

NO. 41939-4-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JOSHUA ANTHONY WARREN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald E. Culpepper

No. 10-1-01288-7

Response Brief

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly sustain an objection to an argumentative question that would have adduced cumulative evidence, as well as exclude evidence that was barred by the rape shield statute?
2. Was defendant afforded his due process right to present a meaningful defense and confrontation when he was allowed an opportunity to cross-examine all witnesses, present all witnesses to the stand, and the only limitation was the exclusion of cumulative and speculative evidence?
3. Has defendant failed to show that the prosecutor's closing argument was so flagrant and ill-intentioned that any potential prejudice could not have been neutralized with a curative instruction?
4. Did the trial court exceed its statutory authority in part when it prohibited defendant from accessing the internet without a child block, patronizing establishments that promote the commercialization of sex, and to receive a mental health evaluation as conditions on defendant's community custody?

B. STATEMENT OF THE CASE.

1. Procedure

On March 24, 2010, the Pierce County Prosecuting Attorney's Office (State) charged Joshua Anthony Warren (defendant) with one count of rape of a child in the second degree. CP 1. Defendant's jury trial began on January 3, 2011, before the Honorable Ronald E. Culpepper. RP 5.¹

During motions in limine, the State moved to exclude any reference to the victim's sexual history under the rape shield statute, RCW 9A.44.020,² including testimony regarding the victim's virginity. RP 16, 148–50. Defense counsel argued that a statement made by the victim, that the defendant had “popped her cherry,” fell outside the statute's ambit. RP 148. The court, however, determined that RCW 9A.44.020 prohibited such testimony and excluded the evidence. RP 150.

The jury found defendant guilty as charged. CP 79. On March 25, 2011, the court sentenced defendant to 111 months, the low end of the

¹ Defendant's jury trial began after several continuances, which were separately transcribed and paginated in two volumes. Seven hearings occurred between July and December 2010: six of which have been transcribed into a single verbatim report of proceedings, and the seventh (7/19/2010) on its own. The State will refer to these proceedings as “[DATE] RP” where necessary. The State will refer to defendant's jury trial as “RP” in its brief.

The State notes that the verbatim report of proceedings includes several errors regarding the dates of defendant's trial: RP 5 should read “Monday, January 3, 2011 Morning Session” instead of “Friday, July 23, 2010”: RP 60 should read “Tuesday, January 4, 2011 Morning Session” instead of “Monday, January 3, 2011 Morning Session.”

² The statute is attached as Appendix A.

standard range.³ CP 92 (Judgment and sentence, paragraph 4.8). The court imposed in part the following conditions on defendant's community custody:

- 13. You shall not possess or consume any mind or mood altering substances, to include alcohol, or any controlled substances without a valid prescription from a licensed physician.
- 24. You shall not have access to the internet unless the computer has child blocks in place and active, unless otherwise approved by the Court.
- 25. Participate in DOC's Moral Recognition Therapy (MRT) per CCO's discretion and also successfully complete an Anger Management treatment program.
- 26. Obtain both a Substance Abuse Evaluation and a Mental Health Evaluation, and comply with any/all treatment recommendations.
- 27. Do not patronize Prostitutes or establishments that promote the commercialization of sex.

CP 102–103. This appeal timely followed on March 29, 2011. CP 116.

2. Facts

Stephanie L.⁴ and her children lived with one of her relatives, Nakisha Babbs, and Ms. Babbs' friend, Nikia Braun, in an apartment in Tillicum, Washington. RP 154. Defendant was a friend of Ms. L.'s son and had lived with the L. family on several occasions. RP 155–57, 176–77.

³ Defendant had an offender score of four and a standard range of 111–147 months. CP 86 (Judgment and sentence 2.3).

⁴ The State will refer to the victim's family name as "L." for purposes of anonymity because the victim, Stephanie L.'s daughter, was a minor at the time of the crime. RP 155. The State will refer to the victim as "S.L."

On the evening of August 21, 2009, Ms. L. and her daughter, S.L., went to a party at a family friend's house. RP 161. The defendant, who was nineteen years old at the time,⁵ was also at the party. RP 180–81. After Ms. L. and S.L. returned to their apartment that evening, S.L. went back to the party with Ms. Braun. RP 161. S.L. returned around midnight with Ms. Braun's baby. RP 161. Ms. L. went to bed around 1:00 a.m. while S.L. stayed up with the baby in the living room RP 161, 178–79.

S.L. had seen defendant drinking at the party and was worried about him, so she called to see if he was okay after she put the baby to sleep. RP 179–81. Defendant asked her if she wanted him to come over, and she responded, "I don't know." RP 180. He told her that she "need[ed] to say yes or no," and so she told him, "Yeah, I guess." RP 180. She testified that she fell asleep on the couch waiting for him because it took him over an hour to get there. RP 182. She awoke to defendant entering the apartment. RP 182–83.

Defendant came in, pulled S.L. over to another couch on top of a blanket, pulled off her underwear, and digitally penetrated her several times. RP 183–86. Even though she told him to stop because it hurt, he told her to relax and kept pushing her down. RP 183. He got on top of her, took off his pants, and penetrated her with his penis. RP 186–88. After he penetrated her several times, S.L. was able to push him off and ran into the

⁵ RP 170.

bathroom. RP 187–88. Defendant put his pants back on and told her that he would be back the next day. RP 188.

S.L. text messaged her cousin to tell her what had happened, and her cousin responded by telling S.L. that she needed to tell her mother. RP 188. S.L. woke her mother up and told her what had happened. RP 188–89. Ms. L. testified that S.L. was crying hysterically, so she calmed S.L. down and helped her go to sleep, and then called the police. RP 164–65. Although Ms. L. debated about dealing with defendant herself, she ultimately called the police to report the crime. RP 165. While she was waiting for officers to arrive, she went to open a window in the apartment and kneeled down on a wet spot on the blanket where S.L. had said the raped occurred. RP 165. She bundled it up and threw it on the floor while waiting for the police to arrive. RP 165.

When officers arrived, they interviewed Ms. L. and S.L., and retrieved the blanket for testing. RP 218–19. A forensic analyst later examined the blanket and determined that the wet spots tested positive for defendant’s semen and skin cells. RP 245–46, 301–04. Ms. L. and S.L. were transported to a hospital. RP 169–70, 190. No semen was discovered from the vaginal swabs taken from the victim. RP 308.

