

COA NO. 45733-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID NEASE,

Appellant.

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

The Honorable Marilyn K. Haan, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct violated appellant's due process right to a fair trial.
2. Defense counsel provided ineffective assistance in failing to object to prosecutorial misconduct.
3. The court violated appellant's constitutional right to a public trial during the jury selection process.
4. The court erred in imposing the following condition of community custody: "Do not use/possess . . . alcohol." CP 58.
5. The court erred in imposing the following condition of community custody: "Submit to . . . a plethysmograph as directed by Corrections Officer[.]" CP 54.

Issues Pertaining to Assignments of Error

1. Whether the prosecutor committed prejudicial misconduct during closing argument in misstating the reasonable doubt standard, misstating what was needed to prove appellant's affirmative defense, and disparaging defense counsel?
2. Whether counsel was ineffective in failing to object to prosecutorial misconduct where no legitimate reason justified the failure?
3. Whether the court violated appellant's constitutional right to a public trial when it conducted the peremptory challenge portion of the

jury selection process in private without addressing the requisite factors to justify closure?

4. Whether the court lacked authority to prohibit appellant from using or possessing alcohol as a condition of community custody because appellant did not use alcohol in relation to the offense?

5. Whether the community custody condition requiring submission to plethysmograph examination at the direction of the corrections officer must be stricken as an unconstitutional bodily intrusion?

B. STATEMENT OF THE CASE

The State charged David Nease with second degree rape (count I) and indecent liberties (count II) against Toni Vossen, alleging the latter was mentally incapacitated or physically helpless at the time. CP 1-2. The case proceeded to a jury trial, at which the following evidence was produced.

i. *Background*

Vossen had known Nease for about 10 years. 3RP¹ 9. Nease lived in a building on the property of Russell Butler. 2RP 88. Butler lived in a separate structure. 2RP 89. Vossen, who was homeless, had an agreement

¹ The verbatim report of proceedings is referenced as follows: 1RP - 11/5/13 (jury voir dire); 2RP - 11/5/13 (pretrial/trial); 3RP - one volume consisting of 11/6/13 and 12/9/13.

with Butler to do some work on his property in exchange for a car. 2RP 90, 95-96; 3RP 10-12.

ii. *Vossen's testimony*

On April 15, 2012, Nease picked Vossen up at a motel and gave her a ride to his residence so that she could work at Butler's house the next day. 3RP 10-12. Vossen took a stimulant drug before heading out with Nease. 3RP 29. She felt tired by the time she arrived. 3RP 13. Vossen believed that Nease had surreptitiously drugged her during the drive over. 3RP 29-30.

She "passed out" on his bed, fully clothed. 3RP 13-14. She woke up later without pants or underwear. 3RP 15. Nease was at the end of the bed. 3RP 15. Nease said he "didn't do anything." 3RP 15. Vossen claimed she later started to remember certain things in snippets or snapshots. 3RP 19, 23. She remembered freaking out about her clothes, asking where they were. 3RP 23-24. She asserted "then he was licking me, and I was like: No, don't, don't." 3RP 24. He was licking her vagina. 3RP 34. She was "barely" awake. 3RP 28. He had already started when she realized what he was doing. 3RP 34. She had a memory of Nease performing oral sex on her. 3RP 27. She did not give him permission to do that. 3RP 24. She put her pants back on. 3RP 26-27.

Vossen fell back asleep. 3RP 24, 26-27. When she woke up again, Nease was on top of her. 3RP 24. She felt pressure on her neck. 3RP 24. She passed back out. 3RP 24. She woke up later with pain in her neck, feeling dizzy. 3RP 17. Her neck was red and irritated. 3RP 18. She got up and went to Butler's house. 3RP 17. In the bathroom, she noticed her pants were dirty and had red on them. 3RP 18-19. She felt numb and confused. 3RP 19. Things were "foggy" and she "did not remember much." 3RP 19. She was not "fully awake" when any of this happened. 3RP 24. She called for a friend to pick her up. 3RP 20.²

On April 16, she went to the Family Health Center. 3RP 20. She felt like she had been choked and her neck hurt. 3RP 20. She told the nurse of her belief that she had been raped. 3RP 21. The nurse directed her to St. John's Hospital, but she did not immediately go there.³ 3RP 21. She waited three weeks. 3RP 21, 30. She reported the incident to the police on April 22. 3RP 21-22, 31.

² Butler testified that Vossen came over and asked him to look at her neck, saying it hurt a little bit. 2RP 91. Before leaving with the person she called, Vossen and Butler watched television together. 2RP 95-96. She did not seem distressed, although she was concerned about having what she called a heat rash on her neck. 2RP 96.

³ The nurse that saw Vossen at the Family Health Center testified that Vossen complained about swollen glands and a pain in her neck. 2RP 76-79. Vossen also expressed a feeling that she had been raped, having awoken without pants on. 2RP 77.

iii. *Investigation*

Deputy Hammer met with Nease on May 8, at which time Nease gave his initial version of events. 3RP 45, 48. Nease said he brought Vossen over to his residence, where she fell asleep. 3RP 45, 51. He lay down on the couch. 3RP 51. In the morning, he left to do some babysitting next door. 3RP 51. Upon his return at 6 p.m., Vossen was awake, complaining that her neck hurt. 3RP 52. She acted distant towards him and asked "What did you do, choke me out?" 3RP 52. Nease replied that he did not know what she was talking about. 3RP 52. They played video games for a couple hours and then she left. 3RP 52.

Nease later voluntarily provided a DNA sample upon the deputy's request. 3RP 53, 67. Nease's DNA was found on the fly area of Vossen's pants. 3RP 76-77. A red/brown area from which the sample was taken tested presumptively positive for blood. 3RP 76-77. The amount of DNA present was consistent with transfer from a body fluid. 3RP 80-81. No semen was present. 3RP 78-79.

Deputy Hammer spoke with Nease again on February 18, 2013, by which time the DNA lab results were available. 3RP 53. After being told his DNA was found on Vossen's pants, Nease said he climbed into bed with Vossen at around 7 a.m., removed her panties and performed oral sex on her. 3RP 58. She moaned and he felt that she was enjoying it. 3RP 59.

