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Court of Appeals
Division III
State of Washington

No. 30707-7

89926-6

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

CASMER VOLK, Appellant

APPEAL FROM THE SUPERIOR COURT

OF KITTITAS COUNTY

THE HONORABLE MICHAEL MCCARTHY

BRIEF OF APPELLANT

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 - E. The Trial Court Erred When It Failed To Enter Written Findings of Fact And Conclusions Of Law To Support Its Decision To Impose An Exceptional Sentence.
 - F. The Length Of The Exceptional Sentence Imposed By The Trial Court Is Excessive.
 - G. The Sentencing Court Acted Outside Its Authority By Imposing Community Custody Conditions That Were Either Not Reasonably Related to The Circumstances Of The Offense Or Were Unconstitutionally Vague.

Issues Pertaining To Assignments Of Error

- A. Did the trial court err when it admitted statements under the child hearsay exception rule without conducting the statutorily mandated requirement of determining whether the statements had indicia of reliability?
- B. Did Mr. Volk receive ineffective assistance of counsel where counsel did not object to the repetitious and cumulative child hearsay statements?
- C. Was the evidence insufficient to sustain the conviction when there was no physical evidence that definitively connected Mr. Volk to the crime?
- D. Did the State present sufficient evidence to prove beyond a reasonable doubt the aggravating sentencing factor?
- E. The sentencing statute requires the trial court to enter written findings of fact and conclusions to law supporting its decision to impose an exceptional sentence. Where the trial court fails to enter such findings, should the case be remanded for entry of findings of fact and conclusions of law?
- F. Was the length of the exceptional sentence imposed by the trial court excessive?

G. Did the court err in imposing community custody conditions (9) and (10), non-crime related conditions prohibiting Mr. Volk from purchasing, possessing, and/or consuming alcohol or entering into or remaining in establishments where alcohol is the main source of revenue?

H. Did the court err in imposing community custody condition (18) barring Mr. Volk from purchasing, possessing, or viewing any pornographic material in any form as defined by the treatment provider, the supervising community corrections officer, and the court?

III. Statement of Case

Casmer Volk was charged by information with rape of a child in the first degree, with the aggravating circumstance of a particularly vulnerable victim, on May 11, 2011. CP 5. The alleged victim, four-and-a-half-year-old L.H. was deemed an incompetent witness. RP 22. After the jury could not unanimously agree on a conviction, the court declared a mistrial. 1RP 8; 728.¹

At a pretrial hearing for the second trial, despite L.H.'s inability to give accurate details about the alleged incident, the court found L.H., now

¹ For purposes of this brief, the hearing date of January 6, 2012 will be referenced as 1RP page no; the trial dates of January 10,11,12,13,18,19,20 and March 12, 2012 will be referenced as RP page no.

5 years old, a competent witness. 1RP 6; RP 22. The prosecutor acknowledged the State's case was premised upon child hearsay statements. He represented to the court that an analysis under RCW 9A.44 120 (to allow the child's hearsay statements to be admitted), need not be conducted as (1) the child was going to testify so there was not a concern about the constitutional right to confrontation; and (2) he and defense counsel agreed during the first trial that all hearsay statements could be admitted if the child testified. 1RP 2-3;7. Defense counsel stated he intended to use the video interviews of the child as prior inconsistent statements. RP 22; 1 RP 8. No hearing was held and the court made no finding as to whether either the unrecorded or recorded hearsay statements were sufficiently reliable to be admitted.

Deidre Volk and Selena Hamblin were best friends². RP 121. The Volks provided daycare for the Hamblin children two to three times per week for about a year. RP 125. On Thursday, April 28, 2011, Selena Hamblin and her husband, Travis, took the second eldest of their three children, four year old L.H., to Casmer and Deidre Volk's home so they could spend a long weekend away. RP 74;128. Ms. Volk has three

² Deidre Volk was not married to Casmer Volk at the time of the alleged incident. They married shortly thereafter. She will be referred to by her married name for purposes of this brief.

children from previous relationships; two of the children, ages 2 and 3, were also at the home the entire weekend. RP 470.

On Saturday morning, April 30, L.H. complained of an earache. RP 481. With his parent's permission, Ms. Volk took him to urgent care and then filled his prescription for Augmentin. RP 88; 482-83; CP 109. One common side effect of the medication is diarrhea. RP 112; CP 115. That evening Mr. and Mrs. Volk dropped all the children off at her parent's home for an hour and a half to two hours. RP 525; 569. Present at that home were Mrs. Volk's father and "Uncle Mike." RP 613-14.

