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No. 98493-0

No. 51923-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER JOHNSON,

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION

Christopher Johnson is a husband and father who served in the Navy for 10 years and had no criminal history prior to this case. But he is now serving an indeterminate life sentence because he responded to an ad on the “Casual Encounters” section of Craigslist. The ad was posted by a police officer under the “women for men” category, but the police officer later falsely claimed to be a 13-year-old. Although Craigslist prohibited people under 18 years of age from using the Casual Encounters section, and Mr. Johnson testified he did not intend to have sex with a child, the trial court denied his request to instruct the jury on the defense of entrapment.

This Court should reverse and remand for a new trial. It is for the jury to weigh evidence and evaluate credibility, but the court denied the requested entrapment instruction simply because the judge was unconvinced after hearing the evidence.

In the alternative, this Court should reverse the sentence. Mr. Johnson was deprived of his constitutional right to the effective assistance of counsel when his attorney failed to argue the three convictions constituted the same criminal conduct for purposes of the offender score. And the condition of community custody prohibiting internet access violates the First and Fourteenth Amendments.

B. ASSIGNMENTS OF ERROR

1. The trial court erred and deprived Mr. Johnson of his Sixth and Fourteenth Amendment right to present a defense by denying Mr. Johnson's request to instruct the jury on the defense of entrapment.

2. Mr. Johnson was deprived of the effective assistance of counsel under the Sixth Amendment and article I, section 22 by his attorney's failure to argue at sentencing that the offenses constituted the same criminal conduct pursuant to RCW 9.94A.589.

3. The condition of community custody prohibiting internet access without the approval of the community corrections officer ("CCO") is overbroad and vague in violation of the First and Fourteenth Amendments.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. It is reversible error to refuse to instruct the jury on a defense if there is evidence to support the defense. The defense of entrapment applies if the criminal design originated in the minds of law enforcement officers and the defendant was lured or induced to commit a crime he would not otherwise have committed. Evidence was presented that Mr. Johnson answered an advertisement on an adult website seeking men for women, but that a police officer had set up the advertisement and later pretended to be 13 years old. In this attempted rape of a child case, did the

trial court err in denying Mr. Johnson's motion to instruct the jury on the defense of entrapment?

2. Multiple convictions constitute the "same criminal conduct" for sentencing purposes if they involved the same intent, same victim, and same time and place. A defendant is deprived of his constitutional right to the effective assistance of counsel if his attorney fails to argue that multiple convictions encompass the same criminal conduct and there is a reasonable possibility that the sentencing court would have found the offenses constituted the same criminal conduct had counsel so argued.

Mr. Johnson was convicted of attempted rape of a child, attempted commercial sexual abuse of a child, and communication with a minor for immoral purposes. For all crimes, the State alleged the victim was a fake 13-year-old, that Mr. Johnson's intent was to have sex with the fake teenager, and that the crimes occurred online and in Mr. Johnson's car in Kitsap County on October 12, 2017. Was Mr. Johnson deprived of his constitutional right to the effective assistance of counsel when his attorney failed to argue at sentencing that these three counts encompassed the same criminal conduct?

3. Sentencing conditions violate due process if they vest unbridled discretion in community corrections officers, and they violate the First Amendment if they prohibit all internet access instead of imposing

restrictions narrowly tailored to address the defendant's crime. Did the sentencing court violate Mr. Johnson's constitutional rights by imposing a condition of community custody prohibiting all internet access without prior approval of the CCO?

D. STATEMENT OF THE CASE

Christopher Johnson is a husband and father who had no criminal history prior to this case. CP 82. He served in the Navy for 10 years, then joined Progeny Systems, a primary Department of Defense contractor, where he performed computer work on U.S. submarines for another 10 years. CP 82. He provided for his family, which includes his wife, their biological son, their adopted daughter, and his wife's children from a prior relationship. RP (3/27/18) 656-57.

In October of 2017 Mr. Johnson responded to a post on the "Casual Encounters" section of Craigslist. RP (3/27/18) 553, 610-11. The section is for adults only, and users must confirm they are 18 or over when logging in. RP (3/27/18) 576, 637, 686. A police officer had posted the advertisement and titled it "crazy and young. Looking to explore – w4m Bremerton." RP (3/27/18) 552. The phrase "w4m" means "women for men." RP (3/27/18) 552.

