

NO. 68056-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

WILLIS ALLEN WHIPPLE,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

S.T. is a 12-year-old girl who says that several relatives, including her father, had some sexual contact with her. Her father has never been prosecuted. The State charged Willis Whipple with four counts of rape of a child based on S.T.'s allegations. But at trial, S.T. testified that nothing happened. She did not describe having the parts of her body touched that were necessary to prove sexual intercourse, an essential element of rape. The prosecution told the jury that even though S.T. said nothing happened, the jury should not assume that nothing happened.

By virtue of the State's efforts to dilute its burden of proof and encourage the jury to convict Whipple based on a gut sense that S.T. was implying that something happened, the prosecution obtained convictions against Whipple that rest on speculation and sympathy, rather than reliable evidence or reasonable inferences from proven facts. The legally insufficient evidence, as well as improper sentencing conditions, require reversal of the convictions as sentence.

B. ASSIGNMENTS OF ERROR.

1. The prosecution did not prove the charged crimes by legally sufficient evidence.

2. The prosecution encouraged the jury to render a verdict by shifting the burden of proof.

3. The court erred by refusing to dismiss the charges after the prosecution rested its case due to the legally insufficient evidence.

4. The court imposed sentencing conditions that are impermissibly vague and contrary to the protections guaranteed by the First Amendment.

5. The court lacked authority to impose sentencing conditions that are not related to the crime of conviction.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The prosecution's obligation to prove each essential element of the crime charged prohibits the State from relying on speculation rather than proven facts. The State charged Whipple with the offense of rape, which requires evidence of sexual intercourse, but offered no direct or circumstantial evidence of actual sexual intercourse. Where the complainant never testifies that the essential elements of sexual intercourse occurred, and no other evidence otherwise demonstrates that an act of sexual intercourse occurred, is there legally insufficient evidence?

2. The prosecution may not encourage the jury to base their verdict on sympathy or sheer speculation. Here, the prosecution told the jury that they should disregard the complainant's testimony that nothing happened and assume the opposite is true. Did the prosecution impermissibly shift the burden of proof and seek a verdict based on passion or suspicion?

3. Sentencing conditions that implicate First Amendment freedoms must be narrowly drawn and closely related to the crime of conviction. The court ordered that Whipple may not engage in several undefined acts, such as possess "stimulus material" for an undefined deviancy or possess sexually explicit materials, even though no such materials were implicated in the crime of conviction. Did the court impermissibly impose conditions of community custody that are unconstitutionally vague and insufficiently related to the offenses of conviction?

D. STATEMENT OF THE CASE.

When S.T. was in kindergarten, she alleged that her father, Luddly, engaged in sexual contact with her. 1RP 71, 74, 124.¹ Later, she said she had sex with her father when she was nine

¹ The verbatim report of proceedings from trial and sentencing consists of two consecutively paginated volumes referred to as "1RP" and "2RP."

years old. 1RP 74-75, 151. She also said her two cousins Manny and Kenny had sexual contact with her when she was 10. 1RP 72-73. Luddy was not prosecuted for any of S.T.'s allegations, nor were Manny and Kenny, with whom S.T. still lives in the same household. 1RP 86, 90, 149, 153. Instead, the State brought charges of four counts of rape of a child in the first degree against S.T.'s uncle, Willis Allen Whipple. CP 71.

At Whipple's trial, 12-year-old S.T. said Whipple touched her "penis," but did not explain what part of her body she meant. 1RP 32. She said he licked her "pee pee" one time in the bathroom, without describing in any more detail what part of her body this was. 1RP 51. She said other "different" things happened in the bathroom but never explained what occurred. 1RP 55. S.T. was in seventh grade but attended a special school due to what her mother described as mental retardation. 1RP 84. Her friend Scotland who was the same age as S.T. said S.T. was able to do grade-level work and was pretty good at math. 1RP 105.

