

NO. 33701-4-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SERGIO MAGANA, JR.

Appellant.

DIRECT APPEAL FROM THE SUPERIOR COURT OF
FRANKLIN COUNTY

BRIEF OF RESPONDENT

Respectfully submitted
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TABLE OF CONTENTS

I.	IDENTITY OF RESPONDENT	1
II.	RELIEF REQUESTED	1
III.	ISSUES FOR REVIEW	1
IV.	STATEMENT OF THE CASE	2
V.	ARGUMENT	4
	A. THE DEFENDANT’S CONSTITUTIONAL RIGHT TO SILENCE WAS NOT VIOLATED WHEN HE LATER MADE STATE-MENTS AFTER <i>MIRANDA</i> . EVEN IF THIS COURT FINDS A CONSTITUTIONAL ERROR, IT WAS HARMLESS.....	4
	B. THE DETECTIVE DID NOT PURPOSEFULLY VIOLATE A MOTION <i>IN LIMINE</i> ; THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING A MISTRIAL.....	9
	C. THE COURT DID NOT ERR IN ADMITTING THE FULL AND COMPLETE PHOTOGRAPHIC LINEUP WHICH SATISFIED THE BUSINESS RECORD EXCEPTION TO THE HEARSAY RULE.....	13
	D. THE STATE CONCEDES THAT THE NO CONTACT ORDER FOR THIS CASE SHOULD BE FOR A PERIOD OF FIVE YEARS.	17
	E. THIS COURT SHOULD REFUSE TO REVIEW THE JURY DEMAND FEE AS IT WAS NOT RAISED IN THE TRIAL COURT. IF THIS COURT REVIEWS THE ISSUE, THE DEFENDANT WAS CORRECTLY ASSESSED TWO JURY FEES AS TWO SEPARATE AND DISTINCT JURIES HAD TO BE IMPANELED FOR HIS CASE.....	18
	F. THE DEPARTMENT OF CORRECTIONS’ COMMUNITY CUSTODY CONDITIONS IMPOSED IN THIS CASE WERE NOT UNCONSTITUTIONALLY VAGUE OR OVERBROAD; ALL IMPOSED CONDITIONS WERE CRIME-RELATED.....	20
VI.	CONCLUSION.....	31

TABLE OF AUTHORITIES

CASES

<i>City of Puyallup v. Spenser</i> , __ Wn. App. __, 366 P.3d 954, 2016 WL 1019108 (2016)	11-12
<i>Greer v. Miller</i> , 438 U.S. 756, 107 S.Ct. 3102 (1987).....	7-8
<i>In re Rainey</i> , 168 Wn.2d 367, 229 P.3d 686 (2010).....	29
<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S.Ct. 1602 (1966)	5
<i>Sanchez v. Valencia</i> , 169 Wn.2d 782, 239 P.3d 1059 (2010).....	21, 26
<i>State v. Acrey</i> , 135 Wn. App. 938, 146 P.3d 1215 (2006).....	23-24
<i>State v. Allen</i> , 159 Wn.2d 1, 147 P.3d 581 (2006).....	11
<i>State v. Ancira</i> , 107 Wn. App. 650, 27 P.3d 1246 (2001).....	22
<i>State v. Anderson</i> , 112 Wn. App. 828, 51 P.2d 179 (2002)	17
<i>State v. Armendariz</i> , 160 Wn.2d 106, 156 P.3d 201 (2007).....	18
<i>State v. Aumick</i> , 126 Wn.2d 422, 894 P.2d 1325 (1995)	8
<i>State v. Autrey</i> , 136 Wn. App. 460, 150 P.3d 580 (2006)	24
<i>State v. Bahl</i> , 164 Wn.2d 739, 193 P.3d 678 (2008).....	21, 24-25
<i>State v. Bourgeois</i> , 133 Wn.2d 389, 945 P.2d 1120 (1997)	14, 17
<i>State v. Bunch</i> , 168 Wn. App. 631, 279 P.3d 432 (2012).....	19
<i>State v. Crenshaw</i> , 98 Wn.2d 789, 806, 659 P.2d 488 (1983)	14-15
<i>State v. Dixon</i> , 159 Wn.2d 65, 147 P.3d 991 (2006).....	15
<i>State v. Easter</i> , 130 Wn.2d 228, 922 P.2d 1285 (1996).....	7-8
<i>State v. Emery</i> , 174 Wn.2d 741, 278 P.3d 653 (2012).....	11-12
<i>State v. Engel</i> , 166 Wn.2d 572, 210 P.3d 1007 (2009).....	17

TABLE OF AUTHORITIES CONTINUED

State v. Escalona, 49 Wn. App. 251, 742 P.2d 190 (1987)12

State v. Evans, 96 Wn.2d 1, 633 P.2d 83 (1981)..... 7

State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999).....21

State v. Foxhoven, 161 Wn.2d 168, 163 P.3d 786 (2007) 13

State v. Fricks, 91 Wn.2d 391, 588 P.2d 1328 (1979)..... 8

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) 16

State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006)
overruled on other grounds by State v. W.R., Jr., 181 Wn.2d 757, 336
P.3d 1134 (2014) 4

State v. Halverson, 176 Wn. App. 972, 309 P.3d 795 (2013).....20

State v. Hathaway, 161 Wn. App. 634, 251 P.3d 263,
review denied, 172 Wn.2d 1021 (2011).....19

State v. Hearn, 131 Wn.App. 601, 128 P.3d 139 (2006)24

State v. Irwin, 191 Wn. App. 644, 364 P.3d 830 (2015)21, 25-28

State v. Jackson, 150 Wn. 2d 251, 76 P.3d 217 (2003).....11

State v. Johnson, 42 Wn. App. 425, 712 P.2d 301 (1985) 7-8

State v. Keene, 86 Wn. App. 589, 938 P.2d 839 (1997) 7

State v. Llamas–Villa, 67 Wn. App. 448, 836 P.2d 239 (1992)..... 24, 26

State v. Mak, 105 Wn.2d 692, 718 P.2d 407 (1986) 12

State v. Mason, 160 Wn.2d 910, 162 P.3d 396 (2007) 15

State v. McKee, 141 Wn. App. 22, 167 P.3d 575 (2010).....30

State v. Montague, 31 Wn. App. 688, 644 P.2d 715 (1982)..... 13

State v. Moreno, 173 Wn. App. 479, 294 P.3d 812 (2013).....19

State v. Parramore, 53 Wn. App. 527, 768 P.2d 530 (1989).....26

TABLE OF AUTHORITIES CONTINUED

State v. Perez-Valdez, 172 Wn.2d 808, 265 P.3d 853 (2011).....12

State v. Rich, 184 Wn.2d 897, 365 P.3d 746 (2016).....16

State v. Riles, 135 Wn.2d 326, 957 P.2d 655 (1998) 24-25

State v. Riley, 121 Wn.2d 22, 846 P.2d 1365 (1993).....22

State v. Rodriguez, 183 Wn. App. 947, 335 P.3d 448 (2014),
 review denied, 182 Wn.2d 1022 (2015)..... 17-18

