SUPREME COURT NO. 99365-3

NO. 80365-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALFREDO BARRAGAN,

Petitioner.

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

The Honorable Jennifer R. Langbehn, Judge
The Honorable Linda Krese, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. PETITIONER AND COURT OF APPEALS DECISION

Petitioner Alfredo Barragan seeks review of the Court of Appeals' unpublished decision in State v. Barragan, filed November 30, 2020 ("Op."), which is appended to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. The trial court admitted inflammatory internet browser search terms and results that suggested Barragan had the propensity to commit the charged crimes, but which were not probative of a lustful disposition toward the complainant. Did the internet evidence deny Barragan a fair trial?

2. Did the prosecution also deny Barragan a fair trial by misstating the evidence in closing argument, and did defense counsel provide ineffective assistance by failing to object?

C. STATEMENT OF THE CASE[1]

1. **Barragan is accused.**

G., the biological daughter of Barragan, claimed he began molesting her as a child, with the activity progressing to sexual intercourse by the time she was a teenager. 6RP 435-38; 7RP 18-19. G. was 23 when she went to the authorities. 7RP 106. Her mother, Georgina Rocha, had

[1] This petition refers to the verbatim reports as follows: 1RP – 3/14/19; 2RP – 5/22/19; 3RP – 5/23/19; 4RP – 5/28/19; 5RP – 5/29/19; 6RP – 5/30/19; 7RP 6/3/19; 8RP – 6/4/19; 9RP – 6/5/19; 10RP – 6/6/19; 11RP – 6/7/19; 12RP – 6/10/19; and 13RP – 8/16/19.

reportedly found videos on a phone at Barragan's apartment, which prompted the women to contact the police. 6RP 346-47, 353; 7RP 88, 116.

Ultimately, for dates ranging between 2001 and 2018, the State charged Barragan with first degree child rape (count 1), first degree child molestation (count 2), first degree incest (count 3), third degree child rape (count 4), second degree rape based on inability to consent (counts 5-7), and voyeurism (counts 8-14). CP 626-18.

2. **Trial testimony**

Rocha was the State's first witness. Rocha and Barragan married in 1993. 5RP 294-95. They opened a bakery in 2002. 6RP 317-20, 375. They separated in 2011 or 2012 but officially divorced only a few months before trial. 5RP 294-95; 6RP 326, 381-82. G., born in August 1994, is their only child in common. 5RP 295. G. chose to live with Barragan following the couple's separation. 6RP 388.

In 2015, Rocha and Barragan were quarrelling; they had discussed reuniting, but Rocha suspected Barragan was seeing another woman. 6RP 329-30. Rocha demanded that he return his iPhone 6 or reimburse her for the phone. 5RP 330-31, 388-89. Rocha wanted to return the phone, but she also wanted to look for evidence Barragan was cheating. 6RP 332, 389-90. Barragan did find photos of Barragan the other woman. 6RP 390.

But, while searching through the phone's deleted items, Rocha found several videos of a woman Rocha identified as G. sitting on a toilet. 6RP 334-35, 341-42. Rocha kept the phone but did not tell G. about the videos. 6RP 343, 345. Nor did she speak to Barragan. 6RP 342-43. Rocha did encourage G. to move out of Barragan's apartment. 6RP 346.

In 2018, Barragan was in Mexico for several weeks. He asked Rocha to pay rent for him. 6RP 346-47. Rocha went to his apartment to find Barragan's checkbook but initially couldn't find it. 6RP 347. Rocha found it in a nightstand under a Samsung phone. 6RP 346-47. When Rocha handled the phone, it began to play a video of G. having sex with her boyfriend. 6RP 350. Rocha, unfamiliar with "Android" phones, could not locate the video on the phone. But she did find that video and others on a Google "cloud" account associated with the phone. 6RP 351. Rocha also found additional videos showing digital and penile penetration of a woman's vaginal area. 6RP 353. Rocha recognized the woman as G. She also recognized Barragan's hands. 6RP 353-54, 357-58.

Rocha confronted Barragan about the videos the day after he returned from Mexico. 6RP 361-63. She told G. a few days after that. The women contacted Everett police in July 2018 and turned over the Samsung, the iPhone 6, and Rocha's iPhone 7. 6RP 364-65, 412-13. The Lake Stevens police took over the investigation 8RP 212.

G. also testified. Her family moved into a downtown Arlington duplex when she was in fourth grade, or about nine years old. 6RP 427-28, 430-31, 433. She lived there until she was a senior in high school. 6RP 427-28. G. testified Barragan began abusing her after the family moved to the Arlington duplex. Barragan put her to bed at night while Rocha was working. 6RP 431. He read G. a story then appeared to fall asleep. 6RP 431. But, sometimes, his penis fell out of his shorts. 6RP 431-32, 434. Curious, G. would poke at it. 6RP 432. Eventually, Barragan began to watch G. play with his penis. 6RP 436-37. Soon after, Barragan showed G. how to touch her vaginal area and to use small vibrating flossing device to produce pleasant sensations. 6RP 437-39. Not long after that, Barragan began performing oral sex on G. 6RP 442-43. At some point, he also penetrated her vagina with a finger. 6RP 445; 7RP 144-45.

According to Rocha and G., the family socialized with other families and frequently had long-term visitors, including family members. E.g., 6RP 368-71; 7RP 130-33, 138-39. Nonetheless, according to G., the sexual activities expanded outside of the bedroom. 6RP 451-52. Not until G.'s sixth grade year did she begin to realize that these types of activities were typically reserved for romantic couples. 6RP 449.

A practice then developed in which Barragan required G. to "pay time" (engage in sexual activity for periods of time) in order to, for example, hang out with her friends or obtain a new pair of shoes. 6RP 453-54. The highest value activities were those that made G. most uncomfortable. 7RP 7-8. G. provided inconsistent accounts regarding when this practice began. At trial, she said it started in sixth grade. 8RP 186. In an earlier interview, she said it started in high school. 8RP 186-87.

After Barragan caught G. smoking marijuana with her friends, he began supplying her with mind-altering substances. 7RP 18, 21. They frequently smoked marijuana. 7RP 23-24. Beginning G.'s junior year of high school, Barragan also supplied other drugs, including hallucinogens, to G. and her friends. 7RP 23-25, 58, 154.

G.'s parents separated her senior year of high school. G. chose to live with Barragan. 7RP 36-37, 52. G. and Barragan moved into the Lake Stevens apartment where Barragan resided at the time of his arrest. 7RP 36.

