SUPREME COURT NO. 95383-0

NO. 74421-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PABLO SANTOS-SANTIAGO,

Petitioner.

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

The Honorable James D. Cayce, Judge

PETITION FOR REVIEW

JARED B. STEED
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Pablo Santos-Santiago, the appellant below, asks this Court to grant review pursuant to RAP 13.4 of the Court of Appeals' unpublished decision in State v. Santos-Santiago, ___ Wn. App. ___, ___ P.3d ___, 2017 WL 5569209 (No. 74421-6-I, filed November 20, 2017).[1]

B. ISSUES PRESENTED FOR REVIEW

1. Washington courts hold it is inappropriate for experts to testify about general characteristics of sexually abused individuals. The complaining witnesses did not undergo any sexual assault or other medical examinations. Nonetheless, the trial court admitted over defense objection, testimony from a nurse regarding possible conclusions from a hypothetical sexual assault examination, including testimony that "normal" exams generally do not show evidence of injury. Is review of warranted under RAP 13.4(b)(1), (b)(2), and (b)(3) because the Court of Appeals decision conflicts with precedent from the Court of Appeals, this Court, and presents a significant constitutional question?

2. As a condition of community custody, the court ordered Santos-Santiago to "[i]nform the supervising [community corrections officer (CCO)] and sexual deviancy treatment provider of *any dating relationship*." CP 91 (special condition 5) (emphasis added). Where

[1] A copy of the opinion is attached as an appendix.

Division One's opinion in this case conflicts with an opinion from Division Three, is review warranted under RAP(b)(2) and (b)(3) to determine whether the condition is unconstitutionally vague?

C. STATEMENT OF THE CASE

Santos-Santiago is married to Joavanna Santos Cortez. 1RP[2] 293; 2RP 83. Cortez has two children, A.G. (DOB 10/18/2000) and M.G. (DOB 6/2/2002), from a previous relationship. 1RP 294-95. The girls took an immediate liking to Santos-Santiago when he began dating Cortez. 1RP 307, 312, 394-95. At some point however, A.G. and M.G. began having contact with their biological father in Mexico. 2RP 98-99. Shortly thereafter, the girls began acting out and ignoring Santos-Santiago, telling him that they did not have to listen to him because he was not their dad. 1RP 330, 335, 366, 2RP 99-100.

In March 2014, A.G. skipped school and went to a shopping mall with her friends and boyfriend. 1RP 341-44, 449. When Cortez found out she threatened to send A.G. to live with her father in Mexico. 1RP 343-44, 350, 366-67, 451-53. When Cortez asked A.G. why she was behaving the way she was, A.G. disclosed for the first time several incidents involving her and Santos-Santiago. 1RP 343-44, 350, 463-64. M.G. also

[2] The index to the citations to the record is found in the Brief of Appellant (BOA) at 3, n.1.

disclosed alleged incidents between herself and Santos-Santiago to Cortez that same day. 2RP 49, 53.

A.G. explained that Santos-Santiago changed after marrying Cortez. 1RP 399-400, 468, 473. Within weeks of marrying Cortez, A.G. alleged that Santos-Santiago tried to put his hands down her pants. 1RP 400, 468. A.G. was sleeping in Cortez's bed when Santos-Santiago got into the bed next to her, hugged her, and put his hand down her pants and beneath her underwear. 1RP 402-03, 408-12, 490-91, 517. Santos-Santiago laughed when A.G. pulled away and started crying. 1RP 403, 412.

During a separate incident, Santos-Santiago grabbed A.G. while she was inside Cortez's bedroom, placed the bed covers over her face, and pulled down her pants. 1RP 413-16. Santos-Santiago pinned A.G.'s arms behind her back but she was able to get away after two or three minutes. 1RP 415-16. Santos-Santiago never touched A.G.'s genitals during the incident. 1RP 417-18.

On other occasions Santos-Santiago would touch A.G.'s breasts, grab her buttocks, kiss her, and ask her to shower with him. 1RP 422-25, 433-41, 446-47, 489. One on occasion, Santos-Santiago also pushed A.G.'s hand onto his penis. 1RP 439-43.

A.G. also learned that Santos-Santiago was allegedly having sexual contact with M.G. 1RP 419-20. Santos-Santiago would try and touch M.G.'s buttocks and genitals. 2RP 20-21, 39-40. M.G. did not recall the first time the incidents began or where she was at the time. 2RP 171-18.

Once, Santos-Santiago pushed M.G. to the floor when she bent down to pick up a toy. 1RP 25. Santos-Santiago then put his hand over her mouth and tried to take off her skirt with his other hand. 1RP 26-27. Santos-Santiago forced M.G. back down when she tried to push him away. 2RP 28-29. During the incident, Santos-Santiago's penis touched M.G.'s vagina for one or two minutes. M.G. was not certain if any penetration occurred. 2RP 27-28, 34-35. Eventually M.G. was able to push Santos-Santiago away and lock herself in the bathroom. 2RP 29-30. After the incident M.G. experienced burning during urination for about one week. 2RP 31, 55. She did not experience any bleeding. 2RP 31.

M.G. told a classmate, Y.M., about the incidents with Santos-Santiago. 1RP 271-74; 2RP 36-37. M.G. and Y.M. were in a health class together at the time and learning about sexual harassment and human anatomy. 2RP 247-48, 252-54. Y.M. did not tell anyone about what M.G. told her. 1RP 273-74. A.G. and M.G. also did not tell Cortez about the incidents because they were scared. 1RP 444-45; 2RP 49. Cortez never

observed any interactions between Santos-Santiago and the girls that were out of the ordinary. 1RP 307.

