

65431-4

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No. 65431-4-I

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

STATE OF WASHINGTON, Respondent,

v.

CHARLES FRANCES BOOME, Appellant.

BRIEF OF RESPONDENT

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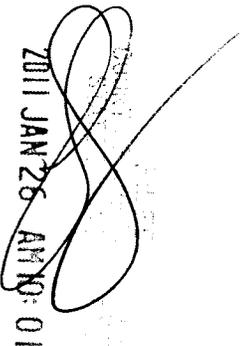


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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the prosecutor's cross-examination of the defendant constituted prosecutorial misconduct resulting in incurable prejudice for failing to prove up implied facts where the defendant testified on direct he was surprised to find out that he was charged with raping the victim but admitted on cross that he had been hiding when he was arrested and didn't deny that he didn't have shoes with him when he was arrested, where the detective testified on rebuttal that it had been aired on television that the defendant was wanted and the prosecutor's question regarding law enforcement's contact with defendant's friends and family was intended to elicit whether the defendant was aware of the contact, and where the defendant's story was not credible even without considering any of his testimony about his knowledge of the charges.
2. Whether the court exceeded its statutory authority in imposing certain community custody conditions where under caselaw the conditions regarding minors could not be crime-related where the victim was not a minor, but where the conditions were reasonably related to the defendant's risk of reoffending and ensuring the safety of the community where the defendant had a prior conviction for Child Molestation in the Third Degree and had had a warrant out for his arrest for failing to report and failing to complete sexual deviancy treatment at the time he committed the offense, and where the challenged evaluations could be ordered as part of the community custody conditions under RCW 9.94A.713 under his indeterminate sentence.

C. FACTS

1. Procedural facts.

On July 20, 2007 Appellant Charles Boome was charged with one count of Burglary in the First Degree, in violation of RCW 9A.52.020(1) and one count of Rape in the First Degree, in violation of RCW 9A.44.040(1)(d), for his actions on or about April 27, 2007. He was found guilty as charged by jury. CP 33. He was sentenced to an indeterminate sentence under RCW 9.94.712, with a minimum imprisonment sentence of 216 months and a maximum of life on the rape conviction. CP 21.

2. Substantive facts.

On the night of April 26, 2007, EH, a 22 year old student at Western Washington University, walked to downtown Bellingham from her apartment, which was close to downtown as well as the university, to a bar called the Ranch Room to join some friends around 9 p.m. or so. 1RP¹ 31-32, 44, 80, 90. EH lived with a male friend and roommate, Jordan Melin, in an apartment on the first floor of the building. 1RP 32, 36, 134. Another friend of EH's, TJ Acena, had come to visit and was going to stay

¹ 1 RP refers to the verbatim report of proceedings for March 8th-10th, 2010 and 2RP for March 11th, 15th, 16th and April 29th, 2010.

the night on the couch in the apartment. 1RP 43, 136. It had been a long day and EH was very tired. 1RP 42, 47, 80.

EH saw Jordan and TJ at the bar and stayed there for about an hour and a half, having a mixed drink and some appetizers. 1RP 45, 137. She and some friends, along with Jordan and TJ, went to the Nite Lite Café where she stayed until about 1 a.m. 1RP 46-47, 49, 137. While there she had about 3-4 mixed drinks, got drunk, and at one point sat down in a lounge area of the bar and fell asleep. 1RP 48, 83-85. Someone shook her awake and she decided to go home to go to sleep. 1RP 47, 92.

Jordan and she walked back to the apartment together. 1RP 139.² They did not encounter anyone, including Boome, on the way back to the apartment. 1RP 48, 140. TJ was not back yet when they got there. 1RP 48, 142.

EH went to the bathroom and then went to her bedroom and went to sleep. 1RP 48-50. The next thing she remembered was waking up to a Native American man, with long stringy hair, a man she had never seen before, on top of her having penal vaginal intercourse with her. 1RP 50-

² EH thought she had walked back to her apartment alone, but she wasn't sure and said she may have. Although she remembered entering the front door, she didn't remember unlocking it, which Jordan testified he unlocked, and she testified that Jordan was at the apartment when she got back to it and she testified "we went in the front door." 1RP 48, 70-71, 140-41. Jordan, who had not drunk very much because he had an early morning class, testified that he was "positive" that he had walked back to the apartment with EH. 1RP 138, 147.

