

No. 42893-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL SHANNON DEROUEN,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 10-1-01192-9
The Honorable Beverly G. Grant, Judge

OPENING BRIEF OF APPELLANT

STEPHANIE C. CUNNINGHAM
Attorney for Appellant
WSBA No. 26436

4616 25th Avenue NE, No. 552
Seattle, Washington 98105
Phone (206) 526-5001

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it admitted testimony describing uncharged prior sexual conduct under RCW 10.58.090.
2. The trial court erred when it admitted testimony describing uncharged prior sexual conduct under ER 404(b).
3. The trial court erred when it failed to give a proper ER 404(b) limiting instruction.
4. The trial court erred when it imposed a term of confinement and community custody that, when combined, exceeds the statutory maximum.
5. The trial court exceeded its statutory sentencing authority by ordering that Michael Derouen have no contact with both male and female minors.
6. The trial court violated Michael Derouen's constitutional right to parent his children by imposing limits on his contact with his minor sons.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the trial court commit error when it admitted testimony under RCW 10.58.090 describing uncharged prior sexual conduct, where that statute has been declared unconstitutional? (Assignment of Error 1)

2. Did the trial court commit error when it admitted testimony under ER 404(b) describing uncharged prior sexual conduct in order to show a common scheme or plan, where the testimony of one witness did not exhibit sufficient similarity to the charged crime, and where the highly prejudicial nature of both witnesses' testimony outweighed its limited probative value? (Assignment of Error 2)
3. Was Michael Derouen prejudiced by the trial court's failure to give a proper ER 404(b) limiting instruction? (Assignment of Error 3)
4. Where a Brooks notation limiting the combined term of confinement and community custody to the statutory maximum is no longer permitted under the sentencing statutes, did the trial court err when it imposed a sentence in excess of the statutory maximum and included a Brooks notation? (Assignment of Error 4)
5. Did the trial court exceed its statutory sentencing authority, and violate Michael Derouen's fundamental constitutional right to parent his children, by ordering that he have no contact whatsoever with any minor child and by placing limits on his contact with his sons, where there is no allegation or

showing by the State that he poses a danger to male children in general or to his minor sons in particular?
(Assignments of Error 5 & 6)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Michael Shannon Derouen by Information with four counts of rape of a child in the third degree (RCW 9A.44.079). (CP 59-60) The State alleged that Derouen engaged in sexual intercourse with B.D. when she was between the ages of 14 and 16 years old. (CP 59-60)

Before trial, the prosecutor sought permission, under RCW 10.58.090 and ER 404(b), to introduce testimony from two other women, J.S. and D.L., who claimed to have had sexual intercourse with Derouen when they were 17 years old and 15 years old, respectively. (RP 100-01, 105; CP 61-80) Derouen vigorously objected. (RP 25-27, 103-05; CP 6-12) The trial court admitted some of the testimony under RCW 10.58.090 and the remainder under ER 404(b). (RP 21-25, 29-30, 106)

The jury convicted Derouen as charged. (CP 193-96; RP 733) The trial court sentenced Derouen to 60 months of confinement (the statutory maximum), but also imposed a 36-month

term of community custody. (RP 739, 746; CP 216, 217) The court also ordered that Derouen have no contact with any minors and that he can only have contact with his sons if they request the contact. (RP 749-51; CP 216, 218, 223, 226) This appeal timely follows. (CP 230)

B. SUBSTANTIVE FACTS

1. Evidence Relating to Charged Offenses

Michael Derouen's family and B.D.'s family were neighbors. (RP 333, 421-22) In the summer of 2003, when B.D. was 14 years old, Derouen and his then-wife, Catherine Merritt, asked B.D. if she would babysit their three young sons. (RP 335, 336, 561, 595) With her parents' approval, B.D. started babysitting for the Derouens about once a week. (RP 336-37, 423) Eventually the Derouens increased B.D.'s schedule, so she was at their house more frequently. (RP 339)

According to B.D., Derouen was friendly and talkative with her, and began asking about her life and interests. (RP 340) They would often sit and drink coffee together in Derouen's kitchen while the boys played or watched television. (RP 340) B.D. enjoyed these conversations because she did not feel she had anyone else to talk to. (RP 341)

