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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

TRAVIS MICHAEL DENBO,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 18-1-00633-5
The Honorable Jack Nevin, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion by precluding Appellant from eliciting information pertinent to the victim's credibility.
2. The trial court denied Appellant his right to present a defense by precluding him from eliciting information pertinent to the victim's credibility.
3. The community custody condition forbidding Appellant from having pictures of "any minors at all" is not related to the crimes for which Appellant was being sentenced.
4. The community custody condition forbidding Appellant from having pictures of "any minors at all" is unconstitutionally overbroad.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the trial court abuse its discretion and deny Appellant his right to present a defense, when it refused to allow Appellant to present testimony that would have assisted the jury in evaluating the complaining victim's credibility?
(Assignments of Error 1 & 2)
2. Did the trial court commit prejudicial error when it excluded evidence that the complaining victim has in the past exaggerated or embellished facts to benefit herself, where

such evidence was clearly pertinent to her credibility?

(Assignments of Error 1 & 2)

3. Should the community custody condition forbidding Appellant from having pictures of “any minors at all” be struck where there is no evidence that viewing or possessing images of minors has any connection to Appellant’s crimes, and where this condition is not narrowly drawn so as to avoid prohibiting a substantial amount of constitutionally protected behavior? (Assignments of Error 3 & 4)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Travis Michael Denbo with three counts of child molestation in the first degree and two counts of communication with a minor for immoral purposes. (CP 61-63) The State also alleged that the offenses were aggravated because Denbo used his position of trust to facilitate the crimes. (CP 61-63)

The trial court found that statements made by the alleged victim, S.B., to her family members and a child interviewer were admissible under the child hearsay statute. (RPII 18)¹ But the trial

¹ The transcripts labeled with Roman numerals I thru IV will be referred to by their Roman numeral volume number. The transcripts labeled with Arabic numerals 1 thru 10 will be referred to by their Arabic numeral volume number.

court excluded testimony that on several occasions S.B. exaggerated or embellished facts related to certain events. (RP7 432-39, 497)

The trial court dismissed one count of child molestation because only two incidents were testified to during the State's case-in-chief. (RP6 403-05) The jury found Denbo guilty on the remaining charges and aggravating factors. (RP9 717-18)

The trial court declined the State's request for an exceptional sentence, and imposed a standard range sentence totaling 89 months to life. (RP10 751-52; CP 175, 178) The trial court imposed only mandatory fines and fees, and imposed standard community custody conditions including a prohibition against possessing any pictures of minors including relatives. (CP 176, 187) Denbo filed a timely Notice of Appeal. (CP 164)

B. SUBSTANTIVE FACTS

Travis Denbo and Rochelle Dufrain knew each other in childhood, and reconnected through Facebook sometime around 2013-2014. (RP4 103, 104) At the time Dufrain had four children—one adult daughter, twin four-year old boys, and a five-year old daughter, S.B.. (RP4 105-06)

The twins spent every other weekend with their biological

father. (RP4 106-07) S.B., whose biological father was out of the picture, was sad that she did not have similar weekend getaways. So eventually she began spending alternating weekends at Denbo's home. (RP4 58, 108, 109) She enjoyed the weekends with Denbo in part because she was able to watch whatever television programs and movies that she wanted. (RP4 54-55, 109) Those programs frequently included mature mystery and crime shows. (RP4 95)

Dufrain testified that S.B. was usually a happy child, but she noticed a change in S.B.'s behavior towards the end of 2017. (RP4 117) S.B. began spending more time alone in her room, spent less time with her friends, and slept more than usual. (RP4 117) S.B. also started to express reluctance to spend weekends with Denbo. (RP4 83, 117-18)

By January of 2018, after about five years together, Dufrain and Denbo's relationship was "on the rocks," and Dufrain had decided to end it. (RP4 115, 118) Dufrain wanted to know if S.B. would be upset if Denbo was no longer in their lives, so one evening she asked S.B. how she felt about Denbo. (RP4 83, 118) S.B. began to cry and ran to her mother's bedroom. (RP4 83, 84-85, 118) S.B. eventually told Dufrain about several inappropriate

incidents that took place at Denbo's home.² (RP4 84-85, 119-20, 126, 127, 139)

At trial, S.B. testified about these incidents. First, she testified that Denbo took her shopping for a hand-held back massager that Denbo could use on his sore neck. (RP4 60-61) S.B. testified that on two specific occasions, Denbo sat next to her while she watched television on the couch, turned on the massager, then placed it on her pubic area. On one occasion he touched her with the massager over her underpants, and on another he touched her inside her underpants. (RP4 61-63, 64, 66) After these incidents, Denbo told S.B. not to tell her mother what they had done. (RP4 68)

