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Division II
State of Washington
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NO. 52468-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

STEVEN PEMBERTON,

Appellant.

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

The Honorable Sally F. Olsen, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by entering a judgment for attempted commercial sex abuse of a minor as the State's evidence failed to prove each element of the crime.

2. The State's use of outdated charging language in the Information on Count 2, attempted commercial sex abuse of a minor, failed to put Pemberton on adequate notice of the charge.

3. The trial court failed to enter written findings of fact and conclusions of law after hearing a CrR 3.5 hearing, contrary to CrR 3.5(c)'s requirement they be entered.

4. The trial court erred in imposing an alcohol-related community custody condition prohibiting Pemberton from purchasing or possessing alcohol or entering locations where alcohol is the primary sale product.

5. The trial court erred in imposing a vague community custody condition requiring Pemberton to notify his community custody officer of any "romantic" relationship.

6. The trial court made a scrivener's error on the judgment and sentence which indicated Pemberton pled guilty to all the offenses.

7. The trial court made a scrivener's error on the judgment and sentence in Pemberton's criminal history by listing the sentencing date for

a possession of a dangerous weapon conviction as occurring prior to the incident date listed for the offense.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred entering a judgment for attempted commercial sex abuse of a minor as the State's evidence did not support a conviction?

2. Whether the State's use of the statutorily outdated term "fee" instead of the accurate term of "anything of value" failed to put Pemberton on adequate notice of the attempted commercial sex abuse of a minor charge?

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C. STATEMENT OF THE CASE

Steven Pemberton responded to an ad posted on the Casual Encounters section on Craigslist. RP Trial 2 197;¹ RP Trial 3 341. The tag line of the ad read, "Crazy and young. Looking to explore." RP Trial 3 342; CP 7.

People entering the Casual Encounters section of Craigslist must affirmatively acknowledge they are at least 18 years old. RP Trial 2 224.

Pemberton responded to the ad with text and pictures. RP Trial 3 341-42. The pictures showed an unidentified person from the neck down

¹ "RP Trial 1" refers to the Report of Proceedings for trial. There are four trial volumes. The page cite follows the "Trial Volume." In instances where individual volumes are cited, the pattern of citation is "RP" followed by the date and page of the individual hearing.

wearing a white tank top and knee-length plaid shorts, Pemberton exhaling smoke, and three erect penises. RP Trial 3 341-42. Pemberton volunteered to teach adult fun. RP Trial 3 345.

The person ostensibly posting the ad identified herself as Brandi. RP Trial 3 346. Pemberton and Brandi exchanged a few emails before switching to text messages. RP Trial 3 341-44; Supplemental Designation of Clerk's Papers, Exhibit 4 (text exchange).

In her second text, Brandi said she was 13 years old and asked Pemberton if he was okay with her age. Exhibit 4, pg 1. Pemberton did not respond to her question. Exhibit 4, pg 1.

Brandi and Pemberton exchanged text messages on October 12, 2017, starting at about 12:30 p.m. and ending for the day at 11:10 p.m. The next day, they exchanged texts from about 5 a.m. to 7 p.m. Exhibit 4, pgs 5-10; RP Trial 3 359-66.

"Brandi" was not a 13-year-old girl. Instead "Brandi" was Kitsap County Sheriff's detective Krista McDonald. RP Trial 3 376. Detective McDonald was a member of the "Net Nanny" Task Force. RP Trial 3 338. She acted as a "chatter." RP Trial 3 338. As a chatter, she engaged electronically with people who respond to ads placed on Craigslist by the Task Force. RP Trial 2 186-96; RP Trial 3 338. The Task Force focused on

adults using the internet to solicit and arrange sexual encounters with children. RP Trial 2 186.

Pemberton said he was in East Bremerton. Exhibit 4, pg 1. Brandi said she was nearby in “PO”². Exhibit 4, pg 1. Brandi wrote that she was looking for a daddy to have fun with and get some roses. Exhibit 4, pg 1. Brandi explained that “roses” meant money. Exhibit 4, pg 1. Brandi tried to get Pemberton to be more explicit about his interests. Exhibit 4, pg 1. Pemberton suggested they talk about that in person. Exhibit 4, pg 1. The text exchange on October 12, 2017, went back and forth intermittently between 12:30 p.m. and 11:10 p.m. Exhibit 4, pgs 1-5.

The court admitted the complete text exchange as Exhibit 4.

