SUPREME COURT NO. 99812-4

NO. 80817-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

OSCAR MARTINEZ ZAVALA,

Petitioner.

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

The Honorable Brian L. Stiles, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. PETITIONER AND COURT OF APPEALS DECISION

Petitioner Oscar Martinez Zavala asks this Court to review the Court of Appeals' April 26, 2021 unpublished opinion in State v. Martinez Zavala, no. 80817-6-I. The opinion (Op.) is appended to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. A prospective juror revealed she assumed guilt based on the fact that charges had been brought against an individual. No one—not the court or the parties—inquired further, and the juror, who deliberated, was not rehabilitated. Did the trial court violate Martinez's right to an unbiased jury by failing to inquire into the juror's bias and/or excuse the juror? For similar reasons, was defense counsel constitutionally ineffective?

2. Does the community custody condition relating to contact with minors, entered without tailoring or inquiry as to the appropriateness of the condition as to the Martinez's biological children, violate the fundamental right to parent, and was counsel ineffective for failing to object?

3. Is the community custody condition directing in part that Martinez "stay out of areas where children's activities regularly occur or are occurring" impermissibly vague, and does it lend itself to a reading that fails to meet minimal standards of crime-relatedness?

C. STATEMENT OF THE CASE[1]

1. **The underlying facts and allegations**

Martinez met Janet I. in early 2014. RP 701; RP (9/13/19) at 14. Janet had two daughters, including Y.I., the complainant, who was born in April of 2007. RP (9/13/19) at 14; RP 605. Janet and Martinez eventually had a son in April of 2018. RP 699.

Janet handled all discipline of Y.I. RP (9/13/19) at 14. Y.I. misbehaved; her issues with misbehavior related to her tablet computer. Long before the events at issue in this case, Y.I. was caught posting nude videos of herself on Instagram. RP (9/13/19) at 14, 25; RP 783-84. Then, in late 2018, shortly before Y.I. made allegations against Martinez, Janet discovered that Y.I. had been secretly watching pornography on the tablet since 2015 or 2016. RP 706-08, 797, 805; RP (9/13/19) at 27. At that point, Janet let Martinez become more involved in discipline. Y.I. did not appreciate Martinez's new role. RP (9/13/19) at 22, 29.

Several days after discovering Y.I.'s pornography habit, Janet (on the advice of her sister) asked Y.I. if anyone had touched her inappropriately. RP 708-10. Y.I. said Martinez had touched her chest

[1] This petition refers to the verbatim reports as follows: RP (consecutively paginated transcripts covering 6/5, 9/9, 9/10, 9/11, 9/12, 9/16, 9/17, and 9/18/19); RP (9/13/19); RP (11/6/19); and Supp. RP (continuation of consecutively paginated transcript encompassing 5/16/19 and 6/5/19 hearings).

and/or crotch area on three separate occasions. RP 710-11. At trial, Y.I. testified about three incidents. RP 609-18.

Janet testified that, in fact, Y.I. had told her about inappropriate touching a year earlier, in December of 2017. RP 704. At that time, Y.I. had described a single incident in which Martinez put his hands in her pants and asked to touch her breasts. RP 705. But Janet did not report the allegation or confront Martinez. RP 704-05, 710, 779-80.

After Janet's 2018 conversation with Y.I., Janet and the children moved out of the home they shared with Martinez. They went to live with Janet's sister and her family. Janet did not initially contact the authorities. But Janet's brother-in-law called the police after some family members began to discuss taking the matter into their own hands. RP 827-31.

Martinez was distraught. RP (9/13/19) at 33-38. He contacted police upon learning they were looking for him. RP (9/13/19) at 42. He consistently denied the allegations. RP (9/13/19) at 49-50; RP 897, 899.

2. **Charges**

Martinez was charged with three counts of first degree child molestation occurring between June 1, 2016 and August 31, 2018. CP 50-51. The case proceeded to trial.

3. **Jury selection; seating of biased juror**

On the second day of jury selection, after several rounds of questioning, the court announced it still had concerns about certain prospective jurors based on their responses to a questionnaire. These were prospective jurors 1, 9, 28, 41, 55, and 61. RP 425. Defense counsel also raised concerns about prospective jurors 44, 45, and 48. RP 426-27. The court said it would allow parties to follow up with selected jurors. RP 428.

During the supplemental voir dire period, defense counsel introduced a character, a friend, "Ben," who was incapable of presuming the innocence of an accused person. Under Ben's way of thinking, if the case had made it to the courtroom, the defendant was likely guilty. Counsel's inquiry proceeded as follows:

> Q. If the judge told you that [the prosecutor] has to prove her case on all three counts beyond a reasonable doubt for each count, and we don't have to do anything, we can sit here, be asleep, we don't have to do a single thing. If [the prosecutor] hasn't proven her case beyond a reasonable doubt but there is some evidence that says yeah he might have done it, what do you think you would do?
>
> While you are thinking I'm going to tell you about my friend Ben. My friend Ben will never be on one of my juries. He thinks just because somebody is charged with a crime he thinks law enforcement did their job. If the State brought a charge they did their job, and they are probably guilty. He tells me this, and we talk about cases. Yeah, you don't want me on your jury. If they've gotten this far then

he's probably guilty. I'm not naive. I know most people feel that way.

