

No. 30680-1-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

FILED
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Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JOSE LUIS GONZALEZ,

Defendant/Appellant.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT
Honorable Robert Lawrence-Berrey, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The “to-convict” instructions erroneously stated the jury had a “duty to return a verdict of guilty” if it found each element proven beyond a reasonable doubt. CP 147, 150.¹

2. The record does not support the findings that Mr. Gonzalez has the current or future ability to pay Legal Financial Obligations, including the means to pay costs of incarceration and medical care.

3. The trial court erred in imposing a sentencing condition prohibiting the purchase, possession or viewing of pornographic materials.

4. The trial court erred in imposing certain conditions of community custody as part of the sentence.

Issues Pertaining to Assignments of Error

1. In a criminal trial, does a “to-convict” instruction, which informs the jury it has a duty to return a verdict of guilty if it finds the elements have been proven beyond a reasonable doubt, violate a defendant’s right to a jury trial, when there is no such duty under the state and federal Constitutions?

¹ Division One of the Court of Appeals rejected the arguments raised here in its decision in *State v. Meggyesy*, 90 Wn. App. 693, 958 P.2d 319, *rev denied*, 136 Wn.2d 1028 (1998), *abrogated on other grounds by State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005). Counsel respectfully contends *Meggyesy* was incorrectly decided.

2. Should the findings that Mr. Gonzalez has the current or future ability to pay Legal Financial Obligations including the means to pay costs of incarceration and medical care be stricken from the Judgment and Sentence as clearly erroneous, where they are not supported in the record?

3. The word "pornography" does not provide adequate notice of what conduct is prohibited or an ascertainable standard to prevent arbitrary enforcement. Possession of pornography is protected by the First Amendment and article I, section 3. Is the condition of community custody prohibiting Mr. Gonzalez from purchasing, possessing or viewing “any pornographic material in any form as defined by the treatment provider or the supervising Community Corrections Officer” unconstitutionally vague?

4. Does a sentencing court lack statutory authority to impose restitution as a condition of community custody?

5. Does a sentencing court exceed its statutory authority by imposing certain conditions of community custody that are not crime-related?

B. STATEMENT OF THE CASE

The defendant, Jose Luis Gonzalez, was found guilty after jury trial of first degree rape of a child (Count 1) and first degree child molestation

(Count 2). 5 RP 877.² Gonzalez is the paternal uncle of the victim, N.G.
4 RP 589, 645–47.

The jury was given “to convict” instructions as follows:

Instruction No. 9. To convict the defendant of the crime of First Degree Rape of a Child in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or between July 21–28, 2010, the defendant had sexual intercourse with N.G.;
- (2) That N.G. was less than twelve years of age at the time of the sexual intercourse and was not married to the defendant and was not in a state registered domestic partnership with the defendant;
- (3) That N.G. was at least twenty-four months younger than the defendant; and
- (4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 147; *see* WPIC 44.11.

Instruction No. 12. To convict the defendant of the crime of First Degree Child Molestation in Count 2, each of the following elements of the crime must be proved beyond a reasonable doubt:

² The proceedings are contained in five volumes by court transcriptionist, Louie Allred, and pages are numbered sequentially. Because the cover page to each volume does not show the range of pages contained therein, reference to the record will include the volume number, e.g. 5 RP 877.

(1) That on, about, during, or between January 1, 2012 and July 29, 2010, the defendant had sexual contact with N.G.;

(2) That N.G. was less than twelve years old at the time of the sexual contact and was not married to the defendant and was not in a state registered domestic partnership with the defendant;

(3) That N.G. was at least thirty-six months younger than the defendant; and

(4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 150; *see* WPIC 44.21.

Pursuant to RCW 9.94A.507, the sentencing court imposed confinement of concurrent terms within the standard ranges, for a total term of 155 months. CP 158–59. The court imposed legal financial obligations totaling \$1,400.00, and did not order restitution. CP 162.

At sentencing, the court made no inquiry into Mr. Gonzalez' financial resources and the nature of imposing LFOs. 5 RP 911–15. As part of the Judgment and Sentence, the court made the following pertinent findings:

¶ **2.7 Financial Ability:** The Court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The Court finds that the defendant is an adult and is not disabled and therefore has the ability or likely future ability to pay the financial obligations imposed herein. RCW 9.94A.753 [sic].³

...

¶ **4.D.4.* Costs of Incarceration:** In addition to the above costs, the court finds that the defendant has the means to pay for the costs of incarceration, in prison at a rate of \$50.00 per day of incarceration or in the Yakima County Jail at the actual rate of incarceration but not to exceed \$100.00 per day of incarceration (the rate in 2011 is \$79.75 per day), and orders the defendant to pay such costs at the statutory rate as assessed by the Clerk. Such costs are payable only after restitution costs, assessments and fines listed above are paid. RCW 9.94A.760(2). *Capped at \$500 [handwritten in]

¶ **4.D.5 Costs of Medical Care:** In addition to the above costs, the court finds that the defendant has the means to pay for any costs of medical care incurred by Yakima County on behalf of the defendant, and orders the defendant to pay such medical costs as assessed by the Clerk. Such costs are payable only after restitution costs, assessments and fines listed above are paid. RCW 70.48.130.

CP 158 and 162 (bolding in original).

In part, the court imposed the following conditions of sentence:

...

[x] Do not purchase, possess, or view any pornographic material in any form as defined by the treatment provider or the supervising Community Corrections Officer

...

³ The subject matter of this statute is restitution.

[x] Do not purchase or possess children’s clothing, toys, games, etc. without the prior approval of the sexual deviancy therapist and/or supervising Community Corrections Officer
[x] Do not purchase or possess or use law enforcement identification, insignia badges, uniforms or other items identified with law enforcement
[x] Pay restitution for counseling obtained by the victim
...

¶ 4.D.3 at CP 160–61. This appeal followed. CP 168.

