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DIVISION II

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STATE OF WASHINGTON

No. 45016-0-II

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent

vs.

TROY ARNOLD MUONIO

Petitioner

REPLY BRIEF OF APPELLANT

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Plm 1/8/14

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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. REPLY TO RESPONSES TO ASSIGNMENTS OF ERROR

A. Reply to Responses to Assignments of Error Numbers 1 and 2, relating to ineffective assistance of counsel on Count 2, Child Molestation in the Third Degree, and Count 3, Communicating with a Minor for Immoral Purposes, because Appellant's trial attorney failed to raise a *corpus delicti* challenge to the State's evidence as to Appellant's age.

Respondent, State of Washington has responded to the first two assignments of error by arguing that a *corpus delicti* objection to the admission of Appellant's statement of his age would have

been unsuccessful, and therefore trial counsel was not ineffective for failing to make such a challenge.

The Appellant's age was an element of the crime of Child Molestation in the Third Degree, and an element of the crime of Communicating With a Minor for Immoral Purposes, if such charge was predicated upon a communication for the purpose of committing Child Molestation in the Third Degree. The State bore the burden of proving this element with competent evidence, beyond a reasonable doubt.

Appellant and Respondent agree on the premise that if the State can prove that an admission was made during or before the commission of a crime, then the *corpus delicti* rule does not apply, and the statement is admissible, State v. Pietrzak, 110 Wn. App. 670, 41 P.3d 1240 (2002.) The State engages in revisionist history, however, in asserting that the evidence supports such a finding.

At trial, the only evidence of the age of Appellant was an admission by the Appellant to D.N.R and M.S.E. that he was 23 years old as of the day of the encounter. RP of 12/17-18/2012 p.53, l. 23-25; p. 54, l. 1. At page 12 of the Response the State claims that this admission of age was made by the Appellant during a conversation prior to or during the touching of D.N.R. This claim

is not based on any testimony in the record, however, and it is unknown whereby Respondent created that claim. As pointed out in the Opening Brief, the testimony as to the admission of Appellant's age followed the testimony concerning the conversation wherein the Appellant revealed his full name, which occurred as the parties were leaving the swimming pool area, well after the commission of the offense. This evidence in no way supports the argument of the Respondent. At best, the evidence is vague and unclear. The lack of clarity on this issue was caused by the State's slipshod presentation of evidence and failure to pay attention to the *corpus delicti* rule, combined with the catalyst of defense counsel's ineffective representation by failing to bring a proper *corpus delicti* objection.

Based on this state of the record, trial counsel should have waited until the State rested, and then moved to strike the testimony as to Appellant's age, as authorized by 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). The trial court should then have granted the motion to strike, and a concomitant motion to dismiss Counts 2 and 3 for insufficient evidence. Counsel's failure to bring these motions, and in particular a *corpus delicti* challenge, was ineffective assistance of

counsel, as a matter of law, see State v. C.D.W., 76 Wn. App. 761, 887 P.2d 911 (1995). Such failure was prejudicial to the Appellant.

B. Reply to Response to Assignment of Error Number 3, relating to 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.

1. Argument relating to Communication for the purpose of committing Child Molestation in the Third Degree.

The arguments on this assignment of error are thoroughly set out in the Opening Brief of Appellant. It appears that Respondent agrees with Appellant that if the *corpus delicti* rule applies to bar the testimony as to Appellant's age, then the State failed to prove that the communications by the Appellant were made for an immoral purpose; that is, for the purpose of committing the crime of Child Molestation in the Third Degree.

The resolution of this issue will depend on the appellate court's decision relating to the *corpus delicti* issue argued above. Respondent has submitted no argument contesting the propositions that the Appellant's age is an element of the crime, that the age is a necessary part of the *corpus delicti* of the crime, and that the State bears the burden of proving both. Therefore it is a simple matter for the court to determine whether or not the State presented sufficient evidence to take the admissions out of the

operation of the *corpus delicti* rule. The State failed to do so at trial, and trial counsel's failure to bring what would have been dispositive motions violated Appellant's right to effective representation of counsel.

2. Argument relating to communication for the purpose of committing Possession of Depictions of Minors Engaged in Sexually Explicit Conduct.

