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STATE OF WASHINGTON

SUPREME COURT NO. _____
COA NO. 56812-4-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ERIC G. BAHL,

Appellant.

2007 MAR 26 PM 4:08

COURT OF APPEALS
STATE OF WASHINGTON

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Stephen J. Dwyer, Judge

PETITION FOR REVIEW

ANDREW P. ZINNER
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

Today I deposited in the mails of the United States of America a
properly stamped and addressed envelope directed to addressee of
record, Snohomish County Prosecutor, containing a copy of the
document to which this declaration is attached.
I certify under penalty of perjury of the laws of the State of
Washington that the foregoing is true and correct.
Patrick Mayorsky 3-26-07
Name Done in Seattle, WA Date

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A. IDENTITY OF PETITIONER

Petitioner Eric G. Bahl, the appellant below, asks this Court to review the Court of Appeals decision referred to in Section B.

B. COURT OF APPEALS DECISION

Bahl requests review of the Court of Appeals decision in State v. Eric G. Bahl, __ Wn. App. __, __ P.3d __ (Court of Appeals No. 56812-4-I, filed February 26, 2007 as an unpublished opinion and ordered published March 19, 2007). The opinion is attached as Appendix A and the order as Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. Did the trial court violate Bahl's due process and free speech rights under the state and federal constitutions when it imposed vague community custody conditions, including a condition Bahl not "possess or access pornographic materials, as directed by the supervising Community Corrections Officer [CCO][,] as part of Bahl's judgment and sentence?

2. Division One refused to address Bahl's facial vagueness challenge to his community custody conditions because violations of the conditions had not yet been charged. In prior decisions Divisions One and Three have addressed pre-enforcement vagueness challenges. Does the

conflict between the decision in Bahl's case and those cases make review appropriate under RAP 13.4(b)(2)?

3. Among other purposes, the legislature has declared the Sentencing Reform Act should impose sentences that are just and make frugal use of governmental resources. RCW 9.94.010. Further, the public interest is promoted when application of the law is clear and efficient. The Court of Appeals' refusal to reach Bahl's pre-enforcement facial vagueness challenge to community custody conditions is the first such refusal in Washington. Does the Court of Appeals's opinion involve an issue of substantial public interest that should be determined by this Court?

D. STATEMENT OF THE CASE

1. Trial Proceedings

The state charged Bahl with indecent exposure, second degree rape, first degree robbery, residential burglary and first degree criminal trespass. CP 150-51. The jury found him guilty of second degree rape and first degree robbery, not guilty of residential burglary and criminal trespass, and could not reach a unanimous verdict as to indecent exposure. CP 48-52. The trial court sentenced Bahl to concurrent standard range terms of 105 months for rape and 34 months for burglary. CP 18.

Over defense counsel's objections they were not crime-related, the trial court also imposed the following conditions of community custody:

- Do not possess or access pornographic materials, as directed by the supervising Community Corrections Officer [CCO]. Do not frequent establishments whose primary business pertains to sexually explicit or erotic material;
- Do not possess or control sexual stimulus material for your particular deviancy as defined by the supervising [CCO] and therapist except as provided for therapeutic purposes.

CP 28 (Appendix A to Judgment and Sentence); RP 3, 8-9.¹

2. Court of Appeals' Opinion

On appeal, Bahl, relying primarily on State v. Sansone,² challenged the community custody conditions as violating due process under the Fourteenth Amendment and Const. art. I, § 3 because they were impermissibly vague. He also contended the conditions involving "erotic material" and "sexual stimulus material" violated the First Amendment and Const. art. I, § 5 because they were overbroad. Finally, Bahl argued the trial court improperly delegated its authority to the CCO to define

¹ "RP" refers to the verbatim report of the sentencing hearing held July 26, 2005.

² 127 Wn. App. 630, 639-41, 111 P.3d 1251 (2005) (finding in post-enforcement appeal community placement condition prohibiting him from possessing or viewing pornography of his CCO was unconstitutionally vague).

“pornography” and to the CCO and therapist its authority to define “sexual stimulus materials.”

First, the Court of Appeals rejected Bahl’s overbreadth argument, concluding the challenged conditions were crime-related. Opinion at 3-5.