On Sunday, May 1, Ms. Volk left the home around 9 a.m. for an appointment with her wedding planner/DJ. RP 484. The DJ later testified that he could only guess she arrived some time between 8:45 and 9:15 a.m. and the appointment concluded between 10:45 am and 11:45 a.m. RP 442-43. When she returned home, Mr. Volk and all three children were outside working on a yard project. RP 484. She did not notice anything out of the ordinary with L.H.: he played, ran, laughed, jumped, and was "his normal self." RP 512.

The Volks took L.H. back to his home around 5 p.m. on Sunday. RP 77. Mr. Hamblin testified that L.H. appeared to be okay, was active, and happy to see his family. RP 77-78. Mrs. Hamblin went to bed early and Mr. Hamblin helped L.H. and his older brother take a shower and then

put them to bed. RP 79. He noticed that when L.H. went to the bathroom that evening, the stool was “slimy looking.” RP 79.

The next morning, L.H. told his mother “his stomach was like he was rolling in his chair and he was real nervous, not nervous, in a lot of pain like screaming, and I said ‘What’s wrong buddy?’ and he is like ‘my butt hurts’”. RP 125. Assuming it was a diaper rash, she applied Vaseline to the area that looked red. RP 138. He cried and told her it hurt, so she removed the Vaseline. RP 137-38. She testified that in answer to why his butt hurt L.H. told her that Mr. Volk “put macaroni in his butt, a lot of cream in his butt, and his pee pee in his butt.” RP 124.

That afternoon, a sexual assault nurse examiner examined L.H. RP 162. She noted redness around the anus. RP 182. There were flecks of dried blood on his penis and scrotum. RP 197. She observed brownish blood stains in his underpants and called a physician to see if they could determine where it came from. Neither of them could locate an acute injury site. RP 186.

She collected his underwear, swabbed his penis, scrotum, interior and exterior anal area. RP 181. She reported that L.H. said, “My butt hurts. He – that guy named Cas, he put macaroni in my butt and lots of cream and he put his pee pee in my butt and it hurts.” RP 175. L.H. repeated the same allegation to the detective at the hospital, who testified

to the same at trial. RP 336-37. L.H. had no observable injuries anywhere on his body. RP 201.

Ellensburg police department Detective Koss conducted a child interview with L.H. on May 4. During the interview, L.H. initially told the interviewer that *Mrs.* Volk put macaroni in his butt. RP 240; Exh. 8. He further stated that both Mr. and Mrs. Volk put macaroni in his butt and that Mr. Volk put his pee pee in his butt. RP 244. He went on to say that Mr. Volk "did stuff to me" and that Mr. Volk smacked him with a pan on his leg, and that Mrs. Volk also smacked him with a pan. RP 249-50. Toward the end of the interview, the detective asked L.H. "...is it the truth that Cas put his pee pee in your butt?" L.H. answered several times, "No, it is a lie." RP 251. The taped interview was later played for the jury. RP 230.

A second interview was conducted on May 11, by child forensic interviewer Lisa Larrabee. RP 392. That recorded interview was also later played for the jury. RP 406; Exh. 24. In testimony, Ms. Larrabee remarked that L.H. was highly distractible and had difficulty focusing. RP 412, 414. She also stated that L.H. told her, "he put a spoon in my butt and macaroni and he put, and he put, and he spanked me with a spoon. That's all he did." RP 422. He also stated that Mrs. Volk walked in on Mr. Volk and said, "Get off of L". RP 423.

At trial, L.H. initially testified that Mr. Volk “put cream in my butt and his pee pee in my butt and macaroni in my butt.” RP 43. He alternately stated that Mrs. Volk was present, and then that she was not there. RP 54, 60-61. He reported that his clothing was on, Mr. Volk was naked, the incident occurred outside, and that Mr. Volk stuck both cooked macaroni and “his pee pee” in L.H.’s butt, and told L.H. that he was “just rubbing your back.” RP 44-45; 54-56.

Two forensic scientists from the Washington State Patrol Crime Labs analyzed the swabs and underwear from the sexual assault kit, and other items retrieved from the Hamblin home. RP 253, 297. The testing concluded that the blood from the underwear and swabs belonged to L.H. RP 274. The underwear tested positive for the presence of seminal fluid, but the swabs were negative. RP 273. In the first round of testing, it was determined that the mixture of DNA on the underwear, which could have been from blood or non-sperm cells, excluded Mr. Volk. RP 278. Because L.H. and his father share DNA, Mr. Hamblin was included as a potential contributor. RP 275. Each of the DNA samples the technician obtained excluded Mr. Volk as a possible contributor. RP 283; 289.

