

FILED
Court of Appeals
Division III
State of Washington
11/16/2018 3:27 PM

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON
DIVISION III
No. 357228-III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

MICHAEL CHARLES OWEN, JR,

Defendant/Appellant

Respondent's Brief

Jodi M. Hammond
WSBA #43885
205 W. 5th Ave, Ste. 213
Ellensburg, WA 98926
(509) 962 – 7520
Attorney for Respondent

TABLE OF CONTENTS

A. RESPONSE TO ASSIGNMENTS OF ERROR.....	1
B. ISSUES PRESENTED	2
C. STATEMENT OF THE CASE	4
D. ARGUMENT.....	14
E. CONCLUSION.....	28

TABLE OF AUTHORITIES

Cases

<u>In re Estate of Stevens</u> , 94 Wn. App. 20, 29, 971 P.2d 58 (1999).....	21
<u>Jackson v. Virginia</u> , 443 U.S. 307 (1979).....	15
<u>State v. Berg</u> , 147 Wn. App. 923, 942-43, 198 P.3d 529 (2008).....	26
<u>State v. Bourgeois</u> , 133 Wn.2d 389, 399, 945 P.2d 1120 (1997)	20
<u>State v. Camarillo</u> , 115 Wn.2d 60, 64, 794 P.2d 850 (1990).....	23
<u>State v. Corbett</u> , 158 Wn. App. 576, 598, 242 P.3d 52 (2010).....	26
<u>State v. Crenshaw</u> , 98 Wn.2d 789, 806, 659 P.2d 488 (1983).....	20
<u>State v. Garcia</u> , 2018 Wash. App. LEXIS 1781, *6, 2018 WL 3689506	23
<u>State v. Green</u> , 94 Wn.2d 216, 221, 616 P.2d 628 (1980).....	15
<u>State v. Kintz</u> , 169 Wn.2d 537, 551, 238 P.3d 470 (2010).....	15
<u>State v. Kitchen</u> , 110 Wn.2d 403, 405-406, 414, 756 P.2d 105 (1988).	23
<u>State v. Magers</u> , 164 Wn.2d 174, 188, 189 P.3d 126 (2008).....	20
<u>State v. Owens</u> , 180 Wn.2d 90, 95, 323 P.3d 1030 (2014).....	23
<u>State v. Pirtle</u> , 127 Wn.2d 628, 643, 904 P.2d 245 (1995).....	15
<u>State v. Thomas</u> , 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004)	15
<u>State v. Varga</u> , 151 Wn.2d 179, 201, 86 P.3d 139 (2004).....	16
<u>State v. Warren</u> , 165 Wn.2d 17, 32, 195 P.3d 940 (2008).....	25

<u>United States v. Darrell</u> , 629 F.2d 1089 (5th Cir. 1980)	16
<u>United States v. Fenster</u> , 449 F. Supp. 435 (E.D. Mich. 1978)	16
<u>United States v. Fern</u> , 696 F.2d 1269 (11th Cir. 1983)	16
<u>United States v. Hoelscher</u> , 764 F.2d 491 (8th Cir. 1985).....	17
<u>United States v. Masters</u> , 730 F. Supp. 686 (W.D.N.C. 1990).....	17
<u>United States v. Telfaire</u> , 469 F.2d 552 (D.C. Cir. 1972).....	16
<u>United States v. Weed</u> , 689 F.2d 752 (7th Cir. 1982)	16

Statutes

RCW 9.94A.030 (12).....	25
RCW 9.94A.505 (9).....	25

Washington State Constitution

Wash St. Const. Art. I, § 21	23
------------------------------------	----

A. RESPONSE TO ASSIGNMENTS OF ERROR

- a. The State's evidence of identity is sufficient to convict when three state's witnesses testified about the defendant who were known to them at the time and identified him by name and identifying characteristics and relationships to them.
- b. The court did not abuse its discretion in denying a defense request to supply a transcript of a defense interview to the jury of the victim when they did not provide foundational requirements for admission of the transcript.
- c. The jury's verdict was unanimous on the molestation charge even though when questioned by the defense attorney the victim testified that the first time that "this happened" was at the swimming pool because the evidence presented to the jury was overwhelmingly regarding an incident of touching that happened at Christie Templeman's house, not at the pool.
- d. The state concedes the community custody prohibition on the appellant going "in establishments

where the primary source of income is alcohol; bars, taverns, or lounges,” should be struck because it is not crime-related.

