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DIVISION II

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STATE OF WASHINGTON
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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

DAVID ERICKSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas J. Felnagle, Judge

No. 06-1-00053-8

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court violate defendant's right to a public trial when the courtroom was not closed to either the public or the media?
2. Did the court properly deny defendant's motion for a new trial based upon ineffective assistance of counsel where defendant had failed to provide the required affidavits pursuant to CrR 7.5(a) and defendant could not satisfy either prong of the *Strickland*¹ test?
3. Is defendant's claim that his community custody condition prohibiting possession of pornography is vague properly before the court when defendant does not allege a First Amendment violation, cannot show the condition is vague in all circumstances, and makes his challenge pre-enforcement?
4. Has defendant waived any challenge to the improper delegation of sentencing authority, if any, when defendant failed to object at sentencing?
5. Did the sentencing court properly order defendant to participate in a chemical dependency assessment as a condition of community custody pursuant to RCW 9.94A.712(6)(a) when

¹ State v. Strickland, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

defendant admitted during his pre-sentence investigation that he used marijuana on a daily basis?

B. STATEMENT OF THE CASE.

1. Procedure

On January 4, 2005, the State filed an information charging defendant with two counts of first degree rape of a child. CP 1-3. The parties appeared for trial before the Honorable Thomas J. Feltnagle on August 29, 2006. RP 3. Defendant made a motion to continue the trial, which was denied. RP 3, 5, 14. A child competency hearing was held on August 30, 2006, and the victim, M.T., was found competent. RP 41-84. A child hearsay hearing was held on August 30, 2006, and the court found M.T.'s statements were reliable and admissible. RP 91-177. The State filed an amended information extending the charging period from May 30, 2005, to June 20, 2005. CP 9-10; RP 809. The jury convicted defendant as charged on September 14, 2006. CP 27, 28; RP 1020-22. Defendant filed a motion for a new trial on November 29, 2006. CP 33-39. On November 30, 2006, the court denied defendant's motion for a new trial and sentenced him to 140 months to life on each count to be served concurrently. CP 43-55; RP 1045-64. Defendant was ordered to pay standard court costs and fines. CP 43-55; RP 1045-64.

This timely appeal followed.

2. Facts

a. Voir dire

Please see statement of facts outlined in defendant's opening brief.

b. Facts adduced at trial

M.T. testified she and her mother lived with defendant. RP 546. M.T. testified that while she and her mother lived with defendant, on three separate times defendant touched her privates with his fingers. RP 553-54, 560. M.T. testified that she told her grandmother and then her mother that defendant had touched her. RP 555, 556.

M.T.'s grandmother, Donnel Jones testified that M.T. and her mother moved in with defendant when M.T. was three years old. RP 585. Prior to M.T.'s June 21, 2005, disclosure that defendant was molesting her, Ms. Jones did not have any concerns that defendant was behaving inappropriately with M.T. RP 592. Ms. Jones testified that her relationship with defendant was good. RP 591. Ms. Jones testified that her daughter's, Alisa Thebert, relationship with defendant was excellent. RP 591.

On June 21, 2005, M.T. told her grandmother that defendant touches her privates when he checks her for toilet paper. RP 603. Ms. Jones testified that M. T. told her that defendant "holds me open and he cleans me with his tongue, because he said his tongue would be softer for

me.” RP 603. M.T. told her grandmother of three separate occasions when defendant would clean M.T.’s privates with his tongue. RP 605.

Alisa Thebert, M.T.’s mother, testified that M.T. told her on June 21, 2005, that defendant had been molesting her. RP 701-06. Prior to that date, Alisa Thebert did not have any concerns that defendant was doing anything inappropriate with M.T. RP 700. Alisa Thebert testified that M.T. told her that defendant had been checking M.T. for toilet paper with his tongue. RP 706. M.T. told her mother that defendant was using his tongue on her privates, which is how M.T. referred to her vagina. RP 706. M.T. told her mother that defendant used his tongue because it was softer. RP 706.

Cornelia Thomas, a forensic child interviewer at the Child Advocacy center in Tacoma, Washington, testified that he interviewed M.T. on July 12, 2005. RP 783. Ms. Thomas testified that she recorded her interview with M.T. RP 787. The tape of this interview was admitted into evidence and played to the jury. RP 792. Plaintiff’s Exhibit No. 4. A transcribed copy of the interview was provided to the jury as a listening aid while the tape was played. RP 791. Plaintiff’s Exhibit No. 5.