He believed the sex was consensual. 3RP 59. She did not protest. 3RP 61. He was not sure if Vossen was asleep or not when he removed her pants/underwear and began oral sex on her. 3RP 59-60. They had not discussed having sex before he started the oral sex. 3RP 59. He had not earlier admitted to performing oral sex on Vossen because he heard of the accusation from a bartender that he drugged and raped her, and was afraid that by admitting oral sex took place that he would be admitting to those accusations as well. 3RP 61-62.

Nease's written statement to police was entered as an exhibit at trial. Ex. 4. Nease wrote in part that "Toni was in my bed sleeping. I laid down next to her[.] I removed her panties and started to perform oral sex on her[.] She moaned and I felt that she enjoyed it and that it was consensual[.]" Ex. 4.

iv. *Theories and Outcome*

In closing argument, the State specified the basis for the indecent liberties count was the removing of the underwear and the basis for the rape count was the oral sex. 3RP 113. The State argued Nease was guilty of rape because Vossen was asleep when he pulled off her underwear and started oral sex. 3RP 117, 126. Defense counsel argued the State could not prove beyond a reasonable doubt that Vossen was asleep when these acts occurred. 3RP 128-29, 138-39. The jury was instructed on the

affirmative defense that Nease reasonably believed Vossen was not mentally incapacitated or physically helpless. CP 29.

The jury convicted on both counts. CP 32-33. Treating the two offenses as same criminal conduct, the court imposed an indeterminate sentence of 100 months to life confinement on count I, 15 months confinement on count II, and a life term of community custody for any period following release. CP 49, 52; 3RP 157. This appeal follows. CP 62-78.

C. ARGUMENT

1. PROSECUTORIAL MISCONDUCT DEPRIVED NEASE OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

Prosecutorial misconduct violates the due process right to a fair trial when there is substantial likelihood the prosecutor's misconduct affected the jury's verdict. Greer v. Miller, 483 U.S. 756, 765, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987); State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend. XIV; Wash. Const. art. 1, § 3. Prosecutors may not argue the reasonable doubt standard is equivalent to knowing the defendant is guilty based on what a juror's heart or gut says. The prosecutor undermined the burden of proof beyond a reasonable doubt by making this argument. The prosecutor committed further misconduct by misstating the law on Nease's affirmative defense and denigrating

defense counsel. Reversal of the convictions is required because the misconduct was prejudicial. In the alternative, counsel was ineffective in failing to object to the misconduct and seek curative instruction.

a. The Prosecutor Committed Misconduct By Equating Proof Beyond Reasonable Doubt With A Feeling In The Heart And Gut.

"Statements by the prosecution or defense to the jury upon the law, must be confined to the law as set forth in the instructions given by the court." Davenport, 100 Wn.2d at 760. A prosecutor's misstatement of the law is a particularly serious error with "grave potential to mislead the jury." Id. at 763. In keeping with that principle, arguments by the prosecution that misstate the State's burden to prove the defendant's guilt beyond a reasonable doubt constitute misconduct. State v. Lindsay, __Wn.2d__, __P.3d__, 2014 WL 1848454 at *5 (2014). "Due process requires the prosecution to prove, beyond a reasonable doubt, every element necessary to constitute the crime with which the defendant is charged. Misstating the basis on which a jury can acquit insidiously shifts the requirement that the State prove the defendant's guilt beyond a reasonable doubt." In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 713, 286 P.3d 673 (2012).

In closing argument, defense counsel suggested the jury start the process of deliberation by talking about doubt, listening to whoever has a

doubt, and keep "wrestling with that doubt" unless a point is reached where the person expressing a doubt is not being reasonable. 3RP 138-39. Counsel said the jury could not convict unless "you can look everybody in the eye who is either saying that they have a doubt and say to that person you're not being reasonable or you have moved past that and nobody has a doubt to express anymore." 3RP 139.

In rebuttal, the prosecutor began by reciting the reasonable doubt instruction and then breaking down its meaning as follows:

First, an abiding belief in the truth of the charge. What does your head, *what does your heart, what does your gut say? Okay. If it says that he's guilty, then you are convinced beyond a reasonable doubt.* Defense counsel says that if you can look at each other and say you're not being reasonable, then you are convinced beyond a reasonable doubt, but that's not what the instruction says. All of the instructions say that you should consider all of the evidence, you should talk to one another, okay.

A reasonable doubt is one for which a reason exists. You don't have to look at that person and say you're unreasonable. You're not required to name-call, you're not required to take on any person, but a reasonable doubt is based on fully, fairly and carefully considering all the evidence. If you do that and you have a reasonable doubt, that is what the instruction says not the evidence, but if you have an abiding belief in the truth of the charge you are convinced.

3RP 140-41 (emphasis added).

The prosecutor misstated the burden of proof in equating beyond a reasonable doubt with whether a juror's heart or gut said Nease was guilty.

The presumption of innocence and the corresponding burden to prove every element of the crime charged beyond a reasonable doubt is the "bedrock upon which the criminal justice system stands." State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). The determination of guilt beyond a reasonable doubt as to each element of a crime cannot be based upon what is in a juror's heart or a juror's individual "gut feeling." United States v. Hernandez, 176 F.3d 719, 731 (3d Cir. 1999). Although a juror must subjectively believe a defendant has been proven guilty, that subjective belief must be based upon a reasoned, objective evaluation of the evidence. Hernandez, 176 F.3d at 732. Whether the accused is guilty beyond a reasonable doubt does not, as urged by the prosecutor, come down to whether a juror feels the accused is guilty in the heart or gut.

Allowing a jury to determine reasonable doubt as to each element of a crime based upon a gut feeling clearly misleads the jury by inviting "each juror to judge the evidence by a visceral standard unique to that juror rather than an objective heightened standard of proof applicable to each juror." Id. at 731. "Giving way to a 'gut feeling' is the antithesis of reason." State v. Schnabel, 127 Haw. 432, 452, 279 P.3d 1237 (Haw. 2012) (prosecutor misstated law and committed misconduct in telling jurors to decide the case by "gut feeling," imploring each juror to "dig

deep down inside and ask yourself," "based on your gut feeling[,] . . . Is he guilty?").