C. ARGUMENT

1. Mr. Gonzalez’ constitutional right to a jury trial was violated by the court’s instructions, which affirmatively misled the jury about its power to acquit.

As part of the “to-convict” instructions used to convict Gonzalez, the trial court instructed the jury as follows:

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Instruction No 9, 12 at CP 147, 150. This is standard language from the pattern instructions. *See* WPIC 44.11, 44.21. Gonzalez contends there is no constitutional “duty to convict” and that the instruction accordingly misstates the law. The instruction violated Gonzalez’ right to a properly instructed jury.

a. Standard of review. Constitutional violations are reviewed *de novo*. Bellevue School Dist. v. E.S., 171 Wn.2d 695, 702, 257 P.3d 570 (2011). Jury instructions are reviewed *de novo*. State v. Bashaw, 169 Wn.2d 133, 140, 234 P.3d 195 (2010). Instructions must make the relevant legal standard manifestly apparent to the average juror. State v. Killo, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

b. The United States Constitution. The right to jury trial in a criminal case was one of the few guarantees of individual rights enumerated in the United States Constitution of 1789. It was the only guarantee to appear in both the original document and the Bill of Rights. U.S. Const. art. 3, § 2, ¶ 3; U. S. Const. amend. 6; U.S. Const. amend. 7. Thomas Jefferson wrote of the importance of this right in a letter to Thomas Paine in 1789: "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." The Papers of Thomas Jefferson, Vol. 15, p. 269 (Princeton Univ. Press, 1958).

In criminal trials, the right to jury trial is fundamental to the American scheme of justice. It is thus further guaranteed by the due process clauses of the Fifth and Fourteenth Amendments. Duncan v.

Louisiana, 391 U.S. 145, 156, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968);

Pasco v. Mace, 98 Wn.2d 87, 94, 653 P.2d 618 (1982).

Trial by jury was not only a valued right of persons accused of crime, but was also an allocation of political power to the citizenry.

[T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power -- a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Duncan v. Louisiana, 391 U.S. at 156.⁴

c. Washington Constitution. The Washington Constitution provides greater protection to its citizens in some areas than does the United States Constitution. State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). Under the Gunwall analysis, it is clear that the right to jury trial is such an area. Pasco v. Mace, *supra*; Sofie v. Fiberboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989).

⁴ In Sofie v. Fibreboard Corp., the majority saw this allocation of political power to the citizens as a limit on the power of the legislature. 112 Wn.2d 636, 650-53, 771 P.2d 711, 780 P.2d 260 (1989). Two of the dissenting members of the court acknowledged the allocation of power, but interpreted it rather as a limit on the power of the judiciary. Sofie, 112 Wn.2d at 676 (Callow, C.J., joined by Dolliver, J., dissenting).

i. The textual language of the state constitution.

The drafters of our state constitution not only granted the right to a jury trial, Const. art. 1, § 22,⁵ they expressly declared it “shall remain inviolate.” Const. art. 1, § 21.⁶

The term "inviolate" connotes deserving of the highest protection . . . Applied to the right to trial by jury, this language indicates that the right must remain the essential component of our legal system that it has always been. For such a right to remain inviolate, it must not diminish over time and must be protected from all assault to its essential guarantees.

Sofie, 112 Wn.2d at 656. Article 1, section 21 "preserves the right [to jury trial] as it existed in the territory at the time of its adoption." Pasco v. Mace, 98 Wn.2d at 96; State v. Strasburg, 60 Wash. 106, 115, 110 P. 1020 (1910). The right to trial by jury "should be continued unimpaired and inviolate." Strasburg, 60 Wash. at 115.

The difference in language suggests the drafters meant something different from the federal Bill of Rights. See Hon. Robert F. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491, 515 (1984) (Utter).

⁵ **Rights of Accused Persons.** In criminal prosecutions, the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed

⁶ “The right of trial by jury shall remain inviolate”

The framers added other constitutional protections to this right. A court is not permitted to convey to the jury its own impression of the evidence. Const. art. 4, § 16.⁷ Even a witness may not invade the province of the jury. State v. Black, 109 Wn.2d 336, 350, 745 P.2d 12 (1987). The right to jury trial also is protected by the due process clause of article I, section 3.

While the Court in State v. Meggyesy⁸ may have been correct when it found there is no specific constitutional language that addresses this precise issue, the language that *is* there indicates the right to a jury trial is so fundamental that any infringement violates the constitution.

ii. State constitutional and common law history.

State constitutional history favors an independent application of Article I, Sections 21 and 22. In 1889 (when the constitution was adopted), the Sixth Amendment did not apply to the states. Furthermore, Washington based its Declaration of Rights on the Bills of Rights of other states, which relied on common law and not the federal constitution. State v. Silva, 107 Wn. App. 605, 619, 27 P.3d 663 (2001), *citing* Utter, 7 U.

⁷ “Judges shall not charge juries with respect to matters of fact, not comment thereon, but shall declare the law.”

⁸ 90 Wn. App. 693, 701, 958 P.2d 319, *rev denied*, 136 Wn.2d 1028 (1998), *abrogated on other grounds by State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005).

Puget Sound Law Review at 497. This difference supports an independent reading of the Washington Constitution.

State common law history also favors an independent application. Article I, Section 21 “preserves the right as it existed at common law in the territory at the time of its adoption.” Sofie, 112 Wn.2d at 645; Pasco v. Mace, 98 Wn.2d at 96; *see also* State v. Hobbie, 126 Wn.2d 283, 299, 892 P.2d 85 (1995). Under the common law, juries were instructed in such a way as to allow them to acquit even where the prosecution proved guilt beyond a reasonable doubt. Leonard v. Territory, 2 Wash.Terr. 381, 7 Pac. 872 (Wash.Terr.1885). In Leonard, the Supreme Court reversed a murder conviction and set out in some detail the jury instructions given in the case. The court instructed the jurors that they “should” convict and “may find [the defendant] guilty” if the prosecution proved its case, but that they “must” acquit in the absence of such proof.⁹ Leonard, at 398-399. Thus the common law practice *required* the jury to acquit upon a failure of proof, and *allowed* the jury to acquit even if the proof was sufficient.¹⁰ Id.

