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No. 34416-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

EUGENE LESTER STANDFILL,

Appellant

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

NO. 14-1-01343-8

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. Instruction 25 was not an impermissible comment on the evidence.
- B. The State concedes that community custody imposed for Counts II and III exceeds the statutory maximum for these convictions and therefore should be remanded for resentencing; however, the term of community custody for Count IV is correct.
- C. The community custody condition that the defendant avoid places where children congregate, including parks, libraries, playgrounds, schools, daycare centers, and sporting events, is a valid condition because it is not void for vagueness.
- D. The State concedes that the community custody conditions that the defendant not use a computer or electronic device capable of accessing the internet without authorization from his community corrections officer and/or therapist and not use any social networks should be stricken.
- E. Defense counsel was not ineffective when he failed to move the court to find Counts III and IV as same criminal conduct.

II. STATEMENT OF FACTS

When K.S. (D.O.B. 08-28-2000) was around nine years old, she told her aunt and parents that she was being sexually abused by her grandfather, but she was not believed and her parents continued to send

her over to his house. Report of Proceedings (RP)¹ 49, 67-68. On one occasion, K.S.'s mother went over to the defendant's house and saw K.S. naked in the living room on the defendant's computer chair. RP 76-77. The defendant was sitting in the living room drinking a beer. RP 76-77. Even after this, K.S. was still sent to the defendant's home. RP 68, 77.

In late October 2014, 14-year-old K.S. told a friend at school that she was being sexually abused by the defendant. RP 21-27, 259-60. K.S.'s friend told an adult and that adult told the police. RP 36-37, 92-94. K.S. believed the abuse started when she was around five years old. RP 240-41. The abuse happened in the defendant's house, his car, and his cabin. RP 61, 242. The sexual abuse consisted of the defendant touching her vagina with his hands, touching her breast area with his hand, digitally penetrating her vagina with his fingers, oral sex on her, oral sex on him, and having K.S. masturbate herself with a vibrator and/or hand-held massage device while he watched. RP 242-65. The defendant would also take sexually explicit pictures of K.S. RP 250-51.

During the investigation, the police obtained and executed a search warrant on the defendant's home. RP 101. Officers obtained photo documentation of the home and several pieces of evidence. RP 102-09,

¹ Unless otherwise indicated, "RP" refers to the verbatim report of proceedings of the jury trial in this matter held on February 8, 9, 10, 11, and 12, 2016.

144-64. Notably, a search of the defendant's bedroom produced a digital camera and a "Wahl" brand hand-held massager. *Id.*

The digital camera was forensically examined and found to contain 17 images of K.S. at various ages, RP 81-82, 163-76: ten images of K.S. where she appeared to be four to six years of age, and seven images of K.S. that appeared to be 12 to 14 years of age, RP 166. One image was of K.S. between four to six years old sitting in the back of a pickup, and she is pulling her shorts and underwear to one side and exposing her genitals for the camera. RP 169. Another image was of K.S. between 12 to 14 years old on a bed or a couch covered with a sheet and a pillow with a "Wahl" brand massager on her exposed bare vagina. RP 171. Another image was of K.S. standing on an ottoman in the defendant's house, nude. RP 172-73. Another image was of K.S. sitting on the defendant's computer chair, nude. RP 173.

The hand-held massager was sent to the Washington State Crime Laboratory and found to contain K.S.'s DNA. RP 198-203.

On February 8, 2016, this matter went to trial on a first amended information, charging the defendant with:

Count I. Rape of a Child in the Second Degree,
intervening between the 28th day of August
2012 and the 30th day of October 2014.

- Count II. Child Molestation in the Third Degree, intervening between the 1st day of November 2014, and the 10th day of November 2014.
- Count III. Sexual Exploitation of a Minor, intervening between the 28th day of August 2001, and the 30th day of October 2014.
- Count IV. Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct in the First Degree, intervening between the 20th day of August 2011, and the 14th day of November 2014.
- Count V. Rape of a Child in the First Degree, intervening between the 28th day of August 2001, and the 27th day of August 2012.
- Count VI. Child Molestation in the First Degree, intervening between the 28th day of August 2001, and the 27th day of August 2012.

CP 132-35.

The defendant was found guilty on Counts I, II, III, IV, and VI.

