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Court of Appeals
Division I
State of Washington

NO. 74310-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMEEL PADILLA,

Appellant.

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

The Honorable Millie Judge, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The to-convict instructions for viewing depictions of a minor engaged in sexually explicit conduct omitted an essential element of the crime, and the error was not harmless.

2. The information is constitutionally deficient because it omitted an essential element of the charged crimes.

3. The community custody condition requiring appellant to “not frequent areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer” is unconstitutionally vague.

Issues Pertaining to Assignments of Error

1. For an individual to be guilty of viewing depictions of a minor engaged in sexually explicit conduct, he or she must know the person depicted was a minor. Where the to-convict instructions omitted this essential element of the offense and the error was not harmless, must appellant’s convictions be reversed?

2. Alternatively, must appellant’s convictions be reversed where the information omitted the same essential element?

3. Is the community custody condition requiring appellant to “not frequent areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer” unconstitutionally vague?

B. STATEMENT OF THE CASE

The State charged Jameel Padilla by amended information with one count of communication with a minor for immoral purposes (Count I), two counts of first degree viewing depictions of a minor engaged in sexually explicit conduct (Counts II-III), and two counts of second degree viewing depictions of a minor engaged in sexually explicit conduct (Counts IV-V).¹ CP 104-05. For the viewing charges, the State alleged Padilla intentionally viewed visual or printed matter of a minor engaged in sexually explicit conduct over the internet in four separate and distinct internet sessions. CP 104-05. Upon Padilla's motion, the trial court severed Count I and a jury found Padilla guilty of that charge in June 2015.² CP 107, 124. Padilla proceeded to trial on the other four counts in September 2015. 1RP-3RP.³

At trial on the viewing charges, Detective Aaron DeFolo testified an investigation by the Arroyo Grande Police Department in California led them to Padilla's internet protocol (IP) address in Everett, Washington. 2RP 62-63. On September 12, 2012, DeFolo executed a search warrant at

¹ The first amended information extended beyond the three-year statute of limitations. CP 122-23; 3RP 254-55. The trial court permitted the State to amend the information during trial. 3RP 268-70.

² The appeal from that conviction, No. 73902-6-1, has been linked to this appeal.

³ This brief refers to the verbatim reports of proceedings as follows: 1RP – September 21, 2015; 2RP – September 22, 2015; 3RP – September 23 and 24, 2015; 4RP – November 10, 2015.

Padilla's apartment and seized his laptop computer and four cell phones. 2RP 64, 84. DeFolo did not seize Padilla's router. 2RP 83.

In an interview the same day, Padilla admitted to having adult pornography on his computer, as well as images of young girls in bathing suits. 2RP 76. DeFolo testified Padilla "said that having those pictures [was] perverted, but he would never do anything to act on it." 2RP 76. Padilla explained to DeFolo that when he returned from Iraq in 2009, he withdrew from his friends, stopped dating, and began spending more time on the internet. 2RP 77.

Detective Joseph Klingman examined Padilla's laptop, cell phones, and his work computer. 2RP 93. Nothing was found on Padilla's phones or work computer. 2RP 84-85. However, Klingman testified he found hundreds of images of children performing sexual acts or posing nude in the unallocated space on Padilla's laptop. 2RP 133-34, 140-41. With a Windows operating system, deleted files are stored in unallocated space after emptying the recycle bin or clearing internet browsing history. 2RP 104-08. Files in unallocated space are automatically overwritten as the hard drive needs space. 2RP 104-05. The files are no longer accessible without forensic or data recovery software, which was not installed on Padilla's computer. 2RP 104-05, 173-74; 3RP 309-10. Klingman agreed Padilla could not have accessed any of the illicit images. 2RP 173-74. Padilla did,

however, have legal images of scantily clad young girls, as well as adult pornography, saved on his hard drive. 2RP 113-15, 228-29.

Klingman also testified he found evidence of several internet searches on Padilla's computer, such as "Preteen pics," "Child porn FrostWire," and "How to delete stuff from an unallocated space." 2RP 128-29. Klingman explained FrostWire is a peer-to-peer file sharing program, which Klingman believed Padilla used to download child pornography videos. 2RP 128, 156. As FrostWire files download, they are placed in an incomplete folder. 2RP 190-91. Klingman testified all but a few videos he found were in the incomplete folder, meaning Padilla may have only started downloading the files, then deleted them. 2RP 190-94. Klingman also explained he recovered several e-mail and Yahoo chat records in which a person named Brian Petes discussed his interest in juvenile girls. 2RP 130-32. Klingman believed Padilla used Brian Petes as an alias, given some similarities between the two men. 2RP 137-39.