G. testified she and Barragan maintained the appearance of a normal father-daughter relationship. For example, they co-coached volleyball at the Boys & Girls Club. 7RP 45-46, 140; 8RP 366-67. Two of G.'s friends (including one who briefly lived with Barragan and G.) testified they never noticed anything strange. 8RP 360; 9RP 386

In 2015, G. moved in with Rocha. 7RP 51-52. But G. continued to visit Barragan. She visited Sunday evenings. They watched Game of Thrones or Westworld on HBO, and G. spent the night. 7RP 55.

In 2018, Rocha showed G. videos that showed a woman from the waist down. At trial, G. testified that recognized herself, as well as the blanket and the couch depicted the videos. 7RP 88-89, 91, 98. In one of the videos, fingers (which G. recognized as Barragan's) can be seen pulling down pants and touching the woman's clitoris. 7RP 89, 96. In another video, a finger penetrates G.'s vagina. 7RP 89. In a third, a penis penetrates G.'s vagina. 7RP 89; 9RP 507 (detective's testimony). G.'s pubic hair length varies throughout the videos. 7RP 94; see also 9RP 505 and 10RP 566 (detective's testimony).

The videos themselves were introduced during Detective Kristen Parnell's testimony. 9RP 502-07; Ex. 283 (videos). Metadata for the videos did not reveal the date or time they were taken. But screen shots of similar views date from November 9 and December 20, 2016. 9RP 497-502; 10RP 596-97; Ex. 272 (Samsung metadata). Neither date is a Sunday. 10RP 596. As discussed above, in another set of videos, G. (who also identified herself) can be seen sitting on the toilet. 7RP 90, 92; 9RP 507-19 (detective's testimony); Ex. 282 (videos). G. did not authorize any bathroom recording. 7RP 103. Metadata for the video files

suggests they were created on several dates in 2015. Ex. 273 (iPhone 6 metadata).

Detective Parnell also testified. She interviewed Barragan after his July 2018 arrest. 8RP 219. He was not shown videos during the interview, 10RP 567, but he acknowledged he had taken approximately five videos of himself engaging in sexual activity—mostly touching—with a woman who was not G. Ex. 297 at 3-5, 7-15 (transcript of admitted audio exhibit). He did not want to reveal the woman's identity because it would be embarrassing for her. Ex. 297 at 4, 26, 30. Barragan did not remember taking any bathroom videos. But any such videos likely depicted the same woman as the other videos. Ex. 297 at 17-19, 21, 23-24, 50; 10RP 568. Barragan told police officers he had had a good relationship with G. and felt sad about her claims of abuse. Ex. 297 at 37-38.

Upon arrest, Barragan's consented to a search of his phone. 8RP 269, 341; Ex. 297 at 58-60. Over defense objection, Detective Parnell testified a "father plus daughter" search was entered on the Pornhub.com website. 9RP 486; Ex. 274. Videos visited included "Teen siblings fuck in front of stepmom," "Hot MILF caught stepdaughter fucking stepdad," and "Father arrives drunk at his house and fucks his teenage daughter with

big ass." 9RP 487-88; Ex. 274 (admitted exhibit featuring similar titles). Those and similar titles were viewed on two dates in 2018. 9RP 487-88.

3. **Prosecution's misstatement of evidence**

In closing, defense counsel argued in part that Rocha, who had an ax to grind, had produced the phones, and therefore the video evidence found on them should be considered dubious. 11RP 673, 676.

In rebuttal, the prosecutor highlighted that Barragan's search for father-daughter pornography was probative of guilt and, specifically, Barragan's "lustful disposition" toward G. 11RP 701; see also Ex. 302 (PowerPoint used in closing argument, including slides showing inflammatory video titles).

Further, the prosecutor claimed, Barragan

> orchestrated a life for himself, for his wife, for his daughter that was designed to effectuate his sexual abuse of her. . . . . You . . . heard about how he kept [Rocha] busy, encouraged her to go back to school while working, encouraged her to go on a six-month trip for culinary training, and bought her a bakery that she diligently worked at constantly and kept her very busy.

11RP 702. Defense counsel did not object.

4. **Verdicts and appeal**

Barragan was convicted as charged. CP 67-81. He appealed, raising the issues identified above and a challenge to a community custody

condition. The Court of Appeals agreed that the trial court erred in admitting the internet search evidence but found the error harmless. Op. at 12-17. The court rejected Barragan's claims of prosecutorial misconduct and the related ineffective assistance of counsel claim. Op. at 17-20.

Barragan now asks that this court grant review and reverse.

D. REASONS REVIEW SHOULD BE ACCEPTED

1. **Review is appropriate under RAP 13.4(b)(1).**

Review is appropriate under RAP 13.4(b)(1) because the Court of Appeals' opinion conflicts with precedent from this Court.

2. **Unfairly prejudicial evidence regarding Barragan's internet browser searches denied him a fair trial.**

As the Court of Appeals recognized, the trial court erred when it admitted unfairly prejudicial "bad acts" evidence regarding Barragan's internet pornography searches. But, contrary to the Court of Appeals decision, the evidence was prejudicial, warranting reversal.

Additional relevant facts are as follows: Before trial, the prosecution sought to admit evidence of an internet search for father-daughter pornography on Barragan's phone, as well as the results of the search. Defense counsel objected. The information did not qualify as "lustful disposition" evidence because such evidence must be probative of desire for a specific complainant and the evidence was more prejudicial

than probative. 3RP 20; CP 357. But the court ruled that because the search sought father-daughter content, the evidence was probative of Barragan's "lustful disposition" toward G. 3RP 24-25.

The trial court abused its discretion in admitting "lustful disposition" evidence that did not qualify as such and served only as evidence that Barragan had a propensity toward incestuous behavior.

A trial court's admission of evidence is reviewed for abuse of discretion. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). An abuse of discretion exists "[w]hen a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons[.]" State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). The appropriate range of discretionary choices is a question of law, and the trial court abuses its discretion if the discretionary decision is contrary to law. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

ER 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Conversely, evidence that is not relevant is not admissible. ER 402. Further, "[a]lthough relevant, evidence may be excluded if its probative value is substantially

outweighed by the danger of unfair prejudice[.]" ER 403. In addition, ER 404(b) provides that

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character. State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). This is also known as "propensity" evidence. State v. Saltarelli, 98 Wn.2d 358, 365 655 P.2d 697 (1982). "There are no 'exceptions' to this rule." Gresham, 173 Wn.2d at 420. Instead, there is one improper purpose and an undefined number of proper purposes. Id. The burden of demonstrating a proper purpose is on the proponent of the evidence. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

One recognized exception to ER 404(b) exclusion is "lustful disposition" evidence. Under this exception, the defendant's prior sexual misconduct against the specific victim is admissible in order to show the defendant's lustful disposition toward them. State v. Ray, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991) (prior incidents involving specific victim). Such evidence makes it more probable that the defendant committed the

charged offense against the complainant. Id. Otherwise, as this Court has made clear, the evidence is simply prohibited predisposition evidence.

