Supreme Court No. 100616-1
Court of Appeals No. 54589-6-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL AUSTIN BRAZILLE,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Michael Austin Brazille requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Brazille, No. 54589-6-II, filed on January 4, 2022. A copy of the Court of Appeals' opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. A sentencing court may not prohibit an offender from having unsupervised contact with his own biological children who are not victims of the crime unless there is an affirmative showing that the offender is a pedophile or otherwise poses a danger of sexually abusing his own biological children. Here, Mr. Brazille was convicted of attempted second degree rape of a child. The crime involved a fictitious 13-year-old girl, not one of Mr. Brazille's own children. The court imposed a sentencing condition prohibiting him from having unsupervised contact with his biological children and stepchild. The record contains no suggestion he ever harmed any of his children or is a danger

to them, and the results of a psychosexual evaluation indicate he has no sexual interest in children. The sentencing condition unreasonably infringed Mr. Brazille's constitutional right to parent, warranting review. RAP 13.4(b)(1), (2), (3), (4).

2. The Court of Appeals refused to vacate the unconstitutional sentencing condition, ruling any error was invited by defense counsel. The invited error doctrine applies only where the defendant engaged in some affirmative action by which he knowingly and voluntarily set up the error. Here, defense counsel concurred with the State's request that Mr. Brazille be allowed to have supervised contact with his children, stepchild, and minor siblings. But counsel also made clear that any unreasonable limit on Mr. Brazille's ability to contact his biological children and stepchild would violate Mr. Brazille's constitutional right to parent. The Court of Appeals erred in concluding the invited error doctrine precluded Mr. Brazille from challenging the sentencing condition prohibiting

unsupervised contact with his biological children and stepchild, warranting review. RAP 13.4(b)(1), (2), (4).

3. The sentencing court erred in imposing a sentencing condition prohibiting Mr. Brazille from having *any* contact with his minor siblings, where the record contains no suggestion he ever harmed any of his siblings or is a danger to them.

C. STATEMENT OF THE CASE

Michael Brazille was only 22 years old when he responded to a fictitious post on an online social media application called "Whisper." CP 1, 5, 41. The post was placed by a police detective claiming to be a 13-year-old girl. CP 1. Mr. Brazille and the detective exchanged text messages discussing potential sex acts they could engage in. CP 1. The detective told Mr. Brazille to go to an agreed-upon location and when he arrived, he was arrested. CP 2.

Mr. Brazille had often engaged in sexual role play with strangers on Whisper. CP 89, 110. It was common for people to lie about their ages while role playing on the app. CP 45, 74,

77, 110. Mr. Brazille thought the individual he was communicating with was not really 13 but was an adult playing a role. CP 45, 74, 77, 89, 111. On the other hand, he thought, if the girl was actually 13, he would warn her against engaging in such dangerous behavior. CP 73-74, 100-01, 113, 134-35. He realized later, on reflection, that he should have called the police once she told him she was 13, rather than continuing to communicate with her and agreeing to meet her. CP 132, 136.

Mr. Brazille pled guilty to one count of attempted rape of a child in the second degree. CP 14-26. He had no prior criminal history. CP 12, 150. At sentencing, the court imposed a standard-range indeterminate sentence of 60 months to life, with a lifetime term of community custody. CP 152.

Prior to sentencing, Mr. Brazille underwent a forensic psychological evaluation. CP 40-49. The evaluator concluded Mr. Brazille's "relative youthfulness caused intrinsic deficits in judgment and decision-making skills," which were amplified at the time of the offense because he had recently separated from

his wife. CP 49. Moreover, Mr. Brazille was "somewhat emotionally immature relative to his peers." CP 49. The evaluator concluded Mr. Brazille would benefit from treatment to help him "gain insight, devise better coping strategies for stress, improve judgment in emotionally-intense situations, and increase his capacity to control impulses." CP 49.

Mr. Brazille also completed a psychosexual evaluation. CP 50-58. He reported he had never had sexual contact with a minor and his polygraph results indicated he was not lying about that. CP 53. None of the testing results, reports, or interviews suggested he had a sexual interest in children. CP 57. The evaluator concluded Mr. Brazille was amenable to treatment which would help him develop healthy sexual boundaries. Id.

Mr. Brazille has a large, close-knit family. CP 86. He and his ex-wife have a young daughter named Lucille. CP 35, 83. He and his fiancee also have a young child together. CP 35.

And Mr. Brazille's fiancee has a young son from a prior relationship. CP 35, 88.