Klingman acknowledged Padilla's case was unusual, because child pornography users tend to hoard it and keep it accessible so they can view it repeatedly. 2RP 171-72. The vast majority of the child pornography in the unallocated space on Padilla's computer was downloaded on only two days—September 23, 2011 and August 5, 2012—almost a year apart, which Klingman also acknowledged "seems unusual." 2RP 195-96.

Klingman also believed the case was peculiar because he did not find any link files for the illicit images or videos. 2RP 183-88. Windows automatically creates a temporary link file whenever the user views an image or plays a video. 2RP 183-86. Klingman agreed the lack of link files could mean the images and videos were never actually viewed. 2RP 183-88.

Klingman explained there are several ways images could end up in unallocated space without ever being viewed. 2RP 238. For instance, an unopened e-mail attachment could be automatically downloaded to unallocated space depending on the user's e-mail settings. 2RP 182. Likewise, internet browsers cache all images on a visited website, as well as banners and pop-up windows. 2RP 225-26. The user would not actually see all these images if he did not scroll to the bottom of the webpage or immediately closed a pop-up window. 2RP 225-26; 3RP 314. Klingman acknowledged pornography pages often have numerous pop-up windows that would be cached. 2RP 226.

Computer forensic expert Larry Karstetter testified for the defense. 3RP 281-82. Karstetter reviewed Klingman's report, interviewed Klingman and the prosecutor, and watched Klingman's testimony at trial. 3RP 284. Karstetter explained the State should have examined Padilla's router, because it would show the computers connected to the network. 3RP 286-87. If the router were unsecured, people nearby could use the network to

access illegal files and information. 3RP 286-87. From the evidence he reviewed, Karstetter could also not rule out the possibility that Padilla's computer had been hacked. 3RP 294.

Karstetter also testified FrostWire file names can be inaccurate—child pornography is often mislabeled as adult pornography. 3RP 300. Innocuous search terms such as “Britney Spears” will return child pornography. 3RP 300-05. Because a FrostWire user can only see file names and not files previews, the user might download a particular file and then abort the download once he saw the offensive content. 3RP 301-05. This type of activity was consistent with the evidence regarding Padilla's FrostWire use. 3RP 301-05. Karstetter also believed the case was unusual because of the relatively small amount of child pornography found. 3RP 312-13. Like Klingman, Karstetter explained child pornography users typically amass thousands of images. 3RP 312-13.

The to-convict instruction for the first viewing count specified:

To convict the defendant of the crime of Viewing Depictions of a Minor Engaged in Sexually Explicit Conduct in the First Degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 1st day of January 2011 through the 12th day of September, 2012, in an internet session separate and distinct from that alleged in Counts II, III, and IV, the defendant intentionally viewed over the

internet visual or printed matter depicting a minor engaged in sexually explicit conduct;

(2) That the viewing was initiated by the defendant;
and

(3) That the viewing of the visual or printed material occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 86. The remaining counts were charged similarly, with different definitions of sexually explicit conduct given for the first and second degree charges. CP 87-89 (to-convict instructions), 92-93 (definitions of sexually explicit conduct). Defense counsel did not object or take exception to the to-convict instructions. 3RP 345.

The jury found Padilla guilty as charged. CP 74-77. The trial court sentenced Padilla to 84 months confinement and 36 months of community custody. CP 25-26. Padilla timely appealed. CP 4.

C. ARGUMENT

1. THE TO-CONVICT INSTRUCTIONS OMITTED THE ESSENTIAL ELEMENT THAT PADILLA KNEW THE PERSONS DEPICTED WERE MINORS, SO HIS CONVICTIONS ARE UNCONSTITUTIONAL.

