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NO. 25673-1-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

PHILLIP J. BOBENHOUSE,

Defendant/Appellant.

RAP 13.4(a) PETITION FOR DISCRETIONARY REVIEW

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1. IDENTITY OF PETITIONER

PHILLIP J. BOBENHOUSE requests the relief designated in Part 2 of this Petition.

2. STATEMENT OF RELIEF SOUGHT

Mr. Bobenhouse seeks review of a published opinion of Division III of the Court of Appeals entered on February 21, 2008. (Appendix "A" 1-18)

3. ISSUES PRESENTED FOR REVIEW

A. Can a father be found guilty as an accomplice to first degree child rape when the age differential between his children is less than twenty-four (24) months?

B. Can a father be found guilty as an accomplice to first degree incest when his two (2) children are both under ten (10) years of age?

C. Did instructional error deprive Mr. Bobenhouse of his rights under the Sixth Amendment to the United States Constitution and Const. art. I, § 22?

D. Do first degree child rape and first degree incest constitute the "same criminal conduct" for sentencing purposes?

E. Does the State's noncompliance with RCW 9.94A.537(2) require a reversal of Mr. Bobenhouse's exceptional sentence?

4. STATEMENT OF THE CASE

An Information was filed on November 21, 2005 charging Mr. Bobenhouse with two (2) counts of first degree child rape and two (2) counts of first degree incest. (CP 1)

A Second Amended Information was filed on August 29, 2006. It added an additional count of first degree child rape. (CP 129)

The charged offenses involve Mr. Bobenhouse's children. His son was born June 4, 1996. His daughter was born October 21, 1997. Mr. Bobenhouse was thirty-seven (37) years old at the time of trial. (RP 146, ll. 14-15; l. 18; RP 148, ll. 1-6; RP 194, ll. 8-9; ll. 13-14; RP 223, ll. 16-18)

Trial testimony indicated:

1. Oral sex between brother and sister;
2. Sexual intercourse between brother and sister;
3. Oral sex between son and father;
4. Father inserting finger in son's anus;
5. Father watching sexual activity between son and daughter.

(RP 158, ll. 1-13; RP 159, ll. 1-21; RP 160, ll. 18-20; RP 161, ll. 3-9; RP 163, ll. 6-19; RP 165, ll. 6-8; RP 178, ll. 9-19; RP 204, l. 15 to RP 206, l. 9; RP 339, l. 18; RP 341, ll. 16-17; RP 382, ll. 9-10; RP 382, l. 25 to RP 383, l. 4)

Mr. Bobenhouse moved to dismiss various counts of the Second Amended Information. He challenged the sufficiency of the charging language as to Counts 2, 3 and 5. The motion was denied. (RP 413, l. 18; RP 417, l. 17; RP 426, ll. 18-19; RP 428, l. 23 to RP 430, l. 13)

Mr. Bobenhouse objected to instructions 6, 7 and 8. Instruction 6 relates to accomplice liability. Instruction 7 defines the word "innocent." Instruction 8 defines the word "irresponsible." The latter instruction includes language that a child under eight (8) years of age is presumed incapable of committing a crime. (RP 433, ll. 18-20; RP 435, ll. 3-5; Appendices "B"; "C" and "D")

The trial court did not give a unanimity instruction to the jury. Defense counsel did not request a unanimity instruction.

The prosecuting attorney, in closing argument, addressed multiple acts to support the five (5) counts of the Second Amended Information. No election of any particular act was made during closing argument. (RP 567, ll. 14-23; RP 568, ll. 9-21; RP 569, l. 23 to RP 570, l. 3)

The jury found Mr. Bobenhouse guilty of all five (5) counts. (CP 159; CP 160; CP 161; CP 162; CP 163)

Mr. Bobenhouse was sentenced on November 1, 2006. Defense counsel argued a "same criminal conduct" analysis in connection with Counts 1 and 4 and Counts 3 and 5. Defense counsel also argued that any

aggravating factors were included within the definition of the crimes themselves. (11/01/06 RP 5, l. 23 to RP 6, l. 15; RP 7, l. 15 to RP 8, l. 2)

The sentencing court declined to find "same criminal conduct." It assigned an offender score of twenty (20) to the first degree child rape convictions and an offender score of seventeen (17) to the first degree incest convictions.

The sentencing court imposed a six hundred (600) month exceptional sentence on Counts 1, 2 and 3. Findings of fact and conclusions of law were entered in conjunction with the exceptional sentence. A one hundred and two (102) month sentence was imposed on Counts 4 and 5. The sentence on Counts 4 and 5 runs concurrent with the sentence on Counts 1, 2 and 3. The entire sentence is consecutive to Mr. Bobenhouse's sentence under Asotin County Cause No. 05 1 00123 4. (CP 187; CP 188; CP 213; 11/01/06 RP 28, ll. 19-20)

The Court of Appeals affirmed Mr. Bobenhouse's convictions by a published decision on February 21, 2008.

5. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. ACCOMPLICE LIABILITY

(1) COUNTS 2 AND 3

A crime; or not a crime? That is the question!

“It is the function of the Legislature to define the elements of a specific crime.” *State v. Wadsworth*, 139 Wn.2d 724, 734, 991 P.2d 80 (2000).

RCW 9A.44.073(1) defines the crime of first degree child rape as follows:

A person is guilty of rape of a child in the first degree **when the person has sexual intercourse** with another who is less than twelve years old and not married to **the perpetrator** and **the perpetrator** is at least twenty-four months older than the victim.

(Emphasis supplied.)

The crime of first degree child rape has the following elements:

1. Sexual intercourse,
2. With a person under twelve (12) years of age,
3. Who is not married to the perpetrator, and
4. The perpetrator is at least twenty-four months older than the victim.

Mr. Bobenhouse is not “the perpetrator.” The language of the statute is clear. In order to be guilty of the offense “**the person**” must have sexual intercourse with another. “**The person**” in this case is Mr. Bobenhouse. He did not have sexual intercourse with either child as alleged in Counts 2 and 3, or as set forth in the to-convict instructions. Thus, he is not “**the perpetrator**.”

The meaning of a statute is a question of law reviewed *de novo*. *State v. Ammons*, 136 Wn.2d 453, 456, 963 P.2d 812 (1998). The appellate court's paramount duty is "to discern and implement the intent of the legislature." *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Where the plain language of the statute is unambiguous, the legislature's intent is evident, and the statute may not be construed otherwise. *Id.*

State v. Thomas, 150 Wn.2d 666, 670, 80 P.3d 168 (2003); *see also, State v. Morris*, 123 Wn. App. 467, 473, 98 P.3d 513 (2004).

