IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. GERALD H. KANG, Appellant.	No. 39268-2-II UNPUBLISHED OPINION

Van Deren, J. — Gerald Kang appeals his convictions on two counts of communication with a minor for immoral purposes. He argues that (1) the evidence was insufficient to support his convictions; (2) RCW 9.68A.090, the statute criminalizing communication with a minor for immoral purposes, is unconstitutionally vague and violates his U.S. Constitution First Amendment right to free expression; and (3) some community custody conditions imposed are not reasonably related to the crime and should be stricken. In his statement of additional grounds for review (SAG),[1] Kang argues that (1) facts regarding LimeWire, a peer to peer file sharing program, that are outside the record should be considered on review and (2) his counsel was ineffective because he was computer illiterate. We remand for the trial court to clarify which community custody

[1] RAP 10.10.

conditions it imposed on Kang and for the trial court to strike conditions in whole or in part that are inconsistent with this opinion. We otherwise affirm Kang's convictions.

FACTS

On March 31, 2008, Kang took his laptop computer to Adnets in Aberdeen, Washington, to be repaired. While working on Kang's laptop, Kyle Henderson, a personal computer repair technician at Adnets, discovered pictures of young girls either naked or wearing minimal clothing in sexually suggestive poses. Henderson ceased repair work and notified the police.

Aberdeen Police Sergeant Arthur John Laur went to Adnets and viewed some of the images. Laur thought that the images depicted child pornography. At Laur's request, Henderson copied the photographs onto a compact disk. Laur took possession of the laptop computer, the computer bag Kang used to drop off the computer, and the disk. Laur learned that Kang was a Hoquiam resident and contacted Hoquiam Police Detective Sergeant Steve Fretts, who agreed that the Hoquiam Police Department would handle the case.

Adnets informed Kang that his laptop was ready for pick up. Laur and Aberdeen Police Officer Dave Cox were in a small office at the back of the building and Fretts was in his unmarked patrol car outside Adnets as they waited for Kang to pick up his computer. When Kang arrived, Laur identified himself as a police officer and asked Kang to accompany him to the back office. Fretts joined Laur, Cox, and Kang in the office. Fretts told Kang that Adnets had discovered sexually explicit pictures of minors on Kang's computer and had called the police. He told Kang that "[they] needed to deal with it and [they] needed to talk about the situation." Report of Proceedings(RP) at 65-66. Kang replied that "he didn't think it was any big deal to have pictures of young girls on his computer." RP at 66. Fretts then placed Kang under arrest for possession

of child pornography.

At the Hoquiam Police Department, Fretts explained to Kang why he was in custody and advised him of his *Miranda*[2] rights. Kang waived his *Miranda* rights and talked with Fretts for over one hour. Kang eventually dictated a statement to Fretts. Fretts typed the statement and Kang reviewed it, made corrections, and signed it. Kang's signed statement included the following:

> I have been collecting chat room logs with the possibility of writing a book. . . . I would talk to people and would only keep a picture of them to document the different people. I would talk to people on the internet in the chat rooms and a lot of it was bullshit because everybody lies including myself. There is a couple of them that I talked to that I think were cops. . . .
> . . . A lot of times I chat and pretend to be 23, 19 and the lowest either 16 or 17. . . . When we talk about exchanging pictures, I tell them my picture is nude. I send one titled dick to them. It is a picture of some guy laying [sic] on a bed naked. . . . Some of the pictures I get are of young girls. *I kn*[*e*]*w they* [*we*]*re young, but I was not aware i*[*t*] *was such a problem to have them.* I was getting ready or should have erased them.
> . . . I don't get sexually aroused looking at the pictures of the girls. I just find it interesting. I am guessing that I have thirty or so pictures of underage girls.
> I have a friend in Connecticut and my friend Jake ha[s] told me to knock off what I am doing and they thought I was getting excited and jacking off. I showed them the chat logs and tried to explain why I was doing this. I have never sent a picture of a young girl to anyone else.

Ex. 32 at 1-2 (emphasis added).

