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NO. 77776-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SIMON ORTIZ MARTINEZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOHN MCHALE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The fact of complaint doctrine allows the prosecution to present evidence that the victim complained to someone after the assault. It permits only evidence that shows the complaint was timely made and does not permit evidence of the details of the complaint, including identity of the perpetrator. The victim's friend and the victim's mother testified that she reported the sexual assaults to them while the assaults were still ongoing. Another friend and her mother testified that the victim reported the sexual assaults to them a few months after the assaults had stopped when she had run away from home. Did the trial court properly exercise its discretion in permitting fact of complaint testimony from these witnesses?

2. Community custody conditions prohibiting behavior must be crime-related, meaning there must be a relationship between the crime and the condition. A condition of community custody is not unconstitutionally vague if a person of ordinary intelligence can understand what it proscribes. Should this Court affirm a community custody condition requiring Martinez to disclose "any dating" relationship as reasonably crime-related and not unconstitutionally vague?

3. Should this Court strike as not crime-related a community custody condition requiring Martinez to obtain prior approval for a “sexual relationship?”

4. Should this Court affirm as reasonably crime-related and not unconstitutionally vague two related community custody conditions prohibiting Martinez from possessing sexually explicit or erotic material or entering any sex-related businesses?

5. The community custody condition prohibiting Martinez from being in areas where children congregate gives a list of specific types of locations he is not allowed to be. Should this Court reject Martinez’s claim that the community custody condition requiring him to stay out of areas where children’s activities regularly occur or are occurring is impermissibly vague?

6. By statute, an offender on community custody must be ordered to work at Department of Corrections-approved employment. Martinez was additionally ordered to obtain permission from the Department of Corrections before changing employment. Since Department of Corrections approval for any employment is statutorily required, should this Court affirm the condition requiring Department of Corrections approval for any job change?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Simon Martinez was charged with one count of rape of a child in the first degree. CP 1. After a jury trial before the Honorable John McHale, he was convicted as charged. CP 35. Martinez received a standard range sentence of 123 months in prison. CP 39.

2. RELEVANT FACTS

Y.M. was born on July 22, 2000 in Iowa. RP 524.¹ Y.M. had an older brother and two younger brothers. RP 529. She lived with her siblings and her mother and her father, Simon Martinez. RP 528, 531. When she was six or seven years old, the family moved to Washington State. RP 527.

Y.M.'s father began touching her sexually when the family lived in Iowa. RP 535. The first time it happened, Y.M. was playing Barbies with her brothers and her father told her to go to his bedroom. RP 535. Her father pulled down her pants and underwear and began to touch her. RP 536. He touched her thighs and then rubbed her vagina. RP 541. Y.M. did not tell her mother. RP 536. The touching happened about every other week

¹ The verbatim report of proceedings will be referred to as "RP ____."

while Y.M. lived in Iowa. RP 545. Sometimes her father would place her hands on his penis and move them so that she rubbed him. RP 546. It would happen while her mother was at work. RP 546.

The sexual touching started again when the family moved to Washington. RP 547. Martinez would come to Y.M.'s room at the Czech-Mate farm. RP 547. It would usually happen in the afternoons when Martinez got off work. RP 548.

When Y.M. was nine years old, her youngest brother got shot in the eye with a BB gun. RP 549. Y.M.'s mother spent the night at the hospital. RP 549. Martinez had Y.M. come into his room and he began touching her on her arms and thighs. RP 551, 553. Martinez then took off her pants and spit on his hands and rubbed them on his penis and her vagina. RP 555-56. Martinez then attempted to insert his penis into Y.M.'s vagina. RP 556. It hurt badly and Y.M. kept telling him to stop. RP 556. Martinez got the tip of his penis into Y.M. RP 557. Then Martinez stopped and Y.M. went back to her bedroom. RP 558. Y.M. did not tell her mother. RP 559.

Three months later, the abuse happened again in a barn at the farm. RP 560. Y.M. was still nine years old. RP 560. Y.M.

was petting horses when Martinez asked her to follow him into a storage room. RP 562, 567. In the storage room Martinez again took off Y.M.'s pants and underwear and tried to put his penis inside of her vagina. RP 570. Martinez's penis entered Y.M.'s vagina at least ½ inch. RP 571. Martinez ejaculated on the floor. RP 574.

