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Division I
State of Washington

NO. 74358-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

HAI MINH NGUYEN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE MARY E. ROBERTS

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Double jeopardy protects a defendant against multiple punishments for offenses that are the identical in law and fact. The jury was not explicitly instructed that the convictions for child rape had to be based on acts separate and distinct from those acts constituting child molestation. Because child molestation and child rape are not the same in law, did the court properly instruct the jury? Furthermore, when the entire record made manifestly apparent that the rape counts were based on conduct distinct from the molestation counts, has Nguyen failed to establish a double jeopardy violation?

2. A condition of community custody is not unconstitutionally vague if a person of ordinary intelligence can understand what it proscribes. The Washington Supreme Court has held that reference to a dictionary makes the meaning of "sexually explicit" and "erotic" materials clear. Has Nguyen failed to establish that the community custody condition prohibiting him from possessing, using, accessing, or viewing "sexually explicit" and "erotic" materials is unconstitutionally vague? Nguyen was convicted of sexually abusing T.P. over a significant period of time while he lived with her family. Did the trial court properly impose the community custody condition prohibiting Nguyen from possessing or viewing sexually explicit materials as a valid crime-related prohibition?

3. This Court has determined that a community custody condition prohibiting a defendant from entering "places where minors congregate" is unconstitutionally vague. Should that portion of community custody condition eighteen be stricken from Nguyen's judgment and sentence?

4. Should the community custody condition imposing a curfew on Nguyen be stricken because it is not a valid crime-related prohibition?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Following a jury trial, appellant Hai Minh Nguyen was convicted of first-degree child rape, first-degree child molestation, second-degree child rape, and second-degree child molestation. CP 51-54. He received a total sentence of 279 months to life imprisonment, with lifetime community custody. CP 60. He now appeals his convictions for first and second-degree child molestation on double jeopardy grounds, and he challenges certain conditions of community custody imposed by the court.

2. SUBSTANTIVE FACTS

T.P. was born on November 28, 1999. RP 59, 124-25. She lived with her parents and little sister in a house in south Seattle.

RP 125, 131. T.P.'s mother worked long hours. RP 60, 70-71, 130-31, 136, 228, 289. Her father picked T.P. and her sister up from school each day. RP 70-71, 135-36, 228, 290. Appellant Nguyen rented a bedroom in the home. RP 67, 134, 226, 288, 449. T.P.'s family had a good relationship with Nguyen; there were no disagreements between them. RP 69, 140-41, 229-30, 288-89. T.P. was close to Nguyen, and referred to him as "Uncle." RP 74, 449.

Nguyen worked, but he would usually arrive home shortly after T.P. and her sister returned from school. RP 71, 136-37, 290, 452. After bringing the girls home from school, T.P.'s father would often work outside in the yard or on the computer in his bedroom. RP 137, 228-29, 291. Nguyen would frequently let T.P. and her sister use his laptop and his iPad. RP 137, 141, 230, 450.

When T.P. was approximately six years old, Nguyen sexually abused her for the first time. RP 138. While T.P. was sitting on Nguyen's lap at the table, watching a movie on Nguyen's laptop, he began to massage her breasts underneath her shirt. RP 139-40. He asked her if it "felt good." RP 140. At that time, T.P. thought this was normal. RP 145-46. Nguyen continued to abuse T.P. while she was very young. He put his mouth on her breasts and even bit her chest on one occasion. RP 152.

One day after school when T.P. was eight or nine years old, she was in the kitchen when Nguyen came in. Nguyen stood behind T.P., put his hands down her pants, and inserted his finger into her vagina. RP 146-49, 331-32. Nguyen began sexually assaulting T.P. on a near-weekly basis. RP 150, 154, 170, 320. He would perform oral sex on T.P. RP 154, 328-29. He would also penetrate her vagina with his fingers. RP 150. On one occasion, when T.P. was eleven, Nguyen followed T.P. into the spare bedroom and began to abuse her. RP 159-60, 163. Ultimately, he pulled her pants down and put his penis into her vagina. RP 160. He asked her if it hurt. Id.

T.P. did not tell her parents about the abuse. RP 151. Her mother did not discuss puberty or sex with T.P., but when T.P. was in fifth grade, she attended a sex education program at her school. RP 150-51. Then, by the time she was in the seventh grade, she began to realize what Nguyen was doing to her was wrong, and began to avoid him more. RP 150. The last time that Nguyen sexually assaulted T.P. was in March of 2013, when she was thirteen years old. RP 163-65, 425. At that time, Nguyen put his hands down T.P.'s pants and also licked her vagina. Id. After that, T.P. began locking herself in her room and staying close to her little sister and father, in an effort to avoid Nguyen. RP 165, 424-26.

