

NO. 44194-2-II

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

STATE OF WASHINGTON, RESPONDENT

v.

DONALD JOHNSON, APPELLANT

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

No. 12-1-01235-2

Response Brief

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

1. When viewed in the light most favorable to the State, was the evidence sufficient for a rational trier of fact to find Defendant guilty of criminal trespass beyond a reasonable doubt?

2. Did the trial court properly impose community custody conditions requiring Defendant to submit to polygraph testing and prohibiting him from contacting physically or mentally vulnerable individuals?

3. Did the trial court exceed its statutory authority when it imposed conditions 24 and 25 on Defendant's community custody and limited medications to those prescribed by a licensed physician?

4. Should an order be entered to amend the terms of confinement for Defendant's voyeurism convictions to comply with RCW 9.94A.701(9)?

B. STATEMENT OF THE CASE.

1. Procedure

On April 9, 2012, the State charged Donald Johnson, hereinafter referred to as "Defendant," with one count of voyeurism and one count of criminal trespass in the first degree. CP 1-2. Charges were subsequently amended to include one additional count of voyeurism. CP 28-29.

On May 29, 2012, the court granted Defendant's motion to proceed pro se and accepted his waiver of a jury trial. RP 24. Defendant's bench trial began on October 8, 2012, and he was found guilty as charged. RP 100.

The court imposed a sentence of 57 months in confinement and 36 months of community custody, with 224 days credit for time served. CP 116-133. Defendant was also sentenced to the standard mandatory legal financial obligations, no contact with the victims, psychosexual evaluation upon release, and follow up treatment. CP 116-133; 11/19/12 RP 14.

Defendant timely filed a Notice of Appeal on November 16, 2012. CP 141.

2. Facts

On April 6, 2012, S.V., who was 11 years old at the time, saw Defendant watching her shower through her bathroom window.¹ RP 57-58. Scared, S.V. told her babysitter, Julie Stanley, what happened. RP 58. Ms. Stanley told S.V. to stay inside and called the police. RP 58. A couple minutes later when S.V. was rinsing off in the shower, S.V. saw Defendant at the window again trying to pry it open. RP 58, 60. When

¹ S.V. was the victim in this case, and a minor at the time of both the crime and trial. For purposes of anonymity, the State will refer to S.V. by her initials. CP 56.

S.V. screamed, Ms. Stanley ran over and saw Defendant trying to pull the window open. RP 47-50. Some point after S.V. got out of the shower, Defendant said "I love you" and asked everyone to come out of the house. RP 62. Defendant also tried to enter the house through the door, but could not because it was locked. RP 47. Defendant then went to the unit next door. RP 47-48.

Marti Melvin, who lived in the unit next door, was home with her children that day when Defendant knocked on her door. RP 70-71. Melvin believed it was her landlord and said "open the door," thereby trying to grant her landlord permission to open the door. RP 71-74. Defendant opened it instead. RP 71-74. Ms. Melvin did not know Defendant or intend to let him in. RP 76.

At the doorway, Defendant asked Ms. Melvin about S.V. and another girl, but she did not know what he was talking about. RP 72. Defendant then said, "I'm just going to come in," and entered the apartment. RP 74. Ms. Melvin never invited Defendant to enter, and impliedly objected by standing up as he entered. RP 73-74. Defendant walked through Ms. Melvin's apartment opening cupboards, and looking through doors and closets. RP 75. In an effort to get Defendant to leave, Ms. Melvin opened a closet door and said, "[s]ee, there's nobody in here." RP 75.

At some point, Ms. Melvin received a call from Ms. Stanley who told her about Defendant. RP 75. Ms. Melvin asked Defendant, "[a]re you

serious? You were just looking in on an 11 year old girl in the shower?" to which Defendant replied, "[s]he looked like she was 21." RP 75.

Ms. Stanley followed Defendant into Ms. Melvin's apartment. RP 49. Ms. Melvin told Ms. Stanley she did not know Defendant or why he was in her house. RP 49-51. Ms. Stanley also heard Ms. Melvin yelling, "[g]et out of my house." RP 50. Defendant did not immediately leave the apartment, he continued to look through the house until Ms. Melvi and Ms. Stanley "weeded him out the door." RP 51, 75. After they were able to get Defendant out of the apartment, he lingered around the complex for about an hour. RP 50-51.