A different police officer, Detective Kristl Pohl, exchanged e-mail messages with Mr. Johnson. RP (3/27/18) 547-94. She eventually falsely

described herself as a 13-year-old named Brandi, asked Mr. Johnson if he could “help out with \$\$ or something,” and arranged for them to meet at an address in Bremerton. RP (3/27/18) 549, 553-54, 558, 567.

Police stopped and arrested Mr. Johnson in Bremerton. RP (3/26/18) 487. They seized his wallet, which contained just a little over \$40. RP (3/26/18) 480.

The State charged Mr. Johnson with one count of attempted rape of a child in the second degree, one count of attempted commercial sexual abuse of a minor, and one count of communicating with a minor for immoral purposes. CP 1-4. At trial, the State introduced the lurid e-mail and text message exchanges, and police witnesses testified about their false claims and Mr. Johnson’s responses. RP (3/27/18) 547-600, 606-45.

Mr. Johnson testified he did not believe the person who posted the ad was actually 13 years old and would not have had sex with a real 13-year-old. RP (3/27/18) 672-75, 684-86. He asked the court to instruct the jury on the affirmative defense of entrapment, but the court denied the request. CP 39-40; RP (3/28/18) 752-62. The State argued in closing that Mr. Johnson was not credible and that it had proved he intended to pay a 13-year-old 40 dollars for sex. RP (3/28/18) 809-26. Mr. Johnson argued he was only seeking casual sex with a woman, that infidelity is not a crime even if it is dishonorable, and that he happened to have a little over \$40 in

his wallet, which is not an amount one would pay for sex. RP (3/28/18) 826-33.

The jury entered guilty verdicts on all three counts. CP 66. At sentencing, defense counsel requested an exceptional sentence below the standard range, but did not ask the court to count the three crimes as the “same criminal conduct.” CP 80-85. The court denied the requested exceptional sentence and imposed an indeterminate life sentence with a minimum term of 10 years. CP 94-96. A person who actually molested a real child under 12 years old would face only a determinate range of 51-68 months. CP 82; RCW 9.94A.510, .515.

E. ARGUMENT

1. The trial court erred in refusing to instruct the jury on the defense of entrapment.

- a. A defendant is entitled to an instruction on entrapment if evidence is presented that the criminal design originated in the mind of law enforcement officials, and the defendant was induced to commit a crime he had not otherwise intended to commit.

The Sixth and Fourteenth Amendments and article I, sections 3 and 22, “guarantee a criminal defendant a meaningful opportunity to present a defense.” *State v. Ortuño-Perez*, 196 Wn. App. 771, 783-84, 385 P.3d 218 (2016); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22.

“Each side is entitled to have the jury instructed on its theory of the case if there is evidence to support that theory.” *State v. Williams*, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997). “Failure to so instruct is reversible error.” *Id.* at 260.

In any prosecution for a crime, it is a defense that:

- (a) The criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and
- (b) The actor was lured or induced to commit a crime which the actor had not otherwise intended to commit.

RCW 9A.16.070(1). A defendant bears the burden of proving the defense to the jury by a preponderance of the evidence. WPIC 18.05.

Mr. Johnson asked the court to instruct the jury on the entrapment defense, and proposed the pattern instruction. CP 40.

- b. The trial court erred in denying an entrapment instruction because evidence was presented that law enforcement initiated the crime and that Mr. Johnson was seeking sex with a woman, not a child.

Here, the question never even went to the jury, because the trial court refused to instruct the jury on the defense of entrapment. RP (3/28/18) 753-62. The court acknowledged there was evidence of the first prong: “the criminal design originated in the mind of the law enforcement official.” RP (3/28/18) 753-54. But the court believed Mr. Johnson did not present sufficient evidence on the second prong, which is commonly

known as the “predisposition prong”: “that the actor was lured or induced to commit a crime he did not otherwise intend to commit.” RP (3/28/18) 754-62.