Kang also told Fretts that he used the screen names "Jerry3D," "Jetstr10r," and "Jackel014" when chatting online with other people.[3] RP at 115. Kang stated that he thought some of the people with whom he had conversations in the chat rooms were police. When Fretts told Kang that some of the people he was chatting with may have actually been "other adult men

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[3] At trial, Kang testified that he also used the screen name "Stuwrt14." RP at 156.

pretending to be children," Kang gave "a very surprised look" and "didn't think [Fretts] was telling him the truth." RP at 123.

After providing his statement, Kang granted the officers written consent to search his residence. Fretts and Hoquiam Police Detective Shane Krohn accompanied Kang to his residence. Fretts and Krohn seized several volumes of printed chat logs, several printed pictures depicting "minors in varying degrees of . . . undress and sexual activity," a box of videos, and a Compaq desktop computer. RP at 71. Conversations with "Saralovesjohsons" and "Dianamodel14" were included in the seized chat logs. RP at 116, 120. A review of the chat logs showed that most of the people Kang chatted with online gave him their age and claimed to be minors.

Based on Kang's statement and the evidence seized, the State charged Kang with one count of possession of depictions of minors engaged in sexually explicit conduct. Before trial, Kang moved to exclude the statement he made to Fretts at Adnets. Following a CrR 3.5 hearing, the trial court determined that Kang's statement to Fretts at Adnets was admissible because it "was not the product of custodial interrogation[and] the statement was spontaneous and voluntary." Clerk's Papers (CP) at 10. The trial court also granted the State's motion to amend the information to add two counts of communication with a minor for immoral purposes under RCW 9.68A.090 because the added charges neither prejudiced Kang nor contained any surprises.

At trial, the police officers testified as described above. Fretts also testified that none of the people identified in the conversations was subsequently located and it was "almost impossible to tell their exact ages." RP at 119.

Washington State Patrol Detective Todd Taylor examined Kang's laptop and desktop

computers. Taylor testified that he found "several hundred" pictures that "depict[ed] nudity or sexual situations." RP at 101. According to Taylor, there were photographs that "appeared to depict juvenile subjects" and some photographs of people who appeared to be above the age of 18. RP at 102. Taylor also found a video containing child pornography on Kang's desktop computer that Kang had downloaded using LimeWire. Taylor recovered a "large amount" of chat logs saved on the computers. RP at 110.

Dr. William Steven Hutton, an Aberdeen pediatrician who specializes in child abuse, examined some of the photographs and estimated the subjects' ages based on sexual maturation. He testified that "a large number" of the photographs recovered from Kang's residence were of "prepubescent children showing no sexual maturation at all." RP at 136. Additionally, some "were probably 16 years of age, most were very young." RP at 136. The State showed 8 photographs to Dr. Hutton, who estimated that the girls' ages ranged from 7 to 14. Dr. Hutton opined that the girls in the video found on Kang's computer "were very young children, reasonably the same age as [the girls in the photographs] we looked at today. None of them were adults." RP at 140. Defense counsel showed Dr. Hutton additional photographs from Kang's computer. Dr. Hutton estimated that the females and one male in these images were between 14 and 18 years old, and one of the females was a "mature appearing adult." RP at 143.

Kang testified that he did not find the pictures sexually arousing. He said that he kept the pictures "to try to remember who I last talked to . . . [b]ut I was not at all any way sexually motivated or attracted to the pictures." RP at 146. Kang stated that he would print his chat logs, attach any photographs received, and make handwritten notes on the front page. Kang had been collecting chat logs for "five, six years." RP at 150. He kept the pictures received during his

chats with "Dianamodel[14]" with the printed chat history because he knew "this is not the person I'm not talking to because, you know, the doctor said like 10 years old and stuff like that. I know no – no young person can talk like that. But this is the picture that supposedly that person gave me on this conversation." RP at 147.

Kang explained that he kept the pictures for recordkeeping, that "personally[,] it was interesting," and that he was interested in writing erotic stories about it. RP at 148. Explaining why he had the images, Kang referred to "all of the predator kind of killings that were going on, coming over the news" and stated that he "was kind of curious on what drives a person to do that to children. But [he] was not interested actually in children. [He] was just wanting to know what – what was going on with, you know, stuff that [he] d[id]n't know about in the sex area." RP at 149. He also stated that he "was not chatting with children. Children would not understand that kind of story." RP at 154. When the people he was chatting with would say they were "10, 12, [or] 14" years old and would send him a picture of a child, he "did not believe that [he] was speaking to that person in the picture." RP at 154-55. The printed chat logs demonstrate that on multiple occasions Kang asked for the other person's picture first.