The detective who investigated the crime testified that during an interview with defendant, defendant claimed he did not do anything and that he was at another location the night of the rape. RP 260, 268.

Defendant told the detective that he and a friend had been together the entire evening. RP 266–67.

The defense called Ms. Braun to testify that S.L. was neither crying nor hysterical over the incident, and that the party had occurred at the L.'s residence for part of the evening. RP 320–21. The defense called defendant's brother, Damien Warren, to testify that the party had at one point moved to the victim's apartment, and that he and defendant had spent the night elsewhere. RP 326–28. The defense also called Ms. L. to question her about whether she had washed the blanket that had defendant's semen on it. RP 332–46. Finally, the defense called Matthew Holt, who testified that he had spoken to the victim about the incident. RP 347–48.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY SUSTAINED AN OBJECTION TO A REPETITIVE QUESTION PERTAINING TO THE VICTIM'S VOICEMAIL AS CUMULATIVE, AND PROPERLY EXCLUDED EVIDENCE PERTAINING TO THE VICTIM'S VIRGINITY UNDER THE RAPE SHIELD STATUTE

Defendant alleges that his due process and confrontation rights were violated by the exclusion of two pieces of evidence: (1) testimony from the victim and defendant's brother that the victim allegedly left defendant's brother a voicemail, in which she supposedly admitted to

having lied about the rape, and (2) a statement by the victim that implied she was a virgin prior to the rape. Brief of Appellant at 28–29. While defendant only assigns error to defendant being deprived of his constitutional protections, *see* Brief of Appellant at 1, at the core of this issue are two evidentiary rulings made by the trial court. The correct standard of review is thus for an abuse of discretion. *See, e.g., State v. Posey*, 161 Wn.2d 638, 648, 167 P.3d 560 (2007). A trial court abuses its discretion when it bases its decision on manifestly unreasonable or untenable grounds. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). The trial court’s decision should be overturned only when no reasonable person could adopt the view of the trial court. *Posey*, 161 Wn.2d at 648.

- a. The trial court properly sustained an objection to a question that called for hearsay and which was repetitive.

The trial court properly sustained the State’s objection to the victim’s testimony regarding her alleged phone message when the State objected to the evidence during S.L.’s cross-examination. RP 193. The rules of evidence permit the trial court discretion to exclude “needless presentation of cumulative evidence.” ER 403. The rules also grant broad discretion to the trial court to “exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of

the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.” ER 611(a).

Defendant mistakenly argues that the trial court excluded the evidence under the rape shield statute. *See* Brief of Appellant at 31–32. At trial, the court excluded the evidence as hearsay and cumulative:

[Defense counsel]: After these events, do you remember talking to [defendant’s brother]?

[S.L.]: No, I didn’t talk to him.

Q. Did you leave him a message on his phone?

A. No. I wouldn’t have any reason to call him.

Q. Did you leave him a message that said that you had lied?

[Prosecutor]: Objection, Your Honor; hearsay. The question has been asked and answered.

The Court: Sustained.

RP 192–93. Defendant makes no showing that the trial court erred in sustaining the argumentative objection, and makes no showing that the evidence was neither hearsay nor cumulative. Even counsel failed to press the issue at trial, continuing on with his cross-examination after the objection. RP 193. Defense counsel had asked S.L. twice whether she had communicated with defendant’s brother about the event, to which she responded that she had not. The State objected to the question because defense counsel insisted on repeating a question that implied the victim had spoken with defendant’s brother, despite her answers that she had not.

The trial court thus properly exercised its discretion and sustained the objection.

- b. The trial court properly excluded evidence pertaining to the victim's virginity under the rape shield statute

This Court reviews a trial court's exclusion of evidence under the rape shield statute for an abuse of discretion. *Posey*, 161 Wn.2d at 648.

The applicable provision of the rape shield statute states:

(2) Evidence of the victim's past sexual behavior *including but not limited to* the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent except as provided in subsection (3) of this section,

RCW 9A.44.020 (emphasis added).⁶ This statute was enacted to prohibit evidence of a victim's past sexual conduct to prove credibility or consent. *State v. Harris*, 97 Wn. App. 865, 989 P.2d 553 (1999). The statute guards against any attempts to show a logical nexus between chastity and veracity. *State v. Sheets*, 128 Wn. App. 149, 155, 115 P.3d 1004 (2005).

The trial court did not err when it granted the State's motion in limine to exclude S.L.'s statement that defendant "popped her cherry" because it directly implicated S.L.'s sexual history, and defendant wanted

⁶ For the full statute, *see* Appendix A.

to use that statement to challenge her credibility. RP 16. The rape shield statute expressly requires the trial court to exclude such evidence when a defendant seeks to admit it to prove or attack the victim's credibility. RCW 9A.44.020.

Defendant argues that S.L.'s statement does not constitute "past sexual behavior" because it was made on the night in question *after* she was raped. Brief of Appellant at 32. But this argument overly simplifies the rape shield statute to a matter of timing. Regardless of when S.L. told anyone when she lost her virginity, the statement still introduced evidence of S.L.'s past sexual history. This would have permitted the jury to draw inferences—whether positive or negative—about S.L.'s credibility based on her sexual history. The rape shield statute bars such evidence on the issue of the victim's credibility, and thus the trial court properly exercised its discretion to exclude it.

2. THE TRIAL COURT AFFORDED DEFENDANT HIS DUE PROCESS RIGHT TO PRESENT A MEANINGFUL DEFENSE AND HIS RIGHT OF CONFRONTATION

This Court reviews a claim of denial of constitutional rights *de novo*. *State v. Iniquez*, 167 Wn.2d 273, 280–81, 217 P.3d 768 (2009). Due process guarantees criminal defendants the right to a meaningful defense against the State's accusations. *State v. Jones*, 168 Wn.2d 713, 720–21, 230 P.3d 576 (2010). The federal and state constitutions provide the

defendant the right to confront and cross-examine adverse witnesses. *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002); *see also* U.S. Const. amend. VI; WA Const. art. I, § 22.

The purpose of a meaningful cross-examination is not just to physically confront one's witnesses, but to test the credibility of witnesses and assure accuracy in the fact-finding process. *Darden*, 145 Wn.2d at 620. This right is not absolute, however, and trial courts are permitted to exercise their discretion to deny evidence that is merely speculative. *See id.* at 621. The defense does not have a right to present evidence that is otherwise inadmissible. *State v. Tracy*, 128 Wn. App. 388, 398, 115 P.3d 181 (2005).