The next day, October 13, Pemberton picked up where the texting the day before left off. Exhibit 4, pg 5. Brandi sent a picture purporting to be her and her friend Sam. Exhibit 4, pg 5. Brandi asked Pemberton if he was coming over to see her and her friend Anna. Exhibit 4, pg 5. Brandi told him where they lived. Exhibit 4, pg 7. Pemberton suggested he go home and clean up before coming over. Exhibit 4, pg 7. Brandi told Pemberton she was horny. Exhibit 4, pg 7. Brandi told him she was at the

² “PO” is short for Port Orchard.

house alone with her friends Anna. Exhibit 4, pg 6. Anna's mom left the girls alone at the house while she worked out of town for a week or more. Exhibit 4, pg 6. Brandi thought Pemberton was coming over to the house for some condom testing. Exhibit 4, pg 6. Brandi had earlier suggested to Pemberton that she could "suck" him for a phone charger. Exhibit 4, pg 2.

Pemberton owned his own construction company. Exhibit 4, pgs 4-5. He appeared near the address given to him by Brandi driving a work truck and towing a construction trailer. RP Trial 2 241-43. Police pulled Pemberton over and arrested him. RP Trial 2 257-58. At the time of his arrest, Pemberton had a small container of methamphetamine in his lap. RP Trial 2 278-79. As part of the earlier text exchange, Brandi indicated she had heard sex on meth was a good thing and Pemberton agreed that it was good. Exhibit 4, pg 8.

The State charged Pemberton with four crimes: attempted rape of a child in the second degree, attempted commercial sexual abuse of a minor, communicating with a minor for immoral purposes, and possession of methamphetamine. CP 1-12, 13-18.

The Amended Information listed the following elements for the attempted commercial sexual abuse of a minor. CP 15.

On or between October 12, 2017 and October 13, 2017 . . .
Defendant did pay a fee to a minor . . . as compensation for a
minor having engaged in sexual conduct with him . . . or agree to
pay a fee to a minor pursuant to an understanding that in return
therefore such minor will engage in sexual conduct with him . . .
and/or did solicit, offer, or request to engage in sexual conduct
with a minor in return for a fee. . . .

CP 15.

Pre-trial, the court held a CrR 3.5 hearing and found Pemberton's
statements admissible. RP Trial 1 56-97. To date, no written CrR 3.5
findings of fact and conclusions of law are entered in the court file.

The State adopted a trial strategy where they would not use any
of Pemberton's statements to the police as evidence at trial. RP Trial 2
167.

Pemberton did not testify at trial. RP Trial 4 455-64.

On the commercial sex abuse charge, the court provided the
following elements to prove the offense.

That on or about October 12, 2017 and October 13, 2017, the
defendant provided or agreed to provide anything of value to a
minor pursuant to an understanding that in return therefore such
minor will engage in sexual conduct with him or her.

Supplemental Designation of Clerk's Papers, Court's Instructions to the
Jury, Instruction 18.

The jury found Pemberton guilty as charged. RP 6/8/18 9-10; CP 22-23.

Post-trial, the court allowed Pemberton to represent himself. RP 7/6/18 16-25. Pemberton filed several post-trial motions. See *State v. Pemberton*, No. 535084.

At the court's request, the Department of Corrections (DOC) prepared a pre-sentence investigation. Supplemental Designation of Clerk's Papers, Presentence Report.

The court imposed an exceptional sentence upward to 234 months based on free crimes. CP 33, 49-51. Pemberton's offender score on each sex offense was 16. CP 33. His offender score on the methamphetamine possession was 12. CP 33. Count 2 committed Pemberton to lifetime community custody. CP 34.

The court imposed community custody conditions and also ordered Pemberton to abide by all the community custody conditions listed in the pre-sentence investigation. CP 34-35, 37; Supp. DCP, Presentence Report.

Pemberton appeals every portion of his judgment and sentence. CP 45.

D. ARGUMENT

Issue 1: The State failed to provide sufficient evidence of Count 2, attempted commercial sex abuse of a minor.

The State failed to provide sufficient evidence Pemberton offered to exchange anything of value for sex with purported teenage Brandi. As the State presented insufficient evidence, Count 2, charging attempted commercial sex abuse of a minor, should be dismissed with prejudice.

