

No. 41662-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

TYLER RAY CANTRELL,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Thomas J. Felnagle, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The prosecutor committed flagrant, prejudicial misconduct which compels reversal.

2. Appellant Tyler Cantrell was deprived of his Article 1, § 22 and Sixth Amendment rights to effective assistance of counsel.

3. Condition III of the community placement/custody conditions violated Cantrell's due process rights and must be stricken as unconstitutionally vague. That condition provides:

The offender shall participate in crime-related treatment or counseling services.

CP 128.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the prosecutor commit flagrant, prejudicial misconduct when he argued a) that jurors should find that Cantrell had not acted reasonably in his use of force because he failed to warn that he was going to use force before acting in self-defense and b) that jurors should reject Cantrell's claims of self-defense because he would have left if he had really been afraid and thus his failure to retreat should be used against him?

2. The prosecutor further emphasized, first by eliciting testimony about it and then in closing argument with a "powerpoint" computer enhanced presentation including it, that Cantrell had allegedly used a highly offensive racial slur in referring to the victim. Was this flagrant, prejudicial appeal to the passions and prejudices of the jury in order to incite them against Cantrell further flagrant, prejudicial

misconduct compelling reversal?

3. Does the cumulative effect of the misconduct compel reversal? Was counsel prejudicially ineffective in failing to object to and attempt to mitigate the prejudice this misconduct caused to his client's rights to a fair trial?

4. Was community custody condition III unconstitutionally vague and improper in violation of Cantrell's due process rights where it ordered him to "participate in crime-related treatment or counseling services" but failed to set forth what specific treatment or counseling Cantrell will have to pursue in order to avoid sanctions for failure to comply with the terms of his sentence?

Further, to the extent it could be seen as delegating to the Department of Corrections ("DOC") the decision of what treatment or counseling meets this definition, did the condition amount to an improper, excessive delegation of the sentencing court's authority and violate the doctrine of separation of powers?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Tyler R. Cantrell was charged by information with first-degree assault and a firearm sentencing enhancement. CP 1-2; RCW 9A.36.011(1)(a); RCW 9.41.010; RCW 9.94A.310; RCW 9.94A.370; RCW 9.94A.510; RCW 9.94A.530.

Trial was held before the Honorable Thomas J. Felnagle on December 6-9, 13-16, 2010, after which Cantrell was found guilty as charged. CP 86-87. On January 7, 2011, Judge Felnagle ordered Mr.

Cantrell to serve a standard range sentence including 60 months of flat time for the enhancement, for a total of 183 months in custody. CP 117-29. Cantrell appealed and this pleading follows. See CP 113-27.

2. Testimony at trial

On March 12, 2010, Tyler Cantrell shot and injured Michael Ortiz outside a party where both had been. RP 662-63. Ortiz would have died if he had not received medical treatment. RP 652. He had a gunshot wound to the chest which appeared to have come out his spine, a superficial laceration on the upper back of his neck and another gunshot wound to the right hand. RP 649. The chest wound had caused lung injury which was life threatening. RP 650. He was still in a wheelchair, recovering, at trial. RP 119-121.

The only question at trial was whether Cantrell had acted in self-defense. Multiple witnesses testified that, prior to the shooting, Ortiz was very drunk, acting “crazy” and “belligerent” and short-tempered, and causing fights. RP 153, 229, 262, 468, 562-64. Ortiz had decided that someone had taken his keys and he was looking for them, but not in a “nice” or appropriate way. RP 177, 197, 567. He had positioned himself by the front door and was preventing people from leaving. RP 136, 140. He was also grabbing people and searching them for the keys and even stopped the party to yell out, “nobody’s going to leave until I get my keys.” RP 468.

Ortiz’ conduct was making people uncomfortable and several people, including Ortiz’ friend Stefan McClure, got into altercations or arguments about it. RP 186, 469-70. At one point, a man named K.P.

slapped Ortiz because of what Ortiz was doing. RP 154.

Ortiz' friend Michael Carl tried to minimize how drunk Ortiz was at the time and tried to claim that Ortiz was only in two arguments that night (one with K.P., the man who slapped him, and the other with Cantrell). RP 144-46, 176-77. Ultimately Carl admitted that, when he spoke to police, he said that Ortiz "went on a roll, and he started arguing with people, ram, like click, click, click one after another." RP 176-77. Carl also, at one point, admitted that Ortiz was creating a lot of trouble that night, puffing out his chest, screaming and yelling and acting angry. RP 174-75.

Joseph O'Brien, also at the party, said he saw Ortiz "arguing with everybody that night" and that Ortiz was very intoxicated. RP 224. Carl admitted that, even as Ortiz' friend, Carl himself was irritated by what Ortiz was doing and it should have been handled in a much different way. RP 177.

Ivia Durham conceded that Ortiz was in such a state that he "took things out of, just kind of went too crazy," patting people down and even stopping the whole party to threaten everyone that they could not leave. RP 468. Durham had never seen Ortiz this drunk and said the tone of the entire party changed when Ortiz started up, so that Durham was feeling uncomfortable. RP 469.

Ortiz did not remember what he had to drink that night but said that he was in "rough shape" by 1 in the morning. RP 80. He admitted it was the first time he had ever gotten so drunk that his "night was going in and out," he could only remember "bits and pieces," and was falling all

over the place. RP 79-80.

Ortiz conceded that he did not have a good memory of what happened that night. RP 123. He admitted that, when he thought he lost his keys, he started getting agitated and demanding that people start helping him look for the keys. RP 92. Then, because “nobody was confessing,” he decided to start going through people’s pockets to see if his keys were there. RP 93.

Ortiz said most people were “cool with it” and he checked pockets of 10 people or so. RP 93. Other people, however, were not happy with it and Ortiz admitted that he might not have been “the nicest” when demanding to look in their pockets. RP 112, 119-22. Ortiz conceded that he had yelled that he would shut the whole party down until he got his keys back, and he meant that if he did not get his stuff, “everybody will leave.” RP 134. He also remembered getting really mad and threatening that he was going “to kick anybody’s ass that wants it” or “beat everybody’s ass in here” if he did not get his keys. RP 118, 135.

Ortiz first denied that he was causing problems and said not everyone was pissed off at him. RP 124. He next said that there were problems, but they were caused by the small group of people who did not know him and were resisting Ortiz’ efforts to search them. RP 124. Ortiz was also “pretty sure he [Cantrell] wasn’t cool with it” but Ortiz was nevertheless “pretty insistent” that he was going to do it. RP 96.