"Any prosecutor reasonably knows that a 'gut feeling' of guilt is not certainty beyond a reasonable doubt and that such an assertion should never be made to a jury." Randolph v. State, 117 Nev. 970, 982, 36 P.3d 424 (Nev. 2001). Such remarks are patently inadequate to convey to the jury its duty to reach a "subjective state of near certitude" to find guilt. Randolph, 117 Nev. at 982; see also State v. Oxier, 175 W. Va. 760, 764, 338 S.E.2d 360 (W. Va. 1985) (prosecutor's exhortation to treat concept of proof beyond a reasonable doubt like an intuition or a gut reaction was "directed at having the jury disregard one of the most fundamental concepts in the criminal law — the State must prove its case beyond a reasonable doubt."); State v. McMillan, 44 Kan. App.2d 913, 921, 242 P.3d 203 (Kan. Ct. App. 2010) ("It is improper to ask jurors to decide whether reasonable doubt exists based upon feelings in their heart or gut."), review denied, 291 Kan. 915 (2011); Carrero-Vasquez v. State, 210 Md. App. 504, 511, 63 A.3d 647 (Md. Ct. App. 2013) (prosecutorial argument equating as gut feeling with proof beyond a reasonable doubt is "clearly improper for the simple reason that it misstates the law as to reasonable doubt, an evidentiary standard that is the cornerstone of a fair criminal trial.").

While the prosecutor is entitled to make a fair response to defense counsel's argument, the prosecutor's misstatement of the burden of proof does not qualify as one. A prosecutor's remarks made in direct response to defense argument may not go beyond what is necessary to respond to the defense. State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 756 (2005), review denied, 156 Wn.2d 1004, 128 P.3d 1239 (2006). Remarks provoked by defense counsel are grounds for reversal if the remarks are not a pertinent reply. State v. Jones, 144 Wn. App. 284, 299, 183 P.3d 307 (2008). Wrongly comparing the reasonable doubt standard to what is felt in the heart and gut was not a pertinent reply to defense counsel's remarks, which did not seek to equate the burden of proof with a visceral response. It is not necessary or pertinent to respond to defense counsel's proper closing argument with an improper argument, especially one that undermines the bedrock upon which the criminal justice system stands. See Davenport, 100 Wn.2d at 760 (response was improper despite being invited by adversary in closing argument because it exceeded scope of provocation).

b. The Prosecutor Committed Misconduct By Misstating Nease's Burden Of Proving His Affirmative Defense.

The prosecutor committed further misconduct by misstating the law on what Nease needed to prove for his affirmative defense to succeed.

Davenport, 100 Wn.2d at 760. Under the law, a defendant need only prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated or physically helpless. The prosecutor, however, grafted an additional requirement in closing argument: proof that the victim was in fact not physically helpless, i.e., asleep. 3RP 125.

A person commits second degree rape by engaging in sexual intercourse with another person "[w]hen the victim is incapable of consent by reason of being physically helpless or mentally incapacitated." RCW 9A.44.050(1)(b). A person commits indecent liberties when he knowingly causes another person to have sexual contact with him "[w]hen the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless." RCW 9A.44.100(1)(b). Sleep is considered a state in which a person is physically helpless. State v. Mohamed, 175 Wn. App. 45, 58-59, 301 P.3d 504 (2013) (citing State v. Puapuaga, 54 Wn. App. 857, 861, 776 P.2d 170 (1989)); see RCW 9A.44.010(5) ("Physically helpless' means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.").

RCW 9A.44.030(1) provides "In any prosecution under this chapter in which lack of consent is based solely upon the victim's mental

incapacity or upon the victim's being physically helpless, it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless." The jury was instructed consistent with this affirmative defense. CP 29 (Instruction 18).

The prosecutor, however, argued that Nease also needed to prove that Vossen was in fact not sleeping at the time to establish the affirmative defense:

One of the things that you're instructed on, a defendant has the burden of proving by a preponderance of the evidence that at any time the defendant reasonably believed that Toni Vossen was not mentally defective, mentally incapacitated and physically helpless. Okay. *He has to show that it was more probably than not true that she was awake. That's what that means. He hasn't done it.* Okay. Because Toni Vossen testified that she was asleep. He put in his written statement that she was asleep, that he took off her underwear and performed oral sex on her and she moaned. Okay. Is it reasonable to believe that she moans prior to that happening? No, because that's not what he says. He's performing oral sex on her and she moans. Is a moan awake? No. Would a reasonable person believe she was awake? No. *Is it more probably true that she was awake than sleep? No.*

3RP 125 (emphasis added).

This was a misstatement of the law. In order to establish his affirmative defense, Nease only needed to prove that he had reasonable belief that Vossen was not asleep. He did not need to prove Vossen was in

fact awake in addition to having the reasonable belief that she was awake as part of the affirmative defense. RCW 9A.44.030(1).

c. The Prosecutor Committed Misconduct In Disparaging Defense Counsel.

Every criminal defendant has the due process and Sixth Amendment right to present a defense. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); U.S. Const. amend. VI and XIV; Wash. Const. art. 1, §§ 3, 22. "In our adversarial system, defense counsel is not only permitted but is expected to be a zealous advocate for the defendant." Walker v. State, 790 A.2d 1214, 1218 (Del. 2002). No prosecutor may employ language that "limits the fundamental due process right of an accused to present a vigorous defense." Sizemore v. Fletcher, 921 F.2d 667, 671 (6th Cir. 1990).

It is therefore misconduct for a prosecutor to disparage defense counsel's integrity. State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008), cert. denied, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009); State v. Thorgerson, 172 Wn.2d 438, 451, 258 P.3d 43 (2011); Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983). "Prosecutorial statements that malign defence counsel can severely damage an accused's opportunity to present his or her case and are therefore impermissible." Lindsay, 2014

WL 1848454 at *4. A prosecutor's use of language that implies deception and dishonesty on the part of defense counsel is improper. *Id.* (calling counsel's argument a "crook"); *Thorgerson*, 172 Wn.2d 438, 451-52 (referring to defense counsel's presentation as involving "sleight of hand").

The prosecutor improperly conveyed a message that defense counsel was seeking to mislead the jury on a number of occasions.

