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Supreme Court No. 100774-4
Court of Appeals No. 54280-3-II

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

STATE OF WASHINGTON,
Respondent

v.

THOMAS BOSTELLE,
Appellant

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Thomas Bostelle, seeks review of the unpublished opinion in *State v. Bostelle,* #54280-3-II. See Appendix I.

II. ISSUES PRESENTED FOR REVIEW

On appeal, Mr. Bostelle argued the trial court violated Mr. Bostelle's right to confrontation and right to present a defense based upon that ruling impeachment of B.H. The Court of Appeals misread the record when it concluded there was no order limiting Mr. Bostelle's from fully presenting evidence to support his defense that B.H. admitted to her mother she made a prior false accusation of attempted sexual assault and compounded her lies when, under oath on cross-examination, she denied making the false accusation. Did the Court of Appeals violate Mr. Bostelle's state constitutional right to appeal under Const. Art. 1 § 22 when it failed to properly address Mr. Bostelle's issue? And, was Mr. Bostelle denied his state and

federal constitutional right to cross-examine adverse witnesses, including by impeaching an adverse witness's credibility. U.S. Const. amend. VI; Const. art. I, § 22?

III. STATEMENT OF THE CASE

Mr. Bostelle's step-daughter claimed that he had molested and raped her. He was charged with one count of first degree incest, two counts of third degree rape of a child and one count of child molestation. This case was tried to the bench. In reaching his verdict, the trial judge explicitly found B.H. credible and, at the same time, found the defense witnesses not credible. CP 30. But the trial court had prevented Mr. Bostelle from fully presenting evidence to support his defense that B.H. admitted to her mother she made a prior false accusation of attempted sexual assault and compounded her lies when, under oath on cross-examination, she denied ownership of her phone and denied making the false accusation in a text message from that phone.

Contrary to the Court of Appeals opinion, the trial judge did exclude evidence that B.H. had made previous false allegation of

rape.[1] The trial court initially stated it would allow such evidence. However, the State moved for reconsideration. The trial judge reconsidered and ruled as follows:

> So the argument about relevancy means that it's relevant to prove or disprove a material fact. The material facts are whether the defendant did or didn't engage in a behavior as alleged by the State. To suggest that you are wanting to proceed down this inquiry just for the sake of proceeding down this inquiry and for it to be left out that if she's made a prior sexual allegation and that someone's come in to say that she denied it at some point in time, just to leave that out there, that doesn't prove or disprove the defendant's guilt. It goes to something. It goes to credibility, I believe. I believe that that's the intention, to get that information before the Court to suggest that if she's made this prior allegation and if she's denied that prior allegation then the current allegation isn't believable. And that is an issue of credibility which I believe triggers Evidence Rule 608.
>
> The *Harris* case in that last paragraph suggests -- and I want to make sure that I read it again to explain the ruling. It says that by telling the trial court that M.T subsequently withdrew or recanted this prior unrelated accusation -- which is similar to this case, an unrelated prior accusation -- Mr. Harris in that case implied that the victim in that case or alleged victim in that case admitted making the accusation in the first place. But in

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[1] Mr. Bostelle quoted a shorter portion of this ruling on page 10 of his opening brief.

that case, the alleged victim did not withdraw or recant the prior accusation, she utterly denied it. And that's the situation that we have in this case. When Briana testified, she denied the text messages. It goes on to say in the *Harris* case: Since M.T would deny ever having made the statement, it could be proved only by extrinsic evidence from the witness. It was therefore inadmissible under Evidence Rule 608 to impeach M.T's general character for truthfulness. And I believe the same thing happens in this case relying -- and pardon me when I say that, I mean in Mr. Bostelle's case relying on the reasoning in the Harris case that because Briana denied ever having made or written those text messages, the existence of those text messages can only be proved by extrinsic evidence, which is Exhibit 9, and any testimony by Ms. Bostelle about her confronting Briana about the text messages, about Briana didn't make any denials or statements to her which, you know, those are out-of-court statements, and then admitting or not admitting that in fact what was alleged to have occurred in Exhibit 9 occurred. So relying on the *State v. Harris* case and not having heard any argument or providing any case law to the contrary, it seems as though my ruling, given how things played out here, should be that allowing Ms. Bostelle to testify about those statements is not proper evidence to be before the Court.