Although T.P. did not disclose the abuse to her parents, her sister, who was two years younger than T.P., observed two incidents of abuse. RP 129, 165, 220. One time, when T.P. and Nguyen were in the kitchen, T.P.'s sister walked in and observed Nguyen's hand on T.P.'s groin area, with her pants and underwear pulled down. RP 165, 231, 233, 361. Nguyen quickly removed his hand and pretended that they had just been talking. RP 166, 231, 234. T.P. told her sister to keep what she had seen to herself. RP 168, 234. The other time T.P.'s sister observed Nguyen abusing T.P. was in the storage/spare room; she opened the door and saw Nguyen lying on top of T.P. on the treadmill. RP 168-69, 235-38. T.P.'s sister did not tell anyone what she had seen. RP 239. However, she did ask her mother once, "If Uncle Hai does something to [T.P], will you put Uncle Hai in jail?" RP 304. When asked what she meant, T.P.'s sister did not provide any further information. RP 304.

Once, when T.P. was nine or ten, she told her mother that "it hurts really bad down there," but denied that anyone had touched her. RP 72. When T.P. was eleven or twelve, Nguyen gave T.P. a charm bracelet. RP 77-79, 141-42. T.P.'s mother observed T.P. wearing the bracelet, and asked who had given it to her. RP 77-78, 142. T.P.'s mother told T.P. to return the bracelet to Nguyen, but Nguyen would not accept it back when T.P. tried. RP 143.

In early 2013, T.P. gave her mother a note that disclosed that Nguyen had "touched her." RP 79-80, 172-75, 240. However, when questioned by her mom, T.P. downplayed the abuse. RP 81, 175. In July of 2013, T.P. disclosed to her therapist that Nguyen had been sexually abusing her. RP 176-77. Ultimately, it was reported to the police. RP 179.

When interviewed by Seattle Police Detective Roger Ishimitsu, Nguyen admitted that he had rubbed T.P.'s breasts on more than one occasion, admitted that it had happened because he "could not control himself," but denied more serious abuse. RP 446, 455-56, 458-61.

C. ARGUMENT

1. NGUYEN'S FIRST AND SECOND-DEGREE CHILD MOLESTATION CONVICTIONS DO NOT VIOLATE PRINCIPLES OF DOUBLE JEOPARDY.

Despite agreeing with the trial court's instructions to the jury, Nguyen now alleges that he was exposed to multiple punishments for the same offense because the jury was not explicitly instructed that it must find the acts constituting the two child molestation counts to be separate and distinct from the acts constituting the two child rape counts. However, no "separate and distinct acts" instruction was required between the child rape and child molestation charges because the offenses are different in law, and multiple convictions can

stand. Moreover, even if the jury instructions potentially exposed Nguyen to impermissible multiple punishments, in light of the full record, it was manifestly apparent to the jury that each of counts one through four represented a separate and distinct incident. No double jeopardy violation occurred, and Nguyen's convictions must be affirmed.

a. Child Rape And Child Molestation Are Not Identical Offenses, And Multiple Punishments Are Authorized.

Nguyen did not object to the court's instructions below. RP 463-65. In the absence of manifest constitutional error, this Court generally does not consider arguments on appeal that were not raised in the trial court. RAP 2.5. The Washington Supreme Court has held that a double jeopardy claim such as this one may be addressed for the first time on appeal.[1] State v. Mutch, 171 Wn.2d 646, 661-62, 254 P.3d 803 (2011). This Court reviews a double jeopardy claim *de novo*. Id. at 662.

The constitutional guaranty against double jeopardy protects a defendant against multiple punishments for offenses that are identical in both law and fact. U.S. CONST. amend. V; WASH. CONST. art. I, § 9;

[1] Based on Mutch, this Court could decide to address the issue on appeal despite Nguyen's failure to raise the issue below, or it could conclude that because Nguyen fails to establish a double jeopardy violation, there was no manifest constitutional error, and thus review is inappropriate under RAP 2.5.

State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). A defendant's conduct may violate more than one criminal statute, and double jeopardy is implicated only when the court exceeds its legislative authority by imposing multiple punishments where multiple punishments are not authorized. Calle, 125 Wn.2d at 776. The question of whether multiple punishments are authorized is ultimately a question of the legislature's intent. State v. Kelley, 168 Wn.2d 72, 77, 226 P.3d 773 (2010).

In order to determine whether multiple punishments are authorized, courts use the "same evidence" test, which asks if the crimes are the same in law and in fact. Id. at 777-78. If each offense contains an element not included in the other, then the offenses are not the same in law under this test. Id. at 777.

