

NO. 42054-6-II

COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent

vs.

LEOVIGILDO LEAL-LEON,

Appellant

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APPEAL FROM THE SUPERIOR COURT  
FOR MASON COUNTY  
The Honorable Amber L. Finlay, Judge  
Cause No. 10-1-00247-2

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BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR .....	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	1
C. STATEMENT OF THE CASE.....	2
D. ARGUMENT .....	5
01. REVERSAL IS REQUIRED WHERE LEAL-LEON WAS PREJUDICED AS A RESULT OF HIS COUNSEL’S INEFFECTIVE ASSISTANCE IN FAILING TO OBJECT TO STATEMENTS MADE BY M.A.D. TO A NURSE AT A CHILDREN’S SEXUAL CLINIC WHERE THERE WAS NO EVIDENCE THAT M.A.D. SOUGHT MEDICAL TREATMENT, BUT WAS SENT TO THE CLINIC BY LAW ENFORCEMENT AND THERE WAS A LACK OF EVIDENCE THAT M.A.D. UNDERSTOOD THE MEDICAL PURPOSE OF HER STATEMENTS .....	5
02. THE TRIAL COURT ACTED WITHOUT AUTHORITY IN ORDERING LEAL-LEON (1) NOT TO GO INTO PLACES WHOSE PRIMARY BUSINESS IS THE SALE OF ALCOHOL, (2) NOT TO USE OR ACCESS THE INTERNET, (3) NOT TO PURCHASE, POSSESS OR VIEW PORNOGRAPHIC MATERIALS, (4) TO HAVE A CHEMICAL DEPENDENCY EVALUATION AND (5) NOT TO PURCHASE OR POSSESS ALCOHOL .....	10
E. CONCLUSION .....	14

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Washington Cases</u>	
<u>State v. Armendariz</u> , 160 Wn.2d 106, 156 P.3d 201 (2007).....	14
<u>State v. Bahl</u> , 164 Wn.2d 739, 193 P.3d 678 (2008) .....	12, 13, 14
<u>State v. Butler</u> , 53 Wn. App. 214, 766 P.2d 505, <u>reviewed denied</u> , 112 Wn.2d 1014 (1989) .....	8
<u>State v. Carol M.D.</u> , 89 Wn. App. 77, 948 P.2d 837 (1997).....	7, 8
<u>State v. Doggett</u> , 136 Wn.2d 1019, 967 P.2d 548 (1998).....	7
<u>State v. Doogan</u> , 82 Wn. App. 185, 917 P.2d 155 (1996) .....	6
<u>State v. Early</u> , 70 Wn. App. 452, 853 P.2d 964 (1993), <u>review</u> <u>denied</u> , 123 Wn.2d 1004 (1994) .....	6
<u>State v. Gentry</u> , 125 Wn.2d 570, 888 P.2d 1105 (1995).....	6
<u>State v. Gilmore</u> , 76 Wn.2d 293, 456 P.2d 344 (1969).....	6
<u>State v. Graham</u> , 78 Wn. App. 44, 896 P.2d 704 (1995).....	6
<u>State v. Henderson</u> , 114 Wn.2d 867, 792 P.2d 514 (1990).....	6
<u>State v. Jones</u> , 118 Wn. App. 199, 76 P.3d 258 (2003) .....	11, 12, 13, 14
<u>State v. Julian</u> , 102 Wn. App. 296, 9 P.3d 851 (2000), <u>reviewed denied</u> , 143 Wn.2d 1003 (2001).....	11
<u>State v. Kilgore</u> , 107 Wn. App. 160, 26 P.3d 308 (2001).....	7, 8
<u>State v. Leavitt</u> , 49 Wn. App. 348, 743 P.2d 270 (1987), <u>aff'd</u> , 111 Wn.2d 66, 758 P.2d 982 (1988).....	9
<u>State v. Lopez</u> , 95 Wn. App. 842, 980 P.2d 224 (1999).....	7