At trial, the State offered expert testimony from Joanne Mettler, an advanced nurse practitioner at Harborview Sexual Assault Center. Mettler did not examine A.G. or M.G. and did not review any of their medical records. No exam was ever performed on A.G. or M.G. 1RP 187, 193. The trial court denied Santos-Santiago's motion in limine to prohibit Mettler from "offer[ing] testimony in the form of speculation." CP 13-15. The court concluded that Mettler's anticipated testimony was relevant and not unduly prejudicial. 1RP 37-41.

The prosecutor asked Mettler to explain how she performs sexual assault exams and what could be concluded from any given exam. Mettler explained that during a "head to toe physical" examination she looked for both acute and healed injuries. 1RP 177. Mettler testified that it was "very uncommon" to find such injuries during examinations. 1RP 178-79, 186-87. Mettler explained that injuries to the genital area could heal in as little as three days. 1RP 179-80, 184-85, 193. The prosecutor asked Mettler "what kinds of conclusions could be reached" based on the results of an exam that showed no acute or healed injuries. 1RP 181. Mettler explained that "just because they have a normal exam doesn't mean that nothing happened." 1RP 182.

The prosecutor then asked Mettler if there could be a correlation between reported vaginal penetration and subsequent painful urination in a "hypothetical" ten-year-old child. 1RP 187. Mettler explained that painful urination could be caused by a urinary tract infection or a tear in the hymen. 1RP 187-89, 192. The prosecutor followed up, asking Mettler whether she would expect a urinary tract infection to be the cause if the hypothetical urination pain stopped within a few days after the alleged incident. Mettler responded that in such a case she would "lean towards an injury" being the cause of the pain because urinary tract infections typically require antibiotic treatment to resolve. 1RP 189, 191.

At trial, Santos-Santiago denied ever touching A.G. or M.G. in a sexual manner. 2RP 125-26, 139. He swore his innocence in a letter to Cortez written from jail. 2RP 137. Santos-Santiago told Cortez that he once accidentally touched A.G. on the breasts while playing a game. 1RP 362, 375-76. Santos-Santiago also apologized in a letter to Cortez "not because of what I had done to the girls but because of the way I behaved towards them. 2RP 137-40.

Based on this evidence, Santos-Santiago was convicted of one count each of first degree attempted rape and first degree child molestation for the acts alleged to have occurred with M.G., and one count each of first degree child molestation and second degree child molestation for the acts alleged to

have occurred with A.G. CP 77-80, 85; 3RP 2-5. The first degree attempted rape conviction was vacated at sentencing because conviction for the attempted rape and first degree child molestation violated double jeopardy. 4RP 3-4; CP 96.

Santos-Santiago was sentenced to concurrent prison sentences of 75 months on the second degree child molestation conviction and indeterminate sentences of 120 months to life on each of the first degree child molestation convictions. CP 84-95; 4RP 11-12. The trial court also imposed 36 months of community custody. CP 87. The court also imposed a plethora of community custody conditions.

Santos-Santiago appealed, challenging the admission of Mettler's testimony and five of the community custody conditions. The Court of Appeals held four of the five challenged conditions were invalid, Op. at 10-14, but it affirmed the "dating relationships" condition Santos-Santiago now challenges. Op. at 15-16 (rejecting vagueness challenge to dating relationship condition).

The Court of Appeals also rejected Santos-Santiago's arguments that Mettler's testimony was speculative, irrelevant, and an impermissible opinion on guilt. Op. at 5-8. Citing State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007), the Court concluded that "[e]ven though there was no exam of A.G. or M.G., Mettler's testimony was relevant to provide a

context for A.G. and M.G.'s testimony and the lack of medical evidence." Op. at 6. The Court likewise concluded that Mettler's testimony was not an improper opinion on guilt or credibility because she testified from her own experience conducting sexual assault examinations and her testimony was offered to assist the jury in evaluating A.G. and M.G.'s testimony. Op. at 8.

Santos-Santiago now asks this Court to accept review and reverse the Court of Appeals.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4(b)(1), (b)(2), and (b)(3) BECAUSE WHETHER TESTIMONY FROM A NON-EXAMINING EXPERT ABOUT WHAT HYPOTHETICAL SEXUAL ASSAULT EXAMINATIONS CAN REVEAL IS A SIGNIFICANT CONSTITUTIONAL QUESTION AND CONFLICTS WITH PRECEDENT FROM THIS COURT AND THE COURT OF APPEALS.

No witness, lay or expert, "may testify to his [or her] opinion as to the guilt of a defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d 336, 348, 754 P.2d 12 (1987). Nor may a witness "give an opinion on another witness'[s] credibility" or the "veracity of the defendant." State v. Carlson, 80 Wn. App. 116, 123, 906 P.2d 999 (1995). "Testimony regarding the credibility of a key witness" is improper "[b]ecause issues of credibility are reserved strictly for the trier of fact." City

of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993). Moreover, under ER 701 expert testimony is helpful only if it is relevant. State v. Greene, 139 Wn.2d 64, 73, 984 P.2d 1024 (1999).

Relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Even if relevant, however, evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." ER 403. Unfair prejudice "'is that which is more likely to arouse an emotional response than a rational decision by the jury,'" or an undue tendency to suggest a decision on an improper basis. State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000) (quoting State v. Gould, 58 Wn. App. 175, 183, 791 P.2d 569 (1990)).

