SUPREME COURT NO. 96760-1

NO. 50911-3-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ISAIAS RAMOS RAMÍREZ,

Petitioner.

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

The Honorable Toni Sheldon, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Isaias Ramos Ramírez, the appellant below, seeks review of the Court of Appeals split decision in State v. Ramos Ramirez, noted at 5 Wn. App. 2d 1041, No. 50911-3-II, 2018 WL 5014248 (Oct. 16, 2018) (Appendix A), following the grant of Ramos Ramírez's motion for reconsideration solely with respect to legal financial obligations on December 18, 2018 (Appendix B).

B. ISSUES PRESENTED FOR REVIEW

1. Ample evidence presented at trial indicated that Ramos Ramírez was extremely intoxicated at the time the alleged criminal conduct occurred. Defense counsel referenced Ramos's intoxication in arguing that his actions were not undertaken for the purpose of sexual gratification. However, defense counsel did not request a voluntary intoxication instruction. In the context of this case, did the failure to request this instruction constitute ineffective assistance of counsel?

2. Is the community custody condition, "The defendant shall not loiter in nor frequent places where children congregate such as parks, video arcades, and shopping malls," unconstitutionally vague?

C. STATEMENT OF THE CASE

This case involves charges of child molestation in the first degree, indecent liberties, and incest in the second degree. CP 58-66. The charges

arose from the same conduct between Ramos Ramírez and his eight-year-old son, S.P.R. Shelton police officer Hector Diaz testified he observed Ramos kissing S.P.R. on the lips with his tongue going into his mouth. RP 72-73. Diaz stated Ramos was also thrusting into S.P.R. with his body in an up-and-down motion. RP 74. Another witness said she saw Ramos's hands on S.P.R.'s buttocks and "[h]e was just holding him trying to get him to kiss him." RP 61. Other witnesses farther away believed they were witnessing teenagers making out.

Diaz approached Ramos and noticed an empty or almost empty bottle of vodka nearby. RP 75. Ramos was very intoxicated: "Vodka and the strong odor of . . . intoxicants was coming off from his person. He's -- every time he talked you can smell the alcohol." RP 81. Diaz separated Ramos and S.P.R. and "observed [S.P.R.'s] whole side of his face was wet with saliva. His whole mouth and nose area, the side of his ear was just wet with saliva." RP 76. Diaz noted Ramos's fly was open but did not notice whether Ramos had an erection, had ejaculated, or was otherwise sexually aroused. RP 76, 83-84. Diaz indicated that Ramos was difficult to understand because of intoxication. RP 124. Initially Ramos was not cooperative, refusing to provide his name or date of birth; then suddenly Ramos provided Diaz with identification cards. RP 76-77, 124-25.

Defense counsel referred to Ramos's intoxication not address the fact that Ramos's fly was open, suggesting that, due to intoxication, Ramos may have forgotten to zip up his pants after urinating. RP 169. However, defense counsel did not request an involuntary intoxication instruction.

The jury returned guilty verdicts for all counts. CP 29-31; RP 178. With respect to the indecent liberties charge, the jury returned a special verdict indicating the sexual contact was caused by forcible compulsion, which makes indecent liberties a class A felony. CP 28; RCW 9A.44.100(2)(b).

The trial court imposed concurrent high-end indeterminate standard range sentences of 89 months to life. CP 12; RP 190. The trial court also imposed lifetime community custody. CP 13; RP 190. The trial court also imposed a community custody condition that read, "The defendant shall not loiter in nor frequent places where children congregate such as parks, video arcades, and shopping malls." CP 22.

Ramos Ramírez appealed. CP 6. He asserted counsel was ineffective for failing to request a voluntary intoxication instruction. Br. of Appellant at 5-13. The Court of Appeals rejected this argument, noting that defense counsel argued in closing that Ramos "touched SPR in an offensive manner, but not in a sexual manner" and "[c]onsidering defense counsel's theory of the case, Ramos-Ramirez has failed to show that there was no

strategic reason to not request the intoxication instruction." Appendix A at 6. The Court of Appeals never addressed defense counsel's reference to Ramos's intoxication during closing that Ramos's fly was down not because of sexual gratification but because he was drunk and might have forgotten to zip his pants after urinating.

Ramos also argued that the condition prohibiting loitering in areas where children congregate was unconstitutionally vague. Br. of Appellant at 17. The majority of the Court of Appeals disagreed because "the condition imposed . . . provides an illustrative list of examples of prohibited locations, identifying 'parks, video arcades, and shopping malls' as examples." Appendix A at 9. Judge Worswick dissented, noting, "although I appreciate that an illustrative list can clarify an otherwise vague condition, see State v. Bahl, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008), the list here adds confusion, rather than clarity to the condition. For the reasons stated in [State v. Wallmuller, 4 Wn. App. 2d 698, 703, 423 P.3d 282 (2018), review granted ___ Wn.2d ___, ___ P.3d ___, 2019 WL 156943 (Jan. 9, 2019)], I would hold that the community custody condition is vague."