<u>State v. Lynch</u> , 176 Wash. 349, 29 P.2d 393 (1934) .....	9
<u>State v. McKee</u> , 141 Wn. App. 22, 167 P.3d 575 (2007) .....	12
<u>State v. O’Caine</u> , 144 Wn. App. 772, 184 P.3d 1262 (2008) .....	13
<u>State v. Riley</u> , 121 Wn.2d 22, 846 P.2d 1365 (1993) .....	11
<u>State v. Sansone</u> , 127 Wn. App. 630, 111 P.3d 1251 (2005).....	13, 14
<u>State v. Tarica</u> , 59 Wn. App. 368, 798 P.2d 296 (1990).....	6
<u>State v. White</u> , 81 Wn.2d 223, 500 P.2d 1242 (1972) .....	6

Statutes

RCW 9.94A.030(10).....	12
RCW 9.94A.607(1).....	14
RCW 9.94A.700(5)(e) .....	11
RCW 9.94B.050(4) .....	12
RCW 9.94B.050(d).....	13
RCW 9.94B.050(e) .....	11
RCW 9A.44.073.....	2
RCW 9A.44.083.....	2
RCW 9A.44.086.....	2
RCW 10.99.020 .....	3

Rules

ER 803(a)(4) .....	6, 7, 8
--------------------	---------

Other

The Gradual Decline of a Hearsay Exception: The Misapplication of Federal Rule of Evidence 803(a)(4), The Medical Diagnosis Hearsay Exception, Robert R. Rugani Jr., 39 Santa Clara L. Rev. 867 (1999) ..... 8

A. ASSIGNMENTS OF ERROR

01. The trial court erred in permitting Leal-Leon to be represented by counsel who provided ineffective assistance by failing to object to hearsay testimony that did not fit within the medical diagnosis exception to the hearsay rule or any other hearsay exception.
02. The trial court erred in imposing a community custody condition prohibiting Leal-Leon from going into places whose primary business is the sale of alcohol.
03. The trial court erred in imposing a community custody condition prohibiting Leal-Leon from using or accessing the internet.
04. The trial court erred in imposing a community custody condition prohibiting Leal-Leon from purchasing, possessing or viewing pornographic materials.
05. The trial court erred in imposing a community custody condition requiring Leal-Leon to have chemical dependency evaluation.
06. The trial court erred in imposing a community custody condition prohibiting Leal-Leon from purchasing or possessing alcohol.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Is an out-of-court statement to a nurse at a children's sexual clinic inadmissible under ER 803(a)(4) or any other hearsay exception where there is no evidence that the child declarant sought medical treatment, but was sent to the clinic by law enforcement and there was a lack of evidence that the child declarant understood the medical purpose of her

statements? [Assignment of Error No. 1].

02. Whether the trial court acted without authority in ordering Leal-Leon (1) not to go into places whose primary business is the sale of alcohol, (2) not to use or access the internet, (3) not to purchase, possess or view pornographic materials, (4) to have a chemical dependency evaluation and (5) not to purchase or possess alcohol? [Assignments of Error Nos. 2-6].

C. STATEMENT OF THE CASE

01. Procedural Facts

Leovigildo Leal-Leon (Leal-Leon) was charged by second amended information filed in Mason County Superior Court on March 8, 2011, with child molestation in the first degree, count I, child molestation in the second degree, count II, and rape of a child in the first degree, count III, contrary to RCWs 9A.44.083, 9A.44.086 and 9A.44.073, respectively. [CP 67-69].

Following a mistrial [RP 77; CP 70], a second trial to a jury commenced on March 15, the Honorable Amber L. Finlay presiding. Neither exceptions nor objections were taken to the jury instructions. [RP 315]. The jury returned verdicts of guilty as charged on counts I and II and not guilty on count III, Leal-Leon was sentenced within his standard range and timely notice of this appeal followed. [CP 4-20, 40-42].

02. Substantive Facts<sup>1</sup>

Thirteen-year-old M.A.D. (dob 03/26/97) disclosed that 36-year-old Leal-Leon began sexually abusing her during the summertime when she was 11 and continued for two years until she was 13. [RP 141-43, 145-46, 148-49, 178, 259]. She described how Leal-Leon had groped her outside of her clothing on her “breasts” and “vagina.” [RP 145-46, 150-51]. This occurred at her sister’s house on the Skokomish Indian Reservation in Mason County. [RP 142-43].