The First Amendment prohibits an individual from being held criminally liable for possessing depictions of a minor engaged in sexually explicit conduct unless the individual knows the nature of the illegal material. The State must therefore prove beyond a reasonable doubt the accused had knowledge the person depicted was a minor. No Washington court has yet interpreted the statute criminalizing *viewing* depictions of a minor engaged in sexually explicit conduct. It follows, though, that to save the statute from overbreadth, knowledge is also an essential element of the viewing offense. The to-convict instructions in Padilla's case omitted this essential element of the first and second degree offenses. Because this instructional error was not harmless beyond a reasonable doubt, this Court should reverse Padilla's convictions and remand for a new trial.

Essential elements of a crime are those the prosecution must prove to sustain a conviction. State v. Peterson, 168 Wn.2d 763, 772, 230 P.3d 588 (2010). Due process requires that the jury instructions inform the jury the State bears the burden of proving each essential element of the crime beyond a reasonable doubt. State v. Peters, 163 Wn. App. 836, 847, 261 P.3d 199

(2011); State v. Garbaccio, 151 Wn. App. 716, 732, 214 P.3d 168 (2009). Specifically, the to-convict instruction must contain all essential elements because it serves as a yardstick by which the jury measures the evidence to determine the accused's guilt or innocence. State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). It is reversible error to instruct the jury in a manner that relieves the State of its burden to prove every element of the crime. Peters, 163 Wn. App. at 847.

Courts review the adequacy of a challenged to-convict instruction de novo. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). Though courts generally review jury instructions in the context of the instructions as a whole, the reviewing court may not rely on other instructions to supply an element missing from the to-convict instruction. Id. Failure to instruct the jury on every element of the charged crime is an error of constitutional magnitude that may be raised for the first time on appeal. Id. at 6.

In determining the essential elements of an offense, courts first look to the relevant statute. State v. Mason, 170 Wn. App. 375, 379, 285 P.3d 154 (2012). RCW 9.68A.075 defines first and second degree viewing depictions of a minor engaged in sexually explicit conduct as follows:

- (1) A person who intentionally views over the internet visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (e) is guilty of viewing depictions of a minor

engaged in sexually explicit conduct in the first degree, a class B felony punishable under chapter 9A.20 RCW.

(2) A person who intentionally views over the internet visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4) (f) or (g) is guilty of viewing depictions of a minor engaged in sexually explicit conduct in the second degree, a class C felony punishable under chapter 9A.20 RCW.

(3) . . . The state must prove beyond a reasonable doubt that the viewing was initiated by the user of the computer where the viewing occurred.

(4) For the purposes of this section, each separate internet session of intentionally viewing over the internet visual or printed matter depicting a minor engaged in sexually explicit conduct constitutes a separate offense.

The statutory language does not require that the defendant knew the person depicted was a minor. However, a criminal statute is not always conclusive regarding all the elements of a crime. Courts may find nonstatutory, implied elements. State v. Miller, 156 Wn.2d 23, 28, 123 P.3d 827 (2005).

The legislature created the viewing depictions offense in 2010. Laws of 2010, ch. 227, §§ 1, 7. Because it is a relatively new offense, there is no case law construing the statute. However, the legislature also criminalizes *possession* of depictions of a minor engaged in sexually explicit conduct. RCW 9.68A.070. Similar to the viewing statute, a person commits first degree possession when “he or she knowingly possesses a visual or printed

matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (e).” RCW 9.68A.070(1)(a).

The primary difference between the two offenses is possession requires knowledge while viewing requires intent. A person acts with intent or intentionally “when he or she acts with the objective or purpose to accomplish a result which constitutes a crime.” RCW 9A.08.010(1)(a); CP 94. A person knows or acts with knowledge when:

(i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

(ii) he or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.

RCW 9A.08.010(1)(b). Intent is a more culpable mental state than knowledge. State v. Allen, 101 Wn.2d 355, 359, 678 P.2d 798 (1984). “When acting knowingly suffices to establish an element, such element also is established if a person acts intentionally.” RCW 9A.08.010(2).

The Washington Supreme Court has held the possession statute is not overbroad under the First Amendment because it includes scienter (i.e., knowledge) as an element of the offense. State v. Luther, 157 Wn.2d 63, 71, 134 P.3d 205 (2006). The legislature has specified it is not a defense to possession of child pornography “that the defendant did not know the age of the child depicted in the visual or printed matter.” RCW 9.68A.110(3). In

State v. Rosul, this Court considered whether, given this lack of defense, knowledge of the act of possession itself was sufficient to convict under the statute. 95 Wn. App. 175, 182, 974 P.2d 916 (1999).

