IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28068-3-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
LARENZO SANDERS,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Kulik, C.J. — First degree rape of a child requires that the State prove, among other elements, that Larenzo Sanders was not married to the victim. On appeal, Mr. Sanders contends that the State failed to prove that he was not married to the victim, who was his half sister. He also argues that the community custody conditions relating to alcohol and dangerous weapons are invalid because they are not crime related. And Mr. Sanders argues that the dangerous weapon condition is unconstitutionally vague.

We conclude that the State met its burden of proof regarding the element of nonmarriage. We also conclude that while the statute does authorize the trial court to prohibit consumption of alcohol, the statute does not allow imposition of community

custody conditions prohibiting Mr. Sanders from possessing alcohol, entering bars or taverns, and possessing dangerous weapons when those conditions, as here, are not crime related. Accordingly, we affirm the convictions but reverse the disputed community custody conditions.

FACTS

In 2009, the State filed an amended information charging Larenzo Sanders, who was born in 1991, with four counts each of rape of a child in the first degree and incest in the first degree. These charges stemmed from allegations made by Larenzo's[1] half sister, P.S., who was born in 1995. P.S. reported that Larenzo raped her multiple times between September 1, 2005, and August 31, 2007, while they were both living with their foster grandparents. Larenzo pleaded not guilty to all charges.

Melissa Sanders, the mother of P.S. and Larenzo, testified that in November or December 2007, P.S. told Melissa that Larenzo raped her multiple times over the previous two years. Melissa reported the incidents to the police and took P.S. to the hospital. Dr. Rebecca Wiester, an attending doctor at the Harborview Sexual Assault Center, questioned and physically examined P.S. Dr. Wiester testified that P.S. told her that Larenzo raped her on multiple occasions in their grandparents' house. Dr. Wiester's

[1] For the sake of clarity, we refer to the family members by their first names.

physical examination of P.S. did not reveal anything abnormal. Dr. Wiester testified that she did not know whether P.S.'s allegations were true and could not say whether P.S. had been sexually active. On January 15, 2008, P.S. was interviewed by Deputy Dave Houseberg, of the Cle Elum Police Department, and Carolyn Webbster, a child interview specialist with the King County Prosecutor's Office. At trial, the jury watched a video of this interview.

Deputy Houseberg also interviewed Larenzo. At the end of the interview, Larenzo stated that he and P.S. had "'messed around a little,'" but claimed that it was consensual. Report of Proceedings (RP) (Feb. 25, 2009) at 42. Larenzo stated that there were about three instances where he and P.S. "messed around." He described one incident that took place in his room and another that took place in the bathroom. Larenzo's counsel questioned the thoroughness of the investigation, the legitimacy of the methods used to obtain this report, and the report's accuracy. According to the presentence investigation, Larenzo was in a steady relationship with a girl friend prior to being arrested.

At trial, P.S. stated that she lied about the incidents of Larenzo raping her. P.S. testified that she initially accused Larenzo of raping her because her mother had just confronted her about a note P.S. had written in which P.S. agreed to have sex with a young man. P.S. stated that she lied about Larenzo raping her because she hoped to avoid

her mother's punishment regarding the letter. P.S. testified that she had falsely reported two instances of rape: once in the bathroom, and another time in Larenzo's room.

Testimony at trial revealed that Larenzo and P.S. were related and that they referred to each other as brother and sister or half brother and half sister. P.S. testified that Larenzo was her sibling, and that they shared the same mother. Former Cle Elum police officer Scott Larose testified regarding a note that Larenzo had given him that read, in part: "My sister [P.S.] told my mother that we had sex which was not true." RP (Feb. 24, 2009) at 139. Dr. Wiester stated that P.S. referred to Larenzo as her half brother. Dorothy Lillard, P.S. and Larenzo's foster grandmother, testified that Larenzo and P.S. were her grandchildren. In Larenzo's report to Deputy Houseberg, Larenzo stated that "my sister [P.S.] and I messed around a little." RP (Feb. 25, 2009) at 46. At trial, Larenzo's counsel asked Larenzo if he had "heard [his] sister testify," and Larenzo indicated he had. RP (Feb. 25, 2009) at 118.

In his closing statement, the prosecuting attorney told the jury that Larenzo had sex with his sister and that they were not married. Larenzo's counsel did not address the element of nonmarriage in his closing argument and did not request a jury instruction defining marriage.