Kang said that all of the photographs found on his computer were of "women above the age of 16 to 18." RP at 150. When asked about the video, Kang said, "I wanted to see what everybody had to show and that's how that came about. But I was not impressed with it or anything. It's nothing that I wanted to keep about it or anything." RP at 152. He added, "It was just terrible stuff that was happening there that – that people do." RP at 152. Kang also testified that the images shown at trial were probably less than 5 percent of the total number of pictures and videos he had collected. RP at 158.

The jury convicted Kang on all 3 counts. The trial court sentenced him to 54 months in confinement for possession of depictions of minors engaged in sexually explicit conduct and 26 months for each charge of communicating with a minor for immoral purposes via electronic means, to be served concurrently. In addition to sentencing Kang to confinement, the trial court imposed mandatory and discretionary community custody conditions. Kang appeals.

ANALYSIS

Kang argues that the evidence was insufficient to convict him of communicating with a minor for immoral purposes, that RCW 9.68A.090 is unconstitutionally vague and violates his free speech rights, that certain community custody conditions should be vacated, that evidence not offered at trial should be considered on appeal, and that his attorney was ineffective. [4]

I. Evidence Relating To Charges Under RCW 9.68A.090

A. Standard of Review

First, Kang argues that the evidence was insufficient to convict him of communicating with a minor for immoral purposes. "When reviewing a challenge to the sufficiency of the evidence, the test is whether, after viewing the evidence in the light most favorable to the State,

[4] Citing *State v. Kilburn*, 151 Wn.2d 36, 42, 84 P.3d 1215 (2004), Kang argues that we must review the "sufficiency of the evidence with special care when a conviction depends upon the content of one's expression, as expression that is protected by the First Amendment may not be subject to criminal sanctions no matter how distasteful." Br. of Appellant at 12. But *Kilburn* states that "it is imperative that a court carefully assess statements at issue to determine whether they fall within or without the protection of the First Amendment. It is . . . settled that certain kinds of speech are unprotected." 151 Wn.2d at 42. Moreover, our Supreme Court has held that "[t]he State may legitimately prohibit speech of a harmful sexual nature to minors, even where that speech is protected by the First Amendment with regard to adults." *State v. Schimmelpfennig*, 92 Wn.2d 95, 101, 594 P.2d 442 (1979) (citing *Ginsberg v. New York*, 390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968)). RCW 9.68A.090 prohibits communication for immoral purposes with persons believed to be minors. As discussed in a later portion of the opinion, Kang's vagueness challenge to RCW 9.68A.090 fails, and he makes no further argument that the First Amendment protects his communications. Therefore, this argument fails.

any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). On appeal, we draw all reasonable inferences from the evidence in favor of the State and interpret them most strongly against the defendant. *Hosier*, 157 Wn.2d at 8. "A claim of insufficiency admits the truth of the State's evidence" and all reasonable inferences that can be drawn from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

We will reverse a conviction for insufficient evidence only when no rational trier of fact could have found that the State proved all of the elements of the crime beyond a reasonable doubt. *State v. Smith*, 155 Wn.2d 496, 501, 120 P.3d 559 (2005). "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We "defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004).

B. Sufficiency of the Evidence

Kang argues that the State's evidence was insufficient for the jury to convict him of the two counts of communication with a minor for immoral purposes under RCW 9.68A.090. RCW 9.68A.090 provides:

> (1) Except as provided in subsection (2) of this section, a person who communicates with a minor for immoral purposes, or a person who communicates with someone the person believes to be a minor for immoral purposes, is guilty of a gross misdemeanor.
>
> (2) A person who communicates with a minor for immoral purposes is guilty of a class C felony punishable according to chapter 9A.20 RCW if the

> person has previously been convicted under this section or of a felony sexual offense under chapter 9.68A, 9A.44, or 9A.64 RCW or of any other felony sexual offense in this or any other state or *if the person communicates with a minor or with someone the person believes to be a minor for immoral purposes through the sending of an electronic communication.*

RCW 9.68A.090 (emphasis added). Kang argues that (1) the State "did not prove beyond a reasonable doubt that [he] believed the internet chatters he communicated with were minors" and (2) his "communication was not done with the predatory intent to involve minors in future sexual misconduct." Br. of Appellant at 10. We disagree.

