

NO. 73902-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMEEL PADILLA,

Appellant.

FILED
Jul 08, 2016
Court of Appeals
Division I
State of Washington

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

The Honorable David A. Kurtz, Judge

BRIEF OF APPELLANT

MARY T. SWIFT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
C. <u>ARGUMENT</u>	5
1. THE INFORMATION OMITTED AN ESSENTIAL ELEMENT OF COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES, REQUIRING REVERSAL.	5
2. THE TRIAL COURT VIOLATED PADILLA’S RIGHT TO A FAIR AND IMPARTIAL JURY BY REFUSING TO INVESTIGATE WHETHER A JUROR WAS SLEEPING DURING TRIAL OR DESIGNATE THAT JUROR AS AN ALTERNATE.	13
3. THE COMMUNITY CUSTODY CONDITION PROHIBITING PADILLA FROM FREQUENTING AREAS WHERE MINOR CHILDREN ARE KNOWN TO CONGREGATE IS VOID FOR VAGUENESS.....	19
a. <u>The condition is void for vagueness because it does not provide fair notice and invites arbitrary enforcement.</u>	20
b. <u>This preenforcement claim is ripe for review.</u>	23
4. THE COMMUNITY CUSTODY CONDITION PROHIBITING PADILLA FROM POSSESSING OR ACCESSING PORNOGRAPHIC MATERIALS IS VOID FOR VAGUENESS.....	24
5. APPEAL COSTS SHOULD NOT BE IMPOSED.....	26
D. <u>CONCLUSION</u>	28

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>Staats v. Brown</u> 139 Wn.2d 757, 991 P.2d 615 (2000).....	26
<u>State v. Aljutily</u> 149 Wn. App. 286, 202 P.3d 1004 (2009).....	7, 8, 9, 11, 13
<u>State v. Campbell</u> 125 Wn.2d 797, 888 P.2d 1185 (1995).....	7
<u>State v. Curry</u> 118 Wn.2d 911, 829 P.2d 166 (1992).....	26
<u>State v. Duncan</u> __ Wn.2d __, __ P.3d __, 2016 WL 1696698 (Wash. Apr. 28, 2016)	26
<u>State v. Halstien</u> 122 Wn.2d 109, 857 P.2d 270 (1993)).	8, 20
<u>State v. Homan</u> 191 Wn. App. 759, 364 P.3d 839 (2015).....	9
<u>State v. Hughes</u> 106 Wn.2d 176, 721 P.2d 902 (1986).....	14
<u>State v. Irwin</u> 191 Wn. App. 644, 364 P.3d 830 (2015).....	21, 22, 23, 24
<u>State v. Johnson</u> 119 Wn.2d 143, 829 P.2d 1078 (1992).....	6
<u>State v. Jorden</u> 103 Wn. App. 221, 11 P.3d 866 (2000).....	15, 16, 18
<u>State v. Kjorsvik</u> 117 Wn.2d 93, 812 P.2d 86 (1991).....	6, 11, 12

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Leach</u> 113 Wn.2d 679, 782 P.2d 552 (1989).....	11
<u>State v. Mason</u> 170 Wn. App. 375, 285 P.3d 154 (2012).....	5
<u>State v. McCarty</u> 140 Wn.2d 420, 998 P.2d 296 (2000).....	6, 7, 13
<u>State v. McCormick</u> 166 Wn.2d 689, 213 P.3d 32 (2009).....	22
<u>State v. McNallie</u> 120 Wn.2d 925, 846 P.2d 1358 (1993).....	8
<u>State v. Miller</u> 156 Wn.2d 23, 123 P.3d 827 (2005).....	6
<u>State v. Peterson</u> 168 Wn.2d 763, 230 P.3d 588 (2010).....	5
<u>State v. Riles</u> 135 Wn.2d 326, 957 P.2d 655 (1998).....	21
<u>State v. Sanchez Valencia</u> 169 Wn.2d 782, 239 P.3d 1059 (2010).....	20, 21, 22, 23, 24
<u>State v. Sinclair</u> 192 Wn. App. 380, 367 P.3d 612 (2016).....	26
 <u>FEDERAL CASES</u>	
<u>Smith v. Phillips</u> 455 U.S. 209, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982).....	14
<u>United States v. Barrett</u> 703 F.2d 1076 (9th Cir. 1983)	16, 17, 18, 19

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>United States v. Brothers</u> 438 F.3d 1068 (10th Cir. 2006)	14, 16
<u>United States v. Cina</u> 699 F.2d 853 (7th Cir. 1983)	6
<u>United States v. Williams</u> 444 F.3d 1286 (11th Cir. 2006) <u>rev'd otr grds</u> , 553 U.S. 285, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008)...	25

OTHER JURISDICTIONS

<u>Commonwealth v. Braun</u> 74 Mass. App. Ct. 904, 905 N.E.2d 124 (2009)	17
<u>People v. South</u> 177 A.D.2d 607, 576 N.Y.S.2d 314 (1991).....	18
<u>State v. Hampton</u> 201 Wis. 2d 662, 549 N.W.2d 756 (1996).....	18, 19

