**FILED**
**Court of Appeals**
**Division II**
**State of Washington**
**9/13/2018 4:53 PM**

FILED
SUPREME COURT
STATE OF WASHINGTON
9/17/2018
BY SUSAN L. CARLSON
CLERK

No. 96311-8

COA # 48993-7-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

BRANDON C. BARNES,

Appellant/Petitioner.

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ON REVIEW FROM
THE COURT OF APPEALS OF
THE STATE OF WASHINGTON,
DIVISION TWO
AND THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

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# PETITION FOR REVIEW

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TABLE OF CONTENTS

A. IDENTITY OF PARTY .... 1

B. COURT OF APPEALS DECISION .... 1

C. ISSUES PRESENTED FOR REVIEW .... 1

D. STATEMENT OF THE CASE .... 2

a. Procedural posture .... 2

b. Facts relevant to issues presented .... 2

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED .... 4

1. THE FAILURE TO FOLLOW THE CLEAR MANDATES OF CRIMINAL RULES 3.2 IS AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE AND INVOLVES SUBSTANTIAL CONSTITUTIONAL RIGHTS .... 4

2. THE COURT SHOULD GRANT REVIEW BECAUSE PROPER DETERMINATION OF CHILD COMPETENCY UNDER ALLEN IS A SUBSTANTIAL ISSUE OF PUBLIC IMPORTANCE AND DUE PROCESS MANDATES ONLY RELIABLE EVIDENCE IS USED TO CONVICT. .... 8

3. THE "NO EVIDENCE" ARGUMENT IN A CREDIBILITY CASE WHERE THE DEFENDANT PRESENTS NO EVIDENCE UNCONSTITUTIONALLY SHIFTS THE BURDEN AND THIS COURT SHOULD SO HOLD .... 12

F. CONCLUSION. .... 14

## TABLE OF AUTHORITIES

### WASHINGTON SUPREME COURT


Matter of Dependency of A.E.P., 135 Wn.2d 208, 956 P.2d 297 (1998). . . . . . . . . . 9

State v. Allen, 70 Wn.2d 690, 424 P.2d 1021 (1967) . . . . . . . . . 1, 2, 8-10, 12

State v. Barton, 181 Wn.2d 148, 331 P.3d 50 (2014)... . . . . . . . . . 6

State v. Hartzog, 96 Wn.2d 383, 635 P.2d 694 (1981) . . . . . . . . . 6

State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984). . . . . . . . . . 8

State v. Brousseau, 172 Wn.2d 331, 259 P.3d 209 (2011)... . . . . . . . . . 9

State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). .. . . . . . . . . 13


### WASHINGTON COURT OF APPEALS


Butler v. Kato, 137 Wn. App. 515, 154 P.3d 259 (2007). . . . . . . . . . 4

State v. Barnes, __ P.3d __ (2018 WL 3854916). . . . . . . . . . *PASSIM*

State v. Przybylski, 48 Wn. App. 661, 739 P.2d 1203 (1987). . . . . . . . . . 10

State v. Rose, 146 Wn. App. 439, 191 P.3d 83 (2008)... . . . . . . . . . 6

State v. Woodward, 32 Wn. App. 204, 646 P.2d 135, review denied, 979 Wn.2d 1034 (1982). . . . . . . . . . 11


### FEDERAL AND OTHER STATE CASELAW


Estelle v. Williams, 425 U.S. 501, 96 S. Ct. 1691, 48 L. E.d 2d 368 (1970).. . . . . . . . . 6

Hudson v. Parker, 156 U.S. 277, 15 S. Ct. 450, 39 L. Ed 424 (1895)... . . . . 6

In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). . . . . 13

United States v. Salerno, 481 U.S. 739, 107 S. Ct. 2095, 96 L. Ed. 2d 697 (1987).. . . . . . . . . 6

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

Article 1, § 20 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 6

CrR 3.2.. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 1, 4-6

Eighth Amendment. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 6

RAP 13.4.(b)(3).. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 1, 2, 4, 6

RAP 13.4.(b)(4).. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 1, 4, 6

RCW 9A.44.120.. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 8

A. IDENTITY OF PARTY

Mr. Brandon C. Barnes, appellant below, is the Petitioner herein.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4.(b)(3) and (4), Mr. Barnes seeks review of a portion of the decision of the court of appeals, Division Two, issued August 14, 2018, in State v. Barnes, __ P.3d __ (2018 WL 3854916). A copy of the decision is attached hereto as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Is the trial court's failure to follow the mandates of CrR 3.2 an issue of substantial public importance upon which this Court should rule, given the implications for the state and due process pretrial presumption of innocence and the Court's role in overseeing the rules regarding pretrial "bail" rulings?

2. Where the trial court imposes onerous financial conditions on an indigent defendant without conducting the required analysis of CrR 3.2, does that error violate equal protection, due process and the state and federal prohibitions on excessive bail and should this Court grant review under RAP 13.4(b)(3)?

3. Is a five-year-old child competent to testify under State v. Allen, 70 Wn.2d 690, 424 P.2d 1021 (1967) factor 1, requiring an "understanding of the obligation to speak the truth on the witness stand," when she is unable to say answer when asked the difference between a truth and a lie but ultimately could answer correctly when asked if she had ridden to court on a unicorn and similar questions?

4. Does a child meet the Allen factors regarding capacity (factor 2) and requiring a "memory sufficient to retain an independent recollection of the occurrence" (factor 3) when she does not remember the birthday celebration from the previous year, or living with her grandmother, or having talked with a friend of the family she was staying with after the accusations came out, even though all of those events were *after* the incident about which her memory was being tested?

5. Where the only evidence supporting a conviction with a potential lifetime sentence, should this Court grant review under RAP 13.4(b)(3) and (4) regarding the Allen factor errors?

6. Does a prosecutor commit prejudicial, reversible misconduct in repeatedly telling the jury that there was no evidence presented at trial that the four-year-old victim was coached or lying or had a motive to do so and that none of the state's witnesses had been proven to have such a motive where the only evidence at trial was the victim's claim and the defendant presented no evidence at trial?

D. STATEMENT OF THE CASE

a. Procedural posture

Petitioner Brandon Barnes was accused of two counts but convicted of only one count of first-degree rape of a child in Pierce County Superior Court. CP 1-2; 137-38. He appealed to Division Two of the court of appeals. CP 174; see App. A. On August 14, 2018, that court affirmed in part and reversed in part. App. A. This Petition follows.

b. Facts relevant to issues presented

Four-year-old T was watching a "jail" show, said she was sad and then said, "Brandon did something." 8RP 410-52. The family member with her questioned her, eliciting that the child was accusing Brandon Barnes of touching her inappropriately at some time. 8RP 410-52. There was no physical evidence of any such touching- only the statements of the child, both at the later trial and to others. 8RP 514-18, 622-31.

