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Court of Appeals
Division III
State of Washington

33526-7-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FRANK MURILLO, IV,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:
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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Franklin County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the conviction and sentence of the Appellant.

III. ISSUES

1. Where the presumption is that different offenses encompass different criminal conduct, where the Defendant has the burden and yet presented no evidence of same criminal intent, where the Defendant created the images on different dates during different sex acts, where the record supports more than one conclusion, and where the legislative intent is to prosecute the offense per image possessed, did the court abuse its discretion in failing to find the different offenses encompassed the same criminal conduct?
2. Where the subjective determination of a relationship between the crime and the condition traditionally has been left to the discretion of the sentencing judge, did the court abuse its

discretion in imposing various community custody conditions?

3. Where the Defendant admitted the ability to earn and the record demonstrates his employment history, ambition, youth, vigor, intelligence, and ability to pay, did the lower court abuse its discretion in imposing $587.48 in discretionary fees/fine?

4. If the State substantially prevails on appeal, should appeal costs be imposed where the Defendant has the ability to pay?

IV. STATEMENT OF THE CASE

The Defendant Frank Murillo, IV, has been convicted by jury of ten counts of possessing depictions of a minor engage in sexually explicit conduct (child pornography) in the first degree. CP 20-21, 54-63; RP[1] 192-95. He was acquitted on charges of sexual exploitation of a minor and possessing marijuana with intent to deliver. CP 53, 64, 191-92; RP 193, 195.

On February 18, 2014, the defendant was stopped while driving with a suspended license and found to be in violation of the terms of his community custody. CP 173-85, 195; RP 27-28, 81-83. The car smelled strongly of marijuana. CP 178; RP 28-29, 85.

[1] When not otherwise indicated, RP refers to the trial transcript of May 14-15, 2015 as prepared by Official Court Reporter Cheryl Pelletier.

Although the Defendant had a home at 1304 W. Yakima in Pasco, he had rented a motel room with the financial assistance of Community Action Counsel and failed to report this address to his Community Corrections Officer (CCO). CP 178; RP 28, 31, 49-50, 58. In that room, the Defendant had a glass jar with marijuana seeds, digital scales with green vegetable residue, and Ziploc bags. CP 178; RP 28-29, 85.

He was arrested and a search warrant for the car was obtained in order to investigate the crime of possession of marijuana with intent to deliver. CP 178; RP 38, 90, 93. Police observed tobacco rolling paper and an Altoids tin, and they seized an electronic scale, 78.6 grams of marijuana in 12 bags and a jar, and three cell phones. CP 178; RP 29, 42-45, 84, 88-89, 126-27.

The street value of the marijuana was $500 if sold in bulk or, if sold by the gram at $7-$25 per gram, as much as $1950 for the 78 grams. RP 89. Initially, the Defendant told police he was authorized to grow marijuana for his own use and he had a large quantity, because he "just liked to smoke weed." RP 91. He said he liked to package the marijuana so that he could quickly grab one blunt's worth. RP 92. However, each baggie held more than a blunt's worth.

RP 92. Later he admitted he intended to sell the marijuana. RP 104.

A search warrant was obtained for the contents of the phones. CP 178; RP 93-94. One phone held videos of the Defendant engaged in very explicit sexual intercourse with 16 year old J.G.. CP 142, 178; RP 94-97, 114, 127. Another warrant was obtained to investigate child pornography. CP 142, 178; RP 93-94. Police recovered two sexually explicit video recordings and 1600 pornographic images of J.G. (some duplicates). CP 196; RP 68-69, 71-72 (10 total videos), 79, 121. Police selected ten photographs for use in prosecution in which J.G.'s face was easy to identify. CP 196; RP 124. The Defendant's abdomen was identifiable by the tattoo. RP 100-02.

Police learned J.G. was staying with a rival gang to the Defendant's documented affiliation, and they located her through them. CP 142. She told police that the Defendant filmed her without permission on February 14, 2014 and "a lot of times before." CP 142-43, 196; RP 120. She met the Defendant in school, and he knew her age. RP 114-15, 127.

