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Court of Appeals  
Division III  
State of Washington

No. 34416-9-III

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

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STATE OF WASHINGTON,

Respondent,

v.

EUGENE LESTER STANDFILL,

Appellant.

---

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

---

BRIEF OF APPELLANT

---

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A. ASSIGNMENTS OF ERROR

1. The court's Instruction 25 impermissibly commented on the evidence in violation of article IV, section 16.

2. The imposition of statutory maximum sentences for third degree child molestation, sexual exploitation of a minor and first degree possession of depictions of a minor in sexually explicit conduct plus an additional 36 months community custody exceeded the statutory maximums for these offenses and the convictions must be remanded for resentencing.

3. Sentencing condition 9 requiring Mr. Standfill to avoid places where minors congregate is unconstitutionally void for vagueness and must be stricken.

4. Sentencing conditions 19 and 20 barring Mr. Standfill from using a computer or electronic device to access the internet and/or use any social networks are unconstitutionally overbroad and must be stricken.

5. Mr. Standfill's attorney rendered deficient representation in failing to argue his convictions for sexual exploitation of a minor and first degree possession of a minor in sexually and possession of

depictions of a minor engaged in sexually explicit conduct were the same criminal conduct.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Article IV, section 16 of the Washington Constitution bars the court from commenting on the evidence to a jury. A jury instruction which tells the jury that an element had been proven by the State as a matter of law is an impermissible comment on the evidence. The court in Mr. Standfill's matter instructed the jury in to-convict instruction 25 that a particular act constituted the act of possession, which unconstitutionally reduced the State's burden of proof. Was the court's instruction an impermissible comment on the evidence entitling Mr. Standfill to reversal of his conviction and remand for a new trial?

2. A trial court's authority to impose sentences is statutory. The maximum sentence for a class C felony is 60 months and a class B felony is 120 months. A sentence for either a class C or class B offense cannot exceed the statutory maximum of 60 months and 120 months respectively, including any enhancements and terms of community custody. Here, Mr. Standfill's sentence for third degree child molestation, sexual exploitation of a minor and first degree possession of depictions of a minor in sexually explicit conduct plus the 36 month

term of community custody exceeded the statutory maximum sentences. Is Mr. Standfill entitled to remand for resentencing to a corrected sentence?

3. The trial court's power at sentencing is statutory. By statute, the court may impose "crime-related" prohibitions as a condition of the sentence. A crime related prohibition that fails to provide ascertainable standards of guilt to protect against arbitrary enforcement is void for vagueness and must be stricken. Here, the court imposed a condition of community placement that Mr. Standfill avoid places where minors reside or congregate which has been found to be void for vagueness because it has no ascertainable standards for protecting against arbitrary enforcement. Should this provision be stricken as unconstitutional?

4. A crime-related prohibition that infringes First Amendment free speech rights is unconstitutionally overbroad and must be stricken. Barring access to a computer or electronic device in order to access the internet or social networks is constitutionally overbroad. Here, the court barred Mr. Standfill from using a computer or electronic device to access the internet and/or social networks. Must this unconstitutional prohibition be stricken?

5. A defendant has a Sixth Amendment and article I, section 22 right to counsel and to the effective representation of counsel. A defendant who is denied the effective assistance of counsel and is prejudiced by that failure at sentencing is entitled to a new sentencing hearing. Here, counsel failed to argue the sexual exploitation of a minor and possession of depictions of a minor engaged in sexually explicit conduct convictions were the same criminal conduct where the offenses involved the same victim, occurred at the same time and shared the same intent. Was Mr. Standfill prejudiced by his attorney's deficient representation, thus requiring reversal of his sentence and remand for resentencing?

#### C. STATEMENT OF THE CASE

Based upon allegations by 14-year-old K.J.S. that her grandfather, Eugene Standfill, had sexually assaulted her for several years, in November 2014 the Benton County Sheriff's Office began an investigation. RP 38, 43, 92. Deputy Scott Runge interviewed K.J.S., who alleged her grandfather had her use a personal massager to masturbate while he took photographs. RP 99. A subsequent search of Mr. Standfill's residence revealed a personal massager and two digital

cameras. RP 107, 115. A memory card in one of the digital cameras was analyzed and revealed multiple photographs of K.J.S. RP 163-66.

