

FILED
Court of Appeals
Division II
State of Washington

No. 98493-0

2/25/2019 1:27 PM
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER R. JOHNSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 17-1-01536-7

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court erred in not giving jury instructions on the defense of entrapment when that defense was not supported by substantial evidence?

2. Whether counsel was ineffective for failing to argue that the three convictions should have been treated as same criminal conduct where the trial court would have exercised its discretion and found that the convictions are not same criminal conduct?

3. Whether a crime-related condition of sentence restricting Johnson's access to the internet is unconstitutional?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Christopher R. Johnson was charged by information filed in Kitsap County Superior Court with attempted second degree rape of a child, attempted commercial sexual abuse of a minor, and communication with a minor for immoral purposes (felony). CP 1-4.

At omnibus, the defense asserted a general denial defense. RP, 11/9/17, 2. The matter was called for trial on March 19, 2018. 1RP 1.¹ On March 27, 2018, the defense provided proposed jury instructions on

¹ The VRP of the trial are in seven volumes and are referred to herein as 1RP, 2RP, 3RP, and etc. Transcripts from pretrial hearings and sentencing will be cited by date.

the defense of entrapment. CP 40 *et seq.*

The trial court did not instruct the jury on the entrapment defense. CP 41-65 (trial court's jury instructions). The parties first addressed the defense in limine. 1RP 33 *et seq.* Before trial, the state moved to preclude the defense of entrapment because no notice of the defense had been given and because the defense was inapplicable "on the merits." CP 14 The trial court ruled that absent an offer of proof supporting the defense the prosecution's motion to exclude it was granted. 1RP 37-38. The trial court hedged this ruling by indicating that the ruling may change depending on the development of the facts at trial. *Id.*

At the close of evidence the defense argued in favor of instructing the jury on the entrapment defense. 7RP 753. The trial court immediately agreed that the first prong of the defense, that the criminal design originated with law enforcement, was shown. 7RP 754. The trial court parried the defense argument that the state had made no showing of predisposition to commit the crimes by noting that such proof would likely need to include impermissible character evidence. *Id.*

The trial court ruled that Johnson was neither lured nor induced. 7RP 755-56. This primarily because Johnson had admitted that he was "willfully exchanging communication with the other person on this ad to find out more about them." 7RP 756. The trial court again rejected the

defense argument that the state had not shown predisposition by noting that no Washington law that the trial court had reviewed required the state to make such proof. 7RP 759.

The trial court denied the request for an entrapment instruction. 7RP 762. Law enforcement merely afforded Johnson an opportunity. *Id.* Law enforcement used no more than a reasonable amount of persuasion. *Id.* Johnson was a willing and active participant in the exchanges. *Id.* Specifically, it was ruled that Johnson's testimony did not raise entrapment. 7RP 762.

Johnson was convicted of all three counts. 7RP 852-53; CP 66. On the attempted child rape count, Johnson received a minimum term of 120 months and a maximum term of life. CP 96. Concurrent sentences were imposed on the sexual exploitation and communication counts. CP 95. Johnson timely filed a notice of appeal. CP 116.

B. FACTS

The Missing and Exploited Children Task Force (MECTF) conducts proactive "sting" operations aimed at detecting crimes against children. 6RP 606-07. The Task Force posted an ad on craigslist. 6RP 608 (ad admitted as exhibit 13 at 6RP 551). The ad was posted in the "casual encounters" area of craigslist. 6RP 610. The ad was targeted to the Kitsap/West Puget area. 6RP 615.

The ad was titled “Crazy and Young, Looking to Explore.” 6RP 552. The body of the ad said “Bored and home alone. Been watching videos all day. Really looking to meet a clean DDF guy that can teach me what it’s like to be an adult. HMU if interested, winking smiley face. I’m lots of fun.” 6RP 552. DDF stands for “drug and disease free.” 6RP 552. HMU means “hit me up.” Id.

Police received a response. 6RP 553. Police engaged in e-mail exchanges with the responder for around three hours. Id. The responder was Johnson. 6RP 554. Soon into the conversation, Johnson’s response included asking the age of the policewoman and where the tryst would occur. 6RP 556. The police responded “I’m 13 and on my own. Crashing on a friend’s couch but her mom is gone for a few days, so you can come here. We in Bremerton.” 6 RP 556-57. Twelve minutes later, Johnson acknowledges the stated age by saying “Who will be at the house. I’m trying to be cautious as you are underage. Would you like to meet somewhere public first?”

