

NO. 49564-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT FERNANDEZ,
Appellant.

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

Thurston County Cause No. 15-1-01423-8

The Honorable Mary Sue Wilson, Judge

BRIEF OF APPELLANT

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ISSUES AND ASSIGNMENTS OF ERROR

1. Ineffective assistance of counsel violated Mr. Fernandez's Sixth and Fourteenth Amendment right to the effective assistance of counsel.
2. Mr. Fernandez's attorney provided ineffective assistance of counsel by failing to object to the admission of L.V.'s hearsay statements to her mother.
3. L.V.'s hearsay statements to her mother were not admissible as excited utterances under ER 803(a)(2).
4. Mr. Fernandez was prejudiced by his attorney's deficient performance.

ISSUE 1: A criminal defense attorney provides ineffective assistance of counsel by failing to object to inadmissible evidence absent a valid strategic reason. Did Mr. Fernandez's lawyer provide ineffective assistance by failing to object to extensive inadmissible hearsay evidence, which, if believed, completely undermined his theory of the defense?

5. The trial court erred by entering Order Number 15. (CP 137)
6. The trial court violated Mr. Fernandez's fundamental Fourteenth Amendment right to parent by entering an order prohibiting him from having in-person contact with his own children.
7. The trial court violated Mr. Fernandez's fundamental right to parent under Wash. Const. art. I, § 3 by entering an order prohibiting him from having in-person contact with his own children.
8. The court's order prohibiting Mr. Fernandez from having contact with his children is not narrowly tailored to achieve a compelling state interest.

ISSUE 2: A sentencing court violates an offender's constitutional rights by imposing a community custody condition prohibiting in-person contact with his/her own children unless there is some reason to believe that s/he poses a risk of harm to those children. Did the court violate Mr. Fernandez's fundamental right to parent by prohibiting him from having in-person contact with his own children when there was no indication that he had ever harmed or threatened to harm them in any way?

9. The trial court erred by entering Order Number 14. (CP 137)
10. The trial court violated Mr. Fernandez's First Amendment rights by imposing a curfew as a condition of his community custody.
11. The trial court violated Mr. Fernandez's Fourteenth Amendment rights by imposing a curfew as a condition of his community custody
12. The trial court's curfew order is not narrowly tailored to achieve a compelling state interest.

ISSUE 3: State-imposed curfews violate the fundamental right to freedom of movement unless they are narrowly tailored to promote a compelling state interest. Did the sentencing court violate Mr. Fernandez's constitutional rights by entering a curfew as a condition of his community custody when his offense took place in his own home and there was no indication that he posed any danger by being out of his home at night?

13. The trial court exceeded its statutory authority by entering a curfew as a condition of Mr. Fernandez's community custody.
14. The court's curfew order is not a crime-related prohibition under RCW 9.94A.505(9).
15. The court's curfew order does not meet the definition of crime-related prohibition under RCW 9.94A.030(10).

ISSUE 4: A sentencing court exceeds its authority by entering a condition of community custody that is not explicitly authorized by statute. Did the court exceed its authority by entering a curfew as a condition of Mr. Fernandez's community custody when his offense took place in his own home and there was no indication that he posed any danger by being out of his home at night and such an order is not otherwise authorized by statute?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Robert Fernandez was sick on the night of his wife's surprise birthday party. RP (8/29/16) 494. He had a cold, so he took some Nyquil before the party. RP (8/29/16) 494. He also took his normal medications for his diabetes, high blood pressure, and high cholesterol. RP (8/29/16) 496.

At the party, Mr. Fernandez drank much more than he normally does. RP (8/29/16) 496-97. He fell asleep on the couch after the party ended. RP (8/29/16) 497-99.

Mr. Fernandez's son's head was on his lap as he slept. RP (8/25/16) 311. His daughter was on the floor next to the couch with one of her friends. RP (8/23/16) 94. Another of his daughter's friends, L.V.¹, was also on the couch with her feet pointed toward Mr. Fernandez. RP (8/23/16) 101.

When Mr. Fernandez woke up, around 3:00am, he was holding onto L.V.'s pants at the ankles. RP (8/29/16) 499-500. Her pants had been pulled slightly down. RP (8/29/16) 499-500.

Mr. Fernandez immediately apologized to L.V. RP (8/29/16) 500.

¹ L.V. was thirteen years old. RP (8/23/16) 85-86.

