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NO. 65049-1-I

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

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King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

CELESTINO S. HERNANDEZ,

Appellant.

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

The Honorable Hollis R. Hill, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove that each act of alleged child molestation it presented to the jury constituted "sexual contact" such that reliance on each act could sustain a conviction.

2. The state's failure to elect which of several alleged acts of child molestation it relied on to prove the single child molestation charge and the trial court's failure to use a special verdict form created the possibility the jury based its guilty verdict on insufficient evidence to sustain a conviction.

3. The trial court exceeded its statutory sentencing authority by imposing a substance abuse community custody condition because there was no evidence drug abuse played a role in the offense.

Issues Pertaining to Assignment of Error

1. The state presented multiple acts of alleged child molestation, some of which did not meet the definition of "sexual contact." The state did not elect which act or acts it relied on for conviction, did not object to the jury unanimity instruction, and did not argue the acts were part of the same course of conduct resulting in a single act of molestation. Finally, the trial court failed to employ a special verdict form to ensure jurors relied on an act that constituted molestation as a matter of law.

Because it is possible the jury's guilty verdict was based on insufficient evidence, must appellant's second degree child molestation conviction be reversed?

2. Did the trial court exceed its statutory sentencing authority by ordering the appellant to obtain a "substance abuse" evaluation and to follow all treatment recommendations where there was no evidence substance abuse played any role in the offense?

B. STATEMENT OF THE CASE

Celestino Hernandez Serrano and Diana Hulford lived in the same Auburn apartment complex in the spring of 2009. RP 168-69, 600. Hernandez's wife, Dawn Serrano, and Hulford were close friends. RP 170-71, 624. Hernandez's 12-year-old son, Angel, was very close with Hulford's 12-year-old daughter, J.H., who stayed with her mother at least every other weekend. RP 170-72, 239-42, 381, 385, 599-600, 624. Hernandez "did not care for the fact" Hulford and Dawn were friends, but he nevertheless treated Hulford with respect. RP 598-99. He also had "disagreements" with J.H. because of the way she behaved around Hulford and Hernandez's children. RP 599, 636. For her part, Hulford did not like Hernandez, and knew J.H. was aware there were "rough edges" in her relationship with him. RP 201-02.

On a Saturday when J.H. was visiting her mother, Hernandez attended and served as the cook at a barbeque party his friend, Mario, hosted at the apartment complex across the street. RP 389-93, 550-55, 601-06. Later in the afternoon, Angel and J.H. went to use a play area in Mario's complex, as they had often done in the past. The play area was very near the party. RP 244-50, 398-405, 604-05.

Hernandez saw Angel and J.H. and called them over to say hello and to see if they were having a good time. RP 250-52, 401-02, 607-10. What happened thereafter, which was disputed, resulted in the state charging Hernandez with one count of second degree child molestation for allegedly having unlawful sexual contact with J.H. CP 1.

According to J.H., Hernandez called her over because he wanted to talk with her. Angel stayed behind at the play area. Hernandez, who had been drinking beer, and J.H. walked around to the back of the apartment building. Hernandez was "a little bit wobbly," J.H. said, couldn't walk "full on straight," and slurred his words. RP 248, 253-54, 394-95. Hernandez asked her about three or four times if she wanted beer, so she finally relented and took a couple of sips from a can. RP 255-56, 258. As she drank, Hernandez put his hand under her shirt and rubbed her back. RP 256-57. She returned the can to Hernandez and went back to the play

area. Hernandez returned to the party. RP 258-59. J.H. "let it slide" and did not take the incident seriously because her family was so close to Hernandez's. RP 259.

Ten or 15 minutes later, Hernandez called J.H. over again. They again went behind the building, Hernandez again gave her a drink of beer, and again rubbed her back under her shirt. This time, J.H. said, Hernandez also touched her buttocks outside of her jeans, which made her uncomfortable. RP 276-79, 223-25. As with the first incident, this matter ended uneventfully with J.H. returning to the play area and saying nothing. RP 276-80.

