

NO. 40110-0-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DAVID J. VERNON

Appellant.

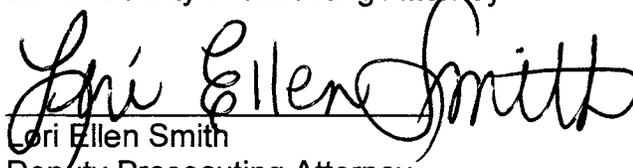
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COURT OF APPEALS
DIVISION II
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Appeal from the Superior Court of Washington for Lewis County

RESPONSE BRIEF

MICHAEL GOLDEN
Lewis County Prosecuting Attorney

By:


Lori Ellen Smith
Deputy Prosecuting Attorney
WSBA No. 27961

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

01-21-11 wd

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STATEMENT OF THE CASE

Due to the length of the argument section of this response, and without waiving the right to challenge Vernon's version of the facts, and except as further cited below, Vernon's statement of the case is adequate for purposes of responding to this appeal.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED VERNON'S PRIOR CONVICTION FOR VOYEURISM UNDER ER 404(b).

Vernon argues that the trial court erred when it admitted testimony of the victim of Vernon's 2003 voyeurism conviction under ER 404(b). But Vernon's unusual interpretation of the law in this area is different from Respondent's understanding of the rules for admission of "prior bad acts." Furthermore, much of Vernon's argument is unsupported by citation to relevant authority. As such, Vernon's arguments as to this issue are not persuasive, and the trial court's ruling admitting this evidence for the limited purpose allowed by the trial court should be upheld.

A trial court's decision admitting ER 404(b) evidence is reviewed for abuse of discretion. State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929(1995). ER 404(b) states as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in

conformity therewith. It may, however, be admissible for other purposes, such as proof of *motive, opportunity, intent, preparation, plan, knowledge . . . or absence of mistake or accident.*

Id. (emphasis added). Furthermore, unlike the way Vernon portrays the State's burden here, for ER 404(b) purposes, the burden of proof is merely a finding by a preponderance of the evidence that the crime probably occurred. State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002).

Here, the trial court admitted the "prior bad acts" evidence under ER 404(b) as "proof of motive, intent, knowledge, preparation, plan and absence of mistake." Id.; CP 23-25.

At the hearing on the State's motion to admit 404(b) evidence in the present case, the State asked the trial court to admit the evidence "to show intent." The State further explained:

[T]hese were voyeurism incidents, in which Mr. Vernon used some type of a plan or device or devices to try to view the intimate areas of women. The closeness in time--there is almost a six year separation, but five of that is accountable for the fact [sic] that Mr. Vernon was incarcerated, so that would be the intervening circumstance. . . . Necessity of evidence beyond testimony, again the State believes that is a relevant and necessary trail to show his intent in this case. Again, that kind of goes along with the 404B argument that Mr. Vernon wasn't simply using the facilities that day, but his intent was to look at the intimate areas of these women for sexual gratification, so the State believes under that prong it is important and necessary to use at trial to show just exactly what his intent was that day.

8/5/09 RP 6,7. The trial court ruled that evidence of Vernon's prior 2003 conviction for voyeurism was admissible in the trial for the current offenses. The trial court explained its ruling, in part, as follows:

. . . I think under 404B weighing all of the factors, including the prejudicial impact that evidence of the prior incident is admissible to show proof of motive, intent, preparation, plan and absence of mistake or accident. . . . I think the probative value of the prior act, with respect to the planning, the idea of inserting the mirror into the wallet and making sure that when the wallet fell open it fell open in just such a way that using the mirror one could look up the dress of the woman standing at the counter in the post office, that goes hand-in-hand I think with the idea that you are cutting a hole inside of a port-a-potty, such that you view a user's otherwise private area, when she is using the facility, so . . . I think the probative value to establishing the State's case. . . . I think this is one of the rare cases where under 404(b), I think that the facts of the prior conviction are admissible to show those factors set forth in the rule, so I'm ruling that the State can in fact use the facts of the prior under 404(b), with respect to those factors.

8/5/09 RP 16,17; CP 23-25 (written findings).

Then, pursuant to the court's ruling, at trial on the present offenses, the State presented evidence of the facts underlying Vernon's 2003 "prior bad act" of voyeurism by putting on the testimony of Ruth Aetzel, the victim of that 2003 incident. RP 114-118. However, according to Vernon, this testimony was inadmissible because "the State was collaterally estopped from presenting this testimony." Brief of Appellant 11. But Vernon's

convoluted application of the doctrine of collateral estoppel to the admission of prior bad acts evidence as occurred in this case is not supported by any *on-point* authority, and often invents law where there is none.

Vernon argues that it is the "guarantee against double jeopardy" that implicates the collateral estoppel doctrine here, and prohibited the State from presenting live testimony from the victim of Vernon's 2003 voyeurism conviction. Brief of Appellant 11. However, "[c]ollateral estoppel in criminal cases is 'not to be applied with a hyper technical and archaic approach. . . but with realism and rationality.'" State v. Eggleston, 129 Wn.App. 418, 426, 118 P.3d 959 (2005), quoting Ashe v. Swenson, 397 U.S. 436, 442-43, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). But Vernon's application of this doctrine to the present case is, at best, strained.

Here, the State did not present the testimony about the prior offense for the purpose of "retrying" Vernon for that offense. Rather, the State presented that testimony solely for the limited purpose set out in the trial court's order allowing the testimony pursuant to ER 404(b). CP 23-25. Furthermore--It is not like the State was simply "making up" this evidence--after all, Vernon pleaded guilty to this offense back in 2003. It is difficult to see how

admitting this evidence through the testimony of the victim of the prior offense can be equated with the State's "retrying" or "relitigating" that offense again. This seems illogical.

This seems especially counterintuitive when even an outright acquittal in a criminal case does not "collaterally estopp" the State from seeking to introduce evidence of the same conduct at a different trial. Instead, "the acquittal is taken into account when balancing probative value against prejudicial value, but the acquittal does not necessarily bar the State from introducing evidence of the underlying misconduct." Karl B. Teglund, *Courtroom Handbook on Washington Evidence* at 255(2009-2010 Ed.), *citing State v. Stein*, 150 Wn.App. 43, 165 P.3d 16 (2007), *as amended (Aug. 21, 2007)*, review denied, 163 Wn.2d 1045, 187 P.3d 271 (2008)(defendant's involvement in killing held admissible, *even though defendant had been acquitted on murder charge*). This being true, Respondent does not see how "introducing evidence of the underlying misconduct" of a prior conviction is forbidden, when the same evidence would be properly admitted even though the defendant was found not guilty of the prior offense. This defies common sense and "rationality"---not to mention general concepts of "fairness." Vernon further claims that the State is not prejudiced

by operation of the collateral estoppel doctrine "because it could easily have produced the 2003 plea documentation to prove its allegations." Id. But how would this have changed anything? Indeed, even Vernon flip-flops all over the place on this issue.