⁹ The trial court’s instructions were found erroneous on other grounds.

¹⁰ Furthermore, the territorial court reversed all criminal convictions that resulted from erroneous jury instructions (unless the instructions favored the defense). *See, e.g.,* Miller v. Territory, 3 Wash.Terr. 554, 19 P. 50 (Wash.Terr.1888); White v. Territory, 3 Wash.Terr. 397, 19 P. 37 (Wash.Terr.1888); Leonard, *supra*.

The Court of Appeals in Meggyesy attempted to distinguish Leonard on the basis that the Leonard court "simply quoted the relevant instruction. . . ." Meggyesy, 90 Wn. App. at 703. But the Meggyesy court missed the point—at the time the Constitution was adopted, courts instructed juries using the permissive "may" as opposed to the current practice of requiring the jury to make a finding of guilt. The current practice does not comport with the scope of the right to jury trial existing at that time, and should now be re-examined.

iii. Preexisting state law.

In criminal cases, an accused person's guilt has always been the sole province of the jury. State v. Kitchen, 46 Wn. App. 232, 238, 730 P.2d 103 (1986); *see also* State v. Holmes, 68 Wash. 7, 122 P. 345 (1912); State v. Christiansen, 161 Wash. 530, 297 P. 151 (1931). This rule applies even where the jury ignores applicable law. *See, e.g.,* Hartigan v. Washington Territory, 1 Wash. Terr. 447, 449 (1874) ("[T]he jury may find a general verdict compounded of law and fact, and if it is for the defendant, and is plainly contrary to the law, either from mistake or a willful disregard of the law, there is no remedy.")¹¹

¹¹ This is likewise true in the federal system. *See, e.g.,* United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969).

- iv. Differences in federal and state constitutions' structures.

State constitutions were originally intended to be the primary devices to protect individual rights, with the United States Constitution a secondary layer of protection. Utter, 7 U. Puget Sound L. Rev. at 497; Utter & Pitler, "Presenting a State Constitutional Argument: Comment on Theory and Technique," 20 Ind. L. Rev. 637, 636 (1987). Accordingly, state constitutions were intended to give broader protection than the federal constitution. An independent interpretation is necessary to accomplish this end. Gunwall indicates that this factor will always support an independent interpretation of the state constitution because the difference in structure is a constant. Id., 106 Wn.2d at 62, 66; *see also State v. Ortiz*, 119 Wn.2d 294, 303, 831 P.2d 1060 (1992).

- v. Matters of particular state interest or local concern.

The manner of conducting criminal trials in state court is of particular local concern, and does not require adherence to a national standard. *See, e.g., State v. Smith*, 150 Wn.2d 135, 152, 75 P.3d 934 (2003); State v. Russell, 125 Wn.2d 24, 61, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). Gunwall factor number six thus also requires an independent application of the state constitutional provision in this case.

vi. An independent analysis is warranted.

All six Gunwall factors favor an independent application of Article I, Sections 21 and 22 of the Washington Constitution in this case. The state constitution provides greater protection than the federal constitution, and prohibits a trial court from affirmatively misleading a jury about its power to acquit.

d. Jury's power to acquit. A court may never direct a verdict of guilty in a criminal case. United States v. Garaway, 425 F.2d 185 (9th Cir. 1970) (directed verdict of guilty improper even where no issues of fact are in dispute); Holmes, 68 Wash. at 12-13. If a court improperly withdraws a particular issue from the jury's consideration, it may deny the defendant the right to jury trial. United States v. Gaudin, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995) (improper to withdraw issue of "materiality" of false statement from jury's consideration); *see* Neder v. United States, 527 U.S. 1, 8, 15-16, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999) (omission of element in jury instruction subject to harmless error analysis).

The constitutional protections against double jeopardy also protect the right to a jury trial by prohibiting a retrial after a verdict of acquittal.

U.S. Const. amend. 5; Const. art. I, § 9.¹² A jury verdict of not guilty is thus non-reviewable.

Also well-established is "the principle of noncoercion of jurors," established in Bushell's Case, Vaughan 135, 124 Eng. Rep. 1006 (1671). Edward Bushell was a juror in the prosecution of William Penn for unlawful assembly and disturbing the peace. When the jury refused to convict, the court fined the jurors for disregarding the evidence and the court's instructions. Bushell was imprisoned for refusing to pay the fine. In issuing a writ of habeas corpus for his release, Chief Justice Vaughan declared that judges could neither punish nor threaten to punish jurors for their verdicts. *See generally* Alschuler & Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 912-13 (1994).

If there is no ability to review a jury verdict of acquittal, no authority to direct a guilty verdict, and no authority to coerce a jury in its decision, there can be no "duty to return a verdict of guilty." Indeed, there is no authority in law that suggests such a duty.

We recognize, as appellants urge, the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge and contrary to the evidence... If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any reason

¹² "No person shall be ... twice put in jeopardy for the same offense."

which appeals to their logic or passion, the jury has the power to acquit, and the courts must abide by that decision.

United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970).

Under Washington law, juries have always had the ability to deliver a verdict of acquittal that is against the evidence. Hartigan, *supra*. A judge cannot direct a verdict for the state because this would ignore "the jury's prerogative to acquit against the evidence, sometimes referred to as the jury's pardon or veto power." State v. Primrose, 32 Wn. App. 1, 4, 645 P.2d 714 (1982). *See also* State v. Salazar, 59 Wn. App. 202, 211, 796 P.2d 773 (1990) (relying on jury's "constitutional prerogative to acquit" as basis for upholding admission of evidence). An instruction telling jurors that they *may not* acquit if the elements have been established affirmatively misstates the law, and deceives the jury as to its own power. Such an instruction fails to make the correct legal standard manifestly apparent to the average juror. Kyllo, 166 Wn.2d at 864.