Second, the Court failed to reach the facial vagueness claims because Bahl had not yet been found to have violated the conditions. The Court stated, “[W]e have not yet agreed it is appropriate to evaluate conditions of sentence for vagueness in a pre-enforcement challenge. We are not inclined to do so in the absence of briefing on the pros and cons of that approach. We have reservations about the wisdom of making the appellate courts routinely available as editors to demand that trial courts rewrite sentencing conditions to avoid hypothetical problems.” Opinion at 8-9. The Court concluded, “Because Bahl has not explained why his vagueness challenge requires evaluation of the conditions in a factual vacuum, we decline to review it.” Opinion at 9.

Finally, citing State v Smith,³ the Court failed to decide whether the trial court improperly delegated its sentencing authority because the issue was not raised at trial. Opinion at 10.

³ 130 Wn. App. 721, 729-30, 123 P.3d 896 (2005).

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

THIS COURT SHOULD ACCEPT REVIEW BECAUSE THE COURT OF APPEALS' OPINION CONFLICTS WITH OTHER COURT OF APPEALS DECISIONS AND RAISES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

1. The Court of Appeals' Decision Conflicts with other Decisions of the Court of Appeals.

The Fourteenth Amendment and Const. art. I, § 3 protect citizens from impermissibly vague penal statutes. State v. Baldwin, 111 Wn. App. 631, 647, 45 P.3d 1093 (2002), affirmed on other grounds, 150 Wn.2d 448 (2003). The vagueness doctrine serves two main purposes. First, it provides citizens with fair warning of what conduct they must avoid. Second, it protects them from arbitrary, ad hoc or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is void for vagueness if either: (1) it does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited; or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. State v. Sullivan, 143 Wn.2d 162, 181-182, 19 P.3d 1012 (2001).

The Court of Appeals refusal to reach Bahl's vagueness challenges because he had not yet been charged with violating them conflicts with other Court of Appeals decisions. RAP 13.4(b)(2).

State v. Llamas-Villa, 67 Wn. App. 448, 455, 836 P.2d 239 (1992), was the first case in Washington in which an appellant argued a community placement condition, rather than a statute or ordinance, was unconstitutionally vague and overbroad. Before he was charged with a violation, Llamas challenged the condition he not associate with persons using, possessing, or dealing with controlled substances. Llamas-Villa, 67 Wn. App. at 454-55. The Court of Appeals reached his claim and determined the condition provided sufficient notice of what conduct was forbidden and was neither vague nor overbroad. Llamas-Villa, 67 Wn. App. at 456.

Following Llamas-Villa, the Court of Appeals took the same approach in State v. Riles.⁴ Riles challenged as unconstitutionally vague the following conditions of community placement: (1) that he have no contact with children; (2) that he avoid locations where children gather; and (3) that he not frequent places where children are known to congregate. Riles, 86 Wn. App. at 17. Following the two-step test set forth in Sullivan, the Court of Appeals concluded that a person of common intelligence would understand from the language of the conditions what

⁴ 86 Wn. App. 10, 17, 936 P.2d 115 (1997), affirmed on other grounds, 135 Wn.2d 326 (1998).

conduct was prohibited and that the language prevented arbitrary enforcement. Riles, 86 Wn. App. at 18.

Only three months ago, two appellants challenged in part on vagueness grounds community custody conditions requiring “explicit consent” before sexual contact and prior approval from their therapist and/or CCO. State v. Autrey, 136 Wn App. 460, 466, 150 P.3d 580 (2006). Neither appellant had been charged with violating the conditions. Autrey, 136 Wn. App. at 466. Nevertheless, the appellate court reached the issue and, applying the two-part test, rejected the appellants’ challenges. Autrey, 136 Wn. App. at 467-468.

The Court of Appeals’ refusal to review Bahl’s pre-enforcement, facial vagueness challenges conflicts with these decisions. Its opinion thus merits review by this Court. RAP 13.4(b)(2).

2. Determining when to review vagueness challenges to community placement and custody conditions is a matter of substantial public importance.