What we want to make sure of is that people can follow the instructions that the Court gives. We want to make sure that if you are Ben then this isn't the right place for you. This isn't a case for you. But if you still feel that way but you think you can follow the Court's instructions, I can follow the law, I can make the State prove their case beyond a reasonable doubt before I say guilty, then this is the case for you. Hearing that, does anyone think they might be like Ben; that they might say, yeah, we're here. Law enforcement investigated –

Thank you for being honest. [Prospective] Juror Number 21, do you think that might be you? I'm still friends with Ben. Ben is a great person.

A. ([Prospective] Juror No. 21) Yes.

[The prosecutor]: Can I request that we focus on the numbers that we were going to focus on? I understand like her, we need to follow up but –

THE COURT: I'll let her respond. . . .

JUROR NO. 21: That's about all I have. To some extent, yes. I think if the State thinks there's enough evidence to bring charges there's definitely something to it. Does that mean for sure. No, but yeah that's where I'm at.

RP 433-35 (emphasis added). No one inquired further.

Other than 21, no other juror aligned with Ben's way of thinking. RP 436. After the supplemental session, the court excused several

prospective jurors for a variety of reasons, including 9, 29, 48, 61, 64, and 65. But it did not excuse prospective juror 21. RP 428.

Shortly after the jury was selected, the court asked for comments regarding prospective jurors 44 and 45, neither of whom had been seated on the jury. RP 456. Prospective juror 45 had, for example, been molested as a 12-year-old. RP 365. It is unclear from the record what the concern was regarding 44.[2] Defense counsel then expressed concern about 21. RP 458.

> [DEFENSE COUNSEL]: Briefly in regards to 21, when I made the mistake of asking the whole panel if anyone was like my friend Ben, who doesn't really believe in the presumption of innocence and all that, [21] raised her card, and she confirmed the concerns obviously I had about her.
>
> THE COURT: Well, my recollection is what she said is that it's a concern like maybe for everybody coming in on a case like this, the importance of it, and the concerns of the charges. But I thought the last thing she said is she thought she could be fair and follow the instructions of the Court.
>
> [Prosecutor], anything else you want to put on the record?
>
> [THE STATE]: I think it's important to note that I did not recall or hear Juror 21 having a cause challenge by defense. It wasn't a cause challenge they raised prior to the jury selection, and now she's seated on the jury.

RP 458 (emphasis added).

[2] Some of the comments the parties attributed to 44 appear to relate to prospective juror 41, who—unlike 44 and 45—served on the jury. RP 456-57; compare RP 431 (statements by prospective juror 41) with RP 457 (counsel's attribution of these statements to prospective juror 44).

In fact, prospective juror 21's response was not as the court recalled. Moreover, despite agreeing she was like "Ben," she never specifically confirmed that she could be fair or follow the instructions of the court. RP 435. The matter was not raised again.

4. **Verdicts, sentence, and appeal**

The jury convicted Martinez of the first of the three counts, but it acquitted him of the second and third counts. CP 116-18. The court sentenced Martinez within the standard range to 58 months to life in prison, with accompanying lifetime community custody. CP 137; RCW 9.94A.507. The court imposed several community custody conditions, including two discussed below. CP 138, 147-48.

Martinez appealed. CP 151. He raised several issues, including the three discussed below. Martinez now asks that this Court grant review.

D. ARGUMENT IN SUPPORT OF REVIEW

1. **This Court should grant review under RAP 13.4(b)(2) because a juror was biased and the Court of Appeals opinion conflicts with prior authority.**

The trial court failed to excuse a biased juror. Defense counsel was, moreover, ineffective for failing to ask that the juror be removed.

The Sixth and Fourteenth Amendments, and article I, section 22, guarantee a defendant the right to trial by an impartial jury. State v. Davis,

175 Wn.2d 287, 312, 290 P.3d 43 (2012), abrogated on other grounds by State v. Schierman, 192 Wn.2d 577, 438 P.3d 1063 (2018) (plurality opinion), and State v. Gregory, 192 Wn.2d 1, 427 P.3d 621 (2018).

To protect this constitutional right, the trial court should excuse a prospective juror for cause if the juror's views "'would prevent or substantially impair the performance of [their] duties as a juror in accordance with his instructions and his oath.'" State v. Gonzales, 111 Wn. App. 276, 277-78, 45 P.3d 205 (2002) (quoting State v. Hughes, 106 Wn.2d 176, 181, 721 P.2d 902 (1986)). "The presence of a biased juror cannot be harmless; the error requires a new trial without a showing of prejudice." State v. Irby, 187 Wn. App. 183, 193, 347 P. 3d 1103 (2015).

At trial, either party may challenge a prospective juror for cause. RCW 4.44.130. Actual bias is a ground for challenging a prospective juror for cause. RCW 4.44.170(2). Actual bias occurs when there is "the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2); see also RCW 4.44.130.

A trial judge also has an independent obligation to excuse a juror, regardless of inaction by counsel or the defendant. Irby, 187 Wn. App. at 193 (citing Davis, 175 Wn.2d at 316). Under RCW 2.36.110,

> It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

And, under CrR 6.4(c)(1), "If the judge after examination of any juror is of the opinion that grounds for challenge are present, he or she shall excuse that juror from the trial of the case."

