68759-0

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No. 68759-0

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL SHANE CATES,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

At Michael Cates's criminal trial, the court permitted an important State witness to testify from outside the courtroom via two-way video link, but the evidence did not show, and the court did not find, that the procedure was necessary to further an important public policy. The court also did not ensure that the reliability of the testimony was sufficient to justify foregoing the usual requirement that the witness testify in court in the defendant's presence. As a result, Mr. Cates's Sixth Amendment right to confront the witness was violated.

In addition, the community custody condition permitting a community corrections officer to search Mr. Cates's home and computer without a warrant and without reasonable cause was unauthorized and must be stricken.

B. ASSIGNMENTS OF ERROR

1. Mr. Cates's Sixth Amendment right to confrontation was violated when the court allowed a State witness to testify via video link.

2. The court erred in imposing a community custody condition that permits a community corrections officer to search Mr. Cates's home and computer.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth Amendment right to confrontation encompasses the right to have adverse witnesses testify in court in the presence of the accused. A witness may testify using a different procedure only in narrow circumstances and only if the trial court finds the procedure is necessary to further an important public policy and the reliability of the testimony is assured. Mere convenience and expediency are not sufficient reasons to forego in-court testimony. Was Mr. Cates's Sixth Amendment right to confrontation violated when the court permitted a State witness to testify via video link merely because the witness lived in another state?

2. A community corrections officer may not search a probationer's home or personal effects without a warrant unless the officer has reasonable cause to believe the probationer violated a condition of community custody or committed a crime. Did the court err in imposing a condition of community custody that permits a community corrections officer to search Mr. Cates's home and computer in the absence of reasonable cause?

D. STATEMENT OF THE CASE

One day in December 2009, when M.S. was 15 years old, he told his mother that a friend of the family, Michael Cates, had sexually abused him over a period of several months when M.S. was seven years old. RP 107, 342-47. M.S. said he decided to tell his mother at that time because his younger sister had recently disclosed that she was molested by a cousin and M.S. wanted to help her feel more comfortable talking about it. RP 123. M.S. said Mr. Cates sexually abused him while Mr. Cates was living with the family in their house in Lake Stevens in 2001. RP 102-05, 210-11. Mr. Cates lived with the family for about six to nine months but M.S.'s parents never noticed anything unusual about his relationship with M.S. or any changes in M.S.'s behavior. RP 216, 228, 233, 241-42, 331, 336, 389-90. After Mr. Cates moved out, the family lost touch with him. RP 226-27, 340.

M.S.'s parents encouraged M.S. to tell the police. 230, 351-52. M.S.'s father provided police with possible contact information for Mr. Cates in Missouri. RP 81. Eventually, Robert McPhail, a police detective in Springfield, Missouri, contacted Mr. Cates at the probation office in Springfield. RP 264. Mr. Cates was on probation for a drinking and driving offense. RP 264; Exhibit 8B. Detective McPhail

interviewed Mr. Cates at the probation office. RP 265. Mr. Cates waived his Miranda rights and agreed to talk to the detective. RP 268-69. He denied sexually abusing M.S. RP 279-81.

Mr. Cates was charged in Snohomish County with two counts of rape of a child in the first degree, RCW 9A.44.073, and two counts of child molestation in the first degree, RCW 9A.44.083, allegedly occurring between August 1, 2000, through August 1, 2002. CP 86-87.

At the jury trial, the court permitted Detective McPhail to testify from Missouri via two-way video link technology. RP 259-60. The court made no finding, and the record does not show, that Detective McPhail's absence from the courtroom was a matter of necessity rather than simple inconvenience.

Detective McPhail testified using a "split screen" two-way video link. RP 259-60. The split screen allowed the jury to see at least part of the witness as well as what the witness himself could see. RP 259. The witness could not see the entire courtroom. Instead, the attorneys had to stand in front of the camera, each in turn as they questioned him, so that he could see them. RP 259. There was a slight time delay between the attorneys' questions and the witness's responses. RP 259-60.