Defense counsel pointed out that the State presented no evidence of predisposition. RP (3/28/18) 758. “He’s lured. He’s induced to commit a crime he was not intending to commit.” *Id.* Counsel noted the State presented no history, “no child pornography found on his computer ... no texts with other young people.” *Id.* “We don’t even have evidence from the State as to his Craigslist history. There’s been no testimony that -- how often he went on this site. There’s not been one single shred of evidence presented that he has attraction or interest in children.” *Id.*

The court countered, “a reasonable amount of persuasion to overcome reluctance does not constitute entrapment. So even if there’s some persuasion and -- and maybe there’s some persuasion, but I don’t know that we’ve crossed the line beyond a reasonable amount of persuasion. So I’m – I’m hesitant, Mr. Kelly.” RP (3/28/18) 760. The court concluded, “I’m going to deny the defendant’s request for that instruction. I don’t believe it has been established by sufficient evidence at trial that law enforcement did more than simply afford the defendant an opportunity to commit the crime. There was not anything beyond a reasonable amount of persuasion that might overcome a reluctance that the

defendant may have had, and so that would not constitute entrapment.” RP (3/28/18) 762.

The court erred, because it is not for the judge to weigh evidence and evaluate credibility; that is a task exclusively for the jury. *See State v. Powell*, 150 Wn. App. 139, 154, 206 P.3d 703 (2009) (counsel was ineffective for failing to request instruction on affirmative defense in rape case, where conflicting evidence “created weight and credibility issues for the jury to determine”). Indeed, “[t]he defense of entrapment is basically an inquiry into the intention of the defendant, and that intention along with questions of inducement, ready complaisance and other evidence of predisposition, may raise an issue of fact.” *State v. Keller*, 30 Wn. App. 644, 648, 637 P.2d 985 (1981) (reversing for failure to give entrapment instruction).

The judge was obviously unconvinced that Mr. Johnson was lured or induced to commit the crime, but the judge is not the trier of fact. Mr. Johnson was not required to *prove* the defense to the judge. An instruction on an affirmative defense must be given where there is “evidence that, *if believed by the jury*, would support [the] defense.” *State v. Harvill*, 169 Wn.2d 254, 257 n.1, 234 P.3d 1166 (2010) (addressing duress defense).¹

¹ For this reason, Division One’s analysis in *Trujillo* misses the mark. *See State v. Trujillo*, 75 Wn. App. 913, 917-18, 883 P.2d 329 (1994)

The evidence showed Mr. Johnson answered an ad on the Craigslist “casual encounters” section, and that only adults are permitted on this website. RP (3/27/18) 553, 576, 610-11, 637, 686. The person who posted the ad was in fact an adult, and described herself as a woman, not a girl. RP (3/27/18) 552. Only after hooking Mr. Johnson did the poster claim to be 13 years old. RP (3/27/18) 556. And Mr. Johnson testified he did not believe the person communicating with him was an actual child; he believed the exchange was a role-play game. RP (3/27/18) 672-75, 684. Thus, evidence was presented that, if believed by the jury, showed Mr. Johnson was *not* predisposed to commit this crime, but was induced by law enforcement. Mr. Johnson was entitled to have the jury instructed on his defense, and the trial court erred in refusing to provide the instruction.

- c. The remedy is reversal and remand for a new trial at which the jury will decide the factual issue of whether Mr. Johnson proved entrapment.

“In the trial of a criminal case, the court must instruct the jury on the law as to any legitimate defense advanced by the defendant when there is evidence to support that theory.” *Keller*, 30 Wn. App. at 649. “The failure to do so constitutes reversible error.” *Id.*

(suggesting that to even receive the instruction a defendant must “present evidence which would be sufficient to permit a reasonable juror to conclude that the defendant has established the defense of entrapment by a preponderance of the evidence”).

Because the trial court failed to instruct the jury on the legitimate defense of entrapment despite evidence to support that theory, this Court should reverse and remand for a new trial. *See id.*

2. Mr. Johnson was deprived of his constitutional right to the effective assistance of counsel at sentencing because his attorney failed to argue that the three counts encompassed the same criminal conduct.

- a. A criminal defendant has a constitutional right to the effective assistance of counsel.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to the effective assistance of counsel in criminal proceedings. U.S. Const. amend. VI; Const. art. I, § 22; *United States v. Cronin*, 466 U.S. 648, 654, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). A defendant is deprived of this constitutional right if (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

As to the first inquiry (performance), an attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical basis. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not permissibly tactical or strategic if it is not reasonable. *Roe v. Flores-*

Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000); *see also Wiggins v. Smith*, 539 U.S. 510, 521, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (“[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms”) (quoting *Strickland*, 466 U.S. at 688). While an attorney’s decisions are treated with deference, his or her actions must be reasonable under all the circumstances. *Wiggins*, 539 U.S. at 533-34.

