

67948-1

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NO. 67948-1-I

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

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STATE OF WASHINGTON

Respondent

v.

JENNIFER M. KIM,

Appellant

2012 JUL 24 PM 1:39

COURT OF APPEALS DIV 1  
STATE OF WASHINGTON

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BRIEF OF RESPONDENT

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MARK K. ROE  
Prosecuting Attorney

KATHLEEN WEBBER  
Deputy Prosecuting Attorney  
Attorney for Respondent

Snohomish County Prosecutor's Office  
3000 Rockefeller Avenue, M/S #504  
Everett, Washington 98201  
Telephone: (425) 388-3333

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## **I. ISSUES**

1. The defendant was convicted of rape of a child first degree and incest. The sentence included several provision aimed at prohibiting the defendant from having unsupervised contact with children. Were these conditions permissible as crime related prohibitions?

2. The court ordered the defendant not initiate or prolong contact with children without the presence of an adult who is knowledgeable of the offense and has been approved by the supervising Community Corrections Officer. Did this community custody condition impermissibly infringe on the defendant's fundamental right to parent?

## **II. STATEMENT OF THE CASE**

M.K. born September 1991, lived with his parents, Paul Kim and the defendant, Jennifer Kim. M.K. had two sisters. V.K. was two years older than M.K. Mi.K. was eight years younger than him. Beginning when he was 9 years old M.K. had sexual contact with his mother. That contact eventually progressed to sexual intercourse. M.K. continued to have sexual intercourse with his mother until he left the home in June 2009. 1 RP 30-33, 63.

The family was living in Mountlake Terrace the first time M.K. had sexual contact with his mother. It was at night when his father moved him to his parent's bed. Mr. Kim grabbed M.K.s hand and moved it so that M.K was groping his mother breast and vagina. Mr. Kim made M.K. have sexual contact with Ms. Kim on average twice per week. 1 RP 34-35, 38.

Eventually Mr. Kim started having M.K. suck on his mother's breast and vagina. Sometimes Mr. Kim had M.K. kiss his mother. That led to M.K. having sexual intercourse with his mother. Mr. Kim would physically put M.K. on Ms. Kim to perform those sexual acts. Ms. Kim was awake when M.K. had sexual contact and sexual intercourse with her. Neither of M.K's parents said anything during these episodes. After M.K. was done having sex with Ms. Kim then Mr. Kim had sex with her. On some occasions Mr. Kim had sex with Ms. Kim at the same time M.K. had sex with her. Mr. Kim did not tell the defendant to participate in this activity, she just did it. 1 RP 38-40, 58-59, 63-64.

Just before M.K. turned 10 the family moved to Lynnwood. The sexual activity between M.K. and his mother continued there. On two or three occasions at that time Ms. Kim resisted Mr. Kim's

attempt to get M.K. and her to have sex. Mr. Kim responded by slapping her. 1 RP 37, 44-46.

On one occasion when M.K. turned 12 he asked his father if he could stop having sex with his mother. Mr. Kim told M.K. no, that it was necessary, and to trust him. M.K. did not talk about the sexual activity with his mother while they lived in Mountlake Terrace or Lynnwood. Later Mr. Kim explained to M.K. that it was necessary to practice his sexual function. 1 RP 46-48, 67.

M.K. and his family moved to Mukilteo when he was 12 or 13 years old. M.K. continued to have sexual intercourse with his mother there. On more frequent occasions Mr. Kim came home drunk. When Mr. Kim was drunk he was happier, but also more aggressive and insistent that M.K. have sex with Ms. Kim. At this time Mr. Kim started verbally instructing M.K. what he wanted M.K. to do with his mother. Mr. Kim also showed M.K. pornographic movies and instructed M.K. to do the things portrayed in those movies. 1 RP 48-52.

On occasion Mr. Kim came into M.K.'s room and told M.K. to go into Ms. Kim's room and have sex with her. M.K. tried to pretend he had done so, without actually having sex with her. Mr. Kim discovered M.K.'s deception, and became angry with M.K.

After that M.K. did have sex with his mother even when Mr. Kim was not in the room. 1 RP 52-53, 55-58.

On several occasions when M.K. was sent to have sex with his mother M.K. talked to her about not having sexual intercourse. Ms. Kim promised to talk to Mr. Kim about it, but she did not do so and the sexual contact did not stop. 1 RP 53-55.

