NO. 45016-0-II

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

STATE OF WASHINGTON, Respondent

v.

TROY ARNOLD MUONIO, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-00164-4

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

I. MUONIO'S ATTORNEY WAS NOT INEFFECTIVE FOR FAILING TO ARGUE CORPUS DELECTI REGARDING COUNTS 2 AND 3

II. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION FOR COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES

III. MUONIO'S ATTORNEY WAS NOT INEFFECTIVE BECAUSE THE COLLATERAL BAR RULE PROHIBITS HIM FROM HAVING ARGUED THE UNDERLYING ORDER WAS INVALID IN A PROCEEDING FOR VIOLATION OF THAT ORDER

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VI. THE POST-CONVICTION SEXUAL ASSAULT PROTECTION ORDERS SHOULD EXPIRE ON A DATE IN ACCORDANCE WITH RCW 7.90.150

B. STATEMENT OF THE CASE

Troy Muonio (hereafter 'Muonio') was arrested on January 21, 2011 by BattleGround Police Department. CP 2. The probable cause affidavit alleged Muonio began talking to D.N.R. and M.S.E. in a hot tub at a hotel; he grabbed the foot of M.S.E. and began massaging it making M.S.E. uncomfortable. CP 3. Muonio grabbed M.S.E.'s arm and made

M.S.E. touch the breast of D.N.R. CP 3. M.S.E. and D.N.R. were frightened by the interaction and did not know what to do. CP 3.

At first appearance Muonio was before the court on allegations of Indecent liberties, but the prosecutor informed the court at that time that the State may also be charging him with Child Molestation in the Third Degree due to the nature of the allegations. 1/24/11 RP at 2.[1] The trial court issued a sexual assault protection order prohibiting Muonio from having any contact with M.S.E. on January 24, 2011. CP 4-5; 1/24/11 RP at 3. Muonio signed the document. CP 5; 1/24/11 RP at 4. The document states that

> Violation of this order is a criminal offense under chapter 26.50 RCW and will subject a violater to arrest. You can be arrested even if any person protected by the order invites or allows you to violate the order's prohibitions. You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order.

CP 4-5. On February 4, 2011, the trial court issued an identical order which prohibited Muonio from having any contact with D.N.R. Supp CP 96-97.

The State charged Muonio with Indecent Liberties with Forcible Compulsion, Child Molestation in the Third Degree, Assault in the Fourth

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[1] The verbatim report of proceedings consist of 5 separate volumes that are not designated as any particular volume number. The State references the VRP as "date of hearing, RP at page number" to attempt to avoid any confusion.

Degree with Sexual Motivation and Communication with a Minor for Immoral Purposes. CP 6-7. Both M.S.E. and D.N.R. are listed in count 2, Child Molestation in the Third Degree; D.N.R. was the listed victim in counts 1 and 4; M.S.E. is the listed victim in count 3. CP 6-7. In September 2012, the State filed an Amended Information which charged Indecent Liberties against D.N.R., Child Molestation in the Third Degree against M.S.E. and D.N.R., Communication with a Minor for Immoral Purposes against D.N.R., and two counts of Court Order Violation against M.S.E.

Muonio waived his right to a jury trial on December 17, 2012. CP 11; 12/17/12 RP at 1. The case proceeded to a bench trial before the Honorable Judge Scott Collier on December 17-18, 2012. CP 85-90; 12/17-18/12 RP at 1-209.