At times in his argument Vernon seems to say that rather than live, non-hearsay testimony of the victim of the prior voyeurism conviction, the State could have properly relied upon a certified copy of his guilty plea to the 2003 Voyeurism charge. Brief of Appellant 13. However, Respondent has no doubt that had this been all the State offered as proof of the prior, Vernon would now be arguing--probably correctly--that the plea document was inadmissible to prove the "facts" of the crime under ER 404(b) because the plea document is full of hearsay. Plea documents--especially in an Alford plea--are often rife with hearsay, because such plea documents often stipulate to the facts asserted in the probable cause statement. And the probable cause statement often contains multiple level of hearsay. Thus, how Vernon reaches the unsupported-by-relevant-authority conclusion that a mere copy of a plea document is somehow "better" evidence than live, non-hearsay testimony--is beyond Respondent's comprehension.

But Vernon asserts that a certified copy of the plea statement and a transcript of the plea hearing were necessary to show whether Vernon entered a standard guilty plea or an Alford plea. No authority is cited for these assertions. Similarly, Vernon claims the trial Court had to inquire into the factual basis for the plea and the State had to produce the guilty plea or the transcript of the plea hearing. But again, no authority is cited for this assertion. And the State is not aware of any authority requiring this type of evidence for proof of ER 404(b) evidence. This Court need not consider these arguments.

A reviewing court is entitled to conclude that the failure of counsel to cite authority means that no authority exists supporting counsel's position. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126 (1962); State v. Chapman, 140 Wn.2d 436, 453, 998 P.2d 282, *cert. denied*, 531 U.S. 984, 121 S.Ct. 438, 148 L.Ed.2d 444 (2000). Accordingly, this Court should not give consideration to Vernon's inventive assertions that are unsupported by on-point authority.

Vernon further argues that "[c]laims based on potential trial evidence that was never presented because the defendant pleaded guilty are precluded by the plea." Brief of Appellant 14. But the cases Vernon cites for this proposition have nothing whatsoever to do with the topic of the propriety of presenting live testimony in a subsequent trial to admit evidence of a prior bad act pursuant to ER 404(b). Brief of Appellant 15, citing State v. Carrier, 36 Wn.App. 755, 757, 677 P.2d 768 (1984), and State v. Davis, 29 Wn.App. 691, 695-96, 630 P.2d 938 (1981). Indeed, Vernon seemingly conflates the evidentiary rules for proving current offense in jury trials or guilty pleas with the rules for proving the facts of prior acts in a subsequent proceeding under ER 404(b). Brief of Appellant 15. These principles are not interchangeable.

Vernon goes on to conclude that "the State chose in 2003 to avoid the risk of outright acquittal or a second hung jury by foregoing a second trial based on Aetzel's testimony and accepting a guilty plea instead. That choice works an estoppel now." But Vernon again cites no on-point authority for this assertion. Moreover, on the one hand Vernon argues that only a certified copy of the guilty plea would have been proper evidence of the prior bad act, and that only "Vernon's admissions in the guilty plea statement"

should have "reached the ears of the jurors." Brief of Appellant at 16. Yet in the same argument Vernon earlier states that if the 2003 plea was an Alford plea, that is "problematic" because such a plea "does not admit any facts" and has "limited evidentiary value." Brief of Appellant 10. Flip/ Flop.

Again, had the State indeed simply presented a certified copy of Vernon's 2003 guilty plea--and assuming arguendo it was an Alford plea--Vernon would now be arguing that because it was an Alford plea, it did not "prove" any facts of the underlying crime and should not have been admitted as proof of the prior bad act. See e.g., Brief of Appellant at page 10 where Vernon states that if the plea was Alford "no facts were admitted or proved and the mere existence of the conviction did not constitute proof of conduct by a preponderance as required by ER 404(b)." Brief of Appellant 10. In other words, according to Vernon's convoluted reasoning, the State was damned if it did present a copy of the 2003 guilty plea, and damned if it did not present the guilty plea to prove the prior bad acts evidence.

Furthermore, Vernon's reliance on the Saltarelli case seems misplaced because the facts of Saltarelli involve the admission of prior bad acts evidence in the context of a different crime (assault)

and a different defense (consent) than in the present case. State v. Saltarelli, 98 Wn.2d 358, 655 P.2d 697 (1982). Moreover, the jury was given a limiting instruction regarding the prior bad act evidence, and the jury is presumed to follow the court's instructions. State v. Davenport, 100 Wn.2d 757, 763-64, 675 P.2d 1213 (1984).

The evidence of Vernon's prior conviction for voyeurism was properly admitted and this Court should affirm his convictions.

II. SUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT THE CONVICTIONS.

Vernon also claims there was insufficient evidence presented to support the convictions. This argument is without merit in the first instance because Vernon analyzes this issue from an utterly incorrect, "qualified" standard of review. In addition, Vernon further misapplies the law when he invades the province of the jury with an incomprehensible attempt to substitute his own credibility determinations of a witness for the first time on appeal.

Vernon argues that "without the propensity-based presumption of guilt, the evidence against Vernon . . . falls far short of the State's burden of proof beyond a reasonable doubt." Brief of Appellant 25. But we do not properly begin this analysis "without" certain evidence that was admitted at trial. Indeed, Vernon's "qualified" standard of review ignores long-settled rules for

determining sufficiency of the evidence on appeal. Vernon does not get to choose which evidence this Court should consider when determining sufficiency of the evidence.

Rather, in challenging the sufficiency of the evidence, the appellant *admits the truth of the State's evidence* and all inferences that can reasonably be drawn from it. State v. McNeal, 145 Wash.2d 352, 360, 37 P.3d 280 (2002). Thus, the well-settled standard for determining sufficiency of the evidence on appeal is whether, after viewing the evidence *in the light most favorable to the State*, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence have equal weight. State v. Varga, 151 Wash.2d 179, 201, 86 P.3d 139 (2004). The State bears the burden of proving all the elements of the crime charged beyond a reasonable doubt. State v. Teal, 152 Wash.2d 333, 337.

Vernon further misapplies the law when he argues insufficient evidence based on his assertion of new facts on appeal that go solely to the issue of credibility of the States witnesses. This is improper because credibility determinations are for the trier of fact and are not subject to review. State v. Thomas, 150

Wash.2d 821, 874, 83 P.3d 970 (2004) (citing State v. Camarillo, 115 Wash.2d 60, 71, 794 P.2d 850 (1990)).