In his written statement to the Hoquiam Police Department, Kang stated, "I kn[e]w they [we]re young, but I was not aware i[t] was such a problem to have them." Ex. 32 at 1. The verbatim copies of his chat logs further demonstrate his knowledge or belief that they were young minors.[5]

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[5] We have quoted the following conversations from chat rooms verbatim. In a chat between "Jetstr10r" and "Dianamodel14," the following exchange occurred:

> Jetstr10r [9:45 p.m.]: asl
> Dianamodel14 [9:46 p.m.]: i use my sister conputer, i 12
> Jetstr10r [9:46 P.M.]: wow im 16m
> Dianamodel14 [9:46 P.M.]: kewlk
> Jetstr10r 9:47 P.M.]: i dunno .....single?
> Dianamodel14 [9:48 P.M.]: me, yeah
> Jetstr10r [9:48 P.M.]: virgin?....
> Dianamodel14 [9:48 P.M.]: what u mean
> Dianamodel14 [9:49 P.M.]: my name donna
> Jetstr10r [9:49 P.M.]: i'm jerry u into sex?...

Ex. 39 at 1 (alterations in original). "Asl" means "age, sex, location." RP at 124. Kang also noted in the top right corner of the printout, "Donna 12 not virg Photographs Pic 116." Ex. 39 at 1.

Kang, using the screen name "Stuwrt014," chatted with "Saralovesjohsons" and the following exchange occurred:

> Saralovesjohsons [10:51 P.M.]: im deb they sauid u wanted talk to me
> Stuwrt014 [10:51 P.M.]: lol hi deb
> Stuwrt014 [10:52 P.M.]: sure if u feel like it .....r u really 10
> Saralovesjohsons [10:53 P.M.]: ya hang on
> . . . .

Kang points out that he expected people to lie in chat rooms. When asked if he believed he was chatting with a 10 year old when referring to his chat with "Dianamodel14," Kang replied, "No, no."[6] RP at 148.

Kang's testimony raised issues of credibility that the jury did not resolve in his favor. We defer to the trier of fact's credibility determinations and will not invalidate a conviction based on conflicting evidence when sufficient evidence supports the verdict. *Thomas*, 150 Wn.2d at 874-75. From the testimony and the evidence at trial—including Kang's chat logs, the pictures discovered on his computers and at his residence, and his statement to the police officers—the

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Stuwrt014 [11:02 P.M.]: can i ask how old u r i m 16
Saralovesjohsons [11:02 P.M.]: 10

Ex. 37 at 1 (alterations in original). Kang noted at the top of the page "Deb 10." Ex. 37 at 1.

Kang engaged in the following chat with "Dianamodel14:"

Jetstr10r [11:14] A.M.]: my name jerry
Jetstr10r [11:15 A.M.]: u said u 12 yr old
Jetstr10r [11:15 A.M.]: but diana said u not 12 u 9
. . . .
Jetstr10r [11:33 A.M.]: n u say u 12
Dianamodel14 [11:33 A.M.]: umm
Dianamodel14 [11:34 A.M.]: i really 11 but i b 12 in july
Jetstr10r [11:34 A.M.]: lol diana say u 9
Dianamodel14 [11:34 A.M.]: no she lie

Ex. 38 at 1-2 (alterations in original).

"Jackel014" and "Dianamodel14" had the following exchange:

Jackel014 [4:47 P.M.]: asl
Dianamodel14 [4:56 P.M.]: i am 14
Jackel014 [4:56 P.M.]: kool i 15
Jackel014 [4:56 P.M.]: ur name diana?
Dianamodel14 [4:57 P.M.]: yes

Ex. 40 at 1 (alterations in original). Additionally, Kang noted on the top right corner of the printout, "Diana 14 or Donna?" Ex. 40 at 1.

[6] Kang also argues that the names "Deborah," "Debra," and "Donna" were more common in the 1950s and 1960s. Br. of Appellant at 15 n.7. Because he did not present this evidence at trial we do not consider it. *See* RAP 10.10(c); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (appellate courts will not consider evidence outside the trial record).

finder of fact could infer that Kang believed "Deb" and "Donna" were minors when he communicated with them online.