The evidence at trial showed that M.S.E., DOB 9/21/94 and D.N.R., DOB 1/29/95 were staying at the Best Western Hotel in Battle Ground, Washington on January 21, 2011. CP 85-86; 12/17/12 RP at 48; 116. Muonio was also staying at the same hotel on the same date with his wife and daughter. CP 85. Muonio did not know M.S.E. or D.N.R. CP 86. During the evening hours of January 21, 2011 M.S.E. and D.N.R. were in the hot tub; Muonio was also in the hot tub. CP 86. The only other person in the hot tub room was Muonio's 2 year old daughter. CP 86. Muonio

engaged in conversation with M.S.E. and D.N.R.; prior to this incident neither girl knew Muonio. CP 89; 12/17/12 RP at 114. Both girls provided Muonio with their names and ages early in the conversation. CP 86; 12/17/12 RP at 53, 118. Muonio told M.S.E. and D.N.R. his age was 23 years old. 12/17/12 RP at 53-54, 118. The conversation soon became sexual in nature with Muonio asking the girls if they've ever been raped. CP 86; 12/17/12 RP at 55. Muonio asked the girls if they would take naked pictures for $100. CP 86; 12/17/12 RP at 56, 119. Muonio commented that D.N.R. had a nice body for a fifteen year old. CP 86; 12/17/12 RP at 122.

While in the hot tub, Muonio grabbed M.S.E.'s feet and massaged her foot and ankle area. 12/17/12 RP at 57, 119-20. Muonio commented that the girls had "nice bodies and nice-nice boobs…." 12/17/12 RP at 57. Muonio was daring the girls to touch each others' breasts on the bare skin. 12/17/12 RP at 57-58, 119. Muonio also dared M.S.E. to touch D.N.R. bottom underneath her bikini. CP 86. Muonio also grabbed M.S.E.'s thigh as he was whispering to her. 12/17/12 RP at 59. Muonio then grabbed M.S.E.'s hand and forcefully put it on D.N.R.'s breast and tried rubbing it. 12/17/12 RP at at 60-61, 120-21. The girls were frightened during this incident. CP 87; 12/17/12 RP at 120-21, 124. The girls left the area, but were scared of Muonio and thought he had tried to follow them. CP 87;

12/17/12 RP at 65-66. The girls called 911 and the recording shows the fear M.S.E. was feeling at the time she made the call. 12/17/12 RP at 67-68. Muonio was not married or in a state-registered domestic partnership with either M.S.E. or D.N.R. CP 87.

While the case was still pending trial, Muonio went to M.S.E.'s place of employment on three occasions. CP 88; 12/17/12 RP at 69. M.S.E. described that she was working at the drive-thru window of Burgerville in Clark County and Muonio drove up to her window, but said he forgot his wallet and drove away. CP 88; 12/17/12 RP at 69. However, he returned an hour later and M.S.E. again had contact with him through the window at her place of employment and he asked if her name was "M…E…" CP 88; 12/17/12 RP at 69. He indicated to M.S.E. that he probably should not be there and talking to her and apologized. 12/17/12 RP at 70. This occurred sometime in between May 1 and June 15, 2012. CP 88; 12/17/12 RP at 69. Approximately a month later Muonio returned to her place of employment. CP 88; 12/17/12 RP at 70, 72.

C. ARGUMENT

I. MUONIO RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

Muonio argues his trial counsel was ineffective for failing to raise a corpus delecti motion to prohibit admission of evidence of his age at

trial. Muonio's counsel would not have succeeded on a corpus delecti argument as Muonio's statements regarding his age to the victims were made during the course of and commission of his crimes, which statements are specifically admissible at trial and do not raise a corpus delecti issue. As Muonio's trial counsel would not have succeeded in making such an argument, Muonio cannot show his attorney's choice not to bring a frivolous motion was ineffective or that Muonio suffered any prejudice. Muonio's claim of ineffective assistance of counsel fails.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors

> were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

Thomas, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); *see also State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011) (stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney's performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kyllo*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the

theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable). To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that "but for counsel's deficient performance, the outcome of the proceedings would have been different." *Kyllo*, 166 Wn.2d at 862. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing court should

also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

Also, in making a determination on whether defense counsel was ineffective, the reviewing court must attempt to eliminate the "distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from the counsel's perspective at the time." *Id.* at 689. The reviewing courts should be highly deferential to trial counsel's decisions. *State v. Michael*, 160 Wn. App. 522, 526, 247 P.3d 842 (2011). A strategic or tactical decision is not a basis for finding error in counsel's performance *Strickland*, 466 U.S. at 689-91.

