

FILED
Court of Appeals
Division I
State of Washington
7/25/2018 4:12 PM

No. 97496-9

No. 77776-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

SIMON ORTIZ MARTINEZ,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF APPEAL

The trial court abused its discretion in admitting hearsay statements made by the complaining witness under the “hue and cry” exception to the hearsay rule. In rape cases, statements are admissible under the hue and cry exception only to rebut an inference that a timely complaint was not made. Here, the statements were made long after the abuse allegedly began and more than two years after the charging period ended. Therefore, they were not timely. They did not rebut any inference that a timely complaint was not made and did not meet the requirements of the hue and cry exception to the hearsay rule.

Also, several conditions of community custody must be stricken because they are not crime-related or are unconstitutionally vague.

B. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in admitting out-of-court statements under the “hue and cry” hearsay exception.

2. Special community custody condition number 5 is both vague in violation of due process and not authorized by statute because it is not crime-related.

3. Special community custody condition number 6 is not authorized by statute because it is not crime-related.

4. Special community custody condition number 9 is not authorized by statute because it is not crime-related.

5. Special community custody condition number 10 is both vague in violation of due process and not authorized by statute because it is not crime-related.

6. A portion of special community custody condition number 18 is vague in violation of due process.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In a rape prosecution, a trial court may admit a testifying complainant's prior out-of-court statements under the "hue and cry" exception to the hearsay rule only if the statements are made soon after the alleged event occurred. Here, the statements were made several years after the alleged abuse began and more than two years after the charging period ended. Did the trial court abuse its discretion in admitting the statements under the hue and cry exception?

2. Should community custody conditions addressing dating relationships, entry into sex-related businesses, possession of sexual material, and change of work location be stricken because they are not crime-related?

3. Does the community custody condition requiring Martinez to inform his CCO and treatment provider of any “dating relationship” violate due process because it does not provide fair warning of proscribed conduct and exposes Martinez to arbitrary enforcement?

4. Is the community custody condition prohibiting Martinez from viewing any “sexually explicit” or “erotic” material vague in violation of due process?

5. Is the portion of the community custody condition prohibiting Martinez from entering “areas where children’s activities regularly occur” vague in violation of due process?

D. STATEMENT OF THE CASE

1. The trial court admitted several of the complaining witness’s out-of-court statements over defense objection.

The State charged Simon Ortiz Martinez with a single count of first degree rape of a child against his daughter, Y.M. CP 1. The charging period was three years long, from July 22, 2009, to July 21, 2012. Id.

At trial, Y.M. testified her father touched her inappropriately and had sexual intercourse with her numerous times beginning when

she was about 5 years old until she was 14. RP 514, 532-616. Y.M. generally could not recall specific instances of abuse. See RP 573.

Three witnesses testified about prior out-of-court statements Y.M. allegedly made to them about her father's conduct. RP 436, 455, 508. Defense counsel objected to the statements as hearsay and inflammatory. CP 11; RP 19-25, 404, 436. The State argued the statements were admissible under the "hue and cry" exception to the hearsay rule. RP 18. Defense counsel disagreed, pointing out the statements were made when Y.M. was 14, at least two years after the end of the charging period. Therefore, they were not timely. RP 19-25. The court overruled the objection and admitted the statements. RP 405.

Thus, at trial, Y.M.'s friend C.R. testified that sometime in November 2014, Y.M. told her "[s]he had been raped." RP 436. C.R.'s mother testified that around that same time, Y.M. told her "she had been being abused and that she didn't want to go home." RP 455. Also, Y.M.'s friend A.T. testified that one day when she and Y.M. were both 14, Y.M. told her "she was molested and raped." RP 508, 514.

Regina Butteris, a medical doctor, testified she examined Y.M. and found no injury or other sign of abuse. RP 671, 677, 682-83.

Martinez himself testified and denied the allegations. RP 772.

He said he and Y.M. had got along well. RP 779.

