

No. 36938-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DAYLON RHODEN

Appellant.

STATE OF WASHINGTON
COURT OF APPEALS
BY [Signature]
[Date]

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

The Honorable Christopher Wickham, Judge
Cause No. 06-1-02160-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether sufficient evidence supports the defendant's second degree child molestation conviction on count seven where the victim testified to numerous incidents of molestation when she was under the age of 14 and the State alleged multiple acts.

2. Whether sufficient evidence supports the defendant's second degree child molestation conviction on count eight where the victim testified to numerous incidents of molestation when she was under the age of 14 and the State alleged multiple acts.

3. Whether sufficient evidence supports the defendant's first degree child molestation conviction on count two where the victim testified to numerous incidents of molestation when she was under the age of 11 and the State alleged multiple acts.

4. Whether the defendant's community placement condition prohibiting the defendant from visiting schools, malls, parks, fast food establishments, or playgrounds where children congregate vagueness challenge is ripe for review.

5. Whether the defendant's community placement conditions prohibiting the defendant from possessing cameras, possessing computers, frequenting bars or taverns, and frequenting places where children are known to congregate are crime-related.

B. STATEMENT OF THE CASE.

1. Procedural History.

The State accepts the appellant's procedural statement of the case, while noting the following:

The morning of trial, the trial court granted defense counsel's request to exclude any character evidence for the defendant. RP (August 27, 2007) at 9.

The defendant did not object to any of the jury instructions. RP (August 30, 2007) at 416-17. The trial court instructed the jury:

There are allegations that the defendant committed acts of rape of a child in the first degree on multiple occasions. To convict the defendant, one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt. You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.

RP (August 30, 2007) at 432 (jury instruction 5). The trial court also gave unanimity instructions for second degree child rape, first degree child molestation, second degree child molestation, first degree incest, and second degree incest. RP (August 30, 2007) at 432-34 (jury instructions 6-10).

The jury found the defendant guilty as charged. CP at 71-82.

2. Substantive Facts.

Jeanette Larson met the defendant through the internet playing an online game of "Spades" in May 2000. RP (August 28, 2007) at 196. When they were communicating online, Larson told the defendant that she had two young daughters. RP (August 28,

2007) at 197. The relationship progressed through phone calls and instant messages. RP (August 28, 2007) at 196.

In October 2000, the defendant moved from Florida into Larson's home, where her daughters also resided. RP (August 28, 2007) at 195, 197. Larson had two daughters, JMB and GRB, born on February 27, 1988 and April 9, 1992 respectively. RP (August 28, 2007) at 47, 164.

a. Defendant's child rape and molestation of GRB.

GRB was eight years old when the defendant moved into her home. RP (August 28, 2007) at 164, 168, 195. When GRB was nine years old, the defendant "touched [her] inappropriately with his hands," in her "vaginal area." RP (August 28, 2007) at 168-70. GRB testified that she could not remember the exact number of times that the defendant touched her vaginal area, but that it was more than 20 times. RP (August 28, 2007) at 169. He also rubbed his "privates" on GRB about once every two months while he was living at the residence. RP (August 28, 2007) at 179.

During one of these incidents, the defendant called her into his bedroom where he was watching t.v. and "casually put his hand in [her] pants," touching her "vaginal area." RP (August 28, 2007) at 170-71. The defendant moved his hand up and down, back and

forth, and side to side on her vaginal area. RP (August 28, 2007) at 172.

During another incident, the defendant walked up behind GRB and put "his hand in [her] pants," while she was doing the dishes. RP (August 28, 2007) at 174. At trial, GRB could not remember whether he touched "any part of [her] privates" during this time. RP (August 28, 2007) at 174.

Another time, the defendant put GRB's ankles around his neck and rubbed her vagina with his penis while she had clothes on. RP (August 28, 2007) at 175. On at least two other occasions, the defendant put his fingers into GRB's vagina. RP (August 28, 2007) at 172.

All of the incidents of the defendant touching GRB's vaginal area and inserting his fingers into her vagina occurred when she was between nine and eleven years old. RP (August 28, 2007) at 174.

b. Defendant's child rape, molestation, and incest of JMB.

JMB was twelve years old when the defendant moved into her home. RP (August 28, 2007) at 49. When JMB was 13 the defendant started having sexual relations with her. RP (August 28, 2007) at 51.