Martinez told Y.M. that he would get in trouble if she told anybody. RP 572. The intercourse happened every other week while the family lived at Czech-Mate farm; the touching happened almost daily. RP 547.

When Y.M. was ten years old the family moved to Donida farm. RP 579. Two months after moving to Donida, the assaults started again. RP 581. Martinez would assault Y.M. in his living room. RP 583. Martinez also assaulted Y.M. in her bedroom at night. RP 587-89.

Martinez gave Y.M. two Siamese kittens that he made her keep in the garage. RP 590. One time Martinez came into the garage and had Y.M. sit on his Carhartt jacket and he made her put her mouth on his penis. RP 594-95. Martinez pushed her mouth onto his penis until she gagged. RP 595. Martinez told her to

cooperate if she wanted another dog. RP 596. Two months later Martinez got her a dog. RP 598-98.

The rapes happened on average of every other week at Donida. RP 598. One time when Y.M. was 11 she got very upset when Martinez tried to rape her and she rolled into a ball and begged him to stop and he left. RP 601.

When Y.M. got her period at 11 or 12 years old, she told her mother. RP 609. Prior to this, Martinez did not use any protection during intercourse. RP 609. After Y.M. got her period, Martinez would use condoms and flush them down the toilet. RP 609-10.

Y.M. testified that her father was not circumcised. RP 610. This was confirmed in a stipulation read to the jury. RP 660.

Y.M. had a good friend, A.T., from school. RP 503. They would spend time at each other's houses and eat lunch together. RP 503. Most often, Y.M. would go to A.T.'s house. RP 503. A.T. observed that Y.M. did not interact with her father much. RP 505. One day in June 2014, Y.M. went to the pond on her property with A.T. RP 610, 612. A boy that A.T. knew was at the pond. RP 612. A.T. hugged him and talked with him. RP 613. Martinez showed up at the pond and was very upset that a boy was with the girls. RP 613. He called Y.M.'s mother and she picked the girls up. RP

613-14. At Y.M.'s house, she told A.T. that her dad was raping her.

RP 615. A.T. told Y.M. that she needed to tell her mother or A.T. would tell her own. RP 616.

After Y.M. and her mother dropped A.T. at home, Y.M. told her mother that she had been raped by her father. RP 617. Her mother was upset and asked Y.M. if she was lying and Y.M. said no. RP 617. Y.M. begged her mother not to confront her father. RP 617.

Y.M.'s mother drove them to where Martinez was working and made Y.M. confront Martinez. RP 618. Martinez called Y.M. a liar. RP 618. Y.M. went to her room and her mother walked into the woods where she stayed for several hours. RP 618-19.

Y.M. got a gun that her dad kept in the garage and took it to her room. RP 619. Martinez came and got the gun from her and then left the house. RP 620. Martinez was out of the house for a few days. RP 620. Y.M. was not taken to the hospital and nobody called the police. RP 621. Y.M. did not want to go to the police because she did not want her father to get in trouble. RP 621.

Y.M. ran away from home in November 2014 because she felt like a burden to her family. RP 622. She stayed with her friend, C.R.'s, family for a few days around and on Thanksgiving. RP 623.

C.R. and Y.M. became friends because they rode the school bus together when they were in middle school. RP 432. On the day after Thanksgiving, while Y.M. stayed with C.R. she told her she had been raped. RP 436. Y.M. cried as she told C.R. RP 436. When C.R.'s mother became suspicious that Y.M. was staying with them for so long, Y.M. left to stay at someone else's house. RP 437. One night, Y.M. had nowhere to go so she texted C.R. and C.R. and her mother picked up Y.M. RP 437. Y.M. told C.R.'s mother in the car that she had been raped. RP 455.

Y.M.'s parents sent her to live with her aunt and uncle in Iowa on December 18, 2014. RP 753.

Martinez testified that he never had sexual intercourse with Y.M. RP 772.

