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SUPREME COURT NO. 98418-2

COURT OF APPEALS NO. 52054-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JUAN FREGOSO URIBE,

Petitioner.

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

The Honorable Daniel Stahnke, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

	Page
A. <u>IDENTITY OF PETITIONER</u>	1
B. <u>COURT OF APPEALS DECISION</u>	1
C. <u>ISSUES PRESENTED FOR REVIEW</u>	1
D. <u>STATEMENT OF THE CASE</u>	2
1. Charges	2
2. Testimony of prosecution witnesses	2
3. Defense theory and court’s refusal to permit inquiry into bias	4
4. Misadvisement regarding Fregoso’s right to testify	5
6. Appeal	7
E. <u>REASONS REVIEW SHOULD BE ACCEPTED</u>	8
1. The trial court misadvised Fregoso regarding the right to testify, in violation of his constitutional rights	8
a. <i>Fregoso was denied his right to testify.</i>	9
b. <i>The issue of remedy is unsettled.</i>	14
2. The trial court violated Fregoso’s right to confront witnesses and usurped the role of the jury when it prohibited cross-examination as to bias based on an improper evaluation of credibility	19
F. <u>CONCLUSION</u>	20

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Condon Bros., Inc. v. Simpson Timber Co.</u> 92 Wn. App. 275, 966 P.2d 355 (1998).....	19
<u>In re Detention of Haga</u> 87 Wn. App. 937, 943 P.2d 395 (1997).....	13
<u>Matter of Pers. Restraint of Lord</u> 123 Wn.2d 296, 868 P.2d 835 <u>decision clarified sub nom. In re Pers. Restraint Petition of Lord</u> 123 Wn.2d 737, 870 P.2d 964 (1994).....	12
<u>State v. C.J.</u> 148 Wn.2d 672, 63 P.3d 765 (2003).....	19
<u>State v. Clark</u> 143 Wn.2d 731, 24 P.3d 1006 (2001).....	18
<u>State v. Epefanio</u> 156 Wn. App. 378, 234 P.3d 253 (2010).....	11
<u>State v. Gunwall</u> 106 Wn.2d 54, 720 P.2d 808 (1986).....	16, 17
<u>State v. Hart</u> 180 Wn. App. 297, 320 P.3d 1109 (2014).....	11, 18
<u>State v. Hill</u> 83 Wn.2d 558, 520 P.2d 618 (1974).....	13, 15, 16, 18
<u>State v. Hockaday</u> 144 Wn. App. 918, 184 P.3d 1273 (2008).....	14
<u>State v. Jones</u> 168 Wn.2d 713, 230 P.3d 576 (2010).....	9
<u>State v. Kalebaugh</u> 183 Wn.2d 578, 355 P.3d 253 (2015).....	9

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Karpenski</u> 94 Wn. App. 80, 971 P.2d 553 (1999).....	19
<u>State v. Lee</u> _ Wn. App. 2d, _ P.3d, _, 2020 WL 1645299 (Feb. 18, 2020).....	12, 14
<u>State v. Martin</u> 171 Wn.2d 521, 252 P.3d 872 (2011).....	9, 16, 17
<u>State v. Robideau</u> 70 Wn.2d 994, 425 P.2d 880 (1967).....	11
<u>State v. Robinson</u> 138 Wn.2d 753, 982 P.2d 590 (1999).....	9, 10, 13, 15, 16
<u>State v. Snider</u> 70 Wn.2d 326, 422 P.2d 816 (1967).....	20
<u>State v. Spencer</u> 111 Wn. App. 401, 45 P.3d 209 (2002).....	19, 20
<u>State v. Thomas</u> 128 Wn.2d 553, 910 P.2d 475 (1996).....	10, 12
<u>State v. Wallin</u> 166 Wn. App. 364, 269 P.3d 1072 (2012).....	9, 17
 <u>FEDERAL CASES</u>	
<u>Davis v. Alaska</u> 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).....	19
<u>Johnson v. Zerbst</u> 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938).....	10
<u>Rock v. Arkansas</u> 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987).....	9, 10, 12

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>United States v. Pino-Noriega</u> 189 F.3d 1089 (9th Cir. 1999)	9
 <u>OTHER JURISDICTIONS</u>	
<u>People v. Robles</u> 2 Cal.3d 205, 85 Cal. Rptr. 166, 466 P.2d 710 (1970)	13
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
ER 104	19
RAP 2.5.....	9
RAP 13.4.....	8, 19, 20
RCW 9.94A.507.....	2
RCW 9.94A.535.....	2
RCW 9.94A.837.....	2
RCW 10.52.040	17
U.S. CONST. amend. VI.....	9, 19, 20
CONST. art. I, § 22	9

A. IDENTITY OF PETITIONER

Petitioner Juan Gabriel Fregoso Uribe (Fregoso) asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Mr. Fregoso seeks review of the Court of Appeals' unpublished decision in State v. Juan Gabriel Fregoso Uribe, filed March 17, 2020 ("Opinion" or "Op."), which is appended to this petition.

C. ISSUES PRESENTED FOR REVIEW

1. In a colloquy regarding the petitioner's decision to testify, the trial court informed him that once he waived his right to silence, he would have to answer any question posed by the prosecutor. This misadvisement regarding the parameters of petitioner's right to testify effectively deprived the petitioner of his constitutional right to testify. Based on this error, should each of the petitioner's convictions be reversed?

2. Further, is such error considered per se prejudicial, or is it subject to harmless error analysis?

3. The trial court prohibited cross-examination of key witnesses as to their bias based on an improper evaluation of the credibility of the assertions, i.e., whether the witnesses were, in fact, biased. In doing so, did the trial court usurp the role of the jury and violate the petitioner's constitutional right to confront the witnesses against him?

D. STATEMENT OF THE CASE

1. **Charges**

The State charged Fregoso with five crimes¹ alleged to have occurred between February 25, 2013 and March 1, 2017. CP 11-13. AOS, born in 2009 and Fregoso's niece by marriage, was the complainant as to each. RP 555. The jury entered guilty verdicts on each charge and answered "yes" on each special verdict relating to aggravators. CP 63-72. The court sentenced Fregoso to 318 months to life in prison, reflecting the high end of the standard range on count 1. CP 99; RCW 9.94A.507. The court also imposed lifetime community custody. CP 100.

2. **Testimony of prosecution witnesses**

Beginning in 2013 Fregoso's wife, Patricia, who is AOS's paternal aunt, provided child care for AOS while AOS's parents worked. RP 694-95. Patricia provided care at Patricia and Fregoso's residence. RP 695. They lived in the downstairs of a house. Patricia's sister, another paternal aunt of AOS, lived upstairs. RP 899.