RULES, STATUTES AND OTHER AUTHORITIES

CrR 6.5.....	15, 16
RAP 14.....	26
RAP 15.2.....	27
RCW 2.36.110	15, 16
RCW 9.68A	8
RCW 9.68A.001	8
RCW 9.68A.090	5, 7, 8, 9, 12

TABLE OF AUTHORITIES (CONT'D)

	Page
U.S. CONST. amend. VI.....	14
WASH. CONST. art. I, § 22	14
WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 1.02 (3d ed. 2008).....	15
WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 47.06 (3d ed. 2008).....	11

A. ASSIGNMENTS OF ERROR

1. The information is constitutionally deficient because it omits an essential element of the charged crime.

2. The trial court abused its discretion in refusing to investigate a juror who was sleeping during trial or designate that juror as an alternate.

3. The community custody condition requiring appellant to “not frequent areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer” is unconstitutionally vague.

4. The community custody condition requiring appellant to “not possess or access pornographic materials, as directed by the supervising Community Corrections Officer” is unconstitutionally vague.

Issues Pertaining to Assignments of Error

1. For a person to be guilty of communication with a minor for immoral purposes, he or she must intend that the communication reach a minor. Must appellant’s conviction be reversed where the information omitted this essential, implied element of the offense?

2. Did the trial court violate appellant’s right to a fair trial and right to an impartial jury by refusing to investigate a juror who was sleeping during trial or designate that juror as an alternate?

3. Is the community custody condition requiring appellant to “not frequent areas where minor children are known to congregate, as

defined by the supervising Community Corrections Officer” unconstitutionally vague?

4. Is the community custody condition requiring appellant to “not possess or access pornographic materials, as directed by the supervising Community Corrections Officer” unconstitutionally vague?

B. STATEMENT OF THE CASE

On June 22, 2015, the State charged Jameel Padilla by amended information with one count of communication with a minor for immoral purposes via electronic communication (Count I), two counts of first degree viewing depictions of a minor engaged in sexually explicit conduct (Counts II-III), and two counts of second degree viewing depictions of a minor engaged in sexually explicit conduct (Counts IV-V). CP 63-64. On the first count, the State alleged Padilla used a fictitious Facebook profile, Jim Wilcox, to send sexually explicit messages to nine-year-old K.M. CP 113-14. On Padilla’s motion, the trial court severed Count I and the parties proceeded to trial on that count in June 2015. CP 65-66, 96; 2RP 25-26.¹

K.M. and her family live in Arroyo Grande, California. 4RP 122, 140-41. She was nine years old in March and April of 2012 when she received Facebook messages from Jim Wilcox. 4RP 123-27. She testified

¹ This brief refers to the verbatim reports of proceedings as follows: 1RP – March 13, 2015; 2RP – June 18, 2015; 3RP – June 22, 2015; 4RP – June 23, 2015; 5RP – June 24, 2015; 6RP – June 25 and July 31, 2015.

her Facebook profile photo was taken when she was eight and a half years old. 4RP 126-27. The first message said, “you are pretty. i’m so hard jerking off to you. ;).” Ex. 11. K.M. explained she did not understand exactly what Wilcox’s message meant, but she wrote back because she thought he might be a family friend. 4RP 129. Wilcox then responded with messages like, “my cock is still hard for you” and “open wide.” Ex. 11. After telling Wilcox she was nine, K.M. told her father about the conversation. 4RP 129-31.

K.M. father, Gregory M., testified he read the Facebook chat between K.M. and Wilcox. 4RP 140. At trial, he did not recall the entire conversation, but remembered “something to the effect of a blow job and masturbating.” 4RP 140. He took a screenshot of the conversation, as well as Wilcox’s Facebook page, which he turned over to the Arroyo Grande Police Department. 4RP 140-41; Exs. 11, 12, 13.

The Arroyo Grande police served a search warrant on Facebook to obtain Wilcox’s account records. 4RP 153-54. The particular internet protocol (IP) address used to access Wilcox’s account was linked to Everett, Washington. 4RP 153-54. The Arroyo Grande police contacted the Everett Police Department and Detective Aaron DeFolo began investigating. 4RP 151-52. Comcast identified Padilla as the subscriber for the particular IP address in question. 4RP 153-54. DeFolo executed a search warrant at

Padilla's apartment on September 12, 2012, seizing a laptop computer and several cell phones. 4RP 157-58, 170-71.

DeFolo and another detective spoke with Padilla at his workplace that same day. 4RP 161-62. DeFolo testified Padilla did not admit to the chat with K.M., but acknowledged he had similar chats in the past. 4RP 163-64. He also acknowledged he had fictitious Facebook profiles he used to "troll" Facebook. 4RP 164. Padilla told the detectives he talked to girls on Facebook who appeared underage and masturbated to those chats. 4RP 165. Padilla explained he was an Iraq War veteran. 4RP 167. When he returned from his tour of duty, he started withdrawing from his friends and stopped dating women, while starting to troll Facebook. 4RP 167.

