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

STATE OF WASHINGTON, Respondent

v.

EDWARD AZAEL COCOM-VAZQUEZ, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-01659-0

CORRECTED BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. The trial court fairly and impartially presided over Mr. Cocom-Vazquez's case and did not make itself a witness by asking questions of witnesses or interpreters during the CrR 3.5 hearing.**
- II. The State concedes that the community custody condition that states "[n]o unauthorized use of electronic media" is invalid because it is void for vagueness and/or constitutionally overbroad.**
- III. The State concedes that the judgment and sentence contains a scrivener's error regarding the date of Mr. Cocom-Vazquez's bench trial that requires correction.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Edward Cocom-Vazquez was charged by third amended information with one count of Dealing in Depictions of a Minor Engaged in Sexually Explicit Conduct in the First Degree for an incident occurring on or about or between January 1, 2014 and July 29, 2014 and two counts of Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct in the First Degree for conduct between January 1, 2014 and August 13, 2014. CP 161-62. The third amended information, which reduced the number of counts Mr. Cocom-Vazquez was facing from eight to three, was filed pursuant to an agreement between the parties wherein the defendant would proceed to a stipulated facts bench trial and the State

would recommend a low-end sentence upon conviction. RP 319-321, 324; CP 1-2, 161-62. Before the stipulated facts bench trial, Mr. Cocom-Vazquez filed CrR 3.6 motions seeking the suppression of evidence that was found in his home following the execution of a search warrant as well as his confession, and he also challenged the admissibility of his confession in a CrR 3.5 hearing. CP 7-12, 141-47. The trial court, the Honorable David Gregerson, denied the motions to suppress and ruled that Mr. Cocom-Vazquez's confession was admissible. RP 303-04; CP 178-182. Following those rulings, Mr. Cocom-Vazquez filed a motion asking the trial court to recuse itself and asking to "reopen" the CrR 3.5 hearing¹ to allow for the calling of additional "witness(es)." CP 151-155. The trial court denied that motion too. RP 313-14.

On March 27, 2017, the case proceeded to the stipulated facts bench trial at which the trial court found Mr. Cocom-Vazquez guilty as charged. RP 322-332; CP 172-77. The trial court sentenced Mr. Cocom-Vazquez to a standard range sentence of 57 months confinement. RP 345; CP 183-196. Mr. Cocom-Vazquez filed a timely notice of appeal. RP 346-47; CP 205.

¹ Mr. Cocom-Vazquez, in part, called his motion one to "reopen suppression hearing," but the substantive issues were ones usually addressed in a CrR 3.5 hearing.

B. STATEMENT OF FACTS

On May 5, 2014 and June 21, 2014, a Vancouver Police investigator used the Ares “Peer-2-Peer” file sharing software to make a direction connection to a computer located at a specific IP (Internet Protocol) address. CP 165-66. This computer made multiple files available for sharing and the investigator downloaded some of these files. CP 165-66. At least four of the files downloaded were video files in which prepubescent minor females are engaged in sexually explicit conduct. CP 166. For example, one file is described as follows:

File name: ‘(ptch) japan - 13 year old school girl fucked(3).mpg.’ This file depicts a prepubescent minor female who appears to be under the age of 13. The child exposes her genitals and has no pubic hair. The child exposes her breasts which are minimally developed. An adult male enters the screen and inserts his erect penis into the child’s vagina. The male has intercourse with the child until he ejaculates inside her.

CP 166.

The relevant IP address was assigned, via Comcast Cable, to Edward Cocom and his residence. CP 167. Based on the above information, the Vancouver police obtained a search warrant and, on August 13, 2014, executed said warrant at Mr. Cocom-Vazquez’s residence. CP 167.

During the search of Mr. Cocom-Vazquez’s residence the police seized his computer and an attached external hard drive. CP 167. The

police noticed that Mr. Cocom-Vazquez's computer was missing a side panel and discovered his Washington ID card wedged inside the computer's case. CP 167. Files on both the computer and attached hard drive contained Mr. Cocom-Vazquez's name. CP 167-68. Additionally, the police discovered numerous images and videos that contained children engaged in sexually explicit conduct on the attached hard drive including two of the files previously downloaded by the police investigator. CP 167, 175.