AOS's paternal grandmother Ramona—Fregoso's mother-in-law—also lived in the area. RP 556. Around AOS's eighth birthday in 2017,

¹ The charges were first degree rape of a child (count 1); first degree child molestation (counts 2-4), and indecent liberties by forcible compulsion (count 5). CP 11-13. As to each charge, the State also alleged two aggravators under RCW 9.94A.535(3). CP 11-13. As to count 5, the State alleged AOS was under 15 at the time of commission. RCW 9.94A.837; RCW 9.94A.507(3)(c)(ii).

Ramona was spending time with AOS. RP 558, 573. During a discussion about some shorts Ramona had purchased, AOS told Ramona that AOS smelled bad because Fregoso put “cream” on her. RP 560. AOS said Fregoso touched her vaginal area, had AOS touch his penis, and, causing pain, used his penis to have contact with AOS from behind. RP 562-63.

Ramona initially kept the information to herself. She eventually told her priest, although she did not reveal details. Then she told her husband, who confronted Fregoso. RP 564-65, 574-75. Ramona finally told AOS’s parents about two weeks after the initial conversation. RP 571, 709. That evening, the parents took AOS to the hospital. RP 355, 713.

AOS’s mother Eugenia testified that AOS was initially reluctant to talk about what she had told her grandmother. RP 710. But AOS mentioned several incidents involving Fregoso during the ride to the hospital. At trial, Eugenia relayed these incidents to the jury. RP 711-12. Over time AOS provided, unprompted, details regarding other incidents. RP 717-21.

At the hospital, AOS was seen by an emergency room physician, Dr. Jennifer Lanning. RP 653, 767. Lanning, who testified at trial, noted some vaginal redness but no discharge or odor. RP 782, 787. Lanning prescribed antibiotics for sexually transmitted infections just in case. No one testified AOS, in fact, suffered from such an infection. E.g. RP 663-65, 779.

AOS was examined by a child abuse pediatrician, Dr. Kimberly Copeland, about two weeks later. RP 594, 674. During an audio-recorded interview with Dr. Copeland, AOS repeated the allegations she had made to grandmother Ramona. Ex. 3A (redacted recording, admitted at trial). AOS said Fregoso used his penis to contact her front and back “private” areas. In addition, AOS reported Fregoso held her wrist and forced her to touch his penis. RP 613-16; see also Ex 3A at approx. 0:59-1:30 and 2:50-3:30.

AOS did not provide specific dates but said the contact often occurred when she got home from school. Ex. 3A at approx. 23:18-23:50. The first incident occurred in first grade; whereas the last incident occurred around her birthday. AOS seemed somewhat confused about the date of her birthday. Ex. 3A at approx. 24:15-24:50. AOS provided estimates of the number of times each type of contact occurred. Ex. 3A at approx. 24:58-25:40.

AOS testified at trial and repeated the allegations. RP 520-32. On cross-examination, AOS acknowledged that 11 people lived at Fregoso and Patricia’s home during the time her aunt babysat her. RP 535-36.

3. **Defense theory and court’s refusal to permit inquiry into bias**

Before certain key prosecution witnesses testified, defense counsel notified the court that Fregoso wished to present a theory that grandmother

Ramona and mother Eugenia were angry at Fregoso and had conspired against Fregoso to fabricate the allegations. RP 460. As for mother Eugenia, she was angry because Fregoso had, in the past, touched her body in a way that Eugenia perceived to be sexual and, therefore, offensive. RP 461. As for grandmother Ramona, she had revealed to Fregoso that she had given birth to a child out of wedlock several years earlier. RP 462.

Defense counsel argued he should be permitted into inquire into each of the incidents to show the women were biased against Fregoso. RP 465-67. For example, counsel wished to ask Ramona if she harbored animus toward Fregoso because she had improvidently divulged her secret to him and feared disclosure. RP 467-68.

The State argued against such inquiry, claiming Fregoso wished to impeach the witnesses with extrinsic evidence of their conduct, which was prohibited under the evidence rules. RP 469. Fregoso's counsel initially acknowledged that impeachment by extrinsic evidence was prohibited. But counsel later clarified that he wished to impeach based on bias. RP 467.

The court ultimately excluded the evidence, appearing to disbelieve the claims of bias. RP 469-70, 474.

4. Misadvisement regarding Fregoso's right to testify

After the State rested, Fregoso informed the court he wished to testify, but not until the next day. RP 935. The court told Fregoso he must

testify that day. RP 935-36. But the court permitted Fregoso 25 minutes to talk with his lawyer. RP 936-37. Back on the record, counsel informed the court Fregoso wished to testify about going to Mexico after learning of the allegations; however, this was information that the trial court had excluded on a defense motion. RP 941-42. Fregoso also wished to point out inconsistencies in AOS's recorded interviews, which had been admitted under the child hearsay statute. RP 943-44.

The court explained Fregoso would not be permitted to testify about his opinion on other witnesses' testimony. The parties, including Fregoso, needed to follow the rules of evidence in presenting their cases. RP 946.

The trial court continued:

[The court:] . . . You'll be sworn in and [your attorney will] ask you questions. Then when he's done asking questions then the Prosecutor is going to start asking you questions. And you're going to have to answer the Prosecutor's questions as directly as possible.

[Fregoso:] Correct.

[The court:] Okay.

[Fregoso:] Can I avoid to answer questions?

[The court]: You can claim the Fifth Amendment Right but not as a blanket statement. **You have to answer all questions presented to you by the Prosecutor. By electing to take the stand you are in effect agreeing to testify to all questions.**

[Defense counsel:] **You can't answer some and not others. You have to answer all. Or don't take the stand at all. Once you take the stand you have to answer all questions – from me or from [the prosecutor]. Those are the Rules. That's the Evidence Rules.**

[The court:] Prior to you being sworn in and sitting in that chair you have a Fifth Amendment Right not to testify or to say anything.

But once you elect to waive your Fifth Amendment Rights [t]hen you have to answer questions that the Prosecutor asks you.

[Fregoso:] Okay. Okay.

RP 946-47 (bold face supplied). The court then reminded Fregoso he was not required to testify and the jury would be instructed not to use his failure to testify against him. RP 947.

5. **Defense case**

Fregoso did not testify. RP 947. But his wife did. RP 896. Patricia never saw anything suspicious between AOS and Fregoso. RP 908-09. She never saw them alone together. RP 909-10. On cross-examination, however, Patricia was forced to acknowledge she did not focus on observing her husband because she was not suspicious of him. RP 929-31.

6. **Appeal**

Fregoso appealed, raising the issues identified above and two sentencing-related issues. The Court of Appeals agreed with Fregoso's sentencing claims, Op. at 12-16, but rejected Fregoso's claims as to the

underlying convictions, holding that although the trial court's comments regarding Fregoso's testimony "could have been clearer," Op. at 9, the court did not infringe on Fregoso's right to testify. Op. at 7-10. Further, the trial court properly excluded the proposed bias evidence. Op. at 10-12.

