**NO. 41674-3-II**

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

STATE OF WASHINGTON, RESPONDENT

v.

KEVIN JACKSON, APPELLANT

---

Appeal from the Superior Court of Pierce County
The Honorable Edmond Murphy

No. 10-1-00576-7

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# RESPONDENT'S BRIEF

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**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. ..... 1

1. Should defendant's argument be treated as a motion for leave to amend the judgment and sentence where the record clearly shows the court intended to sentence defendant under RCW 9.94A.715 rather than under RCW 9.94A.712? ..... 1

2. Has defendant failed to show the court abused its discretion in imposing crime related conditions for community custody where the conditions were directly related to the circumstances of the crime, and the defendant's risk of re-offending? ..... 1

3. Did the court err in imposing a condition which has been found unconstitutionally vague? ..... 1

4. Did the court correctly find that defendant was found guilty of a crime involving domestic violence where the victim was defendant's biological daughter? ..... 1

5. Did the court correctly impose a domestic violence no contact order where the protected party was the victim of defendant's domestic violence offense? ..... 1

B. STATEMENT OF THE CASE ..... 1

1. Procedure ..... 1

2. Facts ..... 3

C. ARGUMENT. ..... 5

1. SENTENCING UNDER RCW 9.94A.712 RATHER THAN RCW 9.94A.715 WAS A CLERICAL ERROR WHICH MAY BE CORRECTED BY THE TRIAL COURT ..... 5

2. THE COURT DID NOT ERR IN IMPOSING CRIME RELATED CONDITIONS OF COMMUNITY CUSTODY ..... 7

3. THE COURT ERRED IN ORDERING DEFENDANT NOT TO POSSESS OR PERUSE PORNOGRAPHIC MATERIALS AS A CONDITION OF COMMUNITY CUSTODY ..... 13

4. THE TRIAL COURT DID NOT ERR IN FINDING THAT DEFENDANT WAS CONVICTED OF CHILD MOLESTATION IN THE SECOND DEGREE INVOLVING DOMESTIC VIOLENCE WHEN THE VICTIM WAS HIS BIOLOGICAL DAUGHTER ..... 13

5. THE TRIAL COURT DID NOT ERR IN ENTERING A 10 YEAR DOMESTIC VIOLENCE NO CONTACT ORDER WHERE DEFENDANT WAS CONVICTED OF A CLASS B FELONY INVOLVING DOMESTIC VIOLENCE. ..... 14

D. CONCLUSION ..... 16-17

## Table of Authorities

### State Cases


***In re Personal Restraint of Rainey***, 168 Wn.2d 367, 374, 229 P.3d 686 (2010) ..... 5, 7, 8

***State v. Armendariz***, 160 Wn.2d 106, 112, 156 P.3d 201 (2007) .. 7, 14, 15

***State v. Bahl***, 164 Wn.2d 739, 1756-57, 93 P.3d 678 (2008) ..... 7, 13

***State v. Castro***, 141 Wn. App. 485, 494, 170 P.3d 78 (2007) ..... 12

***State v. Cayenne***, 165 Wn.2d 10, 14, 195 P.3d 521 (2008) ..... 7, 8

***State v. Felix***, 125 Wn. App. 575, 579-80, 105 P.3d 427 (2005) ..... 15

***State v. Hagler***, 150 Wn. App. 196, 201, 208 P.3d 32, *quoting* ***State v. O.P.***, 103 Wn. App. 889, 892, 13 P.3d 1111 (2000) ..... 13, 14