The police interviewed Mr. Cocom-Vazquez. CP 168. He admitted to the police that his computer contained images of child pornography and the Ares file-sharing program. CP 168. Mr. Cocom-Vazquez explained to the police that he downloaded the Ares program to search for pornographic images of children and that he used search terms such as "P-T-H-C" (pre-teen hard core)" to discover said images. CP 168. Mr. Cocom-Vazquez also stated that he preferred girls between the ages of 11 to 15 "because they look good." CP 168.

CrR 3.5 Hearing

Mr. Cocom-Vazquez's native language is Maya, but he also speaks and understands Spanish.² *See generally* RP; CP 179-180. He was born in Mexico and has lived in the United States for nineteen years. RP 160. Prior to these crimes, Mr. Cocom-Vazquez had faced criminal charges in other courts and had attorneys appointed to represent him. RP 188-190.

On August 13, 2014, the police went to Mr. Cocom-Vazquez's residence to execute a search warrant. The police, after discovering that Mr. Cocom-Vazquez did not speak English and being told by Mr. Cocom-Vazquez that he did speak Spanish, reviewed his Constitutional rights with him and interviewed him in Spanish. RP 40-45, 204-05. The issue at the CrR 3.5 hearing was whether Mr. Cocom-Vazquez knew Spanish well enough to knowingly and voluntarily waive his *Miranda* rights. RP 288-292, 295-301.

Detective David Brown, the first police officer who contacted Mr. Cocom-Vazquez, testified at the CrR 3.5 hearing that Mr. Cocom-Vazquez indicated that he spoke Spanish. RP 204-05. When Det. Brown utilized a language line, Spanish interpreter to read Mr. Cocom-Vazquez his rights Mr. Cocom-Vazquez indicated that he understood his rights. RP 205-212.

² Both a Spanish interpreter and Maya interpreter were utilized at the CrR 3.5 hearing. RP 12-21. The Spanish interpreter would translate English to Spanish and Spanish to English and the Maya interpreter would translate Spanish to Maya and Maya to Spanish. CP 12-21.

Det. Brown testified that Mr. Cocom-Vazquez's answers³ through the language line interpreter, and later through the Lieutenant Randy Hullinger, were responsive. RP 205-212.

Lt. Hullinger, a fluent Spanish speaker, arrived at the scene to do in-person interpretation for Det. Brown. RP 33-40, 44-45. Lt. Hullinger advised Mr. Cocom-Vazquez of his Constitutional rights in Spanish. RP 41-42. Lt. Hullinger also used a packet that contained the rights written in Spanish to aid in the advisement of rights as it allowed for Mr. Cocom-Vazquez to follow along as Lt. Hullinger read each right. RP 41-42. Lt. Hullinger testified that after the reading of each right that he would ask Mr. Cocom-Vazquez if he understood and that each time Mr. Cocom-Vazquez answered in the affirmative. RP 42. He further testified that Mr. Cocom-Vazquez never expressed confusion about his rights, that Mr. Cocom-Vazquez signed a document indicating that he understood his rights, that he (Lt. Hullinger) had no trouble at all communicating with Mr. Cocom-Vazquez, that Mr. Cocom-Vazquez answered questions appropriately, and described Mr. Cocom-Vazquez's Spanish as excellent, very clear, very deliberate, and very articulate. RP 42-43, 50-51, 54, 60-

³ During the interview that took place using the language line interpreter Mr. Cocom-Vazquez discussed his internet service provider, his wi-fi network's name, how he came to buy his computer, what operating system was installed on it, and for what purpose he used his webcam. RP 209-210.

61. It was during this interview that Mr. Cocom-Vazquez confessed. RP 47-50; CP 168,180.

Mr. Cocom-Vazquez and his wife both testified at the CrR 3.5 hearing and essentially claimed that Mr. Cocom-Vazquez was only fluent in Maya, that his ability to understand Spanish is extremely limited, and that he did not, and would not have been able to, understand his Constitutional rights since they were read to him in Spanish. RP 79-86, 101-05, 161-62, 167-69, 172-179, 182, 184-87.