L.V. called her father and told him that Mr. Fernandez had touched her inappropriately. RP (8/23/16) 116-17. Her father told her to wake up her mother, who was asleep in Mr. Fernandez's daughter's room. RP (8/23/16) 117.

Mr. Fernandez came into the room where L.V.'s mother was on the phone with her husband and apologized. RP (8/24/16) 94. Mr. Fernandez woke his own wife up and told her what had happened. RP (8/24/16) 95.

Mr. Fernandez's wife talked to L.V. and her mother. RP (8/24/16) 97. L.V. told them what had happened and Mr. Fernandez continued to apologize. RP (8/23/16) 97, 100.

L.V. and her mother left. RP (8/23/16) 99. The next day, L.V.'s mother babysat for the Fernandez children. RP (8/24/16) 142.

Later, after talking to her boss and some other people, L.V.'s mother called the police. RP (8/23/16) 100, 133-35.

Mr. Fernandez sent text messages to L.V.'s father and a Facebook message to her mother apologizing again for what had happened. RP (8/29/16) 510-513; Ex. 7, 20.

The police arrested Mr. Fernandez and interviewed him. RP (8/24/16) 187. Mr. Fernandez told the officers that he woke up and found that L.V.'s pants were partially off. RP (8/24/16) 194, 197.

The state charged Mr. Fernandez with second-degree child molestation and attempted second-degree rape of a child. CP 17.

At trial, L.V. testified that Mr. Fernandez had put his hand down her pants and touched her vagina. RP (8/23/16) 104.

Next, she said that he took her pants and underwear all the way off and gave her a blanket to put on her lap. RP (8/23/16) 106-07. She said that Mr. Fernandez put his head under the blanket and then she shot up and ended the interaction. RP (8/23/16) 109-10.

She admitted that she was not completely sure if Mr. Fernandez had actually put his head under the blanket. RP (8/24/16) 60-62. She had not told her mother about that. RP (8/24/16) 129.

L.V.'s mother repeated everything that L.V. had told her on the night of the incident. RP (8/24/16) 97, 139-40. L.V.'s statements were in response to questions from her mother or from Mr. Fernandez's wife. RP (8/24/16) 97. L.V.'s mother claimed that L.V. had told her that Mr. Fernandez had pulled her pants down and touched her vagina. RP (8/24/16) 97.

Mr. Fernandez's attorney agreed, pre-trial, that those hearsay statements were admissible as excited utterances. RP (8/22/16) 25.

The state played a recording of a phone call between Mr. Fernandez and his wife at trial. RP (8/25/16) 244-56; Ex. 21. The call was made while Mr. Fernandez was in jail. RP (8/25/16) 242.

On the recording, Mr. Fernandez admitted that “it happened.” RP (8/25/16) 247; Ex. 21.

Mr. Fernandez also testified. He explained that all he remembered was waking up holding onto the ankle of L.V.’s pants. RP (8/29/16) 499-500. He said that his apologies, statements to the police, and comments during the phone call had all been in reference to that incident. RP (8/29/16) 511-13, 516-18, 520-21, 579-84. He clarified that he had not intended to admit to touching L.V.’s vagina or taking her pants all the way off. RP (8/29/16) 511-13, 516-18, 520-21, 579-84.

He said that, on the night of the incident, he asked L.V. what had happened besides pulling on the ankle of her pants and said told him that nothing else had happened. RP (8/29/16) 505.

The jury convicted Mr. Fernandez of child molestation but could not reach a verdict on the attempted rape of a child charge. CP 100-101.

In addition to prison time, the court sentenced Mr. Fernandez to thirty-six months of community custody. CP 130. The court’s community custody conditions included a prohibition on in-person between Mr. Fernandez and his own children. CP 137. The court also imposed a

curfew between 10pm and 5am as a “crime-related” condition of community custody. CP 137.

This timely appeal follows. CP 140.

ARGUMENT

I. MR. FERNANDEZ’S DEFENSE ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO EXTENSIVE, HIGHLY PREJUDICIAL, INADMISSIBLE EVIDENCE.

When L.V. woke her mother up, she did not make any spontaneous declarations. Instead, her mother and Mr. Fernandez’s wife asked her targeted questions in an attempt to elicit what had happened. RP (8/24/16) 97.

