IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0014

STATE OF MONTANA,

Plaintiff and Appellee,

v.

KENNETH WESLEY ROWE,

Defendant and Appellant.

REDACTED BRIEF OF APPELLEE

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Michael Moses, Presiding

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
CORI LOSING
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
cori.losing@mt.gov

SCOTT TWITO
Yellowstone County Attorney
SARAH HYDE
Deputy County Attorney
P.O. Box 35025
Billings, MT 59107-5025

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TYLER T. DUGGER
Attorney at Law
1337 Colton Boulevard
Billings, MT 59102

ATTORNEY FOR DEFENDANT
AND APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF THE ISSUE

Whether the district court abused its discretion when it imposed a probation condition that prohibits Rowe, who has been convicted of four felony sex offenses involving his then-girlfriend's minor daughter, from accessing or possessing any material that describes or depicts human nudity without prior approval of Probation and Parole and Rowe's therapist.

STATEMENT OF THE CASE

The State of Montana ultimately charged Appellant Kenneth Wesley Rowe with one count of felony sexual intercourse without consent, in violation of Mont. Code Ann. § 45-5-503(a), four counts of felony sexual assault, in violation of Mont. Code Ann. § 45-5-502(3), three counts of felony sexual abuse of children, in violation of Mont. Code Ann. § 45-5-625(1)(e), one count of misdemeanor surreptitious visual observation or recordation (1st offense), and one count of felony criminal production or manufacture of dangerous drugs, in violation of Mont. Code Ann. § 45-9-110(1), (4). (Doc. 43.)

Pursuant to a plea agreement, Rowe pleaded guilty to one count of felony sexual intercourse without consent, one count of sexual abuse of children, and two counts of sexual assault. (Doc. 70 at 1, 4-6; Doc. 73.) The district court subsequently imposed a net sentence of 60 years with 25 years suspended, a 20-year parole

restriction, and Condition 29. (Doc. 103 at 1-2, 6.) Rowe appeals only the district court's imposition of Condition 29.

STATEMENT OF THE FACTS

I. The offenses

L.C. and Rowe were childhood friends who rekindled a relationship when L.C.'s daughter, A.C., was 14 or 15 years old. (9/28/23 Tr. at 23.) Later on, Rowe reportedly paid for L.C. and A.C. to move from Oklahoma to reside with Rowe in Billings. (9/28/23 Tr. at 23; Doc. 79 at 20.) At the time, A.C. was "very nervous and not ready to meet somebody that [she] had never met before." (9/28/23 Tr. at 23.) However, once in Montana, A.C.'s "fears" subsided because Rowe "ended up being one of the best father figures" she had ever had. (*Id*.) Truly, Rowe "filled a void" in A.C. because she "never had a dad." (*Id*.) Rowe taught A.C. to drive, helped her with school, helped her through her first breakup, and was there for her for nearly everything in between. (*Id*.)

However, during this time, Rowe became obsessed with seeing A.C. nude. (Doc. 79 at 6; Doc. 95 at 2.) To satiate his desire, Rowe, using his background as a video surveillance installer, installed a covert camera in the bathroom to capture A.C. naked in the shower. (Doc. 42 at 2; Doc. 79 at 9.) He cut a "peep hole . . . into the top of the bathtub/shower in the bathroom" that A.C. used. (Doc. 42 at 2.)

Rowe had protected the peep hole with "a round clear lens . . . secured with duct tape" and concealed it with a shelving unit. (*Id*.)

One day, Rowe's autistic, teenage son, A.B., saw a camera in Rowe's "closet that was taking a video of [A.C.] showering." (Doc. 42 at 2; 9/28/23 Tr. at 69.) A.B. disclosed his observation to his therapist, who reported it to law enforcement. (Doc. 42 at 2.) Soon after, law enforcement executed a warrant to search Rowe's residence. (*Id*.) Detective Kramer discovered the peep hole in the bathroom, and was able to "see into the downstairs bedroom closet, which was consistent with the information provided by A.B." (*Id*.)

Rowe had a computer "mounted to a swivel above the bed," which he would have been able to view while laying down. (*Id*.) Detective Kramer ultimately discovered two laptop computers in the master bedroom, and in an office next to A.C.'s bedroom, Detective Kramer noticed several desktop computers, monitors, and routers being backed up to external hard drives. (*Id*.) In total, three hard drives were seized from Rowe's residence. (*Id*.)