- e. The state concedes the community custody condition requiring a substance abuse evaluation should be struck because it is not crime-related.
- f. A community custody condition that limits the defendant’s contact with his own minor female children does not interfere with his right to parent when it is narrowly tailored by allowing contact with approval by his Community Custody Officer.

B. ISSUES PRESENTED

- a. When the defendant is known to the state’s witnesses and they identify him by name, characteristics, and relationships, is the state’s evidence on identity sufficient?
- b. When a child victim describes a specific act of vaginal touching to the jury and the jury also hears about that same disclosure/incident made to her mom and the police, does the fact that she mentioned during cross examination a separate touching that was

not charged render the jury verdict void for lack of unanimity?

- c. Does a court abuse its discretion in precluding defense from using a transcript of a defense interview when defense does not provide the proper foundation for the admission of the evidence?
- d. When there is no evidence of alcohol use/abuse or consumption at trial, is the community custody prohibition on the appellant going “in establishments where the primary source of income is alcohol; bars, taverns, or lounges,” crime-related?
- e. When there is no evidence of substance use/abuse or consumption at trial, is the community custody condition ordering the defendant to obtain a substance abuse evaluation and follow up with treatment crime-related?
- f. Can a court order a defendant who has been convicted of molesting a five-year old female child have no contact with female minor children, a class that includes his own children, without approval of his

community custody officer as a condition of
community custody?

C. STATEMENT OF THE CASE

In February, 2017, S.C. (five years old at the time) told her mother Angela Couchon that Mike Owen, her aunt Christie Templeman's boyfriend, had put lotion or goo on his finger and rubbed it on the top of her vagina. (RP at 116, 118, 122, 150, 159). Mrs. Couchon knew that S.C. had only spent time with Mr. Owen one time when her sister and he had taken her daughters swimming and S.C. told her mom it had happened when she had last been at her aunt's home. (RP at 120, 157, 158, 165). S.C. talked with her mom about the day, swimming, hanging out with Mr. Owen, her aunt and her sister. (RP at 121, 158). S.C. told her mom she tried to get away when Mr. Owen touched her vagina, but that Mr. Owen was holding her and then let her go (RP at 160, 184).

In the same courtroom where the appellant was sitting on trial Mrs. Couchon testified that she knew somebody named "Mike Owen," because he briefly dated her sister and she knew him through some school functions; his kids went to the same school as some of her daughters. (RP at 152 -

53). While testifying, Mrs. Couchon also said that S.C. referred to the person who touched her as “Mike” and that Mrs. Couchon knew it was her sister’s boyfriend because S.C.’s dad was also “Mike” and S.C. had referred to the person who touched her as, “Christie’s boyfriend Mike.” (RP at 165). Additionally, Ms. Couchon was certain who S.C. was taking about because she had only been with Christie’s boyfriend “Mike” one time. (RP at 165).

Mrs. Couchon reported that she made a report to the police regarding S.C. telling her Mr. Owen had touched her on her vagina (RP at 162 – 63). Mrs. Couchon told the jury that her other daughter M.C. told Mrs. Couchon that S.C. had told M.C. that she (S.C.) had a “gross secret about Christie’s boyfriend.” (RP at 192). Mrs. Couchon told the jury that S.C. had told her that the defendant put his finger under her underwear through the right leg hole of her underwear on the front and that she had been wearing a large t-shirt and just her underwear. (RP at 187, 188). Mrs. Couchon also called her sister, Christie Templeman to ask about the allegations and Ms. Templeman denied S.C. had ever told her anything about the touching (RP at 161).