Applying this test, this Court has held that convictions for first-degree rape of a child and first-degree child molestation, even if based upon the same act, are not the same in law and do not violate double jeopardy. State v. Jones, 71 Wn. App. 798, 824-26, 863 P.2d 85 (1993). The court explained:

> Child molestation requires that the offender act for the purpose of sexual gratification, an element not included in first degree rape of a child, and first degree rape of a child requires that penetration or oral/genital contact occur, an element not required in child molestation. Each offense requires the State to prove an element

> that the other does not, and therefore the offenses are not the "same offense" for double jeopardy purposes.

Id. at 825 (footnotes omitted).

In State v. French, 157 Wn.2d 593, 610, 141 P.3d 54 (2006), the Washington Supreme Court affirmed the reasoning of Jones. After examining the elements of first-degree rape of a child and first-degree child molestation, the court concluded that they were not the same in law, and that convictions for both crimes thus did not violate double jeopardy. "The two crimes are separate and can be charged and punished separately." French, 157 Wn.2d at 611.

In sexual abuse cases where the State charges more than one *identical count* within the same charging period, the jury should be instructed that a conviction on each count must arise from a separate and distinct act. State v. Borsheim, 140 Wn. App. 357, 165 P.3d 417 (2007). Otherwise, the defendant is potentially exposed to multiple punishments for a single offense. Mutch, 171 Wn.2d at 663. However, the mere potential for a double jeopardy violation is not sufficient to warrant reversal; the defendant must have actually received multiple punishments for the same offense. Mutch, 171 Wn.2d at 663 (quoting State v. Noltie, 116 Wn.2d 831, 848, 809 P.2d 190 (1991)). Even if the instructions are insufficient, there is no error when, based on a review of the entire record, it was manifestly

apparent to the jury that each count represented a separate and distinct act. Mutch, 171 Wn.2d at 664-66; State v. Fuentes, 179 Wn.2d 808, 824, 318 P.3d 257 (2014).

In State v. Land, 172 Wn. App. 593, 295 P.3d 782 (2013), this Court applied the requirement of a "separate and distinct acts" instruction to *non-identical* counts. Despite the holdings of Jones and French that child molestation and child rape are not the same in law because each includes an element not required to establish the other, Land looked beyond the elements of the two offenses and considered the definition of "sexual contact" as it relates to child molestation. 172 Wn. App. at 600-01. The court concluded that based on the statutory definition of "sexual contact," when the *only* evidence of sexual intercourse is oral/genital sexual contact, child rape is the "same in law" as child molestation.[2] 172 Wn. App. at 600.

The State respectfully submits that the question of whether two offenses are the same in law for purposes of instructing the jury on "separate and distinct acts" should be answered by a comparison of the legal elements of the two crimes, not by considering just one

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[2] Later, in Fuentes, the Washington Supreme Court addressed a similar claim by concluding that based on the entire record, it was manifestly apparent that rape counts were based on acts separate and distinct from molestation counts. 179 Wn.2d at 824-26. Fuentes cited approvingly its prior decision in French, noting, "In another case, this court found that a 'pattern of molestation and rape' that spanned several years was sufficient to support multiple counts of child molestation and child rape." Fuentes, 179 Wn.2d at 825 (quoting French, 157 Wn.2d at 612).

portion of a definitional term in isolation from its other portions. Jones and French clearly establish that child molestation and child rape each contain an element not included in the other, that the offenses are not the same in law, and that double jeopardy is not offended when convictions are obtained for each based on the same incident.

Indeed, only clear evidence of contrary legislative intent can override the results of the same evidence test. Calle, 125 Wn.2d at 780. In State v. Hughes, 166 Wn.2d 675, 684-86, 212 P.3d 558 (2009), the Washington Supreme Court found such a contrary legislative intent with regards to the statutes at issue by considering legislative history, the structuring of the statutes themselves, their purposes, and other sources. Hughes reasoned that the purposes of the statutes were the same; second-degree rape based on incapacity to consent and second-degree rape of a child both establish strict liability based on the victim's inability to consent due to status (age or mental/physical incapacity). 166 Wn.2d at 684-85. The court also found important that the offenses were located in the same portion of the criminal code, albeit in different subsections, and that previous court decisions had recognized a legislative intention that one act of sexual intercourse not violate both rape and statutory rape provisions. Id. at 685-86 (citations omitted).