The State is required to prove that **the** crime was committed. Accomplice liability may only attach once the State has established **the** underlying crime.

The case of *State v. Peterson*, 54 Wn. App. 75, 78, 772 P.2d 513 (1989) states:

Accomplice liability ... is predicated on aid to another "**in the commission of a crime** and is in essence liability for **that crime**." [Citations omitted.] **Conviction for accomplice liability is improper where there is no proof that a principal "actually committed the crime."** [Citations omitted.]

(Emphasis supplied.)

Furthermore, a person cannot be convicted as an accomplice unless there is an appropriate charging document and appropriate instructions.

Instructions 13, 14 and 17 improperly add an element/language to the respective offenses of first degree child rape and first degree incest ("and/or caused an innocent or irresponsible person to engage in sexual

intercourse ...”). This element/language was not included in the Second Amended Information. (Appendices “E”, “F” and “G”)

The Sixth Amendment to the United States Constitution provides, in part:

In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation

Const. art. I, § 22 states, in part:

In criminal prosecutions the accused shall have the right to ... demand the nature and cause of the accusation against him [and] to have a copy thereof

The constitutional right enunciated in the Sixth Amendment and Const. art. I, § 22 is known as the “essential elements rule.”

An “essential element is one whose specification is necessary to establish the very illegality of the behavior,” *State v. Johnson*, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)

State v. Tinker, 155 Wn.2d 219, 221, 118 P.3d 885 (2005) (Emphasis supplied.); *see also: State v. Greathouse*, 113 Wn. App. 889, 899, 56 P.3d 569 (2002).

The State informed Mr. Bobenhouse he was charged with first degree child rape of his son under Count 2 and of his daughter under Count 3. Then, at trial, the State accused Mr. Bobenhouse of forcing his son and daughter to have sexual intercourse with one another; *i.e.*, knowingly

causing an innocent or irresponsible person to commit **the crime**. This is not the same offense.

First, and foremost, a crime must have been committed for a person to be convicted as an accomplice. The statutory language of RCW 9A.08.020 is specific. It requires the "**commission of a crime**."

RCW 9A.08.020 states, in part:

- (1) A person is guilty of a **crime if it is committed** by the conduct of another person for which he is legally accountable.
- (2) A person is legally accountable for the conduct of another person when:
 - (a) Acting with the kind of culpability that is sufficient for **the commission of the crime**, he causes an innocent or irresponsible person to engage in such conduct

(Emphasis supplied.)

State v. McDonald, 138 Wn.2d 680, 981 P.2d 443 (1999) acknowledges that

... [t]he legislature has said that anyone who participates in **the commission of the crime** is guilty of **the crime** The elements of **the crime** remain the same.

(Emphasis supplied.) *See also: State v. Haack*, 88 Wn. App. 423, 958 P.2d 1001 (1997) (accomplice liability and principal liability are not alternative means of committing a crime; the State is required to prove, beyond a reasonable doubt, commission of a crime as to either).

The State's theory boiled down to the following:

1. Mr. Bobenhouse was legally accountable for the actions of his children;
2. Mr. Bobenhouse had his children engage in sexual intercourse with one another;
3. Mr. Bobenhouse was more than twenty-four (24) months older than either child;
4. Therefore Mr. Bobenhouse was guilty of first degree child rape and first degree incest as charged in Counts 2, 3 and 5.

RCW 9A.04.050 states, in part:

Children under the age of eight years are incapable of committing crime. Children of eight and under twelve years of age are presumed to be incapable of committing crime, but this presumption may be removed by proof that they have sufficient capacity to understand the act or neglect, and to know that it was wrong. ...

Since both children are under eight (8) years of age, and their age differential is less than twenty-four (24) months, the crime of first degree child rape could not and was not committed by either child. Thus, accomplice liability cannot be imposed on Mr. Bobenhouse.

The State charged "the crime" of first degree child rape. It was required to prove each and every element of that offense. It did not do so.

"Where a defendant is convicted of a nonexistent crime, the judgment and sentence is invalid on its face." *Personal Restraint of Hinton*, 152 Wn.2d 853, 857, 100 P.3d 801 (2004).

Mr. Bobenhouse contends that the crime of child rape as set forth in the to-convict instructions is a nonexistent crime. The State, by adding the additional element, attempted to create a new crime.

Mr. Bobenhouse has located only one case that comes close to what the State attempted in his trial. *State v. B.J.S.*, 72 Wn. App. 368, 864 P.2d 432 (1994).

The *B.J.S.* case involved the offense of child molestation first degree. The defendant and the victims were juveniles. A thirteen (13) year old had two (2) three (3) year olds engage in oral sex. The Court ruled at 372:

These facts establish that the victims were less than 12 years of age, that the perpetrator was more than 36 months older than the victims, and that there was a touching of the sexual parts of a person for which BJS could be legally accountable.

Following the *B.J.S.* case the Legislature amended RCW 9A.44.083, .086, .089 (the child molestation statutes), as well as RCW 9A.44.093 and .096 (sexual misconduct with a minor). *See*: LAWS OF 1994, Ch. 271, §§ 303, 304, 305, 306 and 307. The amendment added the following language: “or knowingly causes another person under the age of eighteen to have”

Interestingly enough, the Legislature did not amend the child rape statutes (RCW 9A.44.073, .076, .079). It had the opportunity to amend the child rape statutes. It did not do so.

The Legislature is presumed to know what it is doing. *See: Price v. Kitsap Transit*, 125 Wn.2d 456, 463, 886 P.2d 556 (1994).

[A] court cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or an inadvertent omission.

...

The court is not at liberty to create offenses through judicial construction. *Fasulo v. United States*, 272 U.S. 620, 71 L. Ed. 443, 47 S. Ct. 200 (1926); 22 C.J.S. *Criminal Law* § 17 (1961). Much less can we do so by supplying legislative omissions or correcting legislative oversight.

Jenkins v. Bellingham Municipal Court, 95 Wn.2d 574, 579, 580-81, 627 P.2d 1316 (1981).

The crime of first degree child rape as defined in the instructions cannot be committed. John Doe's date of birth is June 4, 1996. Jane Doe's date of birth is October 21, 1997. The age differential is only sixteen and one-half (16 ½) months. The absence of this element establishes that the State did not prove that offense beyond a reasonable doubt. *See: State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

As previously indicated, the Legislature had the opportunity to amend RCW 9A.44.073. It did not do so.