After her sister moved to Shelton toward the end of 2008 [RP 159], during a sleepover on M.A.D.’s 13<sup>th</sup> birthday, Leal-Leon snuck up behind her and touched the back of her legs and her butt while she was sleeping on the kitchen floor with two of her friends, Brianna Reese and Brittany Burton. [RP 149-151]. Reese did not remember Burton being there but did remember waking up because M.A.D. was screaming. [RP 237-38]. Later that morning she heard Leal-Leon say “he was just cooking food in the kitchen.” [RP 239-240]. Reese saw no evidence of this nor did she see anything to indicate anyone had been eating recently. [RP 240-41].

Lisa Wahl, a nurse working for Providence St. Peter’s Hospital in the Pediatric Sexual Clinic, interviewed M.A.D. on September 16, 2010.

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<sup>1</sup> The facts are limited to counts I-II for which Leal-Leon was convicted.

[RP 201-02, 209-210]. M.A.D. described to her how Leal-Leon had “essentially molested her” over time by touching her breasts, thighs, buttocks and vaginal area when she was at her sister’s house. [RP 211-12].

For approximately five years until August 2010, Leal-Leon was out of state with his brother for most of each year harvesting various products in California, Oregon and Idaho, according to his brother’s testimony. [RP 286-88].

Leal-Leon denied all charges [RP 291-92]. During cross-examination, he admitted that starting in 2007 he was in a “year long program” that required him to be in Mason County on a weekly and then monthly basis. [RP 295-96]. He also acknowledged that he “(p)ossibly” appeared in Mason County District Court in August 2008 and February, April and June 2009. [RP 295].

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D. ARGUMENT

01. REVERSAL IS REQUIRED WHERE LEAL-LEON WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S INEFFECTIVE ASSISTANCE IN FAILING TO OBJECT TO STATEMENTS MADE BY M.A.D. TO A NURSE AT A CHILDREN'S SEXUAL CLINIC WHERE THERE WAS NO EVIDENCE THAT M.A.D. SOUGHT MEDICAL TREATMENT, BUT WAS SENT TO THE CLINIC BY LAW ENFORCEMENT AND THERE WAS A LACK OF EVIDENCE THAT M.A.D. UNDERSTOOD THE MEDICAL PURPOSE OF HER STATEMENTS.

Without objection, Lisa Wahl, a nurse in the children's sexual clinic, interviewed M.A.D. on September 16, 2010. [RP 201-02, 209-210]. Child Protection Services (CPS) and law enforcement were involved in sending M.A.D. to Wahl. [RP 210].

She described to me that her boyfriend's - - her sister's boyfriend had, over a period of time, been essentially molesting her. That she described touching over clothing on her breasts, her thighs or buttocks, her vaginal area. And this would happen when she was at her sister's house. When she'd be asleep she'd wake up to being touched. She was - - said this happened several times.

[RP 211-12].

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under

the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error initiated by the defendant, State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105, cert. denied, 116 S. Ct. 131 (1995)); RAP 2.5(a)(3).

ER 803(a)(4) creates an exception to the hearsay rule for statements made for the purpose of medical diagnosis or treatment:

Statements made for the purpose of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general

character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

The declarant's apparent motive must be consistent with receiving treatment and the statements must be information upon which the medical provider reasonably relies to make a diagnosis. State v. Lopez, 95 Wn. App. 842, 849, 980 P.2d 224 (1999). Moreover, the statements are admissible only if the declarant's motive was consistent with promoting treatment and the provider reasonably relied on the statements. State v. Carol M.D., 89 Wn. App. 77, 85, 948 P.2d 837 (1997), rev'd and remanded for reconsideration on other grounds sub nom., State v. Doggett, 136 Wn.2d 1019, 967 P.2d 548 (1998).

In State v. Carol M.D., Division III of this court reversed the trial court's ruling that a nine-year-old child's hearsay statements were admissible under ER 803(a)(4) because there was no showing that the child understood the need for truthfulness to ensure appropriate treatment, even though the child was capable of understanding such a need. Id. at 85-86. Nor should such a motivation be inferred, as Division I did in State v. Kilgore, 107 Wn. App. 160, 26 P.3d 308 (2001), holding that unless the child did not know what the medical provider is supposed to do, the court may infer the child had such a motive, Id., at 184, which, it can be fairly stated, contradicts the intent of the hearsay exception. See Robert R.