The Defendant has a history of involvement with minor females resulting in parental complaints of trespass or assault. CP 39, 44. He

was staying at a motel with two juvenile females at the time of his arrest. CP 173-74. He admitted creating the videos and photographs of J.G. and knowing her to be a minor at the time. CP 196; RP 104-05. By his own admission, the Defendant took a vulnerable J.G. from a situation of potential sexual abuse by her stepfather and used her to make child pornography. CP 39. *See also* RP (6/5/15) 17 (sentencing court expressing that the Defendant did not try to help the victim, but only wanted access to her for sex). He does not recognize the wrongfulness of his actions or express any regret for what he has done to J.G.. CP 46. Even after the jury verdict, the Defendant continued to solicit pornographic images be created and sent to him in jail. RP (6/2/15) 14-15.

V. ARGUMENT

A. THE COURT DID NOT ABUSE ITS DISCRETION IN FAILING TO FIND THE OFFENSES ENCOMPASSED SAME CRIMINAL CONDUCT.

The Defendant claims that the sentencing court should have entered a finding that the ten counts encompassed the same criminal conduct. BOA at 9. The Defendant acknowledges that the lower court's decision on this issue is deserving of deference. BOA at 9,

(citing *State v. Graciano*, 176 Wn.2d 531, 536, 295 P.3d 219 (2013) (review is for abuse of discretion) (the court does not abuse its discretion when the record supports more than one conclusion)). "A trial court's determination of what constitutes the same criminal conduct for purposes of calculating an offender score will not be reversed absent an abuse of discretion or misapplication of the law." *State v. Walden,* 69 Wash.App. 183, 188, 847 P.2d 956 (1993) (citations omitted).

The Defendant argues that the possessions constitute a single continuing offense. BOA at 11. The case law cited the Defendant cites does not support this conclusion. BOA at 11 (citing *Ex parte Snow*, 120 U.S. 274, 7 S. Ct. 556, 30 L. Ed. 658 (1887) and *State v. McReynolds*, 117 Wn. App. 309, 339, 71 P.3d 663 (2003)). Both cited cases regard the **unit of prosecution** for other offenses. As the Defendant acknowledges the unit of prosecution inquiry is separate from the same criminal conduct question. AOB at 10. The 2010 amendment to RCW 9.68A.001 has definitively resolved the unit of prosecution inquiry in the State's favor.

The legislature has the power to define criminal conduct and set out the appropriate punishment for that conduct. *State v. Polk*,

187 Wn. App. 380, 389, 348 P.3d 1255 (2015), (citing *Bell v. United States,* 349 U.S. 81, 82–83, 75 S.Ct. 620, 99 L.Ed. 905 (1955)). In *State v. Polk*, 187 Wn. App. at 390-91, this Court noted that LAWS OF 2010, ch. 227, § 6 amended RCW 9.68A.001 to address concerns raised in *State v. Sutherby*, 165 Wn.2d 870, 878, 204 P.3d 916 (2009). The amended law determines that the unit of prosecution ***for a first degree offense*** of possessing child pornography is per depiction or image, ***not*** per possession. *State v. Polk*, 187 Wn. App. at 390-91.

The charges in this case are in the first degree. Therefore, the case was properly charged as ten counts for ten images. It is in this unit of prosecution context that the sentencing judge pronounced himself bound by law to treat each pornographic depiction as a separate unit. RP (6/2/15) at 16-17. *But see* AOB at 12 (misrepresenting that the court was referring to a same criminal conduct analysis).

The Defendant does not seek to relitigate the unit of prosecution issue, but questions the court's discretion in failing to find the ten convictions encompassed the same criminal conduct.

Under RCW 9.94A.589(1)(a), if the court determines that

offenses comprise the same criminal conduct, they are scored as a single offense. "Same criminal conduct" means conduct involving the same victim, occurring at the same time and place, and having the same criminal intent. *Id.* However, every element must be found in order to constitute the same criminal conduct. *State v. Wright*, 183 Wn. App. 719, 732-33, 334 P.3d 22 (2014).

At sentencing, the prosecutor acknowledged that the victim was the same in each photograph and that the Defendant was found in possession of the photographs on the same date. RP (6/2/15) 10. However, the prosecutor argued the Defendant did not download the photos from the internet in one fell swoop. He created the images on different dates. *Id.* He took the photos while engaged in sex with the minor victim on different occasions. In other words, the possessions had **separate criminal intents**. In determining criminal intent, the focus is on whether one crime furthers the commission of the other and whether the objective criminal intent changes from one crime to the next. *State v. McGrew*, 156 Wn. App. 546, 552, 234 P.3d 268, 271 (2010). His different sex acts on different days and their recording had different, new intents, separate from and unconnected to the recording of other sexual interactions.