State v. Romero, 113 Wn. App. 779, 54 P.3d 1255 (2002) 7

State v. Sansone, 127 Wn. App. 630, 111 P.3d 1251 (2005).....24

State v. Simpson, 136 Wn. App. 812, 150 P.3d 1167 (2007) 21-24

State v. Smits, 152 Wn. App. 514, 216 P.3d 1097 (2009).....19

State v. Urquhart, 105 Idaho 92, 665 P.2d 1102 (1983)..... 7

State v. Vasquez, 178 Wn.2d 1, 309 P.3d 318 (2013)16

State v. Wade, 186 Wn. App. 749, 346 P.3d 838 (2015) 11, 12

State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008)29

State v. Wentz, 149 Wn.2d 342, 68 P.3d 282 (2003).....17

State v. Whelchel, 115 Wn.2d 708, 801 P.2d 948 (1990) 8

State v. Williams, 157 Wn. App. 689, 239 P.3d 600 (2010)..... 25-26

STATUTES

RCW 10.01.160(2)19

RCW 10.46.190.....20

RCW 36.18.016(3)(b)19

RCW 5.45.020.....14

RCW 9.68.130(2)30

TABLE OF AUTHORITIES CONTINUED

RCW 9.94A.030(10)21

RCW 9.94A.505(8)21

RCW 9.94A.703(3)(f)21

RCW 9A.44.0794, 18

RCW 9A.44.079(1)15

RCW 9A.44.079(2)18

OTHER AUTHORITIES

K. Tegland 13B *Wash. Prac. Evidence* §361219

Sentencing in Washington, § 4.5 (1985)26

RULES

CrR 3.56

ER 404(b)22

ER 801(c)13

ER 803(6)14

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 of constitutional magnitude occurred in the trial of the Appellant (for ease of clarity, hereafter referred to as the Defendant), and asks this Court to affirm his conviction. Respondent asks this Court to refuse to review the jury demand issue, to hold that the community custody conditions are proper, and to remand only with instructions to clarify the five year time period of the No Contact Order.

III. ISSUES FOR REVIEW

- A. WHETHER THE DEFENDANT'S PRE-ARREST RIGHT TO SILENCE WAS VIOLATED BY TRIAL TESTIMONY AFTER HE LATER WAIVED HIS RIGHT TO REMAIN SILENT AFTER *MIRANDA*.**
- B. WHETHER A MISTRIAL SHOULD HAVE BEEN GRANTED TO ADDRESS THE TRIAL TESTIMONY OF DETECTIVE DAVIS.**
- C. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE PHOTOGRAPHIC LINEUP TO BE ADMITTED INTO EVIDENCE.**
- D. THE STATE CONCEDES THE NO CONTACT ORDER SHOULD BE FOR A PERIOD OF FIVE YEARS, THE STATUTORY MAXIMUM FOR THE OFFENSE.**
- E. WHETHER THE DEFENDANT HAS A RIGHT TO CHALLENGE FEES FOR THE FIRST TIME ON APPEAL; ALSO WHETHER THE TRIAL COURT WAS CORRECT TO ASSESS TWO JURY**

DEMAND FEES TO THE DEFENDANT FOR THIS CASE.

F. WHETHER THE COMMUNITY CUSTODY CONDITIONS ENTERED FOR THIS CASE WERE UNCONSTITUTIONALLY VAGUE, OVERBROAD, OR NOT CRIME-RELATED.

IV. STATEMENT OF THE CASE

Y.L. was fourteen years old when she met the Defendant through the social media site Facebook. (RP 123; 139). Y.L. testified that the Defendant asked either her age or her grade. (RP 123). She told him the truth, and he responded that she was “too young.” (*Id.*). Y.L. testified that the Defendant was in his 20s. (RP 152). He called her “babe” (RP 135; 181) and “baby” (RP 135; 181-182) and asked her—a fourteen year old girl—if she was “a cuddler.” (RP 135). After text-messaging, the Defendant tried to persuade Y.L. to sneak out of her house on October 2, 2014. (RP 124). She made up an excuse not to meet with him. (*Id.*). The next day on October 3, 2014 the Defendant met Y.L. around nine after she dropped her little brother off at his bus stop. (*Id.*). The Defendant called her and was by a white car. (RP 124-125). Y.L. got in the car with him, after which he parked outside near her home. (RP 125). Y.L.’s dad left the home, which the Defendant called to verify. (RP 126).

There was a knock on Y.L.’s door and she opened it, thinking it was her neighbor who sometimes checks on her. (RP 126-27). Unfortunately, for Y.L., the Defendant was at the door and let himself into her home. (RP 127). He asked her to be quiet and then got on top of her

on the sofa. (RP 128). Y.L. tried to push him off, but she could not as he was “too tall.” (RP 128-29). She told him no. (RP 150). She tried to bite him. (RP 129). Despite her best efforts to fight him off, the Defendant unzipped her pants. (RP 130). He told her not to be nervous, after which he raped her; penetrating her vagina with his penis. (*Id.*). He lifted up her shirt and started touching her breasts. (RP 131-32). The Defendant forcibly raped a fourteen year old virgin in her own home. (RP 130; 150).

As if that was not bad enough, the Defendant threatened this young girl saying that his name couldn't be mentioned in her house. (RP 133). He asked her to delete all their text messages because “[her] age scared [him].” (RP 90; 134). He told Y.L. “not to say [he] was there.” (RP 134). After the Defendant left, Y.L. realized her father's iPad had been stolen. (RP 135). When confronted, the Defendant denied stealing it. (*Id.*). Y.L. reported the sexual assault at the police station with her parents on October 21, 2014. (RP 135-136). She picked the Defendant out of a photo lineup. (RP 137; Exhibit 1). Y.L.'s mother provided her cell phone to the police for a consent-based search which produced text messages. (RP 68-71; 79; 83-83). Y.L. went through those texts with Detective Davis. (RP 83-84).