Fregoso now asks that this Court grant review, reverse the Court of Appeals, and reverse his convictions.

E. REASONS REVIEW SHOULD BE ACCEPTED

1. **The trial court misadvised Fregoso regarding the right to testify, in violation of his constitutional rights.**

Review is appropriate under RAP 13.4(b)(3) because this case presents a significant constitutional question. The trial court informed Fregoso that once he waived his right to testify, he would have to answer any question the prosecutor asked. Defense counsel perpetuated this erroneous statement by agreeing with the trial court. This misadvisement regarding Fregoso's right to testify—compounded by, although not invited by, defense counsel—effectively deprived Fregoso of his constitutional right to testify. Based on the violation of this fundamental right, reversal is required. This Court should also grant review to clarify whether such an error is per se prejudicial or subject to harmless error analysis.

a. *Fregoso was denied his right to testify.*

Criminal defendants have the right to testify on their own behalf. Rock v. Arkansas, 483 U.S. 44, 51-52, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). This right is implicitly grounded in the Fifth, Sixth, and Fourteenth Amendments. Id. at 52-53. In Washington, however, the right to testify is explicitly protected. CONST. art. I, § 22 (“In criminal prosecutions the accused shall have the right . . . to testify in his own behalf.”); State v. Robinson, 138 Wn.2d 753, 758, 982 P.2d 590 (1999). Given this express guarantee, the state constitutional right to testify is more protective. State v. Martin, 171 Wn.2d 521, 533, 252 P.3d 872 (2011); State v. Wallin, 166 Wn. App. 364, 370-71, 269 P.3d 1072 (2012).

Denial of the right to testify is reviewed de novo. See State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010) (“We review a claim of a denial of Sixth Amendment rights de novo.”); United States v. Pino-Noriega, 189 F.3d 1089, 1094 (9th Cir. 1999) (“[A] defendant’s claim that he was deprived of his Sixth Amendment right to testify is reviewed de novo.”).²

The trial court misadvised Fregoso regarding his right to testify, depriving him of his right to testify under the state and federal constitutions.

² Deprivation of the right to testify is also manifest constitutional error, reviewable for the first time on appeal under RAP 2.5(a)(3). See State v. Kalebaugh, 183 Wn.2d 578, 584-85, 355 P.3d 253 (2015) (erroneous reasonable doubt instruction was such an error because it implicated a constitutional right and had practical and identifiable consequences at trial).

The right to testify is fundamental, “and cannot be abrogated by defense counsel or by the court.” Robinson, 138 Wn.2d at 758. “Even more fundamental to a personal defense than the right of self-representation . . . is an accused’s right to present his own version of events in his own words.” Rock, 483 U.S. at 52. The defendant alone has the authority to decide whether to testify or not. Robinson, 138 Wn.2d at 758.

To be effective, the waiver of a fundamental right must be “an intentional relinquishment or abandonment of a known right or privilege.” State v. Thomas, 128 Wn.2d 553, 558, 910 P.2d 475 (1996) (quoting Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)). Thus, waiver of the right to testify “must be made knowingly, voluntarily, and intelligently.” Thomas, 128 Wn.2d at 558; accord Robinson, 138 Wn.2d at 758. If the decision not to testify is made against the defendant’s will, “it is axiomatic that the defendant has not made a knowing, voluntary, and intelligent waiver of his right to testify.” Id. at 763.

At trial, an accused must choose between exercising his fundamental right to testify and his fundamental right to remain silent under the Fifth Amendment. A waiver of either right need not be on the record, but it must be knowing. Thomas, 128 Wn.2d at 559.

“[W]hen an accused voluntarily takes the stand he waives his constitutional rights [against self-incrimination] as to all matters concerning

which cross-examination is otherwise normally proper.” State v. Hart, 180 Wn. App. 297, 304, 320 P.3d 1109 (2014) (quoting State v. Robideau, 70 Wn.2d 994, 1001, 425 P.2d 880 (1967) (internal quotations omitted)). But “such waiver extends ‘only to cross-examination which . . . is limited to the scope of the defendant’s direct testimony.’” Hart, 180 Wn. App. at 304 (quoting State v. Epefanio, 156 Wn. App. 378, 388, 234 P.3d 253 (2010)). For example, in Hart, the Court of Appeals held that the lower court infringed upon the defendant’s constitutional right against self-incrimination when it allowed the State to cross-examine him about the facts underlying a charge that he did not testify about on direct examination. Hart, 180 Wn. App. at 304-05.

In the present case, the trial court informed Fregoso that he would be required to answer every question put to him by the prosecutor. This was patently incorrect. The prosecutor’s questions would be limited to the scope of direct examination, as well as the other strictures of the rules of evidence. Instead, Fregoso—clearly unsophisticated in his knowledge of legal procedure—was told that the rules of evidence put any and all questions on the table. Accordingly, the trial court’s misadvisement violated Fregoso’s right to testify by mispresenting the consequences of exercising that right.

Several cases, while not factually identical, are instructive. As a preliminary matter, this Court has, in general terms, warned against the type

of colloquy that occurred in this case. This Court discourages trial courts from inquiring into a defendant's decision to testify because it might "appear to encourage the defendant to invoke or waive his Fifth Amendment rights." Matter of Pers. Restraint of Lord, 123 Wn.2d 296, 317, 868 P.2d 835, decision clarified sub nom. In re Pers. Restraint Petition of Lord, 123 Wn.2d 737, 870 P.2d 964 (1994); accord State v. Lee, ___ Wn. App. 2d, ___ P.3d, ___, 2020 WL 1645299, at *5 (Feb. 18, 2020).

And in Thomas, this Court held the federal constitution does not require trial courts to inform defendants of the right to testify. 128 Wn.2d at 559. Nor must the trial court obtain an on-the-record waiver of the right. Id. Rather, the court "may assume a knowing waiver of the right from the defendant's conduct," such as not taking the stand. Id.

But where the record supports that a waiver was not, in fact, knowing, the inquiry is different. At issue in Rock was an Arkansas court rule that prohibited a defendant's hypnotically refreshed testimony. 483 U.S. at 56. The Supreme Court held application of the rule "had a significant adverse effect on the petitioner's ability to testify," because it effectively prevented her from describing any events that occurred the day of the charged conduct. Id. at 57. This "arbitrary restriction" impermissibly infringed the right to testify, necessitating reversal. Id. at 61-62.

Washington courts have reached similar conclusions. In State v. Hill, the trial court ruled Hill could be cross-examined about two prior convictions if he took the stand. 83 Wn.2d 558, 560-61, 520 P.2d 618 (1974). Hill elected not to testify given the prejudicial nature of the prior convictions. Id. at 562-63. However, the convictions had previously been dismissed, making them inadmissible. Id. at 561. This Court recognized Hill’s fundamental right “to give his version of events if he wished.” Id. at 565. This Court therefore held the trial court’s erroneous ruling “prejudicially deprived [Hill] of a free and voluntary choice in the matter and literally compelled him to remain silent.” Id.