Misrepresenting that the State had the burden of proof, the defense argued that it was not clear that the images were taken on different occasions. RP (6/2/15) 11. The statutory presumption is that each current offense shall be scored separately in calculating the offender score.

> ... ***whenever*** a person is to be sentenced for two or more current offenses, the sentence range for each current offense ***shall*** be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.

RCWA 9.94A.589(1)(a) (emphasis added).

> "[B]ecause a finding by the sentencing court of same criminal conduct favors the defendant, 'it is the defendant who must establish [that] the crimes constitute the same criminal conduct.'" *State v. Johnson,* 180 Wash.App. 92, 104, 320 P.3d 197 (2014) (alteration in original) (quoting *State v. Graciano,* 176 Wash.2d 531, 539, 295 P.3d 219 (2013)), *petition for review filed,* No. 90276–3 (Wash. May 27, 2014).

State v. Wright, 183 Wn. App. at 733. The definition of same criminal conduct is narrowly construed to disallow most assertions that conduct is the same. *State v. McGrew*, 156 Wn. App. at 552. In light of the evidence, the court could not find same criminal conduct.

Although the Defendant has the burden, he has not designated the child pornography from which the Court could ascertain different backgrounds or locations. The dates and time stamps on the files were inaccurate, showing dates in the future. RP 72-73. However, the images were distinct, having unique file names. RP 124-25. And most significantly, J.G. told police that the Defendant recorded her on "a lot" of occasions without her permission. CP 142-43, 196; RP 120. When sexual acts are not committed simultaneously, even though relatively close in time, the court may find separate criminal intents. *State v. Grantham*, 84 Wn. App. 854, 858, 932 P.2d 657 (1997). The finding will be sufficiently supported by a gap in time between two sexual acts, activities and communications that take place between the acts, and different methods of sex. *Id.* The Defendant came into possession of the images on separate occasions of sexual intercourse, such that a previous possession did not further the commission of a subsequent one and the objective criminal intent changed from one recorded sex act to a different sex act recorded on a different date.

At sentencing, the Defendant provided no evidence that the images were taken on a single occasion so as to show a single

criminal intent. And on appeal, the Defendant glosses over the issue of same criminal intent. AOB at 11 (assuming, but not discussing, that the intent was the same). The Defendant has not met his burden overcoming the presumption of different criminal conduct.

Because the record supports more than one conclusion as to criminal intent, and because the legislative intent is to treat the prosecution of each image separately, the court did not abuse its discretion in failing to find that each offense encompassed the same criminal conduct.

B. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING COMMUNITY CUSTODY CONDITIONS.

The Defendant challenges the imposition of various community custody conditions. BOA at 13-26. Statutorily authorized conditions are reviewed for abuse of discretion. BOA at 13-14 (citing *State v. Armendariz,* 160 Wn.2d 106, 110, 156 P.3d 201 (2007)). A court abuses its discretion when a decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001). Under RCW 9.94A.703(3)(f), the court may order an offender to comply with crime-related prohibitions during community custody. Determining whether

a relationship exists between the crime and the condition "'will always be subjective, and such issues have traditionally been left to the discretion of the sentencing judge.'" *State v. Berg*, 147 Wn. App. 923, 942, 198 P.3d 529, 538 (2008) (citing *State v. Parramore,* 53 Wn.App. 527, 530, 768 P.2d 530 (1989) (quoting David Boerner, *Sentencing in Washington* § 4.5 (1985)).

1. The court acted within its discretion in imposing the crime-related prohibition against contact with minors where the Defendant created and possessed child pornography after establishing himself in a position of trust by "rescuing" her from her parents.

For the first time on appeal, the Defendant challenges the crime-related prohibition against contact with minors insofar as it encompasses contact with his biological children. BOA at 14-18.