One man, Kenny Wilson, started fighting with McClure when McClure started trying to search him. RP 470-71. Durham thought it seemed that things were “getting out of hand” and “the police would be

there soon.” RP 471. Durham said, “a bunch of fighting was going on, a bunch of pushing, yelling with everybody.” RP 473. In addition to Wilson and McClure and Ortiz, Durham thought that Cantrell was involved in some of it, although Durham saw no interaction between Cantrell and Ortiz. RP 474. Carl, in contrast, said he had “no clue” Cantrell had any problems with Ortiz or anyone else because Cantrell was “so quiet” that night. RP 169.

While Wilson and McClure were physically fighting on the floor and people were yelling and “getting angry,” a man named Tony Creighton pulled a gun out and told everyone to “shut the ‘F’ up. RP 179, 184, 573-76. No one complied but the tone of the party really changed. RP 179, 184, 187, 573-76. Ortiz admitted everybody “was drunk, acting stupid, talking crap to everybody” and “trying to fight everybody.” RP 97.

Ortiz’ girlfriend, Andrea Leija, admitted that Ortiz was being angry, belligerent and obnoxious, making people angry and getting into arguments. RP 207-208. Leija also conceded that McClure, Ortiz’ good friend, was “yelling and causing problems that night.” RP 208. Ortiz himself admitted that McClure was causing “a lot of trouble” and physically fighting people at the party. RP 130.

While McClure was doing that fighting, Ortiz repeatedly referred to McClure, out loud so all could hear, as his “homie.” RP 130.

At some point both Ortiz and McClure were seen in altercations with Cantrell. RP 197, 207, 667-71. Cantrell was not seen in arguments with anyone else, but Ortiz and McClure were. RP 130, 224, 470-71. They were also both seen - by Ortiz’ own girlfriend, Ortiz himself and

other friends - to be causing trouble that night. RP 130, 224, 197, 208, 470-71.

Indeed, Leija testified that it got so bad she had felt compelled to physically grab Ortiz to try to calm him down. RP 197. She slammed him up against the wall, telling him “he needed to calm down or something bad would happen.” RP 197. She said he was getting out of hand about “the key thing” and being “less than nice” with people about it. RP 197.

Leija said that, after this happened, she later saw Ortiz leaning against the couch and Cantrell kind of leaning into his face. RP 195. According to Leija, both were yelling at each other and it looked from their faces like they were in confrontation. RP 195. Leija could not tell what they were saying because at the time everyone in the house - not just Ortiz and Cantrell - were “in commotion” and “arguing.” RP 195.

Leija admitted smoking marijuana and drinking vodka and said she would not have been able to drive a car due to her condition. RP 206. She never told police anything about seeing any such confrontation involving Cantrell. RP 207. For his part, Carl never even saw Ortiz and Cantrell interact that night. RP 143. Neither did O’Brien. RP 211-12.

Ortiz said that, at some point, he got into an argument with Cantrell. RP 98. Ortiz claimed not to remember what it was about but thought it might be “something that had happened probably before, and like about my friend or something.” RP 101. The two men started “calling each other out” and using names like “bitches,” saying “you’re weak, you’re a punk,” and similar things. RP 101.

It was at that point, Ortiz said, that Leija slammed him against the

wall to tell him he was out of control. RP 102. In contrast, Leija said it was earlier, before she saw the argument between Ortiz and Cantrell. RP 197.

Ortiz admitted that he did not “remember too much” but thought that he and Cantrell had been talking about fighting each other “like, let’s fight, let’s go outside.” RP 106. Ortiz then admitted that, while his intention was to fight, he did not really recall if there was an agreement between himself and Cantrell to do so. RP 108.

A little later, however, Ortiz changed his story, denying that they had any agreement to “step outside and fight” and even denying that he had ever claimed otherwise in his testimony. RP 131. Ortiz then said, “[t]here was no agreement made, I don’t think so.” RP 131. Instead, Ortiz said, because Leija had interrupted to slam him against the wall, Cantrell left out the front door. RP 102. But Ortiz said a little later he was back and they argued again. RP 102.

Haley Thompson, who was there with her boyfriend, Monjett Bradley, thought McClure had gotten into a verbal disagreement with Cantrell and Cantrell had gone outside to “cool off.” RP 570-71. Durham said he and his friend walked out the back door to go to the friend’s car and Cantrell was leaving at the same time but stayed in the front yard while they went to the friend’s car. RP 478-80.

Durham was outside in a car when he heard what sounded like two firecrackers go off one after the other. RP 480-81. Carl heard the sounds from next door and said they were less than a second apart. RP 145. Durham looked towards the sound and saw someone on the ground and

someone standing over the other person with a gun pointed. RP 481. The man with the gun - identified as Cantrell - ran off about 30 seconds later. RP 479, 489.

Ortiz said Cantrell was already outside when Ortiz had gone out and confronted him. RP 108. Ortiz admitted that, at that time, he was still angry at Cantrell for having “disrespected” Ortiz during the previous argument. RP 132.

O’Brien, who was in a car on the street at the time, confirmed that Ortiz appeared to confront Cantrell, walking up on him “[p]retty damn close.” RP 219. O’Brien said it seemed really quick, like Ortiz had done a “fast walk” up at someone. RP 219. O’Brien then looked away and the two shots sounded. RP 219. Because the windows of the car he was in were too foggy, O’Brien could not see who the other person was with Ortiz, whose distinctive yellow pants identified him well. RP 220.

The other person in the car with O’Brien, however, Eleanor Hill, testified that the windows were not foggy and she could clearly see what happened. RP 270. In contrast to Ortiz himself, Hill said that Ortiz was the person in the middle of the street and it was Cantrell, not Ortiz, who approached the other man. RP 270. She thought it looked like the men were just talking before she saw Cantrell raise his hand and heard “pop, pop.” RP 273-74. She did not see a gun and did not remember which arm it was that Cantrell raised. RP 274.

An officer who was there shortly after the incident said it was very dark and the nearest streetlight was far away so that it would be somewhat hard to see. RP 314.

Ortiz testified that he did not recall anything specific other than going outside and then getting shot. RP 107-108.

Cantrell was in his late teens and working as a dishwasher at the Tacoma Yacht Club that night. RP 662-63. He went to the party after being invited by a friend giving him a ride home after work. RP 662-63. The party was only a few blocks from Cantrell's house and at first it was "cool." RP 665. It started to change, however, when Ortiz started being really aggressive with people. RP 666.