A trial court need not excuse a prospective juror with preconceived ideas if the juror can set those ideas aside and decide the case on the evidence presented at the trial and the law as provided by the court. RCW 4.44.190. But if such preconceived ideas come to light, a trial court is obliged to inquire. State v. Guevara Diaz, 11 Wn. App. 2d 843, 856, 456 P.3d 869, review denied, 195 Wn.2d 1025 (2020). And a juror should be excused if, due to actual bias—inability to try the issue impartially and without prejudice to a party—it appears from "all the circumstances" the juror cannot disregard such opinion and try the issue impartially." RCW 4.44.190. If the court has only a "statement of partiality without a subsequent assurance of impartiality," a court should "always" presume juror bias. Guevara Diaz, 11 Wn. App. 2d at 855 (quoting Miller v. Webb, 385 F.3d 666, 674 (6th Cir. 2004) (quoting Hughes v. United States, 258 F.3d 453, 460 (6th Cir. 2001))).

A case with a similar underlying expression of bias is State v. Gonzales, 111 Wn. App. 276, 45 P.3d 205 (2002). There, prospective juror 11 first indicated bias in favor of police witnesses. Id. at 281. Questioning of the prospective juror occurred as follows:

> DEFENSE: Is there anyone else . . . who thinks that a police officer's testimony might influence them just because they are police officers?
>
> . . . .
>
> JUROR 11: Just the way I was brought up—I know it's very naïve, but the way I was brought up, the police are always, you know—unless they are proven otherwise, they are always honest and straightforward, and tell the truth. So I would have a very difficult time deciding against what the police officer says.
>
> DEFENSE: Okay. So you would presume the police officer was telling the truth? If it came down to—let's say, hypothetically, if it came down to a police officer's word versus . . . Gonzales's word, okay, and you're trying to assess which one of them is telling the truth, correct me if I'm wrong, but I hear you saying that you would presume the police officer was telling the truth?
>
> JUROR 11: Yes, I would.
>
> DEFENSE: What if the Court instructed you that it's actually the opposite, that you're supposed to presume that the defendant is innocent unless and until the State, through its witness, the police officer, can prove to you otherwise?
>
> JUROR 11: . . . . I don't know. It's going to be back there. That's just the way I was raised. I don't know if I could keep those separate. I don't think—I don't know if I could.

Id. at 278-79.

Later, upon questioning by the prosecutor, the prospective juror agreed the fact that one of the witnesses was a police officer did not relieve the State of its burden to prove guilt. But the juror did not know if she would, nonetheless, presume Gonzales innocent. Id. at 279. The Court of Appeals found the juror showed actual bias. Id. at 281-82.

In the present case, the prospective juror's answers indicated even more strongly that the juror would not presume Martinez innocent. Prospective juror 21 unequivocally aligned herself with Ben's way of thinking. RP 434. Prospective juror 21 agreed that she was a "Ben," the kind of person who thought law enforcement had done their job correctly, and therefore the accused person had likely committed the charged crime. Asked to clarify, the prospective juror stated "I think if the State thinks there's enough evidence to bring charges there's definitely something to it. Does that mean for sure. No, but yeah that's where I'm at." RP 434-35.

Contrary to the Court of Appeals decision, Op. at 5-6, the prospective juror was not equivocal in her expression of bias against accused persons. Her answers were only ambiguous in that she suggested she would not "for sure" find an accused person guilty just because they had been charged. But undersigned counsel is aware of no case that requires a juror to *guarantee* a guilty verdict in order to manifest actual bias. The trial

court failed in its duty to inquire into bias. It also failed in its duty when it allowed a biased juror to deliberate.

"If the court has only a statement of partiality without a subsequent assurance of impartiality, a court should always presume juror bias." Guevara Diaz, 11 Wn. App. 2d at 855. Prospective juror 21's alignment with the Ben persona was itself an indication that she was not able to presume Martinez innocent. Whether the failure was the trial court's, defense counsel's,[3] allowing prospective juror 21 to decide Martinez's fate was inexcusable. This Court should grant review and reverse.

2. **This Court should grant review under RAP 13.4(b)(1), (3), and (4) because the community custody condition prohibiting contact with all minors is not tailored to address contact with Martinez's two sons.**

The community custody condition prohibiting contact with all "minor-aged children" is not narrowly tailored to address contact with Martinez's biological sons. And the Court of Appeals't opinion fails to recognize that the condition will have immediate effect and that it results in a total ban on contact while Martinez is incarcerated. Op. at 7-8 & n. 5.

The trial court ordered that Martinez have

[3] The Sixth Amendment and article I, section 22 guarantee effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Estes, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). As argued the Court of Appeals, defense counsel was ineffective for failing to ask that the juror be excused for cause.

> no direct and/or indirect contact . . . with minor-aged children without the supervision of an adult who is knowledgeable of [his] offense *and only with the approval of [his Community Corrections Officer (CCO)] and Sexual Deviancy Treatment Provider*."

CP 147 (Condition 3) (emphasis added).