51, 54, 71. Her shirt was still on, but her pants and underwear were off. 1RP 51. It seemed surreal to her because she was so drunk and tired, but she remembered it hurting. 1RP 50. She also remembered the man saying, "How do you like my big Indian cock?" and remembered saying no. 1RP 50. She wasn't able to push him off her because he had his forearm on her chest, her arms felt like Jello, and she was still trying to figure out what was going on. 1RP 50, 74. A tampon that had been inside her when she went to sleep was found on the floor next to the bed the next day. 1RP 51-52, CP 16, Ex. 9.

After he finished and left her bedroom, she laid in her bed for a little while trying to figure out if she had been dreaming, but when she didn't hear him leave the apartment, she got up and took the end of a pool cue she kept under her bed for her safety, and walked out into the living room where he still was. 1RP 52-53. Thinking to herself, "just get him out," she started pushing him out the door. He didn't struggle, but grabbed her breast and asked when he could see her again. 1RP 53. She shut the door, locked it and went back to bed. 1RP 53. She identified Boome in court as the man who attacked her, and male DNA found in her rectal area later was determined to come from Boome. 1RP 54, 113-15.

After falling back asleep, EH woke around 3 a.m. to TJ trying to get into the apartment. 1RP 55, 121-22. She let him in, barely spoke to

him and went back to bed. 1RP 55, 123. TJ remembered that there was something stacked against the wall outside EH's apartment when he tried to get in, but he didn't remember specifically what it was. 1RP 125-27. EH didn't tell TJ or her roommate that night what had happened. 1RP 54-55.

In the morning around 5 or 6 a.m. when EH woke up and went to the bathroom, she found the bathroom unusually cold and noticed that the bathroom window was open, which it had never been before. 1RP 58-59, 142. When she tried to close the window, she noticed a footprint in the bathtub. 1RP 59. Later that morning around 8 a.m. when Jordan got up to take a shower, he also noticed that the bathroom was freezing and the window open. 1RP 142. There was dirt everywhere in the bathtub, as well as footprints. *Id.* Jordan assumed TJ had forgotten the key and had broken into the apartment through the bathroom window. *Id.* When he left through the back kitchen door, he noticed the door was unlocked and a nightstand of some sort was outside underneath the bathroom window, which had never been there before. 1RP 143, 151. Again thinking that TJ

must have used it, Jordan moved it backed to where it had been before and closed the window. 1RP 143-45.³

It wasn't until later that day that she fully comprehended what had happened to her. After trying to decide if she wanted to report it because of what it would mean and everyone she would have to tell, she called her best friend who then went with her to the hospital to have a rape exam done. 1RP 54-57. At the hospital she spoke with an officer and was examined by a Sexual Assault Nurse Examiner who took a number of samples. 1RP 57, 2RP 7, CP 65. EH told the nurse that she woke up to a man on top of her raping her vaginally and that she'd been held down by the man's forearm. 2RP 11, 20. EH told her she'd been at a bar earlier and was very drunk when she got home. Id. The nurse noticed external vaginal redness. 2RP 12. EH was worried that the tampon might still be inside her, but a doctor determined it was not. 1RP 51-52, 57-58. EH and Jordan left the apartment and went to live somewhere else after this happened. 1RP 67, 146.

The owner of the building also saw the shelving unit/nightstand outside the bathroom window of EH's apartment. 1RP 84, 187. He also

³ Jordan left EH a phone message about the back door being open and about TJ getting in, and she phoned him back later that day and told him she thought she'd been raped. 1RP 145.

noticed the bathroom window was open and assumed the tenants had locked themselves out. 1RP 185. The shelving unit was examined and a footprint, that was possibly a tennis shoe print, was found on top of the unit. 1RP 195-97. A bucket that was found outside EH's bedroom window about two to four weeks later had a similar footprint on it. 2RP 54, 59. No latent fingerprints were found on the shelving unit or the bucket. 1RP 197, 2RP 54.

