70044-8

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No. 70044-8-I

ORIGINAL

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent,

v.

JOSE GABINO, Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Supreme Court Cases

Court of Appeals

Federal Cases

Statutes

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the trial court violated Gabino's right to public trial by exercising a portion of for-cause and peremptory challenges at side bar in open court.

2. Whether this matter should be remanded to the trial court to amend Gabino's judgment and sentence to remove/amend community custody conditions e offense restricting all contact with Gabino's biological children, ordering him to not "date or form relationships with people who are less than 20 percent of your age" or to keep secrets.

3. Whether the trial court abused its discretion proscribing Gabino from using or possessing sexually explicit material or to submit to polygraph or plethysmograph testing limited to monitoring compliance with crime-related sentencing conditions, as a community custody condition when Gabino was convicted of a sex crime, required to participate in sexual deviancy treatment and where such provisions are not otherwise unconstitutional.

B. FACTS

Substantive Facts

Gabino was charged with one count of first degree child molestation. CP 3-4. The first trial held in 2004, resulted in a hung jury. CP 64-65. Following a second jury trial in 2012, Gabino was convicted as charged. CP 82. At sentencing, the court imposed an indeterminate sentence of 62 months minimum confinement and a lifetime term of community custody. CP 100. Gabino timely appeals asserting his public

trial rights were violated and that several of the terms of community custody should be stricken. CP 115-32.

C. ARGUMENT

1.) Gabino's public trial rights were not violated when the trial court and parties conducted For-cause and peremptory challenges at sidebar in open court.

a.) Grundy waived his right to assert this error for the first time on appeal by failing to object below pursuant to RAP 2.5

In his supplemental opening brief, Grundy asserts for the first time on appeal that the trial court violated his right to a public trial by exercising his for-cause and peremptory challenges at sidebar in open court. Supp. Br. of App. at 4.

A fundamental principle of appellate litigation is that a defendant may not assert a claim on appeal that was not raised with the trial court. State v. Davis, 41 Wn.2d 535, 250 P.2d 548 (1953). Requiring a contemporaneous objection provides the trial court an opportunity to prevent or cure the error. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); *see also*, State v. Paumier, 176 Wn.2d 29, 52, 288 P.3d 1126 (2012) (J. Wiggins dissenting) (trial court should be given opportunity to correct mistakes at time they are made in order to avoid unnecessary appeals and retrials). While some assertions of violations of the right to public trial have been permitted for the first time on appeal,

and most recently in Wise[1] and Paumier, this Court has also held that a defendant can waive[2] the right to public trial issue by failing to assert it below. State v. Collins, 50 Wn.2d 740, 314 P.2d 660 (1957). The court in Collins held that the defendant could not raise the court's partial closure of the courtroom for the first time on appeal, noting that "a trial court is entitled to know that its exercise of discretion is being challenged; otherwise, it may well believe that both sides have acquiesced in its ruling." Id. at 748[3].

Cases that have concluded that public trial claims are exempt from the contemporaneous objection requirement rely upon a single case: State v. Marsh, 126 Wash. 142, 217 P.705 (1923).[4] *See, e.g.*, State v. Wise, 176 Wn.2d 1, 15, 288 P.3d 1113 (2012); Paumier, 176 Wn.2d at 36; Boneclub, 128 Wn.2d at 257. That case was decided 50 years before the adoption of

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[1] State v. Wise, 176 Wn.2d 1, 15, 288 P.2d 1113 (2012).

[2] While the court in Collins used the term "waive," there is a significant distinction between waiver and forfeiture of a right. "Waiver" is the intentional relinquishment of a known right, while "forfeiture" is the "failure to make a timely assertion of a right." U.S. v. Olano, 507 U.S. 725, 733-34, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Waiver extinguishes the "error," while under forfeiture the error still exists despite the failure to timely raise it. Id. Requiring an objection in order to preserve an issue promotes judicial efficiency by permitting a court to know when defense is not intending to waive an issue by silence.

[3] This Court has never addressed, let alone distinguished, its opinion in Collins on this point. The court in Boneclub cited Collins with approval in addressing the issue of whether a partial closure rose to the level of a constitutional violation. Boneclub, 128 Wn.2d at 258.