And in In re Detention of Haga, 87 Wn. App. 937, 943 P.2d 395 (1997), overruled on other grounds by Robinson, 138 Wn.2d at 768, Haga wished to testify on his own behalf. Id. at 940. Defense counsel expressed doubts about Haga’s competency and his ability to testify truthfully. Id. The trial court refused to allow Haga to take the stand. Id. In doing so, the trial court “deprived [Haga] of his constitutional right to testify.” Id. The Court of Appeals held: “when ‘a defendant insists that he wants to testify, he cannot be deprived of that opportunity.’” Id. (quoting People v. Robles, 2 Cal.3d 205, 214-15, 85 Cal. Rptr. 166, 466 P.2d 710 (1970)).

As demonstrated, the trial court may not interfere with the right to testify, whether by direct prohibition, or by misadvisement regarding the

conditions of taking the stand. Here, the trial court misadvised Fregoso regarding his right to testify by suggesting that he would have to answer any question the prosecutor asked, or not testify at all. Although Fregoso's initial proposed testimony was not consistent with the rules of evidence, the trial court went too far by applying legally impermissible conditions to his testimony. This undue interference violated Fregoso's right to testify.

As the Court of Appeals correctly noted, it is primarily defense counsel's responsibility to advise a client about testifying. Op. at 9; see also Lee, 2020 WL 1645299 at *5 (colloquy risks improperly influencing a defendant's selection between the right to testify and the right to not testify and interferes with the attorney-client relationship). But here, defense counsel's comments made the situation worse by parroting the trial court's erroneous statements.³

b. *The issue of remedy is unsettled.*

The trial court's misadvisement, parroted by defense counsel, undermined the right to testify. The only remaining question is the appropriate remedy. Courts of this State have not reached a definitive

³ As argued in the Court of Appeals, counsel did not "invite" the error. Counsel must have "materially contribute[d]" to the error "by engaging in some type of affirmative action through which he knowingly and voluntarily sets up the error." State v. Hockaday, 144 Wn. App. 918, 924 n. 5, 184 P.3d 1273 (2008). Defense counsel did not set up the error in this case. Instead, he repeated the court's own incorrect statements. RP 946-47.

answer. Considering the more protective state constitutional right to testify, however, this Court should find the error was per se prejudicial. But even under a constitutional harmless error analysis, reversal is required.

In Robinson, this Court held that remand for an evidentiary hearing was necessary to determine whether Robinson knowingly and voluntarily waived his right to testify. 138 Wn.2d at 770. Robinson had alleged “specific facts” suggesting his attorney prevented him from testifying, even though Robinson remained silent at trial. Id. at 759-61. This Court rejected a per se prejudice standard in cases where defense counsel prevents a client from taking the stand. Id. at 767-69.

This Court acknowledged, however, that in Hill, it reversed without evaluation of whether Hill was actually prejudiced by the trial court’s denial of his right to testify—Hill made no offer of proof about the contents of his proposed testimony. Robinson, 138 Wn.2d at 767. This Court then made the following distinction:

Hill is distinguishable because it involved wrongful actions by a court that resulted in a deprivation of the defendant’s right to testify. In contrast to [Hill], Robinson’s right to testify was abridged, not by the court, but by actions of his defense counsel.

Robinson, 138 Wn.2d at 767-68. This Court ultimately “declin[e] to address the question of a remedy for defendants whose right to testify is abridged by the court.” Id. at 768.

Hill and Robinson, when read together, suggest that a trial court's denial of the defendant's right to testify is per se prejudicial. Such a conclusion is appropriate given the more protective state constitutional right to testify. As stated, unlike the federal constitution, the state constitution explicitly provides a defendant has a right to testify. Robinson, 138 Wn.2d at 758. Thus, this Court has found the state constitution to be more protective of the right. See Martin, 171 Wn.2d at 529-33 (analyzing six factors under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), and concluding that claim of abridgement of the right to testify should be analyzed separately under the state constitution).

The Court of Appeals, finding no violation occurred, did not address the question of prejudice. Op. at 9. But this Court should grant review and recognize a more protective state constitutional right. In analyzing whether independent state constitutional analysis is required, the relevant factors are “(1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern.” Gunwall, 106 Wn.2d at 58.

As in Martin, Gunwall factors 1, 2, and 3 support independent analysis. The constitutional provision at issue is the same. Thus, the analysis here will be identical to the analysis in that case. Martin, 171 Wn.2d at 529-31. As for the fifth factor, it always weighs in favor of

independent analysis. Id. at 533 n. 6; Gunwall, 106 Wn.2d at 62. The sixth factor, whether the provision touches on matters of local concern, is often tied to the fourth factor. Id. at 67.

Thus, the only remaining issue of substance is the fourth factor, “preexisting state law.” Id. at 58. As discussed above, prior cases addressing the right to testify differ in prejudice analysis. But, as noted in Martin, the state constitution recognized the right to testify well before the right was recognized under federal law. Martin, 171 Wn.2d at 532-33. Moreover, state statute has long protected the right to of the accused testify: RCW 10.52.040 provides in part that “any person accused of any crime in this state . . . may, in the examination or trial of the cause, offer himself, or herself, as a witness[.]” Thus, the fourth factor weighs in favor of independent state constitutional analysis.

In summary, considering each Gunwall factor, this Court should recognize a more protective state constitutional right and, correspondingly, follow the more protective remedy. In Wallin, 166 Wn. App. at 377, for example, a post-Martin case, the Court of Appeals held that under article I, section 22, the State is prohibited from suggesting a defendant tailored his testimony based on nothing more than presence at trial. The court reversed the conviction even without engaging in any harmless error analysis. Id.

But even if this Court does not apply a per se prejudice standard, however, the constitutional harmless error standard applies. State v. Clark, 143 Wn.2d 731, 775, 24 P.3d 1006 (2001) (recognizing that when a constitutional right of the defendant has been violated, the State must prove the error was harmless beyond a reasonable doubt); see also Hart, 180 Wn. App. at 305 (so holding).

The State cannot show that interference with Fregoso's right to testify was harmless beyond a reasonable doubt, because the content of Fregoso's testimony is unknown. Further, without Fregoso's testimony, his defense was incomplete. The State effectively impeached Fregoso's wife's testimony—his only witness—by demonstrating she would not have been able to observe her husband at all times during the charging period. RP 929-31. Cf. Hill, 83 Wn.2d at 564 (“Certainly, the involuntary loss of the right [to testify] can be prejudicial to an accused person's cause, for, in many instances, it constitutes the only evidence available to him.”).