This is not to say there is a right to instruct a jury that it may disregard the law in reaching its verdict. *See, e.g.*, United States v. Powell, 955 F.2d 1206, 1213 (9th Cir. 1991) (reversing conviction on other grounds). However, if the court may not tell the jury it may disregard the

law, it is at least equally wrong for the court to direct the jury that it has a duty to return a verdict of guilty if it finds certain facts to be proved.

e. Scope of jury's role re: fact and law. Although a jury may not strictly determine what the law is, it does have a role in applying the law of the case that goes beyond mere fact-finding. In Gaudin, the Court rejected limiting the jury's role to merely finding facts. Gaudin, 515 U.S. at 514-15. Historically the jury's role has never been so limited: "[O]ur decision in no way undermine[s] the historical and constitutionally guaranteed right of a criminal defendant to demand that the jury decide guilt or innocence on every issue, which includes application of the law to the facts."

Gaudin, 515 U.S. at 514.

Prof. Wigmore described the roles of the law and the jury in our system:

Law and Justice are from time to time inevitably in conflict. That is because law is a general rule (even the stated exceptions to the rules are general exceptions); while justice is the fairness of this precise case under all its circumstances. And as a rule of law only takes account of broadly typical conditions, and is aimed at average results, law and justice every so often do not coincide. ... We want justice, and we think we are going to get it through 'the law' and when we do not, we blame the law. Now this is where the jury comes in. The jury, in the privacy of its retirement, adjusts the general rule of law to the justice of the particular case. Thus the odium of inflexible rules of law is avoided, and popular satisfaction is preserved. ... That is what a jury trial does. It supplies that flexibility of legal rules which is essential to justice

and popular contentment. ... The jury, and the secrecy of the jury room, are the indispensable elements in popular justice.

John H. Wigmore, "A Program for the Trial of a Jury", 12 Am. Jud. Soc. 166 (1929).

Furthermore, if such a "duty" to convict existed, the law lacks any method of enforcing it. If a jury acquits, the case is over, the charge dismissed, and there is no further review. In contrast, if a jury convicts when the evidence is insufficient, the court has a legally enforceable duty to reverse the conviction or enter a judgment of acquittal notwithstanding the verdict. Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980); State v. Carlson, 65 Wn. App. 153, 828 P.2d 30, *rev. denied*, 119 Wn.2d 1022 (1992).

Thus, a legal "threshold" exists before a jury may convict. A guilty verdict in a case that does not meet this evidentiary threshold is contrary to law and will be reversed. The "duty" to return a verdict of not guilty, therefore, is genuine and enforceable by law. A jury must return a verdict of not guilty if there is a reasonable doubt; however, it may return a verdict of guilty if, and only if, it finds every element proven beyond a reasonable doubt.

f. Current example of correct legal standard in instructions. The duty to acquit and permission to convict is well-reflected in the instruction in Leonard:

If you find the facts necessary to establish the guilt of defendant proven to the certainty above stated, then you **may** find him guilty of such a degree of the crime as the facts so found show him to have committed; but if you do not find such facts so proven, then you **must** acquit.

Leonard, 2 Wash.Terr. at 399 (emphasis added). This was the law as given to the jury in murder trials in 1885, just four years before the adoption of the Washington Constitution. This allocation of the power of the jury “shall remain inviolate.”

The Washington Pattern Jury Instruction Committee has adopted accurate language consistent with Leonard for considering a special verdict. *See* WPIC 160.00, the concluding instruction for a special verdict, in which the burden of proof is precisely the same:

... In order to answer the special verdict form “yes”, you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. ... If you unanimously have a reasonable doubt as to this question, you must answer “no”.

The due process requirements to return a special verdict—that the jury must find each element of the special verdict proven beyond a reasonable doubt—are exactly the same as for the elements of the general

verdict. This language in no way instructs the jury on "jury nullification."

But it at no time imposes a "duty to return a verdict of guilty."

In contrast, the "to convict" instruction at issue here does not reflect this legal asymmetry. It is not a correct statement of the law. As such, it provides a level of coercion, not supported by law, for the jury to return a guilty verdict. Such coercion is prohibited by the right to a jury trial. Leonard, *supra*; State v. Boogaard, 90 Wn.2d 733, 585 P.2d 789 (1978).

g. Contrary case law is based on a poor analysis; this Court should decide the issue differently.¹³ In State v. Meggyesy, the appellant challenged the WPIC's "duty to return a verdict of guilty" language. The court held the federal and state constitutions did not "preclude" this language, and so affirmed. Meggyesy, 90 Wn. App. at 696.

In its analysis, Division One of the Court of Appeals characterized the alternative language proposed by the appellants—"you **may** return a verdict of guilty"—as "an instruction notifying the jury of its power to acquit against the evidence." 90 Wn. App. at 699. The court spent much of its opinion concluding there was no legal authority requiring it to instruct a jury it had the power to acquit against the evidence.

¹³ A decision is incorrect if the authority on which it relies does not support it. State v. Nunez, --- Wn.2d ___, ___ P.3d ___, 2012 WL 2044377 *6 (June 7, 2012 Wash).

Division Two has followed the Meggyesy holding. State v. Bonisio, 92 Wn. App. 783, 964 P.2d 1222 (1998), *rev. denied*, 137 Wn.2d 1024 (1999); State v. Brown, 130 Wn. App. 767, 124 P.3d 663 (2005). Without much further analysis, Division Two echoed Division One's concerns that instructing with the language 'may' was tantamount to instructing on jury nullification.

Appellant respectfully submits the Meggyesy analysis addressed a different issue. "Duty" is the challenged language herein. By focusing on the proposed remedy, the Meggyesy court side-stepped the underlying issue raised by its appellants: the instructions violated their right to trial by jury because the "duty to return a verdict of guilty" language required the juries to convict if they found that the State proved all of the elements of the charged crimes.