Shortly thereafter, Hernandez again called J.H. over to him. RP 262-63. This time, Angel followed her. Hernandez gave Angel \$5 and told the boy to go across the street for five minutes. Angel started to do that and Hernandez again took J.H. behind the apartment building and asked her if she wanted alcohol. This time, J.H. pretended like she drank some beer. RP 264-65, 280, 350. Hernandez told her he would give her \$20 to do anything she wanted "in a sexual way." RP 265. J.H. testified she told Hernandez she did not want that and handed the beer back to him. Hernandez kissed her on the forehead and said she "was like his daughter now." 265-66. They then walked back toward the party. RP 268-69.

Again, the girl did not take the matter seriously because Hernandez "was a little bit drunk." RP 268-73.

At a later point, Hernandez approached J.H. and Angel and asked them if they wanted anything. Angel asked if they could go to the store, and Hernandez told his son "yeah, let's go get the keys." RP 281, 283-84. Angel began running toward their residence and J.H. and Hernandez walked back. Hernandez took J.H.'s hand and the girl pulled it away. He did it again and J.H. permitted it, thinking Hernandez was drunk and did not know what he was doing. Then he took J.H.'s hand and rubbed it on his penis outside his pants. J.H. pulled her hand away and began to walk faster. RP 281-82, 285-88.

When Angel emerged from his apartment, he had no keys. J.H. waited a few minutes and then decided to walk to her mother's apartment. RP 289-91. Hernandez insisted on accompanying her. They walked through the parking lot and stopped between two vehicles. Hernandez turned her around and "dry humped" her – moved his lower body back and forth against her butt – twice before she was able to get away. RP 292-96. She quickly walked off and Hernandez caught up, grabbed her hand, and placed it on his exposed penis. RP 298-302. She pulled her hand away, but Hernandez repeated the action. RP 302-04. J.H. again pulled away,

made it into her mom's apartment, and slammed the door closed. RP 304-05.

Angel's recollection was a bit different. Hernandez was not off-balance and did not speak incorrectly, but Angel could tell he had been drinking. RP 412-13. His father spoke with J.H. just once, to offer her and Angel a ride to the store after learning they planned to walk. RP 411-12. The three then walked back across the street to Hernandez's apartment without incident. RP 413-20. When they arrived for the car keys, Angel's mother nixed the plan because Hernandez had alcohol in his system. RP 419-21. His mother also rejected his offer to walk J.H. home, so Hernandez did that. Hernandez returned home within a minute or two. RP 421.

Angel said Hernandez gave him \$5 about an hour before they went for the car keys and told him it was for when they went to the store later. After that exchange, Angel walked over to the party to get food. RP 431-34. He did not recall telling police Hernandez told him to walk away from him and J.H. when he gave him the money. RP 432-35. He also did not tell the officer his father was "drunk out of his mind." RP 435.

The state called an Auburn police officer, who testified he spoke with Angel. The boy told him among other things, that his father "was

drunk out of his mind." Angel also disclosed that Hernandez had walked behind the apartment building with J.H. and told her she was like a daughter and he would do anything for her. RP 515-20, 531-34.

In contrast, Hernandez testified he was never alone with J.H. RP 610-11. He gave Angel \$5 because the boy said he wanted candy. And because J.H. was standing next to Angel at the time, he gave her \$20 because it was the smallest bill he had. RP 612-13. He never took J.H. behind the apartment building and never touched her. RP 614, 616. He was not sexually attracted to young girls. RP 614-15.

When he returned to his residence at the end of the night with Angel and J.H., his wife refused to allow him to drive the kids to the store because he had been drinking. RP 616-17. He then walked J.H. back to her mother's apartment. On the way he did not touch J.H. and did not expose himself to her. RP 617-19. He surmised J.H. falsely accused him of the improper touching because she was upset he did not take her to the store. RP 618, 638.