As he got older M.K. resisted his father's request to have sex with his mother. Ms. Kim also started to resist Mr. Kim's requests that she and M.K. have sex. Sometimes she became angry and walked out of the room. On those occasions Mr. Kim sometimes followed her to bring her back, and sometimes he did not. Despite the arguments M.K. continued to have sexual intercourse with his mother. 1 RP 65-67.

M.K. had a big argument with his father a couple of months before June 1, 2009 because he did not want to have sex with his mother. After that argument Mr. Kim did not ask M.K. to have sex with Ms. Kim for a couple of months. Two weeks before June 1 M.K. and Mr. Kim had another big argument about it. Finally on June 1 Mr. Kim instructed M.K. to go up to his mother. M.K. argued back, but Mr. Kim assured him he just wanted to talk. Mr. Kim told M.K. to go get his mother. When M.K. woke her up she became

angry and went downstairs. Ms. Kim and Mr. Kim argued while M.K. went back to his room. Then Mr. and Ms. Kim went to M.K.'s bedroom where they stripped and had sex in front of M.K. After that M.K. packed his bag and moved to his cousin's house. 1 RP 68-71.

M.K. eventually told his cousin, Yong Woo what had been going on between him and his parents. Yong Woo took M.K. to their elder cousin, David's home. There they told David and his wife what happened. David's wife called M.K.'s school counselor. The counselor talked to M.K. and then called the police. M.K. then told the police and a CPS social worker about his parents sexually abusing him. 1 RP 71-73.

Detective Smith arranged with M.K. and his sister V.K. to have Ms. Kim brought in for an interview. Ms. Kim was interviewed by Officer Kang.<sup>1</sup> When Officer Kang met Ms. Kim she told him she had no information about why he wanted to talk to her. Officer Kang told Ms. Kim that M.K. had made allegations about having sex with her and Mr. Kim. Ms. Kim went pale, appeared that she was about to be sick, and ran into the women's restroom. When

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<sup>1</sup> The defendant is from Korea and has very limited ability to speak English. Officer Kang is from Korea and speaks Korean fluently. 1 RP 61, 136, 143.

she recovered Officer Kang talked to her about the allegations. Ms. Kim denied any sexual activity had occurred. She said that she was not afraid of Mr. Kim, that he did not abuse or hit her, and that he had not abused any of their children. Officer Kang talked with Ms. Kim later about whether she had talked to M.K. about the allegations. Ms. Kim told Officer Kang that she called M.K. and asked him why he was making up stories about his father, and that his father could get in trouble and go to jail. 1 RP 104-105, 137-41.

M.K. had called his mother after she talked to Officer Kang the first time. He asked her why she had not told Officer Kang the truth. Ms. Kim told M.K. that she was scared. 1 RP 74-75.

After that conversation with M.K. police applied for a one party consent order to record a conversation between M.K. and Ms. Kim. The order was granted. A phone call between M.K. and Ms. Kim was set up for June 18. 1 RP 108-10, 142.

During that call Ms. Kim told M.K. that the reason they had sex was to help Mr. Kim, who had trouble getting an erection. Mr. Kim could perform better after watching the defendant and M.K. have sex. Ms. Kim said she was not afraid of Mr. Kim. She did fear that her sexual contact with M.K. would be made public which would cause great embarrassment to her. Ms. Kim acknowledged

that the sex between her and M.K. was wrong. However she encouraged M.K. to amend his statement to the police by taking out various facts like the number of times it occurred. Several times she told M.K. that he should alter his statement so that Mr. Kim would spend less time in prison. Ex. 1.

Ms. Kim was charged with one count of Rape of a Child First Degree and one count of First Degree Incest<sup>2</sup>. 1 CP 148-49. At trial she asserted the affirmative defense of duress to both charges. 1 CP 137-138.

M.K. testified to the facts set forth above. Ms. Kim testified that M.K. told the truth about their sexual contact. 2 RP 184, 213. She said that Mr. Kim was the head of their household. He did get angry with her one time when she did not pick up the living room before he got home from work. At that time he slapped her and broke some furniture. On the occasions that he hit her it was always with an open hand. 2 RP 185-186, 216. Ms. Kim also said that when Mr. Kim was sober he disciplined the children with words, but when he drank he hit them with about a 3' dowel. 2 RP 189-190.