02/16/2016 RP 74-78. The jury was hung on Count V. 02/16/2016 RP 74-75. On May 11, 2016, the defendant was sentenced to LIFE with a minimum sentence of 210 months on Count I; 60 months on Count II; 120 months on Count III; 102 months on Count IV; and 198 months on Count VI. CP 340, 343. All counts were to run concurrently. CP 343. Lifetime

community custody was ordered on Count I and 36 months of community custody was ordered on Counts II, III, IV, and VI.² CP 343-44.

III. ARGUMENT

A. The court’s instruction 25 did not constitute a comment on the evidence, and even if it did, it was not prejudicial.

The Washington Constitution provides that “[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” Wash. Const. art. 4, § 16.

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. 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) (citations omitted).

The defendant alleges that jury instruction 25 is a comment on the evidence because the language “[t]he visual or printed matter depicts the minor masturbating her vagina” was included in the to-convict instruction. CP 295; Br. of Appellant at 9-13.

In 2010, the legislature amended the child pornography statutes to

² Count VI is subject to RCW 9.94A.507 and should have been lifetime community custody.

create first and second degrees of the offenses for the charge Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct. S.H.B. 2424, 61st Leg., Reg. Sess. (Wash. 2010). First degree offenses involve depictions of sexually explicit conduct as defined in RCW 9.68A.011(4)(a) through (e), while second degree offenses involve depictions of sexually explicit conduct as defined in subsections (f) and (g). *Id.*

When this matter went to trial in February 2016, the pattern jury instruction, WPIC 49A.04, did not have bracketed material outlining the different types of sexually explicit conduct. 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 49A.04 (3rd ed. 2008). In October 2016, WPIC 49A.03.02 and 49A.04.02 were created so that the elements in the to-convict would clarify images that were first degree versus second degree. 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 49A.03.02, 49A.04.02 (4th ed. 2016).

In the present matter, WPIC 49A.04 included, “the visual or printed matter depicts the minor masturbating her vagina.” Several sexually explicit pictures were admitted at trial, but only the masturbation image would constitute Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct in the First Degree.

1. Instruction 25 is not a comment on the evidence.

A jury instruction that does no more than accurately state the law pertaining to an issue, however, does not constitute an impermissible comment on the evidence. *State v. Woods*, 143 Wn.2d 561, 591, 23 P.3d 1046 (2001).

In the present matter, the instruction does not comment on the evidence but simply adds the element that the image of the minor be “masturbation.” Instruction 25 accurately states the law and thus is not a comment on the evidence.

2. If this Court finds instruction 25 is a comment on the evidence, the defendant was not prejudiced.

A judicial comment in a jury instruction is presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. *State v. Levy*, 156 Wn.2d 709, 724, 132 P.3d 1076 (2006).

In this matter, there was never an issue as to what sexually explicit conduct the picture depicted. The defense’s theory of the case was that the defendant did not knowingly possess the image. The defendant and his son testified that the defendant does not know how to use a digital camera. RP 324-25, 332-33, 349. The defendant testified that the camera in question

belonged to his deceased wife. RP 348-49. What the image depicted was not a disputed fact. RP 408-10.

B. The community custody on Counts II and III did exceed the statutory maximum and must be remanded for resentencing. Community custody on Count IV is correct.

The court erred in imposing 36 months of community custody on Counts II and III. The defendant was sentenced to the statutory maximum on Count II, 60 months, and Count III, 120 months. Accordingly, the State requests that the case be remanded to strike the term of community custody on Counts II and III.

The court ordered 36 months of community custody on Count IV, Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct in the First Degree, a class B felony. RCW 9.68A.070(1)(a). The defendant was sentenced to 102 months of confinement. This combined sentence clearly exceeds the statutory maximum, but the judgment and sentence solves this issue by stating “[i]f the term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime, the term of community custody shall be reduced so that the defendant shall not serve more than the maximum sentence for the crime.” CP 344. Given the language in the judgment and sentence, the community custody was properly ordered on Count IV.

C. The community custody condition that the defendant avoid places where children congregate, including parks, libraries, playgrounds, schools, daycare centers, and sporting events, is a valid condition because it is not void for vagueness.

State v. Magana, 197 Wn. App. 189, 200, 389 P.3d 654 (2016), dealt with the following provision: “Do not frequent parks, schools, malls, family missions or establishments where children are known to congregate or other areas as defined by supervising CCO [community corrections officer]” (emphasis added). The court held this provision gave too much discretion to the CCO and struck it. *Id.* at 201.