The only witness for the defense, Boome testified that he had been staying a block to two blocks from where EH lived in April 2007. 2RP 25, 35. On April 26, 2007 he was homeless and on his way downtown to panhandle late at night when he encountered EH and stopped her to ask her for some money or food. 2RP 24-25. EH told him that she had some food that he could have and they both walked back to her apartment. 2RP 26. Even though it would have been cold out that time of year, Boome testified that EH didn't have her shoes on. 2RP 26, 32. She unlocked the front door⁴ and went to her bedroom while Boome stayed in the living room. 2RP 26. Boome testified that EH came out of the bedroom with just a tank top and panties on and then went into the bathroom. 2RP 27. After leaving the bathroom, EH posed in a suggestive way for a few

⁴ EH testified that she didn't have her key on her that night. 1RP 70.

minutes before entering her bedroom. 2RP 27-28. Taking this as an invitation, after a few minutes Boome went into the bedroom where she was laying on the bed. Id. He laid beside her and caressed her and she took off her “undergarment.” 2RP 27. He got undressed and they had an “intimate encounter” that lasted an hour and a half to an hour and 45 minutes. 2RP 29. At the end, EH told him she had to go, that he had to leave and went into the bathroom. 2RP 29. He waited a while, but then got dressed when she didn’t return. 2RP 29. He found her in the living room area, hugged her, kissed her and felt her breasts and asked if he could see her again. 2RP 29. She said, no, she had to go, and she led him to the back door, telling him he had to leave. 2RP 30.

Boome denied using force to have sex, said she didn’t say no, and testified that he didn’t become aware of the rape charges until September 2009 when he was in custody in Snohomish County. 2RP 31. He testified that he was surprised that he had been charged with rape, that this sort of thing, having young coeds invite him home for sex, happened to him a lot because the ladies like his long hair. 2RP 31, 32. On cross examination, he testified that young women picking him up while he was panhandling and taking him home to have sex had happened three times. 2RP 32. He denied putting the shelving unit under the bathroom window, but admitted EH didn’t know who he was before that night. 2RP 37. Boomed denied

being approached with a pool stick and being pushed out the door. 2RP 38-39. He denied forcing the window open or ever being in the bathroom and denied wearing tennis shoes, claiming that he wore steel-toed boots because they were warmer. 2RP 40. Boome denied putting the bucket underneath EH's bedroom window, but admitted that anybody would have been able to see into her bedroom if they had stood on it. 2RP 44-46.

D. ARGUMENT

1. The prosecutor's cross-examination did not constitute misconduct resulting in incurable prejudice.

Boome asserts that the prosecutor committed misconduct resulting in incurable prejudice when he asked Boome on cross-examination whether he had been hiding under the bed when he was arrested and other questions about his awareness of the charges, without introducing evidence of the implied facts. However, the prosecutor sought to elicit testimony from Boome regarding his awareness of the charges only because Boome had testified on direct that he was surprised by the charges and hadn't found out about them until he was incarcerated in the Snohomish County jail. The prosecutor did not need to "prove up" the fact regarding Boome's hiding under a bed when he was arrested because Boome admitted that he had been. Boome also did not deny that he didn't have shoes with him when he was arrested, but explained that he had been

at the residence to get some clothes and had wanted to take a shower. The prosecutor did present rebuttal testimony that law enforcement had contacted the television show Washington's Most Wanted regarding Boome and that it had been on the television that there was a warrant out for Boome. While evidence was not presented of law enforcement's contact with Boome's friends and family, that information was only relevant if Boome had had contact with them and he denied that he had. Therefore the prosecutor was "stuck" with the answer that Boome gave him, that he was not aware of the police contacting his friends and family trying to find him.

Even if the prosecutor should have proved up some of the implications from his cross-examination, the prosecutor's failure to do so did not result in incurable prejudice to Boome. Even without any of Boome's testimony regarding his arrest and knowledge of the charges, Boome's story was patently unbelievable, was refuted by Jordan's testimony and didn't account for the physical evidence in the case. Moreover, the prosecutor's intent was not to use the impeachment in order to introduce otherwise inadmissible evidence or to "testify" himself. The prosecutor intended to challenge Boome's claim that he was surprised by the rape charges, which area was opened up when Boome testified he was surprised to find out about the charges while in jail.

Where prosecutorial misconduct is claimed, the appellant bears the burden of showing both the impropriety of the conduct and its prejudicial effect. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). Prejudicial effect is established only if there is a substantial likelihood that the misconduct affected the jury's verdict. State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 713 (2000).