However, portions of the Meggyesy decision are relevant. The court acknowledged the Supreme Court has never considered this issue. 90 Wn. App. at 698. It recognized that the jury has the power to acquit against the evidence: "This is an inherent feature of the use of general verdict. But the power to acquit does not require any instruction telling the jury that it may do so." Id. at 700 (foot notes omitted). The court also relied in part upon federal cases in which the approved "to-convict"

instructions did *not* instruct the jury it had a “duty to return a verdict of guilty” if it found every element proven. *See, Meggyesy*, 90 Wn. App. at 698 fn. 5.^{14, 15} These concepts support Gonzalez’ position and do not contradict the arguments set forth herein.

The Meggyesy court incorrectly stated the issue. The question is not whether the court is required to tell the jury it can acquit despite finding each element has been proven beyond a reasonable doubt. The question is whether **the law** ever requires the jury to return a verdict of guilty. If the law never requires the jury to return a verdict of guilty, it is an incorrect statement of the law to instruct the jury it does. And an instruction that says it has such a duty impermissibly directs a verdict. Sullivan v. Louisiana, 508 U.S. 275, 124 L.Ed.2d 182, 113 S.Ct. 2078 (1993).

Unlike the appellant in Meggyesy,¹⁶ Gonzalez does not ask the court to approve an instruction that affirmatively notifies the jury of its power to acquit. Instead, he argues that jurors should not be affirmatively

¹⁴ E.g., United States v. Powell, 955 F.2d 1206, 1209 (9th Cir.1991) (“In order for the Powells to be convicted, the government must have proved, beyond a reasonable doubt, that the Powells had failed to file their returns.”).

¹⁵ Indeed, the federal courts do not instruct the jury it “has a duty to return a verdict of guilty” if it finds each element proven beyond a reasonable doubt. *See* Ninth Circuit Model Criminal Jury Instructions:

In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt: ...

misled. This question was not addressed in either Meggyesy or Bonisisio; thus the holding of Meggyesy should not govern here. The Brown court erroneously found that there was “no meaningful difference” between the two arguments. Brown, 130 Wn. App. at 771. Meggyesy and its progeny should be reconsidered, and the issue should be analyzed on its merits.

h. The court’s instructions in this case affirmatively misled the jury about its power to acquit even if the prosecution proved its case beyond a reasonable doubt. The instruction given in Gonzalez’ case did not contain a correct statement of the law. The court instructed the jurors that it was their “duty” to accept the law, and that it was their “duty” to convict the defendant if the elements were proved beyond a reasonable doubt. Instructions No. 1 and 10 at CP 289, 299. A duty is “[a]n act or a course of action that is required of one by... law.” *The American Heritage Dictionary* (Fourth Ed., 2000, Houghton Mifflin Company). The court’s use of the word “duty” in the “to-convict” instruction conveyed to the jury that it *could not* acquit if the elements had been established. This misstatement of the law provided a level of coercion for the jury to return a guilty verdict, deceived the jurors about their power to acquit in the face of sufficient evidence, Leonard, *supra*, and failed to make the correct legal

¹⁶ And the appellant in Bonisisio.

standard manifestly apparent to the average juror. Kyllo, 166 Wn.2d at 864. By instructing the jury it had a duty to return a verdict of guilty based merely on finding certain facts, the court took away from the jury its constitutional authority to apply the law to the facts to reach its general verdict.

The instruction creating a "duty" to return a verdict of guilty was an incorrect statement of law. The trial court's error violated Gonzalez' state and federal constitutional right to a jury trial. Accordingly, his conviction must be reversed and the case remanded for a new trial.

Hartigan, *supra*; Leonard, *supra*.

2. The findings that Mr. Gonzalez has the current or future ability to pay Legal Financial Obligations including the means to pay costs of incarceration and medical care are not supported in the record and must be stricken from the Judgment and Sentence.

Courts may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. Fuller v. Oregon, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his or her poverty.

a. Relevant statutory authority. RCW 10.01.160(1) authorizes a superior court to “require a defendant to pay costs.” These costs “shall be limited to expenses specially incurred by the state in prosecuting the defendant.” RCW 10.01.160(2). In addition, “[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). In determining the amount and method of payment of costs, *the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.*” RCW 10.01.160(3) (emphasis added).

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court “may order the payment of a legal financial obligation.” A court-ordered legal financial obligation may include the costs of incarceration (prison and/or county jail) and medical care incurred in a county jail. RCW 9.94A.760; RCW 10.01.160; RCW 70.48.130; *see also* RCW 9.94A.030(30).

b. There is insufficient evidence to support the trial court's findings that Mr. Gonzalez had the present or future ability to pay legal financial obligations, including the means to pay costs of incarceration and medical care. Curry concluded that while the ability to pay was a necessary threshold to the imposition of costs, a court need not make a specific

finding of ability to pay; "[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs." 118 Wn.2d at 916. Curry recognized, however, that both RCW 10.01.160 and the federal constitution "direct [a court] to consider ability to pay." Id. at 915-16.

Here, the court made express and formal findings that Gonzalez had the present ability or likely future ability to pay legal financial obligations ("LFOs"), including the means to pay for the costs of incarceration and the means to pay for any costs of medical care incurred by Yakima County on his behalf. CP 158 at ¶ 2.7¹⁷, 162 at ¶¶ 4.D.4 and 4.D.5. But, whether a finding is expressed or implied, it must have support in the record. A trial court's findings of fact must be supported by substantial evidence. State v. Brockob, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing Nordstrom Credit, Inc. v. Dep't of Revenue, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination "as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard." State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

¹⁷ The Judgment and Sentence at ¶ 2.7 incorrectly cites to RCW 9.94A.753, which concerns restitution. The correct authority is RCW 9.94A.760.