Officer Gildehaus of the Lakewood Police Department responded to the incident. RP 65-66. He found Defendant about a block away from the apartment complex. RP 66. Defendant told Officer Gildehaus that he was at the apartment complex trying to talk to a girl. RP 67.

Officer Henson of the Lakewood City Police Department contacted witnesses at the scene. RP 29, 35. Among those witnesses was Erica Sopak who was caring for S.V. RP 41-43. Ms. Sopak saw Defendant outside of the complex when she returned to the apartment. RP 41-43. Officer Henson eventually contacted Defendant, who was immediately identified by Ms. Sopak and Ms. Stanley. RP 38. Defendant was arrested. RP 39.

C. ARGUMENT.

1. THE EVIDENCE WAS SUFFICIENT TO CONVICT
DEFENDANT OF CRIMINAL TRESPASS IN THE
FIRST DEGREE.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v. Camarillo*, 115 Wn.2d 60, 794 P.2d 850 (1990). The applicable standard of review is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the appellant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

“After a bench trial,” an appellate court “determine[s] whether substantial evidence supports the trial court’s findings of fact, and in turn, whether the findings support the conclusions of law.” *State v. Stevenson*, 128 Wn.2d 179, 114 P.3d 699 (2005). “When findings of fact are unchallenged, they are verities on appeal.” *State v. Rogers*, 146 Wn.2d 55, 61, 43 P.3d 1 (2002)(citing *City of Seattle v. Muldrew*, 69 Wn.2d 877, 878, 420 P.2d 702(1966)). “Notwithstanding the absence of a challenge to findings of fact,” however, “when the sufficiency of the evidence is challenged the appellate court must still determine whether the unchallenged findings of fact support the trial court’s conclusions of law.” *Id.* (citing *State v. Aitken*, 79 Wn. App. 890, 905 P.2d 1235 (1995)). In fact, in a challenge to the sufficiency of the evidence following a bench trial, when findings of fact are not challenged, “review is limited to whether the findings of fact support the trial judge’s conclusions of law.” *State v. Munson*, 120 Wn. App. 103, 83 P.3d 1057 (2004).

A person is guilty of criminal trespass in the first degree if he or she knowingly enters or remains unlawfully in a building. RCW 9A.52.070. Here, the State needed to prove the following elements:

1. That on or about April 6, 2012, the Defendant knowingly entered or remained in a building;
2. That the Defendant knew that the entry or remaining was unlawful; and
3. That this act occurred in the State of Washington.

RCW 9A.52.070

Defendant challenges part of the fifth finding of fact, that he was not invited into the apartment. *See* Brief of Appellant at 9-10. This claim fails because this finding of fact was supported by substantial evidence in the record that Ms. Melvin never wanted or invited Defendant into her apartment.

Here, the court made the following finding of fact: "Melvin did not know the defendant, and had not invited him into her residence." CP 108. This finding is clearly supported by the record which shows that Defendant was not allowed to enter Ms. Melvin's apartment. Ms. Melvin said "open the door" because she thought it was her landlord. RP 71-74, 76. Therefore, she only granted license to her landlord to enter, but not to Defendant. However, she quickly realized it was someone she had never met. Ms. Melvin testified that "I don't make a habit of inviting people I

don't know in my apartment. The manager comes over for coffee every morning, and I believe that's who I thought it was." RP 76. Ms. Melvin never allowed Defendant to enter or look through her apartment, Defendant simply began looking through the house uninvited.

Ms. Melvin also told Defendant to leave and tried to get him out by showing him that the person he was looking for was not there. RP 50. Despite her efforts, Defendant continued to look through Ms. Melvin's apartment, going through the rooms and cupboards. RP 74-75. Ms. Melvin told Defendant, "[g]et out of my house. What are you doing? Get out of my house." RP 50. While Ms. Melvin initially testified she did not tell Defendant to leave, she later clarified that, "I don't remember telling [Defendant] to leave, and I don't remember telling if [my son] told you to leave or not." RP 79. She also mentioned numerous times that she had forgotten details of that night because it had been so long. RP 72, 75-76, 79. The court found that Defendant was asked to leave.