In State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009), the defendant was convicted of first degree child rape and first degree child molestation for allegedly inserting his finger into his granddaughter's vagina. Id. at 874-75. He was also convicted of possessing child pornography for possessing sexually explicit images of other children. Id. at 876-77. Sutherby appealed, arguing in part that defense counsel was ineffective for failing to move to serve the sex abuse charges from the child pornography charges. Id. at 883.

This Court agreed, explaining that had the child pornography charges been severed, "it is highly likely that evidence of Sutherby's possession of the child pornography would have been excluded in a separate trial for child rape and molestation." Id. at 886, 888. This is because in a prosecution for child molestation, evidence that a defendant possessed child pornography is inadmissible because it is relevant only to show the defendant's propensity to molest children. Id. at 884-86.

Here, the Court of Appeals agreed with Barragan that the evidence was improper but failed to find the admission prejudicial. Op. at 15. Nevertheless, the error in admitting the evidence was prejudicial as to all the charged crimes and therefore requires reversal of all the charges.

Error is prejudicial if "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Thomas, 150 Wn.2d 821, 871, 88 P.3d 970 (2004). The potential for prejudice from admission of other bad acts evidence is "at its highest in sex offense cases." State v. Slocum, 183 Wn. App. 438, 442, 333 P.3d 541 (2014). "Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise." Saltarelli, 98 Wn.2d at 363. The attendant danger is that the accused person "will be found guilty not on the strength of evidence supporting the current charge[s], but because of the jury's overreliance on past acts as evidence of his character and propensities." Gresham, 173 Wn.2d at 433. Because of that danger, this Court insists that trial courts carefully exclude improper character evidence in sex abuse cases. Sutherby, 165 Wn.2d at 886-87.

In Gresham, a prosecution for child molestation, the trial court erroneously admitted evidence that the defendant had molested another child. 173 Wn.2d at 405. The untainted evidence consisted of the complainant's testimony that Gresham molested her, her parents' corroboration that he had the opportunity to do so, and the investigating officer's testimony. Id. at 433-34. Even though this Court held that this

evidence was sufficient for the jury to convict, there was nonetheless a reasonable probability that without the bad acts evidence, the jury's verdict would have been materially different. Id.

In Sutherby, defense counsel was ineffective for failing to move to sever the child rape and molestation counts from the child pornography counts. Id. at 884-87. Counsel's ineffective assistance required reversal of the child rape and molestation convictions because, had the charges been severed and the evidence of child pornography excluded, there was a reasonable probability the outcome would have been different. Id. at 887

The prejudice here is like the prejudice in Gresham and Sutherby. Once the jurors learned about the search for simulated father-daughter pornography—and the inflammatory search titles it revealed—they likely concluded that Barragan must have committed the crimes against G. because of his apparent interest in such sexual activity. The State also highlighted this evidence in closing. 11RP 701; Ex. 302 (PowerPoint used in closing argument, including photos showing searches).

The evidence reflected adversely on Barragan's character. Jurors were led to believe Barragan was the kind of person who sought out father-daughter pornography. This likely caused them to instinctively discredit his defense and set aside any doubts about G.'s and ex-wife

Rocha's veracity, and the reliability of the video and photographic evidence, which originated from Rocha. E.g., 9RP 491.

The erroneous admission of this evidence likely affected the jury's decision-making and materially affected the outcome on all counts. This Court should grant review and reverse. RAP 13.4(b)(1).

3. The prosecution also denied Barragan a fair trial by misstating the evidence in closing argument.

The prosecution also denied Barragan a fair trial by misstating the evidence in closing argument. The Court of Appeals' opinion inexplicably minimizes the mischaracterizations. Op. at 19-20.

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments, as well as article I, section 3 and article I, section 22 of the state Constitution. State v. Finch, 137 Wn.2d 792, 843, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

A prosecutor is a "'quasi-judicial officer, representing the People of the state, and presumed to act impartially in the interest only of justice.'" State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984) (quoting People v. Fielding, 158 N.Y. 542, 547, 53 N.E. 497 (1899)). As such, "[a] prosecutor has a duty to refrain from using statements which are

not supported by the evidence and which tend to prejudice the defendant." State v. Grover, 55 Wn. App. 923, 936, 780 P.2d 901 (1989). A jury could believe that such a statement "by a sworn officer of the law, in whom they have confidence, might indicate that such officer was acquainted with facts which had not been disclosed to the jury by the testimony." State v. Susan, 152 Wash. 365, 380, 278 P. 149 (1929). "Such a statement throws into the scales the weight and influence of the personal character of [the prosecutor], and, to some extent at least, calls upon the jury to support [her] judgment." Id.

In State v. Walker, 182 Wn.2d 463, 341 P.3d 976 (2015), this Court found misconduct and, even though there was no objection, reversed based on the prosecutor's misstatement of the evidence. Id. at 474, 485. This Court held that a prosecutor's PowerPoint presentation was a mischaracterization of the evidence because it contained exhibits altered with inflammatory captions and superimposed text, suggesting to the jury that the defendant should be convicted because he was callous and greedy, rather than because the State proved its case beyond a reasonable doubt. Id. at 477. Further, the presentation was prejudicial because the prosecutor's personal beliefs about the defendant were apparent. Id.

Here, contrary to the Court of Appeals' opinion, the prosecutor's rebuttal argument misrepresented the evidence at trial, also contributing to

the jury's finding of guilt. Throughout the trial, Barragan highlighted evidence supporting the defense theory that Barragan, Rocha, and G. led a busy home life, full of visitors and social activities, which was inconsistent with long-term sexual abuse. E.g., 5RP 299; 9RP 446-49.

The prosecutor countered this theory by citing to nonexistent testimony. The prosecutor argued that Barragan "orchestrated a life for himself, for his wife, for his daughter that was designed to effectuate his sexual abuse of her." 11RP 702. In support of this claim, the prosecutor emphasized the jury had "heard about how [Barragan] kept [Rocha] busy, encouraged her to go back to school while working, encouraged her to go on a six-month trip for culinary training, and bought her a bakery that she diligently worked at constantly and kept her very busy." 11RP 702.

Rocha's testimony makes it clear that Rocha—and Barragan—were hardworking. Caring for a child while they worked, studied, and built a business was challenging. They took turns caring for G. and relied on help from a family friend to provide childcare for G. 5RP 298-99; 11RP 629-32. But neither the prosecutor's claim that Barragan "orchestrated a life . . . designed to effectuate his sexual abuse of her," 11RP 702, nor the specific examples supplied, were supported.