Detective McPhail testified about his interrogation of Mr. Cates. RP 261-93. He told the jury that Mr. Cates was on probation and that he interviewed him at the probation office. RP 264-65. He said Mr. Cates was nervous and sweating and had a pale face and shaky hands. RP 266. Mr. Cates became particularly nervous when the detective asked if he had ever been alone with M.S. or had ever been in his bedroom. RP 271.

McPhail testified that Mr. Cates made several statements that were inconsistent with the testimony of M.S.'s parents. For instance, McPhail testified Mr. Cates said he had paid the family $500 a month in rent and still owed them money and speculated that this might be why M.S. had made up the allegations. RP 276-77. By contrast, M.S.'s father testified Mr. Cates never paid any rent. RP 214. McPhail also testified that Mr. Cates said the family did not ask him to move out, whereas M.S.'s father testified he told him to leave. RP 219-20, 278. Finally, McPhail testified Mr. Cates said he was never alone with M.S. and never went to his bedroom, whereas M.S.'s parents said Mr. Cates was sometimes alone with M.S. when the two would got to the park or the store together, and that Mr. Cates sometimes spent time in M.S.'s bedroom playing video games. RP 217, 249, 335.

In closing argument, the deputy prosecutor highlighted Detective McPhail's testimony. The prosecutor emphasized that Mr. Cates was nervous during the interrogation, that he became especially nervous when asked if he had ever been alone with M.S., and that he lied when he claimed he never was alone with the child. RP 530-32. The prosecutor urged the jury to view Mr. Cates's statements as evidence of consciousness of guilt. RP 531-32.

During deliberations, the jury asked to listen to the audiotaped recording of Detective McPhail's interrogation of Mr. Cates. CP 67. The court denied the request because the recording had not been admitted into evidence.[1] CP 67.

After further deliberation, the jury found Mr. Cates guilty of each count as charged. CP 62-65.

At sentencing, the court imposed a standard range determinate sentence and 36 months of community custody. CP 6-7.

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[1] A transcript of the interrogation was admitted as exhibit 8B. The transcript was redacted to eliminate Mr. Cates's request for an attorney. 1/25/12RP 253.

E. ARGUMENT

1. **Mr. Cates's Sixth Amendment right to be confronted by the witnesses against him was violated when the court allowed an important State witness to testify from outside the courtroom via two-way video technology.**

a. Mr. Cates may challenge this manifest constitutional error for the first time on appeal.

Generally, an appellant may not raise a claim of error on appeal that was not raised in the trial court. RAP 2.5(a). But an exception exists for a "manifest error affecting a constitutional right." RAP 2.5(a)(3).

The applicability of RAP 2.5(a)(3) is determined according to a two-part test. State v. Kronich, 160 Wn.2d 893, 899, 161 P.3d 982 (2007), overruled on other grounds by State v. Jasper, 174 Wn.2d 96, 271 P.3d 876 (2012). First, the Court determines whether the alleged error is truly constitutional Id. Second, the Court determines whether the alleged error is "manifest," i.e., whether the error had "practical and identifiable consequences in the trial of the case." Id. "Manifest" errors are to be distinguished from "purely formalistic error[s]." Id. An error in admitting evidence in violation of the Confrontation Clause is "manifest" if the evidence would have been excluded had the

defendant successfully raised the challenge at trial, and if the State's case would have been seriously undermined as a result. Id. at 900.

