SUPREME COURT NO. 94605-1

NO. 73902-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMEEL PADILLA,

Petitioner.

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

The Honorable David A. Kurtz, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Jameel Padilla asks this Court to grant review of the court of appeals' unpublished decision in State v. Padilla, No. 73902-6-1, filed April 24, 2017 (attached as an appendix).

B. ISSUES PRESENTED FOR REVIEW

1. Is this Court's review warranted under RAP 13.4(b)(3) to determine whether the information charging Padilla with communication with a minor for immoral purposes omitted the essential element that Padilla intended that the communication reach a minor, where no Washington court has yet considered the issue?

2. Is this Court's review warranted under RAP 13.4(b)(1) and (b)(3) to determine whether the community custody condition requiring Padilla to "not possess or access pornographic materials, as directed by the supervising Community Corrections Officer" is unconstitutionally vague and overbroad where it defines pornographic materials, in part, as "the display of intimate body parts," plainly encompassing protected speech?

C. STATEMENT OF THE CASE

On June 22, 2015, the State charged Padilla by amended information with one count of communication with a minor for immoral purposes via electronic communication (CMIP) (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. Upon 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.

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 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 conversation 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 using Padilla's IP address, 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. With no prior felony history, the trial court sentenced Padilla to 75 days of confinement and 12 months of community custody. CP 23-25.

On appeal, Padilla argued the charging document omitted the essential element that he intended that the communication reach a minor, which saves the CMIP statute from overbreadth. Br. of Appellant, at 5-13. Padilla also challenged a community custody condition prohibiting him from possessing or accessing "pornographic materials, as directed by the

supervising Community Corrections Officer." Br. of Appellant, at 24-26. The condition defined pornographic materials in part as "the display of intimate body parts." CP 37; Br. of Appellant, at 24-25. Padilla argued this definition plainly encompassed protected speech under the First Amendment and was therefore void for vagueness. Br. of Appellant, at 24-26. The court of appeals rejected Padilla's arguments and affirmed his conviction, remanding only to strike another unlawful community custody condition. Opinion, at 6-9.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THIS COURT'S REVIEW IS WARRANTED TO DECIDE WHETHER THE INFORMATION OMITTED AN ESSENTIAL ELEMENT OF COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES.

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, 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. CP 63. It did not even identify the

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

The court of appeals acknowledged that under Hosier, "an essential implied element of the crime of CMIP is that [Padilla] intended for the communication to reach a minor." Opinion, at 3. The court nevertheless held the charging document fairly implied the allegation that Padilla intended that the communication reach a minor, despite it including no such language. Opinion, at 5. With cursory reasoning, the court explained, "We fail to see, nor does Padilla explain, how he could have sent an electronic communication to a child and yet not have intended for the communication to reach the child." Opinion, at 5. The court either ignored or overlooked Padilla's point that a communication may have been intended to reach an adult but in fact reached a minor, which would not be criminal under the statute.

No Washington court has yet addressed this issue. 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 therefore grant review under RAP 13.4(b)(3), reverse the court of appeals, and dismiss Padilla's conviction without prejudice.

2. THIS COURT'S REVIEW IS WARRANTED TO DETERMINE WHETHER THE COMMUNITY CUSTODY CONDITION PROHIBITING PADILLA FROM POSSESSING OR ACCESSING PORNOGRAPHIC MATERIALS IS OVERBROAD AND 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.

In State v. Bahl, this 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." 164 Wn.2d 739, 743, 193 P.3d 678 (2008). 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.

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." Id. 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.[1]

The Bahl court recognized that when a community custody condition "concerns material protected under the First Amendment," a vague standard "can cause a chilling effect on the exercise of sensitive First Amendment freedoms." 164 Wn.2d at 753. As such, courts apply a stricter standard of definiteness if material protected by the First Amendment falls within the prohibition. Id. Restrictions implicating First Amendment rights "must be clear and must be reasonably necessary to accomplish essential state needs and public order." Id. at 758.

The court of appeals failed to apply this stricter standard, apparently having no problem with the blatant infringement of Padilla's First Amendment rights: "The condition does have standards to avoid being

[1] 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).

arbitrarily enforced because the restricted material is clearly defined." Opinion, at 9. The court therefore rejected Padilla's argument. Opinion, at 9. But neither the State nor the court of appeals articulated how restricting Padilla's access to timeless works of art is reasonably necessary to accomplish essential state needs and public order.

