

FILED
Court of Appeals
Division II
State of Washington
4/22/2019 2:36 PM

NO. 52224-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM THOMPSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Jeffrey P. Bassett, Judge

BRIEF OF APPELLANT

JARED B. STEED
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>Procedural History</u>	2
2. <u>Trial Testimony</u>	4
3. <u>Instructions & Closing Argument</u>	8
C. <u>ARGUMENT</u>	11
1. THE TRIAL COURT'S JURY INSTRUCTIONS VIOLATED DOUBLE JEOPARDY.....	11
a. <u>The jury instructions failed to adequately protect Thompson from four incest convictions based on a single act.</u>	14
b. <u>The record fails to show beyond a reasonable doubt the jury relied on separate and distinct acts to support each count of incest.</u>	16
2. THE COMMUNITY CUSTODY CONDITION BARRING ALL CONTACT BETWEEN THOMPSON AND HIS WIFE AND ADULT CHILDREN IMPERMISSIBLY INTERFERES WITH HIS FUNDAMENTAL RIGHT TO MARRIAGE AND TO COMPANIONSHIP.	22
a. <u>The prohibition on contact with M.T.'s family unconstitutionally infringes on Thompson's fundamental right to marriage.</u>	24

TABLE OF CONTENTS (CONT'D)

	Page
b. <u>The prohibition on contact with M.T.'s family unconstitutionally infringes on Thompson's fundamental right to companionship with his children....</u>	31
3. THE CONDITIONS PROHIBITING 'SEXUALLY EXPLOITIVE' AND 'SEXUALLY EXPLICIT' MATERIALS ARE VAGUE AND OVERBROAD, IN VIOLATION OF DUE PROCESS.....	34
a. <u>The conditions are void for vagueness because they do not provide adequate notice of what is prohibited and exposes Thompson to arbitrary enforcement.</u>	34
b. <u>The conditions are unconstitutionally overbroad because they encompass substantial amounts of protected speech under the First Amendment.....</u>	39
D. <u>CONCLUSION.....</u>	41

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>City of Seattle v. Huff</u> 111 Wn.2d 923, 767 P.2d 572 (1989).....	39
<u>In re Pers. Restraint of Crowder</u> 97 Wn. App. 598, 985 P.2d 944 (1999).....	23
<u>In re Pers. Restraint of Rainey</u> 168 Wn.2d 367, 229 P.3d 686 (2010).....	24, 25, 26, 28, 29, 31
<u>Moore v. Burdman</u> 84 Wn.2d 408, 526 P.2d 893 (1974).....	31
<u>State v. Ancira</u> 107 Wn. App. 650, 27 P.3d 1246 (2001).....	25
<u>State v. Armendariz</u> 160 Wn.2d 106, 156 P.3d 201 (2007).....	22
<u>State v. Bahl</u> 164 Wn.2d 739, 193 P.3d 678 (2008).....	23, 24
<u>State v. Bahl</u> 164 Wn.2d 739, 193 P.3d 678 (2008).....	24
<u>State v. Berg</u> 147 Wn. App. 923, 198 P.3d 529 (2008).....	15
<u>State v. Borsheim</u> 140 Wn. App. 357, 165 P.3d 417 (2007).....	12, 13, 22
<u>State v. Homan</u> 191 Wn. App. 759, 364 P.3d 839 (2015).....	39
<u>State v. Howard</u> 182 Wn. App. 91, 328 P.3d 969 (2014),.....	28

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Kier</u> 164 Wn.2d 798, 194 P.3d 212 (2008).....	21
<u>State v. Land</u> 172 Wn. App. 593, 295 P.3d 782 <u>rev. denied</u> , 177 Wn.2d 1016, 304 P.3d 114 (2013)	13, 15, 16, 18, 19, 20
<u>State v. Mutch</u> 171 Wn.2d 646, 254 P.3d 803 (2011).....	12, 13, 15, 22
<u>State v. Nguyen</u> 191 Wn.2d. 671, 425 P.3d 847 (2018).....	36
<u>State v. Padilla</u> 190 Wn.2d 672, 416 P.3d 712 (2018).....	36
<u>State v. Perrone</u> 119 Wn.2d 538, 834 P.2d 611 (1992).....	35
<u>State v. Riley</u> 121 Wn.2d 22, 846 P.2d 1365 (1993).....	24
<u>State v. Torres</u> 198 Wn. App. 685, 393 P.3d 894 (2017).....	28
<u>State v. Warren</u> 165 Wn.2d 17, 195 P.3d 940 (2008)	24, 25, 27, 28, 30
<u>State v. Watkins</u> 136 Wn. App. 240, 148 P.3d 1112 (2006).....	12
 <u>FEDERAL CASES</u>	
<u>Duchesne v. Sugarman</u> 566 F.2d 817 (2d Cir. 1977)	32
<u>Hodgers-Durgin v. de la Vina</u> 199 F.3d 1037 (9th Cir. 1999)	31

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>Loving v. Virginia</u> 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967)	24
<u>Lowery v. County of Riley</u> 522 F.3d 1086 (10th Cir. 2008).	32
<u>Rentz v. Spokane County</u> 438 F. Supp.2d 1252 (E.D. Wash. 2006)	32
<u>Roberts v. U.S. Jaycees</u> 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984).....	32
<u>Smith v. City of Fontana</u> 818 F.2d 1411 (9th Cir. 1987)	31
<u>Strandberg v. City of Helena</u> 791 F.2d 744 (9th Cir. 1986)	33
<u>Trujillo v. Bd. of County Comm'rs</u> 768 F.2d 1186 (10th Cir. 1985)	32

RULES, STATUTES AND OTHER AUTHORITIES

RCW 9.68.130	36
RCW 9.68A.011	36
RCW 9.94A.030	22
RCW 9.94A.703	22
RCW 26.50.010	28
U.S. CONST. amend. I	35, 37, 39, 40, 41

TABLE OF AUTHORITIES (CONT'D)

	Page
U.S. CONST. amend. V	12
U.S. CONST. amend. XIV	32
WASH. CONST. art. I, § 9	12

A. ASSIGNMENTS OF ERROR

1. The trial court violated principles of double jeopardy when it failed to instruct the jury that separate and distinct acts must be unanimously found in order to convict appellant of counts II through V.

2. The community custody condition prohibiting appellant from having "direct or indirect contact with victim(s) or his or her family," is not narrowly tailored to meet a compelling State interest, and therefore interferes with appellant's fundamental right to marriage and to companionship with his children. CP 116.

3. The trial court erred in imposing the following condition of community custody: "Possess/access no sexually exploitive material (as defined by Defendant's treating therapist or CCO)." CP 116.