This Court should grant review, find that the trial court impermissibly deprived Fregoso of his right to testify, and find that such action by the trial court is per se prejudicial, requiring reversal. Hill, 83 Wn.2d at 565-66. However, the result is the same under a constitutional harmless error analysis, because the State cannot prove Fregoso's defense was not harmed by the trial court's interference.

2. **The trial court violated Fregoso’s right to confront witnesses and usurped the role of the jury when it prohibited cross-examination as to bias based on an improper evaluation of credibility.**

The trial court violated Fregoso’s right to confront witnesses and usurped the role of the jury when it prohibited cross-examination as to bias. This issue also warrants review under RAP 13.4(b)(3).

An accused person has a Sixth Amendment right to impeach a prosecution witness with evidence of bias. Davis v. Alaska, 415 U.S. 308, 315-18, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); State v. Spencer, 111 Wn. App. 401, 408, 45 P.3d 209 (2002).

A trial court decides preliminary questions of fact, including the admissibility of evidence, under ER 104(a). State v. Karpenski, 94 Wn. App. 80, 102, 971 P.2d 553 (1999), abrogated on other grounds by State v. C.J., 148 Wn.2d 672, 63 P.3d 765 (2003). The proper inquiry is “whether the evidence is sufficient to support a finding of the needed fact.” Id.

Under a sufficiency test, the trial court “must take the information in the light most favorable to the proponent, accepting that . . . which favors the proponent.” Condon Bros., Inc. v. Simpson Timber Co., 92 Wn. App. 275, 286, 966 P.2d 355 (1998). In contrast, “[i]t is the function and province of the jury to weigh the evidence, to determine the credibility of the

witnesses, and to decide the disputed questions of fact.” State v. Snider, 70 Wn.2d 326, 327, 422 P.2d 816 (1967).

Here, the trial court usurped the jury’s role by weighing the credibility of the bias allegations. RP 469-70. In doing so, the court violated Fregoso’s Sixth Amendment right to impeach prosecution witnesses with bias evidence. The Court of Appeals repeated this error. Op. at 12. Further, erroneous exclusion of the bias evidence was not harmless beyond a reasonable doubt. See Spencer, 111 Wn. App. at 408. This Court should grant review and reverse Fregoso’s convictions.

F. CONCLUSION

This case presents significant constitutional questions. This Court should accept review under RAP 13.4(b)(3), reverse the Court of Appeals, and reverse each of Fregoso’s convictions.

DATED this 15th day of April, 2020.

Respectfully submitted,

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Attorneys for Petitioner

March 17, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JUAN GABRIEL FREGOSO URIBE,

Appellant.

No. 52054-1-II

UNPUBLISHED OPINION

MAXA, C.J. – Juan Fregoso Uribe appeals his convictions of first degree child rape, three counts of first degree child molestation, and indecent liberties with forcible compulsion. The victim of all these crimes was his young niece. Fregoso Uribe also appeals a community custody condition precluding contact with his children and certain legal financial obligations (LFOs).

We hold that (1) the trial court did not misadvise Fregoso Uribe regarding his right to testify at trial, and (2) the trial court did not err in prohibiting cross-examination of the victim’s mother and grandmother regarding bias because the alleged evidence of bias was irrelevant. However, we hold that the trial court erred in imposing the sentencing condition that prohibited Fregoso Uribe’s contact with his children without considering on the record the effect of the condition on his constitutional right to parent. And on remand the trial court must consider the imposition of LFOs under the current law.

Accordingly, we affirm Fregoso Uribe's convictions, but we strike the sentencing condition prohibiting Fregoso Uribe's contact with his children and remand for the trial court to reconsider that condition and to consider the imposition of LFOs under the current law.

FACTS

Background

Fregoso Uribe lived with his wife Patricia Olvera¹ and their four young children. AOS is the daughter of Patricia's brother and her brother's wife Eugenia Olvera Gomez. In addition to being AOS's aunt and uncle, Fregoso Uribe and Patricia also were AOS's godparents. They frequently provided child care in their home for AOS while her parents were working, from the time AOS was about four years old. After AOS's younger brother was born, he also went to daycare at Patricia and Fregoso Uribe's house.

In February 2017, near the time of her eighth birthday, AOS told her grandmother Ramona Olvera that Fregoso Uribe touched her vagina, put her hand on his penis, and penetrated her vaginally and anally. Ramona later had a conversation with Mauricio, Eugenia, and AOS in which AOS repeated for her parents what she initially had told Ramona.

The State charged Fregoso Uribe with first degree rape of a child, three counts of first degree child molestation, and indecent liberties by forcible compulsion.

Impeachment on Bias

Fregoso Uribe believed that his sister-in-law Eugenia and his mother-in-law Ramona, AOS's mother and grandmother, were unhappy with him and had convinced AOS to fabricate the accusations against him. Fregoso Uribe thought that Eugenia was angry with him because

¹ To distinguish the members of Fregoso Uribe's wife's family from each other, we refer to them by their first names. No offense is intended.

three or four years before trial, he had grabbed her foot in a way she perceived to be sexual while they were goofing around in the living room. Eugenia later complained to Ramona that Fregoso Uribe had tried to sexually molest her. Fregoso Uribe thought that Ramona was angry with him because 10 to 12 years before trial, she told him that one of her eight children was not actually her husband's son. Fregoso Uribe thought that Ramona was worried that he would expose the secret when he was drunk.

Fregoso Uribe's attorney sought permission to impeach Eugenia's and Ramona's credibility with this information on cross-examination. The court ruled that nothing about Eugenia would be allowed because given the fact that she had left her son and daughter in Fregoso Uribe's care for four years, Fregoso Uribe's claim that Eugenia was thinking he molested her was inconsistent with any reasonable analysis. The trial court also ruled that no information about Ramona having a child with someone other than her husband would be admissible to impeach her credibility because there was no rational connection or nexus between this information and AOS's disclosures to her.

At trial, Ramona testified that she was the first adult to whom AOS reported that Fregoso Uribe had been having sexual contact with her. Eugenia testified that AOS told her and Mauricio that Fregoso Uribe had sexual contact with AOS on numerous occasions.

Colloquy Regarding Fregoso Uribe's Testimony

Fregoso Uribe's attorney informed the court that "I've had a discussion with my client – same discussion we've had at the jail several times. My client . . . believes certain things should – he should be allowed to do on the stand." 5 Report of Proceedings (RP) at 940.

Fregoso Uribe apparently wanted to discuss on the stand events that had occurred in Mexico despite his attorney's advice "that that's not a good idea at all" and that he was

“vehemently opposed to that.” 5 RP at 940. Fregoso Uribe thought there had been numerous inconsistencies in the trial testimony up to that point and “indicated that he feels there might be a conspiracy of friendship between the Prosecutor and the cop and the doctor – that they’re friends since they hang out together.” 5 RP at 940. Fregoso Uribe’s attorney advised the trial court that “he does want to testify but I’m – I’m advising the court that I have some great concerns about it at this point.” 5 RP at 941.