The Court of Appeals’ unprecedented refusal to review Bahl’s facial vagueness challenge to his community custody conditions until he is charged with a violation is a matter of substantial public importance. Permitting an appellant to challenge an arguably vague condition for the first time on appeal prevents piecemeal reviews of the same case and thus promotes judicial efficiency. United States v. Loy, 237 F.3d 251, 253-54,

261 (3rd Cir. 2001) (appellate court rejected government's contention Loy's challenge to vague "pornography" sentencing condition should not be reached pre-enforcement in part because such review "promotes judicial efficiency."); see generally Doerflinger v. New York Life Ins. Co., 88 Wn.2d 878, 882, 567 P.2d 230 (1977) ("there is substantial reason to follow the overall policy against piecemeal appeals.")

In a related vein, Washington sentencing courts are required to impose certain community custody conditions in many circumstances and may impose others. RCW 9.94A.715, 9.94A.700(4), (5). One of those conditions is that an offender "shall comply with any crime related-prohibitions." RCW 9.94A.7(5)(e). This condition allows courts considerable leeway in determining what conduct an offender may be forbidden from doing, and lends it to conditions that can be vaguely worded and overbroad. Vaguely worded conditions require offenders to guess whether their conduct violates a sentencing condition, exposes them to needless incarceration and causes a further drain on judicial resources.

A good example is Sansone. There the trial court imposed a condition prohibiting Sansone from "possess[ing] or perus[ing] pornographic materials unless given prior approval by [his] sexual deviancy treatment specialist and/or [CCO]. Pornographic materials are to

be defined by the therapist and/or [CCO].” Sansone, 127 Wn. App. at 634-35.

During a meeting Sansone had with his CCO, the officer observed photographs she believed “inappropriate for a sex offender to possess,” and took Sansone into custody for an alleged violation of the “pornography” prohibition. Sansone, 127 Wn. App. at 635. This arrest resulted in a violation hearing before a superior court judge, who after hearing testimony and argument found Sansone violated the condition. Sansone, 127 Wn. App. at 635. Sansone appealed, was appointed an attorney at public expense, and ultimately prevailed. Sansone, 127 Wn. App. at 639-42.

Under the Court of Appeals’ holding in Bahl’s case, this would be the required procedure anytime an offender wished to challenge an allegedly vague sentencing condition. Failing to review a challenge to an allegedly vague sentencing condition pre-enforcement results in potentially unnecessary and wasteful judicial proceedings, all paid for by the public.

Additionally, as illustrated by Sansone, the Court of Appeals’ refusal to address Bahl’s facial vagueness challenge results in potentially substantial hardships for all offenders obliged to follow arguably vague community custody conditions. Loy, 237 F.3d at 257. Rather than

determining whether a condition is vague and, if so, remanding for further clarification or striking the condition, refusal to address such challenges requires an offender to wait until he is arrested and go through a hearing to determine whether he or she has violated the condition. Loy, 237 F.3d at 257. This is contrary to the Supreme Court's declaration in Steffel v. Thompson, 415 U.S. 452, 459, 94 S. Ct. 1209, 1216, 39 L. Ed. 2d 505 (1974), which held "it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." The public, of course, pays for jail costs.

For the above reasons, the Court of Appeals decision involves issues of substantial public interest deserving of review by this Court. RAP 13.4(b)(4).

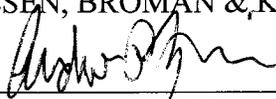
F. CONCLUSION

Bahl respectfully asks this Court to accept review in his case.

DATED this 23 day of March, 2007.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



ANDREW P. ZINNER

WSBA No. 18631

Office ID No. 91051

Attorneys for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,)	NO. 56812-4-I
)	
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
ERIC G. BAHL,)	
)	
Appellant.)	FILED: February 26, 2007

BECKER, J. – In this direct appeal from his sentence for rape and burglary, Eric Bahl asks us to reverse, as overbroad and vague, certain conditions of sentence to which he will be subject during a lifetime of community custody. The conditions are not overbroad because they are related to his crime. And Bahl has not demonstrated that his argument about vagueness is appropriately considered in a pre-enforcement review. We affirm.

FACTS

Appellant Eric Bahl stands convicted of second degree rape and first degree burglary. He entered his neighbor's home when she was asleep and began to touch her leg. He left when she asked him to, but came back when she was again asleep, regained entrance through a locked door, and raped her. The court imposed an indeterminate sentence of 105 months to life for the rape and a concurrent sentence of 34 months for the burglary. The court sentenced Bahl to a lifetime of community custody under the supervision of the Department of Corrections.