The court of appeals' decision is in direct conflict with this Court's decision in Bahl, warranting review under RAP 13.4(b)(1). This Court's review is further warranted under RAP 13.4(b)(3) to determine whether the community custody condition as written violates Padilla's First Amendment rights—a significant question of constitutional law.

E. CONCLUSION

For the aforementioned reasons, Padilla respectfully asks this Court to grant review under RAP 13.4(b)(1) and (b)(3).

DATED this 23rd day of May, 2017.

Respectfully submitted,

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Appendix

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	)	No. 73902-6-I
	)	DIVISION ONE
v.	)	
JAMEEL L. PADILLA, Appellant.	)	UNPUBLISHED OPINION
	)	FILED: April 24, 2017

SPEARMAN, J. — Jameel Padilla was convicted of communication with a minor for immoral purposes (CMIP). On appeal, he argues that the State's charging document was constitutionally deficient because it lacked an essential element. Additionally, Padilla asserts that the trial court abused its discretion by not taking action when defense counsel alleged that a juror was sleeping during trial. He also challenges two of the community custody conditions imposed by the trial court as void for vagueness and thus unconstitutional. We accept the State's concession that the condition prohibiting Padilla from frequenting places where minors congregate is unconstitutionally vague, but Padilla's remaining arguments are without merit. We remand to strike the unlawful condition, but otherwise affirm the judgment and sentence.

FACTS

In March and April 2012, K.M., a nine-year-old girl, received sexually explicit messages on Facebook from an individual using the profile name "Jim Wilcox." K.M. did not understand what some of the messages meant, so she told her father about the conversation. A relevant portion of the message K.M. received was as follows:

> Wilcox: are you alone?
> K.M.: ya,y?
> Wilcox: cause I'm jerking off to you. what are you wearing?
> Wilcox: you are so pretty, my cock is still hard for you.
> K.M.: shut up I am 9!!!!!!!!!!
> Wilcox: suck it
> K.M.: no u r gross I am 9 so back off

Exhibit 11.

K.M.'s father reported the messages to the police. While the detectives were investigating the complaint, they discovered that the Internet Protocol Address for the computer used to access the Facebook account was associated with Jameel Padilla of Everett, Washington.

In September 2012, Everett Police executed a search warrant at Padilla's home. A search of Padilla's computer revealed that Padilla had used various aliases including that of "Jim Wilcox" on Facebook.

Padilla was charged with CMIP and the case proceeded to a jury trial. After the conclusion of the evidence, but before instructing the jury, defense counsel moved the court to designate juror 8 as the alternate juror. Defense counsel stated as his reason that "[p]eople 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." Id.

The trial court asked the prosecutor about his observations of the juror. The prosecutor responded that neither he nor the detective who sat at counsel table during the trial saw juror 8 sleeping and that he objected to the motion. The court asked defense counsel if he had "anything further[.]" Id. at 12. He indicated that he did not. The court stated that it also had not seen any jurors sleeping. It denied the motion and juror 8 deliberated on the verdict. The jury returned a verdict of guilty as charged. At sentencing, the court imposed several conditions of community custody. Padilla appeals.

DISCUSSION

Padilla contends that the State's charging document was constitutionally deficient. He correctly points out that under State v. Hosier, 157 Wn.2d 1, 15, 133 P.3d 936 (2006), an essential implied element of the crime of CMIP is that he intended for the communication to reach a minor. Padilla argues that the charging document did not specifically allege this element, and thus, it failed to provide him with proper notice of the charges brought against him.

Challenges to the sufficiency of a charging document are reviewed de novo. State v. Williams, 162 Wn.2d 177, 182, 170 P.3d 30 (2007) (citing State v. Campbell, 125 Wn.2d 797, 801, 888 P.2d 1185 (1995)). A challenge to a charging document's constitutional sufficiency can be raised for the first time on direct appeal. State v. Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). If a

charging document is challenged after a verdict has been returned, the document will be more liberally construed in favor of validity. Id. at 106

The standard for reviewing the sufficiency of a charging document is two pronged: (1) whether the charging document has the necessary facts, or those facts can be found by fair construction; and if so, (2) whether the defendant can show that he was actually prejudiced by any vague language. Id. Under the first prong, if the necessary facts cannot be found in the charging document, prejudice is presumed and the conviction will be reversed. State v. Zillyette, 178 Wn.2d 153, 162, 307 P.3d 712 (2013) (citing State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000)). Under the second prong, the defendant must establish actual prejudice.[1] Kjorsvik, 117 Wn.2d at 111.