[4] Moreover, Marsh involved a complete closure of an unrecorded criminal trial of a young adult who was unrepresented by counsel. The circumstances in Marsh clearly would have satisfied today's RAP 2.5(a) standard.

the Rules of Appellate Procedure. The adoption of RAP 2.5(a)(3) by this Court limited the ability of a defendant to obtain review of a claim of constitutional error, as under that rule, simply identifying a constitutional issue is no longer sufficient to obtain review of an issue not litigated below. State v. Scott, 110 Wn.2d 682, 687-88, 757 P.2d 492 (1988).

Under RAP 2.5(a), an error is waived if not preserved below unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); Scott, 110 Wn.2d at 686-87. The defendant must show both a constitutional error and actual prejudice to his rights. Kirkman, 159 Wn.2d at 926-2. To demonstrate actual prejudice there must be a "plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the cases." Id. at 935.

Despite Collins and RAP 2.5(a), the court in Boneclub summarily dismissed the state's argument that Boneclub waived his right to raise his right to a public trial error by failing to object below, holding that "the opportunity to object holds "no practical meaning" unless the court informs potential objectors of the nature of the asserted interest. Boneclub, 128 Wn.2d at 261. This flawed analysis stems from the court's misapplication of Art. 1 §10 concerns to the defendant's Art. 1 §22 right. This Court should refuse to apply a rule that conflicts with the Rules of Appellate Procedure and subverts the intent of RAP 2.5(a). State v.

Beskurt, 176 Wn.2d 441, 449-51, 293 P.3d 1159 (2013) (Madsen, J., concurring). The court in Boneclub did not consider the change effected by RAP 2.5(a); its holding that a public trial error need not be raised in the trial court should be corrected.

A rigorous adherence to the contemporaneous objection rule would avoid the potential unfair practice of defense misleading the trial court into believing the defendant does not object to a proposed closure or practice but then turning around on appeal and asserting that his right to public trial was violated. Application of a contemporaneous objection rule in this context is consistent with other jurisprudence. Under federal law, Gabino would not be able to assert a violation of his right to public trial for the first time on appeal. Under federal law, an unpreserved open courtroom claim will not be considered on appeal. Levine v. United States, 362 U.S. 610, 619, 80 S. Ct. 1038, 4 L.Ed.2d 989 (1960); Waller v. Georgia, 467 U.S. 39, 42 n., 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984); Puckett v. U.S., 556 U.S. 129, 129 S. Ct. 1423, 1428-29, 173 L. Ed. 2d 266 (2009). As Justice Madsen noted in her concurrence in Sublett, many other jurisdictions have held or recognized that the failure to object contemporaneously to an alleged violation of the right to public trial subjects the claimed error to forfeiture/failure to preserve rules on review. State v. Sublett, 176 Wn.2d 58, 126-27, 292 P.3d 715 (2012) (listing cases).

Respect for stare decisis requires a clear showing that an established rule is incorrect and harmful before it is abandoned. State v. Devin, 158 Wn.2d 157, 168, 142 P.3d 599 (2006). In this instance, the Boneclub rule is incorrect because it contradicts the spirit and letter of the Rules of Appellate Procedure adopted by this Court. It is harmful in at least three respects: 1) the trial court is denied the opportunity to correct any error; 2) if the claim of error is valid and could have been corrected, the public is unnecessarily denied the opportunity to view the original court proceedings; and 3) if the claim of error is valid and could have been corrected, a retrial that should have been unnecessary may be required. The costs of reversal are substantial: it forces jurors, witnesses, courts, the prosecution, and the defendants to repeat a trial that has already once taken place; the passage of time may render retrial difficult, even impossible; and it compromises the prompt administration of justice. United States v. Mechanik, 475 U.S. 66, 72, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986). This Court should overrule the holding in Boneclub that a defendant need not object to a public trial violation below in order to raise it on appeal.

Furthermore, the facts of this case are distinguishable from those cases, Boneclub, Wise and Paumier, that hold that the failure to object does not waive a right to public trial violation. Here, there was not mere

silence, Gabino's attorney willingly participated in the side bar conference and benefited in ensuring the potential jurors did not know which jurors Gabino was challenging for cause. Gabino should not be permitted to participate in the tradition of side bar consultation over legal issues and then raise this objection for the first time on appeal. Permitting Gabino to raise this alleged violation of the right to public trial for the first time on appeal encourages sandbagging.[5] Gabino waived his right to the formal entry of Boneclub findings by failing to object below pursuant to RAP 2.5.

b.) *A Side bar in open court to briefly address for cause and peremptory challenges during voir dire is not a closure under the experience and logic test and therefore does not implicate Gabino's right to a public trial.*

Even if this Court determines Gabino may raise this issue for the first time on appeal and that his challenge was not waived below, conducting for-cause and peremptory challenges at a side bar in open court does not implicating Gabino's Article 1, section 22 public trial rights pursuant to the experience and logic test.