A subsequent search of the first hard drive revealed four videos of Rowe going into A.C.'s bedroom while she was asleep and either "lift[ing] up the bedding or pull[ing] down her pants to see her underwear, pull[ing] down her underwear to see her vagina, or masturbat[ing] in her room by placing her hand on his penis." (*Id*. at 3.) And there were three videos of Rowe digitally penetrating

A.C. while she was sleeping. (*Id*.) There were also 31 videos of A.C. "naked in the shower or bathtub and one video of [A.C.] changing in her bedroom." (*Id*.)

When law enforcement searched the second hard drive, they discovered two videos of Rowe placing a sleeping A.C.'s "hand on his penis to masturbate, once uncovering and touching A.C.'s breasts while doing so." (*Id*.) There were two videos of Rowe lifting A.C.'s bedding and "pulling down her underwear to expose her vagina" while she was asleep. (*Id*.) Another video showed Rowe moving A.C.'s "bra and touching her breasts" while she was sleeping. (*Id*.) The second hard drive also contained 35 videos of A.C. "naked in the shower or bathtub and one video of [A.C.] changing in her room." (*Id*.)

A search of the third hard drive yielded five videos of Rowe exposing and digitally penetrating A.C.'s vagina while she was asleep. (*Id*. at 4.) There were three videos of Rowe placing an asleep A.C.'s hand on his penis to masturbate. (*Id*.) Two other videos showed Rowe lifting A.C.'s bedding and "pulling down her shorts to expose her underwear" while she was asleep. (*Id*.) And there was a video of Rowe touching A.C.'s buttocks with her pants halfway down while she was sleeping. (*Id*.) The third hard drive also contained 117 videos of A.C. "naked in the shower or bathtub, [with] several of these videos [] dates ranging from January 28, 2018, through December 26, 2018." (*Id*.) And, on one of two Seagate hard drives, law enforcement found "eleven videos of [A.C.] naked in the bathtub." (*Id*.)

In total, Rowe had approximately 570 videos of A.C. in his possession. And, on Rowe's cell phone, law enforcement discovered "146 photos of [A.C.] naked, many of which were duplicates from his computer and hard drives." (Doc. 42 at 4.)

Rowe's internet history revealed searches for "anesthesia medication," "father molested sleeping daughter," "guaranteed ways to render someone unconscious," "buy chloroform," "will chloroform render you unconscious," and "how to make ether." (Doc. 42 at 4; 9/28/23 Tr. at 39-40.) Based on this search history and A.C.'s "deep state of sleep while [Rowe] perform[ed] sexual acts on her," law enforcement believed that Rowe had drugged A.C. (Doc. 42 at 4.)

Rowe searched "Billings rape" 15 times, "[u]nsolved rape statistics" 8 times, and "[w]hat is involved in a rape kit exam" 6 times. (9/28/23 Tr. at 39.) Rowe also searched "[w]hat is sodomy? How long does it take for Benadryl to work?" "Benadryl and alcohol," "[f]orced teen," "[l]ittle naked girls," "[n]aked preteen girls," "[g]irls with hand in her pants," "[g]irl playing with her boobs," "[e]ffects of Valium, Roofie, effects of Quantapen," "remove web cam viewing software," "[d]ad creeps on stepdaughter while mom sleeps," and "[f]ather abuses sleeping daughter." (*Id*. at 39-40.)

The weekend of her prom, law enforcement officers informed A.C. what Rowe had done to her while she was asleep. (*Id*. at 24.) Since then, A.C. has asked herself if it was her fault and questioned why she did not wake up when Rowe was

performing sexual acts on her. (*Id*.) A.C. struggles to take showers, has difficulty going to sleep, and finds it hard to function. (*Id*.)

For A.C., Rowe "stole two of the safest places a person could have for [A.C.]:" she cannot "go hide under [her] blanket, or behind the shower curtain because that's where [her] monsters lie." (*Id*.) She no longer speaks with L.C. because L.C. "went through a horrific mental break[down] herself, not knowing if this was her fault and if she could have seen the signs." (*Id*. at 25.) A.C. believes she will "never be able to get rid of these demons that have been served upon [her]." (*Id*.)

II. Procedural history

Rowe entered into a plea agreement, in which he agreed to plead guilty to one count of sexual intercourse without consent, one count of sexual abuse of children, and two counts of sexual assault in exchange for the State dismissing the remaining charges. (Doc. 70 at 6.) The State would recommend a net sentence of 80 years, and Rowe was free to argue for any legal, lesser sentence. (*Id*.)