As to the second inquiry (prejudice), if there is a reasonable probability that but for counsel’s inadequate performance, the result would have been different, prejudice is established and reversal is required. *Strickland*, 466 U.S. at 694; *Hendrickson*, 129 Wn.2d at 78. A reasonable probability “is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). It is a lower standard than the “more likely than not” standard. *Thomas*, 109 Wn.2d at 226.

- b. A defendant is deprived of his right to the effective assistance of counsel if his attorney fails to argue same criminal conduct at sentencing and there is a reasonable possibility that the sentencing court would have found the offenses encompassed the same criminal conduct had counsel so argued.

The Sentencing Reform Act (“SRA”) provides for the structured sentencing of felony offenders through standard sentence ranges derived

from the seriousness of the offense and the defendant's offender score. *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). The offender score is calculated by adding points from the defendant's criminal history as well as other current offenses. RCW 9.94A.589(1)(a). However, multiple current offenses count as only one crime if they constitute the "same criminal conduct." *Id.* "Same criminal conduct" . . . means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." *Id.*; *State v. Graciano*, 176 Wn.2d 531, 540, 295 P.3d 219 (2013).

Defense counsel's failure to argue same criminal conduct at sentencing can amount to ineffective assistance of counsel. *State v. Phuong*, 174 Wn. App. 494, 547, 299 P.3d 37 (2013); *State v. Saunders*, 120 Wn. App. 800, 824-25, 86 P.3d 232 (2004). If multiple offenses were committed at the same time and place and involved the same victim, and a court could find they were committed with the same objective criminal intent, counsel's failure to argue same criminal conduct amounts to deficient performance that prejudiced the defendant. *Phuong*, 174 Wn. App. at 548; *Saunders*, 120 Wn. App. at 825.

- c. Mr. Johnson was deprived of his right to the effective assistance of counsel because his attorney failed to argue that the three counts constituted the same criminal conduct.

Here, counsel's failure to argue the three counts constituted the same criminal conduct deprived Mr. Johnson of his constitutional right to the effective assistance of counsel. For all three counts, the victim was a make-believe person named Brandi. For all three counts, Mr. Johnson's alleged intent was to have sex with the person who posted the ad. And for all three counts, the time was over a few hours on October 12, 2017 and the place was online and in Mr. Johnson's car in Kitsap County. Therefore, the failure to argue same criminal conduct deprived Mr. Johnson of his constitutional right to the effective assistance of counsel. The remedy is reversal of the sentence and remand for a new sentencing hearing. *Phuong*, 174 Wn. App. at 548; *Saunders*, 120 Wn. App. at 825.

3. The condition prohibiting all internet access unless specifically authorized by the community corrections officer is unconstitutional.

The sentencing court imposed the following condition of community custody: "Do not use or access the World Wide Web unless specifically authorized by CCO through approved filters." CP 99. This condition is unconstitutional because it vests unbridled discretion in the

community corrections officer and prohibits a much broader swath of First Amendment activity than necessary.

The sentencing court has the discretion to impose “crime-related prohibitions” as conditions of community custody. RCW 9.94A.703(3)(f). A crime-related prohibition must be related to the circumstances of the crime for which the offender is being sentenced. RCW 9.94A.030(10); *State v. Land*, 172 Wn. App. 593, 605, 295 P.3d 782 (2013).

The court must avoid vague conditions that violate due process by vesting too much discretion in community corrections officers to engage in arbitrary enforcement. *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008); *United States v. Scott*, 316 F.3d 733, 736 (7th Cir. 2003). Thus, in *Scott*, the court reversed the imposition of a condition like the one at issue here: “The defendant shall be prohibited from access to any Internet Services without prior approval of the probation officer.” *Id.* at 734. *Id.* at 736. The court noted that such open-ended delegations “create opportunities for arbitrary action – opportunities that are especially worrisome when the subject concerns what people may read.” The court ruled, “Terms should be established by judges *ex ante*, not probation officers acting under broad delegations and subject to loose judicial review *ex post*[.]” *Id.*

Courts must also avoid conditions that infringe a defendant's First Amendment right to communicate and receive information, unless the limitation is narrowly tailored to serve a significant government interest. *Bahl*, 164 Wn.2d at 757-58; *see also Packingham v. North Carolina*, ___ U.S. ___, 137 S. Ct. 1730, 198 L. Ed. 2d 273 (2017).