- a. The defendant was afforded his right to present a meaningful defense and confrontation without the excluded evidence

The record shows that the trial court afforded defendant every opportunity to present his defense and challenge the veracity of S.L. After the trial court sustained the State's objection regarding S.L.'s voicemail, defense counsel told the court that he wanted only to question S.L. about whether she had a relationship with Matthew Holt, and whether she left a message on his phone. RP 193–94. The trial court permitted defense counsel to ask those very questions:

[Defense counsel]. [S.L.], do you know Matthew Holt?

A. No.

Q. Did you call him or leave him a message or speak with him in person after this event?

A. No.

RP 196. During its case in chief, the defense presented testimony that directly conflicted with S.L.'s testimony. For example, when examining defendant's brother, defense counsel asked:

Q. You're aware that there were allegations made by [S.L.]?

A. Yes.

Q. And you know [S.L.]?

A. Yes.

Q. Did [S.L.] ever call you and either talk to you or leave you a message about the alleged incident that night?

A. Yes.

[Defense counsel]: Thank you. I have nothing further.

RP 328. Counsel also asked Matthew Holt whether he had spoken to S.L. about the rape, to which he responded, "On multiple occasions, yes." RP 348. The court put no limitations on defendant's ability to present his defense case other than the two rulings discussed earlier.

From the questioning above, defendant was able to challenge S.L.'s veracity by getting her to testify that she did not tell anybody about the incident, and then rebutted her statements by calling two witnesses

who testified to the contrary. The purpose of a meaningful cross-examination—to test the credibility of witnesses—was satisfied in this case. *Darden*, 145 Wn.2d at 620. There is no showing that the defendant was otherwise prohibited from cross-examining S.L., or any other witness, in order to present a meaningful defense.

Next, the evidence pertaining to S.L.'s virginity was speculative, and defendant was also able to present a meaningful defense without it. When hearing motions in limine, the court asked defense counsel why S.L.'s statements about her virginity were necessary to the defense:

The Court: [Defense counsel], why does the jury care whether she's a virgin or not? How does that help them decide the case whether she had sexual intercourse with [defendant], he being over 18 at the time and she being under 14 at the time?

[Defense counsel]: *It's crucial to the defense, Your Honor, because her DNA was not on that blanket. Her blood was not on that blanket. Nothing from her was on that blanket. The swabs taken of her, vaginal, anal, and oral, showed no DNA from him, my client. But if she were a virgin and she does refer to bleeding in the medical records at the hospital, why is there no blood on the blanket? So it's crucial.*

RP 149–50 (emphasis added). Defendant's sole purpose for admitting evidence of S.L.'s virginity was to argue that S.L. was lying about the incident because no evidence of her blood was found. The court, still insisting that defense counsel answer why S.L.'s virginity was relevant, pointed out that defense counsel could question S.L. about the blood during cross-examination:

The Court: Well, that's a good question, but what does that have to do with virginity? She says there's blood and no blood is found. *That might be interesting cross-examination, but I don't see the virginity issue.*

[Defense counsel]: Well, if she said she lost her virginity, then there would be a tear of hymen, and when the hymen is torn, there's bleeding.

The Court: I think medically that's not correct, but I'm not an M.D. People can have sexual intercourse without bleeding. In fact, it's fairly common

RP 150 (emphasis added). Defense counsel's conclusion that "there's bleeding" whenever someone loses their virginity was mere speculation. Even the court recognized that counsel's reasoning was speculative, suggesting that expert testimony would be necessary to support such a conclusion. RP 150. However, defendant proffered no such testimony. The trial court thus properly excluded statements about S.L.'s virginity because it had discretion to deny "merely speculative evidence." *Darden*, 145 Wn.2d at 621.

Moreover, defendant was able to present a meaningful defense because the trial court permitted the defense to refer to any blood evidence—or the lack thereof—during opening statement and cross-examination. RP 150–51, 196. During closing argument, defense counsel again highlighted the discrepancy about the blood, telling the jury that "[y]ou are the sole judges of the credibility of the witnesses and the

evidence. [S.L.] told you she called [defendant], he came over. She said that she was bleeding and had blood. No blood was found.” RP 377–78. Defendant was thus able to confront his witnesses and present a meaningful defense despite the trial court’s exclusion of this evidence.

Defendant relies heavily on *State v. Jones*, 168 Wn.3d 713, 230 P.3d 576 (2010), to argue that he was denied his right to present a defense, but *Jones* is distinguishable from this case. The defendant in *Jones* was charged with second degree rape. *Id.* at 717. The trial court in *Jones* prohibited the defendant from testifying about conduct and statements made by the victim regarding the victim’s consent to an all-night drug-induced sex party where she was raped. *Jones*, 168 Wn.2d 713, 719–22. The court also prohibited Jones from cross-examining other witnesses about whether the victim consented to intercourse. *Id.* at 719–20. This testimony was necessary because Jones’ “entire defense” hinged on whether the victim had consented to having sex at the party. *Id.* at 721. The Washington State Supreme Court held that the trial court improperly prohibited the evidence under the rape shield statute because the evidence had nothing to do with the victim’s *past* sexual behavior, and was highly probative for the defendant’s consent defense. *Id.* at 721–23.

Unlike *Jones*, defendant here did not attempt to take the stand, nor was he prohibited from giving his version of the events. Whereas the defense in *Jones* depended entirely on whether the victim consented,

defendant's theory in this case did not hinge on S.L.'s statement that she lost her virginity. Defendant wanted to introduce the evidence only to question S.L.'s testimony that she was bleeding after being raped, a point the court permitted defendant to argue without referring to S.L.'s virginity. RP 149–50. Neither was S.L.'s virginity probative of that point, but speculative at best. The defendant was thus afforded his due process and confrontation rights.

Additionally, whereas the defendant's questions and cross-examination in *Jones* were limited to the victim's sexual behavior at the sex party, defendant's evidence that S.L. was a virgin necessarily introduced her entire sexual history. As argued above, such evidence is inadmissible under the rape shield statute.