4. The trial court erred in imposing the following condition of community custody: "Possess/access no sexually explicit materials, and/or information pertaining to minors via computer (i.e. internet). CP 116.

Issues Pertaining to Assignments of Error

1. Appellant was convicted, in part, of four counts of first degree incest. Each count contained identical language and an identical charging period. Where the jury instructions did not state that a separate act was required for each count, did the instructions fail to provide

adequate protection against a double jeopardy violation on counts II through V? If so, does the context of the trial fail to show beyond a reasonable doubt that the jury did not convict Thompson of counts II through V, in violation of double jeopardy principles, thus requiring three of the counts to be vacated?

2. Did the sentencing court err in entering a community custody condition, prohibiting all contact, direct or indirect, between appellant and the complaining witness's family -- which includes appellant's wife and other children -- thereby interfering with appellant's fundamental right to marriage and to companionship with his other children?

3. Do the community custody conditions prohibiting appellant from possessing and/or accessing sexually explicit and exploitive materials violate due process because they are unconstitutionally vague, overbroad, and expose appellant to arbitrary enforcement?

B. STATEMENT OF THE CASE

1. Procedural History.

The Kitsap County prosecutor charged appellant William Thompson by amended information with four counts of first degree incest and one count of second degree rape of a child for incidents alleged to

have occurred against M.T. between February 1, 2011 and February 6, 2012. CP 47-53; 3RP¹ 3-4. The State further alleged that each offense was committed against a family member, was part of an ongoing pattern of sexual abuse, and that Thompson abused a position of trust. CP 47-53.

A jury found Thompson guilty as charged. The jury also returned special verdict forms for each count, finding that Thompson committed the offenses as alleged by the prosecutor. CP 89-100; 3RP 987-89.

Based on an offender score of 12, Thompson received concurrent standard range sentences of 280 months to life on the second degree rape conviction and 102 months on each of the incest convictions. CP 111-21; 4RP 23-24. The trial court also imposed 36 months of community custody. CP 114.

Based on a finding of indigency, the trial court ordered that Thompson pay only the \$500 crime victim assessment legal financial obligation. CP 117; 4RP 24.

Thompson timely appeals. CP 124-35.

¹ This brief refers to the verbatim report of proceedings as follows: 1RP -- September 5, 2017; 2RP -- October 10, 2017; 3RP -- May 8, 9, 10, 14, 15, and 16, 2018; 4RP -- June 22, 2018.

2. Trial Testimony.

Thompson married Elizabeth Thompson² in 2003. 3RP 774-75. M.T. was Thompson's daughter from a previous relationship. 3RP 625-26, 777. Elizabeth also had three children from previous relationships, including Bianca McLaughlin, Hunter Mondry, and Shelby Mondry. 3RP 626-27, 777. Each of Elizabeth's children considered Thompson to be their father. 3RP 826-27, 851-52, 879, 890. The family resided together in a single home for many years. 3RP 625-27.

Shortly before her scheduled high school graduation, M.T. announced that she was leaving the house and moving in with her mother. The prior understanding within the family was that all the children would reside with the Thompson's until after they graduated. 3RP 787-89, 839-40. M.T. moved out of the house one week after her 18th birthday, telling people that she needed a change of pace. 3RP 652-53, 666, 731. M.T. believed the house rules were too strict and that she did not have any privacy. 3RP 699-700. In the months before she moved out, none of M.T.'s family members noticed that she was behaving oddly or avoiding contact with Thompson. 3RP 787, 796-97, 835-36, 848-49, 863, 886-87.

² To avoid confusion, this brief will refer to Elizabeth Thompson by her first name. No disrespect is intended.

Around the same time she moved out of Thompson's house, M.T. went to her school counselor and disclosed for the first time that Thompson had engaged in sexual contact with her for several years. 3RP 653-55, 661-62, 814-15. The counselor contacted police in response to M.T.'s allegations. 3RP 607-08, 662. As part of their investigation, police obtained a warrant that allowed M.T. to record a telephone conversation between her and Thompson, without Thompson's consent. 3RP 662, 608-11. During the conversation, M.T. indirectly confronted Thompson about the alleged incidents. Thompson repeatedly denied knowing what M.T. was talking about, but apologized for being a bad father to M.T. He also made statements about taking his own life. 3RP 621, 982.

At trial, M.T. could not provide any specific details about Thompson's penis, despite the fact that Thompson shaved his pubic hair and had "two very large scars" on his testicles from a reverse vasectomy. 3RP 725, 784-85. M.T. nonetheless testified about multiple alleged incidents that occurred in the days before her 13th birthday until she was 16 or 17-years-old. 3RP 630, 637-38, 640-41, 647-48, 65-51, 672, 674-75, 724, 743, 758-59.

M.T. testified that the first alleged incident occurred five days before her 13th birthday. No one else was home at the time. Thompson

called M.T. downstairs and told her that he was going to do "some things" to her but she could not tell anyone, or her family would be harmed. 3RP 631, 638-39, 644-45. Thompson grabbed M.T.'s breast underneath her shirt, took off her underwear, and put his finger inside her vagina. 3RP 632-33. He then put his penis inside her vagina. 3RP 634-36.

During a different incident, Thompson told M.T. to take a shower with him. 3RP 637-38. M.T. could not recall when exactly the incident happened but testified that Thompson put his penis inside her vagina in the shower. 3RP 637-40, 723-24.

M.T. also testified that Thompson engaged in oral sex with her twice. 3RP 640. During one incident, Thompson woke M.T. up while everyone continued to sleep. M.T. got on her hands and knees and licked Thompson's penis. 3RP 642-44. During another incident, M.T. got on top of Thompson and put his penis inside her mouth while he licked her vagina. 3RP 640-41.

M.T. testified that multiple other incidents happened during the same period of time. As M.T. explained,

Sometimes it would be like once a week, sometimes it would go a couple months where nothing would happen and then it would start again. There were sometimes where it would happen a couple times a week. It didn't have any kind of regular schedule. It just happened, I guess.

3RP 647, 722-24. The other incidents included vaginal and anal penetration. 3RP 648, 672, 724. M.T. never told Thompson to stop and never told anyone else about the incidents because she was scared that she or someone else would be hurt. 3RP 648-52, 724, 756-57.

The incidents stopped entirely around the time M.T. turned 16 or 17-years-old. Thompson told M.T. that the incidents would stop without explaining why. 3RP 650-51, 726, 743. Although M.T. had told people she was moving out of Thompson's for a change of pace, she testified that she decided to leave because she was having anxiety attacks and difficulty sleeping. 3RP 652, 749.

