FILED
Court of Appeals
Division II
State of Washington
11/15/2018 11:54 AM

Supreme Court No. 96532-3
Court of Appeals No. 50282-8-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EDWARD COCOM-VAZQUEZ

Petitioner.

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

The Honorable David E. Gregerson, Judge

PETITION FOR REVIEW

LISA E. TABBUT
Attorney for Appellant
P. O. Box 1319
Winthrop, WA 98862
(509) 996-3959

TABLE OF CONTENTS

Page

A. IDENTITY OF PETITIONER……………………………………………………..1

B. COURT OF APPEALS DECISION………………………………………………1

C. ISSUE PRESENTED FOR REVIEW……………………………………………..1

Basic due process requires trial by a fair tribunal. Washington's appearance of fairness doctrine requires the court to appear to be impartial. Did the appellate court err as a matter of law by holding Mr. Cocom-Vazquez was not unfairly prejudiced by the trial court's use of its Spanish language skills, untested by cross-examination, to hold that Cocom-Vazquez, a native Yucatan Maya speaker, had adequate Spanish language skills to make a knowing waiver of his *Miranda* rights after being read the rights in Spanish?...1

D. STATEMENT OF THE CASE……………………………………………………..1

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED……………………...8

The trial court's use of its own untested Spanish language skills at the CrR 3.5 hearing violated the appearance of fairness doctrine and prejudiced Mr. Cocom-Vazquez…….8

F. CONCLUSION………………………………………………………………….….12

CERTIFICATE OF SERVICE……………………………………………………………13

TABLE OF AUTHORITIES

Page

Washington Supreme Court Cases

Sherman v. State, 128 Wn.2d 164, 905 P.2d 355 (1995) 9
State v. Gamble, 168 Wn.2d 161, 225 P.3d 973 (2010) 8, 9
State v. Solis-Diaz, 187 Wn.2d 535, 387 P.3d 703 (2017) 9

Federal Cases

In re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955) 8

Other Authorities

CrR 3.5 .... 4, 5, 6, 8, 9, 12
ER 605 .... 9, 12
RAP 13.4 8
U.S. Const. Amend. VI 8
U.S. Const. Amend. XIV 8
Wash. Const. art. I, § 22 8

A. IDENTITY OF PETITIONER

Petitioner, Edward Cocom-Vazquez, through his attorney, Lisa E. Tabbut, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Mr. Cocom-Vazquez seeks review, in part, of the October 16, 2018, unpublished opinion of Division Two of the Court of Appeals (Appendix).

C. ISSUE PRESENTED FOR REVIEW

Basic due process requires trial by a fair tribunal. Washington's appearance of fairness doctrine requires the court to appear to be impartial. Did the appellate court err as a matter of law by holding Mr. Cocom-Vazquez was not unfairly prejudiced by the trial court's use of its Spanish language skills, untested by cross-examination, to hold that Cocom-Vazquez, a native Yucatan Maya speaker, had adequate Spanish language skills to make a knowing waiver of his *Miranda* rights after being read the rights in Spanish?

D. STATEMENT OF THE CASE

Clark County detectives learned that an IP address associated with Mr. Cocom-Vazquez's residence had downloaded, and had available to share, videos of what appeared to be young girls engaged in sexual activity. RP2 202. The detectives obtained a search warrant to search computers

and associated computer equipment in Mr. Cocom-Vazquez's home. RP2 201-02. Mr. Cocom-Vazquez was home when the police served the warrant. RP2 205.

Mr. Cocom-Vazquez is a native Yucatan Maya speaker. RP1 104, 159. He lived in Mexico for the first 20 years of his life. RP1 160. His wife grew up in a nearby town and is also a native Maya speaker. RP1 100. The couple moved to the Vancouver area after their oldest child was born. A second child was born in the United States. RP1 101.

Mr. Cocom-Vazquez worked planting trees and in a family-owned pallet-making business. His co-workers mostly speak Maya. RP1 160-61. Away from work, Mr. Cocom-Vazquez associated mostly with family who, like him, spoke Maya. RP1 84, 86. Mr. Cocom-Vazquez learned a little Spanish along the way but had no proficiency in the language. RP1 87, 167, 172. Mr. Cocom-Vazquez's children spoke English and a little Spanish. RP1 101. Because of the language barrier, the children had limited verbal exchanges with their father. RP1 105.