Mr. Brazille has several siblings and half-siblings. CP 79. Two of his siblings are minors. His sister Kiya was 10 years old at the time of sentencing. CP 64. She is autistic and does not understand why she has not been able to see or talk to her brother and has been negatively impacted by his absence. CP 64. Mr. Brazille also has a 10-year-old half-brother named Dagon who misses his big brother. CP 64, 81-82.

The defense requested that Mr. Brazille be allowed to have contact with his biological children and future stepson while in prison and on community custody. CP 35-36. The defense argued that restricting contact with his children was not crime-related and would violate his fundamental constitutional right to parent, given that he never harmed his children and there was no showing he was a potential danger to them. CP 27, 35-39; RP 27, 31-32. The defense also requested that Mr. Brazille be allowed to have contact with his minor siblings. CP

27, 35-39; RP 33-34. In particular, he should be allowed to communicate with his autistic sister because his unexplained disappearance from her life has had an "extreme consequence" on her well-being and ability to function in daily life. RP 33-34.

Mr. Brazille's mother, stepfather, ex-wife, and fiancee all submitted letters supporting his request to be allowed contact with his children and minor siblings. CP 62-66. These relatives uniformly reported that Mr. Brazille was a loving father and that the children had been negatively impacted by his absence. CP 62-66. They all trusted Mr. Brazille and believed the children were safe with him. CP 62-66.

Despite Mr. Brazille's request and the support of his family members, the court ordered, as a condition of his sentence, that he have no unsupervised contact with his biological children or stepchild. CP 153; RP 42-43. As for his minor siblings, Mr. Brazille may have no contact at all, at any point, with them, until they reach the age of majority. CP 163; RP 41.

Mr. Brazille appealed, arguing the court erred in imposing sentencing conditions prohibiting him from having unsupervised contact with his biological children and stepchild, and from having any contact with his minor siblings.[1] The Court of Appeals refused to address the argument regarding Mr. Brazille's biological children and stepchild, ruling any error was invited by defense counsel. Slip Op. at 5-7. The court focused on one statement in the defense sentencing memorandum in which counsel requested "'[c]ontact with his children, step-child, and family members that are below the age of 18 *in the presence of Adult that is aware of the charges.*'" Slip Op. at 6 (quoting CP 27) (emphasis in Brazille). The court ignored counsel's multiple other statements requesting no unreasonable limitations on Mr. Brazille's ability to contact his biological children and stepchild, and objecting to any unreasonable infringement of Mr. Brazille's constitutional right

[1] Mr. Brazille also argued the trial court erred in imposing certain legal financial obligations. Those are not at

to parent. The Court of Appeals also upheld the condition prohibiting all contact with Mr. Brazille's minor siblings. Slip Op. at 8-9.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. This Court should grant review and hold the trial court erred in imposing a sentencing condition prohibiting Mr. Brazille from having unsupervised contact with his biological children and stepchild.

As a condition of Mr. Brazille's sentence, the court ordered that he may not have unsupervised contact with his biological children or stepchild as long as they are minors. CP 153; RP 42-43. This condition violates Mr. Brazille's fundamental constitutional right to parent.

This Court carefully reviews conditions that interfere with fundamental constitutional rights. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). Unlike statutes, sentencing conditions are not presumed to be constitutionally valid. State v. Bahl, 164 Wn.2d 739, 753, 193

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issue in this petition.

P.3d 678 (2008). The extent to which a sentencing condition affects a constitutional right is a legal question subject to strict scrutiny. Rainey, 168 Wn.2d at 374 (citing Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)).

A parent has a fundamental liberty interest in the care, custody, and companionship of his children that is protected by the Due Process Clause. Rosenbaum v. Washoe County, 663 F.3d 1071, 1079 (9th Cir. 2011); Troxel v. Granville, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); U.S. Const. amend XIV; Const. art I, § 3.

> This interest occupies a unique place in our legal culture, given the centrality of family life as the focus for personal meaning and responsibility. "Far more precious than property rights," parental rights have been deemed to be among those "essential to the orderly pursuit of happiness by free men," and to be more significant and priceless than "liberties which derive merely from shifting economic arrangements."

Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 38, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981) (Blackmun, J., dissenting) (quoting multiple Supreme Court cases) (individual citations

omitted); see also id. at 27 (majority opinion) (acknowledging that "[t]his Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to the companionship, care, custody and management of his or her children is an important interest" and that infringement on this right "work[s] a unique kind of deprivation") (internal quotation marks and citation omitted).