The sentence included a number of conditions of community custody. On appeal, Bahl challenges several of these conditions as being vague or overbroad:

Do not possess or access pornographic materials, as directed by the supervising Community Corrections Officer.
Do not frequent establishments whose primary business pertains to sexually explicit or erotic material.

Do not possess or control sexual stimulus material for your particular deviancy as defined by the supervising Community Corrections Officer and therapist except as provided for therapeutic purposes.^[1]

Below, the only specific objection Bahl raised to these conditions was to say, at sentencing,

With regards to the next, pornographic materials, erotic material, sexual stimulus, again, there are no facts in this case which suggest that any of those things played a part in what

¹ Clerk's Papers at 28 (Additional Conditions of Community Custody, entered July 26, 2005).

happened here. This was not – there is simply no evidence that he has ever viewed any of this material or that this material played a part in what happened. It's a sex crime, yes, but it's a very unique situation, I believe. And I don't believe that those are appropriate. I don't think that they are helpful. I think they would just subject him to possible imprisonment down the road if he makes a mistake in that regard.^[2]

OVERBREADTH

Bahl contends the prohibitions concerning “erotic material” and “sexual stimulus material” are overbroad in violation of his right to free speech. See U.S. Const. Amend. 1 (“Congress shall make no law ... abridging the freedom of speech”); Wash. Const. Art. 1, § 5 (“Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.”).

A criminal statute that sweeps constitutionally protected free speech activities within its prohibitions may be overbroad and thus violate the First Amendment. Courts consider whether the challenged statute reaches constitutionally protected speech or expression and whether it proscribes a real and substantial amount of protected speech. If the answer to both questions is yes, the court must strike the statute as overbroad unless the regulation of protected speech is constitutionally permissible or it is possible to limit the statute's construction so that it does not unconstitutionally interfere with protected speech. State v. Knowles, 91 Wn. App. 367, 372, 957 P.2d 797 (1998).

Bahl contends that the sentencing conditions are overbroad by this standard because they sweep in material that he has the right to view: sexually

² Sentencing Hearing transcript at 8-9, July 26, 2005.

explicit movies, videos, and magazines. What his argument fails to recognize is that he is not complaining about a statute affecting the public generally. He is attempting to invoke the overbreadth doctrine to attack a condition of his own particular sentence. “An offender's usual constitutional rights during community placement are subject to SRA-authorized infringements.” State v. Hearn, 131 Wn. App. 601, 607, 128 P.3d 139 (2006)(citing State v. Riles, 135 Wn.2d 326, 347, 957 P.2d 655 (1998)). The Sentencing Reform Act authorizes the court to order crime-related prohibitions. See RCW 9.94A.700(5)(e). The assignment of crime-related prohibitions has traditionally been left to the discretion of the sentencing judge and will be reversed only if it is manifestly unreasonable. State v. Riley, 121 Wn.2d 22, 37, 846 P. 2d 1365 (1993).

Bahl did not argue in his opening brief that the conditions of his sentence are not appropriate crime-related prohibitions. By statute, a “crime-related prohibition” prohibits conduct that directly relates to the circumstances of the crime for which the offender has been convicted. RCW 9.94A.030(12). In his reply brief Bahl contends there is no relationship between his crime and the conditions preventing him from possessing “sexual stimulus material” or frequenting establishments such as bookstores and movie houses devoted to sexually explicit materials. An issue raised and argued for the first time in a reply brief is too late to warrant consideration. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). In any event, the argument is unpersuasive. Bahl emphasizes there was no evidence that any particular

stimulus influenced him to commit rape. He misses the point of the trial court's concern about the circumstances of his crime, which showed him to be egregiously unable to control himself when in a state of sexual stimulus. An order limiting Bahl's access to sexually stimulating materials and environments relates directly to that aspect of his crime.

Because the conditions are crime-related, Bahl's overbreadth argument is unfounded.

VAGUENESS

Bahl also contends the challenged conditions are void for vagueness. A statute is presumed to be constitutional unless the party challenging it proves otherwise beyond a reasonable doubt. The same is true for a challenge to a sentencing condition. State v. Smith, 130 Wn. App. 721, 726-727, 123 P.3d 896 (2005).

