SUPREME COURT NO. 100638-1
COA NO. 82135-1-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FREDDY ESCOBAR,

Petitioner.

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

The Honorable Anna G. Alexander, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Freddy Escobar asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Escobar requests review of the decision in State v. Freddy Escobar, Court of Appeals No. 82135-1-I (slip op. filed January 18, 2022), attached as an appendix.

C. ISSUE PRESENTED FOR REVIEW

After the State told the court it had no further witnesses or evidence to offer at the child hearsay hearing, the court alerted the State to the deficiency of proof in its case presentation, educated the State about how to supply the missing proof, and subsequently allowed the State to reopen the hearing to fix its case. Did the court violate the appearance of fairness requirement in so doing?

D. STATEMENT OF THE CASE

Freddy Escobar and KO began dating in 2015. RP 719. In 2016, Escobar started living with KO and her daughter AO, who was born in 2012. RP 718-20. In November 2018, AO told her mother that Escobar was touching her inappropriately. RP 722-23, 727-29. KO took AO to the police station, where an officer took a report, then to the hospital for examination. RP 757-57. AO spoke with a forensic nurse at the hospital. RP 821, 846. She also later spoke with a child interview specialist. RP 980-86; Ex. 9. The State charged Escobar with two counts of first degree rape of a child and one count of first degree child molestation. CP 146-47.

Before trial, the State moved to admit AO's hearsay statements. CP 220-30. A child hearsay hearing took place, during which the State called several witnesses to testify.

AO testified that she spoke with a nurse, Heidi Scott, and her mother about what happened. RP 87-89. She denied telling her aunt Alma or her grandfather. RP 90-91. KO, AO's mother,

testified that she talked with AO about what she saw on November 25, 2018. RP 104-07, 119, 157-58. The grandfather, Ovidio, asserted that AO disclosed to him that Escobar touched her vulva. RP 540.

Scott, a child interview specialist at the Dawson Place Child Advocacy Center, testified that she conducted a forensic interview on November 28, 2018, during which AO made unspecified sexual assault allegations. RP 159, 162, 164. The DVD recording of the interview was identified by Scott but the State did not seek to admit it into evidence. RP 166-67. Taous Sawyer interpreted during the November 28 interview. RP 130-31. The transcript of the interview was identified by Sawyer but the State did not seek to admit it into evidence. RP 132-33.

Stephanie Wahlgren, a forensic nurse, examined AO at the hospital on November 25, 2018, at which time AO talked about what brought her to the hospital; she disclosed a sexual assault. RP 178, 180-82.

The aunt, Alma, claimed that AO told her what happened after she picked up AO and her mother on November 25. RP 544-47. Defense counsel impeached Alma with her statement to police in which she reported that Keilyn was the one who told her what happened. RP 547-48, 555-56.

After Alma finished testifying, the court asked the State if it had any other witnesses for the child hearsay hearing. RP 559. The State said it did not. RP 559. The court asked the State if there was anything else the State would like the court to consider. RP 559. The State reiterated it had no other witnesses and assumed the court was ready to hear argument from both sides. RP 559.

Defense counsel then called Detective Arnett as a witness to complete the impeachment of Alma. RP 559-62. Following Arnett's testimony, the court asked if there was any other evidence or witnesses for the child hearsay hearing. RP 570. The prosecutor responded "Not from the State." RP 570.

Defense counsel answered that he had no other evidence or witnesses. RP 570.

The court said that, before hearing argument, it had some questions "currently in the forefront of my mind." RP 570. The court first asked if the State thought Ovidio's testimony was admissible. RP 570. The State withdrew its request for a ruling on Ovidio, seemingly because his testimony did not jibe with his earlier interview. RP 570-72.

The court then posed the next question it had for the prosecutor:

> is the Court not first required to determine whether or not whatever statement the child is making to whatever witness is an actual description of sexual abuse? And how is the Court supposed to make that determination without hearing what the actual statement, for example, to the mother was? Because there was no testimony about what the child actually said to the mother from the mother or from the child. RP 572-73.

The prosecutor offered: "Well, my -- my recollection was that [KO] did make statements in regards to sexual contact by the defendant." RP 573. The court commented: "I had

specifically reviewed all of my notes in anticipation that we would have argument about this issue today. And I, frankly, specifically was asking whether or not there is anything else in regards to the child hearsay hearing, because counsel stopped short of asking the mother what the child actually said to her." RP 573. The court continued: "Specifically the child hearsay statute allows only statements from the child describing actual acts of sexual abuse or physical abuse that causes substantial bodily harm. And I was frankly waiting for the actual statements presuming that there was something that was said to the mother. But I can't presume that in making my decision, because it was not in the record." RP 573-74.

The prosecutor said she did not think she had the burden to elicit the exact statements at issue, but only to establish their reliability. RP 574. The court said it needed to know what the actual statements were to determine whether they fell within the "sexual abuse" portion of the child hearsay statute. RP 574. The prosecutor said she thought there was sufficient evidence in

the record on the point, but "If the Court's not willing to make that finding, then the State would like to reopen and recall [KO]." RP 575.

