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DIVISION II

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No. 45016-0-II

STATE OF WASHINGTON

BY *Cn*
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent

vs.

TROY ARNOLD MUONIO

Appellant

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

Troy Arnold Muonio (Appellant) seeks reversal of his convictions at bench trial in Clark County Superior Court, for the

crimes of:

Count 2 – Child Molestation in the Third Degree, RCW 9A.44.089

Count 3 – Communicating with a Minor for Immoral Purposes, RCW 9.68A.090;

Count 4 – Violation of a Sexual Assault Protection Order, RCW 7.90.150; and

Count 5 – Violation of a Sexual Assault Protection Order, RCW 7.90.150.

Appellant also seeks vacation of post-conviction Sexual Assault Protection Orders, entered by the trial court following sentencing.

II. ASSIGNMENTS OF ERROR AND ISSUES

Assignments of Error

Assignment Number 1: The Appellant received ineffective assistance of counsel on Count 2, Child Molestation in the Third Degree, in violation of his constitutional right to counsel, because his trial attorney failed to raise a corpus delicti challenge to the State's evidence.

Assignment Number 2: The Appellant received ineffective assistance of counsel on Count 3, Communicating with a Minor for

Immoral Purposes, in violation of his constitutional right to counsel, because his trial attorney failed to raise a corpus delicti challenge to the State's evidence.

Assignment Number 3: Appellant was convicted on insufficient evidence on Count 3, Communicating with a Minor for Immoral Purposes, because the State failed to prove that the communication involved any illegal purpose.

Assignment Number 4: Appellant received ineffective assistance of counsel on Counts 4 and 5, Violation of a Sexual Assault Protection Order, because trial counsel failed to object to admission of a pre-arraignment protection order that had expired a year and a half prior to the alleged violation.

Assignment Number 5: Appellant received ineffective assistance of counsel on Counts 4 and 5, Violation of a Sexual Assault Protection Order, because trial counsel failed to object to admission of a pre-arraignment protection order that was issued without authority of law, and was inapplicable, because the protected party, M.S.E., was not a "victim" of any crime for which the Appellant had been arrested.

Assignment Number 6: There was insufficient evidence to support a conviction of Violation of a Sexual Assault Protection Order, as

charged in Count 4, because the evidence failed to prove that the contact between Appellant and the protected party was willful, as opposed to a momentary, accidental encounter.

Assignment Number 7: The trial court erred in issuing a post-conviction Sexual Assault Protection Order without authority of law, and which was inapplicable under the statute, because the protected party, M.S.E., was not a “victim” of any crime for which the Appellant had been convicted.

Assignment Number 8: The trial court erred in issuing both post-conviction Sexual Assault Protection Orders, without authority of law, because the expiration dates on each order exceeded the time allowed by law for enforcement of such orders.

Issues Relating to Assignments of Error

Issue Number 1: Does a trial attorney provide ineffective assistance of counsel, by failing to object to admission of a defendant’s incriminating statements which establish a necessary element of the crime charged, where the State has failed to prove that element by independent evidence, and therefore failed to prove that a crime occurred? (Assignments of Error numbers 1 and 2)

Issue Number 2: Does the State bear the burden of proof of establishing that admissibility of a defendant's extra-judicial statement is not governed by the *corpus delicti* rule? (Assignments of Error numbers 1 and 2)

Issue Number 3: In order to convict a defendant of Communicating with a Minor for Immoral Purposes, must the State prove that the purpose of the communication was both illegal, and involved a sex offense? (Assignment of Error number 3)

Issue Number 4: Can a defendant be convicted of violating a Sexual Assault Protection Order, which has expired, as a matter of law, one and a half years prior to the alleged violation thereof? (Assignment of number Error 4)

Issue Number 5: May the fact that a pre-arraignment Sexual Assault Protection Order had expired a year and a half prior to the alleged violation thereof be raised as an objection to admissibility of the protection order at trial? (Assignment of Error number 4)

Issue Number 6: Does a trial attorney provide ineffective assistance of counsel, by failing to object to admission of a pre-arraignment Sexual Assault Protection Order which, as a matter of law, expired over a year and a half prior to the alleged violation thereof? (Assignment of Error number 4)

Issue Number 7. May a superior court judge issue a pre-arraignment Sexual Assault Protection Order which prohibits contact with a person who is not the victim of any crime for which the defendant was arrested? (Assignment of Error 5)

Issue Number 8: Does a trial attorney provide ineffective assistance of counsel, by failing to object to admission of a pre-arraignment Sexual Assault Protection Order which failed to list the victim of the alleged crime for which the defendant was arrested as the protected person? (Assignment of Error number 5)

Issue Number 9: Does an inadvertent, momentary contact with a protected party, which is immediately terminated when the defendant becomes aware of the contact, constitute a willful violation of a court order? (Assignment of Error number 6)

Issue Number 10: May a superior court judge issue a post-conviction Sexual Assault Protection Order which prohibits contact with a person who is not the victim of any crime for which the defendant was convicted? (Assignment of Error number 7)

Issue Number 11: May a superior court judge issue a post-conviction Sexual Assault Protection Order which purports to expire more than six months later than the period allowed by law? (Assignment of Error number 8)

III. STATEMENT OF THE CASE

Appellant Troy Arnold Muonio was arrested on January 11, 2011 by an officer of the City of Battle Ground Police Department. The charge levied by the officer was, according to his probable cause statement (CP 2) "Indecent Liberties--1 count."