S.B. also testified that she would take baths at Denbo's home, and that he called it "tubby time." (RP4 72) S.B. would wear a swimsuit, and Denbo would sit beside the tub in shorts and a tank-top. (RP4 72-73) One time, Denbo put a rag over her eyes and put whipped cream into her mouth. (RP4 74-75) S.B. told her mother that the whipped cream was placed into her mouth by what felt like Denbo's tongue. (RP4 139)

² Dufraim's mother was also present when S.B. made these disclosures, and testified at trial about what she remembers S.B. saying. (RP4 86, 121-22; 157, 158, 159, 161)

During another visit, Denbo showed S.B. a web page with pictures of underwear for sale. He asked her opinion about a pair that S.B. described as having white beads down the middle of the front, and then he purchased them. (RP4 79-80) After they were delivered, Denbo asked S.B. to try them on. (RP4 81) She put them on and showed them to Denbo, but they were uncomfortable and she felt weird wearing them. (RP4 81-82) This occurred after Denbo had told S.B. not to talk to her mother about their activities, so she “started getting a little skeptical about things.” (RP4 81, 82)

Dufrain called the police and reported S.B.’s allegations. (RP4 123) S.B. was later interviewed by a child forensic interview, and made similar disclosures. (RP4 124; RP6 362; Exh. P1) Police executed a search warrant at Denbo’s apartment and collected the massager, but did not find the underpants that S.B. described. (RP5 215-16, 252-53, 275, 280)

Denbo’s mother, Barbara Murphy, lived with Denbo during this time. (RP7 537) She would have been present in the home when most of these incidents took place. (RP7 537) Dufrain testified that Murphy is nearly bed-ridden and rarely leaves her bedroom. (RP4 110-11) But Murphy testified that she has no trouble moving around her apartment because it is small and she

uses a walker. (RP7 539-40) Murphy also testified that the walls are “paper thin,” and she can easily hear conversations occurring in other rooms of the apartment. (RP7 537-38, 545)

Denbo’s daughter, Tieren Stokes, and his cousin, Toni Sherry, both testified that S.B. always seemed happy to be with Denbo and they never saw her act uncomfortable around him. (RP7 448, 449, 485, 489, 490) They also both confirmed that Murphy’s mobility issues did not prevent her from moving freely about the apartment whenever she wanted. (RP7 448, 482-83) Stokes also testified that she observed S.B. watching the television program Law & Order SVU, which regularly featured sexual assault storylines. (RP7 502)

Tests performed on the massager identified presence of DNA belonging to S.B., Denbo, and an unknown third person. (RP5 302) But this is not surprising, considering that S.B. and Murphy both testified that Murphy once caught S.B. alone, using the massager to masturbate by herself. (RP4 89; RP7 546-47) Murphy yelled at S.B. and told her that behavior was inappropriate. (RP4 89; RP7 547-48)

IV. ARGUMENT & AUTHORITIES

- A. DENBO'S CONVICTIONS SHOULD BE REVERSED BECAUSE THE TRIAL COURT'S EXCLUSION OF EVIDENCE THAT WAS DIRECTLY RELEVANT TO S.B.'S CREDIBILITY WAS AN ABUSE OF DISCRETION AND DEPRIVED DENBO OF HIS RIGHT TO PRESENT A DEFENSE.

Before the defense presented its case to the jury, the State asked the trial court to forbid Denbo's daughter, Tiernen Stokes, from testifying about a prior incident where S.B. exaggerated and made false statements in order to minimize her responsibility or bad behavior. (RP7 432-33)

Denbo's counsel explained what the evidence was and why it was relevant:

[T]his witness has seen [S.B.] take a simple story that's true and add a bunch of facts to it. Not saying she's lying. She exaggerates and blows the story -- make it bigger than it was. She's witnessed this event more than once or twice. That has nothing to do with the fact that she's lying. We're not saying that [S.B.] is lying. We're not going into that under 405, under character, because you have to use general reputation in the community. She's witnessed several times [S.B.] take a story that [she's] witnessed herself and watched her just add stuff to it, ad lib it and make it exaggerated.

(RP7 433)

The trial court then demanded that counsel "tell me, under the evidence rules, why it's admissible." (RP7 434) Counsel

explained that it was simply relevant to S.B.'s credibility and therefore admissible under ER 401 and 402. (RP7 434-35)

The trial court stated that ER 401 was “just our jumping off point,” and because defense counsel could not point to a specific rule allowing such testimony, it would not be admitted. (RP7 438, 439, 497-98) The trial court’s refusal to allow the testimony was an abuse of discretion because it was admissible under the rules of evidence and because its exclusion denied Denbo his constitutional right to present a defense.³

A defendant in a criminal case has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible. U.S. Const. amend. VI, XIV; *State v. Kim*, 134 Wn. App. 27, 41, 139 P.3d 354 (2006). Washington’s evidence rules also provide that “[a]ll relevant evidence is admissible[.]” ER 402. “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401.