There is no indication that the trial court evaluated Martinez's fundamental right to parent his two sons in drafting this condition. Although counsel stated they were not objecting to the condition, counsel was ineffective for doing so, to the extent that the condition addresses contact with biological children. RP (11/6/19) at 10. There was no reason for counsel to agree to such a defective condition. Counsel knew, and even announced to the court, that Martinez wanted to maintain a relationship with his young son. RP (11/6/19) at 11. This is not logically consistent with counsel's lack of objection to the challenged condition.

As written, the condition relating to minors interferes with Martinez's fundamental right to parent. Individuals have a fundamental right to the "care, custody, and management" of their children. Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). State interference with this fundamental right is subject to strict scrutiny. State v. Warren, 165 Wn.2d 17, 34, 195 P.3d 940 (2008); see also State v. McGuire, 12 Wn. App. 2d 88, 95,456 P.3d 1193 (2020) (a crime-related prohibition that interferes with a fundamental constitutional right is lawful

only when it is narrowly drawn and there is no reasonable alternative way to achieve the State's interest) (quoting Warren, 165 Wn.2d at 34-35).

A sentencing court may not prohibit contact between a defendant and his children as a matter of routine practice. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 377-82, 229 P .3d 686 (2010). Instead, the court must consider whether prohibiting contact is reasonably necessary in scope and duration to prevent harm to the child. Id. For example, less restrictive alternatives such as indirect contact or supervised contact may not be prohibited unless barring all contact is shown to be necessary to achieve a compelling State interest. Warren, 165 Wn.2d at 32. Washington case law requires the trial court to articulate, on the record, the reasons for the reasonable necessity for a no-contact order. Or the record must clearly demonstrate such necessity. State v. Howard, 182 Wn. App. 91, 101-02, 328 P.3d 969 (2014). Unlike statutes, community custody conditions do not enjoy a presumption of constitutionality. State v. Sanchez Valencia, 169 Wn.2d 782, 793, 239 P.3d 1059 (2010).

The condition here does not differentiate between Martinez's own sons and other minors. And, although the Court of Appeals appears to have chosen to sidestep the argument, the condition violates Martinez's fundamental right to parent to the extent that it prohibits all contact, even indirect or supervised contact, without permission from two separate

sources: a CCO and a treatment provider. The record does not support a finding that, for example, two separate levels of approval are necessary to protect his sons, one of whom is only a toddler, and one of whom is an older teenager. Moreover, while Martinez is incarcerated, the approval condition for direct or indirect contact cannot be satisfied because the persons whose approval is required do not exist. Although the no-contact order is couched as a community custody condition, it will have effect even while Martinez is incarcerated. See DOC Policy 450.050 (revised Nov. 21, 2015) ("An offender's contact with specific individuals or classes of individuals will be restricted or prohibited when . . . [their] Judgement and Sentence prohibits contact with the individual or class of individuals during incarceration *or upon release*.") (Emphasis added.)

While incarcerated, Martinez has no CCO. He has no treatment provider. Thus, this condition as currently written effectively amounts to a complete prohibition on all contact, with no exceptions, while he is incarcerated. There is no indication that the trial court intended such a blanket ban and also no evidence it would be necessary to protect Martinez's biological sons. As Martinez argued in the Court of Appeals, moreover, defense counsel was ineffective for failing to ask that the court address this specific issue.

This Court should grant review and remand with instructions to the trial court to carefully consider what, if any, limitations are necessary and to draft them sensitively and clearly.

3. **This Court should also grant review under RAP 13.4(b)(1) and (4) because the "stay out of areas" condition is unconstitutionally vague and fails to meet minimal standards of crime-relatedness.**

Another condition of community custody requires that Martinez

> [s]tay out of areas where children's activities regularly occur *or* are occurring as follows: parks *used* for youth activities; schools (except post-secondary schools"), daycare facilities, playgrounds, wading pools, swimming pools *being used for youth activities*, play areas (indoor and outdoor), sports fields *being used for youth sports,* arcades, or any area where more than 50% of the individuals there are youth. "Youth" is defined as an individual under 16 years of age.

CP 148 (Condition 7B) (emphasis added). This condition is vague.

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). Condition 7B fails both tests; it is not clear whether only parks "being used" for youth activities, or essentially all parks—parks *sometimes* used for youth activities—are off-limits to Martinez for the rest of his life. Condition 7B also lends itself to a reading that fails to meet minimal standards of crime-relatedness.

Even a vague term can be made definite if it incorporates clarifying language or an illustrative list. State v. Irwin, 191 Wn. App. 644, 652, 364 P.3d 830 (2015). Due process does not require "impossible standards of specificity." State v. Wallmuller, 194 Wn.2d 234, 242, 449 P.3d 619 (2019) (quoting City of Seattle v. Eze, 111 Wn.2d 22, 26-27, 759 P.2d 366 (1988)). In the context of community custody, courts may enforce "commonsense" restrictions, including use of nonexclusive lists to elucidate general phrases such as "where children congregate." Wallmuller, 194 Wn.2d at 243.

In Wallmuller, this Court upheld, against a vagueness challenge, the condition that Wallmuller not "loiter in nor frequent places where children congregate such as parks, video arcades, campgrounds, and shopping malls." Id. at 237. Here, although Martinez raised a distinct challenge, the Court of Appeals treated Wallmuller as dispositive. Op. at 9. In doing so, the Court of Appeals failed to confront Martinez's specific arguments.