Mr. Standfill was charged with one count of second degree rape of a child, one count of third degree child molestation, one count of sexual exploitation of a minor, one count of first degree possession of depictions of a minor engaged in sexually explicit conduct, one count of first degree rape of a child, and one count of first degree child molestation. CP 132-34.

At the request of the State, the court deviated from the WPIC instruction for possession of depictions of a minor engaged in sexually explicit conduct and instructed the jury in Instruction 25:

To convict the defendant of the crime of possession of depictions of a minor engaged in sexually explicit conduct, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That during the time intervening between the 20th day of August, 2011, and the 14th day of November, 2014, the defendant knowingly possessed visual or printed matter depicting a minor engaged in sexually explicit conduct;

(2) *The visual or printed matter depicts the minor masturbating her vagina;* and

(3) That the defendant knew the person depicted was a minor; and

(4) That this act occurred in the State of Washington.

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

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

CP 295 (emphasis added).

The jury failed to reach a verdict on the count of first degree child rape but convicted Mr. Standfill of the remaining counts. CP 307-12; 3/16/2016RP 74-75. The court declared a mistrial on the count upon which the jury failed to reach a verdict and subsequently dismissed the count. 3/16/2016RP 74; 5/11/2016RP 80.

At sentencing, the court imposed statutory maximum sentences for the third degree assault, sexual exploitation and possession of depictions of a minor engaged in sexually explicit conduct convictions plus an additional 36 months community custody. CP 343-44; 5/11/2016RP 86-87. In addition, as part of the conditions of community custody, the court required Mr. Standfill to “[a]void places where children congregate, including parks, libraries, playgrounds, schools, daycare centers and sporting events.” CP 349. Further, the court required that Mr. Standfill “not use a computer or electronic device

capable of accessing the internet without authorization from your community corrections officer and/or therapist” or “use any social networks.” CP 350.

D. ARGUMENT

**1. The court’s instruction 25 constituted an impermissible comment on the evidence contrary to the Washington Constitution.**

- a. *The trial court is barred from commenting on the evidence to the jury.*

Under article IV, section 16 of the Washington Constitution, “[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” This provision prohibits a judge from “‘conveying to the jury his or her personal attitudes toward the merits of the case’ or instructing a jury that ‘matters of fact have been established as a matter of law.’” *State v. Jackman*, 156 Wn.2d 736, 743-44, 132 P.3d 136 (2006), quoting *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). “The touchstone of error in a trial court’s comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury.” *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). “‘All remarks and observations as to the facts before the jury are positively prohibited.’” *State v. Bogner*, 62 Wn.2d 247, 252, 382 P.2d

254 (1963) (emphasis added), *quoting State v. Walters*, 7 Wn. 246, 250, 34 P. 938 (1893). A court may comment on the evidence when it incorporates specific facts in a jury instruction. *State v. Levy*, 156 Wn.2d 709, 721-23, 132 P.3d 1076 (2006).

“A statement by the court constitutes a comment on the evidence if the court’s attitude toward the merits of the case or the court’s evaluation relative to the disputed issue is inferable from the statement.” *Lane*, 125 Wn.2d at 838. While a trial court “may supplement an instruction with an explanatory instruction if the meaning of the language is unclear or if the language might mislead persons of ordinary intelligence,” *State v. Young*, 48 Wn.App. 406, 415, 739 P.2d 1170 (1987), an instruction “improperly comments on the evidence if it resolves a disputed issue of fact that should have been left to the jury.” *Becker*, 132 Wn.2d at 64-65. Judicial comments in jury instructions are presumed prejudicial and the State has the burden to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. *Levy*, 156 Wn.2d at 725.

Even though Mr. Standfill did not object to the instruction at trial, he may still raise the issue on appeal as it involves a manifest

constitutional error that this Court may consider for the first time on appeal. *Levy*, 156 Wn.2d at 719-20, citing *State v. Lampshire*, 74 Wn.2d 888, 893, 447 P.2d 727 (1968) (because a comment on the evidence invades a constitutional provision, failure to object does not foreclose raising the issue on appeal); *Bogner*, 62 Wn.2d at 252 (even if the evidence is undisputed or overwhelming, comment by the judge violates a constitutional injunction).

This Court reviews whether the instruction was legally correct *de novo*. *State v. Becklin*, 163 Wn.2d 519, 525, 182 P.3d 944 (2008); *State v. Johnson*, 152 Wn.App. 924, 935, 219 P.3d 958 (2009).