As their friendship progressed, Derouen began asking questions about whom she dated, and began acting in a way that B.D. interpreted as flirtatious. (RP 343) B.D. testified that Derouen's attention made her feel important and pretty. (RP 346) She did not find it odd that Derouen was paying so much attention to her even though he was 36 years old at the time, because her parents were 14 years apart in age so it seemed normal. (RP 346, 357, 500)

Derouen would frequently call or send text messages to B.D, and became physically affectionate. (RP 344, 351) By the summer of 2004, when B.D. was 15 years old, Derouen told B.D. that he was in love with her and wanted to marry her when she turned 18 years old. (RP 349, 351) At the time, B.D. felt she was in love with Derouen too. (RP 350)

Derouen and B.D. engaged in frequent oral sex and intercourse beginning in June of 2004. (RP 352-53, 356, 361) B.D. testified that Derouen was her first sexual partner, and that Derouen was aware of that fact. (RP 343, 360) Derouen gave B.D. gifts and promised to marry her. (RP 363, 366)

Their relationship continued until B.D. ended it in late 2005 or early 2006, because she had tired of Derouen and felt he was no

longer treating her well. (RP 361, 372) B.D. eventually decided to tell her parents about her relationship with Derouen because she was concerned that he might start a similar relationship with another young girl. (RP 379, 428, 429)

B.D.'s father, who was a mandatory reporter, called CPS to report what B.D. had told him. (RP 379, 434) As a result, the police contacted B.D. and began an investigation. (RP 380, 434, 471-72) B.D.'s father also confronted Derouen, who denied any improper relationship with B.D. (RP 435)

Eventually, B.D. and her fiancé, Jonathan Korba, also went to Derouen's home to confront him. (RP 381-82, 456-57) They told Derouen not to attempt any contact with B.D. and Korba warned him: "no more little girls." (RP 381-82, 458, 459) According to Korba, Derouen agreed and also appeared nervous and evasive when his wife came to the door to see what was happening. (RP 458, 459, 460)

Derouen testified and denied having any sexual contact with B.D. or D.L. (RP 592, 596, 630, 631) He also testified that D.L. once tried to initiate a sexual encounter with him, but that he stopped it. (RP 599, 609) He testified that D.L. would come over unannounced to play with his children, and that he felt paternal

towards her because he believed her story that she had been abused by an uncle. (RP 601-02)

Several of Derouen's Veterans of Foreign Wars (VFW) associates testified that he was with them all day and night working on an inventory project on the date that B.D. says they were first intimate. (RP 508-10, 521) Catherine Merritt, Merritt's mother, and Derouen's eldest son all testified that they never observed any inappropriate behavior between Derouen and B.D. or any other young women. (RP 537, 540, 552-53, 569-70) Derouen's son also testified that he overheard B.D. and Korba confront his father, and Derouen did not admit to any wrongdoing; rather, Derouen told them he had no idea what they were talking about. (RP 553-54)

2. Evidence of Other Uncharged or Non-Criminal Sexual Conduct

J.S. was 15 years old when she met Derouen at a VFW convention in the summer of 2002. (RP 265, 266-67) The following winter, when J.S. was 16 years old, she saw Derouen again at another VFW convention. (RP 270, 271) They became friends, and often talked when they would see each other at various VFW events. (RP 269-70, 273, 274-75)

When J.S. was 17 years old, she and her family traveled to

Yakima for another VFW convention. (RP 271-72, 276) J.S. had a fight with her stepmother, and went to Derouen's hotel room to talk. (RP 277-78) J.S. believed at the time that she was in love with Derouen, and she decided to have sexual intercourse with him. (RP 276, 278, 279, 286) It was the first and last time they had any sexual contact. (RP 323) When J.S. told her parents, they forbid her from having any contact with Derouen. (RP 290-91, 293, 327)

J.S. moved out of her parents' house when she turned 18 years old, and a few months later she moved in with Derouen and his family. (RP 293, 295, 297, 298-99, 319) At that point, J.S. had no romantic feelings for Derouen, and they did not engage in a romantic or physical relationship. (RP 300, 304, 323) J.S. babysat and cleaned the house in exchange for room and board, and she developed a close bond with Catherine Merritt, who was still married to Derouen at the time. (RP 297, 300-01, 302) When Merritt moved out in the spring of 2006, J.S. moved out as well. (RP 305, 561)