Defendant testified and denied the allegations. RP 819-79.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT VIOLATE
DEFENDANT’S RIGHT TO A PUBLIC TRIAL WHEN
THE COURT MADE NO RULING EXCLUDING THE
PUBLIC OR THE MEDIA FROM THE COURTROOM.

The right to a public trial is guaranteed by Article I, section 22 of the Washington State Constitution. Additionally, Article I, section 10 provides that “[j]ustice in all cases shall be administered openly...” The right to an open, public trial includes jury selection. State v. Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004); State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005).

The right to a public trial is not absolute. State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1984). A trial court has “inherent authority and broad discretion to regulate the conduct of a trial.” State v. Momah, ___ Wn. App. ___ (2007). In limited circumstances, a court can close the courtroom to the public and press. State v. Bone-Club, 128 Wn.2d 254, 259. Before a court closes a courtroom to the public and press, however, the court must apply the five *Bone-Club* factors on the record. The *Bone-Club* factors are:

1. The proponent of closure . . . must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a 'serious and imminent threat' to that right.

2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59.

Not all exclusions from the courtroom are considered closures. The court can exclude a disruptive spectator for good cause without violating a defendant's right to a public trial and without engaging in a *Bone-Club* analysis. See State v. Gregory, 158 Wn.2d 759, 816, 147 P.3d 1201 (2006). Additionally, individual voir dire in a sex case does not constitute a courtroom closure if the court's order does not exclude the public or press. State v. Momah, ___ Wn.2d ___ (2007) (Interviewing prospective jurors in chambers and in the jury room did not violate defendant's right to a public trial because the court gave no order excluding the public or press from the courtroom); but see State v. Frawley, 140 Wn. App. 713, 718, 167 P.3d 593 (2007) (Interviewing prospective jurors in chambers violated defendant's right to a public trial because the court did not ask Frawley whether he would waive his right to have the public present during questioning even though Frawley indicated that he waived his right to be present during individual voir dire.).

To determine if a courtroom is closed, courts look to the plain language of the closure request and order. State v. Momah, ___ Wn.2d ___, (2007); State v. Orange, 152 Wn.2d at 808 (“Looking solely at the transcript of the trial court’s ruling..., the court ordered a permanent, full closure of voir dire”); State v. Brightman, 155 Wn.2d at 516 (“[O]nce the plain language of the trial court’s ruling imposes a closure, the burden is on the State to overcome the strong presumption that the courtroom was closed.”); United States v. Shryock, 342 F.3d 948, 974 (9th Cir. 2003) (“The denial of a defendant’s Sixth Amendment right to a public trial requires some affirmative act by the trial court meant to exclude persons from the courtroom.”) (quoting United States v. Al-Smadi, 15 F.3d 153, 155 (10th Cir. 1994)); but see State v. Frawley, 140 Wn. App. 713, 719 (Individual voir dire conducted in chambers is closed to the public.).

In State v. Momah, ___ Wn. App. ___ (2007), defendant was tried on two counts of indecent liberties, one count of second degree rape, and one count of third degree rape. Momah, ___ Wn. App. ___ (2007). Defense counsel asked that all jurors be questioned individually so that if one potential juror had information that would disqualify him as a juror, the rest of the jury venire would not be contaminated. Id. at ____.

Additionally, some jurors specifically requested to be questioned individually. Id. Over the course of the day, the court individually

interviewed prospective jurors, first in chambers and later in the jury room. Id. at _____. During at least one interview the chambers' door was closed, however, the record is silent in subsequent interviews whether the door was open or closed. Id. at _____.

The court in Momah noted the trial court did not close the courtroom in violation of controlling case law. Id. at _____. Instead, the trial court allowed individual voir dire 1) to avoid the questioning of one prospective juror from tainting the other members of the jury venire, and 2) in response to the express request of individual jurors for individual questioning. Id. at _____.