Condition 7B first describes a type of location from which Martinez is excluded, areas where children's activities regularly occur *or* are occurring. CP 148. After a colon, an illustrative list is provided. But, unlike in Wallmuller, the first portion of the condition in this case contains the disjunctive "or." Analyzing cases, this Court stated in Wallmuller that a disjunctive "or" may render a condition vague. Wallmuller, 194 Wn.2d at 244 (citing United States v. Peterson, 248 F.3d 79, 86 (2d Cir. 2001)

("condition which prohibits [appellant] from 'being on any school grounds, child care center, playground, park, recreational facility *or* in any area in which children are likely to congregate'" is vague because "[i]t is not clear whether the clause 'in which children are likely to congregate' applies only to 'any area,' or to the other places listed") (emphasis added)).

Considering that here, the first portion of the condition is written in the disjunctive, the illustrative list becomes internally confusing. The list consists of locations that appear to be child-specific, such as schools, daycare facilities, and arcades. These appear always to be prohibited. The list also contains locations that are mixed-use and not necessarily child-specific, such as parks, swimming pools, and sports fields. These are not always prohibited. In each case, with one notable exception, each mixed-use location is modified by the phrase "*being used* for youth activities." CP 148 (emphasis added).

The problem (which was not present in the Wallmuller condition) is that the first portion of the condition contains a disjunctive "or," which then makes the illustrative list internally confusing, at least as to parks. Unlike in Wallmuller and the cases it approved, the illustrative list fails to clarify.

While not identical to the invalid condition in Peterson, 248 F.3d at 86, the use of "or" makes this condition confusing. That is because (as in Peterson) use of the word "or" renders the interplay between the two parts

of the condition ambiguous. As in Peterson, even though the condition purports to contain an illustrative list, the structure of the condition and the language used undermines any resulting clarity.

By way of illustration, the "being used for youth activities" modifier is not applied to parks, so Martinez must avoid parks "used" for youth activities. Meanwhile, the first part of the condition prohibits Martinez from being in areas where children's activities regularly[4] occur *or* are occurring. Must Martinez stay out of parks "used" (at some point in their existence) for youth activities, regardless of whether youth are actually present? Or does the "are occurring" language in the first portion of the condition control? Does the condition prohibit Martinez from going for a jog in a park the dead of winter even though youth camps are routinely—regularly— held at the park only in the summer? Considering that the first part of the condition is written in the disjunctive, it is unclear.

In its current vague and ambiguous state, the condition also runs afoul of the requirement that community custody conditions be crime related. State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007), overruled on other grounds by Sanchez Valencia, 169 Wn.2d 782. To use the prior example, how does a winter jog past a park that, as a matter of

[4] Webster's defines "regular" as "returning [or] recurring . . . at stated, fixed, or uniform intervals." WEBSTER'S THIRD NEW INT'L DICTIONARY 1913 (1993).

routine, hosts youth sailing classes in the summer relate to a crime against a minor, or avoidance of contact with minors?

This Court should grant review and remand for the trial court to clarify that Martinez is prohibited from entering parks *being used* for youth activities, not parks *used* for youth activities at some point in time. As it currently stands, the condition is confusing as to what is prohibited, does not provide protect against arbitrary enforcement, and is insufficiently crime-related.

E. CONCLUSION

For the reasons stated, this Court should grant review and reverse the Court of Appeals on each of the three issues.

DATED this 25th day of May, 2021.

Respectfully submitted,

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APPENDIX

FILED
4/26/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. OSCAR MARTINEZ ZAVALA, Appellant.	)	No. 80817-6-I DIVISION ONE UNPUBLISHED OPINION

MANN, C.J. — Oscar Martinez Zavala appeals his judgment and sentence for child molestation in the first degree. Martinez argues that (1) the trial court erred in failing to dismiss a biased juror, (2) community custody condition 3 is not narrowly tailored to address visitation with Martinez's minor sons, (3) community custody conditions 7B (avoiding parks with children), and 7D (avoiding relationships with families), are unconstitutionally vague, and (4) that the court erred in requiring him to pay the cost of postrelease supervision as a condition to his community custody. We agree that condition 7D is impermissibly vague and that the trial court erred in requiring Martinez to pay the cost of postrelease supervision as a condition to his community custody. As such, we remand to modify community custody condition 7D consistent with this opinion, and to strike the cost of community custody supervision. We otherwise affirm.

FACTS

A. Background

Martinez met Janet[1] in early 2014. Martinez had a teenage son. Janet had two daughters, including Y.I. Martinez became Janet's cohabitating partner, sharing in parenting responsibilities for the children. Martinez and Janet had a son in April of 2018. Martinez referred to Y.I. as his daughter and Janet as his wife.

Y.I. testified that Martinez touched her inappropriately on three occasions between June 1, 2016 and August 31, 2018. Y.I. would have been from 9 to 11 years old. On October 8, 2018, after learning of these incidents, Janet and her children moved in with her sister, Yesenia. On October 13, 2018, Yesenia's husband called 911 and reported the interactions between Martinez and Y.I. After an investigation, the State charged Martinez with three counts of child molestation in the first degree, RCW 9A.44.083.