- b. *Instruction 25 relieved the State of proving an element of the offense of possession of depictions of a minor engaged in sexually explicit conduct as charged in Count 4.*

A court comments on the evidence when a jury instruction states as a fact an issue to be determined by the jury. *See Levy*, 156 Wn.2d at 721 (instruction described a location as a building but whether it was a building was a question for the jury); *Becker*, 132 Wn.2d at 64–65 (instruction described program as a school but whether it was a school was a disputed issue of fact); *Jackman*, 156 Wn.2d at 744 (instruction stated the victims' birthdates but the State had the burden of proving the victims were minors).

The pattern jury instruction, WPIC 49A.04, sets forth the elements of the offense thusly:

To convict the defendant of the crime of Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about \_\_\_\_, the defendant knowingly possessed visual or printed matter depicting a minor engaged in sexually explicit conduct;
- (2) That the defendant knew the person depicted was a minor; and
- (3) That this act occurred in the State of Washington.

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

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

Court's Instruction 25, which was given to the jury here, deviated from the pattern instruction in relevant part by stating:

To convict the defendant of the crime of possession of depictions of a minor engaged in sexually explicit conduct, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That during the time intervening between the 20th day of August, 2011, and the 14th day of November, 2014, the defendant knowingly possessed visual or printed matter depicting a minor engaged in sexually explicit conduct;

(2) *The visual or printed matter depicts the minor masturbating her vagina; and*

(3) That the defendant knew the person depicted was a minor; and

CP 295 (emphasis added).

It was for the jury that to determine what, if any, acts constituted the depictions that Mr. Standfill allegedly possessed. This instruction removed that disputed issue of fact from the jury's consideration by stating as fact that the act of masturbation by K.S. constituted the possession, thus relieving the State of its burden to prove all elements of the offense. *Becker*, 132 Wn.2d 65.

In *Becker*, the “to-wit” reference in the special verdict form expressly stated that the youth program *was a school*, a fact that was a threshold issue that had to be established for there to be any crime at all. 132 Wn.2d at 64.

In *State v. Brush*, a jury instruction purporting to define “prolonged period of time” for the jury resolved a contested factual issue; whether the abuse occurred over a “prolonged period of time”. 183 Wn.2d 550, 557, 353 P.3d 213 (2015). As a consequence, the instruction constituted an improper comment on the evidence which

effectively relieved the prosecution of its burden of establishing an element of the domestic violence aggravating factor. *Id.*

Here, the Court's Instruction 25 resolved the contested issue of which photograph of K.S. engaged in sexually explicit conduct constituted possession by Mr. Standfill, thus impermissibly commenting on the evidence.

*c. The instruction relieved the State of its burden of proof.*

Whether the State produced sufficient evidence for a rational juror to find the disputed element is irrelevant to whether the jury instruction was correctly instructed. *Becker*, 132 Wn.2d at 65. The “to-convict” instruction “must contain all of the elements of the crime because it serves as a ‘yardstick’ by which the jury measures the evidence to determine guilt or innocence.” *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010) (internal quotation marks omitted), quoting *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

A judicial comment on the evidence is presumed prejudicial, and the State must demonstrate that the defendant was not prejudiced by the comment, unless the record affirmatively shows that no prejudice occurred. *Levy*, 156 Wn.2d at 723, citing *Lane*, 125 Wn.2d at 838-39; *State v. Stephens*, 7 Wn.App. 569, 573, 500 P.2d 1262 (1972),

*aff'd in part, rev'd in part*, 83 Wn.2d 485 (1973) (the State has the burden of showing that the jury's decision was not influenced, even when the evidence is undisputed or overwhelming).

In *Becker*, the Supreme Court ruled the court's comment that the alternative school was a "school" for enhancement under the statute was tantamount to a directed verdict because it relieved the State of the burden of proof, thus resulting in reversal of the conviction. *Becker*, 132 Wn.2d at 65. The Court noted that whether or not the State produced enough evidence was simply not the issue and did not cure the error. *Id.*

Similarly, in *Brush*, the Supreme Court found that the jury instruction defining "prolonged period of time" was prejudicial and the State failed to prove that no prejudice resulted from the error. 183 Wn.2d at 560.

Mr. Standfill's matter is no different from *Becker* and *Brush* in that in all of these cases the trial court, in its instruction to the jury, conveyed that a disputed element had been proven as a matter of law. Mr. Standfill is entitled to the same result as in *Becker* and *Brush*; reversal of his conviction for possession of depictions of a minor engaged in sexually explicit conduct as charged in Count IV.

