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DIVISION II

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STATE OF WASHINGTON

BY:  DEPUTY

No. 39268-2-II

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

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STATE OF WASHINGTON,  
Respondent,

v.

GERALD KANG,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

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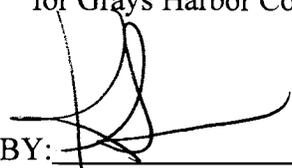
THE HONORABLE F. MARK MCCAULEY, JUDGE

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BRIEF OF RESPONDENT

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## **COUNTER STATEMENT OF THE CASE**

### **Procedural History**

The defendant was charged by Information on April 3, 2008 with one count of Possess of Depictions of Minors Engaged in Sexually Explicit Conduct. (CP 1-3). The State amended the Information on February 23, 2009 to add two additional counts of Communication With a Minor for Immoral Purposes. (CP 7-8). The case proceeded to jury trial and the defendant was found guilty as charged on March 11, 2009. (CP 19-21). The defendant was given a standard range sentence on May 4, 2009. (CP 37-46).

### **Factual Background**

On March 31, 2008, the defendant took his computer to Adnets in Aberdeen to have a non-working laptop worked on. RP at 43-44. Employee Kyle Henderson was familiar with the defendant from prior contacts. RP at 44. On April 2, 2008, Henderson began work on the defendant's laptop. RP at 46. During Henderson evaluation of the

computer he found “pictures that shouldn’t have been there.” RP at 47. Henderson described these photographs as “young girls in either naked or near naked poses.” RP at 47. Henderson ceased the evaluation of the defendant’s laptop, notified the police and later, at the request of law enforcement, burned a copy of the images to a compact disc. RP at 47-48, 57.

Aberdeen Police Sergeant Laur received the information that Henderson had found what he “believed to be child pornography on a computer that they were working on.” RP at 56. Laur responded in person to Adnets. RP at 56. In reviewing the images, he concurred that they were sexually explicit depictions of minors. RP at 60. Laur took possession of the disk prepared by Henderson, the laptop computer, and the bag it had been brought in. RP at 57. Upon realizing that the defendant was a resident of Hoquiam, Laur notified Hoquiam Police Sergeant Fretts and advised him of the situation. RP at 57. Laur also turned over the collected evidence to Fretts. RP at 59.

Law enforcement was advised that the defendant would be returning to Adnets at 2 pm to pick up his computer. RP at 58. Laur, Fretts and another officer decided to contact the defendant at that time. RP at 58. When the defendant arrived, he was identified to Laur by Adnets employees and Laur asked the defendant to speak with him in a private

office. RP at 59. At this time, Fretts came into the office and took over the investigation. RP at 65. Fretts explained that law enforcement had been notified that Adnets “had recovered pictures that they felt were sexually explicit pictures of minors in various ages and depictions of sexual conduct, explained to him that we needed to deal with it and we needed to talk about the situation.” RP at 65-66. The defendant’s comment was that he “didn’t think it was any big deal to have pictures of young girls on his computer.” RP at 66.

The defendant agreed to speak with Fretts at the station and give a statement. RP at 67. The defendant stated that he had gotten some of the pictures sent to him during internet chats and that “he was a collector” and “that it was just kind of a hobby that he did, that he had been doing it for some time.” RP at 68. In his written statement, regarding internet chats, the defendant stated that “When we talk about exchanging pictures, I tell them my picture is nude. I send one titled dick to them. It is a picture of some guy laying on a bed naked...Some of the pictures I get are young girls. I know they are young, but I was not aware is [sic] was such a problem to have them. I was getting ready or should have erased them.” Exhibit 32.