Appellant made an initial appearance on this charge, and no others, on June 24, 2011. At the first appearance, the Prosecutor presented, and the docket judge, the Honorable Diane M. Woolard, issued a pre-arraignment Sexual Assault Protection Order (hereafter "SAPO") on this charge. (Trial Exhibit 3, CP 4) The order purported to be effective for ten years. It provided that the Appellant could have no contact with "M.S.E.", who was a witness to the alleged crime of Indecent Liberties, and not the victim thereof.

The SAPO prohibited the Appellant from coming within 1,000 feet of M.S.E.'s place of employment. She had advised the Appellant that she worked at a Jack in the Box fast food establishment. RP p. 54, l. 6-8.

On February 4, 2011 the Appellant was arraigned and pled not guilty to an Information, charging four counts, RP of 2/4/2011, p. 6, l. 6, (CP 6). At that time, count 3 did list M.S.E. as a victim, on

a charge of Assault in the Fourth Degree. This charge is not a sex offense for which a SAPO may be issued. At the arraignment, the pre-arraignment Sexual Assault Protection Order relating to M.S.E. was not discussed, was not modified, and was not re-issued nor extended. RP of 2/4/2011, p 10, l. 23-24; p. 11, l. 1-10.

On September 25, 2012, a second amended information, (CP 9) was filed, removing the count charging Assault in the Fourth Degree involving M.S.E. as a victim, and adding counts 4 and 5, alleging that the Appellant had, in May and June of 2012, violated the terms of the pre-arraignment SAPO by having contact with M.S.E. at a different place of employment, a Burgerville fast food restaurant.

Appellant pled not guilty to all counts, and proceeded to a bench trial held on December 17, 2012, before the Honorable Scott A. Collier, judge of the superior court.

At trial, State's witnesses "M.S.E." and "D.N.R." testified that on January 20, 2011, they had struck up a conversation with the Appellant in a hot tub near a swimming pool at a Best Western Hotel in Battle Ground, Washington. RP of 12/17/2012, p 48, l. 2-6; p. 52, l. 7-25. The girls testified that the Appellant had engaged them in a game of "Truth or Dare" and a game of "Ten Fingers",

both of which involved eliciting conversations about sexual behaviors. RP of 12/17/2012 p.55, l. 18-19; p.80, l. 19-21. The Appellant asked the girls if they ever “took” or “sent” “naked pictures” and if they would do so for \$100.00. RP of 12/17/2012 p.56, l. 16-19. He also complimented the girls on their bodies, and suggested that they should “flash” him, and touch each other’s bodies. RP of 12/17/2012 p.120, l. 2-5. It is these conversations that the State relied upon for its charge of Count 3, Communicating with a Minor for Immoral Purposes.

The State presented testimony that M.S. E. was 16 years of age at the time, and that D.N.R. was fifteen years of age at the time of the encounter. RP p. 54, l. 2-3, p. 118, l. 20-21.

Both girls testified that the Appellant told them he was twenty-three years of age, RP p.53, l. 23-25; p. 54, l. 1. RP p.118, l. 17-18.

The State failed to make this clear, but one can infer that the statement about age came after the crime was committed, as the girls were leaving the hot tub. The testimony was this:

“Q: Okay. And did he give you his name?

A: Not at that point. We were – he – he didn’t actually tell us his full name until like we were leaving.

Q: Okay. Did he tell you how old he was?

A: He said he was twenty-three.” RP of 12/17/2013, p.53, l. 23-25; p. 54, l. 1.

During the indeterminate period of time in which the Appellant and the girls were conversing in the hot tub, the Appellant took the hand of M.S.E. and quickly, without warning, placed it on the breast of D.N.R., over her bathing suit, for a few seconds. M.S.E. then removed her hand. RP of 12/17/2013 p. 60, l. 23-25; p. 61, l. 1-2; p.120. l. 10-13. It is this act that the State relied upon for its charge of Count 1, Indecent Liberties with Forcible Compulsion, and Count 2, Child Molestation in the Third Degree.

At trial, the State presented testimony of M.S.E. that in May and June of 2012, she had been working at a Burgerville fast food restaurant. (Rather than the Jack in the Box which Appellant knew of.) RP of 12/17/2013 p. 69, l. 13-14. She testified that on an unknown day in May, 2012, the Appellant had come in a vehicle to the drive up window at the Burgerville, and ordered a hamburger. RP of 12/17/2013 p. 69. He then realized that he had left his wallet elsewhere, and went to retrieve it. Upon returning to the Burgerville, he asked M.S.E. if her name was M..... When she said yes, he said he should not be there, and immediately left. RP

of 12/17/2013 p. 69, l. 18-25; p. 71, l. 1-8; Findings of Fact (trial) 24, 25, (CP 85)

Approximately a month later, M.S.E. was again working at the Burgerville, when a car in which the Appellant was a passenger drove up to the service window. The Appellant leaned over from the front passenger seat and handed her a discount card. RP of 12/17/2013 p. 71, l. 1-25; p. 73, l. 1-25; p. 74, l. 1-4; Finding of Fact (trial) 26, (CP 85.) These events at the Burgerville are those relied upon by the State to prove Counts IV and V, violation of a Sexual Assault Protection Order.

Following a one-day bench trial on December 17, 2012, the trial court rendered an oral decision on December 18, 2012. The Court stated that it was finding the Appellant guilty on all charges. RP of 12/18/2012, p.186-197.

On April 12, 2013, the trial court granted Appellant's Motion in Arrest of Judgment (CP 12) filed by substitute counsel, (coincidentally having the same last name as trial counsel) as to Count I—Indecent Liberties with Forcible Compulsion. RP of 4/12/2013, p. 58, l. 21-22. The trial court expressly stated that the evidence was insufficient to convict on that count, and later entered a finding of Not Guilty on that count. Conclusion of Law (trial) # 12,

(CP 85.)