**2. The combined sentences imposed by the trial court for the third degree child molestation, sexual exploitation of a minor and possession of child pornography convictions exceeded the statutory maximum for those offenses requiring resentencing.**

The Sentencing Reform Act (SRA) prescribes the trial court's authority to sentence in felony cases. *State v. Furman*, 122 Wn.2d 440, 456, 858 P.2d 1092 (1993); *State v. Skillman*, 60 Wn.App. 837, 839, 809 P.2d 756 (1991). Whenever a sentencing court exceeds its statutory authority, its action is void. *State v. Theroff*, 33 Wn.App. 741, 744, 657 P.2d 800 (1983). Whether a court has exceeded its sentencing authority is a question of law reviewed *de novo*. *State v. Murray*, 118 Wn.App. 518, 521, 77 P.3d 1188 (2003).

A sentence imposed contrary to the law may be reviewed for the first time on appeal. *State v. Anderson*, 58 Wn.App. 107, 110, 791 P.2d 547 (1990). On appeal, a defendant may challenge a sentence imposed in excess of statutory authority because "a defendant cannot agree to punishment in excess of that which the Legislature has established." *In re Personal Restraint of Goodwin*, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002).

Here, the third degree child molestation offense was a class C felony with a maximum penalty of five years confinement. RCW

9A.44.089(2). The sexual exploitation of a minor and first degree possession of depictions of a minor engaged in sexually explicit conduct offenses were class B felonies with a maximum penalty of 120 months. RCW 9.68A.040(2); RCW 9.68A.070(1)(b). A court may not impose a term of community custody that, combined with the term of confinement, exceeds the maximum term of confinement allowed by RCW 9A.20.021. RCW 9.94A.505(5), RCW 9.94A.701(9).

RCW 9.94A.701(9) provides that “[t]he term of community custody . . . shall be reduced by the court whenever an offender’s standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021. Here, the trial court imposed the statutory maximum sentences and imposed a community custody term of 36 months for each offense. CP 343-44. These combined sentences exceeded the statutory maximum for each offense.

Where the sentence imposed exceeds the statutory maximum, the trial court must reduce the term of community custody. RCW 9.94A.701(9); *State v. Boyd*, 174 Wn.2d 470, 472, 275 P.3d 321 (2012). The proper remedy is to “remand to the trial court to either

amend the community custody term or resentence.” *Boyd*, 174 Wn.2d at 473.

The trial court’s imposition of statutory maximum sentences for each offense plus 36 months of community custody on each offense exceeded the statutory maximum for each offense. CP 343-44. The remedy is for this Court to remand to the trial court for resentencing.

**3. The imposition of the challenged conditions of community custody violate the United States and Washington Constitutions and must be stricken.**

- a. *Courts possess the authority to impose conditions that are constitutional.*

Under the Sentencing Reform Act (SRA), a court has the authority to impose “crime-related prohibitions” and affirmative conditions as part of a felony sentence. RCW 9.94A.505 (8). “‘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.” RCW 9.94A.030(10). A court may order compliance “with any crime-related prohibitions” as a condition of community custody. RCW 9.94A.703(3)(f).

There is no need to demonstrate that the condition has been enforced before challenging the condition; a preenforcement challenge is ripe for review. *State v. Bahl*, 164 Wn.2d 739, 752, 193 P.3d 678

(2008). Community custody conditions are ripe for review on direct appeal ““if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.”” *Bahl*, 164 Wn.2d at 751, *quoting First United Methodist Church v. Hearing Exam’r*, 129 Wn.2d 238, 255-56, 916 P.2d 374 (1996).

This court reviews community custody conditions for an abuse of discretion, and will reverse them if they are “manifestly unreasonable.” *State v. Sanchez Valencia*, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010). Imposing an unconstitutional condition will always be “manifestly unreasonable.” *Id.*

b. *Crime-related prohibition 9 is void for vagueness and must be stricken.*

Under the Due Process Clause of the Fourteenth Amendment, a prohibition is void for vagueness if either (1) it does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited, or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. *Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). Thus, a condition of community custody is unconstitutionally vague if it fails to do either. *Bahl*, 164 Wn.2d at 753.