In response to the other argument made by Appellant, that the State failed to prove what was meant by the vague term "naked pictures," the State seeks refuge from its failure in the rule that all reasonable inferences from the evidence are drawn in favor of the State on appeal. While this is in fact the rule, it does not apply so as to justify a conviction based upon speculation and conjecture. Respondent makes a remarkable statement in at page 14 of its brief:

"It is absolutely reasonable for a trier of fact to conclude Muonio was asking that the girls allow him to take pictures of them naked and that these pictures would depict their genitalia."

The first observation must be that there is no evidence in the record whatsoever that Appellant ever asked to be allowed to take pictures of any type. He asked the girls if they themselves had ever taken or sent "naked pictures" to anyone, or if they would do so for \$ 100.00. The court certainly is aware from the testimony

that this question came in the context of a “truth or dare” game, in which the players ask what embarrassing things the other person has done or would do (the “truth”.) If the other person refuses to answer (tell the “truth,”) then the first person can “dare” the other to do something. From this child’s word game, the State imagines that Appellant was requesting to personally photograph the girls’ genitalia.

That is not a reasonable inference, supported by the evidence. That is speculation at best, a blatant last ditch effort to preserve an invalid conviction based on insufficient evidence.

The State failed to present any evidence as to the meaning of the term “naked pictures.” Not every picture of a naked body part is a depiction of a child engaged in sexually explicit conduct, and therefore the only way to so conclude on this paltry, vague, and inconclusive record is to grasp at imaginative possibilities, rather than reasonable inferences.

The State failed to present substantial evidence that the Appellant’s communications were made for the purpose of commission of a crime, because the State failed to establish *corpus delicti* of either crime, and failed to establish sufficient evidence to convict of either crime. Therefore the conviction on Count 3, Communicating with a Minor for Immoral Purposes,

should be reversed and remanded to the trial court with instructions to dismiss.

C. Reply to Response to Assignment of Error Number 4, relating to 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 an expired pre-arraignment Sexual Assault Protection Order.

In brief, Appellant was charged with, and convicted of violating a pre-arraignment Sexual Assault Protection Order (SAPO) which had, as a matter of law, expired over a year before the alleged violations. Respondent does not contest that this is true. Respondent does not argue that the issuing court had authority to ignore RCW 7.90.150 (1)(a), which provides that this type of order expires at or before arraignment, nor dispute that the order in question had never been extended or renewed.

Counsel for Respondent does not argue that her own error in writing in an expiration date ten years after the statutory expiration date for this type of order has any legal validity or effect.

Instead, Respondent relies upon language in Seattle v. May, 171 Wn.2d 847, 861, 256 P.3d 1161 (2011), to the effect that a defendant in a prosecution for violation of an invalid order may not challenge the validity of the order.

Seattle v. May did not deal with a Sexual Assault Protection Order issued under RCW chapter 7.90, but instead involved a

Domestic Violence protection order under RCW chapter 26.50, however, Appellant sees no legal distinction as to the issue presented here.

Respondent, as did the trial court in the post-trial Motion in Arrest of Judgment, (CP 12), RP of 4/12/2013, p. 59. L. 12-19, misapplies the rule of Seattle v. May, *supra*. Respondent asks the appellate court to invoke the “Collateral Bar” rule referenced in that case. In doing so, Respondent misapprehends the rule, and its limitations.

Respondent overlooks the holding in May, that a criminal defendant can attack the order if:

- 1) The order is void on its face, or
- 2) The court lacked jurisdiction to issue the type of order, and
- 3) Even if a defendant cannot attack the validity of the order, the trial court in such a prosecution, as gatekeeper of the evidence, must exclude the order if it is inapplicable to the case.

The order here was a pre-arraignment SAPO. By statute, RCW 7.90.150(1)(a), it was only effective until the arraignment, which occurred on February 4, 2012. The order was not applicable to post-arraignment conduct, because it was not renewed or

extended past arraignment. The conduct alleged in Counts 4 and 5 occurred in May and June of 2013, almost a year and a half after the end of the period to which the order applied.

When it is said that a person who is prosecuted for violation of a no contact order may not collaterally attack the validity of the order, the meaning is that the accused may not subsequently attack the adequacy of the proof upon which the order was entered. The facts giving rise to the issuance of the order may not be re-litigated:

“May contends that his order is invalid because the issuing court allegedly failed to find that May was likely to resume acts of domestic violence. This assertion of factual inadequacy does not go to the court's jurisdiction to issue a permanent domestic violence protection order, and, accordingly, the collateral bar rule precludes May's challenge.” Seattle v. May, 171 Wn.2d 847, 861, 256 P.3d 1161 (2011).