In his closing argument, the prosecutor admitted that S.T. said "nothing happened" a number of times, but told the jurors they should not assume that "nothing happened." 2RP 232. The prosecution also told the jury they could decide when four separate

incidents occurred even though the evidence did not indicate when, where, or how separate incidents occurred. 2RP 214. The trial court denied Whipple's motion to dismiss three of the four counts after the prosecution rested even though there was not evidence marking four distinct incidents of sexual intercourse as required for rape. 2RP 199.

Whipple was convicted of the four charged counts. CP 49-52. He received a standard range indeterminate sentence of 300 months to life imprisonment. CP 23. Pertinent facts are addressed further detail in the relevant argument sections below.

E. ARGUMENT.

1. Where the only eye witness never described the accused person engaging in acts that meet the elements of the charged offenses, and there is no other corroboration, the convictions rest on legally insufficient evidence

a. Criminal convictions may not rest on utter speculation.

The prosecution bears the burden of proving all elements of an offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. amend. 14; Wash. Const. art. I, § 3. Challenges to the sufficiency of the evidence are reviewed taking the evidence in the light most favorable to the prosecution. Jackson v. Virginia, 443 U.S. 307,

319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Jurors may not concoct evidence based on suspicion or speculation. Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir. 1995); see United States v. Nevils, 598 F.3d 1158, 1167 (9th Cir. 2010) (“[E]vidence is insufficient to support a verdict where mere speculation, rather than reasonable inference, supports the government's case.”); Juan H. v. Allen, 408 F.3d 1262, 1279 (9th Cir. 2005) (“Speculation and conjecture cannot take the place of reasonable inferences and evidence”). Reasonable inferences may be drawn only from proven facts. Maass, 45 F.3d at 1358. “[N]o reasonable inference” may flow from the complainant's failure to describe abuse at trial, because reasonable inferences must be based on the evidence. State v. Boehning, 127 Wn.App. 511, 522, 111 P.3d 899 (2005).

When the prosecution alleges multiple incidents of the same offense in the same charging period, the jury must unanimously agree on a specific act or incident that constitutes the crime. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). The evidence must “clearly delineate specific and distinct incidents of sexual abuse during the charging periods.” State v. Hayes, 81

Wn.App. 425, 431, 914 P.2d 788, rev. denied, 130 Wn.2d 1013 (1996) (quoting State v. Newman, 63 Wn.App. 841, 851, 822 P.2d 308, rev. denied, 119 Wn.2d 1002 (1992)).

In a case involving a very young complainant and allegations of multiple sexual assaults, this Court concluded that “generic” testimony may be sufficient to support a conviction for multiple counts of sexual assault if it meets certain minimum requirements:

First, the alleged victim must describe the kind of act or acts with sufficient specificity to allow the trier of fact to determine what offense, if any, has been committed. Second, the alleged victim must describe the number of acts committed with sufficient certainty to support each of the counts alleged by the prosecution. Third, the alleged victim must be able to describe the general time period in which the acts occurred.

Hayes, 81 Wn.App. at 438. In Hayes, an 11-year-old complainant gave generic testimony that the defendant “put his private part in mine” and that this occurred at least “four times” and up to “two or three times a week” during the charging period. Id. at 429. She described the usual course of conduct and did not describe other types of conduct. Id. The court concluded that the evidence was sufficiently specific to support all four charged counts of rape. Id. at 438-39.

In Whipple’s case, a 12-year-old complainant offered vague

testimony about potentially improper contact with Whipple that did not meet the essential elements of the charged crime. She never specified when any potential incidents occurred and gave the jury no rational basis on which to conclude Whipple committed the specific elements of rape of a child in the first degree on four separate occasions within the charging period.

b. The complainant's vague testimony did not set forth the essential elements of the charged crime.