C. ARGUMENT

1. THE HUE AND CRY STATEMENTS WERE PROPERLY ADMITTED.

Martinez argues that testimony from multiple fact of complaint witnesses was improper because the "hue and cry" exception is not a legally valid exception to the hearsay rule and the complaints were not timely. These arguments should be rejected. Hue and cry statements are a well-recognized common law

exception to the hearsay rule and the complaints made by Y.M. in this case were timely. The trial court properly admitted the fact of complaint testimony from four witnesses in this case.

a. Relevant Facts.

The trial court admitted four “hue and cry” statements made by Y.M. that she had been raped. RP 340. First, Y.M.’s statement to her friend, A.T. on June 14, 2014, when Y.M. and A.T. were at the pond. RP 340. Second, Y.M.’s statement to her mother that same day in the car.² RP 340. Third, Y.M.’s statement to her friend, C.R. in November 2014, when Y.M. and C.R. were house-sitting together. RP 340. Lastly, Y.M.’s statement to C.R.’s mother a few days later when Y.M. was staying at C.R.’s house. RP 340. Martinez objected to all of the hue and cry statements. RP 18.

b. The Hue And Cry Statements Were Properly Admitted.

In the prosecution of sex offense cases, the fact of complaint or hue and cry doctrine allows the prosecution to present evidence that the victim complained to someone after the assault, but “the rule admits only such evidence as will establish that the complaint

² Originally the State sought to also admit through the mother’s testimony that Y.M. had identified her rapist as her father. RP 75. However, the trial court denied that. RP 403-04.

is timely made.” State v. Chenoweth, 188 Wn. App. 521, 532, 354 P.3d 13 (2015). The fact of complaint rule excludes “evidence of the details of the complaint, including the identity of the offender and the nature of the act.” State v. Ferguson, 100 Wn.2d 131, 136, 667 P.2d 68 (1983). The history and purpose of the common law “hue and cry” doctrine was established in State v. Murley, 35 Wn.2d 233, 237, 212 P.2d 801 (1949) (emphasis in original):

This doctrine rests on the ground that a female naturally complains promptly of offensive sex liberties upon her person and that, on trial, an offended female complainant’s *omission of any showing* as to when she first complained raises the inference that, since there is no showing that she complained timely, it is more likely that she did not complain at all therefore that it is more likely that the liberties upon her person, if any, were not offensive and that consequently her present charge is fabricated.

A trial court’s decision to admit fact of complaint evidence is reviewed for abuse of discretion. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

Testimony from multiple fact of complaint witnesses is admissible. In State v. DeBolt, 61 Wn. App. 58, 63, 808 P.2d 794 (1991), an indecent liberties case, statements made to the victim’s sister and social worker were both admitted under the fact of complaint doctrine. In State v. Ackerman, 90 Wn. App. 477, 481-

82, 953 P.2d 816 (1998), a child molestation case, the court upheld the admissibility of fact of complaint testimony from three witnesses (the victim's two schoolmates and a school counselor).

Martinez has cited no authority supporting his argument that because the fact of complaint exception is not found in the evidence rules that it is not a properly hearsay exception. Fact of complaint testimony has routinely been admitted subsequent to the adoption of the evidence rules and is accepted as an exception to the hearsay rules.

Additionally, Martinez has cited no authority supporting his argument that because the fact of complaints occurred beyond the charging period that they did not meet the criteria. The charging period in this case was July 22, 2009 through July 21, 2012. CP 1. Y.M. turned 12 on July 22, 2012 so a charge of rape of child in the first degree had to occur while Y.M. was under age 12. RCW 9A.44.073. However, as the testimony established, Y.M. was sexually abused by her father beginning when she was five years old, and continuing until June 2014, when she was 13 years old and told her mother. RP 527, 535-36, 610, 615. At the end of 2014, her parents sent her to live in Iowa. RP 623, 753.

Therefore, Y.M. reported this abuse to her friend A.T. and her own mother while the abuse was still happening and to her friend C.R. and C.R.'s mother within five months of the abuse stopping. RP 435-36, 455, 508, 614-17. Y.M. reported the abuse to C.R. and C.R.'s mother when she had run away from home because she felt like a burden to her family after having disclosed the abuse. RP 622. Y.M.'s credibility would have been called into question by the jury had they not heard evidence that she had disclosed the rapes to her friends, friend's mother, and her own mother.