The issuing court in Appellant Muonio's case apparently determined that there was a basis to believe that the Defendant had committed a sex offense against a young female, D.N.R., and issued the pre-arraignment Sexual Assault Protection Order (protecting the wrong party) at issue in this case. Appellant does not collaterally attack that finding. Under Seattle v. May, supra, and State v. Miller, 156 Wn.2d 23, 123 P.3d 827 (2005), however, the applicability of that order to the conduct alleged herein was

subject, at trial, to the gate-keeping authority of the court. The court had a duty to exclude the order from evidence at trial if it was not applicable to the protected person, or as to the Defendant's alleged conduct.

"Today, we clarify that, in a proceeding for violation of a court order, the trial court's gate-keeping role includes excluding orders that are void, orders that are inapplicable to the crime charged (i.e., the order either does not apply to the defendant or does not apply to the charged conduct), and orders that cannot be constitutionally applied to the charged conduct (e.g., orders that fail to give the restrained party fair warning of the relevant prohibited conduct). Though some language in *Miller* may be capable of being read more broadly when viewed in isolation, *Miller* specifically stated that no-contact orders issued pursuant to chapter 10.99 RCW may not be "collaterally attacked after the alleged violations of the orders." 156 Wn.2d at 31 n.4. We see no reason this should apply differently to orders issued pursuant to chapter 26.50 RCW. The collateral bar rule precludes challenges to the validity--but not the applicability--of a court order in a proceeding for violation of such an order except for challenges to the issuing court's jurisdiction to issue the type of order in question. Void orders and inapplicable orders are inadmissible in such proceedings." *Seattle v. May*, 171 Wn.2d at 861. (emphasis added)

.....

"State v. Miller, 156 Wn.2d 23, 123 P.3d 827 (2005), is entirely consistent with the collateral bar rule. In Miller, the defendant in a prosecution for violation of a domestic violence no-contact order, Clay Jason Miller, contended that the validity of the underlying no-contact order was an element of the crime that the State had to prove beyond a reasonable doubt to the jury. *Id.* at 25. We held that the validity of the order, as opposed to its

existence, was neither a statutory nor an implied element of the crime. *Id.* at 31. Instead, we held that "[t]he court, as part of its gate-keeping function, should determine as a threshold matter whether the order alleged to be violated is applicable and will support the crime charged." *Id.* Seattle v. May, 171 Wn.2d at 862.

As a matter of law, a pre-arraignment SAPO expires at arraignment. In the absence of a new, post-arraignment order, or an extension of the pre-arraignment order, there is no SAPO in effect after arraignment, and therefore cannot apply to conduct occurring after the expiration date. At trial, the prosecuting attorney offered into evidence, with no objection from ineffective defense counsel, an inapplicable expired pre-arraignment SAPO, which was the basis of the convictions on Counts 4 and 5.

An objection which calls into play the court's gate-keeping function as to applicability of the order is not a collateral attack on the factual underpinning of the order, and is not precluded by the collateral bar rule.

The trial court should have found the SAPO relating to M.S.E. void on its face, because the termination date on the face of the order was in direct contravention of the controlling statute, and that the superior court has no jurisdiction to issue a ten year pre-arraignment SAPO, because this type of order is unknown to the law.

All three available challenges, that the order was void on its face, that the trial court lacked jurisdiction to issue the type of order, and that it was inadmissible because it was inapplicable, were squandered, due to ineffective assistance of counsel.

Given that Respondent has presented no argument supporting the validity or admissibility of the mutant SAPO, it must be conceded by Respondent that trial counsel was ineffective, and that such ineffective assistance of counsel prejudiced the Appellant. Had the proper objections been made, the order would not have been admitted into evidence, and Counts 4 and 5 would have been dismissed.

D. Reply to Response to Assignment of Error Number 5, relating to Ineffective Assistance of Counsel on Counts 4 and 5, Violation of a Sexual Assault Protection Order, when trial attorney failed to object to admission of a pre-arraignment Sexual Assault Protection Order which prohibits contact with a witness, rather than a victim of an alleged crime.