They discuss meeting at a nearby minimart and, responding to the police question as to what he will teach her, Johnson sent that he will “teach you how to suck my cock, how to cum, how to ride my cock, how to take my cock deep.” 6RP 558. The putative 13-year-old mentioned money. 6RP 558. Johnson said he can give a little, expressed

nervousness, but also expressed that he wanted to proceed. 6RP 559.

Soon, Johnson communicated that he just got to Bremerton and wanted to know about meeting. 6RP 559. The police officer responded that she needed a shower first. 6RP 560. Johnson responded in the affirmative and asked how long they would have together. 6RP 560. The police asked Johnson if later would be better, adding that the friend's mother would be out all night. 6RP 561. Johnson replied that now was fine and asked what minimart he would meet her at. 6RP 561. She said "There's a 7-eleven on Wheaton. How long will it take you to get there?" 6RP 561. He said "about 15 minutes." 6RP 561.

The girl asked Johnson how she would know him. 6RP 562. Johnson responded that he is "Scott" and is driving a black Suburban. 6RP 562. Johnson arrived at the appointed 7-eleven and the two communicated as to whether he was in the right place. 6RP 565. Then, she said her house was close and provided Johnson with the address. 6RP 567. The two switched from e-mail to text messaging and he said he was on his way and asked her if she would meet him outside. 6RP 571. She said she would meet him outside. 6RP 573. But before that happened Johnson was in custody. 6RP 574.

Police had followed Johnson from the 7-eleven. 5RP 476-77. Police pulled Johnson's car over while he was driving toward the provided

address. 5RP 487.

Jonson said that he began the day of his arrest by going to work. 6RP 663. He accessed craigslist on his smartphone. 6RP 664. He looked in the women for men section, saw two ads, and replied to the ad in question in this case. 6RP 665. Johnson claimed that he did not carefully read the ad and just responded because it was the one of the two ads he had seen that did not appear to be “spam.” 6RP 667.

Johnson responded because he was interested in casual sex. 6RP 668. By the time he got an email reply to his response, the ad was gone from craigslist. 6RP 669. He claimed that when he asked about age and location of the person on the other end of the conversation, he had no idea of the age or gender of the person he was communicating with. 6RP 670-71. Johnson believed that the picture he had received was “modified” and did not believe it to be real. 6RP 671-72.

When the person on the other end said that she was 13 years old, Johnson claimed that he believed the situation was an “age-play fetish.” 6RP 672. Johnson testified that his email telling the police that he needs to be “cautious as you are underage” was aimed at the fact that the police had mentioned another person that he was trying to find out about. 6RP 673. He wanted to meet in public so he could see with whom he was communicating. 6RP 674.

Johnson claimed that he never thought that the person at the other end was a child wanting to learn sex. 6RP 675. He claimed that the sex acts he described were are part of the role-play fetish that he thought he was engaged in. 6RP 676. Johnson claimed that curiosity was behind his drive to the 7-eleven. 6RP 679-80.

III. ARGUMENT

A. THE TRIAL COURT CORRECTLY RULED THAT THERE WAS NOT SUBSTANTIAL EVIDENCE TO SUPPORT THE GIVING OF AN ENTRPMENT DEFENSE INSTRUCTION.

Johnson argues that the trial court erred in failing to instruct the jury on the defense of entrapment. He argues that this failure impacts his right to present a defense. He asserts that the trial court improperly weighed the available evidence in deciding against giving the instruction. This claim is without merit because the trial court correctly ruled that the entrapment instruction proposed by the defense was not supported by substantial evidence.

“Each side is entitled to have the jury instructed on its theory of the case if there is evidence to support that theory.” *State v. Williams*, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997) *quoting State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (En Banc) (1986). “On the other hand, it is prejudicial error to submit an issue to the jury when there is not substantial

evidence concerning it.” *Hughes*, 106 Wn.2d at 191 (citation omitted). “Substantial evidence exists when sufficient evidence in the record could persuade a fair-minded, rational person that the accused established the defense.” *State v. Ponce* 166 Wn. App. 409, 416, 269 P.3d 408 (2012). The trial court must view the evidence most favorably to the requesting party. *Ponce*, 166 Wn. App. at 416. Review of a trial court refusal to give an instruction when based on a lack of factual support is for abuse of discretion. *See State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996) *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997).

