

NO. 36938-9-II
Thurston County No. 06-1-02160-0

STATE OF WASHINGTON,

Respondent,

vs.

DAYLEN RHODEN

Appellant.

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DIVISION I
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STATE OF WASHINGTON
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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

I. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION IN COUNT 7.

II. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION IN COUNT 8.

III. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION IN COUNT 2.

IV. THE TRIAL COURT ERRED IN IMPOSING CONDITIONS OF COMMUNITY CUSTODY IN APPENDIX F WHICH ARE NOT CRIME RELATED OR ARE VAGUE, INCLUDING:

i. Avoid places where minors are know to congregate without the specific permission of the Community Corrections Officer (including, but not limited to, fast food establishments, shopping malls, parks, play grounds, schools, video arcades, etc.);

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iii. Do not possess a computer or any computer components;

iv. Do not go into bars, taverns, or cocktail lounges.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

I. INSUFFICIENT EVIDENCE EXISTS TO SUPPORT COUNT 7, CHILD MOLESTATION IN THE SECOND DEGREE, WHERE THE EVIDENCE ESTABLISHED THAT JESSICA WAS 14 WHEN DAYLON TOUCHED HER BREASTS, NOT 13, AND THE JURY WAS NOT INSTRUCTED ON THE LESSER INCLUDED OFFENSE OF CHILD MOLESTATION IN THE THIRD DEGREE.

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IV. THE CONDITIONS OF COMMUNITY PLACEMENT TO WHICH MR. RHODEN WAS SENTENCED WHICH ARE NOT CRIME RELATED OR OTHERWISE AUTHORIZED BY STATUTE SHOULD BE STRICKEN.

C. STATEMENT OF THE CASE

1. FACTUAL HISTORY

Daylon Rhoden was married to Jeanette Larson for two years. Trial RP II, p. 210-11. They met online in May of 2000, and by October of 2000 Mr. Rhoden had moved from Florida to Washington, to live with Jeanette. Trial RP I, p. 196-97. Jeanette and Daylon were married in December of 2001. Trial RP I, p. 198. Jeanette has two daughters, G.R.B. and Jessica Bradford. Trial RP I, p. 198. Jeanette first heard her daughters' accusation of sexual abuse by Daylon in April of 2006. Trial RP II, p. 205. At that time, Jessica was about to graduate from high school and was being treated for depression. Trial RP II, p. 205: Jessica was first diagnosed with depression in her Sophomore year of high school.

Trial RP II, p. 205. Jeanette questioned Grace during this time about what was bothering Jessica and Grace made the accusation of sexual abuse, claiming that it happened to both her and Jessica. Trial RP II, p. 206-07.

When Daylon first moved in Jessica viewed him as a father figure. Trial RP II, p. 50. Jessica didn't see her biological father very often. Trial RP II, p. 50.

Jeanette and Daylon separated in May of 2003, when Daylon moved back to Florida. Trial RP II, p. 210. When Daylon first brought up ending the marriage in April of 2003, Jeanette was crushed. Trial RP II, 210. She was emotionally dependent on him and felt abandoned. Trial RP II, 210. When Daylon left it also caused financial hardship for Jeanette, Jessica, and G.R.B. Trial RP II, 210-11.

In June of 2001, Daylon suffered an on-the-job injury. Trial RP II, p. 345. It was a lower back injury which caused nerve damage to his left leg and prevented him from working. Trial RP II, p. 345. He began receiving his income from L&I. Trial RP II, p. 348. The most comfortable position for him was lying on his back with several pillows under his knees. Trial RP II, p. 345. He eventually had surgery on his back but it was unsuccessful. Trial RP II, p. 365. Daylon became very irritable, by his own admission, after his injury. Trial RP II, p. 349.

Daylon was strict with G.R.B. and Jessica, more so than Jeanette. Trial

RP II, p. 352. This led to arguments between Jeanette and Daylon. Trial RP II, p. 352.

When Daylon left Jeanette, he promised her he would make the mortgage payments on the house, but he was unable to keep that promise. Trial RP II, p. 371. As a result, Jeanette and her daughters nearly lost their house. Trial RP II, p. 188. Roughly three years after Daylon left Jeanette, her daughters accused Daylon of molesting them. Trial RP II, 205. Specifically, Jessica claimed that when she was 13, she began having sexual relations with Daylon. Trial RP II, p. 51. During the first incident, according to Jessica, Daylon was sitting at a computer that was situated at a desk in the hallway of the house. Trial RP II, p. 89. Jessica estimated that the house was about 900 square feet. Trial RP II, p. 88. Jessica's mother was on the computer in Jessica's room, down the hall from where Daylon was sitting. Trial RP II, p. 90-91. During this incident, Jessica alleged, Daylon stuck his hand in her pants and masturbated her for about fifteen to thirty minutes, penetrating her vagina with his finger, while playing spades on the internet with Jeanette. Trial RP II, p. 52-53, 91. Jessica was standing next to him while Daylon was seated at the computer. Trial RP II, p. 52. After questioning Jessica about this incident at the computer, the State had the following exchange with Jessica:

State: Was there any other time that you and he had sexual contact?

Jessica: Yes.

State: How many other times would you say?

Jessica: I can remember at least I think three incidents, maybe more. I have blocked a lot out.

State: Did they all occur when you were 13?

Jessica: No.

Trial RP I, p. 53-54.

During another alleged incident, Jessica claimed that Daylon performed oral sex on her by kissing and licking her vagina. Trial RP II, p. 54. During this occasion she claimed that Daylon also rubbed her breasts. Trial RP I, p. 55. Jessica said she was 13 or 14 at the time. Trial RP II, p. 54. She testified he performed oral sex on her three or four times. Trial RP II, p. 54. She later changed her testimony to say that she believed, but couldn't specifically recall, that he performed oral sex on her two or three times when she was 13, and three or four times when she was 14. Trial RP II, p. 57. In conjunction with one of the oral sex occasions, Jessica claimed that Daylon coaxed her into masturbating him. Trial RP II, p. 57-58. Jessica described another incident in which Daylon allegedly rubbed his penis on top and around her vagina, eventually ejaculating near her vagina. Trial RP II, p. 59-60. She believed she was 14 at the time.