Sentencing conditions that interfere with the fundamental right to the care, custody, and companionship of one's children "must be 'sensitively imposed' so that they are 'reasonably necessary to accomplish the essential needs of the State and public order.'" Rainey, 168 Wn.2d at 374 (quoting State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008)).

Where an offender is convicted of sexually molesting a child, the State has a compelling interest in protecting other children from the risk of harm of sexual molestation by the offender. State v. Letourneau, 100 Wn. App. 424, 439-41, 997 P.2d 436 (2000). But in order to justify prohibiting the offender

from having unsupervised contact with his own biological children who were not victims of the crime, "[t]here must be an affirmative showing that the offender is a pedophile or that the offender otherwise poses a danger of sexual molestation of his or her own biological children." Id. at 441-42.

In Letourneau, a sentencing condition prohibiting unsupervised contact with Letourneau's biological children was not reasonably necessary to serve the State's interests. Letourneau, 100 Wn. App. at 441-42. Letourneau, a school teacher, pled guilty to two counts of second degree rape of a child stemming from a sexual relationship she had with a 13-year-old boy in her class. Id. at 426. Letourneau's own children were not victims of the crimes, yet, as a condition of her sentence, the trial court ordered her to have no unsupervised contact with *any* minors. Id. In striking down the condition, the Court of Appeals noted no evidence suggested Letourneau ever molested her own children or any children other than the present victim. Id. at 439. Also, no evidence suggested she was

a pedophile. Id. Therefore, prohibiting her from unsupervised contact with her biological children was not reasonably necessary to protect the children from the risk of harm of sexual molestation by their mother. Id. at 441.

Similarly, in State v. Gabino, Gabino was convicted of child molestation but the victim was not his own child. No. 70444-8-I, 2015 WL 248875 (Wash. Ct. App. Jan. 20, 2015) (cited as non-binding persuasive authority pursuant to GR 14.1(a)). A condition of community custody ordered Gabino to "[a]void all contact with minors," including his own biological children. Id. at *2. Relying on Letourneau, the Court of Appeals held the State had not demonstrated how prohibiting contact between Gabino and his children was reasonably necessary to accomplish the State's interest in protecting children from harm, given that Gabino's children were not victims of his offenses. Id. at *3. And the State had presented no evidence to indicate Gabino would molest his own children. Id. The State failed to demonstrate with specificity how Gabino's children

fell within the same "specified class" as the victim. Id. Because the State did not show the condition was reasonably necessary to accomplish the essential needs of the state and the public order, the court struck the portion of the condition prohibiting contact with Gabino's minor children. Id.

Here, as in Letourneau and Gabino, the condition of Mr. Brazille's sentence prohibiting him from having unsupervised contact with his biological children and stepchild is neither crime-related nor sensitively imposed and reasonably necessary to accomplish the essential needs of the State and public order. Mr. Brazille was not convicted of offending against his children. In fact, his crime had no victim, as he was convicted of attempting to rape a fictitious 13-year-old girl. CP 1-2, 14-26. No evidence suggested Mr. Brazille ever harmed his own children, and no evidence suggested he is a pedophile. The results of his psychosexual evaluation indicated he never had sexual contact with a minor and had no sexual interest in children. CP 53, 57. Therefore, prohibiting Mr. Brazille from

unsupervised contact with his biological children and stepchildren was not reasonably necessary to protect those children from the risk of harm of sexual molestation by their father. Letourneau, 100 Wn. App. at 441.

The sentencing condition prohibiting Mr. Brazille from unsupervised contact with his biological children and stepchild unreasonably infringes his fundamental constitutional right to parent. This Court should grant review and reverse.

2. This Court should grant review and hold the Court of Appeals erred in concluding defense counsel invited the sentencing court's error in prohibiting Mr. Brazille from having unsupervised contact with his biological children and stepchild.

Contrary to the Court of Appeals' opinion, defense counsel was not responsible for the trial court's decision to prohibit Mr. Brazille from having unsupervised contact with his children and stepchildren. The invited error doctrine does not apply.

"The invited error doctrine applies only where the defendant engaged in some affirmative action by which he

knowingly and voluntarily set up the error." State v. Phelps, 113 Wn. App. 347, 353, 57 P.3d 624 (2002). The purpose of the doctrine is to prohibit a party from setting up an error at trial and then complaining about it on appeal. State v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). That is not what happened here.

The State bears the burden to prove invited error. State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004). A party's failure to object to the trial court's proposed action does not establish invited error. Id.