Rugani Jr., The Gradual Decline of a Hearsay Exception: The Misapplication of Federal Rule of Evidence 803(a)(4), The Medical Diagnosis Hearsay Exception, 39 Santa Clara L. Rev. 867, 869, 898-901 (1999) (statements by children to health care providers not sufficiently reliable absent proof child understood need to be truthful in providing information). Carol M.D. should trump Kilgore since adherence to the latter abolishes the foundational requirements essential to the validity of ER 803(a)(4).

The motive prong of ER 803(a)(4) is met where the health provider makes clear to the child, and the child manifests an understanding, that the examination is necessary for diagnosis and treatment. State v. Butler, 53 Wn. App. 214, 222, 766 P.2d 505, reviewed denied, 112 Wn.2d 1014 (1989). The record here shows that Wahl did little more than inform M.A.D. to tell her what's been happening and no indication that Wahl relied upon the forthcoming statements or any demonstration that M.A.D. understood the critical cause-and-effect connection between accurate information and the correct diagnosis. [RP 208].

The record does not reveal, nor could it, any tactical or strategic reason why trial counsel failed to properly argue for the exclusion M.A.D. statements to Wahl under ER 803(a)(4).

To establish prejudice a defendant must show a reasonable

probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self-evident. This case was hardly clear-cut, and Wahl's testimony was crucial to the State's case, for the combined testimony of the other witnesses at trial would not be sufficient to convict Leal-Leon. Wahl's testimony was prejudicial, not only because of its content, but because it repeated M.A.D.'s allegations against Leal-Leon, which allowed her testimony to take on greater importance and triggered a prejudicial bolstering effect, serving no other purpose than to provide repetition of her allegations. See State v. Lynch, 176 Wash. 349, 351, 29 P.2d 393 (1934) ("A witness may not fortify his testimony or magnify its weight by showing that he had previously told the same story on another occasion out of court."). The evidence should not have been admitted under the medical diagnosis exception to the hearsay rule or any other hearsay exception, and it is impossible to conclude that a reasonable jury would have reached the same result had the testimony not been given, with the result that this court should reverse and remand for a new trial.

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02. THE TRIAL COURT ACTED WITHOUT AUTHORITY IN ORDERING LEAL-LEON (1) NOT TO GO INTO PLACES WHOSE PRIMARY BUSINESS IS THE SALE OF ALCOHOL, (2) NOT TO USE OR ACCESS THE INTERNET, (3) NOT TO PURCHASE, POSSESS OR VIEW PORNOGRAPHIC MATERIALS, (4) TO HAVE A CHEMICAL DEPENDENCY EVALUATION AND (5) NOT TO PURCHASE OR POSSESS ALCOHOL.

At sentencing, as conditions of community

custody, the court, in part, ordered that Leal-Leon:

- (10) The defendant shall not go into bars, taverns, lounges, or other places whose primary business is the sale of liquor....
- (11) The defendant shall not use or access the internet (including via cellular devices) or any other computer modem without the presence of a responsible adult who is aware of the conviction, and the activity has been approved by the Community Corrections Officer and the sexual offender's treatment therapist in advance....
- (26) The defendant shall not purchase, possess, or view any pornographic materials....
- (28) The defendant shall have a chemical dependency evaluation within 30 days of release from custody, provide a copy of the evaluation to the assigned CCO and successfully participate in and complete all recommended treatment, sign all releases necessary to ensure the CCO can consult with the treatment provider to monitor progress and compliance....
- (29) The defendant shall not purchase, possess or consume alcohol.

[CP 19-20].

A defendant may raise claims relating to sentencing conditions for the first time on appeal. State v. Julian, 102 Wn. App. 296, 304, 9 P.3d 851 (2000), reviewed denied, 143 Wn.2d 1003 (2001); State v. Jones, 118 Wn. App. 199, 204 n.9, 76 P.3d 258 (2003); State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Whether a trial court had statutory authority to impose community custody conditions, is reviewed de novo. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). This court reviews the imposition of community custody conditions for abuse of discretion, reversing only if the decision is manifestly unreasonable or based on untenable grounds. State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). A condition is manifestly unreasonable if it is beyond the court's authority to impose. State v. Jones, 118 Wn. App. at 207-08. When conditions imposed do not relate to the circumstances of the crime, such conditions are unlawful. Id.