The testimony of Mettler was entirely speculative and not relevant. Under ER 701 expert testimony is helpful only if it is relevant. Greene, 139 Wn.2d at 73. To satisfy either ER 401 or 702, Mettler's testimony must have the tendency to make the existence of any fact of consequence more or less probable. Here, that meant that either M.G. or A.G.'s lack of injury was consistent with healing or that M.G.'s report of painful urination was related to the alleged incident. By her own admission however, Mettler had

never met or examined A.G. or M.G. or even reviewed their medical charts. 1RP 187, 193. Indeed, neither M.G. or A.G. ever underwent any sexual assault examination. Because Mettler could not state beyond hypotheticals that M.G.'s painful urination was related to the crimes charged, her testimony was speculative and not relevant.

Citing Kirkman, 159 Wn.2d at 931-32, the Court of Appeals concluded that Mettler's testimony was not speculative because "[e]ven though there was no exam of A.G. or M.G., Mettler's testimony was relevant to provide a context for A.G. and M.G.'s testimony and the lack of medical evidence." Op. at 6. The statements in Kirkman that were determined not to be manifest constitutional error bear little resemblance to Mettler's testimony in this case. The Court of Appeals conclusion that Kirkman controls the outcome of this case is misguided.

The two consolidated child rape cases in Kirkman involved the testimony of Dr. John Stirling. First, Dr. Stirling testified the child gave "a very clear history" with "lots of detail," "a clear and consistent history of sexual touching . . . with appropriate affect" and that "[t]he physical examination doesn't really lead us one way or the other, but I thought her history was clear and consistent." Kirkman, 159 Wn.2d at 929. In the case of the other defendant, Dr. Stirling testified, "to have no findings after receiving a history like that is actually the norm rather than the exception."

Id. at 932. Significantly, in both cases Dr. Stirling personally examined each child. Kirkman, 159 Wn.2d at 923-25.

This Court concluded as to both cases that Dr. Stirling's testimony was not an improper opinion on credibility or guilt because his testimony was content neutral, focusing upon what the medical examinations and clear communication with each child revealed, rather than the substance of matters discussed during his examinations. Kirkman, 159 Wn.2d at 930, 932-33.

Unlike Kirkman, here Mettler never met or examined A.G. or M.G., or even reviewed their medical charts. 1RP 187, 193. Indeed, here, neither M.G. or A.G. ever underwent any sexual assault examination. And that's precisely what makes Mettler's testimony in Santos-Santiago's case problematic. While Dr. Stirling was able to testify about what his personal communication with, and examination of, each child revealed, here the testimony of Mettler was entirely speculative and irrelevant. Mettler could not state beyond hypotheticals and speculation that M.G.'s painful urination was related to the crimes charged.

Moreover, in Kirkman, Dr. Sterling explained that although his personal examination of each child revealed no physical injuries that was not unusual. Kirkman, 159 Wn.2d at 932. In contrast, here Mettler testified that "just because they have a normal exam doesn't mean that nothing happened." 1RP 182. In doing so, Mettler implied that A.G. and M.G. were

credible and had, in fact, been sexually abused despite never having been given an exam by Mettler or anyone else. Kirkman is factually distinct from what transpired in this case and does not control the outcome.

But Mettler also went a step further and testified that "just because they [A.G. and M.G.] have a normal exam doesn't mean that nothing happened." 1RP 182. In doing so, Mettler implied that A.G. and M.G. were credible and had, in fact, been sexually abused.

The Court of Appeals, disagreed, explaining that Mettler testified from her own experience about what sexual assault examinations can reveal. Op. at 7-8. The Court of Appeals conclusion conflicts with this Court's opinion in State v. Black, 109 Wn.2d 336, 348, 754 P.2d 12 (1987), and State v. Maule, 35 Wn. App. 287, 289-90, 667 P.2d 96 (1983).

In Maule, Nancy Ousley, a caseworker at a sexual assault center, testified most child sex abuse cases are ongoing and involve a male parent figure. 35 Wn. App. at 289-90. She further testified that, in her experience, very few children lied or made false reports about sexual abuse. Id. at 289-90. The Court of Appeals reversed, concluding Ousley's testimony was improperly admitted "as substantive evidence to help persuade the jury that Maule was guilty." Id. at 293.

In State v. Black, this Court recognized expert testimony that an individual exhibits symptoms commonly associated with sexual abuse

unfairly prejudices the accused "by creating an aura of special reliability and trustworthiness." 109 Wn.2d at 348-49 (quoting State v. Saldana, 324 N.W.2d 227, 230 (Minn. 1982)).

Maule and Black make clear that an expert cannot opine that the child at issue exhibits characteristics common among sexually abused children. Mettler crossed this line into forbidden opinion testimony. The Court of Appeals opinion fails to address why Maule and Black do not require the same result in Santos-Santiago's case.

Because the Court of Appeals decision is not supported by the record and conflicts with this prior precedent from this Court and the Court of Appeals, review is appropriate under RAP 13.4(b)(1), (b)(2), and (b)(3).

2. THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4(b)(2) AND (b)(3) BECAUSE THIS CASE HIGHLIGHTS A CONFLICT BETWEEN DIVISIONS OF THE COURT OF APPEALS AND PRESENTS A SIGNIFICANT CONSTITUTIONAL QUESTION.