Washington courts routinely permit criminal defendants to raise Confrontation Clause challenges for the first time on appeal under RAP 2.5(a)(3). See Kronich, 160 Wn.2d at 899-901 (admission of Department of Licensing certification of defendant's driving status); State v. Kirkpatrick, 160 Wn.2d 873, 881-82, 161 P.3d 990 (2007), overruled on other grounds by Jasper, 174 Wn.2d 96 (admission of Department of Licensing certification as to absence of driver's record for defendant); State v. Price, 158 Wn.2d 630, 146 P.3d 1183 (2006) (admission of child hearsay statements); State v. Clark, 139 Wn.2d 152,156, 985 P.2d 377 (1999) (same); State v. Rohrich, 132 Wn.2d 472, 939 P.2d 697 (1997) (same); State v. Hayes, 165 Wn. App. 507, 514-15, 265 P.3d 982 (2011) (admission of complaining witness's hearsay statements to medical providers); State v. Lee, 159 Wn. App. 795, 813, 247 P.3d 470 (2011) (admission of cell phone records); State v. Fleming, 155 Wn. App. 489, 228 P.3d 804 (2010) (admission of "quote sheet" establishing replacement value of stolen property); State v. Rangel-Reyes, 119 Wn. App. 494, 81 P.3d 157 (2003) (admission of co-conspirator's statements); but see State v. O'Cain, 169 Wn. App.

228, 279 P.3d 926, 935 (2012) (holding admission of hearsay statements to medical providers was not manifest error affecting constitutional right and that Kronich's RAP 2.5(a)(3) analysis was no longer good law).[2]

In this case, RAP 2.5(a)(3) permits Mr. Cates to raise his Confrontation Clause challenge for the first time on appeal. There is no question the Sixth Amendment and article I, section 22 challenge is truly constitutional. See Kronich, 160 Wn.2d at 899. The error is also "manifest" rather than "purely formalistic." Id. Had Mr. Cates challenged the video link procedure at trial, the court would have been compelled to exclude Detective McPhail's testimony and the State's case would have been seriously undermined as a result. Id at 900.

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[2] In O'Cain, the Court of Appeals purported to overrule the Supreme Court's RAP 2.5(a)(3) holding in Kronich, but the Court had no authority to do so. See O'Cain, 169 Wn. App. at 247. It is a fundamental principle that the Court of Appeals does not have authority to overrule the Supreme Court on a question of state law. State v. Lee, 147 Wn. App. 912, 920 n.2, 199 P.3d 445 (2008). Therefore, O'Cain is not controlling in this case. Instead, this Court is obliged to follow the holdings of the other cases cited in the above paragraph.

b. Admission of Detective McPhail's testimony via video link violated the Sixth Amendment in the absence of a finding of necessity and the court's assurance that the testimony was sufficiently reliable.

i. The Confrontation Clause guarantees the right of the accused to meet the witnesses against him face-to-face in court.

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[3] Above all, the Confrontation Clause "guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." Coy v. Iowa, 487 U.S. 1012, 1016, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988).

In Maryland v. Craig, 497 U.S. 836, 845, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990), the United States Supreme Court explained that "[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." The right guaranteed by the Confrontation Clause includes not only a "personal examination," but also (1) ensures that

[3] This guarantee applies to the states through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

the witness will give his statements under oath, "thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury"; (2) forces the witness to submit to cross-examination, which is the "'greatest legal engine ever invented for the discovery of truth''; and (3) permits the jury to observe the demeanor of the witness, thus aiding the jury in assessing his credibility." Id. at 845-46 (quoting California v. Green, 399 U.S. 149, 158, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970)). "The combined effect of these elements of confrontation—physical presence, oath, cross-examination, and observation of demeanor by the trier of fact—serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings." Id. at 846.

Face-to-face confrontation is essential to a fair trial because it "enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person." Id. In Coy, the Court recognized the truism that "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'" Coy, 487 U.S. at 1019-20. Face-to-face confrontation also serves a "strong symbolic

purpose . . . by requiring adverse witnesses at trial to testify in the accused's presence." Craig, 497 U.S. at 846-47 (quoting Coy, 487 U.S. at 1017) ("[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution'") (quoting Pointer v. Texas, 380 U.S. 400, 404, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965)).

ii. A court may dispense with face-to-face confrontation only in narrow circumstances when necessary to serve an important public policy.