While in the courtroom where the defendant was sitting, S.C. testified that she went to the pool with “that guy, and Christie and Madeline and [her] mom.” While at the pool, S.C. testified that she went in the hot tub with “Mike,” and that “Mike” was “that guy, I don’t remember him, but ...” She testified that she sat on Mike’s lap at Christie’s house, and initially told the jury she didn’t remember the next part. (RP at 222). When asked what she knew about Mike, she said that she swam at the pool with him and sat on his lap, but didn’t remember the next part. (RP at 223). She told the jury that she remembered talking to “this lady,”¹ and that it was hard to talk about what she was in court to talk about because she didn’t remember (RP at 223). She told the jury that she did remember talking to her mom about what happened and telling her mom the truth, but that she couldn’t remember what she said to her Mom (RP at 223).

The state took a break from S.C. testifying and went forward with other witnesses and at the point of Detective Margheim’s testimony, in order to comply with the court’s

¹ The record does not note who “this lady” is, but from inference, it appears to be Detective Margheim who had interviewed Sage and who was sitting in court at the table with the prosecution (RP at 223).

ruling on the child hearsay, the state re-called S.C. S.C. testified that she was nervous about being in court because she didn't like to talk around lots of people and that she didn't know if she could tell the truth because there were so many people in the courtroom (RP at 258 – 260). She told the jury that when she sat on Mike's lap at her Aunt Christie's house, he put some kind of see-through lotion from a little bottle on his finger and put it on her vagina (RP at 262). She testified that he put his hand in her underwear and that it felt like "a slimy slug" on her (RP at 263). She later testified that it felt good (RP at 276). She said he rubbed it on the top of her vagina two times (RP at 264). She said that he scratched her vagina on accident and it hurt (RP at 266).

On cross examination, defense asked S.C. to clarify her testimony about it happening two times and she told the jury that the first time it happened was at the swimming pool with no lotion (RP at 269). Specifically again when testifying on cross examination and asked by defense who got the lotion, S.C. said, "Mike, that guy." Mr. Owen was in the courtroom during S.C.'s testimony. Defense specifically asked S.C. if she remembered talking to Mr. Alford, the

petitioner's trial defense counsel and S.C. testified that she did not remember any interview with Mr. Alford. She testified that she didn't remember what Mike looked like, didn't remember telling Mr. Alford that he had dark skin and didn't remember telling Mr. Alford that he had a beard. (RP at 275).

S.C. also testified that Mike, who was Christies' friend that touched her vagina, told her that he lived in a tent by the field.

Christie Templeman also testified that Angela was her sister and S.C. and Angela's other daughters were like Christie's own kids. (RP at 226).² She testified that she met Mike Owen on a dating website in October, 2016 and actually met in November, 2016 (RP at 226 - 227). She remembered a time in January, 2017 when they planned to take Mr. Owens' kids, along with several of her nieces to the pool and S.C. and M.C. were the only two of her nieces that went (RP at 228). Mr. Owen's kids didn't go with them because they were sick. (RP at 228). After the pool, they

² Although the transcript does not reflect the demeanor of the witness while testifying, the audio file from the testimony demonstrates that Ms. Templeman is quite upset while testifying with moments of crying, breaking voice, etc.

went back to Christie's house and M.C. got sick. (RP at 228). Christie was tending the Christie and had put on a movie, but was also in the kitchen making milkshakes, going back and forth to check on M.C. and eventually helping M.C. clean up because she had vomited on herself (RP at 228). Christie reported the only people at herself were M.C., S.C., herself, and Mike. (RP at 228).