Cantrell first saw Ortiz being aggressive about his sweatshirt, which Ortiz thought was missing, but then when Ortiz found it "he was fine, smiles." RP 66. A moment later, it was the keys that Ortiz was upset about. RP 666. It was clear to Cantrell that Ortiz was intoxicated and Cantrell saw Ortiz stumbling. RP 66.

Cantrell said he did not see any physical altercations going on but just Ortiz "getting in people's faces, same as - - except for being loud, that's about it." RP 666. Cantrell described Ortiz as "running around like a chicken with its head cut off, throwing a little temper tantrum, patting people down, getting in their faces, things like that." RP 667. Cantrell said he did not notice if others were getting upset because he just "walked away." RP 667.

Cantrell had gotten a gun for protection because of some things he had done in the past and because he had to walk in an relatively unsafe area to get home from work. RP 668. He had only had the gun for about a week when this happened, having gotten rid of his previous one about a month before. RP 690, 692.

Cantrell had the gun in his backpack at first but, when he “felt the change in the atmosphere” at the party due to Ortiz, Cantrell “put it on” himself so the gun could be accessible. RP 669. Ortiz had gotten loud and was yelling “all this Hilltop Crip” stuff, referring to a notorious criminal street gang. RP 669. Ortiz was saying “I’ll shut the party down” and things like that and Cantrell was concerned for his safety. RP 669.

Ortiz admitted that he made comments that night which could have been interpreted as showing some affiliation with the Hilltop Crips criminal street gang. RP 114. He claimed never to have been involved in the gang but said he had “hung out” with some kids from the school who were involved. RP 115. Ortiz’ father, whom he did not meet until about age 15 or 16, was a gang member of some renown in the Hilltop Crips in the 1980s and had been in the gangs since he was 12 years old. RP 116. Indeed, Ortiz said, his father had some “stature” or “status” in the gang community. RP 117. Ortiz’ brother from a different dad is also associated with the Crips. RP 117. Ortiz did not recall, however, saying at the party things like “it’s all Hilltop here.” RP 117, 125.

Carl said he had never heard Ortiz call himself a Crip, although Carl knew about Ortiz’ father. RP 170. Carl admitted, however, that he heard Ortiz saying things, at the party, about the party being “Hilltop.” RP 170.

Carl tried to minimize it, saying “others” were also saying the same thing and that it was “like a threatening thing to say these days,” scoffing, “12-year-olds say it” and “[i]t’s hard to take serious.” RP 172. Carl conceded that he heard “rumors” about his friends being involved in the

Crips but maintained he did not “know” for sure. RP 172.

A few moments later, however, Carl admitted that saying you were from Hilltop or “[m]y dad’s in the mob” was something people did when they wanted to intimidate others and sound “tougher.” RP 178.

Leija did not recall hearing anyone say “[i]t’s all Hilltop here” or anything similar. RP 190-92. O’Brien also did not hear anyone saying this was a “Hilltop” party or Ortiz saying he was himself a Crip or anything “particularly” at the party or any other time. RP 224-25.

On cross-examination, however, O’Brien, admitted that, when he spoke to police, he said that Ortiz “thinks he’s a Crip, and he’s not.” RP 229. O’Brien said that not everyone who was a Crip was a criminal but it was not the same as being a “wannabe.” RP 230. When asked to explain further, he balked, saying “I don’t really want to talk about that.” RP 230.

O’Brien did not recall telling the police that Ortiz was “trying to be all hot and shit,” “trying to prove himself,” and “trying to be a little gangster” that night. RP 232.

Cantrell said that he and Ortiz did not have any kind of shouting match or argument inside the house that night. RP 667. Instead, Cantrell just said to Ortiz “be quiet and show some respect to Jeremy’s house, you know, stop yelling or go home.” RP 667. After that, McClure, Ortiz’ friend, grabbed Cantrell’s shirt and would not let go, getting in Cantrell’s face. RP 667-68. In fact, McClure actually ripped Cantrell’s shirt before Cantrell pulled away and walked out through the backdoor and garage to the front of the house. RP 670.

No one else was initially outside but Cantrell then saw Ortiz

running back toward the house, apparently having left at some time before. RP 671. Cantrell got Ortiz' attention, asking, "hey, is that your homey inside tripping?" RP 671, 708. This meant "[i]s that your friend inside acting stupid, referring to McClure. RP 671, 708. Ortiz responded, "what's up, you guys beefing, it's on Hilltop, you'll get smashed right now." RP 671, 709. Cantrell said this made him think "[j]ust in one ear and out the other," and he told Ortiz to calm down and calm his friend down. RP 672. When Ortiz said "you'll get smashed," it mean to Cantrell that he was going to get his "ass beat." RP 709.

Cantrell admitted that he was much taller than Ortiz and also weighed more. RP 710. He said that he did not know if he "was really concerned about it but" that it was clear that Ortiz was "insinuating" that Cantrell was going to get hurt. RP 710. Cantrell told him to calm down and that was when Ortiz started reaching behind his back and walking towards Cantrell. RP 672, 710.

Cantrell immediately thought, "I'm about to get shot." RP 672. He knew that "a lot of people" carry guns in the same place that Ortiz was moving his hand towards. RP 672. Cantrell explained that he had been shot at before and was familiar with where people keep guns. RP 673. He also said he had not always been very nice in his past and he was worried about retaliation. RP 691.

Thinking that Ortiz was going to shoot him, Cantrell pulled his gun and started firing. RP 673.

Cantrell freely admitted that he knew his gun was loaded and that he probably had chambered a round when he pulled it out of his backpack

and made it more accessible. RP 693-94. He said he thought he had done so because of what Ortiz was doing, although they had not had a confrontation at that point. RP 695.

Cantrell said he thought about going home because his house was only two blocks away, but he stayed, thinking everything would “die down,” by which he meant the “chaos” of what Ortiz was doing. RP 701.

Cantrell did not aim when he shot. RP 673, 713. At trial, he made it clear that he had believed he was about to be shot and did not think he had any choice - either shoot or get shot himself. RP 674. He said he was afraid he was going to be harmed, again noting he had been shot before. RP 683.