The trial court asked Fregoso Uribe, “As an Offer of Proof what about Mexico is relevant to this case?” 5 RP at 941. Fregoso Uribe apparently was concerned that the prosecutor would ask him on cross-examination about why he went to Mexico after learning about AOS’s allegations against him. The trial court responded:

Judge: I’ve – I’ve already instructed [the prosecutor] that she is not allowed to raise the issue of you fleeing to Mexico. If you’ll recall she wanted to have that evidence presented to the jury as an inference of a consciousness of guilt – that you fled to Mexico because you believed yourself guilty.

I did not let her do that in her case-in-chief. I did say that if you – if the defense opens the door to that topic then I would let her go through that door that the defense opens.

So if you want to talk about fleeing to Mexico it’s going to open the door to the Prosecutor asking you all kinds of questions and then making the inference for the jury. That’s what I believe your attorney was probably trying to tell you but –

[Fregoso Uribe]: Okay. Understood.

5 RP at 943.

The trial court then asked Fregoso Uribe, “What else is a concern for you?” 5 RP at 943.

The following discussion occurred:

[Defense counsel]: . . . [Fregoso Uribe] feels that with the – all these experts that came in and testified that they’re very important people.

And that he wants to be able to refute each and every point that they said on – in – in their – in the CDs and – and on the audios. That they said this – they didn’t say this. He wants to go down each and every question. So . . . hundreds and hundreds of things that he wants to challenge.

Judge: It – it's – that door has been closed on that cross exam tactic of those witnesses. Those witnesses were on the stand here for you to cross examine everything that was in those audios and the videos. [The child forensic interviewer] was here this morning. That was your opportunity to cross examine her about that information.

[Defense counsel]: What he's saying is he wants to be able to talk about those –

Judge: He had the chance to talk about those –

[Defense counsel]: – no. He –

Judge: – in cross examination.

[Defense counsel]: – he wants to do it on the stand. He wants to do it on the stand now. He wants to say yeah she said this – but this is really bad. No she said this but she didn't do that – she should have done this. He wants to be able to say that.

Judge: Okay. You can't challenge the witness without the witness being able to – to be confronted by that challenge. You are sure able to testify about what you know. You cannot testify about what somebody else has told you. That's hearsay. You can testify about what you know personally.

[Fregoso Uribe]: Okay.

Judge: But there are Rules of Evidence that we all have to follow [T]hose Rules apply to the Prosecutor as well as the defense. . . . Neither one of you have a different rule book.

[Fregoso Uribe]: – no.

Judge: And – and my job is to sit up here and make sure they follow the rules and you follow the rules.

5 RP at 944-45.

The trial court then explained to Fregoso Uribe what would occur if he chose to testify:

Judge: And your attorney will be available to ask you questions – that's how it will start. You'll be sworn in and he'll ask you questions. Then when he's done asking questions then the Prosecutor is going to start asking you questions. *And you're going to have to answer the Prosecutor's questions as directly as possible.*

[Fregoso Uribe]: Correct.

Judge: Okay.

[Fregoso Uribe]: Can I avoid to answer questions?

Judge: You can claim the Fifth Amendment Right but not as a blanket statement. *You have to answer all questions presented to you by the Prosecutor. By electing to take the stand you are in effect agreeing to testify to all questions.*

[Defense counsel]: *You can't answer some and not others. You have to answer all. Or don't take the stand at all. Once you take the stand you have to answer all questions – from me or from her. Those are the Rules. That's the Evidence Rules.*

Judge: Prior to you being sworn in and sitting in that chair you have a Fifth Amendment Right not to testify or to say anything. But *once you elect to waive your Fifth Amendment Rights* – sorry – then – I apologize. *Then you have to answer questions that the Prosecutor asks you.*

[Fregoso Uribe]: Okay. Okay.

Judge: And – and I just want to reiterate that you do not have to testify. If you do not testify I'll give the jury an instruction that they're not to use the fact that you didn't testify again[st] you. The burden is still on the Prosecutor – and the State – to prove you guilty of these charges. You have no burden to prove your innocence.

[Fregoso Uribe]: Very well.

Judge: Okay.

[Fregoso Uribe]: So – I'm not going to testify.

Judge: You choose not to testify?

[Fregoso Uribe]: Not testify.

Judge: Okay.

5 RP at 946-47 (emphasis added).

Conviction and Sentence

The jury convicted Fregoso Uribe of first degree child rape, three counts of first degree child molestation, and indecent liberties with forcible compulsion.

The trial court imposed a sentencing condition requiring that Fregoso Uribe “not have any contact with minors without prior approval of DOC [Department of Corrections] and [his]

sexual deviancy treatment provider.” Clerk’s Papers (CP) at 110. Fregoso Uribe had four minor children between the ages of 2 and 9 at the time of sentencing. The trial court did not address or acknowledge Fregoso Uribe’s constitutional right to parent before imposing this condition.

The trial court imposed LFOs, including a \$200 criminal filing fee and a \$250 jury demand fee. The court found in the judgment and sentence that Fregoso Uribe was presently indigent.

Fregoso Uribe appeals his convictions, the imposition of the community custody condition that prohibited his contact with his children, and the imposition of the criminal filing fee and jury demand fee.

ANALYSIS

A. ALLEGED MISSTATEMENT OF THE RIGHT TO TESTIFY

Fregoso Uribe argues that he was deprived of his constitutionally protected right to testify because the trial court’s comments to him that he would have to answer all the prosecutor’s questions misadvised him of his right to testify. We disagree.²

1. Right to Testify

Article I, section 22 of the Washington Constitution provides, in relevant part: “In criminal prosecutions the accused shall have the right to . . . testify in his own behalf.” The United States Supreme Court recognized a criminal defendant’s right under the Sixth Amendment to the United States Constitution to “take the witness stand and to testify in his or her own defense” in *Rock v. Arkansas*, 483 U.S. 44, 49, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987).

² Fregoso Uribe did not object to the court’s comments in the trial court. However, the State does not argue that Fregoso Uribe’s failure to object precludes him from raising this issue on appeal. Therefore, we consider the merits of the claim.

The right to testify is fundamental, and cannot be abrogated by defense counsel or by the trial court. *State v. Robinson*, 138 Wn.2d 753, 758, 982 P.2d 590 (1999). The defendant alone has the authority to decide whether or not he or she will testify. *Id.* “In general, the waiver of a fundamental constitutional right must be made knowingly, voluntarily, and intelligently.” *State v. Thomas*, 128 Wn.2d 553, 558, 910 P.2d 475 (1996).