When J.H. returned to her mother's apartment, she cried and told her mother, Diana Hulford, she wanted to go home to her father's residence. She then said Hernandez made her drink alcohol and "touch his dick." RP 184, 204-06. Hulford believed her and called 911. RP 184-85,

207-09. An angry Hulford, accompanied by J.H., walked to Hernandez's apartment and came inside looking for Hernandez. RP 186-88. Hulford broke down Hernandez's bedroom door and began yelling at him. She wanted answers. RP 156-58, 188-89, 211-15. She got "in his face." RP 215. During the ensuing scuffle, she and Hernandez pushed and shoved each other and Hulford repeatedly hit Hernandez, including in the face. RP 213, 229-30, 311-13, 619.

An enraged J.H., meanwhile, yelled racial slurs. She threatened to slit Hernandez's throat and kill him. J.H. admitted she had armed herself with a kitchen knife back at her mother's apartment and had it in her possession when she made her threats. RP 358-60.

This explosion quickly ended and Hulford and J.H. went back to their apartment. RP 161-62, 190-92, 313-14. Because her mother had caused a scene and police were on the way, J.H. realized she could not take back her accusations. RP 360-61.

Police arrived and spoke with J.H. and Hulford. RP 102-06, 125-33, 139-42, 191-93. J.H. showed officers where in the apartment complex the touchings occurred. RP 107-09, 118, 128-29. The officers arrested Hernandez. RP 134. One described him as "moderate[ly]" intoxicated. RP 125.

After hearing this evidence, jurors found Hernandez guilty of second degree child molestation as charged. CP 70. The trial court imposed a 20-month standard range sentence and 36 months community custody. As a condition of community custody, the court ordered Hernandez to obtain a substance abuse evaluation and to follow all treatment recommendations. CP 76-82; RP 717-18.

C. ARGUMENT

1. BECAUSE THE JURY MAY HAVE BASED ITS GUILTY VERDICT ON AN ACT THAT WAS INSUFFICIENT TO PROVE CHILD MOLESTATION, REVERSAL IS REQUIRED.

A guilty verdict may not stand unless it is based on evidence that proves the charged offense beyond a reasonable doubt. Jurors must also unanimously agree the same act has been proved beyond a reasonable doubt. The trial court instructed Hernandez's jury it must be unanimous, but the possibility remained the jury may have relied on an act that did not constitute the element of "sexual contact." This Court should therefore reverse Hernandez's conviction and remand for a new trial.

*a. Pertinent facts*

The trial court instructed the jury it had to unanimously agree that the state proved one particular act of child molestation beyond a reasonable doubt. CP 65 (instruction 9, attached as Appendix). The

instruction defining the element of sexual contact provided: "Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party or a third party." CP 67.<sup>1</sup>

The state presented evidence of the following incidents of contact between Hernandez and J.H.: 1) rubbing back under shirt; 2) rubbing back under shirt; grabbing buttocks outside jeans; 3) kiss on forehead; 4) took J.H.'s hand, placed it on penis area outside of pants, and rubbed; 5) put his hands on J.H.'s hips and three times moved his lower body back and forth against her buttocks; and 6) twice placed J.H.'s hand on his exposed penis and moved it back and forth. RP 256-58, 265-66, 275-76, 281-82, 294-96, 300-03.

During closing argument, the prosecutor read instruction 9, the instruction stating jurors must find the state proved one particular act of

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<sup>1</sup> RCW 9A.44.086 provides:

A person is guilty of child molestation in the second degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

CP 63.

child molestation beyond a reasonable doubt. RP 653. Then the prosecutor made the following statement:

[Y]ou heard testimony from [J.H.] about the rubbing of her back and then the groping of her bottom. And then as they're crossing the street and walking back to Angel's apartment, the defendant makes her touch his penis over the pants. And then again as they're walking, as the defendant is walking [J.H.] home, between the cars, he's grinding his penis on her. And then even further than that is when he actually pulls out his penis and makes her touch it.

*Each of those could be considered an act of child molestation.* All of you only need to agree that one of them occurred, and you have to all agree as to which occurred in order to convict the defendant.

RP 654 (emphasis added).