In *State v. Irwin*, this Court struck the same condition of community custody barring persons from frequenting places where minors reside or congregate on vagueness grounds:

While *Bahl* and *Sansone* involved the intractably undefinable term “pornography,” this case simply requires ordinary people to understand where “children are known to congregate.” But, as Irwin points out, whether that would include “public parks, bowling alleys, shopping malls, theaters, churches, hiking trails” and other public places where there may be children is not immediately clear. Trial counsel requested that, rather than leave the definition of this condition to the discretion of the CCO, the court should list prohibited places as examples. When presented with this argument at sentencing, the trial court explained that that [sic] Irwin should not “frequent areas of high concentration of children.” But, the final condition did not include that clarification.

...

It may be true that, once the CCO sets locations where “children are known to congregate” for Irwin, Irwin will have sufficient notice of what conduct is proscribed. But, although that would help the condition satisfy the first prong of the vagueness analysis, it would leave the condition vulnerable to arbitrary enforcement. *See Bahl*, 164 Wn.2d at 753, 193 P.3d 678; *Sansone*, 127 Wn.App. at 639, 111 P.3d 1251. The potential for arbitrary enforcement would render the condition unconstitutional under the second prong of the vagueness analysis. *See Bahl*, 164 Wn.2d at 753, 193 P.3d 678. Therefore, this court reverses the trial court, strikes the condition as being void for vagueness, and remands to the trial court for resentencing.

191 Wn.App. 644, 654-55, 364 P.3d 830 (2015) (internal footnotes omitted).

The same potential for arbitrary enforcement here renders the condition unconstitutional under the second prong of the vagueness analysis. *Bahl*, 164 Wn.2d at 753. The condition in Mr. Standfill’s case is virtually the same condition as in *Irwin*. *Irwin* should control, as even if the Community Corrections Officer sets locations, at a later date, this does nothing to deter arbitrary enforcement. Therefore, this Court must reverse the trial court, strike the condition as being void for vagueness, and remand for resentencing.

c. *Crime-related prohibitions 19 and 20 are unconstitutionally overbroad and must be stricken.*

“Overbreadth is a question of substantive due process—whether the statute is so broad that it prohibits constitutionally protected activities as well as unprotected behavior.” *State v. McBride*, 74 Wn.App. 460, 464, 873 P.2d 589 (1994). Overbreadth doctrine creates a limited exception to the general rule that a party “will not be heard to challenge [a] statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.” *Broadrick v. Oklahoma*, 413 U.S. 601, 610, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Washington courts apply federal overbreadth analysis to these challenges. *State v. Talley*, 122 Wn.2d 192, 210, 858 P.2d 217 (1993). While overbreadth challenges usually invoke rights under the

First Amendment to the United States Constitution, Washington courts have applied overbreadth analysis to other constitutionally protected rights as well. *See State v. Lee*, 135 Wn.2d 369, 389-90, 957 P.2d 741 (1998) (applying overbreadth analysis to an anti-stalking statute and determining that the statute did not improperly infringe on the constitutional right to travel and move freely in public places); *McBride*, 74 Wn.App. at 465 (applying overbreadth analysis to a statute prohibiting drug traffickers from frequenting areas known for drug activity and noting that such an analysis applies regardless of whether the constitutional right involved is free speech or the right to move about freely and travel).

The first step in overbreadth analysis is determining if a statute reaches constitutionally protected conduct. *Id.* at 464. “Statutes which regulate behavior and not purely speech will not be overturned unless the overbreadth is both real and substantial in relationship to the conduct legitimately regulated by the statute.” *Id.* Even if a statute is substantially overbroad, it “will be overturned only if the court is ‘unable to place a sufficiently limited construction upon the standardless sweep of [the] legislation.’” *Id.* (alteration in original)

(internal quotation marks omitted), *quoting City of Seattle v. Webster*, 115 Wn.2d 635, 641, 802 P.2d 1333 (1990).

Overbreadth analysis measures how statutes (or conditions of community custody) that prohibit conduct fit within the universe of constitutionally protected conduct. *See State v. Halstien*, 122 Wn.2d 109, 121, 857 P.2d 270 (1993). A condition of community custody is overbroad if it sweeps within its prohibitions free speech activities protected under the First Amendment. *Id.* Offenders on community custody have a right to access and transmit material protected by the First Amendment. *Bahl*, 164 Wn.2d at 753.