In September of 2004, when D.L. was 13 years old, she was walking past the Derouen home and noticed that they were giving away a glass terrarium, so she stopped to inquire whether she could take it. (RP 118-19, 141) She and Derouen began a

conversation about reptiles, and he took her inside to see his collection. (RP 120)

D.L. came over uninvited several times over the next few months to see Derouen's reptiles and to play with his sons. (RP 121) She eventually began spending a great deal of time with the Derouens, even accompanying them on a family vacation to California. (RP 122, 124, 146-47, 148-49)

In March of 2006, Derouen's wife moved out and began divorce proceedings. (RP 129, 129, 151, 561) Soon after, Derouen told D.L. that he was in love with her, and D.L. told Derouen that she was in love with him too. (RP 128, 130) D.L. was then 15 years old. (RP 139) Over the next few weeks and months, their physical relationship gradually progressed and they eventually engaged in intercourse. (RP 128, 130, 131, 132, 163, 165-66)

D.L. testified that Derouen told her he was risking everything to be with her, and that he would kill himself if she ended their relationship. (RP 155, 167) He also told D.L. he would marry her when she turned 18 years old. (RP 193) D.L. admitted telling Derouen and his second wife, Deanna, that she had a heart murmur and that she had been molested by her uncle. (RP 244-45,

247) Neither of these stories were true. (RP 244-45, 247)

In the spring of 2008, Derouen's then-wife, Deanna, found a love letter that D.L. had written to Derouen. (RP 166-67) D.L. also began feeling badly about the relationship and started spending less time at the Derouen home. (RP 169-71, 173)

While at summer camp, D.L. met a friend who encouraged her to report the relationship to the police, so when she returned from camp she did so. (RP 173, 175-76, 177, 184) The detective recorded a telephone conversation between D.L. and Derouen wherein Derouen appears to admit to a sexual relationship with D.L. when she was under the age of 16 years old. (RP 185, 186, 187, 192; Exh. P1)

IV. ARGUMENT & AUTHORITIES

A. ADMISSION OF TESTIMONY ALLEGING PRIOR UNCHARGED SEXUAL CONDUCT WAS IMPROPER AND OVERLY PREJUDICIAL

The State sought to introduce evidence regarding Derouen's prior alleged sexual conduct with J.S. and D.L. under either RCW 10.58.090 or ER 404(b). (CP 61-80) RCW 10.58.090(1) provides, in relevant part:

In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if

the evidence is not inadmissible pursuant to Evidence Rule 403.

And under ER 404(b),

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The State argued that the testimony was admissible under the statute, but also under the court rule because it showed a common scheme or plan. (CP 61-80; RP 100-01, 105)

Derouen objected to its admission under RCW 10.58.090, arguing that the majority of the misconduct was not actually a “sex offense” as it is defined in the statute because it occurred when J.S. and D.L. were 16 years of age or older, and she was therefore legally able to consent. (RP 25-27; CP 6-12) Derouen also objected to admission under ER 404(b) because the evidence was not sufficiently similar and was more prejudicial than probative. (RP 103-05; CP 6-12)

The State and the trial court agreed that the statute likely did not apply to evidence of acts committed with J.S., but found that the testimony was admissible under ER 404(b). (RP 24-25, 106) As

for D.L.'s testimony, although the trial court was not specific or particularly clear in its ruling, it appears that the court admitted evidence of acts occurring when D.L. was less than 16 years old under RCW 10.58.090, and admitted evidence of acts occurring when D.L. was 16 years old as evidence of a common scheme or plan under ER 404(b). (RP 21-24, 29-30)

1. It was error to admit any portion of the testimony under RCW 10.58.090.

The Supreme Court held in State v. Gresham, that RCW 10.58.090 is unconstitutional because it violates the separation of powers doctrine. 173 Wn.2d 405, 432, 269 P.3d 207 (2012). Therefore, RCW 10.58.090 cannot be used in this case to justify the admission of any portion of J.S.'s or D.L.'s testimony. And, as argued in detail below, the admission of such testimony was not harmless error.

2. The trial court erred when it admitted testimony under ER 404(b) as evidence of a common scheme or plan.

A defendant must only be tried for those offenses actually charged. Therefore, evidence of other crimes must be excluded unless shown to be relevant to a material issue and to be more probative than prejudicial. State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984); State v. Goebel, 40 Wn.2d 18, 21, 240 P.2d 251

(1952).