Even before the prosecutor's "forensic" interviewer or a pediatric nurse had seen T, two family members had separately questioned the four-year-old at length about her claim, making her repeat what she said

and asking her questions to try to get information. 8RP 510-18, 533-39. Those interrogators then compared "notes," after which one would claim at trial she had immediately called police to report the suspected crimes. 8RP 40-41, 516, 645. Actually, it was established that she spoke to others, first and she was allowed to tell the jury (over defense objection) that she had tried to call Barnes before the police, but Barnes' girlfriend refused to put Barnes on the phone. 8RP 440-61, 516-19, 645.

T told a pediatric nurse someone had done something she did not like to her hip, but pointed to her anal region, but said it happened "where the pee pee comes out." 6RP 610-16. When specifically asked by the first family member who questioned her if anything went inside her, the four-year-old said no. 8RP 438-66. Other than that, neither original questioner could remember the bulk of what the child had said or specific words. 8RP 517-57. When interviewed by the prosecutor's forensic interviewer, however, the child said Barnes had tried to put his "boomerang" in her and it had felt "weird" when it came out. 8Rp 696; Ex. 12.

A family friend caring for the child before trial with no training decided to conduct her own interview and questioned the child while bathing her, until the child was so upset she cried. 8RP 460-71, 478-83. That friend testified that T said it still hurt when the friend was helping wash the child's private parts, even after the physical and forensic exams had occurred. 8RP 460-71, 478-80. At trial, however, the child did not remember ever having talked to that "grandma" about it - or having done the forensic interview, either.

Further facts relevant to the competency and other rulings are discussed, *infra*.

## E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

### 1. THE FAILURE TO FOLLOW THE CLEAR MANDATES OF CRIMINAL RULES 3.2 IS AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE AND INVOLVES SUBSTANTIAL CONSTITUTIONAL RIGHTS

Below, Mr. Barnes argued that the trial court had failed to follow the mandates of CrR 3.2 in imposing financial conditions of bail on him which were so onerous they amounted to effective deprivation of his constitutional rights regarding bail, because he is indigent. See Brief of Appellant ("BOA") at 55-65. On review, Division Two refused to address the arguments, finding they were "moot." App. A at 6.

This Court should grant review of these issues under RAP 13.4(b)(3) and (4). The failure to follow the mandates of our criminal rules regarding pretrial release is not "moot." Instead, it is an issue which squarely presents not only the violation of a rule-based presumption of pretrial release on personal recognizance but also the violation of significant constitutional rights to due process, equal protection and reasonable bail.

First, under CrR 3.2, unless someone is charged with a crime for which they could face the death penalty (or now, life without parole), the rule creates a presumption of release without any conditions pretrial. Butler v. Kato, 137 Wn. App. 515, 522-23, 154 P.3d 259 (2007). When Mr. Barnes was first brought before the court, the prosecutor asked for 100,000 bail, based on his criminal history (from 2003), and the nature of

the crime. 1RP 4. Mr. Barnes specifically raised the presumption of release on personal recognizance under CrR 3.2, pointing out that the rule requires specific findings of a "risk of flight" or "likely danger," which meant more than just filing a charge and citing criminal history. 1RP 4-9. He argued the presumption for release without conditions set forth in the rule should apply unless the state met its burden of providing evidence sufficient to support the trial court finding the presumption of release had been rebutted. 1RP 7-9. He also presented argument that the state had not - and could not - meet its burden, and argued about less restrictive ways any concerns might be met. 1RP 7-9. Without any findings being made, the judge just said, "I'm going to set bail." After counsel detailed Mr. Barnes' indigence and asked for a bail amount Barnes could possibly meet, without elaboration, the judge just set the prosecutor's requested amount. 1RP 9. Bail was reduced after a later hearing but again not down to recognizance.

On review, Barnes challenged the trial court's failure to follow CrR 3.2, noting first that the court below had failed to apply the presumption of release and second that the state had presented no evidence to rebut that presumption, so there was no authority for the trial court to therefore set bail. BOA at 60. He also argued that the trial court's failure to follow the mandates of the rule was not "moot," because the trial court twice failed to apply the presumption of release on personal recognizance under the rule, an issue of continuing and substantial interest, likely to arise again but evade review. BOA at 60-61. He pointed out the disparate impact this has in our system, arguing that

it violated the Eighth Amendment and Article 1, § 20 prohibitions against "excessive" bail, ultimately improperly depriving defendants like Mr. Barnes who are in poverty the right to pretrial release despite their presumption of innocence and the mandates of the rule, in violation of equal protection. BOA at 60-62.

This Court should grant review of these issues under RAP 13.4(b)(3) and (4). It is an abuse of discretion to fail to follow the mandates of an explicit court rule. Butler, 137 Wn. App. at 524. The rule explicitly requires that court must make specific findings prior to the presumption of pretrial release being rebutted. CrR 3.2; see State v. Rose, 146 Wn. App. 439, 450-51, 191 P.3d 83 (2008).

But more important, it is an essential part of pretrial due process that every person charged with a crime is innocent until proven guilty. See Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. E.d 2d 368 (1970). These due process rights are far more substantial than those enjoyed after conviction. See State v. Hartzog, 96 Wn.2d 383, 635 P.2d 694 (1981).

Further, as this Court has noted, Article 1, § 20 provides a right to bail in all but the most extreme case. See State v. Barton, 181 Wn.2d 148, 331 P.3d 50 (2014). It is a fundamental right to be free from governmental restraints - including jail - based solely upon an unproven accusation. Id.; see Hudson v. Parker, 156 U.S. 277, 285, 15 S. Ct. 450, 39 L. Ed 424 (1895). And CrR 3.2 reflects this, also reflecting the idea that pretrial release and liberty is supposed to be "the norm" - not the exception. See CrR 3.2; United States v. Salerno, 481 U.S. 739, 742, 107

S. Ct. 2095, 96 L. Ed. 2d 697 (1987).

In refusing to consider the arguments presented by Barnes, the court of appeals treated the issue as if it was a "discretionary imposition of bail here based on the specific circumstances" of his case that was challenged. App. A at 7. But that challenge was *only* after first arguing that the trial court had erred as a matter of law in failing to follow the mandates of the rule to follow the presumption, or make the required findings. BOA at 55-65.

This Court should grant review, because Division Two erred in finding these issues "moot" and refusing to address them. App. A. The Court has previously held that, where the case involves "matters of continuing and substantial public interest," it will address them. See State v. Cruz, 189 Wn.2d 588, 598, 404 P.3d 70 (2017). The Court has found that constitutional questions are "public in nature," and looks as issues like the desirability of having guidance from the Court for future guidance to public officers, as well as the likelihood the issue will recur. See State v. Hunley, 175 Wn.2d 901, 907, 287 P.3d 584 (2012).