After he was arrested and waived his *Miranda* rights, the Defendant said he knew Y.L. (RP 91-92). He acknowledged that they met on Facebook, and that he had been to her apartment. (RP 92). He denied having sex with her. (*Id.*). He did, however, offer to provide

assistance [to the police] in local criminal cases. (RP 93). He told the detective he felt confident he could “beat” this case. (RP 96). He alleged Y.L. fabricated the report of the sexual assault because he stole her iPad. (RP 108).

The Defendant was charged by Information with Rape of a Child in the Third Degree, RCW 9A.44.079. (CP 108-109). A mistrial resulted on May 21, 2015 (CP 104) when four members of the already-impaneled jury saw the Defendant before trial in a holding cell, in handcuffs, and in close proximity to a jail Corrections Officer. After a re-trial, the Defendant was convicted of the sole count by a Franklin County Jury. (CP 68). It is from this decision that he now appeals.

V. ARGUMENT

A. **THE DEFENDANT’S CONSTITUTIONAL RIGHT TO SILENCE WAS NOT VIOLATED WHEN HE LATER MADE STATEMENTS AFTER *MIRANDA*. EVEN IF THIS COURT FINDS A CONSTITUTIONAL ERROR, IT WAS HARMLESS.**

A jury is entitled to have an accurate impression of law enforcement’s investigation and the steps they took to ensure that the Defendant was held accountable. The State’s intention in posing questions to the detective was “to explain the investigative process in [the] case,” not to comment on the Defendant’s failure to meet with police. *State v. Gregory*, 158 Wn.2d 759, 840, 147 P.3d 1201 (2006) (*overruled on other grounds by State v. W.R., Jr.*, 181 Wn.2d 757, 759, 336 P.3d 1134 (2014)). In the *Gregory* case, the defendant’s silence was

referenced in the State's closing argument (unlike in this case) but the court, in finding that there was not an improper comment on the right to silence, held that the prosecutor's argument was "so subtle and brief that it did not naturally and necessarily emphasize any testimonial silence." *Id.* The Defendant seemingly has no problem with the following exchange:

Q: Did you attempt to locate the [D]efendant?

A: I did.

Q: For how long?

A: Several months. . . . I left my business card with [his brother] and let him know that I needed to get hold of him.

(RP 90-91). The Defendant takes issue, however, with the detective's testimony that the Defendant failed to make a scheduled appointment (RP 97-98) after first fishing for information over the phone. (RP 97). And also that the Defendant made no contact with the detective between December 8th of 2014 (the date of their phone call) and January 5th of 2015. (RP 98).

What differentiates our situation from the cases the Defendant relies on is the fact that the Defendant *did ultimately speak* with Detective Davis after waiving his *Miranda* rights on January 5th, 2015. (RP 91-92); *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). He gave some statements before he was read his rights, which the State agreed to (and

did) suppress in the trial. The balance of the Defendant's statements were stipulated to under CrR 3.5:

For 3.5 purposes we're not contesting whether or not statements were voluntary, a December 8th phone call. However, there were statements on January 5th that my client allegedly made to Detective Davis. Those statements, he was in custody. He made certain statements prior to *Miranda* being read, and the [S]tate agrees that those statements should not be admitted. Subsequent to that the allegation is that my client was read his rights, that he understood his rights, and that he did in fact waive his rights. Those statements would likely be admitted. So we're stipulating to that.

(04/28/2015 RP 2). The Defendant expressed no confusion and gave the detective a full interview, acknowledging that he knew Y.L., that they met on Facebook, and that he had been to her apartment. (RP 92). He denied having sex with her. (*Id.*). He had no explanation for asking Y.L. to delete her text messages, but suggested that she had fabricated the report of the sexual assault because he stole her iPad. (RP 93). He offered to provide assistance for local criminal cases (*Id.*), and was confident he could "beat" this charge. (RP 94).

Our situation is distinguishable from *Keene* as, aside from impermissible witness testimony, the prosecutor directly commented on the defendant's right to remain silent:

[the defendant] played phone tag for a little bit and Detective Pea had to leave several messages for him, finally leaving a message she would turn it over to the Prosecutor if she did not hear from him and she never heard from Terry Keene again. It's your decision if those are the actions of a person who did not commit these acts.

State v. Keene, 86 Wn. App. 589, 592, 938 P.2d 839 (1997). The *Keene* court held that “[b]ecause the testimony and argument constituted an impermissible comment on Keene’s right to remain silent, the State bears the burden of showing the error was harmless.” *Id.* at 594. (emphasis added).

Easter as well involved not only testimony of pre-arrest silence but also comments by the prosecutor in closing argument to the jury referencing the defendant’s pre-arrest silence. The court held that his “right to silence was violated by testimony he did not answer and looked away without speaking to [the officer]. . . . It was also violated by testimony and argument he was evasive. . . .” *State v. Easter*, 130 Wn.2d 228, 241, 922 P.2d 1285 (1996) (emphasis added). Indeed, the State “compounded the error by emphasizing Easter’s pre-arrest silence many times in closing argument.” (*Id.* at 242-43). This case is divergent from *Easter*, *Keene*, and *State v. Romero*, 113 Wn. App. 779, 54 P.3d 1255 (2002) for the mere fact that the Defendant later made statements after *Miranda*; statements concerning the iPad that he used to advance his defense that he was merely a thief and not a child rapist.

However, assuming *arguendo* an error, the appellant must demonstrate reversible error, i.e. prejudice. *Greer v. Miller*, 438 U.S. 756, 765, 107 S.Ct. 3102 (1987); *State v. Urquhart*, 105 Idaho 92, 95, 665 P.2d 1102 (1983); *State v. Evans*, 96 Wn.2d 1, 4, 633 P.2d 83 (1981). Prejudice is weighed in context. *State v. Johnson*, 42 Wn. App. 425, 431,

712 P.2d 301 (1985); *Greer v. Miller*, 438 U.S. 756, 766, 107 S.Ct. 3102, (1987). If this Court finds that there was error in the testimony of Detective Davis, the State concedes that it was a constitutional error. The State, therefore, would be in the position to argue whether the use of the Defendant's pre-arrest silence was harmless.