The prosecution charged Whipple with four counts of rape of a child in the first degree during a single charging period. CP 71. The essential elements of rape of a child in the first degree are that the accused person had "sexual intercourse" with a child who was younger than 12 years old, the perpetrator was at least 24 months older than the complainant and the two are not married. RCW 9A.44.073(1). "Sexual intercourse" is defined by statute to mean: (1) intercourse under its ordinary meaning, including any penetration, however slight; (2) "any penetration of the vagina or anus however slight, by an object . . ." or (3) "any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another . . ." RCW 9A.44.010(1).

i. S.T. did not describe acts that meet the elements of sexual intercourse with sufficient specificity.

Hayes mandates that a complainant who offers generic testimony about multiple incidents of sexual abuse must describe the acts that occurred with “sufficient specificity” so that the trier of fact is able to “determine what offense if any was committed.” 81 Wn.App. at 431. As the Ninth Circuit explained in Maass, jurors may make reasonable inferences from proven facts, but may not predicate inferences on suspicion or speculation. 25 F.3d at 1358.

S.T. first testified about some contact with Whipple that clearly did not meet the elements of sexual intercourse. 1RP 26. She said that one night, while she slept in the living room of her grandmother’s doublewide mobile home alongside her three younger siblings, Whipple woke her up and directed her to come to the bedroom he was sharing with three others. 1RP 28-29; 2RP 174, 179. At least one person slept in the bottom bunk and S.T. climbed to the top bunk bed, where Whipple slept. Id. She said he touched “my penis, my butt, my boobies.” 1RP 32. When the prosecutor asked her “what part” is the penis that she said Whipple touched, S.T. said, “I don’t know.” 1RP 48. With substantial coaxing from the prosecutor, she said her penis is in the middle of the body,

between the legs, closer to the front. 1RP 48-49. She unequivocally said he never put anything inside her body. 1RP 50. The prosecution did not argue that any conduct in the bedroom could satisfy the legal elements of the charged crime. 2RP 207.

After this incident, S.T. said another incident occurred in the bathroom. She said, "he touched me." 1RP 36. She said "one thing" was different in the bathroom than the bedroom but she could not say more about it, did not remember it, and did not want to talk about it. 1RP 38. When asked what was different in the bathroom, she said he "starting licking me." 1RP 51. When asked where, she said, "In my pee pee." 1RP 51. But the prosecutor never asked her to describe what her pee pee was, where it was on her body, or whether it was similar to the "penis" she had said she had. 1RP 32, 51. S.T. said she did not have another name for her "penis." 1RP 32. S.T.'s mother said that she and S.T. referred to genitals as "don't touch areas." Snowden did not believe S.T. used any other names for her genitals. 1RP 85.

S.T. also implied but then denied that something happened in the laundry room. 1RP 39, 59. She said she took her clothes off to get dressed in the laundry room. 1RP 61-62. Then she said nothing else happened in the laundry room. 1RP 62. The

prosecutor asked her if she knew what “sex” was, and she said, “I don’t know what it means.” 1RP 62.

S.T.’s descriptions of contact with Whipple do not meet the essential elements of sexual intercourse. S.T. never said her vagina or anus were penetrated as required for sexual intercourse. See State v. A.M., 163 Wn.App. 414, 421, 260 P.3d 229 (2011) (parsing definition of sex organs for purposes of rape and rejecting claim that touching buttocks suffices). S.T. said she was touched but not penetrated by Whipple, but at best, touching on the outside of her butt, “boobies,” or penis would fall under the category of child molestation and the prosecution did not charge Whipple with that offense. See RCW 9A.44.010(2) (defining sexual contact as touching of sexual or intimate parts of a person for purpose the gratifying sexual desire); RCW 9A.44.083 (defining child molestation as adult knowingly causing sexual contact with child).

S.T. did not look at a diagram of a human body and explain what parts of her body she was talking about. She had no consistent language to describe her genitals. The prosecution never tried to clarify that she was discussing her genitals. S.T.’s lack of specific testimony meeting the elements of sexual intercourse, and the absence of other evidence demonstrating that

S.T. was the victim of “sexual intercourse” as defined by RCW 9A.44.010(1), results in insufficient evidence of the charged crime.

ii. The complainant did not testify to the number of acts with sufficient certainty for each count.