Finally, this Court should grant review because of its own role in crafting the requirements of CrR 3.2 in particular to try to prevent the kind of disparate impact pretrial as here. The Court is the final arbiter of the rule. Because of their nature, there is a strong likelihood the issues presented will constantly escape review. See In re the Marriage of Horner, 151 Wn.2d 884, 892, 93 P.3d 124 (2004). This Court should ensure that does not happen by granting review and addressing them here.

2. THE COURT SHOULD GRANT REVIEW BECAUSE PROPER DETERMINATION OF CHILD COMPETENCY UNDER ALLEN IS A SUBSTANTIAL ISSUE OF PUBLIC IMPORTANCE AND DUE PROCESS MANDATES ONLY RELIABLE EVIDENCE IS USED TO CONVICT

The Court should also grant review on the issues of interpreting the Allen requirements, because the questions involve substantial issues of public importance upon which this Court should rule and further implicate the due process rights of the defendant to be convicted based only on evidence which is constitutionally sufficiently reliable.

Admission of T's statements and her testimony below all depended upon the trial court's pretrial finding that she was "competent" and that the statements were sufficiently "reliable" under RCW 9A.44.120. See State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984). If she was not competent, she is "unavailable" and could not testify - further, her statements would only be admissible at trial if there was "sufficient corroboration" of the crime. See Ryan, 103 Wn.2d at 175-76. And because it was only her word that the crime occurred and there was no other evidence at all, her testimony and statements were crucial to the conviction.

In Allen, supra, this Court set forth the relevant test for competency of a child witness, requiring a trial court to determine whether the child has all of the following:

> (1) an understanding of the obligation to speak the truth on the witness stand;
> (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it;
> (3) a memory sufficient to retain an independent recollection of the occurrence;
> (4) the capacity to express in words his memory of the

occurrence; and
(5) the capacity to understand simple questions about it.

Allen, 70 Wn.2d at 692.

In general, a competency determination is reviewed for abuse of discretion, because the trial court has the opportunity to see the witness and judge her manner and demeanor in person. See State v. Brousseau, 172 Wn.2d 331, 340, 259 P.3d 209 (2011;. Nevertheless, this Court has not simply applied "abuse of discretion" where, as here, the trial court failed to follow the Allen requirements or there was a question as to what they require. For example, this Court has reviewed whether each of the five elements is separately required, finding they are all "critical to a determination of competency," and has declared for trial courts that no competency can be found if even *one* of the elements is missing. See Matter of Dependency of A.E.P., 135 Wn.2d 208, 223, 956 P.2d 297 (1998).

Here, Mr. Barnes argued that the trial court did not properly apply the requirements of factors 1, 2 or 3, showing understanding of the obligation to speak the truth on the witness stand (factor 1), the mental capacity at the time the alleged crime happened to receive "accurate impressions" of what happened (factor 2) or a memory sufficient to retain independent recollection of it (factor 3). In finding factor 1, Judge Orlando simply relied on the child's ability to understand "the differences between fiction and reality." 8RP 287. But whether a preschooler understands that something is not a "story" is not the same question as whether they understand the difference between telling the truth and a lie or the importance of telling the truth.

The child was asked, explicitly, "do you know the difference between telling the truth and telling a lie?" 8RP 120. She answered "no." 8RP 120. She could not answer whether it was better to tell the truth or a lie. 8RP 120-121. She could not say what she had been told about telling a truth or a lie. 8RP 122. She was able to say it was "pretend" that she had ridden to court on a unicorn and that the prosecutor was dressed like a clown. 8RP 122. She was asked if she could promise not to tell anything that was a lie that day she said "yes," she could promise, and she said "yes" when asked if it was important to keep your promises - but could not say *why* it was important when asked. 8RP 122-23.

Similarly, in factor 2, the judge relied on how T appeared in the exam as "verbally agile" for a four or five year old. But factor 2 is the mental capacity of the child and whether they can receive an accurate impression of it. Allen, 70 Wn.2d at 692. It is focused on whether the child is capable of having the ability to be accurate in relation to events. State v. Przybylski, 48 Wn. App. 661, 665, 739 P.2d 1203 (1987).

Here, T could not remember her fifth birthday the year before . 8RP 98-99. She was sure she had not seen her grandma at Christmas just three months before trial, although her grandma had been there at her home. 8RP 98-99, 128-29, 206-207. She could not remember living with her grandma - even though *that was the time when the alleged crime occurred*. 8RP 130-31, 581. And this was also relevant to Allen factor three, that she had a "sufficient memory" - when she did not recall where she was living at the time the crime occurred, even though it was the first time in her entire life she had lived away from her mom. 8RP 287-88. She

did not remember talking to people she had talked to about the alleged abuse, such as the "grandma" she visited and who talked to her after the forensic interview, while taking a bath. 8RP 134. And she did not remember the forensic interview, or ever being in a room with someone who told her there was a camera. 8RP 130. All of those events were either contemporaneous with or subsequent to the alleged abuse.

The court of appeals simply applied an abuse of discretion standard and declared that "[i]nconsistencies in the child witness's testimony bear on credibility, not admissibility." App. A (quotation omitted). The problem is that at some point the inconsistencies and issues are no longer just inconsistencies but instead very serious and significant concerns about competency. Compare, State v. Woodward, 32 Wn. App. 204, 208, 646 P.2d 135, review denied, 979 Wn.2d 1034 (1982).

Further, here, the "inconsistencies" here were about facts crucial to how, where and when the crime occurred. She repeatedly told interviewers nothing went inside of her and her underwear stayed on. 8RP 410-12, 465. She said she never saw or felt any part of his body touch hers. 8RP 410-12. But in the forensic interview she did not later remember, she said he had tried to put his "boomerang" inside her and that it felt weird. That is not a competent witness giving inconsistent details about unimportant events - that is a witness who is simply not competent to understand what she is saying is a contradiction, i.e., that she cannot both have not felt him touch her body with his in any way and that he did, his "boomerang" was involved and it felt a particular way.

This was not a case where the trial court applied the proper standards and deference is due to the finding that the problems of T relevant to the Allen factors were just minor "inconsistencies" going to "weight." This case involved a child whose competency was neither properly evaluated by the trial court nor sufficiently shown by the state. She was allowed to testify and her claims to others admitted in a court of law without the proper safeguards set in place by this Court in Allen. Because she was not competent, the trial court erred in allowing that testimony and in admitting her statements, because those statements and testimony were the sole evidence against Mr. Barnes. This Court should grant review and so hold.