For example, Vernon states that without the "propensity evidence" the evidence is insufficient because "the jury would have recognized as meaningless self-aggrandizement fisherman Jeremy Wilson's testimony that he knew immediately that Vernon was 'creepy'" Brief of Appellant 25. Second-guessing on appeal what the jury "would have done" as to credibility issues is totally improper. On appeal, we must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Thomas, 150 Wash.2d at 874-750 (citing State v. Cord, 103 Wash.2d 361, 367, 693 P.2d 81 (1985)); State v. McCullum, 98 Wash.2d 484, 489, 656 P.2d 1064 (1983).

But Vernon goes on. For the first time on appeal, he tries to discredit the testimony of one of the *victims* with an argument that is, quite frankly, jaw-dropping--not to mention unsupported by any authority. Brief of Appellant 25. Shockingly, Vernon attempts to tear apart the testimony of victim Schoelkopf by labelling Schoelkopf incompetent for the *very manner in which she pulled down her pants and underwear* in preparation to use the "facilities"

once inside the port-a-potty. Id. In a tone of ludicrous superiority,

Vernon states:

Schoelkopf said she lowered her shorts, then squatted over the toilet, and only then thought about pulling her underwear down. *Every female juror would know this is simply not how it is done. No mentally competent female sits on the seat of a highway convenience. The unit is straddled, one foot on either side.* This means the underwear either is loose enough to be pulled to one side or it is pulled down along with the shorts.

Brief of Appellant 26 (emphasis added). *Really?* According to whom?

Apparently-- given the nature of Vernon's offenses-- he fancies himself somewhat of an "expert" on proper Porta-Potty de-pantying procedures. Be that as it may, the problem is that in addition to improperly imposing his own credibility determination on this witness' testimony, he once again cites no authority for his lofty pronouncements on female Sani-Can etiquette. Brief of Appellant 26. Nor did he present any of this "evidence" below.

Incredibly, Vernon's appellate mockery of Ms. Schoelkopf's testimony does not stop there (he did have a chance to cross examine her at trial). Vernon further proclaims that, "[i]t is inconceivable that a *thwarted voyeur* would remain frozen for two minutes with his eye to a hole while the eye of the intended victim stared back at him from the other side." Id. (emphasis added).

Well, Vernon's experience may tell him that but he did not present any testimony from a "voyeurism expert" at trial, so these "facts" certainly cannot be considered now.

The overall point is, in this sufficiency-of-the-evidence analysis, Vernon put on no evidence supporting these arguments in the trial court, nor are his arguments well-reasoned or supported by citation to authority. Brief of Appellant. Again, this Court need not consider arguments made without citation to authority. State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990); State v. Kroll, 87 Wash.2d 829, 838, 558 P.2d 173 (1976).

Most importantly, though, these arguments go to credibility of the State's witnesses. It is axiomatic that credibility determinations are the sole province of the jury. Thomas, 150 Wash.2d at 874 (Credibility determinations are for the trier of fact and are not subject to review); State v. Cord, 103 Wash.2d 361, 367, 693 P.2d 81 (1985), 96 P.3d 974 (2004)(on appeal, we must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence).

Because Vernon applies the wrong standard of review to determining the sufficiency of the evidence on appeal, and argues new facts that he never presented at trial, his arguments are not

persuasive. Furthermore, his arguments go to the credibility of the witnesses--which is the sole province of the jury. Accordingly, this Court should find that Vernon's arguments regarding insufficient evidence are meritless, and should affirm.

III. THE TRIAL COURT JUDGES WERE NOT "BIASED."

Vernon further argues that the two Lewis County Superior Court judges presiding over this case were biased and should have recused. This argument is also without merit.

First of all, it does not appear that Vernon actually objected below to Judge Hunt's presiding over the jury trial. 8/27/09 RP 27. However, it is also true that the record is confusing as to which judge the affidavit of prejudice was intended for. 8/27/10 30-32. Although somewhat strangely, Vernon ultimately filed an affidavit of prejudice to remove the one judge who probably would have had to automatically recuse himself-- because he had been Vernon's prior defense attorney (Judge Lawler). 8/47/09 RP 27,30. As to Judge Hunt, it does not seem to Respondent that the fact that Judge Hunt apparently may have "prosecuted [Vernon] many moons ago" necessarily means that Judge Hunt was required to recuse himself on this case 8/27/09 RP 31. And it does not appear that Vernon

has found any authority stating that Judge Hunt was required to step down from presiding over the jury trial here.

In any event, after learning that Judge Hunt would indeed be presiding over the jury trial, Vernon could have lodged a formal objection, but it does not appear that he did so. 8/27/09 RP 29-32. Accordingly, Vernon should not be able to raise this particular issue now.

Under RAP 2.5(a), an "appellate court may refuse to review any claim of error which was not raised in the trial court." Washington courts have applied the doctrine of waiver to bias and appearance of fairness claims. See e.g., State v. Bolton, 23 Wn.App. 708, 714, 598 P.2d 734 (1979); In re the Welfare of Carpenter, 21 Wn.App. 814, 820, 587 P.2d 588 (1978)("a litigant who proceeds to trial knowing of potential bias by the trial court waives his objection and cannot challenge the court's qualifications on appeal.") However, even if this Court decides to address this issue, it is without merit.

Outside of situations involving a clear and nondiscretionary duty to recuse, the decision "will necessarily involve the exercise of discretion." State v. Carlson, 66 Wn.App. 909, 918, 833 P.2d 463, *rev. denied*, 120 Wn.2d 1022, 844 P.2d 1017 (1993). Furthermore,

"an assertion of an unconstitutional risk of bias must overcome a *presumption of honesty and integrity accruing to judges.*" State v. Chamberlin, 161 Wn.2d 30, 38, 162 P.3d 389, 393 (2007)(emphasis added). The party claiming bias must present evidence that the judge has a preconceived adverse opinion against him or his cause. See In re Borchert, 57 Wn.2d 719, 722, 359 P.2d 789 (1961).

The "appearance of fairness" doctrine requires a judge to disqualify himself if he is biased against a party or if his impartiality could reasonably be questioned. State v. Dominguez, 81 Wn.App. 325, 328-30, 914 P.2d 141 (1996). However, an appearance of fairness doctrine claim requires evidence of the judicial officer's actual or potential bias. State v. Dugan, 96 Wn.App. 346, 354, 979 P.2d 885 (1999). Mere speculation is not enough. In re Personal Restraint of Haynes, 100 Wn.App. 366, 377 n. 23, 996 P.2d 637 (2000).