I think it is clear that you entered and remained in the building and that you knew that it was unlawful to remain in the building... Now, the witness did say that she invited you in but that was because she thought you were someone else... But the overall impression is that you entered and attempted to remain on the premises even after she asked you to leave.

RP 86.

In viewing the evidence in the light most favorable to the State, there is substantial evidence in the record to support the court's finding

that Defendant was not invited into Ms. Melvin's apartment. The record shows that Defendant was never allowed to enter the apartment and refused to leave when asked. Therefore, the findings of fact properly supported the court's conclusion that Defendant knew that the entry into Ms. Melvin's apartment was unlawful. As the evidence was sufficient to find Defendant guilty of first degree criminal trespass, this Court should affirm Defendant's conviction.

2. THE TRIAL COURT PROPERLY IMPOSED
COMMUNITY CUSTODY CONDITIONS REQUIRING
DEFENDANT TO SUBMIT TO POLYGRAPH TESTING
AND PROHIBITING CONTACT WITH PHYSICALLY
OR MENTALLY VULNERABLE INDIVIDUALS.

When sentencing a defendant to community custody, RCW 9.94A.703 provides guidance for what restrictions the court may include as part of community custody. Elements mandatory for the court to include in the order of community custody appear in RCW 9.94A.703(1). RCW 9.94A.703(2) lists conditions that the court may choose to waive but shall otherwise impose. Further discretionary elements appear in RCW 9.94A.703(3).

The authority for the court to sentence a convicted person to community custody comes from RCW 9.94A.703. Amongst the mandatory conditions, the court will “[r]equire the offender to comply

with any conditions imposed by the department under RCW 9.94A.704.”
RCW 9.94A.703(1)(b).

The Department of Corrections “may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.” RCW 9.94A.704(4). The court “shall order an offender” to act in accordance with the conditions of RCW 9.94A.703(2) unless the court chooses to waive them. “As part of any term of community custody, the court may order an offender to: ... (c) Participate in crime-related treatment or counseling; (d) 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[.]” RCW 9.94A.703(3). RCW 9.94A.704(4) grants the department the authority to make an offender participate in a rehabilitative program. Specifically, “[t]he department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.” RCW 9.94A.704(4). Although RCW 9.94A.030 does not define “rehabilitative program,” this Court has previously considered substance abuse programs as viable rehabilitative programs. *See State v. Motter*, 139 Wn. App. 797, 162 P.3d 1190 (2007).

The court ordered conditions must address an issue that contributed to the offense. *State v. Jones*, 118 Wn. App. 199, 207-208, 76 P.3d 258 (2003). However, 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). The trial court may also rely on information that is “admitted” or “acknowledged” “at the time of sentencing” in imposing a sentence. RCW 9.94A.530(2).

When a court imposes a sentence that falls outside of its statutory authority, defendant can raise the issue for the first time on appeal. *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003) (citing *State v. Julian*, 102 Wn. App. 296, 304, 9 P.3d 831 (2000)). The Washington Supreme Court has generally reviewed matters of sentencing conditions for abuse of discretion. *In re Rainey*, 168 Wn.2d 367, 374, 229 P.3d 686 (2010).

In the instant case, defendant challenges five conditions of his community custody: conditions 13, 16, 18, 24, and 26. See Brief of Appellant at 13.

- a. The Court properly imposed community custody condition 18 requiring Defendant to submit to polygraph testing.

Here, the trial court imposed community custody condition 18 requiring that Defendant "submit to polygraph and/or plethysmograph testing upon direction of your Community Correction Officer and/or therapist at your expense." CP 146-147.

The court has authority to impose polygraph testing for the purpose of monitoring compliance with other conditions of community placement.

See State v. Riles, 135 Wn.2d 326, 350, 957 P.2d 655 (1998), *overruled in part on other grounds by State v. Valencia*, 169 Wn.2d 782, 239 (2010). In *Riles*, the Supreme Court explicitly held that trial courts have the authority to impose polygraph monitoring conditions and further acknowledged the validity of polygraphs as an investigative tool. *Id.* The Supreme Court has upheld polygraph testing for sex offenders, referring to it as "an important asset in monitoring the sex offender client in the community." *Id.* at 342.