After serving the warrant, Detective David Brown determined Mr. Cocom-Vazquez was from Mexico and Mr. Cocom-Vazquez acknowledged speaking a little Spanish. RP2 205-06. Detective Brown, who did not speak Spanish, called a language line and directed an interpreter to give Mr.

Cocom-Vazquez his *Miranda* rights in Spanish. RP2 206-07. The language line interpreter ostensibly translated the rights into Spanish. RP2 206-10. The language line interpreter had a problem trying to explain the nature of the allegations against Cocom-Vazquez to Mr. Cocom-Vazquez. RP2 228.

Washington State Patrol Lieutenant Randy Hullinger was summoned to the home to help with Spanish language translation. RP1 39. Lieutenant Hullinger took Spanish in high school and college before serving a two-year religious mission in Argentina where he spoke Spanish daily. RP1 33. After returning from his mission, Lieutenant Hullinger continued to use Spanish regularly and has assisted in translating in Spanish while working for the State Patrol. RP1 33-37. He believed he had the skills to recognize a non-native Spanish speaker. RP1 37-38. He read Mr. Cocom-Vazquez *Miranda* rights in Spanish and had Mr. Cocom-Vazquez sign an advice of rights form. RP1 39-42, 175. He talked with Mr. Cocom-Vazquez in Spanish, and Mr. Cocom-Vazquez made statements about images of young girls and viewing them on his computer. RP1 47; RP2 210.

The state charged Mr. Cocom-Vazquez with possessing and dealing in images of minors engaged in sexually explicit conduct. CP 1-6, 148-50, 161-62.

Mr. Cocom-Vazquez motioned the court to suppress his statements based on his inability to understand the Spanish language. CP 7-34; RP1 33-189, RP2 201-305.

Mr. Cocom-Vazquez was assisted in court with a Maya translator after it became apparent he did not communicate adequately in Spanish. RP1 12-14.

At the CrR 3.5 hearing, wife Antonia Ruiz-Vazquez testified her husband spoke Maya and had very limited Spanish. RP1 83. Maya Interpreter Alvaro Gongora had interpreted for Mr. Cocom-Vazquez. In his opinion, Mr. Cocom-Vazquez barely understood Spanish. RP1 114. Gongora reviewed the *Miranda* rights form and noted many words used had no Maya equivalent. RP1 114. He also said that in the Maya culture, people are very polite and will say "yes" or "no" to a situation just to get rid of the situation and this was especially true when dealing with an authority figure such as a police officer. RP1 116-17.

Translation in the Maya language is problematic because there are no literal translations. In other words, in translating another language into Maya, the actual meaning of a word must be explained. RP1 114, 120.

Clark County district court translator Korrine Wells provided Spanish language interpretation for Mr. Cocom-Vazquez at an initial court

hearing. RP1 140. She reviewed a video of the hearing. She realized in hindsight that Mr. Cocom-Vazquez did not track well when she interpreted English to Spanish. RP1 142.

Mr. Cocom-Vazquez testified he told the police he did not understand Spanish or English. RP1 166-67. He could not understand the Spanish speaker on the language line. RP1 168-69. When communicating with Lieutenant Hullinger, he only signed the rights form because it was given to him to sign. In his culture, you sign things when asked. RP1 174-75. He did not understand Lieutenant Hullinger's Spanish. RP1 17-72.

Nancy Brewer-Conta, a qualitied Spanish interpreter who had spent many years of her life working in Spanish language education at Barbier International, tested Mr. Cocom-Vazquez's Spanish language abilities. RP2 233-34. Mr. Cocom-Vazquez tested at a beginner level in reading and spoken Spanish. RP2 241. He rated a "poor" communication ability. RP2 242. Given his limited proficiency in Spanish, she believed he would have a difficult time understanding the concepts in *Miranda* rights. RP2 246-48.

At various times during the CrR 3.5 hearing, the court interjected in Spanish. The court told the parties he spoke a little Spanish. He asked

Lieutenant Hullinger words in Spanish and had him translate them to English. RP1 75.

The court entered written findings of fact and conclusions of law on the CrR 3.5 hearing. The findings and conclusions follow.