Christie reported that Mike had a son in the same class as S.C. at school, but that he had never spent any other time with her nieces, other than that day at the pool. (RP at 230). Christie testified that all of her nieces, including S.C. knew that she was dating someone, that his son was in the same classroom at school as S.C. and his daughter had friends who's sister was friends with S.C.'s other sisters. (RP at 235).

Christie reported that while she was in and out of the room where S.C. and Mike were sitting, she saw S.C. sitting partially on his lap and partially on the arm of the chair and had changed from her swimming suit into just a tee-shirt and her underwear with a super soft Mickey Mouse sweatshirt draped over her like a blanket. (RP at 230, 233). Christie

said that S.C. never told her anything about Mike touching her vagina, but there were periods of time during the night when Mike would have been alone with S.C. (RP at 235). Christie also testified that she does not keep any lubricant in her house that her nieces would be able to access (RP at 236).

Detective Jennifer Margheim with the Ellensburg Police Department testified about child forensic interviews, interviewing S.C., and the investigation of Mr. Owen. (RP at 241 – 251, 252). During S.C.’s interview, Detective Margheim believed S.C. understood the rules of the interview, promised to tell the truth, and even corrected the Detective when the Detective made mistakes. (RP at 253). Before the interview even started, S.C. told Detective Margheim S.C. wanted to talk to Detective Margheim about “Mike.”

The jury heard Detective Margheim’s entire recorded interview with S.C. that was approximately thirty minutes in length (RP at 282). During that interview S.D. told Detective Margheim that S.C. wanted to tell Detective Margheim what her Aunt Christie’s friend Mike did to her. (RP at 290 – 91; Exhibit 2). She said Mike squirted something gooey on his

finger nail and put it on top of her vagina (RP at 291). S.C. said they were at her aunt's house, in the living room sitting on Mike's lap and watching T.V. (RP at 293, Exhibit 2). She said she was covered up with Christie's fluffy red Mickey Mouse shirt (RP at 295). S.C. told the detective that Mike stuck his finger through her underwear to touch her vagina. (RP at 297, Exhibit 2). She also said the lotion was see-through and gooey and that Mike had told her you're supposed to make a vagina feel soft with the lotion. (RP at 298). S.C. said that Mike's fingernail was hooked inside her vagina (RP at 300). She told the Detective this had happened one time (RP at 301, 306).

Detective Margheim testified that while S.C. was testifying, she disclosed for the first time that there may have been an earlier touching at the pool, but that it was never investigated because S.C. had never made that disclosure before (RP at 331 – 332).

After the state rested, defense requested to admit an interview the defense attorney, Mr. Alford had done of the victim, S.C. (RP at 340). The state objected, indicating the statement did not qualify as an exception under the child

hearsay statute. (RP at 340). Defense asked to admit the statement for impeachment, indicating that the interview had statements made by the victim describing “Mike” as dark-skinned with a beard as well as told he lived in a tent. (RP at 341) Defense also argued that the court’s prior ruling admitting child hearsay statement to the detective and to S.C.’s mom included all of the child’s hearsay (RP at 341). The court expressed concern that even though the court had done two prior child hearsay hearings, defense had never presented this interview for the court to rule on (RP at 342). The court reiterated that the reason the child hearsay rule exists is because under the Ryan factors, the prior statement has reliability. (RP at 343). The court took a recess to review the interview (RP at 343). The court noted that almost all of the questions in the interview were suggestive (RP at 344). The court denied the defense request to admit the interview (RP at 344).

The state’s closing argument focused solely on the allegation of touching that happened at Christie’s house with the good. (RP at 360 – 372). The defense also focused the closing argument on the veracity of S.C.’s claim about the

touching that happened at her aunt's house after the pool.
(PR at 372 - 382).

As the jury left to deliberate, defense moved for a directed verdict, claiming no witness identified the defendant (RP at 388). The state responded the witnesses had identified him by name and also identified him as the person who was dating Mr. Templeman. (RP at 388). The court denied the motion. (Id.)