First, there was no testimony or other evidence presented that Barragan "orchestrated" abuse by encouraging Rocha to go back to

school. Rocha's testimony about her decision to go back to school does not mention Barragan. 5RP 298. Similarly, the claim that Barragan "bought [Rocha] a bakery" to further his sexual abuse of G. was not supported by the evidence. Rocha testified that Barragan was in favor of the idea to start a bakery. But the business idea originated with a friend and was developed collectively. 6RP 317. This is distinct from the prosecutor's representation that the bakery was incidental to a plan to isolate and abuse G. Third, the prosecutor suggested Barragan pushed Rocha to leave for six months. Barragan supported Rocha's decision to attend culinary school, but the idea was Rocha's. 6RP 324-25. The prosecutor's argument distorted the trial testimony to a paint a picture that was both incendiary and unsupported.

Where a defendant fails to object to misconduct, reversal is required if the misconduct causes prejudice that is incurable by a curative instruction. State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006), overruled on other grounds by State v. W.R., 181 Wn.2d 757, 336 P.3d 1134 (2014). Courts "'focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.'" State v. Lindsay, 180 Wn.2d 423, 431 n. 2, 326 P.3d 125 (2014).

Here, the prosecutor's misconduct was prejudicial. Several days after Rocha's testimony—she was the first witness—the prosecutor reimagined portions her testimony to suggest the presence of a conspiracy to isolate and abuse G. The misconduct was, moreover, so prejudicial it could not be remedied by curative instruction. Had there been an objection, the Court may have sustained it. But it is doubtful the trial court could have provided an effective curative instruction without wading into territory forbidden by Article IV, section 16 of the state constitution.

The misconduct was so prejudicial and of such character that no curative instruction could have cured the prejudice. Because all the convictions (including voyeurism) rested on the theory that Barragan sexually abused his daughter, the misconduct was prejudicial on all counts. This Court should grant review and reverse the Court of Appeals.

4. **Counsel's failure to object to the misconduct similarly denied Barragan a fair trial**.

Counsel's ineffectiveness in failing to object denied Barragan a fair trial under the federal and state constitutions.

Every accused person is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and article I, section 22. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816

(1987). A person asserting ineffective assistance must show (1) counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor performance prejudiced them. State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

Barragan satisfies each of these requirements. As to the performance prong, there could be no legitimate trial strategy in failing to object to the prosecutor's misstatement of the evidence. As to the prejudice prong, the argument misrepresented Rocha's testimony days after jurors heard it. Further, because the prosecutor's rebuttal argument misrepresented the facts, any objection was likely to have been sustained. This Court should grant review and reverse.

E. CONCLUSION

This Court should grant review under RAP 13.4(b)(1) and reverse.

DATED this 28th day of December, 2020.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. BARRAGAN, ALFREDO MARTINEZ, DOB: 04/09/1963, Appellant.	No. 80365-4-I UNPUBLISHED OPINION

BOWMAN, J. — A jury convicted Alfredo Martinez Barragan of 14 separate sex offenses involving his biological daughter that occurred over a span of more than 15 years. Barragan claims the trial court erred by admitting evidence of his Internet searches related to "father plus daughter" pornography as evidence of lustful disposition toward his daughter. He also claims the prosecutor's mischaracterization of the evidence in closing remarks and his counsel's failure to object to the argument deprived him of a fair trial, and he challenges a condition of community custody. Because the evidence related to Barragan's Internet browsing history was directed toward "daughters" or minors in general but not toward the specific victim in the case, the trial court abused its discretion by admitting the evidence to show his lustful disposition toward the victim. But

given the strength of the State's evidence, the error was harmless, and Barragan otherwise fails to establish reversible error.[1] We affirm.

FACTS

After Barragan's adult daughter disclosed longstanding sexual abuse, Barragan faced a jury trial on multiple charges. Witnesses at Barragan's trial testified about the following events.

Georgina Rocha Herrera (Rocha) and Barragan married in 1993 in Mexico. The couple's only child in common, G., was born the year after. When G. was less than a year old, the family moved to Everett, where Barragan had temporary work in the lumber industry. The move was difficult for Rocha because of the language barrier.

When G. was around seven years old, the family moved to Arlington. The couple worked opposite schedules and took turns caring for G. Rocha worked nightshifts while Barragan was home with G. in the evening.

After they moved to Arlington, the couple started a bakery business out of their home. When G. was around 10 years old, they opened a freestanding bakery in downtown Everett. At first, Rocha continued to work another job in the mornings. Barragan took G. home in the afternoon while Rocha stayed at the bakery or worked late in a makeshift home office, often until 1:00 or 2:00 a.m.

Around the time that G. was in the third grade, Barragan began a "nighttime routine" that consisted of gradually escalating sexual abuse. At first, Barragan would read a story to G. and then appear to fall asleep next to her

[1] Because we apply a harmless error analysis, we must engage in a detailed discussion of witness testimony and the substantial evidence supporting the convictions.

while exposing his penis to G. Barragan cut "large hole[s]" in the front of all his underwear "exactly where [his] penis" is, explaining that it made his underwear more comfortable. Barragan allowed G. to touch his penis and started encouraging her to "play with it." Soon after, Barragan placed G.'s fingers on her vagina and showed her how to move them to stimulate herself. After a short period of either stimulating G. or watching her stimulate herself, Barragan began to penetrate her with his finger or perform oral sex on her.

The sexual abuse usually occurred in Barragan and Rocha's bedroom in their bed. If Barragan heard Rocha approach, he told G. to run to her room and pretend to be asleep, saying, "This is our game. This is our secret." Barragan made it "very clear" to G. that she could not tell her mother.

Barragan sometimes bathed with G. and touched her genitals in the bath. Other times, Barragan put G. in the bath by herself and directed her to stimulate herself while he watched. Barragan sometimes placed his computer on the outside of the tub and played animated pornography for G. to watch. One video portrayed two children raping and torturing their babysitter. Barragan did not allow G. to watch any other "normal" cartoons or television.

When G. was young, Barragan called his penis "rubber ducky" and often told her that the rubber ducky "wanted some playing time" or was "missing" her. The sexual abuse started occurring when G. accompanied Barragan during bakery deliveries as well. He would ask her to "pet the rubber ducky," and sometimes G. would either perform oral sex on Barragan or masturbate him while he drove. The types of sexual acts Barragan engaged in with G. expanded

over time, and at some point, he began to have anal and vaginal intercourse with her. Barragan had regular sexual contact with G. about four or five times a week for several years.