Cantrell said he had previously had verbal altercations with Ortiz and Ortiz was being “very aggressive.” RP 684. In one prior incident, Ortiz and his friends were “running their mouths” about Ortiz being a “Juggalo,” i.e., a member of a criminal street gang in which Cantrell had been involved about three years earlier. RP 684. Cantrell said he was no longer involved but still enjoyed the culture, which involves the music of a particular group, Insane Clown Posse, who play a mix of rock and roll and hip hop which Cantrell labeled “aggressive music.” RP 686. The band members dress with clown makeup, as do the audience members such as Cantrell, often. RP 686-87.

Cantrell admitted that he had a Juggalo MySpace group but claimed he had forgotten all about it. RP 759, 769-70.

While Ortiz was not really threatening to harm Cantrell in that prior incident then he was definitely talking “like he had something to

prove, you know, like he wanted to fight or something.” RP 685. On this night, in contrast, Ortiz was saying all this “Hilltop” gang stuff and was really drunk, and Cantrell did not know what Ortiz was going to do. RP 684.

Ortiz said he had never had a gun in his life and never told anyone he was armed or pretended to be armed. RP 107. He maintained this even though he knew that Cantrell was bigger than him and Ortiz was planning to fight Cantrell. RP 107. Ortiz specifically denied he tried to pretend to be armed to try to scare Cantrell. RP 107.

At trial, Ortiz denied trying to pretend he was armed as a way to scare Cantrell and claimed never to have had a gun in his life. RP 107. He maintained that Cantrell “just came over there” and shot Ortiz “for no reason.” RP 132.

But Ortiz admitted that, when he and Cantrell were exchanging words, Ortiz felt “disrespected” and was so angry his girlfriend had to throw him to the wall to calm him down. RP 128, 132. Ortiz also first was sure he had no altercations or disagreements with Cantrell when they went to high school together but then said he did not remember, although he was “pretty sure” they did not. RP 129.

When first asked if he threatened Cantrell that night, Ortiz said he had not other than when he was arguing with him, “probably.” RP 130. A few moments later, Ortiz admitted, “I did threaten him.” RP 132. Ortiz then said, “does it warrant getting shot in the neck and the chest and the hand?” RP 132.

Ortiz claimed not to remember anything about talking with

Cantrell about McClure needing to calm down, nor did he remember threatening Cantrell just before the shooting saying something about Hilltop and smashing Cantrell. RP 132-33. When asked if he had reached behind his back as Cantrell had said, Ortiz said, “[t]o grab what? My pants, to pull them up.” RP 133.

Ultimately, Ortiz agreed that he was not denying that he reached behind his back as Cantrell had said. RP 133. Ortiz simply could not remember and said he could well have done so. RP 133.

At the time he was treated after the shooting, Ortiz’ blood alcohol level was 1.70 and his drug screen was positive for tetrahydrocannabinol or “THC,” a “breakdown product from marijuana.” RP 652. The 1.70 drug alcohol level was more than twice the legal limit for driving of .08. RP 653. Because the test for THC does not indicate “levels,” it was not possible for the doctor to say whether Ortiz was getting high just before the incident or sometime earlier. TP 653.

Cantrell said he had “no idea” why he did not wait for police and just tell them it was self-defense. RP 674. He was afraid, thinking he had just killed someone. RP 674. He ran home and took the gun apart, wanting to get rid of it. RP 675. He also called Bradley, asking for a ride. RP 589-90, 675. He changed out of the shirt that McClure had ripped and told Bradley to get his backpack, which Cantrell had left at the party. RP 718-20.

Cantrell did not tell Bradley or Thompson, who was also in the car, where they were going or why, until, Cantrell said, Bradley pulled them over into a cul-de-sac, had Cantrell get out and asked if Cantrell had been

the one who shot Ortiz. RP 590-93, 600, 676, 717, 720-21, 731. Cantrell admitted it but said, “[y]es, let’s go, I don’t want to talk about it.” RP 734.

Bradley honored that request and they drove on to the waterfront, with Thompson staying in the car when the others got out. RP 595, 734. Carl was texting Thompson, trying to find out where she was and Thompson sent back some untruthful things about their location, saying that “the guys” told her to do so. RP 596.

Cantrell took the four pieces of the gun out from his pants pocket as they walked along, throwing two pieces in the water by where they were parked. RP 677, 725, 728. Where the beach was connected with the boathouse, they stopped, Cantrell then throwing the barrel into the water there. RP 677.

After they left the waterfront, Cantrell ended up telling Thompson, too. RP 736, 738. She said, “[o]h, my god, why did you do it?” RP 739. Cantrell did not remember saying anything and explained that he was not particularly listening to her or trying to answer all her questions and he told her he did not want to talk about it. RP 739. He said he did not worry that she was not going to keep his secrets because it was “going to come out at some point.” RP 742.

Thompson said that, after admitting he had shot Ortiz, when she asked why, Cantrell did not really seem to have a reason and said something like, “[h]e wanted Mikey to die so he couldn’t say anything.” RP 604. She also said that he said “he hoped that he would choke on his blood and die.” RP 605. On redirect, the prosecutor elicited testimony from Thompson that Cantrell called Ortiz a “[n]igga.” RP 630. She was

hesitant to say it “[b]ecause it’s derogative.” RP 631.

In her statement to police, Thompson never said anything about Cantrell making any such statements. RP 626-27. She could not explain why. RP 626. Although she initially lied to police about events, she said, she ultimately told police, in the interview she said was the real truth, that she was “prima baked” i.e., really stoned on marijuana, that night and that her memory was not the best. RP 620-26.

Bradley testified that Cantrell disposed of two guns, but told the officers “he threw the gun,” singular, into the water. RP 409. Bradley also said that Cantrell told Bradley he had shot Ortiz “because he was talking shit” but did not say “I had to shoot him.” RP 391. Bradley was accused of rendering criminal assistance and offered a deal to testify against Cantrell. RP 403.

Cantrell said that, after he got rid of the gun, he did not even know what was going on in his mind, he was so stressed and panicking, thinking he had killed someone. RP 679. They all went to Bradley’s house without conversation, at least that Cantrell could remember, because he was “blocking both of them out, just in my own zone.” RP 679. Cantrell denied, however, telling Bradley and Thompson to lie to police or anyone about where they took him or to create any kind of an alibi. RP 679. He got a ride away from their house and then started drinking heavily. RP 681. He did not recall being arrested the following morning but said, instead, that the next thing he knew, he was waking up in jail. RP 681.