The court responded:

> I'll just say, Ms. Lawrence, I was specifically waiting so that I could highlight from my own notes so that I could rely on those notes and eventually make my rulings since I knew that this hearing was going to take -- well, first of all, the hearing was going to take several days. But also the fact that I needed to document from the record exactly what I was going to be basing my decision on. And it was significant that I -- that all of the questioning had stopped short, and all of the answers had stopped short, of any description of what the child actually said to the mother.
>
> There were other witnesses who specifically testified, at least -- not even to the actual words that the child used, but at least the nurse did have, in her testimony, something that said that she – the child had described sexual abuse; although, she didn't say what words she used. But that was, besides Ovidio, the only person who had used the words the child had used. The child herself did not say, of course, and none of the witnesses did either. RP 575-76.

The prosecutor again expressed her belief that the child hearsay hearing was just about establishing the reliability of

out-of-court statements, and defense counsel could raise an objection at trial if any statement did not fall within the confines of the statute. RP 577.

The court disagreed: "unfortunately, that's not what the statute actually says, and that's not how any courts ever rule on the statute." RP 577. Under the statute, the very first determination to be made by the court was whether there is a statement describing an act of sexual contact. RP 577. "This Court has nothing in the record during this entire child hearsay hearing, at least as to the mother for now, that indicates what the child actually described." RP 577. The court thought such statements presumably existed somewhere, "But as I sit on the bench, I have to make my findings from what has been presented to me on the record for purposes of this child hearsay hearing. And if this Court was to say that I assumed these were descriptions of sexual assault, that would be -- I would be laughed out of Division I." RP 578.

The prosecutor said she would put on additional evidence as to the sexual abuse, either through an offer of proof or by having Detective Arnett testify about statements relayed to her during interviews. RP 578. The court pointed out it needed to hear from the witnesses who directly heard AO's statements and observed "I haven't even been offered the child interview video by Dawson Place to determine whether or not, in fact, there were statements describing sexual abuse by the child in that video." RP 579.

The prosecutor said Scott testified there were statements about sexual touching. RP 579. She asked to put on more evidence. RP 579.

The court said it did not doubt that evidence existed, "[b]ut we're at a point where we have had a child hearsay hearing over several days. And in terms of evidence that you're asking to put on in addition, you know, we're well past that; now we're at argument. I had asked several times if there was anything else from anyone, testimony or otherwise, for the

Court to base the decision on." RP 579-80. The court described itself as being in "a very difficult position right now" because jurors were coming tomorrow morning to hear opening statements. RP 580. The court asked for defense counsel's input. RP 580.

Defense counsel maintained the hearing had ended. RP 580. The parties were asked if there was additional evidence and the parties indicated there was not. RP 580. The defense did not get into the statements on cross-examination because the State did not elicit them. RP 580. Counsel continued:

> I don't think it's the role of the Court to assist the State in correcting the – its deficits in this case. It's the State's obligation. That State has made its presentation and rested. The evidence is what it is. And I believe the Court should make its ruling as to whether purported statements would meet the standard for child hearsay admissibility, based on the record before the Court. RP 581.

Following a recess, the court returned to the matter, asking the prosecutor how she'd like to proceed. RP 581, 584. The prosecutor requested that she be allowed to reopen the

child hearsay hearing for additional evidence, citing State v. Brinkley, 66 Wn. App. 844, 837 P.2d 20 (1992) for the proposition that a court has discretion to grant the request. RP 584. The prosecutor chalked up the deficiency in the State's presentation to lack of experience, saying it was her first child hearsay hearing, describing it as "my mistake." RP 584.

The court asked when the prosecutor proposed to reopen and how she intended to supplement the record. RP 585. The prosecutor said she was prepared to recall KO, Alma, Scott and Wahlgren as witnesses the next day. RP 585-86. She would also submit the forensic interview. RP 586.

Defense counsel continued to oppose reopening of the hearing. RP 587. The jury was already impaneled and "[t]he Court gave both sides ample opportunity to present whatever evidence would be presented. Had the Court simply ruled at the conclusion of the evidence, the matter would be resolved now. It was only when the Court pointed out the deficits in the

State's presentation that the State is now moving to reopen." RP 587.

The judge said she still had to develop her judicial philosophy about fairness in the courtroom, stating "I will allow her to reopen her case." RP 588.

The next day, defense counsel asked the court to reconsider its ruling on reopening the hearing. RP 592. "I think what has happened in this matter greatly impacts the appearance of fairness in this proceeding; that when the State cites to authority to indicate that it is in the Court's discretion to allow the reopening of the State's case for testimony, there's certainly no case, that I'm aware of, where the State has fatally failed to meet its evidentiary burden in a hearing, had the Court point out specifically what problem it was with the State's presentation, and then allow the State to reopen in order to correct that problem." RP 593. "I think it crosses into the concern about the fairness of the proceeding for Mr. Escobar when the Court alerts the State to that problem, educates them

to what would be needed to potentially be able to prevail with regard to potential statements and then allows the State to reopen and present additional evidence to meet that burden." RP 593-94. Counsel thus requested that the Court make a ruling based on the evidence presented at of the conclusion of the State's presentation, and not allow the State to address the problems pointed out by the Court. RP 594.

The judge responded that she struggled with "what to ask in argument." RP 594. The judge asked about the missing statements because she wondered if she was missing something in terms of the law. RP 594-95. Had she simply heard argument without asking questions and then made a ruling, the prosecutor would have still moved to reopen the child hearsay hearing. RP 595-96.