Trial RP II, p. 60. The last incident, Jessica claimed, occurred a couple of days before Daylon left, wherein Daylon performed oral sex on her and penetrated her with his finger. Trial RP II, p. 61-62.

G.R.B. claimed that when she was nine years old, Daylon began touching her sexually. Trial RP II, p. 170. In one incident, she said that he asked her to come into his bedroom when he was watching T.V., and she laid on the bed next to him. Trial RP II, p. 170-71. She alleged that Daylon put his hand down her pants and penetrated her vagina with his finger. Trial RP II, p. 173. G.R.B. testified that she couldn't remember how many times he touched her like this, but it was probably more than twice. Trial RP II, p. 172-174. She also recounted an incident where Daylon allegedly came up behind her in the kitchen while she was doing dishes and put his hand in her pants. Trial RP II, p. 174. However, during this incident she did not recall if he touched her vagina. Trial RP II, p. 174. The last incident G.R.B. recounted occurred in his bedroom, where Daylon allegedly rolled on top of her placed her in a sexual position with her ankles around his neck and rubbed his penis against her vaginal area. Trial RP II, p. 175-77. They were both clothed at the time. Trial RP II, p. 175-76.

Daylon Rhoden denied ever touching either G.R.B. or Jessica Bradford in a sexual way. Trial RP II, p. 343-396.

The State argued during closing, with regard to the counts pertaining to G.R.B., that the charge of Rape of a Child in the First Degree (Count I) was established by G.R.B.'s testimony about the touching that occurred in the bedroom in which Daylon penetrated her vagina with his finger. Trial RP III, p. 465, CP 68. The State argued that the three counts of Child Molestation in the First Degree (Count 2, 3, and 4) were established as follows:

Now G.R.B. testified to at least three incidents of touching that were at different times: Once in the kitchen while she was doing the dishes he came up behind her and put his hands down her pants; at least twice a month when he put her in that sexual position rubbing his penis on her vagina; and more times than she can count where he had her in the bedroom watching TV and rubbing her privates with his hand. The State has proven these charges beyond a reasonable doubt.

Trial RP III, p. 465. CP 68-69. G.R.B. never testified that Daylon rubbed private parts "more times than she could count" with his hand, she testified that she couldn't remember how many times he touched her like this, but it was probably more than twice. Trial RP II, p. 172-174.

With regard to Jessica, the State argued that Counts 5 and 6, Rape of a Child in the Second Degree, were established, respectively, when Daylon allegedly put his hand in her pants and digitally penetrated her vagina as she stood next to him at the hallway computer, and, as to Count

6, the three occasions of oral sex when she was 13.¹ Trial RP III, p. 466-67. CP 69-70.

With regard to Counts 7 and 8, two counts of Child Molestation in the Second Degree, the State argued that Count 7 was supported by the incident of Daylon touching Jessica's breasts (an incident which occurred in conjunction with oral sex) and Count 8 was supported by the three or more occasions in which Daylon allegedly "rubbed her privates...without penetration." Trial RP III, p. 467. Presumably, here, the prosecutor was referring to Jessica's testimony where she was asked if there were occasions, other than the digital penetration at the computer, where she and Daylon had sexual contact and she replied "yes," but couldn't recall how many times, except it was at least three, and where she answered "no" when she was asked if they all occurred when she was 13. Trial RP I, p. 53-54.

With regard to Counts 9 and 10, two counts of Incest of in the First Degree, the State argued that Count 9 was established by the alleged acts of oral sex which occurred after Jessica turned 14, to include the incident in her bedroom in the garage in the days before Daylon left the home. Trial RP III, p. 468, CP 69-70. As to Count 10, the State argued that this

¹ The State mischaracterized Jessica's testimony on this point. She said she couldn't recall, but she believed it happened two or three times, not "three times." Trial RP I, p. 57.

count was supported by the incident where Jessica alleged Daylon rubbed his penis near and around her vagina, where she could not recall if he penetrated her and where he “ejaculated on her hand.” (Quoting the prosecutor, not Jessica). Trial RP III, p. 468. Jessica, however, never testified that Daylon ejaculated on her hand. Trial RP I, p. 46-71. She testified that he ejaculated on top of her pubic hair area. Trial RP I, p. 60. The prosecutor argued, contrary to Jessica’s testimony, that Daylon penetrated Jessica and this constituted sexual intercourse for the purpose of Count 10. Trial RP III, p. 468-69.

With regard to Counts 11 and 12, Incest in the Second Degree, the State argued:

Finally, Counts 11 and 12, incest in the second degree, they represent the acts upon Jessica when she was over 13. He asked for a blow job; she refused. She masturbated him with her hand instead. She said she was 14 and it occurred after he started giving her oral sex, and he ejaculated into a towel. She testified that he said it felt good and he was groaning and sighing. There are at least two incidents of sexual contact upon Jessica when she was over 13, and we have two counts, Counts 11 and 12.

Trial RP III, p. 469. Presumably, with regard to Count 12, the prosecutor was again referring to Jessica’s testimony where she was asked if there were occasions, other than the digital penetration at the computer, where she and Daylon had sexual contact and she replied “yes,” but couldn’t recall how many times, except it was at least three, and where she

answered "no" when she was asked if they all occurred when she was 13, because there were no other incidents testified to by Jessica that were not already being used to establish the other eleven counts. Trial RP I, p. 53-54.

2. PROCEDURAL HISTORY

The Thurston County Prosecuting Attorney charged Daylon Rhoden by Amended Information with twelve counts: Count I: Rape of a Child in the First Degree against G.R.B.; Count II: Child Molestation in the First Degree against G.R.B.; Count III: Child Molestation in the First Degree against G.R.B.; Count IV: Child Molestation in the First Degree against G.R.B.; Count V: Rape of a Child in the Second Degree against Jessica Bradford; Count VI: Rape of a Child in the Second Degree against Jessica Bradford; Count VII: Child Molestation in the Second Degree against Jessica Bradford; Count VIII: Child Molestation in the Second Degree against Jessica Bradford; Count IX: Incest in the First Degree against Jessica Bradford; Count X: Incest in the First Degree against Jessica Bradford; Count XI: Incest in the Second Degree against Jessica Bradford; Count XII: Incest in the Second Degree against Jessica Bradford. CP 68-70.