In reviewing the trial transcript, the Momah court determined that the trial court made no statement or order to close the courtroom which would have triggered the application of the *Bone-Club* factors or shifted the burden to the State to prove the proceeding was open. Id. at _____. "There is simply no indication in the record that individual questioning was for the purpose of excluding either the press or the public from this trial." Id. at _____. The Momah court also noted that the record did not indicate that any member of the public or press attempted to enter the courtroom and was excluded. Id. at _____.

In the present case, like Momah, the trial court made no order or ruling to close the courtroom from the public or the press. RP 252-530. Instead, the court identified four potential jurors who requested individual

questioning. RP 286-87. Like Momah, these potential jurors were questioned in the jury room with the attorneys, judge, and court reporter. RP 288. The record is silent as to whether the jury room door was open or closed. Also like Momah, because the courtroom was not closed, the trial court did not need to engage in a *Bone-Club* analysis, nor did the burden shift to the State to prove the proceeding was open.

Defendant relies on Storer Broadcasting Co. v. Circuit Court, 131 Wis.2d 342, 388 N.W. 633 (Wis. App. Ct. 1986), and State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005), to support his argument that the individual voir dire of four jurors violated defendant's right to a public trial. Brief of Appellant at 9. However, Brightman and Storer Broadcasting are distinguishable from the present case because in those cases the trial court closed the courtroom for the express purpose of excluding individuals from observing voir dire.

In Brightman, the court closed the courtroom to observers and witnesses during jury selection. The court ruled as follows:

In terms of observers and witnesses, we can't have any observers while we are selecting the jury, so if you would tell the friends, relatives, and acquaintances of the victim and defendant that the first two or three days for selecting the jury the courtroom is packed with jurors, they can't observe that. It causes a problem in terms of security.

When we move to the principal trial, anybody can come in here that wants to. It is an open courtroom.

Brightman, 155 Wn.2d at 511. Neither party objected, and there was no

other discussion of courtroom closure. Id. In contrast, the record in the present case does not show that the trial court excluded anyone, public or press, from the courtroom during the individual questioning.

In Storer Broadcasting, Wisconsin television and print media sought a writ of prohibition from the Wisconsin Court of Appeals to prohibit the trial judge in a pending criminal trial from closing all or part of the voir dire from members of the press and public. 131 Wis.2d 342, 344. The underlying criminal case was a highly publicized case in which the defendant was alleged to have shot two police officers. Storer Broadcasting at 345. Because of pretrial publicity, the defense moved to individually voir dire each prospective juror out of the hearing of the rest of the panel on the issues of racial prejudice and opinions formed on the basis of pretrial publicity. Id. The court allowed defense to examine several prospective jurors in chambers outside the presence of the media.

In Storer Broadcasting, it is clear the court closed the courtroom to the media with the express intent to limit the media's access to portions of voir dire. In the present case, however, the court did not exclude the public or media from the courtroom. Instead, like Momah, the court was concerned with questioning jurors out of the presence of the rest of the jury venire, not outside the presence of the public or the media. Like Momah, because the courtroom was not closed, the trial court was not required to engage in a *Bone-Club* analysis.

Defendant's claim that he was denied a public trial is without merit and must fail.

2. THE COURT PROPERLY DENIED DEFENDANT'S MOTION FOR A NEW TRIAL BECAUSE THE MOTION RELIED ON MATTERS OUTSIDE THE RECORD, WAS NOT SUPPORTED BY AFFIDAVITS, AND DEFENDANT COULD NOT SATISFY EITHER PRONG OF THE *STRICKLAND* TEST.

The court may grant a new trial when it affirmatively appears that a substantial right of the defendant was materially affected and substantial justice has not been done. Criminal Rule (CrR) 7.5(a)(8). The decision to grant or deny a motion for a new trial is within the sound discretion of the trial court and will be reversed only for abuse of discretion. State v. Copeland, 130 Wn.2d 244, 294, 922 P.2d 1304 (1996). A trial court abuses its discretion when the reason for its decision is manifestly unreasonable or based upon untenable grounds. Davis v. Globe Mach. Mfg. Co., 102 Wn.2d 68, 77, 684 P.2d 692 (1984).

When defendant's motion for a new trial "is based upon matters outside the record, the facts **shall** be shown by affidavit." CrR 7.5(a) (emphasis added). If the evidence is based on knowledge in the possession of others, defendant may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence. See State v. Bandura, 85 Wn. App. 87, 93-94, 931 P.2d 174 (1997).