For these reasons, *Jones* is different both in fact and law. The trial court ensured defendant his due process right to present a meaningful defense, and confrontation, by permitting the defense to question S.L. about her relationship with defendant's friends and family, whether she called and left a message with them after being raped, as well as pursue other evidence that questioned S.L.'s testimony about her bleeding. Nowhere did the court prevent defendant from testifying, from giving his version of the events, or cross-examine witnesses regarding his theory of the case.

b. The exclusion of evidence regarding S.L.'s virginity was harmless

Even if the court determines that the trial court erred when it excluded the evidence, the error is subject to a harmless error analysis. *State v. Hawkins*, 157 Wn. App. 739, 752, 238 P.3d 1226 (2010). Evidentiary errors are harmless where there is a reasonable probability it did not materially affect the verdict, while errors of constitutional magnitude are harmless if proven beyond a reasonable doubt. *Id.*

The error was harmless under either standard of review. The excluded evidence pertained only to S.L.'s credibility. But the State offered compelling evidence outside of S.L.'s testimony that defendant was guilty: the DNA evidence and Ms. L.'s testimony. Even if the excluded evidence had been admitted—presumably to undermine S.L.'s credibility—S.L.'s account of the crime matched the physical evidence obtained from the scene (e.g., she testified that the blanket was under her when she was raped). Furthermore, as argued above, defendant's case lacked credibility.

The error was harmless beyond a reasonable doubt because there was otherwise substantial evidence indicating that defendant was guilty. The excluded evidence would not have affected the jury's verdict in this case.

3. DEFENDANT FAILS TO SHOW THAT THE PROSECUTOR'S CLOSING ARGUMENT WAS SO FLAGRANT AND ILL-INTENTIONED THAT ANY POTENTIAL PREJUDICE COULD NOT HAVE BEEN CURED WITH AN INSTRUCTION

A defendant claiming prosecutorial misconduct carries the burden of proving the prosecutor's conduct was improper and that it prejudiced the defense. *State v. Dhaliwhal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003)). The court reviews a prosecutor's alleged misconduct "[in] the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." *Id.* The jury is "presumed to follow the instruction that counsel's arguments are not evidence." *State v. Warren*, 165 Wn.2d 17, 29, 195 P.3d 940 (2008).

Where a defendant fails to object to alleged misconduct, he waives any resulting error unless the conduct is flagrant, ill-intentioned, and so prejudicial that any resulting prejudice could not have been neutralized by a curative instruction. *Dhaliwhal*, 150 Wn.2d at 578 (holding that reversal is not required where the error could have been obviated by an instruction that the defense did not request). When a defendant fails to object to a prosecutor's remarks, it "strongly suggests" that it did not appear critically

prejudicial to the defense. *State v. Monday*, 171 Wn.2d 667, 679, 257 P.3d 551 (2011) (quoting *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)).

In *State v. Curtiss*, 161 Wn. App. 673, 250 P.3d 496 (2011), this Court's most recent decision regarding a puzzle analogy during closing argument, this Court rejected a claim of prosecutorial misconduct where the prosecutor argued:

[R]easonable doubt is not magic. This is not an impossible standard. Imagine, if you will, a giant jigsaw puzzle of the Tacoma Dome. There will come a time when you're putting that puzzle together, and even with pieces missing, you'll be able to say, with some certainty, beyond a reasonable doubt what that puzzle is: The Tacoma Dome.

Id. at 700. The court reasoned that the analogy was permissible because it described the relationship between circumstantial evidence, direct evidence, and the beyond-a-reasonable-doubt standard to the jury. *Id.* The court found that the analogy was not flagrant or ill-intentioned, and that the defendant could not show that the analogy had any lasting prejudice in light of the court's instructions that "lawyers' statements are not evidence." *Id.*

The court in *Curtiss* also rejected any comparison to *State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009), where the court found prosecutorial misconduct when the prosecutor compared the reasonable-doubt standard to the jurors' everyday decisions. *Anderson*, 153 Wn. App. at 431 (holding that such a comparison "trivialized" the

State's burden). In *Curtiss*, the court held that identifying a puzzle with certainty was not analogous to the "weighing of competing interests inherent in a choice that individuals make in their everyday lives." 161 Wn. App. at 701. Thus, using a puzzle analogy can still comport with the court's holding in *Anderson*.

In other particular circumstances, this Court has determined that the use of a puzzle analogy can constitute prosecutorial misconduct. In *State v. Johnson*, 158 Wn. App. 677, 243 P.3d 936 (2010), this Court found that the prosecutor had committed misconduct when after holding up merely half of a picture of Tacoma, the prosecutor argued that "at this point *even being able to see only half, you can be assured beyond a reasonable doubt* that this is going to be a picture of Tacoma." *Id.* at 682 (emphasis added). The court reasoned that the prosecutor had trivialized its burden by "focus[ing] on the degree of certainty the jurors needed to act, and implied that the jury had a duty to convict without a reason to do so." *Id.* at 685.

- a. The prosecutor's argument was not flagrant, ill-intentioned, and could have been remedied with a curative instruction if defendant had only requested one

Defendant objects to the prosecutor's closing argument, which in part referred to an analogy of a jigsaw puzzle. Brief of Appellant at 13. The prosecutor's argument in this case was very similar to the argument

utilized in *Curtiss*, and assisted the jury to understand the relation between the evidence and the reasonable-doubt standard:

I also told you in opening statement an analogy that a criminal trial is much like a jigsaw puzzle and that over the course of this trial you're going to be hearing from a number of witnesses. Some of these witnesses will have pieces of the puzzle; some will not. Some will have evidence that you consider to be credible and valuable; others may not, but that over the course of the trial you will be receiving from these witnesses and exhibits admitted into evidence pieces of the puzzle, of what actually happened on August 22nd, 2009, at an apartment in Lakewood, Washington.

We are now at the opposite end of the spectrum. We are before you for closing argument, and this is the final opportunity for [defense counsel] and me to come before you and not talk about what we think the evidence will show or what we think witnesses will say but discuss what the evidence is that we actually have and how we think. And, again, it doesn't really matter what we think, but ultimately what you all decide. But what we think from our own clients' perspective each of the pieces of the puzzle you received over the course of this trial means and how, if at all, they fit together, and then ultimately what you can decipher from those pieces when you consider putting them all together and what your verdict should reflect.