Mr. Cocom-Vazquez also presented the testimony of an expert who opined that Mr. Cocom-Vazquez's Spanish was good enough for day-to-day communication but below the 6th grade level of education in Mexico. RP 241-42. She made this determination by meeting with him for about an hour and thirty minutes during which time she administered a test. RP 240-242. The expert also concluded—based on what she described as Mr. Cocom-Vazquez's beginner-level Spanish—that Mr. Cocom-Vazquez would have a difficult time understanding some of the concepts present in the advisement of rights. RP 243-47.

The expert did not know if the test she utilized had any inherent tools to protect against malingering and acknowledged that she was not looking for malingering or employing any safeguards against it during the test taking process. RP 257-58. That said, she did not believe that Mr.

Cocom-Vazquez was malingering. RP 263. Nonetheless, she also conceded that if somebody taking her assessment wanted to perform poorly they could choose to do so. RP 259. When asked how she would go about explaining the Constitutional rights to Mr. Cocom-Vazquez to make sure he understood she responded:

[w]ell, I would begin reading the Miranda Rights to him in Spanish and if I thought that he really did not understand specific terms, I would probably ask him if he understood what I was asking him to do.

RP 247-48, 259-260.

ARGUMENT

I. The trial court fairly and impartially presided over Mr. Cocom-Vazquez's case and did not make itself a witness by asking questions of witnesses or interpreters during the CrR 3.5 hearing.

The trial court who presided over Mr. Cocom-Vazquez's case knows and speaks some Spanish. RP 75. On three occasions, during the CrR 3.5 hearing, which included multiple witnesses over multiple days, the trial court asked the interpreter for clarification of a translation. RP 167, 175-76, 187-88. The trial court also asked two of the witnesses questions about the interplay of Maya and Spanish. RP 175, 260-61. Additionally, during both the examination of Lt. Hullinger and of the defense expert the trial court asked each to translate about 10 words from

Spanish to English. RP 75-76, 261-62. Mr. Cocom-Vazquez did not object to any of the court's questions or complain about the court's use of Spanish in asking some of the questions. *See* RP.

In its oral ruling⁴ that Mr. Cocom-Vazquez knowingly, intelligently, and voluntarily waived his rights the trial court stated:

The testimony seems to be that [Lt. Hullinger] had a conversation with Mr. Cocom-Vazquez and had no indication of any difficulty in understanding the exchange and, in fact, that the defendant provided some detailed information in response to the questioning which was highly indicative of an ability to understand and communicate in Spanish.

I will also note that during the course of these proceedings, I have listened during the relay translating and I noted several important words that appear to be identical in both Spanish and Mayan; words that pertain to the advisement and alleged waiver of rights in responses given. Words which in English are: Eleven, twelve, telephone, bank, account, document, not guilty, police, rights, attorney, television; many, if not all, of those words appeared to the Court to be identical in both languages.

Reviewing the case law -- and while I appreciate Defense argument -- I don't believe the State has the burden to prove the cognition and comprehension by each individual. What is sufficient is whether there is a full and detailed reading of those rights and whether the waiver appears to be knowing, intelligent, and voluntary. Based on the record

⁴ An appellate court may consider a trial court's oral opinion or memorandum opinion when interpreting written findings of fact and conclusions of law but cannot consider them as the basis for the trial court's decision because they have no final or binding effect unless formally incorporated into the written findings. *State v. Mallory*, 69 Wn.2d 532, 533-34, 419 P.2d 324 (1966). An oral ruling that is inconsistent with the written findings cannot be relied upon. *State v. Bynum*, 76 Wn.App. 262, 266, 884 P.2d 10 (1994) (citing *State v. Moon*, 48 Wn.App. 647, 653, 739 P.2d 1157 (1987)).

before this Court, the Court concludes that the rights were properly read by Officer Hullinger and were in fact waived.

RP 303-04.