On May 24, 2013, the Appellant was sentenced by the court to eight months in jail on the remaining charges, counts 2 through 5. (CP 56) and a period of twelve months of community supervision was ordered.

The trial judge, over objection by substituted counsel, entered two post-conviction Sexual Assault Protection Orders. RP of 5/29/2013 p. 128, l. 21-25. One order, (CP 68A) named M.S.E. as the protected party, despite the fact that she was not the victim of any felony sex offense for which the Appellant was convicted. The other order (CP 68B) related to D.N.R., who actually was the victim of a felony sex offense for which the Appellant was convicted.

Each order listed an expiration date of January 19, 2017, which was more than two years after the end of the Appellant's period of community supervision would expire.

On June 19, 2013, Findings of Fact and Conclusions of Law were entered as to the bench trial, (CP 85) CrR 3.5 hearing (CP 81) and the Motion in Arrest of Judgment (CP 89).

Appellant served his sentence. (CP 91)

IV. ARGUMENT

1. ARGUMENT ON ASSIGNMENTS OF ERROR NUMBER ONE AND TWO.

Issues Number 1, 2, and 3. Corpus Delicti and Ineffective Assistance of Counsel

The Appellant received ineffective assistance of counsel on Count 2---Child Molestation in the Third Degree, and Count 3---Communicating with a Minor for Immoral purposes, in violation of his constitutional right to counsel, because his trial attorney failed to raise a *corpus delicti* challenge to the State's evidence on both charges.

Count 2---Child Molestation in the Third Degree

The crime of Child Molestation in the Third Degree is defined as follows:

"RCW 9A.44.089 (1) A person is guilty of child molestation in the third degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim." (emphasis added)

There is evidence in the record, from the testimony of the girls, that the Appellant caused M.S.E. to have sexual contact with

D.N.R., by placing M.S.E.'s hand in contact with D.N.R.'s breast for a few seconds. There is evidence in the record that D.N.R. was 15 years old at the time, and that M.S.E. was 16 years old.

There is insufficient evidence, however, to prove that the Appellant was more than 48 months older than either girl. That is because the Prosecuting Attorney neglected to offer any independent evidence of the Appellant's age, and therefore, as a matter of law, the crime cannot be proven by Appellant's statements to the girls as to his age. The Appellant's statements should have been excluded on timely motion by the defense attorney. State v. Aten, 130 Wn.2d 640, 927 P.2d 210 (1996.)

By choosing not to offer independent evidence of the Appellant's age, the State failed to prove commission of the crime of Child Molestation in any degree.

The Appellant's statement to the girls as to his age, as a matter of law, cannot be considered by the Court in determining whether or not the Appellant was guilty, because the corpus delicti of the crime must be proven in order for such statements to be considered.

The *corpus delicti* rule is as old as the common law itself, and is so basic and fundamental that it is seldom raised in criminal matters. The rule addresses the concern that lawmakers and judges have had for centuries concerning the unreliability of a Appellant's statements when used as the basis for a criminal conviction. Here, that concern is especially evident. A young man is trying to impress two young girls he has just met. Young men throughout history have tried to impress girls, and young girls have tried to impress boys, by lying about their age, to seem older and more sophisticated.

Two modern examples of application of the rule are found in State v. Hamrick, 19 Wn. App. 417, 576 P.2d 912 (1978) and State v. Dow, 168 Wn. 2d 243, 227 P. 3d 1278 (2010.)

In Hamrick, a WSP trooper was dispatched to the scene of a motor vehicle accident. The Defendant was found nearby, and admitted to driving his vehicle into a ditch. The Defendant appeared to be intoxicated, and showed obvious symptoms of impairment. The Defendant was charged with DUI, but the trial court dismissed. The Court of Appeals, Division II affirmed. The corpus delicti (body of the crime) of DUI is that a person under the

influence of alcohol was driving a motor vehicle. In order to prove that an intoxicated person was driving, it was essential that the State prove that the Defendant, the only intoxicated person around, was in fact the driver. There was no evidence of that fact, apart from the Defendant's statements to the trooper. In other words, the crime of DUI had not been proven by evidence independent of the Defendant's statements, and therefore, the evidence was insufficient to convict. Significantly, the court held that the rule applied to statements of a Defendant, regardless of whether they were classified as confessions (as in Dow, discussed below) or admissions (as in the Muonio case.).

In Dow, the Defendant was charged with Child Molestation in the First Degree, after confessing to having sexual contact with his three year old son. The only evidence that the crime had been committed was the Defendant's statements. Again, Division II applied the *corpus delicti* rule, holding that the commission of the crime could not be proven without the defendant's statements, and therefore the evidence, even with the defendant's statements, was insufficient to convict.

Here, the identical situation is presented. The Appellant, according to the State's witnesses, used one girl's hand to touch the victim's breast. A purpose of sexual gratification can be inferred. By itself, without the required age differential, that conduct does not constitute the crime of Child Molestation in the Third Degree. The corpus delicti of Child Molestation in the Third Degree is the sexual touching of a person less than sixteen years of age, by a person more than 48 months older than the victim. A sexual touching of a fifteen year old is not a crime, unless committed by a person four years or more older.

The State's failure to prove the Appellant's age by independent evidence rendered his statement to the girls inadmissible. Without such evidence, there was insufficient evidence to convict.