Where a defendant objects on the basis of prosecutorial misconduct, a reviewing court defers to the trial court's ruling on the matter because the "trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial." State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), *cert. den.*, 523 U.S. 1008 (1998); *see also*, State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006) (court gives deference to the trial court's ruling on motion for mistrial "because the trial court is in the best position to evaluate whether the prosecutor's comment prejudiced the defendant").

Absent an objection, a claim of misconduct is waived unless it is so flagrant or ill intentioned that it creates an incurable prejudice. State v. Echevarria, 71 Wn. App. 595, 597, 860 P.2d 420 (1993); State v. Russell, 125 Wn.2d 24, 82, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). Misconduct does not create an incurable prejudice unless: (1) there is a substantial likelihood that it affected the jury's verdict, and (2) a

properly timed curative instruction could not have prevented the potential prejudice. State v. Brett, 126 Wn.2d 136, 175-76, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996).

“A defendant may be vigorously cross-examined in the same manner as any other witness if he voluntarily asserts his right to testify.” State v. Graham, 59 Wn. App. 418, 427, 798 P.2d 314 (1990). A prosecutor may cross-examine a defendant in order to qualify or rebut the defendant’s testimony on direct or to explore issues defendant raised in his testimony. Graham, 59 Wn. App. at 427. Inadmissible evidence may be admitted if a party “opens the door”:

A party may introduce inadmissible evidence if the opposing party has no objection, or may choose to introduce evidence that would be inadmissible if offered by the opposing party... The introduction of inadmissible evidence is often said to “open the door” both to cross-examination and to the introduction of normally inadmissible evidence to explain or contradict the initial evidence.

State v. Avendano-Lopez, 79 Wn. App. 706, 714, 904 P.2d 324 (1995), *rev. den.*, 129 Wn.2d 1007 (1996) (*quoting* Karl B. Tegland, 5 Wash. Prac. 41 3rd Ed. 1989). “Fairness dictates that the rules of evidence will allow the opponent to question a witness about a subject matter that the proponent first introduced through the witness.” State v. Gallagher, 112 Wn. App. 601, 610, 51 P.3d 100 (2002), *rev. den.*, 148 Wn.2d 1023

(2003). The scope of cross-examination lies within the sound discretion of the trial court. Graham, 59 Wn. App. at 427.

Failure to prove up impeachment evidence can constitute prosecutorial misconduct if it the prosecutor intends to use the “impeachment as a means of submitting evidence to the jury that is otherwise admissible.” State v. Miles, 139 Wn. App. 879, 886, 162 P.3d 1169 (2007). “Where a prosecutor’s questions refer to extrinsic evidence that is never introduced, deciding if the questions are inappropriate requires examining whether the focus of the question is to impart evidence within the prosecutor’s personal knowledge without the prosecutor formally testifying.” *Id.* at 887. However, a prosecutor does not need to “prove up” information within a cross examination if the defendant admits the evidence on cross examination. *See, State v. Beard*, 74 Wn.2d 335, 338, 444 P.2d 651 (1968) (“Had [the defendant] admitted the alleged convictions or had the state proved them, the prosecutor’s cross-examination would have been entirely proper.”); State v. Yoakum, 37 Wn. 2d 137, 141, 222 P.2d 181 (1950) (emphasis added) (when prosecutor questions witness about conflicting statements the witness made to him or others, *if the witness denies the fact*, the prosecutor should be prepared to offer proof on those questions).

Here, Boome asserts that the prosecutor failed to prove up his questions related to his hiding under the bed when he was arrested and whether he was aware of the charges against him. On direct, Boome testified that he was not aware of the rape charges until September of 2009 while he was in custody in Snohomish County and his public defender informed him of the charges. 2RP 31. He also testified that he was surprised to be charged related to the incident that night. *Id.* On cross examination the prosecutor questioned Boome regarding his surprise about being charged.⁵ Boome denied knowing that the police were looking for him and denied knowing that it had been on television, but admitted that he had been hiding under a bed when the police arrested him in September 2009. 2RP 47. Defense counsel then objected based on relevancy. *Id.* Boome interjected that he was arrested on different charges, and counsel reiterated his objection on relevancy and foundation grounds. *Id.* at 48. In response to the prosecutor's explanation that it was relevant because Boome said he was surprised and Boome's hiding when he was arrested impeached his surprise, defense counsel objected that the prosecutor was testifying then as to what was going on at the time of Boome's arrest and there was no basis for the testimony. 2RP 48. The court inquired as to