Article 1, section 22 guarantees a criminal defendant the right to a public trial. State v. Lomor, 172 Wn.2d 85, 90-91, 257 P.3d 624 (2011).

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[5] This case presents the very concern Justice Wiggins raised in his dissent in Paumier, 176 Wn.2d at 52. While the State is not necessarily asserting that defense counsel purposefully misled the court below, the effect is the same as sandbagging. Most likely

Whether there is a right to public trial violation is a question of law reviewed de novo. State v. Momah, 167 Wn.2d 140, 147, 217 P.3d 321 (2009). Jury selection is considered part of a criminal trial that is subject to the defendant's constitutional right to a public proceeding. State v. Strode, 167 Wn.2d 222, 227, 217 P.3d 310 (2009), State v. Bennett, 168 Wn.App. 197, 204, 275 P.3d 1224 (2102)(public trial right encompasses "circumstances in which the public's mere presence passively contributes to the fairness of the proceedings, such as deterring deviations from established procedures, reminded the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny").

Whether a particular portion of a court proceeding is encompassed by the public trial right is determined by the application of the "experience and logic" test. State v. Sublett, 176 Wn.2d 58,114, 292 P.3d 715 (2012). In Sublett, the court explained the "experience and logic" test requires courts to determine the necessity for closure by consideration of both history and the purposes of the open trial provision. Sublett, 176 Wn.2d at 73, 292 P.3d 715. The experience portion of the test asks whether the practice in question has historically been open to the public, while the

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counsel below was intending to waive the issue, but it is the current state of the law which permits Gambino to exploit his silence below.

logic portion of the test focuses on whether public access is significant to the functioning of the public trial right. Id. If both prongs of this test are met, then the court must apply the Boneclub factors before the court can close the courtroom Id.

Applying the logic and experience test in Sublett, the Court found that the public trial right does not attach to counsel meeting in chambers to answer a question from a deliberating jury. State v. Sublett, 176 Wn.2d at 75. The Court reasoned that such proceedings have not historically been done in an open courtroom and the court's answer to the jury was recorded in writing, thus becoming part of the public record, necessarily reminding the court and counsel of their responsibilities and providing necessary oversight. See, State v.Sublett, at 75-77, *citing* People v. Virgil, 51 Cal.4th 1210, 1237-38, 253 P.3d 553 (2011), *cert. denied*, --U.S.(not every side bar conference rises to the level of a constitutional violation; brief bench conferences during jury selection when the courtroom itself is open to the public and the defendant is present did not deprive the defendant of his right to a public trial.)

Similarly, applying the Sublett logic and experience test to the facts in this case, the record reflects use of a side bar in open court does not implicate public trial rights. Jury selection in this case was completed in open court and there is a written record of all actions taken by the court

and counsel pertaining to both peremptory and for cause challenges that were completed initially at side bar in open court. See, Supplemental RP 2-8, Supp. CP __(sub nom 128). Gabino fails to cite to any authority that demonstrates historically for-cause and peremptory challenges have as a matter of routine, historically been done publicly. To the contrary, in State v. Love, __Wn.App. __, 309 P.3d 1209 (2013), *citing* State v. Thomas, 16 Wn.App. 1, 13, 553 P.2d 1357 (1976), the court pointed out that the use of written peremptory challenges was a practice used by many counties historically and that there is little evidence to demonstrate in Washington that voir dire challenges are traditionally completed open court within earshot of the public. See also, Popoff v. Mott, 14 Wn.2d 1, 9, 126 P.2d 597 (1942), (where the record describes a sidebar during voir dire on whether to excuse a juror for cause.), State v. Wolfe, 343 S.W.2d 10, 14 (missouri, 1961) (objection during voir dire). That is not to say that the exercise of peremptory and for cause challenges should not open to public scrutiny. Only that such scrutiny has historically been had through written documentation through clerk's notes or transcripts of open court where potential venire persons are not present. In this case the clerk's notes and transcript reflect what for cause and peremptory challenges were taken at side bar as reflected by the clerk's notes and the subsequent hearing wherein the court placed the content of the sidebar on the record

in open court. These actions sufficiently provide the oversight necessary to ensure the court and counsel acted responsibly in ensuring Gabino obtained a fair trial by an impartial jury and in considering public trial rights.