Evidence is only sufficient to support a conviction if, viewing the evidence in the light most favorable to the State, any rational trier of fact can find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence are drawn in favor of the State and interpreted most strongly against the defendant. *Id.* A claim of insufficiency of the evidence “admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *Id.* Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). “Credibility determinations are for the trier of fact and cannot be reviewed on appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

To prove criminal attempt, the State must prove the defendant had specific intent to commit the attempted offense. RCW 9A.28.020(1). Therefore, to prove attempted commercial sexual abuse of a minor, the State had to prove Pemberton had the specific intent to solicit, offer, or request to engage in sexual conduct with a minor in exchange for anything of value. RCW 9.68A.100(1)(c). In reviewing the evidence presented at trial, the State failed to prove Pemberton's intent to satisfy all elements of the crime.

The State presented its case through Exhibit 4, the text message exchange between Detective McDonald posing as "Brandi," who represented herself via texts as 13 years old, and Pemberton. Detective McDonald knows the legal elements of various sex offenses. Detective McDonald used the text exchange to try and commit Pemberton to say things that satisfied the elements of the offense and to thereby build a case against Pemberton. The State failed in its effort to lure Pemberton into committing the crime of attempted commercial sex abuse. Pemberton never agreed to provide anything of value in exchange for sex.

Brandi: im looking for a daddy who i can have some fun with and get me some roses

Pemberton: Roses??

Brandi: that's the word my friend told me to use. money.

Pemberton: Your friend gonna have boys showing up with flowers for you lol

...

Brandi: maybe I can suck you for a phone charger [smiley face emoticon]

Pemberton: Oh really now

Brandi: I can do more to you if you want

Pemberton: Ummmm.. If you want to kick it sometime then we can talk in person. I'm not even trying to catch some criminal charges

...

Brandi: hi again i'm so sorry about earlier i didn't mean to bug you so I waited alittle. you still want to come over?

Pemberton: Over to where

Brandi: thought you were gonna hook up with us today

Pemberton: Us??

Brandi: my friend anna i'm hanging out at her house

Pemberton: What's y'all's plans

Brandi: thought the three of us were gonna do some condom testing lol

Pemberton: Oh is that what you're needing

Brandi: yes babe. and a few bucks for it that cool?

Pemberton: HmMMMMM..... What's few bucks

Pemberton: ????

Brandi: 40 and it will get me more minutes for my phone

Pemberton: Interesting. Very very interesting

Brandi: why's that

Pemberton: And where is this gonna happen at???

Brandi: at anna's place her mom's out of town

Pemberton: Savannah's mom just goes out of town and leaves her
the house to do whatever she wants to

Brandi: who is savannah?

Pemberton: It was supposed to say so Anna not Savannah

Brandi: Anna's mom job takes out of town for like a week a few
months then we got to do our own thing

Brandi: what u think we're able to fuck a guy three way with my in
the kitchen

Pemberton: Freeway huh. So you get money and Anna doesn't?

Brandi: im the one that needs a phone card if you want to pay her
for sex you can lol

Pemberton: I never said I was paying for sex. I was just helping you out with some phone time

Brandi: I didn't ask for money for sex why when we want it i just need a phone card

Therafter, the exchange continues with a discussion about how to get to Anna's place. Pages 25-30, Exhibit 4.

As explicit as Detective McDonald is while posing as Brandi in the text exchange, the content of the exchange fails to present sufficient evidence of attempted commercial sex abuse of a minor.

To prove criminal attempt, the State must prove that the defendant had the specific intent to commit the attempted offense. RCW 9A.28.020(1). Therefore, for attempted commercial sexual abuse of a minor, the State had to prove Pemberton had the specific intent to solicit, offer, or request to engage in sexual conduct with a minor in return for anything of value. RCW 9.68A.100(1)(c).

The State was in control of where it took the text exchange. Had the State wanted to commit Pemberton to provide something of value to Brandi in exchange for sex with a minor, it was obligated to do so. Instead, the State clumsily lead Pemberton nowhere.

Pemberton told Brandi in no uncertain terms, "I never said I was paying for sex." Exhibit 4, pg 7. Brandi assures Pemberton she is not interested in money for sex. Instead, she asked him why she would require money when what she wanted was sex. "[W]hy when we want it." Exhibit 4, pg 7. Brandi introduced the topic of needing phone time. Exhibit 4, pg 7. While Pemberton agreed, "I was just helping you out with some phone time," there is no quid pro quo. Exhibit 4, pg 7. The sex is not contingent on Mr. Pemberton giving her a phone card. Rather, the sex is free because "we [Brandi and Anna] want it." Exhibit 4, pg 7. The text exchange shows Mr. Pemberton enjoyed his text exchange with Brandi. Exhibit 4. To keep it going, Brandi needed a working phone.