Here, defense counsel did not knowingly and voluntarily set up the court's error. It is true that on page one of the defense presentence memorandum, defense counsel requested that Mr. Brazille be allowed to have "[c]ontact with his children, step-child, and family members that are below the age of 18 in the presence of Adult [sic] that is aware of the charges." CP 27. At the sentencing hearing, counsel made clear he was simply concurring with the State's assessment that it was safe for Mr.

Brazille to have "sight and sound" supervised contact with his minor family members. See CP 67-68; RP 21-22, 32. But the substance of the defense memorandum, and counsel's argument at the sentencing hearing, also made clear that the defense objected to any unreasonable limitation on Mr. Brazille's ability to contact his biological children and stepchild. See CP 37-39; RP 31-32.

Defense counsel did not knowingly and voluntarily set up the court's error in unreasonably infringing Mr. Brazille's constitutional right to parent. To the contrary, at the sentencing hearing, counsel argued that a sentencing condition prohibiting Mr. Brazille from contacting his biological children and stepchild would not be "crime-related." RP 31. Counsel pointed out there was no actual victim in the case, and no connection between the crime and Mr. Brazille's family members. RP 31.

More important, counsel argued that the court could not unreasonably limit Mr. Brazille's ability to contact his own children in light of his fundamental constitutional right to

parent. RP 31-32; CP 37-39. Counsel argued any limitation on contact between Mr. Brazille and his children must be "narrowly tailored." RP 32. Counsel specifically cited State v. Letourneau, 100 Wn. App. 424, which Mr. Brazille relies upon in his appeal. RP 32; CP 38. Consistent with Letourneau, counsel argued that the court could not impose any prohibition on Mr. Brazille's ability to contact his children because "[t]here's no evidence that's been put forward that he would harm any children or his own children or that he is a pedophile." RP 32.

The record makes plain that, in allowing only supervised contact, the court relied upon the recommendations of the State and the psychosexual evaluator, not defense counsel. RP 43. Counsel is not responsible for the court's error.

In sum, the State cannot prove that Mr. Brazille set up the trial court's error in prohibiting unsupervised contact between him and his children and stepchild. This Court should grant

review and hold the Court of Appeals misapplied the invited error doctrine.

3. This Court should grant review and hold the condition prohibiting contact with Mr. Brazille's minor siblings is not crime-related.

As a condition of the sentence, the court ordered that Mr. Brazille may have no contact whatsoever with his minor siblings until they reach the age of majority. CP 163; RP 41. Although this condition does not affect Mr. Brazille's fundamental constitutional right to parent, it must also be stricken because it is not crime-related.

A court's authority to impose sentencing conditions is derived wholly from statute. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980); State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008).

Generally, a court may not order an offender as a condition of the sentence to refrain from engaging in otherwise lawful behavior unless the prohibition is "crime-related." RCW 9.94A.703(3)(f); State v. Riles, 135 Wn.2d 326, 349-50, 957

P.2d 65 (1998), overruled in part on other grounds by State v. Sanchez Valencia, 169 Wn2d 782, 239 P.3d 1059 (2010). A crime-related prohibition is "an order of a court prohibiting conduct that *directly relates to the circumstances of the crime* for which the offender has been convicted." RCW 9.94A.030(10) (emphasis added).

Sentencing conditions must be "reasonably crime related." State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). The record must provide a factual basis for concluding a condition is crime-related. State v. Parramore, 53 Wn. App. 527, 531, 768 P.2d 530 (1989) (citing David Boerner, Sentencing in Washington § 4.5 (1985)).

Generally, the State has a compelling interest in preventing future harm to the victims of the crime. Rainey, 168 Wn.2d at 377. But at the same time, courts are reluctant to uphold no-contact orders with persons *other* than victims. Id. Although a court may order an offender to have no contact with a "specified class of individuals," RCW 9.94A.703(3)(b), the

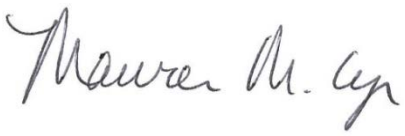
specified class must bear some relationship to the crime. Riles, 135 Wn.2d at 350. A condition prohibiting contact with a class of individuals must "directly relate[] to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). The State must demonstrate with specificity how the protected class of individuals falls within the same "specified class" as the victim. Riles, 135 Wn.2d at 350; Gabino, 2015 WL 248875 at *3.