Muonio argues his trial attorney was ineffective for failing to raise a corpus delecti challenge to the State's evidence on counts 2 and 3. No challenge based on corupus delecti would have succeeded at the trial court level, and therefore Muonio cannot show his attorney's performance was deficient or that it prejudiced him. Muonio's claim of ineffective assistance of counsel fails.

"Corpus delecti" means the "body of the crime." *State v. Aten*, 130 Wn.2d 640, 655, 927 P.2d 210 (1996) (quoting 1 McCormick on Evidence §145 at 227 (John W. Strong ed., 4th ed. 1992)). When determining whether corpus delecti is established, a court must assume the truth of the

State's evidence and all reasonable inferences from it in a light most favorable to the State. *State v. Ray*, 130 Wn.2d 673, 679, 926 P.2d 904 (1996) (quoting *Aten*, 130 Wn.2d at 655).

Statements made by a defendant in the course of a crime are not confessions or post-crime statements which require corroboration for purposes of corpus delecti. *State v. Dyson*, 91 Wn. App. 761, 763, 959 P.2d 1138 (1998); *Warszower v. U.S.*, 312 U.S. 342, 347, 61 S. Ct. 603, 85 L. Ed. 876 (1941). The United States Supreme Court in *Warzower* explained:

> The rule requiring corroboration of confessions protects the administration of the criminal law against errors in convictions based upon untrue confessions alone. Where the inconsistent statement was made prior to the crime this danger does not exist. Therefore we are of the view that such admissions do not need to be corroborated. They contain none of the inherent weaknesses of confessions or admissions after the fact.

Warszower, 312 U.S. at 347. The Court in *State v. Pietrzak*, 110 Wn. App. 670, 41 P.3d 1240 (2002) adopted this reasoning. *Pietrzak*, 110 Wn. App. at 681.

Further, the Court in *Dyson* held that statements which are made by a defendant during the course of the commission of a crime are not a confession to which the corpus delecti rule applies. *State v. Dyson*, 91 Wn. App. at 763. The Court in *Dyson* reasoned that the definition of "confession" means "an expression of guilt as to a past act." *Id.* (citing to

State v. Saltzman, 241 Iowa 1373, 1379-82, 44 N.W.2d, 27-28 (1950) (holding that statements made as part of the res gestae of a crime are neither admissions nor confession) and *Opper v. U.S.,* 348 U.S. 84, 90, 75 S. Ct. 158, 99 L. Ed. 101, 45 A.L.R2d 1308 (1954)). In *Dyson*, the defendant arranged with an undercover police officer for a third person to have sex with the officer in exchange for money. *Dyson*, 91 Wn. App. at 762. At trial, the State admitted statements that the defendant made to the officer during the course of the commission of the crime. *Id.* On appeal, the Court in *Dyson* found that statements made during the course and commission of a crime do not constitute a confession and therefore are admissible despite the defendant's corpus delecti argument. *Id.*

This Court has held that the corroboration requirement for corpus delecti does not apply to incriminating statements made prior to or during the course of an offense. *State v. Zillyette*, 163 Wn. App. 124, 131 n.5, 256 P.3d 1288 (2011), *rev'd on other grounds*, 173 Wn.2d 784, 270 P.3d 589 (2012). This Court's holding was again upheld in 2012 in *State v. Witherspoon*, 171 Wn. App. 271, 296, 286 P.3d 996 (2012). No Washington case has held that the exception to the requirements of corpus delecti apply only to pre-crime statements as Muonio argues. *See* Br. of Appellant, p. 17-18. All three divisions of this Court have held that statements made during the commission of the crime are not confessions

for corpus delecti purposes. *See Zillyette*, 163 Wn. App. at 131 n.4; *Witherspoon*, 171 Wn. App. at 296; *Dyson* 91 Wn. App. at 763-64; *Pietrzak*, 110 Wn. App. at 682.