I believe that my understanding initially was that she was going to admit that she had made those statements. I think that's the understanding that I had at the beginning of the case when we were discussing the motions in limine. And that if she admitted that she made those statements then you would be able to cross-examine her and to go into whether she did or didn't later deny those statements -- not deny those statements

> but later deny that the allegation had actually occurred. But because that's not what happened when Briana testified, she denied making -- writing those text messages altogether, **I don't think that the case law or the evidence rule allows the parties to be able to go down that road.**

RP 385-87. As a result of misreading the record, the Court of Appeals failed to consider Mr. Bostelle's claim that he had been denied his constitutional right to cross-examine the adverse witness and, in doing so, also denied his state constitutional right to appeal.

IV. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Both the state and federal constitutions guarantee criminal defendants the right to cross-examine adverse witnesses, including by impeaching an adverse witness's credibility. U.S. Const. amend. VI; Const. art. I, § 22; *Washington v. Texas*, 388 U.S. 14, 23, 87 S.Ct. 1920, 18 L.Ed. 2d 1019 (1967); *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed. 2d 347 (1974); *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002); *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

"'The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.'" *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010), quoting C*hambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). A defendant's right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence. *Chambers*, 410 U.S. at 294. "The right to confront and cross-examine adverse witnesses is [also] guaranteed by both the federal and state constitutions." *Darden*, 145 Wn.2d at 620. A court "'necessarily abuses its discretion by denying a criminal defendant's constitutional rights.'" *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009), quoting *State v. Perez*, 137 Wn. App. 97, 105, 151 P.3d 249 (2007). The denial of Sixth Amendment rights is reviewed de novo. *Iniguez*, 167 Wn.2d at 280-81.

The record establishes that prior to trial, B.H. left the prosecutor with the impression that she would admit she used her

phone to text a friend that a stranger had attempted to sexually assault her. RP 387. However, during trial B.H. denied that statement and denied that she used that phone to text her friend. Bostelle offered proof to show B.H.'s previous report of an attempted rape (which she told her mother was false) and her denial that the phone belonged to her was relevant to her credibility as to the charges against Bostelle.

The State convinced the trial judge that once B.H. denied the statements the defense could not impeach her by admitting the phone, the texts and her admission to her mother that that accusation on a text in her phone was a lie. The trial court agreed. The State's argument rests solely on the opinion in *State v. Harris*, 97 Wash. App. 865, 872, 989 P.2d 553, 557 (1999). But in that case, *Harris* conceded that he had no evidence that the prior accusation was false, even if it was made. As a result, it was not proof that the victim had lied.

In this case, however, there is proof that B.H. had previous given the State impression that she did not deny that she had made

this false allegation. And, unlike the evidence in *Harris*, there was convincing evidence that it was B.H.'s phone, she did write the texts and she admitted to her mother the texts were false. Thus, B.H. was actually covering up her false claim of rape and compounding her lack of credibility by lying to the trial court in her testimony.1

Contrary to the State's suggestion, ER 608 does not categorically bar the admission of prior false claims of rape. By its terms, ER 608 authorizes inquiry into specific instances when the alleged conduct tends to show the witness's untruthfulness. The trial court has complete discretion to admit the prior claims. *State v. McSorley*, 128 Wn. App. 598, 611, 116 P.3d 431 (2005). But a court abuses its discretion if its decision is based on untenable grounds or reasons or is manifestly unreasonable. *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003). In exercising its discretion, the court must consider that "'[i]t is well established that a criminal defendant is given extra latitude in cross-examination to show... credibility, especially when the particular prosecution witness is essential to the State's case. Any fact which goes to the trustworthiness of the

witness may be elicited if it is germane to the issue.'" *McSorley*, 128 Wn. App. at 612–13 (quoting *State v. York*, 28 Wn. App. 33, 36–37, 621 P.2d 784 (1980)). The Washington Supreme Court has reasoned that "[f]ailing to allow cross-examination of a state's witness under ER 608(b) is an abuse of discretion if the witness is crucial and the alleged misconduct constitutes the only available impeachment." *State v. Clark*, 143 Wn.2d 731, 766, 24 P.3d 1006 (2001).

V. CONCLUSION

This Court should grant review because the Court of Appeals' mistake in reading the record and its failure to properly address the violation of Mr. Bostelle's constitutional rights is a question of substantial public importance. RAP 13.4(b)(4).

RESPECTFULLY SUBMITTED this 28th day of March 2022.