***State v. Jones***, 118 Wn. App. 199, 204, 76 P.3d 258 (2003) ..... 5, 9

***State v. Julian***, 102 Wn. App. 296, 304, 9 P.3d 831 (2000) ..... 5

***State v. Llamas-Villa***, 67 Wn. App. 448, 456, 836 P.2d 239 (1992) ..... 8

***State v. Priest***, 100 Wn. App. 451, 455, 997 P.2d 452 (2000) ..... 5

***State v. Riley***, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993) ..... 7

***State v. Vasquez***, 95 Wn. App. 12, 972 P.2d 109 (1999) ..... 11, 12

***State v. Warren***, 165 Wn.2d 17, 32, 195 P.3d 940 (2008) ..... 8

***State v. Winston***, 135 Wn. App. 400, 406, 144 P.3d 363 (2006) ..... 14, 15


### Federal and Other Jurisdictions


***Blakely v. Washington***, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004) ..... 14, 15

## Statutes

RCW 10.99.010 ..... 13

RCW 7.90.005 ..... 16

RCW 7.90.150 ..... 16

RCW 7.90.150(6) ..... 16

RCW 9.94A.030(13) ..... 7, 8, 14

RCW 9.94A.120 ..... 11

RCW 9.94A.120(9)(c)(iii) ..... 11

RCW 9.94A.505(8) ..... 7, 8

RCW 9.94A.700(4) ..... 6

RCW 9.94A.700(5) ..... 6

RCW 9.94A.712 ..... 1, 5, 6

RCW 9.94A.712(6)(a)(i) ..... 6

RCW 9.94A.715 ..... 1, 5, 6, 11

RCW 9.94A.715(2)(a) ..... 6, 12

RCW 9A.20.021(1)(b) ..... 15

RCW 9A.44.086(2) ..... 15

## Rules and Regulations

CrR 7.8(a) ..... 5

RAP 7.2(e) ..... 5, 6

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

1. Should defendant's argument be treated as a motion for leave to amend the judgment and sentence where the record clearly shows the court intended to sentence defendant under RCW 9.94A.715 rather than under RCW 9.94A.712?

2. Has defendant failed to show the court abused its discretion in imposing crime related conditions for community custody where the conditions were directly related to the circumstances of the crime, and the defendant's risk of re-offending?

3. Did the court err in imposing a condition which has been found unconstitutionally vague?

4. Did the court correctly find that defendant was found guilty of a crime involving domestic violence where the victim was defendant's biological daughter?

5. Did the court correctly impose a domestic violence no contact order where the protected party was the victim of defendant's domestic violence offense?

B. STATEMENT OF THE CASE.

1. Procedure

On February 5, 2010, the State charged defendant, Kevin Jackson, with one count of child molestation in the second degree, with a domestic

violence designation. CP 1. A jury trial began before the Honorable Edmond Murphy on November 1, 2010. RP 32. The jury found defendant guilty as charged on November 10, 2010. CP 81; RP 452. The jury was not asked to find the domestic violence designation. CP 57-80.

Defendant was evaluated by Joe Sophia from the Department of Corrections on December 13, 2010. CP 115-130. The pre-sentence investigation report recommended that the defendant be sentenced to 20 months of custody, and that he serve 36 months of community custody. *Id.* Additionally, the pre-sentence report recommended that the defendant undergo a mental health evaluation and a chemical dependency evaluation, and complete the accompanying treatment programs. *Id.* The pre-sentence investigation report also contained a recommendation that defendant undergo Moral Reconation Treatment (MRT). *Id.*

The sentencing judge reviewed the DOC report along with the defendant's and victims' statements prior to entering the judgment and sentence. RP 467, 475-76. The judge sentenced defendant to 17 months, the middle of the standard range[1]. CP 84-85, 86-102; RP 475. The court also sentenced defendant to 36 months of community custody. CP 86-102. As conditions of community custody, the court ordered that defendant undergo a psychosexual evaluation and accompanying treatment unless the examination defendant had undergone on May 6,

[1] Defendant had an offender score of 1, giving him a standard range of 15-20 months. CP 84-85, 86-102.

2010, by Dr. Traywich was acceptable as a substitute to DOC. CP 86-102; RP 476. The court also entered a no contact order preventing defendant from contacting the victim, K.J., for ten years, unless DOC and K.J.'s therapist agreed that contact should occur. CP 103-105. Defendant was also required to undergo a chemical dependency evaluation and any related treatment. CP 103-105.