The court will recall that Appellant was arrested for allegedly committing only one crime: the crime of Indecent Liberties (see CP 2, statement of probable cause) against D.N.R. That charge was later filed as Count 1, and dismissed by the trial court after trial for insufficient evidence. On January 24, 2011, when the original SAPO (CP 4) was issued, the Appellant had not been “charged” with anything. He had been arrested only for the crime against

D.N.R. As much as Respondent attempts to obscure this fact, by referencing a charge of Assault IV and a charge of Child Molestation in the Third Degree, filed three days after issuance of the SAPO, it is beyond dispute that the trial court had no jurisdiction to issue a SAPO naming anyone other than D.N.R. as the protected party. Appellant, on January 4, 2011, was not subject to issuance of a SAPO naming M.S.E., a witness, as the protected party, because the law does not recognize that type of order.

Just as she erred in inventing non-existent ten year pre-arraignment type of SAPO, the deputy prosecutor erred in drafting the pre-arraignment SAPO with the wrong girl's name in it.

There is no authority under the statute for issuance of this type of SAPO; that is, one which protects a witness to a crime. If the legislature had meant for such a type of order to exist, it would have so provided. SAPOs are not applicable to witnesses; they apply only to victims of crimes for which a defendant has been arrested or charged at the time of the issuance of the order. RCW 7.90.150(1)(a).

Respondent argues at page 20 of the State's brief that the trial court has discretion to ignore the clear language of RCW 7.90.150(1)(a), because M.S.E. is a person "...the state has an

interest in protecting from unwanted contact by Muonio.”

Regardless of what interests the State may have in restricting the freedom of accused or convicted persons, those interests do not supersede society’s interests in the concept that criminal statutes are construed strictly, in favor of the accused. The trial court has no discretion to ignore the law and the clear statutory language.

It is disturbing to have a prosecuting attorney assert that the legislature, lawyers and the courts do not know the difference between a victim of a crime and a non-victim witness, and therefore the court should just lump both categories together for purposes of restraining and imprisoning the accused. When that happens, due process of law takes a holiday.

E. Reply to Response to Assignment of Error Number 6, relating to insufficiency of 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.

The conviction on count 4 was based upon a May, 2012 accidental encounter at a public place. The court will recall that the Appellant pulled up to a Burgerville, and ordered a hamburger through a telephonic speaker. RP of 12/17-18/2012, p. 70, l. 9.

He had no knowledge that M.S.E. worked there, and did not

recognize her. She did not recognize him either. RP of 12/17-18/2012 p. 69, l. 20-25; p. 70, l. 1-2. He did not have his wallet, and left to go get it.

Given that there was no evidence that Appellant recognized M.S.E. this time, and the only evidence in the record is to the contrary, this contact could not possibly be characterized as a wilful violation of the SAPO.

Appellant did not recognize her as the subject of the (inapplicable and void) SAPO until he returned and paid for his meal. He did not know her last name, which was the only name on her name tag. CP 85, Finding # 24, and then had to ask her if she was "M." to be sure. When she said yes, he became aware that he was

in contact with the protected person under the SAPO. He then stated he was sorry, and should not be there, and immediately left. RP of 12/17-18/2012 p. 155, l. 5-25; p. 156, l. 1-18.

Respondent is correct that in a challenge to the sufficiency of evidence, all reasonable inferences are drawn in favor of the State, but that does not necessitate that the appellate court ignore the only evidence in the record, or draw a reverse influence that the Appellant had prior knowledge of the fact that M.S.E. had changed employment, in the absence of any evidence supporting such an

inference.

From these undisputed facts, and despite the absence of any contradictory evidence, Respondent argues that there exists a reasonable inference that Defendant willfully chose to violate the SAPO.

The mens rea for this crime is that the accused acting “knowingly,” however, as here, knowledge can be obtained instantaneously. The courts have used the term “knowingly” and “wilfully” interchangeably. State v. Clowes, *infra*. Further, RCW 9A.08.010(4) provides that:

(4) Requirement of Wilfulness Satisfied by Acting Knowingly. A requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements plainly appears.”

In the context of prosecution for violation of restraining orders under RCW chapter 26.50 (domestic violence protection orders) and RCW chapter 10.99 (domestic violence no contact orders), the courts have made it clear that evidence of accidental, unintentional contact with a protected person is insufficient to prove a crime. In State v. Sisemore, 114 Wn. App. 75, 55 P.3d 1178 (2002) this very court stated:

Sizemore contends that the public policy of "preventing convictions of people after accidental or inadvertent contact," requires the State to prove that he intentionally contacted Cuny. Appellant's Br. at 11. The statutes, RCW 26.50.110 and 10.99.050, do not specifically require an intentional contact. Rather, the statutory definition states that a person acts willfully if he "acts knowingly with respect to the material elements of the offense." RCW 9A.08.010(4).

