

FILED
Court of Appeals
Division II
State of Washington

NO. 52468-6-II
10/10/2019 1:19 PM
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,
v.

STEVEN ALLEN PEMBERTON,
Appellant.

In re the Personal Restraint of
STEVEN ALLEN PEMBERTON,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 17-1-01554-5

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the evidence was sufficient to prove commercial sexual abuse of a minor beyond a reasonable doubt?
2. Whether the commercial sexual abuse of a minor count was improperly charged?
3. Whether on this record it was harmless for the trial court to neglect to enter findings of fact and conclusions of law following a CrR 3.5 hearing?
4. Whether conditions of sentence should be stricken as not crime-related or unconstitutionally vague?
5. Whether the matter should be remanded for correction of scrivener's errors on the judgment and sentence? (CONCESSION)

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Steven Allen Pemberton was charged by information filed in Kitsap County Superior Court with attempted second degree rape of a child, attempted commercial sexual abuse of a minor (CSAM), and felony communicating with a minor for immoral purposes. CP 1-4. A first amended information added a fourth count of possession of methamphetamine. CP 16.

The attempted CSAM count was charged in terms of providing a “fee” instead of “something of value” in exchange for sexual contact with a minor. CP 15.

Early in the case, Pemberton moved to fire defense counsel. RP, 11/21/17. He was apparently upset that he had not received a copy of the discovery in the matter and was upset that defense counsel communicated a plea offer to him. RP, 11/21/17, 9-10. After discussion with the trial court, Pemberton relented saying “I’m going to continue to have him.” RP 11/21/17, 11.

The state moved to exclude the defense of entrapment. The trial court granted that motion with no objection from Pemberton. 1RP 18.

A CrR 3.5 hearing was had on the issue of the admissibility of Pemberton’s statements to police. 1RP 56-97. The defense had no argument as to admissibility. 1RP 97. The trial court ruled that the statements offered were post-Miranda and voluntary and admissible. 1RP 97. No findings of fact and conclusions of law regarding the CrR 3.5 hearing are in the record.

Pemberton was found guilty of all four counts. CP 22-23.

Post-verdict, Pemberton moved to proceed pro se. The trial court engaged a complete colloquy with Pemberton over this decision,

ultimately completing a comprehensive waiver of the right to counsel. RP, 7/6/18, 16-24; CP 24-27.

The trial court convened a hearing to address Pemberton's many post-trial motions. RP, 8/20/18, 3. With Pemberton's agreement, the trial court signed an order waiving attorney/client privilege. RP, 8/20/18, 3-4. Defense counsel Adrian Pimentel testified regarding some of the issue raised by Pemberton. Id. at 4.

Mr. Pimentel testified that he had 24 years of experience as an attorney. RP, 8/20/18, 5. Most of the time has been spent doing criminal defense. RP, 8/2018, 6. Mr. Pimentel was aware of "net-nanny" cases like this one and had sought advise from other defense attorneys. RP, 8/20/18, 7-8. In preparation, Mr. Pimentel interviewed Pemberton, arranged a psychosexual evaluation, arranged a polygraph, hired an expert on electronic devices to review Pemberton's phone, and hired an investigator. RP, 8/20/18, 9. The investigator was hired because Mr. Pimentel will not interview witnesses alone, risking becoming a witness in the matter. RP, 8/20.18, 10.

Mr. Pimentel described the process by which he assures that Pemberton receives copies of discovery. RP, 8/20/18, 10-11. Pemberton complained that Mr. Pimentel had not used the psychosexual evaluation in defense. RP, 8/20/18, 21. Mr. Pimentel testified that he did not think the

psychosexual report was admissible and, to the point, it was “not favorable.” RP, 8/20/18, 22. Mr. Pimentel believed the evaluation would have significantly hurt Pemberton’s case. Id.

On questioning by Pemberton, Mr. Pimentel indicated that Pemberton had admitted to detectives, himself, and the psychosexual evaluator that the communicating detective had told him that she was 13. RP, 8/20/18, 29. Asked why he did not advance an entrapment defense, Mr. Pimentel said

I didn't raise entrapment. I went -- at the very beginning of this case, I reviewed entrapment and I came to the -- to two conclusions. One, I saw that -- I don't remember if I talked to someone or if I researched it or what.

But this had come up in other Net Nanny cases and they weren't winning. Entrapment was not winning at all. Never. There has to be, if I remember, inducement, and there's a couple elements that I didn't think fit. And one, they weren't winning.

And two, I read it, and based on my initial cursory review, I wasn't of the belief that it was a -- that we were going to be able to win that argument.

RP, 8/20/18, 70-71.

The trial court entered findings of fact and conclusions of law and denied Pemberton’s post-verdict motions. CP 28.

At sentencing on September 19, 2018, an exceptional sentence of 234 months was imposed. CP 34. Count I was given a minimum term of 210 months (top of the range) and the 24-month sentence on count IV is

consecutive. CP 34. Findings of fact and conclusions of law regarding the exceptional sentence were entered. CP 49-50. The sentence was justified because “the defendant has committed multiple current offenses and the defendant’s high offender score results in some of the current offenses going unpunished.” CP 50, *citing* RCW 9.94A.535(2)(c).

The trial court imposed conditions of sentence in the judgment and sentence (CP 37) and incorporated the conditions listed in appendix F. CP 43-44. Among the conditions is a requirement that Pemberton complete a substance abuse evaluation and comply with treatment recommendations. CP 37. Another condition is that Pemberton report romantic relationships to his community corrections officer so that the latter may ascertain whether there are minor children involved. CP 43.

Pemberton timely appealed. CP 45.

B. FACTS¹

This was an operation by the Washington State Patrol Missing and Exploited Children Task Force (MECTF). 2RP 183. The MECTF investigates crimes against children. 2RP 185. So-called Net Nanny operations are proactive and focus on persons attempting to have sex with children. 2RP 186. Social media sites are used to contact people

¹ Trial transcripts are in numbered volumes and are referred to at “1RP, 2RP, etc.” Other transcripts are referred to by date.

interested in sex with children. Id.