When considering whether contrary legislative intent exists to override the same elements test in this case, the only similarity to Hughes is that the child rape and child molestation statutes are contained in different subsections of the same portion of the criminal code. See RCW 9A.44.089; 9A.44.079. But "[t]he codification of two crimes in the same chapter in and of itself does not demonstrate a clear legislative intent to treat the two crimes as the same offense for double jeopardy purposes." State v. Smith, 165 Wn. App. 296, 323-24, 266 P.3d 250 (2011), aff'd on other grounds, 177 Wn.2d 533, 303 P.3d 1047 (2013).

Child rape punishes different conduct than child molestation (sexual intercourse versus other forms of sexual contact). Child rape requires no mental state, while child molestation requires that the defendant act with the specific purpose of his or her sexual gratification. And in both Jones and French, supra, the appellate courts have recognized a legislative intent to authorize multiple punishments for child rape and child molestation. See also State v. Lorenz, 152 Wn.2d 22, 34, 93 P.3d 133 (2004) (differentiating between sexual contact and sexual intercourse by holding that child molestation is not a lesser included offense of child rape). The Legislature is deemed to acquiesce in the court's interpretation of a statute if no change is made for a substantial time after the decision.

In re Pers. Restraint of Reed, 136 Wn. App. 352, 361, 149 P.3d 415 (2006); see also State v. Kier, 164 Wn.2d 798, 805, 194 P.3d 212 (2008) (holding that the legislature had acquiesced in a previous decision on double jeopardy).

This Court should disagree with the Land analysis and conclude that no "separate and distinct acts" instruction was required as between the child rape and child molestation counts in this case – especially given that the rape counts were supported by clear evidence of penetration.

b. Based On The Entire Record, It Was Manifestly Apparent To The Jury That The Child Rape Counts Were Predicated On Acts Separate And Distinct From The Child Molestation Counts.

However, even if this Court follows the decision in Land, reversal in this case is unnecessary. Even though the court did not explicitly tell the jury that the acts it found to constitute the child molestation counts had to be separate and distinct from the acts constituting the child rape counts, when considering the entire record, it was manifestly apparent to the jury that the State was not seeking to impose multiple punishments for the same offense, and that each of the four counts was based on a separate act. There was no double jeopardy violation.

T.P. testified to multiple incidents of abuse spanning a period of years. The evidence was clear that there were incidents of sexual contact that did not include sexual intercourse during each of the two charging periods. T.P. testified that Nguyen touched and rubbed her breasts when she was approximately six years old. RP 138-40. He continued to grope and rub her breasts until she was thirteen. RP 355. T.P. testified that on one occasion when she was twelve years old, Nguyen lay on top of her body on the treadmill, while her pants were down and "hugged her." RP 156-58.

T.P. was also clear about separate instances of child rape during both charging periods. She testified that Nguyen penetrated her vagina with his finger multiple times, the first occurring when she was eight or nine years old, and the last occurring when she was thirteen. RP 146-50, 163-65. T.P. testified that Nguyen put his penis into her vagina on one occasion, when she was eleven years old. RP 159-61. She also testified that Nguyen put his mouth on her vagina on numerous occasions between the ages of nine and thirteen. RP 154, 163-64.

The prosecutor's argument clearly articulated that the two child rape counts were predicated on separate incidents from the child molestation counts. Speaking to the jury, the prosecutor addressed *each of the four counts separately*, first addressing child rape in the

first degree, the definition of "sexual intercourse" as it related to that charge, and Nguyen's specific conduct that satisfied that definition:

> The Defendant is charged in Count I with rape of a child in the first degree. The State has to prove that between November 28, 2005, [T.P.]'s sixth birthday, and November 27, 2011, the day before her twelfth birthday, the Defendant had sexual intercourse with [her] when she was less than twelve . . . . Your jury instructions also define the term "sexual intercourse" for you, and you'll have that jury instruction back in the jury room. And again, sexual intercourse is defined as any penetration by a sexual organ of the male, any penetration of the sexual organ of the female. It also includes any act of sexual contact involving the sex organs of one and the mouth of the other. ***So, what we're talking about in Count I is the times that the Defendant penetrated [T.P.], penetrated her vagina with his finger, prior to her turning twelve years old, and any of the many times the Defendant performed oral sex on [T.P.] prior to her turning twelve years old.***

RP 482 (emphasis added). The prosecutor then immediately moved on to separately discuss the first-degree child molestation charge:

> In Count II, he's charged with child molestation in the first degree. It's the same charging period between the day [T.P] turned six and the day before she turned twelve. And the State has to prove that the Defendant had sexual contact with [T.P.], that she's less than twelve . . . . Again, sexual contact is defined by your jury instructions. It's any touching of the sexual or other intimate parts of the person done for the purpose of gratifying the sexual desires of either party. Here, we're talking about gratifying the sexual desires of Hai Nguyen. What we're talking about is not contact that is accident [sic]. We're not talking about contact between an adult and a child that's done for a medical purpose or for a bathing purpose. We're talking about contact that was intentional, that was purposeful, that is done in order to gratify the sexual desires of the Defendant. . . .