M.T. acknowledged that she wrote Thompson several letters during the time frame of the incidents expressing her love for Thompson. 3RP 663-64, 684, 741-42, 758, 797. M.T. acknowledged that she continued to be close to Thompson even after the alleged incidents. 3RP 664. Although Thompson never hit M.T. or anyone else, she took his threats about harming other people seriously because of the tone of his voice. 3RP 744-45.

Several people testified in Thompson's defense at trial. Elizabeth explained that she and Thompson always shared a bed during their marriage. Elizabeth was a light sleeper and only ever heard Thompson

get up during the night to use the bathroom. 3RP 781-82, 807-08. Elizabeth explained that she never suspected any inappropriate contact between Thompson and M.T. 3RP 806. In fact, M.T. never seemed withdrawn and made active efforts to spend time alone with Thompson in the months before she moved out. 3RP 787, 791-92. McLaughlin and Hunter and Shelby Mondry also denied observing any unusual behavior between Thompson and M.T. 3RP 835-36, 848-49, 863, 867, 886-87, 890.

Mike Best was the music and arts teacher at the Thompson's church. Thompson often brought his family to church. 3RP 818-20. Best observed the relationship between Thompson and M.T. to be perfectly normal. As Best explained, M.T. was typically shy around other people but "super warm with her dad." 3RP 821-22. Best was a mandatory reporter and would not have hesitated to report any behavior that gave him concern. 3RP 822.

3. Instructions & Closing Argument.

The jury was provided with general instructions to apply the law from the court's instructions, and not to rely on attorney remarks as the source of law. CP 56-58 (instruction 1). The instructions also stated all instructions are important, the order of instructions is of no significance, and that lawyers may discuss specific instructions during argument, but

the jury was to “consider the instructions as a whole.” CP 56-58 (instruction 1).

For count two, first degree incest, the "to-convict" instruction read:

To convict the Defendant of the crime of incest in the first degree as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or between February 1, 2011 and February 7, 2012, the defendant engaged in sexual intercourse with [M.T.];

(2) That [M.T.] was related to the defendant as a daughter;

(3) That at the time the defendant knew the person with whom he was having sexual intercourse was so related to him; and

(4) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 70 (instruction 13).

The language of the “to convict” instruction for first degree incest as charged counts III through V, merely replaces “count II” with the

respective count and is otherwise identical to the instruction for count II. CP 71-73 (instructions 14-16). The "to convict" instructions contained no additional language addressing unanimity, and contained the same time-frame alleged in count II.

Several instructions were relevant to unanimity, including the following. Instruction No. 4 provides in relevant part, "A separate crime is charged in each count. You must decide each count separately." CP 63. The jury was also instructed that although the State had alleged multiple acts of first degree incest, they must unanimously agree to a specific act to support each respective conviction. CP 75-78 (instructions 18-21).

Jurors were instructed as follows:

In alleging that the defendant committed incest in the First Degree as charged in Count II, the State relies upon evidence regarding a single act constituting the alleged crime. To convict the defendant, you must unanimously agree that this specific act was proved.

CP 75 (instruction 18).³ No other instruction informed the jury that each of the four counts of incest must be supported by separate and distinct acts.

³ Instructions 19-21 merely replaces "count II" with the respective count and is otherwise identical to the instruction quoted above. CP 76-78 (instructions 19-21).

During closing argument, the prosecutor attempted to further define what specific acts it was relying on for each charged count. As the prosecutor stated,

We've charged the defendant with a large time -- basically a large time gap. Five years. The time frame that Mona says she was raped. But during those time frames, we've charged him with five specific counts. And I'll go over them right now, so that when you're deliberating you don't forget which ones are which.

The first count, Rape of a Child in the Second Degree, and the second count, Incest in the First Degree, those two counts go together. Those counts are for the first time that Mona was raped when she was 12.

The third count, Incest in the First Degree. That count is for the time that he raped her in the shower.

The fourth count of Incest in the First Degree is for the time that she was down on all fours forced to give her dad oral sex.

And the next count of Incest in the First Degree is for the time that she was forced to give him oral sex for the first time. When he described to her what 69 was for the first time. And she ended up throwing up after he shoved his penis in her mouth.

So to recap: Count I and Count II are the taking the virginity instance; Count III is for the shower; Count IV is for when she was down on all fours in her bedroom; And Count V is for the first time that he made her have oral sex.

3RP 956-57.

C. ARGUMENT

1. THE TRIAL COURT'S JURY INSTRUCTIONS VIOLATED DOUBLE JEOPARDY.

The trial court was required to provide clear instructions to the jury that it could not convict Thompson of multiple counts based on a

single act. The instructions failed to do so and subjected Thompson to double jeopardy. Three of Thompson's convictions for first degree incest must be vacated.

The right to be free from double jeopardy “is the constitutional guarantee protecting a defendant against multiple punishments for the same offense.” State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007) (citing U.S. CONST., Amend. V; WASH. CONST., art. I, § 9). Double jeopardy claims are reviewed de novo and may be raised for the first time on appeal. State v. Mutch, 171 Wn.2d 646, 661-62, 254 P.3d 803 (2011).

Jury instructions “must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror.” Borsheim, 140 Wn. App. at 366 (quoting State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006)). To adequately protect against a double jeopardy violation, instructions must make “manifestly apparent to the jury that each count represented a separate act.” Mutch, 171 Wn.2d at 665-66. Vague jury instructions that do not convey this requirement are flawed because they create the risk of multiple punishments for a single act and so create the risk of a double jeopardy violation. Id.

The Borsheim Court held an instruction that the jury must find a “separate and distinct” act for each count is required when multiple counts of sexual abuse are alleged to have occurred within the same charging

period. 140 Wn. App. at 367-68. Without this instruction, the accused is exposed to multiple punishments for the same offense, violating his right to be free from double jeopardy. Id. at 364, 366-67. The court vacated three of Borsheim's four child rape convictions for this instructional omission. Id. at 371.

Where a double jeopardy violation is found, the conviction(s) must be vacated. Borsheim, 140 Wn. App. at 371. However, since Borsheim, the Washington State Supreme Court has clarified that the mere possibility of a double jeopardy violation does not require automatic reversal. See Mutch, 171 Wn.2d at 665; State v. Land, 172 Wn. App. 593, 603, 295 P.3d 782, rev. denied, 177 Wn.2d 1016, 304 P.3d 114 (2013). The reviewing court must consider the insufficient instructions "in light of the full record." Mutch, 171 Wn.2d at 665. Reversal is required unless the Court is "convinced beyond a reasonable doubt" that the flawed instructions did not actually effect a double jeopardy error. Id. at 665; Borsheim, 140 Wn. App. at 371 (reversal required). Stated another way, the context of the trial as a whole must convince the reviewing court beyond a reasonable doubt that the jury relied on separate and distinct acts to convict for each count. Id. at 665. The jury instructions in Thompson's case were flawed and do not satisfy this standard. Thus, three of his counts of first degree incest must be vacated.