The due process vagueness doctrine serves two important purposes: "first, to provide adequate notice of proscribed conduct, and second, to protect against arbitrary, ad hoc enforcement." State v. Acrey, 135 Wn. App. 938, 947, 146 P.3d 1215 (2006). In determining if a penal statute provides adequate standards for enforcement, one must decide whether the ordinance proscribes conduct by resort to inherently subjective terms. However, the terms are not viewed "in a vacuum." The question is whether they are inherently subjective in the context in which they are used. Spokane v. Douglass, 115 Wn.2d 171, 180-81, 795 P.2d 693 (1990).

In analyzing a vagueness challenge, a court's first step is to determine whether to review the rule on its face or as applied to the particular case. Douglass, 115 Wn.2d at 181-82. The parties ignore this step. They appear to treat Bahl's appeal as a facial challenge that this court will entertain even though Bahl has not as yet been accused of violating the conditions, and even though he did not raise a vagueness challenge below.

A rule is facially invalid if its terms "are so loose and obscure that they cannot be clearly applied in any context." Douglass, 115 Wn.2d at 182 n.7 (quoting Basiardanes v. Galveston, 682 F.2d 1203, 1210 (5th Cir. 1982)). Vagueness challenges to enactments which do not involve First Amendment rights are to be judged not facially but rather as applied, in light of the particular facts of each case. Douglass, 115 Wn.2d at 182. In as-applied challenges, courts examine the actual conduct of the party challenging the law, not hypothetical situations at the periphery of the rule's scope. Douglass, 115 Wn.2d at 181-83. Even where a facial challenge is appropriate, the challenger must show that the challenged rule is impermissibly vague in all of its applications, and so a factual record showing how it applies to the challenger is "not unimportant." Douglass, 115 Wn.2d at 182 n.8.

In the present case there is no actual conduct or factual record for the court to review. Bahl merely anticipates that he might be accused of engaging in conduct that violates the sentencing conditions.

The parties do cite and discuss State v. Sansone, 127 Wn. App. 630, 111

P.3d 1251 (2005). In that case, an offender was subject to the condition that he not possess pornography except as permitted by his therapist or community corrections officer. While on community placement, he was discovered to be in possession of photographs of scantily-clad women. The trial court found him in violation of the condition and sentenced him to additional confinement. We reversed the judgment after finding that the term “pornography” was unconstitutionally vague as applied. Based on Sansone, the State here concedes error as to the condition regulating “pornographic materials.” We reject the concession because unlike in Sansone, the term has not yet been applied, and here there is no factual record to draw upon.

One of the authorities we relied on in Sansone was United States v. Loy, 237 F.3d 251, 267 (3rd Cir. 2001). In that case the federal court also concluded that a prohibition against possessing “pornography” was unconstitutionally vague. Unlike in Sansone, the condition had not yet been enforced. The government argued in Loy that it would be premature to address the offender’s challenge to the condition in a direct appeal from his sentence. The government asked the court to apply the rule that a vagueness challenge that does not involve First Amendment freedoms must be examined in light of the facts of a particular case. Loy, 237 F.3d at 259.

The court rejected the government’s position after finding “there are important differences between a probationer on supervised release and a member of the general public”. Loy, 237 F.3d at 260. For instance: “The fewer

procedural protections available at a revocation proceeding, as opposed to a trial, make it far more hazardous for a releasee to wait until a condition has been enforced in order to test its validity.” Loy, 237 F.3d at 260. Persons under conditions of supervised release are also more likely to be prosecuted for violations because “these conditions are, after all, special ‘laws’ tailored only to them.” Loy, 237 F.3d at 260. Finally, while concerns about justiciability generally derive from separation of powers considerations, no such concerns are present in the supervised release context because the “rule” being challenged is not a statute or an administrative regulation; it is a sentencing condition created by a court. Loy, 237 F.3d at 260-261.