A trial court's decision to admit or exclude evidence under ER 404(b) is reviewed for an abuse of discretion. State v. Tharp, 27 Wn. App. 198, 205-06, 616 P.2d 693 (1980). A trial court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Although ER 404(b) allows the admission of evidence of a "common scheme or plan," this is not an exception to the ban on propensity evidence. Gresham, 173 Wn.2d at 429. "Even when evidence of a person's prior misconduct is admissible for a proper purpose under ER 404(b), it remains inadmissible for the purpose of demonstrating the person's character and action in conformity with that character." Gresham, 173 Wn.2d at 429.

Before evidence can be admitted under ER 404(b) for the purpose of proving a common scheme or plan, it must satisfy three requirements: the prior acts must be (1) proved by a preponderance of the evidence, (2) relevant to prove an element of the crime charged or to rebut a defense, and (3) more probative than prejudicial. State v. Lough, 125 Wn.2d 847, 852, 889 P.2d

487 (1995). The State's burden to demonstrate admissibility is "substantial." State v. DeVincentis, 150 Wn.2d 11, 17, 20, 74 P.3d 119 (2003).

As shown below, J.S.'s testimony fails to meet the second requirement, and both J.S.'s and D.L.'s testimony fail to meet the third requirement.

a. *J.S.'s allegation is not relevant because it is dissimilar to B.D.'s allegation and therefore does not demonstrate a common scheme or plan.*

To prove a common scheme or plan, the other crime evidence must demonstrate "that the person 'committed markedly similar acts of misconduct against similar victims under similar circumstances.'" State v. Carleton, 82 Wn. App. 680, 683, 919 P.2d 128 (1996) (quoting Lough, 125 Wn.2d at 852). Stated another way, the "prior conduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations." Carleton, 82 Wn. App. at 684 (quoting Lough, 125 Wn.2d at 860).

The Supreme Court has recognized two types of evidence of a common scheme or plan admissible under ER 404(b):

The first type involves multiple crimes that constitute parts of a larger, overarching criminal plan in which the prior acts are causally related to the crime charged. An example of this type is a prior theft of a tool or weapon, which is used to perpetrate the subsequent charged crime, such as a burglary. . . . a second type of common scheme or plan . . . involves prior acts as evidence of a single plan used repeatedly to commit separate, but very similar, crimes.

DeVincentis, 150 Wn.2d at 19. To show the second type of “plan,” the “degree of similarity” between the prior bad acts and the charged crimes “must be substantial.” DeVincentis, 150 Wn.2d at 20.

For example, in DeVincentis, the court noted that the proposed evidence showed “that the defendant had devised a scheme to get to know young people through a safe channel, such as a friend of his daughter, or . . . as a friend of the next-door neighbor girl” and used that familiarity to lure the children into an isolated environment in which he proceeded to groom them through wearing little clothing and asking for massages. 150 Wn.2d at 22. The conclusion of this scheme was the actual criminal behavior—sexual contact. 150 Wn.2d at 22. The trial court in that case very carefully analyzed the similarity of the prior bad act evidence and excluded some of the acts, finding them dissimilar. 150 Wn.2d at

23.

In contrast to DeVincentis, J.S.'s allegations do not describe any "plan" or "scheme." J.S. was never at Derouen's home before their sexual encounter. They originally encountered each other only at public places surrounded by other people, and had friendly conversations. (RP 266-67, 269-70, 274-75) There was no evidence that Derouen groomed her by declaring his love for her, giving her gifts, or promising to marry her when she turned 18. (RP 303-04) They shared just one sexual encounter when she was 17 years old, despite the fact that Derouen and J.S. lived in the same home for several years after the incident. (RP 295, 323)

While there may be superficial similarities between this prior conduct and the charged crime, the similarities are not substantial enough to become relevant as a common scheme or plan rather than merely propensity evidence. Even the trial court noted the weakness in similar features:

It has some scant similarities of a common scheme or plan, and I think that will be up to the jury to determine if there is enough meat on that bone. It's questionable.

(RP 106) The prior conduct evidence provided by J.S. in this case simply does not bear an adequate degree of similarity.