It is abundantly clear from the testimony of the victims, D.N.R. and M.S.E. that Muonio made statements regarding his age during the course of commission of the crime. 12/17/12 RP at 53-54, 118. The statements he made were certainly not made post-crime as the testimony clearly indicated this statement was made by Muonio while in the hot tub area on January 21, 2011, and it was not through statements to police that the State admitted these statements. 12/17/12 RP 53-54, 118. The State admitted the statements Muonio made regarding his age through the victims, to whom he indicated his age during the conversation leading up to the incident which lead to the charge of Child Molestation in the Third Degree. 12/17/12 RP at 53-54, 118. Pursuant to case law on corpus delecti in this State, the statements Muonio made to his victims during the course of his crimes are sufficient corroboration of the act and do not constitute a confession absent other evidence. Muonio cannot establish that he would have prevailed had his attorney made a corpus delecti motion. In fact, the case law established above categorically shows that his trial counsel would not have prevailed upon such a motion. Defense counsel need not bring frivolous motions in order to be effective. Muonio's attorney did not bring

a losing motion; Muonio suffered absolutely no prejudice from his failure to bring such a frivolous motion. Muonio has not and cannot establish prejudice, or even that his attorney's choice in not bringing such a motion was ineffective. This court should deny Muonio's claim of ineffective assistance of counsel for failing to bring a corpus delecti motion.

II. THERE WAS SUFFICIENT EVIDENCE OF COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES

Muonio claims his conviction for communication with a minor for immoral purposes was not supported by sufficient evidence. There was ample evidence to support the charge for communication with a minor and the trial court did not err in finding Muonio guilty. This conviction was supported by sufficient evidence.

The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green,* 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d

1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

Muonio claims there was insufficient evidence that he communicated with D.N.R. for an immoral purpose of a sexual nature. It is clear from the evidence that Muonio committed this crime, and that any rational trier would have found him guilty.

The evidence shows that Muonio offered $100 to the victims to take naked pictures. The victims are minors and it would have been criminal to produce depictions which show the victims' intimate body parts. *See* RCW 9.68A.070. As explained above, the evidence that Muonio requested the victims allow him to take pictures of them naked is taken in the light most favorable to the State, and all reasonable inferences are drawn from it. Though Muonio argues this Court should consider the evidence in a different light, that is not the legal standard to be applied here. It is absolutely reasonable for a trier of fact to conclude Muonio was asking that the girls allow him to take pictures of them naked and that these pictures would depict their genitalia. This would have been a violation of RCW 9.68A.070. Given the rest of the conversation, it is clear his intent in those pictures would have been for sexual stimulation. There is ample evidence that Muonio communicated with the victims for a sexual purpose of an immoral nature.

The evidence also shows that Muonio communicated with the

victims with the goal of having the victims touch each other in a sexual way. It is a violation of RCW 9A.44.089 for Muonio to have caused one person to have contact with a minor when Muonio is more than 48 months older than the minor. As established at trial, Muonio was 23 years old at the time of this incident. 12/17/12 RP at 53-54, 118. D.N.R. was 15 years old at the time of the incident. 12/17/12 RP at 116. Muonio was encouraging, through his words and conduct, sexual contact between D.N.R. and M.S.E. CP 86-87; 12/17/12 RP at 57-58, 119. This clearly falls within the definition of communication for an immoral purpose of a sexual nature when the crime of Child Molestation in the Third Degree is being promoted. Muonio again argues that corpus delecti prevents the State from having proven this crime, however as discussed above corpus delecti is not applicable in this case as Muonio made the statements to the victims regarding his age during the course of the commission of the crimes. Muonio's claim of insufficiency of the evidence fails.

III. THE COLLATERAL BAR RULE PROHIBITS MUONIO FROM ARGUING THE VALIDITY OF THE NO CONTACT ORDER

Muonio argues that the Sexual Assault Protection Order the trial court issued against Muonio prohibiting him from having any contact with M.S.E. pretrial was unlawfully issued. The collateral bar rule prohibits a party from challenging the validity of the order in a proceeding for

violation of that order. Muonio's claim fails.