Defense counsel said it would have been fine if the court simply raised the issue and allowed the State to respond. RP 596-97. But what happened is that the court raised the issue, the State responded that it felt all it had to do was present

evidence of reliability, and then the court went further about why the statute required testimony about the statements themselves. RP 597. To allow the State to reopen the hearing unfairly impacted Escobar and would "create a grave concern about the appearance of fairness in the proceeding." RP 598.

The prosecutor, falling in line with the court's lead, said she "certainly" would have moved to reopen the hearing if the court had ruled yesterday. RP 597-98. According to the prosecutor, the court's inquiry did not suggest partiality. RP 598. The prosecutor asserted the court is a truth-seeking forum and it was an appropriate exercise of discretion to allow the hearing to be reopened. RP 599. The prosecutor said counsel did not provide any reason why Escobar "would be unduly prejudiced or any excess of unfairness." RP 598.

Defense counsel reiterated that his concern about impartiality arose, not from the inquiry, but when the court educated the State about the fatal flaw in its presentation after

the State intentionally elected not to present testimony regarding the statements. RP 599-600.

The court adhered to its ruling allowing the State to reopen the hearing to put on additional evidence. RP 600. The judge said she understood the appearance of fairness argument, but she considers how she would have treated any issue from the opposing side about reopening testimony, and she would have done the same for the defendant. RP 600.

At the reopened hearing, Alma testified that AO made various statements to her about being sexually touched by Escobar. RP 603-06. KO related statements of sexual abuse that AO made to her. RP 621-25. The court admitted the exhibit containing the video of the forensic interview over defense objection. RP 629-30.

After hearing argument on admissibility, the court did not find Alma credible and did not admit purported statements AO made to her. RP 670-72. Statements made to the mother on November 25 and statements made to the forensic interviewer

on November 28 were admissible because they were sufficiently reliable. RP 672-74. Statements made to the nurse were admissible under the medical diagnosis exception to the hearsay rule. RP 676. The case proceeded to trial, after which the jury acquitted Escobar on the rape counts but found him guilty on the molestation count. CP 74-76, 78.

On appeal, Escobar argued the trial court violated the appearance of fairness requirement, necessitating reversal of the conviction. The Court of Appeals disagreed and affirmed the conviction. Slip op. at 1, 7-8.

E. WHY REVIEW SHOULD BE ACCEPTED

THE COURT VIOLATED THE APPEARANCE OF FAIRNESS DOCTRINE IN AIDING THE PROSECUTION AT THE CHILD HEARSAY HEARING.

When the judge aids the prosecutor in building its case against the defendant, the proceeding does not look like it's fair. The judge, in alerting the prosecution to its missing proof, educating the prosecution on how to supply the missing proof,

and then permitting the prosecution to reopen the hearing to satisfy its burden, violated the appearance of fairness standard. Escobar seeks review under RAP 13.4(b)(3) and (4).

A brief review of the child hearsay statute is necessary to provide context. A child's hearsay accusations of abuse are generally inadmissible. In re Dependency of A.E.P., 135 Wn.2d 208, 226, 956 P.2d 297 (1998). RCW 9A.44.120 creates an exception to the general rule. As relevant here, the proponent of admissibility must establish that the statement "is made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another." RCW 9A.44.120(1)(a)(i). The court then determines whether such a statement is sufficiently reliable. RCW 9A.44.120(1)(b).

In Escobar's case, the State did not present evidence that statements made to AO's mother were statements describing sexual contact under the statute. Nor did it seek admission of the forensic interview conducted by Scott that would have shown what specific statements AO made to her. After the

court pointed out these deficiencies, the court ultimately permitted the State to reopen its case to supply the missing evidence and thereby satisfy the child hearsay statute.

Escobar's argument does not stem solely from the court's decision to allow the State to reopen its case. As articulated by defense counsel below, the appearance of fairness problem goes deeper, extending to events that happened before the court made the ultimate decision to allow the State to reopen. RP 581, 593-94, 596-600. Stated another way, allowing the State to reopen its case was the culmination of actions taken by the court that violated the appearance of fairness.

"A fair trial in a fair tribunal is a basic requirement of due process." State v. Madry, 8 Wn. App. 61, 68, 504 P.2d 1156 (1972) (quoting In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955)). Under the state and federal constitutions, a criminal defendant has the due process right to be tried by an impartial judge. State v. Solis-Diaz, 187 Wn.2d 535, 539, 387 P.3d 703 (2017); In re Pers. Restraint of

Swenson, 158 Wn. App. 812, 818, 244 P.3d 959 (2010); U.S. Const. amends. VI, XIV; Wash. Const. art. I, § 22. "The law requires more than an impartial judge; it requires that the judge also appear to be impartial." Solis-Diaz, 187 Wn.2d at 540.

The critical concern in determining whether a proceeding satisfies the appearance of fairness doctrine is how it would appear to a reasonably prudent and disinterested person. Chicago, Milwaukee, St. Paul, & Pac. R.R. Co. v. Human Rights Comm'n, 87 Wn.2d 802, 810, 557 P.2d 307 (1976). "Next in importance to rendering a righteous judgment, is that it be accomplished in such a manner that no reasonable question as to impartiality or fairness can be raised." State v. Romano, 34 Wn. App. 567, 569, 662 P.2d 406 (1983). "[W]here a trial judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating." Sherman v. State, 128 Wn.2d 164, 205, 905 P.2d 355 (1995).