Y.M.'s mother Ramona Rios also testified in support of Martinez. She said Martinez had very little opportunity to be alone with Y.M. and could not have engaged in such conduct. RP 692-93, 696-97, 703-07, 760. She had noticed no tension between Y.M. and her father and never saw anything troubling. RP 734, 757. None of her children ever seemed to be afraid of their father. RP 760. Y.M. ran away from home at around the time she disclosed the alleged abuse and soon thereafter moved to Iowa to live with her aunt and uncle. RP 622-24, 753. Y.M. had always wanted to return to Iowa where the family had lived when she was a young child. RP 753.

The jury found Martinez guilty as charged. CP 35.

2. The trial court imposed a life-time term of community custody with numerous conditions.

At sentencing, the court imposed an indeterminate sentence of 123 months to life, with a lifetime term of community custody upon Martinez's release. CP 40. The court imposed several conditions of community custody. CP 45-46.

E. ARGUMENT

1. The court abused its discretion in admitting several hearsay statements made by the complaining witness.

The trial court abused its discretion in admitting several out-of-court statements made by Y.M. under the “hue and cry” exception to the hearsay rule. First, the “hue and cry” exception is not a valid hearsay exception. Second, even if it is valid, it does not apply in this case because the statements were not timely. The court’s decision to admit the statements was harmful because they were inflammatory and merely served to bolster Y.M.’s in-court testimony. The court’s erroneous decision to admit the statements requires reversal.

A trial court’s interpretation of an evidence rule is reviewed *de novo* as a matter of law. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). If the trial court interprets the rule correctly, the Court reviews the trial court’s decision to admit the evidence for an abuse of discretion. Id. A trial court abuses its discretion if it fails to abide by the rule’s requirements. Id.

- a. The “hue and cry” exception is not a legally valid exception to the hearsay rule.

A person’s out-of-court statement offered for the truth of the matter asserted is “hearsay.” ER 801(c). “Hearsay is not admissible

except as provided by these rules, by other court rules, or by statute.”

ER 802.

The so-called “hue and cry” exception to the hearsay rule is not found in the Rules of Evidence, other court rules, or any statute.

Therefore, hearsay evidence is not admissible under that exception.

The trial court abused its discretion in concluding otherwise.

- b. The out-of-court statements did not meet the requirements of the “hue and cry” hearsay exception.

Notwithstanding the clear mandate of ER 802, courts sometimes admit a rape victim’s hearsay allegations under the common law “hue and cry” or “fact of complaint” doctrine. But that exception did not apply in this case.

The fact of complaint rule, first announced in 1898 in State v. Hunter, 18 Wash. 670, 52 P. 247 (1898), provides that the State in a forcible rape case may present evidence of the fact of the victim’s complaint in its case in chief. State v. Bray, 23 Wn. App. 117, 121, 594 P.2d 1363 (1979). The evidence is not considered to be hearsay because it is introduced for the purpose of bolstering the complainant’s credibility. Id. “The rule is grounded in the time-honored assumption that in forcible rape cases the absence of evidence of seasonable

complaint creates an inference that the victim's testimony has been fabricated." Id. at 121-22. Allowing the State to present the fact of the complaint in its case in chief rebuts this inference. Id. at 122.

The fact of complaint rule is narrow and allows into evidence only the fact of the complaint and that it was "timely made." State v. Osborn, 59 Wn. App. 1, 7 n.2, 795 P.2d 1174 (1990). The testimony is admissible for the sole purpose of rebutting any inference that the complaining witness was silent following the attack. Id. (citing State v. Fleming, 27 Wn. App. 952, 957, 621 P.2d 779 (1980)). Thus, "the statement must be made within a short time period subsequent to the sexual offense. The doctrine rests on the premise that a victim naturally complains promptly about offensive sexual activity and that a victim's silence makes it more likely the offense did not occur." Id.

Where the fact of complaint doctrine does not apply, testimony that the child's disclosures were consistent impermissibly bolsters the child's testimony and is therefore inadmissible. State v. Alexander, 64 Wn. App. 147, 153, 822 P.2d 1250 (1992).