A jury trial was held and Mr. Rhoden was convicted on all counts. CP 71-82. Mr. Rhoden was given a standard range sentence on all counts.

CP 137, 140. As a condition of his sentence, Mr. Rhoden was sentenced to conditions of community custody as outlined in Appendix F attached to the Judgment and Sentence. CP 148-150. Among those conditions, Mr. Rhoden was sentenced to the following conditions of community placement to which Mr. Rhoden assigns error: (1) That Mr. Rhoden “avoid places where minors are known to congregate without the specific permission of the Community Corrections Officer (including, but not limited to, fast food establishments, shopping malls, parks, play grounds, schools, video arcades, etc.;;” (2) That Mr. Rhoden “not possess any photographic equipment, to include cameras or video cameras;” (3) That Mr. Rhoden “not possess a computer or any computer components;” and that Mr. Rhoden “not go into bars, taverns, or cocktail lounges.” CP 149. These are specifically described as “additional conditions during the term of community placement,” found under section (b) of Appendix F. CP 149. This timely appeal followed. CP 133.

D. ARGUMENT

I. INSUFFICIENT EVIDENCE EXISTS TO SUPPORT COUNT 7, CHILD MOLESTATION IN THE SECOND DEGREE, WHERE THE EVIDENCE ESTABLISHED THAT JESSICA WAS 14 WHEN DAYLON TOUCHED HER BREASTS, NOT 13, AND THE JURY WAS NOT INSTRUCTED ON THE LESSER INCLUDED OFFENSE OF CHILD MOLESTATION IN THE THIRD DEGREE.

The prosecutor argued to the jury that the act which supported Count 7, child molestation in the second degree, was the incident where Daylon kissed and licked Jessica's breasts prior to performing oral sex on her. The prosecutor asked Jessica to "Tell us one incident that you recall" about oral sex. Trial RP I, p. 54. The incident Jessica chose to relate occurred, according to her testimony when she was "13 or 14. I can't remember." Trial RP I, p. 54. She then went on to recount that it happened in her bedroom and Daylon coached her out of her clothes. Trial RP I, p. 55. He "kissed and licked me all over my chest," she testified, and testified he told her she had great breasts. Trial RP I, p. 55. He then performed oral sex on her. Trial RP I, p. 56. Jessica never testified about any other incident of Daylon touching her breasts. Trial RP I, p. 46-71.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: "[The] use of the reasonable-doubt standard is

indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996). “Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the

crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

Child molestation in the second degree occurs when the perpetrator engages in sexual contact with the victim, and the perpetrator is at least 36 months older than the victim and the victim is at least twelve years of age but less than fourteen years old. RCW 9A.44.086. The State does not meet its burden of proving this offense where the victim specifically says that she may have been fourteen years old. Jessica was unwilling to commit to whether she was thirteen or fourteen years old. The State cannot simply take that part of her answer which helps its case and excise that portion of her answer which hurts its case. It was required to prove, beyond a reasonable doubt, that she was thirteen. The State failed to do so and Mr. Rhoden’s conviction under Count 7 should be reversed.

Here, the court did not instruct the jury on the lesser included offense of child molestation in the third degree. However, the proper remedy is for this Court to remand to the trial court with instructions to enter a judgment of guilty to the charge of Child Molestation in the Third Degree. In *State v. Gamble*, 118 Wn.App. 332, 336, 72 P.2d 1139 (2003), the court noted the remedy of resentencing on a lesser included offense is generally only permissible when the jury has been explicitly instructed on that lesser included offense. The court observed, however, that the

“proper inquiry is not whether the jury was *instructed* on the lesser included offense but, rather, whether the jury *necessarily found* each element of the lesser included offense beyond a reasonable doubt in reaching its verdict on the crime charged.” *Gamble*, 118 Wn.App. at 336. Here, because the jury concluded the act was committed but merely lacked sufficient evidence to prove, beyond a reasonable doubt, that Jessica was thirteen at the time, the jury necessarily found each element of lesser included offense in reaching its verdict on the crime charged.

Further, in *State v. Jones*, 22 Wn.App. 447, 454, 591 P.2d 796 (1979), the court held that when the jury resolved all other issues of the lesser included offense against the interest of the defendant, the court can remand with directions to resentence the defendant on the lesser included offense.

**II. INSUFFICIENT EVIDENCE EXISTS TO SUPPORT
COUNT 8 WHERE THE EVIDENCE DOES NOT PROVE
THAT JESSICA WAS 13 DURING THE INCIDENTS OF
TOUCHING UPON WHICH THE STATE RELIED FOR
THIS CHARGE.**

The State, it must be observed, had a difficult task separating the various incidents of sexual contact upon which it relied for each of these counts. During closing argument, the State indicated that Count 8 was based upon Daylon rubbing Jessica’s “privates on at least three occasions.” Trial RP III, p. 467. The only testimony that pertained to

sexual contact in general which did not include the incidents of oral sex, digital penetration, and Daylon rubbing his penis around her vagina, was this:

State: Was there any other time that you and he had sexual contact?

Jessica: Yes.

State: How many other times would you say?

Jessica: I can remember at least I think three incidents, maybe more. I have blocked a lot out.

State: Did they all occur when you were 13?

Jessica: No.

Trial RP I, p. 53-54.

This testimony occurred after Jessica testified about the computer incident but before she began recounting incidents of oral sex. The problem, if this is the testimony upon which the State relied to support Count 8, is that Jessica did not testify these incidents occurred when she was thirteen. The State asked "Did they all occur when you were 13?" Jessica replied "No." Jessica was not asked whether any of them occurred when she was thirteen, she was asked if they *all* occurred when she was thirteen, to which Jessica replied "no." Based on the way the question was asked, it could just as easily be true that none of the incidents occurred when she was thirteen as it could be that some, or even one, occurred

when she was thirteen. The State could have simply asked if any of these incidents occurred when she was 13. However the State didn't ask that, and we are bound by the question that was asked and the answer that was given. For the same reasons argued in part I above, the evidence is insufficient to sustain the charge of child molestation in the second degree.

The remedy in this assignment of error is the same as the remedy in assignment of error number one, for this Court to remand to the trial court with instructions to enter a judgment on the lesser included offense of child molestation in the third degree and for Mr. Rhoden to be resentenced accordingly.

III. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION FOR CHILD MOLESTATION IN THE FIRST DEGREE UNDER COUNT 2, WHERE THE STATE FAILED TO PROVE THAT THERE WAS SEXUAL CONTACT, OR THAT IT WAS DONE FOR THE SEXUAL GRATIFICATION OF EITHER PARTY.

The State alleged that Mr. Rhoden was guilty of child molestation in the first degree under Count 2 for the incident in which he allegedly came up behind G.R.B. in the kitchen and put his hand in her pants. The specific testimony given by G.R.B. about this incident is as follows:

State: Was there a time when he touched you with his hand that was in a different room?

G.R.B.: I only recall once in the kitchen, very briefly.

State: What happened?

G.R.B.: I was doing the dishes.

State: Uh-huh. And what happened?

G.R.B.: He just walked up behind me and put his hand in my pants.

State: And what did he do with his hand once it was in your pants?

G.R.B.: Kind of moved a bit, and then like I don't remember after that.

State: Okay. When he moved a bit, did he touch any part of your privates?

G.R.B.: I don't remember.

Trial RP I, p. 174.

This testimony does not establish sexual contact between Daylon and G.R.B, and the evidence as to Count 2 is therefore insufficient. The case law pertaining to insufficiency of the evidence in part I is incorporated herein.

The definition of sexual contact is any touching of the sexual or intimate parts of a person done for the purpose of gratifying the sexual desire of either party or a third party. RCW 9A.44.010 (2). In those cases where the evidence shows touching through clothing, or touching of intimate parts of the body other than the primary erogenous areas, the courts have required some additional evidence of sexual gratification.

State v. Powell, 62 Wn.App. 914, 917, 816 P.2d 86 (1991), citing *State v. Camarillo*, 115 Wn.2d 60, 63, 794 P.2d 850 (1990).

Here, the testimony of G.R.B. is simply too anemic and vague to support a finding of sexual contact. We cannot discern, from this testimony, where Mr. Rhoden's hand was; whether it was on her stomach, her hip, her pelvic region, etc. It could easily have been near her belly button with as little detail G.R.B. gave. And there is no evidence about what he did with his hand, beyond that he "kind of moved it a bit." Slight movement of his hand, on some part of G.R.B.'s lower torso, does not constitute sufficient evidence of sexual contact and it does not provide sufficient evidence that the contact was done for the sexual gratification of either party. Mr. Rhoden's conviction as to Count 2 should be reversed and dismissed.

IV. THE CONDITIONS OF COMMUNITY PLACEMENT TO WHICH MR. RHODEN WAS SENTENCED WHICH ARE NOT CRIME RELATED OR OTHERWISE AUTHORIZED BY STATUTE SHOULD BE STRICKEN.

As noted above in the Statement of the Case and Assignments of Error, Mr. Rhoden asks this court to strike certain provisions of his community custody that either are not crime related, or vague.

Beginning with the provision the problem of vagueness, Mr. Rhoden asserts that the prohibition of him entering fast food

establishments and shopping malls without the specific permission of his Community Corrections Officer, as well as the term “etc.,” in this particular condition, is a vague condition.

Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, “a statute is void for vagueness if its terms are ‘so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.’” *State v. Worrell*, 111 Wn.2d 537, 761 P.2d 56 (1988) (quoting *Myrick v. Board of Pierce Cy. Comm’rs*, 102 Wn.2d 698, 707, 677 P.2d 140 (1984)). This rule applies equally to conditions of community custody, which had the effect of a criminal statute in that their violation can result in a new term of incarceration. *State v. Simpson*, 136 Wn.App. 812, 150 P.3d 1167 (2007).

As the Washington Supreme Court explained in *State v. Aver*, 109 Wn.2d 303, 745 P.2d 479 (1987), the test for vagueness rests on two key requirements: adequate notice to citizens and adequate standards to prevent arbitrary enforcement. In addition, there are two types of vagueness challenges: (1) facial challenges, and (2) challenges as applied in a particular case. *State v. Worrell*, 111 Wn.2d at 540. In *Aver*, the court explained the former challenge as follows:

In a constitutional challenge a statute is presumed constitutional unless its unconstitutionality appears beyond a reasonable doubt. *Seattle v. Shepherd*, 93 Wash.2d 861, 865, 613 P.2d 1158 (1980);

Maciolek, 101 Wash.2d at 263, 676 P.2d 996. In a facial challenge, as here, we look to the face of the enactment to determine whether any conviction based thereon could be upheld. *Shepherd*, 93 Wash.2d at 865, 613 P.2d 1158. A statute is not facially vague if it is susceptible to a constitutional interpretation. *State v. Miller*, 103 Wash.2d 792, 794, 698 P.2d 554 (1985). The burden of proving impermissible vagueness is on the party challenging the statute's constitutionality. *Shepherd*, 93 Wash.2d at 865, 613 P.2d 1158. Impossible standards of specificity are not required. *Hi-Starr, Inc. v. Liquor Control Bd.*, 106 Wash.2d 455, 465, 722 P.2d 808 (1986).

Aver, 109 Wn.2d at 306-07.

Here, this condition is vague first and foremost because the term "etcetera" fails to advise Mr. Rhoden which conduct, specifically, he is proscribed from engaging in. Will "etcetera" simply be conduct which the CCO decides, after the fact, was objectionable? How will Mr. Rhoden be able to alter or prevent his conduct in advance? Similarly, prohibiting Mr. Rhoden from entering fast food establishments is vague because it does not clarify which fast food establishments are proscribed. Logically, it would seem that the only fast food establishments which could be included are those with a play area for children. If a fast food restaurant has no play area, it is no different than any other restaurant, and no more likely to attract children than any other restaurant. A Taco Time without a play area is no different than an Azteca family restaurant. How will Mr. Rhoden know where he can and cannot eat? And if the prohibition includes even those fast food areas without a play land, how is that crime

related? Mr. Rhoden was not convicted of victimizing anyone, either a child or an adult, who is not known to him.