In the event that the error was not harmless, the Defendant would be entitled to receive a new trial. *Easter*, 130 Wn.2d at 242 (*citing State v. Fricks*, 91 Wn.2d 391, 397, 588 P.2d 1328 (1979)). “[The courts will] find a constitutional error harmless only if convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error.” *Easter*, 130 Wn.2d at 242 (*citing State v. Aumick*, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995)). “[And also] where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt.” *Easter*, 130 Wn.2d at 242 (*citing State v. Whelchel*, 115 Wn.2d 708, 728, 801 P.2d 948 (1990)). The State's intention in asking the questions was to provide the jury with a full and accurate picture of the investigative process in this case. If this Court finds error, it was harmless.

The untainted evidence here was overwhelming; the most damning pieces coming by virtue of the Defendant's own words in his text messages, even after finding out Y.L.'s true age. He said she was “too young” (RP 123), but tried to persuade her to sneak out of her house. (RP 124). He called her “babe” (RP 135; 181) and “baby” (RP 135; 181-182) and asked a fourteen year old girl if she's “a cuddler.” (RP 135). The

Defendant, after entering her apartment, forced himself on top of Y.L. (RP 128). She tried to push him off of her and could not because he was too tall. (RP 129). She tried to bite him (*Id.*), and he told her not to be nervous (RP 130), after which he unzipped her pants, and raped her by penetrating her vagina with his penis (RP 130). To try and avoid accountability the Defendant asked her to delete their text messages because “[her] age scared [him].” (RP 133-34). Because the evidence of guilt was overwhelming coupled with the fact that the State did not re-emphasize the Defendant’s pre-arrest silence in closing argument, this Court should find that the error was harmless.

B. THE DETECTIVE DID NOT PURPOSEFULLY VIOLATE A MOTION *IN LIMINE*; THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING A MISTRIAL.

This trial was started twice, the first of which resulted in a mistrial. There were also two separate judges that presided over the case, the Honorable Alex Ekstrom in the first instance, and the Honorable Robert G. Swisher for the second trial. Judge Ekstrom had previously made rulings on Motions *in Limine* that Judge Swisher honored. The transcript of the Defendant’s Pre-Trial hearing was sent to this Court (04/28/2015 RP 1-5), but Defendant’s Appellate Counsel did not order transcripts from May 20-21, 2015 covering the first trial including the arguing of Motions *in Limine* and the jury selection process yielding the first jury. That transcript would have been helpful to arguing this issue. Relying on this

author's best recollection of events, Judge Ekstrom's rulings on exactly what testimony the State could elicit were altered during the time that the parties argued the motions.

After he had been *Mirandized*, when he was being interviewed in the jail, the Defendant asked the Detective if he could "make the charge go away" (RP 8; 94). He offered to provide assistance on a currently pending murder case against the alleged shooter, DeShawn Anderson. (RP 8). He also offered to provide assistance to law enforcement to help locate large amounts of narcotics. (*Id.*). Initially, Judge Ekstrom was going to allow Detective Davis to testify that the Defendant offered to help locate a wanted individual but then changed his ruling to allow the State to ask "Did he provide any offers of assistance for any local criminal cases?" Counsel for the State worded the question exactly as the judge had instructed (RP 93), and was looking to elicit testimony regarding the Defendant's arrogance that he could "beat" this charge with the next question "[w]hat else did he say relative to the prosecution of this charge?" (RP 93). The Detective, either misunderstanding the question or Judge Ekstrom's prior rulings about narcotics (from two months before this trial) responded: ". . . he asked if we could make this charge go away, he would cooperate in helping the police department in narcotics related cases." (RP 94).

The State agreed to strike the response (RP 94), but defense counsel moved for a mistrial. (*Id.*). The trial court declined to grant a

mistrial and instead instructed the jury to disregard the detective's answer without repeating and reemphasizing it. (RP 95-96). Defense counsel claimed that his client's right to a fair trial was prejudiced (RP 94), while on the other hand—*repeatedly and consistently* argued the theory that his client was a thief who stole an iPad from Y.L.'s apartment. (RP 37-38; 107-108; 114; 144; 186; 188). In terms of prejudice, offering assistance in narcotics cases is a far cry from admittedly stealing (what potentially could be) a very expensive electronic device. The logical inference is that the Defendant could provide assistance in narcotics cases as he himself was drug-involved, but the trial court dealt with the matter appropriately and judiciously in giving a curative instruction to avoid potential prejudice to the Defendant.

The trial court's denial of a motion for a mistrial is reviewed for abuse of discretion. *City of Puyallup v. Spenser*, __ Wn. App. __, 366 P.3d 954, 955, 2016 WL 1019108 (2016) (*citing State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012)); *See also State v. Jackson*, 150 Wn.2d 251, 276, 76 P.3d 217 (2003). "A trial court abuses its discretion in denying a motion for a mistrial only if its decision is manifestly unreasonable or based on untenable grounds." *State v. Wade*, 186 Wn. App. 749, 772, 346 P.3d 838 (2015) (*citing State v. Allen*, 159 Wn.2d 1, 10, 147 P.3d 581 (2006)). There are three items examined in determining if a trial court abused its discretion in denying a mistrial: (1) the seriousness of the irregularity, (2) whether the statement was cumulative

of other properly admitted evidence, and (3) whether the irregularity could be cured by an instruction. *State v. Wade*, 186 Wn. App. at 773 (citing *State v. Perez-Valdez*, 172 Wn.2d 808, 818, 265 P.3d 853 (2011)).

It bears noting that Judge Swisher is a seasoned trial judge with decades of experience on the Superior Court bench. Regarding item (1), the irregularity in this case was not that serious; as previously explained the mere inference that the Defendant was drug-involved is no more damning than his own admission (and entire theory of his case) that he was a thief. While the State concedes on issue (2) that the testimony was not cumulative of other admitted evidence, clearly the trial court was in the best position here to determine if a new trial should be granted weighing the potential prejudice to the Defendant. “The court should grant a mistrial only when the defendant has been so prejudiced that *nothing short of a new trial* can ensure that the defendant will be fairly tried.” *Puyallup v. Spenser*, 366 P.3d at 955 (quoting *State v. Emery*, 174 Wn.2d at 741); *State v. Mak*, 105 Wn.2d 692, 701, 718 P.2d 407 (1986). The Defendant cannot meet that very high burden.