Mr. Brazille's minor siblings do not fall within the same specified class of individuals as the victim of his crime. In fact, his crime had no victim. CP 1-2, 14-26. But even if Mr. Brazille intended to have sexual contact with a 13-year-old girl who was a stranger to him, that class of individuals bears little relationship to his own minor siblings. No evidence suggests he ever harmed his siblings or is a danger to them. The condition of his sentence prohibiting him from having any contact with his minor siblings should also be stricken.

E. CONCLUSION

For the reasons provided, this Court should grant review and reverse the Court of Appeals.

Respectfully submitted this 2nd day of February, 2022. I certify this brief complies with RAP 18.17 and contains 3,524 words, excluding those portions of the document exempted from the word count by the rule.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL AUSTIN BRAZILLE, Appellant.	No. 54589-6-II UNPUBLISHED OPINION

LEE, C.J. — Michael A. Brazille appeals sentencing conditions imposed after he pled guilty to attempted second degree rape of a child. Brazille argues that the trial court exceeded its statutory authority and violated his fundamental constitutional right to parent by prohibiting unsupervised contact with his biological children and stepchildren, and by prohibiting written contact with his children. Brazille also argues that the sentencing condition prohibiting contact with his minor siblings was improperly imposed because it is not crime-related. Finally, Brazille argues that certain legal financial obligations (LFOs) must be stricken because he is indigent.

We decline to address the claims related to Brazille's biological children and stepchildren. We affirm the sentencing condition prohibiting contact between Brazille and his minor siblings. As to the challenged LFOs, we reverse and remand to the trial court to consider the challenged LFOs in accordance with this opinion.

FACTS

The State charged Brazille with attempted second degree rape of a child and communication with a minor for immoral purposes. Brazille pled guilty to attempted second

degree rape of a child, and the State dismissed the charge of communication with a minor for immoral purposes. In his guilty plea, Brazille confirmed that he "did take a substantial step towards having sexual intercourse with another who was at least 12 years old and less than 14 years old" while being "at least 36 months older than the victim" and "not married to the victim." Verbatim Report of Proceedings (VRP) (Nov. 1, 2019) at 12. At sentencing, the trial court referred to the case as a "'net nanny'" case, coordinated by police, where "there really wasn't a child that Mr. Brazille was coming down to have sex with." VRP (Apr. 6, 2020) at 37.

In a sentencing memorandum, Brazille requested

> an exceptional downward sentence of 52 Months to Life, $500 Crime Victim Penalty, $100 DNA fee, Sexual Deviancy Evaluation and follow all recommended treatment; No Contact with Minors; *Contact with his children, step-child, and family members that are below the age of 18 in the presence of Adult that is aware of the charges;* No internet access, unless approved by his CCO and Treatment Provider, Comply with Sex Offender Registration.

Clerk's Papers (CP) at 27 (emphasis added). The sentencing memorandum also noted that "[s]tate infringements on the parent-child relationship as a function of the sentence must be reasonably necessary to meet a compelling state interest, cannot be arbitrary, must be narrowly tailored, and must be sensitively imposed." CP at 38. The argument section of Brazille's sentencing memorandum asked "that the court allow Mr. Brazille to receive information regarding the lives of his children" and "not prohibit him from having contact with his children." CP at 38. Brazille submitted a psychosexual evaluation that found he had "a long history of boundary issues," posed "an average risk to reoffend sexually," and was "amenable to treatment." CP at 55, 57.

In its sentencing memorandum, the State agreed that Brazille should be allowed supervised contact with his biological children and stepchildren. The State requested that Brazille's contact

with his biological children and stepchildren be "sight and sound" supervised "by an adult who is familiar with the nature of Mr. Brazille's charges." CP at 67. But the State argued that Brazille should be prohibited from contacting other minor family members without permission from his treatment provider, the Department of Corrections (DOC), and the court.

At the sentencing hearing, Brazille's counsel requested that any limitations on contact with his children be "narrowly tailored." VRP (Apr. 6, 2020) at 32. Brazille's counsel asked that Brazille be allowed "some sort of contact with his children" and noted that "[w]e are grateful to the State for their suggestion about sight and sound." VRP (Apr. 6, 2020) at 32. Brazille's counsel expressed some concern about the meaning of "sight and sound" supervision but did not ultimately object or modify Brazille's original request to have some sort of supervised contact with his children, stepchildren and minor family members. Additionally, Brazille's counsel asked for the court to allow written contact with Brazille's children and stated that "we have no problem with that being supervised by another adult who is aware of the charges." VRP (Apr. 6, 2020) at 33.