In Craig, the United States Supreme Court held that the Sixth Amendment right to face-to-face confrontation may be compromised only under limited circumstances where "considerations of public policy and necessities of the case" so dictate. Craig, 497 U.S. at 848.

In Craig, the Court upheld, over a defendant's Sixth Amendment challenge, a Maryland rule that allowed child victims of abuse to testify by one-way closed circuit television from outside the courtroom. 497 U.S. at 858. The defendant could see the testifying child witnesses on a video monitor, but the child witnesses could not see the defendant. Id. at 841-42. The trial court found the children would suffer serious emotional distress if they testified in the presence of the defendant such that they could not reasonably communicate. Id. at 842-43.

The defendant contended this procedure violated his Sixth Amendment right to confrontation because he was denied a physical face-to-face encounter with the witness. Id. at 842. The Supreme Court approved Maryland's rule, stating: "though we reaffirm the importance of face-to-face confrontation with witnesses appearing at trial, we cannot say that such confrontation is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers." Id. at 849-50. The Court explained "[t]he Confrontation Clause reflects a preference for face-to-face confrontation at trial, a preference that must occasionally give way to considerations of public policy and the necessities of the case." Id. The Court held, "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." Id. The State's interest in protecting child victims of sexual abuse from further trauma is sufficiently "compelling" to outweigh, at least in some cases, a defendant's right to face his accusers in court. Id. at 852-53.

The Court has never held that a trial court may dispense with physical face-to-face confrontation without satisfying the two-part test

set forth in Craig. Thus, before a court may permit a witness to testify from outside the courtroom, the court must find (1) the proposed procedure is necessary to further an important public policy and (2) the reliability of the testimony is otherwise assured.[4] Id. at 850.

iii. The *Craig* requirements apply in this case because the witness did not testify in the physical presence of the defendant.

Detective McPhail testified from Missouri, outside the physical presence of Mr. Cates. The court utilized a two-way video link procedure. RP 259-60. Although the jury could see at least the upper portion of the witness's body[5], the witness could not see the jury. RP 259. The attorneys had to take turns standing in front of the camera while they questioned the witness so that he could see them. RP 259. It is not clear from the record whether the witness could see the defendant. It is possible he could see the defendant while defense counsel questioned him. At the same time, it is likely he could not see the defendant while being questioned by the State. Finally, there was a

[4] The proper standard is not set forth in the Court's more recent decision in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Crawford applies only to testimonial statements made prior to trial, and the live two-way video testimony at issue in this case was presented at trial. See United States v. Yates, 438 F.3d 1307, 1314 n.4 (11th Cir. 2006).

[5] The record does not indicate how much of the witness's body the jury could see.

time delay between the attorneys' questions and the witness's responses. RP 259-60. This procedure does not amount to the face-to-face confrontation guaranteed by the Sixth Amendment.

"The simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation." United States v. Yates, 438 F.3d 1307, 1315 (11th Cir. 2006). Studies suggest that video screens necessarily present "antiseptic, watered down versions of reality." United States v. Nippon Paper Indus. Co., 17 F.Supp.2d 38, 42 (D. Mass. 1998) (and articles cited). Much of the interaction of the courtroom is missed, such as the witness's body language. Id. Commentators and judges believe that video teleconference testimony causes a significant loss of courtroom formality, which harms the fact-finding process. Anthony Garofano, Comment, Avoiding virtual justice: video-teleconference testimony in federal criminal trials, 56 Cath. U. L. Rev. 683, 701 (Winter, 2007). "Cross-examination via VTC lacks the adversarial impact it enjoys in person because the witness is separated from the cross-examining lawyer by distance and technology." Id. Delay also creates a sense of distance that impairs cross-examination. Marc Chase McAllister, Two-way video trial testimony and the confrontation clause: fashioning a better *Craig* test in

light of *Crawford*, 34 Fla. St. U. L. Rev. 835, 851-52. (Spring, 2007). Finally, if the procedure is not properly monitored, the witness's testimony may be tainted by other individuals present in the room. See, e.g., United States v. Shabazz, 52 M.J. 585, 591-92 (N-M. Ct. Crim. App. 1999) (during cross-examination defense counsel could hear a voice coaching the witness several times as she testified).