Further, how is "shopping mall" defined? Many shopping malls are new, open air malls which contain separate, outside entrances for each store. Is this a shopping mall? Will Mr. Rhoden face a violation for shopping at Rite-Aid? Is there any evidence that children congregate in shopping malls? Wouldn't it be more appropriate to just list the stores he is prohibited from entering, such as Abercrombie and Fitch? This condition is void and violates the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

Also, the prohibitions restricting Mr. Rhoden from possessing any photographic equipment, including cameras and video cameras, from possessing computers or any computer equipment, and restricting him from entering bars, taverns, or cocktail lounges should be stricken because they are not crime related. Lifetime community custody must be imposed for sex offense convictions where, as here, defendants are sentenced under RCW 9.94A.712. RCW 9.94A.712 specifies that unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4) and may include those

conditions found in RCW 9.94A.700(5). Many of the conditions appear in list form under RCW 9.94A.700(4) and (5) as follows:

(4)

- (a) The offender shall report to and be available for contact with the assigned community corrections officer as directed;
- (b) The offender shall work at department-approved education, employment, or community restitution, or any combination thereof;
- (c) The offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions;
- (d) The offender shall pay supervision fees as determined by the department; and
- (e) The residence location and living arrangements shall be subject to the prior approval of the department during the period of community placement.

(5)

- (a) The offender shall remain within, or outside of, a specified geographical boundary;
- (b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;
- (c) The offender shall participate in crime-related treatment or counseling services;
- (d) The offender shall not consume alcohol; or
- (e) The offender shall comply with any crime-related prohibitions.

No causal link need be established between the condition imposed and the crime committed so long as the condition relates to the circumstances of the crime. *State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). 'Circumstances' is defined as 'an accompanying or accessory fact.' Black's Law Dictionary 259 (8th ed. 2004).

In addition, the court can also order an offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of re-offending, or the safety of the community. RCW 9.94A.712(6)(a)(i). Finally, under RCW 9.94A.720(b), the offender shall report as directed to the community corrections officer, remain within prescribed geographic boundaries, notify the community corrections officer of any change of address or employment, and pay supervision costs.

As Mr. Rhoden was sentenced under the authority of RCW 9.94A.712, the court imposed certain reasonable and authorized conditions of community custody. However, the court also imposed the aforementioned objectionable conditions that are neither authorized by statute nor crime-related.

There was no mention of illicit photography or the improper use (or the use at all) of a camera or photographic equipment at Mr. Rhoden's trial or sentencing. Yet the trial court held, as a condition of his lifetime

community custody, that he could not possess photographic equipment of any kind. This would include, presumably, a cell phone, as almost all cell phones contain cameras within them. This would be a significant intrusion into Mr. Rhoden's liberty as well as being totally unrelated to his crimes. Likewise, there was no mention at Mr. Rhoden's trial or sentencing that he improperly used a computer or computer components. The only mention of a computer was the fact that Mr. Rhoden was allegedly using a computer to play a card game while he committed the first act of sexual contact against Jessica.

Also, the restriction from entering bars, taverns, or cocktail lounges is not crime related. There was no evidence or any mention that alcohol played a role in these crimes, or that Mr. Rhoden ever took a minor into a drinking establishment. These crimes were not committed against adults (the only ones allowed entry into bars, taverns, and cocktail lounges). Although Mr. Rhoden does not challenge the condition that he not *consume* alcohol, there is no basis on which to exclude him, for life, from establishments where alcohol is served and where he will not, in any event, come into contact with minors.

While Mr. Rhoden did not object to these conditions at sentencing, he is objecting to them on appeal. Objections to community custody conditions can be raised for the first time on appeal. *State v. Jones*, 118

Wn. App. 199, 204, 76 P.3d 258 (2003); *State v. Julian*, 102 Wn. App. 296, 304, 9 P.3d 851 (2000), *review denied*, 143 Wn.2d 1003 (2001) (“sentences imposed without statutory authority can be addressed for the first time on appeal”). Imposition of crime-related prohibitions are reviewed for an abuse of discretion and will only be reversed if the decision is manifestly unreasonable or based on untenable grounds. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). Here, there is no evidence that photographic equipment or computers contributed to Mr. Rhoden’s crimes, or in any way played a role in his crimes. Nor is there any evidence that Mr. Rhoden frequented bars, taverns, or cocktail lounges or that this type of thing played any role in his crime. As such, these conditions are erroneous and should be stricken. The trial court abused its discretion when imposing those three conditions.

Should this Court refuse to address this argument as not ripe, it will violate Mr. Rhoden’s right to due process under Washington Constitution, Article 1, § 3 and the United States Constitution, Fourteenth Amendment, as well as Mr. Rhoden’s right to effective appellate review under Washington Constitution, Article 1, § 22.

In a recent decision this court ruled that constitutional arguments such as these are not ripe for decision given the fact that the state had not sought to sanction the defendant for violation of any of the conditions the

defendant herein claims are improper. In this case, *State v. Motter*, 139 Wn. App. 797; 162 P.3d 1190 (2007), a defendant convicted of first degree burglary appealed his sentence, arguing that the trial court imposed a number of community custody conditions that violated certain constitutional rights and which were not authorized by the legislature. One of these conditions prohibited the defendant from possessing “drug paraphernalia” which the court said included such items as cell phones and data recording devices. This court refused to address this condition on the basis that the issue was not ripe for decision. This court held:

Moreover, Motter’s challenge is not ripe. In *State v. Massey*, 81 Wn. App. 198, 200, 913 P.2d 424 (1996), the defendant challenged a condition that he submit to searches. This court held that the judicial review was premature until the defendant had been subjected to a search he thought unreasonable. And in *State v. Langland*, 42 Wn. App. 287, 292-93, 711 P.2d 1039 (1985), we held that the question of a law’s constitutionality is not ripe for review unless the challenger was harmed by the law’s alleged error. Here, Motter claims that the court order could prohibit his possession of innocuous items. But Motter has not been harmed by this potential for error and this issue therefore is not ripe for our review. It is not reasonable to require a trial court to list every item that may possibly be misused to ingest or process controlled substances, items ranging from pop cans to coffee filters. Thus, we can review Motter’s challenge only in context of an allegedly harmful application of this community custody condition. This argument is not properly before this court and we will not address it.

Motter, 139 Wn. App. at 804.