The First Amendment “embraces the right to distribute literature, and necessarily protects the right to receive it.” *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 143, 63 S.Ct. 862, 87 L.Ed. 1313 (1943). It protects material disseminated over the internet as well as by the means of communication devices used prior to the high-tech era. *Reno v. ACLU*, 521 U.S. 844, 868, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). Thus, restrictions upon access to the Internet necessarily curtail First Amendment rights. *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004).

A total ban on internet access and social media violates the First Amendment. *Packingham v. North Carolina*, \_\_\_ U.S. \_\_\_, 137 S.Ct. 1730, 1737, 198 L.Ed.2d 273 (2017). In *Packingham*, the defendant, a registered sex offender, was convicted under a statute which barred registered sex offenders from “access[ing] a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages.” 137 S.Ct. 1733. The Supreme Court began its analysis by noting:

[G]iven the broad wording of the North Carolina statute at issue, it might well bar access not only to commonplace social media websites but also to websites as varied as Amazon.com, Washingtonpost.com, and Webmd.com. The Court need not decide the precise scope of the statute. It is enough to assume that the law applies (as the State concedes it does) to social networking sites “as commonly understood” - that is, websites like Facebook, LinkedIn, and Twitter.

*Id.*, at 1736-37 (internal citations omitted). In finding the statute violated the First Amendment, the Court held that:

[T]he statute here enacts a prohibition unprecedented in the scope of First Amendment speech it burdens. Social media allows users to gain access to information and communicate with one another about it on any subject that might come to mind. By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking

ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to “become a town crier with a voice that resonates farther than it could from any soapbox.”

In sum, to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights. It is unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences. Even convicted criminals - and in some instances especially convicted criminals - might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives.

*Packingham*, 137 S. Ct. at 1737 (internal citations omitted).

The conditions here restrict Mr. Standfill’s lawful use of a computer or electronic device and deprive him of the easiest way to pay his bills, check the weather, stay on top of world events, and keep in touch with friends. *See Packingham*, 137 S.Ct. at 1737; *Bahl*, 137 Wn.App. at 714-15 (a community custody condition is overbroad if the condition encompasses matters that are not crime related.).

This ban is overbroad in that it impermissibly infringes on core First Amendment rights. *Packingham*, 137 S.Ct. at 1737. This Court should strike the condition of community custody.

**4. Mr. Standfill’s trial attorney rendered constitutionally deficient representation when he failed to move the court to find that first degree possession of depictions of a minor engaged in sexually explicit conduct and sexual exploitation of a minor constituted the same criminal conduct.**

- a. *Mr. Standfill had the right to the effective assistance of counsel.*

A criminal defendant has a Sixth Amendment and art. I, § 22 right to counsel. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 58, 77 L.Ed. 158 (1932). “The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275-76, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942).

The right to counsel includes the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *Strickland*, 466 U.S. at 686. The proper standard for attorney performance is that of reasonably effective lawyer. *Strickland*, 466 U.S. at 687; *McMann*, 397 U.S. at 771. When

raising an ineffective assistance of counsel claim, the defendant must meet the requirements of a two prong-test:

First, the defendant must show counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*Strickland*, 466 U.S. at 687.

"A claim of ineffective assistance of counsel presents a mixed question of fact and law reviewed *de novo*." *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

While a challenge to the failure to find counts to be the same criminal conduct cannot be raised for the first time on appeal, *State v. Nitsch*, 100 Wn.App. 512, 523-25, 997 P.2d 1000 (2000), the issue can be raised for the first time on appeal where such a failure is due to the deficient representation of defense counsel and a sufficient record exists for the court to determine whether the counts are the same criminal conduct. *State v. McFarland*, 127 Wn.2d 322, 337-38 n.5, 899 P.2d 1251 (1995). The failure of defense counsel to argue that several crimes encompass the same criminal conduct can constitute deficient

performance. *State v. Saunders*, 120 Wn.App. 800, 824-25, 86 P.3d 232 (2004).

- b. *Where multiple current offenses constitute the same criminal conduct the trial court must count them as a single offense.*

A person's offender score may be reduced if the court finds two or more of the criminal offenses constitute the same criminal conduct. RCW 9.94A.589(1)(a). Same criminal conduct "means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." *Id.*

The "same time" element does not require that the crimes occur simultaneously. *State v. Porter*, 133 Wn.2d 177, 185-86, 942 P.2d 974 (1997). Individual crimes may be considered same criminal conduct if they occur during an uninterrupted incident. *Porter*, 133 Wn.2d at 185-86.