- a. The jury instructions failed to adequately protect Thompson from four incest convictions based on a single act.

Here, four counts of first degree incest (counts II through V) were alleged to have occurred within the same charging period: 2/1/11 - 2/6/12. See CP 47-53 (same charging period), 70-73 (instructions 13-16). The jury instructions with respect to these counts did not provide adequate protection against a double-jeopardy violation.

The jury was instructed that the State had alleged multiple acts of incest, and for each count, "the State relies upon evidence regarding a single act constituting the alleged crime. To convict the defendant, you must unanimously agree that this specific act was proved." CP 75-78 (instructions 18-21). This instruction requires general unanimity, but just as the general "separate crime instruction" discussed below, this instruction does not require a separate and distinct act for each count, and so fails to protect against a double jeopardy violation. See Mutch, 171 Wn.2d at 663.

Moreover, no other instruction informed the jury that each of the counts of incest must be supported by separate and distinct acts. For example, the jury was instructed "[a] separate crime is charged in each count. You must decide each count separately." CP 63 (instruction 6). However, the Washington State Supreme Court has characterized this

instruction as a general “separate crime instruction,” and held it is insufficient to protect against a double jeopardy violation because “it still fails to ‘inform[] the jury that each “crime” required proof of a different act.’” Mutch, 171 Wn.2d at 663 (quoting Borsheim, 140 Wn. App. at 367 (citing State v. Berg, 147 Wn. App. 923, 953, 198 P.3d 529 (2008))).

Thus, the instructions left open the possibility that the jurors would unanimously agree to one act of incest and would rely on that one act to support each of the four counts. Where none of the instructions conveyed that the jury must find separate and distinct acts to support each of counts II through V, the instructions failed to protect against a double jeopardy violation. Borsheim, 140 Wn. App. at 364, 366-67.

This analysis is supported by jurisprudence. In Mutch, the State charged five identical counts of rape, all within the same charging period. 171 Wn.2d at 662. There was sufficient evidence of five separate acts of rape, but the jury was not instructed that each count must arise from a separate and distinct act in order to convict. Id. at 662-63. The possibility that the jury convicted Mutch on all five counts based on a single criminal act created a potential double jeopardy violation. Id. at 663.

In Land the court similarly found the instructions inadequate where they failed to inform the jury they must find “separate and distinct” acts to support each count, where both counts involved sex offenses during the

same charging period. Land, 172 Wn. App. at 602. This allowed for the possibility that the child rape and molestation convictions could have been based on one act in violation of double jeopardy. Id. at 601-02 (considering rape and molestation charges could be based on allegations of oral sex).

Like the defendants in Mutch and Land, Thompson was charged with multiple sex offenses within the same charging period, yet the instructions failed to inform the jury that separate and distinct acts were required to convict for each incest count. The instructions similarly failed to protect against a double jeopardy violation and so were flawed.

- b. The record fails to show beyond a reasonable doubt the jury relied on separate and distinct acts to support each count of incest.

Where a double jeopardy violation is found, the appellate court must vacate the offending conviction. Borsheim, 140 Wn. App. at 371. However, flawed jury instructions do not always ripen into an actual double jeopardy violation. If after reviewing the record as a whole, the court is persuaded beyond a reasonable doubt that despite flawed instructions it is “manifestly apparent” the jury based each conviction on a separate and distinct act, then the convictions may stand. Mutch, 171 Wn.2d at 665; see also Land, 172 Wn. App. at 601-03 (citing Mutch, 171 Wn.2d at 663-65).

In Mutch, the Court found the jury instructions were flawed. 171 Wn.2d at 663. However, the Court held that case “presented a rare

circumstance where, despite deficient jury instructions,” it was nevertheless “manifestly apparent” jurors based each conviction on a separate and distinct act. Id. at 665. The Court was “convinced beyond a reasonable doubt, based on the entire record, that the jury instructions did not actually effect a double jeopardy violation.” Id.

First, the victim, J.L., testified to precisely the same number of rape episodes (five) as there were counts charged and to convict instructions. Id. at 651. Second, the defense essentially conceded these interactions; Mutch admitted to a detective that he engaged in multiple sex acts with J.L., his defense was that of consent rather than denial, and the defense did not contest the number of episodes in closing argument. Id. Third, during closing argument the prosecutor discussed each of the five alleged acts individually and both parties emphasized that jurors must unanimously agree to a separate and distinct act to support each count. Id. at 665.

Given this context, the Court concluded that all indications were that the jury was not confused and had relied on five specific instances of sexual contact to support the five rapes charged. Id. at 665-66. Rather, “it was manifestly apparent to the jury that each count represented a separate act.” Id. at 665-66. Despite the deficient jury instructions, the Mutch Court was convinced beyond a reasonable doubt that an actual double jeopardy violation did not occur. Id. at 666.

In keeping with the Mutch Court's analysis, the Court of Appeals in Land found the failure to instruct on the separate and distinct acts requirement allowed for the possibility in theory that the counts of child rape and child molestation could have been based on the same conduct, i.e. allegations of oral sex, in violation of double jeopardy. Land, 172 Wn. App. at 601-02. However, after evaluating the context of the trial, the Land Court concluded it was "manifestly apparent" the jury had not convicted Land of both rape and child molestation on the basis of one act. Id. at 603.

The Land Court considered the following factors. First, the testimony of the victim, S.H., alleged that Land had kissed and touched her breasts and "lower part" both under and over her clothing. Id. at 601. This "vague" testimony did not include any clear allegation that Land's mouth had come into contact with her genitals, and so could support the molestation count, but not the rape count. Id. The only evidence of rape was S.H.'s testimony that Land had penetrated her vagina with his finger. Id. at 602. Second, the prosecutor's use of this testimony in closing made a clear election of the finger penetration to support the rape count, and of the touching of her breast and her vagina up until the point of penetration to support the molestation. Id. Third, the charging language and "to-convict" instructions of the two counts were not identical; the rape instruction and

charge used the language “sexual intercourse” whereas the molestation instruction and charges stated “sexual contact.” Id. at 602-03.

The Land Court reasoned, that taken together, it was “manifestly apparent” to the jury that the rape and molestation counts were not based on the same alleged act of oral sex, and no other act could, as a matter of law, support both different crimes. Id. at 603. Thus, there was no double jeopardy violation in fact. Id.

The context of Thompson's trial is distinct from that of Mutch and Land in all important respects. First, M.T.'s testimony made clear there were multiple alleged incidents of oral and genital penetration beyond just the five that were charged. 3RP 630, 637-38, 640-41, 647-48, 672, 674-75, 724, 743, 758-59. Without identifying a specific time period, M.T. explained that sometimes incidents would happen as often as once a week. 3RP 647, 672, 722-23. Thus, there was no clear match between the number of precise incidents testified to and the number of counts charged as there was in Mutch.