State v. Irwin, 191 Wn. App. 644, 649, 364 P.3d 830 (2015), dealt with the following community custody condition: “Do not frequent areas where minor children are known to congregate, as defined by the supervising [community corrections officer (CCO)].” The court struck this provision because it did not give sufficient notice of what the CCO would declare as an “area where minor children are known to congregate.” 191 Wn. App. at 655. If the CCO set a specific limitation, it would be subject to arbitrary enforcement. *Id.*

The provision in this case does not give the CCO any authority to designate such areas. It states, “Avoid places where children congregate, including parks, libraries, playgrounds, schools, daycare centers and sporting events.” CP 349. This provision avoids the problems in *Magana*

and *Irwin*. If the provision should be remanded, it could read, “Avoid the following places where children congregate: parks, libraries, playgrounds, schools, daycare centers, and sporting events.”

D. The State concedes that the community custody conditions that the defendant not use a computer or electronic device capable of accessing the internet without authorization from his community corrections officer and/or therapist and not use any social networks should be stricken.

As part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions. RCW 9.94A.505(9). A crime-related prohibition is an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the defendant has been convicted. RCW 9.94A.030(10). Directly related community custody conditions include those that are reasonably crime-related to the underlying offense. *State v. Kinzle*, 181 Wn. App. 774, 785, 326 P.3d 870 (2014). A court may order an offender to comply with these crime-related prohibitions during the term of community custody. RCW 9.94A.703(3)(f). A crime-related condition may be stricken when there is no evidence in the record supporting a connection between the condition and the circumstances of the crime. *Irwin*, 191 Wn. App. at 656-57.

The State will concede that there is no evidence that the defendant accessed the internet or social media in relation to the sexual abuse or the

images of sexually explicit conduct. This condition should be stricken as not crime-related.

E. Defense counsel was not ineffective when he failed to move the court to find Counts III and IV as same criminal conduct.

Defense counsel was not ineffective when he failed to move the court to find Counts III and IV as same criminal conduct because they are not. To establish ineffective assistance of counsel, the defendant must show that his counsel's representation was deficient and that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient only if it falls below an objective standard of performance. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice results where there is a reasonable probability that but for counsel's deficient performance, the outcome would have been different. *State v. Thomas*, 109 Wn.2d 222, 223-26, 743 P.2d 816 (1987). There is a strong presumption that counsel is competent and provided proper, professional assistance. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991).

Same criminal conduct refers to the situation where there are two or more crimes that (1) require the same criminal intent, (2) are committed at the same time and place, and (3) involve the same victim. *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994); RCW 9.94A.589(1)(a). The

court will not find same criminal conduct if any of the three elements are missing. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

In the present matter the defendant took sexually explicit pictures of the victim over the course of her childhood. RP 81-82, 163-76, 250-51. He was charged in Count III of Sexual Exploitation of a Minor, intervening between the 28th day of August 2001 and the 30th day of October 2014. During this time frame, K.S. was one to 14 years old. The defendant was charged in Count IV with Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct in the First Degree, intervening between the 20th day of August 2011 and the 14th day of November 2014. K.S. would have been 11 to 14 years old. The State made it very clear in closing argument which pictures were for which count. RP 388-89.

It is clear from the statute that first degree Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct, as defined in RCW 9.68A.070(1)(a), requires a person to knowingly possess the prohibited image. For Sexual Exploitation of a Minor, as defined in RCW 9.68A.040(1)(b), a person must aid, invite, employ, authorize, or cause a minor to engage in sexually explicit conduct, knowing that it would be photographed or part of a live performance. The count of Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct in the First

Degree is not the same criminal conduct as the count for Sexual Exploitation of a Minor. One statute addresses an offender's intent to possess the prohibited images, and the other addresses an offender's intent of aiding, inviting, employing, or causing a minor to engage in sexually explicit conduct knowing it would be photographed or part of a live performance. The intent and the time and place for each offense is different, so they do not constitute the same criminal conduct.

IV. CONCLUSION

Based on the facts of this case and the arguments provided above, this Court should deny the defendant's appeal and remand to clarify and strike community custody conditions.

RESPECTFULLY SUBMITTED on February 8, 2018.

ANDY MILLER
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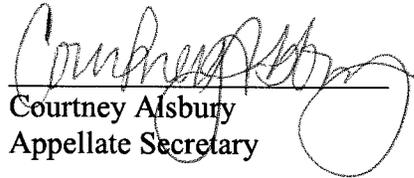
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