In closing argument, defense counsel acknowledged that Nease's failure to be upfront with Deputy Hammer about having oral sex was a "mistake" and "just as consistent with the mistake that an innocent person who's scared to death of rumors going around would make as with a guilty person." 3RP 127-28.

In rebuttal, the prosecutor argued as follows:

We talked a little bit about the defendant's statement, and defense counsel opened up about saying, well, you know, he was misguided, he lied to the officer, but what was interesting is defense counsel never used the word "lie." He said the defendant was mistaken. Think about all your definitions of the term "mistake." Does lie come into that? Is lie an accident? Is lie inadvertent? No. A lie is intentional, and that's exactly what he did, he intentionally told Deputy Hammer that he didn't have sex with her, that they hadn't even kissed. That is not a mistake. So what does that tell you about everything the defendant has said in this case and even about defense counsel's argument? If he is telling you a lie is a mistake, why should you believe what he says? He's not being upfront with that. You have no evidence this was a mistake. The evidence that you do have is in the defendant's own words. He said that I should have admitted to it and that he misinformed the deputy.

Misinformed? Again, that minimizing language. So what else has the defendant minimized?

3RP 141-42 (emphasis added).

At this point, defense counsel requested a sidebar, which was later put on the record. 3RP 142, 149-51. Counsel objected, believing the prosecutor had impugned his credibility. 3RP 149-50. The court did not believe the prosecutor commented on counsel's credibility and did not give any additional direction. 3RP 150.

It is clear that the prosecutor impugned defense counsel's integrity. The prosecutor was not simply talking about Nease's statement to police. The prosecutor identified counsel as the one who used the word "mistake" instead of "lie" in his closing argument. 3RP 141. The prosecutor rhetorically asked, "what does that tell you does that tell you about everything the defendant has said in this case *and even about defense counsel's argument?*" Id. It was not Nease who was "telling you a lie is a mistake." Id. Nease did not testify and Nease did not use the word "mistake" in his statement to police. No, it was defense counsel: "If he is telling you a lie is a mistake, why should you believe what he says? He's not being upfront with that." Id. In this manner, the prosecutor conveyed a message to the jury that defense counsel was attempting to hoodwink the jury. The implication of deception and dishonesty on the part of defense

counsel is improper. Lindsay, 2014 WL 1848454 at *4; Thorgerson, 172 Wn.2d 438, 451-52.

The prosecutor did not stop there. The prosecutor also told the jury that whether Vossen was drugged was a "red herring" because the State did not need to prove she was drugged. 3RP 125. Defense counsel had elicited this evidence in his cross examination of Vossen. 3RP 29-30. In rebuttal, the prosecutor returned to this theme: "Defense counsel pointed you there, which the State was worried about, which is why we said don't get caught up in that." 3RP 144. In this manner, the prosecutor again played on the sense that defense counsel was trying to confuse the jury. A red herring is "a diversion intended to distract attention from the real issue." Webster's Third New Int'l Dictionary 1902 (1993).

With reference to defense counsel's talk about the timing of when "all of this happens," the prosecutor said everything besides Nease's "confession" were "red herrings." 3RP 144-45.

The prosecutor continued: "He says start with doubt. The officer should have gone back to talk to Vossen about if they were hanging out, really? She [sic] just confessed. What does that do? *That's a misdirection. A misdirection* of look here at the officer, what the officer didn't do rather than focusing on the evidence that you do have. Because if the officer had gone back and said to Ms. Vossen, well, did you hang

out, she would have said no, just like she told you. *So what's he doing there? Misdirection. Focus on something that's not necessary and don't focus on true evidence, the true evidence of his client'[s] confession.*" 3RP 146 (emphasis added).

The prosecutor maligned defense counsel in telling the jury that counsel was "not being upfront" with the jury (3RP 141), raising red herrings (3RP 125, 144-45), and misdirecting the jury (3RP 146). The prosecutor is entitled to make a fair response to the arguments of defense counsel. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). But the prosecutor cannot disparage the integrity of defense counsel in responding. That is unfair. That is what happened here.

The word "mistake" has different meanings, one of which is to "to choose wrongly : blunder in the choice." Webster's Third New Int'l Dictionary 1446 (1993). In context, defense counsel was telling the jury that Nease exercised poor judgment in not telling Deputy Hammer the whole story when they first spoke, in an effort to explain to the jury why it was not dispositive evidence of guilt but rather an understandable response to the fear of being wrongly accused. 3RP 127-28. The prosecutor, however, treated counsel's effort as an attempt to mislead the jury: "He's not being upfront with that." 3RP 141. There was no need for that. The prosecutor and the defense are entitled to attach different meanings to a

piece of evidence. Such disagreement is par for the course. Each side can properly draw reasonable inferences from the evidence and those inferences will often differ. Such is the nature of the adversarial system. But what a fair adversarial system will not tolerate is disparagement of defense counsel simply because he chooses to interpret a piece of evidence differently than the prosecutor.

As for the "red herring" comments, the first one came in the prosecutor's opening salvo, before defense counsel offered argument, and was therefore not responsive in any sense. 3RP 125. Further, it was a legitimate tactic for the defense to later comment on Vossen's uncorroborated drugging allegation to impeach her credibility in a case where her credibility was central to the outcome.⁴ 3RP 129-31. Similarly, it was proper for defense counsel to question Vossen's behavior in relation to the timing of events because that also went to the credibility of her account. 3RP 132-33. The prosecutor could have fairly responded by putting his own spin on the significance of this evidence. What he did not need to do was accuse defense counsel of using red herrings to mislead the jury.

⁴ The State did not offer evidence of Vossen's drugging allegation because "we have no evidence via a blood test or results that it happened." 2RP 4-5.

It was also proper for the defense to question why the police did not follow up on Nease's statement that Vossen hung out with him playing video games. 3RP 133-34. It is a common, and legitimate, trial tactic of defense lawyers to discredit the manner, quality, and thoroughness of the police investigation. Bowen v. Maynard, 799 F.2d 593, 613 (10th Cir. 1986); see also Kyles v. Whitley, 514 U.S. 419, 443, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) (information that might "have raised opportunities to attack . . . the thoroughness and even good faith of the investigation" constitutes exculpatory, material evidence). Whether Vossen hung out with Nease after the alleged events at issue took place goes to her credibility and, by extension, the credibility of a police investigation that stopped short of questioning Vossen about that allegation. The prosecutor went beyond a fair and pertinent reply in accusing counsel of misdirecting the jury in relation to the issue.

e. Reversal Of The Convictions Is Required.