Second, there was sufficient evidence admitted at trial for a rational finder of fact to determine beyond a reasonable doubt that Kang communicated with the minors for an immoral purpose. The "immoral purpose" element of the statute refers to sexual misconduct. *State v. Falco*, 59 Wn. App. 354, 358, 796 P.2d 796 (1990). Our Supreme Court has held that the statute prohibits "'communication *with children* for the predatory purpose of promoting their exposure to and involvement in sexual misconduct.'" *Hosier*, 157 Wn.2d at 9 (quoting *State v. McNallie*, 120 Wn.2d 925, 933, 846 P.2d 1358 (1993)). "Further, a defendant communicates with a minor under RCW 9.68A.090 if he or she *invites* or *induces* the minor to engage in prohibited conduct." *State v. Jackman*, 156 Wn.2d 736, 748, 132 P.3d 136 (2006). Kang argues that "he did not encourage future sexual misconduct." Br. of Appellant at 17. But the statute does not require the communication with minors to encourage *future* sexual misconduct. His reading of the statute is narrower than the legislature intended. For example, in *Hosier*, 157 Wn.2d at 11, the defendant argued that his communication with the minor was not prohibited by the statute. Our Supreme Court stated that RCW 9.68A.001's legislative findings "reflect legislative concern with adults who exploit children for personal gratification. Here, based on Hosier's own statements, Hosier 'communicated' with [the victim] because it sexually excited him to do so. Hosier's communication with [the victim] is exactly the sort of conduct the legislature intended to prohibit." *Hosier*, 157 Wn.2d at 11.

Using the screen name "Jackel014," Kang chatted with a person using the screen name "Dianamodel14." Their verbatim communication included the following:

> Jackel014 [5:33 P.M.]: u have another pic?
> Dianamodel14 [5:56 P.M.]: k
> Jackel014 [5:57 P.M.]: u have pic no clothes?
> Dianamodel14 [5:59 P.M.]: yes
> Jackel014 [5:59 P.M.]: please can i c?
> Dianamodel14 [5:59 P.M.]: y
> Jackel014 [6:00 P.M.]: I want to see u naked n play with my dick
> Jackel014 [6:03 P.M.]: omg diana u r so beautiful
> Dianamodel14 [6:03 P.M.]: thanks
> Jackel014 [6:03 P.M.]: u know my dick is so hard now
> Dianamodel14 [6:04 P.M.]: o
> Jackel014 [6:04 P.M.]: u have another one
> Jackel014 [6:04 P.M.]: showing ur p[***]y

Ex. 40 at 2-3 (alterations in original).

Similar sexually explicit conversation took place between Kang and "Deb." Additionally, in a separate chat with "Saralovesjohsons," Kang engaged in the following verbatim conversation:

> Stuwrt014 [12:09 A.M.]: u got a nude of pic
> Saralovesjohsons [12:10 A.M.]: msybr why
> Stuwrt014 [12:10 A.M.]: i would luv to c u
> Saralovesjohsons [12:11 A.M.]: hm u sure i don't have myuch
> Stuwrt014 [12:11 A.M.]: u have alot
> . . . .
> Stuwrt014 [12:17 A.M.]: that is ur nipples looks developed for 10.....
> Saralovesjohsons: [12:17 A.M.] is that bad
> Stuwrt014 [12:17 A.M.]: got more
> . . . .
> Stuwrt014 [12:19 A.M.]: mmmmmmmm ya was hoping to see u naked.....lol
> Saralovesjohsons [12:19 A.M.]: u did

Ex. 37 at 5-6 (alterations in original).

Kang maintained that he did not use the photographs for sexual purposes. But, because "[c]redibility determinations are for the trier of fact, [they] are not subject to [our] review." *Thomas*, 150 Wn.2d at 874.