3. THE "NO EVIDENCE" ARGUMENT IN A CREDIBILITY CASE WHERE THE DEFENDANT PRESENTS NO EVIDENCE UNCONSTITUTIONALLY SHIFTS THE BURDEN AND THIS COURT SHOULD SO HOLD

Finally, this Court should grant review to address the prejudicial misconduct in this case. The prosecutor repeatedly told the jurors the case was a "swearing match" between the state and the defense," telling jurors that the victim had "absolutely no motive to fabricate" and could not have had the motive at her age because "she's too young," told the jury there was no way that a four-year old could "come up with something like this on her own," and that all of the state's witnesses similarly had no motive, "there's nothing to show that they have any reason to fabricate it," or make things up. 8RP 747-56. Counsel made an initial objection when the prosecutor declared the first "no evidence before you" claim, "shifting the burden," but the trial court just said "the stat has the burden

to prove the elements ot the crime beyond a reasonable doubt." 8RP 750-51. She said there was "[a]bsolutely no evidence" of a dispute and circled back, again saying there was no evidence that anyone made up the claims or that someone told T to do so, with counsel again objecting to the burden shift and the court just stating again the general instruction about lawyer's statements not being evidence. 8RP 757-58. Over defense objection, she told the jury that if they believed T then they were convinced beyond a reasonable doubt and the law did not require more. 8RP 761-72. And she repeated that there was not "a shred of actual evidence" to show anyone coached the child or made up the claims. 8RP 798, 801-802.

In affirming, the court of appeals said that there was no error because Barnes did not present any witnesses and that the state never explicitly told jurors they had to choose sides or decide that T was lying in order to acquit. App. A at 12-14.

This Court should grant review. The accused has no burden to rebut the state's case. See In re Winship, 397 U.S. 358, 361-64, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Byrd, 125 Wn.2d 707, 713, 14, 887 P.2d 396 (1995). The prosecutor here effectively told the jury, over defense objection, that the two versions of events were "mutually exclusive," thus clearly conveying the message that they had to find the child and state's witnesses were deliberately lying and had a motive to do so to not "believe" the state's case - and thus convict.

It is especially important that this misconduct occurred in a case where the only evidence against the defendant is the claim by a four-

year-old girl and these tactics were used. The misconduct in this case was so offensive that counsel specifically objected to it below. This Court should grant review on this issue and should find the misconduct was reversible error, and so hold.

F. CONCLUSION

For the reasons stated herein, this Court should grant review.

DATED this 13th day of August, 2018.

Respectfully submitted,

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Filed
Washington State
Court of Appeals
Division Two

August 14, 2018

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

# DIVISION II

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|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>BRANDON CHRISTOPHER BARNES,<br><br>Appellant. | No. 48993-7-II<br><br>UNPUBLISHED OPINION |

MAXA, C. J. — Brandon Barnes appeals his conviction for first degree rape of a child and the trial court's imposition of certain community custody conditions.

We hold that (1) Barnes's claims regarding the imposition of bail and the amount of bail are moot; (2) the trial court did not err in entering a protective order restricting Barnes's use and dissemination of the victim's recorded forensic interview; (3) the trial court did not err in finding that the five-year-old victim, TV, was competent to testify; (4) the trial court did not err in admitting TV's statements to various people under the child hearsay statute; (5) the prosecutor did not engage in misconduct regarding the State's burden of proof; (6) the community custody condition prohibiting Barnes from frequenting places where children congregate is unconstitutionally vague; and (7) two other community custody provisions are invalid and a third is invalid in part because they are not crime related.

Accordingly, we affirm Barnes's conviction, but we remand with instructions to strike community custody conditions 16, 24, 28 and a portion of 29 in accordance with this opinion.

## FACTS

From September to December of 2014, four-year-old TV lived with her grandmother, Francesca Heard. Various family members also helped care for TV, including TV's second cousin Sonya Jones and Heard's boyfriend's mother, Darlene Quins. During this time, TV's mother, Keshia,[1] was in the process of relocating to Nevada.

TV also spent time at the home of another second cousin, Tahjiere Smith, who lived with her boyfriend, Barnes. In November, Heard went out of town for the weekend and TV spent the weekend with Smith and Barnes.

Later that week, after Heard had returned, TV told Jones that she was sad because Barnes "did something to her." 5 Report of Proceedings (RP) at 437. TV told Jones that while she stayed with Barnes and Smith, Barnes called her into his and Smith's bedroom, started to take off her underwear, laid TV on the ground, and touched TV in the vaginal region of her body. TV said that she tried to scream, but Barnes covered her mouth with his hand. According to TV, Barnes lay on top of her and moved up and down.

After this disclosure, Jones took TV to Heard, who went with TV into a separate room to talk without Jones present. TV told Heard that Barnes took TV into his bedroom, told her to lie down on her stomach, and pulled down her panties, and that Barnes laid on top of her. TV also said that she wanted to get up, but Barnes would not let her. Heard asked TV if she was telling the truth and TV said that she was. Heard reported TV's disclosure to the police.

TV later made disclosures regarding the abuse to Keshia and Quins.

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[1] We refer to Keshia by her first name to protect TV's privacy. We intend no disrespect.

*Imposition of Bail*

The State charged Barnes with two counts of first degree rape of a child. After Barnes was arrested, the trial court set bail in the amount of $100,000. Barnes later filed a motion to reduce his bail amount, and the trial court reduced bail to $50,000.

*Protective Order Regarding TV's Forensic Interview*

On December 1, Patricia Mahaulu-Stephens of the Child Advocacy Center conducted a videotaped forensic interview of TV. The State would not provide Barnes with a copy of the recorded interview until he agreed to sign a protective order restricting the dissemination of copies of the recording. Barnes disagreed with the terms of the proposed protective order.

The trial court ruled that there was cause for the protective order because it implicated the privacy of a minor child. The order stated, "Neither the transcript of the recording, nor any portion thereof, shall be divulged to any person not authorized by the terms of this stipulation to review the DVD and/or audio recording." Clerk's Papers (CP) at 187. After both parties signed the order, Barnes received a copy of the recording. At trial, the recording was played in open court for the jury, but was not transcribed for the record.

*Competency/Child Hearsay Hearing*

The State notified Barnes that it intended to introduce TV's hearsay statements at trial pursuant to RCW 9A.44.120. Specifically, the State sought to introduce TV's statements to Jones, Heard, Keshia, Quins, Mahaulu-Stephens, and Michelle Breland, a nurse practitioner who examined TV following her disclosure. The court held a hearing to determine TV's competency to testify and the admissibility of her hearsay statements.

At the hearing, the State questioned TV as to her understanding of the difference between the truth and a lie. TV initially stated that she did not know the difference between telling the

truth and telling a lie. But then she said that her teacher told her not to lie and that her mother sometimes talked to her about telling the truth and a lie. And TV correctly answered some hypothetical questions that distinguished between the truth and pretend. Finally, she said she would tell the truth and promised not to lie.

TV could not remember living at Heard's house in the fall of 2014, but she recalled that Heard's house was brown and that she had spent the night there in her own bedroom upstairs. She also did not remember talking in a room with cameras about the incident involving Barnes. However, she remembered telling Heard and Jones about what had happened at Barnes's house.