The Supreme Court has held that the collateral bar rule precludes a defendant's challenge to the validity of a court order in a proceeding for violation of that order. *City of Seattle v. May*, 171 Wn.2d 847, 256 P.3d 1161 (2011) (citing *State v. Noah*, 103 Wn. App. 29, 46, 9 P.3d 858 (2000) and *State v. Wright*, 273 Conn. 418, 426-28, 870 A.2d 1039 (2005)). An exception does exist for orders that are void. *Id.* However, for an order to be void, the court must lack the power to issue that type of order. *Mead Sch. Dist. No. 354 v. Mead Educ. Ass'n*, 85 Wn.2d 278, 281, 534 P.2d 561 (1975). The Court in *May* held that "in sum, May can challenge the validity of the underlying domestic violence protection order only insofar as he can show that the order is absolutely void; the collateral bar rule precludes him from arguing that the order is merely erroneous." *May*, 171 Wn.2d at 852-53. The reasoning behind this rule is that a challenge to the order must be made to the issuing court and not collaterally attacked in front of another judge. *State v. Miller*, 156 Wn.2d 23, 31, 123 P.3d 827 (2005).

The Superior Court has authority to issue an order pursuant to RCW 7.90.150 and the statute gives the trial court the authority to initially issue and extend such protection orders to a period of time after arraignment. The trial court has the power to issue this type of order. As

such, a voidness argument is unpersuasive given the case law.

Muonio further argues that M.S.E. was not a victim of any sex crime to which the trial court could issue a sexual assault protection order. However, it was clear from the probable cause affidavit that there were two victims- D.N.R. and M.S.E., and further, from the filing of the initial information, M.S.E. has been listed in count 2, Child Molestation in the Second Degree. CP 6. The term "victim" is not defined by RCW 7.90 and the State submits that given the facts of this case, and the information filed, M.S.E. was likewise a victim of a sex offense. She was named in the probable cause affidavit and in the original information for the charge of Child Molestation in the Third Degree. It is absolutely appropriate that the trial court issued a sexual assault protection order prohibiting Muonio from having contact with M.S.E.

Muonio is barred from collaterally attacking the underlying order that he is alleged to have violated. He was barred from so arguing at the trial court level as well. His trial attorney was not ineffective for failing to object to the admission of the sexual assault protection order because such an objection would not have been sustained. As discussed above, in an ineffective assistance of counsel claim Muonio must show prejudice as well as deficient performance. Muonio has shown neither here.

IV. THERE WAS SUFFICIENT EVIDENCE MUONIO KNOWINGLY VIOLATED THE SEXUAL ASSAULT PROTECTION ORDER

Muonio appears to argue that there was insufficient evidence that he knowingly violated the sexual assault protection order against M.S.E. when he drove through the drive-thru at M.S.E.'s place of employment. However, Muonio fails to recognize the standard for review on appeal of sufficiency of the evidence claims. In viewing the evidence in the light most favorable to the State and accepting all reasonable inferences that could be drawn from the evidence, there was sufficient evidence for a rational trier of fact to find him guilty of this crime. Muonio's claim fails.

The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green,* 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

Muonio argues in his brief that the only evidence presented at trial

is that he did not knowingly violate the order. However, the evidence showed Muonio went through the drive thru where M.S.E. worked not once, but twice. 12/17/12 RP at 69-70. From M.S.E.'s testimony it is clear that a rational trier of fact could have concluded, as it did, that Muonio knowingly violated the order. It is reasonable to infer from the evidence of Muonio leaving the drive thru and then returning that on the second occasion he knew M.S.E. was present and chose to return, thus violating the order. This is clearly the logical conclusion the trier of fact drew from the evidence that was presented. CP 89. Based on the standard of review for this challenge, the facts must be taken in the light most favorable to the State. In so reviewing, there was clearly sufficient evidence to support this conviction.