/s/Suzanne Lee Elliott

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. THOMAS BOSTELLE, Appellant.	No. 54280-3-II UNPUBLISHED OPINION

LEE, C.J. — Thomas Bostelle appeals his convictions and sentence for one count of first degree incest, two counts of third degree rape of a child, and one count of third degree child molestation. Bostelle argues that the trial court denied his right to confrontation and right to present a defense by improperly excluding evidence that a cell phone belonged to the victim. Bostelle also argues that he received ineffective assistance of counsel because his attorney failed to move to admit a text message on his victim's cell phone as a prior inconsistent statement and because his attorney did not have the victim's cell phone analyzed before trial. And Bostelle argues that the trial court erred by imposing a sentence that exceeds the statutory maximum for his convictions on two counts of third degree rape of a child and one count of third degree child molestation.

We affirm Bostelle's convictions but remand for the trial court to strike the term of community custody imposed on the convictions for third degree rape of a child and the conviction for third degree child molestation.

FACTS

B.H.,[1] Bostelle's stepdaughter, alleged that Bostelle had molested and raped her several times in the home that they shared. The State charged Bostelle with one count of first degree incest, two counts of third degree rape of a child, and one count of third degree child molestation. The case proceeded to a bench trial.

A. Motion in Limine

Before trial, the trial court heard motions in limine and considered whether evidence about particular text messages from B.H.'s cell phone was admissible. The texts were sent from B.H.'s cell phone to B.H.'s friend, who was not called as a witness, and contained an allegation that a stranger on the street had sexually assaulted and attempted to rape the person who sent the texts.

Kymberly Bostelle,[2] who is B.H.'s mother and Bostelle's wife, knew about these texts because she monitored B.H.'s text messages. This text monitoring was a condition of B.H. having a cell phone. The State agreed that questioning B.H. about these texts was "fair game on cross" and "the exact kind of relevant question of credibility and specific instance under [ER] 608 that is directly applicable in this case." 1 Verbatim Report of Proceedings (VRP) (Sept. 18, 2019) at 18.

The trial court ruled that:

> [T]he information . . . of the prior allegation of an attempted rape, I think specifically is something that you all can go into because it does weigh on her

[1] We use initials to protect the victim's identity and privacy interests. General Order 2011-1 of Division II, *In re the Use of Initials or Pseudonyms for Child Witnesses in Sex Crimes* (Wash. Ct. App.), https://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=2011-1&div=II.

[2] We refer to Kymberly Bostelle by her first name to avoid confusion with the defendant, Thomas Bostelle. No disrespect is intended.

> credibility as to another allegation of a sexual assault which is alleged to have occurred by Mr. Bostelle.

1 VRP (Sept. 18, 2019) at 18-19. However, the trial court also ruled that the evidence would be limited by the evidence rules and that the attorneys should object if the other party sought to admit evidence in a way that does not comply with those rules.

B. B.H.'s Testimony

On cross-examination, Bostelle's counsel asked B.H. if she recalled sending a text to a friend in which she claimed she was walking down the street and was sexually assaulted. B.H. testified that she did not recall sending this text, so Bostelle's counsel confronted her with screenshots of text messages, which were marked as Exhibit 9. B.H. reviewed the screenshots and stated, "No, I did not text that." 1 VRP (Sept. 18, 2019) at 229. B.H. then testified that her parents supervised and had access to all the texts that were sent from her phone. Bostelle's counsel did not move to admit the screenshots into evidence.

C. Cell Phone

Bostelle's counsel later attempted to have B.H.'s cell phone marked as an exhibit to show to B.H.'s brother as he was testifying. Bostelle's counsel also requested a recess to "have experts review the phone and reach whatever conclusions they reach regarding the message that is on the phone." 2 VRP (Sept. 19, 2019) at 303.

The trial court denied counsel's request for a trial recess because "there's no expert that can come in and say that in fact based off of their ability to download the information on that phone that they can say with any certainty that the message was written by the alleged victim." 2 VRP (Sept. 19, 2019) at 307. The trial court did, however, admit the cell phone as an exhibit for

demonstrative purposes and allow Bostelle's counsel to question witnesses about who owned the cell phone. The trial court also allowed Bostelle's counsel to use the cell phone to ask questions about the text message B.H. allegedly sent but limited questioning "to the actual language that's included in Exhibit 9." 2 VRP (Sept. 19, 2019) at 296.

B.H.'s brother testified that the cell phone belonged to B.H. and that he had seen B.H. texting on the phone.