I. FINDINGS OF FACT

> 5. The defendant was present at his residence when the search warrant was served. Detective Brown asked the defendant if he spoke English. The defendant responded that he spoke "a little". Detective Brown ascertained that the defendant spoke Spanish. The defendant is from Mexico. The defendant's native language is Maya. Detective Brown utilized a telephonic "language line" interpreter to speak to the defendant in Spanish. Detective Brown advised the defendant of his Constitutional Rights in Spanish using the interpreter. (*The State is unable to produce the language line statement made by the defendant through the language line interpreter.)
>
> 6. Washington State Patrol Sgt. Randy Hullinger arrived at the defendant's residence. Trooper Hullinger is fluent in Spanish. Trooper Hullinger advised the defendant of his Constitutional Rights in Spanish, and presented them to the defendant in writing using an English/Spanish Constitutional Rights form. The defendant signed the form and indicated that he understood his rights and would speak with the police.
>
> 7. The defendant, through Sgt. Hullinger, then admitted to police that they would find images of child pornography on his computer and that they would find the ARES file sharing program. The dependent told police how he was introduced to images of younger girls and how he would use ARES to search for child pornographic images.
>
> 8. The Defendant's answers to Sgt. Hullinger's questions were appropriately responsive. Sgt. Hullinger and the defendant

> conversed with no indication of any difficulty in communicating and understanding each other.
>
> II. CONCLUSIONS OF LAW
>
> 7. The statements the defendant made to the police were made after a knowing and voluntary waiver of his Constitutional Rights. Under the totality of circumstances the defendant's statements were voluntarily made and are admissible.

CP 178-82.

Mr. Cocom-Vazquez waived his right to a jury trial. The court found him guilty at a stipulated facts bench trial of one count of dealing in depictions of minors engaged in sexually explicit conduct in the first degree and two counts of possession of depictions of minors engaged in sexually explicit conduct in the first degree. CP 163-82.

Post-sentencing, Mr. Cocom-Vazquez file a notice of appeal. CP 205. He asserted on the appeal that the trial judge violated the appearance of fairness doctrine by relying on his Spanish language skills, untested by cross-examination, to hold that Mr. Cocom-Vazquez, a native Yucatan Maya speaker, had adequate Spanish language skills to make a knowing waiver of his *Miranda* rights after being read the rights in Spanish. The Court of Appeals disagreed with Mr. Cocom-Vazquez.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The trial court's use of its own untested Spanish language skills at the CrR 3.5 hearing violated the appearance of fairness doctrine and prejudiced Mr. Cocom-Vazquez.

Under RAP 13.4, a petition for review will be accepted by the Supreme Court

> (1) If the decision of the Court of Appeals conflicts with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals conflicts with a published decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

A fair tribunal is a basic tenant of due process. *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 right to be tried and sentenced by an impartial court. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, § 22. 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. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010). "'The law

goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.'" *Id*.

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. *State v. Solis-Diaz*, 187 Wn.2d 535, 540, 387 P.3d 703 (2017); *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995). The party asserting a violation of the appearance of fairness must show a judge's actual or potential bias. *Gamble*, 168 Wn.2d at 187.

ER 605, Competency of a Judge as a Witness, provides

> The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

Here the impropriety of the court, and the unfairness of the CrR 3.5 hearing is proven by the court's testifying as a witness by interjecting its Spanish language skills into the case to resolve the essential issue of whether Mr. Cocom-Vazquez had enough Spanish language skills to have made a knowing and intelligent waiver of his *Miranda* rights. This issue was vociferously objected to by Mr. Cocom-Vazquez and was the issue at the CrR 3.5 hearing. RP1 32-189; RP2 210-63.

In hearing and deciding the issue, the court repeatedly interjected its Spanish language skills into the mix. The court told the parties he spoke a little Spanish. RP1 75. During Lieutenant Hullinger's testimony, the court threw words at the lieutenant and asked him to translate them from Spanish to English. RP1 75.

During Mr. Cocom-Vazquez's testimony, the court inquired partially in English and, apparently, partially in Spanish, on whether the interpreter was interpreting everything.

> THE COURT: Well, let me clarify, because I thought I heard something (speaking Spanish) somewhere in there, and I didn't hear that in the translation so
>
> THE INTERPRETER: Yeah, this interpreter is only interpreting what this interpreter is interpreting.

RP1 167.