⁵ Apparently defense counsel also mentioned Boome's surprise at the charges in opening. 2RP 48.

how the prosecutor was testifying, and defense counsel responded that the prosecutor had just said that Boome was hiding under the bed when he was arrested and there was no foundation for that. 2RP 49. The court responded that Boome had admitted that. Id. Then counsel reiterated his earlier objection as to relevancy. Id. The court then clarified it was responding to defense counsel's claim that the prosecutor was testifying and reiterated it wanted to make sure that concern of counsel's was addressed. Id. It then concluded that the prosecutor's question was relevant. Id.

The prosecutor then confirmed with Boome that Boome was admitting he was hiding under the bed when he was arrested and specifically that he was hiding from the police. 2RP 50. The prosecutor then inquired "When you were arrested you didn't have shoes with you either, did you?" and Boome explained that he went to that residence, his girlfriend's, because he had clothing there and he wanted to take a shower and get some clothes because he was homeless. Id. When the prosecutor inquired whether he had seen anything on television about the charges, Boome denied it and explained that he was homeless and the television at the residence would only play movies and DVDs. Id. at 51. Boome denied that *he knew* that the police were talking to his friends and family to find him, and that *he had ever heard* of the charges, and offered that he stayed

away from his family because whenever he would be around them, the kids would get taken away and so he just stayed on the streets, homeless. Id. at 51-52. In questioning on redirect Boome reiterated that he was in jail on other charges when he first learned of the rape charges. Id. at 52.

In rebuttal the prosecutor called one of the Bellingham Police detectives assigned to the case. The detective testified that the warrant for Boome had been on the television in the area, that another detective had contacted Washington's Most Wanted and requested that they run Boome as a person of interest. 2RP 59. On cross defense counsel confirmed with the detective that it had been on channel 13 on Washington's, not America's, Most Wanted. 2RP 67.

Before closing arguments defense moved for a mistrial, asserting that the prosecutor had failed to disclose the information about Boome having been found hiding under the bed, under CrR 4.7. 2RP 84. After the prosecutor responded to the motion and explained why there wasn't a CrR 4.7 violation, the court denied the motion. 2RP 85-88.

There was no motion for a mistrial based on the prosecutor's alleged "testifying" during cross-examination. The only questioning that defense counsel objected to based on the prosecutor's "testifying" was that Boome was hiding under the bed when he was arrested. The prosecutor did not need to prove up the fact that Boome had been hiding under the

bed when arrested in rebuttal because Boome admitted it. The prosecution did prove up that Boome was wanted and that police were looking for him and his warrant was aired on television through the rebuttal testimony of the detective. Boome did not present an objection below to the other cross-examination. The other evidence that the prosecutor sought to elicit from Boome on cross-examination was not denied by Boome or rested solely within Boome's knowledge. Boome did not deny that he didn't have shoes with him at the time of arrest, but explained that he had clothes at the residence and had wanted to take a shower, which was tantamount to admitting that he did not have shoes with him when he was arrested. Only Boome could testify about whether *he was aware* that there were pending charges from talking with his friends and family. When Boome testified that he wasn't aware, and explained that he didn't have contact with his family, the prosecutor was stuck with Boome's answer.⁶ The thing that made the police's contact with Boome's friends and family relevant was *if* Boome had had contact with them such that he became aware of the charges through them. Only his *knowledge* of the charges

⁶ Under a number of rules, in fact, counsel is expressly allowed to cross-examine about matters not in evidence and may *not* introduce extrinsic evidence on the same matter. For example, the cross-examiner may ask a witness about a collateral matter contrary to the witness's testimony, but if the witness denies the facts sought to be brought out, extrinsic evidence is inadmissible.

5 Wash. Prac., Evidence Law and Practice § 103.22 (5th ed.).

through them impeached his testimony that he was surprised by the charges.