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<sup>2</sup> Paul Kim was charged with numerous counts of sexually assaulting all three of his children. He was convicted at trial. See COA no. 66405-1-I; 1 CP 64

Ms. Kim recounted one occasion in their early marriage when Mr. Kim took her target shooting in the mountains. Mr. Kim told her that a gun is a scary thing so you listen to me always very well. He was not pointing the gun at her when he said that, and he seemed like he was in a good mood. She knew he was not the kind of person to kill her, but nonetheless she froze when he said that. 2 RP 193-194, 219-220.

Ms. Kim testified that when Mr. Kim first had her do sexual things with M.K. she asked him to stop. She did not think of it as wrong, but she did not like it either. She did feel like she owed it to Mr. Kim because she was unable to satisfy Mr. Kim sexually. Mr. Kim had told Ms. Kim that it was her fault he could not get an erection because she refused him so many times. She had refused to have regular sex with Mr. Kim many times but he had never hit her for that. She had trouble resisting the sexual encounters with Mr. Kim and M.K. because it always happened when she had been awoken from a sleep. The next day she would tell Mr. Kim she did not want to do that anymore. While it seemed like he listened to her at the time, the sexual contact did not stop. 2 RP 197-199, 233, 245.

Ms. Kim said Mr. Kim got angry when she tried to resist the sexual contact with M.K. On occasion she told Mr. Kim she did not want to have sex and Mr. Kim did not push her to do so. He never threatened to kill her or otherwise verbally threatened her. 2 RP 200-201, 218, 237.

Ms. Kim said she never told anyone about her sexual encounters with Mr. Kim and M.K. because she was afraid it would make the three of them look bad and she did not want to be embarrassed. She said she lied to Officer Kang because she wanted to resolve the matter within the family. She asked M.K. to change his report to the police because Mr. Kim had promised to move out of the house, and she believed that would resolve the matter, which she wanted to resolve quietly. She still thought it was her duty as a wife to help her husband. 2 RP 202-203, 207, 217, 226, 239.

The jury rejected the defendant's duress defense and convicted her of both counts. 1 CP 121-122. At sentencing the court considered two presentence reports written by a community corrections officer, presentence memorandums filed by the prosecutor and the defense, a letter from the Guardian Ad Litem for the defendant's youngest daughter Mi.K., and several sentencing

documents. 1 CP 40-53, 61-120, 2 CP \_\_ (sub 52, 63). The court ultimately decided to impose an exceptional sentence downward on the basis of duress insufficient to constitute a complete defense but which significantly affected her conduct. 1 CP 33-34. In addition to the term of confinement the court ordered a lifetime term of community custody on the Rape of a Child charge and 36 months of community custody on the Incest count. 1 CP 25.

### **III. ARGUMENT**

#### **A. CONDITIONS WHICH PROHIBIT THE DEFENDANT FROM UNSUPERVISED CONTACT WITH MINORS WERE PERMISSIBLE CRIME RELATED PROHIBITIONS.**

The court ordered 13 conditions of community custody.

They included:

2. Do not initiate or prolong contact with minor children, without the presence of an adult who is knowledgeable of the offense and has been approved by the supervising Community Corrections Officer.
3. Do not seek employment or volunteer positions, which place you in contact with or control over minor children.
4. Do not frequent areas where minor children are known to congregate, as defined by the Community Corrections Officer.
5. Do not date men or form relationships with families who have minor children, as directed by the supervising Community Corrections officer.

6. Do not remain overnight in a residence where minor children live are spending the night.

7. Do not hold employment without first notifying your employer of this conviction.

1 CP 35-36.

The court had the authority to impose conditions of community custody pursuant to RCW 9.94A.703. The court had discretion to prohibit the defendant from direct or indirect contact with a specified class of individuals. RCW 9.94A.703(3)(b). It also had had the authority to order the defendant to comply with any crime related prohibitions. RCW 9.94A.703(3)(f), RCW 9.94A.505(8). A crime related prohibition is an order of the court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted. RCW 9.94A.030(10). The Court reviews imposition of a crime related prohibition for an abuse of discretion. In re Rainey, 168 Wn.2d 367, 375, 229 P.3d 686 (2010).

Conditions 2 through 6 prohibit the defendant from contact with minors, a specified class of individual. It was thus authorized by statute.