Detective Joseph Klingman examined Padilla's computer. 4RP 188-89. Klingman concluded the IP address used to communicate with K.M. on Facebook was the same as Padilla's IP address. 5RP 23-24, 35. Klingman also found evidence Padilla accessed the Wilcox Facebook account from his computer. 5RP 25-26. Two google searches were also conducted on Padilla's computer, one for "Jim Wilcox stalker" and the other for "Facebook stalker," both on May 26, 2012. 5RP 37-28. Klingman could not recover any portions of the actual chat with K.M. on Padilla's computer. 5RP 35-36. However, Klingman testified the Facebook records showed many other chats from Wilcox using very similar language as the chat with

K.M. 5RP 57-58. Klingman did not know whether Padilla's wireless internet or computer were password protected. 5RP 62-64.

The jury found Padilla guilty of communication with a minor for immoral purposes by electronic communication. CP 42. Because Padilla had no felony criminal history, the standard range sentence was one to three months. CP 23, 40. The trial court sentenced Padilla to 75 days confinement and 12 months of community custody. CP 24-25. Padilla timely appealed. CP 1.

C. ARGUMENT

1. THE INFORMATION OMITTED AN ESSENTIAL ELEMENT OF COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES, REQUIRING REVERSAL.

Essential elements of a crime are those the prosecution must prove to sustain a conviction. State v. Peterson, 168 Wn.2d 763, 772, 230 P.3d 588 (2010). In determining the essential elements, this Court first looks to the relevant statute. State v. Mason, 170 Wn. App. 375, 379, 285 P.3d 154 (2012). RCW 9.68A.090(2) defines felony communication with a minor for immoral purposes (CMIP), in relevant part, as follows:

A person who communicates with a minor for immoral purposes is guilty of a class C felony . . . if the person communicates with a minor or with someone the person believes to be a minor for immoral purposes, including the purchase or sale of commercial sex acts and sex trafficking, through the sending of an electronic communication.

The statutory language does not require the person intend that the communication reach a minor. However, a criminal statute is not always conclusive regarding all the elements of a crime. Courts may find nonstatutory, implied elements. State v. Miller, 156 Wn.2d 23, 28, 123 P.3d 827 (2005).

Like a to-convict instruction, a charging document must include all essential elements of a crime, “statutory or otherwise.” State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). The purpose of this rule is to notify the accused of the charges against him and allow him to prepare and present a defense. Id. at 101. An “essential element is one whose specification is necessary to establish the very illegality of the behavior.” State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992) (citing United States v. Cina, 699 F.2d 853, 859 (7th Cir. 1983)). Essential elements may derive from statutes, common law, or the constitution. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

A challenge to the constitutional sufficiency of a charging document may be raised for the first time on appeal. Kjorsvik, 117 Wn.2d at 102-03. When such is the case, as here, courts engage in a two-pronged inquiry: (1) do the necessary facts appear in any form or by fair construction can they be found in the charging document; and, if so, (2) can the individual show he was nonetheless actually prejudiced? Id. at 105-06. “If the document cannot

be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it.” State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995). If so, this Court presumes prejudice and reverses without further inquiry. McCarty, 140 Wn.2d at 425.

Here, the charging document does not contain or imply all necessary elements of the charged crime. Padilla was accused of:

That the defendant, on or about the 5th day of March, 2012, through the 14th day of April, 2012, did communicate with a person under the age of 18 years for immoral purposes through the sending of an electronic communication; proscribed by RCW 9.68A.090(2), a felony.

CP 63 (amended information); see also CP 117 (original information). The information omitted the essential, nonstatutory element that Padilla intended for the communication to reach a minor.

Case law establishes this is an essential element of the offense. In State v. Aljutily, Aljutily argued the CMIP statute, RCW 9.68A.090, is overbroad and infringes on constitutionally protected speech because it (1) penalizes communication with someone the accused believes to be a minor without requiring the belief be somehow objectively manifested, and (2) because there is no scienter required when the communication involves an actual minor. 149 Wn. App. 286, 291, 202 P.3d 1004 (2009). A law is overbroad under the First Amendment “if it sweeps within its prohibitions

free speech activities protected under the First Amendment.” Id. at 292 (quoting State v. Halstien, 122 Wn.2d 109, 122, 857 P.2d 270 (1993)).

The court of appeals concluded RCW 9.68A.090 is not overbroad because it “is limited to immoral communication intended for minors and does not reach a substantial amount of constitutionally protected speech or conduct.” Id. at 297 (emphasis added). In reaching this conclusion, the court relied on two Washington Supreme Court cases, State v. McNallie, 120 Wn.2d 925, 846 P.2d 1358 (1993), and State v. Hosier, 157 Wn.2d 1, 133 P.3d 936 (2006). Aljutily, 149 Wn. App. at 295-97.