The jury found the defendant not guilty of Rape of a Child in the First degree and guilty of Child Molestation in the First Degree. (RP at 392, CP 37, 38). The court set a sentencing date and ordered a presentence investigation (RP at 398, CP 45 – 53).

At sentencing, defense renewed the motion to dismiss based on lack of identity evidence (RP at 400). The state responded that the circumstantial evidence based on the witnesses having an established relationship with the defendant, particularly Ms. Couchon who looked directly at the defendant while testifying in front of the jury, was enough to establish identity. (RP at 404). The state also relied on the testimony and demeanor of Ms. Templeman

while testifying in court against the defendant, with whom she had been in a dating relationship – she came into the courtroom, sat on the witness chair, and turned her back completely towards the defendant, refusing to look at him while she testified. (RP at 404 – 405). The court ruled that the record was clear and denied the motion to dismiss for lack of identity (RP at 406).

The court sentenced the defendant to an indeterminate sentence of fifty-one months to life in prison pursuant to RCW 10.95.030 with a term of lifetime community custody and imposed conditions of community custody that were suggested and proposed by the Department of Corrections in Appendix F of the J&S (RP at 411, CP at 45 – 53; 180 – 191). The defense attorney specifically challenged the condition regarding no contact with minors except with DOC supervision and the court did not strike the term. (RP at 411 – 12, 413; CP at 45 – 53; 180 – 191).

D. ARGUMENT

- a. The evidence of the defendant’s identity was sufficient even without an in court identification of the defendant when the defendant was known to two of the adult witnesses, in a relationship with one of the witnesses and both adults testified about knowing

him in court where he was sitting and described their relationship with him and to him in front of the jury.

In a criminal case, the State must provide sufficient evidence to prove each element of the charged offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). In evaluating the sufficiency of the evidence, the court must determine whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Pirtle, 127 Wn.2d 628, 643, 904 P.2d 245 (1995). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences from that evidence. State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). Reviewing courts also must defer to the trier of fact “on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). This court does not reweigh the evidence and substitute its judgment for that of the jury. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (plurality opinion). For

sufficiency of evidence claims, circumstantial and direct evidence carry equal weight. State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004).

Identification of the defendant as the person who committed the charged crime is always an essential element which the government must establish beyond a reasonable doubt. United States v. Telfaire, 152 U.S. App. D.C. 146, 469 F.2d 552, 555, 559 (D.C. Cir. 1972); United States v. Fenster, 449 F. Supp. 435, 439 (E.D. Mich. 1978). However, in-court identification by a witness is not necessarily required. United States v. Fern, 696 F.2d 1269, 1276 (11th Cir. 1983). "Identification can be inferred from all the facts and circumstances that are in evidence." United States v. Weed, 689 F.2d 752, 754 (7th Cir. 1982). "[A] witness need not physically point out a defendant so long as the evidence is sufficient to permit the inference that the person on trial was the person who committed the crime." United States v. Darrell, 629 F.2d 1089, 1091 (5th Cir. 1980). For example, in-court identification is not necessary when the defendant's attorney himself identifies his client at trial.

United States v. Masters, 730 F. Supp. 686, 690 (W.D.N.C. 1990). See also United States v. Hoelscher, 764 F.2d 491, 496 (8th Cir. 1985) (defense attorney's references to defendant as "Hoelscher" sufficed, along with a photograph and videotape of the defendant, as evidence of identification). Moreover, "the failure of any . . . witnesses to point out that the wrong man had been brought to trial [can be] eloquent and sufficient proof of identity." United States v. Weed, 689 F.2d at 755.

In this case, there was no in-court identification as is the preference according to the Washington State Supreme Court and the record is silent about why there is no in-court identification. The victim did testify that she didn't remember what the defendant looked like, but there is ample circumstantial evidence in the record about the identity of the defendant. The evidence is circumstantial, but sufficient.