Such an operation was setup in Kitsap County in October, 2017. 2RP 192. Craigslist was used to post an ad. 2RP 196; 206. Exhibit 2, the ad, was admitted and published. 2RP 206-07. The ad was entitled “Crazy and young. Looking to explore.” 2RP 207. The ad read

Bored and home alone. Been watching videos all day. Really looking to meet a clean DDF guy that can teach me what it’s like to be an adult. HMU if interested. I’m lots of fun.

2RP 207-08. “HMU” means hit me up. 2RP 207.

Pemberton responded to this ad by text message. Supp. CP, exhibit 4 (page 1 Of 10) (admitted without objection, 2RP . Within two messages, the detective doing the communication, pseudonym Brandi, wrote “you down with me being 13.” Id. One minute later, the detective asked Pemberton for his name. Id. Pemberton responded with his correct name, “Steve,” and asked where Brandi was located. Id.

A communication ensued over the next two days between Pemberton and Brandi. Brandi asked for “roses,” which means money. Supp. CP, exhibit 4 (page 1 of 10). Although seeming noncommittal about roses, Pemberton told Brandi that that would have to be discussed in person. Id. Brandi suggested sex for a

phone charger. Supp. CP, exhibit 4 (page 2 of 10). Pemberton again suggested that they talk in person. Id.

Brandi broke off and Pemberton responded that he just did not want to talk about it over texts. Id. Pemberton told her that he had everything she wants. Id. Brandi responded regarding the size of his penis and asked if she scared him. Id. Pemberton replied “You haven’t scared me one bit your not big enough to scare me.” Id.

Pemberton asked about plans for the next day. Supp. CP, exhibit 4 (page 3 of 10). The two discussed the timing of a meeting the next day. Id. Brandi expressed disappointment that the next afternoon would not work for Pemberton. Id. Pemberton replied “I never said I couldn’t do afternoon was just trying to kick it with you sooner.” Supp. CP, exhibit 4 (page 4 of 10). The two further discussed the timing of their meeting. Id. As the day’s communication ends, Pemberton wanted to see a picture of Brandi. Id.

The next day began with Pemberton again enquiring about a picture. Supp. CP, exhibit 4 (page 5 of 10). Further discussion ensued about the when and where of the meeting. Id. Brandi told Pemberton that she had a friend and that the two girls were at

the friend's house and ready for "condom testing." Id. (pages 5-6 of 10). Brandi says she wants \$40 for phone time, which Pemberton found to be "very interesting." Id. (page 6 of 10). Pemberton said he wasn't "paying for sex" he was "just helping you out with some phone time." Id. (page 7 of 10).

Time and place and various sexual activity highlight the continuing conversation. Pemberton asked Brandi whether she drinks or smokes. Id. (page 8 of 10). Brandi said that she smokes marijuana. Id. Pemberton said he has something other than marijuana or alcohol. Id. Brandi said that she's "curious about meth because the sex is amazing. Id. Pemberton agreed with that sentiment. Id.

The plan to meet ripened as the two get closer to the rendezvous. Supp. CP, exhibit 4. Surveillance police found Pemberton at a Grocery Outlet in east Bremerton near the rendezvous (2RP 243), which is across the street from the Starbucks store where the meeting was to occur. 2RP 247-48. Pemberton was followed as he drove around the area. 2RP 243; 2RP 256-57. As Pemberton began to drive out of the area, he was stopped by police. 2RP 258.

A search of Pemberton's truck netted Pemberton's

cellphone and a “little orange straw.” 2RP 278. The straw appeared to be one used for smoking controlled substances. *Id.* Pemberton had possession of the straw and admitted that he had used methamphetamine the day before the arrest. 2RP 279. Pemberton stipulated that the substance found in the straw is methamphetamine. CP 19-21.

No condoms, money, guns, drugs, or phone cards were found in Pemberton’s truck. 2RP 290-92.

Exhibits 5 and 6 were offered and admitted. 2RP 307. Those exhibits are printouts of chats engaged by Pemberton’s cellphone with the police. 2RP 306. Exhibit 4 was offered, admitted without objection, and published to the jury. 3RP 349. Exhibit 4 is an extract from the detective’s cellphone communications with Pemberton. 3RP 347-48. The detective testified that “the information that is in [exhibits] 5 and 6 is contained within Exhibit 4, but 5 and 6 are not as complete as Exhibit 4.” 3RP 347.

III. ARGUMENT – DIRECT APPEAL

A. THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THE ELEMENTS OF COMMERCIAL SEXUAL ABUSE OF A MINOR.

Pemberton argues that the facts of record are insufficient to establish attempted commercial sexual abuse of a minor (CSAM). This claim is without merit because Pemberton agreed to provide a thing of value, a phone card, in exchange for sexual contact.

It is well settled that

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime proved beyond a reasonable doubt. On appeal, we draw all reasonable inferences from the evidence in favor of the State and interpret them most strongly against the defendant. A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences therefrom. We will reverse a conviction for insufficient evidence only when no rational trier of fact could have found that the State proved all of the elements of the crime beyond a reasonable doubt. In evaluating the sufficiency of the evidence, circumstantial evidence is as probative as direct evidence.

State v. Garbaccio, 151 Wn.App. 716, 742, 214 P.3d 168 (2009) (internal citation omitted). Appellate courts defer to the trier of fact on issues of “conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *State v. Hernandez*, 85 Wn.App. 672, 675, 935 P.2d 623 (1997).

In part, RCW 9.68A.100 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.

Subsection (a) requires that the thing of value be provided and has no application in this case. And, subsection (c) seems to apply to a defendant's offer of sex. The present case proceeds from the phrase "agrees to provide" under subsection (b).

In Exhibit 4: "Pemberton: I never said I was paying for sex. I was just helping out with some phone time." Spp. CP. From this statement, it is a reasonable inference that Pemberton intended to provide a phone card as the fee or thing of value for sex with the minor. "Phone time" cost money. Thus, offering to help out with phone time entails an agreement to provide something of value.