The first time that the defendant sexually touched JMB, when JMB was 13, he was playing Spades online on a computer against JMB's mother who was in another room in the house. RP (August 28, 2007) at 51-52. JMB was standing next to the defendant when he began to stroke her thigh, "then his hands would keep creeping up, and he masturbated [JMB] with his hands. RP (August 28, 2007) at 51. The defendant "masturbated" JMB for about 15 minutes and asked her if she liked it. RP (August 28, 2007) at 52. During this incident, the defendant also put his fingers into JMB's vagina. RP (August 28, 2007) at 53.

At trial, JMB remembered at least three other incidents when the defendant had sexual contact with her, and that not all of them occurred when she was 13 years old. RP (August 28, 2007) at 53-54.

The defendant also performed oral sex on JMB. RP (August 28, 2007) at 54. The defendant persuaded JMB to take off her clothes, kissed and licked her chest, used his hands to masturbate JMB and himself, and then performed oral sex on her by kissing and licking her vaginal area. RP (August 28, 2007) at 55-56. The defendant put a towel on her stomach and ejaculated onto the towel. RP (August 28, 2007) at 56-57.

JMB testified that she could not remember the exact number of times that the defendant performed oral sex on her when she was 13 years old, but it was "two or three times." RP (August 28, 2007) at 57. He also performed oral sex on her "three or four" times when she was 14 years old. RP (August 28, 2007) at 57.

When JMB was 14 years old, the defendant asked JMB "to give him a blow job." RP (August 28, 2007) at 59. JMB refused, but the defendant talked her "into giving him a hand job." RP (August 28, 2007) at 59. JMB then rubbed the defendant's penis, which she described as uncircumcised, until the defendant ejaculated. RP (August 28, 2007) at 57-58, 60.

During another incident when JMB was 14 years old, the defendant rubbed his penis on top of JMB's vagina and around her clitoris, ejaculating on top of her pubic hair area. RP (August 28, 2007) at 59-60. JMB was also 14 when the defendant was masturbating himself and JMB and ejaculated into a condom. RP (August 28, 2007) at 60-61.

The last time the defendant sexually touched JMB was right before he moved out of the home in 2003. RP (August 28, 2007) at 61, 210. The defendant used his fingers to penetrate JMB's vagina

while masturbating himself until he ejaculated into a towel. RP (August 28, 2007) at 62.

C. ARGUMENT.

1. Sufficient evidence supports the defendant's second degree child molestation conviction on count seven.

a. Standard of review.

When reviewing a challenge to sufficiency of the evidence, this court views the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). The defendant's insufficient evidence claim "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

This court defers to the fact finder's resolution of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "Circumstantial evidence provides as reliable a basis for findings as direct evidence." *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997).

b. Multiple acts with unanimity jury instruction.

A person is guilty of second degree child molestation if he or she knowingly has 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. RCW 9A.44.086. On appeal, the defendant challenges whether the State proved that JMB was less than fourteen years old when the defendant molested her. See Br. of Appellant at 11-12.

The defendant argues that the evidence shows that JMB was either 13 or 14 when the defendant kissed and licked her chest and then performed oral sex on her. Br. of Appellant at 12. The defendant is correct that JMB did not testify specifically that she was 13 years old when the defendant molested her during *this* incident. See RP (August 28, 2007) at 55-56.

However, JMB did testify that the defendant performed oral sex on her when she was 13 years old "two or three times." RP (August 28, 2007) at 57. In this case, the State alleged multiple acts for the second degree child molestation charges on counts seven and eight. The charging information, for count seven, stated:

In that the defendant, DAYLON E. RHODEN, in the State of Washington, on or between June 1, 2001 and February 26, 2002, on an occasion not alleged in

Count VIII, did engage in sexual contact with J.M.B., his step-daughter, and was at least thirty-six months older than J.M.B. who was at least twelve years of age but less than fourteen years of age and not married to the defendant.

CP at 68-70. In her closing argument, the prosecutor referred to more than one act, which JMB testified about, to support counts seven and eight. The prosecutor argued:

7 and 8 are child molestation in the second degree, domestic violence. These represent the acts upon [JMB] of touching her privates for sexual gratification. She talked about how he rubbed her breasts, how he rubbed her privates on at least three occasions without penetration. Those are the acts that are represented here. And remember she said that he touched her so many times from the time she was 13 until he left that she couldn't count.

RP (August 30, 2007) at 467. Thus, the prosecutor did not elect a specific act, of the multiple acts that JMB testified about, for counts seven and eight.