Prior to the next hearing on the case, Mr. Cocom-Vazquez filed a motion asking the court to recuse itself and seeking to reopen the CrR 3.5 hearing for the possibility of additional expert witness testimony. RP 311-12; CP 151-155. While Mr. Cocom-Vazquez did not cite any authority for his arguments, they are essentially the same ones he now makes on appeal, i.e., that the trial court's knowledge of Spanish and its questioning of the witnesses and interpreters created an issue of fairness and made itself, the trial court, a witness. CP 151-55; Brief of Appellant 9-12. The trial court denied the motion and stated:

I'll note for Counsel's benefit that, I guess, the complaint is that the Court maybe went outside or read between some lines on some things that jeopardized the defendant's due process rights. In this case I'm relying on the translation of Counsel [sic], but I also have eyes and ears and my own observations and so certain words I did notice happen to be the same. I'll note that the Court's ruling was not based on my use of interpretive skills really at all; it was really on the record that was made by the State and the Defense. I'm going to deny the motion for recusal under these circumstances.

RP 313-14.

A trial court judge has the inherent authority to manage parties and proceedings. *State v. Gassman*, 175 Wn.2d 208, 211, 283 P.3d 1113

(2012). Furthermore, “[t]hat the court has wide discretionary powers in the trial of a cause and is not prohibited from questioning a witness, is beyond controversy.” *State v. Brown*, 31 Wn.2d 475, 486, 197 P.2d 590 (1948) (quoting *Dennis v. McArthur*, 23 Wn.2d 33, 158 P.2d 644, 647 (1945)); *State v. Gross*, 31 Wn.2d 202, 219, 196 P.2d 297 (1948) (overruled on other grounds). Additionally, when the trial court is the “trier of fact, illustrative comments phrased in the first person are not improper unless they evidence bias, prejudice, or other impropriety.” *Fernando v. Nieswandt*, 87 Wn.App. 103, 109, 940 P.2d 1380 (1997) (approving of a trial judge discussing his own experience as a judge, parent, and grandfather to explain his decision in fashioning a parenting plan).

Fair hearing claims

An appellate court reviews a trial court’s decision on recusal for abuse of discretion. *State v. Gentry*, 183 Wn.2d 749, 761, 356 P.3d 714 (2015) (citing *State v. Davis*, 175 Wn.2d 287, 308, 290 P.3d 43 (2012)). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable reasons or untenable grounds. *State v. Castillo-Lopez*, 192 Wn.App. 741, 746, 370 P.3d 589 (2016).

Fair hearing claims, i.e., claims that a trial court was biased against a party, “fall into two categories: [(1)] due process and [(2)] claims under

the ‘appearance of fairness doctrine.’” *State v. Blizzard*, 195 Wn.App. 717, 725, 381 P.3d 1241 (2016). The due process claim is one of constitutional magnitude that can be raised for the first time on appeal. *Id.* at 727; RAP 2.5(a)(3). Only “only three circumstances,” under the due process analysis, “have been found to create unconstitutional judicial bias: (1) when a judge has a financial interest in the outcome of a case, (2) when a judge previously participated in a case in an investigative or prosecutorial capacity, and (3) when an individual with a stake in a case had a significant and disproportionate role in placing a judge on the case through the campaign process.” *Id.* at 727-28 (citing *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009)). Mr. Cocom-Vazquez does not raise a due process claim. His claim is that the trial judge violated the appearance of fairness doctrine.

Under the appearance of fairness doctrine, “a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial and neutral hearing.” *State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010) (citation omitted). Accordingly, the appearance of fairness doctrine is broader than the due process claim in that it allows parties to make fair trial claims based on “violations of the Code of Judicial Conduct,” statutes, and the common law; but the doctrine is not constitutional. *Id.* at 188; *Blizzard*, 195

Wn.App. at 725; *Tatham v. Rogers*, 170 Wn.App. 76, 90, 283 P.3d 583 (2012). As a result, a claim under the appearance of fairness doctrine generally cannot be raised for the first time on appeal. *Blizzard*, 195 Wn.App. at 725. More specifically, “[d]elaying a request for recusal until after the judge has issued an adverse ruling is considered tactical and constitutes waiver.”⁵ *Id.* at 725-26 (emphasis added).