The conditions of community custody may include “crime-related prohibitions.” Former RCW 9.94A.700(5)(e), recodified as RCW 9.94B.050(5)(e). 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....” RCW 9.94A.030(10).

02.1 Purchase, Possess or Frequent Places Selling Alcohol

There was no evidence at trial that alcohol played any part in Leal-Leon’s crimes. In Jones, supra, the defendant pleaded guilty to several offenses and the court imposed conditions of community custody relating to alcohol consumption and treatment. As here, nothing in the evidence indicated that alcohol contributed to the defendant’s offenses. State v. Jones, 118 Wn. App. at 207-08. This court found that although the trial court had authority to prohibit consumption of alcohol, it did not have the authority to order the defendant “to participate in alcohol counseling(,)” Id. at 208, reasoning that the legislature intended a trial court to be able “to prohibit the consumption of alcohol regardless of whether alcohol had contributed to the offense.” Id. at 206. In contrast, when ordering participation in treatment or counseling, the treatment or counseling must be related to the crime. Id. at 207-08; see also State v. McKee, 141 Wn. App. 22, 34, 167 P.3d 575 (2007) (community custody provisions prohibiting purchasing and possession of alcohol invalid where alcohol did not play a role in the crime), reviewed denied, 163 Wn.2d 1049 (2008). And while RCW 9.94B.050(4) outlines various conditions

that are mandatory unless waived by the court, one of which under subsection (c) that the “offender shall not possess or consume controlled substances(,)” there is no mandatory condition under this authority that an offender “not possess or consume any mind or mood-altering substances, to include the drug alcohol....”

Here, while the condition prohibiting Leal-Leon from consuming alcohol is valid since it need not be crime-related per RCW 9.94B.050(5)(d) and Jones, 118 Wn. App. at 206-07, the conditions prohibiting Leal-Leon from purchasing or possessing alcohol or from frequenting places selling alcohol are invalid because there was no evidence that alcohol played any part in Leal-Leon’s offenses.

#### 02.2 Use or Access Internet

Since there was no evidence that access to the internet was crime related to Leal-Leon’s convictions, this condition must be stricken. See State v. O’Caine, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (striking condition prohibiting internet access for lack of evidence that it was crime related).

#### 02.3 Pornographic Materials

The term “pornography” or “pornographic material” is unconstitutionally vague. State v. Bahl, 164 Wn.2d at 754-56. In State v. Sansone, 127 Wn. App. 630, 638-641, 111 P.3d 1251 (2005),

Division I of this court held that such a condition<sup>2</sup> violated due process because it was unconstitutionally vague.

Additionally, in Bahl, our Supreme Court held that pre-enforcement challenges to similar conditions were properly raised, even if it was left to a third party to determine what satisfied the condition. Bahl, 164 Wn.2d at 754-52, 758.

Here, because the condition does not define pornography and is thus unconstitutionally vague, it must be stricken. See State v. Sansone, 127 Wn. App. at 643.

#### 02.4 Chemical Dependency Evaluation

This condition is not supported by the record and must be stricken. See RCW 9.94.607(1) (court may order evaluation etc. if it finds “the offender has a chemical dependency that has contributed to his or her offense”), State v. Jones, 118 Wn. App. at 199 (if evidence shows that alcohol contributed to the offense, an alcohol evaluation and treatment may be ordered).

#### E. CONCLUSION

Based on the above, Leal-Leon respectfully requests this

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<sup>2</sup> Sansone was “not (to) possesses or peruse pornographic materials unless given prior approval by (his) sexual deviancy treatment specialist and/or (CCO). Pornographic materials are to be defined by the therapist and/or (CCO).” Sansone, 127 Wn. App. 642-43.

court to reverse his convictions or remand to strike the community custody conditions consistent with the arguments presented herein.

DATED this 4<sup>th</sup> day of October 2011.

Respectfully submitted,

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CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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DATED this 4<sup>th</sup> day of October 2011.

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# DOYLE LAW OFFICE

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