At first, G. felt "very special" to have a secret with her father, and she was unaware that what they were doing was anything but "fun and games." But over time, the relationship became "more complicated." G. had limited exposure to television and friends as a child. But by the time she was in sixth grade, she saw more television and sometimes visited friends' houses when her parents were busy with the bakery business. G. began "questioning what was going on" and became more "uncomfortable" and unwilling to engage in sexual contact voluntarily.

In response to G.'s increasing unwillingness, Barragan began to use a system of bribery that he called "paying time." "Time would be sexual performances." For instance, to spend time with friends or have new basketball shoes or clothing, G. would have to agree to engage in sexual activity with Barragan for a certain number of minutes. "Chores didn't count for it. . . . Time was its own thing." They used the timer on Barragan's cell phone and he kept a running tally of G.'s debt in the "notes" section of his phone. Barragan required G. to "pay time" throughout middle and high school. He provided G. with "Plan B" birth control every time he ejaculated inside her. G. testified that "ejaculating inside of me . . . always came with Plan B afterwards, always."

G. could not avoid sexual contact with her father by asking her mother for things like money for the movies because Rocha would consult with Barragan as

to any request. Rocha testified that she tried to make unified parenting decisions but Barragan would overrule her. Rocha described Barragan as "very strict."

G. changed schools often, including five times during high school. Barragan generally advocated for these changes, claiming that a different school had a better sports team or explaining to Rocha that G. needed to be steered away from "friends who [were] a bad influence." And although Rocha believed that friendship was important, especially because G. was an only child, Barragan did not generally allow G.'s friends to come to the house when she was a child and never allowed boys in the house. Barragan told G. that boys her own age were "losers" and forbade her from having outside sexual relationships because she had to "protect him" from contracting a sexually transmitted disease.

Over time, Barragan ceased to respect the "boundaries" of the "pay time" arrangement. Barragan was unaffected by G.'s complaints or whether she cried throughout the sexual acts. G. physically resisted by positioning her body in a manner that made sexual intercourse uncomfortable for Barragan or intentionally tried to hurt him. But Barragan would "call [her] out for doing it" and "restart the time."

Drugs began to play a major role in securing G.'s submission during her high-school years. When G. was around 15 years old, Barragan discovered her smoking marijuana with two friends. After that, Barragan began to take G. to marijuana stores to purchase hallucinogenic and potent strains of marijuana for her. By using drugs, G. could "numb" and "distract[ ]" herself "from the abuse

that was going on at home." And Barragan preferred G. to be intoxicated because it prevented her from being "emotional, crying," or resisting.

G. and Barragan continued to have sexual contact outside the home. They would tell Rocha they were going to the gym and would instead drive to a secluded location, smoke marijuana, and G. would "pay him time" by performing sexual acts in the vehicle. On occasion, G. would also agree to sexual acts in exchange for having a few female friends over. Barragan supplied G. and her friends with alcohol and drugs, including marijuana, ecstasy, acid, or cocaine.

For about six months when G. was still in high school, Rocha went to Mexico to take culinary courses to help the struggling bakery business. Barragan "was supportive" of her leaving. During the time Rocha was in Mexico, Barragan and G. settled into a routine after work, school, and sports of consuming drugs. When she was "numb enough," she would perform the sex acts she "owed" Barragan "because there was no one to stop us."

Rocha and Barragan separated when G. was around 17 years old. Barragan moved into an apartment. G. lived with Barragan following the separation because Barragan told her that she was "a disgraceful daughter," and she felt ashamed and believed that she "did not deserve" to live with her mother.

After graduating from high school, G. often avoided going home. She also ignored Barragan's text messages and phone calls "to come home." When she did go home, she would be in "a lot of trouble" and would "always have to pay time." When they discussed their sexual relationship during this period, Barragan told G. that "it was [her] fault," that she "was like his heroin," and that she "made

him sick" and "addicted" because she "approached" him sexually when she was a child.

In late 2015, Barragan and Rocha travelled to Mexico together to obtain medical treatment and to explore repairing their marriage. However, Rocha suspected Barragan was involved in another romantic relationship and the couple fought. As a result, when they returned to Washington, Rocha demanded that Barragan return an Apple iPhone he was using that belonged to the bakery business. When he did so, Rocha examined the phone, looking for evidence of Barragan's relationship. Instead, Rocha found several videos in a deleted items folder, taken on different days, showing close-up images of G.'s genitalia while she was alone in the bathroom in Barragan's apartment.

The videos appeared to have been taken from the other side of a "vent" in the bathroom and showed the "slats." Rocha recognized G.'s hands and clothing as well as a pair of colored tweezers she bought for G. At the end of one of the videos, the camera direction turns around briefly and shows Barragan's face as he records the video. Rocha saved the items to a folder and kept the cell phone but did not confront Barragan or discuss what she found with G. Rocha explained that she felt she needed to protect G., who was in a "fragile state." Rocha contacted the Everett Police Department and an officer informed her that if the person in the videos is an adult, that person has to make the report.

After Rocha found the videos, she asked G. to move in with her. G., who had spent much time away from Barragan that year during two long trips, "finally felt safe enough to leave" and agreed to move in with Rocha.

After moving in with her mother, G. did not plan to see Barragan. But she changed her mind after Barragan assured her that he could change, told her that "he was going to help himself" so they could have a normal "father-daughter relationship," and made her feel "guilty" about not visiting. G. began to visit Barragan on Sunday evenings. They would eat dinner together, watch the Game of Thrones on television, and G. would sleep on the sofa. Barragan always lent G. the same pajama pants, which were blue with beige stripes. Although Barragan sometimes jokingly asked G. to "pay time," she refused to have sexual contact. Barragan always offered G. marijuana and a margarita, but at first, G. declined alcohol. "[I]t was a while for [her] to feel comfortable accepting a drink from him." Eventually, she accepted his offer of a margarita. Barragan made the drinks out of G's sight in the kitchen and used a small blender and cups that made only individual servings.

Although she had a "pretty high" tolerance for alcohol, G. noticed that after drinking a single margarita at her father's home, she always fell asleep very early, often before the end of the television program. And sometimes when she woke up, her pajama pants were untied, loosened, or the knot differed from the one she had tied the night before. One time, she had a vague recollection of waking up in the middle of the night because she felt "body heat" on her chest and "the pressure of cold lips" on her lips. When she opened her eyes, Barragan was there and moved away very quickly. She then "faded back away into unconsciousness." When she woke up that morning, her pants were "loosely tied" and she "felt pain" in her vaginal area. One evening after several instances

of having only one margarita and falling asleep, G. switched her drink with Barragan's while he was not looking. That night, Barragan "passed out early" on the couch and she stayed awake until 4:00 a.m.