RP 362-63. The prosecutor introduced the analogy again in rebuttal closing argument:

The beginning of this trial I told you the defendant was guilty of rape of a child in the second degree and right now I'm going to tell you that this is a picture of the city of Seattle. At the beginning of this trial when I told you the defendant was guilty of rape of a child in the second degree, you had about as much evidence to support my claim that this is a picture of the city of Seattle as you do right now.

But over the course of this trial you begin to hear from witnesses. You heard from the victim. You heard from her mother. You heard the officers on the scene and detectives who conducted follow-up examinations. You heard from a forensic scientist who tested the DNA.

Is there still a doubt? Yes. Is there still a doubt that this is a picture of the city of Seattle? I suppose there is. A big piece of the puzzle is missing, but you can look at the evidence you do have. You have a Space Needle. You have Mount Rainier. You have a fraction of the Key Arena and the Seattle Center. And the question I'll pose to you is this: You may not have every piece of the puzzle, but based on the pieces that you have, can you find beyond a reasonable doubt that this is a picture of the city of Seattle? Would you be reasonable reaching that conclusion?

The defendant has been proven beyond a reasonable doubt that on August 22nd, 2009, he had sexual intercourse with [S.L.]. And, ladies and gentlemen, that makes him guilty of the crime with which he is charged, and I ask you to return the only verdict that is supported by the evidence in this case and your common sense when you evaluate it. Thank you.

RP 392-93.

In this case, defendant did not object to the prosecutor's argument during closing argument, and failed to request a curative instruction for any alleged misconduct. RP 361-62, 392-93. Defendant thus waived any resulting error unless the court finds that the conduct was so flagrant and ill-intentioned that the resulting prejudice could not have been cured with additional instruction.

The prosecutor's argument in this case was neither flagrant nor ill-intentioned, especially such as to warrant the exceptional relief of a new trial. Similar to the closing argument in *Curtiss*, the prosecutor's argument here simply illuminated how the jury was to weigh the evidence offered by each witness, and how to fit that evidence into the context of the entire trial. RP 362–63. The analogy closely followed the jury's instructions, which state:

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider . . . the reasonableness of the witness's statements in the context of all of the other evidence

CP 65 (Instruction No. 1).

When the prosecutor introduced the analogy again in rebuttal, the court should consider the prosecutor's conduct in the entire context of his argument, including defendant's closing argument. *See Dhaliwhal*, 150 Wn.2d at 578. Defense counsel had repeatedly emphasized that the State had not met its burden beyond a reasonable doubt in his closing argument:

Some of you may think [defendant] may have had sex with [S.L.]. Some of you may think it's likely [defendant] had sex with [S.L.]. Some of you may think it's probable that [defendant] had sex with S.L. That's not proof. The burden the State has is to prove that element beyond a reasonable doubt, and that it's likely or that it's probable does not pass that standard.

RP 377. Defense counsel continued:

At this stage in the trial we no longer have innocent. That's not on your verdict form. Your verdict form says not guilty and guilty. There isn't a place for innocent. The judge has told you that the presumption of innocence carries through until and unless you find that it has been overcome beyond a reasonable doubt by evidence as presented by the State.

In Europe, mostly in Scandinavia, a lot of countries don't have "not guilty." They have "not proven." And that makes a lot of sense to me because if the State has the burden of proof and they have not proven the case beyond a reasonable doubt, well, that's the answer, it's not proven, and not proven is the same as not guilty.

Again, some of you may think that [defendant] may have had sex with [S.L.]. Some of you think it's likely that [defendant] had sex with [S.L.]. Some of you may think it's probable, may more likely than not, but it's not proven to you beyond a reasonable doubt, and not proven is what we have here, and not proven is not guilty.

RP 377, 381–82.

It was in this context that the prosecutor used the analogy in rebuttal, incorporating the State's burden to prove the elements of the crime beyond a reasonable doubt. The prosecutor began by tailoring it to the jury instructions regarding reasonable doubt, arguing that reasonable doubt is "a doubt which must be supported by reason after considering all the evidence taken together, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." RP 392; *see also* CP 67 (Instruction No. 2). ("A reasonable doubt is one for which a reason

exists and may arise from the evidence or lack of evidence . . . If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.”). The prosecutor did not attempt to shift the State’s burden, nor did he undermine the beyond-a-reasonable-doubt standard. To the contrary, the prosecutor simply asked a rhetorical question whether the jury could convict the defendant given the evidence they received at trial. RP 392–93.

The prosecutor’s conduct here is considerably distinguishable from the prosecutor’s improper conduct in *Johnson*. Unlike the prosecutor in *Johnson*, who told the jury that they should convict the defendant with *just half of the puzzle*, the prosecutor here did not focus on the degree of certainty the jurors needed to convict, but rather highlighted the jury instructions (as discussed above) pertaining to a reasonable doubt. Instead of simply telling the jury that they had to convict, the prosecutor posed a rhetorical question that asked whether the jurors, given their instructions, could convict with the evidence that they had.

This case is also distinguishable from *Johnson* because there, the prosecutor implied that the jury had a duty to convict without any specific reason to do so. But here, the prosecutor outlined several key pieces of evidence—testimony from Ms. L., detectives, a DNA analyst, and the victim—that supported a finding of guilt. In light of the closing

argument's context and the jury's instructions, defendant cannot show how the prosecutor's conduct was either flagrant nor ill-intentioned. Rather, the argument helped the jury consider the weight of the State's evidence, and what was necessary for the State to meet its burden beyond a reasonable doubt.

Defendant also fails to show how the prosecutor's conduct, even if improper, could not have been remedied had he only objected and requested a curative instruction. Similar to the court's instructions in *Curtiss*, which this Court found sufficient to overcome any potential prejudice caused by a puzzle analogy, the jury instructions here state:

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence . . . *You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.*

CP 65 (Instruction No. 1) (emphasis added); *Curtiss*, 161 Wn. App. at 700. The prosecutor properly argued that the jury should focus on the evidence adduced at trial, and reiterated that what he and defense counsel said in closing “[didn’t] really matter.” RP 362–63. Because the jury is presumed to have followed the court's instructions, *see Warren*, 165 Wn.2d at 29, this Court should presume that the jury was adequately

instructed to disregard anything the prosecutor might have said that was improper in this regard.

The jury's verdict was likely unaffected by any alleged prejudice because of the overwhelming evidence that defendant was guilty. There was compelling DNA evidence that defendant had sexual intercourse with S.L. A forensic analyst examined the blanket, which S.L. testified was under her when defendant raped her, and determined that two spots on the blanket tested positive for defendant's semen. RP 245–46, 301–04. Ms. L. provided the blanket to officers after kneeling in defendant's semen while waiting for officers to arrive. RP 165.