In the present case, Vernon first claims that Judge Brosey-who heard the preliminary motion to admit the ER 404(b) evidence- was "biased" because he was the judge in Vernon's prior voyeurism prosecution in 2003. However, adverse rulings do not demonstrate prejudice. See Jones v. Halvorson-Berg, 69 Wn.App.

117, 127, 874 P.2d 945 (1993). Indeed, "[j]udicial rulings alone almost never constitute a valid showing of bias. In re Davis, 152 Wn.2d 647, 692-693, 101 P.3d 1 (2004), *citing* Liteky v. United States, 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). Still, Vernon goes on to claim that because Judge Brosey knew the prior first involved a mistrial and that Vernon had ultimately pled guilty to that prior offense, that the judge then "wrongly recollected that the facts underlying the offense were established." Brief of Appellant 28.

A similar allegation was addressed and rejected in State v. Carter, 77 Wn.App. 8, 888 P.2d 1230 (1995). In Carter, the State charged Carter with possession of controlled substances. 77 Wn.App. at 10. Carter entered an Alford plea, which was later vacated, and Carter was sentenced. Carter, 77 Wn.App. at 10. Subsequently, a jury trial was set before the same judge who had accepted the Alford plea. Carter moved for a recusal, arguing that he could not get a fair trial because the judge had commented on his guilt during sentencing. Carter, 77 Wn.App. at 10. The court denied the motion for recusal, and Carter was found guilty by a jury. Carter, 77 Wn.App. at 10-11. On appeal, Carter contended that the trial judge should have disqualified himself from presiding over the

trial because the judge had commented on his guilt in connection with his Alford plea. Carter, 77 Wn.App. at 11. Division Three of this Court affirmed, stating, "there is no evidence of any prejudice or bias on the part of the judge during the course of Mr. Carter's jury trial." Carter, 77 Wn.App. at 12. The reasoning in the Carter case is applicable here, and Judge Brosey was not required to recuse himself from Vernon's ER 404(b) hearing simply because Judge Brosey had presided over Vernon's previous voyeurism case.

But Vernon goes on to make the incorrect assertion that because Judge Brosey knew that the prior ER 404(b) offense had first been tried before a jury but the jury deadlocked, that meant that "the facts alleged in that incident were never proved" Id. Thus, says Vernon, "an unbiased judge would have recognized that the hung-jury mistrial required documentation of the guilty plea to determine what facts, if any, were either admitted or proved." But, as argued in a later section below, this is *not the law* in the first place, and Vernon tellingly cites no authority for this assertion. Brief of Appellant 29. Nonetheless, Vernon marches on with his attack on Judge Brosey's integrity, stating that, "mere allegations from six years before were transformed into 'facts' *by the alchemy*

of the judge's false memory , and the court admitted highly prejudicial prior bad act evidence without the requisite foundation." Brief of Appellant 29 (emphasis added). As set forth in another section of this brief, these were not "mere allegations" --Vernon *pled guilty to the crime* six years ago. CP 94. Judge Brosey's memory was correct, and so was his ruling on the ER 404(b) issue (argued more fully below). Vernon has not shown that Judge Brosey was biased against him..

Vernon now also similarly claims that Judge Hunt should not have presided over his trial because Judge Hunt had been a prosecutor on one of Mr. Vernon's prior cases, and because Judge Hunt "initially refused to do this trial for that reason." Brief of Appellant 29, citing MRP 26-27. Vernon states that, "both judges were affected by *same irresistible but impermissible inference* that Vernon was guilty based on knowledge of past conduct." (Emphasis added). He further complains that "Judge Hunt's prosecutorial relationship with Mr. Vernon is particularly unmistakable in his misapplication of sentencing laws that led the court to double the sentence," and that Judge Hunt "unquestioningly adopted the earlier erroneous ER 404(b) ruling" and then "imposed the harshest possible sentence." Id.

Neither Judge Brosey or Judge Hunt were "biased" against Mr. Vernon. Furthermore, Vernon's allegation that Judge Hunt "misapplied" the sentencing laws when he doubled Vernon's "lawful" sentence is just plain wrong. As set out in detail in another section of this brief, Judge Hunt correctly applied the sentencing statutes to this case. In fact, as set out elsewhere in this brief, it is Vernon who totally misinterprets the sentencing laws applicable to this case.

Moreover, any sentencing judge presented with Vernon's disgusting criminal history of (1) voyeurism (2003); (2) Indecent Exposure (2002); (d) Failure to register as a sex offender (1994); (4) Rape Second Degree (1994); (5) Indecent Exposure (1993); and (6) Indecent liberties with forcible compulsion (1990), would rightly *throw the book at Vernon*. CP 94. But the point is, Judge Hunt lawfully sentenced Vernon to two consecutive five-year sentences for these two current convictions for voyeurism involving two different victims (as further addressed in another section of this brief). RCW 9.94A.712 (effective until August 1, 2009); RCW 9.94A.535; State v. Hughes, 166 Wn.2d 675, 686-688, n. 14, 212 P.3d 558 (2009). Vernon simply cannot show that Judge Hunt sentenced Vernon the way he did because he had some sort of

personal bias towards Vernon, because he may have prosecuted Vernon "many moons ago."

In sum, Vernon's bald assertions of "bias" on the part of Judge Brosey and Judge Hunt are nothing more than "naked castings into the constitutional sea . . . [and] are not sufficient to command judicial consideration and discussion." State v. Blilie, 132 Wn.2d 484, 493 n. 2, 939 P.2d 691 (1997)(quoting United States v. Phillips, 433 F.2d 1364, 1366 (8th Cir.1970), *cert. denied*, 401 U.S. 917 (1971)). Not to mention the reality that If a judge were required to recuse himself from a case any time he had previously ruled against, or previously presided over a case involving the same defendant, we would very soon run out of judges. This is not the standard, and Vernon cites no authority that says it is. Because Vernon has not shown actual bias on the part of Judge Brosey or Judge Hunt, Vernon's bias arguments are not persuasive. Accordingly, his convictions and sentence should be affirmed.

IV. VERNON HAS NOT SHOWN THAT HIS TRIAL COUNSEL WAS INEFFECTIVE.

Vernon claims that his trial counsel was ineffective for failing to exclude Ruth Aetzel's testimony and for failing to move for a change of venue. These arguments are without merit.