As the Defendant notes, he may challenge an illegal sentence for the first time on appeal. AOB at 13, (citing *State v. Bahl,* 164 Wn.2d 739, 744, 193 P.3d 678 (2008); *State v. Jones,* 118 Wn. App. 199, 204, 76 P .3d 258 (2003). However, this order is plainly lawful and not appropriate for appellate review on this record.

The imposition of no-contact orders is highly discretionary, and the tailoring of the order can be highly fact-specific. When there is an objection or a post-sentence motion, the court may address the issue

squarely. Then the superior court will frequently take testimony from the protected parties and inquire into ongoing treatment and the opinions of counselors. The superior court can investigate what reasonable accommodations may be made to insure safety and consider tailoring, for example to allow letters from prison or supervised contact with specified supervisors. Therefore, unless the no-contact order is plainly illegal, the better path is for the Defendant or a protected party to approach the superior court, not the court of appeals, for any proposed alteration of the no-contact order. Such a motion may be raised at any time the condition is in effect.

Parental rights are not absolute and may be subject to reasonable regulation necessary to accomplish the essential needs of the state and public order. *Prince v. Massachusetts*, 321 U. S. 158, 166, 64 S. Ct. 438, 88 L.Ed. 648 (1944); *State v. Riles*, 135 Wn.2d 326, 349-50, 957 P.2d 655 (1998). A sentencing court can restrict fundamental parenting rights to forward the state's compelling interest in preventing harm and protecting children. *State v. Corbett,* 158 Wn. App. 576, 598, 242 P.3d 52 (2010). Here where the Defendant victimized a minor, a prohibition against contact with his own minor children is plainly crime-related and appropriate. *State v. Riles*, 135

Wn.2d 326, 350, 957 P.2d 655 (1998) ("it would be logical for a sex offender who victimizes a child to be prohibited from contact with that child, as well as from contact with other children.").

The Defendant has been convicted of possessing child pornography, which he has admitted he also created. The Defendant has a history of involvement with minor females resulting in parental complaints of trespass or assault. CP 39, 44. He was staying at a motel with two juvenile females at the time of his arrest. CP 173-74. In that room where juvenile females were present, he was growing marijuana which he admitted he was selling. Marijuana is an intoxicating substance and illegal for consumption by minors. The Defendant admitted creating the videos and photographs of J.G. knowing her to be a minor at the time. CP 196; RP 104-05. The Defendant told the DOC that he took a vulnerable J.G. from a situation of alleged sexual exploitation by her stepfather and used her to make child pornography, i.e. actual sexual exploitation. CP 39. In imposing sentence, the Honorable Judge Ekstrom clarified that the Defendant had not been trying to help J.G. by taking her from her parents' home. RP (6/5/15) 17. What the Defendant portrayed as a rescue was actually a desire to gain access to a dependent child for

sex. *Id.*

In *State v. Berg*, 147 Wn. App. 923, 198 P.3d 529 (2008), the facts are similar. There the sexual abuse victim was a 14 year old who lived with the defendant Berg. *State v. Berg*, 147 Wn. App. at 926-30. Berg was ordered to have no unsupervised contact with any minor females. *State v. Berg*, 147 Wn. App. at 926, 930. The court of appeals upheld this order in regards to Berg's two year old biological daughter, noting that the prohibition addresses the potential for the same kind of abuse which the defendant was able to achieve by exploiting a child's trust in him as a parental figure. *State v. Berg*, 147 Wn. App. at 944.

The difference in age between the victim and biological children is approximately the same in this case. [And by the time the Defendant is released from his 7 year sentence (CP 28), his children will be approaching the age of his victim.] J.G. was living with him after the Defendant had taken her from her parents' home under the auspices of being her protector.

Under these facts, the court's ruling is tenable and beyond review.

2. The court acts within its discretion in imposing the crime-related prohibition against affiliating with gang members.

The Defendant challenges the gang-related prohibitions. BOA at 18. He claims that the court's exclusion of his gang affiliation at trial demonstrates that his crimes were not gang related. AOB at 18. No authority is provided for this claim. Where no authority is cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel after diligent search has found none. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). The exclusion of the Defendant's *specific* membership was a matter of *undue* prejudice, and not irrelevance.

> The danger for people to be able to link that up to a ***specific*** gang is simply too great, as are the three dots, which are common knowledge as having a gang association.

RP (5/13/15) at 16-17 (emphasis added).