At trial, defendant presented no evidence as to how his semen ended up on the blanket. The defense only argued during closing argument that the blanket was somehow wet from being washed earlier in the day, and that defendant's semen just so happened to be there from before. RP 376–77. But Ms. L. testified that she had hung the blanket to dry. RP 333. Even then, when she looked at the blanket after kneeling on the wet spot, she testified that she actually saw the wet spot, a point that undermines the defense's theory that the whole blanket might have been damp from being washed earlier. RP 165.

Further evidence proved that S.L.'s testimony corroborated with the physical evidence retrieved from the blanket. RP 184–85. Ms. L.'s

testimony corroborated with S.L.'s testimony regarding the night S.L. was raped. RP 161–65.

The jury also heard S.L.'s eyewitness account of the rape, and she identified defendant as the perpetrator. RP 176.

On the other hand, defendant's witnesses lacked credibility. Defendant's brother testified that he spent the entire evening with defendant. RP 328. But this came just after he testified that defendant went back to the victim's apartment late at night. RP 326–27. But this was inconsistent with statements that defendant made to the detective who was investigating the crime. RP 268. Defendant told that detective that he was at an entirely different location for the duration of the evening. RP 268. Furthermore, he told the detective that he spent the evening with a friend, rather than his brother. RP 267. By finding the defendant guilty, the jury apparently did not find defendant's alibi credible. Credibility determinations are left to the trier of fact, and not subject to review on appeal. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Defendant cannot show that the prosecutor's conduct during closing argument had any effect on the jury's verdict.

Defendant fails to show that the prosecutor's closing argument was so flagrant and ill-intentioned such as to warrant a new trial. When considering the weight of the evidence against defendant, it is highly

improbable that the prosecutor's conduct had any impact on the jury's decision. This Court should affirm defendant's conviction because there has been no showing that the prosecutor's conduct was improper

4. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY IN PART WHEN IT IMPOSED CONDITIONS 24, 26, AND 27 AS CONDITIONS ON DEFENDANT'S COMMUNITY CUSTODY BECAUSE THEY WERE NOT DIRECTLY RELATED TO DEFENDANT'S CRIME

When the sentencing court has statutory authority to impose a sentencing condition, this Court reviews sentencing conditions for an abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). A sentencing court abuses its discretion when the sentence is manifestly unreasonable or based on untenable reasons, such that no reasonable person would adopt the view of the court. *Id.*; see also *State v. Cunningham*, 96 Wn.2d 31, 34, 633 P.2d 886 (1981).

The sentencing court has broad discretion to impose and enforce the following conditions of community custody:

- (3) Discretionary conditions. As part of any term of community custody, the court may order an offender to:
 - (a) Remain within, or outside of, a specified geographical boundary;
 - (b) Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals;
 - (c) Participate in crime-related treatment or counseling services;

(d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;

(e) Refrain from consuming alcohol; or

(f) Comply with any crime-related prohibitions.

RCW 9.94A.703.⁷

A "crime-related prohibition" is defined as "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct."

RCW 9.94A.030. Although a crime-related prohibition must be directly related to the crime, it does not need to be causally related to the crime.

State v. Autrey, 136 Wn. App. 460, 467, 150 P.3d 580 (2006).

A sentencing court may only impose statutorily authorized sentences. *State v. Paulson*, 131 Wn. App. 579, 588, 128 P.3d 133 (2006).

When the court imposes an unauthorized condition on community custody, the reviewing court remedies the error by remanding the issue with instructions to strike the unauthorized condition. *See State v. O'Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

⁷ The full statute is included as Appendix B.

- a. The trial court properly prohibited defendant from possessing or consuming alcohol under condition 13 because it is a crime-related prohibition

The sentencing court in this case properly imposed condition 13—prohibiting defendant from possessing and consuming alcohol—because there was evidence that alcohol directly related to the circumstances of the crime. S.L. testified that she saw defendant drinking at the party just before she left and thought he was “acting like a fool,” so she “called him to see if he left or if he was still there drinking.” RP 180–81. Defendant raped her just an hour later. RP 181–87. The detective who interviewed defendant also testified that defendant had admitted to drinking on the night of the crime just a few hours before the rape occurred. RP 265–66.

Because there was evidence that alcohol “directly relate[d] to the circumstances of the crime,” the trial court properly imposed condition 13. RCW 9.94A.030.

The defendant’s claim that the sentencing court exceeded its authority by requiring defendant to obtain a prescription from a “licensed physician” before possessing a controlled substance under condition 13 is not ripe for review. A sentencing condition is not ripe for review where it has not yet been enforced, and where the defendant has yet to suffer any

negative consequences from it. *State v. Eaton*, 82 Wn. App. 723, 123, 919 P.2d 116 (1996), *overruled on other grounds*, *State v. Frohs*, 83 Wn. Appl. 803, 924 P.2d 384 (1996). Unlike a condition on community custody that will inevitably occur, such as undergoing an evaluation for treatment, defendant's condition of receiving prescriptions from a licensed physician is conditional upon defendant attempting to purchase a prescription from someone other than a licensed physician, and then being prohibited from doing so. Defendant's claim in this regard should be dismissed because the condition has neither been enforced, nor has defendant suffered any negative consequences.

- b. The trial court exceeded its statutory authority in imposing condition 24, which prohibits defendant from accessing the internet without child blocks

The State acknowledges that while the sentencing court has broad discretion in imposing conditions on community custody, it may only impose prohibitions that are crime related. *O'Cain*, 144 Wn. App. at 775 (finding that defendant's conviction of child rape in the second degree did not warrant an internet prohibition where the record did not show that the internet contributed to the rape). The trial court exceeded its authority when it imposed condition 24 because there was no testimony to support that the internet was related to defendant's crime. The State respectfully

requests that the issue be remanded with instructions to strike the provision that defendant not have access to the internet without child blocks in place. *O’Cain*, 144 Wn. App. at 775.

- c. The trial court improperly imposed a mental health evaluation under condition 26 because the court made no finding that defendant was mentally ill whose condition influenced the offense

In *State v. Jones*, 118 Wn. App. 199, 76 P.3d 258 (2003), this court held that in order to impose a mental health evaluation as a condition on community custody, the sentencing court must (1) receive a presentence report or mental status evaluation, and (2) find that the defendant was a mentally ill person whose condition influenced the offense. *Id.* at 210.