> ***So, for Count II, what we're talking about here are the many times that the Defendant rubbed, massaged [T.P.]'s breasts prior to her twelfth birthday.***

RP 482-83 (emphasis added). Next, the prosecutor addressed the child rape charge involving the other charging period:

> The Defendant is charged in Count III with rape of a child in the second degree. It's a different charging period you'll notice. It begins on November 28, 2011 and ends on March 31, 2013. There's a reason for that. November 28, 2011, that is the day that [T.P.] turned twelve. March 31, 2013, if you will recall, [T.P.] told you that this happened – the last time this happened to her it was in March of 2013. The State has to prove that the Defendant had sexual intercourse with [T.P.], that she was twelve or thirteen . . . . ***Again, we talked about what sexual intercourse means. For this particular charging period, again, we're talking about the many times the Defendant penetrated [T.P.]'s vagina with his finger after she turns twelve and before he moves out of the house in March 2013.***

RP 483-84. The prosecutor then immediately addressed the second-degree child molestation charge:

> In Count IV, he's charged with child molestation in the second degree. The same charging period as Count III. And again, we've talked about sexual contact and what that means. ***What we're talking about in Count II [sic] are the times that the Defendant touched, massaged, rubbed [T.P.]'s breasts after her twelfth birthday and before he left the house. That the Defendant himself admitted to in his statement when he said he rubbed her breasts and though[t] she was thirteen.***

RP 484 (emphasis added).

The prosecutor also reminded the jury of T.P.'s testimony about the first time that Nguyen "molested" her – how Nguyen had rubbed her breasts when she was six years old – "too young to understand what was happening to her . . . and that what this man was doing to her was wrong." RP 485. The prosecutor continued by reminding the jury that this same behavior continued until T.P. was eight or nine, "when it ***began to escalate into something more***." Id. (emphasis added). She discussed how at that time, Nguyen began penetrating T.P.'s vagina with his finger, and began putting his mouth on her vagina. Id. The prosecutor then discussed the incident where Nguyen penetrated T.P.'s vagina with his penis. RP 486. The prosecutor also discussed other specific instances of abuse that T.P. had recalled occurring up until the age of thirteen. RP 486-87.

The court gave the jury a Petrich[3] unanimity instruction for each of the four counts. CP 39, 42, 45, 48. The deputy prosecutor discussed how these instructions required the jury to unanimously agree on one particular act for each of the four counts. RP 489-90. The prosecutor immediately went on and described for the jury how it could determine that any of the incidents T.P. described where Nguyen fondled her breasts could constitute the child molestation

[3] State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984).

counts, and how any of his acts of penetration or oral sex could constitute the child rape counts:

> I have some suggestions for you on how you can become clear about that when you're deliberating in this case. [T.P.] told you about the first time that it happened when she was six, when the Defendant put his hand under her shirt and rubbed her breasts. You could decide beyond a reasonable doubt that that is the act on which you want to rest your verdict for child molestation in the first degree. She described to you the first time when she was eight or nine the Defendant penetrated her vagina with his finger. And you could decide beyond a reasonable doubt that that is the act upon which you want to rest your verdict for rape of a child in the first degree. She also, of course, told you about the one and only time when she was eleven years old when the Defendant penetrated her vagina with his penis. You could decide that that is the act on which you want to rest your verdict for rape of a child in the first degree. Similarly for counts 3 or 4, you heard about the incident where [T.P.], the last time it happened, March 31, 2013, when [T.P.] was thirteen years old and the Defendant penetrated her vagina with his finger. You could decide that is the act upon which you want to rest your verdict for rape of a child in the second degree. And of course any of the times that the Defendant massaged or rubbed [T.P.]'s breasts after she turns twelve. The time that the Defendant himself admitted to rubbing her breasts when he believed she was thirteen years old. You could decide that that is the act upon which you want to rest your verdict for child molestation in the second degree.

RP 491-92. Then, the prosecutor *again* distinguished the acts that would constitute child molestation as opposed to child rape:

> Any one of the many occasions that the Defendant rubbed her breasts constitutes sexual contact. And any one of the many occasions that the Defendant penetrated [T.P.]'s vagina with his finger constitute [sic]

> rape of a child. The many times he performed oral sex on her constitutes sexual intercourse.

RP 492. Based on the totality of her remarks, the prosecutor clearly used the terms "rape" and "molestation" to describe separate and distinct acts. She divided Nguyen's behavior between acts that involved sexual intercourse (penetration and oral sex) and acts that did not (fondling and rubbing T.P.'s breasts).