Even so, defense counsel did not object when the state sought to offer L.V.’s hearsay statements to her mother as excited utterances. RP (8/22/16) 25. Mr. Fernandez’s attorney provided ineffective assistance of counsel.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel’s performance is deficient if it falls below an objective standard of reasonableness. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*²

Counsel provides deficient performance by failing to object to inadmissible evidence absent a valid strategic reason. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (citing *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)). Reversal is required if an objection would likely have been sustained and the result of the trial would have been different without the inadmissible evidence. *Id.*

Here, Mr. Fernandez's attorney provided ineffective assistance by failing to object to hearsay repetition of L.V.'s alleged statements by her mother, based on the state's incorrect theory that those declarations were admissible as excited utterances.

ER 803(a)(2) creates an exception to the rule against hearsay evidence for excited utterances. An excited utterance is defined as "[a] statement relating to a startling event or condition made while the declarant was under the stress of the excitement caused by the event or condition." ER 803(a)(2).

The exception is based on the idea that a statement made by someone under such stress is reliable because it is not based on reflection

² Ineffective assistance raises an issue of constitutional magnitude that the court can consider for the first time on appeal. *Ky'llo*, 166 Wn.2d at 862; RAP 2.5(a)(3).

or misrepresentation but is “a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock.” *State v. Rodriquez*, 187 Wn. App. 922, 938, 352 P.3d 200 (2015), *review denied*, 184 Wn.2d 1011, 360 P.3d 817 (2015) (quoting *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992)).

In order to qualify as an excited utterance, however, the proponent of the evidence must demonstrate that the statement was made while “while under the stress or excitement of a startling event or condition.” *State v. Pavlik*, 165 Wn. App. 645, 658-59, 268 P.3d 986 (2011). This element “constitutes the essence of the rule.” *Id.* And the “key to this requirement is spontaneity.”³ *Id.*

L.V.’s hearsay declarations to her mother on the night of the alleged incident were not excited utterances because they were not spontaneous. *Id.* Rather, they were deliberate responses to questions asked of her by L.V.’s mother and Mr. Fernandez’s wife. RP (8/24/16) 97, 139-40. The statements do not present the indicia of reliability associated with true excited utterances because they are not “a

³ Division III has said in *dicta* that a statement can be in response to a question and still qualify as an excited utterance. See *State v. Bache*, 146 Wn. App. 897, 904, 193 P.3d 198 (2008) (citing *Johnston v. Ohls*, 76 Wn.2d 398, 405-06, 457 P.2d 194 (1969); *State v. Thomas*, 150 Wn.2d 821, 854, 83 P.3d 970 (2004)). But neither *Johnston* nor *Thomas* made such a holding. See *Johnston*, 76 Wn.2d at 406; *Thomas*, 150 Wn.2d at 854. This Court should decline to follow the *dicta* in *Bache*.

spontaneous and sincere response[s] to the actual sensations” of a startling event. *Rodriquez*, 187 Wn. App. at 938.

Mr. Fernandez’s attorney provided deficient performance by failing to object to the inadmissible hearsay. *Saunders*, 91 Wn. App. at 578. Defense counsel had no valid tactical reason for the failure to object.

Mr. Fernandez was prejudiced by his attorney’s deficient performance. The entire basis for his defense was that he had admitted to tugging on the ankle of L.V.’s pants but to nothing else. RP (8/29/16) 511-13, 516-18, 520-21, 579-84. He said that he had asked L.V. what, if anything, had happened besides that and she said nothing else had occurred. RP (8/29/16) 505.

L.V.’s mother’s hearsay repetition of her claims on the night of the incident undermined Mr. Fernandez’s testimony that he did not know that L.V. had alleged that he had taken her pants all the way off or touched her vagina. Indeed, the jury could not believe L.V.’s mother’s assertions about L.V.’s claims on the night of the incident and still believe Mr. Fernandez’s defense theory. There is a reasonable probability that defense counsel’s ineffective assistance affected the outcome of Mr. Fernandez’s trial. *Kyllo*, 166 Wn.2d at 862.

Mr. Fernandez’s attorney provided ineffective assistance of counsel by unreasonably failing to object to extensive, inadmissible

hearsay. *Id.*, *Saunders*, 91 Wn. App. at 578. Mr. Fernandez’s conviction must be reversed. *Id.*

II. THE COURT VIOLATED MR. FERNANDEZ’S RIGHT TO DUE PROCESS BY ENTERING AN ORDER PROHIBITING FROM HAVING IN-PERSON CONTACT WITH HIS OWN CHILDREN AS A CONDITION OF HIS COMMUNITY CUSTODY.

