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No. 71563-1-1

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

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STATE OF WASHINGTON,

Respondent,

v.

KEVIN SKAAR,

Appellant.

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

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Mr. Skaar was deprived of his right to a unanimous jury guaranteed by article I, section 21 of the Washington Constitution.

2. The sentencing court lacked authority to impose a curfew as a condition of community custody.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether a new trial is required because the State failed to prove Mr. Skaar attempted to pay a minor with whom he had had sex, yet this alternative means of attempted commercial sexual abuse of a minor was presented to the jury and there was no special verdict form?

2. Whether the condition of community custody imposing a curfew from 10:00 p.m. to 5:00 a.m. should be stricken as not crime-related, where the crime in question occurred around 7:00 p.m.?

C. STATEMENT OF THE CASE

Detective Tye Holland of the Seattle Police Department posed as a 15-year-old prostitute and solicited sex on the “casual encounters” section of Craigslist. RP (1/14/14) at 153-69; ex. 2A. Kevin Skaar responded to Detective Holland’s advertisement, and agreed to pay \$50 for oral sex from “Spring Break Girl.” RP (1/14/14) at 166-79; ex. 2A. The two planned to meet at a Park & Ride at 7:00 p.m. Shortly after Mr. Skaar arrived, he was arrested and told that the person with whom he had

exchanged e-mail messages was actually a police detective. RP (1/14/14) at 171-84; RP (1/15/14) at 202-12.

Mr. Skaar was charged with and convicted of one count of attempted commercial sexual abuse of a minor. CP 1, 39. He timely appeals. CP 54-65.

D. ARGUMENT

**1. Mr. Skaar's constitutional right to a unanimous jury was violated because there was no unanimity instruction, all three alternative means of committing the crime were presented to the jury, and insufficient evidence supported one of the means.**

a. The Washington Constitution guarantees the right to a unanimous jury.

Article I, section 21 guarantees criminal defendants the right to a unanimous jury verdict. Const. art. I, § 21; *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). This right includes the right to unanimity on the means by which the defendant committed the crime. *State v. Green*, 94 Wn.2d 216, 232-33, 616 P.2d 628 (1980). Where an alternative means crime is alleged, the preferred practice is to provide a special verdict form and instruct the jury that it must unanimously agree as to which alternative means the State proved. *State v. Whitney*, 108 Wn.2d 506, 511, 739 P.2d 1150 (1987). Absent such an instruction, a guilty verdict will be affirmed only if the evidence, viewed in the light most

favorable to the State, was sufficient as a matter of law to prove each alternative means presented to the jury beyond a reasonable doubt. *State v. Owens*, 180 Wn.2d 90, 99, 323 P.3d 1030 (2014); *Green*, 94 Wn.2d at 220-21.

- b. All three alternative means of attempted commercial sexual abuse were presented to the jury, but there was no unanimity instruction.

The State charged Mr. Skaar with attempted commercial sexual abuse of a minor. CP 1. A person is guilty of commercial sexual abuse of a minor if:

- (a) He or she pays a fee to a minor or a third person as compensation for a minor having engaged in sexual conduct with him or her;
- (b) He or she pays or agrees to pay a fee to a minor or a third person pursuant to an understanding that in return therefore such minor will engage in sexual conduct with him or her; or
- (c) He or she solicits, offers, or requests to engage in sexual conduct with a minor in return for a fee.

RCW 9.68A.100(1). A person is guilty of attempt to commit a crime if he intended to commit the crime and took a substantial step toward its commission. RCW 9A.28.020.

The structure, grammar, and content of RCW 9.68A.100 indicate it is an alternative means statute. *See Owens*, 180 Wn.2d at 96-98 (evaluating grammar of RCW 9A.82.050 and “how varied the actions are”

to determine that the trafficking in stolen property statute sets forth two alternative means). The charging document and the jury instructions alleged all three alternative means, and the prosecutor listed all three alternatives in closing argument. CP 1; Supp. CP \_\_\_\_ (sub no. 79) (Instruction 6); RP (1/15/14) at 305, 311. However, the jury was not provided with a special verdict form and was not instructed that it had to be unanimous regarding which alternative the State proved. CP 39; Supp. CP \_\_\_\_ (sub no. 79); RP (1/15/14) at 300-09.

- c. A new trial is required because the State presented insufficient evidence to support the first alternative means.

Because there was no express jury unanimity regarding the means by which Mr. Skaar was found to have committed the crime, the conviction may be affirmed only if sufficient evidence supported all three alternative means. *Ortega-Martinez*, 124 Wn.2d at 707-08. Reversal is required because insufficient evidence was presented to support the first alternative means.

As shown above, the first alternative means requires a past sex act. RCW 9.68A.100(1). If the State had presented evidence that Mr. Skaar had had sex with a minor and then attempted to give her money as compensation for the act, then it would have proved this alternative. No such evidence was presented. Mr. Skaar does not dispute that the State

presented sufficient evidence to prove either of the other two alternatives. The evidence showed that Mr. Skaar intended to pay a minor pursuant to an understanding that she would then perform a sex act, and that he took a substantial step toward doing so. The evidence also showed that Mr. Skaar intended to solicit a minor to engage in a sexual act in return for a fee, and that he took a substantial step toward doing so. But the evidence did not show that Mr. Skaar intended to pay a minor with whom he had already had sex, or that he took a substantial step toward paying said minor. The first alternative means should not have been presented to the jury. Because it was presented to the jury without sufficient evidentiary support, and because there is no special verdict form showing the jury relied on a different alternative, reversal is required. On remand, only the second and third alternatives may be presented to the jury. *State v. Fernandez*, 89 Wn. App. 292, 300, 948 P.2d 872 (1997).