To show ineffective assistance of counsel, Vernon must satisfy the two-part test established by Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 675(1984). First, Vernon must show that counsel's performance was deficient. "[S]crutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Second, Vernon must show that the deficient performance prejudiced him. Prejudice occurs "when there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the trial would have been different." State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). If Vernon fails to satisfy either prong of this test, the reviewing court need not address the other prong. State v. Lord, 117 Wn.2d 829, 894, 822 P.2d 177 (1991). It is Vernon's burden to prove ineffective assistance of counsel. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1241 (1995).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of

hindsight.” Strickland, 466 U.S. at 689. Moreover, the reviewing court must judge the reasonableness of counsel’s actions “on the facts of the particular case, viewed as of the time of counsel’s conduct.” Id. At 690; State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993). “What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless . . . for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.” Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995).

Indeed, as the United States Supreme Court has stated, “The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” Yarborough v. Gentry, 540 U.S. 1, 8, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003).

Mere differences of opinion regarding trial strategy or tactics cannot support an ineffective assistance of counsel claim.

Hendrickson, 129 Wn.2d at 77-78. And counsel does not render ineffective assistance by refusing to pursue strategies that

reasonably appear unlikely to succeed. State v. McFarland, 127 Wn.2d 322, 334 n.2, 899 P.2d 12451 (1995).

Here, Vernon has not met the very high bar for proving ineffective assistance of counsel because he cannot show prejudice. In sum, Vernon has not shown that the trial court would have granted a motion to exclude Ruth Aezel's testimony on the basis of "collateral estoppel, nor that the court would have granted a change of venue, had his counsel made such motions.

Furthermore, Vernon's trial counsel did move to exclude evidence of Vernon's prior voyeurism offense--about which Ms. Aetzel testified--but the trial court denied that motion. 8/5/09 RP 16,17. So, even if trial counsel had asked the court to exclude Ms. Aetzel's testimony about the prior offense, the trial court's prior ruling on this issue shows that the motion would have been denied. An attorney has no duty to argue frivolous or groundless matters before the court. State v. Stockman, 70 Wn.2d 941, 946, 425 P.2d. 898 (1967). Additional reasons the trial court would have denied a motion to exclude this evidence under the collateral estoppel doctrine are addressed in the first section of this brief and will not be repeated here.

For the same reasons, Vernon has not shown that his trial counsel was ineffective for failing to renew his motion for a change of venue. That the trial court would not have granted a motion for a change of venue is shown by the trial court's reaction to such a motion the first time it was brought up by trial counsel. 8/5/09 RP 21, 22. Because Vernon cannot show that the trial court would have granted his renewed motion for a change of venue, he cannot meet the prejudice prong of Strickland, and his ineffective assistance claim fails.

V. THE JURY WAS NOT "BIASED" AND VERNON'S ARGUMENT TO THE CONTRARY IS WITHOUT MERIT.

Vernon also claims the jury panel was tainted when, according to his characterization, "juror No. 35 informed all the potential jurors the defendant was in custody" and because a "'uniformed custody officer' was seated a few feet from the defendant while the court made no inquiry into the need for this." Brief of Appellant 39. These arguments are without merit.

First of all, Vernon mischaracterizes what juror No. 35 said. When -prospective jurors were asked if they had heard of this case, juror number 35 responded, "Yes, I just saw a jail roster." RP 15. Juror No. 35 works in law enforcement. RP 15. Thus, this juror did not inform "all the potential jurors the defendant was in custody."

Rather, juror no. 35 saw the defendant's name on a jail roster. RP 15. Having seen a defendant's name on a jail roster at some point in time is not the same as actually having *seen the defendant in custody* or in his jail garb or in handcuffs. This argument is simply not persuasive. Nor is Vernon's argument that because a uniformed custody officer was seated "four feet away from him" that the jury panel was biased against him persuasive.

A criminal defendant is entitled to appear free from all bonds or shackles except in extraordinary circumstances. State v. Finch, 137 Wn.2d 792, 842, 975 P.2d 967 (1999). Before ordering a defendant shackled or restrained, or ordering extra police presence in the courtroom, the trial court must conduct a Hartzog hearing on the record and make findings to justify such orders. State v. Hartzog, 96 Wn.2d 383, 401, 635 P.2d 694(1981).

However, most cases discussing this issue involve situations where defendants either appeared in the courtroom shackled and/or in prison garb *throughout the proceedings*, or there was a conspicuous police presence in the courtroom, or additional security measures were apparent. Holbrook v. Flynn, 475 U.S. 560, 160 S.Ct. 1340, 89 L.Ed. 2d 525 (1986); Finch, 137 Wn.2d at 850; State v. Turner, 99 Wn.App. 482, 487-88, 994 P.2d 284

(2000). Furthermore, this issue is subject to harmless error analysis. State v. Elmore, 139 Wn.2d 250, 274, 985 P.2d 289 (1999), *cert. denied*, 531 U.S. 837, 121 S.Ct. 98, 148 L.Ed.2d 57 (2000). In general, error that violates a constitutional right of the accused is presumed to be prejudicial. Finch, 137 Wn. 2d at 859. But, if it appears from the record that the error was harmless beyond a reasonable doubt, the State overcomes this presumption. State v. Clark, 143 Wn.2d 731, 775, 24 P.3d 1006, *cert.denied*, 534 U.S. 1000, 122 S.Ct. 475, 151 L.Ed.2d 389 (2001).

For example, "[w]here the record reveals that the jury never saw the defendant in shackles, the error is harmless." State v. Donery, 131 Wn.App. 667, 675, 128 P.3d 1262 (2006)(emphasis added), *citing State v. Hutchinson*, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998), *cert. denied*, 525 U.S. 1157, 119 S.Ct. 1065, 143 L.Ed. 2d 69 (1999). In Hutchinson, the Court noted that in order to succeed on such a claim, "the Defendant must show the shackling had a substantial or injurious effect or influence on the jury's verdict. Because the jury never saw the defendant in shackles, he cannot show prejudice. . . we hold any error was harmless." Id.

In the present case, Vernon was not shackled or restrained, or handcuffed--nor is there any evidence that the presence of the

uniformed police officer was even noticed by the jury. Indeed, the only reference to this one security officer was an exaggerated remark made by the trial judge outside the presence of the jury that "[t]he jurors would have to have total vacuums in their heads not to figure out he's in custody, there is a custody officer sitting four feet away from him. and that's not unduly suggestive." RP 38, 39.

With all due respect to the trial judge, given the fact that Mr. Vernon was not wearing jail garb, was not wearing shackles or handcuffs, or any sort of restraint--Respondent does not see how the jury would have "figured out" Vernon was "in custody." RP 39 (trial court's statement). Nor does the presence of one uniformed security officer in the courtroom represent an "additional security measure" or a "conspicuous police presence" that would give a jury the idea that Vernon was particularly dangerous. Holbrook, supra.