After providing the statement, the defendant gave officers consent to search his residence. RP at 69-70. Officers located several volumes of

printed out chat logs and seized several printed pictures of children, who appeared to the officers to be under the age of sixteen, in various forms of undress and exposure of the genital private areas. RP at 7–71. The chat logs recovered by the Hoquiam Police show an exchange between the defendant and a person who identifies herself as Donna, using the screen name “Dianamodel14.” Exhibits 38-40. The chat logs also contain a conversation between the defendant and a person who identifies herself as Deb, using the screen name “Saralovesjohsons.” Exhibit 37.

The defendant also informed Fretts that he used the screen names “Jerry 3d”, “Jetstr10r” and “Jackel014” when chatting online with other people. RP at 114-115. The defendant also used “Stuwrt14.” RP at 156. The defendant would print out the chat logs and make notations on the top and staple photographs that had been sent during the chat to the logs. RP at 116, 147. When Fretts spoke to the defendant and told him that it was likely other adult men chatting with him while pretending to be children, the defendant gave “a very surprised look” and “didn’t think [Fretts] was telling him the truth.” RP at 123.

The defendant testified that for record-keeping, he would attached the photos to the chat logs to keep track of who he was chatting with. RP at 147. The defendant claimed that he thought that he might be chatting with a police officer. RP at 148. There was testimony though that law

enforcement does not transmit sexually explicit photographs of minors during a proactive investigation. RP at 123, 126.

The defendant admitted that the chats in question were with people claiming to be minors, and that he did not attempt to verify their true identity or age in any way. RP at 154-156, 160-161. The defendant also admitted requesting nude photographs from both “Deb” and “Donna.” RP at 157.

In chats dated during the period February 1, 2007 through June 3, 2007, the defendant, using the screen names “Jetstr10r” and “Jackel014” chats with a person using the screen name “Dianamodel14.” Exhibits 38-40. These chat is sexually explicit and the defendant questions “Donna” about her sexual experience. In addition, he solicits nude photographs from a girl stating she is 12 years old, the solicitation is materially contained the following excerpts:<sup>1</sup>

Chat log dated February 6, 2007 (Exhibit 38).

Defendant: asl<sup>2</sup>  
Donna: i use my sister computer, i 12  
Defendant: wow im 16m  
Donna: kewlk  
Defendant: i dunno .....single?  
Donna: me, yeah

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<sup>1</sup>The spelling and grammar have not been corrected from the original chat log. The State has replaced the screen names with “defendant” and “Donna” for clarity’s sake.

<sup>2</sup>“ASL” was explained to mean “age, sex, location.” RP at 124.

Defendant: virgin?....  
Donna: what u mean  
Donna: my name donna  
Defendant: im jerry u into sex?  
...  
Defendant: u have pic ?.....can i c?  
Donna: i got  
Defendant: can i c?  
Donna: ok  
...  
Defendant: don't look like u wearing panties.....lol  
Donna: i do  
Defendant: ok u got more?...  
Donna: yes  
Defendant: got nude one?  
Donna: no  
Defendant: lol thats ok just joking.....

In a chat dated April 22, 2007, the defendant, using the screen name "Stuwrt014," chats with a person using the screen name "Saralovesjohnsons." Exhibit 37. This chat is sexually explicit and the defendant questions "Deb" about her sexual experience. In addition, he solicits nude photographs from a girl stating she is 10 years old, the solicitation is materially contained the following excerpts:<sup>3</sup>

Deb: im deb they sauid u wanted talk to me  
Defendant: lol hi deb  
Defendant: sure if u feel like it .....r u really 10  
Deb: ya hang on  
...  
Defendant: can i ask how old u r im 16  
Deb: 10  
...

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<sup>3</sup>The spelling and grammar have not been corrected from the original chat log. The State has replaced the screen names with "defendant" and "Deb" for clarity's sake.