Consequently, it was an abuse of discretion for the trial court to admit J.S.'s testimony under ER 404(b).

b. *The prejudicial nature of the highly inflammatory testimony outweighs its relevance and is therefore inadmissible under ER 404(b) and ER 403.*

Prior bad act evidence can be admitted only where “its probative value clearly outweighs its prejudicial effect.” Lough, 125 Wn.2d at 862; ER 403. The trial court mentioned but did not actually conduct a balancing of the relative probative value versus potential prejudice. (RP 23) Regardless, it is clear that under the circumstances of this case, the prejudice did outweigh the probative value of J.S.'s and D.L.'s testimony.

DeVincentis notes several relevant considerations to consider in making this determination, such as the age of the victim, the need for the evidence, the absence of physical proof, and the absence of corroborating evidence. 150 Wn.2d at 23. In this case, B.D. was old enough to competently testify on her own behalf, so the necessity of the additional testimony was low.

The probative value of J.S.'s and D.L.'s testimony must be weighed against the prejudicial impact of the evidence. The Supreme Court's decision in Lough is instructive on this point. In Lough, the defendant was charged with drugging and then raping

his victim while she was unconscious. The State attempted to introduce evidence from four other women that over a ten-year period, Lough had raped them in a similar manner. The trial court allowed the women's testimony as evidence of a common scheme or plan to drug and rape women. Lough, 125 Wn.2d at 849-50.

On appeal, the Supreme Court considered three factors in deciding that the probative value of the testimony clearly outweighed its prejudicial effect. These factors were subsequently discussed in State v. Krause, 82 Wn. App. 688, 919 P.2d 123 (1996).

First, the court found the evidence highly probative because it showed the same design or plan on a number of occasions. Krause, 82 Wn. App. at 696. There are similarities between D.L.'s and B.D.'s stories. But, as argued above, there are no marked similarities between J.S.'s and B.D.'s stories that would increase the probative value of J.S.'s prior conduct testimony.

The second factor identified by the Lough court was the need for the ER 404(b) testimony because the victim was drugged during the attack and not entirely capable of testifying to the defendant's actions. Lough, 125 Wn.2d at 859. Only by hearing from all of the witnesses would a clear picture of events emerge.

Krause, 82 Wn. App. at 696. Again, this is not true in Derouen's case. J.S. was 17 years old at the time of the alleged incident and 24 years old at trial, and D.L. was 14 to 17 years old during her relationship with Derouen and 20 years old at trial. (RP 116, 139, 150, 151, 144-45, 263, 271-72, 323) Both women were therefore fully able to testify for themselves. Compare State v. Kennealy, 151 Wn. App. 861, 890, 214 P.3d 200 (2009) (noting that the young age of alleged victims when they testified supported admission).

The third factor identified in Lough was the repeated use of a limiting instruction. Krause, 82 Wn. App. at 696. In this case, as set forth in detail below, the instruction given to the jury was not a proper limiting instruction for ER 404(b) evidence and did not limit the purpose for which the jury could consider the evidence. Moreover, even if a proper instruction had been given, "[c]ourts have often held that the inference of predisposition is too prejudicial and too powerful to be contained by a limiting instruction." Krause, 82 Wn. App. at 696 (and cases cited therein).

Thus, the inapplicability of all three Lough factors to J.S.'s testimony, and two of the three Lough factors to D.L.'s testimony, shows that their testimony was not more probative than prejudicial, and therefore should not have been admitted under ER 403 and ER

404(b).

The erroneous admission of this testimony is not harmless because, as the Washington Supreme Court has recognized, “[o]nce the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise.” State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982) (citations omitted).

3. Even if the testimony was admissible under ER 404(b), its admission in this case is still error because the trial court did not give an appropriate limiting instruction.

When evidence of other misconduct or crimes is admitted under ER 404(b), it should be accompanied by a limiting instruction under ER 105 directing a jury to disregard the propensity aspect of the evidence and focus solely on its proper purpose. State v. Griswold, 98 Wn. App. 817, 825, 991 P.2d 657 (2000); State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990) (pointing out “vital importance” of a limiting instruction to stress limited purpose of evidence).

When the parties in this case discussed the jury instructions, they agreed that an instruction addressing the testimony admitted

under RCW 10.58.090 was appropriate. (RP 726-30) The instruction agreed upon and given to the jury in this case stated:

Evidence has been admitted in this case regarding the defendant's commission of a previous sex act or offense. The defendant is not on trial for any act, conduct or offense not charged in this case.