In Bandura, the defendant made a motion for an arrest of judgment and/or a new trial based upon ineffective assistance of counsel. Bandura at 90-91. Defense counsel filed an affidavit stating that defendant “wishes to assert that he expressly forbid” trial counsel from requesting jury instructions on lesser included offenses on two counts. Bandura at 91. The court denied defendant’s motion for arrest of judgment and/or a new trial. Id. at 92. On appeal, Bandura argued that the court improperly denied his motion. Id. at 93. Noting that the rule required post-trial motions that rely upon facts outside the record be supported by affidavits, this court affirmed the trial court’s ruling. Id. at 94. Defense counsel’s affidavit was insufficient because the affidavits must be made by individuals with personal knowledge who are competent to testify and not by defense counsel declaring what others would testify to. Id. at 93.

The present case is strikingly similar to the facts in Bandura. In the present case, defendant made a motion for a new trial pursuant to CrR 7.5(a)(8) based upon facts outside the record. RP 1033-37; CP 33-39, 81-83. Defendant alleged ineffective assistance of counsel for trial counsel’s failure to subpoena witnesses to testify to defendant’s reputation in the community for sexual morality and decency. RP 1033-37; CP 33-39. Defendant’s motion was supported by defense counsel’s declaration which stated that four individuals (three of defendant’s relatives and one co-worker) would have testified to defendant’s reputation in the community for sexual morality and decency, had they been subpoenaed. CP 81-83.

Like Bandura, defendant failed to provide affidavits by these four individuals as required by CrR 7.5(a). Like Bandura, defendant's motion for a new trial fails because it is not supported by appropriate affidavits. See RP 1045. The trial court did not abuse its discretion in denying defendant's motion for a new trial.

Assuming *arguendo*, that defendant's motion for a new trial was properly supported by affidavits, defendant's claim still fails because defendant cannot satisfy either prong of the *Strickland* test.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L.Ed.2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. Id. "The essence of an ineffective assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 3582, 91 L.Ed.2d 305 (1986).

To prevail on a claim of ineffective assistance of counsel, defendant must meet both prongs of a two-prong test set out in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674

(1984); see also, State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). First, a defendant must establish that defense counsel's representation fell below an objective standard of reasonableness. Second, a defendant must show that defense counsel's deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687; State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

To satisfy the first prong, deficient performance, the defendant has the "heavy burden of showing that his attorney 'made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" State v. Howland, 66 Wn. App. 586, 594, 832 P.2d 1339 (1992) (quoting Strickland v. Washington, 466 U.S. 668, 687). Defendant may meet this burden by establishing that, given all the facts and circumstances, his attorney's conduct failed to meet an objective standard of reasonableness. State v. Huddleston, 80 Wn. App. 916, 912 P.2d 1068 (1996). There is a strong presumption that counsel's representation was reasonable and, taking into consideration the entire record, that counsel made all significant decisions in the exercise of reasonable professional judgment. State v. McFarland, 127 Wn.2d at 335.

Matters that go to trial strategy or tactics do not show deficient performance. State v. Hendrickson, 129 Wn.2d at 77-78. The decision of

when or whether to object is an example of trial tactics and only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. McFarland, 127 Wn.2d at 336. When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objection had been granted. Kimmelman, 477 U.S. at 375; United States v. Molina, 934 F.2d 1440, 1447-48 (9th Cir. 1991).

To satisfy the second prong, resulting prejudice, a defendant must show that, but for counsel's deficient performance, the trial's outcome would have been different. McFarland, 127 Wn.2d at 337; see also, Strickland, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.").

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude the defendant received effective representation and a fair trial. State v. Ciskie,

110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. State v. Carpenter, 52 Wn. App. 680, 684-85, 763 P.2d 455 (1988).

In the present case, defendant asserts the court abused its discretion in denying defendant's motion for a new trial because trial counsel was ineffective for failing to call four witnesses who would testify that the defendant had a reputation in the community for good sexual morality. Brief of Appellant at 13. However, the decision whether to call a particular witness is presumed to be a matter of legitimate trial tactics. State v. Davis, 152 Wn.2d 647, 742, 101 P.3d 1 (2004).