Defendant: u got a nude of pic  
Deb: msybr why  
Defendant: i would luv to c u  
Deb: hm u sure i don't have myuch  
Defendant: u have a lot  
...  
Defendant: send again nuthin came  
[an image is transmitted]  
Defendant: that is ur nipples looks developed for 10.....  
Deb: is that bad  
Defendant: got more  
Deb: no sorry  
Defendant: nope that is nice if i saw ur face to  
...  
Defendant: mmmmmmmm ya was hoping to see u  
naked.....lol  
Deb: u did  
Defendant: lol k thanks<sup>4</sup>

During the search, the officers also seized a Compaq desktop computer that was found in the defendant's residence. RP at 75-76. Washington State Patrol Detective Todd Taylor conducted a forensic examination of this desktop computer. RP at 102. During this examination, the detective recovered the photographs and video admitted as Exhibit 36. RP at 105. The video was reviewed by pediatrician Dr. Steve Hutton, and his opinion was that none of the children depicted were older than 16-18 years old, and that some were very young, under 10 years old. RP at 139-140. The defendant admitted that he knew the images of Exhibit 36 were on his computer. RP at 153.

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<sup>4</sup>The State quotes these portions as illustrative, but to fully understand the sexual nature of the chats the Court is encouraged to read the exhibits as presented to the jury.

## RESPONSE TO ASSIGNMENTS OF ERROR

### **Sufficiency of the Evidence**

Due process requires that the State bear the burden of proving each and every element of the crime beyond a reasonable doubt. *State v. McCollum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). The applicable standard of review is whether, after reviewing 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. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn.App. 478, 484, 761 P.2d 632 (1987) rev. den., 11 Wn.2d 1033 (1988). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted more strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In considering this evidence, "credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Carmillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

### **Defendant's belief that he was communicating with minors.**

Here, the defendant claims that his "belief that he was not

communicating with children was reasonable.” Appellant’s Brief at 16. The defendant also attempts to introduce improper additional facts regarding the popularity of the names “Deb” and “Donna” as somehow persuasive. Appellant’s Brief at 15. However, the evidence must be viewed in the light most favorable to the State, and the evaluation must certainly focus only on facts presented to the jury in this case.

The defendant’s argument regarding his belief to the ages of “Deb” and “Donna” was rejected by the jury and should not be disturbed on appeal. This credibility determination is squarely within the responsibilities of the fact finder and is not subject to appellate review.

The Court must look to the favorable evidence and determine whether or not any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The State argues that the evidence was sufficient. There was ample evidence in this case that the defendant was actively seeking out sexually explicit depictions of minors, given the graphic nature of the video shown, it is reasonable that the jury would conclude that the defendant was also attempting to chat with minors.

The defendant cites to *Luther* for the proposition “... it is very common for people to lie to one another and play fictional roles while

chatting .... It is therefore impossible for a person chatting ... to know anything about the person they are chatting with to any degree of certainty, including name, age, and even gender.” *State v. Luther*, 157 Wash.2d 63, 68-69, 134 P.3d 205, 208 - 209 (2006). However, the trial court went on to clarify its position, which was endorsed by the *Luther* court.

[I]t is my belief, beyond a reasonable doubt, that [Luther] was in fact making every attempt to secure photographs of boys under the age of eighteen in sexually explicit positions. In fact, it is my belief, beyond a reasonable doubt, that he thought he had them. He might have thought some of them might have been a ruse, but it is my belief, without any doubt at all, what he wanted was pictures of boys under the age of eighteen in sexually explicit positions. And, at least as to some of them, he certainly thought he had them. He might have had a doubt as to some because of the way people react and play games on the internet, ruses. But he thought he had them.

....

The Court finds beyond a reasonable doubt that the defendant was out on the internet sites ... conversing with persons that he believed to be young males under the age of eighteen. Through technology available over the internet he was able to secure electronic images, of photographs or of images created electronically of persons that he believed to be under the age of eighteen who were male and engaged in sexually explicit activities as defined by the statute.

*State v. Luther*, 157 Wash.2d 63, 69.