The State may argue that the corpus delicti rule does not apply, where the statements attributed to the defendant precede the commission of the crime, relying on State v. Pietrzak, 110 Wn. App. 670, 680, 41 P.3d 1240 (2002) (The trial court admitted pre-crime statements by defendant that he wanted the eventual murder victim to be dead, and that he had thought about killing her) and

State v. Dyson, 91 Wn. App. 761, 763, 959 P.2d 1138 (1998)
(statements by defendant while negotiating the crime of promoting prostitution, but before the crime was completed.)

This may be an accurate statement of the law, however, nothing in the record supports the assertion that such occurred in this case. The State failed to offer any evidence as to when the alleged statement as to age occurred in the chain of events.

Count 3—Communicating With a Minor for Immoral Purposes.

The charge in Count 3 is bootstrapped onto Count 2. The State was obligated to prove the Child Molestation charge, in order to prove a violation of the Communicating charge. That is because the State must prove that the “immoral purpose” of the communication was to commit a crime. State v. Luther, 65 Wn. App. 424, 830 P.2d 674 (1992).

The State failed to identify nor even plead which communications constituted the crime, and also what the “immoral purpose” was.

Count 3, Child Molestation in the Third Degree, fails because the conduct alleged and presented at trial, in the absence

of proof of the Appellant's age, does not violate any statute relating to "immoral conduct" as interpreted by the appellate courts. On its face, the Crime of Communicating With a Minor for Immoral Purposes is remarkably vague—that is, what is an immoral purpose? The statute does not define immoral purposes.

What is immoral to one person may not be immoral to another. Is smoking by a minor immoral? Many would say yes. Is watching adult pornography immoral? Many would say yes. Is campaigning for the Democratic Party immoral? Many would say yes. In order for the statute to be constitutional, there must be ascertainable standards for the determination of what is, and what is not an immoral purpose. The definition of "immoral" is not left to the individual judgment of the police, the Prosecutor, nor even the jury or the judge.

In State v. McNallie, 120 Wn.2d 925, 929, 846 P.2d 1358 (1993) the Supreme Court of Washington held that the "immoral purposes" referenced in RCW 9.68A.090 must be limited to misconduct of a sexual nature. In State v. Luther, 65 Wn. App. 424, 830 P.2d 674 (1992), the Court of Appeals held that the

alleged misconduct which is the subject of the communication must be a crime itself.

Under this analysis, the court must then evaluate:

1. The facts proven, that is, what conduct did the State rely upon to convict the Appellant, and
2. What crime was the subject of the communication, and
3. Is the crime a sex offense?

In the Amended Information, the State failed to allege the specific conduct claimed to violate RCW 9.68A.090, and further failed to allege which, if any, crimes were the topic of the communication. The Appellant and the defense attorney, and the trial judge were left to flounder and guess as to what conduct the State was claiming deserved harsh punishment. This is exactly the situation abhorred by the constitution, the law and the courts.

Absent any specificity of what conduct the State alleged to be “immoral,” perhaps the court can examine the opening statement and closing argument of the Prosecutor. In the opening statement, the Prosecutor not once mentioned the phrase “Communication with a Minor for Immoral Purposes.” In her closing

argument, she made the following argument at RP of 12/17/2012,
p. 174 and 175:

“The next count is Communicating With a Minor for Immoral Purposes. The elements are that on or about January 21st, 2011 the Defendant communicated with (D.N.R.) for the immoral – for immoral purposes of a sexual nature, that (D.) was a minor and that the act occurred in Clark County, Washington.

There are numerous statements in this case that could be considered the basis for communicating. Daring these girls to touch each other alone would be the basis of the communication charge as his immoral purpose in that case would be the Child Molest III when they do touch each other.

The court could also find that when he asked them if they would take naked photographs for a hundred dollars, that was a communicating. The immoral purpose being the possession of depictions of a minor engaged in sexually explicit conduct.

Clearly from the totality of the circumstances and the statements made there is overwhelming evidence that the Defendant committed the offense of Communicating With a Minor for Immoral Purposes.”

A. Communication for the purpose of commission of the crime of Possession of Depictions of a Minor Engaged in Sexually Explicit conduct.

The Prosecutor, in her backup argument, represented to the Court that the Appellant offered \$100.00 to the girls to “take” naked pictures, and that this offer was a violation of RCW 9.68A.070,

which prohibits possession of depictions of minors engaged in sexually explicit conduct. That argument mis-states the applicable law and the evidence. The totality of the evidence on the “naked picture” evidence is this:

“(M.S.E) Okay. He said – he asked us if we had ever sent naked pictures to people and we both said no and then he said would we ever do it – I think it was like a hundred bucks or something – and – and we said no.” RP p. 56 l. 16-19.

“(D.N.R.) Q: Okay. What other questions did he ask you?

A: He asked us if we would take pictures for money. And when we asked what kind of pictures he made it – he implied that they were bad pictures.” RP p. 119, l.18-21.

The Appellant, according to the testimony set out above, (the only testimony on the issue) asked if the girls had ever sent naked pictures to anyone, and if they would ever do it. The disjointed phrase “I think it was like a hundred bucks or something” is vague and meaningless. M.S.E. doesn’t say that he offered her or the other girl money to send naked pictures to someone. It is impossible to tell from the testimony elicited by the Prosecutor what the meaning the reference to \$100.00 was.

Asking someone if they had ever done something, and asking if they would do so for pay are not inducements to commit a

criminal act. The questions were hypothetical small talk, and do not constitute an offer, nor solicit commission of an immoral act.

More significantly, however, the State failed to present any evidence whatsoever as to what was meant by “naked pictures.” The vague term “naked pictures” does not satisfy the specific definition of “depictions of sexually explicit conduct.”

RCW 9.68A.011
Definitions.