Rowe subsequently entered his guilty pleas to the four outlined charges on December 27, 2022. (12/27/22 Tr. at 8-9.) As part of his allocution, Rowe admitted that he: (1) digitally penetrated A.C.'s vulva without consent; (2) touched her vagina, breasts, and buttocks while she was sleeping; (3) placed her hand on his penis for the purpose of masturbation when she was sleeping; and (4) possessed

videos of A.C. naked in the shower, bathtub, or in a state of undress. (*Id*. at 10-12.) Rowe admitted that A.C. was over the age of 16, but under the age of 18, when the offenses occurred, and agreed that his actions resulted in A.C. suffering from mental impairment. (*Id*. at 10-11.)

In advance of sentencing, the district court received the Presentence Investigation Report (PSI), which included Rowe's Psychosexual Evaluation. (Doc. 79.) [redacted]

[redacted]

The PSI recommended that the district court impose Condition 29, which provides:

> The Defendant shall not access or have in his/her possession or under his/her control any material that describes or depicts human nudity, the exploitation of children, consensual sexual acts, non-consensual sexual acts, sexual acts involving force or violence, including but not limited to computer programs, computer links, photographs, drawings, video tapes, audio tapes, magazines, books, literature, writings, etc., without prior written approval of the Probation & parole Officer and therapist. The Defendant shall not frequent adult bookstores, topless bars, massage parlors, or use the services of prostitutes.

(Doc. 79 at 12.)

Before sentencing, Rowe submitted a memorandum to the district court in which he objected to Condition 29, arguing that it had no nexus to the crime, was unconstitutional, and was overbroad. (Doc. 95 at 5-6.) To Rowe, "[t]he supervising officer would have to constantly enter the residence and regularly scrutinize all devices, computer[,] and TV," rendering the condition "unconstitutional" and "unworkable." (*Id*. at 6.)

At sentencing, Rowe reiterated his objection to Condition 29, clarifying that it was only to "the first clause that he shall not have access or have in his possession under his control any material that describes or depicts human nudity." (9/28/23 Tr. at 16.) Rowe argued that the condition was "unconstitutional,"

"unduly vague," and had no nexus to the crime "because there are many depictions of human nudity," such as "in fine art" and "in a medical record," or "in a fashion magazine advertisement." (9/28/23 Tr. at 16.)

In response, the State argued that Condition 29 was appropriate and that Rowe had "forfeit[ed] the right to partake in any kind of this art or material, movies, media, whatever, by virtue of the charges in this case with which he pled guilty to and will be sentenced for today; that is, that he created hundreds of videos of a 16, 17-year old, for his own selfish benefit and gain." (*Id*. at 17.) As the State asserted, "[t]here is a beautiful world out there full of art and full of movies that do not depict nudity or consensual sex acts." (*Id*.) The State further argued that Condition 29 was appropriate given the amount of sex offender treatment it anticipated Rowe would have to complete, and "his offending cycle which began with his sister decades ago.[1]" (*Id*. at 18.)

Based on the evidence presented at the sentencing hearing, the record, the PSI and Psychosexual Evaluation, the district court sentenced Rowe to the Montana State Prison for a net term of 60 years with 25 years suspended, and ordered that Rowe register as a level II sexual offender. (*Id*. at 62-91.) The district court also imposed a 20-year parole restriction and, in relevant part, imposed Condition 29.

[1] [redacted]

(*Id*. at 91.) In reaching its sentence, the district court described Rowe's offenses as "simply horrendous, atrocious and disgusting," with there not being "enough adjectives for [the district court] to effectively describe them." (*Id*. at 87.)

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion when it prohibited Rowe from possessing or accessing any material that depicts or describes human nudity as part of Condition 29. Rowe is a level II sexual offender who, over the course of a year, recorded A.C. naked in the shower, bathtub, or changing in her room. Although the images and recordings of A.C. were predatory and inappropriate, those images and several of those recordings of A.C. showed her naked, which is not inherently sexually explicit.

During that same time, Rowe also recorded himself digitally penetrating A.C., touching her buttocks, exposing her vagina, and using her hand to masturbate himself. A.C. was asleep during every one of Rowe's sexual encounters. At the time, she was 16 to 17 years old. It is presumed that Rowe drugged A.C. because she did not wake up during any of these encounters. His conduct was predatory and disturbing, and a result of an uncontrollable obsession of seeing A.C. naked. Therefore, a sufficient nexus exists between prohibiting Rowe from accessing or

possessing any material that describes or depicts human nudity and Rowe's conduct, convictions, and individual circumstances.