2. Facts

Sometime between June and August of 2008, defendant attended a barbeque and party with his daughter, K.J.,[2] and his son. RP 81, 328. The defendant and the other adults at the party were drinking and socializing while the children watched television and played together. RP 82, 100, 329. After consuming a number of drinks, defendant went to lay down in the bedroom. RP 83, 84, 330. K.J. went to the bedroom where defendant was, and asked if he was asleep. RP 84. Defendant told her he was not, and then told her to lie down with him. RP 84. K.J. laid down next to defendant. RP 84. Defendant then took K.J.'s hand, and "put it on him." RP 84. K.J. explained that by "on him," she meant on his penis under his clothing. RP 85. Defendant moved K.J.'s hand on his penis. RP 87. K.J. tried to leave, and asked defendant, "What are you doing." RP 87. Defendant told K.J. to stay, and she obeyed. RP 87. Defendant

[2] Because the victim is a minor, the State will refer to her by her initials.

then "put his hands down [her] pants." RP 86-7. Defendant continued to touch K.J. under her pants and underpants, and move her hand on his penis for "a couple of minutes." RP 87.

Cindy Stuber walked down the hallway while defendant and his daughter were laying on the bed in the bedroom. RP 255, 257. Ms. Stuber saw that defendant "was having [K.J.] touch his penis." RP 257. Defendant "was telling [K.J.] that she needed to learn what to do with – if she's going to be with a boy, that he's going to teach her how to." RP 258. While defendant told his daughter she needed to "learn what to do," K.J.'s hand stayed on defendant's penis, and was "rubbing him." RP 258. Ms. Stuber went to get Dolores Allen and told her to get K.J. out of the bedroom. RP 237, 261. Ms. Allen told K.J. to come out of the bedroom. RP 261.

After K.J. left the room, Leah Wilson took her for a walk and to discuss what had happened. RP 88. When K.J. and Ms. Wilson returned from the walk, defendant took K.J. and his son and left the party. RP 90.

Later in the evening, two of defendant's friends, Clarence Allen, and "DC" came to his door, "were yelling at [defendant]" and asking him questions. RP 92, 331. Defendant told K.J., "I'm sorry." RP 92, 95, 332.

Neither K.J. nor anyone else reported the incident to the police, or to K.J.'s mother. RP 96, 337. K.J. disclosed the incident to her mother around December of 2009. Her mother reported the incident to the police the same day K.J. explained what had happened. RP 132, 135.

C. ARGUMENT.

1. SENTENCING UNDER RCW 9.94A.712 RATHER THAN RCW 9.94A.715 WAS A CLERICAL ERROR WHICH MAY BE CORRECTED BY THE TRIAL COURT.

When a court imposes a sentence that falls outside of its statutory authority, defendant can raise the issue for the first time on appeal. ***State v. Jones***, 118 Wn. App. 199, 204, 76 P.3d 258 (2003) (citing ***State v. Julian***, 102 Wn. App. 296, 304, 9 P.3d 831 (2000)). The Washington Supreme Court has generally reviewed matters of sentencing conditions for abuse of discretion. ***In re Rainey***, 168 Wn.2d 367, 374, 229 P.3d 686 (2010).

A clerical error may be corrected by the trial court pursuant to CrR 7.8(a) and, once accepted for review by an appellate court, pursuant to RAP 7.2(e). "A clerical mistake is one that when amended would correctly convey the intention of the court based on other evidence." ***State v. Priest***, 100 Wn. App. 451, 455, 997 P.2d 452 (2000). Where a defendant argues that his case should be remanded rather than filing a motion with the trial court, the court may treat defendant's argument as a motion to give the trial court leave to address the issue under RAP 7.2(e). *Id.* at 454-455.

Here, in sentencing defendant, the court stated, "it is the judgment of the Court that you are guilty of the crime of child molestation in the

second degree." RP 474. The judgment and sentence likewise reflects the crime as child molestation in the second degree. CP 86-102. On appendix H in the judgment and sentence, the statute under which defendant is required to serve community custody as RCW 9.94A.712 rather than RCW 9.94A.715. CP 103-105. Former RCW 9.94A.712 applies to child molestation in the first degree, but does not apply to child molestation in the second degree. RCW 9.94A.712. Both former RCW 9.94A.712 and former RCW 9.94A.715 contain the following language on community custody conditions:

> 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...

RCW 9.94A.712(6)(a)(i); RCW 9.94A.715(2)(a). Because the conditions imposed under both former RCW statutes are the same, the court's error in entering appendix H of the judgment and sentence under RCW 9.94A.712 rather than RCW 9.94A.715 was clerical, and defendant's argument should be treated as a motion for leave to amend the judgment and sentence under RAP 7.2(e).