Compare Detective Davis’ honest mistake with a case where a mistrial was proper. The victim of the crime violated a motion *in limine* by referring to a prior conviction of the defendant for the same crime he was on trial for, testifying that the defendant “has a record and stabbed someone.” *State v. Wade*, 186 Wn. App. at 774 (quoting *State v. Escalona*, 49 Wn. App. 251, 255, 742 P.2d 190 (1987)). The Defendant’s

reliance on *State v. Montague* is misplaced; *Montague* differs markedly from the facts of our case as in that situation inadmissible evidence of the defendant's former rape investigation was elicited during a rape case. *State v. Montague*, 31 Wn. App. 688, 690-92, 644 P.2d 715 (1982). By contrast, here, the testimony in no way related to the Defendant's prior sex offense history or propensity for sexually deviant behavior with minor females. Assuming for the sake of argument that there was at least some degree of prejudice, regarding issue (3), the irregularity was properly cured by the instruction to the jury to disregard the detective's answer. All things considered, the trial court did not abuse its discretion in denying the Defendant's motion for a mistrial.

C. THE COURT DID NOT ERR IN ADMITTING THE FULL AND COMPLETE PHOTOGRAPHIC LINE-UP WHICH SATISFIED THE BUSINESS RECORD EXCEPTION TO THE HEARSAY RULE.

The Defendant contends the trial court abused its discretion in admitting Exhibit 1 (a two page photographic montage) and also that the Defendant's conviction was not based on sufficient evidence regarding the age requirement. (BOA 19-27). "Interpretation of an evidentiary rule is a question of law, which [is reviewed] de novo." *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). Hearsay is defined by ER 801(c) as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." In this case the court properly interpreted the

hearsay rule, finding that Exhibit 1 met the business record exception, ER 803(6). The rule for introducing business records in evidence sets forth that:

a record of an act, condition or event, shall . . . be competent evidence if the custodian . . . testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

RCW 5.45.020.

In investigating the case, Pasco Police Officer Chris Caicedo met initially with Y.L. and her parents at the police department on October 21, 2014. (RP 50-51; 136). He prepared a photo lineup after Y.L. provided him information about the Defendant's name and age. (RP 52). The lineup was admitted at trial as Exhibit 1. (RP 55-56; CP 67). Officer Caicedo testified that he followed his normal procedure in both preparing (RP53) and administering the photo lineup (RP 53-54). He went on to testify that it was made and kept in the regular course of his business. (RP 55). Y.L. identified the Defendant (RP 137), who was listed in position 5. (RP 56-57). His age, though not visible to Y.L., was listed on the second page also corresponding with position 5. (RP 57-58).

“The decision to admit evidence lies within the sound discretion of the trial court and should not be overturned on appeal absent a manifest abuse of discretion.” *State v. Bourgeois*, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997) (*citing State v. Crenshaw*, 98 Wn.2d 789, 806, 659 P.2d 488

(1983)); *State v. Mason*, 160 Wn.2d 910, 922, 162 P.3d 396 (2007). A trial court abuses its discretion when “the court’s decision is manifestly unreasonable or rests on untenable grounds.” *State v. Dixon*, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006). Manifestly unreasonable is tantamount to a decision that no reasonable person would take. *Dixon*, 159 Wn.2d at 76 (citing *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). Officer Caicedo’s testimony established proper foundation to meet the business record exception to the hearsay rule. He properly testified to the photo montage’s identity, mode of preparation and that it was made and kept in the regular course of his business. (RP 55). Clearly it was made near the time of the rape as it was prepared the same night Y.L. first reported the incident to police, October 21, 2014. Judge Swisher’s decision was reasoned and the Defendant cannot show it was manifestly unreasonable or made on untenable grounds; the court did not abuse its discretion in admitting Exhibit 1.

The Defendant is correct in his recitation of the law of Rape of a Child in the Third Degree, as codified in RCW 9A.44.079(1). (BOA at 22). The State was required to prove that the Defendant was over the age of eighteen at the time of this offense as it was proved that Y.L. was 14. (RP 121). In considering whether sufficient evidence exists to support a conviction, courts view the evidence in the light most favorable to the prosecution and determine whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”

State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016) (quoting *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). Aside from Exhibit 1 itself laying out the Defendant's age on the second page, circumstantial evidence supported the jury's verdict regarding the age requirement. "Inferences based on circumstantial evidence must be reasonable and cannot be based on speculation." *State v. Rich*, 184 Wn.2d at 903 (quoting *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013)).

Here, the Defendant texted Y.L. that she was "too young." (RP 123). He intimidated her by saying that his name couldn't be mentioned in [her] house. (RP 133). He asked her to delete their text messages (RP 133-134), saying "[w]ill you do me a favor? . . . Delete all our texts from today and last night, LOL, please. And I just deleted yours because your age scares me and I don't want some of those messages saved, you know." (RP 134) (emphasis added). Y.L. also testified that the Defendant was older than she was. (RP 140). She didn't remember if he told her his age or not, "I just, I just, like you can see that he was around his 20's." (RP 152-153).

The jury, during the course of the two day trial was able to observe the Defendant who, aside from the sheer fact of being charged and tried as an adult in Superior Court, looked physically like a man over the age of 18. Exhibit 1 coupled with the circumstantial evidence in this case and further combined with the jurors' general observations and common sense clearly established that the Defendant was over 18 (or 48

months older than Y.L. who was 14 at the time of the offense). The Defendant's conviction should be upheld because a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009) (citing *State v. Wentz*, 149 Wn.2d 342, 347, 68 P.3d 282 (2003)).

Even if this Court were to hold that Exhibit 1 in its entirety was improperly admitted, the error was non-constitutional. Non-constitutional error is harmless "unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Anderson*, 112 Wn. App. 828, 837, 51 P.2d 179 (2002) (quoting *State v. Bourgeois*, 133 Wn.2d at 403, 945 P.2d 1120 (1997)). The Defendant cannot show that the outcome of the trial would have been altered without Exhibit 1. The jury would still be left with Y.L.'s testimony that the Defendant was in his 20's, they could rely on their personal observations of the Defendant, and—most damaging to the Defendant—are his text messages saying that Y.L.'s was too young (RP 123), that her age "scared him" (RP 134), not to mention the fact that he asked her to delete their text messages. (RP 134).