Second, Thompson's defense was not consent but rather complete denial. Thompson consistently maintained that no incidents of sexual contact had occurred between him and M.T. Thus, unlike in Mutch, the existence and number of instances of sexual contact was not agreed by both parties.

In Land, the double jeopardy violation involved rape and molestation, which could only even theoretically violate double jeopardy if the jury relied on oral sex to support both counts. See Land, 172 Wn. App. at 600-03. Thus, where the allegation of oral sex was not, as a matter of law, sufficient to support the rape, not even a theoretical risk of a double jeopardy violation remained. Id. In contrast, the double jeopardy violation in Thompson's case involves four counts of the identical crime.

Finally, unlike the charging document and “to-convict” instructions in Land, the information and “to-convict” instructions for counts II through V were essentially identical. See CP 70-73 (instructions 13-16). Thus, these documents did not provide clarity to the jury regarding how to differentiate between the counts.

In response, the State may argue the prosecutor's election during closing argument remedied Thompson's exposure to double jeopardy. See 3RP 956-57 (counts 1 and 2 "are for the first time that [M.T.] was raped[,]” count III is for the "shower" incident, count IV is for the "oral sex" on all fours, and count V is for "oral sex"). But counsel's closing argument is just that: argument. See CP 57 (Instruction 1 reminds jurors that “The lawyers’ remarks, statements, and argument are intended to help you understand the evidence and apply the law[,]” but that "the lawyers' statements are not evidence" and “The evidence is the testimony and the

exhibits[,]” and “The law is contained in [the court’s] instruction to you.”).

In State v. Kier, 164 Wn.2d 798, 808, 194 P.3d 212 (2008), the state argued Kier’s assault and robbery convictions did not merge because they were committed against separate victims. Noting the case before it was somewhat analogous to a multiple acts case, the court indicated it was at best unclear whether the jury believed Kier committed the crimes against the same or different victims. Id. at 811. The rule of lenity requires ambiguous jury verdicts to be resolved in the defendant’s favor. Id. Therefore, because the evidence and instructions allowed the jury to consider whether a single person was the victim of both the robbery and assault, the verdicts were ambiguous and would violate double jeopardy to not merge the offenses. Id. at 814.

The Supreme Court likewise intimated as much in Mutch, when it opined it will be a “rare circumstance” where jury instructions like those here – that do not make it manifestly apparent that each count must be based on a separate and distinct act– will not result in a double jeopardy violation. Mutch, 171 Wn.2d at 665. As noted above, the “rare circumstances” that existed in Mutch are absent here. Instead, the evidence presented at Thompson's trial consisted of multiple alleged acts

of sexual contact against the same complaining witness over the same course of time.

The context of Thompson's trial does not dispel the risk of a double jeopardy violation. For the reasons discussed above, this Court cannot conclude “beyond a reasonable doubt” that the jury relied on separate and distinct acts to convict Thompson of counts II through V. Mutch, 171 Wn.2d at 665. Accordingly, three of these counts must be vacated. Borsheim, 140 Wn. App. at 371.

2. THE COMMUNITY CUSTODY CONDITION BARRING ALL CONTACT BETWEEN THOMPSON AND HIS WIFE AND ADULT CHILDREN IMPERMISSIBLY INTERFERES WITH HIS FUNDAMENTAL RIGHT TO MARRIAGE AND TO COMPANIONSHIP.

As a condition of community custody, courts may order an offender to “[r]efrain from direct or indirect contact with the victim of the crime or a specified class of individuals.” RCW 9.94A.703(3)(b). Likewise, courts may impose crime-related prohibitions, including “an order of a court prohibiting contact that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). No-contact orders may extend up to the statutory maximum for the crime committed. State v. Armendariz, 160 Wn.2d 106, 119-20, 156 P.3d 201 (2007).

Sentencing errors may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

Here, as a condition of community custody, the trial court prohibited Thompson from "Hav[ing] [] direct or indirect contact with [the] victim(s) or his or her family, including by telephone, computer, letter, in person, or via third party." CP 116. The problem is that M.T.'s family also includes Thompson's other family members, including his wife and adult children. See 3RP 774, 826-27, 879, 890. The prohibition, imposed as part of community custody, will not take effect until community custody begins following completion of Thompson's indeterminate sentence of confinement of 280 months to life sentence of confinement. See In re Pers. Restraint of Crowder, 97 Wn. App. 598, 600, 985 P.2d 944 (1999) (community custody begins upon completion of the term of confinement or at such time as the offender is transferred to community custody). The court did not justify why this prohibition on all contact was necessary to protect M.T. Prior case law guides this Court's decision and demonstrates why remand for modification of the condition prohibiting Thompson's contact with his family, including his wife and other children, is required.

- a. The prohibition on contact with M.T.'s family unconstitutionally infringes on Thompson's fundamental right to marriage.

Individuals have a fundamental right to marriage. State v. Warren, 165 Wn.2d 17, 32-34, 195 P.3d 940 (2008) (citing Loving v. Virginia, 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967)). The imposition of crime-related prohibitions is generally reviewed for abuse of discretion. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). However, Washington law requires more than simple crime-relatedness for sentencing conditions that interfere with fundamental rights. Bahl, 164 Wn.2d at 757.

Rather, such conditions are subject to strict scrutiny—they “must be reasonably necessary to accomplish the essential needs of the State and public order.” Warren, 165 Wn.2d at 32-34. They must be “sensitively imposed,” with “no reasonable alternative way to achieve the State’s interest.” Id. at 32, 35. Courts apply this high standard to all manner of fundamental rights, including the fundamental right to marriage. See, e.g., Rainey, 168 Wn.2d at 377 (fundamental right to parent); Bahl, 164 Wn.2d at 757-58 (freedom of speech); Warren, 165 Wn.2d at 32-34 (fundamental right to marriage); State v. Riley, 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993) (freedom of association).

A court may not impose a no-contact order between a defendant and his or her biological child as a matter of routine practice, given the fundamental right to parent. Rainey, 168 Wn.2d at 377-82. Instead the court must consider whether the order is reasonably necessary in scope and duration to prevent harm to the child. Id. Less restrictive alternatives such as indirect contact or supervised contact may not be prohibited unless there is a compelling State interest barring all contact. Warren, 165 Wn.2d at 32; State v. Ancira, 107 Wn. App. 650, 655, 27 P.3d 1246 (2001).