"The test is whether a reasonably prudent and disinterested observer would conclude [the party] obtained a fair, impartial, and neutral trial." State v. Dominguez, 81 Wn. App. 325, 330, 914 P.2d 141 (1996). The dispositive question is whether the judge's impartiality might reasonably be questioned. State v. Davis, 175 Wn.2d 287, 306, 290 P.3d 43 (2012). The test is an objective one. Sherman, 128 Wn.2d at 206. It assumes that a reasonable person knows and understands all the relevant facts. Davis, 175 Wn.2d at 306.

"A defendant's due process right to a fair trial is implicated where the trial court's activities 'turn a neutral judge into the state's advocate.'" State v. Mandefero, 14 Wn. App. 2d 825, 835, 473 P.3d 1239 (2020) (quoting State v. Moreno, 147 Wn.2d 500, 512, 58 P.3d 265 (2002)). The trial court's actions at the child hearsay hearing strayed beyond the bounds of neutrality into the forbidden territory of helping the State build its case against Escobar.

The State, upon court inquiry, twice told the court it had no further witnesses or evidence to present at the child hearsay hearing. RP 559, 570. Instead of hearing argument and ruling based on the record that had been created, the court pointed out the deficiency in the State's case and engaged in an extended discussion with the State about what the child hearsay statute required. The prosecutor thought it was sufficient to prove the hearsay statements were reliable. The court informed the State that was not enough; the statements themselves needed to be put into evidence to determine whether they qualified for admissibility under the statute. RP 572-78.

Having been educated by the court on this point, the prosecutor said she would put on additional evidence as to the sexual abuse, either through an offer of proof or by having Detective Arnett testify about statements relayed to her during interviews. RP 578. The court then continued its education process, telling the prosecutor:

> But, see, then the following determination the Court has to make is as to each witness through whom you wish to admit these statements and all of the factors that go to that particular witness. And so, for example, as to the mother, that testimony has to come not from Detective Arnett, it has to come from the mother. And as to testimony from the aunt, the statement that supposedly described sexual abuse, as the statute requires, has to come from the aunt. Literally, the only person who actually said what words the child used was Ovidio. I haven't even been offered the child interview video by Dawson Place to determine whether or not, in fact, there were statements describing sexual abuse by the child in that video. RP 578-79.

By this point, a reasonably prudent and disinterested observer would be concerned that the court did not handle the case in a neutral manner. There is evidence of potential bias here. It looks like the court was helping the State prove its child hearsay case, first by informing the State of the deficiency in its case before hearing argument and then guiding the State on how to fix that deficiency.

Defense counsel raised the appearance of fairness issue, protesting that it was not the role of the court to assist the State

in correcting the deficits in its case. RP 581. After the court permitted the State to reopen, counsel further objected: "I think it crosses into the concern about the fairness of the proceeding for Mr. Escobar when the Court alerts the State to that problem, educates them to what would be needed to potentially be able to prevail with regard to potential statements and then allows the State to reopen and present additional evidence to meet that burden." RP 593-94.

The judge acknowledged the appearance of fairness issue raised by defense counsel but brushed it aside by saying that she would have allowed the defendant to reopen. RP 600. That is the trial court's subjective view of the matter. But that is not the test for determining whether the appearance of fairness doctrine is violated. The standard is an objective one, viewed from the standpoint of a reasonably prudent and disinterested observer. Dominguez, 81 Wn. App. at 330; Davis, 175 Wn.2d at 306.

The judge justified her decision by saying the prosecutor would still have moved to reopen the child hearsay hearing if the court had simply heard argument without asking questions and then made a ruling. RP 595-96. The prosecutor predictably said she "certainly" would have moved to reopen the hearing. RP 597-98. That may be true, though we'll never really know because that is not in fact what happened. Post hoc justifications should be viewed with skepticism. Regardless, whether the State would have sought to reopen the hearing anyway does not solve the problem created by the manner in which the court aided the State before it ruled that the State would be allowed to reopen.

To satisfy the "appearance of justice," "it may be unfair to a litigant for a judge to don executive and judicial hats at the same time." Moreno, 147 Wn.2d at 507. "A trial judge should not enter into the 'fray of combat' nor assume the role of counsel." Egede-Nissen v. Crystal Mountain, Inc., 93 Wn.2d 127, 141, 606 P.2d 1214 (1980). In State v. Ra, 144 Wn. App.

688, 705, 175 P.3d 609 (2008), for example, the Court of Appeals found the "the trial court's proposal of theories for the State to use in admitting improper ER 404(b) evidence" to be inappropriate.

In Escobar's case, the court aided the State's case by alerting the State to why it had not sustained its burden of proof on the child hearsay issue. When the State described how it intended to supply the missing evidence, the court corrected the State, telling it how it needed to be done. RP 578-79. In so doing, the trial court assumed the role of counsel. It donned the prosecutor's hat. Its ultimate ruling allowing the State to reopen its case did not arise in a vacuum. It arose from what came before. The court's ruling permitting the State to reopen its case is the apex of the appearance of fairness violation.