B. Procedure

On September 9, 2019, jury selection began. During a supplemental voir dire period, defense counsel introduced a hypothetical using a character named "Ben" who presumed that if the State charged a person with a crime that the person was guilty. The exchange went as follows:

> [DEFENSE COUNSEL]: If the judge told you that Ms. Sebens has to prove her case on all three counts beyond a reasonable doubt for each count, and we don't have to do anything, we can sit here, be asleep, we don't have to do a single thing. If Ms. Sebens hasn't proven her case beyond a reasonable doubt but there is some evidence that says yeah he might have done it, what do you think you would do?

[1] This opinion refers to Y.I.'s mother as "Janet" to help preserve the anonymity of Y.I., the minor victim in this case.

> While you are thinking I'm going to tell you about my friend Ben. My friend Ben will never be on one of my juries. He thinks just because somebody is charged with a crime he thinks law enforcement did their job. If the State brought a charge they did their job, and they are probably guilty. He tells me this, and we talk about cases. Yeah, you don't want me on your jury. If they've gotten this far then he's probably guilty. I'm not naïve. I know most people feel that way.
>
> What we want to make sure of is that people can follow the instructions that the Court gives. We want to make sure that if you are Ben then this isn't the right place for you. This isn't a case for you. But if you still feel that way but you think you can follow the Court's instructions, I can follow the law, I can make the State prove their case beyond a reasonable doubt before I say guilty, then this is the case for you. Hearing that, does anyone think they might be like Ben; that they might say, yeah, we're here. Law enforcement investigated—
>
> Thank you for being honest. Juror Number 21, do you think that might be you? I'm still friends with Ben. Ben is a great person.
>
> [JUROR 21]: Yes.
>
> [PROSECUTION COUNSEL]: Can I request that we focus on the numbers that we were going to focus on? I understand like her, we need to follow up but—
>
> [THE COURT]: I'll let her respond.
>
> Counsel, let's go through the numbers we talked about. This isn't open ended.
>
> You may respond.
>
> [JUROR 21]: That's about all I have. To some extent, yes. I think if the State thinks that there's enough evidence to bring charges there's definitely something to it. Does that mean for sure? No, but yeah that's where I'm at.

No one inquired further.

The jury convicted Martinez on one count of child molestation in the first degree, and acquitted him on two counts of the same. The court sentenced Martinez to 58 months to life in prison, with lifetime community custody.

Martinez appeals.

ANALYSIS

A. Juror Bias

Martinez argues that the trial court failed in its duty to excuse juror 21 for bias[2], and that trial counsel was ineffective for not moving that the juror be excused. We disagree.

"The right to trial by an impartial jury is guaranteed by the Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington Constitution." State v. Gonzalez, 111 Wn. App. 276, 277, 45 P.3d 205 (2002). When a juror with actual bias is seated, this constitutional right is violated. "The presence of a biased juror cannot be harmless; the error requires a new trial without a showing of prejudice." State v. Irby, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015); RAP 2.5(a)(3).

A trial judge has an independent obligation to excuse a juror, regardless of inaction by counsel or the defendant. Irby, 187 Wn. App. at 193. "When a trial court is confronted with a biased juror . . . the judge must, either sua sponte or upon a motion, dismiss the prospective juror for cause." State v. Guevara Diaz, 11 Wn. App. 2d 843, 856, 456 P.3d 869 (2020). A trial court need not excuse a juror with preconceived ideas as long as the juror can set those ideas aside in order to decide the case on the evidence presented at trial and law provided by the court. RCW 4.44.190; State v. Phillips, 6 Wn. App. 2d 651, 662, 431 P.3d 1056 (2018) (citing State v. Rupe, 108 Wn.2d 734, 748, 743 P.2d 210 (1987)). Thus, the question presented to the trial court

[2] While Martinez did not raise this issue below, he may raise it on appeal per RAP 2.5(a)(3). "If the record demonstrates the actual bias of a juror, seating the biased juror was by definition a manifest error." State v. Guevara Diaz, 11 Wn. App. 2d 843, 856, 456 P.3d 869 (2020).

is "whether a juror with preconceived ideas can set them aside." State v. Noltie, 116 Wn.2d 831, 839, 809 P.2d 190 (1991).

The trial court is in the best position to determine a juror's ability to be fair and impartial. Therefore, we review a trial court's decision not to dismiss a juror for manifest abuse of discretion. Guevara Diaz, 11 Wn. App. 2d at 856. A trial court abuses its discretion when it is exercised on untenable grounds or for untenable reasons. Guevara Diaz, 11 Wn. App. 2d at 856. The trial court's broad discretion during the voir dire is nonetheless "subject to essential demands of fairness." Guevara Diaz, 11 Wn. App. 2d at 856.