As the trial court correctly pointed out, the tenor of this trial was that M.T.'s allegation of sexual abuse came out of the blue. RP 1044. Donnel Jones testified that M.T. did not appear to be afraid of defendant, nor did M.T. ever express that she did not want to stay with defendant. RP 649. Donnel testified that prior to M.T.'s disclosure, she had no concerns that defendant was behaving inappropriately with M.T.. RP 592. Alisa Thebert testified that defendant and M.T. appeared to have a good relationship. RP 702. Alisa Thebert testified that she was shocked at the disclosure. RP 703. Defendant had been part of the family for some time and, despite a heated argument between Donnel Jones and defendant years before, defendant had been well liked. RP 668-69.

Assuming *arguendo* that the four witnesses proposed by defendant would have testified that they were aware of defendant's reputation in the community for sexual morality, the testimony would have added little to defendant's case. Trial counsel could have made a tactical decision not to have these witnesses testify because their testimony could easily have made the jury question why defendant felt the need to bring on character witnesses to talk about his sexual morality when that had never been challenged by the State. The defense in this case was to attack the credibility of the allegation and show the bias of Donnel Jones and Alisa Thebert. The decision not to call these four character witnesses was consistent with the defense case theory. Defendant cannot show that trial counsel was deficient.

If this court were to find that trial counsel was deficient, defendant's argument still fails because he cannot show he was prejudiced by trial counsel's performance. The defendant cannot show the outcome of the trial would have been any different if the four character witnesses testified that defendant had a reputation for good sexual morality because that information was already before the jury. Donnel Jones testified that she had no concerns regarding the appropriateness of defendant's interactions with M.T. prior to M.T.'s disclosure. RP 592. In fact, Donnel Jones testified she thought defendant and M.T.'s relationship was "excellent". RP 592. Similarly, Alisa Thebert testified that she had not

suspected any sexual abuse. RP 700. Alisa Thebert testified that during the time she dated defendant, she had never thought defendant had a sexual interest in children. RP 770-71. By their testimony, the State's witnesses effectively conceded that defendant had a reputation for good sexual morality. Having four defense witnesses reiterate what had already been conceded would not have changed the outcome of the trial. Defendant cannot show he was prejudiced by trial counsel's performance.

Because defendant cannot satisfy either prong of the *Strickland* test, defendant's claim of ineffective assistance of counsel is without merit. The trial court did not abuse its discretion when it denied defendant's motion for a new trial..

3. DEFENDANT'S CLAIM THAT THE COMMUNITY CUSTODY PROVISION RESTRICTING HIS POSSESSION OR PERUSAL OF PORNOGRAPHIC MATERIALS IS UNCONSTITUTIONALLY VAGUE IS NOT PROPERLY BEFORE THE COURT BECAUSE IT IS NOT BASED UPON HOW THE CONDITION IS APPLIED.

A rule can be facially vague or vague as applied. When a challenged prohibition does not involve First Amendment rights, it must be evaluated as applied. State v. Douglass, 115 Wn.2d 171, 181-82, 795 P.2d 693 (1990). A rule is facially invalid if its terms "are so loose and obscure that they cannot be clearly applied in any context." Douglass, 115 Wn.2d at 182 n.7 (quoting Basiardanes v. Galveston, 682 F.2d 1203, 1210 (5th Cir. 1982)). When making a facially invalid challenge, the defendant

must show that the rule is impermissibly vague in all of its applications.

A challenger seeking to establish that a sentencing condition is vague as applied to him must show beyond a reasonable doubt either: (1) that the condition does not define a violation with sufficient definiteness that allows persons of ordinary intelligence to understand what conduct is prohibited; or (2) the condition does not provide ascertainable standards of guilt to protect against arbitrary enforcement. State v. Douglass, 115 Wn.2d at 178. "Vagueness in the constitutional sense means that persons of ordinary intelligence are obliged to guess as to what conduct" is proscribed. Douglass, 115 Wn.2d at 179; and see State v. Smith, 111 Wn.2d 1, 10, 759 P.2d 372 (1988). A sentencing condition is presumed to be constitutional unless the party challenging it proves otherwise beyond a reasonable doubt. See State v Bahl, 137 Wn. App. 709, 715, 159 P.3d 416 (2007).