Nguyen downplays the prosecutor's argument, contending that she never specifically informed the jury that it could not rely on an act of oral sexual contact as the basis for finding guilt on both the child molestation and child rape counts. But his argument ignores that the whole of the prosecutor's closing argument, in context, made clear that the rape charges were based on penetration and oral contact, and the child molestation charges were based on Nguyen's fondling and rubbing T.P.'s breasts.

Additionally, Nguyen did not challenge the number of incidents and whether they overlapped; rather he denied the allegations of rape in their entirety, and instead focused on attacking T.P.'s credibility generally. Fuentes, 179 Wn.2d at 825. Although Nguyen had admitted rubbing T.P.'s breasts to Detective Ishimitsu, he denied all forms of sexual intercourse and argued that T.P. was fabricating her testimony. See RP 496 (counsel discussing during closing argument

an imaginary, future letter written by T.P. at age twenty-four, wherein she "admits" lying to the jury about the extent of the abuse).

Nguyen pointed out the inconsistencies in T.P.'s testimony and prior statements, and argued that she could not be believed. See e.g., RP 498 ("[O]nce [T.P.] started saying these things, it was easy to keep saying them"); RP 499-500, 502 (arguing that T.P. liked the attention she was getting from her therapist, and disclosed the abuse only when she thought that relationship was threatened); RP 503, 506-07 (arguing that T.P. and her sister's memories were inconsistent and could not be believed because they could not remember details). However, the jury clearly believed T.P., who testified to a pattern of multiple incidents of abuse spanning a period of years.

Finally, the jury was also instructed that "[a] separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." CP 34. While courts have held that this instruction is insufficient by itself to guard against a double jeopardy violation,[4] this instruction given here, in combination with four separate unanimity instructions relating to each count, the evidence presented, and the closing arguments of the parties, made manifestly apparent to the jury that the rape counts were based on acts of penetration and oral

[4] Mutch, 171 Wn.2d at 663.

contact, while the molestation counts were based on fondling T.P.'s breasts.

Based on the entire record, the lack of a "separate and distinct acts" instruction between the molestation and the rape charges did not actually effect a double jeopardy violation.

2. THE COMMUNITY CUSTODY CONDITION REGARDING SEXUALLY EXPLICIT AND EROTIC MATERIALS IS NOT UNCONSTITUTIONALLY VAGUE AND WAS PROPERLY IMPOSED BY THE TRIAL COURT AS A VALID CRIME-RELATED PROHIBITION.

Nguyen challenges as unconstitutionally vague the community custody condition requiring that he not:

> [P]ossess, use, access or view any sexually explicit material as defined by RCW 9.68.130 or erotic materials as defined by RCW 9.68.050 or any material depicting any person engaged in sexually explicit conduct as defined by RCW 9.68A.011(4) unless given prior approval by your sexual deviancy provider.

CP 65. He also contends that the condition must be stricken because it is not sufficiently crime-related. Both arguments must be rejected. A person of ordinary intelligence can understand what the condition proscribes, and the Washington Supreme Court has held that reference to a dictionary makes the meaning of "sexually explicit" and "erotic" materials clear. Additionally, the community custody condition was reasonably related to Nguyen's crime and properly imposed.

a. The Restriction On Sexually Explicit And Erotic Materials Is Not Unconstitutionally Vague.

The Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington State Constitution require that citizens have fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008) (citing City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990)). A statute or community custody condition is unconstitutionally vague if it (1) does not define the criminal offense with sufficient definiteness 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.

In determining whether a term is unconstitutionally vague, the appellate courts consider the term in the context in which it is used. Bahl, 164 Wn.2d at 754 (citing Douglass, 115 Wn.2d at 180). When a statute does not define a term, the court may consider the plain and ordinary meaning as set forth in a standard dictionary. Bahl, 164 Wn.2d at 754 (citing State v. Sullivan, 143 Wn.2d 162, 184-85, 19 P.3d 1012 (2001)). A condition of community custody is sufficiently definite "[i]f persons of ordinary intelligence can understand what [it] proscribes, notwithstanding some possible areas of disagreement." Bahl, 164 Wn.2d at 754 (quoting Douglass, 115 Wn.2d at 179).