During direct examination of its expert witness on spoken Spanish, Ms. Brewer-Conta, the court cut off the defense when it attempted to point out differences in Spanish from a person who speaks, or learns, Spanish in Argentina, such as Lieutenant Hullinger, versus someone who might learn Spanish in Mexico, such as a language line interpreter.

> THE COURT: Well, to save time, Counsel, we need to finish at the end of the day. I'm aware of some general dialectic and

> grammatical difference. For example, the use of the informal (Court speaks Spanish) in an Argentinean Spanish; so don't want to waste a lot of time on this. Let's get to the most germane points.

RP2 249.

The court later repeatedly asked Ms. Brewer-Conta to translate words from the court's Spanish into English. RP2 261-62.

Finally, in ruling that Mr. Cocom-Vazquez's statements to law enforcement were admissible, the court emphasized its Spanish language skills.

> I will also note that during the course of these proceedings, I have during the relay translation and I noted several important words that appear to be identical to both Spanish and Mayan; words that pertain to the advisement and alleged waiver of rights in responses given. Words which in English are: Eleven, twelve, telephone, bank, account, document, not guilty, police, rights, attorney, television; many if not all, of those words appeared to the Court to be identical in both languages.

RP2 303-04.

No instances of the court asserting its knowledge of the Spanish language were subject to cross-examination by the defense. The court made itself a witness in complete denial of any appearance of fairness. Defense counsel called for the court to acknowledge the unfairness:

> What's at issue is the court using its own perceived knowledge and skill to make conclusions based on facts that are not part of the record. We do not know the court's background, education,

> training, and experience and skill with the Spanish language. Counsel has no way to make a record or any objection based on conclusions the court has reached based on its "own" findings. Had the court not used that knowledge during the conduct of the case in the way it did this wouldn't be an issue.

CP1 152.

The court's interjection of its untested personal knowledge of Spanish made the court a witness at the CrR 3.5 hearing thus violating the appearance of fairness doctrine and violating ER 605.

Mr. Cocom-Vazquez is entitled to a CrR 3.5 hearing free of judicial unfairness and most especially where the judge does not put himself in the place of an untested witness.

F. CONCLUSION

This court should accept review, find reversible error in the court's violation of the appearance of fairness doctrine, and remand to the trial court for further action.

Respectfully submitted November 14, 2018.

LISA E. TABBUT/WSBA 21344
Attorney for Edward Cocom-Vazquez

CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Petition for Review to (1) Clark County Prosecutor's Office, at prosecutor@clark.wa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it to Edward Cocom-Vazquez/DOC#398229, Coyote Ridge Corrections Center. PO Box 769, Connell, WA 99326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed November 14, 2018 in Winthrop, Washington.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Edward Cocom-Vazquez, Petitioner

APPENDIX

Filed
Washington State
Court of Appeals
Division Two

October 16, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. EDWARD COCOM-VAZQUEZ, Appellant.	No. 50282-8-II UNPUBLISHED OPINION

MELNICK, J. — Edward Cocom-Vazquez appeals his convictions for one count of dealing in depictions of a minor engaged in sexually explicit conduct in the first degree and two counts of possession of depictions of a minor engaged in sexually explicit conduct in the first degree. He contends the trial court violated the appearance of fairness doctrine for comments made during the CrR 3.5 hearing. Cocom-Vazquez further argues the sentencing court erred by imposing an unconstitutionally vague sentencing condition barring unauthorized use of electronic media and by listing the wrong bench trial date on his judgment and sentence. We affirm Cocom-Vazquez's convictions, but accept the State's concession of error on the sentencing issues and remand for the sentencing court to either strike or clarify the sentencing condition and correct the bench trial date on the judgment and sentence.

FACTS

Detectives traced downloaded images of minors engaged in sexual activity to Cocom-Vazquez's computer. The computer contained software to allow the images to be shared. After executing a search warrant on the computer and an attached hard drive, detectives discovered

numerous images and videos of minors engaged in sexually explicit conduct. After reading Cocom-Vazquez his *Miranda*[1] rights, detectives interviewed Cocom-Vazquez, who admitted that his computer contained images of child pornography and a file-sharing program.

Cocom-Vazquez was born in Mexico and his native language is Maya. He also speaks some Spanish.

The State charged Cocom-Vazquez with one count of dealing in depictions of a minor engaged in sexually explicit conduct in the first degree and two counts of possession of depictions of a minor engaged in sexually explicit conduct in the first degree.