D. ARGUMENT IN SUPPORT OF REVIEW

1. THE COURT OF APPEALS INEFFECTIVE ASSISTANCE OF COUNSEL ANALYSIS ON THE FAILURE TO REQUEST A VOLUNTARY INTOXICATION INSTRUCTION CONFLICTS WITH DECISIONS OF THIS COURT AND THE COURT OF APPEALS

The federal and state constitutions guarantee effective assistance of counsel. U.S. CONST. amend. VI; CONST. art. I, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). "[T]he defendant must show both (1) deficient performance and (2) resulting prejudicial to prevail on an ineffective assistance claim." State v. Estes, 188 Wn.2d 450, 457-58, 395 P.3d 1045 (2017). Performance is deficient if it falls below an objective standard of reasonableness considering all the circumstances. Id. at 458. Prejudice exists if there is a reasonable probability the outcome of trial would have differed but for counsel's deficient performance; a reasonable probability is "a probability sufficient to undermine confidence in the outcome." Id.

The defense is entitled to a jury instruction on any theory supported by substantial evidence. State v. Kruger, 116 Wn. App. 685, 693, 67 P.3d 1147 (2003). Evidence of intoxication and its effect on mental functioning

may be used to negate the mental state of an offense. RCW 9A.16.090; State v. Carter, 31 Wn. App. 572, 575, 643 P.2d 916 (1982).

The trial court must instruct on voluntary intoxication when (1) the charged crime includes a mental state, (2) there is substantial evidence of intoxication, and (3) there is evidence the intoxication affected the individual's ability to form the requisite mental state. Kruger, 116 Wn. App. at 691.

Here, the first element is met as to the indecent liberties and second degree incest charges because both include mental states. RCW 9A.44.100(1) (indecent liberties requires "knowingly caus[ing] another person to have sexual contact with him or her"); RCW 9A.64.020(2)(a) (incest requires the accused to engage in "sexual contact with a person whom he or she knows to be related to him or her"). Because they require proof of knowledge, voluntary intoxication is an avenue of defense for indecent liberties and incest.

The second Kruger factor is also met. Diaz noted a mostly or entirely empty bottle of vodka near Ramos and also noted the strong odor of intoxicants emanating from Ramos's person. RP 75, 80-81. Diaz stated directly that Ramos was "really intoxicated" and difficult to understand. RP 124. Thus, there was substantial evidence of intoxication presented at trial.

The third Kruger factor is met but case law is inconsistent on this factor. See State v. Walters, 162 Wn. App. 74, 83, 255 P.3d 835 (2011) (discussing inconsistent approaches). A voluntary intoxication instruction was necessary where the defendants drank beer all day, ingested Quaaludes, spilled beer and uncoordinatedly played ping pong, and one felt no pain when hit by a car. State v. Rice, 102 Wn.2d 120, 122-23, 683 P.2d 199 (1984). In contrast, the defendant was not entitled to an instruction where he was obviously intoxicated and angry, but there was no sign of the alcohol's impact on his reasoning. State v. Gabryschak, 83 Wn. App. 249, 253-55, 921 P.2d 549 (1996). Likewise, in State v. Priest, 100 Wn. App. 451, 455, 997 P.2d 452 (2000), the court determined no intoxication instruction was warranted given Priest was able to operate a motor vehicle, communicate clearly with a state trooper, purposefully provide false information, and attempt to reduce his charges by becoming an informant. The Walters court, considering these various cases, concluded that "physical manifestations of intoxication provide sufficient evidence from which to infer that mental processing also was affected, thus entitling the defendant to an intoxication instruction." 162 Wn. App. at 83.

Based on the evidence of Ramos's intoxication and its clear physical manifestations, Ramos would have been entitled to a voluntary intoxication instruction had a voluntary intoxication instruction been requested.

Counsel's performance was deficient in failing to request one. Counsel has an affirmative duty to research, investigate, and apply the law to their clients' circumstances. Estes, 188 Wn.2d at 460; In re Pers. Restraint of Tsai, 183 Wn.2d 91, 102, 351 P.3d 138 (2015). Several cases support proposing a voluntary intoxication instruction in similar circumstances to this case and have held defense counsel is ineffective for failing to request such instructions. E.g., Thomas, 109 Wn.2d at 229 (ineffective for failing to request voluntary intoxication instruction); Kruger, 116 Wn. App. at 688 (same); see also State v. Powell, 150 Wn. App. 139, 155-57, 206 P.3d 703 (2009) (failure to request reasonable belief instruction).

In Kruger, the court determined counsel was ineffective because there was substantial evidence of Kruger's intoxication. 116 Wn. App. at 692-93. Because the defense theory was lack of intent, the court concluded there was no strategic reason for not requesting the instruction. Id. at 693-94. Reversal was required because "[e]ven if the issue of Mr. Kruger's intoxication was before the jury, without the instruction, the defense was impotent." Id. at 694-95.