In the instant case, the community custody condition requiring polygraph testing was appropriate for Defendant as a method of monitoring his compliance as a registered sex offender. As Defendant was found guilty of committing voyeurism on a child in the shower, he was required to register as a sex offender and undergo psychosexual evaluation and follow up treatment. CP 122. Community custody conditions requiring polygraph testing are recognized as an important asset in monitoring sex offender compliance. As such, the condition was properly imposed on Defendant, a registered sex offender. Therefore, this Court should affirm community custody condition 18.

- b. The Court properly imposed community custody condition 16 prohibiting Defendant from contact with physically or mentally vulnerable individuals.

The trial court also imposed community custody condition 16 prohibiting Defendant from contact with children or physically or mentally vulnerable individuals. CP 146-147. This condition was also properly imposed pursuant to RCW 9.94A.703(3)(b) which states that "[a]s part of any term of community custody, the court may order an offender to:... (b) refrain from direct or indirect contact with the victim of the crime or a specified class of individuals."

The Supreme Court has indicated that the provision allowing no contact with a "'specified class of individuals' seems in context to require some relationship to the crime," and that "[i]t is not reasonable... to order even a sex offender not to have contact with a class of individuals who share no relationship to the offender's crime." *Riles*, 135 Wn.2d at 350.

Here, community custody condition 16 was appropriate for Defendant because the victim, S.V., was physically and mentally vulnerable when the crime occurred. S.V. was only 11 years old at the time of the incident. Defendant not only watched S.V. shower, but also tried to get to her in her own home by entering through the window, attempting to open the door, and asking her to come outside. S.V.'s vulnerability as a child is compounded by the fact that she was naked in

the shower in her own home at the time the crime occurred. She was alone and unclothed as Defendant watched and tried to get to her. As the crime involved a physically and mentally vulnerable victim, this Court should affirm community custody condition 16.

3. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY WHEN IT IMPOSED CONDITIONS 13, 24 AND 25 ON DEFENDANT'S COMMUNITY CUSTODY.

This Court reviews de novo whether the trial court had statutory authority to impose certain conditions of community custody. *State v. Acevedo*, 159 Wn. App. 221, 231, 248 P.3d 526 (2010). A trial court may only impose statutorily authorized sentences. *State v. Paulson*, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). “If the trial court exceeds its sentencing authority, its actions are void.” *Id.* When the trial court imposes an unauthorized condition on community custody, this Court remedies the error by remanding the issue with instructions to strike the unauthorized condition. *See State v. Jones*, 118 Wn. App. 199, 212, 76 P.3d 258 (2003).

RCW 9.94A.505(8) states: “As part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.” The law defines a “crime-related prohibition” as:

[A]n order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order a court may be required by the department.

RCW 9.94A.030(10).

In *State v. O'Cain*, 144 Wn. App. 772, 184 P.3d 1262 (2008), the trial court prohibited defendant from internet access as a condition of his community custody where the defendant was convicted of rape. *Id.* at 774. The defendant in *O'Cain* pushed his victim over a fence, raped her, took her cell phone, and ran away. *Id.* at 773–74. The reviewing court found that the trial court had exceeded its statutory authority because there was no evidence or findings that the internet-access condition was related to the crime. *Id.* at 775.

Here, as part of defendant's community custody, the court imposed the following conditions:

13. You shall not possess or consume any controlled substances without a valid prescription from a license physician.
24. "You shall not have access to the Internet at any location nor shall you have access to computers unless otherwise approved by the Court. You also are prohibited from joining or perusing any public social websites (Face book, MySpace, etc.)."

25. Do not possess or peruse any sexually explicit materials in any medium. Your sexual deviancy treatment provider will define sexually explicit material. Do not patronize prostitutes or establishments that promote the commercialization of sex. Also, do not possess or use any cell phone that may provide access to the Internet as well.

CP 146-147 (Judgment and sentence, Appendix H, conditions 13, 24 and 25). In regard to conditions 24 and 25, the sentencing court did not make any findings, nor was there evidence from trial or the pre-sentencing investigation, to support the conditions as related to Defendant's crime. Hence, this Court should remand the case with instructions to strike conditions 24 and 25 from Appendix H of the judgment and sentence.