*b. Some of the acts cannot sustain a child molestation conviction.*

The prosecutor's statement was not correct with respect to the back rubs and kiss on the forehead. Courts look to the totality of the facts and circumstances in deciding whether the "sexual contact" element has been proved. State v. Harstad, 153 Wn. App. 10, 21, 218 P.3d 624 (2009). "Contact is 'intimate' if the conduct is of such a nature that a person of common intelligence could fairly be expected to know that, under the circumstances, the parts touched were intimate and therefore the touching was improper." Harstad, 153 Wn. App. at 21-22 (quoting State v. Jackson, 145 Wn. App. 814, 819, 187 P.3d 321 (2008)) (held, upper inner

thigh, which puts defendant's hand in closer proximity to primary erogenous zone, was intimate part).

Under this standard, neither a back rub – on the skin or not -- nor a kiss on the forehead is "sexual contact." Neither area is near an erogenous zone. And at the time Hernandez touched J.H.'s back the first time, and kissed her forehead, there were no surrounding circumstances indicating the contact was sexual. According to J.H., she was taking a sip of beer when Hernandez first rubbed her back. RP 256-57, 323-24. Hernandez did not touch her anywhere else and said nothing when he rubbed her back. RP 257. When Hernandez kissed her on the forehead, he said she "was like his daughter now." RP 266.

Providing further support is State v. R.P., 122 Wn. 2d 735, 736, 862 P.2d 127 (1993). There a juvenile picked up, hugged, and kissed a classmate. During these events, he placed a "hickey" or "passion mark" on her right neck area. The Court held this evidence was not sufficient to establish "sexual contact." R.P., 122 Wn.2d at 736.

In another case, the defendant took a 5-year-old girl into the bathroom, removed her pants, washed her "bottom" with a wash cloth, and afterwards had her perform fellatio on him. State v. Johnson, 96 Wn.2d 926, 927, 934, 639 P.2d 1332 (1982), overruled on other grounds by State

v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995). The Court held that by itself, the defendant's act of wiping the child's genitals was not an act of child molestation. Rather, the "sexual character of the encounter was unmistakable" only when considered with the act of fellatio that followed. Johnson, 96 Wn.2d at 934. In other words, only when considering the surrounding circumstances did the wiping constitute "sexual contact."

There were no such circumstances in Hernandez's case with respect to the first back rub and the kiss on the forehead. Those acts are not sexual contact; therefore, a guilty verdict based on either act would have to be reversed.

As evidenced by instruction 9, the state alleged Hernandez committed multiple acts of child molestation. A multiple acts prosecution occurs when "several acts are alleged and any one of them could constitute the crime charged." State v. Furseth, 156 Wn. App. 516, 520, 233 P.3d 902 (2010). Where different acts could form the basis for the charge: 1) the State must elect the act on which it will rely for conviction; or 2) the trial court must instruct the jury to agree unanimously, beyond a reasonable doubt, on a specific criminal act as the basis of conviction. State v. Vander Houwen, 163 Wn.2d 25, 37-38, 177 P.2d 93 (2008); State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

This rule exists because a defendant may be convicted only when a unanimous jury concludes the act charged has been committed. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); Wash. Const. art. I, §22; U.S. Const. Amend 6. This is an issue of constitutional magnitude that can be raised for the first time on appeal. State v. Watkins, 136 Wn. App. 240, 244, 148 P.3d 1112 (2006), review denied, 161 Wn.2d 1028 (2007), cert. denied, 552 U.S. 1282 (2008); Vander Houwen, 163 Wn.2d at 38.

In Hernandez's case, the state not only failed to prove the first back rub or the kiss on the forehead rose to the level of "sexual contact," it also did not establish either of those touchings was "done for the purpose of gratifying sexual desires." This portion of the "sexual contact" definition may not be inferred because Hernandez did not touch sexual or intimate parts when he rubbed J.H.'s back or kissed her forehead. See Harstad, 153 Wn. App. at 21 ("Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touch was for the purpose of sexual gratification[.]") (quoting, State v. Powell, 62 Wn. App. 914, 917, 816 P.2d 86 (1991), review denied, 118 Wn.2d 1013 (1992)).

Without such an inference, or any surrounding circumstances that reveal Hernandez rubbed J.H.'s back or kissed her forehead for his own sexual gratification, the state cannot show such a purpose. This is yet another reason for this Court to conclude those touches were not "sexual contact" and therefore did not constitute child molestation.