Evidence of a prior sex act or offense is not sufficient to prove the defendant guilty of the crimes charged in this case.

The state has the burden of proving beyond a reasonable doubt that the defendant committed each of the elements of the crimes charged.

(CP 187; RP 731)). This instruction did not limit the purpose of the prior sexual conduct evidence and therefore permitted the consideration of J.S.'s and D.L.'s testimony for any purpose, even an improper one.

In holding that a similar instruction given under RCW 10.58.090 was inadequate where the evidence was admissible under ER 404(b), the Supreme Court reasoned:

An adequate ER 404(b) limiting instruction must, at a minimum, inform the jury of the purpose for which the evidence is admitted and that the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character.

Gresham, 173 Wn.2d at 423-24. Again, the instruction given in this case is insufficient because it did not tell the jury the limited purpose for which the ER 404(b) evidence was admitted, and did

not inform them that it could not be used to show that Derouen acted in conformity with his supposed character.

Although the defense did not object to the State's flawed instruction and did not propose an alternative ER 404(b) limiting instruction, Gresham held that "the trial court has a duty to correctly instruct the jury, notwithstanding defense counsel's failure to propose a correct instruction." Gresham, 173 Wn.2d at 424.

Failure to give an ER 404(b) limiting instruction is harmless "unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." Gresham, 173 Wn.2d at 425 (citing State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). In Gresham, the Court held that the error was harmless for the companion case because the remaining evidence, including the victim's detailed testimony and a recorded phone conversation of the defendant admitting the charged molestation, persuaded the court that the result was not materially affected. 173 Wn.2d at 425.

That is not true in this case. Little evidence remains once the evidence and testimony relating to sexual conduct with J.S. and D.L. is removed. Credibility was then the primary issue, which left jurors particularly vulnerable to an instruction that failed to prevent

them from using the prior evidence for propensity or other improper purposes. Thus, even if the trial court did not err in admitting J.S.'s and D.L.'s testimony, reversal of Derouen's conviction is still required.

B. THE INCLUSION OF A "BROOKS NOTATION" LIMITING DEROUEN'S COMBINED TERM OF INCARCERATION AND COMMUNITY CUSTODY TO THE 60 MONTH STATUTORY MAXIMUM WAS IMPROPER.

A trial court may impose a sentence only as authorized by statute. See In re Personal Restraint of Tobin, 165 Wn.2d 172, 175, 196 P.3d 670 (2008). And the court cannot impose a term of confinement and community custody that, when added together, punishes an offender in excess of the statutory maximum. RCW 9.94A.505(5); State v. Zavala-Reynoso, 127 Wn. App. 119, 124, 110 P.3d 827 (2005); State v. Sloan, 121 Wn. App. 220, 223-24, 87 P.3d 1214 (2004).

Based on Derouen's offender score, his standard range minimum and maximum are both 60 months, which is to be followed by a three year (36 month) term of community custody. RCW 9.94A.510, RCW 9.94A.701(1), RCW 9A.20.021(c). But the statutory maximum for third degree rape of a child is five years (60 months). RCW 9A.20.021(c).

The trial court sentenced Derouen to 60 months of confinement and 36 months of community custody. (CP 216, 217) Then, at the State’s request, the court added the following notation: “Total confinement, to include incarceration and community custody combined shall not exceed 60 month statutory maximum[.]” (CP 216, 217; RP 739) But this sort of notation is no longer acceptable.

In In re Personal Restraint of Brooks, the Court held that when the trial court imposes an aggregate term of confinement and community custody that potentially exceeds the statutory maximum, it must include a notation clarifying that the total term of confinement and community custody actually served may not exceed the statutory maximum. 166 Wn.2d 664, 674, 211 P.3d 1023 (2009).

But the Brooks Court also noted the then-recent passage of RCW 9.94A.701(9), and indicated that once the statute became effective it would likely supersede the Court’s decision in that case. 166 Wn.2d at 672 n. 4.

Under RCW 9.94A.701(9), first enacted in 2009, the community custody term specified by RCW 9.94A.701 “shall be reduced by the court whenever an offender’s standard range term of confinement in combination with the term of community custody

exceeds the statutory maximum for the crime.” Accordingly, “following the enactment of this statute, the ‘Brooks notation’ procedure no longer complies with statutory requirements.” State v. Boyd, -- Wn.2d --, 275 P.3d 321, 322 (2012) (citing State v. Franklin, 172 Wn.2d 831, 263 P.3d 585 (2011)).