In State v. Jensen, 125 Wn.App. 319, 324, 104 P.3d 717, rev. denied, 154 Wn.2d 1011 (2005), the complainant testified that the defendant touched her in her private area “a few times.” She described one specific incident of being touched in her “private spot.” Id. at 327. She also described two other occasions where the defendant came into her bedroom at night. Id. Absent testimony about sexual contact on those other occasions, the court held that the complainant did “not describe the acts with sufficient specificity” to enable the trier of fact to determine whether any offenses were committed on the other occasions where the defendant entered her bedroom at night. Id. at 328.

Without referring to any specific part of the body, the prosecutor asked S.T. “how many times do you think he licked you,” and S.T. said, “a couple.” 1RP 52. He asked what she meant by “a couple,” and S.T. said, “I don’t know.” 1RP 52. When asked if it was more than three, she said it was. 1RP 52. But S.T. never said where on her body she was licked on any other occasions and

the prosecution never asked her to explain where on her body it occurred. 1RP 52, 54-55. When the prosecutor asked if it was always the same, she said no, it was different. 1RP 55. The prosecutor asked, "Did anything touch you in the bathroom on these other different times?" 1RP 56-57. S.T. said, "No." 1RP 57.

The prosecutor urged S.T. to talk more about "what happened." 1RP 55-56. He said, "can you tell us more about the bathroom?" 1RP 56. S.T. responded, "not really." 1RP 56. After prodding, S.T. said she was not touched in the bathroom. 1RP 57. Then she said she was touched by a palm, not fingers, on "my legs," and nowhere else. 1RP 57-58.

Sexual intercourse requires either actual penetration of the vagina or anus or sexual contact of the sex organs by the accused person's mouth. RCW 9A.44.010(1); see A.M., 163 Wn.App. at 419. S.T. said she was not licked more than one time, and never said she was licked in a sex organ. 1RP 52. Even if her "pee pee" could be considered a "sex organ" notwithstanding the prosecution's failure to elicit such evidence, S.T. insisted that each interaction with Whipple was different and was not the same type of touching each time. 1RP 55. Unlike Hayes, S.T. never described acts with sufficient specificity for the jury to determine whether any

acts that constitute “sexual intercourse” occurred on multiple occasions.

- iii. S.T. never described the time period of the allegations.

Hayes also mandates that the complaining witness “must be able to describe the general time period in which the acts occurred. 81 Wn.App. at 431. S.T. never said when any of these incidents occurred. The place was the same for each, her grandmother’s home, but she did not offer any more testimony about when the incidents happened. She did not discuss the time of the year, the weather, her age, or any indicia of relating to the time period.

S.T.’s mother Ronda Snowden explained that she and S.T.’s father Luddy had been married off and on. 1RP 89. They last lived together “probably about three, four years ago.” 1RP 79. Snowden said that when she was separated from S.T.’s father, S.T. visited her father every other weekend and then alternating weeks during the summer. 1RP 81. She did not say when these visits occurred in the course of S.T.’s life. 1RP 81. S.T.’s grandmother, who owned the home where S.T.’s father lived and the incidents allegedly occurred, said that S.T. stayed at their home on weekends and

some week-long periods from 2007 through 2010. 2RP 175. She had lived in that home since 2001. 2RP 174.

The charging period was September 2009 through July 2010. CP 71. The jury was instructed that it must find that the incidents occurred “on a date between on or about the 1st day of September, 2009 and on or about the 31st day of July, 2010.” CP 63-66. The sufficiency of evidence to sustain the verdict is determined with reference to the instructions. State v. Hickman, 135 Wn.2d 97, 102-03, 954 P.2d 900 (1998). S.T. never indicated that any incident she was discussing occurred in the time frame of the charging document and to-convict instruction, or even close in time to this time period.