Defense counsel objected to the prosecutor's argument that counsel was not being upfront with the jury. 3RP 142, 149-51. When the defense objects to prosecutorial misconduct, reversal is required if there is a substantial likelihood that the misconduct affected the jury's verdict. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

There is a substantial likelihood that the State's disparagement of defense counsel, to which objection was lodged, affected the outcome. The State's case against Nease was not overwhelming. This was primarily a credibility contest. Vossen claimed lack of consent and that she did not realize he had already started oral sex before she realized what he was doing. 3RP 24, 34. At one point during cross examination, she claimed to have a completely clear recollection about the oral sex. 3RP 27.

Vossen elsewhere acknowledged her memory was impaired in that she gradually remembered things only in snippets or snapshots after the fact. 3RP 19, 23. She admitted being "barely" awake and not "fully awake," i.e., not asleep. 3RP 24, 28. Significantly, at one point in her testimony she described Nease performing oral sex on her *after* she woke up and noticed her clothes were missing: "I remembered waking up and freaking out: Where are my fucking pants, David? Why are they off me? I don't understand. And then I -- and then he was on top of me -- or, no, *then* he was licking me, and I was like: No, don't, don't." 3RP 23-24 (emphasis added). Nease, in his statements to police, claimed Vossen consented because she moaned and seemed to enjoy it. 3RP 59; Ex. 4. The State's case against Nease had its weaknesses.

Reviewing claims of prosecutorial misconduct is not a matter of determining whether there is sufficient evidence to convict. Glasmann,

175 Wn.2d at 710. Rather, the question is whether there is a substantial likelihood that the instances of misconduct affected the jury's verdict. Id. at 711. Statements made during closing argument are intended to influence the jury. State v. Reed, 102 Wn.2d 140, 146, 684 P.2d 699 (1984). Prosecutors, in their quasi-judicial capacity, usually exercise a great deal of influence over jurors. State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956). The prosecutor's disparagement of defense counsel, by conveying a message that counsel was not to be trusted, may have swayed the jury into discounting the defense theory of the case that the State had failed in its proof or that Nease had proved his affirmative defense.

Although counsel explained that he did not request a curative instruction or mistrial because the misconduct was not "that bad," it was bad enough that he rightly felt the need to object. 3RP 150. Whether there is a substantial likelihood that the misconduct affected the verdict does not turn on trial counsel's subjective assessment of the situation, but whether the court on appeal believes the requisite prejudice exists. Counsel's lack of request for a curative instruction is neither here nor there. Because the trial court found nothing wrong with the prosecutor's argument, there was nothing to cure in the court's view. 3RP 150.

Counsel did not object to the other improper arguments. In the absence of objection, appellate review is not precluded if the misconduct is so flagrant and ill-intentioned that no curative instruction could have erased the prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). When applying this standard, reviewing courts should "focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." Emery, 174 Wn.2d at 762.

Prosecutorial misconduct in some circumstances can be so prejudicial that neither objection nor instruction can cure it. State v. Stith, 71 Wn. App. 14, 23, 856 P.2d 415 (1993) (prosecutor's personal assurance of defendant's guilt was flagrant misconduct requiring reversal). Further, "the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." Glasmann, 175 Wn.2d at 707 (quoting State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011)).

Disregard of a well-established rule of law is deemed flagrant and ill-intentioned misconduct. State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018, 936 P.2d 417 (1997). A prosecutor's misconduct is similarly flagrant and ill-intentioned where

case law and professional standards are available to the prosecutor and clearly warned against the conduct. Glasmann, 175 Wn.2d at 707.

Case law in existence before Nease's trial clearly warned against arguments that misstate the law, including the burden of proof, and that denigrate defense counsel. Warren, 165 Wn.2d at 29-30; Thorgerson, 172 Wn.2d at 451; State v. Lindsay, 171 Wn. App. 808, 827, 288 P.3d 641 (2012), rev'd on other grounds, __ Wn.2d __, __ P.3d __, 2014 WL 1848454 (2014) (reversing Court of Appeals decision that misconduct did not require new trial). The prosecutor's conduct must therefore be deemed flagrant and ill-intentioned. Again, the cumulative effect of misconduct may be so flagrant that no instruction can erase its combined prejudicial effect. Glasmann, 175 Wn.2d at 707. The prosecutor's misstatement of the burden of proof, misstatement of what is required to prove the affirmative defense, and disparagement of defense counsel combine to create a cumulative prejudicial force that deprived Nease of his due process right to a fair trial.

The prosecutor's remarks in this case were not accidental and were designed to win conviction. Trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case. Fleming, 83 Wn.

App. at 215. As set forth above, the evidence against Nease was not overwhelming. Reversal is appropriate where, as here, the reviewing court is unable to conclude from the record whether the jury would have reached its verdicts but for the misconduct. State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

f. In The Alternative, Counsel Was Ineffective In Failing To Object To The Misconduct Or Request Curative Instruction.

In the event this Court finds proper objection or request for a curative instruction could have cured the prejudice, then defense counsel was ineffective in failing to take such action. Every criminal defendant is guaranteed the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Wash. Const., art. I, § 22. Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687. Only legitimate trial strategy or tactics constitute reasonable performance. State v. Kyllo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009).

The most obvious responsibility for putting a stop to prosecutorial misconduct "lies with the State, in its obligation to demand careful and dignified conduct from its representatives in court. Equally important,

defense counsel should be aware of the law and make timely objection when the prosecutor crosses the line." State v. Neidigh, 78 Wn. App. 71, 79, 95 P.2d 423 (1995). No legitimate reason supported the failure of counsel to properly object and request curative instruction given the prejudicial nature of the prosecutor's improper comments.