1. Quantum of proof required to support entrapment instruction.

Johnson claims that the Court of Appeals “misses the mark” in *State v. Trujillo*, holding that in order to be entitled to an entrapment instruction a defendant must “produce sufficient evidence to persuade a reasonable jury that he has established the defense by a preponderance of the evidence.” 75 Wn. App. 913, 917-18, 883 P.2d 329 (1994) *review denied* 126 Wn.2d 1008 (1995). Appellant’s Brief at 9 (fnt. 1). Johnson’s argument comes from a footnote, which footnote is found in the section that recites the facts of the case, and which footnote is without citation to authority. *State v. Harvill*, 169 Wn.2d 254, 257 (fnt.1), 234 P.3d 1166 (2010).

But the analytical part of the *Harvill* decision does not repeat the unsupported footnote. The decision considers the contours of the duress defense at length. The primary issue was whether or not a defendant's burden of production on the duress defense includes showing an explicit threat or whether an implicit threat will suffice. 169 Wn.2d at 259. In fact, the decision does not further address the quantum of proof required for a duress instruction. The *Harvill* Court resolved the issue in holding that Harvill's sufficient proffer of evidence of an implicit threat warranted the giving of the instruction. 169 Wn.2d at 263.

The *Harvill* Court distinguished the entrapment defense, saying "[t]he elements of duress differ from those of entrapment." 169 Wn.2d at 264. And, the *Trujillo* Court directly rejected the "some evidence" test asserted herein by Johnson. *Trujillo*, 75 Wn. App. at 917. Otherwise,

this statement of the required quantum of proof [some evidence] is overly broad and improperly entitles a defendant to an entrapment instruction upon production of a mere scintilla of evidence. A scintilla of evidence is not sufficient to justify an entrapment instruction.

75 Wn. App. at 917 (modification added). Thus, the question presented is did the trial court abuse its discretion in finding that the evidence upon which Johnson relied was not sufficient to persuade a reasonable jury that the defense of entrapment is established by a preponderance of the evidence.

2. The entrapment defense was not established.

The defense of entrapment is statutory. The statute provides that

1) In any prosecution for a crime, it is a defense that:

(a) The criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and

(b) The actor was lured or induced to commit a crime which the actor had not otherwise intended to commit.

(2) The defense of entrapment is not established by a showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime.

RCW 9A.16.070. From that statute comes the entrapment jury instruction

Entrapment is a defense to a charge of (fill in crime) if the criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and the defendant was lured or induced to commit a crime that the defendant had not otherwise intended to commit.

The defense is not established if the law enforcement officials did no more than afford the defendant an opportunity to commit a crime. The use of a reasonable amount of persuasion to overcome reluctance does not constitute entrapment.

The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty [as to this charge].

Washington Pattern Jury Instructions-Criminal 18.05.

The entrapment defense is not of “constitutional dimensions.”

Lively, 130 Wn.2d at 11. Entrapment is an affirmative defense that a defendant must prove by preponderance “because generally, affirmative

defenses are uniquely within the defendant's knowledge and ability to establish." 130 Wn.2d at 13 (internal quotation omitted). Thus, "Defendants should ultimately be responsible for demonstrating that they were improperly induced to commit a criminal act which they otherwise would not have committed." *Id.* As seen above, a mere scintilla of evidence on the point is insufficient. *State v. Trujillo*, 75 Wn. App. 913, 917, 883 P.2d 329, (1994) *review denied* 126 Wn.2d 1008 (1995).

Whether or not in satisfying her burden a defendant must show a lack of "predisposition" is an undecided question. The statute poses the question whether the defendant is induced to do a crime that she "had not otherwise intended to commit." RCW 9A.16.070 (1) (b) As the *Lively* Court puts it

The defendant must demonstrate that he was tricked or induced into committing the crime by acts of trickery by law enforcement agents. Second, he must demonstrate that he would not otherwise have committed the crime.

130 Wn.2d at 10. The *Lively* Court places the burden on the defendant to demonstrate that he would not otherwise have committed the crime, not to disprove that he was predisposed to commit the crime.

One element of the defense asks whether the defendant was "lured or induced" to commit the crime that she would not have otherwise committed. Here, police may use deception: "[i]n affording a suspect with an opportunity to violate the law, police may use some subterfuge. For

example, an officer may pose as a drug dealer, fence, or prostitute.” *State v. Smith*, 93 Wn.2d 329, 350, 610 P.2d 869 (1980) (alteration added).