Jones, Heard, Keshia, and Quins, testified about TV's statements to them. Jones asked TV if she was telling a story or telling the truth. TV told Jones, "I'm not telling you a story. I'm telling you the truth." 2 RP at 150. TV also told Heard that she was telling the truth about what happened with Barnes. Keshia testified that she never had any problems with TV lying.

Mahaulu-Stephens testified that during her forensic interview of TV, she asked TV if she would promise to tell the truth and TV said that she would. TV corrected Mahaulu-Stephens if she made errors while talking to TV. TV also asked for clarification when she did not understand something.

The trial court reviewed TV's recorded interview with Mahaulu-Stephens. In the recorded interview, TV described Barnes's "boomerang" as "going in her potty." 3 RP at 247. TV described the feeling as "smooshy or gooey." 3 RP at 247. Mahaulu-Stephens testified that TV's use of this language evidenced a lack of coaching because she was only able to articulate a four year old's understanding of anatomy.

The trial court found that while TV initially had difficulty answering directly whether she understood the difference between the truth and a lie, "she did by examples indicate that she did

have an understanding of the difference between fiction and reality." 3 RP at 287. The court also found that TV "has the understanding and the knowledge of her obligation to speak the truth on the witness stand." 3 RP at 287. Further, based on the forensic interview, the court found that TV demonstrated mental capacity at the time of the occurrence. Specifically, TV was conversant during the interview, paid close attention to the room, and complimented the examiner on her clothing. Compared to her demeanor in court, her demeanor in the interview "indicated she was very grounded at the time." 3 RP at 288. The court also found that TV had sufficient memory to retain independent recollection of the charged incident because she could answer questions related to where she was living, what happened shortly after, when she moved, and whether she was in school or daycare.

The trial court found that there was no reason to question TV's general character nor was there a motive for TV to lie. And the initial disclosure to Jones was spontaneous. There were multiple people who heard TV's statement in a short period of time, TV disclosed the incident to Heard moments after disclosing the incident to Jones, and the forensic interview was set up a week following the initial disclosure. Even though TV made some inconsistent statements, there was some degree of consistency between the two initial disclosures.

Based on the totality of the circumstances, the trial court found that there was no reason to believe that TV misrepresented what she perceived in this case. Therefore, the trial court ruled that TV was competent to testify at trial and TV's child hearsay statements to each of the witnesses were admissible.

*Trial Testimony and Argument*

At trial, Jones, Heard, Keshia, Quins, and Mahaulu-Stephens testified about TV's statements that the trial court had ruled admissible. TV also testified. She stated that the last

time she spent the night at Barnes's home, he called her into his room. He then told her to lie down on the floor on her stomach and got on top of her. She was wearing pants and a shirt at the time and her "clothes were halfway off because of him." 5 RP at 410.

Breland, a pediatric nurse practitioner, performed a physical examination of TV. Breland testified that during her examination of TV, TV told her that someone had done something she did not like to her hip, but then pointed to her anal region. TV then described the area as "the part where the pee pee comes out." 6 RP at 615. TV also told Breland that her pants and panties had been taken down.

Throughout closing argument, the State emphasized that the jurors were the sole judges of credibility. The State argued that the evidence in this case was TV's words. The State also argued, "[i]f you believe [TV's] words, if you believe her description of what happened to her, what the defendant did to her, you are convinced beyond a reasonable doubt." 7 RP at 761.

The State also emphasized that TV had "absolutely no motive to fabricate what happened to her" and that there was "no evidence before you, none presented, to suggest a reason why she would." 7 RP at 750. Barnes objected to this statement as shifting the burden of proof. The State then argued that there was no evidence that any of the other witnesses fabricated their testimony. Barnes again objected that these statements were shifting the burden.

Barnes argued in closing that Heard coached TV into disclosing the abuse. He also argued that the circumstantial evidence suggested animosity between Heard and Keshia, which prompted the coaching.

The State addressed Barnes's theory of coaching in rebuttal, stating, "There's nothing to support that. Not a shred of actual evidence to support that." Later, the State argued:

> Everything that was talked [about] in defense counsel's argument and all of the evidence presented at trial does not support this. There simply is no evidence to

> support that. There is no evidence that [TV] was actually, in fact, coached and no evidence that would suggest [] Heard did this. There is nothing tying her to her being mad and wanting to seek revenge against [Barnes] and [Smith]. It doesn't make any sense.

7 RP at 803.

*Conviction and Sentence*

The jury found Barnes guilty of one count first degree rape of a child and not guilty on the other count. As part of Barnes's sentence, the trial court imposed several community custody conditions.

Barnes appeals his conviction and the imposition of certain community custody conditions.

## ANALYSIS

### A. IMPOSITION OF BAIL

Barnes assigns error to the trial court's initial imposition of bail at $100,000, as well as the court's subsequent reduction of bail to $50,000. He argues that the trial court failed to apply the presumption of release in noncapital cases. He also claims that the bail amounts were excessive and in violation of the Eighth Amendment. We decline to address these arguments because they are moot.

An issue is moot if we can no longer provide effective relief. *State v. Gentry*, 125 Wn.2d 570, 616, 888 P.2d 1105 (1995). We generally do not consider questions that are purely academic. *Id.* at 616-17. But we may consider a moot issue if it involves matters of continuing and substantial public interest. *State v. Cruz*, 189 Wn.2d 588, 598, 404 P.3d 70 (2017). In determining whether a case presents an issue of continuing and substantial public interest, we consider (1) the public or private nature of the issue, (2) whether guidance for public officers on the issue is desirable, and (3) the likelihood that the issue will recur. *Id.*

The relief that Barnes requests here is for us to hold that the initial $100,000 bail was excessive and to hold that the trial court erred in failing to apply the presumption of release in imposing bail. But we cannot grant effective relief regarding the bail imposed because the trial court granted Barnes's request to lower the initial $100,000 bail and Barnes subsequently posted the lowered bail amount. Therefore, this issue is moot.

Barnes argues that the imposition of bail in his case represents a matter of continuing and substantial public interest because of the significant impact of pretrial detention on the accused. However, his challenge here is based on the specific circumstances of his imposed bail amount; his criminal history, ties to the community, and financial need. And the amount of bail imposed is left to the discretion of the trial court. *State v. Reese*, 15 Wn. App. 619, 620, 550 P.2d 1179 (1976). Barnes fails to show that the discretionary imposition of bail here based on the specific circumstances of his criminal history, ties to the community, and likelihood of complying with court orders represents a matter of continuing and substantial public interest.

We decline to address Barnes's moot arguments regarding the imposition of bail.

B. PROTECTIVE ORDER FOR TV'S FORENSIC INTERVIEW

Barnes argues that the trial court erred in entering the protective order restricting his use and dissemination of the video copy of TV's forensic interview. He claims that such restriction on his use of the evidence violated (1) discovery rule CrR 4.7(a), (2) his constitutional right to an open and public trial, and (3) the required procedure for sealing court records. We reject each of these arguments.