The logic prong also does not suggest jury selection challenges should be conducted openly in public. Requiring the parties to make their for cause and peremptory challenges in open court in front of the venire panel does nothing to further the underpinnings of public trial rights such as, encouraging witnesses to come forward or otherwise providing public oversight of the process. The issues presented during voir dire challenges are legal in nature and directed to the judge to decide. Furthermore, the clerks notes, in addition to the transcript following the side bar as previously noted reflect there is a written record of the parties exercise of their for cause and peremptory challenges sufficient to meet public oversight concerns. See, Supp. CP ___(sub nom 138), RP 3-5 (10/8/12). The trial court therefore did not erroneously close the courtroom by hearing Gabino's for cause and peremptory challenges at side bar in an open courtroom.

Predicated on the analysis of Sublett and application of the experience and logic test, the court in Love determined that the right to public trial was also not implicated by peremptory or for cause challenges.

As in Love, the exercise of for cause and peremptory challenges at side bar in this case do not, pursuant to the experience and logic test, implicate Gabino's public trial rights. Gabino's counsel engaged in the side bar wherein peremptory and for cause challenges were initially made, the court recorded the challenges and the court's decisions and the court then, outside the presence of the jury but in the open courtroom, made a record detailing the brief sidebar. This record does not reflect Gabino's public trial rights were implicated such that Boneclub findings would be warranted.

Gabino nonetheless, argues pursuant to State v. Wilson, 174 Wn.App. 328, 342-43, 346, 298 P.3d 148 (2013), and State v. Jones, 175 Wn.App. 87, 303 P.3d 1084 (2013), that the side bar conference in this case necessarily violated Gabino's right to a public trial because it pertained to the exercise of peremptory and show cause challenges and was not merely an administrative action.

The Court in Wilson determined the bailiff's administrative dismissal of two potential venire persons prior to voir dire did not implicate nor violate Wilson's public trial right based on the logic and experience test because court's have historically engaged in these administrative actions as reflected by court rules and statutes and, requiring administrative decisions to be conducted in open court would not

meaningfully further the public trial right. The Wilson court did not however, address whether a side bar in open court constitutes - a closure implicating the public trial right–or whether the use of the side bar to initially conduct peremptory or for cause challenges, in open court pursuant to the logic and experience test violates the right to a public trial. Wilson is therefore not instructive in this case.

In Jones, division II of this Court also determined that the historic practice in Washington is to select alternative jurors, in open court as part of voir dire. Jones public trial rights were violated because a clerk conducted a random drawing of the alterative jurors during an afternoon recess off the record and outside of the trial proceedings. In contrast to Jones, the peremptory and for cause challenges in this case were completed within the trial proceedings, during open court at side bar. Moreover, the parties made a written and verbal record reflecting the challenges and the court's decisions. Under those circumstances, Jones is also not instructive because Gabino's public trial rights were honored and not implicated by the experience and logic test as explained in Love. Gabino's argument should be rejected.

c.) If holding a side bar constitutes a closure, the alleged closure in this case should be considered de minimus and not requiring reversal.

Even if the court's side bar determination of for cause and peremptory challenges in construed as a closure, such closure should be construed as de minimus, thus not requiring reversal.

Any infringement upon Gabino's right to public trial was minimal and caused at least in part by his own failure to object. While our state has yet to affirmatively recognize the concept of a de minimis violation of the right to public, a majority of our state Supreme Court has also not explicitly held that there can be no such exception. The Court in State v. Brightman, 155 Wn.2d 506, 517, 122 P.3d 150 (2005), recognized that closures that have a de minimis effect on a proceeding do not necessarily violate the right to public trial. Brightman, 155 Wn.2d at 517. In order to determine whether the right to a public trial is implicated by a closure, courts look to whether the principles underlying the right to public trial are negatively impacted by the closure.

> "... [W]hether a particular closure implicates the constitutional right to a public trial is determined by inquiring whether the closure has infringed the 'values that the Supreme Court has said are advanced by the public trial guarantee...' ... This analysis tends to safeguard the right at stake without requiring new trials where these values have not been infringed by a trivial closure."