The Court of Appeals rejected Escobar's argument by constructing an alternate reality: if the court had not done what it did, the outcome would have still been the same, because the

State, upon encountering court resistance, would have eventually presented the necessary testimony. Slip op. at 7-8 .

That may or may not be true, but the speculation is irrelevant to whether there was an appearance of fairness violation in this case. The test is not whether the appearance of fairness is satisfied had the court acted differently than it did. Again, "[t]he test is whether a reasonably prudent and disinterested observer would conclude [the party] obtained a fair, impartial, and neutral trial." Dominguez, 81 Wn. App. at 330. That standard is considered in light of what actually happened, not what could have happened but didn't. The reasonably prudent and disinterested observer is observing things as they are, not how they might have been.

The Court of Appeals also commented that, had the court taken a different tack, none of its decisions would have been an abuse of discretion. Slip op. at 8. That also warps the appearance of fairness standard. The test is not whether a prudent and disinterested observer would conclude the court

abused its discretion in making a ruling. The dispositive question is whether the judge's impartiality might reasonably be questioned. Davis, 175 Wn.2d at 306. That question is answered without regard to whether the court abused its discretion in ruling on the issues before it.

The remedy for an appearance of fairness violation is a new trial. Madry, 8 Wn. App. at 69-71; State v. Hendrickson, 81 Wn. App. 397, 402, 914 P.2d 1194 (1996); Diimmel v. Campbell, 68 Wn.2d 697, 699, 414 P.2d 1022 (1966). This is the remedy Escobar seeks.

F. CONCLUSION

For the reasons stated, Escobar requests that this Court grant review.

I certify that this document was prepared using word processing software and contains 4,662 words excluding those portions exempt under RAP 18.17.

DATED this 10th day of February 2022.

Respectfully submitted,

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FILED
1/18/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. FREDDY ESCOBAR, Appellant.	No. 82135-1-I DIVISION ONE UNPUBLISHED OPINION

APPELWICK, J. — Escobar seeks reversal of his conviction for child molestation of his girlfriend's daughter. He claims the trial court violated the appearance of fairness doctrine during the child hearsay evidentiary hearing. He argues that ineffective assistance of counsel resulted in a prior federal criminal conviction being improperly scored. He also challenges community custody conditions and certain legal financial obligations. We affirm Escobar's conviction and remand for resentencing.

FACTS

Freddy Escobar and K.O. began dating in 2015 and lived together from 2016 to November 2018. K.O. had a daughter, A.O., who was born in 2012. A.O. lived with her mother and Escobar. Escobar treated A.O. like his daughter and often cared for her in the evenings while K.O. was in school. Escobar and K.O. also had a son together.

In November 2018, A.O. disclosed to K.O. that Escobar was touching her inappropriately. After hearing this, K.O. left the house with both children. They went to the police station where an officer took a report and arranged for a sexual assault examination at the hospital. During the examination, A.O. told the forensic nurse that her father touched her and that she did not want him to do that. She also spoke with a child interview specialist.

The State charged Escobar with two counts of first degree rape of a child and one count of first degree child molestation. A jury convicted Escobar of child molestation, but acquitted him of the two counts of first degree rape of a child.

Escobar had a prior federal felony conviction for conspiracy to commit murder in aid of racketeering. During sentencing, Escobar agreed that his prior federal conviction was comparable to Washington's criminal conspiracy to commit first degree murder. This resulted in an offender score of 2 with a standard range sentence of 62 to 82 months. The court imposed a midrange sentence of 72 months of incarceration. Escobar appeals.

DISCUSSION

I. Appearance of Fairness During the Child Hearsay Hearing

The State sought to use the child hearsay exception under RCW 9A.44.120 to admit statements that A.O. made to her mother, aunt, and grandfather, as well as the child forensic interviewer and the nurse who conducted her sexual assault examination. This exception allows for admission of hearsay evidence "made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another." RCW 9A.44.120(1)(a)(i). When reviewing whether

to admit hearsay evidence, the court must conduct a hearing outside the presence of the jury and find "that the time, content, and circumstances of the statement provide sufficient indicia of reliability." RCW 9A.44.120(1)(b). We review a trial court's decision to admit child hearsay testimony for abuse of discretion. State v. Kennealy, 151 Wn. App. 861, 879, 214 P.3d 200 (2009).

The trial court conducted a hearing on the admissibility of child hearsay evidence. The State presented testimony from a number of witnesses which addressed when and under what circumstances A.O. had disclosed abuse to them. However, the State failed to adduce the actual words A.O. spoke. Without those words, the trial court could not determine that the statute applied and had no need to rule on admissibility of the evidence.

Escobar does not challenge the trial court's admission of A.O.'s hearsay testimony as an abuse of discretion. Instead, Escobar argues the trial court violated the appearance of fairness during the hearing on the child hearsay exception.

Under the appearance of fairness doctrine, "a judicial proceeding is valid if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial, and neutral hearing." State v. Solis-Diaz, 187 Wn.2d 535, 540, 387 P.3d 703 (2017). A criminal defendant has the constitutional right to be tried and sentenced by an impartial court. Id. at 539; U.S. CONST. amends. VI, XIV; WASH. CONST. art. I, § 22. "The law requires more than an impartial judge; it requires the judge also appear to be impartial." Solis-Diaz, 187 Wn.2d at 540.