That Pemberton did not have a phone card with him when arrested is irrelevant to the inquiry. Pemberton's agreement to do so establishes the offense. Subsection (b) does not require the delivery of the consideration to the minor, just the agreement to so provide. Subsection (b) would cover a situation in which a defendant falsely promises a thing

of value in order to reach an understanding that he will get sexual contact in return. Lying about the consideration should not be a defense if the agreement is in fact made. Not having a phone card on him allows Pemberton an argument to the jury on intent. Here the jury rejected that argument. Sufficient evidence is found in Pemberton's agreement to help out with a phone card.

B. THE INFORMATION INCLUDED ALL ESSENTIAL ELEMENTS AND THERE WAS NO PREJUDICE CAUSED BY INARTFUL CHARGING LANGUAGE.

Pemberton next claims that the charging language for CSAM is prejudicially defective for exchanging the word "a fee" for "anything of value." This claim is without merit because fair construction shows that all elements included and Pemberton alleges no prejudice from the inartful language used.

A challenge to the sufficiency of the charging document implicates Washington constitution article I, section 22: "In criminal prosecutions the accused shall have the right . . .to demand the nature and cause of the accusation against him." *See also* United State Constitution, Sixth Amendment (the accused "shall . . .be informed of the nature and cause of the accusations."). As a constitutional issue, the sufficiency of the charging document may be raised for the first time on appeal. *See State v.*

Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). Review is de novo. *State v. Lindsey*, 177 Wn. App. 233, 244, 311 P.3d 61 (2013).

A charging document must allege facts supporting every element of the offense in addition to adequately identifying the crime charged. *Lindsey*, 177 Wn. App. at 245. The language of the statute may be used. See *State v. Leach*, 113 Wn.2d 679, 686, 782 P.2d 552 (1989) (“it is sufficient to charge in the language of the statute if the statute defines the crime sufficiently to apprise an accused person with reasonable certainty of the nature of the accusation.”); *Lindsey*, 177 Wn. App. at 246. “All essential elements of the crime charged, including nonstatutory elements, must be included in the charging document so that a defense can be properly prepared.” *Id.* But, “it is not necessary to use the exact words of the statute if other words are used which equivalently or more extensively signify the words in the statute.” *Leach*, 113 Wn.2d at 686, citing *State v. Knowlton*, 11 Wash. 512, 39 P. 966 (1895).

When, as in this case, there is no objection to the charging language in the trial court, the information is construed liberally in favor of validity. *Lindsey*, 177 Wn. App. at 244. “The test is: “(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he was nonetheless actually prejudiced by the inartful language which

caused a lack of notice?” *Lindsey*, 177 Wn. App. at 245, citing *Kjorsvik*, 117 Wn.2d at 105–06. Pemberton must show that the necessary facts do not appear in any form or by any reasonable construction and that he suffered actual prejudice from that omission. See *Lindsey* 177 Wn. App. at 246 (defendant has burden of “raising and demonstrating prejudice”). A defendant may not challenge a merely vague charge unless she first requested a bill of particulars in the trial court. *Leach*, 113 Wn.2d at 687.

In the present case, the jury was properly instructed under the new iteration of RCW 9.68A.100. CP 75-76. The first element of the CSAM “to convict” instruction requires the jury to find that “the defendant provided or agreed to provide anything of value. . .” CP 75. The instruction is drawn from WPIC 48.21. 11Wash. Prac., Pattern Jury Instr. Crim. (4th Ed.).

The legislature announced its intention in amending RCW 9.68A.100 as

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.

2017 *Wash. Legis. Serv. Ch. 231* (S.B. 5030) (WEST). The striking out of the term “pays a fee” in favor of “provides anything of value” is intended to expand the universe of items in exchange that will satisfy the elements

of the offense.

The two terms, if not equivalent, are very closely related—a fee is something of value. The element that requires that there be a transaction between the defendant and the alleged victim remains. The facts of a case may include payment of money as a fee and be properly charged with reference to that fact. Fair construction militates against Pemberton’s claim because “an information need not state the statutory elements of an offense in the precise language of the statute, but may instead use words conveying the same meaning and import as the statutory language.” *Leach*, 113 Wn.2d at 689.

Pemberton was not faced with a charging document that omitted an essential element. At worst, the charge is vague as to that included element. The close relationship between the terms underlies Pemberton’s failure to object or seek a bill of particulars; he knew the charge.

Pemberton has not argued prejudice here. None is evident in this record. This issue fails.

C. THE TRIAL COURT’S FAILURE TO ENTER CRR 3.5 FINDINGS AND CONSLUSIONS WAS HARMLESS BECAUSE THE ORAL RULING WOULD ALLOW APPELLATE REVIEW BUT PEMBERTON HAS NOT CHALLENGED THE ADMISSIBILITY OF HIS STATEMENTS.

Pemberton next claims that the trial court erred in failing to enter

findings of fact and conclusions of following a CrR 3.5 hearing. This claim fails because the trial court's oral findings were sufficient to allow review and because Pemberton has not sought review of those findings. The failure to enter written findings is harmless in this case.

A CrR 3.5 hearing was convened by the trial court. 1RP 56. When asked for argument, defense counsel declined, saying "your honor, I have no argument." 1RP 97. The trial court orally ruled that

I find under the totality of the evidence before me and under the burden of proof at this stage, which is by preponderance of the evidence, I'm satisfied that the statements were made after Miranda rights were given correctly, and they were made voluntarily. They'll be admitted.

1RP 97. The trial court did not enter CrR 3.5 findings and conclusions as required by the rule.

Although the rule requires them, "failure to enter findings required by CrR 3.5 is considered harmless error if the court's oral findings are sufficient to permit appellate review." *State v. Grogan*, 147 Wn. App. 511, 516, 195 P.3d 1017 (2008), *review granted* 168 Wn.2d 1039 (2010) (remanded for reconsideration of corpus delicti issue), 158 Wn. App. 272 (on remand), *review denied* 171 Wn.2d 1006 (2011).