Condition 29 is also not overly broad or unduly punitive. If there are depictions or descriptions of human nudity Rowe wishes or must see, such as medical reports, educational materials, and fine art, Rowe can do so with the permission of his probation and parole officer and therapist. Finally, Condition 29 furthers the State's interest in rehabilitating Rowe, who is at moderate risk to reoffend.

STANDARD OF REVIEW

This Court reviews for legality a condition imposed in a criminal sentence. *State v. Johnson*, 2023 MT 143, ¶ 6, 413 Mont. 114, 533 P.3d 335. "A condition is illegal when there exists no statutory authority to impose it, where the condition exceeds the limits of the relevant sentencing statute, or where the court fails to 'adhere to the affirmative mandates of the applicable sentencing statutes.'" *State v. Hotchkiss*, 2020 MT 269, ¶ 11, 402 Mont. 1, 474 P.3d 1273 (citation omitted). If this Court concludes the sentence condition is legal, this Court then reviews for abuse of discretion the reasonableness of the conditions or restrictions imposed. *Johnson*, ¶ 6. A district court abuses its discretion when it acts arbitrarily without conscientious judgment or exceeds the bounds of reason. *Johnson*, ¶ 6.

ARGUMENT

The district court did not abuse its discretion when it imposed Condition 29 because a sufficient nexus exists between prohibiting Rowe from possessing or accessing any material depicting or describing human nudity and Rowe's four convictions and conduct, and the prohibition is not overly broad.

Just as before the district court, Rowe, on appeal, challenges only the portion of Condition 29 that prohibits him from possessing or accessing any material that depicts or describes human nudity. (Appellant's Br. at 3-6.) Rowe argues that this portion of Condition 29 is unreasonable because it prohibits more than just sexually explicit human nudity. (*Id*. at 5.) Rowe's argument, however, is without merit because the challenged portion of Condition 29, as written, is a reasonable restriction based on Rowe's four convictions, conduct, and individual circumstances.

"[P]robationers do not enjoy the absolute liberty and heightened expectations of privacy afforded every Montana citizen; rather, they are subject to conditional liberty properly dependent upon special restrictions." *State v. Moody*, 2006 MT 305, ¶ 19, 334 Mont. 517, 148 P.3d 662; *see also* Mont. Code Ann. § 46-18-801(1). To that end, a sentencing judge may impose any reasonable restrictions or conditions during the suspended portion of an offender's sentence that are "considered necessary for rehabilitation or for the protection of the victim or society." *Johnson*, ¶ 7 (quoting Mont. Code Ann. § 46-18-201(4)(p)).

Because a sentencing judge's discretion is broad, this Court affords great deference to the sentencing court. *State v. Melton*, 2012 MT 84, ¶ 18, 364 Mont. 482, 276 P.3d 900 (citation omitted). This Court generally will affirm a restriction or condition imposed by the district court "so long as the restriction or condition has some correlation or connection—i.e., nexus—to the underlying offense or to the offender himself." *Melton*, ¶ 18 (citations omitted). If, however, "the restriction or condition at issue is 'overly broad or unduly punitive,' or if the required nexus is 'absent or exceedingly tenuous,' [this Court] will reverse." *Johnson*, ¶ 7 (citing *Melton*, ¶ 18).

Here, Rowe's conduct and convictions supported the district court prohibiting him from accessing or possessing any material that describes or depicts human nudity without prior written approval of probation and parole and Rowe's therapist. Rowe created a relationship of trust and care between him and A.C. all while he was obsessed with seeing her naked. To satisfy his obsession, he used his video surveillance background to install a covert camera by the shower and bathtub that was covered by a shelf. Rowe also changed the lighting in the bathroom, hung a clear shower curtain, lit candles and encouraged A.C. to take baths, and suggested ways to bathe so she would be more relaxed. (*See* 9/28/23 Tr. at 84.) A.C. was only aware that she was being filmed after A.B.'s disclosure to his therapist.

Rowe's obsession with seeing A.C. naked, however, spiraled into hands on sexual abuse. Several times, Rowe entered A.C.'s room when she was sleeping and filmed himself performing various sexual acts on her, such as exposing her vagina, digitally penetrating her, touching her buttocks, and using her hand to masturbate himself. A.C. never woke up when Rowe was performing these acts leading law enforcement to reasonably believe that Rowe had drugged A.C., especially since Rowe had an extensive internet search history regarding Benedryl, Chloroform, anesthesia medication, Valium, and roofies. He also had an abhorrent Internet history that ranged from searching little and preteen naked girls to father molesting or abusing his sleeping daughter. Rowe's search history also included 219 searches for pornography, "much of which is centered around incest, family play and young women." (9/28/23 Tr. at 18.)