In sum, there is simply nothing in this record to show that any juror was potentially prejudiced against Vernon-- either because a potential juror said he saw Vernon's name on a jail roster, or because *one* uniformed police officer was in the courtroom.

For that matter, Respondent questions Vernon's claim that a Hartzog ("Shackling") hearing was even required in this case, since

there is absolutely no indication that the trial court sought "additional security measures" in the first place. Finch, supra; Hartzog, supra. But even if there was error, Vernon cannot show that these alleged errors had a "substantial or injurious effect or influence on the jury's verdict" because there is no evidence in the record that the jury noticed either one of the claimed "tainting factors." Hutchinson, 135 Wn.2d at 888. Accordingly, any error should be deemed harmless.

Furthermore, the cases cited by Vernon regarding this issue are distinguishable. For example, Vernon cites State v. Gonzalez 129 Wn.App. 895, 120 P.3d 645 (2005). However, in Gonzales, the jury was told that the defendant was *being held in jail* because he could not post bail, so they might see the defendant being taken to and from court in handcuffs, and escorted by uniformed officers. Id., at 897, 989. No such thing happened here, and Gonzalez does not apply. Vernon's arguments to the contrary are without merit, and this Court should agree.

VI. THE EXCEPTIONAL SENTENCE WAS LAWFULLY IMPOSED AND SHOULD BE AFFIRMED IN ALL RESPECTS.

Vernon claims that the trial court erred when it imposed both an exceptional sentence and an indeterminate sentence in this case. Brief of Appellant 36. This is not correct. Vernon

misinterprets and/or misapplies nearly every statute applicable to his sentence, and he cites no authority for many of his inventive interpretations of the sentencing statutes. Accordingly, his arguments are without merit, and his sentence should be affirmed.

A trial court's statutory authority under the Sentencing Reform Act (SRA) is reviewed *de novo*. State v. Murray, 118 Wn.App. 518, 521, 77 P.3d 1188 (2003). However, when reviewing an exceptional sentence, the reviewing court uses a three-pronged test: (1) are the reasons supported by the record under the clearly erroneous standard of review; (2) do those reasons justify a departure from the standard range as a matter of law; and (3) was the sentence imposed clearly too excessive or lenient under the abuse of discretion standard of review. State v. Davis, 146 Wn.App. 714, 192 P.3d 29 (2008), *review denied*, 166 Wn.2d 1033, 217 P.3d 782 (2008).

In this case, Vernon incorrectly argues that RCW 9.94A.535 and RCW 9.94A.507 (formerly RCW 9.94A.712) do not allow exceptional, consecutive sentences to be imposed in sex offense cases such as this, which require that an indeterminate sentence be imposed. Brief of Appellant 38. Vernon wrongly states that "the SRA permits a sentence outside the standard sentence range

solely in determinate sentences." Brief of Appellant 38, citing RCW 9.94A.535. Under Vernon's interpretation, an exceptional sentence could never be imposed in non-persistent offender, felony sex offense cases. Obviously, this is wrong.

The statutes governing Vernon's sentences are RCW 9.94A.712 (effective until August 1, 2009) and RCW 9.94A.535; see also Hughes, 166 Wn.2d at 686-688, n. 14. At the time Vernon committed these crimes, RCW 9.94A.712 applied (effective until August 1, 2009, then recodified at RCW 9.94A.507).

RCW 9.94A.712, which applies to nonpersistent sex offenders like Mr. Vernon, sets out the maximum and minimum terms and as to the minimum term states, in pertinent part, "[e]xcept as provided in (c)(ii) of this subsection, the *minimum term* shall be either within the standard sentence range for the offense, or outside the standard sentence range pursuant to RCW 9.94A.535, if the offender is otherwise eligible for such a sentence." (emphasis added). Thus, while noting that sentences under this statute will indeed have an indeterminate sentence (maximum and minimum), this statute also states that an exceptional sentence may be imposed pursuant to RCW 9.94A.535.

RCW 9.94A.535 sets out the authority for imposing a sentence outside the standard range for the offense, and states in relevant part:

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. . . . A sentence outside the standard sentence range shall be a determinate sentence.

* * *

A departure from the standards . . . governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section. . . .

* * *

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

* * *

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

Id. (emphasis added).

Vernon claims that because this statute states that "a sentence outside the standard sentence range shall be a determinate sentence," this means that when a defendant must be sentenced to an indeterminate sentence under RCW 9.94A.712 that the trial court cannot impose an exceptional sentence because

RCW 9.94A.535 states that an exceptional sentence shall be a determinate sentence. To begin with, Vernon's reading of these statutes brings about an absurd result--which is to be avoided when interpreting statutes. State v. Alvarado, 184 Wn.2d 556 (2008)(when interpreting statutes, "common sense informs a court's analysis. . . so as to avoid absurd results.")

Furthermore, the Washington Supreme Court has noted that an exceptional sentence can indeed be imposed in an indeterminate sentence case. Hughes, supra. Although the Hughes case held that the 2005 amendments to RCW 9.94A.535 did not apply to Hughes, the Court nonetheless further noted that:

[e]ven under the current SRA, exceptional minimum indeterminate sentences remain permissible. When the legislature amended RCW 9.94A.712 it did not remove the language permitting an exceptional minimum sentence. By the plain language of the current RCW 9.94A.712, a court has the authority to impose an exceptional minimum indeterminate sentence. Had the legislature intended to prohibit indeterminate exceptional minimum sentences or convert them into determinate sentences pursuant to RCW 9.94A.535, it would have made those alterations explicit. defendants whose sentences are indeterminate under RCW 9.94A.712.

Huges, 166 Wn.2d n. 14, 687,688 (emphasis added). See also

State v. Woodruff, 137 Wn.App. 127, 151 P.3d 1086

(2007)(published in part).

In Woodruff, this Court held that judicial fact-finding is permissible to impose consecutive exceptional minimum sentences for multiple current sex offense convictions under the indeterminate sentencing statute applicable to this case. RCW 9.94A.712(3), RCW 9.94A.589, and RCW 9.94A.535(2); Woodruff, supra. That is exactly what the court did in the present case, and the exceptional consecutive sentences were lawfully imposed under the statutes and case law just cited. Vernon's reading of the sentencing statutes applicable here is simply wrong, and this Court should affirm his conviction and sentence.