Because there were no sperm in the seminal fluid sample from the underwear there was no DNA profile. The original testing on that sample could neither include nor exclude any male as a contributor. RP 277. The

cutting with the semen sample was then sent to a second lab for a more discriminating test, to determine if a lower level of a DNA profile could be obtained from the seminal fluid. RP 279;285.

The second lab conducted a Y-STR test. RP 305. The lab tech testified that with the presence of semen, and an absence of sperm, there was no way to determine who contributed the semen. RP 309. However, a profile developed from cells in the sample that did have male DNA excluded Mr. Volk as well as L.H.'s older half brother. RP 308. Mr. Volk denied each accusation regarding L.H. RP 597. He also testified that results from his own doctor's testing showed that he indeed does produce sperm. RP 552-53.

At trial, the court gave the following instruction on the Special Verdict:

You will also be given Special Verdict Form for the crime of Rape of a Child in the First Degree. If you find the defendant not guilty of this crime, do not use Special Verdict Form. If you find the defendant guilty of this crime, use the Special Verdict Form for that count and fill in the blank with the answer "yes" or "no" according to the decision you reach.

In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If after full and fair consideration of the evidence, you cannot agree as to the answer, you must fill in the blank with the answer "no." You do not need to be unanimous to answer "no."

For purposes of the Special Verdict Form for the crime of Rape of a Child in the First Degree, the State must have proved beyond a reasonable doubt that the defendant knew or should have

known that the victim of the current offense was particularly vulnerable or incapable of resistance. CP 88.

A jury instruction on the meaning of “particularly vulnerable” was neither requested by counsel nor was one given to the jury.

Mr. Volk was found guilty on all charges. CP 139,140. His offender score was determined to be 6 based on two misdemeanor convictions in North Dakota for “surreptitious peeping.” CP 160; 169-70.

In imposing sentence, the court stated the following:

“...a range for the purpose of the minimum sentence of 162 to 216, then the aggravating factors found by the jury that the child was - - because of the particular vulnerability of the child which was assisted in the commission of this particular offense taking all these matters into consideration I believe that the top of the range is the appropriate for the setting minimum sentence to be served. So that will be set at 216 months, which is 18 years of confinement. And then the question becomes as to what should or what is appropriate in regards to the aggravating, what sanction should be imposed regarding the aggravating factor?...My intention is to impose a significant amount of time in regards to the aggravating factor and that amount of time is 120 months. So the equivalent will be 28 years of confinement.” RP 737.

The court did not enter written findings and conclusions setting forth its decision to impose the exceptional sentence. The court also imposed the following pertinent community custody conditions:

Judgment and Sentence Appendix 4.6

(9) Defendant shall not purchase, possess, and/or consume any intoxicating liquors.

(10) Defendant shall not enter into or remain in establishments where alcohol is the main source of revenue. This does not include a restaurant which is attached to but separate from a bar/lounge area.

(18) Defendant is not to purchase, possess, or use pornographic material. Pornographic material will be defined by the treatment provider, the supervising Community Corrections Officer, and the Court.

CP 194-95.

Mr. Volk makes this timely appeal. CP 200.

IV. Argument

A. The Court Erred In Permitting Multiple Repetitive Child Hearsay Statements Without Complying With RCW 9A.44.120 Or Conducting A *Ryan* Analysis.

Hearsay statements of a child victim of sexual abuse are conditionally admissible in criminal cases under RCW 9A.44.120.³

³ RCW 9A.44.120 states in pertinent part: A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm ... not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under ... criminal proceedings ... in the courts of the state of Washington if: (1) The court finds, in a hearing conducted

In a strongly worded opinion, the Washington Supreme Court stated, “The declarant’s competency is a precondition to admission of his hearsay statements as are other testimonial qualifications...If the declarant was not competent at the time of making the statements, the statements may not be introduced through hearsay repetition...The circumstantial guarantees of trustworthiness on which the various specific exceptions to the hearsay rule are based are those that existed at the time the statement was made and do not include those that may be added by using hindsight.” *State v. Ryan*, 103 Wn.2d 165, 173, 103 Wn.2d 165 (1984) (internal citations omitted).

Nineteen years later, the Court retreated from that position and held instead, “Testimonial competence (the ability to understand the difference between the truth and a lie and the obligation to speak truthfully) is not among the factors used to determine reliability. *State v. C.J.*, 148 Wn.2d 672, 684, 63 P.3d 765 (2003). Thus, a child’s competence to testify at trial is not relevant to the issue of whether earlier

outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and (2) The child either: (a) Testifies at the proceedings; or (b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

hearsay statements are admissible. *State v. Borboa*, 157 Wn. 2d 108, 120-21, 135 P.3d 469 (2006). Rather, admissibility under the statute depends on whether the comments and circumstances surrounding the statement indicate it is reliable. *State v. C.J.*, 148 Wn.2d at 684; *State v. Swan*, 114 Wn.2d 613, 648, 790 P.2d 610 (1990).