The Washington Supreme Court held in Bahl that the term "sexually explicit . . . material" was not unconstitutionally vague in the context of a prohibition on frequenting "establishments whose primary business pertains to sexually explicit or erotic material." Bahl, 164 Wn.2d at 758-59. The court observed that the dictionary definitions of "sexual" and "explicit" indicated that the meaning of the phrase "sexually explicit materials" is "materials that are unequivocally sexual in nature," and that the community custody condition as a whole was "sufficiently clear." Id. The court noted that "'[i]mpossible standards of specificity' are not required since language always involves some degree of vagueness." Id. at 759 (alteration in original) (quoting State v. Halstien, 122 Wn.2d 109, 118, 857 P.2d 270 (1993)). The Bahl court also considered the dictionary definition of "erotic," and determined that the ordinary definition of the term "erotic materials," in the context of the condition at issue, was sufficiently definite. 164 Wn.2d at 759.

When assessing the vagueness of a statute or community custody condition, courts also look at other statutes, "which are '[p]resumptively available to all citizens.'" In re Pers. Restraint of Dyer, 164 Wn.2d 274, 295-96, 189 P.3d 759 (2008) (alteration in original) (internal quotation marks omitted) (quoting State v. Watson, 160

Wn.2d 1, 8, 154 P.3d 909 (2007)); Bahl, 164 Wn.2d at 760. The term "sexually explicit material" is defined in RCW 9.68.130 as

> any pictorial material displaying direct physical stimulation of unclothed genitals, masturbation, sodomy (i.e. bestiality or oral or anal intercourse), flagellation or torture in the context of a sexual relationship, or emphasizing the depiction of adult human genitals: PROVIDED HOWEVER, That works of art or of anthropological significance shall not be deemed to be within the foregoing definition.

RCW 9.68.130(2). The Bahl court did not determine whether this statutory definition *alone* provides sufficient notice to defeat a vagueness challenge where the defendant is convicted under a different statute. Bahl, 164 Wn.2d at 760. However, the court stated that the existence of a statutory definition bolsters the conclusion that "sexually explicit" is not unconstitutionally vague. Id. The statutory definitions of "sexually explicit conduct" (RCW 9.68A.011(4)) and "erotic material" (RCW 9.68.050) specifically referenced in the challenged condition similarly bolster the conclusion that the ordinary definition of those terms is sufficiently definite in this context. See Soundgarden v. Eikenberry, 123 Wn.2d 750, 758-59, 871 P.2d 1050 (1994) (the term "erotic" as used in RCW 9.68.050 is not unconstitutionally vague).

"Sexually explicit" and "erotic" are not indecipherable phrases for ordinary people. While Nguyen imagines a string of scenarios that

he worries might confuse him or his CCO, conditions of community custody are "not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct." State v. Sanchez Valencia, 169 Wn.2d 782, 793, 239 P.3d 1059 (2010). The law does not say that a prohibition is vague any time it is subject to hair-splitting. "'[A] community custody condition is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.'" Sanchez Valencia, 169 Wn.2d at 793 (internal quotation marks omitted) (quoting State v. Sanchez Valencia, 148 Wn. App. 302, 321, 198 P.3d 1065 (2009)). Impossible standards of specificity are not required. City of Seattle v. Eze, 111 Wn.2d 22, 26-27, 759 P.2d 366 (1988) (citing Kolender v. Lawson, 461 U.S. 352, 361, 103 S. Ct. 1855; 75 L. Ed. 2d 903 (1983)). "Condemned to the use of words, we can never expect mathematical certainty from our language." Grayned v. Rockford, 408 U.S. 104, 110, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). "[I]f men of ordinary intelligence can understand a penal statute, *notwithstanding some possible areas of disagreement,* it is not wanting in certainty." State v. Maciolek, 101 Wn.2d 259, 265, 676 P.2d 996 (1984) (emphasis added).

Other courts have similarly found that the term "sexually explicit" material or conduct is not unconstitutionally vague. E.g., United States v. Zobel, 696 F.3d 558, 576 (6th Cir. 2012); United States v. Thompson, 653 F.3d 688, 696 (8th Cir. 2011); United States v. Thielemann, 575 F.3d 265, 277 (3d Cir. 2009); United States v. Rearden, 349 F.3d 608, 619-20 (9th Cir. 2003).

Although there are no published opinions of this Court addressing whether a community custody condition prohibiting possession of "sexually explicit" or "erotic" materials is unconstitutionally vague, the Supreme Court's analysis in Bahl indicates that it is not. Nguyen's argument should be rejected. The challenged terms ("sexually explicit" and "erotic") in the context of the imposed condition (possession, use, access, or viewing of those types of materials) provides fair warning of what Nguyen must avoid, and is sufficiently definite to protect against arbitrary enforcement.

b. The Condition Was Properly Entered As Reasonably Related To The Circumstances Of Nguyen's Crimes.