“Although Baldwin does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether ‘the trial court judge took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard.’ ” Bertrand, 165 Wn. App. 393, 267 P.3d at 517, citing Baldwin, 63 Wn. App. at 312 (bracketed material added) (internal citation omitted). A finding that is unsupported in the record must be stricken. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

The record here does not show that the trial court took into account Gonzalez’ financial resources and the nature of the burden of imposing LFOs including the costs of incarceration and medical care on him. In fact, the record contains no evidence to support the trial court's findings in ¶ 2.7 that Gonzalez has the present or future ability to pay LFOs, including the means to pay costs of incarceration (¶ 4.D.4)¹⁸ and the means to pay costs of medical care (¶ 4.D.5). The findings are unsupported in the record and therefore clearly erroneous. They must be stricken from the Judgment and Sentence. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

¹⁸ The court did cap the “costs of incarceration” at \$500, observing that, “Well, I know that he’s going to have difficulty finding a job given the conditions of probation.” 5 RP 914.

c. The remedy is to strike the unsupported findings. Bertrand is clear: where there is no evidence to support the trial court's findings regarding ability and means to pay, the findings must be stricken. As to medical costs, the State may argue that the issue is somehow "moot" because it appears no medical costs were imposed in this case. However, Gonzalez does not challenge the *imposition* of medical costs. Rather, the trial court made a specific finding that he has the means to pay costs of medical care, and since there is no evidence in the record to support the finding, the finding must be stricken as clearly erroneous. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

Similarly, Gonzalez is not at this time challenging the *imposition* of costs of incarceration at Yakima County Jail or in a prison, or the specified monetary assessments at ¶ 4.D.3 of the Judgment and Sentence.¹⁹ As with medical costs, the trial court's findings that he has the means and ability to pay costs of incarceration and total legal financial obligations are unsupported by the record and must be stricken. Id.

The reversal of the trial court's judgment and sentence findings at ¶ 2.7, ¶¶ 4.D.4 and 4.D.5 simply forecloses the ability of the Department of Corrections to begin collecting LFOs from Gonzalez until after a future

¹⁹ CP 162.

determination of his ability to pay. It is at a future time when the government seeks to collect the obligation that “ [t]he defendant may petition the court at any time for remission or modification of the payments on [the basis of manifest hardship]. Through this procedure the defendant is entitled to *judicial scrutiny* of his obligation and *his present ability to pay at the relevant time.*’ ” Bertrand, 165 Wn. App. at 405, citing Baldwin, 63 Wn. App. at 310–11, 818 P.2d 1116, 837 P.2d 646 (citing court adding emphasis and omitting footnote).

Since the record does not support the trial court's findings that Gonzalez has or will have the ability to pay these LFOs when and if the State attempts to collect them, the findings are clearly erroneous and must therefore be stricken from the record. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

3. The sentencing condition prohibiting the purchase, possession or viewing of “any pornographic material in any form as defined by the treatment provider or the supervising community corrections officer” is unconstitutionally vague.

The due process clauses of the federal and state constitutions require that citizens be provided with fair warning of what conduct is illegal. City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693

(1990). As a result, a condition of community custody must be sufficiently definite that ordinary people understand what conduct is illegal and the condition must provide ascertainable standards to protect against arbitrary enforcement. State v. Bahl, 164 Wn.2d 739, 753, 193 P.3d 678 (2008).

Additionally, even offenders on community custody retain a constitutional right to free expression. *See* Procunier v. Martinez, 416 U.S. 396, 408-09, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974) (inmates retain First Amendment right of free expression through use of the mail). When a condition of community custody addresses material protected by the First Amendment, a vague standard may have a chilling effect on the exercise of First Amendment rights. Bahl, 164 Wn.2d at 752. An even stricter standard of definiteness therefore applies when community custody condition prohibits access to material protected by the First Amendment.

"[I]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal." State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

Accordingly vagueness challenges to conditions of community custody may be raised for the first time on appeal. Bahl, 164 Wn.2d at 745, 193 P.3d 678; State v. Jones, 118 Wn. App. 199, 204 n. 9, 207-08, 76 P.3d 258 (2003).

Imposing conditions of community custody is within the discretion of the sentencing court and will be reversed if manifestly unreasonable. Bahl, 164 Wn.2d at 753, 193 P.3d 678. Imposition of an unconstitutional condition would, of course, be manifestly unreasonable. Id.

Vagueness challenges are sufficiently ripe for review even if the conditions of community custody do not yet apply because the defendant is still in prison, since upon his release the conditions will immediately restrict him. Bahl, 164 Wn.2d at 751-52, 193 P.3d 678. The challenge is also ripe because it is purely legal, i.e., whether the condition violates due process vagueness standards. Bahl, 164 Wn.2d at 752, 193 P.3d 678.

Here, the trial court imposed a sentencing condition prohibiting the purchase, possession or viewing of pornographic materials. Adult pornography is constitutionally protected speech. Bahl, 164 Wn.2d at 757. And the term "pornography" is unconstitutionally vague. Id. at 757-58; State v. Sansone, 127 Wn. App. 630, 639, 111 P.3d 1251 (2005). Thus, a condition of community placement prohibiting an offender from "possess[ing] or access[ing] pornographic materials, as directed by the supervising Community Corrections Officer" is unconstitutionally vague. Bahl, 164 Wn.2d at 754, 758; accord Sansone, 127 Wn. App. at 634, 639-

41. Here, too, the condition prohibiting Gonzalez from possessing pornography is unconstitutionally vague and must be stricken.

Further, the unconstitutional “vagueness” is not eliminated by the further provision that “pornography” is to be “defined by the treatment provider or the supervising community corrections officer.” CP 99. In State v. Bahl, the court struck as unconstitutionally vague a condition that prohibited the defendant from possessing “sexual stimulus material for your particular deviancy as defined by the supervising [CCO] and therapist except as provided for therapeutic purposes.” 164 Wn.2d at 761. The court concluded that what most rendered this condition vague was the provision that the sexual stimulus material must be for the defendant's own deviancy. Bahl, 164 Wn.2d at 761. The court noted that such a condition could not identify materials that might be sexually stimulating for a deviancy when no deviancy has been diagnosed and the record did not show that any deviancy had yet been identified. Accordingly, the court concluded, “the condition is utterly lacking in any notice of what behavior would violate it.” Bahl, 164 Wn.2d at 761. Likewise here, there had been no diagnosis of sexual deviancy nor any record as to how the counselor was to define “pornography” as it applied to Gonzalez’ particular situation.