Here, L.H. was deemed incompetent for the first trial. For the second trial, the parties agreed that because L.H. would testify if found competent, the hearsay statements would be offered. The court, however, failed to comply with the plain requirements of RCW 9A.44.120, and never determined whether the circumstances surrounding the statements provided sufficient indicia of reliability for admission.

In determining the reliability of the hearsay statements, there are nine factors the court *must* consider:

- (1) Whether there is an apparent motive to lie
- (2) The general character of the declarant
- (3) Whether more than one person heard the statements
- (4) The spontaneity of the statements
- (5) The timing of the declaration and the relationship between the declarant and the witness
- (6) Whether the statement contained express assertions of past fact
- (7) Whether the declarant's lack of knowledge could be established through cross-examination

(8) The remoteness of the possibility of the declarant's recollection being faulty

(9) Whether the surrounding circumstances suggested the declarant misrepresented the defendant's involvement.

State v. Ryan, 103 Wn.2d at 175-76.

The goal is for the trial court to determine whether the comments and circumstances surrounding the statement indicate reliability. *State v. Swan*, 114 Wn.2d at 648.

Here, six witnesses repeated the child's hearsay statements: (1) the child's mother (RP 124); (2) Detective Koss (RP 242-44); (3) Detective Higashiyama (RP 344); (4) Former Kittitas Police officer Shuart (RP 336-337); (5) The examining sexual assault nurse; and (6) Forensic Interviewer Lisa Larabee. (RP 407, 424). Admissibility under the statute is not based on mere repetition; it is based on repetition under circumstances indicating the reliability of the statements. *State v. Ryan*, 103 Wn.2d at 174. If witnesses were allowed to fortify their testimony or magnify its weight by showing they had previously told the same story on other occasions out of court, then "garrulity would supply veracity." *See State v. Lynch*, 176 Wash. 349, 351, 29 P.2d 393 (1934).

It is statutorily mandated for the court to conduct a hearing outside the presence of the jury, to determine whether the time, content and

circumstances of the statement provided sufficient indicia of reliability.

RCW 9A.44.120. This was not done.

Child hearsay statements are subject to exclusion if the danger of unfair prejudice or the needless presentation of cumulative evidence substantially outweighs their probative value. ER 403; *State v. Bedker*, 74 Wn.App. 87, 93, 871 P.2d 673 (1994). The reliability determination and the balancing test of ER 403 serve to protect the rights of both the accused and the accuser. *Id.* Here, because there was no reliability determination nor was there a balancing test under ER 403, prejudicial error resulted.

An error is prejudicial if, “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). The concern regarding the use of hearsay statements is the risk of an erroneous conviction. This is especially true where there is no other evidence consistent with the statements the child repeated. Here, there was no physical or genetic evidence linking Mr. Volk to the seminal fluid located in L.H.’s underpants and three men, other than Mr. Volk, were with L.H. at some point on the weekend in question. The court’s failure to hold the statutorily required hearing outside the presence of the jury to determine an indicia of reliability, as laid out in the *Ryan* factors, and the cumulative

effect of the repetition of the child hearsay created an unfair prejudicial bolstering effect to the child's testimony. Evidentiary error is grounds for reversal if it results in prejudice. *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001).

B. Mr. Volk Received Ineffective Assistance Of Counsel Where Counsel Failed To Object To The Multiple Repetitive Child Hearsay Statements Offered At Trial.

The Sixth Amendment guarantees the right to counsel. An attorney must perform to the standards of the profession; failure to meet those standards requires a new trial when the client has been prejudiced by counsel's deficiency. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Claims of ineffective assistance of counsel are reviewed *de novo*. *State v. White*, 80 Wn.App. 406, 410, 907 P.2d 310 (1995). On review, the courts apply a two-prong analysis: whether or not (1) counsel's performance failed to meet a standard of reasonableness and (2) actual prejudice resulted from counsel's failures. *McFarland*, 127 Wn.2d at 334-35. A strategic or tactical decision is not a basis for finding error. *Id.* at 689-90. However, determining that a decision was strategic or tactical does not mean that counsel's action necessarily satisfied the

Strickland reasonableness standard. *State v. Grier*, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011).