- (4) "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;
 - (e) Defecation or urination for the purpose of sexual stimulation of the viewer;
 - (f) Depiction 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. For the purposes of this subsection (4)(f), it is not necessary that the minor know that he or she is participating in the described conduct, or any aspect of it; 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."

The communication about “naked pictures” does not specify any of the instances of conduct referenced in the statute.

Certainly, a “naked picture” could be a photograph of one of the

bodily areas referred to in the statute, but it doesn't have to be. And for this conduct to constitute a violation of the statute, it would have to be.

We don't know what the Appellant meant by "naked pictures", and we don't know what the girls thought he meant. The meager evidence offered to prove this crime by consisted of **two sentences** of ungrammatical, vague testimony from one State's witness, and a vague reference to "bad" pictures by the other State's witness. The reference to "naked pictures" could apply to pictures of the girls' naked backs, legs, arms, feet, stomachs, or buttocks, none of which constitute depictions of sexually explicit conduct under RCW 9.68A. Because they do not, and we have no evidence in the record as to anything else, the proven conduct does not fall within the statute's coverage.

Criminal statutes are strictly construed. Conduct which does not clearly fall within the proscription is not unlawful. In determining whether there was the type of behavior contemplated by the law, the Court must apply the very fundamental rule:

“Penal statutes must be strictly construed so that activities not intended to be included within their ambit are not so included. State v. Clark, 96 Wn.2d 686, 638 P.2d 572 (1982). Ambiguities in criminal statutes are resolved in favor of the defendant. State v. Stockton, 97 Wn.2d 528, 647 P.2d 21 (1982). Strict construction of a statute means that, given a choice between a narrow, restrictive construction and a broader, more liberal construction, the first option must be chosen. Pacific Northwest Annual Conference of United Methodist Church v. Walla Walla Cy., 82 Wn.2d 138, 508 P.2d 1361 (1973).”

Without proof that the Appellant actually requested photographs of the victim’s genital, unclothed pubic or rectal areas or unclothed breasts, the communication is not within the constitutional core of the statute’s reach, and cannot be the basis for a criminal prosecution. The evidence was insufficient to prove the commission of the crime charged.

B. Communication for the purpose of commission of the crime of Child Molestation in the Third Degree.

The Appellant may have been communicating with the girls in order to induce them to touch one another, however, that conduct is not an “immoral purpose” if it is not a crime. The State failed to prove that the requested touching would constitute a crime, because the State failed to establish, by independent

evidence, the age of the Appellant. If an eighteen year old boy asked or caused the girls to touch each other, he would not be guilty of Child Molestation in the Third Degree, because of the missing element of age differential. In this trial, as pointed out above in the discussion of Count 2, and the State's failure to prove *corpus delicti* on that count, the State has failed to prove that the Appellant communicated with the girls for an immoral (illegal) purpose, because the State failed to prove his age.

Therefore, on both of counts 2 and 3, the State had the burden of proving that the Appellant was more than 48 months older than the victim, independent of the Appellant's statement, just to establish that either crime occurred. The State failed to do so, except via the Appellant's own statement to the girls, and therefore, the State failed to establish the *corpus delicti* of the crime.

The *corpus delicti* rule applies to all statements of a Defendant, whether or not they are made in the course of police questioning, or to any other witness. Bremerton v. Corbett, 106 Wn.2d 569, 723 P.2d 1135 (1986). The rule has nothing to do with the admissibility of a statement under the hearsay rule, nor admissibility under the federal or state constitutions. The

Defendant's statements are not *suppressed*, they are as a matter of law, simply *insufficient and inadmissible evidence*. There is absolutely no inference available to the State to permit an argument that the statement preceded the touching and communications which constitute counts 2 and 3.

It is ineffective assistance of counsel to fail to raise a *corpus delicti* objection. There cannot be any tactical advantage or purpose whatsoever in trial counsel's failure to raise a *corpus delicti* objection, which, if sustained, would result in acquittal on a felony charge:

"In order to prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that counsel was deficient and (2) that the deficient performance prejudiced the defense. State v. Tarica, 59 Wn. App. 368, 373-74, 798 P.2d 296 (1990). In analyzing the first prong, the court must decide whether defense counsel's actions constituted a tactical decision which was part of the normal process of formulating a trial strategy. See, e.g., Tarica, at 373. In Tarica, the court concluded that no conceivable tactical advantage could be gained by failing to make a pretrial motion to suppress evidence obtained during a questionable search. Tarica, at 373. Likewise, the failure to raise the issue of the corpus delicti rule in this case cannot be characterized as a trial strategy; it appears to be simply an inexcusable omission on the part of defense counsel.

The second prong of the test is also met in this case. Given that the State concedes that the corpus delicti rule was violated, it is axiomatic that if defense counsel had objected, C.D.W.'s confession would not have been admitted, at least not unless the State was able to present corroborating evidence of penetration. Because the confession was the only evidence of one of the

elements of child rape, it is clear that had it not been admitted, C.D.W. would have been acquitted of that charge. Thus, C.D.W.'s conviction is reversed and remanded for a new trial.”

State v. C.D.W. 76 Wn. App. 761, 887 P.2d 911 (1995.)

The failure of trial counsel to render effective assistance of counsel is a constitutional violation of the United States Constitution 6th amendment right to counsel, and, if prejudicial, mandates reversal. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The State may argue that the Appellant himself testified that he was 25 years of age at the time of trial, RP of 12/17/2013 p. 135, l. 2-6, and that therefore, by reverse extrapolation, there was sufficient evidence to prove the age disparity. This evidence, however, was elicited as a result of ineffective assistance of counsel. Trial counsel failed to object to the testimony as to age, when such an objection should have been sustained, and the testimony excluded, and counts 2 and 3 dismissed at the end of the State's case. Trial counsel exacerbated the error by proceeding, after failing to make the objection at the end of the State's case, (see State v. McConville, 122 Wn. App. 640, 94 P.3d 401 (2004), corpus delicti objection can be made at any time before

both sides have rested) by bailing the State out of its error, and presenting the evidence himself. The ineffective performance by trial counsel consisted of failing to object during the State's case, and then and then presenting the evidence himself during the defense case.