Cocom-Vazquez filed a motion to suppress his confession. Cocom-Vazquez argued he did not knowingly, intelligently, and voluntarily waive his *Miranda r*ights before confessing because his rights were read to him in Spanish instead of Maya.

During the hearing, Washington State Patrol Lieutenant Randy Hullinger testified that he was fluent in Spanish and read Cocom-Vazquez his *Miranda* rights before Cocom-Vazquez confessed. Hullinger studied Spanish in the United States for several years and then lived in Argentina for two years. Hullinger first engaged Cocom-Vazquez in conversation in Spanish and could understand Cocom-Vazquez and believed Cocom-Vazquez could understand him. Hullinger felt "very comfortable" understanding and communicating with Cocom-Vazquez. 1 Report of Proceedings (RP) at 49.

At the conclusion of Hullinger's testimony, the trial court stated that it had "a few questions" and that the trial court spoke Spanish "a little bit" and wanted the lieutenant to translate several words from Spanish to English. 1 RP at 75. The trial court spoke some words and phrases in Spanish and asked Hullinger to translate them into English. Hullinger translated the words:

---

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Translate, lawyer, spouse, signature, do you understand, to clarify, to look for, accent, month, image, and child pornography. Defense counsel did not object and stated that he did not have any further questions.

Cocom-Vazquez testified at the hearing with the assistance of both a Spanish and Maya interpreter. During Cocom-Vazquez's testimony, the trial court interjected with a question for the Maya interpreter, "Well, let me clarify, because I thought I heard something (speaking Spanish) somewhere in there, and I didn't hear that in the translation." 1 RP at 167. The interpreter responded, "Yeah, this interpreter is only interpreting what this interpreter is interpreting." 1 RP at 167. The trial court answered, "Correct. Okay. All right." 1 RP at 167.

Defense counsel then called Nancy Brewer-Conta, a Spanish interpreter who interviewed Cocom-Vazquez prior to trial and opined that Cocom-Vazquez could "get around on a day-to-day basis using Spanish" but he may not have understood some of his *Miranda* rights when they were read to him by Hullinger. 2 RP at 241. Defense counsel asked several questions about the difference between Spanish in Mexico, where Coco-Vazquez grew up, and Spanish in Argentina where Hullinger lived for two years. The trial court commented to defense counsel, "Counsel, we need to finish at the end of the day. I'm aware of some general dialectic and grammatical difference. For example, the use of the informal (Court speaks Spanish) in an Argentinean Spanish; so don't want to waste a lot of time on this. Let's get to the most germane points." 2 RP at 249. At the conclusion of Brewer-Conta's testimony, the trial court again spoke some words in Spanish and asked her to translate them into English. Brewer-Conta translated the words: Eleven, fifteen, telephone, bank, account, documents, police, law, lawyer, and television. Defense counsel did not object.

The trial court concluded that Cocom-Vazquez's statements were made to police after a knowing and voluntary waiver of his *Miranda* rights and that the statements were admissible. In its oral ruling, the trial court stated, "I will also note that during the course of these proceedings, I have listened during the relay translating and I noted several important words that appear to be identical to both Spanish and [Maya]; words that pertain to the advisement and alleged waiver of rights in responses given." 2 RP at 303. The trial court then denied Cocom-Vazquez's motion to suppress.

Following the trial court's order, Cocom-Vazquez filed a motion asking for recusal of the trial judge and to reopen the suppression hearing. Cocom-Vazquez argued that the trial court's use of Spanish during the hearing amounted to an impermissible reliance on matters outside the record and it would not be fair for the trial court to continue to preside over the matter. The trial court denied both motions. In its oral ruling, the trial court stated that its denial of the suppression motion "was not based on my use of interpretive skills[,]" rather the ruling was based "on the record that was made by the State and the Defense." 2 RP at 313. The court also entered written findings of fact and conclusions of law.

Cocom-Vazquez waived his right to a jury trial and the matter proceeded to a bench trial. The trial court found Cocom-Vazquez guilty as charged.

The sentencing court sentenced Cocom-Vazquez to 57 months and imposed the additional sentence condition that he have "[n]o unauthorized use of electronic media." Clerk's Papers (CP) at 202. The judgment and sentence states that Cocom-Vazquez's bench trial was held on "4/28/2017" when it actually occurred on March 27, 2017. CP at 183. Cocom-Vazquez appeals.