State v. Easterling, 157 Wn.2d 167, 183-84, 137 P.3d 825 (2006) (J. Madsen concurring). "[T]he right to public trial serves to ensure a fair trial, to remind prosecutor and judge of their responsibility to the accused

and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." State v. Sublett, 176 Wn.2d at 72; *see also*, Waller v. Georgia, 467 U.S. at 46-47. In the context of a closure of voir dire, the public nature of the proceeding permits the defendant's family to contribute their knowledge or insight to jury selection and permits the venire to see the interested individuals. Brightman, 155 Wn.2d at 515.

In addition to considering the values guaranteed by the public trial right in determining whether a closure is de minimis, courts have also considered the duration of the closure. U.S. v. Ivester, 316 F.3d 955, 960 (9th Cir. 2003); *see also*, Peterson v. Williams, 85 F.3d 39 (2nd Cir. 1996), *cert. den.*, 519 U.S. 878 (1996) (inadvertent closure of courtroom during defendant's testimony for 20 minutes met de minimis standard); Snyder v. Coiner, 510 F.2d 224, 230 (4th Cir. 1975) (short closure of courtroom during closing arguments was too trivial to implicate right to public trial). The de minimis standard has been applied in cases where closure was purposeful as well as unintentional. Easterling, 157 Wn.2d at 184-85 (J. Madsen concurring).

Here, none of the values underlying the right to a public trial is implicated by the side bar in this case wherein for cause and peremptory challenges were made. A side bar by its very nature is brief and is done in

open court, albeit outside of earshot of those in the courtroom, which in constrast to a hearing in chambers or in a locked courtroom still allows oversight by observers based on observations in conjunctions with announced decisions and court records. Having the for cause challenges at side bar and not presented to the potential venire panel enabled Gabino to exercise his rights to ensure a fair impartial jury panel without potentially tainting a potential jurors with knowledge that Gabino did not want them to serve on his jury. Thus, the side bar in this instance advanced Gabino's right to a fair trial, did not detract from it.

The issue of whether side bars addressing evidentiary matters and whether in preliminary discussions regarding jury instructions in chambers implicates the right to public trial under the logic and experience test is pending in our state supreme court in State v. Slert, No. 36534-1-II, 149 Wn.App, 1043, (2009), and in State v. William Glen Smith, (no. 388868-5-II). To the extent these cases may be instructive to this case, the state moves to stay Gabino's appeal pending a decision.

2.) The trial court did not abuse its discretion by ordering Gabino to submit to polygraph or plethysmographs or prohibiting use or possession of sexually explicit material where Gabino was convicted of a sex offense and is required to undergo sexual deviancy treatment. The trial court did abuse its discretion incorporating community custody provisions relating to a lifetime restriction with his biological children, prohibiting Gabino from 'keeping secrets' and prohibiting him

from dating someone 20% of his age. Remand as to those conditions, is appropriate.

Next Gabino asserts a number of community custody crime related prohibitions should be stricken from his judgment and sentence. Specifically, he complains the community custody provisions prohibiting contact with his biological children violate his constitutional right to parent, the plethysmograph assessment as directed by the department of corrections and therapist, limited to topics related to monitoring compliance violates his right to be free from bodily intrusions, restrictions on who Gabino dates violates his first amendment right to freedom of association and the condition requiring him to not have secrets is unconstitutionally vague, the condition that he not possess pornographic material is not crime related and is also constitutionally vague.

The legislature has authorized trial courts to impose crime-related prohibitions. RCW 9.94A.505. RCW 9.94A.703 sets out the community custody conditions that are mandatory, waivable and discretionary. A crime related prohibition is an order prohibiting conduct that relates directly to the circumstances of the crime. State v. Zimmer, 146 Wn.App. 405, 413, 190 P.3d 121 (2008), *review denied*, 165 Wn.2d 1035 (2009). A trial court's finding that a community custody prohibition is crime related

is reviewed for abuse of discretion. State v. Autrey, 136 Wn.App. 460, 150 P.3d 580 (2006).

a.) Prohibition for possessing sexually explicit materials is crime related and not unconstitutionally vague.

Gabino contends the community custody prohibition regarding sexually explicit material as proscribed by his treatment provided is unrelated to his offense and constitutionally vague. The prohibition he contends is unrelated states:

> Do not use or possess sexually explicit material in any form as described by the treatment provider and or community corrections officer, including internet use and possession.