The two-way video procedure utilized in this case was more like live in-person testimony than the one-way closed circuit television procedure used in Craig because in that case the child witnesses could not see the defendant at all while they testified. See Craig, 497 U.S. at 841-42. Nonetheless, most courts to address the question have held that out-of-court testimony presented via two-way video technology violates the Sixth Amendment unless the Craig two-part test is satisfied.[6] See, e.g., United States v. Abu Ali, 528 F.3d 210, 240-41 (4th Cir. 2008); United States v. Yates, 438 F.3d 1307, 1313-14 (11th Cir. 2006); United States v. Bordeaux, 400 F.3d 548, 554-55 (8th Cir. 2005) (holding "'confrontation' via a two-way closed circuit television is not constitutionally equivalent to a face-to-face confrontation"); United States v. Turning Bear, 357 F.3d 730, 737 (8th Cir. 2004); United

[6] Washington courts have not yet addressed whether the use of two-way video technology violates the Sixth Amendment.

States v. Moses, 137 F.3d 89, 897-98 (6th Cir. 1998); United States v. Carrier, 9 F.3d 867, 869 (10th Cir. 1993); United States v. Garcia, 7 F.3d 885, 887-88 (9th Cir. 1993); State v. Sewell, 595 N.W.2d 207, 212 (Minn. Ct. App. 1999); People v. Wrotten, 14 N.Y.3d 33, 38-39, 923 N.E.2d 1099 (N.Y. Ct. App. 2009); State v. Johnson, 195 Ohio App.3d 59, 73-74, 958 N.E.2d 977 (2011), review denied, 131 Ohio St.3d 1437, 960 N.E.2d 987 (2012); Commonwealth v. Atkinson, 2009 Pa. Super. 239, 987 A.2d 743, 750 (2009); Stevens v. State, 234 S.W.3d 748, 782 (Tex. Ct. App. 2007); Bush v. State, 2008 WY 108, 193 P.3d 203, 215-16 (Wyo. 2008); but see United States v. Gigante, 166 F.3d 75 (2d Cir. 1999) (declining to apply Craig and holding government need not show use of two-way video technology serves important public policy).

Although the United States Supreme Court has not addressed the question in a published opinion, it apparently agrees that the presentation of testimony through two-way video conferencing violates the Sixth Amendment unless the strict requirements of Craig are satisfied. In 2002, the Advisory Committee on the Federal Rules of

Criminal Procedure suggested a revision to Rule 26[7] that would have allowed testimony by means of two-way video conferencing. But the Supreme Court declined to transmit to Congress the proposed revision. Justice Scalia filed a statement explaining that he shared "the majority's view that the Judicial Conference's proposed Fed. Rule Crim. Proc. 26(b) is of dubious validity under the Confrontation Clause of the Sixth Amendment to the United States Constitution." Order of the Supreme Court, 207 F.R.D. 89, 93 (2002). He remarked that the proposed amendments were "contrary to the rule enunciated in Craig" in that they would not limit the use of remote testimony to "instances where there has been a 'case-specific finding' that it is 'necessary to further an important public policy.'" Id. (citation omitted). Rule 26 was not revised to allow such testimony.

iv. The two-way video procedure used in this case did not satisfy the *Craig* standard.

As stated, before a court may allow a witness to testify from outside the courtroom, the court must find (1) the denial of face-to-face confrontation is necessary to further an important public policy and (2)

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[7] Federal Rule of Criminal Procedure 26 provides: "In every trial the testimony of witnesses must be taken in open court, unless otherwise provided by a statute or by rules adopted under 28 U.S.C. §§ 2072-2077."

the reliability of the testimony is otherwise assured. Craig, 497 U.S. at 850. Neither prong of the test is met in this case.