That Pemberton did not offer or agree to exchange anything of value for sex is further shown by his lack of money or a phone card when arrested by the police. RP Trial 2 290. Post-arrest, the police indicated Pemberton had no phone card or even any money. The absence of Pemberton possessing anything to exchange for sex, demonstrates Pemberton believed Brandi offered no-strings-attached sex. The State controlled the conversation. Pemberton did not want to pay for sex; he just wanted sex. But he never offered anything of value in exchange for sex. The State failed to ensnare Pemberton in that all-important part of its

net. The attempted commercial sex abuse conviction should be dismissed for lack of evidence.

Issue 2: The outdated charging language used in the Information and Amended Information failed to put Pemberton on notice of the “anything of value” element of attempted commercial sex abuse.

The State used the wrong, outdated, charging language in charging attempted commercial sex abuse of a minor. The dated version of the crime, relied upon by the State in its Amended Information, required an offer to exchange a “fee” for sexual conduct. CP 15. But, by the time of this alleged offense, October 12, 2017, the Legislature had changed the law to require an offer for “anything of value.” The use of the wrong term in the Information failed to apprise Pemberton of all “essential elements” of the crime. Pemberton is entitled to dismissal of the charge.

The State must include all essential elements of a crime in the charging document to give notice to an accused of the nature and cause of the accusation against him. *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013). An “essential element” is one whose specification is necessary to establish the very illegality of the behavior charged. *State v. Ward*, 148 Wn.2d 803, 811, 64 P.3d 640 (2003). When a defendant as here, challenges the sufficiency of the information for the first time on appeal, the court liberally construes the information and analyzes whether the necessary

facts appear in any form, or by fair construction can be found, in the charging document. *State v. Kjorsvik*, 117 Wn.2d 93, 105, 812 P.2d 86 (1991).

In liberally construing a charging document, courts employ a two-pronged test established in *Kjorsvik*: (1) do the necessary elements appear in any form or by fair construction on the face of the document, and, if so, (2) whether the defendant can show he or she was actually prejudiced by the unartful language. *Zillyette*, 178 Wn.2d at 162; *Kjorsvik*, 117 Wn.2d at 105-06. If the State does not satisfy the first prong, the court presumes prejudice and reverses the conviction. *Zillyette*, 178 Wn.2d at 162. If the information cannot be construed to give notice of the essential elements of a crime, the most liberal reading cannot cure it. *Zillyette*, 178 Wn.2d at 162; *State v. Moavenzadeh*, 135 Wn.2d 359, 363, 956 P.2d 1097 (1998).

The Amended Information charging commercial sex abuse of a minor reads:

On or between October 12, 2017 and October 13, 2017, in the County of Kitsap, State of Washington, the above-named Defendant *did pay a fee* to a minor or a third person as compensation for a minor having engaged in sexual conduct with him or her; and/or *did pay or agree to pay a fee* to a minor pursuant to an understanding that in return therefore such minor will engage in sexual conduct with him or her; and/or did solicit, offer or request to engage in sexual conduct with a minor in return for a *fee*; contrary to Revised Code of Washington 9.68A.100.

CP 15 (emphasis in italics).

But in 2017, the Washington State Legislature revised the law with a July 23, 2017, effective date. Senate Bill 5030, Chapter 231, Laws of 2017.

As revised, the statute provides,

- (1) A person is guilty of commercial sexual abuse of a minor if:
 - (a) He or she provides *anything of value* to a minor or a third person as compensation for a minor having engaged in sexual conduct with him or her;
 - (b) He or she provides or agrees to provide *anything of value* to a minor or a third person pursuant to an understanding that in return therefore such minor will engage in sexual conduct with him or her;
 - or
 - (c) He or she solicits, offers, or requests to engage in sexual conduct with a minor in return for *anything of value*.

(Emphasis added in italics). Senate Bill 5030, Chapter 231, Laws of 2017, Section 1, explains the Legislature's reasoning in changing the law.

The legislature finds that statutes governing commercial sexual abuse of a minor, promoting commercial sexual abuse of a minor, and promoting prostitution should be consistent with all human trafficking related statutes, and reflect the practical reality of the crimes, which often involve an exchange of drugs or gifts for the commercial sex act.