Barragan travelled to Mexico in 2018. While he was away, he asked Rocha to help him pay his rent. With his permission, Rocha went to Barragan's apartment to find his checkbook and found a Samsung cell phone in the same nightstand where she found the checkbook. When she picked up the phone, it immediately began to play a video of G. having sexual intercourse with "someone" she was at first unable to identify.

Rocha searched the phone to replay the video and eventually accessed an outside data storage account where she found more sexually explicit videos. She found 10 videos of a woman who was either naked from the waist down or wearing striped drawstring pajama pants pulled partway down. The woman's face and torso were covered and she did not move. The videos showed someone touching the woman's vagina and having sexual intercourse with her, by both digital and penile penetration. Variations in the appearance of the pubic hair in the videos showed that the videos were recorded on different dates. Rocha recognized G. as the woman and Barragan as the person penetrating her based on distinctive physical features and scarring. She also recognized the pajama pants and the location of the videos as the couch in Barragan's apartment.

The first video Rocha found was of G. having sexual intercourse with her boyfriend. The original video was not recorded on the Samsung Rocha found; it

was recorded on G.'s phone, which had a distinctive crack in the screen. The Samsung "video of a video" showed that distinctive crack. Rocha tried to download and save the videos but when she was unable to do so, she recorded them with her own phone.

When Barragan returned from Mexico, Rocha confronted him about the videos. Barragan at first suggested that someone else might have placed videos on his phone when he had it repaired. After Rocha insisted that she knew that he and G. were the people in the videos, he was silent and "didn't say any more words after that. He ke[pt] quiet." Rocha told Barragan to stay away from G. and left. She then told G. about the videos she found. G. "broke into tears," showed a combination of "panic" and relief, and disclosed the sexual abuse to Rocha. G. later said she thought she "was going to die" with her secret but felt emboldened to disclose it because there was concrete evidence of the abuse and it was no longer "he said she said."

G. and Rocha contacted the police. Rocha provided the police with three cell phones—the bakery's iPhone Barragan returned to her after their trip to Mexico, the Samsung cell phone she found in his apartment nightstand, and her own phone that she used to record the videos she viewed on Barragan's phone. G. confirmed that she and Barragan were the people depicted in the couch videos.

Police officers arrested Barragan. In a custodial interview recorded after his arrest, Barragan admitted that he took some videos of himself having sexual contact with "a friend of [his]" named "Lori." He denied that the woman was G.

Barragan refused to reveal Lori's identity because he did not "want to expose her." During a search of Barragan's bedroom, police found a bandana covering a hole that led to a nonfunctioning heater vent in the bathroom that tracked the angle and framing of the photographs taken of G.

The State charged Barragan with 14 sexual offenses against G., alleging crimes that occurred between 2001 and 2018. The charges included first degree rape of a child, first degree child molestation, first degree incest, third degree rape of a child, multiple counts of second degree rape based on inability to consent, and multiple counts of first degree voyeurism. The State alleged domestic violence as to each count.

The primary witnesses during the two-week jury trial were G., Rocha, and the lead detective. The jury viewed the videos taken in Barragan's bathroom in 2015 and the videos taken on Barragan's couch after G. moved in with Rocha. The jury convicted Barragan of all 14 counts and returned a special verdict of domestic violence. Barragan's offender score was 39, which yielded a standard sentencing range of 240 to 318 months. The defense requested a mid-range sentence within the standard range. The State requested an indeterminate exceptional sentence of 840 months. The court determined that an exceptional sentence was appropriate because a standard-range sentence would lead to 10 of Barragan's offenses going unpunished as "free crimes" under RCW 9.94A.535(2). The court imposed an indeterminate sentence of 564 months to life on count 1, domestic violence rape of a child in the first degree, and ran the remaining sentences concurrently. Barragan appeals.

ANALYSIS

ER 404(b) Evidence

Barragan challenges the trial court's decision to admit evidence of the Internet browsing history on the cell phone in his possession at the time of arrest. We review the interpretation of an evidentiary rule de novo as a question of law. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). If the trial court's interpretation is correct, we review the court's admission of evidence under ER 404(b) for an abuse of discretion. DeVincentis, 150 Wn.2d at 17; State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). "Failure to adhere to the requirements of an evidentiary rule can be considered an abuse of discretion." Foxhoven, 161 Wn.2d at 174. Evidence of prior bad acts is presumed inadmissible, and any doubts as to admissibility are resolved in favor of exclusion. DeVincentis, 150 Wn.2d at 17; State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

When police searched the cell phone found on Barragan after his arrest, they found evidence of the recent use of the search term "father plus daughter" on a prominent pornography website. The evidence showed that someone used Barragan's cell phone to access the pornography website and search for videos with titles such as "[t]een siblings fuck in front of Stepmom" and "[f]ather arrives drunk at his house and fucks his teenage daughter with big ass."

Pretrial, the State conveyed its intent to admit the Internet searches as evidence to show Barragan's "lustful disposition" toward G. Barragan opposed admission, arguing there was "no direct link" between the search and G., the

alleged victim, and because the evidence was more prejudicial than probative. The trial court ruled that while the Internet browsing was directed toward daughters in general and not toward G. in particular, it was admissible to show Barragan's lustful disposition toward G. because of the "similarity of the relationship" and because the probative value of the evidence outweighed the prejudice.

ER 404(b) prohibits admission of "evidence offered to 'show the character of a person to prove the person acted in conformity' with that character at the time of the crime." Foxhoven, 161 Wn.2d at 174-75 (quoting State v. Everybodytalksabout, 145 Wn.2d 456, 466, 39 P.3d 294 (2002)). But ER 404(b) does not prohibit evidence of the defendant's prior misconduct for other purposes, such as proving motive, intent, a common scheme or plan, or lack of mistake or accident. State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). One accepted "other purpose" under ER 404(b) is to show the defendant's motive and intent in cases involving sex offenses. Gresham, 173 Wn.2d at 430 n.4. Our courts have consistently recognized that courts may admit evidence of collateral sexual misconduct under ER 404(b) when it shows the defendant's "lustful disposition" directed toward the victim. State v. Ray, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991); State v. Camarillo, 115 Wn.2d 60, 70, 794 P.2d 850 (1990); State v. Ferguson, 100 Wn.2d 131, 133-34, 667 P.2d 68 (1983); State v. Medcalf, 58 Wn. App. 817, 823, 795 P.2d 158 (1990).