This decision, while appropriate at the time of *Massey* and *Langland*, is inappropriate now, and that by applying it in *Motter* and applying it under our facts this court violates Sanchez's right to procedural due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment by denying Sanchez appellate review as guaranteed under Washington Constitution, Article 1, § 22. The following presents this argument.

A criminal defendant does not have a federal constitutional due process right to either post-conviction motions or to appeal. *Rheuark v. Shaw*, 628 F.2d 297, 302 (5th Cir.1980), *cert. denied*, 450 U.S. 931, 101 S.Ct. 1392, 67 L.Ed.2d 365 (1981). However, once the state acts to create those rights by constitution, statute or court rule, the protections afforded under the due process clauses found in Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, have full effect. *In re Frampton*, 45 Wn.App. 554, 726 P.2d 486 (1986). For example, once the state creates the right to appeal a criminal conviction, in order to comport with due process, the state has the duty to provide all portions of the record necessary to prosecute the appeal at state expense. *State v. Rutherford*, 63 Wn.2d 949, 389 P.2d 895 (1964). The state also

has the duty to provide appointed counsel to indigent appellants. *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210 (1987).

In Washington a criminal defendant has the right to one appeal in a criminal case under both RAP 2.2 and Washington Constitution, Article 1, § 22. *State v. French*, 157 Wn.2d 593, 141 P.3d 54 (2006). Thus, this right includes the protections of procedural due process. At a minimum, procedural due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment requires notice and the opportunity to be heard before a competent tribunal. *In re Messmer*, 52 Wn.2d 510, 326 P.2d 1004 (1958). In the *Messmer* decision, the Washington State Supreme Court provided the following definition for procedural due process.

We have decided that the elements of the constitutional guaranty of due process in its procedural aspect are notice and an opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case; also to have the assistance of counsel, if desired, and a reasonable time for preparation for trial.

In re Messmer, 52 Wn.2d at 514 (quoting *In re Petrie*, 40 Wn.2d 809, 246 P.2d 465 (1952)).

In *Massey* and *Langland* the defendant's procedural due process right "to be heard or defend before a competent tribunal" was not violated

even though the court found the defendant's constitutional challenge to certain probation conditions was not ripe. The reason is that in these cases the defendants had the right to contest the constitutionality of those conditions before the court in the future were the Department of Corrections to seek to sanction the defendant for failure to comply with conditions the defendant felt were unconstitutional. The problem with the decision in *Motter*, and the problem in this case is that probation violation claims are no longer adjudicated in court. Rather, they are adjudicated before a Department of Corrections hearing officer who only has the authority to determine (1) what the conditions were, (2) whether or not DOC has factually proven a violation of those conditions, and (3) what the appropriate sanction should be if the violation was proven.

Under WAC 137-104-050 the Department of Corrections has adopted procedures whereby defendants accused of community custody violations are tried before a DOC hearing officer on the claims of violation, not before a court. The first two sections of this code section provide as follows:

- (1) Offenders accused of violating any of the conditions or requirements of community custody will be entitled to a hearing, prior to the imposition of sanctions by the department.
- (2) The hearing shall be conducted by a hearing officer in the department's hearing unit, and shall be considered as an offender

disciplinary proceeding and shall not be subject to chapter 34.05 RCW, the Administrative Procedure Act.

WAC 137-104-050.

There is no provision under this administrative code, nor under any of the other sections of WAC 137-104 to allow the defendant to challenge the constitutionality of community custody conditions that the court imposed. In addition, while this administrative code section does grant the right to appeal, it does not grant the defendant the right at the appellate level to challenge the constitutionality of the community custody conditions imposed by the court. This section, WAC 137-104-080, states as follows:

- (1) The offender may appeal the decision of the hearing officer within seven calendar days to the appeals panel. The request for review should be submitted in writing and list specific concerns.
- (2) The sanction shall be reversed or modified if a majority of the panel finds that the sanction was not reasonably related to the:
(a) Crime of conviction; (b) Violation committed; (c) Offender's risk of reoffending; or (d) Safety of the community.
- (3) The appeals panel will also examine evidence presented at the hearing and reverse any finding of a violation based solely on unconfirmed or unconfirmable allegations.

WAC 137-104-080.

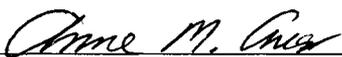
Under WAC 137-104-080 and the procedures by which community custody violations are no longer adjudicated in court, the effect of the decision in *Motter* is to deny a defendant procedural due

process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment by refusing to hear constitutional challenges to community custody provisions at the direct appeal level (not ripe), and then refuse to hear constitutional challenges at the violation level under WAC 137-104 (no authority to hear the claim). Thus, to comport with minimum due process, this court should find that the defendant's constitutional challenges to community custody conditions may be heard as part of a direct appeal from the imposition of the sentence.

E. CONCLUSION

Mr. Rhoden's convictions under counts 7 and 8 should be reversed and he should be resentenced for the offense of child molestation in the third degree for both offenses. Mr. Rhoden's conviction under count 2 should be reversed and dismissed. Certain conditions of Mr. Rhoden's community custody order should be stricken.

RESPECTFULLY SUBMITTED this 25th day of June, 2008.



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APPENDIX

1. § 9.94A.700. Community placement

When a court sentences an offender to a term of total confinement in the custody of the department for any of the offenses specified in this section, the court shall also sentence the offender to a term of community placement as provided in this section. Except as provided in RCW 9.94A.501, the department shall supervise any sentence of community placement imposed under this section.

(1) The court shall order a one-year term of community placement for the following:

(a) A sex offense or a serious violent offense committed after July 1, 1988, but before July 1, 1990; or

(b) An offense committed on or after July 1, 1988, but before July 25, 1999, that is:

(i) Assault in the second degree;

(ii) Assault of a child in the second degree;

(iii) A crime against persons where it is determined in accordance with RCW 9.94A.602 that the offender or an accomplice was armed with a deadly weapon at the time of commission; or

(iv) A felony offense under chapter 69.50 or 69.52 RCW not sentenced under RCW 9.94A.660.