Vernon further incorrectly argues that the only time an "exceptional minimum" sentence can be imposed in a sex offense case is if the crime triggering the provisions of RCW 9.94A.507 [former RCW 9.94A.712] is "indecent liberties by forcible compulsion, and there is a finding beyond reasonable doubt, pursuant to RCW 9.94A.837, that the victim was under the age of fifteen at the time of the offense or a vulnerable adult." Brief of Appellant 39. Respondent does not believe this is a correct reading of the statute because the statute appears to reference such an offense as a current offense--rather than a prior offense.

See, for example, the Judgment and Sentence filed in this case, which is the current recommended pattern Form for Felony Judgment and Sentence (Sex offense and Kidnapping of a Minor Offense)(WPF CR 84.0400(6/2008). CP 93, Sec. 2.1 "Current Offenses" and sections immediately under that designation regarding special findings for current offenses where victim is under 15). It makes sense that the special finding for the age of the victim would be necessary for the current offenses since the State would be asking a jury to make the finding, and because that finding appears under the "current offenses" section of the form.

Respondent is not saying that our pattern sentencing forms are never wrong. However, the State's position is that the "age-findings" for certain sex offense convictions as mentioned by Vernon in his brief are relevant only when such an offense is a current offense. And in this case no special "under fifteen" findings were necessary or requested for sentencing on the two current voyeurism offenses. CP 93,94.

Multiple Current Convictions/High Offender Score

Vernon also engages in some imaginative interpretation of the law when he argues that the "multiple current offenses/high offender score" aggravating sentencing factor did not apply to this

case. First, Vernon computes a "qualified" standard range for the voyeurism offences "but for the sexual component" as having a "real" standard range of 12-14 months. " Brief of Appellant 38. *But for the sexual component?* These voyeurism offenses are Class C felony sex offenses. RCW 9A.44.115(2)(a); RCW 9A.44.115(3); RCW 9A.20.021(1)(c).

Vernon further reasons that none of Vernon's current offenses are "really" going unpunished because, after all, he "only" has three prior felony sex offenses but those offenses count 3 points each, and so does his other current sex offense (different victims). Therefore, says Vernon, he doesn't "really" have a "high" offender score resulting in any current crimes going unpunished because if the sex offenses only counted as one point, his offender score would not be so high. Id. As usual, Vernon cites no on-point authority for his inventive interpretations of the law. Brief of Appellant 39.

The fact is that Vernon's offender score is already at the top of the chart based on his past crimes alone. CP 94. Thus, it certainly appears to the State that the additional current voyeurism offense against a separate victim would go unpunished--unless an exceptional sentence were imposed. See e.g., State v. Stephens,

116 Wn.2d 238, 243, 803 P.2d 319 (1991)(defendant who is already at the upper limit of the sentencing grid "should receive a greater punishment if he commits more than one current crime"); State v. Van Buren, 123 Wn.App. 634, 651, 98 P.3d 1235 (2004). The reasoning of these cases applies here, and the trial court correctly imposed an exceptional sentence on this bases.

"Rapid Recidivism" Factor

Vernon also claims that the court could not base the exceptional sentence on the "rapid recidivism" factor. Assuming, arguendo, that this is correct, it makes no difference here because the trial court clearly indicated in its findings that it "would impose the same sentence if only one of the grounds listed in the preceding paragraph is valid." RP 108 (referencing the proper multiple current offenses/high offender score factor).

Incorrect Offender Score

Vernon correct point out, and the State concedes , that Vernon's 1994 conviction for failure to register as a sex offender appears to have been a gross misdemeanor , and thus should not have counted as one point in Vernon's offender score. However, this error has no effect on the current sentence imposed because

Vernon's corrected offender score remains above a nine--which is off the top of the "chart."

"A defendant's standard range sentence reaches its maximum limit at an offender score of nine." Alvarado, 164 Wn.2d at 561, citing RCW 9.94A.510. Again, Vernon's offender score is over nine--even without the erroneously-included point. CP 94. Therefore, Vernon's sentencing range would not change, even after correction of the offender score. Accordingly, his sentence should be affirmed.

On the other hand, if this Court feels it is important to correct the criminal history on the face of the judgment and sentence to reflect that it was a gross misdemeanor, then this Court should order the ministerial correction to the judgment and sentence without remanding for resentencing.

VII. THE COMMUNITY CUSTODY PROVISIONS WERE PROPERLY IMPOSED PURSUANT TO THE SENTENCING STATUTES APPLICABLE TO VERNON'S CRIMES.

Vernon alleges that the court had no authority to order as a condition of community custody that Vernon not consume alcohol or associate with minors. Brief of Appellant. This is not correct, and Vernon misstates the relevant, binding law on this topic.

Under RCW 9.94A.712(6)(a)(i)(nonpersistent sex offenders), the trial court may impose those community custody conditions provided for in RCW 9.94A.700(5). RCW 9.94A.700(5) states, in relevant part, that:

As a part of any terms of community placement the court may also order one or more of the following special conditions:

* * *

(b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;

* * *

(c) The offender shall not consume alcohol;

RCW 9.94A.700(5)(b)& (c) (emphasis added)(effective until August 1, 2009).

Therefore, by the plain language of these statutes, the trial court had the authority to order that Vernon abstain from alcohol and that he have no contact with minors --minors being "a specified class of individuals." Id. And, contrary to Vernon's assertions, these particular conditions do not have to be "crime related."

That this is true can be seen by reading the plain language of this same statute, which expressly states that some conditions can only be imposed if crime related. See e.g., RCW 9.94A.700(5)(c) ("the offender shall participate in crime-related treatment or counseling services.") Furthermore, RCW 9.94A.712 (6)(a)(i) further provides:

The court may also order the offender to . . . otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community. . . ."

RCW 9.94A.712(6)(a)(i)(emphasis added). This section of the statute gives a trial court even broader authority to impose community custody conditions--and these conditions do not necessarily have to be crime-related pursuant to this section of the statute.

No Contact with Minors

Under this broader statute, and given Vernon's criminal history of voyeurism, indecent exposure (times two), rape in the second degree, failure to register as a sex offender, and indecent liberties with forcible compulsion, it is not unreasonable to impose a condition that Mr. Vernon stay away from minors under the above-quoted "safety of the community" provision. RCW 9.94A.712(6)(a)(i).

On the other hand, at such time that Mr. Vernon is about to be released into the community, if he feels that the condition prohibiting him from associating with minors will unfairly restrict his access to his family, he can discuss his concerns with his corrections officer. His concerns about this provision now seem premature and speculative. However, this statute does provide that

if the corrections officer recommends to the trial court that a change in a condition of community custody is appropriate, the trial court may modify the conditions at that time. RCW 9.94A.700(7).