A crime-related prohibition includes conditions "reasonably related" to the crime. *State v. Kinzle*, 181 Wn. App. 774, 785, 326 P.3d 870, *review denied*, 181 Wn.2d 1019, 337 P.3d 325 (2014). Determining whether a relationship exists between the crime and the condition is subjective and traditionally left to the discretion of the

sentencing judge. *State v. Berg*, 147 Wn. App. at 942. The Defendant's claim (AOB at 18) that there is no evidence in the record of his gang-related circumstances is false. The Defendant is a documented and admitted gang member with a Sureno gang called Varrio Rat Pack or VRP. CP 45. A detective with the Street Crimes Unit learned that the Defendant was keeping company with Miguel Leon, thereby violating community custody conditions prohibiting contact with other gang members. CP 173. One of the chief businesses of gangs is drug sales. He was arrested for the drug sales and gang contact. CP 173. He was also in violation of conditions for possessing a hat emblazoned with his gang moniker. CP 174. He photographed his exploitation of a minor in such a way as to promote his gang by displaying his gang tattoos. RP (5/13/15) at 14-19 (tattoos on his hand displayed "X3" and "VRPX3").

In *State v. Kinzle*, the defendant challenged a condition prohibiting him from dating women or forming relationships with families who have minor children. *State v. Kinzle*, 181 Wn. App. at 785. The court rejected the defendant's claim that the condition was overbroad, vague, and unnecessary, observing that Kinzle came into contact with his victims through social relationships with their parents.

In the same way here, the Defendant came into contact with minor females in the context of his gang involvements. His crimes occurred in the context of his gang lifestyle where he intimidated parents, competed with them for influence over minor females, and conducted sales of mind-altering substances in association with other gang members and while in the company of minor females. The condition is reasonably related, tenable, and deserving of deference.

The Defendant challenges the gang conditions as vague. AOB at 19-21. It is not credible that the Defendant would be confused as to the identity of his own gang members and associates, what items of clothing identify their association with the VRP, and what his gang moniker is. In fact, this is the holding in the very case cited by the Defendant. *United States v. Soltero,* 510 F.3d 858, 865-66 (9th Cir.2007) (finding gang restrictions not vague, because defendant's membership meant the court could reasonably presume him to be familiar with his own gang's other members, apparel, and hangouts). Here the Defendant Murillo told the CCO that he joined VRP at the age of 14 and continues to associate with them. CP 45. He volunteered that the gang moniker "Sneaks" emblazoned on his hat was given to him by the gang. CP 45.

Insofar as the Defendant's claim is that the court's order should specify which gang the Defendant belongs to, the record and the Defendant's tattoos make clear that he belongs to the VRP faction of the Surenos. CP 45. *See State v. Riles*, 86 Wn. App. 10, 16-17, 936 P.2d 11 (1997) (upholding a sentencing condition where the context and record imposed a sufficient limitation). However, the State does not object to remand to clarify the specific provisions by identifying the Defendant's gang as VRP. CP 17 (#25-27).

The Defendant relies on federal case law for his challenge to the restriction on gang apparel. AOB at 22. However, these cases found the condition permissible. In *United States v. Soltero,* the defendant claimed the following terms were impermissibly vague: "associate, "any criminal street gang," "any area known as a criminal street gang gathering of the Delhi," and "items that connote affiliation with, or membership in the Delhi gang." *Soltero,* 510 F.3d at 865. The court upheld the gang conditions, noting that they were not vague ***because Soltero admitted to being a gang member*** such that the district court is entitled to presume Soltero was familiar with his gang members, its places of gathering, and its paraphernalia. *Soltero,* 510 F.3d at 866. The opinions in the other cited cases merely follow the

holding in *Soltero.* *United States v. Johnson*, 626 F.3d 1085, 1091 (9th Cir. 2010); *United States v. Vega,* 545 F.3d 743, 749–50 (9th Cir.2008).

He argues that mere association is impermissibly vague. AOB at 23. But unlike in *United States v. Johnson*, 626 F.3d 1085, 1091 (9th Cir. 2010), he is not prohibited from contact with those who merely socialize with gang members, i.e. "from associating with persons who associate with gang members." AOB at 23. He is prohibited from having contact with gang "associates," a term of art defined by Washington, not federal, statute. CP 17.