This Court should accept review under RAP 13.4(b)(2) and (3). The case presents a significant constitutional question involving a vague community custody condition. This case, therefore, potentially affects the supervision of several probationers throughout the State. Moreover, the Court of Appeals' decision conflicts with an unpublished decision from Division Three of the Court of Appeals. This Court should grant review and reverse the unconstitutionally vague condition.

a. The "dating relationship" condition is unconstitutionally vague.

The condition requiring Santos-Santiago to inform his CCO and treatment provider of any dating relationship is unconstitutionally vague and should be stricken.

The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the Washington Constitution requires the State to provide citizens with fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). The doctrine also protects from arbitrary, ad hoc or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is therefore void for vagueness if it does not (1) define the prohibition with sufficient definiteness such that ordinary people can understand what conduct is prohibited; or (2) provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53.

The condition here does not provide Santos-Santiago with adequate notice of what he must do to avoid sanction and does not prevent arbitrary enforcement. The question is what constitutes a "dating relationship."

Commonly understood, a "relationship" is "a state of affairs existing between those having relations or dealing." WEBSTER'S THIRD NEW INT'L DICTIONARY 1916 (1993). In the context of interaction between people, a "date" means "an appointment or engagement [usually] for a specified time . . . [especially]: an appointment between two persons of the opposite sex for the mutual enjoyment of some form of social activity" or "an occasion (as an evening) of social activity arranged in advance between two persons of opposite sex." Id. at 576. Referring to a person, a "date" is "a person of the opposite sex with whom one enjoys such an occasion of social activity." Id.

Such behavior conceivably covers a large range of human interaction. The condition, as written, leaves the dividing line between a non-dating relationship and a dating relationship intractably blurry. The condition requires Santos-Santiago to take affirmative action to avoid running afoul of his sentence but requires him to do so without a standard for determining when he must do so. The condition does not provide Santos-Santiago adequate notice as to what relationships he is prohibited from forming. A reasonable person cannot describe a standard necessary to avoid arbitrary enforcement. Suppose Santos-Santiago has dinner with a woman in a restaurant. Is that a date? Would that constitute a "dating relationship"? What if it was a one-time occasion? Is that enough to form

a "relationship" with someone? Does meeting someone twice for a social activity turn an ordinary relationship into a dating relationship? Three times? Suppose Santos-Santiago strikes up a relationship with a woman online, and then they go out to a movie together. Is that a dating relationship or something else? What if Santos-Santiago and another person often enjoy social activities together, but consider themselves "just friends." Does that nonetheless qualify as a dating relationship?

A condition that leaves so much room for speculation is unconstitutionally vague because it gives too much discretion to the CCO to determine when a violation has occurred. See State v. Sanchez Valencia, 169 Wn.2d 782, 794-95, 239 P.3d 1059 (2010) (striking down prohibition on "paraphernalia" as follows: "'an inventive probation officer could envision any common place item as possible for use as drug paraphernalia,' such as sandwich bags or paper . . . . Another probation officer might not arrest for the same 'violation,' i.e. possession of a sandwich bag. A condition that leaves so much to the discretion of individual community corrections officers is unconstitutionally vague.").

If the phrase "dating relationship" is meant to be limited to a romantic relationship, however, the vagueness problem remains. United States v. Reeves, 591 F.3d 77 (2d Cir. 2010) is instructive. Reeves held a condition of supervision requiring the defendant to notify the probation

department upon entry into a "significant romantic relationship" was vague, in violation of due process. Id. at 79, 81. The court observed that "people of common intelligence (or, for that matter, of high intelligence) would find it impossible to agree on the proper application of a release condition triggered by entry into a 'significant romantic relationship.'" Id. at 81. "What makes a relationship 'romantic,' let alone 'significant' in its romantic depth, can be the subject of endless debate that varies across generations, regions, and genders." Id. The condition had "no objective baseline," as "[n]o source provides anyone—courts, probation officers, prosecutors, law enforcement officers, or Reeves himself—with guidance as to what constitutes a 'significant romantic relationship.'" Id.

The condition in Santos-Santiago's case suffers from the same sort of defect. "Subjective terms allow a 'standardless sweep' that enables state officials to 'pursue their personal predilections' in enforcing the community custody conditions." State v. Johnson, 180 Wn. App. 318, 327, 327 P.3d 704 (2014) (quoting City of Spokane v. Douglass, 115 Wn.2d 171, 180 n.6, 795 P.2d 693 (1990) (quoting Kolender v. Lawson, 461 U.S. 352, 358, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)) (internal quotation marks omitted). Santos-Santiago's liberty during supervised release should not hinge on the accuracy of his prediction of whether a given CCO, prosecutor, or judge would conclude that a targeted

relationship had been entered without first informing the CCO or treatment provider. The condition, as written, does not provide a standard by which a reasonable person can understand what qualifies as "dating relationship," and what does not, in a non-arbitrary manner.

There is no presumption in favor of the constitutionality of a community custody condition. Sanchez Valencia, 169 Wn.2d at 792-93. Imposition of an unconstitutional condition is manifestly unreasonable. Id. at 792. The condition here is unconstitutional because it fails to provide reasonable notice as to what Santos-Santiago must do to comply with it. The condition exposes Santos-Santiago to arbitrary enforcement. As such, the condition does not meet the requirements of due process and should be stricken altogether or modified to comply with due process.

b. This case represents a conflict between two divisions of the Court of Appeals.

This case represents a conflict between Division One and Division Three of the Court of Appeals.