Trial courts have authority to impose "crime-related prohibitions" as conditions of community custody. RCW 9.94A.703(3)(f). "Crime-related prohibitions" must "directly relate[] to the circumstances of the crime for which the offender has been

convicted[.]" RCW 9.94A.030(10). "Directly related" includes conditions that are "reasonably related" to the crime. State v. Irwin, 191 Wn. App. 644, 656-57, 364 P.3d 830 (2015).

This court reviews the factual basis for crime-related conditions under a "substantial evidence" standard. Irwin, 191 Wn. App. at 656. Reviewing courts will strike community custody conditions when there is "no evidence" in the record that the circumstances of the crime related to the community custody condition. Id. at 657. On the other hand, courts will uphold crime-related community custody decisions when there is some basis for the connection; there is no requirement that the prohibited activity be factually identical to the crime. Id. For example, in State v. Kinzle, a child molestation case, the court upheld a prohibition on dating women with minor children, even though the defendant had not molested any children of the women that he dated.[5] 181 Wn. App. 774, 785, 326 P.3d 870 (2014).

Nguyen's crimes – molesting and raping a young girl – directly involved sexual arousal, sexual deviancy, sexual predation, and the sexual objectification of young girls. Keeping him away from materials that primarily involve sexual arousal and sexual objectification is directly and reasonably related to the circumstances of the crime.

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[5] Nguyen points out that in Kinzle, the State conceded the inapplicability of the prohibition on sexually explicit materials as a crime-related condition. 181 Wn. App. at 785. The State makes no such concession here.

In cases where the courts have stricken community-custody conditions as lacking any connection to the crime, the prohibitions were on broad activities of otherwise normal life. See State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (prohibition on Internet use generally). By contrast here, the condition keeping Nguyen from materials that sensationalize and celebrate the sexual objectification of others is clearly connected to his crimes of rape and molestation.

This Court should affirm the community custody condition because there is a connection between it and Nguyen's crimes.

3. THE COURT SHOULD STRIKE THAT PORTION OF COMMUNITY CUSTODY CONDITION EIGHTEEN THAT RESTRICTS NGUYEN FROM ENTERING "ANY PLACES WHERE MINORS CONGREGATE."

Nguyen also challenges community custody condition eighteen as unconstitutionally vague. He is partially correct. The first clause of the condition, "Do not enter any parks/playgrounds/schools" is sufficiently definite and need not be stricken. However, the remaining language ("or any places where minors congregate") should be stricken as it does not provide adequate notice to Nguyen as to what is proscribed.

This Court recently considered a vagueness challenge to a community custody condition similar to condition eighteen imposed here. Irwin, 191 Wn. App. 644. The court held that a condition that

ordered a defendant to "not frequent areas where minor children are known to congregate" without further specifying the exact locations that were off limits was unconstitutionally vague. Id. at 649. Based on the reasoning in Irwin, that portion of condition 18 that prohibits Nguyen from entering "any places where minors congregate" is unconstitutionally vague and must be stricken. However, Irwin noted that the constitutional deficiency stemmed from the lack of "clarifying language or an illustrative list of prohibited locations (as suggested by trial counsel)". 191 Wn. App. at 655. Certainly, informing Nguyen that he may not enter parks, playgrounds, or schools, provides him sufficient notice to understand what conduct is proscribed.

4. THE STATE AGREES THAT THE CURFEW CONDITION OF COMMUNITY CUSTODY SHOULD BE STRICKEN BECAUSE IT IS NOT CRIME-RELATED.

Nguyen challenges condition seven as not related to the circumstances of his crime. See CP 64. Here, there was no evidence that Nguyen's criminal conduct occurred between the hours of 10:00 p.m. and 5:00 a.m. Therefore, Nguyen is correct that the curfew condition is not reasonably related to the circumstances of his crime, and the trial court lacked authority to order a curfew as a condition of his community custody. As a result, condition number

seven on Appendix H of the judgment and sentence should be stricken.

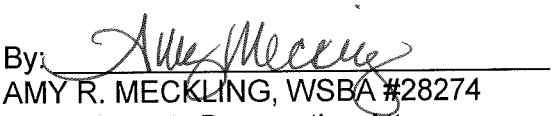
D. CONCLUSION

For the above reasons, the State respectfully asks this Court to affirm Nguyen's convictions and sentence, with the exception of the community custody "curfew" condition, and the community custody condition prohibiting him from entering "places where minors congregate." Those conditions must be stricken.

DATED this 28th day of October, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney



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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Kevin A. March, the attorney for the appellant, at MarchK@nwattorney.net, containing a copy of the Brief of Respondent, in State v. Hai Minh Nguyen, Cause No. 74358-9, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 28 day of October, 2016.

Name:
Done in Seattle, Washington