³ A trial court’s admission of evidence is reviewed for abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). Abuse of discretion exists “[w]hen a trial court’s exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons.” *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

The credibility of a witness often is “an inevitable, central issue” in cases in which the witness is a child victim of sexual molestation. *State v. Hakimi*, 124 Wn. App. 15, 25, 98 P.3d 809 (2004) (quoting *State v. Petrich*, 101 Wn.2d 566, 575, 683 P.2d 173 (1984)). The credibility of the complaining witness is generally an issue in cases involving crimes against children, especially if the defendant denies the acts charged and the child asserts their commission. *Hakimi*, 124 Wn. App. at 25.

The jury’s assessment of S.B.’s credibility was a critical component in this case. As the prosecutor repeatedly told the jury during closing arguments, “If you believe the testimony of [S.B.], the State has already met its burden beyond a reasonable doubt.” (RP8 645) Thus, any evidence that assisted the jury in assessing S.B.’s credibility was highly relevant, and should have been admitted under ER 401 and ER 402.

Despite this, the trial court refused to allow Denbo to present evidence of prior instances where S.B. was obviously exaggerating or embellishing facts to benefit herself. Rather than admitting this relevant evidence under ER 401 and ER 402, the trial court found that the testimony should be excluded because it did not meet the requirements of any other rules of evidence. (RP7 438, 439, 497-

98) The court was wrong because this testimony was not excluded by other evidence rules and in fact is specifically allowed under ER 404.

“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” ER 404(b). However, such evidence may be admissible for other purposes, “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b); *State v. Kidd*, 36 Wn. App. 503, 505, 674 P.2d 674 (1983). Evidence of prior bad acts is permissible under ER 404(b) when offered to assist the jury in evaluating the credibility of a victim. See *State v. Magers*, 164 Wn.2d 174, 186, 189 P.3d 126 (2008). Accordingly, the trial court was wrong to believe that there was no other rule of evidence that would permit the proffered testimony.

The trial court’s error in excluding this testimony was not harmless. The only substantive evidence of the crimes came from S.B.’s testimony and prior out of court statements. The State’s entire case rested on the jury’s willingness to believe S.B. And the State relied heavily on the lack of evidence questioning her credibility when it encouraged the jury to return guilty verdicts. For

example, the prosecutor argued:

- And I submit to you that she gave compelling, honest testimony to you about exactly what that man did to her. (RP8 645)
- [S.B.'s] testimony is credible, and therefore it's been proven beyond a reasonable doubt the defendant is guilty of those charges. (RP8 662)
- You also saw that there's no embellishment in her story. No exaggeration. ... And she gave the naked truth, even when it was uncomfortable. (RP8 664)
- [T]here's just simply no credible evidence to believe that [S.B.] would want to make this up, let alone that she was capable of doing that[.] And it's not reasonable to believe that [S.B.] made this up on her own. There's no evidence to support that. (RP8 665-66)

Denbo was improperly forbidden from presenting testimony to support an inference that S.B. was capable of embellishing and exaggerating, and that would have questioned her credibility. Then the State used this lack of evidence to argue for conviction. The trial court's error in excluding the evidence was an abuse of discretion and highly prejudicial. Denbo's convictions should be reversed and his case remanded for a new trial.

B. THE COMMUNITY CUSTODY CONDITION PROHIBITING DENBO FROM HAVING PICTURES OF MINORS SHOULD BE STRICKEN BECAUSE THE CONDITION IS UNRELATED TO HIS OFFENSES AND IS OVERBROAD.

Condition 17 of the community custody order instructs that Denbo "[h]ave no direct and/or indirect contact with minors, nor

pictures of any minors at all, to include relatives.” (CP 187) The trial court exceeded its authority in imposing the prohibition on possession of photographs of minors because it is not crime-related and is overbroad.⁴

The trial court’s authority to impose a sentence in a criminal proceeding is strictly limited to that authorized by the legislature in the sentencing statutes. *State v. Johnson*, 180 Wn. App. 318, 325, 327 P.3d 704 (2014). RCW 9.94A.703 sets out mandatory, waivable, and discretionary community custody conditions that the trial court may impose. Any conditions not expressly authorized by statute must be crime-related. RCW 9.94A.703(3)(f); see *State v. Jones*, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003).