In Washington, a jury must unanimously conclude which criminal act charged in the information has been committed to convict a defendant. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). "When the prosecution presents evidence of several acts that could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or

the court must instruct the jury to agree on a specific criminal act.”
Kitchen, 110 Wn.2d at 409.

Here, the prosecution presented evidence of several acts that could have formed the basis of count seven. But, the trial court also properly instructed the jury that it had to agree on a specific criminal act. RP (August 30, 2007) at 432 (jury instruction five, known as “unanimity” or “*Petrich*” instruction for second degree child molestation). Thus, there was no violation of the defendant’s right to a unanimous jury verdict. See *State v. Petrich*, 101 Wn.2d 566, 570-72, 683 P.2d 173 (1984).

c. JMB’s testimony was sufficient for count seven.

When the State relies upon generic testimony, rather than electing particular acts associated with each count, the court must “fairly balance the due process rights of the accused against the inability of the young accuser to give extensive details regarding multiple alleged assaults.” *State v. Hayes*, 81 Wn. App. 425, 438, 914 P.2d 788 (1996). The *Hayes* court reasoned that ruling generic testimony inadequate “risks... immunizing from prosecution” the most egregious offenders who subject young victims to multiple assaults. *Hayes*, 81 Wn. App. at 438.

Striking a balance between the defendant's due process rights and the victim's inability to give extensive details about multiple assaults, the courts require the victim to describe (1) the kind of act or acts with sufficient specificity for the jury to determine which offense has been committed; (2) the number of acts committed with sufficient certainty to support each alleged count; and (3) the general time period in which the acts occurred. *Hayes*, 81 Wn. App. at 438.

Here, as in *Hayes*, the defendant committed multiple assaults, including child rape and molestation against the victims while they were children. JMB's testimony meets the three part *Hayes* test. She testified and described (1) the kind of acts with sufficient specificity for the jury to determine which offense has been committed (second degree child molestation when the defendant performed oral sex on her), (2) the number of acts committed with sufficient certainty to support each alleged count (the defendant performing oral sex on her at least twice when she was 13 years old), and (3) the general time period in which the acts occurred (when JMB was 13 years old). *Hayes*, 81 Wn. App. at 438.

Thus, JMB's testimony was sufficient to support the defendant's conviction on count VII. It is clear that the jury believed

that the defendant had sexual contact with JMB, by performing oral sex on her, when she was 13 years old. See RCW 9A.44.086 (second degree child molestation); *Camarillo*, 115 Wn.2d at 71 (courts defer to the jury's resolution of witness credibility and the persuasiveness of the evidence).

Accordingly, this court should hold that viewing the evidence in the light most favorable to the State, sufficient evidence supports the defendant's second degree child molestation conviction on count VII.

2. Sufficient evidence supports the defendant's second degree child molestation conviction on count eight.

The defendant's argument for insufficient evidence on count VIII is identical to its argument for insufficient evidence on count VII. See Br. of Appellant at 11-12, 15-17.

a. Multiple acts with unanimity jury instruction.

As already noted, the State alleged multiple acts for the second degree child molestation charges on counts seven *and* eight. The charging information, for count eight, stated:

In that the defendant, DAYLON E. RHODEN, in the State of Washington, on or between June 1, 2001 and February 26, 2002, on an occasion *not alleged in Count VII*, did engage in sexual contact with J.M.B., his step-daughter, and was at least thirty-six months older than J.M.B. who was at least twelve years of

age but less than fourteen years of age and not married to the defendant.

CP at 68-70 (emphasis added).

The prosecutor did not elect specific acts to rely upon for either count seven or eight during closing argument. Rather, the prosecutor argued that the second degree child molestation charges in counts seven and eight were “the acts upon [JMB] of touching her privates for sexual gratification.” RP (August 30, 2007) at 467.

b. JMB’s testimony was sufficient for count eight.

As with count seven, JMB’s testimony is sufficient to support count eight, where she testified that the defendant performed oral sex on her when she was 13 years old on at least “two” occasions. RP (August 28, 2007) at 57. Because JMB testified that the oral sex occurred twice, and the jury clearly believed her, there is sufficient evidence to support two counts of child molestation. Viewing the evidence in the light most favorable to the State, this court should hold that sufficient evidence supports the defendant’s second degree child molestation conviction on count eight.