"[T]he prosecutor's need for the video conference testimony to make a case and to expeditiously resolve it are not the type of public policies that are important enough to outweigh the Defendant's right to confront their accusers face-to-face." Yates, 438 F.3d at 1316. The trial court must make a case-specific finding that would support a conclusion that the case is different from any other criminal prosecution in which the government would find it convenient to present testimony by two-way video conference. Id. "All criminal prosecutions include at least some evidence crucial to the Government's case, and there is no doubt that many criminal cases could be more expeditiously resolved were it unnecessary for witnesses to appear at trial." Id. Craig requires the government to show it was *necessary* and not merely convenient to deny the defendant his right to a physical face-to-face confrontation. Id.

When a witness resides outside the state, the prosecution must show more than that the witness would be inconvenienced by traveling to Washington. In Abu Ali, for instance, the government made the requisite showing where the key witnesses resided in Saudi Arabia, the

Saudi Arabian government would not allow them to testify in the United States, and the defendant was charged with crimes targeting American civilians and the president which "plainly implicates this vital interest" of protecting Americans against terrorist attack. 528 F.3d at 239-41. Other courts have permitted out-of-state witnesses to testify remotely only because they were severely ill and *unable* to travel to the courtroom. See, e.g, Sewell, 595 N.W.2d at 212; Wrotten, 14 N.Y.3d at 40; Stevens, 234 S.W.3d at 782; Bush, 193 P.3d at 215-16.

On the other hand, courts have held that the Sixth Amendment was violated when the prosecution could show only that bringing the witness to the courtroom was inconvenient and inefficient. See, e.g., Yates, 438 F.3d at 1315-16 (holding Sixth Amendment violated where government could show only that Australian witnesses were unwilling to travel to Alabama); Atkinson, 987 A.2d at 750 (holding Sixth Amendment violated where witness testified from prison because "[w]hile efficiency and security are important concerns, they are not sufficient reasons to circumvent Appellant's constitutional right to confrontation").

Here, the record shows only that it was convenient but not necessary for Detective McPhail to testify from Missouri. Detective

McPhail was *able* to travel to Washington State. Indeed, he had been present in court the previous week.[8] RP 260. The court did not require him to return the following week only because it was inconvenient for him to make a second trip. Thus, the record does not show it was *necessary* for Detective McPhail to testify from outside the courtroom and the first prong of the Craig test is not satisfied. Craig, 497 U.S. at 850; Yates, 438 F.3d at 1316.

As for the second—reliability—prong of the Craig test, the court must ensure not only that the procedure used preserved all of the other elements of the confrontation right. See Craig, 497 U.S. at 851 (holding child's testimony via one-way closed circuit television was sufficiently reliable because child was competent to testify and testified under oath, defense counsel cross-examined her, and judge, jury and defendant were able to view her demeanor and body on the video monitor while she testified). The court must also ensure that the witness's testimony is not tainted by other individuals who might be present in the room. In Shabazz, for example, the court held the defendant's Sixth Amendment right to confront the witness was

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[8] Detective McPhail was unable to testify at that time because the trial was postponed due to snow. The snow had prevented the court from assembling a large-enough jury pool. RP 260.

violated because the judge did not establish and enforce a clear protocol to control the site from which the witness testified and did not take appropriate measures when it became clear that a third party was communicating with the witness during her testimony. Shabazz, 52 MJ at 594; see also Bush, 193 P.3d at 216 (court sufficiently assured reliability of testimony by ordering wife out of room while husband testified).

Here, the record does not show that the court took appropriate measures to ensure that no one was present in the room while Detective McPhail testified. Therefore, the second prong of the Craig test is not satisfied. Shabazz, 52 MJ at 594; Bush, 193 P.3d at 216.