In McNallie, the supreme court clarified that RCW 9.68A.090 is designed to prohibit “communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct.” 120 Wn.2d at 933 (emphasis added). The legislative finding introducing chapter 9.68A RCW reflects the legislature’s intent to prevent sexual exploitation of children and protect them from exposure to sexual misconduct for another’s personal gratification. Id. (quoting RCW 9.68A.001).

In Hosier, the court defined the term “communicate” to mean both transmission and reception of a message to a minor. 157 Wn.2d at 8-9. “Unless a person’s message is both transmitted by the person and received by the minor, the person has not communicated ‘with children,’ the act the statute is designed to prohibit and punish.” Id. The Hosier court also

concluded “the State must prove that the defendant intended that the communication reach the child.” Id. at 15.

The Aljutily court held the State’s burden of proving the communication was intended to reach a minor, articulated in Hosier, saved the statute from overbreadth: “this limits the breadth of the statute and allows adults who do not intend to communicate with children to engage in communications of a sexual nature without fear of prosecution.” 149 Wn. App. at 296. The court concluded the “case law makes clear” that “RCW 9.68A.090 prohibits communication, by words or conduct that is: (1) done for immoral purposes, (2) intended to reach a minor, and (3) received by a minor, or someone the person believed to be a minor.” Id.

In other words, the statute applies “only if one intends that an immoral communication reach a minor.” Id. at 296-97. This requisite element of intent “sufficiently limits the amount of speech or conduct that the statute regulates and ensures that a substantial amount of protected expressive activity is not deterred.” Id. at 297; see also State v. Homan, 191 Wn. App. 759, 777-78, 364 P.3d 839 (2015) (implying a criminal intent element for the crime of luring to save the statute from unconstitutional overbreadth)

The information charging Padilla omitted the essential element that he intended the communication to reach a minor. The information stated

only that Padilla “did communicate with a person under the age of 18 years for immoral purposes through the sending of an electronic communication.” The necessary intent cannot be found or fairly construed from this language. The information could have swept in protected speech, like sexual communications intended for an adult but intercepted by a minor.

The trial court recognized intent that the communication reach a minor was an essential element of the offense and instructed the jury as such, over the State’s objections:

To convict the defendant of the crime of Communication with a Minor for Immoral Purposes, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 5th day of March, 2012 through the 14th day of April, 2012, the defendant communicated with K.M.;

(2) That the communication was done for immoral purposes of a sexual nature and was intended to reach a minor;

(3) That the defendant communicated with K.M. through the sending of electronic communication;

(4) That the communication was received by K.M.;

(5) That K.M. was a minor; and

(6) That any of these acts occurred in the State of Washington.

CP 51 (emphasis added); 5RP 148-66; 6RP 3-7. Defense counsel acknowledged the pattern to-convict instruction did not currently include the element, but noted the instruction had not been updated since 2005, before both Hosier and Aljutily were decided. 5RP 166; 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 47.06 & cmt., at 873-76 (3d ed. 2008) (WPIC).

Kjorsvik provides a useful contrast. There, the court held an information must include all statutory *and nonstatutory* elements of the charged offense, because “mere recitation of the statutory language in the charging document may be inadequate.” Kjorsvik, 117 Wn.2d at 98-99 (quoting State v. Leach, 113 Wn.2d 679, 688, 782 P.2d 552 (1989)). The court explained it is sufficient to charge in language of the statute only if “the statute defines the offense with certainty.” Id. at 99.

Kjorsvik was charged with first degree robbery. Id. at 95. Intent to steal is an essential element of robbery, even though the robbery statute does not include that element. Id. at 98. Though the precise “intent to steal” language was missing from Kjorsvik’s information, id. at 96, the court explained it is not fatal to an information that the “exact words of a case law element are not used.” Id. at 109. Rather, “the question in such situations is whether all the words used would reasonably apprise an accused of the elements of the crime charged.” Id. at 109. Words in a charging document

are read as a whole, construed according to common sense, and include facts that are necessarily implied. Id.

The information alleged Kjorsvik “unlawfully, with force, and against the baker’s will, took the money while armed with a deadly weapon.” Id. at 110. The court reasoned it was “hard to perceive” how Kjorsvik could have taken all these actions “and yet not have intended to steal the money.” Id. Kjorsvik’s intent to steal was therefore “necessarily implied” from the facts included in the information. Id. at 109. Reading the information as a whole and in a commonsense manner, then, the court held it informed Kjorsvik of all the essential elements of robbery. Id. at 110-11.

Here, the charging document parroted the language of the CMIP statute. As demonstrated above, the statutory language alone does not define the offense with sufficient certainty, because the State must also prove the individual intended that the communication reach a minor. But, unlike Kjorsvik, intent to reach a minor cannot be necessarily implied from the facts alleged in the information. All the information alleged was that Padilla communicated with a person under 18 years old for immoral purposes by sending an electronic communication.² CP 63. It did not even identify the

² It makes sense the State did not include the intent to reach a minor element in the charging document, because the State did not believe it was an element of the offense. Despite the supreme court’s clear statement in Hosier that the State bears the burden of proving the communication was intended to reach a minor, the State argued, “I maintain that that requirement that the State prove it was

“person under 18 years old” by name. Construed as a whole, these facts nowhere imply Padilla intended that the communication to reach minor.