The sentencing court in this case received a presentence report that found defendant’s mental health issues were directly related to his “risk to re-offend,” and that a mental health evaluation would “assist in reducing potential risk to community safety.” CP 136 (Pre-sentence investigation 13). However, the court did not make any finding that defendant was mentally ill and that his condition influenced his offense. Accordingly, the trial court improperly required defendant to participate in a mental health evaluation as part of his community custody. This issue should also be

remanded with instructions to strike that portion of condition 26. *O’Cain*,
144 Wn. App. at 775.

- d. The trial court properly imposed all other treatments under conditions 25 and 26 because they qualify as crime-related treatment, or affirmative conduct that is reasonably related to defendant’s risk of reoffending and the safety of the community

The trial court properly imposed the anger management treatment because the record shows that the treatment is related to defendant’s crime. Defendant forcibly pulled his victim across the room to another couch where he raped her. RP 183. When she tried telling him to stop, he ignored her, pushed her down, and refused to stop until his victim successfully pushed him off of her. RP 187. Defendant’s disregard of his victim’s pleas to stop and his forcible compulsion show that the trial court did not abuse its discretion when it imposed an anger management treatment program.

In addition to the facts of the crime, the sentencing court also had a presentence report that indicated:

[Defendant] recounted having seen a psychologist named “Duke” in the past for Anger Management counseling, but he stopped going to see him in 2008. He admitted to having “anger issues,” and described them as when he “gets mad for no reason sometimes when things don’t go the way he thinks the should”; he added that he has “fits of anger” at times, and he “throws things.” He also said that he was going to get G.A.U. financial assistance to resume taking

classes for it in 2009, but he was arrested for Domestic Violence before that happened. He didn't mention being prescribed medication for it or anything else in the past.

CP 134 (Pre-sentence investigation 11). When considering defendant's actions when he raped S.L., and the presentence report, the trial court properly required defendant to participate in anger management treatment.

The sentencing court had ample evidence before it to require defendant undergo a substance abuse evaluation under condition 26 as well. As argued above, alcohol played a role in defendant's crime. The presentence report also contains a lengthy history of defendant's substance abuse, including alcohol. CP 133–34 (Pre-sentence investigation 9–10). The trial court did not abuse its discretion because the evaluation qualifies as a crime-related treatment.

Defendant's challenge to the moral recognition therapy (MRT) is not ripe for review. The MRT is not even a mandatory condition of defendant's community custody, but rather optional per the community corrections officer's discretion. CP 103 ("Participate in DOC's [MRT] *per CCO's discretion*") (emphasis added). The Department of Corrections has substantially broad discretion to impose additional conditions on community custody when it releases a sex offender. *See, e.g.*, RCW 9.95.420(2) (authorizing release board to impose conditions as necessary in addition to the department's conditions); RCW 9.95.064; RCW

9.95.0002 (permitting department of corrections independent judgment when making decisions regarding offenders). Because the MRT is conditional upon the broad discretion of his CCO, this Court should dismiss this issue until it is ripe.

In any case, the MRT constitutes both a crime-related treatment and otherwise affirmative conduct reasonably related to defendant's chance of re-offending and community safety. Defendant was convicted of rape of a child in the second degree, a class A felony, and sentenced as a sex offender. The sentencing court's presentence report stated that the MRT would assist specifically in reducing his risk of reoffending and his risk to community safety. CP 136–37 (Pre-sentence investigation 13–14). The sentencing court, after conducting defendant's trial and considering the presentence report, properly concluded that the therapy should be an optional condition of defendant's community custody per the corrections officer's discretion.

- e. The trial court exceeded its authority in part by prohibiting defendant from patronizing establishments that promote the commercialization of sex as under condition 27.

A sentencing court has the authority to impose conditions on a defendant's community custody that require him to obey a community's laws, regardless of whether the condition relates to the circumstances of

defendant's conviction. *See State v. Jones*, 118 Wn. App. 199, 205–06, 76 P.3d 258 (2003) (finding that the trial court did not err when it ordered defendant to engage in “law abiding behavior”). In Washington, it is a misdemeanor to patronize a prostitute. *See* RCW 9A.88.110.⁸

Here, the trial court properly ordered the defendant to comply with the community's laws and avoid patronizing prostitutes under the first part of condition 27. The trial court's order in this regard is neither manifestly unreasonable nor based on untenable grounds.

The trial court did, however, exceed its statutory authority by prohibiting the defendant from patronizing establishments that promote the commercialization of sex, insofar as those institutions comply with the law. The record does not include any evidence that defendant's activities with such establishments were directly related to his crime. The State requests that the issue be remanded with instructions to strike the latter

⁸ RCW 9A.88.110 states:

A person is guilty of patronizing a prostitute if:

- (a) Pursuant to a prior understanding, he or she pays a fee to another person as compensation for such person or a third person having engaged in sexual conduct with him or her; or
- (b) He or she pays or agrees to pay a fee to another person pursuant to an understanding that in return therefore such person will engage in sexual conduct with him or her; or
- (c) He or she solicits or requests another person to engage in sexual conduct with him or her in return for a fee.

half of condition 27, that defendant not patronize “establishments that promote the commercialization of sex.”

In conclusion, the State requests this Court to direct the trial court to strike the following conditions: condition 24; the mental health evaluation under condition 26; and the prohibition from patronizing establishments that promote the commercialization of sex under condition 27. The remaining conditions should be upheld because they are directly related to the circumstances of defendant’s crime, his risk of reoffense, and the safety of the community.

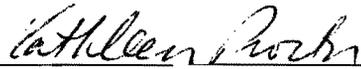
D. CONCLUSION.

This Court should affirm defendant’s conviction of rape of a child in the second degree because defendant makes no showing that the trial court erred in sustaining an objection to a repetitive question, and excluding speculative evidence under the rape shield statute. Defendant was able to present a meaningful defense and confront his witnesses without the evidence. Defendant also fails to show how the prosecutor’s conduct in closing argument was so flagrant and ill-intentioned that any potential prejudice could not have been cured if only defendant had

objected and requested a curative instruction. Finally, the State respectfully requests this Court to uphold the conditions on defendant's community custody where the State has identified the sentencing court properly exercised its statutory authority above.