There was no indication at trial that Mr. Fernandez posed any threat to his own children. The children’s counselor submitted a letter to the sentencing court indicating that the children wanted to maintain contact with their father. RP (10/20/16) 34.

Even so, the court entered a condition of Mr. Fernandez’s community custody prohibiting him from having in-person contact with his children. CP 137. That order violated Mr. Fernandez’s fundamental right to parent because it was not necessary in order to protect his children from harm. *State v. Ancira*, 107 Wn. App. 650, 653–54, 27 P.3d 1246 (2001).

Parents have a fundamental due process liberty interest in the care and custody of their children. *Id.* (citing *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)); U.S. Const. Amend. XIV; art. I, § 3. Limitations on that right can only survive constitutional muster when they are “reasonably necessary to accomplish the essential needs of the state,” including the need to protect children from harm. *Id.*

A sentencing court violates an offender's constitutional rights by imposing a community custody condition prohibiting in-person contact with his/her own children unless there is some reason to believe that s/he poses a risk of harm to those children.⁴ *Id.*; *See also State v. Sanford*, 128 Wn. App. 280, 289, 115 P.3d 368 (2005); *State v. Letourneau*, 100 Wn. App. 424, 441–42, 997 P.2d 436 (2000), *as amended* (June 8, 2000).

In *Ancira*, for example, the defendant was convicted of violating a no-contact order protecting his wife. *See Ancira*, 107 Wn. App. 650. In the process, he took one of their children for several days and refused to return her to her mother until the mother agreed to talk to him. *Id.* Even so, a community custody condition prohibiting him from contacting that child (and his other children) could not survive constitutional scrutiny. *Id.* at 655; *See also Sanford*, 128 Wn. App. at 289 (limitation on defendant's contact with his children to supervised visitation as a condition of his sentence for assaulting their mother violated his constitutional right to parent when there was no allegation that he had ever committed or threatened violence against his children).

Prohibitions on contact between the accused and his/her own children can violate due process even in the case of sentences for sex

⁴ Constitutional issues are reviewed *de novo*. *State v. Clark*, 187 Wn.2d 641, 389 P.3d 462 (2017). Court-ordered community custody conditions are reviewed for abuse of discretion. *Ancira*, 107 Wn. App. at 653.

offenses against children. *See Letourneau*, 100 Wn. App. at 441–42 (community custody condition prohibiting defendant from having unsupervised in-person contact with her children violated her constitutional rights in child sex case because there was no “affirmative showing” that she posed a danger of sexual molestation to her own children).⁵

The community custody condition in Mr. Fernandez’s case – which completely prohibits any in-person contact with his own children – is even more onerous than the one in *Letourneau*, which allowed for supervised visitation. *Id.*; CP 137.

But there was no affirmative showing (indeed, there was no indication at all) that Mr. Fernandez posed any danger to his own children. Accordingly, the prohibition on in-person contact with his children was not reasonably necessary to protect his children from harm. *Ancira*, 107 Wn. App. at 653–54.

⁵ *Letourneau* can be contrasted with cases such as *Berg* and *Corbett*, both of which involve sentences for sexual abuse against the defendants’ step-children. *State v. Corbett*, 158 Wn. App. 576, 242 P.3d 52 (2010); *State v. Berg*, 147 Wn. App. 923, 198 P.3d 529 (2008), *disapproved of on other grounds by State v. Mutch*, 171 Wn.2d 646, 254 P.3d 803 (2011). In those cases, the offender’s history of sex offenses against child members of his own household justified restrictions on contact with his own children. *Id.*

The condition of Mr. Fernandez's community custody prohibiting in-person contact with his own children violates his right to due process.

Id. That condition must be stricken from his Judgment and Sentence. *Id.*

III. THE SENTENCING COURT EXCEEDED ITS AUTHORITY AND VIOLATED MR. FERNANDEZ'S CONSTITUTIONAL RIGHTS BY IMPOSING A CURFEW AS A CONDITION OF HIS COMMUNITY CUSTODY. THE CURFEW IS NOT CRIME-RELATED AND VIOLATES MR. FERNANDEZ'S RIGHTS TO FREEDOM OF MOVEMENT AND DUE PROCESS.