To be admissible to show lustful disposition, the evidence must be "directly connected" to the alleged victim. Ray, 116 Wn.2d at 547 (citing Medcalf, 58 Wn. App. at 822-23). The Washington Supreme Court has emphasized:

> "Such evidence is admitted for the purpose of showing the lustful inclination of the defendant toward the offended female, which in turn makes it more probable that the defendant committed the offense charged.
>
> . . . The important thing is whether it can be said that it evidences a sexual desire for the particular female. . . .
>
> The kind of conduct receivable to prove this desire at such . . . subsequent time is whatever would naturally be interpretable as the expression of sexual desire."

Ferguson, 100 Wn.2d at 134[2] (quoting State v. Thorne, 43 Wn.2d 47, 60-61, 260 P.2d 331 (1953)).

Here, the court admitted the evidence because Barragan's Internet browsing reflected a sexual interest connected to a particular relationship, which is the same relationship he has with G. But this is not evidence that reveals a sexual desire for a particular individual. See Ferguson, 100 Wn.2d at 134. And it is not sufficient for the evidence to "just reveal [a] defendant's general sexual proclivities"; the fact that evidence shows " 'a sexual desire' " for a " 'particular' " individual is what makes it more likely that the defendant committed the charged offense against that particular individual. Ray, 116 Wn.2d at 547 (citing Medcalf, 58 Wn. App. at 822-23) (quoting Ferguson, 100 Wn.2d at 134). It is simply not enough that the evidence of sexual misconduct shares a common feature with the charged crimes.

[2] Emphasis omitted; first and third alteration in original; internal quotation marks omitted.

Here, there is no evidence to suggest that Barragan was searching for depictions of G. Barragan directed his conduct at "daughters" or minors in general but not at G. in particular. Evidence of general lustful disposition toward minors is generally inadmissible. State v. Sutherby, 165 Wn.2d 870, 886, 204 P.3d 916 (2009) (evidence of child pornography not admissible in trial regarding child molestation because it would show only defendant's general predisposition and not his sexual desire for the specific victim). Washington courts recognize a significant distinction between a purpose of "showing [one's] character and action in conformity with that character," and a purpose of showing one's sexual desire for a specific individual and action in conformity with that individualized sexual desire. Gresham, 173 Wn.2d at 425. The admission of Barragan's Internet searches served only the purpose of revealing his proclivities and action in conformity. Because the evidence did not reflect Barragan's lustful disposition toward G. specifically, the court abused its discretion in admitting it.

But error in admitting ER 404(b) evidence "is harmless 'unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.' " Gresham, 173 Wn.2d at 425[3] (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)); see State v. Gunderson, 181 Wn.2d 916, 926, 337 P.3d 1090 (2014) (nonconstitutional harmless error standard applies to evidentiary error).

Barragan argues that as in Gresham, 173 Wn.2d at 433-34, the evidentiary error here was not harmless because the jury's verdict would have

[3] Internal quotation marks omitted.

been different but for the admission of the "highly prejudicial" Internet search evidence. There, the trial court erroneously admitted evidence of the defendant's prior conviction for first degree rape of a child in his later trial on four counts of child molestation in the first degree involving a different victim. Gresham, 173 Wn.2d at 417-18. Our Supreme Court held that the error was not harmless because "[m]uch of the testimony at trial was predicated on the fact of Gresham's prior conviction including all of [the first degree child rape victim]'s testimony and much of the [child molestation victim]'s parents' testimony." Gresham, 173 Wn.2d at 433. Without the erroneously admitted evidence, minimal evidence showed that the defendant committed the offense. Gresham, 173 Wn.2d at 433-34.

Barragan also relies on Sutherby. The State charged Sutherby with child rape and molestation involving the same child as well as multiple counts of possession of child pornography. Sutherby, 165 Wn.2d at 875-76. The question before the court was whether defense counsel's failure to move for a severance of the child rape and molestation charges from the pornography charges deprived Sutherby of effective assistance of counsel. Sutherby, 165 Wn.2d at 883. In concluding that Sutherby showed ineffective assistance of counsel, the court relied on, among other things, the fact that the pornography evidence was much stronger than the rape and molestation evidence and that the State consistently relied on the defendant's possession of child pornography to prove that he molested his grandchild. Sutherby, 165 Wn.2d. at 885-86.

Barragan's reliance on Gresham and Sutherby is unavailing. Here, the State's evidence supporting each count was overwhelming and the prosecutor only mentioned the Internet browsing history evidence in closing remarks as "corroboration." G.'s extensive and detailed testimony about the abuse, along with the corroborating and highly incriminating video evidence found on the phones that had been in Barragan's possession, persuades us that the effect of the brief testimony about Barragan's Internet browsing history was minimal. The jury had a chance to assess G.'s credibility and weigh all of the evidence. See Camarillo, 115 Wn.2d at 71 (we defer to the trier of fact on issues of conflicting testimony, the credibility of witnesses, and the persuasiveness of the evidence). There is no reasonable probability that the result would have been any different if the court had excluded the Internet browsing history evidence.[4]

Prosecutorial Misconduct

Barragan contends that the prosecutor misstated the evidence during closing remarks and thereby deprived him of a fair trial. Prosecutorial misconduct may deprive a defendant of his guaranty to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012).

[4] It does not appear that Barragan requested or the court provided a limiting instruction related to the Internet browsing history evidence. Barragan does not rely on this omission as a basis for his claim of error. In any event, the failure to provide an appropriate limiting instruction upon request is subject to harmless error analysis. See Gresham, 173 Wn.2d at 425. Here, as explained, any error was harmless in view of the strength and nature of the admissible evidence supporting the charges and the relatively minor significance of the browsing history evidence.

To prevail on a claim of prosecutorial misconduct, a defendant must establish that conduct was both improper and prejudicial in the context of the entire case. State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008). When, as here, the defendant fails to object at trial, the error is waived absent misconduct so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). To show this level of misconduct, the defendant must show "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.' " Emery, 174 Wn.2d at 761 (quoting State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

We review statements in a prosecutor's closing arguments in the context of the issues in the case, the total argument, the evidence addressed in the argument, and the jury instructions. State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005). A prosecutor has wide latitude to draw reasonable inferences from the evidence during closing argument "and to express such inferences to the jury." Boehning, 127 Wn. App. at 519. "However, a prosecutor may not make statements that are unsupported by the evidence and prejudice the defendant." Boehning, 127 Wn. App. at 519.

Here, defense counsel argued in closing argument, among other things, that G.'s demeanor when testifying raised questions about her credibility. Counsel asserted that if Barragan had raped G. repeatedly since childhood, she likely would have become pregnant. Defense counsel also suggested that the

theory that Barragan slipped drugs into G.'s drinks to rape her conflicted with her testimony that she could get up for work the next day.