Derouen was sentenced after RCW 9.94A.701(9) became effective. See Laws of 2009, ch. 375, § 5. Thus, the trial court, not the Department of Corrections, is required to reduce Derouen’s term of community custody to avoid a sentence in excess of the statutory maximum. The trial court here erred in imposing a total term of confinement and community custody in excess of the statutory maximum, despite the Brooks notation. See Boyd, 275 P.3d at 323.

Derouen’s case should be remanded to the trial court to amend the community custody term and resentence Derouen consistent with RCW 9.94A.701(9).

- C. THE TRIAL COURT EXCEEDED ITS STATUTORY SENTENCING AUTHORITY, AND VIOLATED DEROUEN'S CONSTITUTIONAL RIGHT TO PARENT HIS CHILDREN, BY ORDERING THAT HE HAVE NO CONTACT WITH BOTH MALE AND FEMALE MINORS AND BY IMPOSING LIMITS ON HIS CONTACT WITH HIS MINOR SONS.

Under RCW 9.94A.505(8), a sentencing court has the authority to impose crime-related prohibitions, including no-contact orders. State v. Armendariz, 160 Wn.2d 106, 113, 156 P.3d 201 (2007). A crime-related prohibition is "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). A court may impose probationary conditions that tend to prevent the future commission of a crime. State v. Williams, 97 Wn. App. 257, 263, 983 P.2d 687 (1999). A trial court also has discretion to order that, during a term of community custody, an offender "[r]efrain from direct or indirect contact with the victim of the crime or a specified class of individuals[.]" RCW 9.94A.703(3)(b).¹

On the other hand, "[p]arents have a fundamental liberty interest in the care, custody, and control of their children." State v.

¹ Crime-related prohibitions are reviewed for an abuse of discretion. Armendariz, 160 Wn.2d at 110. Discretion is abused when "the decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons." State v. Ancira, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001).

Ancira, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001) (citing Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)). This means that a parent has a constitutionally protected, fundamental right to raise children without State interference. State v. Letourneau, 100 Wn. App. 424, 438, 997 P.2d 436 (2000) (citing In re Custody of Smith, 137 Wn.2d 1, 15, 969 P.2d 21 (1998))

A criminal sentencing court may only impose limitations on this right when it is reasonably necessary to protect children from harm and there is an appropriate nexus between the offense committed and the sentencing condition. State v. Berg, 147 Wn. App. 923, 942, 198 P.3d 529 (2008); Ancira, 107 Wn. App. at 653-54; Letourneau, 100 Wn. App. at 437-42. Furthermore, there “must be an affirmative showing that the offender is a pedophile or that the offender otherwise poses the danger of sexual molestation of his or her own biological children to justify such State intervention.” Letourneau, 100 Wn. App. at 442.

At sentencing in this case, the State did not request that any restrictions be placed on Derouen’s contact with his sons, and both the State and the defense pointed out to the court that the author of the presentence investigation report found that Derouen did not

pose a risk to minor boys in general or to his sons in particular.
(RP 738-39, 740, 748-49)

Nevertheless, as part of both the judgment and the terms of community custody, the trial court ordered that Derouen have no contact with minors “except for the defendant’s sons, so long as the sons request the contact.” (CP 216, 218, 223, 226) In explaining her reasoning for imposing this condition, the court stated:

[T]he impact it’s not really about you anymore, it’s about the impact of the children and their need to have a parent in their lives. The concern I have is what type of parent are you to show them that this is an example of what one can expect from a father? Each one of your sons has the possibility of being a father one day, and I would hate if they thought that the way to embellish upon their lives is to follow in your footsteps. . . . So my concern is, if your sons look at you and think that this is the way a father should be, I’m not inclined to let you see them ever. Because I don’t think that you’ve set a clear, definitive example for them as young men and how they are to treat young ladies, or any ladies in their lives. Your example has not been one that I would expect them to follow, I would hope that they not follow.

On the other hand, you have an opportunity here to instill in them respect for women. Because, see, what you did really weren’t respecting these young ladies, you were victimizing them. You were hurting them every step of the way.

...
All of that is just not only despicable conduct, it doesn’t even rise to what I would consider a father should be.