D. MOTION FOR RECONSIDERATION OF TRIAL COURT'S EVIDENTIARY RULING

After B.H.'s brother testified, the State moved the trial court to reconsider its decision to allow Kymberly to testify about her conversation with B.H. regarding the texts on the cell phone.[3] The State argued that because B.H. had denied sending the texts during her testimony, allowing Kymberly to testify about her conversation with B.H. about the texts would be improper impeachment with extrinsic evidence. After hearing argument on the motion, the trial court ruled that "any testimony by [Kymberly] about her confronting [B.H.] about the text messages, about [B.H.] didn't make any denials or statements to her" would be out-of-court statements, and "allowing [Kymberly] to testify about those statements is not proper evidence to be before the Court." 3 VRP (Sept. 26, 2019) at 386-87.

[3] Bostelle's counsel informed the trial court that Kymberly had previously confronted B.H. about these particular text messages. Bostelle's counsel also informed the court that Kymberly was prepared to testify that, during the conversation between Kymberly and B.H., B.H. denied that the assault on the street had occurred.

E. VERDICT AND SENTENCING

The trial court found Bostelle guilty of all charges. Bostelle moved for a new trial, arguing that the trial court improperly excluded evidence related to the cell phone and text messages. The court denied the motion.

The trial court sentenced Bostelle to standard range sentences on all counts. For the convictions for third degree rape of a child and the conviction for third degree child molestation, the court imposed the statutory maximum of 60 months per count, plus 36 months of community custody on each count. The court wrote a notation on the judgment and sentence: "total not to exceed statutory maximum for any count." Clerk's Papers at 41.

Bostelle appeals.

ANALYSIS

A. EXCLUSION OF EVIDENCE

Bostelle argues that the trial court violated his right to confrontation and right to present a defense by excluding evidence that a cell phone containing a particular text message was B.H.'s. Specifically, Bostelle identifies the issue as "[t]he court refused to allow Mr. Bostelle to present evidence the phone from which the text was obtained was B.H.'s." Br. of Appellant at 2. He contends that "[t]he evidence that the phone was B.H.'s was admissible to attack B.H.'s credibility." Br. of Appellant at 12 (italics omitted). Bostelle further argues that "Bostelle was not attempting to prove the falsity of B.H.'s text, rather he wished to have Kymberly Bostelle testify that the text was from the phone that Ms. Bostelle knew to be B.H.'s." Br. of Appellant at 14. And he argues that "[t]he failure to allow evidence that the damaging text came from B.H.'s phone supported Mr. Bostelle's defense, thus becoming critical in casting doubt on B.H.'s

allegations." Br. of Appellant at 15. Because the trial court did not exclude evidence that the phone was B.H.'s, the trial court did not violate Bostelle's right to confrontation or right to present a defense.

When reviewing a trial court's evidentiary ruling that potentially implicates constitutional rights, we engage in a "two-step review process." *State v. Arndt*, 194 Wn.2d 784, 797, 453 P.3d 696 (2019), *cert. denied*, 142 S. Ct. 726 (2021); *see State v. Jennings*, No. 99337-8, slip op. at 4 (Wash. Feb. 3, 2022)[4] (reiterating two-part test as clarified in *Arndt*). First, we review the trial court's evidentiary ruling for an abuse of discretion. *Arndt*, 194 Wn.2d at 797. Then, we consider de novo the constitutional question of whether the ruling deprived the defendant of their constitutional rights. *Id.* at 797-98.

ER 608(b) allows, at the trial court's discretion, cross-examination of specific instances of a witness's conduct for purposes of impeaching the witness's character for truthfulness or untruthfulness. However, specific instances of the conduct of a witness "may not be proved by extrinsic evidence." ER 608(b).

Here, there is nothing in the record to support Bostelle's argument that the trial court excluded evidence about the cell phone's ownership or refused to allow witnesses to testify that the phone belonged to B.H.[5] In fact, the record shows that this evidence was allowed. And B.H.'s

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[4] https://www.courts.wa.gov/opinions/pdf/993378.pdf

[5] The trial court did exclude testimony from Kymberly about her later confrontation and conversation with B.H. about the text message. However, Bostelle does not challenge exclusion of that testimony on appeal.

brother did testify that the cell phone belonged to B.H. and that he had seen her send text messages from it.

Because the trial court did not exclude, but actually allowed, evidence that the cell phone belonged to B.H., Bostelle's argument that the trial court abused its discretion by excluding that evidence fails. And because the trial court did not exclude, but actually allowed, evidence that the cell phone belonged to B.H., the trial court did not violate Bostelle's constitutional rights. Bostelle's argument that the trial court erred by excluding evidence fails.[6]

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Bostelle argues that he was provided ineffective assistance of counsel because his trial counsel failed to admit B.H.'s text as a prior inconsistent statement under ER 613(b) and failed to have B.H.'s cell phone analyzed. We disagree.