In rebuttal, the prosecutor reviewed the details of G.'s testimony and the evidence corroborating those details. The prosecutor also asserted that the evidence showed Barragan exerted control over the family's life in a manner that facilitated the abuse:

> Ultimately, ladies and gentlemen, [Barragan] orchestrated a life for himself, for his wife, for his daughter that was designed to effectuate his sexual abuse of her.

Specifically, the prosecutor pointed out that Barragan was the driving force behind G.'s frequent changes in schools, which had the effect of limiting her "solid" connections outside the family. The prosecutor also argued that Barragan made sure that Rocha was consistently "busy" with the bakery and "encouraged" her to pursue school and culinary training that took her away from the home.

Barragan claims that this argument was "incendiary and utterly unsupported" by the evidence at trial. He contends the evidence does not show that he unilaterally decided to start the family business, that he influenced Rocha to take classes, or that he "pushed" her to return to Mexico for an extended period to take culinary classes. But the evidence as a whole supports a reasonable inference that Barragan used his control over the family dynamics to facilitate his abuse of G.

According to both G.'s and Rocha's testimony, Barragan was "very strict" and largely made the decisions affecting G., including those about her privileges, schooling, and having friends over at their house. This furthered Barragan's

ability to force G. to submit to his sexual demands using a system of bribery and ensured that she lacked strong connections outside the household. The testimony also suggested that Barragan kept G. close to him and, at the same time, drove a wedge between G. and Rocha during G.'s childhood and adolescence. G. testified that the "games" and "secret[s]" Barragan designed during her childhood made her feel closer "with my father. He gave me a false sense of security." As she got older and tried to resist Barragan's sexual advances, he told her that she was a "disgraceful daughter" who "didn't deserve" to live with Rocha. He also provided drugs to G. to "numb" her resistance.

And, according to the record, the impetus behind opening a bakery came from Barragan. Rocha testified that after a friend suggested that they open a bakery in their home, Barragan came home from work one day and "told me that he quit . . . the lumber [job] and he will start to put everything to open the bakery." Further, the bakery business created an opportunity for abuse that Barragan could capitalize on. When G. was a child, she was alone with Barragan while Rocha worked late, and he took only G. with him during deliveries so he could sexually assault her in the van. The evidence supported the State's argument and the remarks were not improper.[5]

Community Custody Condition

Barragan argues that the court imposed a vague and ambiguous condition of community custody. "A trial court necessarily abuses its discretion if it

[5] Barragan also claims that his counsel performed deficiently by failing to object to the prosecutor's remarks. However, because the challenged remarks were not improper, defense counsel was not deficient for failing to object.

imposes an unconstitutional community custody condition, and we review constitutional questions de novo." State v. Wallmuller, 194 Wn.2d 234, 238, 449 P.3d 619 (2019).

A community custody condition is unconstitutionally vague under due process principles of the Fourteenth Amendment to the United States Constitution and article I, section 3, of the Washington Constitution if a reasonable person would not understand what conduct the condition prohibits or if it lacks ascertainable standards that prevent arbitrary enforcement. State v. Wallmuller, 194 Wn.2d 234, 238-39, 449 P.3d 619 (2019); State v. Casimiro, 8 Wn. App. 2d 245, 250, 438 P.3d 137, review denied, 193 Wn.2d 1029, 445 P.3d 561 (2019).

The challenged condition bans Barragan from locations where "children's activities regularly occur or are occurring" and provides:

> Stay out of areas where children's activities regularly occur or are occurring. This includes, but is not limited to: parks used for youth activities, schools, daycare facilities, playgrounds, wading pools, swimming pools being used for youth activities, play areas (indoor or outdoor), sports fields being used for youth sports, arcades, church services, restaurants, and any specific location identified in advance by [the Department of Corrections] or [community corrections officer].

Our Supreme Court determined that a similar community custody condition was not unconstitutionally vague in Wallmuller, 94 Wn.2d at 245. That condition provided, " 'The defendant shall not loiter in nor frequent places where children congregate such as parks, video arcades, campgrounds, and shopping malls.' " Wallmuller, 194 Wn.2d at 237. The court reasoned that

" 'commonsense' restrictions, including those that use nonexclusive lists to elucidate general phrases like 'where children congregate,' " provide fair notice of prohibited conduct. Wallmuller, 194 Wn.2d at 242-43.

Much like the condition in Wallmuller, the condition here uses a nonexclusive list to illustrate the general phrase "areas where children's activities regularly occur or are occurring." The phrase "areas where children's activities regularly occur" is no less precise than "places where children congregate" as addressed in Wallmuller. The language here is specific enough that a person of ordinary intelligence can understand the scope of its prohibition.

Barragan asserts that the "illustrative list" is "confusing" because it includes some "child-specific" locations like schools and some "mixed-use" locations like parks, but only some of the "mixed-use" locations are expressly modified with the language "used for youth activities." But the first sentence modifies the entire illustrative list and eliminates any ambiguity—the locations are limited to "areas where children's activities regularly occur or are occurring." Furthermore, the condition the Supreme Court upheld in Wallmuller also included areas not exclusively used for children's activities, such as shopping malls. Wallmuller, 194 Wn.2d at 237. The condition here is not unconstitutionally vague.

Barragan also suggests that the condition is flawed because it implicates "fundamental constitutional rights." In making this argument, we assume he refers to the right to the free exercise of religion. A community custody condition that burdens the free exercise of religion must withstand strict scrutiny. State v.

Balzer, 91 Wn. App. 44, 53, 954 P.2d 931 (1998). "Under this standard, the complaining party must first prove the government action has a coercive effect on his or her practice of religion." Balzer, 91 Wn. App. at 53. Barragan did not object to the condition below. And while he maintains that it "potentially affects essential human needs and rights," Barragan does not argue or point to any evidence that the condition has a coercive effect on his practice of religion. Because of the limited briefing and undeveloped record, we conclude that the question of whether this condition unconstitutionally burdens Barragan's freedom of religion is not squarely before us.[6]

We affirm Barragan's jury conviction of 14 sex offenses against his biological daughter.

WE CONCUR:

[6] Barragan asserts without elaboration that the condition is also not crime-related. But he agreed to the community custody condition without objection, inviting any resulting error, and cannot argue for the first time on appeal that it is not crime-related. See Casimiro, 8 Wn. App. 2d at 248-49; RAP 2.5(a)(3); see also State v. Peters, 10 Wn. App. 2d 574, 591, 455 P.3d 141 (2019) (declining to consider an argument that a sentencing condition is not crime-related when the defendant raised the issue for the first time on appeal).

NIELSEN KOCH P.L.L.C.

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