'[W]here the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent.' *United*

Parcel Serv., Inc. v. Department of Rev., 102 Wn.2d 355, 362, 687 P.2d 186 (1984).

In re Swanson, 115 Wn.2d 21, 27, 793 P.2d 962 (1990) (Emphasis supplied.); *see also*: *State v. Jacobs*, 154 Wn.2d 596, 603, 115 P.3d 281 (2005).

The obvious difference in language utilized by the Legislature in the child rape statutes, as opposed to the child molestation and sexual misconduct with a minor statutes, clearly indicates that it did not intend what the State attempted to accomplish in this case.

We cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language. **We assume the legislature “means exactly what it says.”** *Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 964, 977 P.2d 554 (1999).

State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). (Emphasis supplied.)

The Legislature’s enactment of Chapter 271 was in response to *State v. B.J.S., supra*.

The Legislature limited itself to addressing child molestation. The caption of this particular section of Chapter 271 is – PART III – CHILD MOLESTATION.

The child rape convictions under Counts 2 and 3 must be reversed and dismissed.

(2) Count 5

Mr. Bobenhouse never engaged in sexual intercourse with his daughter.

Sexual intercourse between a brother and a sister generally constitutes first degree incest when the age differential for child rape is missing.

Accomplice liability could attach to first degree incest if the instructions given to the jury are appropriate instructions on accomplice liability as defined in RCW 9A.08.020(2)(a).

RCW 9A.64.020 states, in part:

(1)(a) **A person is guilty** of incest in the first degree **if he or she engages in sexual intercourse** with a person whom he or she knows to be related to him or her, either legitimately or illegitimately, as an ancestor, descendant, brother, or sister of either the whole or the half blood.

...

(Emphasis supplied.)

Mr. Bobenhouse asserts that his argument with regard to the first degree child rape statute is equally applicable to first degree incest as charged in Count 5.

The State again attempts to insert additional language into the statutory elements in order to create a new crime which the Legislature has not authorized. *See: State v. Chino*, 117 Wn. App. 531, 540-41, 72 P.3d 256 (2003) (instructing a jury on uncharged alternatives of an offense is presumed prejudicial unless it affirmatively appears the error was harmless).

RCW 9A.28.020(2) provides:

If the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense to a prosecution of such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission.

Mr. Bobenhouse was not charged with an attempt. He was charged with the allegedly complete crimes of first degree child rape and first degree incest (Counts 2, 3 and 5).

Mr. Bobenhouse contends that the crimes charged in these counts were impossible of commission under the facts and circumstances of his case. He has not located any authority to indicate that the common law defense of impossibility does not apply to an allegedly complete crime.

Under no set of circumstances can the instructional error in the to-convict instructions be considered harmless. The error allowed Mr. Bobenhouse to be convicted of non-existent crimes.

B. JURY UNANIMITY

John Doe testified as follows:

Q. What did he make you suck?

A. The penis.

Q. What did you have to suck with?

A. My mouth.

Q. How many times did you have to do this
with your dad?

A. Every week.

(RP 158, ll. 8-13)

Q. Did your dad ever, ah, do anything with
you, other -- with his penis, other than
just make you suck on it?

A. Yes.

Q. What did he do?

A. He put his finger in my butt.

(RP 160, ll. 14-18)

When this testimony is viewed in the context of the time frame being discussed in John Doe's testimony, it becomes apparent that separate and distinct acts occurred.

A unanimity instruction was clearly required under the facts and circumstances of the case. *See: State v. Hepton*, 113 Wn. App. 673, 684-85, 54 P.3d 233 (2002); *State v. Hayes*, 81 Wn. App. 425, 431, 914 P.2d 788 (1996); *State v. Petrich*, 101 Wn.2d 566, 570, 683 P.2d 173 (1984).

Trial testimony further established multiple incidents of sexual intercourse between the two (2) children.

Counts 1 and 2 of the Second Amended Information both involved first degree child rape and John Doe. However, Instructions 12 and 13

(the to-convict instructions on Counts 1 and 2) were not identical. The additional language in Instruction 13 takes it outside the testimonial framework of the incidents described by John Doe. (Appendix “H”)

Thus, as to Count 1 there are at least two (2) types of acts described for the jury. As to Count 4, the same types of acts could constitute first degree incest.

The State’s failure to elect a specific act with regard to **Counts 1 and 4** deprived Mr. Bobenhouse of his constitutional right to a unanimous verdict. There is no way to determine whether it was the oral sex or the finger insertion which the jury relied on for these convictions.

See: State v. Borsheim, 140 Wn. App. 357 (2007) (jury instructions must be clear that when there are multiple counts of sexual abuse alleged to have occurred within the same charging period that separate and distinct acts for each conviction are required).

C. SENTENCING

(1) RCW 9.94A.537(2)

Both the *Blakely*¹ decision and current statutory authority (RCW 9.94A.537(1)) require that aggravating circumstances, and in particular, the aggravating circumstances relied upon by the State in this case, be submitted to a jury for determination.

Mr. Bobenhouse submits that his interpretation is supported by RCW 9.94A.537(2) which provides, in part:

¹ *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed.2d 403 (2004).

The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. ...

(Emphasis supplied.)

No aggravating circumstances were presented to the jury. No special interrogatory was presented to the jury.

The State's failure to submit the aggravating factors to the jury negates their validity.

Mr. Bobenhouse further asserts that RCW 9.94A.535 adds additional weight to his argument. It states, in part:

... Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

... (3) Aggravating Circumstances - Considered by a Jury - Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. **Such facts should be determined by procedures specified in RCW 9.94A.537.**

...

(Emphasis supplied.)

(2) Same Criminal Conduct

An appellate court

... will not disturb the trial court's determination of whether two crimes involve the same criminal conduct for sentencing purposes unless there is a clear abuse of discretion or misapplication of law. *State v. Elliott*, 114 Wn.2d 6, 17, 785 P.2d 440, *cert. denied*, 498 U.S. 838 (1990).

State v. Morris, supra.

Mr. Bobenhouse asserts that the trial court erroneously determined that Counts 1 and 4 and Counts 3 and 5 did not constitute the "same criminal conduct."

RCW 9.94A.589(1)(a) contains the definition of "same criminal conduct":

... "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. ...

Mr. Bobenhouse's son was the same victim in Counts 1 and 4. The offenses, as described in testimony, would indicate that the offense charged in Count 4 is the same offense upon which the State relied for the charge of first degree child rape under Count 1.