A liberal reading of Padilla’s information fails to reveal, by implication or otherwise, the essential element that he intended that the communication to reach a minor. Prejudice must therefore be presumed. McCarty, 140 Wn.2d at 425. This Court should dismiss Padilla’s conviction without prejudice. Id. at 428.

2. THE TRIAL COURT VIOLATED PADILLA’S RIGHT TO A FAIR AND IMPARTIAL JURY BY REFUSING TO INVESTIGATE WHETHER A JUROR WAS SLEEPING DURING TRIAL OR DESIGNATE THAT JUROR AS AN ALTERNATE.

Just before the trial court instructed the jury and the parties made their closing arguments, defense counsel noted a juror had been sleeping during trial: “People who have been watching with me during the trial have noticed that Juror 8 spends a lot of time appearing to be sleeping. Nodding off. We saw a lot of inattention there.” 6RP 11. Defense counsel proposed the sleeping juror be replaced with an alternate, as the jury had not yet begun deliberating. 6RP 11. The prosecutor did not see the juror sleeping but said he had “no reason to doubt” defense counsel. 6RP 12.

intended to reach a minor is not an accurate statement of the law.” 5RP 160. The State claimed “the Aljutily court is a misapplication of the court’s analysis and holding in Hosier.” 6RP 5. The same prosecutor who made this argument at trial also filed the original and amended charging documents omitting the essential element. CP 63-64; CP 117-18.

The trial court did not investigate whether the juror had been sleeping during trial. The court said it watched the jury “certainly on occasion” and “did not notice anything in particular.” 6RP 11-12. The court speculated “on occasion that jurors and others, including judges, sometimes close their eyes as they are listening to things. And that does not necessarily mean they are asleep.” 6RP 12. The court accordingly refused to designate the juror as an alternate and proceeded with the jury instructions. 6RP 12. A different juror was randomly selected as an alternate after the parties’ closing arguments. 6RP 82.

The Sixth Amendment and article I, section 22 of the Washington Constitution guarantees the right to a fair trial “by an impartial jury.” U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. An impartial jury means “a jury capable and willing to decide the case solely on the evidence before it.” Smith v. Phillips, 455 U.S. 209, 217, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982). “Clearly, such a jury must be composed of members who not only are free of bias in favor of or against a particular party but are also able, in a more basic sense, to carry out their function.” United States v. Brothers, 438 F.3d 1068, 1071 (10th Cir. 2006). A trial court’s determination of whether a juror was inattentive during trial is reviewed for abuse of discretion. State v. Hughes, 106 Wn.2d 176, 204, 721 P.2d 902 (1986)

In Washington, the dismissal of an unfit juror is governed by statute:

It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

RCW 2.36.110 (emphasis added). While the statute governs what justifies dismissal of a juror for unfitness, CrR 6.5 outlines the specific procedure. It provides: “If at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged, and the clerk shall draw the name of an alternate who shall take the jurors place on the jury.” CrR 6.5 (emphasis added). Thus, before deliberations begin, the trial court has a “continuous obligation” to replace an inattentive juror with an alternate. State v. Jorden, 103 Wn. App. 221, 227, 11 P.3d 866 (2000). Such action is necessary to protect the accused’s right to an impartial jury.

The right to an impartial jury is also reflected in the jury instructions. For instance, Padilla’s jury was instructed: “It is your duty to decide the facts in this case based upon the evidence presented to you at trial.” CP 44; 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 1.02, at 13 (3d ed. 2008). The instructions likewise specify “[t]he evidence that you are to consider during your deliberations consists of the testimony that you have heard from the witnesses and the exhibits that I have

admitted, during the trial.” CP 44. Each party is entitled to the benefit of all the evidence, whether or not that party introduced it. CP 45. Reasonable doubt “is such a doubt that would exist in the mind of a reasonable person after fully, fairly, and carefully considering all the evidence or lack of evidence.” CP 47 (emphasis added). These instructions demonstrate jurors must actually hear all the evidence “to carry out their function.” Brothers, 438 F.3d at 1071. A juror who sleeps during trial cannot do this.

In Jorden, the trial court excused a juror who fell asleep several times during trial. 103 Wn. App. at 224-25. Because the juror did not hear all the evidence presented, her fitness was compromised, and the judge was required to dismiss her under RCW 2.36.110 and CrR 6.5. Id. at 230. The appellate court concluded the judge did not need to individually question the juror before dismissing her, because he allowed both parties to call witnesses, heard argument from both sides, and considered his own notes about the juror’s conduct. Id. at 227. Based on this hearing, there was no dispute the juror was sleeping. Id. at 228.