Here, Y.M.'s out-of-court statements did not meet the narrow requirements of the fact of complaint exception. Y.M. made the statements in late 2014. RP 436, 455, 503, 514. The charging period

ended in July 2012, more than two years earlier. CP 1. Moreover, the abuse allegedly began much earlier, when Y.M. was about 5 years old. RP 532-36. Thus, the complaints were not made “within a short time period subsequent to the sexual offense.” Osborn, 59 Wn. App. at 7 n.2. They were not “timely made.” Id.

Moreover, the rationale underlying the fact of complaint exception did not support admission of Y.M.’s statements. The abuse was allegedly ongoing over a period of several years before Y.M. ever said anything about it. Therefore, the timing of the statements did not rebut an inference that she was silent following the abuse. To the contrary, the timing of the statements *supported* the inference that she did not timely complain. The statements were not admissible under the fact and complaint hearsay exception. Id.

c. The conviction must be reversed.

Evidentiary errors require reversal if, “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” State v. Thomas, 35 Wn. App. 598, 609, 668 P.2d 1294 (1983).

The erroneous admission of Y.M.’s hearsay statements alleging abuse by her father was not harmless. Aside from the hearsay

statements, the only evidence offered by the State to prove the charge was Y.M.'s in-court testimony. The erroneous admission of her hearsay statements improperly bolstered her in-court testimony. It is likely the jury placed significant weight on Y.M.'s out-of-court disclosures. The conviction must be reversed.

2. Four conditions of community custody must be stricken because they are not crime-related.

Four conditions of community custody are not authorized by statute because they are not crime-related.

A court's authority to impose sentencing conditions is derived wholly from statute. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980); State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). An offender may challenge an erroneous sentencing condition for the first time on appeal. Bahl, 164 Wn.2d at 744.

- a. Conditions of community custody must be "crime-related."

Generally, a court may not order an offender to refrain from engaging in otherwise lawful behavior during community custody unless the prohibition is "crime-related." RCW 9.94A.703(3)(f); State v. Riles, 135 Wn.2d 326, 349-50, 957 P.2d 65 (1998), overruled in part on other grounds by State v. Sanchez Valencia, 169 Wn.2d 782, 239

P.3d 1059 (2010). A crime-related prohibition is “an order of a court prohibiting conduct that *directly relates to the circumstances of the crime* for which the offender has been convicted.” RCW 9.94A.030(10) (emphasis added).

Community custody conditions must be “reasonably crime related.” State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). The record must provide a factual basis for concluding a condition is crime-related. State v. Parramore, 53 Wn. App. 527, 531, 768 P.2d 530 (1989) (citing David Boerner, Sentencing in Washington § 4.5 (1985)). Whether a condition is crime-related is reviewed for abuse of discretion in light of the specific facts of the case. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374-75, 229 P.3d 686 (2010).

- b. The condition requiring Martinez to inform his CCO of any dating relationship and limiting his ability to have consensual sexual contact in an adult relationship is not crime-related.

Special community custody condition number 5 requires
Martinez to

Inform the supervising CCO and sexual deviancy treatment provider of any dating relationship. Disclose sex offender status prior to any sexual contact. Sexual contact in a relationship is prohibited until the treatment provider approves of such.

CP 45. The condition is not crime-related because Martinez did not offend against an adult within the context of a dating relationship.

The First Amendment freedom of association protects a person's right to enter into and maintain certain human relationships. State v. Moultrie, 143 Wn. App. 387, 399 n.21, 177 P.3d 776 (2008); Roberts v. United States Jaycees, 468 U.S. 609, 617-18, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984) (recognizing that First Amendment provides a "freedom of association" right to make choices to enter into and maintain certain human relationships); U.S. Const. amend. I.