3. Sufficient evidence supports the defendant’s first degree child molestation conviction on count two.

The defendant argues that insufficient evidence supports the defendant's first degree child molestation conviction on count II because the State did not prove that there was "sexual contact" when the defendant put his hand in GRB's pants and moved it around. Br. of Appellant at 17-18.

a. Multiple acts with unanimity jury instruction.

As with counts seven and eight, the prosecutor did not elect which of the multiple acts submitted to the jury constituted the act for count two, first degree child molestation. For count two, the charging information alleged:

In that the defendant, DAYLON E. RHODEN, in the State of Washington, on or between April 9, 2001 and June 30, 2003, on an occasion not alleged in Counts III and IV, did engage in sexual contact with G.R.B., his step-daughter, and was at least thirty-six months older than G.R.B., a person who was less than twelve years of age and not married to the accused.

CP at 68-69. Additionally, the prosecutor did not elect for count two which of the multiple times the defendant had sexual contact with GRB when she was less than twelve years of age. Rather, the prosecutor argued that any of the defendant's multiple sexual contacts with GRB that occurred when GRB was less than twelve years old could support count two. See RP (August 30, 2007) at 463-64 (prosecutor's closing argument that counts two, three, and

four are supported by the multiple acts of sexual contact between the defendant and GRB when she was under 12 years old, including the defendant rubbing his penis on GRB's vaginal area twice a month for the years he lived in her home).

The State's choice not to elect one act did not violate the defendant's right to a unanimous jury, because the trial court properly instructed the jury with a unanimity or *Petrich* instruction for first degree child molestation. *Kitchen*, 110 Wn.2d at 409; see RP (August 30, 2007) at 432-34 (jury instructions 6-10).

b. GRB's testimony was sufficient for count two.

Because the prosecutor did not elect a specific act, whether GRB could remember if the defendant touched her vaginal area during one particular incident is *irrelevant*, where GRB's other testimony establishes multiple times when the defendant had sexual contact with her while she was under the age of twelve years old that supports the defendant's first degree molestation conviction on count two.

GRB testified that she could not remember the exact number of times that the defendant touched her vaginal area, but that it was more than 20 times. RP (August 28, 2007) at 169. The defendant also rubbed his "privates" on GRB about once every two months

while he was living at the residence. RP (August 28, 2007) at 179. Because the defendant moved into GRB's home in 2000, started molesting GRB when she was nine years old, and moved out of the home in 2003, there is a reasonable inference, viewing the evidence in the light most favorable to the State, that the defendant rubbed his privates on GRB approximately 18 times. Additionally, the State established that all of these incidents occurred when GRB was between nine and eleven years old. RP (August 28, 2007) at 174.

Given this evidence that the defendant touched GRB's vagina more than 20 times and rubbed his privates on her approximately 18 times, there is more than sufficient evidence to support the defendant's first degree child molestation conviction on count two. Accordingly, this court should affirm the defendant's first degree child molestation conviction on count two.

4. The defendant's constitutional vagueness community placement condition challenge is not ripe for review and should not be conflated with a statutory crime-related challenge.

The defendant challenges his community placement conditions on both vagueness and crime-related grounds. Br. of Appellant at 19-20. A challenge to vagueness is distinct and separate from a crime-related challenge to community custody

provisions. *State v. Zimmer*, ___ Wn. App. ___, ___ P.2d ___ (36423-9 August 19, 2008). The two should not be conflated. Thus, the State addresses each in turn.

a. Vagueness challenges to community custody conditions are not ripe for review when they have not been applied, because there has been no harm to the defendant.

The defendant argues that the community placement condition prohibiting him from visiting schools, malls, parks, playgrounds, or other areas where children are known to congregate is unconstitutionally vague because it contains the term “etcetera” and does not define the areas that children are known to congregate. Br. of Appellant at 19-22.

The defendant concedes that this court has recently held that a vagueness challenge to community placement conditions is not ripe for review until the condition has been applied. Br. of Appellant at 27 (citing *State v. Motter*, 139 Wn. App. 797, 162 P.3d 1190 (2007)). But, the defendant also argues that this court should overturn its recent decision in *Motter* because the defendant does not have a right to have a court review sanctions imposed for community custody violations.¹ Br. of Appellant at 28-32. The

¹ This court has recently reaffirmed *Motter* in *State v. Zimmer*, ___ Wn. App. ___, ___ P.3d ___ (36423-9 August 19, 2008).

defendant's argument fails because Washington courts do review any potential or imposed sanctions for community custody violations.