Citing State v. Norris, __ Wn. App. __, 404 P.3d 83 (2017), the Court of Appeals' opinion asserts that Reeves is distinguishable because it involved a prohibition on "significant romantic" relationships. Op. at 15. According to the Court of Appeals, the qualifiers "significant" and "romantic" created an extra layer of subjectivity, rending the condition in

that case vague. Santos-Santiago's condition does not suffer from that sort of defect. Op. at 15.

Unlike Division One, however, Division Three of the Court of Appeals adopted the Reeves court's reasoning in State v. Dickerson, noted at 194 Wn. App. 1014, 2016 WL 3126480 (2016) (unpublished).

In Dickerson, the trial court imposed a community custody condition prohibiting Dickerson from "enter[ing] a romantic relationship without the prior approval of the [community corrections officer] and Therapist." Dickerson, 2016 WL 3126480 at *1 (alteration in original). Relying on Reeves, Division Three of the Court of Appeals held the condition was unconstitutionally vague because "it is not clear which relationships will require the permission of both the community custody corrections officer and therapist." Id. at *5. Further, "[t]he condition is open to arbitrary enforcement by community custody officers and therapists with different ideas about the point at which a relationship becomes romantic." Id.

The condition in Dickerson, by prohibiting "romantic" relationships, did not contain "highly subjective qualifiers" but still the court struck it down as vague. Id. at *5. Contrary to the Court of Appeals opinion in this case, the condition in Santos-Santiago's case suffers from

the same kind of defect afflicting the invalid conditions in Dickerson and Reeves.

The prohibition here fails. This Court should grant review, reverse the Court of Appeals, and determine that the dating relationship condition is unconstitutionally vague.

E. CONCLUSION

Because Santos-Santiago satisfies the criteria under RAP 13.4(b)(1), (b)(2), and (b)(3), this Court should grant review and reverse the Court of Appeals.

DATED this 19th day of December, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

JARED B. STEED
WSBA No. 40635
Office ID No. 91051
Attorneys for Appellant

APPENDIX

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

STATE OF WASHINGTON, Respondent, v. PABLO SANTOS SANTIAGO, a/k/a PABLOS SANTOS SANTIAGO, a/k/a PABLO SANTIAGO SANTO, Appellant.	)	No. 74421-6-I UNPUBLISHED OPINION FILED: November 20, 2017

VERELLEN, C.J. — Pablo Santos Santiago appeals his conviction for two counts of first degree child molestation and one count of second degree child molestation. The State's expert testified about the possible conclusions from a "normal" physical exam following an alleged sexual assault and the possible reasons for painful urination. This testimony was relevant to provide context for the victims' testimony. And the expert did not give a direct or indirect opinion as to Santos Santiago's guilt or the victims' credibility. The trial court did not abuse its discretion when it admitted the expert testimony.

We accept the State's concession that a curfew is not crime related, and this community custody condition should be stricken.

The "use" portion of the community custody condition prohibiting Santos Santiago from using or consuming alcohol is not warranted.

The clause "and or any places" should be stricken from the community custody condition prohibiting Santos Santiago from frequenting "any parks/playgrounds/schools and or any places where minors congregate."[1]

The trial court imposed community custody conditions which prohibited Santos Santiago from entering any sex-related businesses or possessing, using, accessing, or viewing any sexually explicit material or erotic material, or any material depicting any person engaged in sexually explicit conduct. Because there is no evidence Santos Santiago's criminal conduct was related to his frequenting of sex-related businesses or his possession, using, accessing, or viewing of sexually explicit materials, these conditions should be stricken.

The community custody condition requiring Santos Santiago to inform his supervising CCO and sexual deviancy treatment provider of any "dating relationship" is not unconstitutionally void for vagueness.

Therefore, we affirm the conviction and remand with instructions to strike portions of community custody conditions as directed in this opinion.

FACTS

M.G.[2] was born in 2002. A.G. was born in 2000. In 2009, Santos Santiago married A.G. and M.G.'s mother. For the next five years, the family lived together in various locations around south King County.

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[1] Clerk's Papers (CP) at 93.

[2] Because the victims in this case are minors, they will be referred to by their initials.

A few weeks after the marriage, when A.G. was eight or nine years old, Santos Santiago got into bed with A.G., put his hand down her pants, and touched her vagina. On a separate occasion, Santos Santiago forced bedcovers over A.G.'s face, pulled down her pants, and placed his penis against her bottom.

At various times, Santos Santiago attempted to touch A.G.'s breasts and kiss A.G. Santos Santiago also repeatedly attempted to put his hand up A.G.'s shirt and successfully touched her bare breast one time. When A.G. was thirteen, Santos Santiago forced her to touch his penis.

When M.G. was nine or ten years old, she was alone with Santos Santiago. He pushed her on the floor. He put his hand over her mouth and nose, pulled down her skirt, and put his penis against her vagina. M.G. testified that after the assault, "every time I would go to the bathroom it would hurt."[3]

The State charged Santos Santiago with one count of first degree rape of a child and one count of first degree child molestation for his acts committed against M.G. The State also charged Santos Santiago with one count of first degree child molestation and one count of second degree child molestation for his acts committed against A.G.

The State offered expert testimony from Joanne Mettler, an advanced nurse practitioner at Harborview Sexual Assault Center. Mettler did not examine A.G. or M.G. and did not review any of A.G. or M.G.'s records. No exam was ever performed on A.G. or M.G. The trial court denied Santos Santiago's motion in

[3] Report of Proceedings (RP) (Oct. 5, 2015) at 28.

limine to prohibit Mettler from "offer[ing] testimony in the form of speculation."[4] The court concluded that the proffered testimony was relevant and not unduly prejudicial.