As in Hamrick, and Dow, *supra*, the charges in Counts II and III, Child Molestation in the Third Degree and Communicating with a Minor for Immoral Purposes should have been dismissed upon a proper *corpus delicti* objection and motion at the end of the State's case in chief. Trial counsel's failure to employ this strategy resulted in the Appellant being convicted on both charges.

2. ARGUMENT ON ASSIGNMENTS OF ERROR NUMBERS THREE, FOUR AND FIVE.

Issues Number 4, 5, 6, 7, and 8. Invalid, Inapplicable Sexual Assault Protection Order, and Ineffective Assistance of Counsel

The legislature, in order to protect victims of sexual assault from further traumatization, has created an order known as a Sexual Assault Protection Order. RCW 7.90.005. Such an order can be requested by the alleged victim, in a quasi-civil proceeding,

RCW 7.90.020, or in it can be imposed, as in this case, by a criminal court presiding over a felony sex charge. RCW 7.90.150. Appellant's convictions for two counts of "Court Order Violation" relating to M.S.E. must be set aside, and the charges dismissed, for two reasons:

1. The order was invalid, as not authorized by law; and
2. The order had expired over a year before the alleged violations.

On January 24, 2011, Judge Diane Woolard, presiding at the first appearance of the Appellant, issued a Sexual Assault Protection Order, (CP 4) which prohibited contact with M.S.E., who was not the victim of the crime for which the Appellant had been arrested. At that time, no charges had been filed by the Prosecuting Attorney's office.

On September 25, 2012, Deputy Prosecutor Jessica Smith filed an Amended Information (CP 9) deleting the previously designated Count 3, Assault in the Fourth Degree, and adding two counts of "Court Order Violation." The two counts alleged that the Defendant violated the terms of the Sexual Assault Protection

Order issued on January 24, 2011, by having contact with M.S.E. Ms. Smith alleged that the sexual assault protection order (SAPO) was violated in May, 2012, and in June, 2012, "while the order was in effect."

A. The order was invalid and inapplicable. A SAPO cannot issue to prohibit contact with a witness.

The Appellant was arrested on January 21, 2011 and "charged" by the police with Indecent Liberties, one count. (See probable cause statement, CP 2) The alleged victim of the crime was, and always has been D.N.R.

At the request of the deputy prosecutor, Ms. Probstfeld, the court issued the SAPO at issue in this case at Appellant's first appearance in Superior Court, on January 24, 2011. The order prepared for the Court, however, listed the wrong person as the victim.

The Appellant was not arrested for, booked for, nor held to answer for any sex offense committed against M.S.E. M.S.E. was a witness to the alleged sex offense committed against D.N.R., but at no time has she ever been identified as the victim of that crime.

The only information before Judge Woolard was that D.N.R. was the victim. Only a victim can be the subject of a sexual assault protection order.

RCW 7.90.150

Court initiated issuance of sexual assault protection orders — Terms, conditions, requirements, etc.

“(1)(a) When any person charged with or arrested for a sex offense **as defined in RCW 9.94A.030**... is released from custody before arraignment or trial on bail or personal recognizance, the court authorizing the release may prohibit that person from having any contact **with the victim...**” (emphasis added.)

That is not to say that the Court, in a release order, could not prohibit contact with M.S.E., as she was a witness in the case, and eventually was listed as a victim on the original count 3, Assault in the Fourth Degree, however, the prohibition could not be under a specialized Sexual Assault Protection Order, because the legislature clearly specified who may be the protected person under such an order.

The protected person must be the victim of a sex offense, as defined in RCW 9.94A.030. There was never any arrest of the Appellant for a sex offense committed against M.S.E. The fact that M.S.E. was later named as a Fourth Degree Assault victim does

not revive the invalid SAPO. It was invalid when issued because M.S.E. was not a sex offense victim. Assault in the Fourth Degree is not a sex offense, even with the gratuitous “sexual motivation” allegation. Assault in the Fourth Degree, with or without sexual motivation, is not included in the statutory definition of sex offense under RCW 9.94A.030. Only felonies and attempts to commit felonies are included.

Because the order was legally invalid *ab initio*, the State failed to prove that a crime had occurred at all when Appellant allegedly violated it. The SAPO relating to M.S.E. was inapplicable under the statute authorizing such orders.

B. The order expired on February 4, 2011.

Even if the Court had the authority to issue a Sexual Assault Protection Order on behalf of M.S.E., the order expired on February 4, 2011, long before the alleged violations.

Obviously, an order which has expired and is no longer in effect cannot be the basis of a criminal conviction for violation of the order. The order in question carries a handwritten notation that it expires on “1/24/21.” That notation is invalid. The law does not

allow this type of order to remain in effect for ten years, or any period of time remotely approaching that term.

RCW 7.90.150, the statute which authorized the issuance of the order, is very explicit as to the date of expiration of such an order. There are actually three stages of a criminal prosecution where such an order can be issued:

1. Pre-arraignment (section 1(a)),
2. Post-arraignment (section 2(a)), and
3. Post-conviction (section 6(a)).

RCW 7.90.150
Court initiated issuance of sexual assault protection orders —
Terms, conditions, requirements, etc.