Mr. Bobenhouse's daughter was the same victim in Counts 3 and 5. The offenses, as described in testimony, would indicate that the offense charged in Count 5 is the same offense upon which the State relied for the charge of first degree child rape under Count 3.

Mr. Bobenhouse contends that the sole issue as to “same criminal conduct” is whether or not first degree child rape and first degree incest involve the same criminal intent.

Mr. Bobenhouse relies upon *State v. Dolen*, 83 Wn. App. 361, 364-65, 921 P.2d 590 (1996) to support his “same criminal conduct” analysis. *See also: State v. Tili*, 139 Wn.2d 107, 123-25, 985 P.2d 365 (1999).

The *Dolen* Court discussed whether or not child rape and child molestation occurring during the same incident constituted “same criminal conduct.” The issue was as to same criminal intent. The Court, in its analysis, stated:

... To answer this, we consider whether [the] objective criminal intent changed from one crime to the next. *State v. Vike*, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). This depends, in part, on whether one crime furthered the other. *Vike*, 125 Wn.2d at 411.

In *State v. Walden*, 69 Wn. App. 183, 188, 847 P.2d 956 (1993), the court held that child rape and attempted child rape committed by forced masturbation and fellatio followed by attempted anal intercourse, in quick succession, involve the same criminal intent – sexual intercourse. Here, we hold that [the] crimes, committed through continuous sexual behavior over a short period of time, also involve the same objective criminal intent – present sexual gratification. Furthermore, we believe that the child molestation furthered the child rape. ...

It follows that if the jury convicted ... of both offenses for the same incident, the

crimes encompass the same criminal conduct.

First degree child rape and first degree incest involve the same criminal intent – sexual intercourse.

All of the necessary criteria to establish that two (2) crimes constitute “same criminal conduct” are met in Mr. Bobenhouse’s case. *See: State v. Calle*, 125 Wn.2d 769, 772, 888 P.2d 155 (1995) (“The trial court determined that the current offenses encompassed the same criminal conduct.”)

The sentencing court abused its discretion when it ruled otherwise.

(3) Multiple Offense Policy

RCW 9.94A.535(2) provides, in part:

... (2) Aggravating Circumstances - Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

...

(c) The defendant has committed multiple current offenses and the defendant’s high offender score results in some of the current offenses going unpunished.

...

The sentencing court’s first Finding of Fact deals with Mr. Bobenhouse’s multiple current offenses. He concedes that this is a valid aggra-

vating factor and that no jury determination is required. *See: State v. Alkire*, 124 Wn. App. 169, 174, 100 P.3d 837 (2004).

However, in the event the Court reverses any or all of Mr. Bobenhouse's convictions, then his offender score may dramatically change. In that event, resentencing is an absolute requirement. The multiple offense aggravating factor may not apply.

6. CONCLUSION

The Court of Appeals decision runs counter to the reasoning of *State v. Peterson, supra; State v. Haack, supra; Personal Restraint of Hinton, supra*; rules of statutory construction; and the Sixth Amendment to the United States Constitution and Const. art. I, § 22. *See: RAP 13.4(b)(1), (2) and (3)*.

Mr. Bobenhouse was convicted of non-existent crimes. The error(s) as recognized by the Court of Appeals cannot be considered harmless.

The State's accomplice liability theory fails due to the fact that courts cannot intrude upon the legislative prerogative of defining criminal offenses.

The State's attempt to create a new criminal offense through the to-convict instructions violated Mr. Bobenhouse's constitutional rights under the Sixth Amendment to the United States Constitution and Const. art. I, § 22.

“... [T]he so-called rule of lenity ... provides that a statutory ambiguity in a criminal case should be resolved in favor of the defendant.”
State v. Harris, 39 Wn. App. 460, 465, 693 P.2d 750 (1985).

The rule of lenity should be applied to Counts 2, 3 and 5. Mr. Bobenhouse’s convictions under these counts should be reversed and the charges dismissed.

The lack of a unanimity instruction deprived Mr. Bobenhouse of his right to a unanimous verdict from the jury as to Counts 1 and 4.

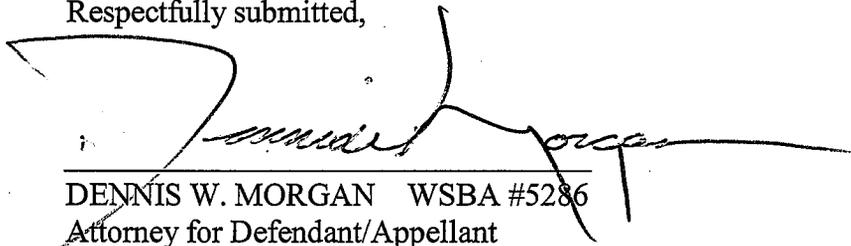
Counts 1 and 4 constitute the “same criminal conduct” for purposes of resentencing.

Counts 3 and 5 constitute the “same criminal conduct” for purposes of resentencing.

Unless the multiple offense policy under RCW 9.94A.535(2) applies, all other bases for the exceptional sentence fail due to noncompliance with RCW 9.94A.537(1) and (2).

DATED this 18th day of March, 2008.

Respectfully submitted,



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APPENDIX "A"

FILED

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 25673-1-III
)	
Respondent,)	Division Three
)	
v.)	
)	
PHILLIP J. BOBENHOUSE,)	PUBLISHED OPINION
)	
Appellant.)	

SWEENEY, C.J.—This is an appeal from convictions for multiple counts of rape of a child and incest. The defendant forced his children—a son and a daughter—to have sexual intercourse. And the defendant raped his son over a period of time. The court properly concluded that the defendant was guilty of incest as an accomplice. It was not necessary for the State to show that the defendant actually had sex with his children to prove incest; using his children to accomplish his crimes was sufficient. And the failure of the court to require a unanimous verdict was error but harmless because the jury had no way to discriminate between the two acts supporting the convictions for the child rapes. We affirm the convictions. We also affirm the defendant's exceptional minimum

sentence as consistent with the constitutional limitations imposed by the *Blakeley*¹ decision.

FACTS

Phillip J. Bobenhouse forced his children, John Doe (age six to eight during the relevant period) and Jane Doe (age four to seven during the relevant period), to engage in sexual intercourse with each other. Mr. Bobenhouse also forced his son John to suck on his penis, and Mr. Bobenhouse also put his finger in John's anus. Child Protective Services referred the matter to the Asotin County Sheriff's Office in August 2005 after the two children reported that their father had sexually abused them.