There is no evidence in the record that the defendant was attempting to contact adults in order to chat about fantasies regarding children. Instead, the evidence, taken in a light most favorable to the

State, shows that the defendant's belief was that he was communicating with minors during his online chat sessions.

In the end, it is not whether or not the defendant's explanation of his behavior was reasonable, or whether or not "Deb" and "Donna" were actually minors. It is only whether there was enough evidence, taken in a light most favorable to the State, to support a finding that the defendant did believe they were minors. The jury is entitled to disbelieve the defendant's claim. When all of the evidence is viewed as a whole, it supports the conviction in this case.

In this case, the defendant was well-organized and kept his chat logs together with photographs and his handwritten notes. None of these notes indicate anything other than a belief that the persons he was chatting with were minors.

**Whether the defendant had an immoral sexual purpose.**

The defendant challenges whether there was sufficient evidence that he acted with an immoral purpose in communicating with the minors. "Immoral purpose," as used in statute prohibiting communication with a minor for immoral purposes, refers to sexual misconduct. *State v. Pietrzak*, 100 Wash.App. 291, 997 P.2d 947 (2000). RCW 9.68A.090 does not only contemplate participation by minors in sexual acts for fee or appearance on film or in live performance while engaged in sexually

explicit conduct; rather, statute prohibits communication with children for predatory purpose of promoting their exposure to and involvement in sexual misconduct. *State v. McNallie*, 120 Wash.2d 925, 846 P.2d 1358 (1993) overruling *State v. Danforth*, 56 Wash.App. 133, 782 P.2d 1091.

In his argument, the defendant does not address the fact that he communicated with the minors “Deb” and “Donna” in an extremely sexually explicit manner and solicited them to send him nude photos, which they did. The Washington statutes criminalizing dealing in, sending and possessing depictions of minors engaged in sexually explicit conduct are all contained in RCW Chapter 9.68A–Sexual Exploitation of Children.

There is also evidence that the defendant was engaging in these chats for his sexual gratification. In the defendant’s April 22, 2007 chat with “Deb” is the following exchange (Exhibit 37):

Deb: hey want try f\*\*\* 3 guys while i type  
Defendant: u wanna do that  
Deb: ya would it turn u on  
Defendant: lol maybe  
Deb: ok let me see if i can figure this out  
Defendant: One d\*ck in ur a\*\* one in ur p\*\*\*y n one in ur mouth

In a June 3, 2007 chat with the screen name “Dianamodel14” is the following exchange (Exhibit 40):

Defendant: u have pic no clothes?  
Dianamodel14: yes  
Defendant: please can i c?

Dianamodel14: y  
Defendant: i want to see u naked n play with  
dick  
Defendant: omg diana u r so beautiful  
Dianamodel14: thanks  
Defendant: u know my dick is so hard now  
Dianamodel14: o  
Defendant: u have another one  
Defendant: showing ur p\*\*\*y

Taken in the light most favorable to the State, the evidence shows that the defendant acted with an immoral purpose. He was soliciting minor females to take and/or electronically send nude photographs and he did it for his own sexual gratification.

**RCW 9.68A.090 is Not Unconstitutionally Vague as Applied to the Defendant**

The choice, interpretation, and application of a statute or other legal principles are matters of law that are reviewed de novo. *State v. Johnson*, 96 Wash.App. 813, 816, 981 P.2d 25 (1999). Statutes are presumed to be constitutional. The court may declare a statute unconstitutional only if the party making the challenge proves invalidity beyond a reasonable doubt. *City of Spokane v. Douglass*, 115 Wash.2d 171, 182-83, 795 P.2d 693 (1990). The court should evaluate the constitutionality of a statute in light of the particular conduct of the party making the challenge. *City of Spokane v. Douglass*, 115 Wash.2d at 182-83,

A statute is unconstitutionally vague if it: (1) does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement. *City of Spokane v. Douglass*, at 178, 795 P.2d 693. The question here is whether RCW 9.68A.090 sufficiently defines the prohibited behavior such that persons of common intelligence need not guess as to the statute's meaning or differ as to its application. *City of Spokane v. Douglass*, at 179, 795 P.2d 693.