D. THE STATE CONCEDES THAT THE NO CONTACT ORDER FOR THIS CASE SHOULD BE FOR A PERIOD OF FIVE YEARS.

The Defendant is correct in his assertion that the No Contact Order for this case cannot exceed the statutory maximum for the crime. (BOA at 27); *State v. Rodriguez*, 183 Wn. App. 947, 959, 335 P.3d 448

(2014), *review denied*, 182 Wn.2d 1022 (2015); *accord State v. Armendariz*, 160 Wn.2d 106, 120, 156 P.3d 201 (2007). It is also true that the Defendant's conviction, Rape of a Child in the Third Degree as codified in RCW 9A.44.079 has a five year maximum sentence as a Class C Felony. (RCW 9A.44.079(2)).

At sentencing, the State asked for a five year No Contact Order in the form of a Sexual Assault Protection Order. (08/13/2015 RP 2). The Order itself, signed on August 13, 2015 correctly indicated that it expired five years later on August 13, 2020. (CP 19-20). Similarly, the Defendant's felony Judgment and Sentence indicated the term of the No Contact Order would be five years. (CP 29). The State concedes that the 10 year time period as written on Appendix H of the Judgment and Sentence (as prepared by the Department of Corrections) (CP 17) is incorrect and agrees to correct the Appendix on remand. Depending on this Court's ruling as to issue F in this appeal—namely whether any of the Community Custody conditions are vague or overbroad—the State will address all of the issues with Appendix H together.

E. THIS COURT SHOULD REFUSE TO REVIEW THE JURY DEMAND FEE AS IT WAS NOT RAISED IN THE TRIAL COURT. IF THIS COURT REVIEWS THE ISSUE, THE DEFENDANT WAS CORRECTLY ASSESSED TWO JURY FEES AS TWO SEPARATE AND DISTINCT JURIES HAD TO BE IMPANELED FOR HIS CASE.

For the first time on appeal, the Defendant challenges a portion of his Legal Financial Obligations (LFOs) in the form of the jury demand fee. (BOA at 28-29). The imposition of this fee was not objected to by defense counsel at sentencing. (08/13/2015 RP 1-9). There is no evidence in the record that the State has sought to enforce the Defendant's LFOs. His challenge, therefore, is not properly before this court in this appeal as a matter of right. *State v. Smits*, 152 Wn. App. 514, 216 P.3d 1097 (2009); this Court should decline to review the issue as it was not addressed in the trial court. (RAP 2.5(a)).

If this Court reviews the issue, the Defendant is correct in his assertion that it is well-settled that a jury demand fee is capped at \$250. (BOA at 28); See also RCW 10.01.160(2); RCW 36.18.016(3)(b); 13B Wash. Prac. §3612; *State v. Hathaway*, 161 Wn. App. 634, 652-53, 251 P.3d 263, *review denied*, 172 Wn.2d 1021 (2011); *State v. Moreno*, 173 Wn. App. 479, 499, 294 P.3d 812 (2013); *State v. Bunch*, 168 Wn. App. 631, 633-34, 279 P.3d 432 (2012). Indeed, the *Hathaway* court “ultimately concluded that RCW 36.18.016(3)(b) caps a ‘jury demand fee’ at \$250 when a 12-person jury is called in a criminal trial.” *State v. Moreno*, *Supra* 173 Wn.App. at 499, (*citing Hathaway*, *Supra* 161 Wn.App. at 653). What makes this situation different is the fact that *two separate* 12-person juries were impaneled for the same case; a mistrial was declared to protect the Defendant's rights after four jurors in the first case saw the Defendant with a Corrections Officer in the holding cell.

(CP 103-104). In the situation where one criminal defendant is tried in two separate trials, he was assessed a \$500 jury demand fee. *State v. Halverson*, 176 Wn. App. 972, 973, 309 P.3d 795 (2013); FN 5.

RCW 10.46.190 provides that “[e]very person convicted of a crime . . . shall be liable to *all the costs of the proceedings against him* . . . including, when tried by a jury in the superior court . . . a jury fee.” (emphasis added). Notably, the statute does not require that a superior court trial has to be completed before a jury fee is assessed. Because two separate juries were impaneled for the Defendant’s case, he should be responsible for two separate jury fees the sum total being \$500. (08/13/2015 RP 5). The fact that the Defendant’s first case resulted in a mistrial cannot be levied against the State. This Court can surely recognize that costs were spent by Franklin County despite the fact that the case did not actually proceed to trial; impaneling a jury is not free. From the plain language of RCW 10.46.190 noting that a defendant is responsible for *all* costs of the proceedings against him, this Court should rule that the \$500 fee was proper.

F. THE DEPARTMENT OF CORRECTIONS’ COMMUNITY CUSTODY CONDITIONS IMPOSED IN THIS CASE WERE NOT UNCONSTITUTIONALLY VAGUE OR OVERBROAD; ALL IMPOSED CONDITIONS WERE CRIME-RELATED.

Aside from the length of the No Contact Order as previously discussed, the Defendant takes further issue with the terms of Appendix H (CP 6-18) and his community custody conditions, arguing either that

they are unconstitutionally vague, overbroad, or not crime-related. (BOA at 29-41). He objects specifically to conditions (14), (15), (18), (19), and (25). (BOA at 29-30). Understanding that “illegal or erroneous sentences may be challenged for the first time on appeal” *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (*quoting State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)), each will be discussed in turn. Generally speaking, “[a] sentencing court may impose crime-related prohibitions and affirmative conditions.” *State v. Simpson*, 136 Wn. App. 812, 815, 150 P.3d 1167 (2007) (*citing RCW 9.94A.505(8)*). It is proper and routine for a Court to order an offender to “comply with any crime-related prohibitions.” RCW 9.94A.703(3)(f).

“Crime related prohibitions” are “[orders] of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted” RCW 9.94A.030(10). They can be reversed only upon a finding that the trial court abused its discretion and if the condition is “manifestly unreasonable” *State v. Irwin*, 191 Wn. App. 644, 654, 364 P.3d 830 (2015) (*quoting Sanchez v. Valencia*, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010)). The Defendant cannot meet that burden for any of the community custody conditions in this case.