Here, Kang engaged in sexually explicit conversations with persons claiming to be minors,

he solicited naked pictures from them, he sent a photograph of a naked male to the minors, and he kept the pictures of the young girls. Not only is the evidence sufficient for a jury to find that Kang thought he was communicating with minors but also that this conduct was done for an immoral purpose. The evidence admitted at trial, with all reasonable inferences drawn from it in favor of the State, demonstrates that any rational trier of fact could have found Kang communicated with people who he believed were minors with a "predatory purpose of promoting their exposure to and involvement in sexual misconduct." *Hosier*, 157 Wn.2d at 9. Thus, the jury could have reasonably concluded that the State proved the elements of communication with a minor for immoral purposes beyond a reasonable doubt. Therefore, we affirm.

II. Vagueness

Kang next contends that RCW 9.68A.090 is unconstitutionally vague because it criminalizes conduct protected by the First Amendment. The State responds that the statute is not unconstitutionally vague because (1) it provides adequate notice of what conduct is prohibited and any person of common understanding would understand what conduct is prohibited, and (2) the statute does not infringe on Kang's First Amendment rights because the Washington Supreme Court has construed the statute "'in a sufficiently limited manner.'" Br. of Resp't at 17 (quoting *State v. Aljutily*, 149 Wn. App. 286, 296, 202 P.3d 1004, *review denied*, 166 Wn.2d 1026 (2009)).

A. Standard of Review

We review the constitutionality of a statute de novo. *State v. Watson*, 160 Wn.2d 1, 5-6, 154 P.3d 909 (2007). We presume a statute is constitutional. *Watson*, 160 Wn.2d at 11. A challenger bears the burden of proving beyond a reasonable doubt that the statute is

unconstitutionally vague. *Watson*, 160 Wn.2d at 11. He may overcome the presumption in favor of a law's constitutionality only in exceptional cases. *Watson*, 160 Wn.2d at 11. Moreover, "'we are especially cautious in the interpretation of vague statutes when First Amendment interests are implicated.'" *State v. Williams*, 144 Wn.2d 197, 204, 26 P.3d 890 (2001) (quoting *City of Bellevue v. Lorang*, 140 Wn.2d 19, 31, 992 P.2d 496 (2000)).

B. Constitutionality of RCW 9.68A.090

A statute is void for vagueness if either: "(1) the statute does not 'define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed'; or (2) the statute 'does not provide ascertainable standards of guilt to protect against arbitrary enforcement.'" *Watson*, 160 Wn.2d at 6 (internal quotation marks omitted) (quoting *Williams*, 144 Wn.2d at 203). Kang does not appear to argue that RCW 9.68A.090 is void for vagueness for either of these reasons. Instead, his argument rests solely on his assertion that the First Amendment protects his communications and, thus, the statute is unconstitutionally vague as applied to him.

Specifically, Kang contends that his

> internet communication consisted of communicating with adults about fantasies of children's sexual experiences. [He] asked the people he was chatting with to tell him about past purported sexual experiences, but he did not try to promote a child's future involvement in sexual misconduct. The statute is therefore unconstitutionally vague as applied to [his] free expression.

Br. of Appellant at 24. His argument does not address how RCW 9.68A.090 is unconstitutionally vague as applied to his communications. Rather, he repeats his arguments that he did not believe the individuals with whom he chatted were actually minors, and that the statute prohibits only encouraging minors to engage in future sexual misconduct. The first argument rests on credibility determinations that the jury resolved against him, and we rejected his second argument above. Thus, we do not further discuss this challenge.

III. Community Custody Conditions

Kang further argues that some of the community custody conditions imposed should be vacated because they are not related to his crimes. The State concedes that several of the

conditions should be stricken and we accept the concessions. But because the conditions Kang specifically challenges are located in appendix H to the judgment and sentence, which was not filed or signed, we remand to the trial court to determine which conditions were actually imposed on Kang and, if necessary, for modification of the conditions consistent with this opinion.

A. Standard of Review

"'[I]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.'" *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)). We review sentencing conditions for abuse of discretion. *Bahl*, 164 Wn.2d at 753.

The Sentencing Reform Act of 1981, ch. 9.94A RCW, states that "[a]ny sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed." RCW 9.94A.345; *see also State v. Varga*, 151 Wn.2d 179, 191, 86 P.3d 139 (2004). Kang was convicted of possession of depictions of a minor engaged in sexually explicit conduct for his conduct that occurred between March 15, 2008, and April 2, 2008. Additionally, Kang was convicted of two counts of communicating with a minor for immoral purposes for conduct that occurred between April 1, 2007, and June 3, 2007.