RCW 9.68A.090 criminalizes communication with a minor for immoral purposes. *State v. McNallie*, 120 Wash.2d 925, 929, 846 P.2d 1358 (1993); *State v. Schimmelpfennig*, 92 Wash.2d 95, 103-04, 594 P.2d 442 (1979) (interpreting former RCW 9A.88.020, predecessor statute to RCW 9.68A.090). “Communicate” within RCW 9.68A.090 includes conduct as well as words, and “immoral purpose” refers to sexual misconduct. *State v. Falco*, 59 Wash.App. 354, 358, 796 P.2d 796 (1990) (citing *Schimmelpfennig*, 92 Wash.2d at 103-04, 594 P.2d 442). A minor is any person under 18 years of age. RCW 9.68A.011(4).

RCW 9.68A.090, as well as its predecessor RCW 9A.88.020, were both challenged as unconstitutionally vague in *McNallie* and *Schimmelpfennig*. *McNallie*, 120 Wash.2d at 930-35, 846 P.2d 1358

(RCW 9.68A.090); *Schimmelpfennig*, 92 Wash.2d at 102, 594 P.2d 442 (former RCW 9A.88.020). Both courts looked at the statute in the context of the relevant portions of the criminal code. *McNallie*, 120 Wash.2d at 931-33, 846 P.2d 1358; *Schimmelpfennig*, 92 Wash.2d at 102, 594 P.2d 442. The *McNallie* court noted that RCW 9.68A.090 is, and its predecessor was, part of a legislative effort to prohibit sexual misconduct. *McNallie*, 120 Wash.2d at 931, 846 P.2d 1358 (citing *Schimmelpfennig*, 92 Wash.2d at 102, 594 P.2d 442). And the code gives ample notice of a legislative intent to prohibit sexual misconduct:

We hold that the communication statute, as written and currently located in the code, does not only contemplate participation by minors in sexual acts for a fee, or appearance on film or in live performance while engaged in sexually explicit conduct. Rather, the statute prohibits communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct.

*McNallie*, 120 Wash.2d at 933, 846 P.2d 1358.

Placed in context, a person of common intelligence need not guess as to the meaning of RCW 9.68A.090. RCW 9.68A provides ample notice of the Legislature's intent to prohibit sexual exploitation and misconduct with persons under the age of 18. *McNallie*, 120 Wash.2d at 932-33, 846 P.2d 1358. *See generally State v. Pietrzak*, 100 Wash.App. 291, 294-296, 997 P.2d 947, 948 - 950 (2000).

As stated above, vagueness challenges to RCW 9.68A.090 have been addressed in several cases, including *State v. McNallie*, 120 Wash.2d 925, 846 P.2d 1358 (1993). The *McNallie* court offered the following analysis:

In *State v. Galbreath*, [69 Wash.2d 664, 419 P.2d 800 (1966)], the court considered a vagueness challenge to the words “indecent” and “obscene” in a criminal statute protecting children. We said there:

In our view, further and more detailed legislative delineation of the particular misconduct [prohibited by the statute] ... is neither dictated by any flux in social values nor otherwise constitutionally required. We are satisfied that any person of common understanding, contemplating a lewd exhibition of the private parts of his or her person before a child under the age of 15 years, need not guess nor speculate as to the proscription and penalties of the statute as it is presently written.

*State v. Galbreath, supra* at 668-69 [419 P.2d 800]. Here we also satisfied that any person of common understanding, contemplating asking a small child to climb into a van and engage in sexual activities need not guess as to the proscription and penalties of the statute. We therefore conclude the words “immoral purposes” in this statute are not unconstitutionally vague. *Schimmelpfennig*, at 102-03, 594 P.2d 442.