In the context of the fundamental right to parent, Washington courts hold that no-contact orders are not automatically appropriate simply because the child is a victim of the parent's crime. Rainey, 168 Wn.2d at 378. For instance, Ancira violated a no-contact order to see his wife and children. Ancira, 107 Wn. App. at 652; see also Rainey, 168 Wn.2d at 378 (recognizing Ancira is authoritative). He drove away with his four-year old child, whom he refused to return until his wife agreed to talk with him. Ancira, 107 Wn. App. at 652. The court imposed a five-year no-contact order with his children. Id. at 652-53. This violated Ancira's fundamental right to parent. Id. at 654. Although the State had a compelling interest in preventing the children from witnessing domestic violence, it failed to show how supervised visitation without the mother's presence, or indirect contact by telephone or mail, would jeopardize this goal. Id. at 654-55.

Similarly, Rainey was convicted of a serious violent crime against his daughter—first degree kidnapping. Rainey, 168 Wn.2d at 371, 379. Rainey also inflicted measurable emotional damage on his daughter and attempted to leverage her to inflict emotional distress on the mother. Id. at 379-80. This included letters Rainey sent his daughter from jail blaming her mother for breaking up the family. Id. The trial court imposed a lifetime no-contact order. Id. at 374. The supreme court acknowledged the State generally “has a compelling interest in preventing future harm to the victims of the crime.” Id. at 378. These facts were therefore sufficient to establish that a no-contact order, including indirect or supervised contact, was reasonably necessary to protect the child. Id. at 380.

Nevertheless, the Rainey court reversed because the sentencing court provided no justification for the order’s lifetime duration and the State failed to show why the lifetime prohibition was reasonably necessary. Id. at 381-82. The court explained:

The duration and scope of a no-contact order are interrelated: a no-contact order imposed for a month or a year is far less draconian than one imposed for several years or life. Also, what is reasonably necessary to protect the State’s interests may change over time. Therefore, the command that restrictions on fundamental rights be sensitively imposed is not satisfied merely because, at some point and for some duration, the restriction is reasonably necessary to serve the State’s interests. The restriction’s length must also be reasonably necessary.

Id. at 381. The court therefore struck the no-contact order and remanded for resentencing, “so that the sentencing court may address the parameters of the no-contact order under the ‘reasonably necessary’ standard.” Id. at 382.

In Warren, the supreme court considered a lifetime condition barring all contact between the defendant, Warren, and his wife, Lisa. 165 Wn.2d at 31. Warren was convicted of molesting his stepdaughters—Lisa’s children. Id. Though she disbelieved the allegations at first, Lisa ultimately cooperated with the investigation and testified against Warren at trial. Id. at 31-32. Warren had also previously been convicted of assaulting Lisa and of murder. Id. at 31, 34. The trial court imposed a lifetime no-contact order, emphasizing that Lisa testified against Warren, her children were the victims of his crimes, and Warren’s controlling behavior towards Lisa. Id. at 32.

The supreme court upheld the lifetime no-contact order, concluding it was “reasonably necessary to achieve a compelling state interest, namely, the protection of Lisa and her daughters.” Id. at 34. The court emphasized Lisa was directly related to the crimes: “She is the mother of the two child victims of sexual abuse for which Warren was convicted; Warren attempted to induce her not to cooperate in the prosecution of the crime; and Lisa testified against Warren resulting in his conviction of the crime.” Id.

Furthermore, there was nothing in the record suggesting that Lisa objected to the no-contact order. Id.

The Rainey court emphasized “the interplay of sentencing conditions and fundamental rights is delicate and fact-specific, not lending itself to broad statements and bright line rules.” 168 Wn.2d at 377. Given this pronouncement, Warren did not create a bright line rule that a no-contact order for the statutory maximum of the crime is always appropriate when the defendant’s spouse is directly related to or the victim of the crime. See Rainey, 168 Wn.2d at 378 (“It would be inappropriate to conclude that, simply because L.R. was a victim of Rainey’s crime, prohibiting all contact with her was reasonably necessary to serve the State’s interest in her safety.”); See also, State v. Howard, 182 Wn. App. 91, 328 P.3d 969 (2014), State v. Torres, 198 Wn. App. 685, 393 P.3d 894 (2017). A “more nuanced look” at the facts of each particular case is necessary. Rainey, 168 Wn.2d at 378.

This brings us to the facts of Thompson's case. Thompson is married to M.T.'s stepmother, Elizabeth. RP 304-05, 430. As a condition of community custody, the trial court prohibited Thompson from having any direct or indirect contact with M.T.'s family. CP 116. Although the condition does not define "family," presumably this would include Elizabeth. See e.g. RCW 26.50.010(6) (defining "family or household

members" broadly to include individuals with children in common, adult persons related by blood or marriage, and those with biological or legal parent-child relationships, including stepparents and stepchildren.); See also CP 68 (instruction 11) (defining "family or household members" as "person who have a biological or legal parent-child relationship").

Although the State has a compelling interest in protecting victims, it did not demonstrate how prohibiting all contact between Thompson and his wife is reasonably necessary to effectuate that interest. The State did not include any analysis in its presentence report. CP 102-110. At sentencing, the State said only, "We're also asking for a lifetime no-contact order with [M.T]." 4RP 3. This is plainly insufficient under Rainey. The State must show that no less restrictive alternative would prevent harm to M.T. Rainey, 168 Wn.2d at 381-82. Any limitations must be narrowly drawn. Id.

At sentencing, with regard to these no-contact orders, the trial court stated only, "I am issuing the permanent no-contact order that is until and unless it is vacated by the court, which in this case it would only be by request of [M.T.], and even then would have to be dependent circumstances." 4RP 26. The court did not engage in any other analysis. This failure to apply the appropriate legal standard constitutes an abuse of discretion. Rainey, 168 Wn.2d at 375. The court did not consider whether

barring all contact between husband and wife was reasonably necessary to achieve the State's interests. Nor did the trial court consider whether less restrictive alternatives could protect M.T. Significantly, a separate lifetime standalone no contact order between Thompson and M.T., was also entered. Supp. CP ____ (sub no. 118, Domestic Violence No Contact Order, dated 6/22/18). This fact alone, strongly suggests, that less restrictive alternatives existed to prevent harm to M.T.

The condition prohibiting contact indisputably interferes with Thompson's fundamental right to marriage. The State's evidence showed Thompson had sexual contact with M.T. Elizabeth was not a witness to those alleged incidents, nor a victim herself. The trial court's complete lack of analysis regarding the no-contact order fails the Rainey standard. Barring all contact between spouses could create significant hardship in managing finances, dealing with shared belongings, or even obtaining a divorce. The trial court did not consider any of this in barring all contact.