In addition to a term of confinement, Kang was subject to community custody, for which the court had statutory authority to impose conditions.[7] Former RCW 9.94A.700(4) (2003) provided mandatory community custody conditions. Additionally, former RCW 9.94A.700(5) provided discretionary "special conditions" that the trial court could impose. These conditions included that "[t]he offender shall not consume alcohol" and that the court could impose "crime-

[7] Former 9.94A.505 (2002) (effective July 1, 2006, through April 26, 2007); former 9.94A.505 (2006) (effective July 22, 2007, through June 11, 2008).

related prohibitions" on the defendant. Former RCW 9.94A.700(5). A "crime-related prohibition" was defined as "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted . . . ." Former RCW 9.94A.030(13) (2006); *State v. Autrey*, 136 Wn. App. 460, 467, 150 P.3d 580 (2006).

Kang contends the trial court erred in imposing a number of community custody conditions. Specifically, he challenges the following conditions located in appendix H:

> (20) Submit to polygraph and plethysmograph examinations as directed by the [community corrections officer].
> (21) Do not possess or pursue any pornographic material.
> . . . .
> (23) Do not purchase, possess, or use any illegal controlled substance, or drug paraphernalia without the written prescription of a licensed physician.
> . . . .
> (25) Do not purchase, possess, or consume alcohol.
> (26) Do not enter any business where alcohol is the primary commodity for sale.

CP at 60. The only challenged condition that also appears in the signed judgment and sentence is the prohibition of consuming or possessing any controlled substance or drug paraphernalia, but we address all the challenged conditions and order the trial court on remand not to impose conditions we find improper.

B. Alcohol Related Conditions

Kang asserts that the two community custody conditions prohibiting him from purchasing, possessing, or consuming alcohol or from entering any business where alcohol is the primary commodity for sale are not crime related and should be stricken. The State concedes this error. We accept this concession and remand for the trial court to strike conditions 25 and 26, if the trial court finds that these conditions were imposed on Kang.

C. Drug Paraphernalia

Kang also argues that the community custody condition prohibiting him from purchasing, possessing, or using drug paraphernalia is not crime related and should be stricken. The State again concedes this error. Again, we accept this concession and remand for the trial court to strike the portion of condition number 23 prohibiting purchase, possession, or use of drug paraphernalia. The trial court should also strike the condition in the judgment and sentence that states that Kang shall "[n]ot consume or possess any controlled substances or drug paraphernalia without a valid prescription." CP at 42.

D. Pornographic Materials

Kang challenges community custody condition 21, which states, "[d]o not possess or pursue any pornographic material," as unconstitutionally vague. CP at 60. We agree.

In *Bahl*, 164 Wn.2d at 743-44, our Supreme Court addressed a community custody condition restricting access to and possession of pornographic materials. The condition did not define pornography, leaving this to the community corrections officer's discretion. *Bahl*, 164 Wn.2d at 743. The Court held that the condition was unconstitutionally vague because it failed to provide ascertainable standards. *Bahl*, 164 Wn.2d at 757-58. Likewise, in *State v. Sansone*, 127 Wn. App. 630, 639, 111 P.3d 1251 (2005), Division One of this court held an identical condition of community custody unconstitutionally vague because the term "pornography" had "not been defined with sufficient definiteness such that ordinary people can understand what it encompasses."

The State argues that this court should read the condition contained in the judgment and sentence that states, "'the defendant shall . . . [n]ot possess or peruse depictions of anyone, minor or adult, engaged in sexually explicit conduct, as defined in RCW 9.68A.011,'" in tandem with

condition number 21. Br. of Resp't at 19-20 (alteration in original) (quoting CP at 42). Thus, the State argues that when reading the two provisions together, "[t]he defendant does not have to guess at what is prohibited by the words 'pornographic' or 'sexually explicit' as the statutory definition is quite clear and thorough." Br. of Resp't at 20. But the State does not provide any authority supporting the proposition that the judgment and sentence and this community custody provision should be read in tandem. Thus, we will not consider this argument. RAP 10.3(a)(6), (b) (The parties' briefs should provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record."). Because nothing in condition 21 defines "pornography," we follow *Bahl* and hold that, as written, the condition of community custody prohibiting Kang from possessing or perusing any pornographic material is unconstitutionally vague.