2. THE COURT DID NOT ERR IN IMPOSING CRIME RELATED CONDITIONS OF COMMUNITY CUSTODY.

Generally, a sentencing judge may impose and enforce crime-related prohibitions and affirmative conditions. ***State v. Cayenne***, 165 Wn.2d 10, 14, 195 P.3d 521 (2008); RCW 9.94A.505(8). A crime-related prohibition is statutorily defined as "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted..." RCW 9.94A.030(13). Crime-related prohibitions may extend for a period of time not to exceed the statutory maximum for the defendant's crime and can be independent of the conditions of community custody. ***State v. Armendariz***, 160 Wn.2d 106, 112, 118-20, 156 P.3d 201 (2007). Conditions of community custody imposed within the discretion of the sentencing court will only be reversed if manifestly unreasonable. ***State v. Bahl***, 164 Wn.2d 739, 753, 93 P.3d 678 (2008).

An appellate court generally reviews sentencing conditions for abuse of discretion. ***State v. Riley***, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993). The appellate court carefully reviews conditions that interfere with the fundamental right to the care, custody, and companionship of one's children. *See* ***In re Personal Restraint of Rainey***, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). Such conditions must be "sensitively imposed" so

that they are "reasonably necessary to accomplish the essential needs of the State and public order." *Id.* at 377, citing ***State v. Warren***, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). The extent to which a sentencing condition affects a constitutional right is a legal question subject to strict scrutiny. *Id.* at 374. Nevertheless, because the imposition of crime-related prohibitions is necessarily fact-specific and based upon the sentencing judge's in-person appraisal of the trial and the offender, the appropriate standard of review remains abuse of discretion. ***Rainey*** at 377.

Generally, a sentencing judge may impose and enforce crime-related prohibitions and affirmative conditions. ***State v. Cayenne***, 165 Wn.2d 10, 14, 195 P.3d 521 (2008); RCW 9.94A.505(8). A crime-related prohibition is statutorily defined as "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted..." RCW 9.94A.030(13). Conduct prohibited during community custody need not be causally related to the crime. ***State v. Llamas-Villa***, 67 Wn. App. 448, 456, 836 P.2d 239 (1992).

a. The court did not err in ordering defendant to undergo a mental health evaluation and treatment as conditions of community custody.

The sentencing court is permitted to order defendant undergo a mental health evaluation and any recommended therapies as a condition of

community custody, so long as "the court finds, based on a presentence report and any applicable mental status evaluations, that the offender suffers from a mental illness which influenced the crime." ***State v. Jones***, 118 Wn. App. 199, 202, 76 P.3d 258 (2003). The court in this case reviewed both the pre-sentence report prepared by DOC and an evaluation conducted by Dr. Traywich conducted on May 6, 2010. CP 86-102; CP 115-130; RP 476. The DOC evaluator recommended that defendant undergo a mental health evaluation. CP 115-130. Based on the recommendation contained in the pre-sentence report, the court ordered that defendant undergo a mental health evaluation and any recommended treatments. RP 475. The court noted that if DOC was satisfied with the mental health evaluation defendant had already undergone, he would not be required to undergo a second. CP 86-102, 115-130; RP 476. Based on a pre-sentence report, the court ordered that defendant undergo the recommended mental health evaluation as there was clearly a concern that defendant's mental state influenced the crime.

b. <u>The court did not err in ordering defendant to undergo a chemical dependency evaluation and treatment as conditions of community custody.</u>

Defendant's alcohol use was a circumstance of the crime in this case. RP 83, 99, 294, 296, 321, 330. The testimony in the case that

defendant had consumed alcohol is undisputed. *Id.* Defendant's own statements were that he was intoxicated on the night of the crime. RP 330. The pre-sentence report, and the evaluation done by Dr. Traywick, include information about defendant's drug use, as well as his alcohol use. CP 115-130. During his evaluations, defendant acknowledged using marijuana and mushrooms. *Id.* Defendant was also involved in a car accident during which he had marijuana in his system. *Id.* Defendant also previously lost a job because of his marijuana use. *Id.* The pre-sentence report included the evaluator's recommendation that defendant undergo an evaluation for chemical dependency, and any related treatment. *Id.* The pre-sentence report concluded that defendant's chemical dependency issues needed to be addressed in order to reduce the risk of re-offending. *Id.* The court relied on this report and ordered that defendant undergo chemical dependency evaluation and any related treatment as a condition of community custody. *Id.* Because the condition is related to the circumstances of the crime, and defendant's risk of reoffending, and the risk to the community, the court did not err in ordering such conditions.