If a curative instruction could have erased the prejudice resulting from the prosecutor's misconduct, then counsel was deficient in failing to request such instruction. See State v. Horton, 116 Wn. App. 909, 921-22, 68 P.3d 1145 (2003) (defense counsel deficient in failing to object to prosecutor's improperly expressed personal opinion about defendant's credibility during closing argument); Warren, 165 Wn.2d at 26-28 (prosecutor's misstatement of the burden of proof and presumption of innocence during closing argument did not require reversal only because the court gave a strongly worded curative instruction); Randolph, 117 Nev. at 981 (harmless error where the prosecutor equated the beyond a reasonable doubt standard to a "gut feeling" but the trial court promptly struck the comment).

Counsel's performance here fell below an objective standard of reasonableness. The prosecutor's comments were clearly improper. If an objection and instruction could have redirected the jury to the proper considerations and cured the prejudice resulting from the improper

comments, then counsel had no legitimate tactical reason for not objecting.

The first prong of the ineffective assistance test is met. When a reviewing court decides misconduct occurred and instruction could have cured the prejudice resulting from that misconduct, it necessarily recognizes the presence of prejudice that was susceptible to cure. No legitimate strategy justified allowing the prosecutor's prejudicial comments to fester in juror's minds without court instruction that the improper comments should be disregarded. Defense attorneys must be ever vigilant in defending their clients' rights to fair trial, including being aware of the law and making timely objections in response to misconduct. Neidigh, 78 Wn. App. at 79. Such vigilance is necessary to allow the trial court to cure prejudice at the time of trial.

The less than overwhelming case presented by the State rendered Nease's trial vulnerable to prejudicial comments unfairly tipping the jury in favor of the State. Reversal is required where defense counsel incompetently fails to object to prosecutorial misconduct and there is a reasonable probability the failure to object affected the outcome. A new trial is required here because defense counsel was ineffective in failing to object to the prosecutorial misconduct and request curative instruction.

2. THE COURT VIOLATED NEASE'S RIGHT TO A PUBLIC TRIAL WHEN IT CONDUCTED A PORTION OF THE JURY SELECTION PROCESS IN PRIVATE.

The court erred in conducting the peremptory challenge portion of the jury selection process in private without justifying the closure under the standard established by Washington Supreme Court and United States Supreme Court precedent. This structural error requires reversal of the convictions.

a. Peremptory Challenges Were Not Exercised In Open Court.

Following questioning of the venire panel, the court announced, "All right. So the attorneys are going to start their selection process at this time." 1RP 150. The attorneys then exercised their peremptory challenges off the record, indicated by a "pause in proceedings" in the transcript. 1RP 150. After the peremptory process was finished, the court announced the names of all the prospective jurors that were excused from further service on the case — 37 in all. 1RP 150-51. The court then announced the names of those who were to sit as the impaneled jury. 1RP 151.

At no time did the court announce in open court which party had removed which potential jurors as part of the peremptory challenge process. A "struck juror list" was filed. CP 80. But it was never

announced in open court that such a document had been filed or was available for immediate viewing.

b. The Public Trial Right Attaches To The Peremptory Challenge Process Because It Is An Integral Part Of Jury Selection.

The federal and state constitutions guarantee the right to a public trial to every defendant. U.S. Const. amend VI; Wash. Const. art I, § 22. Additionally, article I, section 10 expressly guarantees to the public and press the right to open court proceedings. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). Whether a trial court has violated the defendant's right to a public trial is a question of law reviewed de novo. Easterling, 157 Wn.2d at 173-74.

The right to a public trial is the right to have a trial open to the public. In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004). This is a core safeguard in our system of justice. State v. Wise, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). The open and public judicial process helps assure fair trials, deters misconduct by participants, and tempers biases and undue partiality. Wise, 176 Wn.2d at 5-6.

The trial court violated Nease's right to a public trial in holding peremptory challenges in private. The right to a public trial encompasses jury selection. Presley v. Georgia, 558 U.S. 209, 723-24, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); Wise, 288 P.3d at 1118 (citing State v.

Brightman, 155 Wn.2d 506, 515, 122 P.3d 150 (2005)). "The peremptory challenge process, precisely because it is an integral part of the voir dire/jury impanelment process, is a part of the 'trial' to which a criminal defendant's constitutional right to a public trial extends." People v. Harris, 10 Cal. App.4th 672, 684, 12 Cal. Rptr. 2d 758 (Cal. Ct. App. 1992) (peremptory challenges conducted in chambers violate public trial right, even where such proceedings are reported), review denied, (Feb 02, 1993).

One type of "closure" is "when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). Physical closure of the courtroom, however, is not the only situation that violates the public trial right. Another type of closure occurs where a proceeding takes place in a location inaccessible to the public, such as a judge's chambers or hallway. Lormor, 172 Wn.2d at 93 (chambers); State v. Leyerle, 158 Wn. App. 474, 477, 483, 484 n.9, 242 P.3d 921 (2010) (moving questioning of juror to hallway outside courtroom was a closure).

Here, the peremptory challenge portion of the jury selection process was conducted in private. The procedure in this case violated the right to a public trial to the same extent as any in-chambers conference or other courtroom closure would have. Though the courtroom itself remained open to the public, the proceedings were not.

What took place in private should have taken place in open court so that the public could observe the peremptory challenge process as it was taking place. The ultimate composition of the jury was announced in open court. But the selection process was actually closed to the public because which party exercised which peremptory challenge and the order in which the peremptory challenges were made were not subject to public scrutiny. The sequence of events through which the eventual constituency of the jury "unfolded" was kept private. Harris, 10 Cal. App.4th at 683 n.6.

This Court has recognized the right to a public trial attaches to the portion of jury selection involving peremptory challenges. State v. Wilson, 174 Wn. App. 328, 342-43, 346, 298 P.3d 148 (2013) (public trial right not implicated when the bailiff excused the two jurors solely for illness-related reasons before voir dire began, contrasting voir dire process involving for cause and peremptory challenges); State v. Jones, 175 Wn. App. 87, 97-101, 303 P.3d 1084 (2013) (trial court violated the right to public trial when, during a court recess off the record, the trial court clerk drew four juror names to determine which jurors would serve as alternates, comparing to voir dire process involving for cause and peremptory challenges). Both Jones and Wilson applied the experience and logic test set forth in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012). Jones, 175 Wn. App. at 96-102; Wilson, 174 Wn. App. at 335-47.