In Rice, the jury was not instructed that intoxication could be considered in determining whether the defendants acted with the mental state essential to commit felony murder. 102 Wn.2d at 123. "Consequently, the jury, without the requested instruction, was not correctly apprised of the law,

and defendants' attorneys were unable to effectively argue their theory of an intoxication defense." Id. The court noted that had the jury been properly instructed, it "could well have returned a different verdict." Id.

Here, there was no dispute that Ramos had touched S.P.R. The dispute centered on whether the touching constituted sexual contact and whether it was done for sexual gratification. RP 166-70. As part of this argument, defense counsel noted Ramos's intoxication:

> His zipper was down. He was drunk. Maybe peed beforehand and he didn't pull his zipper up. You have no evidence of sexual gratification. There was no testimony that Mr. Ramirez had an erection. There was no testimony that he ejaculated. There's no testimony that he was trying to masturbate while this was going on. So there was no sexual contact, no sexual gratification.

RP 169-70 (emphasis added).

Counsel's argument suggested that at least a portion of Ramos's actions could be explained by intoxication. Yet the only way counsel could have legitimately used Ramos's intoxication to is advantage was to request a voluntary intoxication instruction, which would have been supported by case law. Counsel's failure to pursue this line of defense constituted deficient performance.

The Court of Appeals stated that defense did not render deficient performance because his tactic was to admit to offensive touching of S.P.R. but to argue that the touching was not in a sexual manner. Appendix A at 6.

While this certainly was defense counsel's tactic, he explicitly referred to Ramos's intoxication as part of the explanation for why Ramos's contact was not sexual in nature. In other words, he referenced Ramos's intoxication to attack the proposition that the contact in question was knowing sexual contact. And it is telling that the Court of Appeals fails even to acknowledge counsel's reference to intoxication; it does not acknowledge the reference because it would be inconsistent with its cursory, one-paragraph analysis on the question. There was no reasonable strategy for not requesting the intoxication instruction in light of counsel's arguments. Counsel's performance was deficient.

Furthermore, even if Ramos's sole theory was the absence of sexual motivation, a voluntary intoxication instruction was not inconsistent with this theory. On the contrary, Ramos's significant intoxication would only support defense counsel's overall argument that Ramos was touching his son offensively—perhaps because he was so drunk—rather than for the purpose of sexual gratification. Even considering defense counsel's theory of the case—that there was no sexual motivation on the part of Ramos—there was no reasonable strategy in not also requesting the intoxication instruction because it was entirely consistent with this theory. The jury may well have thought that Ramos's extreme intoxication negated the required sexual gratification motive.

Counsel's deficient performance was prejudicial. It is not commonplace for fathers to be kissing, licking, thrusting against, and groping their eight-year-old sons. It is even less commonplace for them to do so in broad daylight in a public place. Aside from the actions themselves, there was no other evidence Ramos had a sexual motivation, such as evidence of Ramos's sexual demands of S.P.R., touching S.P.R.'s sex organs, or that Ramos was himself sexually aroused. What is clear is that Ramos was extremely drunk when the events occurred. Had the jury been instructed on voluntary intoxication, the jurors may well have agreed with defense counsel that Ramos was not knowingly causing sexual contact and that this lack of knowledge meant he was not criminally liable. The failure to purse the voluntary intoxication instruction undermines confidence in the outcome of Ramos's trial.

The Court of Appeals decision is inconsistent with Thomas, Rice, and Kruger on the constitutional issue of effectiveness of counsel. Therefore, review is warranted pursuant to RAP 13.4(b)(1), (2), and (3).

2. REVIEW SHOULD BE GRANTED TO ADDRESS THE SPLIT IN THE COURT OF APPEALS AS TO WHETHER "WHERE MINORS CONGREGATE" CONDITIONS ARE UNCONSTITUTIONALLY VAGUE

There is currently a split among panels of the Court of Appeals as to whether the community custody condition here—"The defendant shall not

loiter in nor frequent places where children congregate such as parks, video arcades, and shopping malls"—is unconstitutionally vague. Compare Wallmuller, 4 Wn. App. 2d at 702-04 with State v. Johnson, 4 Wn. App. 2 352, 360-62, 421 P.3d 969 (2018). In this case, there was a split as well. Compare Appendix A at 8-10 (majority opinion rejecting Ramos's vagueness challenge) with Appendix A at 13 (Worswick, J., dissenting). Review is appropriate under RAP 13.4(b)(2) and (3) to resolve this split on the constitutional question of vagueness.[1]

The condition at issue is vague because it does not provide fair notice of proscribed conduct and leads to arbitrary enforcement. State v. Padilla, 190 Wn.2d 672, 677, 416 P.3d 712 (2018). As the Wallmuller court persuasively asserted, the word "congregate" in the condition is a significant source of the vagueness:

> But even that definition creates uncertainty and gives rise to several questions: (1) Must the children join together in a formal group to "congregate," or is it sufficient that children be at the same place even if they are unconnected? (2) Similarly, must the children intend to join together with other children to "congregate," or can they end up at the same place by happenstance? (3) How many children are required to congregate to invoke the condition? Is two enough, or is some unstated larger number required? (4) How often must children congregate in a place to invoke the condition? Is once enough, or is some unstated frequency required? (5) Assuming that children must have actually rather than

[1] Ramos acknowledges that this court recently granted review in Wallmuller. Review is appropriate in this case for the same reasons.

> potentially congregated at a place to invoke the condition, how recently must they have congregated there? Is one prior instance of children congregating in a place sufficient regardless of when it occurred? These questions suggest that the condition does not sufficiently define the proscribed conduct.

Wallmuller, 4 Wn. App. 2d at 703. In addition, the Wallmuller court also explained that an illustrative list of prohibited places does not resolve the vagueness issue:

> the condition contains the phrase 'such as' before its list of prohibited places, indicating that frequenting more places than just those listed would violate the condition. As in [State v. Norris, 1 Wn. App. 2d 98, 404 P.3d 83 (2017), aff'd in part and rev'd in part by State v. Nguyen, 191 Wn.2d 671, 425 P.3d 847 (2018)], this short list does not cure the inherent vagueness of the phrase 'places where children congregate.'"

4 Wn. App. 2d at 703. Because of the split among appellate judges in Ramos's case and the split among appellate judges identified in Wallmuller, review should be granted under RAP 13.4(b)(2) and (3).

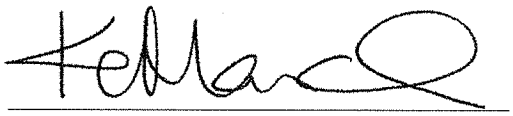
E. CONCLUSION

For the reasons stated, this petition for review should be granted.

DATED this 17TH day of January, 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX A

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Washington State
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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ISAIAS G. RAMOS-RAMIREZ, Appellant.	No. 50911-3-II UNPUBLISHED OPINION

JOHANSON, J. — Isaias Ramos-Ramirez appeals his first degree child molestation, indecent liberties, and second degree incest convictions, sentences, and discretionary legal financial obligations (LFOs). He argues that (1) defense counsel provided ineffective assistance, (2) the trial court erred when it imposed discretionary LFOs without an adequate inquiry, and (3) the trial court erred when it imposed certain community custody conditions.

We hold that defense counsel provided effective assistance of counsel, therefore we affirm the convictions. However, the trial court conducted an inadequate inquiry into Ramos-Ramirez's ability to pay discretionary LFOs. Regarding the community custody condition prohibiting Ramos-Ramirez from "loiter[ing] in []or frequent[ing] places where children congregate," we hold it is not unconstitutionally vague. Clerk's Papers (CP) at 22. In addition, we accept the State's concessions that the court erred when it imposed a community custody condition allowing a community custody officer (CCO) to direct plethysmograph testing and a community custody

condition regarding a curfew that was not crime related. We affirm Ramos-Ramirez's conviction, reverse the sentence, and remand to strike the improper conditions and for a proper inquiry into Ramos-Ramirez's ability to pay LFOs.

FACTS

I. BACKGROUND FACTS

Ramos-Ramirez is related to SPR.[1] SPR was less than 12 years old at the time of the relevant events. On March 10, 2017, Ramos-Ramirez kissed and hugged SPR at the edge of a grocery store parking lot while SPR stood between Ramos-Ramirez's legs. Ramos-Ramirez's hands "cupped" and "caressed" SPR's buttocks. Ramos-Ramirez put his tongue in SPR's mouth and licked his neck. At the same time, Ramos-Ramirez's body thrusted into SPR in an up-and-down motion. SPR tried to pull away, but Ramos-Ramirez forced SPR to kiss him and stand close.

During a routine patrol, City of Shelton Police Officer Hector Diaz observed Ramos-Ramirez "kissing" and "heavily making out with" SPR. Verbatim Report of Proceedings (VRP) at 71. Officer Diaz aimed a light at Ramos-Ramirez and tried to get his attention, but Ramos-Ramirez did not notice and was not paying attention. Officer Diaz approached on foot and separated Ramos-Ramirez from SPR. As Officer Diaz approached, he heard Ramos-Ramirez tell SPR "[d]on't talk." VRP at 76. The side of SPR's "face was wet with saliva. His whole mouth and nose area, the side of his ear was just wet with saliva." VRP at 76. Ramos-Ramirez's zipper was down, exposing his underwear.