In Washington, it is well-established law that "[t]he unconstitutionality of a law is not ripe for review unless the person is harmfully affected by the part of the law alleged to be unconstitutional." *State v. Massey*, 81 Wn. App. 198, 200, 913 P.2d 424 (1996) (citing *State v. Langeland*, 42 Wn. App. 287, 292, 711 P.2d 1039 (1985); *State v. Phillips*, 65 Wn. App. 239, 244, 828 P.2d 42 (1992)).

As in *Motter*, the defendant argues that his community placement condition is void for vagueness because it did not define a specific term. See *Motter*, 139 Wn. App. at 804 . In *Motter*, the defendant argued that hypothetically he could be sanctioned for owning kitchen utensils under his community custody provision prohibiting possession of drug paraphernalia. 139 Wn. App. at 804.

Similarly, the defendant in the present case requests this court to review hypothetical applications of his community custody provision prohibiting him from places where children are known to congregate. See Br. of Appellant at 22 (arguing that this condition could be construed to include stores such as "Abercrombie and

Fitch,” “Rite-Aid,” or “open air malls”). There are numerous reasons that courts refuse to hear challenges to community custody placement conditions when they have not been applied.

One of these reasons is because it is neither practical nor reasonable to require a trial court to list every item or type of place that a defendant is prohibited from possessing or frequenting. See *Motter*, 139 Wn. App. at 804 (unreasonable to require a trial court to list every item that may possibly be used to ingest controlled substances). Additionally, there can always be a multitude of hypothetical arguments on how a condition may be applied, but reviewing such conditions on this basis becomes speculation by the courts where there has been no harm to the defendant. See *Langland*, 42 Wn. App. at 292; *Zimmer*, ___ Wn. App. ___, Slip Opinion at 7 (“We refuse to look at hypothetical situations on the periphery of a community custody condition”).

Because the defendant has not been harmed from any potential and hypothetical error in the court’s order prohibiting him from frequenting places where children congregate, his argument is not ripe for review and is not properly before this court.

b. This court should not review hypothetical applications of the defendant’s community custody placement conditions because

the WAC and RCW provide for court review of any community custody sanctions, when the condition is actually applied.

The defendant argues that this court should review his community custody placement challenge despite its lack of ripeness because courts cannot review community placement violation sanctions under the WAC. Br. of Appellant at 28-32.

This court rejected this argument in the recent case of *State v. Zimmer*. As noted in *Zimmer*, “[r]ather than limiting a defendant’s rights, this WAC gives a defendant further procedural rights, before the trial court hearing to which the statute entitles the defendant.” Slip Opinion at 8.

Under RCW 9.94A.634(3), a defendant has a right to a hearing in front of a trial court on any alleged violations of community custody and a trial court reviews any proposed DOC sanctions even when the defendant stipulates to the violations. Thus, Washington courts review community custody violation sanctions and can review vagueness challenges when the condition is actually applied. Accordingly, this court should hold that the defendant’s challenge is not ripe for review, because the defendant has not been harmfully affected by the community custody provision.

5. All but one of the community placement conditions are crime-related.

This court reviews the trial court's determination and imposition of a community custody crime-related condition for abuse of discretion. *State v. Simpson*, 136 Wn. App. 812, 150 P.3d 1167 (2007) (citing *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993)). The legislature may establish potential legal punishments. *State v. Pillatos*, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007). RCW 9.94A.700(5)(e) authorizes the trial court to impose crime-related prohibitions for defendants on community custody. Washington courts define a crime-related prohibition as "an order prohibiting conduct that directly related to the circumstances of the crime." *State v. Autrey*, 136 Wn. App. 460, 466, 150 P.3d 580 (2006).

a. Prohibiting the defendant from frequenting areas where children congregate is crime-related and otherwise authorized by statute.

The defendant argues that the community custody provision prohibiting him from frequenting areas where children are known to congregate, including fast food establishments, is not crime related because the defendant "was not convicted of victimizing anyone,

either a child or an adult, who is not known to him.” Br. of Appellant at 21-22.