The sentencing court properly imposed community custody condition 13 prohibiting Defendant from possessing or consuming controlled substances pursuant to RCW 9.94A.703(2) because he was found with a bottle of alcohol at the scene of the crime. However, there is no statutory authority to limit medications only to those prescribed by licensed physicians. As such, the court improperly limited Defendant's access of controlled substances only to licensed physicians. Therefore, this Court should remand to strike the words "from a licensed physicians" and replace with "lawfully issued."

4. AN ORDER SHOULD BE ENTERED TO AMEND THE TERMS OF CONFINEMENT FOR THE VOYEURISM CONVICTION TO COMPLY WITH RCW 9.94A.701(9).

On July 23, 2009, the Washington Supreme Court held that, because the exact amount of time that a defendant will spend in confinement can almost never be determined at sentencing, a defendant's judgment and sentence must "explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum." *In re Personal Restraint of Brooks*, 166 Wn.2d 664, 675, 211 P.3d 1023 (2009). However, the court noted in dicta that its ruling in *Brooks* would likely be superseded by amendments of the 2009 regular session of the State Legislature. *Id.* at 672 n. 4.

Effective July 26, 2009, the Washington State legislature passed what is now codified as RCW 9.94A.701(9). It provides that the community custody term specified by RCW 9.94A.701 "shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime." Laws of 2009, ch. 375, § 5; former RCW 9.94A.701(8).

In *State v. Franklin*, 172 Wn.2d 831, 839, 263 P.3d 585 (2011), the Washington Supreme Court addressed the new sentencing requirements and concluded that RCW 9.94A.701(9) applies retroactively and that the Department of Corrections (DOC), not the trial court, is

responsible for bringing pre-amendment sentences into compliance with the new statute. *Id.* at 839–840.

In *State v. Boyd*, 174 Wn.2d 470, 322, 275 P.3d 321 (2012), the Washington Supreme Court held that the trial court, not the DOC, is responsible for bringing post-amendment sentences into compliance with RCW 9.94A.701(9). The court also reiterated its position in *Franklin*, that “following the enactment of [RCW 9.94A.701], the ‘Brooks notation’ procedure no longer complies with statutory requirements.” *Boyd*, 275 P.3d at 322.

Here, Defendant was found guilty of two counts of voyeurism, a Class C felony with a maximum sentence of 60 months. RP 100; RCW 9A.44.115(3). Defendant was sentenced to 57 months confinement as well as 36 months of community custody. CP 134-140. This 93 month total sentence exceeds the statutory maximum by 33 months.

Section 4.6 of defendant's judgment and sentence contains the following "Brooks notation": "PROVIDED: That under no circumstances shall the total term of confinement plus the term of community custody actually served exceed the statutory maximum for each offense." CP 124. However, such notation is no longer sufficient to establish that a sentence complies with statutory requirements. *Boyd*, 275 P.3d at 322.

Because defendant was convicted of two Class C felonies and was sentenced after July 26, 2009, to a combination of confinement and community custody that exceeds the statutory maximum of five years, the

appellate court must enter an order to correct the terms of community custody for the voyeurism conviction to comply with RCW 9.94A.701(9) per *Boyd*.

D. CONCLUSION.

The evidence was sufficient for a rational trier of fact to find Defendant guilty of criminal trespass where he looked through Ms. Melvin's apartment without her permission and refused to leave when asked. In addition, the trial court properly imposed community custody conditions 18 and 16 where Defendant was a registered sex offender and the victim was a vulnerable individual. However, the trial court exceeded its statutory authority when it imposed conditions 24 and 25 and limited medications to those prescribed by a licensed physician. Additionally, an order should be entered to amend the terms of community custody for the two counts of voyeurism to comply with RCW 9.94A.701(9) per *Boyd*.

DATED: January 7, 2014.

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Robin Sand, Rule 9 Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by 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.

1.8.14 Theresa Kal
Date Signature

PIERCE COUNTY PROSECUTOR

January 08, 2014 - 1:46 PM

Transmittal Letter

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Case Name: State v. Johnson

Court of Appeals Case Number: 44194-2

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