(2) The court shall sentence the offender to a term of community placement of two years or up to the period of earned release awarded pursuant to RCW 9.94A.728, whichever is longer, for:

(a) An offense categorized as a sex offense committed on or after July 1, 1990, but before June 6, 1996, including those sex offenses also included in other offense categories;

(b) A serious violent offense other than a sex offense committed on or after July 1, 1990, but before July 1, 2000; or

(c) A vehicular homicide or vehicular assault committed on or after July 1, 1990, but before July 1, 2000.

(3) The community placement ordered under this section shall begin either upon

completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned release. When the court sentences an offender to the statutory maximum sentence then the community placement portion of the sentence shall consist entirely of the community custody to which the offender may become eligible. Any period of community custody actually served shall be credited against the community placement portion of the sentence.

(4) Unless a condition is waived by the court, the terms of any community placement imposed under this section shall include the following conditions:

(a) The offender shall report to and be available for contact with the assigned community corrections officer as directed;

(b) The offender shall work at department-approved education, employment, or community restitution, or any combination thereof;

(c) The offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions;

(d) The offender shall pay supervision fees as determined by the department; and

(e) The residence location and living arrangements shall be subject to the prior approval of the department during the period of community placement.

(5) As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions:

(a) The offender shall remain within, or outside of, a specified geographical boundary;

(b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;

(c) The offender shall participate in crime-related treatment or counseling services;

(d) The offender shall not consume alcohol; or

(e) The offender shall comply with any crime-related prohibitions.

(6) An offender convicted of a felony sex offense against a minor victim after June 6, 1996, shall comply with any terms and conditions of community placement imposed by the department relating to contact between the sex offender and a minor victim or a child of similar age or circumstance as a previous victim.

(7) Prior to or during community placement, upon recommendation of the department, the sentencing court may remove or modify any conditions of community placement so

as not to be more restrictive.

2. § 9.94A.712. Sentencing of nonpersistent offenders

(1) An offender who is not a persistent offender shall be sentenced under this section if the offender:

(a) Is convicted of:

(i) Rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion;

(ii) Any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second degree, or burglary in the first degree; or

(iii) An attempt to commit any crime listed in this subsection (1)(a);

committed on or after September 1, 2001; or

(b) Has a prior conviction for an offense listed in RCW 9.94A.030(33)(b), and is convicted of any sex offense which was committed after September 1, 2001.

For purposes of this subsection (1)(b), failure to register is not a sex offense.

(2) An offender convicted of rape of a child in the first or second degree or child molestation in the first degree who was seventeen years of age or younger at the time of the offense shall not be sentenced under this section.

(3) (a) Upon a finding that the offender is subject to sentencing under this section, the court shall impose a sentence to a maximum term and a minimum term.

(b) The maximum term shall consist of the statutory maximum sentence for the offense.

(c) (i) Except as provided in (c)(ii) of this subsection, the minimum term shall be either within the standard sentence range for the offense, or outside the standard sentence range pursuant to RCW 9.94A.535, if the offender is otherwise eligible for such a sentence.

(ii) If the offense that caused the offender to be sentenced under this section was rape of a child in the first degree, rape of a child in the second degree, or child molestation in the first degree, and there has been a finding that the offense was predatory under RCW 9.94A.836, the minimum term shall be either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater. If the offense that caused the offender to be sentenced under this section was rape in the first degree, rape in the second degree, indecent liberties by forcible compulsion, or kidnapping in the first degree with sexual motivation, and there has

been a finding that the victim was under the age of fifteen at the time of the offense under RCW 9.94A.837, the minimum term shall be either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater. If the offense that caused the offender to be sentenced under this section is rape in the first degree, rape in the second degree with forcible compulsion, indecent liberties with forcible compulsion, or kidnapping in the first degree with sexual motivation, and there has been a finding under RCW 9.94A.838 that the victim was, at the time of the offense, developmentally disabled, mentally disordered, or a frail elder or vulnerable adult, the minimum sentence shall be either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater.

(d) The minimum terms in (c)(ii) of this subsection do not apply to a juvenile tried as an adult pursuant to RCW 13.04.030(1)(e) (i) or (v). The minimum term for such a juvenile shall be imposed under (c)(i) of this subsection.

(4) A person sentenced under subsection (3) of this section shall serve the sentence in a facility or institution operated, or utilized under contract, by the state.

(5) When a court sentences a person to the custody of the department under this section, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody under the supervision of the department and the authority of the board for any period of time the person is released from total confinement before the expiration of the maximum sentence.

(6) (a) (i) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, and the department and the board shall enforce such conditions pursuant to RCW 9.94A.713, 9.95.425, and 9.95.430.

(ii) If the offense that caused the offender to be sentenced under this section was an offense listed in subsection (1)(a) of this section and the victim of the offense was under eighteen years of age at the time of the offense, the court shall, as a condition of community custody, prohibit the offender from residing in a community protection zone.

(b) As part of any sentence under this section, the court shall also require the offender to comply with any conditions imposed by the board under RCW 9.94A.713 and 9.95.420 through 9.95.435.

3. § 9.94A.720. Supervision of offenders

(1) (a) Except as provided in RCW 9.94A.501, all offenders sentenced to terms involving community supervision, community restitution, community placement, or community custody shall be under the supervision of the department and shall follow explicitly the instructions and conditions of the department. The department may require an offender to perform affirmative acts it deems appropriate to monitor compliance with the conditions of the sentence imposed. The department may only supervise the offender's compliance with payment of legal financial obligations during any period in which the department is authorized to supervise the offender in the

community under RCW 9.94A.501.

(b) The instructions shall include, at a minimum, reporting as directed to a community corrections officer, remaining within prescribed geographical boundaries, notifying the community corrections officer of any change in the offender's address or employment, and paying the supervision fee assessment.

(c) For offenders sentenced to terms involving community custody for crimes committed on or after June 6, 1996, the department may include, in addition to the instructions in (b) of this subsection, any appropriate conditions of supervision, including but not limited to, prohibiting the offender from having contact with any other specified individuals or specific class of individuals.

(d) For offenders sentenced to terms of community custody for crimes committed on or after July 1, 2000, the department may impose conditions as specified in RCW 9.94A.715.