[1] We use minor victims' initials to protect their privacy. Gen. Order 2011-1 of Division II, *In re the Use of Initials or Pseudonyms for Child Witnesses in Sex Crime Cases* (Wash. Ct. App.), *available at* http://www.courts.wa.gov/appellate_trial_courts/.

Ramos-Ramirez was intoxicated. Officer Diaz observed an empty or almost empty bottle of vodka nearby and "the strong odor of . . . intoxicants was coming off from his person." VRP at 81. Every time Ramos-Ramirez spoke, he smelled like alcohol. Because Ramos-Ramirez "was really intoxicated," he was "difficult to understand." VRP at 124. Initially, Ramos-Ramirez was uncooperative and refused to provide his name or date of birth, but then he provided identification cards to law enforcement. Officer Diaz determined that SPR and Ramos-Ramirez were related.

The State charged Ramos-Ramirez with first degree child molestation, indecent liberties, and second degree incest.

II. TRIAL

The case proceeded to jury trial. Various witnesses testified to the above facts. The defendant presented no witnesses.

In closing argument, defense counsel asserted that Ramos-Ramirez touched SPR in an offensive manner, but not in a sexual manner. Counsel argued that because all three charged crimes required proof of sexual contact and no sexual contact occurred, the jury should find Ramos-Ramirez not guilty. According to his counsel, Ramos-Ramirez may have committed an assault, but none of the sex offenses with which he was charged. Defense counsel argued,

> His zipper was down. He was drunk. Maybe peed beforehand and he didn't pull his zipper up. You have no evidence of sexual gratification. There was no testimony that Mr. [Ramos-]Ramirez had an erection. There was no testimony that he ejaculated. There's no testimony that he was trying to masturbate while this was going on. So there was no sexual contact, no sexual gratification.

VRP at 169-70.

III. Conviction and Sentence

The jury convicted Ramos-Ramirez of first degree child molestation, indecent liberties, and second degree incest and returned a special verdict for count 2 (indecent liberties) that the sexual contact was caused by forcible compulsion.

The sentencing court imposed concurrent high-end indeterminate standard range sentences of 89 months to life and lifetime community custody. Before imposing LFOs, the sentencing court asked defense counsel about Ramos-Ramirez's "ability to work." VRP at 191. Defense counsel stated that Ramos-Ramirez had worked as a brush picker, and counsel did not know Ramos-Ramirez's potential for employment after his release but he would likely be deported. The sentencing court found that Ramos-Ramirez was "able to work" and imposed sheriff's fees of $241.50, $600 for court-appointed counsel, $283.50 for the cost of a defense investigator, a jury demand of $250, and witness fees of $70.16.

The sentencing court imposed the following relevant community custody conditions:

> 4. The defendant shall abide by a nightly curfew if established by the CCO;
> . . . .
> 15. The defendant shall not loiter in nor frequent places where children congregate such as parks, video arcades, and shopping malls;
> . . . .
> 17. The defendant shall undergo periodic polygraph and/or plethysmograph testing to measure treatment progress and compliance at a frequency determined by his/her treatment provider and/or his/her [CCO].

CP at 21-22.

ANALYSIS

I. Ineffective Assistance of Counsel

Ramos-Ramirez argues that defense counsel was ineffective for failing to request a voluntary intoxication jury instruction. We disagree.

A. PRINCIPLES OF LAW

A claim that counsel was ineffective is a mixed question of law and fact that we review de novo. *State v. Linville*, ___ Wn.2d ___, 423 P.3d 842, 844 (2018). The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In *Strickland*, the United States Supreme Court set forth a two-prong inquiry for reversal of a criminal conviction based on ineffective assistance of counsel. 466 U.S. at 687. Under the *Strickland* test, the defendant bears the burden to show (1) "counsel's performance was deficient" and (2) the attorney's "deficient performance prejudiced the defense." 466 U.S. at 687. Failure to make the required showing of either deficient performance or sufficient prejudice defeats an ineffectiveness claim. *Strickland*, 466 U.S. at 700.

The "defendant bears the burden of establishing deficient performance," and we presume "that counsel's performance was reasonable." *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). "[P]erformance is deficient if it falls 'below an objective standard of reasonableness.'" *Grier*, 171 Wn.2d at 33 (quoting *Strickland*, 466 U.S. at 688). Counsel's conduct is not deficient when it "'can be characterized as legitimate trial strategy or tactics.'" *Grier*, 171 Wn.2d at 33 (quoting *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009)).

B. DEFICIENT PERFORMANCE

To support that counsel was deficient, Ramos-Ramirez cites *State v. Kruger*.[2] In *Kruger*, Division Three of this court determined counsel was deficient because there was substantial evidence that the defendant was intoxicated and the defense theory focused on the absence of the

[2] 116 Wn. App. 685, 67 P.3d 1147 (2003).

requisite intent to commit assault. 116 Wn. App. at 693-94. Under these circumstances, the court stated, "[W]e do not see how the failure to request this instruction would fit strategically or tactically in this case. Every witness testified to Mr. Kruger's level of intoxication. No one downplayed or hid Mr. Kruger's level of intoxication." *Kruger*, 116 Wn. App. at 693.