Thus, the condition lacks sufficient notice of what behavior would violate it and must be stricken.

In United States v. Guagliardo, 278 F.3d 868, 872 (9th Cir.2002), the court addressed the danger of allowing a probation officer to interpret what material is pornographic:

The government asserts that any vagueness is cured by the probation officer's authority to interpret the restriction. This delegation, however, creates "a real danger that the prohibition on pornography may ultimately translate to a prohibition on whatever the officer personally finds titillating." A probation officer could well interpret the term more strictly than intended by the court or understood by Guagliardo.

Guagliardo, 278 F.3d at 872 (internal citations omitted). The Bahl court agreed that the impermissible vagueness is not cured by simple reference to a third party's unknown and unspecified definition of "pornography" that purports to establish the boundary between compliance and violation of the sentencing condition. Bahl, 164 Wn.2d at 758.

In fact, the condition here is even less specific than in Bahl, and does not limit the prohibited materials to those related to the defendant's particular deviancy. It simply prohibits Gonzalez from possessing any pornographic materials as defined by the CCO or sexual deviancy therapist. This seems to suffer the same vagueness problems created by a condition that simply delegates to the CCO to define the scope of the

prohibition, which Bahl also struck as unconstitutional, concluding, “The fact that the condition provides that Bahl’s community corrections officer can direct what falls within the condition only makes the vagueness problem more apparent, since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement. Bahl, 164 Wn.2d at 758.

Thus, for all these reasons, the community placement condition prohibiting the purchase, possession or viewing of pornographic material is unconstitutionally vague. The offending condition must be stricken from the conditions of supervision.

4. The sentencing court violated due process and exceeded its statutory authority by imposing restitution as a condition of sentence and certain conditions of community custody that are not crime-related and/or are constitutionally vague.

a. Standard of review. A trial court’s sentencing authority is limited to that granted by statute. State v. Moen, 129 Wn.2d 535, 544-48, 919 P.2d 69 (1996) (citing State v. Paine, 69 Wn. App. 873, 850 P.2d 1369, *rev. denied*, 122 Wn.2d 1024 (1993)). Any sentence imposed without statutory authority may be challenged for the first time on appeal. State v. Julian, 102 Wn. App. 296, 304, 9 P.3d 851 (2000). The right to

challenge the conditions of community custody is not waived by the failure to object below. Id. (citing Paine, 69 Wn. App. at 883. Where conditions of community custody are not directly related to the circumstances of the crime and are not otherwise authorized by statute, a trial court lacks authority to impose such conditions. See State v. Bird, 95 Wn.2d 83, 85, 622 P.2d 1262 (1980) (court may only suspend sentence if authorized by Legislature); In re Pers. Restraint of Carle, 93 Wn.2d 31, 604 P.2d 1293 (1980).

Whether a trial court has statutory authority to impose a challenged community custody condition is reviewed *de novo*. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). If a statute authorizes the condition, the sentencing court's decision to impose the condition is reviewed for an abuse of discretion. State v. Autrey, 136 Wn. App. 460, 466–67, 150 P.3d 580 (2006).

b. The court had no statutory authority to impose restitution as a condition of community custody. The court required Gonzalez to “[p]ay restitution for counseling obtained by the victim” as a condition of community custody. ¶ 4.C.3 at CP 161. A court may impose court-ordered legal financial obligations, which may include restitution to the victim, other statutory costs, and any other financial obligation that is

assessed to the offender as a result of a felony conviction. RCW 9.94A.030(30). The court is authorized to order restitution under RCW 9.94A.753. Restitution is mandatory for offenses resulting in injury to any person. RCW 9.94A.753(5). Restitution must be a ‘specific sum of money’ ordered by the court as payment of damages. RCW 9.94A.030(42). And the judgment and sentence must name any victim entitled to restitution and state the amount due. RCW 9.94A.753(9).

Here, the State did not request restitution, and the court did not order it. 5 RP 886–917; *see* ¶ 4.D.3 at CP 162.²⁰ The SRA does not authorize the court to alternatively impose restitution of the victim's counseling expenses as a condition of community custody. Since the court lacked authority to impose restitution as a condition of community custody, the condition must be stricken. *See Bird*, 95 Wn.2d at 85.

c. The sentencing condition prohibiting the purchase or possession of “children’s clothing, toys, games, etc.” is not crime-related and is unconstitutionally vague. The court has the power to impose sentences only as provided in the SRA. RCW 9.94A.505(1). Gonzalez was sentenced under RCW 9.94A.507(1)(a)(i) (indeterminate sentence for rape of a child in the first degree, child molestation in the first degree). RCW

²⁰ The judgment and sentence specifies the amount of restitution is “\$0.00”. ¶ 4.D.3 at CP 162.

9.94A.507(5) requires the court to impose community custody as part of the sentence. Any conditions not expressly authorized by statute must be crime-related. RCW 9.94A.703(3)(f). RCW 9.94A.030(10) defines a “crime-related prohibition” as “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” Such conditions will be upheld only if reasonably crime-related. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008), *cert. denied*, 129 S.Ct. 2007 (2009). Sentencing conditions are reviewed for abuse of discretion. State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

Here, the court ordered Gonzalez not to:

[x] ... purchase or possess children’s clothing, toys, games, etc. without the prior approval of the sexual deviancy therapist and/or supervising Community Corrections Officer

¶ 4.D.3 at CP 161.