The Rosul court explained “[a] natural grammatical reading of RCW 9.68A.070 would apply the scienter requirement to possession, but not to the age of the children depicted.” Id. If read in this manner, however, the statute might be facially overbroad because it would punish individuals engaged in otherwise innocent conduct, like possession of second-hand computer hardware or use of a digital camera containing illicit data files. Garbaccio, 151 Wn. App. at 733.

In New York v. Ferber, the U.S. Supreme Court cautioned that criminal liability for possession of child pornography “may not be imposed without some element of scienter on the part of the defendant.” 458 U.S. 747, 765, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982). But the Ferber Court did not specify the dimensions of this requisite scienter. Subsequently, however, the Court elected to impose a scienter requirement on every element of a federal statute that prohibits shipping and transporting child pornography—including the child’s age. United States v. X-Citement Video, Inc., 513 U.S. 64, 78, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994).

Based on these cases, the Rosul court construed “RCW 9.68A.070 as requiring a showing that the defendant was aware not only of possession, but

also of the general nature of the material he or she possessed.” 95 Wn. App. at 185; see also Garbaccio, 151 Wn. App. at 734-35 (“[A]n individual may be convicted of possession of child pornography only if the State proves possession with knowledge of the nature of the content of the material in the defendant’s possession.”). Though the State need not prove specific knowledge of the child’s age, “the statute would be impermissibly overbroad” if “construed in a way that would not require prosecutors to prove that a defendant had this general knowledge.” Rosul, 95 Wn. App. at 184-85.

The Washington Supreme Court Committee on Jury Instructions has since incorporated this knowledge element into the pattern to-convict jury instruction:

To convict the defendant of the crime of possession of depictions of a minor engaged in sexually explicit conduct, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about (date), the defendant knowingly possessed visual or printed matter depicting a minor engaged in sexually explicit conduct;

[(2) That the defendant knew the person depicted was a minor;] and

[(3)] That this act occurred in the State of Washington.

11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 49A.04, at 918 (3d ed. 2008) (WPIC) (emphasis added). The comment to the instruction notes the bracketed language “may be used to require the State to prove that the defendant knew that the person being depicted was a minor,” given the First Amendment issues discussed above. WPIC 49A.04 cmt. In Garbaccio, this Court approved of the above instruction and held it “adequately instructed the jury as to the elements of the charged offense.” 151 Wn. App. at 734.

The four to-convict instructions in Padilla’s case omitted the essential element that Padilla knew the individuals depicted were minors. CP 86-89. Instead, the instructions specified the State needed to prove only that (1) Padilla intentionally viewed the visual or printed matter over the internet, (2) Padilla initiated the viewing, and (3) the viewing occurred in Washington. CP 86-89. The to-convict instructions therefore relieved the State of its burden to prove all essential elements of the offenses beyond a reasonable doubt, violating Padilla’s right to due process of law. Garbaccio, 151 Wn. App. at 732.

Under certain circumstances, omission of an essential element from the to-convict instruction may be subject to a harmless error analysis. State v. Schaler, 169 Wn.2d 274, 288, 236 P.3d 858 (2010). Such an omission is harmless when it is clear beyond a reasonable doubt that it did not contribute

to the verdict; for example, when “uncontroverted evidence” supports the omitted element. State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 18, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). However, the “error is not harmless when the evidence and instructions leave it ambiguous as to whether the jury could have convicted on improper grounds.” Schaler, 169 Wn.2d at 288.

This is not a case with overwhelming evidence. Both Klingman and Karstetter testified the case was unusual given the relatively small amount of child pornography found, all in unallocated space, inaccessible to Padilla. 2RP 171-72; 3RP 312-13. Klingman testified there were numerous ways a user could accidentally download child pornography to unallocated space. 2RP 182, 225-25, 238. The lack of link files found in unallocated space also suggested Padilla never viewed any of the contraband images or videos. 2RP 183-88. Karstetter further testified he could not rule out the possibility that Padilla’s computer had been hacked or that nearby users accessed Padilla’s network for illegal purposes. 3RP 286-94. This is the type of innocent possession for which a person cannot be held criminally liable under the First Amendment. Garbaccio, 151 Wn. App. at 733.