“(1)(a) When any person charged with or arrested for a sex offense ... is released from custody before arraignment or trial on bail or personal recognizance, the court authorizing the release may prohibit that person from having any contact with the victim...”

...

(c) The sexual assault protection order shall also be issued in writing as soon as possible.

(2)(a) At the time of arraignment... the court shall determine whether a sexual assault protection order shall be issued or extended...”

...

(4) If a sexual assault protection order has been issued prior to

charging, that order **shall expire at arraignment or within seventy-two hours if charges are not filed...**" (emphasis added.)

...

(6)(a) When a defendant is found guilty of a sex offense ... and a condition of the sentence restricts the defendant's ability to have contact with the victim, the condition shall be recorded as a sexual assault protection order.

...

(c) A final sexual assault protection order entered in conjunction with a criminal prosecution shall remain in effect for a period of two years following the expiration of any sentence of imprisonment and subsequent period of community supervision, conditional release, probation, or parole."

Therefore, this court must determine at which stage of the proceedings the Sexual Assault Protection Order was issued, in order to determine its effective life.

If the prosecutor fails to file charges within 72 hours of issuance of the pre-arraignment order, it expires automatically after 72 hours. If the prosecutor does file charges within the 72 hour period, the order remains in effect until arraignment, and then expires at arraignment. The order in this case, relating to M.S.E. was issued at Appellant's first appearance on January 21, 2011, before any charge had been filed by the Prosecuting Attorney, and therefore was an RCW 7.90.150(1)(a) pre-arraignment order.

Under section (4) of the statute, that order expired as a matter of law, at arraignment. Despite this clear statutory mandate, the Prosecutor did not move for a new order, and the Court did not extend the expired order, nor issue a new sexual assault protection order as to M.S.E. (Although the trial court would have no authority to do so.)

Because the Prosecutor had the burden at trial of proving beyond a reasonable doubt that the order had not expired, or that a new replacement post-arraignment order had been issued, there was insufficient evidence presented at trial to convict the Appellant of violating the January 21, 2011 expired order. Regardless of whether the Appellant, the defense attorney, or the Prosecutor realized this, the fact remains that the order, as a matter of law had expired, and could not be violated.

Again, trial counsel provided ineffective assistance of counsel, by failing to object to admission of the Sexual Assault Protection Order, Exhibit 3, on the two bases set out above. Had he done so, and had the trial court ruled correctly, Exhibit 3 would have been excluded.

The State may argue that the “collateral bar” rule would have rendered any objection by trial counsel fruitless. The State may argue that, under the collateral bar rule, discussed in Seattle v. May, 171 Wn.2d 847, 861, 256 P.3d 1161 (2011), and Mead School District No. 354 v. Mead Educ. Ass’n., 85 Wn.2d 278, 534 P.2d 561 (1975), a defendant may never challenge the admissibility of a Protection Order in a prosecution for the violation thereof. That is not the import of the rule, however. A defendant may not collaterally attack, and thereby relitigate the factual basis upon which the order was issued. That is, he cannot seek to disprove the facts upon which the issuing court based its decision. However, the legal validity, or “applicability” of the order is always open to attack

In a jury trial, the jury cannot be asked to consider the validity of a court order. The court itself, however, is the gate-keeper of the evidence, and must decide the admissibility of the order. In this case, the judge was both the arbiter of the law and the facts. An objection to the applicability of the order, under the law dictating the length of time it applies, and the class of persons to whom it applies, are legal determinations the trial court should

have made, but for the ineffective performance of trial counsel in failing to raise these legal issues.

Courts may always examine whether or not an order was issued without jurisdiction. Clearly the Superior Courts have jurisdiction to issue a Sexual Assault Protection Order, but there is no jurisdiction to issue the type of order embodied by exhibit 3: a ten year, pre-arraignment witness protection order.

Under the State's argument, presented at Appellant's Motion in Arrest of Judgment, an order which is blatantly inapplicable, invalid, and unconstitutional on its face may be the basis for a criminal conviction. If the SAPO had required the Appellant to convert from Christianity to the Buddhist faith, divorce his wife, and undergo a tonsillectomy, he could be prosecuted for violating those terms of the order, with no recourse to a challenge to its provisions, according to the State's argument, and the trial court's interpretation.

A criminal defendant should be held accountable for his violation of a valid court order. When, however, the order is invalid as a matter of law, because the court had no authority to issue it in the first place, and the order, even if valid, expired at arraignment,

no liability should attach. The convictions on counts 4 and 5 should be reversed, with instructions to dismiss.

3. ARGUMENT ON ASSIGNMENT OF ERROR NUMBER SIX.

RCW 7.90.150, in providing for a criminal penalty o for violation of a SAPO, requires that the defendant's conduct be "knowing." "Knowing" is also described by law as being "willful." The statute does not impose strict liability. The crime is *malum in se*, rather than *malum prohibitum*.

In this case, the State's theory, and the trial court's finding of guilty on to count 4, imposed strict liability. Appellant knew that M.S.E. (whom he knew only as M.....) worked at a Jack in the Box. He was ordered, on June 24, 2011 to not go within 1,000 feet of her place of employment. A year and a half later, he ordered a hamburger at a drive up window at a Burgerville, and then realized he did not have his wallet. He left, got his wallet, and came back to pay for the hamburger. The only evidence in the case is that, at that time and not before, he recognized M.S.E., and asked if her name was M..... When she said yes, he said he shouldn't be there, and immediately left. (Findings of Fact (trial) 24, 25, (CP

85). This is the totality of the evidence on the issue of a knowing or willful violation of the expired order.