For relief, an appellant needs to demonstrate the juror had "actual bias" and "more than a mere possibility that the juror was prejudiced." State v. Grenning, 142 Wn. App. 518, 540, 174 P.3d 706 (2010). "Actual bias is 'the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging.'" Irby, 187 Wn. App. at 193 (quoting RCW 4.44.190). Actual bias is not demonstrated when a juror's answers are at all equivocal. State v. Lawler, 194 Wn. App. 275, 374 P.3d 278 (2016). Rather, where a juror unequivocally admits to a bias in favor of police witnesses and indicates that the bias will likely affect deliberations, actual bias is demonstrated. State v. Gonzales, 111 Wn. App. 276, 281, 45 P.3d 205 (2002).

Here, because juror 21's statements were equivocal, the trial court's decision not to dismiss her did not arise to a manifest abuse of discretion. The juror did not indicate that she wanted to say that Martinez was guilty, nor did she indicate that she would be

unable to base her decision on the evidence presented at trial and the law provided by the court. When faced with the "Ben" hypothetical, juror 21 indicated that if charges were brought there was "something to it" but she was not "for sure."[3] When analyzing juror 21's statement, the trial court explained:

> Well, my recollection is what she said is that it's a concern like maybe for everybody coming in on a case like this, the importance of it, and the concerns of the charges. But I thought the last thing she said is she thought she could be fair and follow the instructions of the Court.

The trial court did not perceive juror 21 to have actual bias and did not abuse its discretion in doing so.

B. Community Custody Conditions

Martinez challenges three community custody conditions. A defendant may challenge conditions of community custody "for the first time on appeal where the challenge involves a legal question that can be resolved on the existing record, preenforcement." State v. Wallmuller, 194 Wn.2d 234, 238, 449 P.3d 619 (2019). We review de novo whether the trial court had statutory authority to impose community custody conditions. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). If the condition is statutorily authorized, we review the imposition of crime-related prohibitions for the abuse of discretion. Armendariz, 160 Wn.2d at 110. "A trial court necessarily abuses its discretion if it imposes an unconstitutional community custody condition, and we review constitutional questions de novo." Wallmuller, 194 Wn.2d at 238. Conditions that do not reasonably relate to the circumstances of the crime, the risk

[3] Further indication of the lack of actual bias from juror 21 is the jury's ultimate unanimous finding of Martinez's guilt on one of the three counts of child molestation in the first degree.

of re-offense, or public safety are unlawful, unless those conditions are explicitly permitted by statute. State v. Jones, 118 Wn. App. 119, 204, 76 P.2d 258 (2003).

1. Contact with Minor Children

Martinez first challenges community custody condition 3 which requires that he:

> [r]efrain from direct and/or indirect contact . . . with minor-aged children without the supervision of an adult who is knowledgeable of your offense and only with approval of your Community Corrections Officer and Sexual Deviancy Treatment Provider.

Martinez contends that this condition fails to address contact with his two biological sons. We disagree.[4]

The right to "care, custody, and companionship" of one's children, or the right to parent, is a fundamental right. State v. Warren, 165 Wn.2d 17, 34, 195 P.3d 940 (2008). A sentencing court may not prohibit contact between a defendant and his children as a matter of routine practice. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 377-82, 229 P.3d 686 (2010). This right, however, is not absolute, and is subject to limitations reasonably necessary to meet the compelling need of the State to prevent harm to children. City of Sumner v. Walsh, 148 Wn.2d 490, 526, 61 P.3d 1111 (2003). For example, less restrictive alternatives such as indirect contact or supervised contact may not be prohibited unless barring all contact is shown to be necessary to achieve a compelling State interest. Warren, 165 Wn.2d at 32. Martinez was in a parental role to Y.I. when he sexually assaulted her. The sentencing court acted within its discretion to limit Martinez's contact with his children during community custody as a result. Further, the court did not impose a complete prohibition on Martinez's contact with his children.

[4] Martinez argues also that his trial counsel was ineffective in failing to object to condition 3. Because we review Martinez's assignment of error and find no error in the condition, his counsel was not ineffective in failing to object.

The court tailored condition 3 to allow contact with the supervision of an adult, as well as the approval of Martinez's community corrections officer and sexual deviancy treatment provider.[5] Condition 3 is appropriately tailored and reasonably necessary to meet the compelling need of the State to prevent harm to children.

2. Avoid Parks Used for Youth Activities

Martinez next challenges condition 7B that requires he:

> [s]tay out of areas where children's activities regularly occur or are occurring as follows: parks used for youth activities; schools (except post-secondary 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, or any area where more than 50% of the individuals there are youth. 'Youth' is defined as an individual under 16 years of age.

Martinez contends that the phrase "parks used for youth activities" in condition 7B is unconstitutionally vague. We disagree.

Under the due process principles of the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution, "[a] legal prohibition, such as a community custody condition, 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] . . . condition is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would

[5] Martinez argues that the requirement that he obtain approval from his community corrections officer and sexual deviation treatment provider results in a de facto prohibition of contact because he will not have a community custody officer or sexual deviancy provider until his release to community custody. Martinez ignores that the conditions of community custody are not effective until his release to community custody.

be classified as prohibited conduct.'" Padilla, 190 Wn.2d at 677 (quoting State v. Sanchez Valencia, 169 Wn.2d 782, 793, 239 P.3d 1059 (2010)). Instead, "'the Fourteenth Amendment and article I, section 3 of the state constitution require that citizens have fair warning of proscribed conduct.'" Sanchez Valencia, 169 Wn.2d at 791 (quoting State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008)). The standard is satisfied where "ordinary people can understand what is and is not allowed, and are protected against arbitrary enforcement." Sanchez Valencia, 169 Wn.2d at 791.