The Sentencing Reform Act expressly authorizes a sentencing court to order an offender to "[r]efrain from direct or indirect contact with the victim of the crime or a specified class of individuals." RCW 9.94A.703(3)(b). But a restriction on an offender's freedom of association with a specified class of individuals must be "reasonably necessary to accomplish the essential needs of the state and public order." Moultrie, 143 Wn. App. at 399 (internal quotation marks omitted) (quoting State v. Riley, 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993)). "Our courts have also recognized that it would not be reasonable to order a sex offender to have no contact with a class of

individuals who do not share a relationship to the offender’s crime.”

Moultrie, 143 Wn. App. at 399 (citing Riles, 135 Wn.2d at 350).

The prohibition against dating or having consensual sexual contact with adults without prior approval is not crime-related because Martinez’s crime involved a child. Another condition specifically prohibits Martinez from having “direct and/or indirect contact with minors.” CP 46. The condition limiting his ability to form relationships with adults, even those who do not have children, is not reasonably related to the State’s essential need to protect children. See Moultrie, 143 Wn. App. at 399. The condition is not crime-related.

The court acted without authority in limiting Martinez’s ability to have contact with adults. The condition must be stricken.

- c. The prohibitions on entering sex-related businesses or possessing sexually explicit materials are not crime-related.

The court entered two conditions of community custody that prohibit Martinez from accessing sexually explicit materials or entering sex-related businesses. CP 45. These conditions are improper because the record contains no evidence that accessing sexually explicit materials or entering sex-related businesses directly related to any

circumstance of the crime. The court was not permitted to impose such conditions simply because Martinez was convicted of a sex offense.

Special community custody condition number 9 states:

Do not enter any sex-related businesses, including: x-rated movies, adult bookstores, strip clubs, and any location where the primary source of business is related to sexually explicit material.

CP 45.

Special condition number 10 states:

Do not possess, use, access or view any sexually explicit material as defined by RCW 9.68.130 or erotic materials as defined by RCW 9.68.050 or any material depicting any person engaged in sexually explicit conduct as defined by RCW 9.68A.011(4) unless given prior approval by your sexual deviancy provider.

CP 45.

Such conditions are authorized only if the record establishes a nexus between the prohibition and the circumstances of the crime.

State v. Norris, 1 Wn. App.2d 87, 98, 404 P.3d 83 (2017), review granted, 190 Wn.2d 1002, 413 P.3d 12 (2018); State v. Kinzle, 181 Wn. App. 774, 785, 326 P.3d 870 (2014).

In Kinzle, the defendant was convicted of molesting two children. Kinzle, 181 Wn. App. at 785. The trial court imposed a community custody prohibition on possessing sexually explicit

materials similar to the condition here. This Court agreed with Kinzle the condition was not crime-related because no evidence suggested such materials were related to or contributed to his crime. Id.

Similarly, in Norris, the defendant was convicted of second degree child molestation for having sexual contact with a 13-year-old boy. Norris, 1 Wn. App.2d at 91. A condition of community custody prohibited her from entering sex-related businesses. Id. at 97. This Court held the condition was not crime-related because the record contained no evidence that frequenting sex-related businesses was related to the circumstances of the crime. Id. at 98.

In Norris, the Court made clear that a trial court may not impose a condition prohibiting access to sexually explicit materials or sex-related businesses simply because a person is convicted of a sex offense. Id. at 97-98. The nature of the crime charged does not alone justify imposition of such conditions as crime-related. Id. The condition must be reasonably related to the circumstances of the particular case. Id.; see also, e.g., Kinzle, 181 Wn. App. at 785 (holding conditions prohibiting sex offender from possessing sexually explicit materials and frequenting establishments selling such materials were not crime-related “because no evidence suggested that such

materials were related to or contributed to his crime”); State v. O’Cain, 144 Wn. App. 772, 776, 184 P.3d 1262 (2008) (holding ban on accessing sexual material on internet was not crime-related because there “is no evidence that O’Cain accessed the internet before the rape or that internet use contributed in any way to the crime”).