Mr. Bobenhouse had pleaded guilty in January 2005 to third degree assault of a child and tampering with a witness. Following a bench trial in November 2005, a judge also found him guilty of two counts of second degree assault of a child and one count of second degree assault. All of these convictions were for assaults on his wife and children. The court sentenced him to a total of 102 months for the November 2005 convictions.

While he was serving his sentence on the 2005 convictions, the State charged Mr. Bobenhouse with two counts of first degree rape of a child and two counts of first degree

¹ *Blakeley v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

incest. The State amended the information on the date of trial to include an additional count of first degree rape of a child. Ultimately the State charged Mr. Bobenhouse with:

- Count 1: First degree rape of a child: Between June 4, 2002 and November 11, 2004, the defendant engaged in sexual intercourse with John Doe, who was less than 12 years old and not married to the defendant, who was at least 24 months older.
- Count 2: First degree rape of a child: Between June 4, 2002 and November 11, 2004, the defendant engaged in sexual intercourse with John Doe, who was less than 12 years old and not married to the defendant, who was at least 24 months older.
- Count 3: First degree rape of a child: Between June 4, 2002 and November 11, 2004, the defendant engaged in sexual intercourse with Jane Doe, who was less than 12 years old and not married to the defendant, who was at least 24 months older.
- Count 4: First degree incest: Between June 4, 2002 and November 11, 2004, the defendant engaged in sexual intercourse with John Doe, known by the defendant to be related to him.
- Count 5: First degree incest: Between June 4, 2002 and November 11, 2004, the defendant engaged in sexual intercourse with Jane Doe, known by the defendant to be related to him.

The jury found him guilty of all charges on August 1, 2006. The court found the necessary aggravating facts to support an exceptional minimum sentence and sentenced Mr. Bobenhouse to a minimum of 600 months on each rape count, to run concurrently. He appeals both his convictions and his sentence.

DISCUSSION

SPEEDY TRIAL

Mr. Bobenhouse contends he was denied the right to a speedy trial guaranteed him by court rule. CrR 3.3. We review the application of the speedy trial rules de novo. *State v. Nelson*, 131 Wn. App. 108, 113, 125 P.3d 1008, *review denied*, 157 Wn.2d 1025 (2006). Objections to a trial date on speedy trial grounds must be made within 10 days after notice of the trial date is given. CrR 3.3(d)(3). And any party who fails, for any reason, to move for a trial date within the time limits of CrR 3.3 loses the right to object. CrR 3.3(d)(3); *State v. Carney*, 129 Wn. App. 742, 748, 119 P.3d 922 (2005).

Mr. Bobenhouse did not object at any time to the dates set for trial. Accordingly, the last allowable date for his trial was August 29, 2006, the date set for trial after his last motion for a continuance. CrR 3.3(d)(4). And his trial began on that date. Mr. Bobenhouse then waived his right to object to a violation of the speedy trial rule. Mr. Bobenhouse also raises the question of speedy trial by claiming that his lawyer was ineffective for failing to raise the issue in the trial court. We take up that assignment of error along with his other claim of ineffective assistance later in this opinion.

ACCOMPLICE LIABILITY FOR ACTS OF THE CHILDREN

Mr. Bobenhouse contends he was improperly charged with first degree rape of a child (counts 2 and 3) and first degree incest (count 5). He asserts the acts alleged in

these counts did not constitute crimes because he did not have sexual intercourse with the children; the children had sexual intercourse with each other. He argues then that he cannot legally be an accomplice to a crime because no crime was committed. And he also argues that there was no crime he could be an accomplice to because the children, both under the age of eight, were incapable of committing crimes. And indeed, that is what RCW 9A.04.050 says.

Mr. Bobenhouse's challenges to these convictions essentially argue the legal impossibility of satisfying the elements of first degree rape of a child or first degree incest because the actual perpetrators of the acts were children. And children cannot legally commit the crimes of rape or incest as charged here. His argument raises a question of law and so our review is *de novo*. *State v. Womac*, 160 Wn.2d 643, 649, 160 P.3d 40 (2007).

In counts 2 and 3, the State charged Mr. Bobenhouse with first degree rape of a child. The elements of this crime are (1) sexual intercourse with another (2) who is less than 12 years old and (3) not married to the perpetrator, and (4) the perpetrator is at least 24 months older than the victim. RCW 9A.44.073(1). John and Jane were both younger than 12 and were not married. Mr. Bobenhouse did not have sexual intercourse with either of them. And neither of them was 24 months older than the other. Incest, as

charged in count 5, requires proof that a person engaged in sexual intercourse with a person he or she knew to be related by family. RCW 9A.64.020.

But Mr. Bobenhouse's criminal culpability does not rest on a showing of actual sexual contact with these children, at least for these charges. The State claimed and proved that he effected the child rape and the incest as an accomplice.

"A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable." RCW 9A.08.020(1). A person is legally accountable when "[a]cting with the kind of culpability that is sufficient for the commission of the crime, he causes an innocent or irresponsible person to engage in such conduct." RCW 9A.08.020(2)(a).

Mr. Bobenhouse caused John to have sexual intercourse with Jane. Both children were innocent or irresponsible persons. RCW 9A.08.020(2)(a). He argues, nonetheless, that no crime was committed because the jury could not find beyond a reasonable doubt that the principal for the crime—John or Jane—was 24 months older than the victim (the other child). And he says that these children were incapable of committing a crime, in any event, because they were under the age of eight. RCW 9A.04.050 (children under the age of eight are incapable of committing a crime).

Mr. Bobenhouse's culpability is based on forcing innocent people (his children) to engage in conduct that would constitute a crime if Mr. Bobenhouse engaged in the same

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conduct. RCW 9A.08.020(2)(a). *See State v. BJS*, 72 Wn. App. 368, 371-72, 864 P.2d 432 (1994) (although the defendant did not personally touch the victims, she was legally accountable for child molestation committed by one three-year-old against another), *abrogated on other grounds by State v. Lorenz*, 152 Wn.2d 22, 32, 93 P.3d 133 (2004). Mr. Bobenhouse used these children as instruments for his own criminal conduct. He effectively reduced the children to instruments that achieved the desired end: sexual intercourse with a child. The State proved the necessary elements of these crimes by accomplice liability.

ADEQUACY OF THE CHARGING INFORMATION

Mr. Bobenhouse next contends that the elements instructions on counts 2 (rape), 3 (rape), and 5 (incest) outlined elements of accomplice liability that were not alleged in the information.