> "Criminal street gang associate or member" means any person who actively participates in any criminal street gang and who intentionally promotes, furthers, or assists in any criminal act by the criminal street gang.

RCW 9.94A.030(13). *See also* RCW 9.94A.030(12) and (14) (defining a gang and a gang offense). *But cf.* 18 USC § 521 (lacking any such definition for "associate"). The terms are well defined in Washington State, and our law enforcement documents membership and association in order to prove it beyond a reasonable doubt.

Because the sentencing condition regards only those people actively participating in and intentionally promoting criminal street

gang offenses, the restriction is reasonably necessary and narrow to accomplish the essential needs of the state and public order.

3. The State concedes the condition regarding possessing alcohol or entering bars is not authorized.

The Defendant acknowledges that, under RCW 9.94A.703(3)(e), the court has authority to prohibit his *consumption* of alcohol *regardless* of the circumstances of the crime. AOB at 24. He only challenges the prohibition against *possessing* alcohol or entering bars. AOB at 24-25. Alcohol has no known relation to this offense, therefore the State concedes the prohibitions are not justified as crime-related under RCW 9.94A.703(3)(f).

Section (3)(e) has been amended to give sentencing courts the discretion to order an offender to refrain from possessing, as well as consuming alcohol. LAWS OF 2015 c. 81, § 3. However, the amendment, which came into effect on July 24, 2015, does not affect this case with offense dates of February 18, 2014. CP 20, 21, 191-94. When no contrary intent is present in the amendatory act, any sentence imposed under RCW 9.94A must be in accordance with the law in effect when the offense was committed. RCW 9.94A.345; *State v. Snedden*, 166 Wn. App. 541, 544, 271 P.3d 298 (2012).

Because the prohibition against consumption is valid, the Defendant would be well advised to avoid bars and the near occasion of alcohol.

4. The court acts within its discretion in imposing the breath test requirement to monitor compliance with the valid prohibition against alcohol consumption.

The Defendant challenges the breath test (but not the urine test) requirement as not being crime-related. Because the prohibition against consumption of alcohol is valid, the court acts within its discretion in requiring the Defendant submit to breath tests in order to monitor his compliance with the valid condition. *State v. Combs*, 102 Wn. App. 949, 952, 10 P.3d 1101 (2000) (upholding the condition that defendant submit to polygraph tests to monitor his compliance with the requirement that he make reasonable progress in treatment and with other conditions); *State v. Riles*, 86 Wn. App. 10, 16, 936 P.2d 11 (1997), *aff'd*, 135 Wn.2d 326, 957 P.2d 655 (1998) (polygraph testing is not itself a sentencing condition so much as a necessary and effective method to monitor an offender's compliance with valid sentencing conditions).

5. The court acts within its discretion in imposing the crime-related condition permitting examinations of his computer.

Although the Defendant does not challenge searches of his cell phone, he challenges the condition that he submit to searches of his larger computer equipment. AOB at 25-26. He attempts to distinguish his handheld computer, the smart phone which was the instrument of his offenses, from a larger but equivalent device. The Defendant's smart phone took photographs and recorded videos and stored them. The functions relevant to his crimes are applications which exist in larger lap top or desk top devices. In fact, larger computers were performing these functions, before they were miniaturized into hand-held smart phones. The size of the computer is not significant. He could have taken the same video and photos from a laptop or desktop. It is the function or application to photograph, videotape, store, play, or display which is significant. The court's reasonable refusal to make an arbitrary distinction between computers based on their size is not an abuse of discretion.

The court would have been justified in prohibiting the Defendant from possessing or having any access to such devices. *State v. Irwin*, 191 Wn. App. 644, 656-59, 364 P.3d 830, 838 (2015)

(upholding such a condition where technology was used to groom child molestation victims). The court here exercised restraint, requiring only that the Defendant submit to searches of his technology. The condition is within the court's discretion.

C. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN FINDING AN ABILITY TO PAY DISCRETIONARY COSTS OF $587.48.

The Defendant's challenge to the imposition of LFO's fails to acknowledge the true record of the court's significant inquiry into the ability to pay before imposing $587.48 in discretionary costs on an able-bodied, employable, ambitious, and resourceful young man.