"A defendant's due process right to a fair trial is implicated where the trial court's activities 'turn a neutral judge into the state's advocate.'" State v. Mandefero, 14 Wn. App. 2d 825, 835, 473 P.3d 1239 (2020) (quoting State v. Moreno, 147 Wn.2d 500, 512, 58 P.3d 265 (2002)). A trial court should not assume the role of counsel or enter the "fray of combat." State v. Ra, 144 Wn. App. 688, 705, 175 P.3d 609 (2008) (quoting Egede-Nissen v. Crystal Mountain, Inc., 93 Wn.2d 127, 141, 606 P.2d 1214 (1980)). For example, in Ra the trial court improperly provided the State with theories that could support admission of improper other-crimes evidence. 144 Wn. App. at 705.

There is a presumption the trial court properly acted without bias or prejudice which can be overcome only by specific evidence establishing actual or potential bias. Mandefero, 14 Wn. App. 2d at 835. "The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes a reasonable observer knows and understands all the relevant facts." Solis-Diaz, 187 Wn.2d at 540.

Escobar contends the trial court violated the appearance of fairness doctrine by aiding the State in building its case. According to Escobar, the trial court alerted the prosecution that it had failed to produce evidence that A.O.'s statements described sexual contact, educated the prosecution on how to supply the missing proof, and permitted the prosecution to reopen the hearing to satisfy its burden.

The initial child hearsay hearing took place over multiple days, concluding the day before trial. The State called several people to testify including A.O., K.O.,

A.O.'s grandfather and Aunt, the child interview specialist who interviewed A.O., the forensic nurse who conducted A.O.'s sexual assault examination at the hospital, and a detective on the case. At the conclusion of the testimony, the court inquired whether the State had any further witnesses or evidence for the child hearsay hearing. The State responded it had no additional evidence. The court then asked the prosecutor,

> [I]s the Court not first required to determine whether or not whatever statement the child is making to whatever witness is an actual description of sexual abuse? And how is the Court supposed to make that determination without hearing what the actual statement, for example, to the mother was? Because there was no testimony about what the child actually said to the mother from the mother or from the child.

The court continued,

> I had specifically reviewed all of my notes in anticipation that we would have argument about this issue today. And I, frankly, specifically was asking whether or not there is anything else in regards to the child hearsay hearing, because counsel stopped short of asking the mother what the child actually said to her.
>
> The mother testified that she saw there was a hug that she was suspicious about, and that she questioned her child about it; and she did not testify about what the child said.

The State responded that the burden was not to show the exact statements but the circumstances surrounding them and their reliability. The trial court responded that it could not make a determination under the child hearsay statute unless the statements describe sexual abuse which requires hearing the child's actual words. The State said it believed the evidence was in the record. The trial court disagreed, noting that "all of the questioning had stopped short, and all of the answers had stopped short, of any description of what the child actually said to the mother." And, no other witnesses had testified as to the actual words A.O. used when talking

to others. Moreover, the State had not offered the video of the child's forensic interview as evidence for the hearing. The court could not assume A.O. had provided descriptions of sexual assault for the purposes of a child hearsay ruling.

In response, the State requested an opportunity to put on additional evidence, either a proffer about the witness testimony expected at trial or to have the detective testify as to the statements made during interviews with the witnesses. The trial court informed the State that this evidence would not suffice for a child hearsay determination. The court explained that it needed to assess A.O.'s actual language to ensure it described sexual assault. In addition to finding that the child's words described sexual abuse, the court has to find that the requirements of the statute are met as to each witness through whom the testimony would be admitted. "For example, as to the mother, that testimony has to come not from Detective Jacqueline Arnett, it has to come from the mother."

The trial court also explained that the request to put on additional evidence was problematic because the hearing had already taken several days and testimony had concluded. The trial was set to start the next day with jurors arriving in the morning for opening statements. Escobar agreed that the hearing had concluded and the parties had indicated there was no additional evidence. He also noted that it was not the court's role to correct the problems with the State's case.

The State moved to reopen portions of the child hearsay hearing for additional evidence, citing the prosecutor's mistake due to lack of experience. Escobar opposed, noting that "[h]ad the Court simply ruled at the conclusion of the

evidence, the matter would be resolved now. It was only when the Court pointed out the deficits in the State's presentation that the State is now moving to reopen." Escobar acknowledged that the court had the discretion to reopen the case but did not believe it would be proper to delay the imminent trial for additional evidence on the child hearsay evidence. The court allowed the State to reopen the hearing.

Prior to the State's additional witness testimony, Escobar asked the court to reconsider its ruling and argued a violation of the appearance of fairness. Defense counsel told the court,

> I think it crosses into the concern about the fairness of the proceeding for Mr. Escobar when the Court alerts the State to that problem, educates them to what would be needed to potentially be able to prevail with regard to potential statements and then allows the State to reopen and present additional evidence to meet that burden.