In Clowes, we held that "proof that a person acted 'knowingly' is proof that they acted 'willfully.'" Clowes, 104 Wn. App. at 944. But we also agreed with Clowes that the elements instruction was flawed because it contained only the single element that " 'the defendant knowingly violated the provisions of a no contact order.' " Clowes, 104 Wn. App. at 944. We explained that "the instruction is inadequate because it does not tell the jury that not only must the defendant know of the no-contact order; he must also have intended the contact." Clowes, 104 Wn. App. at 944-45. And, "[w]ithout this information, a jury could convict based upon evidence that a defendant who knew of a no-contact order accidentally or inadvertently contacted the victim. This clearly would not violate RCW 10.99.050." Clowes, 104 Wn. App. at 945.

We adhere to our decision in Clowes. A defendant acts willfully if he acts knowingly with respect to the material elements, including the contact element. Thus, Sisemore violated the no-contact order if he knowingly acted to contact or continue contact after an original accidental contact. He did not violate the no-contact order if he accidentally or inadvertently contacted Cuny but immediately broke it off. In essence, this means Sisemore must have intended the contact. This is consistent with the Supreme Court's definition of "willful" as requiring a purposeful act. State v. Danforth, 97 Wn.2d 255, 258, 643 P.2d 882 (1982). 114 Wn. App at 77, 78. (emphasis added.)

If criminal liability attaches instantly at the moment that knowledge is obtained, then this criminal statute imposes strict liability, without any volitional conduct by the accused. There is nothing he can do to avoid liability once he innocently bumps into the protected person in a place where he has a right to be, or she bumps into him. This is an issue of sufficiency of evidence as a matter of law for this court to decide. The trial court is entitled to no deference, because none of the facts are in dispute.

It is virtually impossible to construct a more benign, unintentional contact, followed immediately with the totally responsible, reasonable and lawful response. Under the State's analysis, Appellant had better never leave his home, because he might walk in to a public place where she is present, and recognize her. Even if he stays perpetually at home, he would not be safe from prosecution, because M.S.E. might take a job selling things door to door in his neighborhood.

This court should hold that the innocent facts of the case do not sufficiently prove a knowing violation of the pre-arraignment SAPO. It is not a crime for a person who is subject to a SAPO to innocently come into contact with the protected party and then immediately terminate the unintentional contact.

F. Reply to Response to Assignment of Error Number 7, relating to issuance of 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 felony sex crime of which the Appellant had been convicted.

The post conviction SAPO relating to M.S.E, CP 68, issued by the trial court at sentencing suffers from the same infirmity as the pre-arraignment SAPO, CP 4 addressed above. A SAPO of any type, pre-arraignment, pre-trial, or post-sentencing, can only be issued to protect a victim of a certain sex crimes. RCW 7.90.150(1)(a). Appellant was convicted of two crimes relating to M.S.E. wherein she was the victim: the two counts of Violation of the pre-arraignment SAPO. Violation of a SAPO is not a crime for which a post-conviction SAPO can be issued. If the trial court was issuing the post-conviction SAPO based upon those two convictions, then clearly the court had no jurisdiction to issue that type of order, and its validity is subject to attack on appeal.

On the other hand, if the crime of conviction for which the trial court issued the post-conviction SAPO was Count 2, Child Molestation in the Third Degree, then clearly, again, the trial court had no jurisdiction to issue a post conviction SAPO protecting a non-victim witness, because this type of order does not exist.

Respondent seeks to salvage the issuance of the post-

conviction SAPO relating to M.S.E. by arguing that she was a “victim” of the crime of Child Molestation in the Third Degree, because the Appellant used M.S.E.’s hand to touch the breast of D.N.R. Under this rationale, the State should have filed a separate count of Child Molestation in the Third Degree, listing M.S.E. as the victim, in order to get even more convictions. However, such a charge would have been doomed, (assuming effective trial counsel; an assumption that may be unduly optimistic) because as a matter of law, the victim of a charge of Child Molestation in the Third Degree must be 14 or 15 years old, RCW 9A.44.089 and M.S.E. was 16 years old at the time. RP of 12/17-18/2012, p. 54, I. 2.