But unlike in *Kruger*, the defense theory here was that Ramos-Ramirez may have committed an assault, but that he did not commit the offenses charged. In closing argument, defense counsel asserted that Ramos-Ramirez touched SPR in an offensive manner, but not in a sexual manner. Counsel argued that because all three charged crimes required proof of sexual contact and no sexual contact occurred, the jury should find Ramos-Ramirez not guilty. Considering defense counsel's theory of the case, Ramos-Ramirez has failed to show that there was no strategic reason to not request the intoxication instruction. *Grier*, 171 Wn.2d at 33. Accordingly, Ramos-Ramirez's ineffective assistance of counsel claim fails.

As such, we affirm his convictions.

II. LFOs

Ramos-Ramirez argues that the trial court erred by ordering him to pay discretionary LFOs without first conducting a sufficient individualized inquiry into his ability to pay. The State asserts that Ramos-Ramirez's LFO argument is waived because he failed to preserve his objection.

In general, the failure to raise an issue before a superior court waives the issue on appeal under RAP 2.5(a). However, we interpret the rules of appellate procedure liberally "to promote justice and facilitate the decision of cases on the merits." RAP 1.2(a). We exercise our discretion to reach the discretionary LFO issue and conclude that the trial court erred when it failed to conduct a sufficient individualized inquiry before imposing discretionary LFOs.

A. PRINCIPLES OF LAW

De novo review applies to the determination of whether the sentencing court failed to make an adequate inquiry under *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). *State v. Ramirez*, No. 95249-3, 2018 WL 4499761 (Wash. Sept. 20, 2018). Former RCW 10.01.160(3) (2015) requires the trial court to conduct an "individualized inquiry" on the record concerning a "defendant's current and future ability to pay before . . . impos[ing discretionary] LFOs." *Blazina*, 182 Wn.2d at 839. "[T]he court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry." *Blazina*, 182 Wn.2d at 838. As part of this inquiry, the trial court is required "to consider important factors, such as incarceration and the defendant's other debts, when determining a defendant's ability to pay." *Blazina*, 182 Wn.2d at 839. Additionally, courts must look for additional guidance in the comment to court rule GR 34, which "lists ways that a person may prove indigent status" for the purpose of seeking a waiver of filing fees and surcharges. *Blazina*, 182 Wn.2d at 838; *City of Richland v. Wakefield*, 186 Wn.2d 596, 606-07, 380 P.3d 459 (2016). "[I]f someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs." *Blazina*, 182 Wn.2d at 839.

B. SENTENCING COURT ERRED

Here, before imposing discretionary LFOs, the sentencing court asked about Ramos-Ramirez's "ability to work." VRP at 191. Defense counsel stated that Ramos-Ramirez had been a brush picker before his arrest and that Ramos-Ramirez would likely be deported after his release. Without further inquiry, the sentencing court imposed discretionary LFOs, including sheriff's fees of $241.50, $600 for court-appointed counsel, $283.50 for the cost of a defense investigator, a jury demand of $250, and witness fees of $70.16. The court did not take into account Ramos-Ramirez's

financial resources, the nature of the burden that the LFOs would impose, Ramos-Ramirez's indigency status under GR 34, the duration of his incarceration, nor his other debts. *Blazina*, 182 Wn.2d at 838-39. As such, the trial court's limited inquiry was insufficient to satisfy the inquiry required under *Blazina* and *Ramirez*.

We reverse the imposition of discretionary LFOs and remand for a sufficient inquiry into Ramos-Ramirez's ability to pay.

III. COMMUNITY CUSTODY CONDITIONS

A. VAGUENESS CHALLENGE

In a single-paragraph argument, Ramos-Ramirez asserts that the community custody condition prohibiting Ramos-Ramirez from loitering or frequenting places where children congregate is unconstitutionally vague. We disagree.

1. PRINCIPLES OF LAW

We review community custody conditions for abuse of discretion and reverse them only if they are "'manifestly unreasonable.'" *State v. Sanchez Valencia*, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010) (quoting *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008)). Imposing an unconstitutional condition will always be "manifestly unreasonable." *Sanchez Valencia*, 169 Wn.2d at 792. We do not presume that community custody conditions are constitutional. *Sanchez Valencia*, 169 Wn.2d at 793.

Community custody conditions are unconstitutionally vague and violate due process when they (1) fail to provide ordinary people fair warning of the proscribed conduct and (2) fail to provide standards that are definite enough to "'protect against arbitrary enforcement.'" *Bahl*, 164 Wn.2d at 752-53 (quoting *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990)).

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.'" *State v. Padilla*, 190 Wn.2d 672, 677, 416 P.3d 712 (2018) (internal quotation marks omitted) (quoting *Sanchez Valencia*, 169 Wn.2d at 793).