The primary problem with this issue is that its resolution does nothing for Pemberton's case. That is, Pemberton has in no way, either here or in the trial court, challenged the admissibility of his statements to

police. There is no need for appellate review of the trial court’s findings. *See State v. Quincy*, 122 Wn. App. 395, 398, 95 P.3d 353 (2004) (CrR 3.5 findings filed after opening brief on appeal not prejudicial in part because defendant did not challenge admissibility on appeal).

The trial court’s failure to enter findings and conclusions caused no prejudice—at least none that Pemberton has articulated. The trial court’s oversight was harmless.

**D. THE CONDITIONS OF SENTENCE
COMPLAINED OF ARE CRIME-RELATED AND
NOT UNCONSTITUTIONALLY VAGUE.**

Pemberton next claims that the trial court erred entering conditions of sentence that were not crime related and the trial court imposed them without authority. Pemberton claims that the part of PSI condition 5 that prohibits him from going where alcohol is the principle item of sale is not crime related. Further, Pemberton claims that PSI condition 19, which requires Pemberton to inform his community corrections officer of romantic relationships, is unconstitutionally vague.

The imposition of community custody conditions is reviewed for abuse of discretion. *State v. Nguyen*, 191 Wn.2d 671, 678, 425 P.3d 847 (2018). An unconstitutional condition is manifestly unreasonable. *Id.* A condition is unconstitutionally vague if “(1) ... does not define the criminal

offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) ... does not provide ascertainable standards of guilt to protect against arbitrary enforcement.” *Nguyen*, 191 Wn.2d at 678. “A community custody condition “is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.”” *Nguyen*, 191 Wn.2d at 679, quoting *City of Seattle v. Eze*, 111 Wash.2d 22, 27, 759 P.2d 366 (1988).

A sentencing court has direct statutory authority to impose a prohibition on possessing and consuming alcohol and order compliance with crime related prohibitions. RCW 9.94A.703(3)(e),(f). Further

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

9.94A.030(10). A court does not abuse its discretion if a “reasonable relationship” between the crime of conviction and the community custody condition exists. *Nguyen*, 191 Wn.2d at 684, citing *State v. Irwin*, 191 Wn. App. 644, 658-59, 364 P.3d 830 (2015). The prohibited conduct need not be identical to the crime of conviction, but there must be “some basis for the connection.” *Id.* The behavior that the condition addresses need not

have “*directly caused*” the offense or be necessary to prevent reoffense. *Nguyen*, 191 Wn.2d at 685.

1. Places that sell alcohol

The trial court ordered Pemberton to abide the conditions recommended in the presentence investigation. CP 37. Appendix F to the judgment and sentence recites that the conditions there listed are “crime related” and condition #5 says “Do not enter any location where alcohol is the primary product, such as taverns, bars and/or liquor stores.” CP 43. Further, both the judgment and sentence and appendix F order that Pemberton “not purchase, possess or consume alcohol.” CP 43; CP 37.

Further, the trial court ordered Pemberton to complete a substance abuse evaluation and comply with recommended treatment. CP 37.

In *Nguyen*, the consolidated case of *State v. Norris* included a challenge to a condition that excluded Norris from “sex-related businesses.” 191 Wn.2d at 686. Norris had also been prohibited from accessing sexually explicit materials. *Id.* The Supreme Court noted a lack of direct relationship to the crime. 191 Wn.2d at 687. But the condition was upheld because “this condition has more to do with Norris’ inability to control her urges and impulsivities than it does with the specific facts of her crimes.” *Id.*

Thus, the *Nguyen* Court expanded the universe of what is and is not crime related. Things that go to the particular defendant’s character,

like impulsivity, may be considered by the trial court in imposing conditions of sentence.

In the present case, Pemberton was ordered to not possess or consume alcohol. He was ordered to be evaluated for substance abuse and to comply with recommended treatment. The prohibition in issue dovetails with those two conditions. The condition serves to enforce the no alcohol prohibition. Moreover, it is likely a substance abuse treatment provider would prohibit going to bars as part of treatment. *See Nguyen*, 191 Wn.2d at 686 (in upholding condition prohibiting access to sexually explicit material, Court notes that treatment provider would likely independently impose such a condition in any event).

Finally, it should be remembered that Pemberton's crimes included possession of methamphetamine. He spoke to the detective about her doing methamphetamine during the sting. He brought methamphetamine with him to the aborted tryst. He indicated that he had recently relapsed on the drug. The state sees little difference between one drug or the other—alcohol is a drug.

The trial court's order was sufficiently crime related and should be upheld.

2. *Report romantic relationships*

RCW 9.94A.703(3)(b) allows the trial court to order an offender to

“Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals.” Here, the trial court applied this provision by first prohibiting contact with children under 18 unless they are accompanied by an adult who knows of the conviction and the contact has been approved by the community corrections officer. CP 37. And, second, a very similar condition that requires that Pemberton “inform your Community Corrections Officer of any romantic relationships to verify there are no victim-age children involved.” CP 44.

In *State v. Kinzle*, 181 Wn. App. 774, 785, 326 P.3d 870 (2014), Kinzle challenged as vague a condition that order him not to “date women nor form relationships with families who have minor children, as directed by the supervising Community Corrections Officer.” The order was upheld “[b]ecause Kinzle's crime involved children with whom he came into contact through a social relationship with their parents, condition 10 is reasonably crime-related and necessary to protect the public.” 181 Wn. App. at 785.

Similarly, here Pemberton sought to come into contact with children by social media. Moreover, the condition here supplements the other conditions that are designed to protect the public generally and children in particular. Pemberton is prohibited from contacting children. This condition does not prohibit him from having romantic relationships—the condition, like the others, is designed to protect children from a person

who is guilty of attempted child rape. It is not vague. The condition should be upheld.

E. THE TWO SCRIVENER'S ERRORS ON THE JUDGMENT AND SENTENCE SHOULD BE CORRECTED.

Pemberton next claims that the judgment and sentence should be corrected because of two scrivener's errors. The state agrees. Pemberton did not plead guilty as it says on the judgment and sentence. And there is clearly an error in the criminal history data.

This Court should order a limited remand for correction of these error.