The jury found Larenzo guilty of one count each of rape of a child in the first

degree and incest in the first degree. The court sentenced Larenzo to 93 months in prison plus a 36- to 48-month period of community custody. Among other conditions, the community custody order prohibited Larenzo from (1) possessing and consuming alcohol, (2) entering bars or taverns, and (3) possessing any dangerous weapons.

ANALYSIS

Insufficiency of the Evidence. When reviewing a claim of insufficiency of the evidence, the appellate court "must view the evidence in a light most favorable to the State and determine whether a rational trier of fact could have found the essential elements of the charge proved beyond a reasonable doubt." *State v. Myers*, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997). "When claiming insufficiency of the evidence, the defendant admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom." *Id.*

RCW 9A.44.073(1) states:

> A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.

Due process requires the State to prove "beyond a reasonable doubt, every fact necessary to constitute the crime charged." *State v. Baeza*, 100 Wn.2d 487, 490, 670 P.2d 646

(1983).

Larenzo contends that the State did not prove the element of nonmarriage beyond a reasonable doubt. Marriage is defined as "a civil contract between a male and a female who have each attained the age of eighteen years, and who are otherwise capable." RCW 26.04.010(1). Persons who are 17 years old may marry with parental permission. RCW 26.04.210(1). Persons younger than 17 years old may marry with the permission of the superior court. RCW 26.04.010(2). A marriage is not legally recognized if it is between a man and a women who "are nearer of kin to each other than second cousins, whether of the whole or half blood." RCW 26.04.020(1)(b).

"The nonmarriage of a rapist and complainant may be proved by circumstantial evidence, like other material facts." *State v. Shuck*, 34 Wn. App. 456, 458, 661 P.2d 1020 (1983). In *Shuck*, the court convicted an adult defendant of two counts of statutory rape in the third degree when he "engaged in consensual sexual intercourse with two 14-year-old girls." *Id.* at 457-58. The defendant had sexual intercourse with the victims and paid them to be photographed while doing so. *Id.* at 458. The prosecution failed to address the element of nonmarriage, but the court found that the evidence,

> when viewed in the light most favorable to the State . . . was more than sufficient to enable a rational trier of fact to infer beyond a reasonable doubt that [the defendant] was not married to either of the girls.

Id. In reaching this decision, the court reasoned that the jury observed the testimony of both victims, and knew the girls' age, the length of their relationship with the defendant, and girls' other relationships. *Id.* Both girls were in the ninth grade and never spent the night with the defendant. *Id.* The girls' acquaintance with the defendant lasted only one month, and one of the girls had a boyfriend. *Id.*

In *State v. Rhoads*, 101 Wn.2d 529, 681 P.2d 841 (1984), the court addressed the same issue and applied the same rule. The prosecution "failed to ask the victim whether she was married to [the defendant]," but based on the "testimony of several witnesses, including the victim," the court found that "there was sufficient evidence of nonmarriage." *Id.* at 532. In *Rhoads*, the victim and the defendant did not know each other, and the defendant was apprehended moments after the rape occurred. *Id.* at 531. The State charged the defendant with first degree rape. *Id.* at 530-31.

Under the standards set forth in *Shuck* and *Rhoads*, sufficient evidence exists here to prove that Larenzo and P.S. were not married. At trial, there was ample evidence that Larenzo and P.S. shared the same biological mother. Through the testimony of P.S., Larenzo, and other witnesses, the State showed evidence that P.S. and Larenzo considered each other to be related as half brother and half sister. Furthermore, the evidence suggested that Larenzo and P.S. did not always live together and were each

dating other people. *See Shuck*, 34 Wn. App. at 458 (finding factors of living apart and dating other people as indicative of nonmarriage).

Larenzo contends that the facts of this case are distinguishable from *Shuck* and *Rhoads*. Larenzo argues that unlike the short duration of the relationship between the victims and the defendant in *Shuck*, Larenzo and P.S. knew each other for their entire lives and cohabited for many of those years. Larenzo further argues that the existence of a long-term relationship between himself and P.S., unlike the lack of relationship between the parties in *Rhoads*, makes nonmarriage more subject to doubt. However, these contentions equally support the fact that Larenzo and P.S. were *not* married because unmarried brothers and sisters often live together for long periods.

Larenzo also argues that due process requires the fact finder to determine the true biological relationship between himself and P.S. and whether it would disqualify a marital relationship. However, this argument fails because marriage between Larenzo and P.S. would have been invalid on the grounds of (1) their close biological relationship (*see* RCW 26.04.020), and (2) because they were under the legal age to be married. RCW 26.04.010(1); RCW 26.04.210.