1. Legal Principles

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a defendant the right to effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011), *cert. denied*, 574 U.S. 860 (2014). We review ineffective assistance of counsel claims de novo. *State v. Lopez*, 190 Wn.2d 104, 115, 410 P.3d 1117 (2018). A defendant claiming ineffective assistance of counsel has the burden to establish that counsel's performance was deficient and that the performance prejudiced the defendant's case.

[6] In his reply brief, Bostelle argues for the first time that the trial court violated his right to present a defense by not allowing testimony that B.H. admitted to her mother that she had made a prior false accusation of attempted sexual assault. We decline to address this argument raised for the first time in a reply brief. *See State v. Chen*, 178 Wn.2d 350, 414 n.11, 309 P.3d 410 (2013) (declining to address arguments raised for the first time in reply brief).

Grier, 171 Wn.2d at 32-33. Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Id.* at 32-33.

Counsel's performance is deficient if it falls "'below an objective standard of reasonableness.'" *Id.* at 33 (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). "There is a strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). A defendant may overcome this presumption by showing that "'there is no conceivable legitimate tactic explaining counsel's performance.'" *Grier*, 171 Wn.2d at 33 (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). However, if counsel's conduct can be characterized as a legitimate trial strategy or tactic, then counsel's performance is not deficient. *Id.* at 33. To establish prejudice, the defendant must "prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." *Kyllo*, 166 Wn.2d at 862.

For ineffective assistance of counsel claims based on an attorney's failure to take a certain action, the defendant must show that the action likely would have been successful. *See State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012) (requiring showing that severance motion likely would have been granted); *State v. Case*, 13 Wn. App. 2d 657, 673, 466 P.3d 799 (2020) (requiring showing that objection likely would have been sustained); *State v. D.E.D.*, 200 Wn. App. 484, 490, 402 P.3d 851 (2017) (requiring showing that motion to suppress likely would have been granted).

2. Analysis

a. Failure to admit text message as a prior inconsistent statement

Bostelle argues that his counsel provided ineffective assistance by failing to move to admit a text message from B.H.'s cell phone as a prior inconsistent statement under ER 613(b).

ER 613(b) provides that

> [e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

"In general, a witness's prior statement is admissible for impeachment purposes if it is inconsistent with the witness's trial testimony." *State v. Newbern*, 95 Wn. App. 277, 292, 975 P.2d 1041, *review denied*, 138 Wn.2d 1018 (1999).

Here, the evidence in question was a text message on B.H.'s phone stating that the sender had been the victim of sexual assault committed by a stranger on the street. At trial, B.H. testified that she did not send the text. These statements are not inconsistent with each other. And B.H. did not testify inconsistently with the text's substance. In fact, she never testified about the prior unrelated sexual assault at all. Therefore, had Bostelle's counsel moved to admit the text message as a prior inconsistent statement under ER 613(b), the text message would not have been admitted. *See* ER 613(b); *Newbern*, 95 Wn. App. at 292.

Bostelle has failed to show that a motion to admit the text message as a prior inconsistent statement would likely have been granted, so he has not met the standard required for his ineffective assistance of counsel claim to be successful. *See Emery*, 174 Wn.2d at 755; *Case*, 13

Wn. App. 2d at 673; *D.E.D.*, 200 Wn. App. at 490. Thus, Bostelle's ineffective assistance of counsel claim fails because he has not shown deficient performance.

b. Failure to have cell phone analyzed

Bostelle argues that his attorney's failure to have B.H.'s cell phone analyzed constitutes ineffective assistance of counsel.

When seeking relief from counsel's claimed failure to investigate, a defendant "'must show a reasonable likelihood that the investigation would have produced useful information not already known to defendant's trial counsel.'" *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 739, 101 P.3d 1 (2004). "'In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.'" *In re Pers. Restraint of Gomez*, 180 Wn.2d 337, 356, 325 P.3d 142 (2014) (quoting *Strickland*, 466 U.S. at 691).

Here, Bostelle's attorney did not have B.H.'s cell phone analyzed by an expert before trial but requested a recess during trial to have the phone analyzed after B.H. denied sending a text message while on the witness stand. The trial court denied the request for a recess because "there's no expert that can come in and say that in fact based off of their ability to download the information on that phone that they can say with any certainty that the message was written by the alleged victim." 2 VRP (Sept. 19, 2019) at 307.

