consider that specific ground. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004). While specific words or phrases are preferred, the reviewing court evaluates the record to determine admissibility. It would be contrary to law and logic for the trial court to find that the sex offense occurred, but not find the evidence admissible under the facts and defenses of this case. Absent the trial court finding either the evidence is not relevant to an essential element or defense, or that it is unduly prejudicial, the reviewing court stands in the position of being able to uphold the trial court's ultimate and proper ruling. In this case, such a ruling includes the admissibility of the testimony of both girls.

2. SINCE THE DEFENDANT'S TRIAL, THE SUPREME COURT HAS DECLARED RCW 10.58 UNCONSTITUTIONAL, THEREFORE IT WAS ERROR TO ADMIT DEFENDANT'S PRIOR SEXUAL CONDUCT ON THAT BASIS, HOWEVER IN THIS CASE, THE ERROR WAS HARMLESS.

In *State v. Gresham*, \_\_\_\_\_ Wn.2d \_\_\_\_\_ (2012), the Washington State Supreme Court concluded the admission of a defendant's prior sexual conduct under RCW 10.58.090 is error. The Court concluded that evidence under the statute is inadmissible because the statute was not subjected to the Courts rule-making authority of the Court. The Court therefore held the statute was unconstitutional and retroactive.

As a result of the holding in *Gresham*, the State agrees and concedes Derouen's past sexual conduct with minors was not admissible under the statute. However, *Gresham* only addresses evidence admitted under the statute, it does not address evidence admitted on other grounds. In the present case, the defendant's past conduct was admitted pursuant to ER 404(b) and therefore was appropriately admitted. The trial court's grounds for admission as it relates to the statute is harmless given the admissibility of the evidence under an alternate ground, which has already been discussed.

3. THE LIMITING INSTRUCTION GIVEN REGARDING DEFENDANT'S PAST SEXUAL CONDUCT WITH YOUNG TEENAGE GIRLS WAS PROPER.

- a. Any infirmity in the limiting instruction given regarding defendant's past sexual conduct with young teenage girls is overcome by invited error.

A defendant cannot rely on a representation or request made in the trial court and then argue it error on appeal. When error is invited by a criminal defendant it is not subject to appellate review. *State v. Alger*, 31 Wn. App. 244, 640 P.2d 44 (1982); *State v. Donohoe*, 39 Wn. App. 778, 695 P.2d 150 (185). Under the doctrine of invited error, a criminal defendant may not set up error and then complain of it on appeal. *In re Pers. Restraint of Thompson*, 141 Wn.2d 712, 10 P.3d 380 (2000).

In this case the State suggested to the trial court that a limiting instruction be given and provided a proposed instruction. RP 726, CP 263-265. Defense counsel reviewed the State's proposed instruction and agreed in general. However he added language to the instruction and in fact helped the Court's assistant in its preparation. RP 728-730. He concurred with the giving of the instruction and was given the opportunity to draft the language as he saw fit and did just that. It was his version that was ultimately submitted to the jury following argument, but before deliberation. Understandably defense counsel did not object to the giving

of the instruction. He concluded the discussion on the instruction by stating, “[the limiting instruction] is fine.” RP 730.

Given the origin of the final limiting instruction which the jury heard, the doctrine of invited error applies and precludes the defendant from now arguing error.

- b. Any infirmity in the limiting instruction given regarding defendant’s past sexual conduct with young teenage girls was harmless in this case.

An “error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

The defendant assigns error to the limiting instruction given in this case. However, as addressed above, defense counsel himself controlled the language given the jury.

A trial court’s jury instructions are reviewed under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; (3) when read as a whole, properly inform the trier of fact of the applicable law. *State v. Fernandez-Medina*, 94 Wn. App. 263, 266, 971 P.2d 531, *review granted*, 137 Wn.2d

1032, 980 P.2d 1285 (1999), citing *Herring v. Department of Social and Health Servs.*, 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996).