**2. THE COMMUNITY CUSTODY CONDITION
REQUIRING MARTINEZ TO INFORM HIS CCO
OF ANY DATING RELATIONSHIP IS
REASONABLY CRIME-RELATED AND NOT
UNCONSTITUTIONALLY VAGUE.**

Martinez challenges a community-custody condition requiring him to report "any dating relationship" to his community corrections officer (CCO) as not reasonably crime-related to his crime of rape of a child in the first degree against his young daughter, and as unconstitutionally vague. To the contrary, the condition is reasonably related to preventing Martinez from reoffending against young children. And the term "any dating relationship" is not unconstitutionally vague because it is a common

term that is easily understood by ordinary people. This Court should affirm the condition.

a. Relevant Facts.

Martinez was convicted of raping his daughter when she was under the age of 12. CP 1, 36. At sentencing, the court imposed the following condition of community custody:

5. Inform the supervising CCO and sexual deviancy treatment provider of any dating relationship. Disclose sex offender status prior to any sexual contact. Sexual contact in a relationship is prohibited until the treatment provider approves of such.

CP 45.

b. The Dating Relationship Condition Is Reasonably Related To Martinez's Crime Of Raping His Own Daughter.

The Sentencing Reform Act of 1981 (SRA) endowed sentencing courts with limited discretion to impose "crime-related prohibitions" during an offender's term of community custody, meaning they may prohibit conduct that "directly relates to the circumstances of the crime." RCW 9.94A.703(3)(f); RCW 9.94A.030(10). Our appellate courts long have recognized that "there is room for construction as to the scope of 'directly relates' and the meaning of 'circumstances of the crime.'" State v. Barclay, 51 Wn. App. 404, 406, 753 P.2d 1015 (1988) (quoting DAVID

BOERNER, SENTENCING IN WASHINGTON §4.5 (1985).

Moreover:

The Act does not specify how certain the sentencing judge must be that the conduct being prohibited is directly related to the crime of conviction. ... The existence of such a relationship will always be subjective, and such issues have traditionally been left to the discretion of the sentencing judge.

Barclay, 51 Wn. App. at 407 (quoting D. Boerner, §4.5).

Reviewing courts, when considering crime-related conditions under the SRA, afford sentencing courts latitude to decide what is reasonably related to the circumstances of each particular crime.

Barclay, 51, Wn. App. at 407. Community custody conditions should be affirmed unless there is “no evidence” of a relationship between the prohibition and the circumstances of the crime. State v. Irwin, 191 Wn. App. 644, 656-57, 364 P.3d 830 (2015). If there is “some basis for the condition,” the condition should be upheld. Id. at 657. For example, a molester of a four-year-old child could be prohibited from contact with all minors generally – even though there was no evidence he molested older children or teens. State v. Julian, 102 Wn. App. 296, 306, 9 P.3d 851 (2000).

In the recent decision of State v. Nguyen, the Washington Supreme Court further clarified the meaning of “crime-related.” Nguyen, ___ Wn.2d ___, 2018 WL 4355948 (September 13, 2018).

A court does not abuse its discretion if a “reasonable relationship” between the crime of conviction and a community custody condition exists. Nguyen, slip op. at 11. Specifically, the “prohibited conduct does not have to be identical to the crime of conviction but there must be ‘some basis for the connection.’” Id. (citing Irwin, supra, 191 Wn. App. at 657). A sentencing court may impose a condition that might prevent the offender from reoffending. Id. at 12.

In State v. Kinzle, 181 Wn. App. 774, 785, 326 P.3d 870 (2014), this Court held that a community custody condition prohibiting a child molester from dating women with children was proper even though he had not victimized the children of women he dated.