Even if the prosecutor's cross-examination was objectionable to some extent, it was not so flagrant as to result in incurable prejudice. Boome's story was not credible. His testimony that EH invited him to her apartment after being approached by him for food, under the pretext of giving him food but really, in Boome's version, so that she could have sex with a strange man twice her age that according to her had "long, stringy hair" was absolutely implausible. His testimony that young co-eds liked to pick him up when he panhandled them to take him home to have sex with him because they liked his hair was likewise absurd. More importantly Boome's story was refuted by Jordan's testimony that he was "positive" he had walked EH home, opened the front door and locked it behind him, and EH's and Jordan's testimony they had not encountered anyone on the way back to the apartment. His story also did not account for the physical evidence, the used tampon tossed on the floor next to the bed,⁷ the open bathroom window that had never been opened before, the shelving unit that was found outside the bathroom window that hadn't

⁷ Defense counsel argued in closing that the tampon had been placed on the floor "wrapped in tissue." 2RP 124. There was absolutely no evidence of this and was refuted by the photo. Ex. 9.

been there before that night, and the footprints and dirt found in the bathroom the next morning. The prosecutor's cross-examination was not misconduct that resulted in incurable prejudice.

2. The conditions of community custody are statutorily authorized.

Boome challenges certain conditions of community custody the court imposed as being without statutory authority. Specifically, Boome challenges the restrictions on his contact with children, the requirement that he obtain a chemical dependency evaluation and comply with any recommended treatment and that he obtain a psychiatric evaluation and comply with any recommended treatment. While the conditions regarding minors are not statutorily authorized as crime-related prohibitions, they are ones reasonably related to Boome's risk of reoffending and community safety under RCW 9.94A.712(6). Those conditions, including the evaluations, that were listed as "special sentence requirements" in the Presentence Investigation ("PSI") are authorized to be imposed by DOC/the Indeterminate Sentencing Review Board ("Board") under RCW 9.94A.713. The court's listing of those conditions within the judgment is perhaps unnecessary as they are separately authorized by statute to be imposed later. Even if those conditions should be stricken because they don't fall within RCW 9.94A.700(4) or (5), they should be stricken in

such a manner to ensure that the DOC/the Board is not precluded from imposing them when Boome is released from total confinement.

As Boome correctly notes, he was sentenced as a non-persistent offender under former RCW 9.94A.712. Under that statute certain conditions must be imposed by the court, others are discretionary and other, affirmative, conditions may be imposed if they are “reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community: ”

Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, and the department and the board shall enforce such conditions pursuant to RCW 9.94A.713, 9.95.425, and 9.95.430.

RCW 9.94A.712(6)(1)(a)(i). (2007). Boome does not contest any of the conditions that are mandated under RCW 9.94A.700(4).⁸ Under former RCW 9.94A.700(5), the court may impose the following conditions:

⁸ Those conditions are:

- ...
- (a) The offender shall report to and be available for contact with the assigned community corrections officer as directed;
- (b) The offender shall work at department-approved education, employment, or community restitution, or any combination thereof;
- (c) The offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions;

- (a) The offender shall remain within, or outside of, a specified geographical boundary;
- (b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;
- (c) The offender shall participate in crime-related treatment or counseling services;
- (d) The offender shall not consume alcohol; or
- (e) The offender shall comply with any crime-related prohibitions.

RCW 9.94A.700(5) (2007). Under subsection (e) the court may impose crime-related conditions, i.e., conditions “that directly relate[] to the circumstances of the crime for which the offender has been convicted, as a condition of community custody. RCW 9.94A.030(10).⁹

A court’s statutory authority regarding sentencing is reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003). A court’s decision regarding imposition of crime-related prohibitions is reviewed for abuse of discretion. State v. Williams, 157 Wn. App. 689, 691, 239 P.3d 600 (2010), *rev. denied*, ___ Wn.2d ___ (Jan. 5, 2011).

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- (d) The offender shall pay supervision fees as determined by the department; and
 - (e) The residence location and living arrangements shall be subject to the prior approval of the department during the period of community placement.
- RCW 9.94A.700(4) (2007).