By contrast, in United States v. Barrett, after the trial court instructed the jury but before deliberations began, a juror asked to be removed from the panel because he had been sleeping during trial. 703 F.2d 1076, 1082 (9th Cir. 1983). The court refused to dismiss the juror, believing it did not have authority to do so. Id. After the jury returned a guilty verdict, Barrett filed a

motion to permit the defense to interview the sleeping juror. Id. The trial court denied the motion without conducting any investigation, finding “there was no juror asleep during this trial.” Id.

The Ninth Circuit did not believe “that under the particular circumstances of this case, the trial judge could properly take judicial notice of the fact that ‘there was no juror asleep during this trial’ without making further inquiry into the matter.” Id. at 1083. Trial courts have “considerable discretion in determining whether to hold an investigative hearing on allegations of jury misconduct and in defining its nature and extent.” Id. However, “in failing to conduct a hearing or make any investigation into the ‘sleeping’-juror question, the trial judge abused his considerable discretion in this area.” Id. The Ninth Circuit held remand was necessary for the trial court to hold a hearing on whether the juror was sleeping during trial and, if so, whether it denied Barrett a fair trial. Id.

State appellate courts have reached the same conclusion where the trial court fails or refuses to investigate a sleeping juror. See, e.g., Commonwealth v. Braun, 74 Mass. App. Ct. 904, 905, 905 N.E.2d 124 (2009) (“[W]e conclude that the judge abused his discretion by failing to conduct a voir dire where there was a very real basis for concluding that the juror was sleeping during testimony and the judge’s instructions, thereby calling into question that juror’s ability to fulfil her oath to try the issues

according to the evidence.”); People v. South, 177 A.D.2d 607, 608, 576 N.Y.S.2d 314 (1991) (“[T]he court should have granted the defendant’s request and conducted a probing and tactful inquiry to determine whether juror number 9 was unqualified to render a verdict based upon her apparent sleeping episodes.”); State v. Hampton, 201 Wis. 2d 662, 673, 549 N.W.2d 756 (1996) (“[W]e conclude that the responsibility of the trial court to assure the impartiality of the jury and due process is of such paramount importance that when it is conceded that a juror was sleeping, summarily foreclosing further inquiry is an erroneous exercise of trial court discretion.”).

In Jorden, the juror was replaced with an alternate before deliberations began. 103 Wn. App. at 229. The issue of whether her misconduct prejudiced Jorden’s right to a fair trial was therefore premature. Id. The Jorden court recognized, however, that the allegation of the sleeping juror in Barrett, “if true, prejudiced Barrett’s right to a fair trial,” because “he was convicted by a jury that included one member who had not heard all the evidence.” Id. at 228.

Barrett is on point. Defense counsel informed the trial court he observed Juror 8 sleeping during trial. 6RP 11. The trial judge and the prosecutor had no reason to doubt defense counsel’s observations. 6RP 11-12. Nevertheless, the judge refused to voir dire the sleeping juror or designate her as an alternate. 6RP 12. The judge apparently concluded Juror

8 was not sleeping because he had not seen her sleeping. 6RP 11-12. He also relied on pure speculation that she may have just been closing her eyes while listening to the testimony. 6RP 12. This is analogous to Barrett, where the judge could not properly take judicial notice of the fact that no juror was sleeping “without making further inquiry into the matter.” 703 F.2d 1083. If Juror 8 slept during trial, then she did not hear all the evidence and was unfit to render a verdict. The trial judge accordingly should have either made further inquiry into the matter or designated her as an alternate. Failure to do so was an abuse of discretion, because the judge put at risk Padilla’s right to an impartial jury and right to a fair trial.

This Court should remand for the trial court to conduct an evidentiary hearing to determine the extent of the juror’s inattentiveness, the importance of the testimony missed, and whether such inattention prejudiced Padilla. See Barrett, 703 F.2d at 1083; Hampton, 201 Wis. 2d at 673.

3. THE COMMUNITY CUSTODY CONDITION PROHIBITING PADILLA FROM FREQUENTING AREAS WHERE MINOR CHILDREN ARE KNOWN TO CONGREGATE IS VOID FOR VAGUENESS.

As a condition of community custody, the trial court ordered Padilla: “Do not frequent areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer.” CP 37. This condition is unconstitutionally vague because it is not sufficiently definite to

apprise Padilla of prohibited conduct and allows for arbitrary enforcement by his community corrections officer (CCO).

- a. The condition is void for vagueness because it does not provide fair notice and invites arbitrary enforcement.

An illegal or erroneous sentence may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). The due process vagueness doctrine requires the State to provide citizens fair warning of proscribed conduct. Id. at 752. The doctrine also protects against arbitrary, ad hoc, or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is unconstitutionally vague if it does not (1) define the offense with sufficient definiteness such that ordinary people can understand what conduct is proscribed; or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53.

There is no presumption in favor of the constitutionality of a community custody condition. State v. Sanchez Valencia, 169 Wn.2d 782, 792-93, 239 P.3d 1059 (2010). Imposition of a vague condition is manifestly unreasonable, requiring reversal. Id. at 791-92.