Rowe recorded most, if not all, of his encounters with A.C. And even though the videos often were dark, law enforcement was able to confirm it was Rowe because of the playboy bunny tattoo on his hand. A.C. only knew that Rowe had sexually abused her after law enforcement showed her the videos.

In total, Rowe had approximately 570 videos of A.C. across multiple devices, and had over 100 photos of her on his cell phone. Although all of these videos and photos were inappropriate, predatory, and taken without A.C.'s consent, a majority of the videos showed A.C. naked, which is not inherently sexually

explicit. Simply put, Rowe's internet history of searching for nude photos, possessing hundreds of videos and photos of A.C. nude that are not inherently sexually explicit, and Rowe's disturbing conduct supported the district court prohibiting Rowe from accessing or possessing any material that describes or depicts human nudity, without any qualifying language that the human nudity material must be sexually explicit.

Moreover, Rowe's individual circumstances further supported the district court imposing Condition 29 as written. [redacted] *See generally State v. Bullplume*, 2013 MT 169, ¶¶ 8, 11, 370 Mont. 453, 305 P.3d 753. Simply put, Rowe's uncontrollable desire to record an unsuspecting A.C. to capture her nude, which spiraled into Rowe sexually abusing A.C., supported the district court restricting Rowe's ability

to possess and access any material that depicts or describes human nudity without prior written permission.

Likewise, Condition 29, as written, is not overbroad. Rowe seemingly argues that the challenged portion of Condition 29 is overbroad because there "are nearly endless" examples of depictions of human nudity that "are not inherently sexually explicit in nature," such as medical records, newspapers, educational programing, Michaelangelo's David, and Leonardo Da Vinci's Vitruvian Man. (Appellant's Br. at 5.) Rowe's contention, however, disregards that Condition 29 explicitly allows for Rowe to be able to view material that describes or depicts human nudity—such as fine art, medical records, newspapers, and educational programs—so long as Rowe has prior approval from his probation and parole officer and therapist. Thus, the district court placing a limitation, without completely banning Rowe from accessing or possessing any material depicting or describing human nudity, supports that the challenged language of Condition 29 is not overly broad. *See State v. Parkhill*, 2018 MT 69, ¶ 14, 391 Mont. 114, 414 P.3d 1244. Additionally, the district court did not limit Rowe's ability to petition to modify or remove the condition if it is recommended by his probation officer. *See Parkhill*, ¶ 14.

In sum, the challenged language of Condition 29, therefore, has sufficient nexus to Rowe's convictions, conduct, and individual circumstances, and is not overly broad. The challenged probation conditions also further the State's interest

in rehabilitation and ensuring the safety and wellbeing of the community. *See* Mont. Code Ann. § 46-18-202(1). This is especially true as "'probationers have even more of an incentive to conceal their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal because probationers are aware that they may be subject to supervision and face revocation of probation, and possible incarceration, in proceedings in which the trial rights of a jury and proof beyond a reasonable doubt, among other things, do not apply.'" *Samson v. California*, 547 U.S. 843, 849 (2006) (quoting *United States v. Knights*, 534 U.S. 112, 120 (2001)). Accordingly, the district court did not abuse its discretion when it imposed Condition 29 as written.

CONCLUSION

The State respectfully requests that this Court affirm Rowe's convictions and sentences.

Respectfully submitted this 12th day of December, 2025.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: */s/ Cori Losing*
CORI LOSING
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,933 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Cori Losing
CORI LOSING

CERTIFICATE OF SERVICE

I, Cori Danielle Losing, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 12-12-2025:

Scott D. Twito (Govt Attorney)
PO Box 35025
Billings MT 59107
Representing: State of Montana
Service Method: eService

Tyler Thomas Dugger (Attorney)
2451 Applewood Ave
Billings MT 59102
Representing: Kenneth Wesley Rowe
Service Method: eService

Tammy Ann Hinderman (Attorney)
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena MT 59620
Representing: Kenneth Wesley Rowe
Service Method: eService

Electronically signed by LaRay Jenks on behalf of Cori Danielle Losing
Dated: 12-12-2025