Padilla’s knowledge that the individuals depicted were minors is not supported by uncontroverted evidence. As such, omission of the essential knowledge element from the to-convict instructions was not harmless

beyond a reasonable doubt. This Court should reverse Padilla's convictions and remand for a new trial before a properly instructed jury. State v. Richie, 191 Wn. App. 916, 930, 365 P.3d 770 (2015).

2. THE INFORMATION OMITTED AN ESSENTIAL ELEMENT OF THE CHARGED OFFENSES, REQUIRING REVERSAL.

Like a to-convict instruction, a charging document must include all essential elements of a crime, "statutory or otherwise." State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). The purpose of this rule is to notify the accused of the charges against him and allow him to prepare and present a defense. Id. at 101. An "essential element is one whose specification is necessary to establish the very illegality of the behavior." State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992) (citing United States v. Cina, 699 F.2d 853, 859 (7th Cir. 1983)). Essential elements may derive from statutes, common law, or the constitution. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

A challenge to the constitutional sufficiency of a charging document may be raised for the first time on appeal. Kjorsvik, 117 Wn.2d at 102-03. When such is the case, as here, courts engage in a two-pronged inquiry: (1) do the necessary facts appear in any form or by fair construction can they be found in the charging document; and, if so, (2) can the individual show he was nonetheless actually prejudiced? Id. at 105-06. "If the document cannot

be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it.” State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995). In such cases, this Court presumes prejudice and reverses without further inquiry. McCarty, 140 Wn.2d at 425.

The charging document in Padilla’s does not contain or imply all essential elements of the charged crimes. The two first degree offenses were charged as follows:

That the defendant, on or about the 1st day of January, 2011, through on or about the 12th day of September, 2012, did intentionally view over the internet, in an internet session separate and distinct from that alleged in Counts III, IV, and V, visual or printed matter that depicted a minor engaged in actual or simulated sexual intercourse and penetration of the vagina or rectum by any object; proscribed by RCW 9.68A.075(1) and 9.68A.011(4)(a) and (b), a felony.

CP 104 (Count II). The two second degree offenses were charged similarly:

That the defendant, on or about the 1st day of January, 2011, through on or about the 12th day of September, 2012, did intentionally view over the internet, in an internet session separate and distinct from that alleged in Counts II, III, and V, visual or printed matter that depicted the actual or simulated genitals and unclothed pubic and rectal areas of a minor and unclothed breast of a female minor, proscribed by RCW 9.68A.075(2) and 9.68A.011(4)(f), a felony.

CP 105 (Count IV); see also CP 122-23 (first amended information). This language omitted the essential, nonstatutory element that Padilla knew the individuals depicted were minors.

As discussed in the section above, case law establishes this is an essential element of viewing depictions of a minor engaged in sexually explicit conduct. The requisite knowledge that the persons depicted were minors cannot be found or fairly implied from the charging language. Adult pornography is protected speech. State v. Bahl, 164 Wn.2d 739, 757, 193 P.3d 678 (2008). As charged, the offense could sweep in innocent behavior, like intentionally viewing adult or “barely legal” pornography that actually depicted minors, unbeknownst to the viewer. This is precisely the reason the information must include the essential knowledge element. See Garbaccio, 151 Wn. App. at 733 (recognizing criminal liability does not attach for this type of innocent conduct).

Kjorsvik provides a useful contrast. There, the court held an information must include all statutory and nonstatutory elements of the charged offense, because “mere recitation of the statutory language in the charging document may be inadequate.” Kjorsvik, 117 Wn.2d at 98-99 (quoting State v. Leach, 113 Wn.2d 679, 688, 782 P.2d 552 (1989)). The court explained it is sufficient to charge in language of the statute only if “the statute defines the offense with certainty.” Id. at 99.

Kjorsvik was charged with first degree robbery. Id. at 95. Intent to steal is an essential element of robbery, even though the robbery statute does not include that element. Id. at 98. Though the precise “intent to steal”

language was missing from Kjorsvik's information, id. at 96, the court explained it is not fatal to an information that the "exact words of a case law element are not used." Id. at 109. Rather, "the question in such situations is whether all the words used would reasonably apprise an accused of the elements of the crime charged." Id.