Hearsay is an out of court statement offered to prove the truth of the matter asserted. ER 801(c). It can include oral assertions and non-verbal conduct intended as an assertion. ER 801(a). The decision of when or whether to object to hearsay is a classic example of trial tactics. “Only in egregious circumstances, *on testimony central to the State’s case*, will the failure to object constitute incompetence justifying reversal.” *State v. Madison*, 53 Wn.App. 754, 763, 770 P.2d 662 (1989).

Here, there was no question that the State’s case rested mainly on child hearsay statements. Defense counsel did not request an RCW 9A.44.120 reliability hearing, although the court would likely have held one. Defense counsel failed to object at any point when hearsay statements were introduced through the State’s witnesses. In a pretrial hearing defense counsel stated he wanted the hearsay statements admitted to show “prior inconsistent statements” by the child. However, the child’s statements were either not inconsistent, or the few inconsistencies were explained away by State witnesses: such as, child was fatigued, child did not want to talk about the incident any more so he said it did not happen, the child added fantastical elements because of his age.

In *Warren*, the court articulated it “cannot perceive a legitimate trial strategy in counsel’s apparent decision to waive a reliability hearing.” *State v. Warren*, 58 Wn.App. 645, 652, 779 P.2d 1159 (1989). Although there may be circumstances in which it is a legitimate trial tactic, this is not one of those instances. The multiple repetitions of the same complaint to various adults had the prejudicial effect of using out of court statement to prove the truth of the matter.

This was a second trial for Mr. Volk on this matter. In the first trial, the videotaped interviews were not introduced and it ended in a mistrial. The trial strategy of waiving the reliability hearing for the hearsay statements was not reasonable under the *Strickland* standard. Mr. Volk obviously suffered resulting prejudice from the admission of the statements. It is very reasonably probable that the outcome of the trial would have been different had defense counsel either objected to the admission of the hearsay statements or, at the very least, not waived a reliability hearing.

C. The Evidence Was Insufficient To Sustain The Conviction For Rape Of A Child In The First Degree.

Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt.

State v. Colquitt, 133 Wn.App. 789, 796, 137 P.3d 892 (2006). In a sufficiency of the evidence claim, the defendant admits the truth of the State's evidence and all inferences that can reasonably be drawn from that evidence. *State v. Theroff*, 25 Wn. App. 590,593, 608 P.2d 1254, *aff'd*. 95 Wn.2d 385, 622 P.2d 1240 (1980). The State bears the burden of proving all elements of a crime beyond a reasonable doubt. *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004).

To convict Mr. Volk of first-degree rape of a child, the State was required to prove, beyond a reasonable doubt, that he had sexual intercourse with L.H. RCW 9A.44.073. As defined in the jury instructions, 'sexual intercourse' means in addition to its ordinary meaning, any penetration of the anus, however slight, by an object, including a body part, when committed on one person by another, whether such persons are of the same or opposite sex. CP 129. The State did not meet this burden.

There was no physical evidence linking Mr. Volk with the alleged crime. The physical evidence that was introduced, the seminal fluid, contained no DNA that included Mr. Volk as a possible contributor. In cases where no intact spermatozoa are found, a conventional serology test may narrow down the possible contributors to a small percent of the population. *See State v. Kalakosky*, 121 Wn.2d 525, 529, 852 P.2d 1064

(1993). Despite the absence of intact spermatozoa, no serology test was performed to establish whether Mr. Volk even could have been a possible contributor. Further, Mr. Volk testified that medical testing confirmed that he produces sperm, the DNA carrier in seminal fluid.

Additionally, L.H. stated numerous times that Mr. Volk put macaroni and “lots of cream in his butt”. A search of the Volk home turned up gels and lotions and apparently, some uncooked pasta in the kitchen cabinet. RP 346-347. However, when asked whether any of the items discovered matched up with what L.H. had described, the officer answered “No. There is lotions and creams and gels, but...” RP 347. None of those items were ever tied to the alleged cream and macaroni described by L.H. L.H. also alleged that a wooden spoon was used; however, at trial there was no evidence of a wooden spoon. RP 423.

If the reviewing court finds insufficient evidence as to an element, reversal is required. *State v. Lee*, 128 Wn.2d 151, 164, 904 P.2d 1143 (1995). Dismissal is the proper remedy following a reversal for insufficient evidence. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

D. The State Did Not Present Sufficient Evidence To Prove Beyond A Reasonable Doubt The Aggravating Sentencing Factor Alleged In The Information And Found By The Jury.