The State must inform Mr. Bobenhouse of the charges against him. *State v. Kjorsvik*, 117 Wn.2d 93, 101, 812 P.2d 86 (1991). But that right is not violated when the charging document fails to expressly charge accomplice liability. *State v. McDonald*, 138 Wn.2d 680, 688, 981 P.2d 443 (1999); *State v. Davenport*, 100 Wn.2d 757, 764-65, 675 P.2d 1213 (1984). It is constitutionally permissible to charge a person as a principal and convict him as an accomplice, as long as the *court instructs* the jury on accomplice liability. *Davenport*, 100 Wn.2d at 764-65. And the jury here was instructed on

accomplice liability. Mr. Bobenhouse was, accordingly, properly convicted of the charges against him.

UNANIMITY INSTRUCTION

John testified that Mr. Bobenhouse ordered him to suck Mr. Bobenhouse's penis every week from the time that John was five or six years old until he was seven or eight. He also testified that Mr. Bobenhouse put his finger in John's anus. Count 1 charged Mr. Bobenhouse with the first degree rape of John and count 4 charged him with incest with John. The trial court did not instruct the jury that it had to agree that the same underlying act constituted count 1 or count 4. Mr. Bobenhouse's lawyer did not propose a unanimity instruction. Mr. Bobenhouse nonetheless contends the lack of a unanimity instruction was an error requiring reversal of the convictions on these two counts.

"To convict a person of a criminal charge, the jury must be unanimous that the defendant committed the criminal act." *State v. Camarillo*, 115 Wn.2d 60, 63, 794 P.2d 850 (1990). The State must elect the act it relies on for a conviction, or the court must instruct the jury that all members must agree on the same underlying act when multiple acts relate to one charge. *Id.* at 64 (citing *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984)). The failure to give a so-called *Petrich* instruction violates a defendant's constitutional right to a unanimous jury verdict. *Camarillo*, 115 Wn.2d at 64. And so the failure to give a unanimity instruction may be raised for the first time on appeal because

it is a manifest constitutional error. *State v. Kiser*, 87 Wn. App. 126, 129, 940 P.2d 308 (1997). The failure to instruct the jury on the required unanimity is reversible error unless the failure is harmless. *Camarillo*, 115 Wn.2d at 64.

The State contends there was no error at all because the two types of sexual intercourse alleged here—fellatio and anal penetration—are merely alternative means of committing first degree rape of a child, rather than distinct acts for which a unanimity instruction is required. The State is mistaken.

The statute criminalizing first degree rape of a child does not contain alternative means for committing the crime. RCW 9A.44.073. Although sexual intercourse may be accomplished in multiple different acts of penetration (RCW 9A.44.010(1)), statutes that define in the disjunctive an element of a crime do not create alternative means of committing that crime. *State v. Laico*, 97 Wn. App. 759, 762, 987 P.2d 638 (1999). Each of the methods of sexual intercourse described by John constitutes a distinct criminal act, not an alternative means of committing child rape. *State v. Williams*, 136 Wn. App. 486, 498, 150 P.3d 111 (2007).

And the prosecutor did not elect which act—fellatio or penetration of John's anus—constituted the crime in count 1 or count 4 during closing argument:

Ah, the charge, itself [count 1], requires you to find that at least one instance of sexual intercourse happened, not that they all happened, not that the oral sex and the anal sex happened, any number of those things that you are convinced of is really not the point. The point is that one count of it is

charged, meaning that one act of sexual intercourse needs to be proved beyond a reasonable doubt. Any one of those, if you are convinced beyond a reasonable doubt[,] should sustain a verdict of guilty as to Count I, once all of the other elements have been shown, as well.

.....
Now, on Count IV, it says the defendant had sex with John Doe, and all of the other elements I've described for incest in the first degree. . . . It also basically stands for the proposition that if the defendant is guilty in Count I, then in Count IV, as long as you find that the relationship is there between the father and the son, as blood relatives, then he is also guilty of Count IV.

Report of Proceedings (RP) at 567, 569. And nothing in the jury instructions required the jury to find that the same underlying act was proved beyond a reasonable doubt. The failure then to require a unanimous verdict on either or both of these two acts was error. The next question is whether the error was harmless.

FAILURE OF UNANIMITY INSTRUCTION HARMLESS ERROR

There was no contravening evidence to the events here, only a general denial by Mr. Bobenhouse. The victims' testimony is detailed. The acts committed on the children were similar. Our Supreme Court has concluded under similar circumstances that a rational juror would believe each incident occurred beyond a reasonable doubt. *Camarillo*, 115 Wn.2d at 71-72. And the jury would reasonably believe that if one incident happened, then all must have happened. *Id.* at 71. Indeed, in *State v. Kitchen* the court relied on a California case to conclude that the absence of a unanimity instruction was harmless. *State v. Kitchen*, 110 Wn.2d 403, 413-14, 756 P.2d 105 (1988)

(citing *People v. Deletto*, 147 Cal. App. 3d 458, 473, 195 Cal. Rptr. 233 (1983)). There, as here, the jury had no means to discriminate “between the two incidents attested to by the victim. . . . [T]he evidence did not permit the jury to rationally discriminate between the two incidents.” *Id.*

The court came to the same conclusion in *Camarillo*. There, the victim described three incidents that could support one count of indecent liberties: (1) the defendant sat the boy on his lap and rubbed the zipper area of the boy’s pants; (2) the defendant lay down beside the boy on a bed and fondled the boy’s penis; and (3) the defendant committed an act similar to the first incident. *Camarillo*, 115 Wn.2d at 62-63. Again, the defendant ““offered no evidence upon which the jury could discriminate between the incidents.”” *Id.* at 70 (quoting *State v. Camarillo*, 54 Wn. App. 821, 828, 776 P.2d 176 (1989)). *Camarillo* held that the evidence supporting *each* incident established the crime beyond a reasonable doubt, citing the lack of conflicting testimony and the child’s specific detailed testimony. *Id.* at 71.

The court in *Camarillo* cited *State v. Allen*² as illustrative. The victim in *Allen* testified that almost every day for a period of time the defendant would touch her in an inappropriate way. He might kiss her, touch her between the legs over her clothing or under her clothing, put her hand on his penis, or touch her chest. *Allen*, 57 Wn. App. at

² *State v. Allen*, 57 Wn. App. 134, 788 P.2d 1084 (1990).

136, 139. Any one of these acts would have supported his conviction on the one count of indecent liberties. *Id.* at 139. The defendant made only a general denial to the charge that he had touched her improperly. *Id.*; *Camarillo*, 115 Wn.2d at 71.