In the present case, Martinez lived with his wife and minor daughter and raped her. The sentencing court properly had an interest in protecting the public by monitoring whom Martinez dated to make sure he did not reoffend with other children. See Kinzle, supra, at 785 (“Because Kinzle’s crime involved children with whom he came into contact through a social relationship with their parents, condition 10 is reasonably crime-related and necessary to protect the public.”).

The condition requiring Martinez to inform his CCO of any dating relationship was crime-related and should be affirmed.

c. The Condition Is Not Unconstitutionally Vague.

The Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington State Constitution require that citizens have fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008) (citing City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990)). A statute or community custody condition is unconstitutionally vague if (1) it does not define the condition with sufficient definiteness such that ordinary people can understand what conduct is proscribed, or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53. This court reviews community-custody conditions for abuse of discretion, and will reverse only if the condition is “manifestly unreasonable,” which an unconstitutionally vague condition would be. State v. Valencia, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010).

In determining whether a term is unconstitutionally vague, this Court considers the term in the context in which it is used.

Bahl, 164 Wn.2d at 754 (citing Douglass, 115 Wn.2d at 180).

When a statute or condition does not define a term, the court may consider the plain and ordinary meaning as set forth in a standard dictionary. Bahl, 164 Wn.2d at 754 (citing State v. Sullivan, 143 Wn.2d 162, 184-85, 19 P.3d 1012 (2001)). A condition of community custody is sufficiently definite “[i]f persons of ordinary intelligence can understand what [it] proscribes, notwithstanding some possible areas of disagreement.” Bahl, 164 Wn.2d at 754 (quoting Douglass, 115 Wn.2d at 179).

In Nguyen, supra, defendant Norris³ challenged the community custody condition requiring her to inform her community corrections officer of any “dating relationship” as unconstitutionally vague. Nguyen, supra, slip op. at 8. In upholding the condition as not unconstitutionally vague, the Washington Supreme Court acknowledged that “some level of ambiguity will always remain in community custody conditions,” however “impossible standards of specificity are not required.” Id. at 9. The court noted that “dating relationship” is defined in RCW 26.50.010(2)⁴ as follows:

³ Nguyen was a consolidated case involving two defendants – Nguyen and Norris – so for clarity in this brief the defendants’ names will be used.

⁴ RCW 10.99.020(4) states that “[d]ating relationship’ has the same meaning as in RCW 26.50.010.”

“Dating relationship” means a social relationship of a romantic nature. Factors that the court may consider in making this determination include: (a) The length of time the relationship has existed; (b) the nature of the relationship; and (c) the frequency of interaction between the parties.

Id. at 9-10. In affirming the condition, the court noted that “‘dating’ is an objective standard that is easily understood by persons of ordinary intelligence.” Id. at 10.

The condition requiring Martinez to inform his community corrections officer of any “dating” relationship is not unconstitutionally vague and should be affirmed.

3. THE STATE AGREES THAT THE COMMUNITY CUSTODY CONDITION PROHIBITING MARTINEZ FROM “SEXUAL CONTACT IN A RELATIONSHIP” WITHOUT PRIOR APPROVAL IS NOT REASONABLY CRIME-RELATED.

Martinez claims that the community-custody condition requiring him to receive permission from his treatment provider or CCO before having “sexual contact in a relationship” is not crime-related. The State agrees that the portion of special community custody condition number five prohibiting Martinez from having sexual contact in a relationship without permission should be stricken because it is not reasonably crime-related.

Trial courts have authority to impose crime-related prohibitions and affirmative conditions as conditions of community custody. RCW 9.94A.703(3)(f). Crime-related prohibitions must directly relate to the circumstances of the crime for which the offender has been convicted. RCW 9.94A.030(10). This court reviews the factual basis for crime-related conditions under a “substantial evidence” standard. Irwin, supra, 191 Wn. App. at 656 (2015). Reviewing courts will strike community custody conditions when there is “no evidence” in the record that the circumstances of the crime related to the community custody condition. Id. at 657.