This is problematic for several reasons. First, the state did not elect upon which act or acts it was relying in support of its request for conviction. Second, the prosecutor argued, incorrectly, that *any* of the acts could support a conviction. Third, the jury was not given a special verdict form, thereby making it impossible for this Court to be sure it did not base its verdict on Hernandez's back rubbing or kiss on the forehead. In other words, it is reasonably likely the jury could have based its verdict on insufficient evidence.

This Court rejected a similar argument in State v. Stark, 48 Wn. App. 245, 738 P.2d 684, review denied, 109 Wn.2d 1003 (1987). Stark was convicted of first degree statutory rape. A young girl described three separate instances of sexual abuse, two of which could have constituted "sexual intercourse." Stark, 48 Wn. App. at 246-47.<sup>2</sup> The court instructed

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<sup>2</sup> The three alleged acts of intercourse were (1) touching vagina with hand, (2) licking vagina, and (3) inserting penis into vagina. Stark, 48 Wn. App. at 247.

jurors they had to unanimously agree Stark engaged in an act of sexual intercourse with the girl. Stark, 48 Wn. App. at 251.<sup>3</sup> The court did not, however, ask the jury to specify the acts upon which it agreed. Stark, 48 Wn. App. at 251.

This Court held that because the trial court instructed the jury it must unanimously agree that the same act of intercourse had been proven beyond a reasonable doubt, it could not have relied on the one act that did not satisfy the definition of "sexual intercourse." Stark, 48 Wn. App. at 251.<sup>4</sup>

Stark is distinguishable from Hernandez's case. First, the definition of "sexual intercourse" is considerably more straightforward for

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<sup>3</sup> In the more typical case, reviewing courts must decide whether the prosecutor's failure to elect *and* the trial court's failure to give a unanimity instruction -- which is constitutional error -- is nevertheless harmless beyond a reasonable doubt. State v. Petrich, 101 Wn.2d 566, 573, 683 P.2d 173 (1984); State v. Camarillo, 115 Wn.2d 60, 64, 794 P.2d 850 (1990); State v. Hanson, 59 Wn. App. 651, 659, 800 P.2d 1124 (1990). In such circumstances, the error is deemed harmless only if a rational juror could not have a reasonable doubt as to whether each act established the crime. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). In Hernandez's case, as in Stark, the question is whether there was error even though jurors were given the unanimity instruction.

<sup>4</sup> The trial court also provided a definition of "sexual intercourse," which required (1) penetration of either the vagina or anus, or (2) sexual contact between persons involving the sex organs of one person and the mouth or anus or another. Stark, 48 Wn. App. at 250-51 (citing RCW 9A.44.010(1)).

jurors to apply than the definition of "sexual contact" given by the trial court to Hernandez's jury. Because merely touching the vagina with a hand plainly does not involve penetration or contact between one's sex organs and another's mouth or anus, it was easy for this Court in Stark to conclude the jury's verdict was based on either licking the vagina or inserting the penis into the vagina.

In contrast, "sexual contact" is defined more ambiguously, and requires a jury to subjectively determine whether (1) a touching is of the "sexual or other intimate parts" of another and, if so, whether the touching was for the purpose of gratifying sexual desires. CP 67 (instruction 11); RCW 9A.44.010(2). Skin-to-skin contact with a back and a hand, or kissing on the forehead, cannot be easily discounted as "sexual contact" when considering the totality of the circumstances. R.P. offers a good example of this; many reasonable jurors would likely question the Supreme Court's conclusion that giving another a "hickey" on the neck was not "sexual contact."

The elusiveness of the term "sexual contact" is illustrated by this passage from the self-styled "Voice of America's Prosecutors:"

Once an offender has established himself as a "friend" and reinforced *non-sexual touching* (often through backrubs, hugging and wrestling), the offender advances the contact to include direct sexual touching. Some offenders report that they purposefully

“move slowly” and use a “gentle touch.” . . . *Sexual contact usually starts with more intimate hugs, kisses and fondling.* Some offenders stop there while others go on to incorporate masturbation, digital and penile penetration or oral sex.