The Defendant argues that the state should have the burden of proving ability to pay, because it has the burden of proving criminal history. BOA at 29-30. This is not the law. RCW 9.94A760; RCW 10.01.160 (requiring the court to make inquiries of the offender). Nor would such a requirement be reasonable. A criminal prosecutor has access to criminal records in order to fulfill her duty of investigating crimes and determining the sentencing range. She does not have access to highly private medical and financial records when they are unrelated to any criminal investigation. In fact, unauthorized accessing or distribution of this information is itself a crime. The state

has no burden. Instead, according to the law, *the court* made the appropriate, individualized inquiry.

Prior to sentencing, the court ordered a presentence investigation (PSI). CP 51. The PSI detailed the Defendant's work and school history, his debts, and his ability to pay. CP 38-47.

At sentencing, the court further inquired: "Does your client agree upon release from confinement he is capable of employment and thus capable of paying costs on the fines?" RP (6/5/15) at 15. Counsel agreed that his client was physically able. *Id.* The Defendant informed the court that at the time of his arrest, he was working, going to school, and trying to get his diploma with intentions of being present for his three children. RP (6/5/15) at 16. *See also* RP 52-53, 58 (Defendant's earning statement found in his vehicle and entered into evidence).

The court acknowledged the Defendant had outstanding LFO debt in his other matters, but found a small fine appropriate nonetheless. *Id. See also* CP 24 (finding ability or likely future ability to pay).

> Again, the defendant has indicated through counsel that he is physically able to work. While he does have prior obligations based on prior convictions and a current

> child support obligation to one child with the reasonable belief that he may eventually have to pay support for the other two children, I still believe that an imposition of fines [is] appropriate. I would not here they are on the lower end of those fines.

RP (6/5/15) 17. The court imposed $700 in mandatory[2] fees ($500 victim assessment under RCW 7.68.035 and $200 criminal filing fee). CP 25. The court also imposed $587.48 in discretionary costs (sheriff's service fees and punitive fine). CP 25.

The Defendant retained private counsel for trial. RP (6/5/15) at 15. Following sentencing, the Defendant made a motion for an order of indigency. CP 6. Although the motion included no affidavit or any statement regarding his means, it was summarily signed. CP 6-7.

The Defendant argues that the court did not consider his living expenses, education, work experience, support of dependents, other LFO's, or "any other factor" related to his ability to pay. BOA at 28-29. This likely is part of a canned brief, because it is not the record in this case. The court had information on all of those factors.

The Defendant has lived independently of his parents since the age of 17. CP 44-45. After dropping out of school, the Defendant

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[2] The $100 DNA collection fee is mandatory regardless of ability to pay. CP 25. *See State v. Stoddard*, 192 Wn. App. 222, 225, 366 P.3d 474 (2016). However, the State has not cross-appealed on this issue.

worked at low paying jobs. CP 44. He returned to school and was close to graduating from an alternative high school when he was arrested. CP 44. The continued indigency report states that the Defendant has since obtained his GED.

It is not surprising that the Defendant reports no savings or assets. At the time of his arrest, he was only 20 years old and attending school. He has been incarcerated since 2014 on this case, and hired private counsel for a lengthy trial. Any savings he may have had in his few employable years would have been expended.

Despite his youth, the Defendant has a long criminal history with active gang involvement. CP 40-42. He has been accruing LFO's since 2008 such that he owes $30,000[3] in fines and restitution. CP 40, 45.

He is father to three children by three different mothers. CP 44-45. In the PSI, he told the CCO that he is ordered to pay child support for only one of his children – the order is for $160/mo. CP 44. In the continued indigency report, he now claims he has two child

[3] N.B. The LFO sum in the judicial information system necessarily shows the interest as a function of how the database is set up. However, individual clerk's offices like Franklin County may never collect interest as a matter of policy – closing out the case after the principal is paid or remitted. Therefore, the Defendant's true debt is not clear.

support collection cases. However, support orders are generally modified for incarcerated payors.[4] With a child support debt[5] of $6000 (or $10,000 as he now claims), it does not appear that the Defendant had been complying with those orders prior to his incarceration. CP 45.

While his debt has been going unpaid, the Defendant used his earnings and savings to buy multiple cell phones, conduct a marijuana grow operation, and hire a private attorney.