At trial, Mettler testified that most exams are "normal" and do not reveal evidence of injury.[5] She also testified about the possible conclusions that can be drawn from a "normal exam."

> Q: Could a normal exam mean there was some form of sexual assault and that no injury occurred?
>
> A: Yes, that is accurate.
>
> Q: Could a normal exam mean that no sexual assault occurred?
>
> A: Certainly, that is possible.
>
> Q: And could a normal exam also mean that they were sexually assaulted, an injury occurred, it heals and you don't see any evidence of it?
>
> A: Yes, that is also possible, yes.[6]

Mettler explained that a urinary tract infection or some type of injury and subsequent irritation could explain painful urination following sexual assault and that when the pain goes away without treatment, she "would probably lean towards an injury."[7]

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[4] CP at 13.

[5] RP (Sept. 28, 2015) at 181.

[6] Id. at 181-82.

[7] Id. at 189.

The jury found Santos Santiago guilty of one count of first degree attempted rape, two counts of first degree child molestation, and one count of second degree child molestation.[8]

The trial court imposed indeterminate, concurrent sentences of 120 months and lifetime community custody for the two counts of first degree child molestation. The trial court imposed a determinate, concurrent sentence of 75 months and a 36-month community custody term for the one count of second degree child molestation.

Santos Santiago appeals.

ANALYSIS

I. Expert Testimony

Santos Santiago contends the trial court abused its discretion by admitting Mettler's expert testimony because her testimony was speculative and irrelevant. He argues that her testimony was irrelevant because A.G. and M.G. were never examined.

We review a trial court's decision to admit expert testimony for abuse of discretion.[9] To be admissible, an expert opinion "'must be helpful to the trier of fact.'"[10] Courts interpret helpfulness broadly and favor admissibility in doubtful

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[8] The one count of first degree attempted rape was vacated because conviction for first degree attempted rape and first degree child molestation violated double jeopardy principles.

[9] State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

[10] State v. Cheatam, 150 Wn.2d 626, 645, 81 P.3d 830 (2003) (quoting ER 702).

cases.[11] Expert testimony is helpful only if it is relevant.[12] Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[13]

In State v. Kirkman, the expert testified about his examination of the child victim of sexual assault.[14] He testified that it is the "norm" to find "no physical evidence of sexual conduct."[15] Our Supreme Court held the testimony was "particularly relevant" to help the jury address the apparent discrepancy between the child's allegations of rape and the lack of medical evidence.[16]

Here, Mettler's testimony that it is uncommon to find any evidence of injury during an examination is not speculative because it was based on her years of experience and observation. Even though there was no exam of A.G. or M.G., Mettler's testimony was relevant to provide a context for A.G. and M.G.'s testimony and the lack of medical evidence.

Alternatively, Santos Santiago contends the trial court abused its discretion by admitting Mettler's expert testimony because she implied A.G. and M.G. were credible and Santos Santiago was guilty.

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[11] State v. Groth, 163 Wn. App. 548, 564, 261 P.3d 183 (2011) (quoting Moore v. Hagge, 158 Wn. App. 137, 155, 241 P.2d 787 (2010)).

[12] State v. Greene, 139 Wn.2d 64, 73, 984 P.2d 1024 (1999).

[13] ER 401.

[14] 159 Wn.2d 918, 931, 155 P.3d 125 (2007).

[15] Id. at 931-32.

[16] Id. at 933.

Although relevant evidence is admissible, it "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."[17] Witnesses may not give an opinion as to the guilt of the defendant or the credibility of a witness.[18] "Such testimony has been characterized as unfairly prejudicial because it 'invad[es] the exclusive province of the finder of fact.'"[19] But testimony that does not directly comment on guilt or credibility and is otherwise helpful to the jury may be considered as proper opinion testimony.[20]

In State v. Maule, the expert testified concerning her theory that a majority of child abuse cases involve a male parent figure, with biological parents in the majority.[21] The defendant was convicted of sexually assaulting his daughter. On appeal, this court held:

> Such evidence invites a jury to conclude that because the defendant has been identified by an expert with experience in child abuse cases as a member of a group having a higher incidence of child sexual abuse, it is more likely the defendant committed the crime.[22]

In State v. Black, the expert testified concerning rape trauma syndrome, stating, "There is a specific profile for rape victims and [the victim] fits in."[23] Our Supreme Court concluded testimony concerning rape trauma syndrome "'unfairly

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[17] ER 402; ER 403; State v. Gould, 58 Wn. App. 175, 180, 791 P.2d 569 (1990).

[18] City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993) (quoting State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)).

[19] Id. at 578 (alteration in original) (quoting Black, 109 Wn.2d at 348).

[20] Id.

[21] 35 Wn. App. 287, 289, 667 P.2d 96 (1983).

[22] Id. at 293.