The information alleged Kjorsvik "unlawfully, with force, and against the baker's will, took the money while armed with a deadly weapon." Id. at 110. The court reasoned it was "hard to perceive" how Kjorsvik could have taken all these actions "and yet not have intended to steal the money." Id. Kjorsvik's intent to steal was therefore "necessarily implied" from the facts included in the information. Id. at 109. Reading the information as a whole and in a commonsense manner, then, the court held it informed Kjorsvik of all the essential elements of robbery. Id. at 110-11.

Here, the charging document largely parroted the language of the viewing statute. As demonstrated, though, the statutory language alone does not define the offense with sufficient certainty, because the State must also prove the individual knew the person depicted was a minor. But, unlike Kjorsvik, such knowledge cannot be necessarily implied from the facts alleged in the information. The information alleged only that Padilla intentionally viewed depictions of individuals engaged in sexually explicit

conduct, who happened to be minors. It nowhere stated or implied he knew those individuals were minors.

A liberal reading of Padilla's information fails to reveal, by implication or otherwise, the essential element that he knew the individuals depicted were minors. Prejudice is therefore presumed. McCarty, 140 Wn.2d at 425. This Court should reverse and dismiss Padilla's convictions without prejudice. Id. at 428.

3. THE COMMUNITY CUSTODY CONDITION PROHIBITING PADILLA FROM FREQUENTING AREAS WHERE MINOR CHILDREN ARE KNOWN TO CONGREGATE IS VOID FOR VAGUENESS.

As a condition of community custody, the trial court ordered Padilla: "Do not frequent areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer." CP 36. This condition is unconstitutionally vague because it is not sufficiently definite to apprise Padilla of prohibited conduct and allows for arbitrary enforcement by his community corrections officer (CCO).

An illegal or erroneous sentence may be challenged for the first time on appeal. Bahl, 164 Wn.2d at 744. The due process vagueness doctrine requires the State to provide citizens fair warning of proscribed conduct. Id. at 752. The doctrine also protects against arbitrary, ad hoc, or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270

(1993). A prohibition is unconstitutionally vague if it does not (1) define the offense with sufficient definiteness such that ordinary people can understand what conduct is proscribed; or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53.

There is no presumption in favor of the constitutionality of a community custody condition. State v. Sanchez Valencia, 169 Wn.2d 782, 792-93, 239 P.3d 1059 (2010). Imposition of a vague condition is manifestly unreasonable, requiring reversal. Id. at 791-92.

In State v. Irwin, the trial court imposed a condition identical to the one here: “Do not frequent areas where minor children are known to congregate, as defined by the supervising CCO.” 191 Wn. App. 644, 649, 364 P.3d 830 (2015). This Court struck the condition as being void for vagueness and remanded to the trial court for resentencing. Id. at 652-55.

The Irwin court explained, “Without some clarifying language or an illustrative list of prohibited locations[,] . . . the condition does not give ordinary people sufficient notice to ‘understand what conduct is proscribed.’” Id. at 655 (quoting Bahl, 164 Wn.2d at 753). This Court acknowledged “[i]t may be true that, once the CCO sets locations where ‘children are known to congregate’ for Irwin, Irwin will have sufficient notice of what conduct is proscribed.” Id. However, this “would leave the

condition vulnerable to arbitrary enforcement,” rendering it unconstitutional under the second prong of the vagueness analysis. Id.

In State v. Riles, the Washington Supreme Court upheld the constitutionality of a community custody condition almost identical to the one in Irwin and here. 135 Wn.2d 326, 349, 957 P.2d 655 (1998). However, the Riles court presumed the condition was constitutional, a standard later rejected in Sanchez Valencia, 169 Wn.2d at 792-93.

The Irwin court therefore concluded Riles did not control and instead examined the supreme court’s more recent decision in Bahl. Irwin, 191 Wn. App. at 653-55. There, the court held a condition to be unconstitutionally vague where it prohibited Bahl from possessing or accessing pornographic materials, “as directed by the supervising Community Corrections Officer.” Bahl, 164 Wn.2d at 743. The court explained, “The fact that the condition provides that Bahl’s community corrections officer can direct what falls within the condition only makes the vagueness problem more apparent, since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement.” Id. at 758.