Condition 7B is analogous to the condition in Wallmuller, 194 Wn.2d at 238-39. In Wallmuller, our Supreme Court held that the condition "the defendant shall not loiter in nor frequent places where children congregate such as parks, video arcades, campgrounds, and shopping malls" was not unconstitutionally vague. Wallmuller, 194 Wn.2d at 241, 244-45. In doing so, the court reversed the Court of Appeals' interpretation that "congregate" suffered from unconstitutional vagueness, and that the commonsense reading of the prohibition would lend to an ordinary person understanding the scope of the prohibited conduct. Wallmuller, 194 Wn.2d at 245.

Here, condition 7B is even more specific than the condition in Wallmuller. Condition 7B provides a detailed list of areas where Martinez is prohibited. Any indeterminate area is further narrowed to "where more than 50% of the individuals there are youth." "Youth" is additionally defined as "an individual under 16 years of age." A commonsense reading of this prohibition would allow an ordinary person to understand the prohibited conduct. Thus, condition 7B is not unconstitutionally vague.

3. Relationships with Families

Martinez next challenges condition 7D that requires

> [n]o dating or forming relationships with families who have minor children as directed by the Community Corrections Officer and Sexual Deviancy Treatment Provider.

Martinez contends that the phrase "forming relationships with families" in condition 7D is vague because it could be read, for example, to prohibit Martinez from forming a contractual relationship with a family for a construction project if the family has minor children. The State concedes that the phrase "forming relationships with families" is vague and should be stricken.

We agree and remand to the trial court to modify condition 7D as follows: "Do not engage in any dating relationships[6] with any individuals who have minor children unless first approved by the Community Corrections Officer and the Sexual Deviancy Treatment Provider (if the defendant is engaged in sexual deviancy treatment)."

C. Ineffective Assistance of Counsel

Martinez argues that because his trial counsel failed to challenge juror 21 for cause he received ineffective assistance of counsel. We disagree.

A claim of ineffective assistance of counsel presents a mixed question of fact and law that we review de novo. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). To prevail on a claim of ineffective assistance of counsel, a party has the burden of establishing that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defendant's case. State v. Linville, 191 Wn.2d 513, 524, 423 P.3d 842 (2018). If a defendant fails to satisfy either prong, we need not inquire further. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). When reviewing an ineffective assistance of counsel claim, there is a strong presumption that

[6] "Dating relationship" is statutorily defined in RCW 26.50.010(2) and was held by State v. Nguyen, 191 Wn.2d 671, 682, 425 P.3d 847 (2018), to withstand a challenge of constitutional vagueness.

counsel's representation was effective and competent. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

To establish deficient performance, the defendant must show that trial counsel's performance fell below an objective standard of reasonableness. In re Pers. Restraint of Davis, 152 Wn.2d 647, 672, 101 P.3d 1 (2004). Trial strategy and tactics cannot form the basis of a finding of deficient performance. State v. Cienfuegos, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001). Prejudice can be shown only if there is a reasonable probability that, absent counsel's unprofessional errors, the result of the proceeding would have been different. Davis, 152 Wn.2d at 672-73.

To establish ineffective assistance of counsel based on trial counsel's performance during voir dire, a defendant must generally demonstrate the absence of a legitimate strategic or tactical reason for counsel's performance. Davis, 152 Wn.2d at 709. The failure of trial counsel to challenge a juror is not deficient performance if there is a legitimate tactical or strategic decision not to do so. State v. Alires, 92 Wn. App. 931, 939, 966 P.2d 935 (1998).

Martinez fails to establish that juror 21 would have been excused had they been challenged for cause. The juror's remarks identified by Martinez as evidence of bias are merely equivocal and do not establish any probability that the juror had any actual bias against him. See Noltie, 116 Wn.2d at 839.

Further, legitimate strategy exists for Martinez's counsel to avoid challenging juror 21. Excessive questioning or failed challenges can cause antagonism towards Martinez. Because trial counsel's performance during voir dire could be characterized

as legitimate trial strategy and thus not deficient, this performance cannot form the basis for ineffective assistance of counsel.

D. Community Custody Supervision Fees

Martinez argues that the trial court erred in requiring him to pay the cost of his supervision during community custody. We agree.

"Conditions of community custody may be challenged for the first time on appeal and, where the challenge involves a legal question that can be resolved on the existing record, preenforcement." Wallmuller, 194 Wn.2d at 238. Discretionary legal financial obligations, including supervision fees, may not be imposed on a person who is indigent. State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2008); RCW 10.101.010. Here, the trial court found Martinez indigent under RCW 10.101.010(3). Because the trial court found Martinez indigent at the time of sentencing, we remand to the trial court to strike the postrelease supervision cost from the sentence and judgment.

Remanded to modify condition 7D in appendix F consistent with this opinion, and to strike the cost of community custody supervision. Affirmed in all other respects.

Mann, C.J.

WE CONCUR:

Brennan, J.

Chun, J.

NIELSEN KOCH P.L.L.C.

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