*State v. McNallie*, 120 Wash.2d 925, 932, 846 P.2d 1358, 1363 (1993).

The State believes that any person of common understanding would understand that soliciting sexually explicit photographs from minors, for his own sexual gratification, would fall under the purview of

the statute.

### **First Amendment Consideration**

The defendant claims that RCW 9.68A.090 infringes on his First Amendment rights. However, the courts have found “RCW 9.68A.090 does not prohibit or deter a substantial amount of protected speech or conduct, and has been construed by our Supreme Court in a sufficiently limited manner.” *State v. Aljutily*, 149 Wash.App. 286, 296, 202 P.3d 1004 (2009).

This argument was also addressed as follows in *Schoening v. McKenna*, 636 F.Supp.2d 1154, 1157 (W.D.Wash.,2009):

The Washington Supreme Court has construed RCW 9.68A.090 to prohibit communicating with children with “the predatory purpose of promoting their exposure to and involvement in sexual misconduct.” *Washington v. McNallie*, 120 Wash.2d 925, 931-32, 846 P.2d 1358, 1363 (1993). The scope of the term “immoral purposes” has been limited to the category “sexual misconduct.” *McNallie*, 846 P.2d at 1362 (noting that the controlling opinion in *State v. Schimmelpfennig*, 92 Wash.2d 95, 594 P.2d 442 (1979), supports this interpretation). Because the state Supreme Court has provided a narrowing construction, “there is no longer any danger that protected speech will be deterred and therefore no longer any reason to entertain the defendant's challenge to the statute on its face.” *Osborne v. Ohio*, 495 U.S. 103, 115 n. 12, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990) (affirming the appropriateness of the Ohio Supreme Court relying on its own narrowing construction in evaluating the defendant's overbreadth claim).

Because the statute has been construed to prohibit only communications that constitute offers to engage in illegal activity, and such communications are not protected by the First Amendment, the statute is not overbroad. *See United States v. Williams*, ---U.S. ---, 128 S.Ct. 1830, 1842-43, 170 L.Ed.2d 650 (2008).

The defendant has not shown how his speech in this case would be protected by the First Amendment.

### **Community Custody Conditions**

Defendants can object to community custody conditions for the first time on appeal. *State v. Jones*, 118 Wn.App. 199, 204, 76 P.3d 258 (2003). Sentencing conditions, including crime-related prohibitions, are reviewed for abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). A trial court abuses its discretion if it imposes a condition that was manifestly unreasonable or based on untenable grounds, including conditions unauthorized by law. *State v. Riley* at 22.

A trial court may impose a sentence only if it is authorized by statute. *State v. Barnett*, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). A trial court has the authority to impose crime-related prohibitions and affirmative conditions. RCW 9.94A.505(8); *State v. Warren*, 134 Wn.App. 44, 70-71, 138 P.3d 1081 (2006). But conditions that do not reasonably relate to the circumstances of the crime are unlawful, unless those conditions are explicitly permitted by statute. *See Jones*, 118

Wn.App. at 207-08.

***Alcohol/Alcohol-related Establishment Restriction***

The State concedes that this prohibition is not reasonably crime-related and should be stricken from the terms of community custody.

***Possession of Drug paraphernalia***

The State concedes that this prohibition is not reasonably crime-related and should be stricken from the terms of community custody.

***Prohibition of Possession or Perusing Pornographic Material***

In deciding whether a term is unconstitutionally vague, the terms are not considered in a “vacuum,” rather, they are considered in the context in which they are used. *Douglass*, 115 Wash.2d at 180, 795 P.2d 693. When a statute does not define a term, the court may consider the plain and ordinary meaning as set forth in a standard dictionary. *State v. Sullivan*, 143 Wash.2d 162, 184-85, 19 P.3d 1012 (2001); *see also Medina v. Pub. Util. Dist. No. 1 of Benton County*, 147 Wash.2d 303, 315, 53 P.3d 993 (2002); *Giovani Carandola, Ltd. v. Fox*, 470 F.3d 1074, 1080 (4th Cir.2006). If “persons of ordinary intelligence can understand what the [law] proscribes, notwithstanding some possible areas of disagreement, the [law] is sufficiently definite.” *Douglass*, 115 Wash.2d at 179, 795 P.2d 693.