DATED: May 31, 2012.

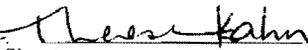
MARK LINDQUIST
Pierce County
Prosecuting Attorney


KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811


Kiel Willmore
Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5.31.12 
Date Signature

APPENDIX “A”

C

West's Revised Code of Washington Annotated Currentness

Title 9A. Washington Criminal Code (Refs & Annos)

Chapter 9A.44. Sex Offenses (Refs & Annos)

→ **9A.44.020. Testimony--Evidence--Written motion--Admissibility**

(1) In order to convict a person of any crime defined in this chapter it shall not be necessary that the testimony of the alleged victim be corroborated.

(2) Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent except as provided in subsection (3) of this section, but when the perpetrator and the victim have engaged in sexual intercourse with each other in the past, and when the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue of consent to the offense.

(3) In any prosecution for the crime of rape or for an attempt to commit, or an assault with an intent to commit any such crime evidence of the victim's past sexual behavior including but not limited to the victim's marital behavior, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is not admissible if offered to attack the credibility of the victim and is admissible on the issue of consent only pursuant to the following procedure:

(a) A written pretrial motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the past sexual behavior of the victim proposed to be presented and its relevancy on the issue of the consent of the victim.

(b) The written motion shall be accompanied by an affidavit or affidavits in which the offer of proof shall be stated.

(c) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and the hearing shall be closed except to the necessary witnesses, the defendant, counsel, and those who have a direct interest in the case or in the work of the court.

(d) At the conclusion of the hearing, if the court finds that the evidence proposed to be offered by the defendant regarding the past sexual behavior of the victim is relevant to the issue of the victim's consent; is not inadmissible because its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice; and that its exclusion would result in denial of substantial justice to the defendant; the court shall make an order stating what evidence may be introduced by the defendant, which order

may include the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

(4) Nothing in this section shall be construed to prohibit cross-examination of the victim on the issue of past sexual behavior when the prosecution presents evidence in its case in chief tending to prove the nature of the victim's past sexual behavior, but the court may require a hearing pursuant to subsection (3) of this section concerning such evidence.

CREDIT(S)

[1975 1st ex.s. c 14 § 2. Formerly RCW 9.79.150.]

Current with all Legislation from the 2011 2nd Special Session and 2012 Legislation effective through May 31, 2012

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END OF DOCUMENT

APPENDIX “B”

C

West's Revised Code of Washington Annotated Currentness

Title 9. Crimes and Punishments (Refs & Annos)

▣ Chapter 9.94A. Sentencing Reform Act of 1981 (Refs & Annos)

▣ Supervision of Offenders in the Community

→ → **9.94A.703. Community custody--Conditions**

When a court sentences a person to a term of community custody, the court shall impose conditions of community custody as provided in this section.

(1) **Mandatory conditions.** As part of any term of community custody, the court shall:

(a) Require the offender to inform the department of court-ordered treatment upon request by the department;

(b) Require the offender to comply with any conditions imposed by the department under RCW 9.94A.704;

(c) If the offender was sentenced under RCW 9.94A.507 for an offense listed in RCW 9.94A.507(1)(a), and the victim of the offense was under eighteen years of age at the time of the offense, prohibit the offender from residing in a community protection zone;

(d) If the offender was sentenced under RCW 9A.36.120, prohibit the offender from serving in any paid or volunteer capacity where he or she has control or supervision of minors under the age of thirteen.

(2) **Waivable conditions.** Unless waived by the court, as part of any term of community custody, the court shall order an offender to:

(a) Report to and be available for contact with the assigned community corrections officer as directed;

(b) Work at department-approved education, employment, or community restitution, or any combination thereof;

(c) Refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions;

(d) Pay supervision fees as determined by the department; and

(c) Obtain prior approval of the department for the offender's residence location and living arrangements.

(3) **Discretionary conditions.** As part of any term of community custody, the court may order an offender to:

(a) Remain within, or outside of, a specified geographical boundary;

(b) Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals;

(c) Participate in crime-related treatment or counseling services;

(d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;

(e) Refrain from consuming alcohol; or

(f) Comply with any crime-related prohibitions.

(4) **Special conditions.**

(a) In sentencing an offender convicted of a crime of domestic violence, as defined in RCW 10.99.020, if the offender has a minor child, or if the victim of the offense for which the offender was convicted has a minor child, the court may order the offender to participate in a domestic violence perpetrator program approved under RCW 26.50.150.

(b)(i) In sentencing an offender convicted of an alcohol or drug-related traffic offense, the court shall require the offender to complete a diagnostic evaluation by an alcohol or drug dependency agency approved by the department of social and health services or a qualified probation department, defined under RCW 46.61.516, that has been approved by the department of social and health services. If the offense was pursuant to chapter 46.61 RCW, the report shall be forwarded to the department of licensing. If the offender is found to have an alcohol or drug problem that requires treatment, the offender shall complete treatment in a program approved by the department of social and health services under chapter 70.96A RCW. If the offender is found not to have an alcohol or drug problem that requires treatment, the offender shall complete a course in an information school approved by the department of social and health services under chapter 70.96A RCW. The offender shall pay all costs for any evaluation, education, or treatment required by this section, unless the offender is eligible for an existing program offered or approved by the department of social and health services.

(ii) For purposes of this section, "alcohol or drug-related traffic offense" means the following: Driving while under the influence as defined by RCW 46.61.502, actual physical control while under the influence as defined by RCW 46.61.504, vehicular homicide as defined by RCW 46.61.520(1)(a), vehicular assault as defined by RCW

46.61.522(1)(b), homicide by watercraft as defined by RCW 79A.60.050, or assault by watercraft as defined by RCW 79A.60.060.

(iii) This subsection (4)(b) does not require the department of social and health services to add new treatment or assessment facilities nor affect its use of existing programs and facilities authorized by law.

CREDIT(S)

[2009 c 214 § 3, eff. Aug. 1, 2009; 2009 c 28 § 11, eff. Aug. 1, 2009; 2008 c 231 § 9, eff. Aug. 1, 2009.]

Current with all Legislation from the 2011 2nd Special Session and 2012 Legislation effective through May 31, 2012

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PIERCE COUNTY PROSECUTOR

May 31, 2012 - 2:04 PM

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Court of Appeals Case Number: 41939-4

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