In State v. Irwin, the trial court imposed a condition identical to the one here: “Do not frequent areas where minor children are known to congregate, as defined by the supervising CCO.” 191 Wn. App. 644, 649,

364 P.3d 830 (2015). This Court struck the condition as being void for vagueness and remanded to the trial court for resentencing. Id. at 652-55.

The Irwin court explained, “Without some clarifying language or an illustrative list of prohibited locations[,] . . . the condition does not give ordinary people sufficient notice to ‘understand what conduct is proscribed.’” Id. at 655 (quoting Bahl, 164 Wn.2d at 753). This Court acknowledged “[i]t may be true that, once the CCO sets locations where ‘children are known to congregate’ for Irwin, Irwin will have sufficient notice of what conduct is proscribed.” Id. However, this “would leave the condition vulnerable to arbitrary enforcement,” rendering it unconstitutional under the second prong of the vagueness analysis. Id.

In State v. Riles, the Washington Supreme Court upheld the constitutionality of a community custody condition almost identical to the one in Irwin and here. 135 Wn.2d 326, 349, 957 P.2d 655 (1998), abrogated by Sanchez Valencia, 169 Wn.2d 782. However, the Riles court presumed the condition was constitutional, a standard later rejected in Sanchez Valencia, 169 Wn.2d at 792-93.

The Irwin court therefore concluded Riles did not control and instead examined the supreme court’s more recent decision in Bahl. Irwin, 191 Wn. App. at 653-55. There, the court held a condition to be unconstitutionally vague where it prohibited Bahl from possessing or accessing pornographic

materials, “as directed by the supervising Community Corrections Officer.” Bahl, 164 Wn.2d at 743. The court explained, “The fact that the condition provides that Bahl’s community corrections officer can direct what falls within the condition only makes the vagueness problem more apparent, since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement.” Id. at 758.

Like in Bahl and Irwin, the condition prohibiting Padilla from frequenting areas where minors are known to congregate does not provide sufficient definiteness such that Padilla knows where he can and cannot go. Some locations are obvious: schools, playgrounds, or public swimming pools. But many other locations are not obvious: public parks, bowling alleys, shopping malls, theaters, churches, hiking trails, grocery stores, and so on.³ A particular restaurant in a certain locale may attract children while the same restaurant in a different area may not. How is Padilla to know which is prohibited and which is not? Because an ordinary person would not know what conduct is prohibited, the condition fails the first prong of the vagueness test.

The condition also fails the second prong of the vagueness test. Both Bahl and Sanchez Valencia involved delegation to the CCO to define the

³ This indefiniteness was fully realized in State v. McCormick, where McCormick was held in violation of the same condition when he went to a food bank that happened to be in the same building as a grade school. 166 Wn.2d 689, 692-96, 213 P.3d 32 (2009).

parameters of a condition. Bahl, 164 Wn.2d at 758; Sanchez Valencia, 169 Wn.2d at 794. The Sanchez Valencia court held that where a condition leaves so much discretion to an individual CCO, it is unconstitutionally vague. 169 Wn.2d at 795. The same is true here. A creative CCO could come up with almost any location where he or she believed minors congregated. The condition gives Padilla's CCO unfettered discretion to define where minors congregate. This "virtually acknowledges that on its face" that the condition "does not provide ascertainable standards for enforcement." Bahl, 164 Wn.2d at 758.

The condition is unconstitutionally vague and should be stricken because it fails to provide reasonable notice as to what conduct is prohibited and exposes Padilla to arbitrary enforcement. Irwin, 191 Wn. App. at 655.

b. This preenforcement claim is ripe for review.

Courts routinely entertain preenforcement challenges to sentencing conditions. Sanchez Valencia, 169 Wn.2d at 787. A preenforcement challenge to a community custody condition is ripe for review "if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." Id. at 786 (quoting Bahl, 164 Wn.2d at 751).

The issue in Padilla's case is primarily legal: does the condition prohibiting Padilla from going where children are known to congregate violate due process vagueness standards? See, e.g., Sanchez Valencia, 169

Wn.2d at 790-91 (condition prohibiting use of drug-related paraphernalia was ripe for vagueness review); Bahl, 164 Wn.2d at 752 (condition prohibiting possession of pornography was ripe for vagueness review).

Second, this question is not fact-dependent. Either the condition as written provides constitutional notice and protection against arbitrary enforcement or it does not. Sanchez Valencia, 169 Wn.2d at 788-89 (“[I]n the context of ripeness, the question of whether the condition is unconstitutionally vague does not require further factual development.”).

Third, the challenged condition is final because Padilla has been sentenced to abide by it. Id. at 789 (“The third prong of the ripeness test, whether the challenged action is final, is indisputably met here. The petitioners have been sentenced under the condition at issue.”). Although the State has not yet charged Padilla with violating the condition, this preenforcement claim is ripe for review. Irwin, 191 Wn. App. at 651-52.