The conditions authorized under (c) of this subsection may be imposed by the department prior to or during an offender's community custody term. If a violation of conditions imposed by the court or the department pursuant to RCW 9.94A.710 occurs during community custody, it shall be deemed a violation of community placement for the purposes of RCW 9.94A.740 and shall authorize the department to transfer an offender to a more restrictive confinement status as provided in RCW 9.94A.737. At any time prior to the completion of an offender's term of community custody, the department may recommend to the court that any or all of the conditions imposed by the court or the department pursuant to RCW 9.94A.710 or 9.94A.715 be continued beyond the expiration of the offender's term of community custody as authorized in RCW 9.94A.715 (3) or (5).

The department may require offenders to pay for special services rendered on or after July 25, 1993, including electronic monitoring, day reporting, and telephone reporting, dependent upon the offender's ability to pay. The department may pay for these services for offenders who are not able to pay.

(2) No offender sentenced to terms involving community supervision, community restitution, community custody, or community placement under the supervision of the department may own, use, or possess firearms or ammunition. Offenders who own, use, or are found to be in actual or constructive possession of firearms or ammunition shall be subject to the violation process and sanctions under RCW 9.94A.634, 9.94A.737, and 9.94A.740. "Constructive possession" as used in this subsection means the power and intent to control the firearm or ammunition. "Firearm" as used in this subsection has the same definition as in RCW 9.41.010.

4. § 9A.44.086. Child molestation in the second degree

(1) A person is guilty of child molestation in the second degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

(2) Child molestation in the second degree is a class B felony.

5. § 9A.44.089. Child molestation in the third degree

(1) A person is guilty of child molestation in the third degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim.

(2) Child molestation in the third degree is a class C felony.

5. § 9A.44.010. Definitions

As used in this chapter:

(1) "Sexual intercourse" (a) has its ordinary meaning and occurs upon any penetration, however slight, and

(b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and

(c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

(2) "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

(3) "Married" means one who is legally married to another, but does not include a person who is living separate and apart from his or her spouse and who has filed in an appropriate court for legal separation or for dissolution of his or her marriage.

(4) "Mental incapacity" is that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause.

(5) "Physically helpless" means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

(6) "Forcible compulsion" means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.

(7) "Consent" means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.

(8) "Significant relationship" means a situation in which the perpetrator is:

(a) A person who undertakes the responsibility, professionally or voluntarily, to provide education, health, welfare, or organized recreational activities principally for minors;

(b) A person who in the course of his or her employment supervises minors; or

(c) A person who provides welfare, health or residential assistance, personal care, or organized recreational activities to frail elders or vulnerable adults, including a provider, employee, temporary employee, volunteer, or independent contractor who supplies services to long-term care facilities licensed or required to be licensed under chapter 18.20, 18.51, 72.36, or 70.128 RCW, and home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW, but not including a consensual sexual partner.

(9) "Abuse of a supervisory position" means:

(a) To use a direct or indirect threat or promise to exercise authority to the detriment or benefit of a minor; or

(b) To exploit a significant relationship in order to obtain the consent of a minor.

(10) "Person with a developmental disability," for purposes of RCW 9A.44.050(1)(c) and 9A.44.100(1)(c), means a person with a developmental disability as defined in RCW 71A.10.020.

(11) "Person with supervisory authority," for purposes of RCW 9A.44.050(1)(c) or (e) and 9A.44.100(1)(c) or (e), means any proprietor or employee of any public or private care or treatment facility who directly supervises developmentally disabled, mentally disordered, or chemically dependent persons at the facility.

(12) "Person with a mental disorder" for the purposes of RCW 9A.44.050(1)(e) and 9A.44.100(1)(e) means a person with a "mental disorder" as defined in RCW 71.05.020.

(13) "Person with a chemical dependency" for purposes of RCW 9A.44.050(1)(e) and 9A.44.100(1)(e) means a person who is "chemically dependent" as defined in RCW 70.96A.020(4).

(14) "Health care provider" for purposes of RCW 9A.44.050 and 9A.44.100 means a person who is, holds himself or herself out to be, or provides services as if he or she

were: (a) A member of a health care profession under chapter 18.130 RCW; or (b) registered under chapter 18.19 RCW or licensed under chapter 18.225 RCW, regardless of whether the health care provider is licensed, certified, or registered by the state.

(15) "Treatment" for purposes of RCW 9A.44.050 and 9A.44.100 means the active delivery of professional services by a health care provider which the health care provider holds himself or herself out to be qualified to provide.

(16) "Frail elder or vulnerable adult" means a person sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself. "Frail elder or vulnerable adult" also includes a person found incapacitated under chapter 11.88 RCW, a person over eighteen years of age who has a developmental disability under chapter 71A.10 RCW, a person admitted to a long-term care facility that is licensed or required to be licensed under chapter 18.20, 18.51, 72.36, or 70.128 RCW, and a person receiving services from a home health, hospice, or home care agency licensed or required to be licensed under chapter 70.127 RCW.

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DIVISION II

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STATE OF WASHINGTON
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DEPUTY

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

STATE OF WASHINGTON,)
Respondent,)
vs.)
DAYLEN RHODEN,)
Appellant.)

) Court of Appeals No. 36938-9-II
) Thurston County No. 06-1-02160-0
) AFFIDAVIT OF MAILING

ANNE M. CRUSER, being sworn on oath, states that on the 25th day of June, 2008
affiant placed a properly stamped envelope into the mails of the United States addressed to:

Carol La Verne
Thurston County Deputy Prosecuting Attorney
2000 Lakeridge Dr. S.W.
Olympia, WA 98502

AND

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

AND

AFFIDAVIT OF MAILING - 1 -

Anne M. Cruser
Attorney at Law
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1
2
3
4 Mr. Daylon Rhoden
5 DOC #310131
6 Stafford Creek Corrections Center
7 191 Constantine Way
8 Aberdeen, WA 98520

9 and that said envelope contained the following

- 10 (1) BRIEF OF APPELLANT
11 (2) VRP (TO MS. LAVERNE)
12 (3) RAP 10.10 (TO MR. RHODEN)
13 (4) AFFIDAVIT OF MAILING

14 Dated this 25th day of June, 2008

15 
16 ANNE M. CRUSER, WSBA #27944
17 Attorney for Appellant

18 I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of
19 Washington that the foregoing is true and correct.

20 Date and Place: June 25, 2008, Kalama, WA

21 Signature: Anne M. Cruser