The cases cited by defense all involve an issue of identity in a case where the defendant is not known to the victim and other witnesses – it is obvious in these types of cases, where the victim and witnesses and the

defendant are strangers or unknown to each other, why circumstantial evidence of identity could create some challenges for the state, although even in those cases, there are times the evidence is upheld.

Here, although S.C. only met the defendant the one time she went swimming with him and he molested her, the defendant was known to her mom and very well known to her aunt – Christie was in a dating relationship with him.

Angela Couchon testified that she knew the defendant in different capacities – she knew him as a parent who’s kids also attended her kids’ school; she spent time with him, saw him at school events, even had an opinion on him being a caring and attentive father. Additionally, she told the jury that he had dated her sister and she had spent some time with him that way. Although she did not clearly point to the defendant at any point during the trial and in a Matlock-esque manner say, “HE DID IT,” she was called into court to testify about a person who was known to her, she sat in the same courtroom as him while testifying. She looked at him several times while

testifying, and she testified about the person who was known to her.

Additionally, Ms. Templeman, who was in a dating relationship with the defendant came into court where he was sitting, expressed extreme emotions and difficulty while testifying, attempting at all points to keep her back turned toward the defendant. She was testifying against her boyfriend in a trial where he was accused of molesting her very young niece. What the record does not show in writing, common sense clearly dictates – that the jury was able to watch every person in the courtroom, all of the expressions, demeanor, emotions, body language, and indirect communication that happened during the trial, particularly where S.C.’s aunt testified against the man who was accused of molesting her niece and whom she dated while she sat in a courtroom with him present.³

³ As noted by the state in responding to this motion at the trial level, this is not a case where the defense is actually identity; the defendant admitted in the PSI investigation that he was the person who had dated Christie Templeman. This is important evidence because it becomes clear then that the person before the jury was the person the witnesses were actually talking about and the juror’s ability to perceive those relationships, those emotions, and that nonverbal communication becomes stronger evidence.

The persuasive authority is directly on point when it says it is absurd to think someone would come to court to testify against someone who is known to them and not point out the very real absence of that person. Instead based on the testimony and the demeanor of the witnesses in this case, the evidence is sufficient to prove identity - that the person in the courtroom was the person who was known to them. Therefore, the jury had circumstantial evidence that was sufficient on the issue of identity.

- b. The court did not abuse its discretion in limiting the defense attorney's "impeachment" evidence to the attorney asking the witness if she remembered making the statement and proposing no witness to contradict nor offering any admissible evidence to rebut the testimony of the child witness, even though the court oversimplified by denying the motion on the basis of the child hearsay statute.

The decision to admit evidence lies within the sound discretion of the trial court and will not be overturned on appeal absent a manifest abuse of discretion. State v. Magers, 164 Wn.2d 174, 188, 189 P.3d 126 (2008); State v. Bourgeois, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997) (citing State v. Crenshaw, 98 Wn.2d 789, 806, 659 P.2d 488 (1983)). A trial court abuses its discretion when it exercises its discretion on untenable grounds or for

untenable reasons, or where its discretionary act was manifestly unreasonable. In re Estate of Stevens, 94 Wn. App. 20, 29, 971 P.2d 58 (1999).

Defense frames the issue for the court as if defense were precluded from attempting to impeach the victim about her prior “statement” to the defense attorney in a defense interview. This is not an accurate representation of what happened. When testifying, S.C. was asked by Mr. Kirkham if she remembered talking to Mr. Alford, the petitioner’s trial defense counsel and S.C. testified that she did not remember any interview with Mr. Alford. She testified that she didn’t remember what Mike looked like, didn’t remember telling Mr. Alford that he had dark skin and didn’t remember telling Mr. Alford that he had a beard. (RP at 275).