All of the challenged conditions are crime related prohibitions. A valid crime related prohibition need not be causally

linked to the crime committed. State v. Acrey, 135 Wn. App. 938, 946, 146 P.3d 1215 (2006). It is sufficient if the condition relates to the circumstances of the crime. Id.

Under some circumstances a prohibition on contact with a class of person may be valid even where there is an indirect link between the defendant's criminal conduct and the class of persons the defendant is restrained from contacting. In Autrey the defendant had been convicted of a sexual assault of a minor. in State v. Autrey, 136 Wn. App. 460, 150 P.3d 580 (2006). The Court imposed a community custody condition prohibiting him from sexual contact with anyone without prior approval from the offender's therapist. The defendant argued the condition was not crime related as it applied to adult sexual partners. The court rejected that argument finding the freedom to choose adult sexual partners was reasonably related to the crime because potential romantic partners may be responsible for the safety of live in or visiting minors. Id. at 468.

Like the condition in Autrey the conditions prohibiting the defendant from contact with minors except under controlled circumstances are reasonably related to the crimes she committed. Although her crimes were not motivated by her own deviant sexual

linked to the crime committed. State v. Acrey, 135 Wn. App. 938, 946, 146 P.3d 1215 (2006). It is sufficient if the condition relates to the circumstances of the crime. Id.

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Like the condition in Autry the conditions prohibiting the defendant from contact with minors except under controlled circumstances are reasonably related to the crimes she committed. Although her crimes were not motivated by her own deviant sexual desire, they were motivated by other factors which equally make

her a threat to the safety of minors unless her contact with them is regulated.

At trial she made it clear that her first priority was her loyalty was to her husband. As the VGAL for Mi.K. stated "She offered absolutely no effort she ever made to protect the children from Mr. Kim. She completely abrogated her responsibility to her children to satisfy her husband's sexual perversion." 2 CP \_\_ (sub 63, page 2) Ms. Kim attempted to cover up the crimes or at least mitigate the damage caused by M.K.'s report by urging M.K. to recant a portion of his statement to police. She was concerned about Mr. Kim spending perhaps 20 to 30 years in prison. She asked M.K. to take out parts of his statement, to reduce the sentence to a more acceptable 5 to 10 years in prison. She begged him "I will give you whatever you ask" if he would only change his statement. Ex. 1, pages 5-9.

Her second priority was to avoid the public humiliation occasioned by the report that she had willingly participated in the sexual assault of her son for eight years. She complained to M.K. that once it got out it would be in the Korean newspapers. "[A]nd how can I go around with my face up?" Ex. 1, page 7.

Her last priority was her own children. Not only did she pressure M.K. to change his story, but she also attended Mr. Kim's trial when her children testified. The prosecutor noted in his sentencing memorandum that the defendant deliberately intimidated Mi.K. as she sat through Mi.K.'s testimony. Sub. 52, page 4.

Given the defendant's demonstrated priorities it is clear that she is completely unwilling to protect vulnerable children from a man in her life if that man presents a danger to children. In that sense the defendant herself presents a danger to children. Conditions that control her access to children thus reasonably relate to the circumstances of the crime.

Similarly the condition that she notifies her employer of this conviction is also related. It gives an employer the opportunity to protect any children that may come into contact with the defendant through her employment.

The defendant challenges these conditions on the basis that they are not authorized by the Sentencing Reform Act. BOA at 14. Specifically she argues that they do not relate to the circumstances of her offenses, because she herself is not a sexual predator.

The defendant's position utterly fails to recognize her role in the victimization of her son and her other children. The defendant presents a danger to minors not because she is a sexual predator herself. Rather she is a danger to children because she has demonstrated that she will willingly assist and protect the man in her life, even if it means that children will be sexually, physically, mentally, or emotionally victimized. The trial court did not abuse its discretion when it imposed conditions 2 through 7.