*State v. Bahl*, 164 Wash.2d 739, 754, 193 P.3d 678, 686 (2008)

In this case, the Department of Corrections condition is that the defendant shall “not possess or pursue [sic] any pornographic material.” CP at 51-61, Condition (b)(21). However, the Court also ordered that the defendant “[n]ot possess or peruse depictions of anyone, minor or adult,

engaged in sexually explicit conduct, as defined in RCW 9.68A.011.” CP at 37-46, Judgment and Sentence sections 4.2 and 4.6.

Pursuant to RCW 9.69A.011:

“Sexually explicit conduct” means actual or simulated:

- (a) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals;
- (b) Penetration of the vagina or rectum by any object;
- (c) Masturbation;
- (d) Sadomasochistic abuse for the purpose of sexual stimulation of the viewer;
- (e) Exhibition of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer;
- (f) Defecation or urination for the purpose of sexual stimulation of the viewer; and
- (g) Touching of a person's clothed or unclothed genitals, pubic area, buttocks, or breast area for the purpose of sexual stimulation of the viewer.

While these two conditions may be somewhat redundant, when read in tandem it is quite clear what conduct is prohibited. The defendant does not have to guess at what is prohibited by the words “pornographic” or “sexually explicit” as the statutory definition is quite clear and thorough. Therefore, the condition imposed is not unconstitutionally vague.

***Plethysmograph testing***

The State concedes that this testing should not be at the discretion of the defendant's Community Corrections Officer, and that this condition should be stricken.

**Statement of Additional Grounds for Review (SAG) #1**

There is no apparent legal argument to this SAG. Instead, the defendant is presenting facts outside of the record, and the State asks that they not be considered.

**Statement of Additional Grounds for Review (SAG) #2**

*Whether the defendant received ineffective assistance of counsel due to trial attorney's lack of personal computer expertise.*

In his Statement of Additional Grounds, the defendant claims that his trial attorney was "incompetent and lacked litigation skills required to defend the defendant." This claim is based on the defendant's statement that the trial attorney was "computer illiterate" and "this trial is based on computer electronic communication." The State believes this amounts to a claim that counsel was ineffective.

The Washington State Supreme Court adopted a two prong test stated for analysis of the effectiveness of a defense counsel performance. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct.

2052 (1984). The Court stated that “[t]he purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial.” *State v. Thomas*, 109 Wn.2d 222, 225; 743 P.2d 816 (1987). In order to maintain a claim of ineffective assistance of counsel, the defendant must show not only that his attorney’s performance fell below an acceptable standard, but also that his attorney’s failure affected the outcome of the trial.

*Strickland v. Washington* explains that the defendant must first show that his counsel’s performance was deficient. 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Counsel’s errors must have been so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. *Id.* The scrutiny of counsel’s performance is guided by a presumption of effectiveness. *Id.* at 689.

Secondly, the defendant must show that the deficient performance prejudiced the defense. *Id.* at 687. The defendant must show “that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* For prejudice to be claimed there must be a showing that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

If both prongs of the test are not met than the defendant cannot claim the error resulted in a breakdown in the adversary process that renders the result unreliable. *Id.* at 687.