In the present case, Johnson was afforded an opportunity to commit several crimes. He engaged in one crime, communication with a minor, by his sexual banter with a person whom he knew to be 13 years old. He engaged in a second crime, sexual exploitation, when he agreed to bring money to the 13 year old in exchange for sex. Moreover, these behaviors followed closely upon Johnson’s initial answer of the craigslist ad.

Here, the police provided the opportunity to commit the crimes. But as in *State v. Smith, supra*, here the police did no more than pose as an underage potential sexual partner, which is not analytically distinct from posing as “a drug dealer, fence, or prostitute.” *Smith*, 93 Wn.2d at 350. No other trickery or artifice was necessary to capture Johnson.

The defendant must show more than mere reluctance to commit the crime. *See State v. Trujillo*, 75 Wn. App. 913, 918, 883 P.2d 329 (1994) *review denied* 126 Wn.2d 1008 (1995). Here, Johnson showed little or no reluctance. He was on his way to a sexual rendezvous within three hours of being told that she was 13. *See State v. Wilson*, 158 Wn. App. 305, 321, 242 P.3d 19 (2010)(travel to appointed location equals a substantial step). He articulated that caution was indicated because of her young age

but then quickly moved forward with the program, including telling her what sexual activities he would do to her.

Despite Johnson's after-the-fact claims that he did not know for sure who he would meet when he arrived, this record has nothing by which Johnson might prove that he expected to find an adult engaged in an underage fetish when he arrived. There was no discussion of sex with an adult. *Cf. State v. Chapman*, slip. op. No. 50089-2-II, January 23, 2019 (UNPUBLISHED AND UNBINDING) (Entrapment instruction should have been given when police promised defendant sex with adult as well as child). Moreover, as the trial court noted at sentencing, Johnson made no effort to resolve that question (i.e., he never asked) before he set out. 7RP 44. Johnson never refused that which was offered and thus the police in this case did not engage in appeals to sympathy, cajoling, or appeals to Johnson's weaknesses. *See State v. Trujillo*, 75 Wn. App. at 918-19. There was no "concerted effort" by the police to get Johnson to commit a crime he would not have otherwise committed. *See State v. Keller*, 30 Wn. App. 644, 647-48, 637 P.2d 985 (1981) *review denied* 100 Wn.2d 1023 (1983).

The record shows that the police merely afforded Johnson the opportunity to commit crimes. Very little, if any, persuasion was necessary to get Johnson to take the bait. Johnson's post-hoc explanations

simply do not claim that the police tricked or improperly induced him to talk to a 13 year old about sexual acts, to promise to bring money to exchange for those acts, and drive to the location to perform those acts. His testimony unsuccessfully tried to convince the jury that he went there for another purpose; which other purpose is not supported by any of the communications Johnson had with the police.

The trial court did not improperly weigh the evidence on this issue but engaged it's duty to assure that substantial evidence supported the proposed instruction. The trial court did not abuse its discretion in excluding the entrapment defense.

B. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ARGUE SAME CRIMINAL CONDUCT BECAUSE THE TRIAL COURT WOULD HAVE RULED AGAINST JOHNSON ON THAT ISSUE.

Johnson next claims that his counsel was ineffective for failing to argue that the three convictions were same criminal conduct for sentencing purposes. But each of the three crimes of conviction has a separate intent element and the statute defining each of the crimes is aimed at different evils. This claim fails because the trial court would have ruled against Johnson had counsel raised it.

To show ineffective assistance of counsel, Johnson must first show

that counsel provided deficient performance, that is, performance that falls below an objective standard of reasonableness. *State v. Gier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). Second, it must be shown “there is a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceeding would have been different.” 171 Wn.2d at 34, quoting *State v. Kylo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* Johnson must overcome a strong presumption that counsel’s performance was reasonable. 171 Wn.2d at 33.

Ineffective assistance claims are reviewed de novo. *State v. Estes*, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). On review, “[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Grier*, 171 Wn.2d at 34 (alteration by the court), quoting *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

If ineffective assistance is based on counsel’s failure to raise an issue, the defendant must show that the motion would probably have been granted. See *State v. McFarland*, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995).