The CMIP statute prohibits "communicat[ion] with a minor or with someone the person believes to be a minor for immoral purposes . . . through the sending of an electronic communication." RCW 9.68A.090(2). The statute does not explicitly state a requirement that the person must intend for the communication to reach a minor, but our supreme court has held that such a requirement is implied and must be proved in order for the State to obtain a conviction for CMIP. State v. Hosier, 157 Wn.2d at 15. Padilla argues that the charging document in this case was deficient because it was missing this implied element.

[1] Padilla argues only under the first prong of this standard and does not contend that he suffered actual prejudice. Accordingly, we do not reach the issue under the second prong of whether Padilla was prejudiced by any vague language in the charging document.

When deciding whether a charging document has the necessary facts, we look at the document as a whole with a common sense approach. Kjorsvik, 117 Wn.2d at 109. A charging document is constitutionally sufficient when, read as a whole and in a common sense manner, an implied essential element can be inferred through a liberal construction in favor of its validity. Id. at 110-11. Our first inquiry is whether the nonstatutory element of "intent to reach a minor" can be fairly implied from the language in the charging document. Id. at 108.

In the present case, the charging document tracked the language of the CMIP statute. It read:

> COUNT I: COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES VIA ELECTRONIC COMMUNICATION, committed as follows: 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 . . . .

Clerk's Papers (CP) at 63-64. This language apprised Padilla that he was accused of committing the crime of CMIP and of the following factual allegations: (1) that he communicated by means of an electronic communication; (2) that the communication was for an immoral purpose; and (3) that the communication was with a person under 18 years of age. We fail to see, nor does Padilla explain, how he could have sent an electronic communication to a child and yet not have intended for the communication to reach the child. Liberally construed, the language in the charging document fairly implies the allegation that Padilla intended that the communication reach a minor.

Kjorsvik, 117 Wn.2d 93 is instructive. In that case, a defendant challenged his robbery conviction because the State's charging document was missing the implied essential element of "intent to steal." Id. at 95-96. The court upheld the defendant's conviction and reasoned that it would be "hard to perceive how the defendant" could have forcefully taken money from the shopkeeper while brandishing a weapon but did not intend to steal the money. Id. at 110. Similarly here, because the charging document describes Padilla sending electronic communication to a minor, a fair reading is that through this volitional act, he intended to reach a minor. We conclude that the language of the charging document is sufficient because it contains all the necessary facts to reasonably inform Padilla of the elements of the crime charged.

Next, Padilla argues the trial court abused its discretion when it refused to investigate whether juror 8 was sleeping during trial and denied his motion to have juror 8 named as the alternate juror. We disagree on both counts.

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). A trial court's decision will only be disturbed if it was manifestly unreasonable or based on untenable grounds. State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004) (citing State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

Relying on United States v. Barrett, 703 F.2d 1076 (9th Cir. 1983), Padilla argues that the trial court failed to investigate whether juror 8 had been sleeping. But the case is distinguishable. In Barrett, a juror asked to be excused because

he was sleeping during the trial. Id. at 1082. The trial court declined to remove him. Id. After a guilty verdict, the defendant sought permission from the court to interview the juror. Id. The court denied the request because "there was no juror asleep during the trial." Id. at 1082-83. On appeal, the court held that the judge abused his discretion. Id. at 1083.

The Barrett court recognized that it is not always necessary for a judge to make further inquiry in response to a defendant's allegation that a juror had been sleeping, because a judge may properly take judicial notice of the fact that the juror had not been sleeping. Id. But in that case, in light of the juror's admission that he had been sleeping during the trial, there was no basis for the trial court's "bare assertion" that he was not. Id. Thus, the trial judge's decision to take judicial notice was an abuse of discretion because it was based on untenable grounds. The case was remanded for a hearing on whether the juror was sleeping, and if so, whether that fact prejudiced the defendant's right to a fair trial. Id.