The "experience" component of the Sublett test is satisfied here. Historical evidence reveals "since the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown." Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). The criminal rules of procedure show our courts have historically treated the peremptory challenge process as part of voir dire on par with for cause challenges. Wilson, 174 Wn. App. at 342. CrR 6.4(b) contemplates juror voir dire as involving peremptory and for cause juror challenges. Id. CrR 6.4(b) describes "voir dire" as a process where the trial court and counsel ask prospective jurors questions to assess their ability to serve on the defendant's particular case and to enable counsel to exercise intelligent "for cause" and "peremptory" juror challenges. Id. at 343.

This stands in sharp contrast with CrR 6.3, which contemplates administrative excusal of some jurors appearing for service before voir dire begins in the public courtroom. Id. at 342-43. In further contrast, a trial court has discretion to excuse jurors outside the public courtroom under RCW 2.36.100(1), but only so long as "such juror excusals do not amount to for-cause excusals or *peremptory challenges* traditionally exercised during voir dire in the courtroom." Id. at 344 (emphasis added).

The "logic" component of the Sublett test is satisfied as well. "Our system of voir dire and juror challenges, including causal challenges and peremptory challenges, is intended to secure impartial jurors who will perform their duties fully and fairly." State v. Saintcalle, 178 Wn.2d 34, 74, 309 P.3d 326 (2013) (Gonzalez, J., concurring). "The peremptory challenge is an important 'state-created means to the constitutional end of an impartial jury and a fair trial.'" Saintcalle, 178 Wn.2d at 62 (Madsen, C.J., concurring) (quoting Georgia v. McCollum, 505 U.S. 42, 59, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992)).

While peremptory challenges may be exercised based on subjective feelings and opinions, there are important constitutional limits on both parties' exercise of such challenges. McCollum, 505 U.S. at 48-50. A prosecutor is forbidden from using peremptory challenges based on race, ethnicity, or gender. Batson v. Kentucky, 476 U.S. 79, 86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); Rivera v. Illinois, 556 U.S. 148, 153, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009); State v. Burch, 65 Wn. App. 828, 836, 830 P.2d 357 (1992).

The peremptory challenge component of jury selection matters. It is not so inconsequential to the fairness of the trial that it is appropriate to shield it from public scrutiny. Discrimination in the selection of jurors places the integrity of the judicial process and fairness of a criminal

proceeding in doubt. Powers v. Ohio, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991).

The public trial right encompasses circumstances in which the public's mere presence passively contributes to the fairness of the proceedings, such as deterring deviations from established procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny. Brightman, 155 Wn.2d at 514; Leyerle, 158 Wn. App. at 479. An open peremptory process of jury selection acts as a safeguard against discriminatory removal of jurors. Public scrutiny discourages discriminatory removal from taking place in the first instance and, if such a peremptory challenge is exercised, increases the likelihood that the challenge will be denied by the trial judge.

In Saintcalle, the Supreme Court issued an opinion that was fractured on how to deal with the persistence of racial discrimination in the peremptory challenge process, but all nine justices united in the recognition that the problem exists. See Saintcalle, 178 Wn.2d at 49, 60 (Wiggins, J., lead opinion), at 65 (Madsen, C.J., concurring), at 69 (Stephens, J., concurring), at 118 (Gonzalez, J., concurring), at 118-19 (Chambers, J., dissenting). In light of that problem, it cannot be plausibly maintained that the peremptory challenge process, as it unfolds in real

time at the trial level, gains nothing from being open to the public. The public nature of trials is a check on the judicial system, provides for accountability and transparency, and assures that whatever transpires in court will not be secret or unscrutinized. Wise, 176 Wn.2d at 6. "Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges [and] lawyers . . . will perform their respective functions more responsibly in an open court than in secret proceedings." Id. at 17 (quoting Waller v. Georgia, 467 U.S. 39, 46 n.4, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). The peremptory challenge process squarely implicates those values.

Division Three of the Court of Appeals recently held no public trial violation occurred during the peremptory challenge phase because the record did not show peremptory challenges were actually exercised at sidebar instead of in open court. State v. Love, 176 Wn. App. 911, 920, 309 P.3d 1209 (2013).⁵ A panel in Division Two recently adhered to Love without independent analysis. State v. Dunn, __ Wn. App. __, 321 P.3d 1283, 1285 (2014).⁶

Love was wrongly decided and should not be followed for the reasons already articulated in this brief. The experience prong of the

⁵ A petition for review has been filed in Love.

⁶ A petition for review has been filed in Dunn.

"experience and logic" test is met because the relevant court rule envisions both for cause and peremptory challenges taking place in open court. Wilson, 174 Wn. App. at 342-44; Jones, 175 Wn. App. at 98, 101. Division Three ignored what Jones and Wilson have to say on the issue.

Its reliance on State v. Thomas, 16 Wn. App. 1, 13, 553 P.2d 1357 (1976) as a basis to conclude peremptory challenges do not meet the "experience" prong of the "experience and logic" test is misplaced. Love, 176 Wn. App. at 918. Thomas rejected the argument that "Kitsap County's use of secret – written – peremptory jury challenges" violated the defendant's right to a fair and public trial where the defendant had failed to cite to any supporting authority. Thomas, 16 Wn. App. at 13. Thomas, however, predates the seminal public trial decision in State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995) by nearly 20 years.

Moreover, Thomas noted in 1976 that secret peremptories were used "in several counties" according to a Bar Association directory. Thomas, 16 Wn. App. at 13 & n.2. There are 39 counties in Washington. The implication, then, is that only several of the 39 counties used secret peremptories as of 1976.⁷ That shows an established historical practice of public peremptory challenges in this state with a few exceptions.

⁷ The source of the court's information is actually dated 1968. Thomas, 16 Wn. App. at 13 n.2.

Turning to the "logic" prong, Division Three's bald assertion that the exercise of peremptory challenges "presents no questions of public oversight" is simply wrong. Love, 176 Wn. App. at 919-20. The reasons why it is wrong, including the benefit of public oversight to deter discriminatory removal of jurors during the peremptory process, have already been articulated in this brief.

c. The Convictions Must Be Reversed Because The Court Did Not Justify The Closure Under The Bone-Club Factors.