IV. PRP RESPONSE

The State respectfully moves this court for an order dismissing the timely-filed petition with prejudice because the claims lack factual support and merit.

V. AUTHORITY FOR PETITIONER'S RESTRAINT

The authority for the restraint of Steven Pemberton lies within the judgment and sentence entered by the Superior Court of the State of Washington for Kitsap County, on September 19, 2018, in cause number

17-1-01554-5, upon Pemberton’s conviction of the offenses of attempted second degree rape of a child, attempted commercial sexual abuse of a minor, felony communication with a minor for immoral purposes, and unlawful possession of methamphetamine.

VI. PRP ARGUMENT

A. PEMBERTON FAILS IN HIS BURDEN TO SHOW ERROR AND PREJUDICE BECAUSE HE FAILS TO ADVANCE SUFFICIENT FACTS TO ESTABLISH HIS CLAIMS AND THE CLAIMS ARE WITHOUT MERIT.

Pemberton filed several post-conviction motions. The trial court ordered that two of those should be transferred to this Court as personal restraint petitions—the two filed on January 14, 2019.

1. The claims and personal restraint petition standards.

In his Motion to Vacate CrR 7.8 Relief From Judgment and Order, Pemberton argues that (1) the trial court erred by not transferring previous motions to this Court; (2) that there is newly discovered evidence in the case; (3) due process violation because he was not allowed to choose his defense; (4) criminal police conduct violated his right to fundamental fairness; (5) ineffective assistance of counsel for failing to prove his innocence, for failing to properly cross examine witnesses, for “actions prejudice to the defendant,” and for lying about having an investigator.

On the same day, Pemberton filed a Motion for New Trial. There

he alleges error in that (1) it was misconduct to select him as a target of the investigation; (2) law enforcement misconduct violated due process; (3) defense counsel prejudicially failed to investigate the case; (4) he should have gotten an entrapment jury instruction; and (5) substantial justice has not been done in his case.

The two documents overlap on several issues. The motions are repetitive of various motions brought in the trial court.

Post-trial, the trial court convened an evidentiary hearing on Pemberton's claims. RP, 11/20/18. On September 10, 2018, the trial court entered Findings of Fact and Conclusions of Law for Hearing on CrR 7.4 Motion to Arrest Judgment, CrR 7.5 Governmental Misconduct and Ineffective Assistance of Counsel. CP 28. There the trial court considered most if not all the issues raised by Pemberton in the present petition. Herein, Pemberton has not challenged any of the trial court's findings of fact and those findings are therefore verities in this matter. *See State v. Arndt*, 5 Wn. App.2d 341, 347, 426 P.3d 804 (2018) *review denied* 192 Wn.2d 1013 (2019).

“Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders.” *In re Hagler*, 97 Wn.2d 818, 824, 650 P.3d 1103 (1982). Pemberton must prove error by a preponderance of the

evidence. *In re Crow*, 187 Wn. App. 414, 420-21, 349 P.3d 902 (2015). Then, if he is able to show error, he must also prove prejudice. *Crow*, 187 Wn. App. at 421. Constitutional error must have resulted in actual and substantial prejudice. *In re Woods*, 154 Wn.2d 400, 409, 114 P.3d 607 (2005). “Actual and substantial prejudice, which ‘must be determined in light of the totality of circumstances,’ exists if the error ‘so infected petitioner’s entire trial that the resulting conviction violates due process.’” *Crow*, 187 Wn. App. at 421, quoting *In re Music*, 104 Wn.2d 189, 191, 704 P.2d 144 (1985).

If the error is nonconstitutional, the petitioner must meet a stricter standard and demonstrate that the error resulted in a fundamental defect which inherently resulted in a complete miscarriage of justice. *In re Schreiber*, 189 Wn. App. 110, 113, 357 P.3d 668 (2015) (subsequent Habeas Corpus proceedings not cited). This standard requires more than a “mere showing of prejudice.” *In re Davis*, 152 Wn.2d 647, 672, 101 P.3d 1 (2004).

The showings of error and prejudice must be supported by particular facts that, if proven, would entitle Pemberton to relief and these factual allegations must be based on more than speculation and conjecture. RAP 16.7(a) (2); *In re Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086, cert. denied, 506 U.S. 958 (1992). Conclusory allegations are insufficient.

Cook, 114 Wn.2d at 813-14. The petition should be denied absent a prima facie showing of either actual and substantial prejudice or a fundamental defect. *In re Yates*, 177 Wn.2d 1, 17, 296 P.3d 872 (2013). If this showing is made, but the record is insufficient, a reference hearing may be ordered. 177 Wn.2d at 18.

B. NONE OF PEMBERTON'S ARGUMENTS WARRANT RELIEF.

1. The trial court followed CrR 7.8(c)(2) by holding a factual hearing on Pemberton's claims and thereafter denying them and was not required to transfer the post-trial motions to this Court.

Pemberton claims that not forwarding motions he filed in the trial court to the Court of Appeals is an abuse of discretion. This claim is without merit because the trial court exercised its discretion, held an evidentiary hearing, and denied Pemberton's motions.

First, Pemberton does not say which motions he refers to—he says they are attached but they are not. Motion at 2 (under “Statement of Facts”).² Second, Pemberton does not address the rule and say why the unspecified motions required transfer. He makes no argument that the

² Pemberton filed 11 pleadings in the trial court: one styled arrest of judgment, CrR 7.4, one for new trial, CrR 7.5, one titled “ineffective assistance,” two supplemental ineffective assistance motions, one governmental misconduct motion (which would proceed under CrR 8.3), one “statement of additional grounds,” one motion to dismiss; one motion entitled “dismissal,” one supplemental dismissal, and one CrR 8.3 motion.

trial court acted on untenable grounds or for untenable reasons.

Moreover, the state can only assume he is referring to CrR 7.8—the only court rule requiring transfer under appropriate circumstances. If the motions he refers to were brought under CrR 7.4, arrest of judgment, or CrR 7.5, new trial, there is no mechanism for transfer. Pemberton was tasked with appealing the denial of those motions, which he has not done.