Corey Jensen, Patti Bailey, Steve Jensen, Selection, Engagement and Seduction of Children and Adults by Child Molesters, Prosecutor, (November-December 2002), at 20, 45 (emphasis supplied). As this illustrates, determining whether a touching is sufficient to prove child molestation requires consideration of many factors.

At this point, Hernandez must note he is not arguing the term "sexual contact" is unconstitutionally vague as applied. Rather, he wishes to emphasize the restraint with which this Court must act before assuming the jury based its verdict on sufficient evidence. See, e.g., State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001) (“When a defendant is convicted under alternative theories, one acceptable and the other based on an erroneous instruction, this court has not been willing to substitute its judgment for that of the jury by inferring that the verdict was reached under the correct instruction.”); State v. Golladay, 78 Wn.2d 121, 140, 470 P.2d 191 (1970) (“It is not our purpose in discussing these facts to act as a ‘superjury[.]’”), overruled on other grounds by State v. Arndt, 87 Wn.2d 374 (1976).

Unlike the facts in Stark, the circumstances in Hernandez's case do not permit this Court to be certain that the jury did not rely on an act that is insufficient, as a matter of law, to support conviction. That a conviction based on insufficient evidence cannot stand is a bedrock principle of constitutional law. In every criminal prosecution, constitutional due process requires the state to prove all elements of the charged crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996).

On the record in Hernandez's case, a reasonable jury could have based a guilty verdict on an act that was not "sexual contact." This possibility requires reversal. See State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994) (retrial necessary when jury may have relied on legally insufficient alternative means).

*c. The multiple acts were not a continuing course of conduct.*

In response to Hernandez's arguments, the state may contend his case involves one continuing offense rather than separate multiple acts. This Court should reject any such argument without reaching the merits. First, such a theory would be contrary to the prosecutor's argument at trial. It is therefore waived. Second, if there were only one continuing act, there

would be no need for a unanimity instruction. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). Because the state did not object to the instruction at trial, it is now the law of the case. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) ("jury instructions not objected to become the law of the case").

Even if this Court chooses to reach the merits, the argument fails. An accused's actions must be evaluated in a commonsense manner to determine whether the conduct forms one continuing offense. Petrich, 101 Wn.2d at 571; State v. Marko, 107 Wn. App. 215, 220, 27 P.3d 228 (2001). A continuing course of conduct requires an ongoing enterprise with a single objective. State v. Love, 80 Wn. App. 357, 361, 908 P.2d 395, review denied, 129 Wn.2d 1016 (1996).

Factors to be considered include whether the acts occurred at separate times or places. State v. Blade, 126 Wn. App. 174, 181, 107 P.3d 775, review denied, 155 Wn.2d 1019 (2005). As well, courts have been more willing to find a continuing course of conduct where the charged offense contemplates continuing action. See State v. Fiallo-Lopez, 78 Wn. App. 717, 724-25, 899 P.2d 1294 (1995) (citing welfare fraud, certain kinds of assault, and promoting prostitution as offenses that contemplate continuing conduct).

Three controlled substances cases illustrate the importance of the type of crime charged. This Court in State v. King held *possession* of cocaine found in a Tylenol bottle inside a car in which the accused had been a passenger, and possession of cocaine found inside a fanny pack the accused was wearing, did not constitute one continuing possession offense. State v. King, 75 Wn. App. 899, 903, 878 P.2d 466 (1994), review denied, 125 Wn.2d 1021 (1995). Rather, the evidence "tended to show two distinct instances of cocaine possession occurring at different times, in different places, and involving two different containers-the Tylenol bottle and the fanny pack. One alleged possession was constructive; the other, actual." King, 75 Wn. App. at 903.

In contrast, where the state charged the accused with possession of cocaine *with intent to deliver*, this Court held the accused's possession of five rocks on his person and 40 rocks in his residence constituted a continuing course of conduct. Love, 80 Wn. App. at 362. Important to this decision was other evidence of an ongoing drug trafficking operation found at the residence and the accused's exit from the residence only minutes before the search of his person. Id.