CP 98-114. Prohibiting the use of possession of sexually explicit materials is crime related in this case because Gabino was convicted of a sex offense. The trial court therefore did not abuse its discretion imposing this crime related prohibition. Gabino's assertion this community custody provision is unconstitutionally vague should also be rejected.

The due process vagueness doctrine under the federal and state constitution requires defendants have fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008). A statute for example, is constitutionally vague if it does not define the criminal offense with sufficient definiteness so that ordinary persons can understand the proscribed conduct or provides ascertainable standard of guilt to protect

against arbitrary enforcement. Id at 739. Washington sentencing courts are required to impose certain community custody conditions in specified circumstances and are authorized within their discretion to impose others. Sentencing conditions are reviewed for abuse of discretion and only reversed if manifestly unreasonable. Id at 753. Imposing a condition that is unconstitutional is manifestly unreasonable. Id.

On appellate review, there is no presumption of constitutionality when a constitutional vagueness challenge to a community custody condition is raised. State v. Sanchez-Valencia, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010). When interpreting a condition, the reviewing court considers terms in the context in which they are used. State v. Bahl, 164 Wn.2d at 754. If a term is not defined, the court may consider the plain and ordinary definition found in a standard dictionary. If persons of ordinary intelligence understand what the condition proscribes, even if there is some dispute, the condition is sufficiently definite to withstand a vagueness challenge. State v. Sanchez-Valencia, 169 Wn.2d at 793. When a condition of community placement concerns materials protected by the First Amendment, a heightened level of clarity and precision is demanded. State v. Bahl, 164 Wn.2d at 754. In Bahl, our state supreme court determined that the community custody condition prohibiting the possession of pornographic materials was unconstitutionally vague. The

Court also determined however, that the term "sexually explicit" was narrower and sufficiently definite in the context of the type of prohibited establishments based on the dictionary definition of "explicit" which when used in conjunction with 'sexual' clearly defines the proscribed conduct as possessing materials that are clearly sexual in nature. Bahl, at 752. The court determined its analysis was further supported by RCW 9.68.130(1) which makes it unlawful to display "sexually explicit material" defining such as:

> Any pictorial material displaying direct physical simulation of unclothed genitals, masturbation, sodomy (bestiality or oral or anal intercourse), flagellation or torture in the context of a sexual relationship, or emphasizing the depiction of adult human genital: PROVIDED HOWEVER, That works of art of anthropological significance shall not be deemed to be within the foregoing definition.

RWC 9.68.130(2), see also RCW 9.68A.011(3) (listing sexually explicit conduct). When this community custody condition is reviewed in the context of Gabino's crime, the dictionary definition and statutory definition, the term is sufficiently clear to place Gabino on notice of the proscribed conduct that will reasonably subject him to a violation. This condition should therefore be upheld. Alternatively, this court could remand to the sentencing court to add or reference the statutory definition to ensure the community corrections officer or treatment provider and

Gabino are working within the same clear definition of proscribed conduct.

b.) Remand to strike the conditions requiring Gabino to not withhold secrets and to not date anyone 20 percent of his age is appropriate and to clarify if a basis exists to restrict contact with Gabino's biological children.

In contrast to the prohibition pertaining to sexually explicit materials, the state concedes the community custody provision that Gabino not "withhold information or secrets" from his treatment provider or community corrections officer" is vague and not sufficiently clear, pursuant to State v. Bahl, 164 Wn.2d 739, to overcome a constitutional vagueness challenge where it is not clear the context of this requirement. The state additionally concedes the sentencing condition requiring Gabino "not to date or form relationships with people who are less than 20 percent of your age" should be stricken. This matter should be remanded to the sentencing court in order to allow the court to strike these community custody provisions.

Gabino next asserts the community custody condition prohibiting contact with his own children is not crime related when the victim in this case was his niece, and not his own child. Gabino further contends this condition unconstitutionally violates his fundamental right to parent his own children.

Crime related prohibitions impacting a defendant's fundamental rights, such as the right to parent must be narrowly drawn. State v. Warren, 165 Wn.2d 17, 34, 195 P.3d 529 (2008). If a sentencing condition impacts a defendant's fundamental right to parent, the sentencing court must make a determination that the condition is "reasonably necessary to accomplish the essential needs of the State and public order." In re Rainey, 168 Wn.2d 367, 377, 229 P.3d 686 (2010), *quoting* State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940(2008).