c. <u>The court did not err in ordering defendant to undergo Moral Reconation Therapy (MRT) as a condition of community custody.</u>

As is the case for the court's imposition of the other conditions on

community custody, the court ordered defendant to undergo MRT on the recommendation of the pre-sentence report. CP 115-130. MRT was recommended as a way to reduce the risk of defendant reoffending, and reduce the risk to the community. *Id.* The court is permitted to enter conditions which reduce such risks under RCW 9.94A.715.

Defendant cites ***State v. Vasquez***, 95 Wn. App. 12, 972 P.2d 109 (1999) in support of his argument that the court erred in entering an order that defendant undergo MRT. Appellant's Brief at 15-16. However, the holding in ***Vasquez*** was that because the pre-sentence report suggested that the MRT was "not related to the specific circumstances of [the] crime," but rather was meant to assist Vasquez in "being able to make better decisions for the future." ***Vasquez***, 95 Wn. App. at 16. Vasquez was convicted of second degree assault. *Id.* at 13. Vasquez was required to complete community placement under RCW 9.94A.120. *Id.* at 16. RCW 9.94A.120 only allows the court to order that the offender "crime-related treatment." *Id. citing* RCW 9.94A.120(9)(c)(iii). Because the condition in ***Vasquez*** was not crime related, the court was not permitted to order the condition under the Vasquez's community custody statute. *Id.*

In this case, defendant was sentenced to community custody under former RCW 9.94A.715, which allows the court to impose conditions on community custody that are "reasonably related to the circumstances of

the offense, the offender's risk of reoffending, or the safety of the community," not just those which are "crime related." RCW 9.94A.715(2)(a); CP 103-105. Thus, the ruling in ***Vasquez*** striking the MRT condition does not apply to the case at bar. The court did not err in ordering MRT as a condition of community custody, where the condition was reasonably related to the offender's risk of reoffending.

d. The court did not err in ordering defendant not to have access to the internet without child blocks in place.

The court did not err in ordering that defendant not access the internet without child blocks in place as a condition of community custody. Internet restrictions which require defendant to fulfill a condition in order to have access to the internet are a valid order requiring an affirmative act from the defendant. ***State v. Castro***, 141 Wn. App. 485, 494, 170 P.3d 78 (2007). In ***Castro***, the defendant was convicted of child molestation in the second degree. *Id.* at 488. As a condition of community custody, the sentencing court ordered that defendant not access the internet without first securing the permission of is community custody officer. *Id.* at 494. The court determined that this was a valid condition under former RCW 9.94A.715(2)(a), the same statute under which defendant is required to serve community custody in this case. *Id.* at 494. The court in this case therefore did not err in placing conditions on defendant's access to the internet.

3. THE COURT ERRED IN ORDERING DEFENDANT NOT TO POSSESS OR PERUSE PORNOGRAPHIC MATERIALS AS A CONDITION OF COMMUNITY CUSTODY.

The State concedes that the condition which addresses pornography is unconstitutionally vague per ***State v. Bahl***, 164 Wn.2d 739, 1756-57, 93 P.3d 678 (2008). CP 103-105. The State agrees that this case should be remanded to correct the judgment and sentence as to that condition only.

4. THE TRIAL COURT DID NOT ERR IN FINDING THAT DEFENDANT WAS CONVICTED OF CHILD MOLESTATION IN THE SECOND DEGREE INVOLVING DOMESTIC VIOLENCE WHEN THE VICTIM WAS HIS BIOLOGICAL DAUGHTER.