Two crimes encompass the "same criminal conduct" if they require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a). This definition should be narrowly construed and applied to relatively few situations. *State v. Saunders*, 120 Wn. App. 800, 824, 86 P.3d 232 (2004). All prongs of the statutory test must be met. *State v. Chenoweth*, 185 Wn.2d 218, 220, 370 P.3d 6 (2016). The burden of establishing same criminal conduct falls to the defendant. *State v. Graciano*, 176 Wn.2d 531, 539, 295 P.3d 219 (2013). A trial court's determination of this question is reviewed for abuse of discretion. *Graciano*, 176 Wn.2d at 536.

In this context, the trial court abuses its discretion when the record only supports the opposite conclusion. *State v. Valencia*, 2 Wn. App.2d 121, 125, 416 P.3d 1275, *review denied*, 190 Wn.2d 1020 (2018). If the record supports either conclusion, there is not abuse of discretion. 2 Wn. App. at `126. Johnson's counsel was not ineffective if the three crimes of conviction are not in fact same criminal conduct.

As to same intent, the Washington Supreme Court's most recent decision on RCW 9.94A.589(1)(a) is *State v. Chenoweth, supra*. There, the Court had no problem with the idea that child rape and incest are crimes that show intent. And, "[t]he intent to have sex with someone related to you differs from the intent to have sex with a child." 185 Wn.2d

at 223. Thus, “Chenoweth's single act is comprised of separate and distinct statutory criminal intents and therefore under RCW 9.94A.589(1)(a) do not meet the definition of same criminal conduct.” *Id.* (internal quotation omitted). Further, the court found that the legislature intended to punish incest and rape as separate offenses. *Id.* at 224. Finally, the court concluded that it was advancing a “straightforward analysis of the statutory criminal intent of rape of a child and incest.” *Id.*; *see also State v. Wilson*, 136 Wn. App. 596, 150 P.3d 144 (2007) (Before *Chenoweth*, considering statutory intent elements in deciding same criminal conduct question).

Johnson correctly argues that the same time and place elements are not seriously in question. *See e.g., State v. Young*, 97 Wn. App. 235, 984 P.2d 1050 (1999) (same time established when all a part of a continuous transaction or uninterrupted criminal episode). Simultaneous acts are not required. *State v. Porter*, 133 Wn.2d 177, 182-83, 942 P.2d 974 (1997). Here, the entire process was completed in one day in a relatively rapid succession of events.

However, with regard to same criminal intent, Johnson argues a test and analysis that was championed by the *Chenoweth* dissent. Brief at 41. Just as Justice Madson dissenting wanted the Supreme Court to do in *Chenoweth*, Johnson wants this court to seek an objective criminal

purpose, separate from the statutory law applied to the case, and look to whether or not that over-arching, objective criminal purpose changed from crime to crime.

But since the *Chenoweth* majority did not expressly overrule cases that apply the objective criminal purpose test, appellate courts have continued to decide questions of the intent element of the same criminal conduct test under that test. *See State v. Bogle*, slip. op. No. 49800-6-II (January 29, 2019) (UNPUBLISHED AND UNBINDING) (objective criminal purpose test applied with no reference to *Chenoweth* less than one month before this writing). Thus, “intent in this context does not mean the mens rea required for the crime, but the defendant’s objective criminal purpose in committing the crime.” *State v. Davis*, 174 Wn. App. 623, 642, 300 P.3d 465 (2013) (citation and internal quotation omitted) *review denied* 178 Wn.2d 1012 (2013).

This Court recently reconciled the contradictory aspects of the *Chenoweth* statutory intent approach and the objective criminal purpose test. *State v. Smith*, __ Wn. App. __, 433 P.3d 821 (January 23, 2019) (UNPUBLISHED AND UNBINDING SECTION OF DECISION). There, Smith had been convicted of first degree theft and first degree identity theft. He argued that these offenses should be considered same

criminal conduct. *Smith* ¶ 64.² In the analysis of this claim, it was held that the defendant's criminal intent is to be viewed objectively, but that the "relevant statutory text" is to be consulted in identifying that objective intent. *Smith* ¶65.