Under the first prong, the necessary element did not appear in any form or by fair construction on the face of the document. Both the Information and the Amended Information contain the outdated "fee" language. The Legislature specifically changed the language of the statute

in recognition that “anything of value” was the appropriate language given the “practical reality” that this sort of crime often involves an exchange of drugs or gifts for the commercial sex act. Senate Bill 5030, Chapter 231, Laws of 2017, Section 1. As per *Zillyette*, the State’s failure to provide accurate elements in the charging document is presumptively prejudicial. As such, this court should dismiss Pemberton’s conviction for attempted commercial sex abuse with prejudice.

Issue 3: The court exceeded its statutory authority by imposing certain community custody conditions.

When sentencing a person to a term of community custody, trial courts are tasked with crafting supervision conditions that are sufficient to promote public safety, but also respectful of a convicted person’s statutory and constitutional rights. *State v. Johnson*, 4 Wn. App. 2d 352, 421 P.3d 969, 970, *review denied*, 192 Wn.2d 1003 (2018).

Pemberton did not object to any of the community custody conditions imposed by the court. However, Pemberton’s objections to certain conditions are amenable to review for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744-45, 193 P.3d 678 (2008); *State v. Irwin*, 191 Wn. App. 644, 650-51, 364 P.3d 830 (2015).

a. Alcohol prohibitions

This court reviews de novo whether a trial court has statutory authority to impose community custody conditions. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). When a sentence includes community custody, the trial court has the discretion to impose crime-related prohibitions. RCW 9.94A.703(3)(f). A “crime-related prohibition” is one that involves “conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10).

The sentencing court ordered Pemberton to refrain from consuming alcohol and to refrain entering any place where alcohol is the chief item for sale. CP 37; Supplemental Designation of Clerk’s Papers, PSI Appendix, Conditions 4, 5.

A court may impose only a sentence that is authorized by statute. *State v. Barnett*, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). “If the trial court exceeds its sentencing authority, its actions are void.” *State v. Paulson*, 131 Wn. App. 579, 588, 128 P.3d 133 (2006).

The court's decision to impose a crime-related prohibition is reviewed for abuse of discretion. *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 375, 229 P.3d 686 (2010). “A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts

and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.” *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P. 2d 1362 (1997). See also, *Armendariz*, 160 Wn.2d at 110. Prohibitions are usually upheld if reasonably crime related. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008).

Under the Sentencing Reform Act, some community custody conditions are mandatory, while the sentencing court has discretion in imposing others. RCW 9.94A.703. Under RCW 9.94A.703(3)(d), a sentencing court may order the defendant to “perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community.”

Under RCW 9.94A,703(3)(e), a sentencing court may order an offender to refrain from consuming alcohol; therefore the court had discretion to order Pemberton “to comply with any crime-related prohibitions” including to bar consumption of alcohol, which is specifically delineated in the statute. Such a condition is authorized regardless of whether alcohol contributed to the offense. *State v. Jones*, 118 Wn. App.

199, 207, 76 P.3d 258 (2003) (examining former RCW 9.94A.700, which contained the same operative language as RCW 9.94A.703(3)(e)).

Regarding the second half of the clause pertaining to PSI community custody Condition 5, however, the only possible authority for the condition prohibiting entry into locations where alcohol is the principal item of sale is RCW 9.94A.703(3)(f), which authorizes the court to impose crime-related prohibitions. A “crime-related prohibition” is “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). Such a prohibition must be supported by evidence showing the factual relationship between such prohibition and the crime being punished.

Substantial evidence must support a determination that a condition is crime-related. *State v. Motter*, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007). Here, no evidence showed alcohol played any role in contributing to Pemberton’s offenses or that alcohol was in any way related to its circumstances. No affirmative evidence showed Pemberton had used alcohol or was under its influence at the time of the offenses. *See also, State v. Parramore*, 53 Wn. App. 527, 531, 768 P.2d 530 (1989).

Although the SRA permits a court to prohibit the consumption of alcohol, the imposition of the condition that Pemberton not enter

businesses selling alcohol as its primary item of sale was erroneous because the condition was not “directly relate [d]” to the circumstances of the crimes of conviction. *Parramore*, 53 Wn. App. at 531.