Here, requiring Martinez to report dating relationships and disclose his sex-offender status are reasonably related to preventing him from reoffending against children of people with whom he has relationships (as discussed above). However, requiring Martinez to obtain permission from his CCO or treatment provider prior to engaging in *any* sexual contact *within a relationship* is not so reasonably related. Condition number five already works to ensure that Martinez will choose partners without children or who have children but are aware of Martinez’s crimes and can protect the children from him. Requiring Martinez to obtain prior approval for any sexual contact with an age-appropriate

partner, who presumably already has been vetted, is not appropriately crime-related.

A contrary conclusion was reached in State v. Autrey, 136 Wn. App. 460, 150 P.3d 580 (2006). There, the consolidated defendants had committed sex offenses against children, and the trial courts had imposed conditions requiring the defendants obtain prior approval of adult sexual contact. Autrey, 136 Wn. App. at 466. Division three of this Court concluded that the condition was reasonably crime-related because potential romantic partners may be responsible for minor children. Id. at 468-69. However, notably missing in Autrey were the other conditions present here, which require Martinez to inform his CCO and treatment provider of dating relationships, and to inform his potential partners of his history of abusing children. Therefore, the concern for protecting the safety of the children of potential partners is being met in a manner that was not present in Autrey.

This Court should remand for the trial court to strike only that portion of special community custody condition number five that requires Martinez to obtain prior approval for sexual contact within a relationship. But it should affirm the remainder of condition number five.

4. THE PROHIBITIONS ON SEX-RELATED BUSINESSES AND SEXUALLY EXPLICIT MATERIAL ARE REASONABLY CRIME RELATED AND NOT VAGUE.

Martinez also attacks two separate-but-related conditions, one that bans him from sex-related businesses and another that forbids him from possessing or viewing sexually explicit material. He contends that neither is reasonably related to the circumstances of his crime, and that the condition on possessing sexually explicit or erotic material is unconstitutionally vague. To the contrary, both conditions are reasonably related to Martinez's crimes of repeatedly raping his young daughter, and the prohibition on sexually explicit material is sufficiently definite such that an ordinary person can understand what is prohibited. These conditions should be affirmed.

a. Relevant Facts.

At sentencing, the court imposed the following special conditions of community custody:

9. Do not enter sex-related businesses, including x-rated movies, adult bookstores, strip clubs, and any location where the primary source of business is related to sexually explicit material.

10. Do not possess, use, access or view any sexually explicit material as defined by RCW 9.68.130 or erotic materials as defined by RCW 9.68.050 or any

material depicting any person engaged in sexually explicit conduct as defined by RCW 9.68A.011(4) unless given prior approval by your sexual deviancy provider.

CP 45.

b. The Conditions Are Reasonably Crime-Related.

As previously discussed above, the SRA allows sentencing courts to impose “crime-related prohibitions,” meaning they may prohibit conduct that “directly relates to the circumstances of the crime.” RCW 9.94A.703(3)(f); RCW 9.94A.030(10). As the Washington Supreme Court held in Nguyen, supra, a trial court does not abuse its discretion as long as imposing a prohibition that “address[es] the cause of the present crime or some factor of the crime that might cause the convicted person to reoffend.” Nguyen, slip op. at 12.

In Nguyen, the Washington Supreme Court held that conditions prohibiting access to sexually explicit materials and sex-related businesses were crime-related. Nguyen, at 14, 16. Specifically, the court held that if materials “may trigger a defendant to reoffend or, perhaps, commit another sex offense,” then they are reasonably crime-related. Id. at 13-14.

Nguyen was convicted of child molestation in the first degree. Nguyen, slip op. at 2. In affirming the “sexually explicit material” prohibition as crime-related, the Nguyen court stated

Nguyen committed sex crimes and, in doing so, established his inability to control his sexual urges. It is both logical and reasonable to conclude that a convicted person who cannot suppress sexual urges should be prohibited from accessing “sexually explicit materials,” the only purpose of which is to invoke sexual stimulation.

Id. at 14.

The court further held that “the State need not establish that access to ‘sexually explicit materials’ *directly caused* the crime of conviction or will necessarily prevent the convict from reoffending. Rather, on review, we must decide if the trial court abused its discretion in prohibiting certain conduct.” Id. at 13 (emphasis in original).