The domestic violence act was enacted to protect victims of domestic violence from abuse, and to correct problems associated with differing treatment by law enforcement agencies of crimes of domestic violence and those occurring between strangers. RCW 10.99.010. "The designation does not itself alter the elements of the underlying offense; rather, it signals the court that the law is to be equitably and vigorously enforced." ***State v. Hagler***, 150 Wn. App. 196, 201, 208 P.3d 32, *quoting* ***State v. O.P.***, 103 Wn. App. 889, 892, 13 P.3d 1111 (2000) (internal quotations omitted). "A finding of domestic violence alone does not

authorize an exceptional sentence... and does not impermissibly increase the potential punishment." ***State v. Winston***, 135 Wn. App. 400, 406, 144 P.3d 363 (2006). The designation of domestic violence does not need to be proven to a jury under ***Blakely v. Washington***, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004). ***Hagler***, 150 Wn. App. at 201, *citing* ***Winston***, 135 Wn. App. at 406-10.

Here, the evidence is uncontested that the victim was defendant's biological daughter. RP 98-99, 103, 293, 316. Defendant himself testified that the victim was his daughter. RP 337-38, 348. Because the designation need not be found by a jury, and does not impermissibly increase the defendant's potential punishment, the trial court did not err in finding that the crime involved domestic violence.

5. THE TRIAL COURT DID NOT ERR IN ENTERING A 10 YEAR DOMESTIC VIOLENCE NO CONTACT ORDER WHERE DEFENDANT WAS CONVICTED OF A CLASS B FELONY INVOLVING DOMESTIC VIOLENCE.

As a part of any felony sentence, the trial court permitted to impose crime related prohibitions as a part of defendant's sentence. RCW 9.94A.030(13). "[S]uch crime related prohibitions may include orders prohibiting contact with victims or witnesses for the statutory maximum term." ***State v. Armendariz***, 160 Wn.2d 106, 108, 156 P.3d 201 (2007). Child molestation in the second degree is a class B felony. RCW

9A.44.086(2). Class B felonies carry a maximum sentence of 10 years. RCW 9A.20.021(1)(b). Here, defendant was convicted of child molestation in the second degree. CP 86-102. Because the statutory maximum for that crime is 10 years, the trial court was entitled to impose a no contact order for the entirety of that 10 year period. ***Armendariz***, 160 Wn.2d at 111. The court did not err in entering a no contact order with a ten year duration where the defendant's statutory maximum sentence was 10 years.

Furthermore, where defendant commits a crime involving domestic violence, the court may impose a domestic violence no contact order without a finding of domestic violence by a jury. ***State v. Winston***, 135 Wn. App. 400, 407, 144 P.3d 363 (2006), ***State v. Felix***, 125 Wn. App. 575, 579-80, 105 P.3d 427 (2005). No contact orders are civil in nature and are designed to protect third parties. ***Felix***, 125 Wn. App at 579, ***Winston***, 135 Wn. App. at 407. Because the no-contact order does not implicate any increase in the possible penalties associated with the crime, ***Blakely*** is inapplicable, and the domestic violence designation need not be determined by a jury. ***Winston***, 135 Wn. App at 406, *citing* ***Blakely***, 542 U.S. at 303-04. The court did not err in entering a domestic violence no contact order where it had found that the domestic violence designation applied.

Defendant argues that the court erred in not entering the no-contact order under RCW 7.90.150(6). RCW 7.90.150 applies to cases in which the crime was one involving sexual motivation, and provides a mechanism for the court to impose a no contact order to protect a victim of such a crime. However, the legislature noted in its declaration that:

> It is the intent of the legislature that the sexual assault protection order created by this chapter be a remedy for victims who do not qualify for a domestic violence order of protection.

RCW 7.90.005. Because the victim here qualifies for a domestic violence order of protection, the legislature did not intend for the mandates of RCW 7.90.150(6) to apply in this case. Because RCW 7.90.150(6) does not apply to cases involving domestic violence, the court did not err in entering a domestic violence no contact order rather than a sexual assault protection order.

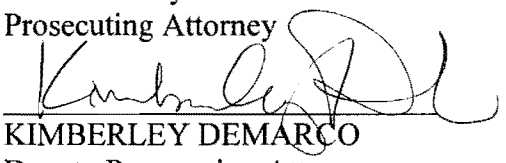
D. CONCLUSION.

For the reasons stated above, the State respectfully requests this Court to affirm defendant's conviction and sentence, but to remand for

correction of appendix H of the judgment and sentence, by correcting the scrivener's error in the sentencing statute, and striking the pornography restriction.

DATED: November 22, 2011.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



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MARGO MARTIN
Rule 9 Intern

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