In its oral ruling, the trial court sentenced Brazille to 60 months of confinement. The court expressly imposed a $500 crime victim fund assessment and a $100 DNA fee. The trial court ordered, among other conditions, that Brazille have no contact with minors except with his biological children and stepchildren, and that contact with his biological children and stepchildren must be sight and sound supervised by an adult who is aware of Brazille's conviction and the circumstances related to it. The trial court also ordered that the supervision requirement continue when Brazille is out of custody, with the approval of his treatment provider, unless his treatment provider finds that he has been making progress and makes a different recommendation. The trial court further ordered no contact "with his sibling who is not yet of the age of majority but who is

not a young child but certainly falls within the age range of concern based upon this conviction."[1] VRP (Apr. 6, 2020) at 41-42. The trial court stated that the bases for its decision included Brazille's poor boundaries as recorded in his psychological and psychosexual evaluations, the actual facts of the crime, a lack of evidence in the file about his family's ability to protect children, and recommendations from the psychosexual evaluation. In response to a question from defense counsel, the trial court said, "I would not authorize, at this time, written correspondence between Mr. Brazille and minor children." VRP (Apr. 6, 2020) at 43.

Brazille's judgment and sentence included the sentencing provisions the trial court orally imposed at the sentencing hearing but does not mention written contact. The judgment and sentence required "no contact [with] minors except: defendant can have contact with his biological children [and] stepchildren that is sight [and] sound supervised by an adult that is aware of the charges." CP at 153. The judgment and sentence also included two provisions the trial court did not discuss at the sentencing hearing: a line ordering payment of a $200 criminal filing fee and form language ordering Brazille to "pay supervision fees as determined by DOC." CP at 152. The judgment and sentence did not include any finding about indigency; neither the "indigent" nor "not indigent" box is checked in the section regarding legal financial obligations and restitution. CP at 151.

[1] According to a letter that Brazille submitted with his sentencing memorandum, his younger minor siblings were 10 and 11 years old in February 2020.

About a month after the trial court entered Brazille's judgment and sentence, the trial court found Brazille indigent for the purposes of this appeal. The trial court found Brazille indigent because he "lacks sufficient funds to prosecute an appeal."[2] CP at 186.

Brazille appeals.

ANALYSIS

A. SUPERVISED CONTACT WITH BIOLOGICAL CHILDREN AND STEPCHILDREN

Brazille argues that the trial court exceeded its statutory authority and violated his fundamental constitutional right to parent by prohibiting unsupervised contact with his biological children and stepchildren. We decline to address this argument under the invited error doctrine.

"The invited error doctrine prohibits a party from setting up an error at trial and then complaining of it on appeal." *Matter of Estate of Irwin*, 10 Wn. App. 2d 924, 927, 450 P.3d 663 (2019), *review denied*, 195 Wn.2d 1020, 464 P.3d 201 (2020). The invited error doctrine precludes our review "'even where constitutional rights are involved,'" as long as the appellant proposed or agreed to the error. *State v. Weaver*, 198 Wn.2d 459, 465, 496 P.3d 1183 (2021) (quoting *State v. Winings*, 126 Wn. App. 75, 89, 107 P.3d 141 (2005)); *see also State v. Casimiro*, 8 Wn. App. 2d 245, 249, 438 P.3d 137, *review denied*, 193 Wn.2d 1029, 445 P.3d 561 (2019) (courts do not need to consider challenges to sentencing conditions that were invited, even alleged constitutional errors).

[2] This language corresponds with an indigency finding under RCW 10.101.010(3)(d), which provides that a person is indigent if they are "[u]nable to pay the anticipated cost of counsel for the matter before the court because his or her available funds are insufficient to pay any amount for the retention of counsel."

Brazille contends that he did not invite error because his sentencing memorandum and argument at the sentencing hearing "make clear that counsel objected to any unreasonable limitation on Mr. Brazille's ability to contact his biological children and stepchild." Suppl. Br. of Appellant at 2. We disagree.

Here, Brazille *asked* the trial court for supervised contact with his biological children and stepchildren—his sentencing memorandum requested "[c]ontact with his children, step-child, and family members that are below the age of 18 *in the presence of Adult that is aware of the charges*." CP at 27 (emphasis added). Brazille's counsel made requests consistent with his sentencing memorandum at the sentencing hearing by asking for "some sort of contact with his children" and noting that "[w]e are grateful to the State for their suggestion about sight and sound [supervision]." VRP (Apr. 6, 2020) at 32. Although Brazille's counsel expressed some concern about the meaning of "sight and sound" supervision, counsel did not ultimately object or modify Brazille's original request to have some sort of supervised contact with his children. Consistent with Brazille's request, the trial court allowed Brazille to have supervised contact with his children and stepchildren by ordering that Brazille "can have contact with his biological children [and] stepchildren that is sight [and] sound supervised by an adult that is aware of the charges." CP at 153. Because Brazille proposed and agreed to a sentencing condition that requires supervised contact with his biological children and stepchildren, Brazille invited any alleged error relating to that sentencing condition.