Similarly, in Nguyen, defendant Norris was convicted of child molestation in the second degree and prohibited from entering sex-related businesses as a condition of sentence. Nguyen, slip op. at 4-5. In affirming the condition as crime-related, the court noted “this condition has more to do with Norris’ inability to control her urges and impulsivities than it does with the specific facts of her crimes.” Id. at 15. The court stated that it is “unlikely Norris will

meet a minor, and potential victim, in a 'sex related business.' But, it is reasonable to conclude that Norris will struggle to rehabilitate from her sexual deviance so long as she frequents 'sex-related businesses.'" Id.

Similar to the Nguyen case, Martinez's crimes of raping his daughter demonstrated a clear failure by him to control his sexual urges and impulsivities. Since both sexually explicit materials and sex-related businesses may trigger Martinez to reoffend, the trial court acted within its discretion to impose those prohibitions and they should be affirmed.

c. The Prohibition On Sexually Explicit And Erotic Material Is Not Unconstitutionally Vague.

In Bahl, the Washington Supreme Court held that the term "sexually explicit or erotic material" was not unconstitutionally vague in the context of a prohibition on frequenting "establishments whose primary business pertains to sexually explicit or erotic material" — basically the same language that Martinez complains about here. 164 Wn.2d at 758-59. In Bahl, the court observed that the dictionary definitions of "sexual" and "explicit" indicated that the meaning of the phrase "sexually explicit materials" is "materials that

are unequivocally sexual in nature,” and that the community custody condition as a whole was “sufficiently clear.” Id.

In its recent opinion in Nguyen, the Washington Supreme Court reaffirmed that position in holding that the prohibition on sexually explicit material is not unconstitutionally vague. Nguyen, supra, at 8. The court stated that the statutory definition of “sexually explicit material” bolsters the conclusion that it is not an unconstitutionally vague term. Id. at 8.

The condition prohibiting Martinez from possessing sexually explicit materials is not unconstitutionally vague and should be affirmed.

5. THE COMMUNITY CUSTODY CONDITION PROHIBITING MARTINEZ FROM ENTERING AREAS WHERE CHILDREN'S ACTIVITIES REGULARLY OCCUR IS NOT UNCONSTITUTIONALLY VAGUE.

Martinez also challenges the community custody condition prohibiting him from entering areas where children's activities regularly occur as unconstitutionally vague.⁵ He is incorrect. The condition provides adequate notice to Martinez of the areas he is to

⁵ This same argument is currently before this Court in State v. Brian T. Stark, No. 76676-7-I. Oral argument occurred on September 12, 2018.

avoid, and contains sufficient standards to prevent arbitrary enforcement.

a. Relevant Facts.

At sentencing, the trial court imposed the following condition of community custody:

18. Stay out of areas where children's activities regularly occur or are occurring. This includes parks used for youth activities, schools, daycare facilities, playgrounds, wading pools, swimming pools being used for youth activities, play areas (indoor or outdoor), sports fields being used for youth sports, arcades, and any specific location identified in advance by DOC or CCO.

CP 46.

b. Special Condition 18 Provides Adequate Notice To Martinez Of The Areas He Is To Avoid, And Limits The Potential For Arbitrary Enforcement.

As noted above, a community custody condition is not unconstitutionally vague so long as it: (1) provides ordinary people with fair warning of the proscribed conduct, and (2) has standards definite enough to protect against arbitrary enforcement. Bahl, supra, 164 Wn.2d at 752-53.

In Irwin, supra, this Court considered a vagueness challenge to a condition that required Irwin not to "frequent areas where minor children are known to congregate, as defined by the supervising

CCO.” 190 Wn. App. at 650. The court decided that the condition needed either clarifying language or an illustrative list, so that an ordinary person would have fair warning of the areas he was to avoid. Id. at 654-55. Furthermore, the condition was subject to arbitrary enforcement because sole discretion to define the prohibited areas rested with the CCO. Id.

Here, to the contrary, the sentencing court tailored the condition to comply with Irwin by using an illustrative list of places that constitute “areas where children’s activities regularly occur or are occurring,” such as playgrounds, schools, daycare facilities, and swimming pools being used for youth activities. CP 125.