This court need not determine whether this provision is specifically crime-related under RCW 9.94A.700(5)(e), because the legislature authorized the trial court to make this condition under RCW 9.94A.700(5)(b).² Because a trial court can order a defendant not to have a direct or indirect contact with the victim or a specified class of individuals under RCW 9.94A.700(5)(b) rather than under the crime-related subsection (e), the trial court need not make a finding that the prohibition is crime-related. Regardless, this condition is crime-related since the defendant raped and molested two young girls. Because the defendant was convicted of child rape and child molestation, the trial court may prohibit the defendant

² RCW 9.94A.700(5) provides:

- 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.

from having direct or indirect contact with other children under both RCW 9.94A.700(5)(b) and RCW 9.94A.700(5)(e).³

The defendant's argument that he will not know any of the children at places that children are known to congregate is not convincing. See Br. of Appellant at 22. He did not know either of his victims in this case either, until he met them, and he is likely to meet other children if he goes to places where children are known to congregate. He is also likely to have direct or indirect contact with children if he frequents places such as parks or schools and it is within the public's interest to keep the defendant away from children when he has raped and molested children in the past.

b. Not to frequent bars or taverns is a crime-related prohibition.

Next, the defendant argues that the prohibition on frequenting bars or taverns is not crime related because "[t]here was no evidence or any mention that alcohol played a role in these crimes...." Br. of Appellant at 25.

However, JMB testified that after the defendant had a back injury he "laid in bed all day watching TV and drinking beer and

³ RCW 9.94A.700(6) also allows this prohibition because the defendant was convicted of a felony sex offense he must "comply with the 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 previous victim."

chewing snuff.” RP (August 28, 2007) at 95. It is also after this back injury that the sexual abuse started. RP (August 28, 2007) at 85-86. JMB recalled that she saw the defendant “drinking Ice House Beer...” and that this memory makes her “very emotional.” . RP (August 28, 2007) at 95. Thus, there was evidence that the defendant was consuming alcohol during the time period that he raped and molested his two victims.

The defendant is correct that he is unlikely to meet children in bars or taverns. But the restriction is meant to prevent the defendant from imbibing alcohol, which would then impair his judgment, and coming into contact with children. Prohibiting the defendant from frequenting a bar or taverns, the primary purpose of these establishments being to serve alcohol, is crime-related given that there is evidence in the record that the defendant consumed alcohol when committing the crimes against his victims.

c. The community custody prohibition on computer possession is crime-related.

The defendant argues that the community custody provision prohibiting him from possessing a computer is not crime-related because there is no evidence that he “improperly used a computer or computer components.” Br. of Appellant at 25.

However, there is evidence in the record that supports this crime-related prohibition on computer possession. First, the defendant was playing a "Spades" game while he penetrated JMB's vagina with his finger for the first time. Second, the victims' mother testified that she met the defendant online, and that he knew that she had two young daughters before he came up to meet her and began a relationship with her, and eventually sexual relationships with her two daughters. RP (August 28, 2007) at 196-97.

Because the defendant used the internet to contact the victims' mother and gain information about the family, before moving in with them and eventually raping and molesting the children in the family, prohibiting the defendant from possessing a computer is related to the crimes he committed against his victims. In these circumstances, the trial court should be able to prohibit the defendant from finding future victims through the internet.

d. The State concedes that the community custody provision prohibiting photographic equipment and cameras is not crime-related.

Finally, the defendant argues that the community custody prohibition on possession of photographic equipment and cameras is not crime-related. Br. of Appellant at 22, 24.

The State concedes that there is no evidence in the record that the defendant used photographic equipment or cameras in relation to the rape, incest, and molestation crimes. Accordingly, the State requests that this court reverse the community custody provision prohibiting the defendant from possessing or using photographic equipment or cameras.

D. CONCLUSION.

This court should hold that sufficient evidence supports the defendant's child molestation and rape convictions, the defendant's vagueness community custody provision challenge is not ripe for review, and all of the community custody conditions are crime-related, except for the prohibition on possessing photographic equipment or cameras. This court should reverse the community custody provision prohibiting the defendant from possessing or using photographic equipment or cameras.

Respectfully submitted this 21 of August, 2008.



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Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, No. 36938-9-II,
on all parties or their counsel of record on the date below as follows:

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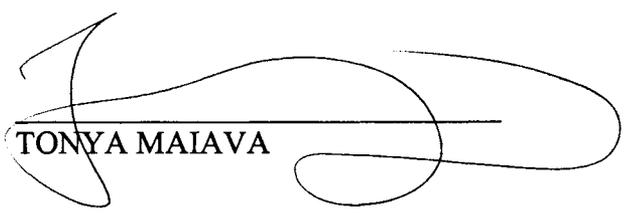
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I certify under penalty of perjury under laws of the State of
Washington that the foregoing is true and correct.

Dated this 22nd day of August, 2008, at Olympia, Washington.


TONYA MAIAVA