The prohibition is not reasonably crime-related. There was no evidence that physical items of this or any nature were involved in the commission of the crimes herein. The court made no finding that the prohibition was crime-related. Since the prohibition is unrelated to the crimes for which Gonzalez was convicted and is not otherwise authorized as a mandatory, waivable or discretionary condition under RCW

9.94A.703(1), (2) or (3), the court exceeded its statutory authority in imposing the condition and it should be stricken.

The prohibition is unconstitutionally vague. The due process clauses of the federal and state constitutions require that citizens be provided with fair warning of what conduct is illegal. U.S. Const. amend. 14, Const. art. I, § 3; City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). As a result, a condition of community custody must be sufficiently definite that ordinary people understand what conduct is illegal and the condition must provide ascertainable standards to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 753.

The ruling in State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010) is instructive. Upon conviction for several drug-related crimes, the defendant was prohibited from “possess[ing] or us[ing] any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, police scanners, and hand held electronic scheduling and data storage devices.” Valencia, 169 Wn.2d at 785. The Washington Supreme Court determined that the phrase “any paraphernalia”—even with its modifiers—failed to limit the proscribed contact to drug paraphernalia. Thus, “[a]s in Bahl, the vague scope of

proscribed conduct fails to provide the petitioners with fair notice of what they can and cannot do.” Id. at 795.

The court further determined the prohibition failed to provide ascertainable standards to protect from arbitrary enforcement:

Because the condition might potentially encompass a wide range of everyday items, it ‘ ” does not provide ascertainable standards of guilt to protect against arbitrary enforcement.’ ” As petitioners note, ‘an inventive probation officer could envision any common place item as possible for use as drug paraphernalia, such as sandwich bags or paper. Another probation officer might not arrest for the same ‘violation,’ i.e. possession of a sandwich bag. A condition that leaves so much to the discretion of individual community corrections officers is unconstitutionally vague.

Valencia, 169 Wn.2d at 794–95 (internal citations omitted). The court held the prohibition was void for vagueness. Id. at 795.

The condition at issue here is even vaguer than that in Valencia, prohibiting the purchase or possession of any “children’s clothing, toys, games, etc”. As defense counsel observed, just what is a toy or game, or a “children’s toy” or a “children’s game”? 5 RP 905–06. The vague scope of proscribed conduct fails to provide fair notice of what a defendant can and cannot do. The sentencing court acknowledged that the condition further fails to provide an ascertainable standard to protect against arbitrary enforcement when it noted that only a therapist or the Department of Corrections would have the final say whether defendant’s future activity

violated the prohibition.²¹ Under both prongs of Bahl, *supra*, the challenged prohibition is void for vagueness and must be stricken.

d. The sentencing condition prohibiting the purchase, possession or use of “law enforcement identification, insignia badges, uniforms or other items identified with law enforcement” is in not reasonably related to the circumstances of these crimes. A “crime-related prohibition” means one that “directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). Here, the State and the court acknowledged this prohibition had nothing to do with Gonzalez’ offenses.²² And the court made no finding that this prohibition was related to Gonzalez’ crimes.

The prohibition against items identified with law enforcement was imposed because the victim of this offense was a child. It appears the prohibition was directed at ensuring the defendant did not have future child victims in which he lured children to think he was acting in an

²¹ COURT: “Again this [condition of sentence] has the phrase ‘without the prior approval of the sexual deviancy therapist.’ I think it’s a no-brainer that if [Gonzalez is] buying a birthday toy for a, you know, relative, he can say, hey, I’m getting this, have any problem with it? The therapist says, no, I got no problem with it. And even if he doesn’t get prior approval, where this comes into play really is if the Department wants to revoke his community custody, they would have to convince a judge that somehow he intentionally violated the terms of his probation. If he bought, you know, a ten-year-old a game of Monopoly, I don’t think that’s going to really be that much of a worry for him.” 5 RP 906.

²² 5 RP 906–08.

official capacity in order to gain their trust before engaging them in sexual misconduct.²³ Because N.G. was a daughter to the defendant and he already had her trust, there was no evidence that he needed to use any item to gain her trust as part of the grooming process. Although there is the possibility that the defendant may have future child victims, it cannot be said that the condition is "crime related" within the meaning of the statute. This condition should more appropriately be a part of sex offender treatment if recommended in a sexual deviancy evaluation.²⁴

There was no evidence that "items identified with law enforcement" were involved in the commission of the crimes herein. Since the prohibition is not directly related to the circumstances of Gonzalez' crimes and is not otherwise authorized as a mandatory, waivable or discretionary condition under RCW 9.94A.703(1), (2) or (3),

²³ At sentencing, the court observed, "even though there's no evidence that your client did this or might do it, the fact is in this type of a crime it is a way of luring children. And I'm going to allow it in this situation." 5 RP 908. The prosecutor maintained the condition was warranted because this "type ... of sexual crime of opportunity against a child" is a "common form of luring children". 5 RP 906-07.

²⁴ Gonzalez does not challenge the condition requiring him to obtain such an evaluation and participate in recommended treatment. ¶ 4.D.3 at CP 160. Further, as the court acknowledged, the mis-use of items identified with law enforcement is separately a crime of second degree impersonation (RCW 9A.60.045). 5 RP 907-08. Thus without the challenged prohibition, Gonzalez is still prohibited from such impersonation by the authorized condition that he "obey all laws and commit no new crimes". ¶ 4.D.3 at CP 161. It also appears Yakima County wishes to introduce conditions such as this into their "boilerplate" conditions of community custody. However, there is no statutory authority to do so where the prohibition is not crime-related and is not otherwise authorized as a mandatory, waivable or discretionary condition under RCW 9.94A.703(1), (2) or (3).

the court had no statutory authority to impose the condition. The condition should be stricken.

D. CONCLUSION

For the reasons stated, the conviction should be reversed and the matter remanded for a new trial. Alternatively, the findings of ability and means to pay legal financial obligations including costs of medical care and incarceration, as well as the conditions prohibiting use of pornography and items identified with children and law enforcement, should be stricken from the Judgment and Sentence.

Respectfully submitted on August 21, 2012.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on August 21, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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