1. Violation of Discovery Rules

CrR 4.7(a)(1)(ii) states, "*Except as otherwise provided by protective orders* . . . the prosecuting attorney shall disclose to the defendant . . . any written or recorded statements" of

witnesses the State intends to call at trial. (Emphasis added.) The purpose of this disclosure requirement is to ensure the defendant has meaningful access to the evidence supporting the criminal charges. *State v. Boyd*, 160 Wn.2d 424, 432, 158 P.3d 54 (2007). Such access allows the defense to effectively prepare for trial and the defendant to be provided adequate representation. *Id.* CrR 4.7(a) obliges the prosecutor to provide copies of evidence "[w]here the nature of the case is such that copies are necessary in order that defense counsel can fulfill this critical role." *Id.* at 435.

Barnes relies on *Boyd* to argue that the protective order here limited his right to meaningfully access the video recording and thereby violated his right to effective assistance of counsel. But here, the State did provide Barnes a copy of the forensic interview of TV. Therefore, contrary to Barnes's assertion, the State did not fail to produce required material under the rules of discovery.

Further, the Supreme Court in *Boyd* specifically upheld a protective order restricting the use and dissemination of evidence that was similar to the order at issue here. 160 Wn.2d at 439. The court reasoned that CrR 4.7(a) explicitly provides for disclosure of evidence subject to protective orders. *Id.* at 438. The court held, "In cases such as these, safeguarding the interests of the victims requires conditions that account for the ease with which the evidence can be disseminated." *Id.* A protective order limiting the dissemination and use of such evidence protects the victim and "also safeguards the defendant's interests." *Id.* at 439.

Like the protective order in *Boyd*, the protective order here provided defense counsel ongoing access to the copied recording before and during trial, allowed for access by defense expert, and permitted defense counsel to review the evidence with Barnes. Therefore, Barnes's CrR 4.7(a) argument fails.

2. Constitutional Right to Open Courts

Article I, section 22 of the Washington Constitution guarantees a criminal defendant the right to a public trial. *State v. Love*, 183 Wn.2d 598, 604, 354 P.3d 841 (2015), *cert. denied* 136 S. Ct. 1524 (2016). And article I, section 10 of the Washington Constitution guarantees the public that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." These constitutional provisions assure fairness of our judicial system, and are collectively referred to as the "public trial right." *Love*, 183 Wn.2d at 605. We review public trial right claims de novo. *Id.* at 604.

We apply a three-step analysis in assessing a claimed violation of public trial rights: (1) whether the public trial right attaches to the proceeding at issue; (2) if the right attaches, whether the courtroom was closed; and (3) whether such closure was justified. *Id.* at 605. "The appellant carries the burden on the first two steps; the proponent of the closure carries the third." *Id.*

Here, Barnes appears to argue that his constitutional right to an open and public trial was violated because the forensic recording of TV was played in public court but not transcribed. He also argues that in issuing the protective order, the trial court expressed a belief that it was proper to automatically exclude the public from access to such materials.

However, Barnes presents no argument explaining how the issuance of a protective order limiting dissemination of a forensic interview during discovery closed the courtroom to public access. And the record shows that TV's interview recording was played during trial in open court. Barnes does not provide argument or citation to authority to support his claim that the failure of the trial court to transcribe the video recording in the record rendered the courtroom closed for purposes of the public trial right. Because Barnes has failed to show that the

courtroom was closed to the public during this proceeding, he has failed to meet his burden to show a public trial violation. Therefore, Barnes's argument fails.

3. Sealing of Forensic Interview Pursuant to GR 15

GR 15(a) "sets forth a uniform procedure for the destruction, sealing, and redaction of court records." Sealing a record pursuant to GR 15 "means to protect from examination by the public and unauthorized court personnel." GR 15(b)(4). A party in a criminal proceeding may file a motion to seal court records by giving notice to all parties and the victim. GR 15(c)(1). Barnes argues that the trial court failed to enter written findings as required by GR 15 when it sealed TV's recorded forensic interview.

But the record does not support Barnes's claim that the trial court sealed the record under GR 15. The record does not contain a motion by the State to seal the forensic interview from public examination pursuant to GR 15 or a court order granting such motion. Further, neither party referenced GR 15 during the hearing on the protective order. Nowhere in the order does the court prohibit the public from accessing the recording for any purpose. In fact, the order specifically allows for potential dissemination to the media pursuant to court order. Therefore, Barnes's argument fails.

C. COMPETENCY OF TV TO TESTIFY

Barnes argues that the trial court erred in finding TV competent to testify at trial because the court applied the wrong legal standard for determining competency. He also argues that based on the inconsistencies throughout TV's testimony, she did not demonstrate an ability to receive just impressions and accurately relate events occurring contemporaneously to the incident at issue. We disagree.

1. Standard of Review

The determination of a witness's competency is left to the trial court's sound discretion and will not be disturbed on appeal absent a showing of manifest abuse of discretion. *State v. Woods*, 154 Wn.2d 613, 617, 114 P.3d 1176 (2005). "There is probably no area of law where it is more necessary to place great reliance on the trial court's judgment than in assessing the competency of a child witness." *State v. Borland*, 57 Wn. App. 7, 11, 786 P.2d 810 (1990), *overruled on other grounds*, *State v. Rohrich*, 132 Wn.2d 472, 939 P.2d 697 (1997). Because the competency of a minor witness is not easily reflected in a written record, we "must rely on the trial judge who sees the witness, notices the witness's manner, and considers his or her capacity and intelligence." *Woods*, 154 Wn.2d at 617. On appeal, we may examine the entire record in reviewing the trial court's competency determination. *Id.*

2. No Abuse of Discretion

Barnes argues that the trial court abused its discretion by applying the wrong legal standard to determine that TV was competent to testify. We disagree.

In *State v. Allen*, our Supreme Court outlined the test a trial court must employ when assessing the competency of a child witness. 70 Wn.2d 690, 692, 424 P.2d 1021 (1967). The trial court must determine whether the child exhibits:

> (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; and (5) the capacity to understand simple questions about it.

*Id.* Barnes argues that the trial court applied the wrong legal standard when making a finding on factors one and two.

Regarding the first factor, Barnes argues that the trial court applied the wrong standard because the court relied on TV's answers to the State's hypothetical questions regarding whether something was true or imaginary. The court acknowledged that TV initially struggled in answering the question of whether she understood the difference between the truth and a lie, but found that "she did by examples indicate that she did have an understanding of the difference between fiction and reality." 3 RP at 287. Specifically, TV was able to answer whether a series of posed hypotheticals were truths or lies. She then promised to not testify to anything that was a lie or pretend. The trial court ruled that TV "ha[d] the understanding and the knowledge of her obligation to speak the truth on the witness stand." 3 RP at 287. Therefore, the trial court did not apply the wrong legal standard.