Like in Bahl and Irwin, the condition prohibiting Padilla from frequenting areas where minors are known to congregate does not provide sufficient definiteness such that Padilla knows where he can and cannot go. Some locations are obvious: schools, playgrounds, or public swimming

pools. But many other locations are not obvious: public parks, bowling alleys, shopping malls, theaters, churches, hiking trails, grocery stores, and so on.⁴ How is Padilla to know which is prohibited and which is not? Because an ordinary person would not know what conduct is prohibited, the condition fails the first prong of the vagueness test.

The condition also fails the second prong of the vagueness test. Both Bahl and Sanchez Valencia involved delegation to the CCO to define the parameters of a condition. Bahl, 164 Wn.2d at 758; Sanchez Valencia, 169 Wn.2d at 794. The Sanchez Valencia court held that where a condition leaves so much discretion to an individual CCO, it is unconstitutionally vague. 169 Wn.2d at 795. The same is true here. A creative CCO could come up with almost any location where he or she believed minors congregated. The condition gives Padilla's CCO unfettered discretion to define where minors congregate. This "virtually acknowledges that on its face" that the condition "does not provide ascertainable standards for enforcement." Bahl, 164 Wn.2d at 758.

⁴ This indefiniteness was fully realized in State v. McCormick, where McCormick was held in violation of the same condition when he went to a food bank that happened to be in the same building as a grade school. 166 Wn.2d 689, 692-96, 213 P.3d 32 (2009).

The condition is unconstitutionally vague and should be stricken because it fails to provide adequate notice as to what conduct is prohibited and exposes Padilla to arbitrary enforcement.⁵ Irwin, 191 Wn. App. at 655.

4. APPEAL COSTS SHOULD NOT BE IMPOSED.

If Padilla does not substantially prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. RCW 10.73.160(1) provides that appellate courts “may require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). This Court has ample discretion to deny the State’s request for appellate costs. State v. Sinclair, 192 Wn. App. 380, 387-93, 367 P.3d 612 (2016) (exercising discretion and denying State’s request for costs).

Padilla’s ability to pay must be determined before discretionary LFOs are imposed.⁶ The trial court made no such finding, waiving all discretionary LFOs. CP 28. The court did, however, enter an order of indigency, finding Padilla “lacks sufficient funds to prosecute or defend an

⁵ The Irwin court also held this preenforcement challenge to the sentencing condition was ripe for review. Irwin, 191 Wn. App. at 651-52.

⁶ See State v. Duncan, __ Wn.2d __, __ P.3d __, 2016 WL 1696698, at *2 (Wash. Apr. 28, 2016) (recognizing “[t]he imposition and collection of LFOs have constitutional implications and are subject to constitutional limitations,” and a “constitutionally permissible system that requires defendants to pay court ordered LFOs must meet seven requirements,” including “[t]he financial resources of the defendant must be taken into account” (quoting State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992))).

appeal.” CP 1. Padilla reported having no income, assets, or real estate. Supp. CP__ (Sub. No. 115, Motion & Declaration for Order Authorizing the Defendant to Seek Review at Public Expense, at 2-3). He was living in a hotel at the time of trial because he had lost his apartment. 3RP 408-09. At the time of sentencing, Padilla had only \$80 in cash and owed approximately \$7,000 in child support. Supp. CP__ (Sub. No. 115, at 3-4). The record reflects Padilla worked at Boeing at the time of the investigation, 2RP 72, but it is safe to assume Padilla’s job at Boeing will not be guaranteed after his five felony sex offense convictions and 84-month sentence. Indeed, Padilla reported he had lost his job and was unemployed at the time of sentencing. Supp. CP__ (Sub. No. 115, at 4).

Finally, there has been no order finding Padilla’s financial condition has improved or is likely to improve. RAP 15.2(f) specifies “[t]he appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party’s financial condition has improved to the extent that the party is no longer indigent.” This Court must presume Padilla remains indigent and give him the benefits of that indigency. For these reasons, this Court should not assess appellate costs against Padilla in the event he does not substantially prevail on appeal.

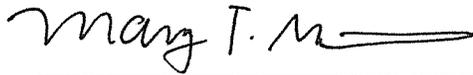
D. CONCLUSION

This Court should reverse Padilla's convictions because the to-convict instructions and information omitted an essential element of the charged offenses. This Court should also remand for the trial court to strike the unconstitutionally vague community custody condition.

DATED this 29th day of July, 2016.

Respectfully submitted,

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