However, a defendant also has the right *not* to testify under the Fifth Amendment and article I, section 9. A defendant’s right to testify in his or her own defense is in tension with the constitutional right against self-incrimination. *State v. Russ*, 93 Wn. App. 241, 245-46, 969 P.2d 106 (1998). “For that reason, it will generally be inappropriate for a judge to influence a defendant’s choice between these two rights.” *Id.* at 246.

It is the responsibility of counsel, not the trial court, to advise the defendant whether or not to testify. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 317, 868 P.2d 835 (1994). The trial court is not required to advise a defendant of his or her right to testify in order for a waiver to be valid. *State v. Chapple*, 145 Wn.2d 310, 328, 36 P.3d 1025 (2001). And the trial court need not conduct an on the record colloquy in order to obtain the defendant’s waiver of his or her right to testify. *Robinson*, 138 Wn.2d at 758-59.

If a defendant chooses to exercise his right to testify, he or she waives the right against self-incrimination regarding all matters properly addressed on cross-examination. *State v. Hart*, 180 Wn. App. 297, 304, 320 P.3d 1109 (2014). “But such waiver extends ‘only to cross-examination which . . . is limited to the scope of the defendant’s direct testimony.’ ” *Id.* (quoting *State v. Epefanio*, 156 Wn. App. 378, 388, 234 P.3d 253 (2010)). And ER 611(b) provides that “[c]ross examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness.”

We review de novo a claim that the trial court violated a defendant's right to testify. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

2. Analysis

The trial court stated, "You have to answer all questions presented to you by the Prosecutor. By electing to take the stand you are in effect agreeing to testify to all questions." 5 RP at 946. The court also stated, "[O]nce you elect to waive your Fifth Amendment Rights . . . you have to answer questions that the Prosecutor asks you." 5 RP at 946-47. Fregoso Uribe apparently interprets these comments as telling him that if he testified he would have to answer all of the prosecutor's questions, regardless of the rules of evidence precluding questions beyond the scope of direct examination.

The trial court's comments could have been clearer. The court preferably should have specifically stated that Fregoso Uribe would be subject only to cross-examination within the scope of direct examination.

However, viewed in the context of other portions of the colloquy, the trial court's statements cannot reasonably be interpreted as broadly as Fregoso Uribe suggests. Directly before the challenged comments, the court told Fregoso Uribe that the prosecutor could not ask him questions about going to Mexico. And the court told him that the rules of evidence applied to both sides and that the court's job was to ensure that both parties followed those rules. It appears that the court was conveying to Fregoso Uribe that he could not pick and choose what questions to answer.

In addition, defense counsel stated that he had discussed with Fregoso Uribe both during trial and earlier in the jail whether he should testify. As noted above, it is defense counsel's responsibility to advise the defendant about testifying. *Lord*, 123 Wn.2d at 317.

We hold that the trial court's comments did not violate Fregoso Uribe's right to testify.

B. CROSS-EXAMINATION REGARDING BIAS

Fregoso Uribe argues that the trial court violated his confrontation right by failing to allow him to cross-examine Ramona and Eugenia regarding past incidents that gave them reason to be biased against him, which would have impeached their credibility as witnesses. We disagree.

1. Legal Principles

The confrontation clause of the Sixth Amendment and article I, section 22 guarantee the right of a criminal defendant to confront adverse witnesses. *State v. Lile*, 188 Wn.2d 766, 781-82, 398 P.3d 1052 (2017). The “ ‘principal means by which the believability of a witness and the truth of his testimony are tested’ ” is cross-examination. *Id.* at 782 (quoting *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)).

But the right of cross-examination is not absolute. *Lile*, 188 Wn.2d at 782. It is “limited by general considerations of relevance.” *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Relevant evidence is admissible unless otherwise prohibited, ER 402, but a defendant does not have a constitutional right to present irrelevant evidence. *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). “Evidence is relevant if a logical nexus exists between the evidence and the fact to be established.” *State v. Burkins*, 94 Wn. App. 677, 692, 973 P.2d 15 (1999).

A defendant has a constitutional right to impeach a prosecution witness with bias evidence. *State v. Spencer*, 111 Wn. App. 401, 408, 45 P.3d 209 (2002); *see also State v. Fisher*, 165 Wn.2d 727, 752, 202 P.3d 937 (2009). However, the bias evidence must be “at least minimally relevant.” *Fisher*, 165 Wn.2d at 752. Generally, evidence of bias is relevant to a witness's credibility and accuracy while testifying. *See id.*; *State v. Lubers*, 81 Wn. App. 614,

623, 915 P.2d 1157 (1996). Trial courts may limit cross-examination regarding bias if it is speculative or remote in time to trial testimony. *Fisher*, 165 Wn.2d at 753.

In evaluating whether the exclusion of evidence violates the defendant’s constitutional right to present a defense, “the State’s interest in excluding evidence must be balanced against the defendant’s need for the information sought to be admitted.” *State v. Arndt*, 194 Wn.2d 784, 812, 453 P.3d 696 (2019).

We review a trial court’s evidentiary rulings for abuse of discretion. *Id.* at 797; *Lile*, 188 Wn.2d at 782 (limitation of the scope of cross-examination). We review de novo whether an evidentiary ruling violated the defendant’s right to present a defense. *Arndt*, 194 Wn.2d at 797.

2. Analysis

Fregoso Uribe wanted to cross-examine Eugenia about his claim that she was angry with him because she believed that he had made unwelcome sexual advances toward her about three or four years before trial by grabbing her foot. The State objected to the admission of the alleged evidence of Eugenia’s bias because it was not relevant to the charges. The trial court ruled that no cross-examination of Eugenia on this basis would be admissible because it was undisputed that Eugenia had left her children in Fregoso Uribe’s care in the four years since the alleged incident.

Fregoso Uribe wanted to cross-examine Ramona about his claim that she was angry with him because about 10 to 12 years before trial, she had told him that one of her eight children was not actually her husband’s son. He claimed that Ramona was worried that Fregoso Uribe would expose the secret when he was drunk. The State argued there was no nexus between Ramona’s alleged secret and the fact that her statement to Fregoso Uribe occurred 10 to 12 years earlier made it irrelevant. The State further stated, “So what . . . would be the relevance that ten or

twelve years later . . . [Ramona’s] method of controlling her deep, dark secret is exposing [Fregoso Uribe] publicly. . . ?” 3 RP at 470.

The trial court ruled that “any information about Ramona and having another child by a – not her husband is not going to be admitted as impeachment evidence to her credibility. It doesn’t make sense. It doesn’t make a rational connection or nexus to the disclosures that [AOS] made to her.” 3 RP at 470.

We hold that the trial court did not abuse its discretion in excluding this evidence as irrelevant to show bias on the part of Eugenia or Ramona. Both alleged incidents were remote in time from trial, three or four years for Eugenia and 10 to 12 years for Ramona. And the claim of bias was speculative and was counterintuitive. The fact that Eugenia had left her children in Fregoso Uribe’s care in the three or four years since she allegedly thought he sexually molested her tended to show that she was not biased against him. And the suggestion that Ramona would fabricate allegations against Fregoso Uribe because he knew her secret made no sense. In addition, we find no constitutional violation here.