- (i) (14) Do not frequent parks, schools, malls, family missions or establishments where children are known to congregate or other areas as defined by supervising CCO, treatment providers;

The Defendant argues this condition is vague, overbroad, and not crime-related. (BOA at 29). Without question Counsel for the State can tell this Court that the Defendant is a deviant sexual predator. Not only did he rape a fourteen year old virgin in her own home as the basis for this case, he is currently being held in the Benton County Jail on federal charges relating to Child Pornography. A prior Rape of a Child in the Third Degree charge had to be dismissed against the Defendant by Franklin County as the victim ran away and could not be located. Though it was discussed only briefly at trial, there were “other allegations of [the Defendant’s] sexual misconduct with other under-aged females through Facebook and other means of technology.” (RP 38-39). The State agreed not to present that material for ER 404(b) purposes. (RP 43-44).

Dealing first with the issue of whether the condition is crime-related, the Defendant was convicted of raping a child. The community custody condition at issue aims to prevent the Defendant from having unfettered access to minor children by prohibiting him from going to places minors are known to frequent. Whether a community custody condition is crime-related is reviewed for an abuse of discretion. *State v. Simpson*, 136 Wn. App. 812, 815, 150 P.3d 1167 (2007) (*citing State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993)); *State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001). It is a high standard that the Defendant herein cannot meet.

The trial court (and this Court, for that matter) have a vested interest in preventing similar crimes from reoccurring. Indeed, “the community wants to provide necessary support and supervision in matters of judgment and impulse control.” *Simpson*, 136 Wn. App. at 818. By prohibiting the Defendant from going to certain places the trial court is attempting to deny him the opportunity to access future victims. To put it another way, because the Defendant cannot control his sexually deviant impulses, he should not be allowed to go to places minor children are known to be.

In the case of *State v. Acrey*, the defendant drained the retirement savings of an elderly man and saddled him with \$83,000 of debt. In affirming a condition that prohibited Ms. Acrey from working as a caretaker for elderly or disabled individuals, Division One held that the prohibition was crime-related and was not unconstitutionally vague. *State v. Acrey*, 135 Wn. App. 938, 941, 146 P.3d 1215 (2006). Because the decision to prohibit the Defendant from parks, schools, and malls (among other areas) is not manifestly unreasonable or exercised for untenable reasons, this Court should not find an abuse of discretion. Due to the nature of Rape of a Child in the Third Degree, prohibiting access to minors is undoubtedly crime-related.

“[C]ourts routinely reach the merits of preenforcement vagueness challenges to sentencing conditions, including Washington courts that have considered such challenges without addressing whether it is proper

to do so in the preenforcement setting. *State v. Bahl*, 164 Wn.2d, 739, 745-46, 193 P.3d 678 (2008) (citing as examples *State v. Riles*, 135 Wn.2d 326, 347–51, 957 P.2d 655 (1998) (challenges to community placement conditions prohibiting one defendant from having contact with minors or frequenting places where children congregate, and requiring another defendant to make reasonable progress in treatment); *State v. Llamas–Villa*, 67 Wn. App. 448, 836 P.2d 239 (1992) (challenge to condition that the defendant not associate with persons using, possessing, or dealing with controlled substances); *State v. Hearn*, 131 Wn. App. 601, 607–09, 128 P.3d 139 (2006) (challenge to condition that the defendant not associate with known drug offenders); *State v. Autrey*, 136 Wn. App. 460, 466–69, 150 P.3d 580 (2006) (challenges to conditions that the defendants not have sexual contact with anyone without that individual's explicit consent and that the defendants not have sexual contact with anyone without prior approval of their therapists); accord, e.g., *State v. Simpson*, 136 Wn. App. at 816-17; *State v. Acrey*, 135 Wn. App. 938, 947-48, 146 P.3d 1215 (2006).

“An unconstitutionally vague sentencing condition deprives an offender of due process of law.” *Acrey*, 135 Wn. App. at 947 (citing *State v. Sansone*, 127 Wn. App. 630, 638-39, 111 P.3d 1251 (2005)). “The due process vagueness doctrine under the United States Constitution has two purposes: first, to provide adequate notice of proscribed conduct, and second, to protect against arbitrary, ad hoc enforcement. *Id.* at 947

(citing *State v. Riles*, 135 Wn.2d at 348 (1998)). The condition contains an illustrative list of prohibited locations and gives “ordinary people sufficient notice to ‘understand what conduct is proscribed.’” *State v. Irwin*, 191 Wn. App. 644, 655, 364 P.3d 830 (2015) (quoting *State v. Bahl*, 164 Wn.2d, 739, 753, 193 P.3d 678 (2008)). There is not the same fear of arbitrary enforcement here as there was in *Irwin* as a list of sample locations are set out in the condition. The condition is not void for vagueness.

The condition is not overbroad as the Defendant claims. It does not need to specify that it relates to “primary or secondary” schools when it by the same token explains that it relates to establishments where *children* are known to congregate. No community custody officer in the world would allege a violation of the Defendant’s community custody where he was attending college, as he claims. (BOA at 36). Nor would they attempt to violate him for being in places that do not relate to areas *children* are known to congregate. Failing to use general common sense does not make a provision overbroad.

- (ii) (15) Do not frequent X-Rated movies or adult book stores while on community custody;

The Defendant argues this condition is not crime-related. (BOA at 29). “The existence of a relationship 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. Williams*, 157 Wn. App.

689, 691, 239 P.3d 600 (2010) (*citing State v. Parramore*, 53 Wn. App. 527, 530, 768 P.2d 530 (1989) (*quoting* David Boerner, *Sentencing in Washington*, § 4.5 (1985)). “No causal link need be established between the condition imposed and the crime committed, so long as the condition relates to the circumstances of the crime. *State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992) (*citing Parramore*, 53 Wn. App. at 527). The circumstance of this crime is a sexual assault. The Defendant should not be able to freely view depictions of sexual acts.

Again, because the Defendant cannot control his impulses, the trial court and the Department of Corrections are left to try to do it for him. While it is true that the charge in this case did not involve x-rated movies or adult book stores, the Defendant forced himself on a minor child and had sexual intercourse with her. Allowing him unfettered access to sexually explicit materials in visual or printed form will do nothing more than strengthen his urges to commit further acts of sexual deviancy. Because the Defendant is unable (or resistant) to have normal and consensual sexual encounters with partners of a suitable age, he should not be allowed access to sexually explicit materials that depict and encourage sexual intercourse.