2. CONDITION NOT VAGUE

Here, the sentencing court imposed a community custody condition that stated, "The defendant shall not loiter in nor frequent places where children congregate such as parks, video arcades, and shopping malls." CP at 22. Ramos-Ramirez asserts that the community custody condition is void for vagueness and without argument relies on *State v. Norris*, 1 Wn. App. 2d 87, 404 P.3d 83 (2017), *aff'd in part and rev'd in part by State v. Nguyen*, ___ Wn.2d ____, 425 P.3d 847 (2018), and *State v. Irwin*, 191 Wn. App. 644, 364 P.3d 830 (2015). These cases are distinguishable because the wording in the conditions at issue in each case failed to provide an illustrative list of prohibited locations, which rendered the conditions void for vagueness. *Irwin*, 191 Wn. App. at 655 ("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.'" (quoting *Bahl*, 164 Wn.2d at 753)); *Norris*, 1 Wn. App. 2d at 95-96 (accepting the State's concession that a condition prohibiting the defendant "from entering 'any places where minors congregate'" was unconstitutionally vague).

In contrast, the condition imposed on Ramos-Ramirez provides an illustrative list of examples of prohibited locations, identifying "parks, video arcades, and shopping malls" as examples. CP at 22. As such, the provision includes an illustrative list of prohibited locations, which means it is not unconstitutionally vague under *Irwin* and *Norris*. *Irwin*, 191 Wn. App. at

655; *Norris*, 1 Wn. App. 2d at 95-96. The sentencing court did not err when it imposed the condition. *See Bahl*, 164 Wn.2d at 752-53; *Irwin*, 191 Wn. App. at 655.

B. PLETHYSMOGRAPH COMMUNITY CUSTODY CONDITION

Ramos-Ramirez argues, and the State concedes, that the sentencing court erred when it imposed a community custody condition allowing a CCO to order plethysmograph testing as a monitoring tool. We accept the State's concession.

Trial courts are authorized to impose community custody conditions that monitor compliance with treatment. *State v. Riles*, 135 Wn.2d 326, 342-43, 957 P.2d 655 (1998), *abrogated on other grounds by Sanchez Valencia*, 169 Wn.2d 782. However, "plethysmograph testing does not serve a monitoring purpose," *Riles*, 135 Wn.2d at 345, and such testing implicates a defendant's due process "right to be free from bodily intrusions," *State v. Land*, 172 Wn. App. 593, 605, 295 P.3d 782 (2013). "Plethysmograph testing is extremely intrusive" and "can properly be ordered incident to crime-related treatment by a qualified provider. But it may not be viewed as a routine monitoring tool subject only to the discretion of a [CCO]." *Land*, 172 Wn. App. at 605 (citation omitted).

Here, the sentencing court imposed a community custody condition that authorized "periodic polygraph and/or plethysmograph testing to measure treatment progress *and compliance* at a frequency determined by his/her treatment provider *and/or his/her [CCO]*." CP 22 (emphasis added). To the extent this condition allows the CCO to direct plethysmograph testing as a monitoring tool, the condition violates Ramos-Ramirez's due process rights. *Land*, 172 Wn. App. at 605. As such, we accept the State's concession and reverse and remand to strike the improper

portions of the community custody condition from the judgment and sentence. *Land*, 172 Wn. App. at 605.

C. CURFEW COMMUNITY CUSTODY CONDITION

Ramos-Ramirez argues, and the State concedes, that the sentencing court erred when it imposed a community custody condition allowing a CCO to set a curfew for Ramos-Ramirez because the condition is not a crime-related restriction. We accept the State's concession.

1. PRINCIPLES OF LAW

"We review community custody conditions for an abuse of discretion and will reverse them if they are manifestly unreasonable." *Nguyen*, 425 P.3d at 851. "A court does not abuse its discretion if a 'reasonable relationship' between the crime of conviction and the community custody condition exists." *Nguyen*, 425 P.3d at 853 (quoting *Irwin*, 191 Wn. App. at 658-59). As such, crime-related community custody "conditions are usually upheld if reasonably crime related." *Nguyen*, 425 P.3d at 853.

Under RCW 9.94A.703(3)(f), the trial court may require an offender to "[c]omply with any crime-related prohibitions." A "'[c]rime-related prohibition' means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). The sentencing court may also order an offender to "[p]articipate in rehabilitative programs or [] perform affirmative conduct reasonably related to the circumstances of the offense." RCW 9.94A.703(3)(d).