Before a trial court closes the jury selection process off from the public, it must consider the five factors identified in Bone-Club on the record. Wise, 176 Wn.2d at 12. Under the Bone-Club test, (1) the proponent of closure must show a compelling interest for closure and, when closure is based on a right other than an accused's right to a fair trial, a serious and imminent threat to that compelling interest; (2) anyone present when the closure motion is made must be given an opportunity to object to the closure; (3) the proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; (4) the court must weigh the competing interests of the proponent of closure and the public; (5) the order must be no broader in its application or duration than necessary to serve its purpose. Bone-Club, 128 Wn.2d at 258-60; Wise, 176 Wn.2d at 10.

There is no indication the court considered the Bone-Club factors before the peremptory challenge process took place in private. The trial court errs when it fails to conduct the Bone-Club test before closing a court proceeding to the public. Wise, 176 Wn.2d at 5, 12. The court here erred in failing to articulate a compelling interest to be served by the closure, give those present an opportunity to object, weigh alternatives to the proposed closure, narrowly tailor the closure order to protect the identified threatened interest, and enter findings that specifically supported the closure. Orange, 152 Wn.2d at 812, 821-22.

The violation of the public trial right is structural error requiring automatic reversal because it affects the framework within which the trial proceeds. Wise, 176 Wn.2d at 6, 13-14. The State may try to argue the issue is waived because defense counsel did not object to conducting the peremptory challenge process in private. That argument fails. A defendant does not waive his right to challenge an improper closure by failing to object to it. Id. at 15. The issue may be raised for the first time on appeal. Id. at 9. Nease's convictions must be reversed due to the public trial violation. Id. at 19.

3. THE COURT LACKED AUTHORITY TO PROHIBIT NEASE FROM POSSESSING OR USING ALCOHOL AS A CONDITION OF COMMUNITY CUSTODY.

As a condition of community custody, the court ordered "Do not use/possess/consume alcohol." CP 58. The court had authority to prohibit consumption of alcohol but lacked authority to prohibit Nease from possessing or using alcohol. The possession and use aspects of the condition are not crime-related and therefore should be stricken from the judgment and sentence.

A court may impose only a sentence authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). "If the trial court exceeds its sentencing authority, its actions are void." State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). Whether a trial court exceeded its statutory authority under the Sentencing Reform Act by imposing a community custody condition is an issue of law reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

Erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). A defendant always has standing to challenge the legality of community custody conditions even though he has not been charged with violating them. State v. Sanchez Valencia, 169 Wn.2d 782, 787, 239 P.3d 1059 (2010).

Under RCW 9.94A.703(3)(e), a sentencing court may order an offender to refrain from consuming alcohol. Such a condition is authorized regardless of whether alcohol contributed to the offense. State v. Jones, 118 Wn. App. 199, 207, 76 P.3d 258 (2003) (examining former RCW 9.94A.700, which contained the same operative language as RCW 9.94A.703(3)(e)).

But the only possible statutory authority for the prohibition on use and possession of alcohol is RCW 9.94A.703(3)(f), which authorizes the court to impose crime-related prohibitions. A condition is "crime-related" only if it "directly relates to the circumstances of the crime." RCW 9.94A.030(10). Crime-related conditions of community custody must be supported by evidence showing the factual relationship between the crime punished and the condition imposed. State v. Parramore, 53 Wn. App. 527, 531, 768 P.2d 530 (1989). Substantial evidence must support a determination that a condition is crime-related. State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007), overruled on other grounds, State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010).

There is no evidence that Nease possessed, used or drank alcohol when the events forming the basis for conviction occurred. The community custody condition prohibiting Nease from possessing and using alcohol must therefore be stricken from the judgment and sentence

because it is not crime-related. See State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (remanding to the trial court to strike a condition of community custody that was not crime-related).

4. THE PLETHYSMOGRAPH CONDITION, IN ALLOWING THE TEST TO BE EXECUTED AT THE DIRECTION OF THE CORRECTION OFFICER, VIOLATES NEASE'S RIGHT TO BE FREE FROM BODILY INTRUSIONS.

As a condition of community custody, the court ordered Nease to "[s]ubmit to, and at your expense, a polygraph and a plethysmograph as directed by Corrections Officer or treatment provider." CP 54. That part of the condition requiring Nease to submit to a plethysmograph at the direction of the corrections officer is unconstitutional.

Plethysmograph testing involves the restraint and monitoring of an intimate part of a person's body while the mind is exposed to pornographic imagery. In re Marriage of Parker, 91 Wn. App. 219, 223-24, 957 P.2d 256 (1998). Such examination implicates the due process right to be free from bodily restraint. Parker, 91 Wn. App. at 224; U.S. Const. amend. XIV; Wash. Const. art. 1, § 3.

Plethysmograph "testing can properly be ordered incident to crime-related treatment by a qualified provider." State v. Land, 172 Wn. App. 593, 605, 295 P.3d 782 (2013). Nease accordingly does not challenge that aspect of the condition requiring submission to the test at the direction of

the treatment provider. But requiring submission to plethysmograph testing at the discretion of a community corrections officer violates Nease's constitutional right to be free from bodily intrusions. Land, 172 Wn. App. at 605. "Plethysmograph testing is extremely intrusive. The testing can properly be ordered incident to crime-related treatment by a qualified provider." Id. Such testing is not a routine monitoring tool subject to the discretion of a community corrections officer. Id. The reference to the plethysmograph examination at the direction of the correction officer must therefore be stricken. Id. at 605-06.

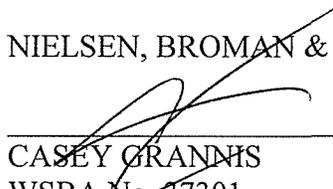
D. CONCLUSION

For the reasons set forth, Nease requests that this Court reverse the convictions and strike the challenged conditions of community custody.

DATED this 20th day of June 2014

Respectfully Submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 45733-4-II
)	
DAVID NEASE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 20TH DAY OF JUNE, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DAVID NEASE
DOC NO. 299854
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 2049
AIWAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF JUNE, 2014.

X *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

June 20, 2014 - 2:05 PM

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