Third, this Court found one continuing *delivery* of cocaine where delivery of a small sample of the agreed-upon larger amount of cocaine at

a restaurant was followed soon thereafter by delivery of the larger remaining amount in a grocery store parking lot. Fiallo-Lopez, 78 Wn. App. at 725-26.

The offense of child molestation, in contrast, does not contemplate continuing individual acts. This Court said as much in State v. Gooden, where it recognized "child molestation, unlike promoting prostitution, is not an ongoing enterprise." 51 Wn. App. 615, 620, 754 P.2d 1000, review denied, 111 Wn.2d 1012 (1988).

With respect to the other factors, Hernandez's alleged acts were separated into distinct incidents by clear breaks when J.H. returned to the play area. And unlike in promoting prostitution or welfare fraud cases, here there was no overarching singular objective. Instead, Hernandez allegedly sought sexual gratification with each contact.

Finally, the number of acts presented to the jury is also important: "[t]he greater the number of offenses in evidence, the greater the possibility, or even probability, that all of the jurors may never have agreed as to the proof of any single one of them." State v. Workman, 66 Wash. 292, 295, 119 P. 751 (1911). The number of acts alleged to have occurred by the state increased the likelihood the jury either could not unanimously agree or relied on an act that does not sustain the verdict.

This Court should reject any assertion that Hernandez's acts constituted one continuing act of child molestation. And for all the aforesaid reasons, this Court should reverse Hernandez's conviction and remand for a new trial.

2. THE TRIAL COURT EXCEEDED ITS STATUTORY SENTENCING AUTHORITY BY IMPOSING A SUBSTANCE ABUSE COMMUNITY CUSTODY CONDITION BECAUSE THERE WAS NO EVIDENCE DRUG ABUSE PLAYED A ROLE IN THE INCIDENTS.

Despite an absence of evidence indicating Hernandez was under the influence of drugs, the trial court demanded he participate in a "substance abuse" evaluation and follow recommended treatment as a condition of community custody. CP 84. The trial court exceeded its sentencing authority because the condition was not crime-related.

A trial court may only impose a sentence authorized by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). A defendant may therefore challenge an illegal or erroneous sentence for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); State v. Julian, 102 Wn. App. 296, 304, 9 P.3d 851 (2000), review denied, 143 Wn.2d 1003 (2001). An offender has standing to challenge conditions even though he has not been charged with violating them. State v. Riles, 86 Wn. App. 10, 14-15, 936 P.2d 11

(1997), aff'd., 135 Wn.2d 326, 957 P.2d 655 (1988); see also Bahl, 164 Wn.2d at 750-52 (defendant may bring pre-enforcement challenge to vague sentencing condition).

Hernandez was convicted of second degree child molestation, a nonviolent sex offense according to RCW 9.94A.030(45)(a)(i), (53). When Hernandez committed his crime, offenders were sentenced according to former RCW 9.94A.715. That statute authorized a trial court to impose a term of community custody. Former RCW 9.94A.715(1) (2008).

Under former RCW 9.94A.715(2)(a), unless the court waived a community custody condition, all conditions set forth in former RCW 9.94A.700(4) applied, and the court could also include those provided for in former RCW 9.94A.700(5). In addition, a trial court could have ordered participation in rehabilitative programs or to otherwise perform affirmative conduct “reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community . . . .” Former RCW 9.94A.715(2)(a).

Former RCW 9.94A.700(5) provided:

(a) The offender shall remain within, or outside of, a specified geographical boundary;

(b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;

(c) The offender shall participate in crime-related treatment or counseling services;

(d) The offender shall not consume alcohol; or

(e) The offender shall comply with any crime-related prohibitions.

One of the conditions the trial court imposed on Hernandez was that he obtain a "substance abuse" evaluation and follow all recommended treatment. CP 84. This condition could not be imposed unless it reasonably related to the circumstances of Hernandez's offense. Under State v. Jones,<sup>5</sup> it does not.