The simple question is: What else should he have done? There is no evidence that he knew she worked at the Burgerville, even after the first contact, when he left to get his wallet. He knew her by her first name only. Her name tag listed her last name. Finding of Fact 24, (CP 85.) He knew her to be employed at Jack in the Box. The chance encounter was at Burgerville. She did not recognize him, RP of 12/17/2012 p. 62, l. 22-25, and he only knew it was her after he asked her name, and she confirmed his suspicion.

This simply is not substantial evidence of a knowing violation. The contact was inadvertent, accidental, brief, harmless, and meaningless. The rubric of *de minimis non curat lex* should be applied here. Under the State's theory, and the trial court's analysis, defendant would be guilty if he happened to be at a Seahawks game, and through his binoculars, saw her sitting 200 yards away at the opposite end of the field, and then immediately left the stadium.

The State will argue, no doubt that it must only prove that the Appellant knew an order of protection existed, and knew at some point on the day of the encounter that he was within 1,000 feet of the protected person or her place of employment. Appellant advocates that the court impose a more demanding standard of scienter; that is, that the defendant know that he has inadvertently come into contact, and then elects to disregard the order, and stay in proximity of the protected person, knowing that he is violating the order.

4. ARGUMENT ON ASSIGNMENT OF ERROR NUMBER SEVEN.

In total disregard of the controlling statute, and after the issue had been brought to the court's attention by substituted counsel, the trial judge repeated Judge Woolard's error, and issued a post-conviction SAPO prohibiting contact with M.S.E. (CP 100A) This error is fully discussed above, and the argument will not be repeated. Suffice it to say that A SAPO can only be issued as to prohibit contact with the victim of the crime of which the defendant is convicted. This appellant was not convicted of any crime of which M.S.E. was a victim.

It should be noted, however, that this assignment of error is not based upon any desire of the Appellant to have contact with M.S.E., ever. It is apparent however, that the Clark County Prosecuting Attorney is willing to file charges and seek convictions for the most trivial and innocuous violations of the illegal orders, placing the Appellant in jeopardy every time he seeks to eat lunch at a fast food restaurant.

5. ARGUMENT ON ASSIGNMENT OF ERROR NUMBER EIGHT.

The post-conviction SAPOs entered by the trial court did not comply with the applicable law as to duration of such orders.

As discussed above, the Clark County Prosecuting Attorney's Office, which prepares SAPOs for the Court's signature, has yet to honor the statute dictating the effective life of such orders, be they pre-arraignment orders or post-conviction orders.

RCW 7.90.150 (6)(c) provides:

"A final sexual assault protection order entered in conjunction with a criminal prosecution shall remain in effect for a period of two years following the expiration of any sentence of imprisonment and subsequent period of community supervision, conditional release, probation, or parole."

Rather than complying with the statute, the prosecutor simply filled in the blanks on both post-conviction SAPOs (CP 100A and CP 100B) with an arbitrary date, January 19, 2017, having no connection with the requirements of the law.

Appellant's release date from custody was scheduled by the jail as July 1, 2013. (CP 91) Upon his release, his twelve month period of community custody began. RCW 9.94A.702, RCW 9.94A.707. Therefore, his community custody will end on July 1, 2014.

Two years from that date, on July 1, 2016, the SAPO expires, as a matter of law, six months and eighteen days prior to the erroneous expiration date written in by the deputy prosecuting attorney on the case. The post-conviction SAPO protecting M.S.E. should be vacated entirely under the arguments made above, and the post-conviction SAPO protecting D.N.R. should be vacated and corrected by the trial court in accordance with the controlling statute cited above.

V. CONCLUSION

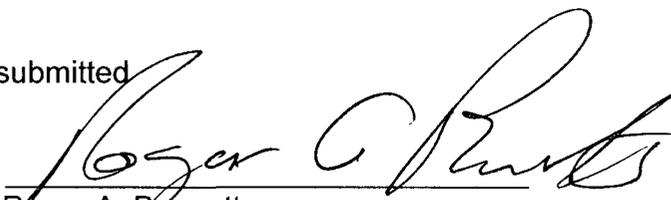
Appellant respectfully requests that the Court of Appeals reverse all four convictions and remand to the trial court for a new

trial on Count 2, Child Molestation in the Third Degree, and Count 3, Communicating With a Minor for Immoral Purposes, because Appellant received ineffective assistance of counsel at trial.

Further, Appellant requests that the Court of Appeals reverse the convictions on counts 4 and 5, Violation Sexual Assault Protection Order, and remand with instructions to dismiss, as the orders are invalid on their face, and cannot be admitted into evidence in a new trial. If relief is denied on Count 2, Child Molestation in the Third Degree, Appellant requests remand for vacation of the erroneous Sexual Assault Protection order relating to D.N.R.

Dated the 23 day of September, 2013

Respectfully submitted



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DIVISION II

SEP 23 AM 11:57

STATE OF WASHINGTON,
Respondent,
vs.
TROY ARNOLD MUONIO,
Appellant

No. No. 45016-0-II

STATE OF WASHINGTON

BY 
DEPUTY

PROOF OF SERVICE
OF OPENING BRIEF
OF APPELLANT

I hereby certify, pursuant to RCW 9A.72.085, that on the date set out below, I caused a true and accurate copy of the OPENING BRIEF OF APPELLANT to be served on opposing counsel listed below, by personal service upon her place of business:

Anne M. Cruser, Deputy Prosecuting Attorney
1013 Franklin Street
Vancouver, WA 98660

And upon Appellant by U.S. mail, postage prepaid, to:

Troy Arnold Muonio
802 N. Parkway
Battle Ground, WA 98604

DATED the 23 day of September, 2013



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