CrR 7.8(c)(2) requires the trial court to so transfer unless the motion is not time-barred and either includes a substantial showing of entitlement to relief or requires a factual hearing. The trial court held a factual hearing. The trial court's actions fell under the "unless" clause of the rule. On this nonconstitutional claim, Pemberton has failed to establish a fundamental defect in the proceedings below. There was no error.

2. There is no newly discovered evidence in the case.

Pemberton claims that there was newly discovered evidence in the case. He asserts that he received exhibits 5 and 6 (transcripts of cell phone extracts) after trial. Secondly, Pemberton claims that the extracts he received don't match those from the detective's phone so, he claims, he was never told the victim's age. He claims that he did not receive exhibits 5 and 6 until after the trial on September 1, 2018.

Newly discovered evidence under CrR 7.8(b)(2) is "evidence

which by due diligence could not have been discovered in time to move for a new trial under CrR 7.5.” “When raised as a ground for relief in a personal restraint petition, newly discovered evidence is subject to the same standards that apply to a motion for a new trial.” *In re Copeland*, 176 Wn. App. 432, 450, 309 P.3d 626 (2013) *review denied* 182 Wn.2d 1009 (2015); *citing In re Benn*, 134 Wn.2d 868, 886, 952 P.2d 116 (1998), *quoting In re Pers. Restraint of Lord*, 123 Wn.2d 296, 319, 868 P.2d 835 (1994). That is: “The petitioner must show that the evidence was discovered after trial and could not have been discovered before trial in the exercise of due diligence.” *Id.*

The direct counterfactual to Pemberton’s argument is that exhibits 5 and 6 were in fact admitted at trial, on June 5, 2018. 2RP 307. Thus, they could not have been “newly discovered” after trial. Pemberton did not object to these exhibits. 2RP 307. On November 21, 2017, Pemberton’s said that he had spent one to two hours with Pemberton and that they had reviewed the text message transcripts with him. RP, 11/21/17, 2-3. Counsel asserted that Pemberton had “reviewed the transcripts.” RP, 11/21/17, 5. Pemberton fails as a factual matter to establish that his after-trial receipt of these exhibits proves they were newly discovered.

As to his claim that the extracts would have exonerated him, here

he is also factually incorrect. The messaging exchanges in exhibits 5 and 6 commence on October 13, 2017. Appendix B. But Pemberton ignores admitted exhibit 4. Supp. CP (exhibits) Exhibit 4 includes the entire exchange, commencing on October 12, 2017. There, the detective sends Pemberton the following: “hang out looking for some fun. You down with me being 13.” Supp. CP 1 of 10. The detective then asked for Pemberton’s name. Id. He responded with his name and wanted to know where she is located. Id.

Further, the exchanges in exhibits 5 and 6 include and match exhibit 4. Supp. CP 5 of 10. Exhibit 4 is the same as 5 and 6 from the entries on October 13, 2017 onward. And, finally, the defense is discussing the contents of exhibit 4 with the trial court in defense motion in limine to exclude portions of it. 1RP 109.

Pemberton’s assertion of a lack of evidence is incorrect. He has not identified newly discovered evidence. On this nonconstitutional issue, Pemberton has not met his burden. This issue fails.

3. Right to choose defense / entrapment defense.

Pemberton claims error because he was not allowed to choose his defense. He claims defense counsel foreclosed his ability to assert the entrapment defense and failed to use evidence of police interviews to exonerate him. This third claim in Pemberton’s Motion to Vacate is

related the fourth claim in the Motion for New Trial and are briefed together here. The fourth claim in the Motion for New Trial is that the trial court erred by not giving an entrapment jury instruction.³

Implicit in the Sixth Amendment is the criminal defendant's right to control his defense. *State v. Lynch*, 178 Wn.2d 487, 491-92, 309 P.3d 482 (2013) citing *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (“Although not stated in the [Sixth] Amendment in so many words, the right ... to make one's own defense personally [] is thus necessarily implied by the structure of the *492 Amendment.”). Review is de novo. *Lynch*, 178 Wn.2d at 491. The right “encompasses the decision to present an affirmative defense.” 178 Wn.2d at 493.

But the right to present a defense has limits. The right “is subject to reasonable restrictions and must yield to established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.” *State v. Donald*, 178 Wn. App. 250, 263-64, 316 P.3d 1081 (2013) review denied 180 Wn.2d 1010 (2014). “Defendants have the right to present a defense, but they may not do so by introducing evidence that is irrelevant or otherwise inadmissible.” *State v. Ginn*, 128 Wn. App. 872, 879, 117 p.3d 1155 (2005). “A defendant raising an affirmative defense must offer sufficient admissible evidence to

³ Further, the next section below “Ineffective assistance” has analysis of defense counsel’s role on this issue.

justify giving the jury an instruction on the defense.” Id.

The affirmative defense of entrapment requires the defendant to show by a preponderance of the evidence that he committed the crime, that state officers lured or induced him to commit the crime, and that he lacked the disposition to commit the crime. *State v. Lively*, 130 Wn.2d 1, 9, 921 P.2d 1035 (1996); RCW 9A.16.070. Entrapment is not a defense if law enforcement “merely afforded the actor an opportunity to commit a crime.” RCW 9A.16.070(2). Neither the defendant’s mere reluctance to violate the law, nor the use of a normal amount of persuasion to overcome the defendant’s resistance is entrapment; “nor is the use of deception, trickery, or artifice by the police.” *State v. Trujillo*, 75 Wn. App. 913, 918, 883 P.2d 329 (1994).

For instance, in one case a police informant met with the defendant six times in three weeks trying to get him to sell cocaine. *State v. Enriquez*, 45 Wn. App. 508, 725 P.2d 1384 (1986) *review denied* 107 Wn.2d 1020 (1987). Eventually, the defendant was convinced and met with an undercover police officer. It was held that

The amount of persuasion used by the informant was not improper. He merely pointed out to Enriquez that he could better support his cocaine addiction by selling narcotics. The informant repeatedly made that suggestion before Enriquez agreed, but Enriquez was not badgered or pressured in any way.