**2. The curfew condition should be stricken from the judgment because it is not crime-related.<sup>1</sup>**

One of the community custody conditions the court imposed was: “Abide by a curfew of 10pm-5am unless directed otherwise. Remain at registered address or address previously approved by CCO during these hours.” CP 51. The court purported to impose this condition pursuant to

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<sup>1</sup> The Court need not reach this alternative argument if it reversed pursuant to the first argument.

RCW 9.94A.703 & .704. CP 51. However, neither of these statutes includes a curfew in its list of community custody conditions. RCW 9.94A.703; RCW 9.94A.704. The latter statute does not apply to courts at all, but to the Department of Corrections. *See* RCW 9.94A.704. The former statute provides:

When a court sentences a person to a term of community custody, the court shall impose conditions of community custody as provided in this section.

(1) **Mandatory conditions.** As part of any term of community custody, the court shall:

- (a) Require the offender to inform the department of court-ordered treatment upon request by the department;
- (b) Require the offender to comply with any conditions imposed by the department under RCW 9.94A.704;
- (c) If the offender was sentenced under RCW 9.94A.507 for an offense listed in RCW 9.94A.507(1)(a), and the victim of the offense was under eighteen years of age at the time of the offense, prohibit the offender from residing in a community protection zone;
- (d) If the offender was sentenced under RCW 9A.36.120, prohibit the offender from serving in any paid or volunteer capacity where he or she has control or supervision of minors under the age of thirteen.

(2) **Waivable conditions.** Unless waived by the court, as part of any term of community custody, the court shall order an offender to:

- (a) Report to and be available for contact with the assigned community corrections officer as directed;
- (b) Work at department-approved education, employment, or community restitution, or any combination thereof;
- (c) Refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions;
- (d) Pay supervision fees as determined by the department;
- and
- (e) Obtain prior approval of the department for the offender's residence location and living arrangements.

(3) **Discretionary conditions.** As part of any term of community custody, the court may order an offender to:

(a) Remain within, or outside of, a specified geographical boundary;

(b) Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals;

(c) Participate in crime-related treatment or counseling services;

(d) 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;

(e) Refrain from consuming alcohol; or

(f) Comply with any crime-related prohibitions.

(4) **Special conditions.**

(a) In sentencing an offender convicted of a crime of domestic violence, as defined in RCW 10.99.020, if the offender has a minor child, or if the victim of the offense for which the offender was convicted has a minor child, the court may order the offender to participate in a domestic violence perpetrator program approved under RCW 26.50.150.

(b)(i) In sentencing an offender convicted of an alcohol or drug-related traffic offense, the court shall require the offender to complete a diagnostic evaluation by an alcohol or drug dependency agency approved by the department of social and health services or a qualified probation department, defined under RCW 46.61.516, that has been approved by the department of social and health services. If the offense was pursuant to chapter 46.61 RCW, the report shall be forwarded to the department of licensing. If the offender is found to have an alcohol or drug problem that requires treatment, the offender shall complete treatment in a program approved by the department of social and health services under chapter 70.96A RCW. If the offender is found not to have an alcohol or drug problem that requires treatment, the offender shall complete a course in an information school approved by the department of social and health services under chapter 70.96A RCW. The offender shall pay all costs for any evaluation, education, or treatment required by this section, unless the offender is

eligible for an existing program offered or approved by the department of social and health services.

(ii) For purposes of this section, “alcohol or drug-related traffic offense” means the following: Driving while under the influence as defined by RCW 46.61.502, actual physical control while under the influence as defined by RCW 46.61.504, vehicular homicide as defined by RCW 46.61.520(1)(a), vehicular assault as defined by RCW 46.61.522(1)(b), homicide by watercraft as defined by RCW 79A.60.050, or assault by watercraft as defined by RCW 79A.60.060.

(iii) This subsection (4)(b) does not require the department of social and health services to add new treatment or assessment facilities nor affect its use of existing programs and facilities authorized by law.

RCA 9.94A.703.

The statute does allow courts to order “crime-related prohibitions.”

RCW 9.94A.703(3)(f). But the definition of “crime-related prohibition” is strictly limited:

“Crime-related prohibition” means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

RCW 9.94A.030(10).

The curfew imposed here does not fall within this provision, because Mr. Skaar’s crime did not occur between 10:00 p.m. and 5:00 a.m. He went to the designated meeting area around 7:00 p.m., and even

most of the e-mail exchanges occurred during daylight hours. Ex. 2A. The crime simply had nothing to do with being outside the house between 10:00 p.m. and 5:00 a.m. Thus, the condition should be stricken. *See, e.g., State v. Zimmer*, 146 Wn. App. 405, 414, 190 P.3d 121 (2008) (prohibition on use of cell phone or data storage device stricken because there was no evidence defendant possessed or used phone or storage device in connection with possessing methamphetamine); *State v. O'Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (condition prohibiting internet use stricken because there was no evidence that internet use contributed to rape).

E. CONCLUSION

For the reasons set forth above Mr. Skaar asks this Court to reverse his conviction and remand for a new trial. In the alternative, the curfew condition should be stricken from the judgment.

DATED this 5th day of September, 2014.

Respectfully submitted,



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DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
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	)	
KEVIN SKAAR,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 8<sup>TH</sup> DAY OF SEPTEMBER, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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**SIGNED** IN SEATTLE, WASHINGTON THIS 8<sup>TH</sup> DAY OF SEPTEMBER, 2014.

X \_\_\_\_\_ 

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