In *Jones*, the court struck community custody conditions requiring the defendant to participate in alcohol and mental health treatment and counseling. Jones pleaded guilty to first-degree burglary and “other crimes,” and the court imposed a prison sentence and conditions of community custody relating to alcohol consumption and treatment. *Jones*, 118 Wn. App. 199, 202-03. Nothing suggested that alcohol contributed to the defendant's offenses. *Id.* at 207- 08. On appeal, the Court found the trial court had the authority to prohibit alcohol consumption, but it could not order the defendant to participate in alcohol counseling because the counseling was not related to the crime. *Id.* at 206-08.

Similarly, in this case, the challenged clause in PSI Condition 5 barring Pemberton from entry into places where alcohol is the primary item of sale was not crime-related. There was no evidence in the record that the charges were augmented, precipitated, or influenced in any way by alcohol. Because there was no evidence, and the court did not specifically find that alcohol contributed to the offenses, the prohibition was not a valid crime-related prohibition. CP 33; RCW 9.94A.030(10).

Where the trial court exceeds its authority in imposing an invalid condition of sentence, the remedy is to remand to the trial court and direct the court to strike the offending condition or conditions. *See Jones*, 118 Wn. App. at 212 (“On remand, the trial court shall strike the condition pertaining to alcohol counseling.”). This court must, therefore, remand the matter to the court with the direction that the lower court strike the challenged condition as being unrelated to the crimes for which Pemberton was convicted.

b. Romantic relationships

The sentencing condition prohibiting certain romantic relationships is unconstitutionally vague. Specifically, the court ordered Pemberton shall inform his community corrections officer of any romantic relationships so they can verify there are no victim-age children involved. Supplemental Designation of Clerk’s Papers, PSI, Appendix, Condition 19. The condition is unconstitutionally vague in its current form.

Due process under the Fourteenth Amendment of the United States Constitution and art. I, § 3 of the Washington Constitution requires that sentencing conditions provide “fair warning of proscribed conduct.” *Bahl*, 164 Wn.2d at 752. A sentencing condition is unconstitutionally vague if it “does not define the criminal offense with sufficient definiteness that

ordinary people can understand what conduct is proscribed” or if it “does not provide ascertainable standards of guilt to protect against arbitrary enforcement.” *Bahl*, 164 Wn.2d at 752-53 (quoting *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990)).

Here, the challenged sentencing condition states Pemberton “shall inform [his] Community Corrections Officer of any romantic relationships to verify there are no victim-age children involved.” Supplemental Designation of Clerk’s Papers, PSI, Appendix, Condition 19. In *United States v. Reeves*, the Second Circuit of the United States Court of Appeals held that a condition requiring the offender to notify the probation department “when he establishes a significant romantic relationship” was unduly vague, reasoning:

We easily conclude that people of common intelligence (or, for that matter, of high intelligence) would find it impossible to agree on the proper application of a release condition triggered by entry into a “significant romantic relationship.” What makes a relationship “romantic,” let alone “significant” in its romantic depth, can be the subject of endless debate that varies across generations, regions, and genders. For some, it would involve the exchange of gifts such as flowers or chocolates; for others, it would depend on acts of physical intimacy; and for still others, all of these elements could be present yet the relationship, without a promise of exclusivity, would not be “significant.” The history of romance is replete with precisely these blurred lines and misunderstandings. See, e.g., Wolfgang Amadeus Mozart, *The Marriage of Figaro* (1786); Jane Austin, *Mansfield Park* (Thomas Egerton, 1814); *When Harry Met*

Sally (Columbia Pictures 1989); He's Just Not That Into You (Flower Films 2009).

591 F.3d 77, 80-81 (2d Cir. 2010).

The court's reason is persuasive. The term "romantic relationship" lacks sufficient definiteness such that an ordinary person would understand what conduct is proscribed. Thus, the condition as written also permits arbitrary enforcement by granting corrections officers broad discretion to determine when an offender's relationship has crossed the prohibited threshold of becoming "romantic" in nature. Because the sentencing condition, as written, impermissibly lacks sufficient definiteness and fails to protect against arbitrary enforcement, the condition should be stricken.

Issue 4: The trial court's failure to enter written CrR 3.5 findings of fact and conclusions of law requires remand for their entry.

The trial court held a CrR 3.5 hearing to determine whether Pemberton's statements to law enforcement could be admitted in the State's case in chief. RP Trial 1 56-97 But the court failed to enter post-hearing written findings of fact or conclusions of law as required by CrR 3.5(c). This court must remand this matter for the entry of written findings of fact and conclusions of law, as the law requires.