Regarding the second factor, Barnes argues that the trial court applied the wrong standard when it determined that TV had the mental capacity at the time of the occurrence based on her demeanor in the forensic interview. In support, Barnes references the portion of the trial court's ruling describing TV as verbally agile and paying close attention during the forensic exam. However, a trial court may infer the second factor of the *Allen* test based on the child's overall demeanor and manner of answering questions. *State v. Sardinia*, 42 Wn. App. 533, 537, 713 P.2d 122 (1986). Therefore, it was not untenable for the trial court to consider TV's demeanor and ability to answer questions during the interview.

Barnes also argues that the trial court abused its discretion in ruling on factors two and three of the *Allen* test because TV was unable to recall contemporaneous events during her testimony. In support, Barnes points to various inconsistencies in TV testimony over the course of trial.

However, "[i]nconsistencies in the child witness's testimony bear on credibility, not admissibility." *State v. Przybylski*, 48 Wn. App. 661, 665, 739 P.2d 1203 (1987). A competency determination of a child witness does not require the trial court examine the child regarding the particular issues and facts of the case. *Id.* at 666 (holding a five year old witness was competent to testify where she "demonstrated an ability to recall and recount past events and to intelligently respond to questions."); *Sardinia*, 42 Wn. App. at 537 (holding the child victim demonstrated an adequate memory to recall the past when she testified that she knew who her school teachers were and what her performance in school had been). Here, TV demonstrated an ability to recall past events and to intelligently respond to questions.

Based on the record, we hold that the trial court did not abuse its discretion in finding TV competent to testify at trial.

D. ADMISSION OF CHILD HEARSAY STATEMENTS

Barnes argues that the trial court abused its discretion in ruling that TV's child hearsay statements were admissible because (1) there was no corroborative evidence and (2) the trial court failed to consider the reliability of each statement individually. We disagree.

Hearsay statements of a child under the age of 10 are admissible in a criminal case when the statements describe sexual or physical abuse of the child; the court finds that the time, content, and circumstances of the statements provide sufficient indicia of reliability; and either the child testifies at the proceedings or the child's statements are supported with corroborative evidence of the act. RCW 9A.44.120(1), (2)(a), (b); *State v. Kennealy,* 151 Wn. App. 861, 880, 214 P.3d 200 (2009). We review a trial court's decision to admit child hearsay statements for an abuse of discretion. *Id.* at 879.

In determining the reliability of child hearsay statements, the trial court considers the *Ryan*[2] reliability factors: (1) whether there is an apparent motive to lie, (2) the general character of the declarant, (3) whether more than one person heard the statements, (4) the spontaneity of the statements, (5) the timing of the declaration and the relationship between the declarant and the witness, (6) whether the statement contained express assertions of past fact, (7) whether the declarant's lack of knowledge could be established through cross-examination, (8) the remoteness of the possibility of the declarant's recollection being faulty, and (9) whether the surrounding circumstances suggested the declarant misrepresented the defendant's involvement. *Id.* at 880. No single factor is decisive, but the factors must be substantially met to indicate sufficient reliability. *Id.* at 881.

Barnes argues that corroborative evidence was required to support TV's hearsay statements because TV should have been ruled incompetent to testify and therefore unavailable. However, as explained above, the trial court did not abuse its discretion in finding TV competent to testify and therefore she was not unavailable as a witness. Because TV testified at trial, the State was not required to support TV's statements with corroborative evidence of the act. RCW 9A.44.120(2)(a), (b).

Regarding Barnes's second argument, Barnes never objected to the trial court's method of applying the *Ryan* factors generally to all of TV's statements rather than on an individual basis. In order to raise the objection for the first time on appeal, the appellant must show admission of the evidence was a "manifest error affecting a constitutional right." *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). But Barnes argues only that the trial court

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[2] *State v. Ryan*, 103 Wn.2d 165, 176, 691 P.2d 197 (1984).

abused its discretion. He makes no argument on appeal why RAP 2.5(a) applies. Thus, we decline to reach this issue.

We hold that the trial court did not abuse its discretion in ruling that TV's child hearsay statements were admissible under RCW 9A.44.120.

E. PROSECUTORIAL MISCONDUCT

Barnes argues that the prosecutor's statements during closing argument improperly shifted the State's burden of proof and created a "false choice" by telling the jury that they would need to find the State's witnesses were lying in order to find Barnes not guilty. We disagree.

1. Legal Principles

To prevail on a claim of prosecutorial misconduct, a defendant must show " 'that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.' " *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (quoting *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). We review allegedly improper arguments of the prosecutor in the context of the total argument, the evidence addressed during argument, the issues in the case, and the trial court's instructions. *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). During closing argument, the State is afforded wide latitude in drawing and expressing reasonable inferences from the evidence. *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). The State may also respond to defense arguments in its closing. *Russell*, 125 Wn.2d at 86. Prejudice is established by showing a substantial likelihood that the prosecutor's misconduct affected the verdict. *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

2. No Misconduct

When the State and defense present two conflicting versions of events at trial, the jury need not determine which version is true in order to reach a verdict. *State v. Miles*, 139 Wn. App. 879, 890, 162 P.3d 1169 (2007). Even if the jury remains unpersuaded by the defense evidence, it still "only [has] to entertain a reasonable doubt as to the State's case." *Id.* Therefore, a prosecutor engages in misconduct by informing the jury that they may only acquit the defendant if they believe the evidence defense presented. *Id.*

Barnes relies on *Miles* to argue that the prosecutor here committed misconduct by commenting on the credibility of the State's witnesses. But here, the prosecutor never told the jury that they had heard mutually exclusive versions of the events. The prosecutor also never told the jury that if the defense witnesses are incorrect, then the State's witnesses must be correct. Given that Barnes did not present any witnesses to testify to a different version of the events at trial,[3] the prosecutor could not have argued that the jury must choose which side's witnesses were correct.

Barnes's theory of the case was that Heard had coached TV into disclosing the abuse because of Heard's animosity toward Keshia. Barnes also directed considerable argument toward Jones's credibility, who he argued had given a false name to police, had not cooperated with the investigation, and through her actions showed she did not want to be involved. His theory was that Jones's hostility during the investigation and trial showed that "she knew Mr. Barnes was not guilty of these charges." 7 RP at 779. Because Barnes's defense largely entailed

[3] At trial, the only witness Barnes called to testify was the defense investigator, who testified to the accuracy of the transcription of the defense interviews of State witnesses.

undermining the credibility of the State's witnesses, it was not improper for the prosecutor to respond to this argument and inform the jurors that they were the sole judges of credibility.

Further, contrary to Barnes's assertion, the State never told the jury that they should find Barnes guilty because he had failed to present any evidence showing he was not guilty. The prosecutor merely argued that there was no evidence to support Barnes's argument that TV and the other witnesses fabricated their testimony. A prosecutor is permitted to argue the absence of evidence to support the defendant's theory of the case.