The trial court did not abuse its discretion in approving that community custody condition. The condition can be reversed only if it is “manifestly unreasonable” *State v. Irwin*, 191 Wn. App. 644, 654, 364 P.3d 830 (2015) (*quoting Sanchez v. Valencia*, 169 Wn.2d 782, 791-92,

239 P.3d 1059 (2010)), and the nature of the Defendant's actions do not support that conclusion. The courts would not allow a convicted drug addict free and open access to obtain more drugs. Nor should it allow a sexual deviant free and open access to other sexually explicit material in whatever form he so chooses. All things considered, the trial court did not abuse its discretion in entering that community custody condition.

- (iii) (18) Do not use, purchase, or own any electronic device which allows the offender to use social media sites or networks or the internet. This includes smartphone, computer or other devices;

The Defendant argues this condition is not crime-related and is overbroad. (BOA at 29-30). This is perhaps the most clearly crime-related prohibition levied against the Defendant and the trial court did not abuse its discretion in authorizing the prohibition. It is completely uncontroverted that the Defendant met Y.L. through Facebook (RP 123; 139; CP 39) which is a social media networking site, accessed through use of the internet. As in *State v. Irwin*, 191 Wn. App. at 658, there is evidence in the record that technology contributed to the Defendant's crime. Indeed, the Defendant's unmonitored and open access to the internet is what precipitated this case, allowing the Defendant to "troll for under aged victims." (CP 41). Despite his smug and arrogant refusal to even apologize for what he did (CP 41), he denies even contacting other minor females on Facebook and soliciting child pornography. (CP 41-42).

Facebook aside, there are many other internet sites or cell phone

applications that would allow the Defendant to contact minor females: Craigslist, Backpage, Twitter, Instagram, Snapchat, Kik, Skype, WhatsApp, WeChat, Tango, Viber, and Voxel, just to name a few. It is true that we live in a technology-driven age but an individual (especially an offender like the Defendant) does not *have to have* all the internet capable devices his appellate counsel listed. (BOA at 40). It is certainly true that the Defendant could own a cellular phone (and numerous other devices) that do not connect to the internet. The inconvenience he will have in following these conditions pales in comparison to the very real trauma he inflicted on Y.L. and other female victims. It is disheartening he now argues how “absurd and impossible” the trial court’s attempt is to protect others from his actions; not at all seeing the forest for the trees.

The Defendant is free to live in his delusions, but this Court and the Department of Corrections both have an interest in protecting minor children from offenders like the Defendant who would willingly do them harm. Even if the condition will make it “virtually impossible for [the Defendant] to possess a cell phone after release,” it is not an abuse of discretion to retain the language. See *Inwin*, 191 Wn. App. at 659. Because the trial court’s decision was not manifestly unreasonable, it should be affirmed.

- (iv) (19) If deemed necessary by treatment provider, computer use for work purposes only, are to be approved and monitored solely by a certified sex offender therapist;

The Defendant argues this condition is not crime-related and is overbroad. (BOA at 29-30). Item 19 clarifies item 18 and allows monitored internet access in certain circumstances. Understanding that the Defendant may have to use the internet, it is not at all unreasonable to require that his usage be monitored. The Department of Corrections does not intend to stand in the way of the Defendant being gainfully employed—indeed, the only way he can repay court costs and fees including restitution to Y.L. is if he is.

Computer use is crime-related as the Defendant used the internet to reach out to his young victim. The courts “more carefully review conditions that interfere with a fundamental constitutional right.” *In re Rainey*, 168 Wn.2d 367, 374, 229 P.3d 686 (2010) (citing *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008)). Such conditions must be ‘sensitively imposed’ so that they are ‘reasonably necessary to accomplish the essential needs of the State and public order.’” *Id.* Having the ability to work is clearly a fundamental right. Condition (18)’s prohibition is clearly “sensitively imposed” by Condition (19)’s compromise, allowing the Defendant to get and maintain employment. The trial court did not abuse its discretion in authorizing that community custody term and it is not overbroad.

- (v) (25) You shall not use or physically/electronically possess sexually explicit material; meaning any pictorial material displaying direct physical stimulation of unclothed genitals, masturbation, sodomy (i.e. bestiality or oral or anal intercourse),

flagellation or torture in the context of a sexual relationship, or emphasizing the depiction of adult or child human genitals; provided however, that works of art of anthropological significance shall not be deemed to be within the foregoing definition as defined in RCW 9.68.130(2).

The Defendant argues this condition is not crime-related (BOA at 30), and goes on to advocate that the Defendant should be allowed to view adult sexual materials in accordance with his First Amendment right. (BOA at 37). This neglects the fact that “an offender’s constitutional rights during community placement are subject to SRA-authorized infringements, including crime-related prohibitions.” *State v. McKee*, 141 Wn. App. 22, 37, 167 P.3d 575 (2010). In the *McKee* case Division One held that a community custody provision not to possess pornography were not overbroad after the defendant was convicted of two counts of Rape in the First Degree. Sexually explicit material is crime-related as the Defendant committed a sexually abusive act. The depiction and glorification of sexual intercourse in whatever form should not be viewed by the Defendant; it is clear he cannot handle those topics or depictions as he cannot control his impulses. He severely minimized his actions, seeing absolutely no problem with his sexually deviant behavior. (CP 42). He persists with the false narrative that this case was all one grand conspiracy to frame him for stealing an iPad. (*Id.*). In convicting him of this offense, the jury saw right through him; so too should this Court. In the same way that a trial court would restrict a convicted drug offender’s

access to drugs, this Court should similarly restrict a sexually deviant predator's access to depictions of sexual activity.

VI. CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm the Defendant's Rape of a Child Third Degree conviction, decline to review the assessed jury demand fee, decline to modify any of his community custody conditions, and remand the case only for imposition of a corrected Appendix H indicating the Defendant's prohibition on contacting Y.L. remain only for the statutory period of five years.

Dated this 26th day of April, 2016.

Respectfully submitted,
 SHAWN P. SANT
 Prosecuting Attorney



By: Maureen R. Astley
 WSBA #40987
 Deputy Prosecuting Attorney

Affidavit of Service	Appellant Attorney Kristina Nichols e-mail address WA.Appeals@gmail.com	A Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity. I hereby certify that a copy of the foregoing was delivered to opposing counsel by email per agreement of the parties pursuant to GR30(b)(4). I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Dated April 26th, 2016, Pasco WA Original e-filed at the Court of Appeals; Copy to counsel listed at left
Signed and sworn to before me this 26th day of April, 2016 Notary Public and for the State of Washington residing at Kennewick My appointment expires: May 19, 2018		