Allen held that the defendant's general denial and the victim's testimony that similar contact occurred on each occasion gave the jurors no rational basis to distinguish among the acts charged to support the one count. *Allen*, 57 Wn. App. at 139. The crucial point is that "proof of the substantially similar incidents relied upon a single witness' detailed, uncontroverted testimony.'" *Camarillo*, 115 Wn.2d at 70 (quoting *Camarillo*, 54 Wn. App. at 828). In other words, if a juror believed beyond a reasonable doubt that one act occurred, that juror would then necessarily believe that the others occurred as well. *Id.*

Moreover, a purpose of the jury instructions is to allow the defendant to argue his theory of the case. *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). Mr. Bobenhouse easily argued his theory of the case without the required unanimity instruction.

We conclude that any error in failing to give a unanimity instruction was harmless. *Camarillo*, 115 Wn.2d at 72; *Kitchen*, 110 Wn.2d at 413-14; *Allen*, 57 Wn. App. at 139.

INEFFECTIVE ASSISTANCE OF COUNSEL

Mr. Bobenhouse contends he was not effectively represented by his lawyer. He says that defense counsel failed to object to the trial dates and failed to request a

unanimity instruction. He must show that his attorney's representation was deficient and that this deficiency deprived him of a reliable verdict. *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 420-21, 114 P.3d 607 (2005). We presume the effectiveness of defense counsel. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Conduct that amounts to legitimate strategy will not support a claim of ineffective assistance of counsel. *Id.*

Speedy Trial. A defendant detained in jail must be brought to trial within 60 days after arraignment. CrR 3.3(b)(1)(i), (c)(1). But "detained in jail" means in custody "pursuant to the pending charge." CrR 3.3(a)(3)(v) (emphasis added). Any period of time when the defendant is held in custody on an unrelated charge or is serving another sentence is excluded. CrR 3.3(a)(3)(v). Mr. Bobenhouse was not detained in jail pursuant to the pending charges at any time within the meaning of the speedy trial rule. He was serving a sentence on unrelated charges. Consequently, the court had 90 days to bring him to trial. CrR 3.3(b)(2)(i); *State v. Johnson*, 132 Wn. App. 400, 412, 132 P.3d 737 (2006), *review denied*, 159 Wn.2d 1006 (2007).

During the 90 days following Mr. Bobenhouse's arraignment on November 28, 2005, two judges recused themselves (adding five days each time under CrR 3.3(e)(9)) and a continuance was granted for one week. Defense counsel withdrew after Mr. Bobenhouse filed a complaint with the Washington State Bar Association before the 90-

day period (plus the excluded periods) had run. The court allowed his first lawyer to withdraw and assigned new counsel on March 14, 2006. The time to trial was then reset to zero on that date. CrR 3.3(c)(2)(vii). And 90 days from this new start date was June 12, 2006. Trial was set for June 7, 2006. On June 1, 2006, Mr. Bobenhouse's lawyer moved for a continuance to August 29, 2006, so that he would have more time to prepare experts and review additional discovery. Trial was set for August 29, 2006, and actually began on that date.

The continuances sought by defense counsel were consistent with a sound trial strategy. There was no violation of Mr. Bobenhouse's right to a speedy trial. Mr. Bobenhouse shows, then, neither deficient performance nor prejudice.

Unanimity Instruction. We have already concluded that any error in failing to give a unanimity instruction was harmless.

SAME CRIMINAL CONDUCT

Mr. Bobenhouse argued at his sentencing hearing that his rape and incest convictions were based on the same acts and should have constituted the same criminal conduct for sentencing purposes. He contends here that counts 1 and 4—relating to sexual intercourse with John Doe—constitute the same criminal conduct, as do counts 3 and 5—relating to sexual intercourse with Jane Doe.

Two or more current offenses that encompass the same criminal conduct may be counted as one crime in an offender score. RCW 9.94A.589(1)(a). “Same criminal conduct” means “crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). The offenses do not constitute the same criminal conduct and must be counted separately in the offender score if any one of these factors is missing. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997); *State v. Wilson*, 136 Wn. App. 596, 613, 150 P.3d 144 (2007). The conclusion that crimes constitute the same criminal conduct is somewhat discretionary with the trial court. *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000). We will reverse the sentencing court’s conclusion of same criminal conduct, then, only for “abuse of discretion” or misapplication of the law. *State v. French*, 157 Wn.2d 593, 613, 141 P.3d 54 (2006).

But we do not need to pass on whether the sentencing judge abused his discretion or not here. Mr. Bobenhouse’s current offender score is 20 for the child rape convictions and 17 for the incest convictions. An amended sentence that reduced his offender score by 6 (counting the two incest convictions as three points each, former RCW 9.94A.525(16) (2002)) would not be less than 9, which is the top of the range. RCW 9.94A.525(5)(a)(i). Thus, even assuming error, any error would be harmless.

EXCEPTIONAL MINIMUM SENTENCE

Mr. Bobenhouse next contends the State did not give him notice of its intent to seek an exceptional sentence. He also argues that his exceptional sentence violates the rule set out in *Blakely* because a jury did not find aggravating factors beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). *Blakely* requires that any fact, other than the fact of a previous conviction, used to support an exceptional sentence upward must be found by a jury beyond a reasonable doubt. *Blakely*, 542 U.S. at 301-03.

The State must give notice at any time prior to trial, “if substantial rights of the defendant are not prejudiced,” that it is seeking a sentence above the standard range. RCW 9.94A.537(1). This notice must set out any aggravating factors alleged. *Id.* But no particular form of notice is specified by the statute.

Here, the prosecutor wrote a letter to Mr. Bobenhouse’s lawyer to notify him that the State would seek an exceptional sentence based on RCW 9.94A.535(2)(c) (“[t]he defendant has committed multiple current offenses and the defendant’s high offender score results in some of the current offenses going unpunished”). Clerk’s Papers (CP) at 232-33. The lawyer acknowledged, in writing, that he received the prosecutor’s notice of intent and delivered it to Mr. Bobenhouse. Mr. Bobenhouse then received advance notice of the State’s intent to seek a sentence above the standard range.