The SRA defines a “crime-related prohibition” as 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). The condition need not be causally related to the crime, but it must be directly related to the crime. *State v. Zimmer*, 146 Wn. App. 405, 413, 190 P.3d 121 (2008). Thus, crime-related conditions of community custody must be supported by evidence

⁴ Defense counsel specifically objected to this condition at sentencing. (RP10 739-41)

showing the factual relationship between the crime punished and the condition imposed. *State v. Parramore*, 53 Wn. App. 527, 531, 768 P.2d 530 (1989). 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).⁵

As long as a trial court has statutory authorization to impose a condition, its decision to do so is reviewed for abuse of discretion. *Johnson*, 180 Wn. App. at 326; *State v. Irwin*, 191 Wn. App. 644, 656, 364 P.3d 830 (2015).

“In addition to meeting the statutory requirements under RCW 9.94A.703(3), community custody provisions must also pass constitutional muster.” *State v. Johnson*, 4 Wn. App. 2d 352, 358, 421 P.3d 969 (2018).⁶ Any restriction on protected materials that a defendant may access or possess must be clear and “must be reasonably necessary to accomplish essential state needs and public order.” *State v. Bahl*, 164 Wn.2d 739, 757-58, 193 P.3d 678 (2008).

This case is similar to *State v. Johnson*, where Division 3 recently struck even more specific prohibitions on possession of

⁵ *Overruled on other grounds, State v. Sanchez Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010).

⁶ *Review denied*, 192 Wn.2d 1003, 430 P.3d 260 (2018)

photographic images. 4 Wn. App. 2d at 359-60. There, the defendant was convicted of second degree child molestation. The trial court imposed several community custody conditions, including one prohibiting the possession or viewing of “material that includes images of nude women, men, and/or children” (condition 17), or of “material that includes images of children wearing only undergarments and/or swimsuits” (condition 18). 4 Wn. App. 2d at 356.

The appellate court found that both conditions were invalid “in that they are both overbroad and not crime related.” *Johnson*, 4 Wn. App. 2d at 359. The court reasoned:

While Mr. Johnson was convicted of an offense against a minor and appears to have had an interest in undergarments and masturbation, there is no indication that Mr. Johnson was aroused by the type of nonerotic images described in conditions 17 and 18. At the same time, conditions 17 and 18 encompass broad swaths of materials with significant social value. For example, condition 17, prohibiting possession or viewing of material that includes images of nude men, women, and/or children, would extend to medical text books, health-related Internet sites, and most art museums. Condition 18, prohibiting possession or viewing of material that includes images of children wearing only undergarments and/or swimsuits, would extend to countless advertisements for diapers and sunscreen that are depicted in newspapers and magazines. There is no indication that such a broad prohibition on constitutionally-protected materials is reasonably

necessary for public order or safety. Accordingly, conditions 17 and 18 must be struck.

Johnson, 4 Wn. App. 2d at 359 (citing *State v. Padilla*, 190 Wn.2d 672, 681, 416 P.3d 712 (2018)).

Similarly, the blanket prohibition on all pictures of minors, whether erotic or not, is not remotely crime related and is extremely overbroad, and does not meet statutory or constitutional muster. There was no evidence Denbo possessed sexually explicit photographs or images of any kind. There is no indication that Denbo was aroused by nonerotic images of minors. And there was no allegation or evidence that Denbo's possession or viewing of pictures of minors is in any way connected to his current offenses.

Furthermore, like the conditions in *Johnson*, condition 17 encompasses "broad swaths of materials with significant social value." In addition to those listed by Division 3, Denbo's condition 17 also prohibits such innocuous things like school photographs of his now-grown children or future grandchildren, family vacation or holiday photographs, and advertisements of all sorts in virtually any catalogue or magazine.⁷

There is simply no indication that such a broad prohibition on

⁷ Notably, possessing or accessing materials containing erotic or "sexually explicit" images is specifically prohibited in condition 10. (CP 186)

this type of constitutionally-protected material is reasonably necessary for public order or safety. This portion of condition 17 must be struck. *Johnson*, 4 Wn. App. 2d at 359.

V. CONCLUSION

The trial court abused its discretion and denied Denbo his constitutional right to present a defense when it refused to allow Denbo to present evidence of prior instances where S.B. was obviously exaggerating or embellishing facts to benefit herself. This prejudicial error requires reversal of Denbo's convictions and remand for a new trial. Additionally, the portion of condition 17 forbidding Denbo from having a photograph of any minor is both unrelated to Denbo's crimes and overbroad, and must be struck from appendix H of the Judgment and Sentence.

DATED: August 30, 2019



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CERTIFICATE OF MAILING

I certify that on 08/30/2019, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Travis M. Denbo, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.



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