The state does have a compelling interest in protecting children, such that the court may restrict a defendant's fundamental right to parent if the crime-related prohibition is reasonably necessary to prevent further harm to children and to protect them. State v. Corbett, 158 Wn.App. 576, 598, 242 P.3d 52 (2010).

A prohibition on a defendant's contact with his own children must be reasonable in scope as well as duration. In re Rainey, 168 Wn.2d at 378-81. Whether such a prohibition is reasonably necessary is fact dependent. Id at 377. The inquiry is based on the judge's evaluation of the defendant and the evidence produced at trial. Id at 374-75.

Here, the no contact order is directly related to Gabino's crime because it prohibits contact with his children who fell within the same class as that of the victim at the time-that of a minor, at the time of the

offense and at sentencing. The presentence investigation also references that Gabino was accused of other sex offenses, domestic violence and that there existed a no-contact order between Gabino and his biological children. CP 98-114.

The trial court in this case did not sufficiently explain the basis for the lifetime restriction between Gabino and his own children but given the references to an existing no contact order between Gabino and his children at the time of sentencing, remand for clarification of the basis to restrict contact with his biological children and/ or amending this community custody provision to ensure Gabino is restricted from minor children but not his own, is appropriate.

c.) The sentencing court did not abuse its discretion by ordering Gabino to submit to a polygraph and/or plethysmograph limited to compliance with his community placement conditions where his conditions include sexual deviancy treatment.

Next, Gabino challenges the condition requiring him to submit to a polygraph/ or plethysmograph assessment at his own expense as directed by the department of corrections and therapist, limited to topics related to monitoring compliance with crime-related sentencing conditions. CP 111.

In State v. Land, 172 Wn.App. 593, 295 P.3d 782 (2013), this Court determined that ordering an offender to participate in urinalysis, Breathalyzer, polygraph and plethysmograph testing as directed by your

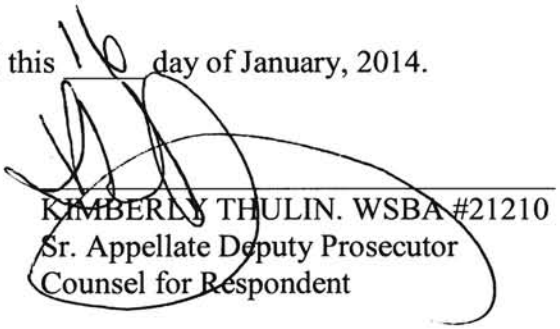
Community corrections officer as a condition of community custody violated Land's right to be free from bodily intrusions. The court noted however, that such testing could be properly ordered if related to the conviction and related treatment by a qualified provider *citing* State v. Castro, 141 Wn.App. 485, 494, 170 P.3d 78 (2007). Castro is dispositive in this case. Conditions of community custody may include participation in crime related treatment or counseling services, or order affirmative conduct related to the offense or to the offenders risk of reoffending or the safety of the community. RCW 9.94B.050, WA RCW 9.94A.704. Plesthymograph testing as a community custody condition is not prohibited where it is related to treatment in so far as treatment is a community custody provision. State v. Riles, 135 Wn.2d 326,340,957 P.2d 655 (1998), *overruled in part on other grounds by*, State v. Sanchex-Valencia, 169 Wn.2d at 792. As a condition of his community placement, Gabino must comply with sexual deviancy treatment. Having the plethysmograph as a tool to ensure Gabino's compliance with treatment is therefore appropriate. Gabino's claim should be rejected.

D. CONCLUSION

Based on the foregoing, the State respectfully requests this court affirm Gabino's conviction, to affirm community custody provisions so argued and remand to the sentencing court to strike and or amend the

community custody provisions relating to the lifetime ban of no contact with Gabino's children, his ability to date persons 20% of his age and not keeping secrets.

Respectfully submitted this 10 day of January, 2014.



KIMBERLY THULIN. WSBA #21210
Sr. Appellate Deputy Prosecutor
Counsel for Respondent

CERTIFICATE

I certify that on this date I placed in the United States mail with proper postage thereon, a true and correct copy of the document to which this certificate is attached, to appellant's counsel, Casey Grannis, addressed as follows:

Casey Grannis
Nielsen, Broman & Koch, PLLC
1908 East Madison
Seattle, Wa 98122

TM Anderson
Legal Assistant

1/16/14
Date