In the present case, defendant is making a pre-enforcement challenge to the condition that he not possess or peruse pornography. Brief of Appellant at 26. Because it is a pre-enforcement challenge, defendant must allege that the condition is facially invalid and involves a First Amendment right. See Douglass, at 181-82. Defendant cannot meet his burden.

First, defendant does not allege a First Amendment violation. Second, defendant cannot show that the condition is vague under any circumstance because there are some materials, double and triple X rated publications for example, that any reasonable person would understand to constitute pornography. Because defendant cannot meet the stringent test for facial invalidity, his pre-enforcement claim must fail.

Defendant relies on State v. Sansone, 127 Wn. App. 630, 111 P.3d 1251 (2005) when asking this court to find defendant's condition that he not.... Defendant incorrectly states "Moreover, **this** Court held in *Sansone* that the sentencing court improperly delegated its authority to the Department of Corrections. (DOC) to define pornography." Brief of Appellant at 28. (emphasis added). Sansone, however, is a Division One case, not a Division Two case. Additionally, Sansone is distinguishable from the present case because it involved a post-enforcement challenge to a condition as it was applied to Sansone. As was noted above, defendant's challenge is pre-enforcement.

In Bahl, a 2007 Division One case, the defendant challenged a community custody condition pre-enforcement. The Bahl court concluded "we have not yet agreed it is appropriate to evaluate conditions of

sentence for vagueness in a pre-enforcement challenge. We are not inclined to do so in the absence of briefing on the pros and cons of that approach.” State v. Bahl, 137 Wn. App at 718.

Defendant asserts that reviewing a pre-enforcement challenge would serve the interests of judicial economy. Brief of Appellant at 31. However, reviewing pre-enforcement challenges would increase, not decrease, the amount of litigation. If this court were to review pre-enforcement challenges, then it would be face numerous appeals based upon hypothetical situations that may never come to fruition.

4. ANY CLAIM THAT THE SENTENCING COURT IMPROPERLY DELEGATED ITS SENTENCING AUTHORITY BY AUTHORIZING DEFENDANT’S COMMUNITY CORRECTIONS OFFICER TO DEFINE PORNOGRAPHIC MATERIALS IS WAIVED BECAUSE DEFENDANT DID NOT OBJECT TO THIS CONDITION AT SENTENCING.

For the first time on appeal, defendant claims that the sentencing court improperly delegated its sentencing authority when it authorized defendant’s Community Corrections Officer (CCO) to define “pornographic material” CP 56-58. Brief of Appellant at 26. However, this issue is not properly before the court because a claim of improper delegation may not be raised for the first time on appeal. State v. Smith, 130 Wn. App. 721, 729-30, 123 P.3d 896 (2005), citing RAP 2.5(a)(3). The failure to raise an issue in the trial court precludes review on appeal

unless the trial court committed a manifest error affecting a constitutional right.); State v. Bahl, 137 Wn. App. 709, 719.

In State v. Smith, 130 Wn. App. 721, 729-30, Smith was convicted of two counts of child molestation and was ordered to “comply with all crime related prohibitions.” Smith at 724. While on community placement, Smith was cited for violating conditions of his community placement by possession a video that showed a sexual relationship between two child cousins. Smith at 724. On appeal, Smith claimed that the Department of Correction’s restriction on the materials he is allowed to possess or view is an unlawful delegation of powers. Smith at 728. The court found that because Smith had not objected at sentencing, the issue could not be raised for the first time on appeal unless it was an issue of constitutional magnitude. Smith at 728. The court held that “any improper delegation of judicial authority that may have occurred did not amount to a manifest constitutional error warranting appellate review despite the lack of objection below.” Id. at 729-30.

Bahl was convicted of second degree rape and first degree burglary. State v. Bahl, 137 Wn. App. 709, 712. Bahl was sentenced to a lifetime of community custody in addition to his prison sentence. Bahl at 713. One of his community custody conditions was not to “possess or control sexual stimulus material for your particular deviancy as defined by

the supervising Community Corrections Officer and therapist, except as provided for therapeutic purposes.” Bahl at 713. At sentencing, Bahl objected to this condition because there were no facts in the record to show that ‘sexual stimulus material’ was a contributing factor to his crime. Id. The sentencing court imposed the condition over Bahl’s objection. On appeal, Bahl challenged this condition as an improper delegation of judicial authority because the community corrections officer would define sexually stimulating material. Id. at 719. The court declined to review this issue because a claim of improper delegation can not be raised for the first time on appeal. Id.