ANALYSIS[2]

I. APPEARANCE OF FAIRNESS DOCTRINE AND ER 605

Cocom-Vazquez argues that the trial court violated the appearance of fairness doctrine during the CrR 3.5 hearing by interjecting the trial court's Spanish knowledge into the hearing contrary to ER 605. We disagree.[3]

Under the appearance of fairness doctrine, a judge must not be biased or give the appearance of bias. *State v. Solis-Diaz*, 187 Wn.2d 535, 539-40, 387 P.3d 703 (2017). Judges enjoy a presumption of "honesty and integrity." *State v. Chamberlin*, 161 Wn.2d 30, 38, 162 P.3d 389 (2007). The party asserting a violation of the appearance of fairness doctrine must make a showing of a judge's actual or potential bias sufficient to overcome this presumption. *Solis-Diaz*, 187 Wn.2d at 540. In evaluating the trial court's decision on recusal, the test is whether a reasonable observer who knows and understands the relevant facts would conclude that the parties received an impartial hearing. *Solis-Diaz*, 187 Wn.2d at 540.

Cocom-Vazquez unsuccessfully moved for recusal and to reopen the suppression hearing. Recusal lies within the trial court's discretion, and its decision will not be disturbed without a clear showing of an abuse of that discretion. *State v. Gentry*, 183 Wn.2d 749, 761, 356 P.3d 714 (2015).

---

[2] Cocom-Vazquez raises eight assignments of error in his opening brief, but only provides argument on four of those assignments (Nos. 1, 2, 7, and 8). When an appellant fails to raise an issue in connection with an assignment of error and fails to present any argument on the issue or provide any legal citation, we will not consider the merits of that issue. *State v. Olson*, 126 Wn.2d 315, 319, 893 P.2d 629 (1995).

[3] In general, a party may not raise an appearance of fairness doctrine argument for the first time on appeal. *State v. Blizzard*, 195 Wn. App. 717, 725, 381 P.3d 1241 (2016), *review denied*, 187 Wn.2d 1012 (2017). Here, defense counsel did not object during the suppression hearing to the trial court's comments and did not argue below that the appearance of fairness doctrine was violated. Nevertheless, since defense counsel filed a motion for recusal below based on the trial court's comments, we reach this issue.

A court abuses its discretion when a decision is manifestly unreasonable or made on untenable grounds or for untenable reasons. *State v. Perala*, 132 Wn. App. 98, 111, 130 P.3d 852 (2006).

ER 605 provides that "[t]he judge presiding at the trial may not testify in that trial as a witness." This may include when the trial judge does not formally testify, but inserts his or her own personal experience into the decision-making process. *Vandercook v. Reece*, 120 Wn. App. 647, 652 n.12, 86 P.3d 206 (2004).

But, "judges do not leave their common experience and common sense outside the courtroom door." *In re Estate of Hayes*, 185 Wn. App. 567, 598, 342 P.3d 1161 (2015). "The judicial system hopes for a judge possessing experience and knowledge of the workings of the world and the cogs of his community rather than a judge with a vacuumed mind." *Hayes*, 185 Wn. App. at 598.

Here, the trial court notified the parties that it spoke some Spanish. It asked for the translation of certain words from two of the Spanish-speaking witnesses. The trial court also asked Cocom-Vazquez's interpreter for clarification, stating, "I thought I heard something (speaking Spanish) somewhere in there, and I didn't hear that in the translation." 1 RP at 167. The trial court also commented to defense counsel, "Counsel, we need to finish at the end of the day. I'm aware of some general dialectic and grammatical difference. For example, the use of the informal (Court speaks Spanish) in an Argentinean Spanish; so don't want to waste a lot of time on this. Let's get to the most germane points." 2 RP at 249.

Following the trial court's denial of Cocom-Vazquez's motion to suppress, he filed a motion asking for recusal of the trial judge and to reopen the suppression hearing. The trial court stated that its ruling on the suppression motion was not based on the trial court's "interpretive

skills[,]" rather the ruling was based "on the record that was made by the State and the Defense." 2 RP at 313.