Brazille also contends that invited error does not apply because he did not agree to sight and sound supervised contact once he is released from prison. But Brazille's sentencing memorandum and oral statements at sentencing draw no distinction between supervision while in

prison and after release. Brazille simply requested supervised contact, and the trial court granted that request.

Because Brazille proposed and agreed to a sentencing condition that requires supervision when he contacts his biological children and stepchildren, Brazille invited any alleged error relating to that sentencing condition. Therefore, we need not consider Brazille's challenge to the sentencing condition requiring supervised contact with his minor children and stepchildren by an adult who is aware of the charges.

B. PROHIBITION ON WRITTEN CONTACT WITH BRAZILLE'S CHILDREN

Brazille argues that the sentencing condition prohibiting written contact with his children is not invited error because his "counsel specifically requested that the court allow Mr. Brazille to have written contact with his children while he is in prison," which the trial court then rejected. Suppl. Br. of Appellant at 4. We decline to address the issue because the trial court did not prohibit Brazille from having written contact in its written order.

A trial court's oral ruling "'is no more than an expression of its informal opinion at the time it is rendered.'" *State v. Friedlund*, 182 Wn.2d 388, 394, 341 P.3d 280 (2015) (quoting *State v. Mallory*, 69 Wn.2d 532, 533, 419 P.2d 324 (1966)). In contrast, the trial court's written judgment and sentence "is a final order subject to appeal." *Id.* at 395.

Here, at the sentencing hearing, Brazille's counsel requested that the court allow written contact between Brazille and his children, stating that "we have no problem with that being supervised by another adult who is aware of the charges." VRP (Apr. 6, 2020) at 33. In its oral ruling, the trial court said "I would not authorize, at this time, written correspondence between Mr. Brazille and minor children." VRP (Apr. 6, 2020) at 43. But the trial court's written order requires

"no contact [with] minors except: defendant can have contact with his biological children [and] stepchildren that is sight [and] sound supervised by an adult that is aware of the charges." CP at 153. The trial court's written order does not specifically mention nor prohibit written contact; the order requires that contact be supervised by an adult who is aware of the charges. The oral ruling is the only indication of any sentencing condition inconsistent with Brazille's request for supervised written contact, but that oral ruling is "no more than an expression of [the court's] informal opinion." *Friedlund*, 182 Wn.2d at 394 (quoting *Mallory*, 69 Wn.2d at 533). Because the trial court did not prohibit all written contact between Brazille and his children in its written judgment and sentence, we decline to address Brazille's argument about written contact.

C. PROHIBITIONS ON CONTACT WITH MINOR SIBLINGS

Brazille argues that the trial court exceeded its statutory authority by prohibiting all contact with his minor siblings because that condition is not crime-related. We disagree.

Courts can order offenders to comply with crime-related prohibitions. RCW 9.94A.703(3)(f). A crime-related prohibition is one that is related to the circumstances of the crime for which the offender is being sentenced. RCW 9.94A.030(10).[3] "The prohibited conduct need not be identical to the crime of conviction, but there must be 'some basis for the connection.'" *State v. Nguyen*, 191 Wn.2d 671, 684, 425 P.3d 847 (2018) (quoting *State v. Irwin*, 191 Wn. App. 644, 657, 364 P.3d 830 (2015)). Sentencing conditions are subject to abuse of discretion review, *State v. Valencia*, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010), and will be reversed if they are manifestly unreasonable. *Nguyen*, 191 Wn.2d at 678.

[3] RCW 9.94A.030 was amended in 2020 and 2021. However, there were no substantive changes made affecting this opinion. Therefore, we cite to the current statute.