45 Wn. App. at 586.

In the present case, the police merely afforded Pemberton an

opportunity to commit the crimes of attempted child rape, attempted CSAM,⁴ and communication with a minor. Pemberton did the first two crimes while communicating with the detectives and then got in his truck and drove to meet the putative 13-year-old girl, thereby taking a substantial step.

As exhibit 4 shows, Pemberton was told that the person he was communicating with was 13 years old just several lines into the electronic communication. CP Supp., exhibits. He quickly thereafter provided his name and proceeded to enquire as to where he could locate the 13-year-old girl. *Id.* In sum, little or no persuasion was necessary for Pemberton to take the bait and proceed in his sexual communication with a minor.

RCW 9A.16.070(2) provides that “The defense of entrapment is not established by a showing that law enforcement officials merely afforded the actor an opportunity to commit a crime.” This provision covers the facts of the present case. Pemberton displayed little or no reluctance that law enforcement had to overcome. Pemberton may well have a right to choose his defense, but his behavior did not allow for the defense of entrapment.

The right to a defense is a constitutional claim but Pemberton has

⁴ The CSAM charge was charged as attempt but it appears to have been a completed crime because of an agreement to provide a fee (thing of value) in return for sexual conduct that happened in the text exchanges and did not require a further step by Pemberton. But one is certainly successfully attempting a crime if he completes it.

not established error or prejudice therefrom. This issue fails.

4. *Illegal police actions.*

Pemberton claims that the police acted illegally by posting an ad in the adult section, speaking in a mature manner, and making most of the “sexual comments” in the exchanges. This fourth claim in Pemberton’s Motion to Vacate is the same as the first and second issues raised in the Motion for New Trial and will be addressed together. The first argument in the Motion for New Trial is that the state improperly targeted him, the second argument is that law enforcement misconduct violated due process.

The initial difficulty with this claim is that Pemberton entwines entrapment with his allegations of police misconduct. The viability of the entrapment defense is discussed under number 3, *supra*, and under number 4, *infra*. This section addresses Pemberton’s claim of police misconduct by reference to the seminal case on that issue, *State v. Lively*, 130 Wn.2d 1, 921 P.2d 1035 (1996).

The second difficulty is that Pemberton cites no authority for the arguments he makes in this connection. He claims, for instance, that police may not “target” him but provides no authority for that proposition. The police posted an ad that anyone could answer. Pemberton was not the particular target of the operation—no evidence indicates that police knew who he was until he responded to the ad.

But it is true that police conduct “may be so outrageous that due

process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.” *Lively*, 130 Wn.2d at 19 (internal quotation omitted). Such conduct “must shock the universal sense of fairness.” *Id.* Such police misconduct violates due process as a matter of law. *Id.* Police conduct is to be considered under the totality of the circumstances. 130 Wn.2d at 21.

The *Lively* Court pronounced “several factors” to consider:

- whether the police conduct instigated a crime or merely infiltrated ongoing criminal activity,
- whether the defendant's reluctance to commit a crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation,
- whether the government controls the criminal activity or simply allows for the criminal activity to occur,
- whether the police motive was to prevent crime or protect the public, and
- whether the government conduct itself amounted to criminal activity or conduct “repugnant to a sense of justice.

Lively, 130 Wn.2d at 22 (internal quotation and citation omitted).

The trial court addressed these factors in its findings of fact as follows

1) The police, in this case, infiltrated ongoing criminal activity. Sergeant Rodriguez has investigated instances of child exploitation and sexual abuse through the internet for several years. The current form of investigation was designed to infiltrate the already extensive sexual exploitation of children on our internet. The investigations are created using information obtained from other criminal investigations. In this case, the defendant choose to respond to and communicate with someone he believed was a 13 year old despite the undercover' s attempts to end communications.

2) Law Enforcement did not engage in persistent solicitation to overcome the defendant's reluctance to commit

the crime because the defendant was never reluctant to commit the crime. The defendant repeatedly communicated with the undercover and pursued the conversation, eventually driving across town to meet with, who he believed, was a 13-year-old girl.

3) The government did not control the criminal behavior but simply allowed for the criminal activity to occur. Although law enforcement made the initial post and engaged in sexual conversation, it was the defendant who decided what the terms were for meeting the undercover. The defendant decided the location and when he would meet with the undercover. The undercover's attempts to discontinue the conversation were quickly rebuffed by the defendant who indicated that he wished to pursue the conversation.

4) The current investigation was designed to prevent crime and protect the public.

5) The government's conduct did not amount to criminal activity and was not repugnant to a sense of justice. The investigation gave the defendant several opportunities to abandon his criminal intent, yet the defendant choose to continue the conversation and criminal behavior.

CP 30. From these findings the trial court concluded

That law enforcement did not engage in misconduct and the defendant's motion for dismissal is denied. The defendant's due process right to fundamental fairness was not violated by the current investigation conducted by Sergeant Rodriguez. The five *Lively* factors way [sic] in favor of the State in this case, and thus, defendant's motion for dismissal is denied.

CP 31.

Pemberton provides no facts of record or authority to contest these findings and conclusions. Moreover, the findings are unchallenged.⁵ Under the totality of the circumstances, Pemberton's claim of outrageous police misconduct fails.

5. *Ineffective assistance of counsel.*

Pemberton claims that he received ineffective assistance of counsel

in various ways: claim three in the Motion for New Trial alleges that defense counsel failed to investigate the entrapment defense; claim five in the Motion to Vacate alleges that defense counsel failed to argue exculpatory evidence and failed to properly cross examine witnesses “due to over sight of evidence.”

To establish ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Pemberton must “overcome a strong presumption that counsel’s performance was reasonable.” *State v. Breitung*, 173 Wn.2d 393, 398, 267 P.3d 1012 (2011). Such claims are addressed as follows:

A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. “The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances.”