Mr. Bobenhouse's other challenge to the exceptional minimum sentence is also without merit. *Blakely* does not apply to the exceptional minimum sentence imposed here because the sentence does not exceed the maximum sentence. *State v. Borboa*, 157 Wn.2d 108, 117, 135 P.3d 469 (2006); *State v. Clarke*, 156 Wn.2d 880, 890-93, 134 P.3d 188 (2006), *cert. denied*, 128 S. Ct. 365 (2007). First degree rape of a child requires a *minimum term* within the standard range for the offense (or outside the standard range under RCW 9.94A.535), and a *maximum term* that is the statutory maximum sentence for the offense. Former RCW 9.94A.712(3) (2004). The *statutory maximum* sentence for first degree child rape is *life*. RCW 9A.20.021(1)(a); RCW 9A.44.073(2).

The trial court determined that aggravating factors supported an exceptional minimum sentence. See CP at 221-22 (Findings of Fact and Conclusions of Law for an Exceptional Sentence). And the resulting concurrent minimum sentences of 600 months on each rape count were less than the statutory maximum of life. The exceptional minimum sentences did not then violate the rule in *Blakely*. *Clarke*, 156 Wn.2d at 890-91.

FOSTER PARENTS NO-CONTACT ORDER

Mr. Bobenhouse's final challenge is to a postconviction no-contact order attached to his judgment and sentence. The domestic violence no-contact order prohibits him from contacting his three children, his former wife, and the former foster parents of his

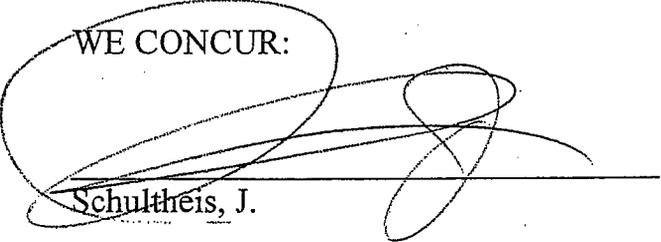
children. Mr. Bobenhouse contends the inclusion of the foster parents is improper because that restraint is not crime related.

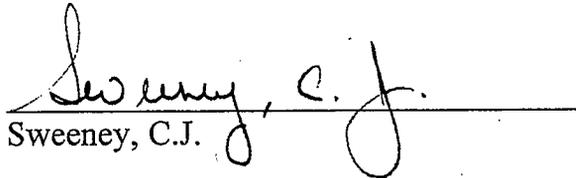
RCW 9.94A.700(5)(b) allows a court to impose a community placement condition that prohibits contact with a "specified class of individuals." *State v. Hearn*, 131 Wn. App. 601, 607, 128 P.3d 139 (2006). There is no requirement that a condition imposed under this statute be crime related. *State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992) (citing former RCW 9.94A.120(8) (1988)). An offender's usual freedom of association may be restricted if the restriction is reasonably necessary to accomplish the needs of the State and public order. *Hearn*, 131 Wn. App. at 607 (citing *State v. Riley*, 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993)).

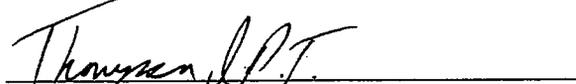
At sentencing, the State reported that the former foster parents had asked to be included in the no-contact order. The presumption raised was that they feared retribution. Restricting Mr. Bobenhouse's contact with the former foster parents was reasonably necessary to protect them and the public order.

We affirm the convictions and sentence.

WE CONCUR:


Schultheis, J.


Sweeney, C.J.


Thompson, J. Pro Tem.

APPENDIX "B"

INSTRUCTION NO. 6

A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.

A person is legally accountable for the conduct of another person when, acting with the kind of culpability that is sufficient for the commission of a crime, he causes an innocent or irresponsible person to engage in such conduct.

APPENDIX "C"

INSTRUCTION NO. 7

Innocent means free from guilt; acting in good faith and without knowledge of incriminatory circumstances.

APPENDIX "D"

INSTRUCTION NO. 8

Irresponsible means not answerable to a higher authority.

Children under the age of eight years are incapable of committing crime. The law presumes that children who are at least eight but less than twelve years of age are incapable of committing crime.

APPENDIX "E"

INSTRUCTION NO. 13

To convict the Defendant of the crime of Rape of a Child in the First Degree as charged in Count 2, each of the following elements must be proved beyond a reasonable doubt:

- (1) That on or about and between the 4th day of June 2002 and the 11th day of November 2004 the Defendant had sexual intercourse with John Doe and/or caused an innocent or irresponsible person to engage in sexual intercourse with John Doe;
- (2) That John Doe was less than twelve years old at the time of the sexual intercourse and not married to the Defendant;
- (3) That the Defendant was at least twenty-four months older than John Doe; and
- (4) That the acts occurred in Asotin County, 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 of 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.

APPENDIX “F”

INSTRUCTION NO. 14

To convict the Defendant of the crime of Rape of a Child in the First Degree as charged in Count 3, each of the following elements must be proved beyond a reasonable doubt:

- (1) That on or about and between the 4th day of June 2002 and the 11th day of November 2004 the Defendant had sexual intercourse with Jane Doe and/or caused an innocent or irresponsible person to engage in sexual intercourse with Jane Doe;
- (2) That Jane Doe was less than twelve years old at the time of the sexual intercourse and not married to the Defendant;
- (3) That the Defendant was at least twenty-four months older than Jane Doe; and
- (4) That the acts occurred in Asotin County, 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 of 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.

APPENDIX "G"

INSTRUCTION NO. 17

To convict the Defendant of the crime of Incest in the First Degree as charged in Count 5, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about and between the 4th day of June 2002 and the 11th day of November 2004 the Defendant engaged in sexual intercourse with Jane Doe and/or caused an innocent or irresponsible person to engage in sexual intercourse with Jane Doe;
- (2) That the Defendant and/or the innocent or irresponsible person who the Defendant caused to have sexual intercourse with Jane Doe was related to Jane Doe as an ancestor and/or a brother of either the whole or the half blood;
- (3) That at the time of the sexual intercourse, the Defendant knew that Jane Doe was so related to him and/or to the innocent or irresponsible person who the Defendant caused to have sexual intercourse with Jane Doe; and
- (4) That the acts occurred in Asotin County, 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 of 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.

APPENDIX “H”

INSTRUCTION NO. 12

To convict the Defendant of the crime of Rape of a Child in the First Degree as charged in Count 1, each of the following elements must be proved beyond a reasonable doubt:

- (1) That on or about and between the 4th day of June 2002 and the 11th day of November 2004 the Defendant had sexual intercourse with John Doe;
- (2) That John Doe was less than twelve years old at the time of the sexual intercourse and not married to the Defendant;
- (3) That the Defendant was at least twenty-four months older than John Doe;
and
- (4) That the acts occurred in Asotin County, 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 of 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.