The officer who interviewed him later that morning said Cantrell appeared to track what was going on and did not appear to have red or

bloodshot eyes or any similar signs of heavy intoxication. RP 785-89.

Cantrell's telephone conversations to various people were tape-recorded at the Pierce County Jail and played for the jury or used against Cantrell at trial. RP 673, 682. Cantrell admitted that some of the things he said in conversations from jail were not true, like whether he knew the gun was loaded. RP 673. He explained that he told his mom he was not there or did not do it and things like that because he did not want to disappoint her and wanted to just pretend it had not occurred. RP 682. For three weeks he told her things like "[i]t wasn't me, they can't prove it," or that they would not find gunpowder on his clothes when he knew they would, but then he finally told her he had done it, explaining that it had been in self-defense. RP 682, 688. He said he had finally decided to tell her what happened. RP 683.

Cantrell also had a friend tell O'Brien, who was saying he was not a snitch, "kiss my ass," because Cantrell believed he was. RP 762. O'Brien admitted saying on a social media page something about having seen everything and not being a "snitch" but conceded that, actually, he did not, in fact, see the whole thing. RP 226. He was just making assumptions, saying, he just "king of know what happened." RP 227. Cantrell was recorded in one phone call as saying "Jett is snitching up a storm" to a lot of people, meaning Bradley was "tattling." RP 702. He also said to someone that, even though the police had his phone, they were not going to find his text messages because his phone deletes them after 15 days. RP 745. At trial, he said there was nothing on his phone to be found anyway. RP 745.

Cantrell admitted that he initially told people he was not there but later admitted it and explained that it was self-defense. RP 763. In one call, Cantrell's father said something about Cantrell being surrounded by three gang-bangers and defending himself but Cantrell did not correct his father's misimpression, instead just letting it "slide." RP 764-65.

D. ARGUMENT

1. REVERSAL IS REQUIRED BECAUSE OF THE PROSECUTOR'S FLAGRANT, PREJUDICIAL MISCONDUCT

As quasi-judicial officers, prosecutors have a duty to ensure that an accused receives a fair trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). As part of that duty, prosecutors are required to refrain from engaging in conduct at trial which is likely "to produce a wrongful conviction." State v. Clafin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985). Because of her role, the words of a prosecutor carry great weight with the jury, so misconduct does not just violate her duties but may also result in deprivation of a fair trial. See Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); Suarez-Bravo, 72 Wn. App. at 367; 5th Amend.; 6th Amend.; 14th Amend.; Art. I, § 22.

In this case, reversal is required, because the prosecutor committed serious, prejudicial misconduct in repeatedly misstating the law and telling the jury that Cantrell had a duty to retreat or to warn before acting in self-

defense. The prosecutor also committed flagrant, prejudicial misconduct when he emphasized the racial slur Cantrell had used even though that slur was completely unrelated to anything other than Cantrell's character. Further, counsel was prejudicially ineffective in failing to at least attempt to mitigate the serious, corrosive impact of the misconduct.

a. Relevant facts

At trial, in cross-examining Cantrell, the prosecutor asked about whether Cantrell had been aiming when he shot at Ortiz, saying, "[y]ou were trying to shoot him, right?" RP 711. The following exchange then occurred:

- A: I just kind of moved out of the way and started shooting.
- Q: Well, were you trying to fire a warning shot up in the air?
- A: No.
- Q: Did you back up a step and say, back up, motherfucker, I've got a gun?
- A: No.
- Q: You just shot him, right?
- A: Yeah.
- Q: And it wasn't an accident, was it?
- A: No.

RP 711.

In closing argument, the prosecutor specifically argued that the jury should find that the force used was not reasonable even if the jury believed Cantrell because:

Cantrell. . .shoots twice after spending time in Ortiz's presence, seeing no indication, even from his mouth, that Ortiz is armed,

**without giving a warning, even a warning as he shoots,
even as he shoots the first time[.]**

RP 824 (emphasis added).

During his closing argument, the prosecutor projected a “PowerPoint” presentation for the jury, presenting the prosecutor’s theory that, even if Cantrell was credible, the “self-defense claim fails” because the force was not such that a “reasonably prudent person would use.” CP 98. One of the slides said:

Self-defense

-Here, even if you believe Cantrell, he shoots twice:

-After spending hours in Ortiz’s presence seeing no indication that Ortiz was armed

-Without giving any warning - even a warning as shoots

CP 99. Later, in discussing “The Evolving Cantrell Story,” the prosecutor projected a slide which included “I didn’t leave” as one part of the story and then, in small letters, “(see the no duty to retreat inst[.]” CP 101.

Later, in faulting Cantrell for failing to leave if he was really afraid of Ortiz, the prosecutor said,

I want to be very careful about this. I want you to be sure to understand exactly what I’m arguing and exactly what I am not arguing. Okay. He does not have a duty to retreat. Nobody has a duty to retreat, okay? He can stand there and if, you know, an altercation develops, it’s not, it doesn’t make it defect [sp] self-defense if he stands his ground.

RP 829. The prosecutor then argued, however, that it was not reasonable or credible that Cantrell would not have left if he indeed was afraid of Ortiz. RP 829.

b. These arguments were serious, prejudicial misconduct

By making these arguments, the prosecutor committed serious, prejudicial and flagrant misconduct which could not have been cured by instruction.

As a threshold matter, these issues are properly before the Court, despite counsel's failure to object below. Where a prosecutor commits serious, prejudicial and flagrant misconduct, the issue may be raised on appeal despite the absence of an objection if the misconduct is so flagrant and prejudicial that it could not have been cured by corrective instruction. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), cert. denied sub nom Russell v. Washington, 514 U.S. 1129 (1995).¹

Despite the "wide latitude" given to prosecutors in closing argument, no attorney is permitted to misstate the law and thus mislead the jury. See State v. Davenport, 100 Wn.2d 757, 763, 675 P. 2d 1213 (1984). This is especially true of the prosecutor, whose status as a quasi-judicial officer entrusts him with not only special authority in the eyes of the jury but also with a special responsibility to ensure the defendant receives a fair trial. State v. Reeder, 46 Wn.2d 888, 892-93, 285 P.2d 884 (1955).