S.T.’s grandmother said that Whipple spent the night at her house on occasion after Thanksgiving 2009, when his roof collapsed. 1RP 179, 188. He also stayed with two close friends during this time period. 1RP 176. Neither S.T. nor anyone else said that any of the claimed incidents occurred after Whipple’s roof collapsed.

The prosecution offered no rational basis to discern when the incidents occurred. S.T. never said how old she was during these alleged encounters. She did not say they occurred during a

certain grade of school, or after Whipple's roof collapsed. She simply never addressed the time frame of the incident and no other testimony establishes that it could only have occurred at a certain time. The lack of evidentiary basis on which to decide the time frame of the incidents means the prosecution has not proven that the incidents occurred during the charging period.

c. The prosecution conceded the complainant never described what happened but told the jury they should not assume nothing happened.

The prosecution urged the jury to convict Whipple even if it did not present evidence establishing when and how the essential elements of multiple incidents of rape occurred. The prosecution's closing argument diluted its burden of proof and encouraged the jurors to rest their verdict on what they felt in their heart. The insufficient evidence, combined with the prosecution's efforts to obtain convictions notwithstanding the lack of competent, reliable evidence, require reversal.

A prosecutor owes a duty to an accused person to ensure that the right to a fair trial is not violated. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); U.S. Const. amend. 14; Wash. Const. art. I, §§ 3, 22. A prosecutor commits misconduct by bolstering her case with facts not in evidence or asking the jury to

make inferences predicated on claims that were not introduced at trial. State v. Ramos, 164 Wn.App. 327, 341, 263 P.3d 1268 (2011); State v. Jones, 144 Wn.App. 284, 293, 183 P.3d 307 (2008) (misconduct to urge jury to consider professional consequences to police officer if lied at trial); Boehning, 127 Wn.App. at 521-22 (misconduct to argue that jury should consider complainant likely offered more detailed testimony in unadmitted interviews with police).

In Whipple's case the prosecutor urged the jurors to convict Whipple based on what "you feel in your heart" or "feel in your stomach," when S.T. said she let Whipple touch her to get chocolate. 2RP 206. He further explained that all the evidence must be viewed through the prism that "you knew, in your stomach, she [S.T.] was telling you the truth." 2RP 208. Whether it was true that Whipple gave S.T. chocolate after touching her in her bedroom had little significance to the charged offenses, because even if true, it did not show that Whipple engaged in sexual intercourse as required to prove rape. Therefore, the prosecution improperly encouraged the jury to convict Whipple by claiming that if S.T. was telling the truth about being promised chocolate, she did not need

to describe conduct that would constitute the four counts of rape charged.

The prosecution acknowledged that S.T. said she was licked on multiple occasions and it was different each time but never said what happened or how it was different. 2RP 231. The prosecutor admitted S.T. did not give “a good description” about “what made it different.” 2RP 231-32. But the prosecutor said that even though “she didn’t describe it . . . don’t assume from that evidence that it didn’t happen.” 2RP 232.

The prosecutor told the jury that even though S.T. said “nothing happened,” she did not mean “nothing.” 2RP 232. She said something happened, then said she did not know what happened, then said she did not want to talk about it. 2RP 232. Because she implied something may have happened “you can’t just assume that at one point when she says ‘nothing’ that it means that nothing happened.” 2RP 232.

The notion that the jury should not “assume” nothing happened to S.T. turns the prosecution’s burden of proof on its head. “The presumption of innocence is the bedrock upon which the criminal justice system stands.” State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). Telling the jury that they must

supply a reason to find there is a reasonable doubt improperly implies that jury's initial duty is to convict the accused, and also implies that the defendant must supply a reason to avoid convictions. State v. Venegas, 155 Wn.App. 507, 524, 228 P.3d 813 (2010). In Boehning, the prosecution argued that the defendant's failure to impeach the complainant with inconsistent statements showed that she must have consistently described being abused in her prior conversations with police and others. 127 Wn.App. at 522. This Court held that this argument impermissibly implied that the defendant carried the burden to produce evidence that the complainant was lying. Id. The prosecution also implied that jurors should ignore the complainant's reluctance to articulate multiple offenses at trial. The Boehning Court condemned such remarks on the ground that evidence from which reasonable inferences may be drawn is testimony or documents, not speculation about why the complainant was reluctant to testify at trial. Id.