In the present case, defendant did not object when the court ordered that defendant’s CCO would define pornographic material. RP 1048-65. This Court should decline to review this issue because, like Bahl and Smith, defendant cannot allege an improper delegation of sentencing authority on for the first time on appeal.

5. THE COURT PROPERLY ORDERED DEFENDANT TO PARTICIPATE IN A CHEMICAL DEPENDENCY ASSESSMENT PURSUANT TO RCW 9.94A.712(6)(a), BUT EXCEEDED ITS SENTENCING AUTHORITY IN ORDERING DEFENDANT NOT TO POSSESS ALCOHOL PURSUANT TO RCW 9.94A.700(5)(d).

Defendant argues the court exceeded its sentencing authority when it, as conditions of community custody, ordered defendant not to possess

alcohol and to participate in a chemical dependency assessment. Brief of Appellant at 19 and 24. The court properly ordered defendant to have a chemical dependency assessment pursuant to RCW 9.94A.712(6)(a), but exceeded its authority in ordering defendant not to possess alcohol pursuant to RCW 9.94A.700(5)(d).

Defendant was sentenced pursuant to RCW 9.94A.712(1)(a)(i), to a standard range sentence. RP 1064; CP 43-45. In addition to his prison sentence, the court sentenced defendant to a mandatory term of community custody pursuant to RCW 9.94A.712(5). As a condition of community custody, the court ordered defendant not to possess or consume alcohol and to participate in chemical dependency assessment and follow prescribed treatment recommendations. CP 56-58.

The State concedes that the sentencing court exceeded its sentencing authority when it ordered defendant not to possess alcohol. The court may restrict defendant's consumption of alcohol pursuant to RCW 9.94A.712(6)(a) and RCW 9.94A.700(5), but those statutes do not appear to authorize the sentencing court to restrict defendant's possession of alcohol.

The sentencing court properly ordered defendant to participate in a chemical dependency assessment and to follow any recommended treatment pursuant to RCW 9.94A.712(6)(a). The statute states in the relevant part:

The court may also order the offender to participate in rehabilitative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community...

In the present case, according to defendant's presentence investigation (PSI), defendant self-reported that he began experimenting with marijuana when he was 12 years old. CP PSI. PSI was filed with trial court on November 8, 2006, and sent to this Court under separate cover. Defendant's use increased when he was 17 years of age. Immediately prior to his arrest, defendant admitted he used the drug daily. CP 67-88.

The PSI investigator noted:

A history of substance abuse is a risk factor for criminal behavior. Substance abuse erodes significant pro-social bonds that contribute to increased criminal risk. Substance misuse may facilitate or instigate criminal behavior.

CP PSI. The court properly ordered defendant to participate in a chemical dependency assessment pursuant to RCW 9.94A.712(6)(a), because a chemical dependency assessment and follow up treatment is an affirmative

act and rehabilitative program that is reasonably related to the offender's risk of re-offending and/or the safety of the community.

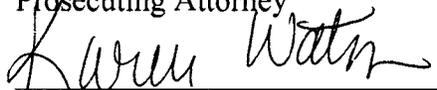
Defendant's claim that the court exceeded its sentencing authority when it ordered chemical dependency evaluation and follow up treatment is without merit. The State concedes the court exceeded its sentencing authority in ordering defendant not to possess alcohol. The sentencing court's prohibition on defendant's possession of alcohol should be stricken from defendant's judgment and sentence.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests that this Court affirm defendant's convictions, affirm the trial court's denial of defendant's motion for a new trial, and remand defendant's judgment and sentence with an order to strike the community custody condition that prohibits defendant from possessing alcohol.

DATED: December 27, 2007.

GERALD A. HORNE
Pierce County
Prosecuting Attorney



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Deputy Prosecuting Attorney
WSB # 24259

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/29/2011
Date Signature