In count I, Johnson was convicted of attempted second degree rape of a child under RCW 9A.44.076. CP 1. Title 9A constitutes the state's criminal code. Chapter 9A.44 defines sex offenses. The intent element of second degree child rape is "the intent to accomplish a criminal result: to have sexual intercourse." *State v. Wilson*, 158 Wn. App. 305, 317, 242 P.3d 19 (2010) quoting *State v. Chhom*, 128 Wn.2d 739, 743, 911 P.2d 1014 (1996). "Sexual intercourse" (a) has its ordinary meaning and occurs upon any penetration, however slight." RCW 9A.44.010(1)(a). Moreover, when attempted second degree child rape is charged under circumstances where there was actually no victim, the issue is whether the defendant intended to have sexual intercourse with the putative child. *Wilson*, 158 Wn. App. at 319.

In count II, Johnson was convicted of attempted commercial sexual abuse of a minor under RCW 9.68A.100. CP 3. Chapter 68A of title 9 deals with the sexual exploitation of children. The gravamen of the crime is the exchange of anything of value as compensation for "sexual conduct"

² There are no page numbers in the Westlaw copy of this decision.

with a minor. “Sexual conduct” includes “sexual intercourse or sexual contact as defined in RCW 9A.44. RCW 9.68A.100(5). Thus “sexual intercourse” is defined as above and “sexual contact” is defined as “any touching of the sexual or intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.” RCW 9A.44.010(2).

As with child rape, the intent element of sexual exploitation is not expressly stated in the statute. This Court has opined that the mens rea element is “intent to engage in sexual conduct with a minor.” *Ohnemus v. State*, 195 Wn. App. 135, 142, 379 P.3d 142 (2016). Sexual exploitation has been held to be not concurrent with child rape for purposes of general versus specific charging because one can make an agreement to have sexual contact that is not sexual intercourse. *State v. Wilson*, 158 Wn. App. 305, 242 P.3d 19 (2010).

The legislature’s intent statement regarding RCW 9.68A is focused on sexual exploitation for commercial gain. RCW 9.68A.001. The legislature’s findings include that “children engaged in sexual conduct for financial compensation are frequently the victims of sexual abuse.” *Id.* Since child rape is clearly an instance of “sexual abuse” the legislature is making a distinction between exploitation for commercial gain and rape.

In count III, Johnson was convicted of communication with a

minor for immoral purpose under RCW 9.68A.090(2) (felony by use of electronic communication). CP 4. This provision provides that it is a felony to so communicate and in particular to communicate for the “purchase or sale of commercial sex acts or sex trafficking, through the sending of an electronic communication.” Although “immoral purpose” by itself seems to describe the intent element here, the Supreme Court has expanded, saying that there must be “the requisite predatory purpose of promoting a minor’s exposure and involvement in sexual conduct.” *State v. Hosier*, 157 Wn.2d 1, 11-12, 133 P.3d 936 (2006)(internal quotation omitted).

Each of the intent elements of the three crimes of conviction are different. One, child rape, requires an intent to have sexual intercourse. Next, sexual exploitation can be committed with intention to engage in sexual conduct that may include sexual contact not amounting to sexual intercourse. Finally, communication may be accomplished with the predatory purpose of exposing a minor to sexual conduct that, again, does not include sexual intercourse as required for child rape or sexual contact as required by the exploitation of minors statute.

The statutes address different evils: in turn, raping children, trying purchase sexual contact with a child, or sexualizing them with sexual communication.

Thus the straight-forward statutory approach to the issue that the Supreme Court used in *Chenoweth, supra*, shows that the various crimes herein, objectively viewed, are not the same criminal conduct. It is not the case that Johnson's criminal intent, viewed objectively, remained the same from one crime to the other. *Porter*, 133 Wn.2d at 183. His intent to discuss sexual acts with a 13 year old in order to expose her to sexual conduct stands alone from his attempt to rape her. Similarly, his agreement to pay for sexual conduct is different from his intent to have sexual intercourse.

The record adequately supports the conclusion that the trial court in the exercise of discretion would have ruled against Johnson had his attorney raised the issue of same criminal conduct. Johnson fails to carry his burden to establish ineffective assistance of counsel.

C. THE TRIAL COURT PLACED A REASONABLE INTERNET RESTRICTION ON AN OFFENDER WHO USED THE INTERNET TO COMMIT HIS CRIMES.

Johnson next claims that the trial court erred in imposing a condition of sentence that is unconstitutional because it allows too much enforcement discretion and impacts too much of Johnson's First Amendment rights. This claim is without merit because the complained of condition is a crime-related prohibition that is narrowly tailored to achieve

the state's interest in not allowing Johnson to access minors in cyberspace as he did in committing his crimes..