Noticeable absent from the record on appeal is any transcript of the recorded interview of S.C. by Mr. Alford and or any witness who could testify about that recording; instead we have a reference in the transcript to the interview. The interview is mentioned at points in the record that S.C. was present, that Mr. Alford was present,

and that the prosecutor was present. In trial, defense requested the opportunity to “impeach” S.C. with the prior statement in the interview, but had no witness who was able to do so. Regardless of how defense frames it, when asked, S.C. did not remember any interview with Mr. Alford and did not remember making any of those statements – defense could have taken an opportunity to refresh S.C.’s memory or present a witness who could say what happened at the interview, but they had neither and any issue was waived at the trial court level.

It was not an abuse of discretion for the court to deny defense to do anything they did – they confronted S.C. with the prior inconsistent statement and she did not remember making it. Defendant’s brief says they wanted to “admit the interview,” which clearly was not admissible in whole. Even *arguendo* if the portions of the interview or transcript could be played or shown to

- c. Although the defense attorney cross examined the victim on her statement that the defendant touched her vagina twice and elicited a response from her that it had happened the first time at the pool, it is clear from the totality of the testimony and the arguments presented by the state and the defense that the charged incident related to the touching that happened

at her Aunt Christie's house after swimming and there is no reason to doubt the unanimity of the jury's verdict.

To satisfy the commands of art. I, § 21 of our state constitution, Washington requires that a jury verdict in a criminal case be unanimous. State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014); Wash St. Const. Art. I, § 21. In "multiple acts" cases where more different criminal actions were proved than were alleged, the constitution requires that the jury either be instructed on the need to agree on the specific act proved or the State must elect the specific act it is relying upon in order to ensure that a unanimous verdict was returned. State v. Garcia, 2018 Wash. App. LEXIS 1781, *6, 2018 WL 3689506. This type of error requires a new trial unless shown to be harmless beyond a reasonable doubt. State v. Camarillo, 115 Wn.2d 60, 64, 794 P.2d 850 (1990); State v. Kitchen, 110 Wn.2d 403, 405-406, 414, 756 P.2d 105 (1988).

The defense attorney asked S.C. in cross examination to clarify her statement she had made that he had rubbed her vagina two times. She said the first time it happened

was at the pool with no lotion – this was in direct response to a question the defense attorney asked. There was no other discussion during her testimony or during any other point in the trial about any touching other than the one S.C. told her Mom about at her Aunt Christie’s house. The entire closing arguments from both sides relates to touching that happened at the house and not the pool. It is true, S.C. said it happened at the pool – there is not a reasonable likelihood this statement by her one time in the trial could have formed the basis for a non unanimous verdict on the child molest charge. It was a direct answer given in response to a question by the defense attorney. He opened the door and could have requested a limiting instruction, but did not do so.

- d. The evidence does not support a community custody condition relating to alcohol consumption

The state concedes there was no reference at the trial or sentencing hearing of alcohol and this community custody condition is not appropriate in this case and should be struck.

- e. The evidence does not support a community custody condition relating to a substance abuse evaluation.

There was minimal reference in trial and or at sentencing to any substance abuse issues other than some minor marijuana use. The state concedes this community custody condition should be struck.

- f. The state interest in protecting children is protected when the court narrowly tailors a community custody condition that prohibits the defendant's contact with female minor children when he has been found guilty of child molestation in the first degree of a female and the restriction allows contact with his own female children if approved by his Community Corrections Officer ("CCO").

The Sentencing Reform Act of 1981 authorizes the trial court to impose crime-related prohibitions. RCW 9.94A.505 (9). Crime-related prohibitions are orders directly related to the circumstances of the crime. RCW 9.94A.030 (12). Sentencing conditions that interfere with a fundamental constitutional right, like the right to parent are reviewed more carefully than abuse of discretion. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). Sentencing courts can restrict fundamental parenting rights by conditioning a criminal sentence if the condition is reasonably

necessary to further the State's compelling interest in preventing harm and protecting children. State v. Corbett, 158 Wn. App. 576, 598, 242 P.3d 52 (2010). These conditions “must be sensitively imposed” so that they are “reasonably necessary to accomplish the essential needs of the State and public order.” Warren, 165 Wn.2d at 32. Any “crime-related prohibitions affecting fundamental rights must be narrowly drawn” and “[t]here must be no reasonable alternative way to achieve the State's interest.” Warren, 165 Wn.2d at 34-35.