This also distinguishes Thompson's case from Warren, where the trial court pointed to several compelling factors that warranted no contact. Unlike Warren, Elizabeth did not testify against Thompson at trial, instead testifying she had neither observed, nor suspected, any inappropriate contact between Thompson and M.T. 3RP 787, 791-92, 806. There is no evidence in the record Thompson attempted to influence Elizabeth's testimony. Also,

unlike Warren, there is no evidence in the record that Thompson and Elizabeth want to avoid contact with one another.

The community custody condition barring all contact between Thompson and his wife impermissibly and unnecessarily interferes with Thompson's fundamental right to marriage. This Court should strike the no-contact order condition and remand for resentencing “so that the sentencing court may address the parameters of the no-contact order under the ‘reasonably necessary’ standard.” Rainey, 168 Wn.2d at 382.

- b. The prohibition on contact with M.T.'s family unconstitutionally infringes on Thompson's fundamental right to companionship with his children.

The condition prohibiting any contact between Thompson and M.T.'s family also impermissibly infringes on Thompson's right to companionship. Even though Thompson's three other children are no longer minors, parents and children share a constitutional interest in each other's companionship and affection. Moore v. Burdman, 84 Wn.2d 408, 411, 526 P.2d 893 (1974); Smith v. City of Fontana, 818 F.2d 1411, 1418-19 (9th Cir. 1987), overruled on other grounds, Hodgers-Durgin v. de la Vina, 199 F.3d 1037 (9th Cir. 1999). The right to the preservation of family integrity encompasses the reciprocal rights of both parent and

children. Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977).
Familial bonds do not simply evaporate once a child turns 18 years old.

"[C]hoices to enter into and maintain certain familial human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty." Roberts v. U.S. Jaycees, 468 U.S. 609, 617–18, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984). "This right to familial association is grounded in the Fourteenth Amendment's Due Process Clause." Lowery v. County of Riley, 522 F.3d 1086, 1092 (10th Cir. 2008). The freedom of intimate association protects associational choice as well as biological connection. Trujillo v. Bd. of County Comm'rs, 768 F.2d 1186, 1188 (10th Cir. 1985).

Based on these principles, parents have a due process liberty interest in the companionship and society of their adult children. See Rentz v. Spokane County, 438 F. Supp.2d 1252, 1265 (E.D. Wash. 2006) ("the Ninth Circuit has consistently recognized that its precedent recognizes a Fourteenth Amendment liberty interest of parents in the companionship and society of their adult children"); Smith, 818 F.2d at 1419 (recognizing companionship and nurturing interests of parent and

child in maintaining familial bond are reciprocal and there is no reason to accord less constitutional value to child-parent relationship than to parent-child relationship; holding due process right to familial companionship and society extended to protect an adult child from unwarranted state interference into relationship with parents) (citing Strandberg v. City of Helena, 791 F.2d 744, 748 (9th Cir. 1986) (in section 1983 claim, parents' interest in directing the upbringing of their son was not implicated because son was twenty-two years old and no longer a minor; but parents were able to "claim a violation of their fourteenth amendment due process rights in the companionship and society of the decedent.")).

Thompson and his children each have a fundamental right to one another's companionship and society despite the fact they are adults. As discussed above, the State generally has a compelling interest in preventing future harm to the victims of the crime. Rainey, 168 Wn.2d at 377. But Thompson committed no crime against his other three children. The State and court both failed to explain why this complete prohibition on contact with M.T.'s family was reasonably necessary to protect M.T.

The condition prohibiting contact cannot be justified under the standard for assessing restrictions on fundamental rights. Moreover, the order unduly interferes with the freedom of both parent and child to

preserve a familial relationship. This court should remand for an appropriately tailored order.

3. THE CONDITIONS PROHIBITING 'SEXUALLY EXPLOITIVE' AND 'SEXUALLY EXPLICIT' MATERIALS ARE VAGUE AND OVERBROAD, IN VIOLATION OF DUE PROCESS.

On vagueness, overbreadth, and arbitrary enforcement grounds, Thompson challenges the conditions that prohibit possessing or accessing "sexually explicit materials" and "sexually exploitive materials (as defined by Defendant's treating therapist or CCO)." CP 116.

- a. The conditions are void for vagueness because they do not provide adequate notice of what is prohibited and exposes Thompson to arbitrary enforcement.

The conditions are vague because they are not sufficiently definite so that ordinary persons can understand what it proscribes, and it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53 (setting forth legal standard).

Bahl reasoned "the prohibition on perusing pornography was not sufficiently definite to apprise ordinary persons of what is permitted and what is proscribed" because definitions of pornography may "include any nude depiction, whether a picture from Playboy Magazine or a photograph of Michelangelo's sculpture of David." Id. at 756. The same is true of the prohibition on all sexually explicit and exploitive materials,

Countless works of art, literature, film, and music explicitly describe, depict, and relate sex and sexuality. Thompson has no way to know which of these works he can possess, use, access, or view, and which he cannot.

"[A] stricter standard of definiteness applies if material protected by the First Amendment falls within the prohibition." Id. at 753. The condition here makes no distinction between sexually explicit materials involving adults versus children. Sexually explicit materials, such as adult pornography, are protected by the First Amendment. State v. Perrone, 119 Wn.2d 538, 551, 834 P.2d 611 (1992). The blanket ban on all sexually explicit or exploitive materials fails to ensure First Amendment rights are honored. The condition impacts Thompson's ability to read a certain book, view a certain painting or film, or listen to a certain song.

Bahl approved of a condition that prohibited "frequenting 'establishments whose primary business pertains to sexually explicit or erotic material.'" Bahl, 164 Wn.2d at 758. The court discussed dictionary definitions of "sexually explicit" and "erotic," and also noted statutes provided definitions of such terms. Id. at 758-60. Bahl held that because "[t]he challenged terms [we]re used in connection with a prohibition on frequenting business," "[w]hen all the challenged terms,

with their dictionary definitions, are considered together, we believe the condition is sufficiently clear. It restricts Bahl from patronizing adult bookstores, adult dance clubs, and the like." Id. at 759. The connection to frequenting business saved the condition in Bahl. No similar context saves the prohibition here.

More recently, the Supreme Court in State v. Nguyen, held the following condition was not unconstitutionally vague:

Do not possess, use, access or view any sexually explicit material as defined by RCW 9.68.130 or erotic materials as defined by RCW 9.68.050 or any material depicting any person engaged in sexually explicit conduct as defined by RCW 9.68A.011(4) unless given prior approval by your sexual deviancy provider.

191 Wn.2d 671, 679-80, 425 P.3d 847 (2018). Significant to the Nguyen court's conclusion, however, was the fact that the statutory definitions of the terms were referenced in the condition itself. Id. Notably, such statutory references and definitions are absent from the condition in Thompson's case.