The facts supporting an aggravating factor must be proved to the jury beyond a reasonable doubt. RCW 9.94A.537(3). The standard of review is identical to a sufficiency review of the evidence for the elements of a crime. On a claim of insufficiency of the evidence, the reviewing court considers whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Under RCW 9.94A.535(3)(b) the State is required to present evidence to support the jury's finding that during the commission of the crime the defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance. "Particular vulnerability" requires that (1) the defendant knew or should have known (2) of the victim's *particular* vulnerability and (3) that vulnerability must have been a substantial factor in the commission of the crime." *State v. Suleiman*, 158 Wn.2d 280, 291-92, 143 P.3d 795 (2006).

When analyzing 'particular vulnerability', the focus is on the victim: Was this victim more vulnerable to the offense than the typical victim and did the accused know of that vulnerability? *State v. Bedker*, 74 Wn.App. at 94; *State v. Jackmon*, 55 Wn.App. 562, 566-67, 778 P.2d 1079 (1989). The question is whether the State presented sufficient

evidence for a jury to conclude that L.H. was more vulnerable to first-degree child rape than the typical child victim. It is a question of fact. *Suleiman*, 158 Wn.2d at 292.

By definition, first-degree rape of a child accounts for the youth of the victim. In determining that L.H. was competent to stand trial, the trial court stated, “ You know, based upon what I heard, it appears to me that this is – L is a very bright young man, bright than the typical 5 year old”. RP 20. He was described by his father as “all boy...he was go go go all the time” RP 78. There was no evidence presented that L.H. had suffered abuse by anyone previous to this accusation; no evidence that he had any type of physical or mental developmental disability; no evidence was presented to the jury that he suffered from any psychological traumas; and there was no evidence that this alleged incident was part of an ongoing pattern of abuse by the defendant. In short, the evidence was insufficient to establish a *particular* vulnerability at the time of the alleged incident.

E. The Trial Court Erred When It Failed To Enter Written Findings Of Fact To Support An Exceptional Sentence.

If a jury finds, unanimously and beyond a reasonable doubt, facts alleged by the State in support of an aggravated sentence, the court may impose a sentence that exceeds the standard range, *if* it determines that the

facts found are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.537(6); *State v. Hyder*, 159 Wn.App. 234, 259-60, 244 P.3d 454, *rev. denied*, 171 Wn.2d 1024 (2011). (Emphasis added).

Whenever a sentence outside the standard sentence range is imposed, the trial court *shall set forth the reasons* for its decision in *written findings of fact and conclusions of law*. RCW 9.94A.535. (Emphasis added). “Written findings ensure that the reasons for exceptional sentences are articulated, thus informing the defendant, appellate courts, the Sentencing Guidelines Commission, and the public of the reasons for deviating from the standard range.” *In re Pers. Restraint of Breedlove*, 138 Wn.2d 298, 311, 979 P.2d 417 (1999). The Court of Appeals reviews *de novo* whether the trial court’s reasons for imposing an exceptional sentence are substantial and compelling. *Hyder*, 159 Wn. App. at 262.

Here, the trial court did not enter any written findings of fact or conclusions of law. Paragraph 2.4 of the Felony Judgment and Sentence is as follows:

Exceptional Sentence. The court finds substantial and compelling reasons that justify an exceptional sentence...
Above the standard range for Count One.....
Aggravating factors were ...found by jury, by special interrogatory....

Findings of fact and conclusions of law are attached in Appendix 2.4
[X] Jury's special interrogatory is attached.
CP 185.

No written findings of fact, conclusions or law or Appendix 2.4 were attached.. Further, the court's oral ruling did not articulate any facts that it relied on to support the finding of "particular vulnerability." In the absence of such findings, an appellate court should not uphold a trial court's reliance on an aggravating factor said to support an exceptional sentence. *State v. Batista*, 116 Wn.2d 777, 789, 808 P.2d 1141 (1991).

In the alternative, Mr. Volk respectfully requests that this Court remand for entry of the required findings. *In re Pers. Restraint of Breedlove*, 138 Wn.2d at 311. The findings and conclusions must be based only on evidence already taken. *State v. Head*, 136 Wn.2d 619, 625, 964 P.2d 1187 (1998); See *State v. Alvarez*, 128 Wn.2d 1, 20-21, 904 P.2d 754 (1995). Further, this Court should allow for supplemental briefing in accordance with *State v. Hale*, 146 Wn. App. 299, 304, 189 P.3d 829 (2008).