The court responded that if it had merely ruled on the child hearsay issues, "I fully expect that I would have come back out this morning, and the jury would have been here at 9 a.m., and [the State] would have still moved the Court to reopen the child hearsay hearing." The State agreed that it would have asked to reopen upon the court's ruling.

The court allowed the State to elicit additional testimony. At the conclusion of the hearing, the court admitted some of the child hearsay testimony but found other statements inadmissible due to a lack of credibility.

Escobar argues that there is evidence of potential bias and it appears that the court was helping the State provide its child hearsay case by highlighting the deficiencies and how to cure them. But, if the court had denied the motion to admit the witnesses' testimony, the State would certainly have inquired as to the basis

of the decision. The court would then be expected to answer and provide the same information it did here, that the statute required a threshold determination that the statements described sexual abuse and the State had not identified the express statements to be considered. The State would have undoubtedly moved to reopen the proceeding at that time. The court would have granted that motion. If the State had then made the proffer of evidence as it suggested here, the court would have rebuffed the offer for not being direct evidence from each individual witness of the statements A.O. made to them. None of these decisions by the trial court would have been an abuse of discretion. And, ultimately the State would have presented the necessary testimony. The trial court, cognizant that the trial was about to start the next day, cut to the chase. In doing so, the court did not show bias or prejudice in favor of the State, assume the role of the prosecutor, or enter the fray of combat.

The trial court's colloquy with the State did not violate the appearance of fairness.[1]

II. Sentencing Issues

A. Comparability

Escobar contends he received ineffective assistance of counsel because his trial attorney agreed that his federal conviction for conspiracy to commit murder in aid of racketeering was comparable to Washington's criminal conspiracy to commit first degree murder. For the purposes of calculating a defendant's offender score, "[f]ederal convictions for offenses shall be classified according to the

[1] Escobar has not assigned error to the trial court's decision to reopen the proceeding for the State to produce additional evidence. We do not consider this issue on appeal.

comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). If no comparable offense exists under Washington law, a federal felony conviction is scored as a class C felony. RCW 9.94A.525(3).

The court must conduct a two part test to determine the comparability of a foreign offense. State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). First, the court considers "whether the foreign offense is legally comparable—that is, whether the elements of the foreign offense are substantially similar to the elements of the Washington offense." Id. If the elements of the foreign offense are broader than Washington's version, "the sentencing court must then determine whether the offense is factually comparable—that is, whether the conduct underlying the foreign offense would have violated the comparable Washington statute." Id.

The State bears the burden of proving the comparability of convictions. In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 876, 123 P.3d 456 (2005). Generally, comparability is a question of law reviewed de novo. State v. Beals, 100 Wn. App. 189, 196, 997 P.2d 941 (2000). But, in this case, Escobar's counsel affirmatively agreed to the comparability of the federal conviction and the offender score. This results in a waiver of the right to directly appeal the offender score. See State v. Hickman, 116 Wn. App. 902, 907, 68 P.3d 1156 (2003) ("[W]here the alleged error involves a factual dispute, a defendant who stipulates that his out-of-state conviction is equivalent to a Washington offense has waived a later challenge to the use of that conviction in calculating his offender score").

In order to challenge his offender score, Escobar alleges that trial counsel's agreement to the comparability of the federal conviction to a Washington offense was ineffective assistance of counsel. To succeed on a claim of ineffective assistance of counsel, the defendant must demonstrate that defense counsel's representation fell below an objective standard of reasonableness and the deficient representation resulted in prejudice. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice requires that "there is a reasonable probability that except for counsel's unprofessional errors, the result of the proceeding would have been different." Id.

The State concedes that the federal conviction is broader than the Washington offense and that the record is insufficient to determine that the federal conviction is factually comparable to a Washington offense. Without defense counsel's agreement, the trial court could not have found the crimes legally or factually comparable. The federal conviction would have been considered a class C felony for the purposes of Escobar's offender score. RCW 9.94A.525(3). As a result, Escobar would have had an offender score of 1 with a standard sentence range of 57 to 75 months instead of the 62 to 82 month standard range sentence for an offender score of 2.[2] RCW 9.94A.510, 9.94A.515. Counsel's deficient

[2] The State argued the federal felony conviction for conspiracy to commit murder in aid of racketeering was comparable to Washington's conspiracy to commit murder or first degree murder under accomplice theory. These offenses are both class A felonies. RCW 9A.28.040(3); RCW 9A.32.030(2); RCW 9A.08.020(3). As a "violent offense" either crime would contribute 2 points to Escobar's offender score. Former RCW 9.94A.030(55)(a)(i) (2018); RCW 9.94A.525(8). If the federal felony conviction is not comparable to a Washington offense, it is scored as a class C felony and scores as 1 point. RCW 9.94A.525(3), (8); former RCW 9.94A.030(34) (2018).

representation led to prejudice in the form of a higher offender score and higher standard sentencing range. We agree that Escobar received ineffective assistance of counsel and is entitled to a new sentencing hearing.

B. Community Custody Conditions

Escobar argues that two community custody conditions limiting his contact with minor children violate his fundamental right to parent his son.[3] Community custody conditions may be challenged for the first time on appeal.[4] State v. Wallmuller, 194 Wn.2d 234, 238, 449 P.3d 619 (2019).