The prosecution told the jury it could not "assume" from S.T.'s desire not to talk about what happened "that it didn't happen." 2RP 232. He also told the jury, "you can't just assume that at one point when she says 'nothing,' that it means nothing

happened.” 2RP 232. The prosecution exacerbated this improper framework for deliberations by telling the jury it should consider whether the evidence “create[s] a reasonable doubt,” which implied that the defendant has a burden to create such a doubt. 2RP 208; see also 2RP 215 (questions about evidence must “create a doubt” based on specific evidence). The presumption of innocence requires the jury to assume Whipple did not commit the charged crime, and the jury is not free to disregard that presumption when the complaining witness testifies that “nothing happened,” even if the prosecution suspects something happened that no one articulated at trial.

Finally, the prosecution’s closing argument demonstrates the entirely speculative nature of the charged offenses. The prosecution could not articulate any means to discern four specific incidents that might have occurred on which the jury could rest its verdict, but it abdicated that responsibility. The prosecution told the jury that it needed to agree each act occurred and “[y]ou can pick any ones you want.” 2RP 214. Because there was “no delineating mark” between each act, “it’s up to you.” 2RP 214. “So somebody has got to come up with the four times. If you want to say it was the first and the last time, or the first three times and the last time, . . . it

doesn't matter, as long as you all agree that those are the four acts that you're going to base your four verdicts on." 2RP 214. If you believe it happened once, then "[y]ou know this was going on. And it went on more than four times." 2RP 214. The prosecution put the onus on the jury to find four separate occurrences rather than acknowledging its burden to prove four separate acts.

The prosecution's evidence did not establish that even a single act that constituted the charged crime occurred. S.T.'s testimony must be viewed in the context of her inability to specify that Whipple engaged in sexual intercourse. When asked if she would promise to tell the truth at the start of her testimony, she said, "I'll try my best," indicating that she was not really sure what the truth was. 1RP 15.

S.T.'s testimony must also be considered in light of her failure to explain that Whipple's mouth touched her genitals. Although S.T. had some development delays, she was in seventh grade in school. 1RP 17. Her friend Scotland thought S.T. was a capable learner. 1RP 105. S.T. could have articulated the specific elements of the offense if the acts constituting rape had actually occurred. Rather than vaguely mention her "pee pee" or her "penis," the prosecution could have asked S.T. to show the jury on

a diagram where, exactly, she was touched. The prosecution's failure to obtain concrete testimony does not permit the jury to simply speculate what S.T. might have meant, yet the prosecution told them not to "assume" nothing happened even without evidence that something happened. Reasonable inferences must be based on proven facts, not on suspicion. The prosecution did not offer reliable evidence and encouraged the jury to convict Whipple anyway, telling them to supply the specificity by their own guesswork.

Since there was insufficient evidence to support the convictions, this Court must reverse the conviction with instructions to dismiss. To do otherwise would violate double jeopardy. Burks v. United States, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978)**Error! Bookmark not defined.** (the Double Jeopardy Clause "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.").

2. Unduly vague or impermissible community custody conditions must be stricken

The due process clauses of the federal and state constitutions require that citizens be provided with fair warning of

what conduct is illegal. U.S. Const. amend. 14; Const. art. I, § 3; State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). As a result, a condition of community custody must be sufficiently definite that ordinary people understand what conduct is illegal and the condition must provide ascertainable standards to protect against arbitrary enforcement. Id. at 752-53. Additionally, even offenders on community custody retain a constitutional right to free expression. See Procnier v. Martinez, 416 U.S. 396, 408-09, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974) (inmates retain First Amendment right of free expression through use of the mail). When a condition of community custody addresses material protected by the First Amendment, a vague standard may have a chilling effect on the exercise of First Amendment rights. Bahl, 164 Wn.2d at 752. An even stricter standard of definiteness therefore applies when community custody condition prohibits access to material protected by the First Amendment or implicates a right otherwise protected by the First Amendment. Id.