V. TRIAL COURT HAD THE AUTHORITY TO ISSUE A SEXUAL ASSAULT PROTECTION ORDER PROTECTING M.S.E.

Muonio argues the trial court erred in issuing a sexual assault protection order protecting M.S.E. from any contact from Muonio. As discussed above, M.S.E. was noted in the information for Child Molestation in the Third Degree, a sex crime. CP 6. RCW Ch. 7.90 does not define "victim" for purposes of issuing a sexual assault protection order. M.S.E. was the conduit through which Muonio completed his sex crime against a 15 year old child. M.S.E. herself was a minor, and it is

clear from her testimony that she too was victimized by Muonio's actions in forcing her to help him commit a sex crime against a child, who was her close friend. The trial court exercised its discretion in finding M.S.E. qualified as a person the state has an interest in protecting from unwanted contact by Muonio. The trial court's sexual assault protection order prohibiting Muonio from having any contact with M.S.E. should stand.

VI. THE SEXUAL ASSAULT PROTECTION ORDERS SHOULD EXPIRE ON A DATE IN ACCORDANCE WITH RCW 7.90.150

Muonio argues that the sexual assault protection orders have an invalid expiration date. Pursuant to RCW 7.90.150(6)(a), when a defendant who is found guilty of any violation of RCW 9.68A.090 (communication with a minor for immoral purposes), or any sex offense, the court may issue a sexual assault protection order and this order shall remain in effect for a period of two years following the expiration of any sentence of imprisonment and subsequent period of community supervision, conditional release, probation or parole. RCW 7.90.150(6)(a); (c).

Regarding victim D.N.R., Muonio was convicted of a violation of RCW 9.68A.090 and was sentenced to a 24 month suspended sentence. CP 47. Regarding both D.N.R. and M.S.E., Muonio was convicted of a sex offense, Child Molestation in the Third Degree. CP 89. Muonio's 24

month suspended sentence began on the date of sentencing, May 24, 2013. Muonio's term of sentence on his gross misdemeanor sex offense is over on May 24, 2015. Pursuant to RCW 7.90.150(6)(a), the sexual assault protection order may exist for 2 years after May 24, 2015. The sexual assault protection order as to D.N.R. could expire on May 24, 2017. The sexual assault protection order regarding D.N.R. is appropriate and valid, its expiration date is January 19, 2017, four and a half months prior to the end of the court's authority to issue such an order.

Regarding M.S.E., if Muonio was released on July 1, 2013 from confinement, his community custody ends on July 1, 2014 and the sexual assault protection order should expire on July 1, 2016. The trial court exceeded its jurisdiction by approximately 6 months. Therefore the State agrees with Muonio that this case should be remanded for reissuance of the sexual assault protection order concerning M.S.E. to provide for a termination date on or before July 1, 2016.

D. CONCLUSION

For all the reasons discussed above, Muonio did receive effective assistance of trial counsel. Further, the sexual assault protection order was validly issued, and Muonio is collaterally barred from raising the issue in this proceeding. The State respectfully requests this Court affirm the trial

court in all respects save for the issuance of the sexual assault protection order that exceeded its statutorily authorized expiration date regarding victim M.S.E. For that reason alone, this case should be remanded to the trial court for reissuance of a sexual assault protection order.

DATED this 3rd day of January, 2014.

Respectfully submitted:

ANTHONY F. GOLIK
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Clark County, Washington

By: _____
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, v. TROY ARNOLD MUONIO, Appellant.	No. 45016-0-II Clark Co. No. 11-1-00164-4 DECLARATION OF TRANSMISSION BY MAILING AND EMAILING

STATE OF WASHINGTON)
: ss
COUNTY OF CLARK)

On January 3, 2014, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

TO:

Roger A Bennett Attorney at Law 112 W. 11th St Suite 200 Vancouver WA 98660-3359 RBENN21874@AOL.COM

DOCUMENTS: Brief of Respondent

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Date: January 3, 2014.
Place: Vancouver, Washington.

CLARK COUNTY PROSECUTOR

January 03, 2014 - 4:19 PM

Transmittal Letter

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Court of Appeals Case Number: 45016-0

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