⁹ Former RCW 9.94A.030(13). The definition has not changed and in full states:

“Crime-related prohibition” means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

Whether a condition is related to the circumstances of the crime has traditionally been left to the discretion of the sentencing judge. Id. “No causal link need be established between the condition imposed and the crime committed, so long as the condition relates to the circumstances of the crime.” Id. at 691-92. “Accessory facts” may be considered by the sentencing court in determining what crime-related prohibitions may be imposed. Id. at 692 (court properly considered underlying child sex offense in imposing the crime-related condition of no unsupervised contact with minors in sentence on failure to register).

a. conditions re minors

Boome challenges, and objected below, to the imposition of a restriction on his contact with minors in general and specifically with his own minor children as not being reasonably related to his crime. 2RP 142-44. A condition prohibiting contact with minor children generally is not reasonably related to sex offenses where the victim is not a minor. *See State v. Riles*, 135 Wn.2d 326, 349-50, 957 P.2d 655 (1998), *abrogated on other grounds*, *State v. Valencia*, ___ Wn.2d ___, 239 P.3d 1059 (2010) (holding that it is "not reasonable ... to order even a sex offender not to have contact with a class of individuals who shares no relationship to the offender's crime"). While the judgment and sentence here lists the restrictions on contacts with minors as those that are crime-related, and in

and of itself Boome's rape of a young adult woman under caselaw does not warrant imposition of restrictions regarding minors, it is worthy to note in this case that the defendant was 43 years old at the time and victimized a 22 year old young woman, a person nearly half his age.

While not crime-related, under RCW 9.94A.712(6) the court may impose conditions that reasonably relate to the offender's risk of reoffending or the safety of the community. Here, Boome committed this sexual offense while on supervision for a prior sex offense, Child Molestation in the Third Degree, and while he was on warrant status for failure to report and failure to complete sexual deviancy treatment under that sentence. 2RP 138, Supp CP __, Sub Nom. 81 ("PSI") (at 8-9). Boome committed his prior offense in November of 2000, while he was over 35 years of age, against a 15 year old child, who had passed out from drinking. *Id.* at 8. Boome admitted the offense to witnesses, but stated, "I'm not doin' nothing she doesn't want." *Id.* The Department of Corrections believed that Boome is such a risk to the community that it recommended the maximum of the standard range on his indeterminate sentence and the very conditions that Boome now challenges. *Id.* at 9-14. While minors do not fall within the "category" of victim in Boome's latest offense, and thus technically restrictions with minors are not reasonably related to his current offense, Boome's sexual offense history combined

with the facts of this case warrant the restrictions on contact with minors as conditions reasonably related to his risk of reoffending or the safety of the community. *But see*, State v. O’Cain, 144 Wn. App. 772, 184 P.3d 1262 (2008) (internet access restriction condition did not fall within RCW 9.94A.712(6) because it was not an affirmative conduct condition, but a prohibition, reasonably related to the circumstances of the offense).

Boome also contends that there should be no restrictions on his contact with his own children. The judgment and sentence explicitly permits his children to have contact with him while he is in prison. CP 23. Any determination about his contact with his children thereafter will be determined in accord with the conditions set by the DOC and the Board upon his release to community custody. (See *infra* at 26.)

b. conditions re psychiatric and chemical dependency evaluations

Boome also challenges the conditions of having to obtain a psychological evaluation and a chemical dependency evaluation. While the court does not have the statutory authority to impose a psychological evaluation without a mental health evaluation or demonstrated mental health issues, and cannot impose the affirmative conduct of obtaining a chemical dependency evaluation unless it is reasonably related to the circumstances of the offense, the evaluations are conditions that the DOC

and the Board are statutorily authorized to take. As such, the judgment and sentence's reference to these DOC recommended "special sentencing requirements" are authorized albeit to be imposed by the DOC/Board upon Boome's release.

Under RCW 9.94A.505(9) a court has the discretion to order an offender whose sentence includes community supervision or placement to undergo a mental health evaluation and participate in mental health treatment but only if "the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense." RCW 9.94A.505(9); State v. Jones, 118 Wn. App. 199, 209, 76 P.3d 258 (2003)¹⁰; *accord*, State v. Lopez, 142 Wn. App. 341, 353-54, 174 P.3d 1216 (2007), *rev. denied*, 164 Wn.2d 1012 (2008). Such an order must be based on a presentence report and any previously filed mental status evaluations. *Id.* A chemical dependency evaluation, as an affirmative conduct condition, could only be ordered pursuant to RCW 9.94A.712(6) and 9.94A.700(5), and therefore would need to be related to the circumstances of the crime. While Boome criminally took advantage of a

¹⁰ In State v. Jones, the court attempted to harmonize RCW 9.94.505(9) with the statutory provision under RCW 9.94A.700(5)(c) that the court may order *crime-related* treatment in imposing community custody for certain specified offenses. *Id.* at 208-10. In doing so, it found that mental health treatment "reasonably relates" to the offender's risk of

victim who was drunk, the circumstances of the case do not reflect that he did so while under the influence of drugs or alcohol.