[23] 109 Wn.2d 336, 339, 745 P.2d 12 (1987).

prejudices [the defendant] by creating an aura of special reliability and trustworthiness.'"[24] "It carries with it an implied opinion that the alleged victim is telling the truth and was, in fact, raped."[25]

Here, Mettler identified the possible conclusions following a normal exam, including sexual assault with no injury, sexual assault with healed injury, and no sexual assault, but she did not express an opinion concerning A.G. or M.G. And Mettler testified about the possible causes of painful urination, including a tear following sexual assault or a urinary tract infection due to poor hygiene. She also stated she "would probably lean towards an injury" rather than infection if the pain goes away without medication.[26]

Mettler's testimony does not constitute an improper opinion on guilt or credibility. She testified from her own experience conducting sexual assault examinations. The State offered her testimony in anticipation of the defense questioning the absence of injury. Her testimony was offered to assist the jury in evaluating A.G. and M.G.'s testimony. Mettler's general statement that she "would probably lean towards an injury" when painful urination resolves without medication is not an implicit opinion on the cause of M.G.'s painful urination; it is merely a medical observation based on her experience. Mettler did not express an opinion as to the guilt of Santos Santiago or the credibility of A.G. and M.G.

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[24] Id. at 349 (alteration in original) (quoting State v. Saldana, 324 N.W.2d 227, 330 (Minn. 1982)).

[25] Id.

[26] RP (Sept. 28, 2015) at 189.

Santos Santiago also suggests that the State exacerbated the prejudice during closing argument by recounting Mettler's testimony, but the State's brief reference was accurate. And Santos Santiago offers no compelling authority to support this argument.[27]

We conclude the trial court did not abuse its discretion when it admitted Mettler's testimony because it was relevant and not unfairly prejudicial.

II. Community Custody Conditions

We review the imposition of community custody conditions for abuse of discretion.[28] A sentencing court abuses its discretion if its decision is "manifestly unreasonable."[29] The trial court may require an offender to comply with "crime-related prohibitions."[30] The factual basis for crime-related community custody conditions is reviewed under a "substantial evidence" standard.[31] Crime-related prohibitions must be "reasonably related" to the corresponding crime.[32] Courts will uphold crime-related community custody decisions when there is some basis for

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[27] We reject the State's alternative argument that Santos Santiago failed to preserve this issue for appeal. Santos Santiago's motion in limine to exclude Mettler's testimony as speculative, combined with his motion to exclude testimony by any witness expressing an opinion as to guilt, adequately apprised the trial judge that he objected to Mettler providing an opinion on guilt or credibility.

[28] State v. Irwin, 191 Wn. App. 644, 656, 364 P.3d 830 (2015).

[29] Id.

[30] RCW 9.94A.703(3)(f).

[31] Irwin, 191 Wn. App. at 656.

[32] RCW 9.94A.030(10) ("crime-related prohibitions" are those "directly relate[d]" to the crime); Irwin, 191 Wn. App. at 656 ("directly related" includes "reasonably related"); State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008) ("[crime-related prohibitions] are usually upheld if reasonably crime related").

the connection.[33] Reviewing courts will strike community custody conditions when there is no evidence in the record that the circumstances of the crime related to the community custody condition.[34]

Imposing an unconstitutional condition will always be "manifestly unreasonable."[35] The guarantee of due process in the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution requires that laws not be vague.[36] "The laws must (1) provide ordinary people fair warning of proscribed conduct and (2) have standards that are definite enough to 'protect against arbitrary enforcement.'"[37] "A community custody condition is unconstitutionally vague if it fails to do either."[38] "However, 'a community custody condition is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.'"[39]

(A) Special Condition 7 – Curfew

Santos Santiago contends special condition 7 is not crime related and therefore exceeds the trial court's authority. The State agrees.

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[33] Irwin, 191 Wn. App. at 656-57.

[34] Id.

[35] Id. at 652.

[36] State v. Bahl, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008).

[37] Irwin, 191 Wn. App. at 652-53 (quoting id.).

[38] Id. at 653 (quoting Bahl, 164 Wn.2d at 753).

[39] Id. (quoting State v. Valencia, 169 Wn.2d 782, 793, 239 P.3d 1059 (2010)).

Here, there is no evidence that Santos Santiago's criminal conduct occurred during the curfew hours. We accept the State's concession and conclude special condition 7 should be stricken on remand because it is not crime related.[40]

(B) Special Condition 12 – Use of Alcohol

Santos Santiago contends special condition 12 exceeds the trial court's authority. Special condition 12 provides, "Do not use or consume alcohol."[41] Santos Santiago argues the trial court lacked the authority to prohibit his "use" of alcohol. Former RCW 9.94A.703(3)(e) (2009) authorizes the trial court to prohibit an offender "from consuming alcohol" whether or not alcohol was related to the charged offense.[42] The statute does not mention "use," and "use" is broader than "consume." The trial court also has the authority pursuant to RCW 9.94A.703(3)(f) to impose "any crime-related prohibitions." But there is no evidence that Santos Santiago's criminal conduct was related to the use of alcohol.[43]

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[40] See State v. Johnson, 180 Wn. App. 318, 329, 327 P.3d 704 (2014) (Division Two of this court remanded and ordered the trial court to either clarify a term in the condition or strike the portion of the condition using that term).

[41] CP at 93.

[42] In 2015, the statute was amended to grant the trial court the authority to prohibit an offender from "possessing or consuming alcohol." But a trial court's authority to impose community custody conditions "must be in accordance with the law in effect when the offense was committed." State v. Coombes, 191 Wn. App. 241, 250, 361 P.3d 270 (2015) (citing RCW 9.94A.345).

[43] State v. Norris, No. 75258-8-I, slip op. at 12 (Wash. Oct. 30, 2017), http://www.courts.wa.gov/opinions/pdf/752588.pdf (this court considered an identical condition and struck the use limitation as outside the trial court's authority under former RCW 9.94A.703(3)(e) and not crime related under RCW 9.94A.703(3)(f)).