A party is given the opportunity to object to the Court's proposed instructions and to provide a reason or basis for the objection. CrR 6.15(c). The purpose of the court rule is to afford the trial court an opportunity to be advised of any potential error and the chance to correct an error, if any. *State v. Colwash*, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert the court to his position regarding a particular instruction before the instruction given be considered on appeal. *State v. Rahier*, 37 Wn. App 571, 575, 681 P.2d 1299(1984). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. *State v. Harris*, 62 Wn.2d 858, 872-73, 385 P.2d 18 (1963).

Given the defense proposed the language of the instruction, he is precluded from arguing it is error. Therefore the instruction is not subject to appellate review. Furthermore, there is no reasonable probability of a different verdict in this case. Defendant's argument must fail.

4. THE DEFENDANT'S SENTENCE IS IMPROPER IN THAT THE AMOUNT OF TIME THE TRIAL COURT SENTENCED DEFENDANT IN BOTH INCARCERATION AND COMMUNITY CUSTODY EXCEED THE STATUTORY MAXIMUM.

a. The defendant's sentence should be remanded to the trial court for resentencing in accord with RCW 9.94A.701(9).

A sentence may not exceed the statutory maximum of the crime for which a defendant is convicted. RCW 9.94A.505(5), RCW 9A.20. The defendant was convicted of four counts of rape of a child in the third degree, a Class C felony. By law, the maximum allowed sentence is five or 60 months for each count and absent a departure upward, shall be ordered served concurrently. RCW 9.94A.589.

RCW 9.94A.505(5) provides that with exceptions not applicable here, "a court may not impose a sentence providing for a term of confinement or ...community custody...which exceeds the statutory maximum of the provided crime." *State v. Zavala-Reynoso*, 127 Wn. App. 119, 124, 110 P.3d 827 (2005).

Previously, a court could impose both incarceration time and community custody that technically, on the judgment and sentence, exceeded the statutory maximum *provided* the trial court included a notation known as a "*Sloan* notation." *State v. Sloan*, 121 Wn. App. 220,

224, 87 P.3d 1214 (2004). *Sloan* allowed the sentencing court to instruct the Department of Corrections to fix a release date not in excess of the statutory maximum and with consideration for the defendant's earned early release or "good time." *Id.* If, however, the petitioner did not receive any earned good time, his total sentence could exceed the statutory maximum. However, the question as to the appropriateness of a *Sloan* notation has been answered by the legislature's amendment to the applicable statute, RCW 9.94A.701. The statute now provides the sentencing court must fix the specific amount of both incarceration and community custody time at the time of sentencing. Because that was not done in this case, the State concedes it carries the risk of an unlawful sentence and should be remanded to the trial court for resentencing in accord with the applicable statute.

5. GIVEN THE DEFENDANT USED HIS CHILDREN IN CONJUNCTION WITH HIS CONTACT WITH ALL THREE GIRLS, THE COURT'S IMPOSITION AS A CONDITION OF HIS SENTENCE THAT HE HAVE CONTACT WITH HIS MINOR CHILDREN ONLY IF IT IS AT THE CHILDREN'S REQUEST WAS A LAWFUL EXERCISE OF DISCRETION.

- a. To eliminate the court's order regarding contact with his children, including while in custody, would serve to order the children to have contact with the defendant.

A sentencing court may prohibit an offender from having contact with specified persons or a specified class of individuals for a period not to exceed the maximum allowable for the crime. The order prohibiting contact must relate directly to the circumstances of the crime for which the defendant has been convicted. RCW 9.94A.030(11).

In the present case the Court provided that the defendant could have contact with his three sons if the sons initiated the contact. Presuming the boys wish to have contact with their father, there is no court imposed impediment to having contact. If one or more of the boys wishes to have contact they need only inform their mother or other adult to began the process to arrange contact.

If, on the other hand, if one or more of the boys does not wish to have contact, he cannot be compelled to either write or visit his father in prison if he does not wish.

The Court is specifically granted the authority to limit a defendant's access to an individual or a group of individuals if directly related to the circumstances of the conviction. *Id.* The imposition of crime-related prohibitions is generally reviewed for abuse of discretion. *State v. Armendariz*, 160 Wn.2d 106, 156 P.3d 201 (2007) *citing State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001). A crime-related prohibition is "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." *State v. Armendariz*, 160 Wn.2d 106, 111-12.