The above statements do not amount to trial court testimony in violation of ER 605; rather, they are comments based on common experience and common sense. The trial court's common experience and common sense are not required to be left "outside the courtroom door." *Hayes*, 185 Wn. App. at 598. Moreover, the trial court clarified that its order denying the suppression motion was based on the evidence and not the court's Spanish interpretation skills. Accordingly, Cocom-Vazquez does not overcome the presumption that the trial court acted with honesty and integrity. *See Solis-Diaz*, 187 Wn.2d at 540. A reasonable observer who knows and understands the relevant facts would conclude that Cocom-Vazquez received an impartial hearing. *See Solis-Diaz*, 187 Wn.2d at 540.

Therefore, there was no appearance of fairness doctrine violation and no violation of ER 605. The trial court did not abuse its discretion in denying Cocom-Vazquez's motion for recusal.

Based on our holding, we do not reach Cocom-Vazquez's argument that a different judge should hear this matter on remand.

II. Sentencing Condition

Cocom-Vazquez next argues the sentencing condition that he have "[n]o unauthorized use of electronic media" is void for vagueness. CP at 202. The State concedes that the condition is unconstitutionally vague or overbroad.[4] We accept the State's concession.

[4] While the State concedes that the condition is also overbroad, we only address appellant's argument that it is void for vagueness.

The guarantee of due process, contained in the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution, requires that legal prohibitions, such as sentencing conditions, not be vague. *State v. Irwin*, 191 Wn. App. 644, 652, 364 P.3d 830 (2015). A legal prohibition is unconstitutionally vague if (1) it does not sufficiently define the proscribed conduct so an ordinary person can understand the prohibition or (2) it does not provide sufficiently ascertainable standards to protect against arbitrary enforcement. *State v. Padilla*, 190 Wn.2d 672, 677, 416 P.3d 712 (2018). A vague term can be made definite by clarifying language or an illustrative list. *Irwin*, 191 Wn. App. at 655.

On its face, the plain language of the electronic media condition is ambiguous. The condition does not inform an ordinary person what "unauthorized use" means and what qualifies as "electronic media." Therefore, the condition is unconstitutionally vague. The State correctly concedes this point. We accept the State's concession and remand to the sentencing court to either strike or clarify the condition.

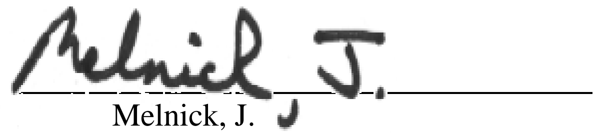
III. BENCH TRIAL DATE ERROR

Cocom-Vazquez next argues that the bench trial date on his judgment and sentence is incorrect. The State concedes that his judgment and sentence contains a clerical error that requires correction. We accept the State's concession.

The judgment and sentence lists the date of Cocom-Vazquez's bench trial as "4/28/2017." CP at 183. April 28, 2017 was actually the date of Cocom-Vazquez's sentencing hearing. His bench trial was March 27, 2017. The remedy for a clerical error in a judgment and sentence form is to remand to the trial court for correction. CrR 7.8(a); see RAP 7.2(e).

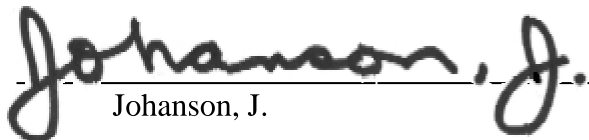
We affirm Cocom-Vazquez's convictions but remand to the sentencing court to either strike or clarify the electronic media sentencing condition and correct the bench trial date on the judgment and sentence.

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.


Melnick, J.

We concur:

Worswick, P.J.


Johanson, J.

LAW OFFICE OF LISA E TABBUT

November 15, 2018 - 11:54 AM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	50282-8
Appellate Court Case Title:	State of Washington, Respondent v Edward Cocom-Vazquez, Appellant
Superior Court Case Number:	14-1-01659-0

The following documents have been uploaded:

- 502828_Petition_for_Review_20181115115301D2025670_0282.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Cocom-Vazquez Petition for Review.pdf

A copy of the uploaded files will be sent to:

- CntyPA.GeneralDelivery@clark.wa.gov
- aaron.bartlett@clark.wa.gov

Comments:

indigent petitioner

Sender Name: Lisa Tabbut - Email: ltabbutlaw@gmail.com
Address:
PO BOX 1319
WINTHROP, WA, 98862-3004
Phone: 877-856-9903

Note: The Filing Id is 20181115115301D2025670