The court found the Defendant able to pay. This is reasonable. Mr. Murillo is able-bodied. CP 44 (has held employment in field labor). He is an English speaker with a GED. The pre-sentence investigation assesses him intelligent. CP 46. He is independent, having taken care of himself since the age of 17. He is energetic. RP

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[4] During a non-custodial parent's incarceration, administrative child support orders frequently are modified to zero orders and superior court child support orders can be modified to $50/mo per child. A parent can request the Division of Child Support perform the legal work of a modification of orders under RCW 74.20.220(3) by alleging incarceration is a substantial change of circumstances under RCW 26.09.170(5)(a).

[5] The Defendant does not explain, and may not know, whether that obligation is to be paid to the mothers/custodial parents or to the state. If the children are on public assistance, the support obligation is owed to the state. RCW 74.20.330. Debt that accrues to the state during incarceration is easily and regularly written off by requesting a conference board (which is just a scheduled but informal phone conversation). WAC 388-14A-4010(2)(b). The Division of Child Support also can and frequently does write off debts owed to the State when it is a hardship to the paying parent. WAC 388-14A-6400. Accordingly, this debt may be on paper only.

(6/5/15) at 16 (working and attending school while growing and selling marijuana and having an active social life). He knows how to navigate the system and is resourceful. CP 45 (obtaining a license to grow and manufacture marijuana); CP 178 (arranging for a non-profit organization to pay the rent for his grow operation). He is charismatic. Instead of paying support to his children's mothers, while incarcerated he has maintained sufficiently good relationships that he receives support from them. RP (6/5/15) at 15 (requesting his girlfriends send him an mp3 player and a television while helping him to pay for a private attorney in a trial regarding his sexual relations with a different female). He had two places to live at one time, both were rent free. CP 45, 178. He possessed multiple smart phones. And he is clearly ambitious. The Defendant was running a marijuana grow operation from a secondary address.

The Defendant's debt says nothing about the trajectory of his earning potential. The question before the court is *future* ability to pay. On this record, the Defendant is not a person destined for unemployment.

The Defendant argues that the court did not consider the impact of accruing interest on the rate of repayment. BOA at 28-29.

This is false. The Franklin County judge is well aware of the practice in Franklin County. The Franklin County Clerk does not collect interest on LFO's. Nor does interest accrue on Washington State child support arrears. WAC 388-14A-8600. And as to the principal, both debts have forgiveness or remission mechanisms. RCW 10.01.160; WAC 388-14A-6400.

The Defendant argues that his pre-existing debt and his youth mean that the court lacks discretion to order him to pay $587.48 in discretionary costs. BOA at 28. This is false. The law gives the court discretion. RCW 9.94A.760.

The Defendant's sole argument that he is unable to pay is based on his paper debt. The total debt is uncertain (1) because it appears the Defendant has not yet requested a conference board hearing on his child support to reduce the amount owed while incarcerated, (2) because the total LFO debt includes interest which will not be collected, and (3) because the debts are both negotiable as to both principal and payment plans.

After the considerable record and inquiry, the lower court's discretionary ruling is deserving of this Court's deference.

D. IF THE STATE SUBSTANTIALLY PREVAILS, COSTS SHOULD BE IMPOSED.

The court "will" award costs to a substantially prevailing party. RAP 14.2. The lower court has found, and Mr. Murillo has demonstrated, that he has the future ability to pay.

Costs serve as a deterrent against appeals which lack merit. The Defendant asks that the appeal be cost free and risk free for the reason that he has incurred debt in the past as a result of failing to engage in cost and risk analysis. His debts are a direct result of his criminal or irresponsible behavior. They remain large, because so far he has made little effort to repay it. The LFO number is inflated, because the software adds interest that will not be collected. To fail to impose costs for such a reason would reward career criminals and incentivize them to appeal without engaging in any analysis as to cost or merit. The better path is to allow the superior courts to remit when actual hardship can be demonstrated during collection.

If this Court exercises discretion, it should be in the model of the lower court which imposed some costs, but fewer than it may otherwise have.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction and sentence.

DATED: Sept. 14, 2016.

Respectfully submitted:

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Susan Marie Gasch <gaschlaw@msn.com>	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED September 14, 2016, Pasco, WA **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**