RCW 9.94A.505(8) also provides a court may impose and enforce crime-related prohibitions and affirmative conditions as provided [in the SRA.]. This additional statutory citation further supports the legislative intent that sentencing courts be granted authority to tailor conditions as dictated by the facts and circumstances on a case by case basis.

In the present case the trial court heard from three separate young women, J.S., D.L. and the victim B.D. who each said the defendant asked and arranged for them to look after his children. Each of them told the jury that they either lived in the defendant's home with the defendant and his children, or stayed at the home for prolonged periods as the boys' babysitter. These representations were essentially affirmed by the defendant.

D.L. gave specific and disturbing details as to how the defendant would arrange sexual encounters with her inside the home while he listened to be sure his boys played outside. RP 359.

Also, it is undisputed that J.S. lived in the defendant's home also to assist with looking after the boys. RP 300.

Lastly, it is also undisputed the defendant arranged his contact with B.D., his neighbor, for the purposes of securing her to babysit his children at his home. RP 619.

It is not coincidental that the boys were used in arranging contact with each of the young girls. They were a lure and provided an apparent legitimate reason for the girls to be in the defendant's home for long periods of time. The boys were the defendant's unwitting guise for arranging extended contact with his targeted victims. Based upon the facts that were elicited at trial, and the applicable statutes, it is evident the trial court had both the authority and the factual support to order the condition.

- b. The court's order regarding the defendant's contact with his children does not operate to preclude contact in the manner normally contemplated by a 'no contact order.' The court's order, as drafted, allows contact provide the boys wish to initiate the contact.

The sentencing court did not order the defendant to have no contact with his sons. Instead the Court stated in two separate places on the judgment and sentence the following:

No contact with minors except for the defendant's sons so long as the sons request the contact.

CP 93, 95, 100. [Emphasis in original]. The court entered a No Contact Order at sentencing for the victim B.D. and similarly noted the prohibition with B.D. in the judgment and sentence. CP 93, 95, 100. The court did, however, give the children the right to initiate or control whether or not they had contact with the defendant. *Id.*

While a sentencing court has the authority to issue prohibition against contact with specific persons or a specific class of individuals, the statute also allows the sentencing court to proscribe "crime-related prohibitions" that relate directly to the circumstances of the case. The Court did not order or impose the traditional 'no contact order' wherein any and all contact, direct or indirect, is prohibited. The Court clearly provided merely a requisite before contact could occur between the defendant and one or all of his sons. Simply stated, the boys must either

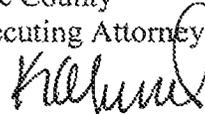
initiate or essentially request the contact. Clearly contact is possible provided the boys wish it. The Court's order is clear and directly related to the facts of the case. More importantly, the order is unequivocally *not* a no contact order. As a result, the condition imposed by the sentencing court is lawful and should not be disturbed.

D. CONCLUSION.

The trial court's admission of defendant's prior sexual conduct was proper under ER 404(b). Any reference to RCW 10.58 is harmless. The limiting instruction given was proper and alternatively challenges barred by invited error. The court had the proper authority to impose crime-related prohibitions. However, the court should remand for sentencing in accord with RCW 9.94A.701(9).

DATED: October 1, 2012

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

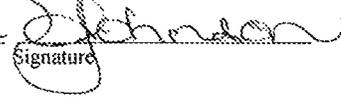


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KAWYNE LUND  
Deputy Prosecuting Attorney  
WSB # 19614

Certificate of Service:

The undersigned certifies that on this day she delivered by <sup>file</sup>~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10/1/12   
Date Signature

# PIERCE COUNTY PROSECUTOR

**October 01, 2012 - 11:54 AM**

## Transmittal Letter

Document Uploaded: 428938-Respondent's Brief.pdf

Case Name: State v. Michael Derouen

Court of Appeals Case Number: 42893-8

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- Personal Restraint Petition (PRP)
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