Here, the prosecutor first misstated the crucial law of self-defense and committed flagrant misconduct in doing so when he repeatedly indicated that Cantrell had some duty to warn or leave the party before using force. As the Supreme Court has made clear, telling the jury that the defendant has to warn or step back before using force in self-defense is

¹Those failures are an independent grounds for reversal, as discussed, *infra*.

improper and “very misleading” in cases such as this. State v. Phillips, 59 Wn. 252, 254-55, 109 P. 1047 (1910). Instead, “the duty to retreat or warn has no application” to cases where a defendant acts in self-defense against what reasonably appears to be “a felonious assault. . .with a deadly weapon.” 59 Wn. at 255.

Indeed, the Supreme Court declared:

It is idle to say that a person assaulted by a highwayman in the street, or by a burglar in his home, must retreat or give warning before he can lawfully resort to the right of self-defense.

59 Wn. at 255-56. Thus, in Phillips, it was error where the jury was given an instruction that both said that “Phillips had a legal right at once to use necessary force and means” in self-defense, including deadly force and that Phillips had “no right” to do so “without first warning” the assailant “to desist from his attack” unless there was no time to do so. 59 Wn. at 255. The Court declared:

When the court instructed the jury that a person against whom a murderous, felonious assault is committed with a deadly weapon must retreat or give warning, before taking the life of his assailant in self-defense, it imposed upon him a burden which the law does not sanction[.]

59 Wn. at 257.

Notably, the error was not necessarily rendered “harmless” based upon the language in the instruction saying the defendant only had to warn of retreat “if he has time.” 69 Wn. at 256-57.

Although there appears to be no further discussion of the absence of a duty to warn before using force in self-defense, there is ample caselaw on the corollary principle that there is also “no duty to retreat.” The “law is well settled” that a person assaulted in a place where they have a right to

be has no duty to retreat. State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). Put another way, while “[i]n some states, retreat would be required in preference to deadly force,” that is not the law in this state. State v. Williams, 81 Wn. App. 738, 744, 916 P.2d 445 (1996). And “[f]light, however reasonable an alternative to violence, is not required.” Id.

This is true even though people might reasonably disagree about “the wisdom of such a policy.” Id. Put simply, “the policy is one of long standing and reflects the notion that one lawfully where he is entitled to be should not be made to yield and flee by a show of unlawful force against him.” Id.

Thus, the Supreme Court has held, where the facts are such that a jury might be able to conclude that retreat was “a reasonably effective alternative to the use of force,” the jury must be told that the defendant had no duty to engage in retreat instead of using force. Redmond, 150 Wn.2d at 494. Otherwise there is a “risk that jurors would conduct their own evaluation of the possibility of retreat” and “engage in their own assessment” of that opportunity. 150 Wn.2d at 494. Such a jury could erroneously conclude that the defendant used “more force than was necessary” simply “because they did not use the obvious and reasonably effective alternative of retreat.” Williams, 81 Wn. App. at 744.

As a result, because jurors could well rely on the belief that retreat was a reasonable alternative to using force, the failure to properly inform jurors that the defendant had no duty to use that alternative instead of using force in self-defense is reversible error. Id.

Here, the jury was given a “no duty to retreat” instruction (instruction 13). CP 84. But before that instruction was given, the prosecutor had already invoked in jurors’ minds the idea that Cantrell could not be deemed to have acted reasonably in self-defense if he used force without first warning of the intent to do so. Cantrell was asked, on cross-examination about whether his claims of self-defense were credible, “were you trying to fire a warning shot up in the air” and “ [d]id you back up a step and say, back up, motherfucker, I’ve got a gun” before firing at Ortiz. RP 711. The clear implication was that Cantrell had some duty to fire a warning shot or give a verbal warning in order to be able to be entitled to use force in self-defense - an implication directly contrary to the actual law. See Phillips, 59 Wn. at 254-55.

And then, in closing argument, the prosecutor specifically argued that the jury should find that the force used was not reasonable even if the jury believed Cantrell’s version of events, because:

Cantrell. . .shoots twice after spending time in Ortiz’s presence, seeing no indication, even from his mouth, that Ortiz is armed, **without giving a warning, even a warning as he shoots, even as he shoots the first time[.]**

RP 824 (emphasis added). The concept that his failure to give “any warning - even a warning as shoots” was a reason the jury should find Cantrell had not acted in self-defense because he could have warned before shooting was prominently displayed in the state’s multimedia presentation in closing argument. CP 98-99.

Similarly projected was the prosecution’s reliance on Cantrell not having left as part of why Cantrell’s claim of self-defense should not be

believed, albeit with a reference to the “no duty to retreat” instruction. CP 101. And while the prosecutor recognized the risk he was taking and how close his argument was skirting to implying a duty to retreat so that he reiterated there was no such duty, he then argued to the jury that it was not reasonable or credible that Cantrell would not have left if indeed he was afraid of Ortiz, as he claimed. RP 829.

Thus, the prosecutor went far beyond the permissible scope of argument in this case. Redmond, supra, is instructive. In Redmond, the failure to give a “no duty to retreat” instruction was “exacerbated” when the prosecutor declared, in closing argument, that the victim had his back against a car and “so if anybody had the way to get out of the situation, it was the defendant.” 150 Wn.2d at 495 n. 3. Although the Court agreed that, in context, this argument amounted to “challenging the credibility of Redmond’s claim that he feared” the victim, the argument was still improper because “the prosecutor’s clear message to the jury was that if Redmond was really afraid of [the victim], he should have retreated.” Id.

Here, the argument of the prosecutor regarding the failure to leave the party may well have been an effort to challenge the credibility of Cantrell’s claims that he feared Ortiz. But it was nevertheless improper, because its clear message was that if Cantrell had really been afraid of Ortiz, he should have retreated i.e., left the party. Under Redmond, that argument was improper and a misstatement of the crucial law that Cantrell had no duty to retreat.

A party is entitled to have the jury instructed properly on the law. And here, the jury was properly instructed that Cantrell had no duty to

retreat under the law. CP 81. But then the prosecutor repeatedly used evocative, intuitively reasonable arguments which effectively said that Cantrell *had* such a duty. RP 711, 824-29.

Further, the prosecutor argued not only that Cantrell had been unreasonable in using force instead of leaving the party but also that he had been unreasonable in using force and could not reasonably claim self-defense because he did not fire any warning shots or verbally warn Ortiz. RP 711, 824-29. Thus, the improper argument about the failure to retreat was coupled with the improper arguments about the failure to warn - both of which could very easily have led the jury to wrongly believe that Cantrell was required to leave the party or warn before shooting in order to be able to claim self-defense.