“Ordinarily, the decision whether to call a witness is a matter of legitimate trial tactics and will not support a claim of ineffective assistance of counsel. *State v. Byrd*, 30 Wash.App. 794, 799, 638 P.2d 601 (1981). The presumption of counsel's competence can be overcome, however, by showing counsel failed to conduct appropriate investigations to determine what defenses were available, adequately prepare for trial, or subpoena necessary witnesses. *State v. Jury*, 19 Wash.App. 256, 263-64, 576 P.2d 1302, *review denied*, 90 Wash.2d 1006 (1978).” *State v. Maurice*, 79 Wash.App. 544, 552, 903 P.2d 514, 518 (1995).

In *Maurice*, the defendant was convicted of Vehicular Homicide after the defendant lost control of his vehicle and hit on oncoming car, whose driver died at the scene of the accident. *State v. Maurice*, 79 Wash.App. at 545. In a person restraint petition, the Maurice raised the issue of ineffective assistance of counsel, based on his attorney's failure to investigate his claim that a mechanical failure caused him to lose control of the vehicle and to call a mechanic or accident reconstructionist as an expert witness on his behalf. Maurice argued his attorney's omissions resulted first in an inadequate defense at trial and then led to denial of his

motion for a new trial, because the court accepted the State's argument that the evidence was not new and that the defense had in fact examined the vehicle with the State's expert and chose not to contradict his testimony that there was nothing wrong with the vehicle. *State v. Maurice* at 550-551.

The Court found that, given Maurice's claimed defense, his attorney's failure to have the vehicle in question inspected could not be justified. The Court remanded for further fact-finding to determine whether or not counsel's deficient performance prejudiced Maurice. *Maurice* at 552.

In the case at bar, the defendant did not make any claim that the material on his computer was unknown to him, or that it was accidentally downloaded. Instead, he freely admitted that he pursued the material, but that he "didn't think it was a problem." RP at 145. The defendant also admitted that he attached photographs to certain chat logs. RP at 147. However, his claim was that he didn't believe he was chatting to children. RP at 147-148.

Specifically, the State asked the defendant "And so the images that we've seen today, those are images you knew were on your computer, correct?" and the defendant answered "That I knew—yes." RP at 153. The State then inquired about the computer chats, and the defendant admitted

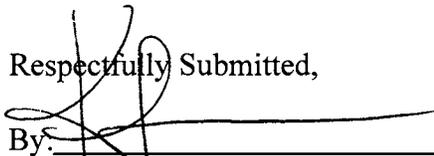
to using the screen names in question and having the chats over a period of five or six years. RP at 153-158.

The defendant offers no defense to possessing the sexually explicit depictions of minors, other than he didn't think it was a big deal. Likewise, the defendant makes no claim that he did not conduct the computer chats in question. Instead, he maintains that he didn't believe that the people he was communicating with were minors, a claim that was presented to and rejected by the jury. There is no deficient performance on the part of trial defense counsel. There is no argument that a computer expert could have further facilitated the defenses claimed by the defendant. Therefore, this SAG must fail.

### CONCLUSION

For the reasons stated above, the State asks the Court to affirm the verdict of the jury and find the statute RCW 9.68A.090 constitutional as applied to the defendant. The State further asks that the case be remanded for clarification of the conceded conditions of sentence, and that the condition prohibiting possession of sexually explicit material be affirmed.

Respectfully Submitted,

By: 

KATHERINE L. SVOBODA  
Sr. Deputy Prosecuting Attorney  
WSBA # 34097

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

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

STATE OF WASHINGTON,

Respondent,

No.: 39268-2-II

v.

**DECLARATION OF MAILING**

GERALD KANG,

Appellant.

**DECLARATION**

I, Barbara Chapman hereby declare as follows:

On the 4<sup>th</sup> day of March, 2010, I mailed a copy of the Brief of Respondent to Elaine L. Winters; Attorney for Appellant; 1511 Third Avenue Suite 701; Seattle, WA 98101, and Gerald Kang 328699; Monroe Correctional Complex; P. O. Box 777; Monroe, WA 98272, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 4<sup>th</sup> day of March, 2010, at Montesano, Washington.

Barbara Chapman