Here, the trial court cited to the age similarity between the fictitious young teenage victim of Brazille's crime and Brazille's minor siblings who were 10 and 11 years old as the basis for imposing the condition. The trial court also stated that Brazille's younger female sibling "certainly falls within the age range of concern based upon this conviction." VRP (Apr. 6, 2020) at 42. It is not manifestly unreasonable to conclude that Brazille poses some risk to pre-teen individuals, like his minor siblings, after he was convicted of attempted rape of a person "who was at least 12 years old and less than 14 years old." VRP (Nov. 1, 2019) at 12. Because there is "'some basis for the connection'" between Brazille's crime of conviction, second degree rape of a child, and the prohibition on contact with Brazille's minor siblings, the prohibition is crime-related. *Nguyen*, 191 Wn.2d at 684 (quoting *Irwin*, 191 Wn. App. at 657). Thus, the trial court did not abuse its discretion in prohibiting contact between Brazille and his minor siblings.

D. CRIMINAL FILING FEE

Brazille argues that the trial court erred in imposing a criminal filing fee. We agree.

Courts cannot impose discretionary costs, including criminal filing fees, on defendants who are found indigent under RCW 10.101.010(3)(a) through (c). RCW 36.18.020(2)(h);[4] *State v. Ramirez*, 191 Wn.2d 732, 749, 426 P.3d 714 (2018). If a defendant is not indigent, a court must assess "the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3); *Ramirez*, 191 Wn.2d at 748.

Here, the trial court made no indigency finding at the time of sentencing. Rather, the trial court found Brazille indigent about a month *after* he was sentenced. And the trial court found that

[4] RCW 36.18.020 was amended in 2021. However, there were no substantive changes made affecting this opinion. Therefore, we cite to the current statute.

Brazille was indigent for the purposes of appeal under RCW 10.101.010(3)(d), not under RCW 10.101.010(a), (b), or (c). Also, there is nothing in the record indicating whether the trial court meant to impose a criminal filing fee. And the trial court made no record of assessing Brazille's financial resources or the burden that payment of costs would impose as required by *Ramirez*, 191 Wn.2d at 748. Thus, the record fails to show that the trial court conducted a proper individualized inquiry into Brazille's ability to pay. Therefore, we reverse the criminal filing fee and remand for the trial court to consider the imposition of a criminal filing fee under RCW 10.01.160.[5]

E. COMMUNITY CUSTODY SUPERVISION FEE

Brazille argues that the community custody supervision fee must be stricken. We remand for the trial court to clarify whether it intended to impose this fee.

RCW 10.01.160(3) states, "The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c)." RCW 10.01.160(2) defines "costs" as expenses that are incurred by the State to prosecute the defendant, to administer a deferred prosecution program, or to administer pretrial supervision. The community custody supervision fee that Brazille challenges is not a "cost" covered by RCW 10.01.160(3).

[5] The State argues that the criminal filing fee was a scrivener's error and does not oppose remand for the purpose of clarification. A scrivener's error is a clerical mistake "that, when amended, would correctly convey the intention of the court." *State v. Davis*, 160 Wn. App. 471, 478, 248 P.3d 121 (2011). Because the trial court did not convey any intention regarding the criminal filing fee, it is unclear from the record whether or not the fee was a scrivener's error. Also, because the trial court imposed the $200 criminal filing fee without an adequate assessment of Brazille's ability to pay, the criminal filing fee was improperly imposed regardless of whether it was actually a scrivener's error.

However, under RCW 9.94A.703(2)(d), trial courts may waive the community custody supervision fee. "Community custody supervision fees are discretionary LFOs because they are waivable by the court." *State v. Spaulding*, 15 Wn. App. 2d 526, 536, 476 P.3d 205 (2020). When the record is unclear whether the trial court actually intended to impose a community custody supervision fee, remand is appropriate. *See id.* at 537.

Here, the record is silent as to whether the trial court exercised any discretion in determining whether to impose or waive the community custody supervision fee, and neither party addressed this fee in their arguments at sentencing. Therefore, we remand to the trial court to clarify whether it intended to impose the community custody supervision fee.

CONCLUSION

Because Brazille proposed and agreed to a sentencing condition that requires supervised contact with his biological children and stepchildren, Brazille invited any alleged error relating to that sentencing condition, and we do not consider Brazille's challenge to that sentencing condition. And because the trial court did not prohibit all written contact between Brazille and his children in the court's written judgment and sentence, we decline to address Brazille's argument that the trial court erred in prohibiting written contact with his children. We affirm the sentencing condition related to Brazille's minor siblings, but we reverse and remand the challenged LFOs to the trial court to consider in accordance with this opinion.

No. 54589-6-II

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 in accordance with RCW 2.06.040, it is so ordered.

Lee, C.J.

We concur:

Worswick, J.

Glasgow, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 54589-6-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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