2. CURFEW NOT CRIME RELATED

Here, the trial court imposed a condition that stated, "The defendant shall abide by a nightly curfew if established by the CCO." CP at 21. This condition must be stricken because it is not related to the defendant's first degree child molestation and second degree incest crimes. The alleged acts of

first degree child molestation and second degree incest did not occur at night. In addition, there is no evidence that Ramos-Ramirez would have been prevented from committing his crimes if he had been confined at night. Because a curfew does not directly relate to the circumstances of the crimes, the condition is improper. *Nguyen*, 425 P.3d at 853. As such, we accept the State's concession and reverse the curfew community custody condition.

CONCLUSION

We affirm Ramos-Ramirez's convictions, reverse the sentence, and remand to strike the improper conditions and for a proper inquiry into Ramos-Ramirez's ability to pay LFOs.

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

Johanson, J.
JOHANSON, J.

I concur:

Melnick, J.
MELNICK, J.

WORSWICK, J. (concur in part and dissent in part) — I agree with the majority decision in most respects. I write separately because I believe that the community custody condition providing, "The defendant shall not loiter in nor frequent places where children congregate such as parks, video arcades, and shopping malls," is unconstitutionally vague. Clerk's Papers at 22. And although I appreciate that an illustrative list can clarify an otherwise vague condition, *see State v. Bahl*, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008), the list here adds confusion, rather than clarity to the condition. For the reasons cited in *State v. Wallmuller*, ___ Wn.2d ___, 423 P.3d 282, 285 (2018), I would hold that the community custody condition is vague.

Worswick, J.

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

December 18, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ISAIAS G. RAMOS-RAMIREZ, Appellant.	No. 50911-3-II ORDER ON RECONSIDERATION AND AMENDING OPINION

The Appellant has moved for reconsideration of the court's unpublished opinion filed October 16, 2018. The court now rules as follows:

(1) The first and second paragraphs on page 1 of the court's opinion is modified to read as follows:

> JOHANSON, J. — Isaias Ramos-Ramirez appeals his first degree child molestation, indecent liberties, and second degree incest convictions, sentences, and discretionary legal financial obligations (LFOs). He argues that (1) defense counsel provided ineffective assistance, (2) the trial court erred when it imposed discretionary LFOs without an adequate inquiry and when it imposed the heretofore mandatory filing fee, and (3) the trial court erred when it imposed certain community custody conditions.
>
> We hold that defense counsel provided effective assistance of counsel, therefore we affirm the convictions. However, the trial court conducted an inadequate inquiry into Ramos-Ramirez's ability to pay discretionary LFOs. Further, we accept the State's concession that the filing fee must be stricken.

> Regarding the community custody condition prohibiting Ramos-Ramirez from "loiter[ing] in []or frequent[ing] places where children congregate," we hold it is not unconstitutionally vague. Clerk's Papers (CP) at 22. In addition, we accept the State's concessions that the court erred when it imposed a community custody condition allowing a community custody officer (CCO) to direct plethysmograph testing and a community custody condition regarding a curfew that was not crime related. We affirm Ramos-Ramirez's conviction, reverse the sentence, and remand to strike the improper conditions, strike the filing fee imposed, and conduct a proper inquiry into Ramos-Ramirez's ability to pay discretionary LFOs.

(2) The two full paragraphs following subsection B on pages 8 and 9 are modified to read as follows:

> Here, before imposing discretionary LFOs, the sentencing court asked about Ramos-Ramirez's "ability to work." VRP at 191. Defense counsel stated that Ramos-Ramirez had been a brush picker before his arrest and that Ramos-Ramirez would likely be deported after his release. Without further inquiry, the sentencing court imposed discretionary LFOs, including sheriff's fees of $241.50, $600 for court-appointed counsel, $283.50 for the cost of a defense investigator, a jury demand of $250, and witness fees of $70.16. The court also imposed a mandatory $200 filing fee. The court did not take into account Ramos-Ramirez's financial resources, the nature of the burden that the LFOs would impose, Ramos-Ramirez's indigency status under GR 34, the duration of his incarceration, nor his other debts. *Blazina*, 182 Wn.2d at 838-39. As such, the trial court's limited inquiry was insufficient to satisfy the inquiry required under *Blazina* and *Ramirez*. Further, because Ramos-Ramirez is indigent, the filing fee must be stricken. *State v. Ramirez*, 191 Wn.2d 732, 749-50, 426 P.3d 714 (2018).
>
> We reverse the imposition of discretionary LFOs and remand for a sufficient inquiry into Ramos-Ramirez's ability to pay and to strike the filing fee.

(3) The first full paragraph following the section CONCLUSION on page 13 is modified to read as follows:

> We affirm Ramos-Ramirez's convictions, reverse the sentence, and remand to strike the improper conditions, for a proper inquiry into Ramos-Ramirez's ability to pay LFOs, and to strike the filing fee.

(4) In all other respects, the motion for reconsideration is denied.

IT IS SO ORDERED.

JOHANSON, J.

I concur in the decision to amend the opinion to strike the filing fee:

WORSWICK, P.J.

I concur:

MELNICK, J.

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

January 17, 2019 - 11:22 AM

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