In re Nichols, 151 Wn. App. 262, 272-73, 211 P.3d 462 (2009) (internal

⁵ Note that Pemberton signed the findings and conclusions in his pro se capacity. CP 31.

citation omitted). Further, Pemberton “must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct of counsel.” *State v. Dhaliwal*, 150 Wn.2d 559, 573, 79 P.3d 432 (2003). To establish ineffective assistance for failing to request an affirmative defense instruction, Pemberton must show that had counsel requested the instruction, the trial court would have given it. *State v. Powell*, 150 Wn. App. 139, 154, 206 P.3d 703 (2009).

An attorney’s decision to forego instruction on an affirmative defense can be a legitimate strategic or tactical decision. *State v. Perez*, 166 Wn. App. 55, 62, 269 P.3d 372 (2012). Moreover, “[w]here a lesser included offense instruction would weaken the defendant's claim of innocence, the failure to request a lesser included offense instruction is a reasonable strategy.” *State v. Hassan*, 151 Wn. App. 209, 220, 211 P.3d 441, *citing Strickland*, 466 U.S. at 691.

First, the issues raised in the Motion to Vacate, failure to offer exculpatory evidence and failure to properly cross examine witnesses, have no factual support. Pemberton alleges that defense counsel “failed to argue evidence proving me innocent.” That pleading does not say what evidence that is. Pemberton heads this issue as #5 but provides no argument portion for a number 5 issue. Similarly, Pemberton does not tell us where and how defense counsel failed to properly cross examine witnesses or what the phrase “due to over sight of evidence” means.

Second, Pemberton questioned defense counsel on this issue at the post-verdict hearing. RP, 8/20/18, 24 *et seq.* There, defense counsel said that he had researched the defense. RP, 8/2018, 70-71. Counsel clearly articulated that he believed it was better strategy to not seek an entrapment defense. *Id.* Defense counsel said “I didn’t believe that we could meet the elements of entrapment.” RP, 8/20/18, 71.

Third, the trial court heard and wrote findings of fact on many of the ineffective assistance issues Pemberton raises. In findings II. through V., (CP 28-29), the trial court found that defense counsel

--is highly skilled and experience;

--acted appropriately in the case;

--properly did not offer an inadmissible polygraph;

--properly did not offer results of a psychosexual evaluation of Pemberton because inadmissible and not favorable;

--properly investigated the case;

--did not prevent Pemberton from testifying;

--was not impaired by an ongoing medical condition; and

--"adequately communicated with the defendant, reviewed evidence with the defendant, and properly proceeded with this case in a reasonable manner.” CP 29.

The trial court concluded that

Defense Counsel was not ineffective and his [Pemberton’s] motion

for new trial under this theory is denied. The defendant has not overcome the strong presumption that counsel's performance was reasonable. The defendant's disputes with counsel's performance arise from the defendant's inexperience with the rules of evidence. Defense counsel made proper strategic decisions within the bounds of the law.

CP 31 (alteration added). Review being de novo (*McFarland*, 127 Wn.2d at 334), this Court is not bound by the trial court's conclusions of law. But this comprehensive legal conclusion follows from the evidence and the trial court's findings of fact.

Pemberton has failed to overcome his heavy burden and prove deficient performance. This even after being given an opportunity to cross examine defense counsel in post-verdict hearing. Counsel was effective and this issue fails.

6. *Substantial justice was done.*

Pemberton baldly claims that substantial justice was not done in his case. He cites no authority but is clearly referring to grounds for a new trial under CrR 7.5(a)(8).

This claim is procedurally curious in that it sounds under a rule, CrR 7.5, that requires that "the motion shall be disposed of before judgment and sentence or order deferring sentence." CrR 7.5(e). Thus the issue is addressed in RAP 2.2(a)(9), which provides that a litigant may appeal "An order granting or denying a motion for new trial or amendment of judgment." On this record it appears that Pemberton did not raised the issue in a new trial motion in the trial court before entry of

the judgment and sentence. Moreover, Pemberton did not appeal the denial of any of his post-verdict motions. This unpreserved, nonconstitutional claim should not be reviewed.

Second, this is a completely bald assertion. Not even citing the rule, Pemberton simply says the trial was not substantial justice by his lights. The issue as presented lacks factual and legal support.⁶

A trial court's ruling on a motion for new trial is reviewed for abuse of discretion and will not be reversed unless "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State v. Williams*, 27 Wn. App. 430, 439-40, 618 P.2d 110 (1980) *affirmed* 96 Wn.2d 215 (1981). Here, of course, there is no ruling to review.

The *Williams* Court reversed the granting of a new trial by the trial court. One piece of the ruling by the trial court was that substantial justice had not been done. *Williams*, 27 Wn. App. at 440⁷. This ground was held to be an abuse of discretion because "[t]he court gave no additional reason for granting a new trial on this ground." It was held that subsection (d) of the rule requires these additional reasons and since the trial court had not articulated one, granting a new trial on this ground

⁶ No finding or conclusion regarding substantial justice is included in the trial court's findings and conclusions on Pemberton's post-verdict motions. CP 28.

⁷ In 1980, the new trial rule was under CrR 7.6, not CrR 7.5 as currently numbered. In all respects relevant to the present case, the language of the rule is the same.

was an abuse of discretion.

Even if this issue is procedurally appropriate, Pemberton has completely failed to advance any additional reason for the failure of substantial justice. Pemberton's mere conclusory assertions do not support the issue. This issue fails.

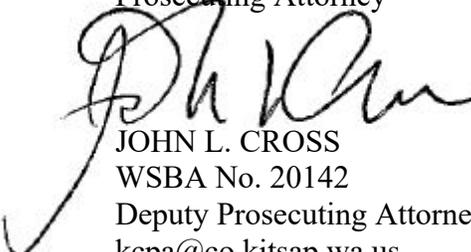
VII. CONCLUSION

For the foregoing reasons, Pemberton's conviction and sentence should be affirmed but the matter should be remanded for the purpose of correcting the scrivener's errors on the judgment and sentence.

DATED October 10, 2019.

Respectfully submitted,

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KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION

October 10, 2019 - 1:19 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52468-6
Appellate Court Case Title: State of Washington, Respondent v. Steven Pemberton, Appellant
Superior Court Case Number: 17-1-01554-5

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