Martinez claims that the condition is vague because “ordinary people cannot possibly know all of the places where minors congregate,” despite the illustrative list. Brf. of App. at 26-27. But the condition, when construed in a sensible manner, is not vague. The first clause – areas where children’s activities regularly occur or are occurring – modifies the clause that provides the illustrative list. Impossible standards of specificity are not required since language always involves some degree of vagueness. Bahl, 164 Wn.2d at 759.

Martinez also claims that the condition suffers the same infirmity as Irwin, in that it affords too much discretion to the CCO to determine the areas he must avoid. But unlike the conditions in Irwin, the condition here places limits on the CCO's authority to designate prohibited areas. The CCO's authority is directly tied to the condition itself – the specific locations that may be designated by the CCO must be places where children's activities regularly occur or are occurring. The CCO's discretion is not "boundless," and the condition is not subject to arbitrary enforcement. The condition is not impermissibly vague.

**6. THE COMMUNITY CUSTODY CONDITION
REQUIRING APPROVAL BY THE DEPARTMENT
OF CORRECTIONS REGARDING EMPLOYMENT
LOCATION WAS STATUTORILY AUTHORIZED.**

Martinez argues that the community custody condition requiring him to obtain permission of the supervising CCO prior to changing his work location is not crime-related and therefore impermissible. This argument should be rejected. The court-imposed requirement that offenders work at Department of Corrections (DOC)-authorized employment is statutorily authorized. The additional condition that the offender get permission from DOC before changing employment is merely a subset of that condition

and does not need to be crime-related. Additionally, for a sex offender like Martinez, this requirement serves community safety by ensuring he is not around minors.

a. Relevant Facts.

At sentencing, the trial court imposed the following conditions:

2. Work at Department of Corrections-approved education, employment, and/or community restitution.
6. Obtain permission of the supervising CCO before changing work location.

CP 45.

b. The Prior Approval Condition Is Statutorily Mandated And Does Not Need To Be Crime-Related.

RCW 9.94A.703(2)(b) requires the following:

2. **Waivable conditions.** Unless waived by the court, as part of any term of community custody, the court shall order an offender to:
 - (b) Work at department-approved education, employment, or community restitution, or any combination thereof.

Statutorily-required conditions do not need to be crime-related. See State v. Acevedo, 159 Wn. App. 221, 234, 248 P.3d 526 (2011) (trial court has authority to order conditions mandated

by statute, including employment conditions, and the conditions do not need to be crime-related); Kinzle, supra, 181 Wn. App. at 787, (conditions authorized by statute as part of any term of community custody, including a requirement to notify an employer of a conviction and to maintain full-time employment, do not need to be crime-related).

Martinez asks that community custody condition six, requiring permission from the CCO before changing employment, be stricken. Martinez does not appear to object to community custody condition two which requires that he work at a DOC-approved job. Most likely because condition two is specifically statutorily mandated by RCW 9.94A.703(2)(b). However, condition six is a subset of condition two. If Martinez has to be employed at a location that is approved by DOC, it means he must have permission from DOC for any employment. It follows, therefore, that if he changes employment, the condition to work at a DOC-approved location still must be followed. Therefore, needing to seek permission from DOC for an employment change is not imposing any additional affirmative conditions on Martinez, but merely restating that he must have DOC approval even if he changes employment.

Condition number six is not a prohibition on working, and therefore does not need to be crime-related. It is merely another reiteration of DOC's statutory authority to approve places of employment.

In the case of a sex offender like Martinez, DOC has a duty to ensure that the community is safe from Martinez, which would include making sure he is employed somewhere that does not present a risk to minors.

Because the condition to get approval for an employment location is statutorily approved in RCW 9.94A.703(2)(b), community custody condition six requiring Martinez to get approval before changing job locations is also statutorily approved as it does not involve imposing any additional conditions. Furthermore, it does not need to be crime-related. This community custody condition should be affirmed.

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm the defendant's conviction and sentence, with the exception of striking the last sentence of community custody condition five

requiring Martinez to obtain permission from his CCO for any sexual contact.

DATED this 19th day of September, 2018.

Respectfully submitted,

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