We hold that the prosecutor's arguments were not improper and therefore that Barnes's prosecutorial misconduct claim fails.

F. COMMUNITY CUSTODY CONDITIONS

Barnes challenges a number of community custody conditions imposed by the sentencing court as either unauthorized or unconstitutional. We hold the prohibition against frequenting places where children congregate is unconstitutionally vague. We also hold that the conditions restricting Barnes's access of locations where alcohol is sold, use of the Internet, and patronizing businesses promoting commercialization of sex were not crime-related.

1. Standard of Review

We review de novo the sentencing court's statutory authority to impose a particular community custody condition. *State v. Acevedo*, 159 Wn. App. 221, 231, 248 P.3d 526 (2010). However, we review a challenge that the condition is not crime-related for abuse of discretion. *State v. Sanchez Valencia*, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010); *State v. Zimmer*, 146 Wn. App. 405, 413, 190 P.3d 121 (2008).

In applying this standard, we will reverse a condition only if we find that imposition of the condition was manifestly unreasonable. *State v. Irwin*, 191 Wn. App. 644, 652, 364 P.3d 830

(2015). Imposing an unconstitutional condition is "manifestly unreasonable." *Id.* Community custody conditions are not presumed to be constitutionally valid. *Sanchez Valencia*, 169 Wn.2d at 793. If we determine a sentencing court imposed an unauthorized condition on community custody, we remedy the error by remanding to the sentencing court with instruction to strike the unauthorized condition. *State v. O'Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

2. Frequenting Locations Where Children Congregate

The trial court imposed community custody condition 24, which states, "Do not go to or frequent places where children congregate, (I.E. Fast-food outlets, libraries, theaters, shopping malls, play grounds and parks, etc.) unless otherwise approved by the Court." CP at 173. In *State v. Wallmuller*, this court recently held that a similar condition was unconstitutionally vague. No. 50250-0-II, (Wash. Ct. App. Aug. 7, 2018) (part published), http://www.courts.wa.gov/opinions/pdf/D2%2050250-0-II%20Published%20Opinion.pdf. We follow *Wallmuller* and hold that community custody condition 24 also is unconstitutionally vague.

3. Other Community Custody Conditions

RCW 9.94A.703(3)(f)[4] provides the sentencing court discretionary authority to order Barnes to "[c]omply with any crime-related prohibitions." A condition is crime-related only if there is specific evidence showing it contributed to the offense. *State v. Jones*, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003). Barnes argues that the trial court imposed three community custody conditions that were not crime related.

4 RCW 9.94A.703 has been amended since the events of this case transpired; however, these amendments do not materially affect the statutory language relied on by this court. Accordingly, we refrain from including the word "former" before RCW 9.94A.703.

First, community custody condition 16, states, "Do not enter into any location where alcohol is the primary product, such as taverns, bars, and/or liquor stores." CP at 172. Here, there is no evidence that alcohol played a role in Barnes's offense. Therefore, the trial court erred by prohibiting Barnes from entering a location where alcohol is the primary product.

Second, community custody condition 28 states,

> You shall not have access to the Internet except for educational or employment purposes at any location in any medium to include cellphones, nor shall you have access to, possess, or peruse any sexually explicit materials in any medium. You are also prohibited from joining or perusing any public social websites ([Facebook], Myspace, *Craigslist*, etc.), Skyping, or telephoning any sexually-oriented 900 numbers.

CP at 173. Internet use is crime-related if there is evidence that Internet use "contributed in any way to the crime." *State v. O'Cain*, 144 Wn. App. at 775.

Here, there was no evidence that the Internet use, public social websites, Skype, or sexually-oriented 900 numbers contributed in any way to Barnes's offense. Therefore, the trial court erred by prohibiting Barnes from engaging in those activities.

Third, community custody condition 29 states, "Do not patronize prostitutes or any businesses that promote the commercialization of sex; also, do not go to or loiter at any place where sexually explicit materials are sold." CP at 173. We agree that the sentencing court abused its discretion in imposing the community custody condition prohibiting Barnes from patronizing businesses that promote commercialization of sex. There was no evidence to suggest that businesses promoting the commercialization of sex contributed in any way to Barnes's crime. Therefore, the trial court erred by prohibiting Barnes from patronizing such businesses.

However, we affirm the sentencing court's imposition of the community custody condition prohibiting Barnes from patronizing prostitutes. It is a misdemeanor to patronize a prostitute. RCW 9A.88.110(1)(c)(3). And the sentencing court may require an offender to

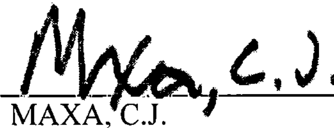
engage in law-abiding behavior. *Jones*, 118 Wn. App. at 205-06. Therefore, the sentencing court did not abuse its discretion in prohibiting Barnes from patronizing prostitutes in violation of Washington law.

We hold that the sentencing court abused its discretion in imposing community custody conditions 16, 24, 28, and the portion of 29 related to patronizing businesses that promote the commercialization of sex and frequenting places where sexually explicit material is sold.

CONCLUSION

We affirm Barnes's conviction, but we remand with instructions to strike community custody conditions 16, 24, 28 and a portion of condition 29.

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.



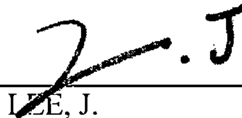
MAXA, C.J.

I concur:

WORSWICK, J.

Lee, J. (concur in part and dissent in part) — I concur with the majority's opinion in all respects, except with regard to Barnes' challenge to community custody condition 24 on unconstitutional vagueness grounds.

Barnes challenges community custody condition 24, which prohibits him from frequenting places where children congregate unless otherwise approved by the court. He argues that the condition was not crime-related and was unconstitutionally vague. For the same reasons articulated in my concurrence/dissent in *State v. Wallmuller*, No. 50250-0-II, (Wash. Ct. App. Aug. 7, 2018) (part published), http://www.courts.wa.gov/opinions/pdf/D2%2050250-0-II%20Published%20Opinion.pdf, I respectfully disagree with the majority and would hold that the condition was crime-related and not unconstitutionally vague.



LEE, J.

CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Petition for Review to opposing counsel at Piece County Prosecutor's Office via email at pcpatcecff@ao.pierce.wa.us, and caused a true and correct copy of the same to be sent to appellant by deposit in U.S. mail, with first-class postage prepaid at the following address: Brandon Barnes, DOC 853558, Stafford Creek CC, 191 Constantine Way, Aberdeen, WA. 98520.

DATED this 13th day of August, 2018.

/s/ Kathryn Russell Selk
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- jschach@co.pierce.wa.us

**Comments:**

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Sender Name: Kathryn Selk - Email: KARSdroit@gmail.com
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