In sum, allowing Detective McPhail to testify from Missouri via two-way video link violated Mr. Cates's Sixth Amendment right to be confronted by the witnesses face-to-face. Craig, 497 U.S. at 850.

c. The constitutional error is not harmless beyond a reasonable doubt.

Confrontation Clause errors are subject to constitutional harmless-error analysis. State v. Jasper, 174 Wn.2d 96, 117, 271 P.3d 876 (2012); Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). Under this standard, the State must show "beyond a reasonable doubt that the error complained of did not

contribute to the verdict obtained." Jasper, 174 Wn.2d at 117 (citing Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). Whether such an error is harmless in a particular case depends upon a host of factors including the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case. Jasper, 174 Wn.2d at 117. The ultimate question is whether "[t]here is a reasonable probability the use of the inadmissible evidence was necessary to find [the defendant] guilty of the crime charged." Id.

Here, the State cannot show beyond a reasonable doubt that Detective McPhail's testimony did not contribute to the verdict. Detective McPhail testified at length about his interrogation of Mr. Cates. RP 261-93. His testimony was highly incriminating. He testified that Mr. Cates was nervous and sweating and had a pale face and shaky hands during the interview. RP 266. He testified Mr. Cates became particularly nervous when asked if he had ever been alone with M.S. or had ever been in his bedroom. RP 271. The deputy prosecutor

urged the jury during closing argument to view Mr. Cates's nervousness during the interrogation as evidence of consciousness of guilt. RP 530-32. Given that the State's remaining evidence consisted almost entirely of the child's testimony, the jury must have relied heavily on Detective McPhail's impressions of Mr. Cates's reaction when confronted with the allegations. Indeed, during deliberations, the jury requested to hear an audiotape of the interrogation, suggesting they found Mr. Cates's reactions during the interrogation significant. CP 67.

Detective McPhail also testified at length about the content of Mr. Cates's statements. RP 261-93. Many of those statements were contrary to the testimony of M.S.'s parents and suggested that Mr. Cates was being untruthful. RP 214, 217-20, 249, 267-78, 335. They therefore seriously undermined Mr. Cates's credibility.

In sum, it is likely the jury relied upon Detective McPhail's testimony in reaching its verdict and the Confrontation Clause violation was therefore not harmless beyond a reasonable doubt. Jasper, 174 Wn.2d at 117. The convictions must be reversed.

2. The court erred in imposing a condition of community custody that permits the community corrections officer to search Mr. Cates's home and computer.

As a condition of community custody, the court ordered Mr. Cates to "consent to DOC home visits to monitor your compliance with supervision. Home visits include access for the purposes of visual inspection of all areas of the residence in which you live or have exclusive/joint control/access, to also include computers which you have access to." CP 18. Defense counsel objected to the condition. 4/24/12RP 614-16. The condition must be stricken because it unreasonably burdens Mr. Cates's constitutionally protected rights.

A court's sentencing conditions are reviewed for abuse of discretion. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). A sentencing court abuses its discretion in imposing a condition if it applies the wrong legal standard. Id. The court also abuses its discretion if it imposes a condition that is unconstitutional. State v. Bahl, 164 Wn.2d 739, 753, 193 P.3d 678 (2008).

The Court carefully scrutinizes sentencing conditions that interfere with fundamental constitutional rights. Rainey, 168 Wn.2d at 374. Conditions that interfere with fundamental constitutional rights

must be "sensitively imposed" so that they are "reasonably necessary to accomplish the essential needs of the State and public order." Id.

Unlike statutes, conditions of community custody are not presumed valid. Bahl, 164 Wn.2d at 753.