Unrestricted Search of Premises upon Release

Regarding the condition that the State can conduct unrestricted searches of his premises upon his release, Respondent believes this is a lawful condition that is imposed upon almost every convicted felon who serves a period of community custody. Vernon does not cite any authority for the proposition that this is a prohibited condition, and indeed bases his objection to this condition on pure speculation that Vernon may live with "non-offending family members" when released. Brief of Appellant 41. In this way Vernon's complaint is premature--since he bases it upon a situation that may never even occur. Accordingly, his Court should affirm the community custody conditions imposed by the trial court.

Finally, Vernon's arguments and recitation of the law pertaining to imposition of community custody conditions ignores the specific statutes pertaining to sentencing for sex offenders like Mr. Vernon. Brief of Appellant 41. For example, for his proposition that a prohibition against consuming alcohol is impermissible

unless it is "crime-related," Vernon cites State v. Jones, 118 Wn.App. 199, 205-206, 76 P.3d 248 (2003). But Jones does not hold that at all. In fact, Jones ruled that a prohibition on consumption of alcohol is lawfully imposed, even when alcohol use cannot be connected to the crime. Id.

In sum, Vernon's citation to legal authority in this section of his brief pertaining to the trial court's ability to impose the conditions of community custody in this case is, quite simply, wrong. As such, his arguments are not persuasive and the community custody conditions imposed in this case should be affirmed.

VIII. THE LEGAL FINANCIAL OBLIGATIONS WERE LAWFULLY IMPOSED.

Vernon argues that the legal financial obligations imposed in this case were "excessive." This argument is not persuasive.

The Superior Court has discretion to impose legal financial obligations as part of a convicted criminal defendant's judgment and sentence pursuant to RCW 9.94A.760. Imposition of such fines "is within the trial court's discretion. [And] [a]mple protection is provided from an abuse of that discretion[:] the court is directed to consider ability to pay, and a mechanism is provided for a defendant who is ultimately unable to pay to have his or her sentence modified." State v. Curry, 118 Wn.2d 911, 916 (1992).

The authority to impose LFO's against convicted criminal defendants is statutory. RCW 10.01.160 authorizes a trial court to impose costs on a convicted indigent defendant if he is able to pay or will be able to pay. RCW 10.01.160(3); State v. Eisenman, 62 Wn.App. 640, 644, 810 P.2d 55, 817 P.2d 867 (1991). Additionally, this statute further notes that "[i]n determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3)(part). This statute survived a constitutional challenge in State v. Barklind, 87 Wn.2d 814, 557 P.2d 314 (1976).

But the law also states that "[h]e *imposition of the penalty assessment, standing alone*, is not enough to raise constitutional concerns." Curry at 918(emphasis added). Rather, "constitutional principles will be implicated . . . only if the government seeks to enforce collection of the [costs] 'at a time when [the defendant is] unable, *through no fault of his own*, to comply.'" State v. Crook, 146 Wn.App. 24, 27, 189 P.3d 811(2008)(emphasis added), *quoting Curry*, 62 Wn.App. at 681 (*quoting United States v. Pagan*, 785 F.2d 378, 381 (2nd Cir. 1986)). Put differently, "[t]he unconstitutionality of a law is not ripe for review unless the person

seeking review is harmed by the part of the law alleged to be unconstitutional." State v. Ziegenfuss, 118 Wn.App. 110, 113, 74 P.3d 1205 (2003); State v. Smits, 152 Wn.App. 514, 216 P.3d 1097(2009)("the time to examine a defendant's ability to pay is when the government seeks to collect the obligation").

As relevant here, this rule means that a defendant is "not an 'aggrieved party' . . . 'until the State seeks to enforce payment and contemporaneously determines his ability to pay.'" Smits, supra, quoting State v. Mahone, 98 Wn.App. 342, 347-348, 989 P.2d 583(1999)((Blank, 131 Wn.2d at 242. Indeed, "[i]t is at the point of enforced collection . . . where an indigent may be faced with the alternatives of *payment or imprisonment*, that he 'may assert a constitutional objection on the ground of his indigency.'" Crook at 27 (other citations omitted); Mahone, 98 Wn.App. at 348.

In the instant case, first of all, the State has not yet sought to collect Vernon's LFO's, nor has it sought to imprison him for nonpayment of these costs. Therefore, the larger constitutional implications discussed by Vernon in his brief are arguably not yet "triggered." Blank, supra. Furthermore, the State is not aware of any Washington case or rule restricting LFO's in indigent criminal

defendants' cases to "nominal" costs in the \$200 or \$100 range (as inferred by Vernon).

That being said, Respondent can see why it seems counter-intuitive that there is no "cap" on the amount of LFO's that can be assessed against "indigent" convicted felons. However, the fact of the matter is that such assessments are authorized under current statutes and case law--*including costs for court-appointed counsel*. RCW 9.94A.760; Blank, supra.

It should also perhaps be kept in mind that at the time Mr. Vernon was charged with these crimes, the maximum potential fine that could be imposed upon him after conviction for one count of voyeurism was (is) "\$10,000 *plus restitution and assessments*." RCW 9A.44.115(3) and RCW 9A.20.021(1)(c). Yet the total costs imposed in Vernon's current case are less than half of that statutory maximum amount. CP 99. Along the same line, Mr. Vernon--as a repeat sex offender--knew *at the time he committed these crimes* what the possible penalty could be; but he re-offended anyway.

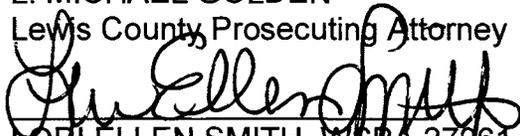
Be that as it may, the point is, until the law forbids imposition of these costs in these cases, or otherwise limits them, such costs are lawfully assessed, as discussed previously. Accordingly, the costs imposed in Vernon's case were lawful, and his arguments to

the contrary are not supported by relevant authority. This being the case, this court should affirm the trial court's imposition of legal financial obligations in this case.

CONCLUSION

For the reasons discussed in detail above, this Court should affirm Vernon's convictions and sentence in all respects--including costs and assessments imposed.

RESPECTFULLY SUBMITTED THIS 12th day of July, 2010

L. MICHAEL GOLDEN
Lewis County Prosecuting Attorney
by 
LORI ELLEN SMITH, WSBA 27961
Deputy Prosecuting Attorney

DECLARATION OF SERVICE BY U.S. MAIL

The undersigned certifies that a copy of the document to which this certificate is attached was served upon the Appellant by depositing said document in the U.S. mail, postage prepaid, addressed to Appellant's attorney as follows:

Jordan McCabe
P.O. Box 7212
Bellevue, WA 98008