Jones pleaded guilty to first degree burglary and other crimes. During the plea hearing, Jones's attorney explained Jones was bipolar and not only off of his medication, but also using methamphetamine, at the time of his crimes. Counsel contended this combination caused Jones to offend. Jones, 118 Wn. App. at 202. There was no evidence, however, that alcohol played a role in Jones' crimes.

The court sentenced Jones after accepting his pleas. The sentence included community custody, a condition of which was abstinence from

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<sup>5</sup> 118 Wn. App. 199, 76 P.3d 258 (2003).

alcohol and participation in alcohol counseling. The court made no finding alcohol contributed to Jones's crimes. Jones, 118 Wn. App. at 202-03.

On appeal, the Jones court held the trial court could not require Jones to participate in alcohol counseling given the lack of evidence alcohol contributed to his crimes. Jones, 118 Wn. App. at 207-08.

In reaching this conclusion, the court first observed RCW 9.94A.700(5)(c) authorizes a trial court to order an offender to "participate in crime-related treatment or counseling services." Jones, 118 Wn. App. at 207. The court held because the evidence failed to show alcohol contributed to Jones's offenses or the trial court's alcohol counseling condition was "crime-related," the trial court erred by ordering Jones to participate in alcohol counseling. Jones, 118 Wn. App. at 207-08.

The Court also acknowledged, however, RCW 9.94A.715(2)(b) permitted a trial court to order an offender to "participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community[.]" Jones, 118 Wn. App. at 208. This condition also applies to Hernandez.

The Court held:

If reasonably possible, [RCW 9.94A.715(2)(a)] must be harmonized with RCW 9.94A.700(5)(c), so that no part of either statute is rendered superfluous. . . . If we were to characterize alcohol counseling as "affirmative conduct reasonably related to the offender's risk of reoffending, or the safety of the community," with or without evidence that alcohol had contributed to the offense, we would negate and render superfluous RCW 9.94A.700(5)(c)'s requirement that such counseling be "crime-related." Accordingly, we hold that alcohol counseling "reasonably relates" to the offender's risk of reoffending, and to the safety of the community, only if the evidence shows that alcohol contributed to the offense.

Jones, 118 Wn. App. at 208 (footnote omitted).

The same language analyzed in Jones applies to Hernandez's case. Therefore, the Jones analysis should apply here. Just as there was no evidence alcohol contributed to Jones's offenses, there was likewise no evidence drugs contributed to Hernandez's criminal conduct. That portion of the community custody condition requiring Hernandez to obtain a "substance abuse" evaluation and participate in treatment is too broad and not reasonably related to the circumstances of the offense. See State v. Parramore, 53 Wn. App. 527, 531, 768 P.2d 530 (1989) (trial court erred by imposing condition requiring submission to breathalyzer because there was no evidence of any connection between alcohol use and Parramore's conviction for delivering marijuana); cf. State v. Motter, 139 Wn. App. 797, 803, 162 P.3d 1190 (2007) (substance abuse treatment and counseling

was crime-related where Motter admitted he used heroin on night of burglary, defense counsel attributed most of Motter's legal problems to his ongoing drug problems, and burglary was of doctor's office, thus evincing a possible desire to steal drugs), review denied, 163 Wn.2d 1025 (2008).

For these reasons, the "substance abuse" evaluation and treatment condition should be stricken from Hernandez's judgment and sentence. Jones, 118 Wn. App. at 207-08, 212.

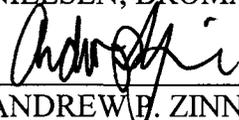
D. CONCLUSION

Because it is reasonably probable jurors either did not unanimously agree on which act constituted child molestation, or unanimously agreed to rely on an act that could not sustain the child molestation conviction, this Court should reverse Hernandez's conviction and remand for a new trial. Alternatively, the trial court exceeded its statutory sentencing authority by imposing a community custody condition that was not crime-related. This court should order the condition vacated.

DATED this 7 day of September, 2010.

Respectfully submitted,

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## APPENDIX

No. 9

The State alleges that the defendant committed acts of Child Molestation in the Second Degree on multiple occasions. To convict the defendant of Child Molestation in the Second Degree, one particular act of Child Molestation in the Second Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Child Molestation in the Second Degree.