Here, the two offenses occurred concurrently and involved the same victim.

- i. *The two acts involved K.J.S. and occurred at the same time.*

The two offenses involved the same victim; K.J.S. The amended information charged the possession of a single photograph for the possession of a minor engaged in sexually explicit conduct and the jury

was instructed on this act as well. CP 134, 295. Once Mr. Standfill took the photograph, he simultaneously possessed it and continued to possess it for his own use. Thus, the two offenses were at the same time.

*ii. The two offenses shared the same intent.*

In the same criminal conduct context, intent does not mean the particular *mens rea* required for the crime. *State v. Davis*, 174 Wn.App. 623, 642, 300 P.3d 465, *review denied*, 178 Wn.2d 1012 (2013).

Rather, intent is the offender's objective criminal purpose in committing the crime. *State v. Adame*, 56 Wn.App. 803, 811, 785 P.2d 1144 (1990). The "same criminal intent" element is determined by looking at whether the defendant's objective intent changed from one act to the next. *State v. Dolen*, 83 Wn.App. 361, 364-65, 921 P.2d 590 (1996). Crimes may involve the same intent if they were part of a continuous transaction or involved a single, uninterrupted criminal episode. *State v. Deharo*, 136 Wn.2d 856, 858-59, 966 P.2d 1269 (1998). "This analysis may include, but is not limited to, the extent to which one crime furthered the other, whether they were part of the same scheme or plan and whether the criminal objectives changed." *State v. Calvert*, 79 Wn.App. 569, 578, 903 P.2d 1003 (1995).

Mr. Standfill's intent was to obtain and possess nude photographs of K.J.S. in sexually explicit conduct for his own use, including the photograph of K.J.S. masturbating with the personal massager as alleged in the amended information. As such, his intent was the same, to obtain and simultaneously possess the photograph. Thus, the two offenses constituted the same criminal conduct.

Further, defense counsel's failure to move the trial court to find the offenses to be the same criminal conduct constituted constitutionally deficient performance. There was no legitimate strategic or tactical reason not to have requested the court to find the two offenses were the same criminal conduct. Because all of the necessary facts were developed at trial and the trial court would have determined the offenses were the same criminal conduct had the issue been raised, Mr. Standfill has made the necessary showing of deficient performance and prejudice by his trial counsel to sustain a finding of ineffective assistance and thus require remand for resentencing.

*McFarland*, 127 Wn.2d at 334-35, 337 n.4.

c. *Mr. Standfill is entitled to remand for resentencing.*

The remedy for an incorrect offender score is reversal of the sentence and remand to the trial court for resentencing with a corrected offender score. *State v. Haddock*, 141 Wn.2d 103, 115-16, 3 P.3d 733 (2000).

In the instant matter, counsel's deficient performance resulted in prejudice to Mr. Standfill: an incorrect offender score and an increased minimum sentence. As a result, this Court must reverse his sentence and remand for resentencing.

E. CONCLUSION

For the reasons stated, Mr. Standfill asks this Court to reverse his conviction for Count 4. In addition, he asks this Court to strike sentence prohibitions 9, 19, and 20, and/or remand for resentencing with a corrected offender score.

DATED this 30<sup>th</sup> day of October 2016.

Respectfully submitted,

*s/Thomas M. Kummerow*

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## APPENDIX

INSTRUCTION NO. 25

To convict the defendant of the crime of possession of depictions of a minor engaged in sexually explicit conduct, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That during the time intervening between the 20<sup>th</sup> day of August, 2011, and the 14<sup>th</sup> day of November, 2014, the defendant knowingly possessed visual or printed matter depicting a minor engaged in sexually explicit conduct;
- (2) The visual or printed matter depicts the minor masturbating her vagina; and
- (3) That the defendant knew the person depicted was a minor; and
- (4) That this act occurred in the State of Washington.

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

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

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE**

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 34416-9-III
	)	
EUGENE STANDFILL,	)	
	)	
APPELLANT.	)	

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<p>[X] EUGENE STANDFILL 389061 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769</p>	<p>(X) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

**SIGNED** IN SEATTLE, WASHINGTON THIS 30<sup>TH</sup> DAY OF OCTOBER, 2017.

X \_\_\_\_\_ 

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