Although not discussed in Nguyen, The Supreme Court in State v. Padilla, 190 Wn.2d 672, 416 P.3d 712 (2018), reached an opposite result, holding that a condition prohibiting pornographic material, defined as "images of sexual intercourse, simulated or real, masturbation, or the display of intimate body parts," was unconstitutionally vague. Padilla,

416 P.3d at 717-18. Padilla agreed "the prohibition against viewing depictions of simulated sex would unnecessarily encompass movies and television shows not created for the sole purpose of sexual gratification. Films such as *Titanic* and television shows such as *Game of Thrones* depict acts of simulated intercourse, but would not ordinarily be considered 'pornographic material.'" Id. at 717. It held "[t]he prohibition against viewing depictions of intimate body parts impermissibly extends to a variety of works of arts, books, advertisements, movies, and television shows." Id. That reasoning controls here. "The presence of a vague definition does not save the condition from a vagueness challenge if it also encompasses a broad range of speech protected by the First Amendment." Id.

Sexually "exploitive" materials present similar problems. The term "sexually exploitative material" is not statutorily defined. Reasonable minds would differ on what constitutes "exploitative" material. Would Sir Mix-a-Lot's "Baby Got Back," in which he explicitly relates the sexual virtues of "big butts," so appeal? Do music videos such as Madonna's mega-hit "Like a Virgin"? And how would a person know in advance whether erotic materials are "utterly without redeeming social value?" As Bahl pointed out in its reliance on Loy, judges and lawyers

have great difficulty answering these questions. Bahl, 164 Wn.2d at 746-48; Loy, 237 F.3d at 264.

This brings us to the problem of arbitrary enforcement. The sentencing condition pertaining to sexually exploitive material makes the CCO the arbiter of what crosses the line. The prohibition is so broad that a corrections officer could apply it to almost anything sex-related.

In Bahl, the State Supreme Court held that "the restriction on accessing or possessing pornographic materials was unconstitutionally vague" because the condition was completely subjective, allowing the community corrections officer to determine what fell within the condition which "virtually acknowledges that on its face it does not provide ascertainable standards for enforcement." Bahl, 164 Wn.2d at 758.

The same reasoning applies here. The prohibition is unconstitutionally vague because it does not give fair notice of what is allowed and what is disallowed. This problem is compounded by the fact that Thompson's CCO is the person determining what constitutes the definition of sexually exploitive material. As written, the discretion conferred on the CCO by the condition is boundless. As such, the condition violates due process because it permits arbitrary enforcement.

- b. The conditions are unconstitutionally overbroad because they encompass substantial amounts of protected speech under the First Amendment.

"A law is overbroad if it sweeps within its prohibitions constitutionally protected free speech activities." City of Seattle v. Huff, 111 Wn.2d 923, 925, 767 P.2d 572 (1989). Courts consider whether the condition prohibits a real and substantial amount of constitutionally protected speech relative to its legitimate sweep. State v. Homan, 191 Wn. App. 759, 767, 364 P.3d 839 (2015).

As discussed, the prohibition on all sexually explicit and sexually exploitive material reaches significant amounts of protected speech. The conditions do not distinguish between adult and child pornography, between artwork and obscenity, or between literature and smut. The condition encompasses at least as much protected speech as it does unprotected speech.

When a sentencing condition limits an offender's fundamental rights under the First Amendment, the condition "must be narrowly tailored and directly related to the goals of protecting the public and promoting the defendant's rehabilitation." Bahl, 164 Wn.2d at 757. When it touches First Amendment freedoms, the condition "must be clear and must be reasonably necessary to accomplish essential state needs and

public order." Id. at 758. Conditions that place restrictions on First Amendment rights must be narrowly tailored. Id. at 757-58.

Loy involved a conviction for possessing child pornography and a sentencing condition that prohibited possession of "all forms of pornography, including legal adult pornography." Loy, 237 F.3d at 255, 261. The court recited examples of protected speech that might or might not fall within the condition. Id. at 264. To be narrowly tailored, "the condition must not extend to all arguably pornographic materials," but only to those directly related to the goals of protecting the public and promoting rehabilitation. Id. "[W]here a ban could apply to any art form that employs nudity," First Amendment rights are "unconstitutionally circumscribed or chilled." Id. at 266. The "unusually broad condition" could "extend not only to Playboy magazine, but also to medical textbooks." Id. "Restricting this entire range of material is simply unnecessary to protect the public, and for this reason the condition is not 'narrowly tailored.'" Id. The condition violated the First Amendment "to the extent that the condition might apply to a wide swath of work ranging from serious art to ubiquitous advertising." Id. at 267.

The same is true here. Thompson was convicted of child sex offenses and the sentencing court prohibited access to any and all sexually explicit or sexually exploitive materials. The conditions

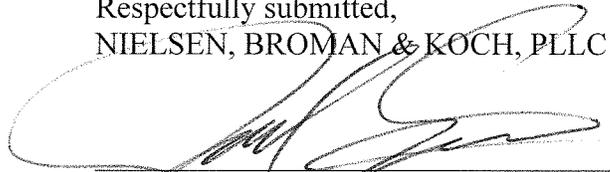
encompass just as wide a range of protected material as in Loy. The State has not demonstrated how restricting Thompson's access to all materials that depict sex or sexuality involving not only minors but also adults is necessary to achieve the State's needs or protect the public. The condition impermissibly chills Thompson's First Amendment rights and must be stricken as overbroad.

D. CONCLUSION

For the reasons stated, this court should reverse Thompson's convictions. Remand is also required so the trial court may address the community custody conditions, including the parameters of the no-contact order.

DATED this 22nd day of April, 2019.

Respectfully submitted,
NIELSEN, BROMAN & KOCH, PLLC



JARED B. STEED
WSBA No. 40635
Office ID No. 91051
Attorney for Appellant

NIELSEN, BROMAN & KOCH P.L.L.C.

April 22, 2019 - 2:36 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52224-1
Appellate Court Case Title: State of Washington, Respondent v. William Howard Thompson, Appellant
Superior Court Case Number: 16-1-00704-8

The following documents have been uploaded:

- 522241_Briefs_20190422143417D2038876_8142.pdf
This File Contains:
Briefs - Appellants
The Original File Name was BOA 52224-1-II.pdf

A copy of the uploaded files will be sent to:

- kcpa@co.kitsap.wa.us
- rsutton@co.kitsap.wa.us

Comments:

Copy mailed to: William Thompson, 735089 Stafford Creek Corrections Center 191 Constantine Way Aberdeen, WA 98520

Sender Name: John Sloane - Email: Sloanej@nwattorney.net

Filing on Behalf of: Jared Berkeley Steed - Email: steedj@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20190422143417D2038876