The DOC and the Board however are granted the authority to impose additional conditions of community custody above and beyond those ordered directly by the trial court at sentencing. *See* former RCW 9.94A.713. Under this statute, the DOC is required to conduct a risk assessment and "recommend to the board any additional or modified conditions of the offender's community custody based upon the risk to community safety." Former RCW 9.94A.713(1). This provision specifically requires the DOC to recommend appropriate "rehabilitative programs" in which the offender may be required to participate or any other "affirmative conduct" the offender may be required to perform. *Id.* Although the DOC and the Board may not impose conditions of community custody "that are contrary to those ordered by the court, and may not contravene or decrease court-imposed conditions," the DOC and the Board are clearly authorized to impose conditions in addition to those imposed by the court. Former RCW 9.94A.713(2). Therefore, as part of its risk assessment and its determination of an offender's risk to the

reoffending if the presentence report finds that the person was a mentally ill person whose condition influenced the offense. *Id.* at 210.

community, the DOC and/or Board may impose conditions regarding rehabilitative programs and affirmative conduct conditions.

Here, the conditions challenged, psychiatric evaluation and the chemical dependency evaluation appear in the judgment and sentence in a list of conditions under “Other conditions may be imposed by the court or the Department during community custody, or are set forth here: ...” Those conditions are derived from those denominated “Special Sentence Requirements” set forth in App. H of the PSI. PSI at 13-14. They specifically are not listed as “Crime-Related Prohibitions.” *Id.* Boome objected below to a number of the special sentence requirements including the chemical dependency evaluation, but not the psychiatric evaluation. SRP 143-44. It was the court’s and prosecutor’s understanding that the conditions Boome was objecting to could be modified by the DOC. SRP 146, 151. Presumably these “special sentence requirements” fall within those authorized to be imposed by DOC under RCW 9.94A.713 during community custody for those persons sentenced pursuant to RCW 9.94A.712.

Boome cites to State v. Jones for the assertion that that court could not require a psychiatric evaluation unless it complied with the statutory requirements under RCW 9.94A.505(9) and found that the Boome suffered from a mental illness that contributed to the crime based on a PSI

or mental status evaluations. Appellant's Brief at 18. While Boome is correct if the court were imposing the conditions under RCW 9.94A.712 or 9.94A.700(5), additional conditions of community custody as may be deemed appropriate by the DOC and the Board under former RCW 9.94A.713 need *not* be "crime-related." Rather, they need only be "based upon the risk to community safety." Former RCW 9.94A.713(1). Therefore, the trial court in this case has done no more than authorize the DOC and the Board to do what they already have authority to do by statute.

Even if this Court finds that the special sentence requirements Boome challenges should be stricken from the judgment, this Court should remand for entry of an order striking the conditions without prejudice to the DOC's/the Board's authority to order an evaluation and treatment if it deems such action necessary to protect community safety if and when Boome becomes eligible for release from total confinement.¹¹ Certainly the DOC or the Board would be well within its authority to impose a number of significant restrictions and affirmative conditions given Boome's prior conviction for Child Molestation in the Third Degree,

¹¹ DOC stated a concern regarding Boome's "alternate perception of reality" due to his belief expressed at trial that the victim was attracted to him because of his long hair. PSI at 8. It appears that while Boome denies drug use, his last drug test in November of 2005 was positive for marijuana. Id. at 7.

under circumstances in which he took advantage of a girl who had passed out due to drinking, his failure to report and to comply with sexual deviancy treatment during supervision, and his commission of a more violent and intrusive sexual offense on another victim who was vulnerable due to the amount she had drunk, in order to ensure the community's safety.

E. CONCLUSION

For the foregoing reasons, the State requests that Boome's appeal be denied and his conviction and sentence affirmed.

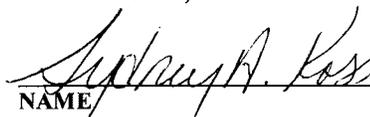
Respectfully submitted this 25th day of January 2011.


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Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the mail a properly stamped and addressed envelope, or caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Appellant's attorney, DANA LIND, addressed as follows:

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NAME Stephen A. Koss DATE 01/25/2011