It is important to note that these misstatements of the law not only came from the prosecutor - a quasi-judicial officer in whose word the jury was very likely to take such high stock. See Suarez-Bravo, 72 Wn. App. at 367. Nor were they just highly evocative, sensible sounding arguments likely to sway the jury into the prosecutor's position about what should be required before force can be used in self-defense even though that is not the policy our state uses. See, e.g., Williams, 81 Wn. App. at 744.

In addition, the misstatements were emphasized when they were projected as images in the "powerpoint" presentation shown to the jurors while the misstatements were made. The use of such "demonstrative aids" is especially effective because it ensures heightened retention of the concepts demonstrated. See, Caldwell, et. al, The Art and Architecture of Closing Argument, 76 Tul. L. Rev. 961, 1042-44. In fact, studies on

retention of visual images and ideas as opposed to those which the person just hears show that “juries remember 85 percent of what they see as opposed to only 15 percent of what they hear. Chatterfee, *Admitting Computer Animations: More Caution and a New Approach Are Needed*, 62 Def. Couns. J. 34, 36 (1995).

Put simply, if jurors are “merely told” information, “they will likely forget,” but “information they are told and shown, they will likely remember. It is that simple.” Caldwell, 76 Tul. L. Rev. at 1043. Experts agree that images resonate and communicate with jurors much more than just verbal description and that they are more easily recalled during deliberations, thus lending more weight to whatever they convey. Caldwell, 76 Tul. L. Rev. at 1044-45.

Here, the prosecutor repeatedly misstated the law in telling the jury that Cantrell’s claims of self-defense should not be believed because it was not reasonable for him to use force in self-defense without first issuing a warning. And he misstated the law in telling the jury that Cantrell’s claims of self-defense should not be believed because if he was really afraid of Ortiz, he would have - and thus should have - left the party. And those improper misstatements were not only told to but also projected for the jury. Their corrosive effect on the deliberative process was thus not only instantaneous but also extremely strong.

Finally, the prosecutor committed flagrant, prejudicial and ill-intentioned misconduct by trying to manipulate the jury into deciding the case based upon emotion and disgust against Cantrell, by emphasizing that he had used a highly inflammatory, racially charged phrase when talking

about the incident. It is flagrant, prejudicial misconduct to try to sway the jurors by inciting their passions and prejudices. See State v. Bautista-Caldera, 56 Wn. App. 186, 195, 783 P.2d 116 (1989), review denied, 114 Wn.2d 1011 (1990). Such arguments are misconduct because they invite the jury to decide the case based upon emotion, not the evidence. State v. Belgarde, 110 Wn.2d 504, 510-12, 755 P.2d 174 (1988).

Here, the prosecutor made just such improper appeals when he emphasized Cantrell's having used a racial slur, first at trial when he repeatedly went after Thompson to force her to say that Cantrell had said he "hoped that nigga would choke on his blood and die." RP 604-605, 630-31. Again, instead of just making a statement amounting to misconduct, the prosecutor actually made a deliberate decision to make the offensive statement part of closing argument as a **strategy**. The prosecutor did not simply mention the hateful slur in closing argument but actually typed it into the multimedia presentation as the very last slide - in large type, as the lasting image the jury would take from initial closing argument. CP 101.

But the evidence of the slur was completely irrelevant to anything other than an effort to malign Cantrell's character and make him appear racist - and thus in a bad light - in front of jurors. If the goal was to portray Cantrell's callousness about the injuries he caused, then having the witness say that Cantrell said he hoped Ortiz would "choke on his blood and die" would have amply made that point. There was no reason to include - and emphasize - the racial slur, which had no relevance to

anything whatsoever in the case. Put simply, there was no evidence that race had anything to do with the incident at all. The only purpose for eliciting the testimony and then exploiting it so thoroughly in closing argument was to have the effect of inciting the jurors, frankly, to find Cantrell to be offensive and thus invite them to decide the case based upon not liking Cantrell versus the actual evidence against him.

Reversal is required based upon all of this misconduct. It is well-recognized that “[p]rosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels those tactics are necessary to sway the jury in a close case.” State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997). Even where, as here, counsel failed to object to the bulk of the misconduct below, a reviewing court will still reverse if the misconduct is so flagrant and prejudicial it could not have been cured by instruction. Belgarde, 110 Wn.2d at 507.² Further, even where individual acts of misconduct, standing alone, would not compel reversal, the cumulative effect of misconduct will if there is a substantial likelihood it affected the verdict. See State v. Jones, 144 Wn. App. 284, 300-301, 183 P.3d 307 (2008).

There is more than such a likelihood in this case.

All the types of misconduct the prosecutor committed here went to the single issue before the jury. There was no question that Ortiz was shot, or that Tyler Cantrell did it. The only question was whether Cantrell acted

²Counsel’s ineffectiveness in failing to object to the misconduct is discussed, infra.

in self-defense. The prosecutor's improper arguments told the jury that Cantrell's claim of self-defense should be rejected because he failed to leave and failed to warn before using force, even though Cantrell had no such duties. And the prosecutor's improper exploitation of the racial slur Cantrell was alleged to have made by projecting that slur before the jury in the powerpoint presentation and leaving that image up last surely invoked strong, improper prejudices against Cantrell, whose entire defense depended upon his credibility. It would be difficult to find anything more divisive or likely to provoke strong enmity against a defendant than evidence that they might be racist. See, e.g., State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011).

Indeed, the Supreme Court has recently held that a prosecutor "gravely violates a defendant's Washington Constitution article I, section 22 right to an impartial jury when the prosecutor resorts to racist argument and appeals to racial stereotypes or racial bias to achieve convictions." 171 Wn.2d at 556. And it would be difficult to find jurors who would think the use of the term "nigga" was anything but racist, given the history of that offensive term.

The prosecutor's arguments invoked compelling ideas likely to sway a jury in a strong way, as did the racial slur. The effect these arguments and the invocation of emotion against Cantrell likely had on the verdict cannot be overstated, given that the only issue was whether the jury would believe Cantrell had acted in self-defense. The cumulative effect of the misconduct prevented the jury from fairly and impartially evaluating the only issue before them in a way which was consistent with the law.

Reversal is required.

If the Court disagrees and finds that the corrosive effect of the misconduct could somehow have been cured by instruction, reversal should nevertheless be granted based on counsel's failure to request such instruction or object to the misconduct the prosecutor committed against his client. Both the state and federal constitutions guarantee the accused the right to effective assistance. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); 6th Amend; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). If Mr. Cantrell can show that, but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different, reversal is required. Strickland, 466 U.S. at 694.