We hold that the trial court did not violate Fregoso Uribe’s right to present a defense by limiting the cross-examination of Eugenia and Ramona regarding bias.

C. NO-CONTACT ORDER REGARDING CHILDREN

Fregoso Uribe challenges a sentencing condition that prohibits his contact with all minors without prior approval from DOC and his sexual deviancy provider because that condition restricts his contact with his own minor children. We hold that the trial court erred in failing to consider Fregoso Uribe’s constitutional right to parent before imposing this condition.

The Sentencing Reform Act of 1981, chapter 9.94A RCW, authorizes the trial court to impose “crime-related prohibitions” as a condition of a sentence. Former RCW 9.94A.505(9)

(2010). A crime-related prohibition prohibits “conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10)³. We review the imposition of community custody conditions for an abuse of discretion. *State v. Padilla*, 190 Wn.2d 672, 677, 416 P.3d 712 (2018). A trial court abuses its discretion by imposing an unconstitutional condition. *Id.* at 677.

“More careful review of sentencing conditions is required where those conditions interfere with a fundamental constitutional right.” *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). The right to the care, custody, and companionship of one’s children constitutes such a fundamental constitutional right. *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). “Sentencing courts can restrict fundamental parenting rights by conditioning a criminal sentence if the condition is reasonably necessary to further the State’s compelling interest in preventing harm and protecting children.” *State v. Corbett*, 158 Wn. App. 576, 598, 242 P.3d 52 (2010). However, these conditions must be “sensitively imposed” so that they are “reasonably necessary to accomplish the essential needs of the State and public order.” *Warren*, 165 Wn.2d at 32. Any “crime-related prohibitions affecting fundamental rights must be narrowly drawn” and “[t]here must be no reasonable alternative way to achieve the State’s interest.” *Id.* at 34-35.

When a sentencing condition prohibits a defendant’s contact with his or her own children, the trial court must address the defendant’s constitutional right to parent. *See Rainey*, 168 Wn.2d at 377-80; *State v. Torres*, 198 Wn. App. 685, 689, 393 P.3d 894 (2017). And the court should

³ RCW 9.94A.030 has been amended since the events of this case transpired. Because those amendments do not affect our analysis, we cite to the current version of the statute.

conduct this inquiry on the record. *State v. DeLeon*, ___ Wn. App. 2d ___, 456 P.3d 405, 408 (2020).

Here, the trial court ordered Fregoso Uribe to have no contact with minors “without prior approval of DOC and [his] sexual deviancy treatment provider.” CP at 110. Because the no-contact condition implicates Fregoso Uribe’s fundamental right to the care, custody, and companionship of his children who are minors, “[t]he question is whether, on the facts of this case, prohibiting all contact with [his children], including indirect or supervised contact, is reasonably necessary to realize [a compelling State interest].” *Rainey*, 168 Wn.2d at 379. In order for the sentencing condition to be constitutionally valid, “[t]here must be no reasonable alternative way to achieve the State’s interest.” *Warren*, 165 Wn.2d at 34-35.

The trial court did not acknowledge Fregoso Uribe’s constitutional right to parent when imposing the sentencing condition prohibiting contact with all minors without prior approval of DOC and his treatment provider. Although the State clearly has a compelling interest in protecting children from harm, the State failed to demonstrate how prohibiting contact between Fregoso Uribe and his children was reasonably necessary to effectuate that interest. And the record does not show that the court “sensitively imposed” the no-contact condition in a manner that was “reasonably necessary” to further the compelling interest of protecting children. Finally, the court did not determine whether there was a reasonable alternative way to accomplish that interest.

This court in *DeLeon* vacated a trial court’s order that the defendant have no contact with his biological children under similar circumstances. 456 P.3d at 407-08. Because the trial court in that case did not address the constitutional right to parent, this court remanded for the trial court to conduct the required analysis on the record. *Id.* at 408.

The State argues that the trial court's restriction of Fregoso Uribe's contact with his minor children was reasonable and crime-related because Fregoso Uribe was convicted of raping and molesting his young niece, whom he frequently cared for like a parent. Restricting Fregoso Uribe's contact with his children without the prior approval of DOC and his sexual deviancy treatment provider may be reasonably necessary to protect his children, and we render no opinion on that issue. But the trial court erred by not considering on the record the effect of the restriction on Fregoso Uribe's constitutional right to parent.

We strike the sentencing condition prohibiting Fregoso Uribe from contact with all minors without prior approval of DOC and his sexual deviancy treatment provider, and we remand for the trial court to reconsider imposition of the sentencing condition under the standards discussed above.⁴

D. IMPOSITION OF LFOs

Fregoso Uribe argues, and the State concedes, that this court should strike the criminal filing fee and jury demand fee from his judgment and sentence.

In 2018, the legislature amended (1) RCW 36.18.020(2)(h), which now prohibits imposition of the criminal filing fee on a defendant who is indigent as defined in RCW 10.101.010(3)(a)-(c); and (2) RCW 10.46.190, which now prohibits the imposition of the jury demand fee on a defendant who is indigent as defined in RCW 10.101.010(3)(a)-(c). These

⁴ Fregoso Uribe also argues that the trial court erred in imposing this condition because it effectively prohibits him from having any contact with his four minor children while he is incarcerated. He contends that because he will not be provided with a sexual deviancy provider until after incarceration, he will not be able to obtain the requisite approval to have contact with his children while he is in prison. Because we strike the sentencing condition based on the reasons discussed above, we do not consider this argument.

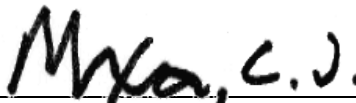
amendments apply prospectively to cases pending on direct appeal. *State v. Ramirez*, 191 Wn.2d 732, 749-50, 426 P.3d 714 (2018).

At Fregoso Uribe’s sentencing, the trial court found that Fregoso Uribe was presently indigent. But the record is unclear if the trial court found him indigent based on the definitions in RCW 10.101.010(3)(a)-(c). On remand, the trial court must consider the imposition of LFOs under the current law.

CONCLUSION

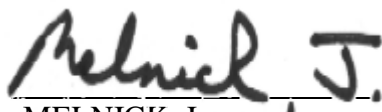
Accordingly, we affirm Fregoso Uribe’s convictions, but we strike the sentencing condition prohibiting Fregoso Uribe’s contact with his children and remand for the trial court to reconsider that condition and to consider the imposition of LFOs under the current law.

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.




MAXA, C.J.

We concur:



MELNICK, J.



SUTTON, J.

NIELSEN KOCH P.L.L.C.

April 15, 2020 - 11:00 AM

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