We review community custody conditions for abuse of discretion and will reverse a manifestly unreasonable condition. State v. Bahl, 164 Wn.2d 739, 753, 193 P.3d 678 (2008). "A trial court necessarily abuses its discretion if it imposes an unconstitutional community custody condition, and we review constitutional

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[3] The two community custody conditions at issue are crime related prohibitions 14 and 18. Condition 14 states, "Do not initiate or prolong contact with minor children without the presence of an adult who is knowledgeable of the offense and has been approved by the supervising Community Corrections Officer." Condition 18 provides, "Do not remain overnight in a residence where minor children live or are spending the night."

[4] The State contends that Escobar failed to object to the sentencing conditions and cannot raise the issue for the first time on appeal based on State v. Peters, 10 Wn. App.2d 574, 581-82, 455 P.3d 141 (2019). According to Peters, "for an objection to a community custody condition to be entitled to review for the first time on appeal, (1) it must be manifest constitutional error or a sentencing condition that . . . is 'illegal or erroneous' as a matter of law, and (2) it must be ripe." Id. at 583 (quoting State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015)). Here, Escobar claims exactly that—his community custody conditions are erroneous as a matter of law. Moreover, the Washington Supreme Court has established that community custody conditions may be challenged for the first time on appeal. See State v. Padilla, 190 Wn.2d 672, 677, 416 P.3d 712 (2018); State v. Bahl, 164 Wn.2d 739, 744-45, 193 P.3d 678 (2008). We recently conducted just such a review of similar community custody conditions. See State v. Peña Salvador, 17 Wn. App. 2d 769, 788, 487 P.3d 923 (2021).

questions de novo." Wallmuller, 194 Wn.2d at 238. Conditions that interfere with fundamental rights must be sensitively imposed and reasonably necessary to accomplish the essential needs of the State. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008).

Parents have a fundamental constitutional right to the care, custody, and companionship of their children. Id. at 34. Because the State has a compelling interest in protecting children, "[t]he fundamental right to parent can be restricted by a condition of a criminal sentence if the condition is reasonably necessary to prevent harm to the children." State v. Ancira, 107 Wn. App. 650, 654, 27 P.3d 1246 (2001). The record must support that prohibiting contact is reasonably necessary to protect the child. State v. DeLeon, 11 Wn. App. 2d 837, 841, 456 P.3d 405 (2020); State v. Martinez Platero, 17 Wn. App. 2d 716, 725, 487 P.3d 910 (2021) (remanding because the trial court failed to consider the defendant's relationship with his biological daughter and whether a no-contact provision was appropriate), review denied, 198 Wn.2d 1019, 497 P.3d 374 (2021). Remand is necessary where the trial court fails to consider a defendant's constitutional right to parent and whether a no-contact provision is appropriate. Martinez Platero, 17 Wn. App. 2d at 725.

Here, the trial court imposed the community custody conditions limiting Escobar's contact with minors without acknowledging it would prohibit contact with his biological son. The parties never mentioned the child or considered whether there was a need to protect him from contact with Escobar. The record is devoid of any support for the limitations to Escobar's constitutional right to parent his son.

We remand to the trial court to consider how the community custody conditions apply to Escobar's son.

An additional community custody condition requires Escobar to "[p]ay all restitution and legal financial obligations, including the costs of crime-related counseling and medical treatment required by A.O." Escobar contends the court lacked authority to impose these costs in the absence of a restitution order. The State properly concedes this condition is not authorized by the Sentencing Reform Act of 1981, chapter 9.94A RCW. A victim's counseling and medical costs are correctly imposed as restitution under RCW 9.94A.753(3). See State v. Land, 172 Wn. App. 593, 604, 295 P.3d 782 (2013) (striking community custody condition ordering restitution where the State failed to seek restitution at the sentencing hearing and no restitution was imposed). In this case, the restitution order includes A.O.'s treatment in the hospital emergency department on the day she disclosed the abuse. These are the only compensable medical costs. The trial court abused its discretion in ordering additional compensation as a community custody condition and the condition should be stricken on remand.

C. Legal Financial Obligations

Escobar's judgment and sentence includes a provision requiring payment of community custody supervision fees. Escobar argues the court intended to waive all nonmandatory legal financial obligations (LFOs) so the supervision fees should be struck.

Community custody supervision fees are discretionary LFOs which can be waived by the trial court. State v. Dillon, 12 Wn. App. 2d 133, 152, 456 P.3d 1199,

review denied, 195 Wn.2d 1022, 464 P.3d 198 (2020); RCW 9.94A.703(2)(d). "Where the record demonstrates that the trial court intended to impose only mandatory LFOs but inadvertently imposed supervision fees, it is appropriate for us to strike the condition of community custody requiring these fees." State v. Peña Salvador, 17 Wn. App.2d 769, 791-92, 487 P.3d 923 (2021).

Here, the record is inconclusive. Escobar requested waiver of all nonmandatory LFOs. The court imposed only the mandatory victim penalty assessment and DNA (deoxyriboneucleic acid) collection fee. But, the court did not explicitly waive all nonmandatory LFOs or make a finding that Escobar is indigent. On resentencing, the court should consider on the record whether it intends to waive the supervision fees.

We affirm the conviction and remand for resentencing.

Appelwick, J.

WE CONCUR:

Coburn, J.

Verellen, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

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