F. The Length Of The Exceptional Sentence Imposed By The Trial Court Is Excessive.

Under the Sentencing Reform Act of 1981, a trial court must impose a sentence within the standard range unless the court finds substantial and compelling reasons to do otherwise. An exceptional sentence is reviewed with a three-prong analysis: first, whether the record supports the jury's special verdict on the aggravating factor: a factual inquiry. Second, the trial court's reasons for an exceptional sentence are reviewed *de novo* to determine if they are substantial and compelling. Third, the reviewing court determines whether the trial court abused its discretion by imposing a sentence that is clearly excessive. *State v. Hyder*, 159 Wn.App. at 258 (citing to *State v. Hale*, 146 Wn.App. at 308.). A trial court abuses its discretion if its decision is based on manifestly unreasonable or untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

If a jury finds the alleged aggravating circumstances beyond a reasonable doubt, the trial judge is bound by that finding and tasked only with the legal conclusion of whether the facts alleged and found were sufficiently substantial and compelling to warrant an exceptional sentence. *Suleiman*, 158 Wn.2d at 290-91. Here, because the court did not make written findings and conclusions, this Court cannot determine whether its reasons were substantial and compelling.

However, the court orally stated that it was sentencing Mr. Volk to the top of the standard range, 216 months, *because* “of the particular vulnerability of the child which was assisted in the commission of this particular offense taking all those matters into consideration...” RP 737. In other words, the court set the minimum sentence at 216 months *because* of the aggravating factor.

A trial court does not abuse its discretion in determining the length of an exceptional sentence unless it relies upon an impermissible reason or imposes a sentence so long that it shocks the conscience of the reviewing court. *State v. Ross*, 71 Wn.App. 556, 568, 861 P.2d 473, 71 Wn.App. 556, 883 P.2d 329 (1993). The trial court here abused its discretion in imposing an extra 120 months after it had already set the minimum at the top of the standard range because of the aggravating factor. Any additional sentence time beyond the minimum 216 months is therefore, inherently excessive and an abuse of discretion.

G. The Sentencing Court Acted Outside Its Authority By Imposing Community Custody Conditions That Were Either Unconstitutionally Vague Or Were Not Directly Related to The Circumstances Of The Offense.

Mr. Volk challenges the imposed community custody conditions that he is prohibited from purchasing, possessing, or using pornographic

material and the “pornographic material will be defined by the treatment provider, the supervising Community Corrections Officer, and the Court”. Such a prohibition is unconstitutionally vague. He also challenges the community custody condition “Defendant shall not purchase, possess, and/or consume any intoxicating liquors...Defendant shall not enter into or remain in establishments where alcohol is the main source of revenue. This does not include a restaurant which is attached to but separate from a bar/lounge area.” The prohibitions on alcohol are unauthorized because they are neither crime-related nor specifically authorized by law.

1. The Challenge To The Community Custody Condition Is Ripe For Review By This Court.

A court may only impose a sentence that is authorized by statute. *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 604 P.2d 1293 (1980). When a trial court has exceeded its statutory authority by imposing an unauthorized community custody condition, its action is void. *State v. Theroff*, 33 Wn.App. 741, 744, 657 P.2d 800 (1983). The reviewing court reviews crime-related prohibitions or conditions imposed by the trial court for an abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). Unauthorized conditions of a sentence may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

A defendant may assert a pre-enforcement vagueness challenge to a sentencing condition of custody if the challenge is sufficiently ripe; that is, if the issue raised is primarily legal, does not require further factual development, and the challenged action is final. The court must also consider the hardship to the parties of withholding the court's consideration. *State v. Valencia*, 169 Wn.2d 782, 786, 239 P.3d 1059 (2010), (quoting *State v. Bahl*, 164 Wn.2ed 739, 751, 193 P.3d 678 (2008)).

Here, the challenge is sufficiently ripe. The community custody condition prohibiting Mr. Volk from purchasing, possessing, or using pornographic material, defined by DOC, a treatment provider, and the court is a purely legal question, as the issue is whether the condition implicates his First Amendment rights and violates due process standards. *Bahl*, 164 Wn.2d at 752. There is no need for further factual context to aid in the court's inquiry, and the challenged condition is final. The potential hardship to Mr. Volk if the court withholds consideration is apparent: upon his release, the condition will restrict him and he would risk incarceration in order to resolve the matter. *Id.* at 751-52.

2. The Community Custody Condition Is Reviewed Under An Abuse of Discretion Standard.

Under the Fourteenth Amendment to the U.S. Constitution and Article 1§3 of the Washington Constitution, a citizen must have a fair warning of proscribed conduct. *City of Spokane v. Douglass*, 115 Wn.2d 171,178, 795 P.2d 693 (1990). Unlike a statute, a sentencing condition is not a law enacted by the legislature and thus, does not have a presumption of validity. *Bahl*, 164 Wn.2d at 753.