Here, as in Norris and Kinzle, the record contains no evidence that accessing sexually explicit materials or frequenting sex-related businesses contributed to the crime in any manner. Special conditions 9 and 10 are not reasonably crime-related and must be stricken.

- d. The condition requiring Martinez to obtain prior permission before changing work location is not crime-related.

Special community custody condition number 6 is not crime-related. It requires Martinez to

Obtain prior permission of the supervising CCO before changing work location.

CP 45.

The record contains no evidence that a change in Martinez’s work location somehow contributed to the offense. Requiring Martinez to obtain permission before changing work location does not serve the legitimate purpose of protecting children. The condition must be stricken.

3. Three conditions of community custody are unconstitutionally vague.

Three conditions of community custody must be stricken because they do not provide fair warning of what conduct is proscribed and do not provide ascertainable standards of guilt to protect against arbitrary enforcement.

The “void for vagueness” doctrine of the Due Process Clause requires that citizens have fair warning of proscribed conduct. Bahl, 164 Wn.2d at 752; U.S. Const. amend. XIV; Const. art. I, § 3.

A sentencing condition is unconstitutionally vague if it (1) does not define the violation with sufficient definiteness that ordinary people can understand what conduct is proscribed or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53; Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983).

Unlike statutes, sentencing conditions are not presumed to be constitutionally valid. Bahl, 164 Wn.2d at 753. A court abuses its discretion if it imposes a condition that is unconstitutionally vague. Id.

- a. The condition requiring Martinez to inform his CCO of “any dating relationship” is unconstitutionally vague.

Special community custody condition number 5 requires Martinez to “[i]nform the supervising CCO and sexual deviancy treatment provider of *any dating relationship*.” CP 45 (emphasis added). The condition does not provide Martinez with adequate notice of what a “dating relationship” is and does not prevent arbitrary enforcement.

Commonly understood, a “relationship” is “a state of affairs existing between those having relations or dealing.” Webster’s Third New Int’l Dictionary 1916 (1993). In the context of interaction between people, a “date” means “an appointment or engagement [usually] for a specified time . . . [especially]: an appointment between two persons of the opposite sex for the mutual enjoyment of some form of social activity” or “an occasion (as an evening) of social activity arranged in advance between two persons of opposite sex.” Id. at 576. Referring to a person, a “date” is “a person of the opposite sex with whom one enjoys such an occasion of social activity.” Id.

Such behavior conceivably covers a large range of human interaction. The condition, as written, leaves the dividing line between

a non-dating relationship and a dating relationship blurry. It requires Martinez to take affirmative action without a standard for determining when he must do so. The condition does not provide Martinez adequate notice as to what relationships he is prohibited from forming without explicit permission. A reasonable person cannot describe a standard necessary to avoid arbitrary enforcement.

A condition that leaves so much room for speculation is unconstitutionally vague because it gives too much discretion to the CCO to determine when a violation has occurred. See State v. Sanchez Valencia, 169 Wn.2d 782, 794-95, 239 P.3d 1059 (2010) (striking down prohibition on drug “paraphernalia” because “an inventive probation officer could envision any common place item as possible for use as drug paraphernalia,” yet “[a]nother probation officer might not arrest for the same ‘violation.’”).

If the phrase “dating relationship” is meant to be limited to romantic relationships, the vagueness problem remains. In United States v. Reeves, 591 F.3d 77 (2d Cir. 2010), the court struck down as vague a condition of supervision requiring the defendant to notify the probation department upon entering a “significant romantic relationship.” Id. at 79, 81. The court observed that “people of

common intelligence (or, for that matter, of high intelligence) would find it impossible to agree on the proper application of a release condition triggered by entry into a ‘significant romantic relationship.’” Id. at 81. The condition has “no objective baseline,” as “[n]o source provides anyone—courts, probation officers, prosecutors, law enforcement officers, or Reeves himself—with guidance as to what constitutes a ‘significant romantic relationship.’” Id.