4. THE COMMUNITY CUSTODY CONDITION PROHIBITING PADILLA FROM POSSESSING OR ACCESSING PORNOGRAPHIC MATERIALS IS VOID FOR VAGUENESS.

The trial court also imposed the following community custody condition: “Do not possess or access pornographic materials, as directed by the supervising Community Corrections Officer . . . Pornographic materials

are defined as images of sexual intercourse, simulated or real, masturbation, or the display of intimate body parts.” CP 37.

As discussed above, the Washington Supreme Court in Bahl held the identical condition prohibiting possession of pornographic materials was unconstitutionally vague. 164 Wn.2d at 743, 758. Bahl controls.

The second sentence does not save the condition from vagueness—it only exacerbates it. The Bahl court noted a CCO could interpret the condition to “include any nude depiction,” such as “a picture from *Playboy Magazine* or a photograph of Michelangelo’s sculpture of David.” 164 Wn.2d at 756. The condition here actually *allows* for such enforcement: Michelangelo’s sculpture of David involves “the display of intimate body parts.” CP 37. So does Botticelli’s Birth of Venus painting, along with countless other works of art. Padilla would be in violation of his community custody for possessing reproductions of any such artwork, accessing them online, or even viewing them in person—all protected speech under the First Amendment.⁴

⁴ See Bahl, 164 Wn.2d at 753 (“As the Eleventh Circuit observed, ‘[v]agueness concerns are more acute when a law implicates First Amendment rights and a heightened level of clarity and precision is demanded of criminal statutes because their consequences are more severe.’” (quoting United States v. Williams, 444 F.3d 1286, 1306 (11th Cir. 2006), rev’d on other grounds, 553 U.S. 285, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008)).

This Court should hold the condition prohibiting Padilla from possessing or accessing pornographic materials is void for vagueness, and remand for the trial court to strike the condition.

5. APPEAL COSTS SHOULD NOT BE IMPOSED.

If Padilla does not substantially prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP . RCW 10.73.160(1) provides that appellate courts “may require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). This Court has ample discretion to deny the State’s request for appellate costs. State v. Sinclair, 192 Wn. App. 380, 387-93, 367 P.3d 612 (2016) (exercising discretion and denying State’s request for costs).

Padilla’s ability to pay must be determined before discretionary LFOs are imposed.⁵ The trial court made no such finding, waiving all discretionary LFOs. CP 27. The court did, however, enter an order of indigency, finding Padilla “lacks sufficient funds to prosecute or defend an appeal.” Supp. CP__ (Sub. No. 80, Order of Indigency, at 1). Padilla

⁵ See State v. Duncan, __ Wn.2d __, __ P.3d __, 2016 WL 1696698, at *2 (Wash. Apr. 28, 2016) (recognizing “[t]he imposition and collection of LFOs have constitutional implications and are subject to constitutional limitations,” and a “constitutionally permissible system that requires defendants to pay court ordered LFOs must meet seven requirements,” including “[t]he financial resources of the defendant must be taken into account” (quoting State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992))).

reported having no income, assets, or real estate. Supp. CP__ (Sub. No. 79, Motion & Declaration for Order Authorizing the Defendant to Seek Review at Public Expense, at 1-2). He had only \$1,500 in cash at the time of sentencing and owed nearly \$30,000 in loans. Id. at 3. The record reflects Padilla worked at Boeing at the time of the investigation, but it is unclear what type of employment he had there—whether skilled or unskilled. 1RP 7-8. It is safe to assume Padilla’s job at Boeing will not be guaranteed after his felony sex offense convictions.⁶

The State also noted at sentencing it was not seeking discretionary LFOs because it wanted Padilla to prioritize paying for sexual deviancy treatment and restitution: “I would rather see any additional funds he has go towards that.” 6RP 132. An appellate cost bill would be at odds with this stated goal, as would an award of appellate costs.

Finally, there has been no order finding Padilla’s financial condition has improved or is likely to improve. RAP 15.2(f) specifies “[t]he appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party’s financial condition has improved to the extent that the party is no longer indigent.” This Court must

⁶ Padilla is also serving 84 months on his convictions for viewing depictions of a minor engaged in sexually explicit conduct.

presume Padilla remains indigent and give him the benefits of that indigency. RAP 15.2(f).

For these reasons, this Court should not assess appellate costs against Padilla in the event he does not substantially prevail on appeal.

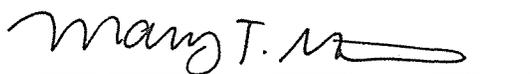
D. CONCLUSION

This Court should dismiss Padilla's conviction without prejudice because the information omits an essential element. Alternatively, this Court should remand for an evidentiary hearing for the trial court to determine the scope and prejudice of the sleeping juror's inattention. Finally, this Court should remand for the trial court to strike the unconstitutionally vague community custody conditions.

DATED this 8th day of July, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



MARY T. SWIFT
WSBA No. 45668
Office ID No. 91051

Attorneys for Appellant