The court thus concluded it was appropriate to reach the merits of the offender’s pre-enforcement challenge, and proceeded to determine that the “unusually broad” prohibition against possessing pornography was unconstitutional as it could subject the offender to prosecution, for example, for the possession of any art form that employs nudity. Loy, 237 F.3d at 266. “That said, there is no question that the District Court could, perfectly consonant with the constitution, restrict Loy’s access to sexually oriented materials, so long as that restriction was set forth with sufficient clarity and with a nexus to the goals of supervised release.” Loy, 237 F.3d at 267.

While we have followed Loy in concluding that a prohibition against possessing “pornography” is too vague as applied to possession of the photographs in Sansone, we have not yet agreed it is appropriate to evaluate

conditions of sentence for vagueness in a pre-enforcement challenge. We are not inclined to do so in the absence of briefing on the pros and cons of that approach. We have reservations about the wisdom of making the appellate courts routinely available as editors to demand that trial courts rewrite sentencing conditions to avoid hypothetical problems.

The Loy court was willing to review a facial challenge to a condition using the term “pornography” partly because the issue seemed to be entirely legal, one “that we can easily resolve without reference to concrete facts”. Loy, 237 F.3d at 261. Terms other than “pornography” are not so easily dealt with outside a factual context. See, e.g., United States v. Phipps, 319 F.3d 177, 192-93 (5th Cir. 2003) (refusing to apply Loy reasoning to a condition prohibiting defendants from possessing sexually oriented or sexually stimulating materials and from patronizing any place where such material or entertainment is available.).

Sentencing courts “must inevitably use categorical terms to frame the contours of supervised release conditions.” United States v. Paul, 274 F.3d 155, 167 (5th Cir. 2001). Bahl’s requested remedy for the alleged vagueness is a remand so the trial court can impose conditions that are more specific. At this time there is no reason to suppose that such an exercise would be useful.

Because Bahl has not explained why his vagueness challenge requires evaluation of the conditions in a factual vacuum, we decline to review it.

IMPROPER DELEGATION

To the extent that the sentencing conditions give the community

corrections officer a role in defining what Bahl can and cannot do, Bahl contends the court improperly delegated its judicial authority.

We have held that the definition of pornography “was not an administrative detail that could be properly delegated” to the community corrections officer. Sansone, 127 Wn. App. at 642. We have also held that a claim of improper delegation may not be raised for the first time on appeal. Smith, 130 Wn. App. at 729-730. Because Bahl did not raise improper delegation as a concern below when the conditions were imposed, we decline to address it.

STATEMENT OF ADDITIONAL GROUNDS

Pro se, Bahl contends the trial court erred by denying his various motions to sever his charges. However, he cannot demonstrate prejudice. The jury acquitted him on charges of residential burglary, trespass, and indecent exposure arising from another neighbor’s accusation that Bahl exposed himself to her on the night in question. They thereby demonstrated that they were not affected by any inference of propensity that may have arisen from trying the charges together. See State v. Standifer, 48 Wn. App. 121, 126-127, 737 P.2d 1308 (1987) (rejecting State v. Ramirez, 46 Wn. App. 223, 227, 730 P.2d 98 (1986)).

Below, the prosecutor argued in rebuttal that the fact that two women had made allegations against Bahl on the same night was not a “coincidence”. The trial court sustained Bahl’s immediate objection, and reminded the jury that it must consider the counts separately. Bahl moved for a mistrial and now

contends the court erred by denying that motion. A trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. Only errors affecting the outcome of the trial are prejudicial. State v. Buss, 76 Wn. App. 780, 790, 887 P.2d 920 (1997). For the same reasons the denial of the severance motions was harmless, the denial of the mistrial motion did not affect the outcome. The jury demonstrated that it could put aside any improper prejudice from the comment by refusing to convict Bahl on the other charges.

Affirmed.

WE CONCUR:

Appelwick, CJ

Becker, J.
Evans, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,) NO. 56812-4-1
)
Respondent,)
)
v.) ORDER PUBLISHING OPINION
)
ERIC G. BAHL,)
)
Appellant.)
-----)

On February 26, 2007, this court filed its unpublished opinion in the above-entitled action. The hearing panel having since reconsidered its prior determination not to publish the opinion; Now, therefore, it is hereby

ORDERED that the written opinion filed in the above entitled case on February 26, 2007, shall be published and printed in the Washington Appellate Reports.

Done this 19th day of March, 2007.

FOR THE PANEL:

Beckell, J.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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