Out of concern for children's welfare, courts have upheld no contact orders that limit a defendant's contact with children that belong in the same class as a minor victim. See State v. Berg, 147 Wn. App. 923, 942-43, 198 P.3d 529 (2008); see also Corbett, 158 Wn. App. at 598. Courts have held an order restricting contact with other female children who lived in the home was reasonable to protect those children from the same type of harm when the defendant parented his victim and committed the

abuse in the home. Berg, 147 Wn. App. at 942-43. Courts have also held an order restricting contact between a defendant and his children to be reasonable when the defendant used “trust established in a parental role” to satisfy his own prurient desire to sexually abuse the victim. Corbett, 158 Wn. App. at 599.

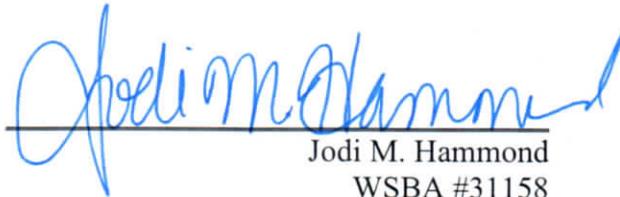
In this case, the interest the state has is the interest of protecting children from harm – the defendant was found guilty of molesting a five year old girl. At trial, it was discussed that Mr. Owen’s son was in the same class as S.C. and therefore approximately the same age as S.C. Additionally, the defendant indicated he has two female daughters. The condition was narrowly tailored – the condition allows for contact with minor female children as long as he has prior approval from his CCO. Appellant asks for remand to clarify, however at sentencing the defense attorney raised the issue to the court and the court declined to strike or amend the condition and

instead relied on the restriction not being over broad
because it allowed contact if the CCO approved.

E. CONCLUSION

For the reasons stated, the conviction and sentence should be affirmed. The case may be remanded to the Superior Court to strike the two community custody conditions that should not apply – restrictions on alcohol and a substance abuse evaluation.

Dated this 16th day of November, 2018,



Jodi M. Hammond
WSBA #31158
Attorney for Respondent

PROOF OF SERVICE

I, Jodi M. Hammond, do hereby certify under penalty of perjury that on 16th day of November, 2018, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Respondent's Brief:

Dana M. Nelson
Attorney for Appellant
NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373
NelsonD@nwattorney.net



/s/ Jodi M. Hammond,
WSBA #43885
Attorney for Respondent
Kittitas County Prosecuting Attorney's Office
205 W 5th Ave
Ellensburg, WA 98926
509-962-7520
FAX – 509-962-7022
prosecutor@co.kittitas.wa.us

KITTITAS COUNTY PROSECUTOR'S OFFICE

November 16, 2018 - 3:27 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35722-8
Appellate Court Case Title: State of Washington v. Michael Charles Owen, Jr.
Superior Court Case Number: 17-1-00048-4

The following documents have been uploaded:

- 357228_Briefs_20181116151851D3492464_9641.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Respondents Brief.pdf

A copy of the uploaded files will be sent to:

- greg.zempel@co.kittitas.wa.us
- nelsond@nwattorney.net
- prosecutor@co.kittitas.wa.us

Comments:

Sender Name: Dustin Davison - Email: dustin.davison@co.kittitas.wa.us

Filing on Behalf of: Jodi Marie Hammond - Email: jodi.hammond@co.kittitas.wa.us (Alternate Email:)

Address:
205 West 5th Ave
Ellensburg, WA, 98926
Phone: (509) 962-7520

Note: The Filing Id is 20181116151851D3492464