The condition at issue reads "Do not use or access the World Wide Web unless specifically authorized by CCO through approved filters." CP 99. The condition is there listed as being crime-related. The trial court engaged a discussion of the condition of sentence at issue. The trial court was concerned about a complete internet prohibition. RP, 5/18/18, 51. The trial court was unsure of the "filtering" of Johnson's internet activity. RP, 5/18/18, 51-52.

The imposition of community custody conditions is reviewed for abuse of discretion. *State v. Nguyen*, 191 Wn.2d 671, 678, 425 P.3d 847 (2018). A community custody is unconstitutionally vague if it fails to describe what is prohibited with sufficient definiteness to allow an ordinary person to understand what conduct is proscribed or if it does not provide ascertainable standards that protect against arbitrary enforcement. *Nguyen*, 191 Wn.2d at 678. However, "A community custody condition is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct." 191 Wn.2d at 679. But a stricter standard of definiteness is required if the condition impacts access First Amendment material. *Id.*

Within this constitutional framework, a sentencing court may impose “any crime-related prohibitions.” RCW 9.94A.703(3)(f). A crime-related prohibition is an order that prohibits “conduct that directly relates to the crime for which the offender has been convicted.” RCW 9.94A.030(10). The word “directly” does not require that the condition be causally related to the crime. *See State v. Autry*, 136 Wn. App. 460, 467, 150 P.3d 580 (2006). As noted, conditions that interfere with fundamental rights must be “reasonable necessary to accomplish the essential needs of the State and public order.” *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). At bottom, “There must be no reasonable alternative way to achieve the State's interest.” *Warren*, 165 Wn.2d at 34-35.

Here, Johnson used the internet to seek sex from a putative 13 year old girl. Some restriction on Johnson’s internet use is in fact causally related to his crimes. At first take, then, the trial court correctly used its discretion to address that aspect of Johnson’s crimes. Moreover, the trial court may delegate “some aspects of community placement to the [Department of Corrections].” *Autry*, 136 Wn. App. at 468 (alteration added) *quoting State v. Sansone*, 127 Wn. App. 630, 642, 111 P.3d 1251 (2005).

In *Packingham v. North Carolina*, ___ U.S. ___, 137 S.Ct. 1730, 198 L.Ed.2d 273 (2017) the Supreme court struck down a law that made it a

felony for a sex offender to access “a commercial social networking Web site” if minor children can become members or maintain personal Web pages. 137 S. Ct. at 1733. The law excepted certain commercial website activities from its purview. 137 S.Ct. at 1734. The Court found that the internet is an important place for the exercise of free expression.

The Court applied “intermediate scrutiny,” which requires that the law be narrowly tailored to serve significant governmental interests.” 137 S.Ct. at 1736. In this wise, the Supreme Court’s jurisprudence and Washington law are in accord. But the *Packingham* Court struck down a statutory crime because it swept away too much legitimate use of the internet. Thus “the State may not enact this complete bar to the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture.” 137 S.Ct. at 1738.

However,

Though the issue is not before the Court, it can be assumed that the First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor.

137 S.Ct. at 1737. Here can be seen the difference between *Packingham* and the present case: there, the Supreme Court considered a criminal statute that would apply to any sex offender; here, we deal with a condition of sentence that is directly related to this particular defendant’s

offending.

In the present case the trial court imposed a crime-related prohibition that was narrowly tailored to address the offending of the individual before the court for sentencing. The state here has a significant interest in keeping internet predators from further access to children in cyberspace. The condition passes constitutional muster because of its specific focus. The trial court did not abuse its discretion in imposing this condition.

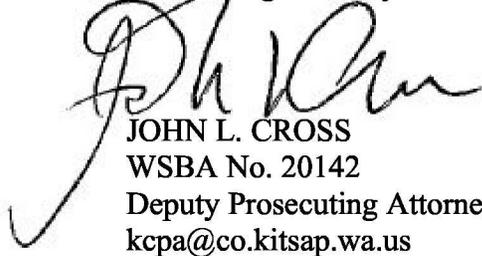
IV. CONCLUSION

For the foregoing reasons, Johnson's conviction and sentence should be affirmed.

DATED February 25, 2019.

Respectfully submitted,

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February 25, 2019 - 1:27 PM

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Appellate Court Case Number: 51923-2
Appellate Court Case Title: State of Washington, Respondent v. Christopher R. Johnson, Appellant
Superior Court Case Number: 17-1-01536-7

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