The record shows B.H. did not have exclusive control of the phone. In fact, Kymberly and Bostelle had access to B.H.'s phone as they would monitor B.H.'s texts as a condition of her having a cell phone. There also is no evidence that an expert could show that it was B.H. who wrote the text in question. At most, an expert analysis could show that the text came from B.H.'s cell phone.

But Bostelle's counsel already knew that the text came from B.H.'s cell phone and witnesses testified to that effect. And without knowing who had the phone at the time the text was sent, an expert's testimony that the text came from B.H.'s phone would not constitute useful information. Because there was no "reasonable likelihood that [expert analysis] would have produced useful information not already known" to Bostelle's counsel, Bostelle has failed to show that his attorney's failure to investigate constitutes ineffective assistance of counsel. *Davis*, 152 Wn.2d at 739. Therefore, Bostelle's ineffective assistance of counsel claim fails.

C. Statutory Maximum Sentence

Bostelle argues that the trial court erred by imposing a sentence that exceeds the statutory maximum for his offenses. The State concedes that this error occurred and does not oppose remand for the trial court to strike community custody terms for the convictions for third degree rape of a child and the conviction for third degree child molestation. We accept the State's concession and remand to the trial court to strike the community custody terms on the convictions for third degree rape of a child and the conviction for third degree child molestation.

A trial court "may not impose a sentence providing for a term of confinement or community custody that exceeds the statutory maximum for the crime." RCW 9.94A.505(5).[7] Prior to 2009, when any trial court imposed an aggregate term of confinement and community custody that potentially exceeded the statutory maximum, the trial court was required to include a notation explicitly stating that the total term of confinement and community custody actually served may

[7] RCW 9.94A.505 was amended in 2019 and 2021. However, there were no substantive changes made affecting this opinion. Therefore, we cite to the current statute.

not exceed the statutory maximum. *See In re Pers. Restraint of Brooks*, 166 Wn.2d 664, 675, 211 P.3d 1023 (2009).

In 2009, the legislature enacted RCW 9.94A.701(10).[8] Following the enactment of this statute, the *Brooks* notation procedure no longer complies with statutory requirements. *State v. Boyd*, 174 Wn.2d 470, 472, 275 P.3d 321 (2012). Instead, "*[t]he term of community custody . . . shall be reduced* by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime." RCW 9.94A.701(10) (emphasis added).

Here, the maximum sentences for third degree rape of a child and third degree child molestation are 60 months. RCW 9A.44.079(2);[9] RCW 9A.44.089(2);[10] RCW 9A.20.021(1)(c). The trial court imposed a sentence of 60 months of confinement plus 36 months of community custody on the convictions for third degree rape of a child and the conviction for third degree child molestation. Together, those combined terms for each crime exceed the statutory maximum sentence for the crimes. Although the trial court included a *Brooks* notation on the judgment and sentence, the *Brooks* notation procedure no longer complies with statutory requirements. *Boyd*, 174 Wn.2d at 472. Thus, the trial court erred by imposing a sentence in excess of the statutory

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[8] This subsection was originally codified as RCW 9.94A.701(8). It was renumbered to subsection (9) in 2010 and renumbered to subsection (10) in 2021. No substantive changes were made affecting this opinion. Therefore, we cite to the current statute.

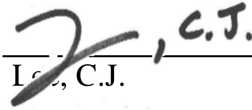
[9] RCW 9A.44.079 was amended in 2021. However, there were no substantive changes made affecting this opinion. Therefore, we cite to the current statute.

[10] RCW 9A.44.089 was amended in 2021. However, there were no substantive changes made affecting this opinion. Therefore, we cite to the current statute.

maximum. *See* RCW 9.94A.505(5). We remand to the trial court to strike community custody terms on the convictions for third degree rape of a child and the conviction for third degree child molestation.

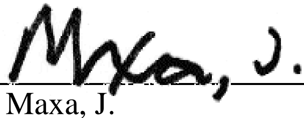
We affirm Bostelle's convictions. However, we remand to the trial court to strike the community custody terms on the convictions for third degree rape of a child and the conviction for third degree child molestation.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

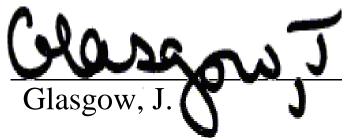


Lee, C.J.

We concur:



Maxa, J.



Glasgow, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 54280-3-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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MARIA ANA ARRANZA RILEY, Paralegal   Date: March 28, 2022
Washington Appellate Project

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