Cantrell can meet those requirements here. The misconduct went to the heart of the prosecution's entire case and the sole issue presented to the jury. The prosecutor's misconduct here effectively told the jury that Cantrell had duties he did not have and thus could not use the defense he sought to use, because he did not warn before using any force in self-defense and did not leave the party when he had the chance. Yet counsel made no objection to these misstatements of the crucial law despite their very clear prejudice to his client.

It is Cantrell's position that the enduring prejudice caused by the prosecutor's misconduct could not have been erased by even the most strongly worded instruction. If, however, such erasure was even possible, reasonably competent counsel would have made the attempt to do so on his client's behalf. The failure was unprofessional, and it clearly prejudiced Mr. Cantrell in this case. This Court should so hold and should reverse.

2. THE SENTENCING COURT ERRED IN ORDERING A CONDITION OF COMMUNITY CUSTODY WHICH VIOLATED DUE PROCESS AND WAS UNCONSTITUTIONALLY VAGUE

Even if this Court does not reverse the conviction based upon the serious, prejudicial misconduct or counsel's ineffectiveness, Cantrell should be granted relief from one of the conditions of community placement/custody, because it was in violation of Cantrell's state and federal constitutional rights to due process.

As a threshold matter, this issue is properly before the Court. Where the lower court imposes an illegal or erroneous condition, that issue may be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744-46, 193 P.3d 678 (2008). Further, a challenge to such a condition may be made "preenforcement" if the challenge raises primarily a legal question and no further factual development is required. Id.

The condition Cantrell is challenging meets those standards, because it is in violation of his due process rights as it is written and no further factual development is required.

A sentencing court is limited to imposing only those conditions

which are authorized by statute. See State v. Zimmer, 146 Wn. App. 405, 414, 190 P.3d 121 (2008), review denied, 165 Wn.2d 1035 (2009).

Further, the due process rights guaranteed under the state and federal constitutions prohibit imposition of conditions which are unconstitutionally vague. See State v. Sansone, 127 Wn. App. 630, 638, 111 P.3d 1251 (2005). A condition is vague and in violation of due process if it either is not defined with sufficient definiteness so that an ordinary person could discern what conduct was prohibited or if it “does not provide ascertainable standards of guilt to protect against arbitrary enforcement.” Sansone, 127 Wn. App. at 639, citing, Spokane v. Douglass, 115 Wn.2d 171, 182, 795 P.2d 693 (1990).

Condition III did not meet any of those requirements. That condition provides:

The offender shall participate in crime-related treatment or counseling services.

CP 128.

This condition fails on both prongs of the due process analysis, because it fails to define the prohibited conduct sufficiently and fails to provide ascertainable standards to prohibit arbitrary or discriminatory enforcement. Bahl, supra, is instructive. In Bahl, the relevant condition mandated that Bahl refrain from “possess[ing] or access[ing] pornographic materials, as directed by the supervising Community Corrections Officer.” 164 Wn.2d at 754. The condition was held unconstitutionally vague. Id. In reaching that conclusion, the Supreme Court declared, “[t]he fact that the condition provides that Bahl’s community corrections officer can

direct what falls within the condition only makes the vagueness problem more apparent,” because, with that language, the condition “virtually acknowledges on its face [that] it does not provide ascertainable standards for enforcement.” 164 Wn.2d at 758.

Similarly, in Sansone, supra, the Court struck down as unconstitutionally vague a condition which mandated that the defendant not possess or peruse pornographic materials “unless given prior approval by [his] sexual deviancy treatment specialist and/or Community Corrections Officer,” with what constituted “pornography” left to be “defined by the therapist and/or Community Corrections Officer.” 127 Wn. App. at 634-35. On review, the term “pornography” was deemed unconstitutionally vague in violation of due process, because the term was not “defined with sufficient definiteness such that ordinary people can understand what it encompasses.” 127 Wn. App. at 639. Further, the vagueness of the condition was made clear by the delegation of defining “pornography” to DOC - “a requirement that would be unnecessary if ‘pornography’ was inherently definite.” 127 Wn. App. at 639. And the delegation of the authority to define what is prohibited to the CCO was especially improper because it creates “a real danger that the prohibition on pornography may ultimately translate to a prohibition on whatever the officer personally finds” to be so - even if it is not, legally, pornography. Id., quoting, United States v. Guagliardo, 278 F.3d 868, 872 (9th Cir.), cert. denied, 537 U.S. 1004 (2002) (citations omitted). Finally, that delegation was found to be an improper abdication of judicial responsibility for setting the terms of community custody, especially because DOC has

several very different definitions of “pornography” in the various statutes and rules it applies. Sansone, 127 Wn. App. at 641-42.

The condition in this case falls squarely in the same category as those in Bahl and Sansone. As in those cases, the condition here fails to define what is prohibited and fails to provide ascertainable standards for enforcement. Instead, it simply delegates to some future date and time the decision of what will be required of Cantrell as “crime-related.” Further, it appears to delegate to the CCO the right to make that determination, thus making it clear the condition fails to sufficiently define the prohibited conduct and to provide ascertainable standards for enforcement.

Notably, even our courts have had difficulty in determining what is “crime related” for the purposes of sentencing. See, e.g., Zimmer, 146 Wn. App. at 413 (where the defendant was alleged to have been involved in a drug crime, condition prohibiting use of pagers or cell phones not “crime-related” even though those things can be used in such crimes). By delegating the determination to the CCO to decide what is “crime-related,” the trial court violated its mandatory duties. Such a condition “abdicates” the court’s “judicial responsibility” for setting those terms. Sansone, 127 Wn. App. at 642. Because condition III is unconstitutionally vague and in violation of Cantrell’s due process rights to adequate notice and ascertainable standards for enforcement, and because it improperly delegates to DOC a judicial function, that condition should be stricken even if this Court does not reverse and remand for a new, fair trial.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and remand for a new trial and/or strike the improper condition of community custody/supervision.

DATED this 8th day of September, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Mr. Tyler Cantrell, DOC 346452, WSP, 1313 N. 13th Ave., Walla Walla, WA. 99362; and to pierce county prosecutor's office through this Court's efile system this date.

DATED this 8th day of September, 2011.

/s/ Kathryn Russell Selk
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Case Name: State v. Cantrell

Court of Appeals Case Number: 41662-0

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Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

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