Finally, Larenzo contends that the court did not properly instruct the jury on the definition of "married" or "legally married." Appellant's Br. at 8. However, this

argument is precluded because "[i]f a party does not propose an appropriate instruction [at the time of the trial], it cannot complain about the court's failure to give it." *Goodman v. Boeing Co.*, 75 Wn. App. 60, 75, 877 P.2d 703 (1994), *aff'd*, 127 Wn.2d 401, 899 P.2d 1265 (1995). Thus, when viewing the evidence in the light most favorable to the State, the State proved the element of nonmarriage beyond a reasonable doubt.

Validity of Community Custody Conditions. The Sentencing Reform Act of 1981, chapter 9.94A RCW, states that "[a]s a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter." RCW 9.94A.505(8). "[T]he assignment of crime-related prohibitions has 'traditionally been left to the discretion of the sentencing judge.'" *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993) (quoting *State v. Parramore*, 53 Wn. App. 527, 530, 768 P.2d 530 (1989)). A sentence will be reversed only if it is manifestly unreasonable such that no reasonable person would adopt the trial court's view. *Id.* (quoting *State v. Blight*, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977)). A "crime-related prohibition" is 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, 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.

Former RCW 9.94A.030(13) (2005).

Former RCW 9.94A.715(2)(a) (2003), applicable to Larenzo, provided for conditions of community custody as follows:

> Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, and the department shall enforce such conditions pursuant to subsection (6) of this section.

Former RCW 9.94A.700(5) (2003) stated:

> As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions:
>
> (a) The offender shall remain within, or outside of, a specified geographical boundary;
>
> (b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;
>
> (c) The offender shall participate in crime-related treatment or counseling services;
>
> (d) The offender shall not consume alcohol; or
>
> (e) The offender shall comply with any crime-related prohibitions.

The court is limited to the types of alcohol related community custody conditions it can order depending on the nature of the crime committed. In *State v. Jones*, 118 Wn. App. 199, 202-03, 76 P.3d 258 (2003), the defendant pleaded guilty to first degree burglary and "other crimes," and the court imposed a prison

sentence and conditions of community custody relating to alcohol consumption and treatment. As here, nothing in the evidence suggested that alcohol contributed to the defendant's offenses. *Id.* at 207-08. The Court of Appeals found that the trial court had the authority to prohibit alcohol consumption but that it could not order the defendant "to participate in alcohol counseling." *Id.* at 208. The court reasoned that the legislature intended a trial court to be able "to prohibit the consumption of alcohol regardless of whether alcohol had contributed to the offense." *Id.* at 206. However, when ordering participation in treatment or counseling, the treatment or counseling must be related to the crime. *Id.* at 207-08; *see also State v. McKee*, 141 Wn. App. 22, 34, 167 P.3d 575 (2007) (finding that community custody provisions prohibiting purchasing and possession of alcohol were invalid when alcohol did not play a role in the crime), *review denied*, 163 Wn.2d 1049 (2008).

Here, the condition prohibiting Larenzo from consuming alcohol is valid since this prohibition does not have to be crime-related. Former RCW 9.94A.700(5)(d); *Jones*, 118 Wn. App. at 206-07. However, the conditions prohibiting Larenzo from possessing alcohol and entering bars or taverns are invalid because there is no evidence that alcohol played a part in Larenzo's crimes.

Larenzo next challenges the community custody provision prohibiting him from possessing "any dangerous weapons." This condition is invalid because there is no evidence that any weapons, or "dangerous weapons," played a part in Larenzo's crimes. *See* former RCW 9.94A.715(2)(a) (courts may only order community custody prohibitions when the conditions are "reasonably related" to the crime). Possession of a "dangerous weapon" is not one of the conditions that a court may impose at its discretion, such as prohibiting the consumption of alcohol. *See* former RCW 9.94A.700(5). Since this condition is invalid on the grounds of being unrelated to the crime, we need not address whether this prohibition is unconstitutionally vague.

CONCLUSION

We affirm the convictions for rape of a child in the first degree and incest in the first degree and the prohibition on consuming alcohol, and reverse the community custody conditions prohibiting Larenzo from possessing alcohol, entering bars or taverns, and possessing any dangerous weapons. We remand for resentencing consistent with this opinion.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to

RCW 2.06.040.

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Kulik, C.J.

WE CONCUR:

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Korsmo, J. Brown, J.