We note that the condition in the judgment and sentence prohibiting Kang from possessing or perusing "depictions of anyone, minor or adult, engaged in sexually explicit conduct, as defined in RCW 9.68A.011" is not vague because it provides ascertainable standards. CP at 40; *Bahl*, 164 Wn.2d at 757-58; *see also State v. Valencia*, No. 82731-1, 2010 WL 3504830 (Wash. Sept. 9, 2010). Thus, the condition as it appears in the judgment and sentence is constitutional.

E. Plethysmograph Testing

Kang asserts that the portion of condition 20 that required him to submit to "plethysmograph testing as required by his community corrections officer violated [his] constitutional right to be free from bodily intrusions." Br. of Appellant at 34 (emphasis omitted). The State also concedes this error. We accept this concession and remand to the trial court to strike the portion of the provision requiring plethysmograph examinations or to revise the

condition to require plethysmograph testing only at the direction of his sexual deviancy treatment provider. *State v. Riles*, 135 Wn.2d 326, 345, 957 P.2d 655 (1998) ("We conclude that requiring plethysmograph testing . . . incident to [the defendant's] treatment is a valid condition which a court is authorized to impose.").

IV. Statement of Additional Grounds for Review

In his SAG, Kang asserts that (1) he erased LimeWire from his inoperable desktop and that LimeWire does not allow the user to preview the video before download completion, and (2) his lawyer was "incompetent and lacked litigation skills required to defend the defendant" and was "negligent in giving advice." SAG at 1. Specifically, Kang asserts that his attorney was "computer illiterate" and had "no knowledge of computers except 'how to play solitaire.'" SAG at 1.

A. Video Download

Kang argues that he erased LimeWire from his desktop computer before the computer became inoperable and that LimeWire requires downloading before viewing the content. These facts are not contained in the record and he raises them for the first time on appeal. Although the rules of appellate procedure do not require Kang to cite to the record or authority in his SAG, nonetheless, he has an obligation to "inform the court of the nature and occurrence of alleged errors." RAP 10.10(c). We are not required to search the record to find support for his claims. RAP 10.10(c). Moreover, we cannot address matters outside the record on direct appeal. *State v. McFarland*, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995); *see* RAP 9.1(a). Thus, this argument fails.

B. Ineffective Assistance of Counsel

Kang argues that he received ineffective assistance of counsel because his trial attorney was "incompetent and lacked litigation skills required to defend the defendant." SAG at 1. Specifically, Kang contends that the "court appointed attorney was 'computer illiterate' and since this trial [wa]s based on computer electronic communication the judge was negligent in appointing this unqualified attorney to this trial." SAG at 1. To prevail on a claim of ineffective assistance of counsel, Kang must show that counsel's performance fell below an objective standard of reasonableness, based on consideration of all the circumstances and that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007).

Here, the record does not indicate how Kang's counsel was ineffective in not seeking a computer expert or how this could have benefitted Kang. A criminal defense attorney's expertise is criminal law and procedure and such an attorney need not personally have all expert skills and knowledge that may bear on a client's case.[8] Thus, the record is inadequate for us to determine whether counsel's performance fell below an objective standard of reasonableness as to constitute deficient representation. *See McFarland*, 127 Wn.2d at 335. A personal restraint petition is the appropriate procedure to raise a claim of ineffective assistance of counsel based on matters outside the record. RAP 10.10(c); *State v. Byrd*, 30 Wn. App. 794, 800, 638 P.2d 601 (1981). Thus, this claim fails.

We remand to the trial court for clarification of the community custody conditions actually imposed on Kang and, if necessary, the trial court should strike the conditions contained in appendix H that relate to alcohol and drug consumption or possession, possession of

[8] The issue may have been whether defense counsel should have sought or secured a computer expert, but Kang does not raise that issue and we do not address it.

pornographic materials, and plethysmograph testing at the direction of his community corrections officer in a manner consistent with this opinion. The trial court should also strike the condition in the judgment and sentence that prohibits Kang from consuming or possessing any controlled substance or drug paraphernalia because it is not crime related. We otherwise affirm Kang's convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Hunt, J.

Quinn-Brintnall, J.