Faced with the legal impossibility of charging Appellant with Child Molestation in the Third Degree relating to M.S.E. as a victim, because she was too old to be a victim of that crime, the State instead asks this court to classify her as a victim, regardless of her age, so as to qualify for a SAPO.

M.S.E. was an unwilling participant in the crime against D.N.R. She may have qualified as a victim of the crime of Assault in the Fourth Degree, however, the State abandoned their accusation of that crime. Even if that charge had proceeded to trial, it would not have qualified M.S.E. for the protection of a SAPO, because it is not a felony or attempt to commit a felony sex

crime.

M.S.E. was an instrumentality of the crime against D.N.R., however, applying the principle that criminal statutes are interpreted strictly in favor of the accused, State v. Clark, 96 Wn.2d 686, 638 P.2d 572 (1982), State v. Stockton, 97 Wn.2d 528, 647 P.2d 21 (1982), Pacific Northwest Annual Conference of United Methodist Church v. Walla Walla Cy., 82 Wn.2d 138, 508 P.2d 1361 (1973), M.S.E. did not qualify as a victim of Child Molestation in the Third Degree.

If Appellant had placed his hand on the breast of M.S.E., or had placed her own hand on her breast, she would not be the victim of Child Molestation in the Third Degree. Simply because he placed her hand on the breast of D.N.R. does not change the fact that M.S.E. was too old to be a victim of that crime.

The post conviction SAPO relating to M.S.E. was issued without jurisdiction. The law does not provide for "witness SAPOs."

G. Reply to Responses to Assignment of Error Number 8, relating to both post-conviction Sexual Assault Protection Orders, issued without authority of law, because the expiration dates on each order exceeded the time allowed by law for enforcement of such orders.

The trial court issued two post-conviction SAPOs, one protecting D.N.R. (CP 70) and one protecting M.S.E. (CP 68). The court had authority to issue the order relative to D.N.R., but not as

to M.S.E., as argued above.

Both orders were void on their faces, for failing to comply with RCW 7.90.150(6)(c), which dictates the effective life of such orders. The orders each contained an expiration date of January 19, 2017. Nowhere in the record is found any explanation of how that arbitrary date was arrived at, similar to the arbitrary date of January 24, 2021 written in on the pre-arraignment SAPO issued on January 24, 2011.

A post-conviction SAPO may be issued only upon conviction of a felony or attempt to commit, solicitation to commit, or conspiracy to commit a felony sex offense, or a violation of RCW 9.68A.090 (felony or gross misdemeanor Communicating With a Minor for immoral Purposes.) It expires twelve months after the end of the convicted person's period of community supervision, conditional release, probation, or parole on the charge for which the order was issued. RCW 7.90.150(6)(c)

Both post-conviction SAPOs entered by the court on May 24, 2013 were based only upon the felony Child Molestation in the Third Degree charge, which carries one year of community supervision, and not upon the gross misdemeanor Communicating with a Minor charge which carries two years of probation.

Both orders bear on page one the title: Sexual Assault

Protection Order (Criminal/Felony). Because the orders both reference the felony conviction only, the Appellant's two year probation on the gross misdemeanor charge is irrelevant. The SAPO as to both girls terminates two years after his one year community supervision on the felony charge ends.

Both post-conviction SAPOs are defective, and their expiration dates do not comply with the statutory limit upon such orders.

III. CONCLUSION

For the reasons set out above and also stated in the opening Brief of Appellant, it is respectfully requested that;

1. The convictions on Count 2, Child Molestation in the Third degree, and Count 2, Communicating With a Minor for Immoral Purposes, be reversed, and remanded for a new trial.

2. The convictions on Counts 4 and 5, Violation of a Sexual Assault Protection Order be reversed with directions to dismiss.

3. The trial court be directed to vacate and dismiss the post-conviction Sexual Assault Protection Order relating to M.S.E.

4. The trial court be directed to correct the post-conviction Sexual Assault Protection Order relating to D.N.R.

Dated the 8 day of January, 2014

Respectfully submitted



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STATE OF WASHINGTON

DEPUTY

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

No. No. 45016-0-11

PROOF OF SERVICE
OF REPLY 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 REPLY BRIEF OF APPELLANT to be served by U.S. mail, postage prepaid, to:

Rachael Probstfeld, Deputy Prosecuting Attorney
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DATED the 8 day of January, 2014


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