A vagueness challenge to the condition of community custody may be raised for the first time on appeal. *Id.* at 745. Whether a sentencing condition offends a constitutional right is a legal question subsumed within a review for abuse of discretion, and thus, is reviewed under an abuse of discretion standard. *In re Pers. Restraint of Rainey*, 168 Wn. 2d 367, 374-75, 229 P.3d 686 (2010); *Bahl* 164 Wn.2d at 753. An unconstitutional condition is manifestly unreasonable. A condition of probation will be reversed if it is manifestly unreasonable. *State v. Valencia*, 169 Wn.2d at 792.

3. Washington Courts Have Held That Restrictions On “Accessing or Possessing Pornographic Materials” Are Unconstitutionally Vague And Must Be Stricken From The Conditions Of Supervision.

Similar to Mr. Volk, in *Bahl*, the trial court imposed a community custody condition restricting possession and access to “pornographic

material, as directed by the supervising community corrections officer.” *Bahl*, 164 Wn.2d at 743. Citing both state and federal cases, the Court noted that many courts have held such sentencing conditions to be unconstitutionally vague. *Id.* at 754 (citing *United States v. Loy*, 127 F.3d 251 (3d Cir. 2001); *United States v. Guagliardo*, 278 F.3d 868 (9th Cir. 2002)); *State v. Sansone*, 127 Wn. App. 630, 111 P.3d 1251 (2005).

On review, the *Bahl* Court reasoned that conditions may be imposed that restrict free speech rights if necessary, but restrictions implicating First Amendment rights must be clear and reasonably necessary to accomplish essential state needs and public order. *Id.* at 758. The Court observed that the term “pornography” has never been given a precise legal definition. *Id.* at 754. Citing *Loy*, the Court wrote, “the term ‘pornography’, unmoored from any particular statute, has never received a precise legal definition from the Supreme Court or any other federal court of appeals, and remains undefined in the federal code.” *Loy*, 237 F.3d at 263.

Washington statutes define “lewd matter” as synonymous with “obscene matter,” under RCW 7.48A.010(2); however, pornography is not defined. *Bahl*, 164 Wn.2d at 756. The Court concluded that a restriction on accessing or possessing pornographic materials was unconstitutionally vague. *Bahl*, 164 Wn.2d at 758. It further held that the fact that the

condition provided Bahl's community corrections officer could direct what fell within the condition as acknowledgement that on its face, there were no ascertainable standards for enforcement. *Id.* Similarly here, the unconstitutional vagueness of the custody condition is not resolved by the provision that "pornography" was to be defined by the treatment provider or the supervising Community Corrections Officer, and the court.

The sentencing court here abused its discretion when it imposed an unconstitutional condition, which was manifestly unreasonable. The condition must be stricken.

4. The Law Does Not Authorize The Court To Prohibit Mere Possession Of Alcohol Or Being In A Place That Serves Alcohol As Its Main Source of Revenue When Alcohol Did Not Contribute To The Offense.

As part of any term of community custody the sentencing court has the discretion to require an offender to refrain from consuming alcohol. RCW 9.94A.703(3)(e). However, unless alcohol is crime-related, the court may not prohibit mere possession of it. *State v. Jones*, 118 Wn.App. 199, 207-08, 76 P.3d 258 (2003). A crime-related prohibition is defined as "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." *State v. Letourneau*, 100 Wn.App. 424, 431, 997 P.2d 436 (2000).

Here, there was no evidence alcohol contributed to the offense. There was no evidence Mr. Volk consumed any alcohol around the time of the offense, or that the offense was in any way related to visiting establishments that have alcohol as their main source of revenue. The imposed condition is not reasonably related to the circumstances of his offense. Further, although the court may order an offender to “remain within, or outside of, a specified geographical boundary” under RCW 9.94A.703(3)(a), the condition to refrain from frequenting establishments where alcohol is the main source of revenue is too broad, that is, it is not a “specified geographical boundary.”

V. Conclusion

Based on the foregoing facts and authorities, Mr. Volk respectfully requests this Court to reverse his conviction and set this matter for a new trial.

Respectfully submitted this 8th day of February 2013.

s/ Marie J. Trombley

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Appellant CASMER VOLK, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Appellant's Opening Brief was sent by first class mail, postage prepaid on February 8, 2013 to: Casmer Volk, DOC # 314231 Airway Heights Correction Center, PO Box 2049, Airway Heights, WA 99001; and Gregory Lee Zempel, Kittitas Co. Prosecuting Attorney, 205 W. 5th Ave Ste 213, Ellensburg, WA 98926.

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