The condition in Martinez’s case suffers from the same sort of defect. “Subjective terms allow a ‘standardless sweep’ that enables state officials to ‘pursue their personal predilections’ in enforcing the community custody conditions.” State v. Johnson, 180 Wn. App. 318, 327, 327 P.3d 704 (2014) (quoting City of Spokane v. Douglass, 115 Wn.2d 171, 180 n.6, 795 P.2d 693 (1990) (quoting Kolender, 461 U.S. at 358) (internal quotation marks omitted). Martinez’s liberty during supervised release should not hinge on whether he can accurately predict whether a given CCO would conclude he had entered a “dating relationship.”

The condition is unconstitutional because it fails to provide reasonable notice as to what Martinez must do to comply with it and

exposes him to arbitrary enforcement. It should be stricken altogether or modified to comply with due process.

In Norris, this Court held a similar condition requiring Norris to inform her community corrections officer of any “dating relationship” was not unconstitutionally vague nor subject to arbitrary enforcement. Norris, 1 Wn. App.2d at 95. For the reasons provided above, that decision is incorrect and should not be followed.

- b. The condition prohibiting Martinez from accessing or viewing any “sexually explicit” or “erotic” material is also unconstitutionally vague.

Special community custody condition number 10 provides:

Do not possess, use, access or view any *sexually explicit material* as defined by RCW 9.68.130 or *erotic materials* as defined by RCW 9.68.050 or any material depicting any person engaged in *sexually explicit conduct* as defined by RCW 9.68A.011(4) unless given prior approval by your sexual deviancy provider.

CP 45 (emphases added). The terms “sexually explicit” and “erotic” are unconstitutionally vague.

In Bahl, the supreme court struck down a community custody ban on possessing pornography because it was unconstitutionally vague. The court declined to decide whether the statutes defining “sexually explicit material,” “erotic material,” and “depictions of a

minor engaged in sexually explicit conduct” would provide sufficient notice. Bahl, 164 Wn.2d at 762.

As the court stated in Bahl, pornography may “include any nude depiction, whether a picture from *Playboy Magazine* or a photograph of Michelangelo’s sculpture of David.” Bahl, 164 Wn.2d at 756. The same is true of the sexually explicit or erotic materials defined in the statutes at issue here.

Material “emphasizing the depiction of adult human genitals” qualifies as “sexually explicit material” under RCW 9.68.130(2).¹ A simple nude might or might not qualify under this definition, depending on who thinks the genitals were emphasized. And the statute exempts “works of art or of anthropological significance” but an ordinary person would not know whether a depiction fell inside or outside this exception. The statutory definition leads to more questions than answers. It is not fair notice.

¹ RCW 9.68.130(2) provides:

“Sexually explicit material” as that term is used in this section means any pictorial material displaying direct physical stimulation of unclothed genitals, masturbation, sodomy (i.e. bestiality or oral or anal intercourse), flagellation or torture in the context of a sexual relationship, or emphasizing the depiction of adult human genitals: PROVIDED HOWEVER, That works of art or of anthropological significance shall not be deemed to be within the foregoing definition.

Similarly, several of the definitions in RCW 9.68A.011(4)² lack specificity. It would be difficult to fairly identify images that showed masturbation or sadomasochistic abuse. And under RCW 9.68A.011(4)(e), (f), and (g), the depictions must be created “for the purpose of sexual stimulation of the viewer.” Without knowing the purpose for which a depiction was created, it is impossible to know whether the depiction shows sexually explicit conduct under the statutory definition.

² RCW 9.68A.011(4) provides:

“Sexually explicit conduct” means actual or simulated:

- (a) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals;
- (b) Penetration of the vagina or rectum by any object;
- (c) Masturbation;
- (d) Sadomasochistic abuse;
- (e) Defecation or urination for the purpose of sexual stimulation of the viewer;
- (f) Depiction of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer. For the purposes of this subsection (4)(f), it is not necessary that the minor know that he or she is participating in the described conduct, or any aspect of it; and
- (g) Touching of a person’s clothed or unclothed genitals, pubic area, buttocks, or breast area for the purpose of sexual stimulation of the viewer.