In *Packingham*, the Supreme Court held that a limitation on internet access violated the First Amendment – even though the limitation was much narrower than the one at issue here. North Carolina made it a felony for a registered sex offender “to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal web pages.” *Packingham*, 137 S. Ct. at 1733 (citing N.C. Gen. Stat. Ann. §§14-202.5 (2015)). The law exempted websites that provided only e-mail, chat, or instant messenger services, and exempted websites whose primary purpose was commercial transactions. *Id.* at 1734.

But even this comparatively limited prohibition was invalid, and the court reversed the conviction of a child rapist who had violated the internet ban. *Id.* at 1734-35. The Court explained: “A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more.” *Id.* at 1735. The Court described the “vast democratic forums

of the Internet” as the “most important places” for the exchange of ideas. *Id.* (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997)). On social networking sites, users “debate religion and politics[,]” “look for work[,]” and “petition their elected representatives[.]” *Id.* Thus, courts “must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks” online. *Id.* at 1736.

Acknowledging that child sexual abuse is a most serious crime and that states may pass laws to protect children, the Court emphasized such laws “must not burden substantially more speech than is necessary” to further that legitimate goal. *Packingham*, 137 S. Ct. at 1736. It is permissible to enact “narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor.” *Id.* at 1737. But the law at issue was unconstitutionally overbroad because it barred access to “the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.” *Id.* The Court concluded, “the State may not enact this complete bar to the exercise of First Amendment rights on

websites integral to the fabric of our modern society and culture.” *Id.* at 1738.

Following *Packingham*, the Third Circuit invalidated a condition of supervised release that is the same as that imposed on Mr. Johnson. *United States v. Holena*, 906 F.3d 288 (3d Cir. 2018). The defendant was convicted of “using the internet to try to entice a child into having sex.” *Id.* at 290. The sentencing judge imposed a condition of supervised release forbidding him from using the internet without his probation officer’s approval. *Id.* The Court of Appeals reversed, noting “the lack of tailoring raises First Amendment concerns.” *Id.* at 291.

“A defendant’s conduct should inform the tailoring of his conditions.” *Id.* For example, “a child-pornography collector may be forbidden to possess pornography or visit pornographic websites.” *Id.* at 292. But in *Holena*’s case, “both the length and coverage” of the condition were “excessive.” *Id.* As in Mr. Johnson’s case, *Holena*’s supervision was to last for life, and the Court of Appeals refused to condone the “lifetime cybernetic banishment.” *Id.* And as to scope, the condition was “the antithesis of the narrowly tailored sanctions we require.” *Id.* (internal quotations omitted); *see also id.* at 294 (“a condition is not narrowly tailored if it restricts First Amendment freedoms without any resulting benefit to public safety.”).

The court explained, “[u]nder *Packingham*, blanket internet restrictions will rarely be tailored enough to pass constitutional muster.” *Holena*, 906 F.3d at 295. “Their ‘wide sweep precludes access to a large number of websites that are most unlikely to facilitate the commission of a sex crime against a child.’” *Id.* (quoting *Packingham*, 137 S. Ct. at 1741 (Alito, J., concurring)). The condition imposed “prevents Holena from accessing anything on the internet – even websites that are unrelated to his crime.” *Id.* at 293. And although the condition permitted internet use with the probation officer’s prior approval, the sentencing court “gave the probation office no guidance on the sorts of internet use that it should approve.” *Id.* The court ordered: “The goal of restricting Holena’s internet use is to keep him from preying on children. *The District Court must tailor its restriction to that end.*” *Id.* at 293 (emphasis added).

Similarly here, the blanket prohibition on internet use without prior authorization of the CCO is unconstitutional. This Court should reverse and remand for imposition of a significantly more tailored condition.

F. CONCLUSION

Mr. Johnson asks this Court to reverse his convictions and remand for a new trial. In the alternative, the sentence should be reversed and the case remanded for resentencing, and the condition prohibiting internet access must be significantly tailored or stricken.

DATED this 17th day of December, 2018.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 51923-2-II
v.)	
)	
CHRISTOPHER JOHNSON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF DECEMBER, 2018, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS - DIVISION TWO AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF DECEMBER, 2018.



X _____

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