We conclude the portion of special condition 12 prohibiting "use" of alcohol (as distinguished from "consumption") should be stricken on remand because it exceeds the trial court's authority and is not crime related.

(C) Crime-Related Prohibition 18 – Places Where Minors Congregate

Santos Santiago contends crime-related prohibition 18 is unconstitutionally vague because it insufficiently apprises Santos Santiago of prohibited conduct and allows for arbitrary enforcement. Crime-related prohibition 18 provides, "Do not enter any parks/playgrounds/schools and or any places where minors congregate."[44] The State agrees only as to the portion "and or any places where minors congregate."

In Irwin, this court considered a similar community custody condition which provided, "Do not frequent areas where minor children are known to congregate, as defined by the supervising [community corrections officer]."[45] The court concluded "without some clarifying language, or an illustrative list of prohibited locations, the condition does not give ordinary people sufficient notice to 'understand what conduct is proscribed.'"[46]

In State v. Norris, this court considered an identical condition, followed Irwin, and concluded "the imposition of a condition that deletes 'and or any places' and states, 'Do no enter parks/playgrounds/schools where minors congregate'

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[44] CP at 93.

[45] Irwin, 191 Wn. App. at 649.

[46] Id. at 655.

gives notice to ordinary persons of what is prohibited and is not unconstitutionally vague."[47]

We conclude the portion of crime-related prohibition 18 reading, "and or any places" is not sufficiently definite to apprise Santos Santiago of the prohibited conduct and must be stricken on remand because it is unconstitutionally vague. But the condition, "Do not enter any parks/playgrounds/schools where minors congregate," lists specific prohibited locations and is not void for vagueness.

(D) Special Conditions 10 and 11 – Sex-Related Businesses and Sexually Explicit Material

Santos Santiago contends special conditions 10 and 11 are not crime related and therefore exceed the trial court's authority.

Special condition 10 provides, "Do not enter sex-related businesses, including X-rated movies, adult bookstores, strip clubs, and any location where the primary source of business is related to sexually explicit material."[48] Special condition 11 provides:

> Do not possess, use, access or view any sexually explicit material as defined by RCW 9.68.130 or erotic materials as defined by RCW 9.68.050 or any material depicting any person engaged in sexually explicit conduct as defined by RCW 9.68A.011(4) unless given prior approval by your sexual deviancy provider.[49]

In State v. Magana, Division Three of this court held "[b]ecause [the defendant] was convicted of a sex offense, conditions regarding access to X-rated

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[47] No. 75258-8-I, slip op. at 6-7 (Wash. Oct. 30, 2017), http://www.courts.wa.gov/opinions/pdf/752588.pdf.

[48] CP at 92.

[49] CP at 93.

movies, adult book stores, and sexually explicit materials were all crime related and properly imposed."[50]

In Norris, the defendant pleaded guilty to three counts of second degree child molestation.[51] She challenged identical conditions as not crime related. This court concluded, "To the extent Magana stands for either a categorical approach or the broad proposition that a sex offense conviction alone justifies imposition of a crime-related prohibition, we disagree."[52] The court struck the sex-related businesses condition because it was not crime related.[53] But the court determined the condition concerning sexually explicit material was crime related because the defendant and the victim exchanged sex-related text messages and the defendant sent the victim "a photo of herself in pants and a bra."[54]

Here, there is no evidence that Santos Santiago's criminal conduct was related to his frequenting of sex-related businesses or his possessing, using, accessing, or viewing of sexually explicit materials. We conclude special conditions 10 and 11 should be stricken on remand because they are not crime related.

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[50] 197 Wn. App. 189, 201, 389 P.3d 654 (2016).

[51] Norris, slip op. at 1.

[52] Id. at 9-10.

[53] Id. at 11.

[54] Id.

(E) Special Condition 5 – Dating Relationship

Santos Santiago contends special condition 5 is unconstitutionally vague because the term "dating relationship" is insufficient to apprise Santos Santiago of prohibited conduct and allows for arbitrary enforcement.

Special condition 5 requires Santos Santiago to "[i]nform the supervising CCO and sexual deviancy treatment provider of any dating relationship."[55]

Santos Santiago relies on United States v. Reeves, where the Second Circuit concluded that a condition requiring the offender to notify the probation department "when he establishes a significant romantic relationship" was insufficiently clear.[56]

In Norris, this court recently examined the constitutionality of the same condition and the applicability of Reeves. This court concluded "the term 'dating relationship' is easily distinguishable from the condition in Reeves" because it "does not contain highly subjective qualifiers like 'significant' and 'romantic.'"[57] The court held "the condition is neither unconstitutionally vague nor subject to arbitrary enforcement."[58]

We conclude the trial court did not abuse its discretion when it imposed special condition 5 because the meaning of "dating relationship" is ascertainable to

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[55] CP at 92.

[56] 591 F.3d 77, 79 (2nd Cir. 2010).

[57] Norris, slip op. at 6.

[58] Id.

an ordinary person and is sufficiently definite to provide against arbitrary enforcement.

Therefore, we affirm and remand with instructions to strike special condition 7 imposing a curfew, strike the limitation on use of alcohol from special condition 12, strike the portion of additional crime-related prohibition 18 that reads "and or any places," and strike special conditions 10 and 11.

WE CONCUR:

NIELSEN, BROMAN & KOCH P.L.L.C.

December 19, 2017 - 10:39 AM

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Appellate Court Case Title:	State of Washington, Respondent v. Pablo Santos-Santiago, Appellant
Superior Court Case Number:	14-1-01941-2

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