...
I’m going to do a hybrid of the

recommendation. I think it's important for a father to have interaction with his children; however, I don't think it's -- I hesitate because based on my expertise and experience sometimes it goes into a progressive state. So I don't think it is amenable or I should order that you have any contact with any other minors. Now, in my eyes you have already messed up enough lives as it is. . . . So for any of the children who want to visit with their father or communicate with their father, I will allow that, but it has to be not at his request. It has to be their request. I think that's the difference. If they say they don't want to be bothered with you, here or see you again, then you have to honor that request.

(RP 747-49)

The court's no-contact provisions are invalid because there was no affirmative showing that Derouen poses a danger to male children, and because there is no evidence or finding that a restriction on Derouen's contact with his sons is necessary to protect those children.

In Letourneau, the defendant was convicted of two counts of second degree rape of a child who was unrelated to her. 100 Wn. App. at 426-27. As part of her judgment and sentence, Letourneau was ordered to have no in-person contact with her biological children unless supervised. 100 Wn. App. at 426-27. The appellate court reversed the no-contact order because there was no evidence that Letourneau was a pedophile or that she otherwise

posed a danger to her own children. The court concluded that the no-contact order was not reasonably necessary to prevent harm to Letourneau's children. 100 Wn. App. at 441.

Similarly here, there is no evidence that Derouen poses a threat to his own male children. Instead, the trial court imposed limitations on contact because Derouen set a poor example for his boys. However, it could be said that any parent incarcerated as a result of a criminal act has set a poor example and caused a degree of harm to their children. But this alone does not justify the State's interference with the constitutionally protected parent-child relationship.

Furthermore, the trial court's restriction on contact with *any* male minor is also overly broad. In Berg, the defendant was convicted of rape of a child and third degree child molestation. As in this case, the victim in Berg was an unrelated female child. The appellate court affirmed a sentencing condition imposed on Berg that prohibited unsupervised contact with "female minors," including Berg's female biological children. 147 Wn. App. at 930, 944.

The court concluded that this restriction was "sufficiently tailored to the crime." Berg, 147 Wn. App. at 944. The Court noted that:

Even though [the order] restricts all forms of contact, not just physical contact, it addresses the potential for the same kind of abuse at issue here, which Berg was able to achieve by exploiting a child's trust in him as a parental figure.

147 Wn. App. at 944. The appellate court noted with approval that the trial court "limited the order to Berg's unsupervised contact with female children, noting that the prosecutor expressed no concern with Berg's contact with boys." 147 Wn. App. at 942.

Unlike Berg, the trial court in this case did not sufficiently tailor the restriction to limit contact with a class of at-risk persons or minors. The trial court instead imposed a complete no-contact order for all minor children, even though there is no evidence that Derouen poses a threat to male minors. Furthermore, like Letourneau, there is no finding in this case that Derouen is a pedophile or that he otherwise poses a danger to his own children or to boys in general.

The trial court's order does not adequately balance Derouen's fundamental parental rights with the State's interest in protecting vulnerable children. The trial court abused its discretion by failing to tailor the no-contact order narrowly, which resulted in an unnecessary and improper infringement on Derouen's parental rights. These portions of the judgment and sentence and

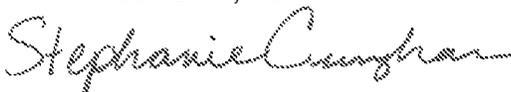
appendices should be stricken.

V. CONCLUSION

The trial court erred by permitting the admission of unfairly prejudicial prior sexual conduct evidence through the testimony of D.L. and J.S. But even if this Court holds that the evidence may have been admissible under ER 404(b), the lack of a proper limiting instruction is prejudicial. For this reason, Derouen's convictions should be reversed and his case remanded for a new trial.

Additionally, or in the alternative, the trial court erred when it imposed restrictions on Derouen's constitutional and fundamental right to parent his children, and when it failed to impose a sentence that was within the statutory maximum. Therefore, at a minimum, his case should be remanded for resentencing.

DATED: June 27, 2012



STEPHANIE C. CUNNINGHAM

WSB #26436

Attorney for Michael Shannon Derouen

CERTIFICATE OF MAILING

I certify that on 06/27/2012, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Michael S. Derouen, DOC#351282, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.



STEPHANIE C. CUNNINGHAM, WSBA #26436

CUNNINGHAM LAW OFFICE

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