Community custody conditions are unconstitutional if they are overbroad. See State v. McBride, 74 Wn. App. 460, 464, 873 P.2d 589 (1994). "Overbreadth is a question of substantive due process—whether a statute is so broad that it prohibits constitutionally protected activities as well as unprotected behavior." Id. The Court's first task in overbreadth analysis is to determine if the statute reaches constitutionally protected conduct. Id. (citing Tacoma v. Luvene, 118 Wn.2d 826, 839, 827 P.2d 1374 (1992)). Statutes that regulate conduct will be overturned if the overbreadth is both real and substantial in relation to the conduct legitimately regulated by the statute. Id.

In general, the First Amendment[9] prevents government from proscribing speech or expressive conduct. State v. Halstien, 122 Wn.2d 109, 121, 857 P.2d 270 (1993). "First Amendment overbreadth doctrine is largely prophylactic, aimed at preventing any 'chilling' of constitutionally protected expression." Id. at 122. As a result, courts

[9] The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech."

will permit a facial overbreadth challenge when the community custody condition in question chills or burdens constitutionally protected conduct. See id.

A personal computer is "the modern day repository of a man's records, reflections, and conversations." State v. Nordlund, 113 Wn. App. 171, 181-82, 53 P.3d 520 (2002) (internal quotation marks and citation omitted). Thus, the search of a computer has First Amendment implications that may collide with Fourth Amendment[10] concerns." Id.

Finally, although probationers have a lesser expectation of privacy than the general public, they are still entitled to the protections of the Fourth Amendment and article I, section 7. State v. Winterstein, 167 Wn.2d 620, 628-29, 220 P.3d 1226 (2009). A community corrections officer may not search a probationer's home or computer without a warrant absent reasonable cause to believe the offender has violated a condition or requirement of the sentence. Id.

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[10] The Fourth Amendment guarantees "[the] right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. In addition, article I, section 7 of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

Here, the court imposed a condition that allows the community corrections officer to search Mr. Cates's home and computer. CP 18. The condition does not specify that the officer must have a warrant or reasonable cause before conducting the search. In addition, the condition is not "crime-related."[11] There is no evidence that Mr. Cates used a computer in connection with the crime. There is also no evidence that Mr. Cates possessed pornography—which can be easily accessed on the internet—or that pornography played a role in the crime.

The condition at issue is unconstitutionally overbroad because it chills Mr. Cates's First Amendment right to use a computer to store his "records, reflections, and conversations." Nordlund, 113 Wn. App. at 181-82. The circumstances of the crime provide no legitimate reason to regulate Mr. Cates's use of a computer. At the same time, Mr. Cates's First Amendment right to use a computer is substantial. Id. Thus, the condition reaches constitutionally protected conduct to a substantial degree in relation to any conduct that may legitimately be regulated. McBride, 74 Wn. App. at 464. It is therefore

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[11] A "crime-related" condition is one that "directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10).

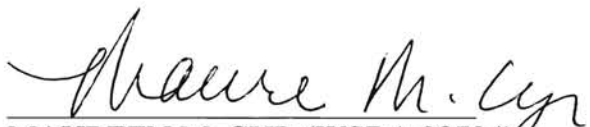
unconstitutionally overbroad. Id. In addition, because the condition "chills" Mr. Cates's constitutionally protected expression, it may be challenged on its face. Halstien, 122 Wn.2d at 122.

When a term included in a sentencing order is found to be improper, "[t]he simple remedy is to delete the questionable provision from the order." State v. Riles, 135 Wn.2d 326, 350, 957 P.2d 65 (1998). The community custody condition must be stricken.

F. CONCLUSION

Permitting an important State witness to testify from outside the courtroom violated Mr. Cates's Sixth Amendment right to confront his accusers and therefore the convictions must be reversed. In the alternative, the community custody condition permitting the community corrections officer to search his home and computer is unconstitutionally overbroad and must be stricken.

Respectfully submitted this 30th day of November, 2012.



MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 68759-0-I
	)	
	)	
MICHAEL CATES,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF NOVEMBER, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	SETH FINE, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	MICHAEL CATES 355618 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 30TH DAY OF NOVEMBER, 2012.

X_____

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