CrR 3.5(c) provides,

Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusions as to whether the statement is admissible and the reasons therefor. The rule plainly requires written findings of fact and conclusions of law.

At the CrR 3.5 hearing, the trial court orally found admissible Pemberton's statements to the investigating officers, but no written findings or conclusions are entered. The trial court's failure to enter written findings and conclusions violates the clear requirements of CrR 3.5(c).

It must be remembered that a trial judge's oral decision is no more than a verbal expression of his [or her] informal opinion at that time. It is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned.

Ferree v. Doric Co., 62 Wn.2d 561, 566-67, 383 P.2d 900 (1963). Moreover, an oral ruling "has no final or binding effect, unless formally incorporated into the findings, conclusions, and judgment." *Id.* at 567.

"When a case comes before this court without the required findings, there will be a strong presumption that dismissal is the appropriate remedy." *State v. Smith*, 68 Wn. App. 201, 211, 842 P.2d 494 (1992). This is so because the court rules promulgated by our supreme court "provide[] the basis for . . . needed consistency" and a "uniform

approach.” *State v. Head*, 136 Wn.2d 619, 623, 964 P.2d 1187 (1998). “[A]n appellate court should not have to comb an oral ruling to determine whether appropriate ‘findings’ have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction.” *Head*, 136 Wn.2d at 624. Where a defendant cannot show actual prejudice from the absence of written findings and conclusions, however, the remedy is remand for entry of written findings of fact and conclusions of law. *Id.*

Here, the court did not enter written findings or conclusions following the CrR 3.5 hearing and provided only an oral ruling. RP1 97. This court must remand Pemberton’s case to the trial court for entry of the findings and conclusions required by CrR 3.5(c).

Issue 5: Scrivener’s errors on the judgment and sentence require remand for correction.

There are two scrivener’s errors on the judgment and sentence. Remand for correction is required.

Scrivener’s errors are clerical errors resulting from mistake or inadvertence, especially in writing or copying something on the record. *In re Personal Restraint of Mayer*, 128 Wn. App. 694, 701, 117 P.3d 353 (2005).

A scrivener's error is one that, when amended, would correctly convey the intention of the trial court, as expressed in the record at trial. *State v. Davis*, 160 Wn. App. 471, 478, 248 P.3d 121 (2011); *see also Presidential Apartment Assocs. v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996).

CrR 7.8(a) provides that clerical errors in judgments, orders, or other parts of the record may be corrected by the court at any time on its own initiative or on the motion of any party. *State v. Makekau*, 194 Wn. App. 407, 421, 378 P.3d 577 (2016).

There are two scrivener's errors on Pemberton's judgment and sentence.

First, contrary to the judgment and sentence, Pemberton did not plead guilty to any of the current offenses. CP 32. Rather, a jury found Pemberton guilty. CP 22-23.

Second, under the Criminal History, it notes a sentence for possession of a dangerous weapon committed on January 1, 2015, but sentenced on February 12, 2013. CP 33. Obviously, sentencing follows the commission of the offense rather than the other way around.

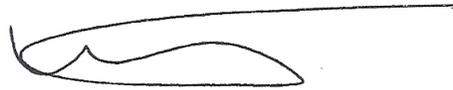
Pemberton's case should be remanded to correct the scrivener's errors.

E. CONCLUSION

Pemberton's conviction for attempted commercial sexual abuse should be reversed and dismissed with prejudice. Given the dismissal of the charge, his case should be remanded for resentencing.

On remand, the court should strike the improper community custody conditions, enter written CrR 3.5 findings of fact and conclusions of law, and correct the scrivener's errors on the judgment and sentence.

Respectfully submitted July 11, 2019.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', written over a horizontal line.

LISA E. TABBUT/WSBA 21344
Attorney for Steven Pemberton

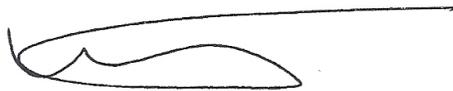
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I filed the Brief of Appellant to (1) Kitsap County Prosecutor's Office, at kcpa@co.kitsap.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to Steven Pemberton, DOC#876309, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed July 11, 2019, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Steven Pemberton, Appellant

LAW OFFICE OF LISA E TABBUT

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