The court ordered that Whipple must not possess “sexual stimulus material for your particular deviancy as defined by the supervising Community Corrections Officer and therapist.” CP 33. The trial court ordered that Whipple “not possess or access

sexually explicit materials,” as directed by DOC, and not frequent establishments whose primary business pertains to sexually explicit or erotic materials. CP 33.

“[R]estrictions implicating . . . First Amendment rights must be clear and must be reasonably necessary to accomplish essential state needs and public order.” Bahl, 164 Wn.2d at 757-58, 761. In Bahl, the court held that an identical condition barring possession for “sexual stimulus material” as defined by a CCO or therapist was unconstitutionally vague. Id. at 761. The “deviancy” is undefined, and the possession of materials relating to an as-yet-undiagnosed deviancy is “utterly lacking in any notice of what behavior would violate it.” Id. This condition is unconstitutionally vague. Id.

Additionally, adult pornography is constitutionally protected speech. Bahl, 164 Wn.2d at 757; U.S. amend. 1; Wash. Const. art. I, § 5. The term “pornography” is unconstitutionally vague. Id. at 757-58; State v. Sansone, 127 Wn.App. 630, 639, 111 P.3d 1251 (2005). It is impermissibly vague because it does not limit it to images that are intended to sexually gratify the persons photographed or the viewer. The same vagueness applies to the

blanket bar on possessing or accessing sexually explicit materials.

Bahl, 164 Wn.2d at 744, 758.

In Bahl, the court addressed a condition of community custody that prohibited the offender from frequenting establishments where sexually explicit or erotic materials are the primary business of the store. 164 Wn.2d at 758. The court ruled that a combination of factors limited the application to this condition to adult bookstores or adult dance clubs, as there would be no other place where sexually explicit or erotic materials are the primary business. The same specificity is not contained in the condition prohibiting Whipple from possessing or accessing sexually explicit materials. It is not further limited to situations such as adult dance clubs. It is not limited to overt depictions of human genitals and does not exclude works of art. It does not contain any further provisions such as requiring the intent of the depiction be for sexual stimulus or gratification. Accordingly, this broadly worded restriction is unconstitutionally vague.

Furthermore, Whipple was not accused of possessing sexually explicit materials and there was no finding that this is a crime-related prohibition. The court lacks authority to order non-crime-related prohibitions. RCW 9.94A.703(3)(f). A crime-related

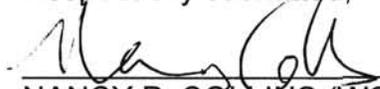
prohibition must directly relate to the circumstances of the crime for which the offender has been convicted. RCW 9.94A.030(10). There must be substantial evidence providing factual support for the prohibition. State v. Motter, 139 Wn.App. 797, 801, 162 P.3d 1190 (2007), rev. denied, 163 Wn.2d 1025 (2008); State v. O'Cain, 144 Wn.App. 772, 184 P.3d 1262 (2008) (striking prohibition on internet access in rape case because it was not crime related). In Whipple's cases, there was no allegation of any pornographic materials. Similarly, adult bookstores, peep shows, or X-rated movies were not involved in the allegations against Whipple, but the court ordered that he may not enter any such establishments. CP 33. The sentencing court erred when it imposed these conditions and they should be stricken.

F. CONCLUSION.

For the reasons stated above, Mr. Whipple respectfully asks this Court to reverse his convictions because they were not supported by the evidence presented. Alternatively, he asks this Court to reverse and dismiss the improper sentencing conditions.

DATED this 30th day of April 2012.

Respectfully submitted,



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Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 68056-1-I
)	
WILLIS WHIPPLE,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF APRIL, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| [X] | WILLIS WHIPPLE
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