Mr. Fernandez's alleged offense occurred in his own home. There was no indication at trial that he roamed around at night or presented a danger to anyone when he was out of his home. Still, the court ordered a curfew from 10am to 5am as a "crime-related" condition of his community custody. CP 137.

The curfew condition of Mr. Fernandez's sentence violates his constitutional rights and is not related to his crime in any way. It must be stricken.

A. The curfew condition of Mr. Fernandez's community custody violates his constitutional rights.

The constitutional right to freedom of movement is rooted in both the First Amendment and the fundamental liberties inherent in due process. *State v. J.D.*, 86 Wn. App. 501, 506, 937 P.2d 630 (1997) (*citing Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31

L.Ed.2d 110 (1972); *Aptheker v. Secretary of State*, 378 U.S. 500, 520, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964) (Douglas, J., concurring)); U.S. Const. Amends. I, XIV.⁶ The constitutional right to “freely move about and stand still has been recognized as fundamental to a free society.” *Id.*

Because it impacts the fundamental right to freedom of movement, a state-imposed curfew is constitutional only if it can survive strict scrutiny. *J.D.*, 86 Wn. App. at 508. Accordingly, the curfew cannot stand unless it is narrowly tailored to promote a compelling state interest. *Id.*

The condition of Mr. Fernandez’s community custody imposing a curfew from 10pm to 5am serves no state interest. His offense took place in his own home. There was no suggestion at trial that he regularly goes anywhere late at night, much less that he would pose any risk if he were to do so. Additionally, he does not challenge the community custody condition prohibiting him from contacting minors other than his own children. CP 137. That condition is sufficient to protect other children from harm.

Mr. Fernandez’s community custody condition imposing a curfew violates his First and Fourteenth Amendment rights because it impedes his free movement and is not narrowly tailored to promote a compelling state

⁶ Constitutional issues are reviewed *de novo*. *Clark*, 187 Wn.2d 641.

interest. *Id.* That condition must be stricken from his Judgment and Sentence. *Id.*

B. The curfew condition of Mr. Fernandez’s community custody exceeds the sentencing court’s authority because it is not crime-related.

A sentencing court derives the authority to impose conditions of community custody from statute. *State v. Warnock*, 174 Wn. App. 608, 612, 299 P.3d 1173 (2013). A court exceeds its sentencing authority by imposing a condition of community custody that is not authorized by statute. *Id.*

Sentencing courts have the authority to impose “crime-related prohibitions” as conditions of community custody. RCW 9.94A.505(9).

Crime-related prohibitions enjoin conduct that “directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10).⁷

In Mr. Fernandez’s case, the court imposed a curfew as a purportedly crime-related prohibition. CP 137. As outlined above, however the curfew is in no way related to Mr. Fernandez’s offense. The curfew condition was not crime-related. Accordingly, the sentencing

⁷ The imposition of crime-related prohibitions is reviewed for abuse of discretion. *Ancira*, 107 Wn. App. at 653. A sentencing court abuses its discretion when it acts manifestly unreasonably or on untenable or unreasonable grounds. *Id.*

court had no authority to impose the curfew as a condition of Mr. Fernandez's community custody.

The court exceeded its authority and abused its discretion by imposing a curfew as a condition of Mr. Fernandez's community custody when the curfew was in no way related to his offense. RCW 9.94A.050(9); 9.94A.030(10); *Warnock*, 174 Wn. App. at 612.

CONCLUSION

Mr. Fernandez's defense attorney provided ineffective assistance of counsel by failing to object to extensive inadmissible hearsay, which was highly prejudicial to the defense. Mr. Fernandez's conviction must be reversed.

In the alternative, the court violated Mr. Fernandez's right to due process by entering a community custody condition prohibiting in-person contact with his children when there was no evidence that he posed any risk to his own children. The court also exceeded its authority by imposing a curfew that was not crime-related and violated Mr. Fernandez's constitutional rights to freedom of movement and due process. These community custody conditions must be stricken from Mr. Fernandez's Judgment and Sentence.

Respectfully submitted on April 11, 2017,

A handwritten signature in black ink, appearing to read "STBrett". The signature is written in a cursive, somewhat stylized font.

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Robert Fernandez/DOC#393587
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on April 11, 2017.



Skylar T. Brett, WSBA No. 45475
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