This case is unlike Barrett. Here, after defense counsel alleged that Juror 8 appeared to be sleeping during the trial, the trial court investigated the matter by questioning the prosecutor and allowing defense counsel the opportunity to provide "anything further." Verbatim Report of Proceedings (VRP) (06/25/15) at 12.The trial court then took judicial notice that it had not seen any jurors sleeping during the trial. On these facts, the trial court properly investigated the allegation and did not err when it took judicial notice of its own observations. The trial court

did not abuse its discretion when it refused to designate juror 8 as the alternate. There was no error.

Next, Padilla challenges two community custody conditions that were imposed during sentencing. Padilla challenges the prohibition from frequenting areas where minor children are known to congregate because it is unconstitutionally vague. He also contends that the community custody condition restricting him from possessing or accessing pornographic material is unconstitutionally vague.

A community custody condition is unconstitutionally vague if it (1) does not provide people with fair warning of prohibited conduct and (2) does not have standards to avoid arbitrary enforcement. State v. Irwin, 191 Wn. App. 644, 652-53, 364 P.3d 830 (2015).

The State concedes, and we agree, that the community custody condition prohibiting Padilla from frequenting areas where minor children are known to congregate is void for vagueness and should be stricken. In Irwin, we found that an identical prohibition was an unconstitutionally vague community custody condition. Irwin, 191 Wn. App. at 652-53. We therefore remand to the sentencing court with instructions to strike the vague condition.

However, the condition prohibiting Padilla from possessing or accessing pornographic materials clearly defines what is restricted. State v. Bahl, 164 Wn.2d 739, 758, 193 P.3d 678 (2008). In Bahl, the sentencing court imposed a community custody condition prohibiting "'Bahl from possessing or accessing pornographic materials, as directed by the supervising Community Corrections

Officer.'" Id. at 754. The court held that the condition was void for vagueness because the word "pornographic" was not clearly defined. Id. at 757-58. Additionally, because Bahl's community corrections officer could direct what was within the condition, the condition could be arbitrarily enforced. Id. at 758. Here, unlike in Bahl, pornographic materials is clearly defined as "images of sexual intercourse, simulated or real, masturbation, or the display of intimate body parts." CP at 37. The condition does have standards to avoid being arbitrarily enforced because the restricted material is clearly defined. We reject Padilla's argument.

Padilla asks that no costs be awarded on appeal. Appellate costs are generally awarded to the substantially prevailing party on review. RAP 14.2. However, when a trial court makes a finding of indigency, that finding remains throughout review "unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency." RAP 14.2. Here, Padilla was found indigent by the trial court. If the State has evidence indicating that Padilla's financial circumstances have significantly improved since the trial court's finding, it may file a motion for costs with the commissioner.

Statement of Additional Grounds

Padilla makes two arguments in a statement of additional grounds. In his first additional ground for review, Padilla argues that the trial court erred in allowing Facebook records to be presented during trial when the officer presenting the records did not know what the technical data on the records

meant. He contends that a Facebook employee was required to present the records. He is incorrect.

Under RCW 10.96.030(2) business records may be admissible without testimony from the custodian of the records if the records are accompanied by an affidavit that meets certain requirements. In this case, there was a pretrial hearing regarding the admissibility of Facebook records without the necessity of calling the custodian as a witness. The trial court ruled that the Facebook records were admissible because they were accompanied by the affidavit required by the statute. Padilla cites to nothing in the record to dispute this finding.

In his second additional ground for review, Padilla argues that the trial court erred in not penalizing Detective Defolo for perjury when he misquoted Padilla. On direct examination, Defolo testified about "parents" being angry about Padilla's communications. On cross, defense counsel impeached Defolo with his report in which he apparently wrote that "people" not "parents" were angry. VRP (06/23/15) at 174-75. Because Padilla sought no further relief from the trial court, the claim is waived. RAP 2.5(a).

Remanded to strike the unlawful condition but otherwise affirmed.

Spearman, J.

WE CONCUR:

Trickey, ACJ

Mann, J.

NIELSEN, BROMAN & KOCH P.L.L.C.

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