**B. THE ORDER PROHIBITING ALL BUT SUPERVISED CONTACT WITH MINORS DID NOT IMPERMISSIBLY INFRINGE ON THE DEFENDANT'S RIGHT TO PARENT.**

Parents do have a fundamental liberty interest in the care, custody, and management of their children. Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). "The State also has a compelling interest in protecting the physical, mental, and emotional health of the children." In re V.R.R., 134 Wn. App. 573, 581, 141 P.3d 85 (2006). In addition the State has a compelling interest in preventing future harm to crime victims. Rainey, 168 Wn.2d at 377. In a criminal case the fundamental right to parent may be restricted by a condition of the defendant's sentence if the condition is reasonably necessary to prevent harm to the children. State v. Sanford, 128 Wn. App. 280, 288, 115 P.3d

368 (2005), State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008), cert. denied, 129 S.Ct. 2007 (2009) (A sentencing condition that impacts a fundamental right must be “reasonably necessary to accomplish the essential needs of the Stat and public order”).

The defendant argues that the conditions prohibiting her from having contact with all minors unconstitutionally infringes on her fundamental right to parent Mi.K. The interplay between sentencing conditions and fundamental rights “is delicate and fact specific, not lending itself to broad statements and bright line rules.” Rainey, 168 Wn.2d at 377.

Here the record shows that after M.K. disclosed the abuse that he suffered the defendant became aware that her other daughters had been abused as well. Nonetheless, rather than take steps to protect Mi.K. she actively protected her husband, Mi.K’s abuser. At Mr. Kim’s trial she sat through Mi.K’s testimony, not to support Mi.K. but to support Mr. Kim. Sub 52 page 4; 1 CP 64.

The State has a compelling interest in protecting Mi.K. from future harm. If the defendant should become involved with another man who has deviant sexual interests the defendant’s history shows that she is likely not going to protect Mi.K. from harm. The

restriction from unsupervised contact with minors that includes restricted contact with Mi.K. is reasonably related to that interest.

The defendant argues that this case is like State v. Letourneau, 100 Wn App. 424, 997 P.2d 436 (2000). There this Court struck a provision prohibiting the defendant from having unsupervised contact with her own biological children when she was convicted of Rape of a Child Second Degree for having sexual relations with her 13 year old student. There Letourneau had been evaluated by several sex offender providers. None of those evaluators found Letourneau was a pedophile. This Court held that to impose that kind of condition on a parent of a child, “[t]here must be an affirmative showing that the offender is a pedophile or that the offender otherwise poses the danger of sexual molestation of his or her own biological children to justify such State intervention.” *Id.* at 442. The record in Letourneau had no such affirmative evidence to support the condition. *id.* at 441-42.

The only similarity between the record here and the record in Letourneau is that both women were found not to be pedophiles. 1 CP 84. The similarity between the two cases ends there. While there was nothing to indicate that Letourneau was a danger to her own children, there was such affirmative evidence here. Even

when the abuse was reported, the defendant took steps to protect the abuser, and not the child. The report from the evaluator lists the reasons for her actions as cultural and a product of her personality and upbringing. 1 CP 83-86. Those reasons support the conclusion that should the defendant form a relationship with another man, and if that man has the same sexually deviant desires that Mr. Kim had, the man, and not Mi.K. will be the defendant's priority. Once again Mi.K. will be in danger of being victimized because her mother simply will not protect her. The defendant "otherwise poses the danger of sexual molestation of . . . her own biological children" and thus State intervention is justified.

Finally the defendant suggests that the question of contact with Mi.K. is better addressed in family court. CPS had intervened at the time her case was pending trial. The VGAL noted that there was a dependency action pending. (sub 63, page 1 of letter dated September 8, 2011 noting Mi.K is a dependent child, page 1 of letter dated October 5, 2011 stating there is no evidence in either the criminal or dependency case that the defendant shows any genuine remorse for her sexual abuse of M.K. or her failure to protect V.K. or Mi.K.). The VGAL also stated that Mi.K. is in foster care, has been separated from her family, and will never be

reunited. (sub 63 letter of September 8, page 2, letter of October 5, page 2). It is not clear from that statement whether the defendant's parental rights had been terminated in juvenile court, or it was anticipated they would be terminated. If they have been terminated then the defendant no longer has a right to parent. RCW 13.34.200. If she no longer has a right to parent, then the condition does not impact her right to parent at all.

#### **IV. CONCLUSION**

For the foregoing reasons the State asks the Court to affirm the conditions of community custody imposed on the defendant.

Respectfully submitted on July 23, 2012.

MARK K. ROE  
Snohomish County Prosecuting Attorney

By:   
KATHLEEN WEBBER WSBA #16040  
Deputy Prosecuting Attorney  
Attorney for Respondent