And RCW 9.68.050(2)³ requires that “erotic material” be “utterly without redeeming social value.” This definition could never provide fair notice in advance to distinguish between permitted and proscribed materials.

The Bahl court emphasized that prohibitions on materials implicated by First Amendment protections “must be narrowly tailored and directly related to the goals of protecting the public and promoting the defendant’s rehabilitation.” Bahl, 164 Wn.2d at 757. The community custody condition here carries a very real risk that reading a certain book, viewing a certain film or painting, or listening to a certain song will result in a violation. It places a prior restraint on Martinez’s ability to create his own writings and depictions. The prohibition is not narrowly tailored to protect the public or promote Martinez’s rehabilitation.

³ RCW 9.68.050(2) provides:

“Erotic material” means printed material, photographs, pictures, motion pictures, sound recordings, and other material the dominant theme of which taken as a whole appeals to the prurient interest of minors in sex; which is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters or sado-masochistic abuse; and is utterly without redeeming social value.

The condition is also vague because it would lead to arbitrary enforcement. Where a condition gives enormous discretion to an individual to define the parameters of a prohibition, the condition is unconstitutionally vague. Bahl, 164 Wn.2d at 758. The condition here provides the provider or community corrections officer the authority to allow or disallow certain material and thus necessarily determine whether the material falls within or without the prohibition. This allows a third party to “direct what falls with the condition” which “only makes the vagueness problem more apparent since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement.” Bahl, 164 Wn.2d at 758. The condition must be stricken.

- c. That portion of special condition 18 prohibiting Martinez from entering “areas where children’s activities regularly occur” is unconstitutionally vague.

Finally, a portion of special community custody condition number 18 is unconstitutionally vague. The condition provides:

Stay out of *areas where children’s activities regularly occur* or are occurring. This includes parks used for youth activities, play areas (indoor or outdoor), sports fields being used for youth sports, arcades, and any specific location identified in advance by DOC or CCO.

CP 46 (emphasis added). The phrase “areas where children’s activities regularly occur” does not provide adequate notice of what is prohibited and allows for arbitrary enforcement.

In Norris, this Court held a similar condition prohibiting Norris from entering “any places where minors congregate” was unconstitutionally vague. Norris, 1 Wn. App.2d at 95; see also State v. Irwin, 191 Wn. App. 644, 650-55, 364 P.3d 830 (2015) (striking down condition prohibiting defendant from frequenting “areas where minor children are known to congregate, as defined by the supervising CCO”).

As the Court explained in Irwin, “[w]ithout some clarifying language or an illustrative list of prohibited locations,” the condition “does not give ordinary people sufficient notice to ‘understand what conduct is proscribed.’” Irwin, 191 Wn. App. at 655 (quoting Bahl, 164 Wn.2d at 753). Because the condition was subject to definition by the CCO, the court also concluded “it would leave the condition vulnerable to arbitrary enforcement.” Irwin, 191 Wn. App. at 655.

Similarly, here, the prohibition on entering “any places where minors congregate” is vague because it does not provide sufficient notice of what specific places are forbidden. Ordinary people cannot

possibly know all of the places “where minors congregate.” Because the term is insufficiently defined, it leaves the condition vulnerable to arbitrary enforcement.

Because it is unconstitutionally vague, that portion of condition number 18 prohibiting Martinez from entering any area “where children’s activities regularly occur” must be stricken.

F. CONCLUSION

The trial court abused its discretion in admitting several hearsay statements of the complaining witness. The conviction must be reversed. Also, several conditions of community custody must be stricken because either they are not crime-related or they are unconstitutionally vague.

Respectfully submitted this 25th day of July, 2018.

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

| | | |
|----------------------|---|---------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | NO. 77776-9-I |
| v. |) | |
| |) | |
| SIMON MARTINEZ, |) | |
| |) | |
| Appellant. |) | |

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