The starting point for determining whether the parties received a fair, impartial and neutral hearing is with a presumption that the trial court properly discharged its “official duties without bias or prejudice.” *In re Davis*, 152 Wn.2d 647, 692, 101 P.3d 1 (2004). Moreover, an appearance of fairness claim requires that the party asserting the claim provide evidence of actual or potential bias. *State v. Solis-Diaz*, 187 Wn.2d 535, 540, 387 P.3d 703 (2017); *State v. Chamberlin*, 161 Wn.2d 30, 37, 162 P.3d 389 (2007). Mere speculation is insufficient to sustain a claim of a violation of the appearance of fairness doctrine. *Gamble*, 168 Wn.2d at 188; *State v. Harris*, 123 Wn.App. 906, 914, 99 P.3d 902 (2004). “The test for determining whether the judge’s impartiality might reasonably be questioned is an objective test that assumes a reasonable observer knows and understands all the relevant facts.” *Soliz-Diaz*, 187 Wn.2d at 540 (citing *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995)).

⁵ Mr. Cocom-Vazquez did not move for the trial court to recuse itself until after it had ruled against him following the CrR 3.5 hearing. RP 311-12; CP 151-155.

Here, Mr. Cocom-Vazquez waived his appearance of fairness claim by not objecting or moving for recusal until after the trial court “issued an adverse ruling,” i.e., ruling that Mr. Cocom-Vazquez’s statements were admissible. *Blizzard*, 195 Wn.App. at 725-26. Furthermore, Mr. Cocom-Vazquez fails to provide, as required, any evidence of actual or potential bias nor does he even speculate as to how the judge acted impartially against him. Br. of App. at 9-13; *Gamble*, 168 Wn.2d at 187-88. Rather, he transitions to his ER 605 claim⁶ and seemingly argues that the court made itself a witness and therefore was impartial. Br. of App. at 12-13. The legal standards, however, are different, *infra*, and establishing that the court acted as a witness does not equate to establishing a viable appearance of fairness claim. *Brown*, 31 Wn.2d at 486 (noting that “not all questioning by the court reveals an opinion of the court.”).

Moreover, the mere fact that the trial court ruled against Mr. Cocom-Vazquez regarding the admissibility of evidence is insufficient to establish a violation of the appearance of fairness doctrine. *In re Davis*, 152 Wn.2d at 692. Because we presume that a trial court performs its duties impartially, and Mr. Cocom-Vazquez has not provided evidence to the contrary, his appearance of fairness claim must fail. Accordingly, the

⁶ This claim is addressed below.

trial court did not abuse its discretion in denying Mr. Cocom-Vazquez's recusal motion. Finally, if an error occurred any such error was harmless based on the independent evidence discussed in facts section and below.

ER 605

As mentioned above, “[t]hat the court has wide discretionary powers in the trial of a cause and is not prohibited from questioning a witness, is beyond controversy.” *Brown*, 31 Wn.2d at 486 (quoting *McArthur*, 23 Wn.2d 33); *Gross*, 31 Wn.2d at 219. On the other hand, under ER 605 the “judge presiding at the trial may not testify in that trial as a witness.” ER 605 can apply “even when the trial judge does not formally testify, but inserts his or her own personal experience into the decision-making process.” *In re Estate of Hayes*, 185 Wn.App. 567, 599, 342 P.3d 1161 (2015) (citing *Vandercook v. Reece*, 120 Wn.App. 647, 651–52, 86 P.3d 206 (2004)). As our courts have noted:

Competing interests surface when addressing whether a judge may rely on personal experience when finding facts. On the one hand, the judicial system hopes for a judge possessing experience and knowledge of the workings of the world and the cogs of his community rather than a judge with a vacuumed mind. Agricultural settings, such as Lincoln and Grant Counties, would probably prefer trial judges to enjoy a background in farming and agricultural law. In turn, the two counties might expect the judge to rely on this background. After all, judges do not leave their common experience and common sense outside the courtroom door. Judges are human: like all humans, their outlooks are shaped by their lives' experiences.

On the other hand, parties deserve a decision based on evidence presented at trial and subjected to cross-examination rather than hidden or undisclosed preconceptions of the trial judge. A party may not cross-examine the knowledge and experience of a judge. A judge inserts himself into the presentation of evidence by basing decisions on his life background.

Id. at 598 (internal citations omitted).

For example, in *Nieswandt*, the court of appeals approved of a trial judge discussing his own experience⁷ as a judge, parent, and grandfather—in particular when placing a child in a car seat—to explain his decision in fashioning a parenting plan that awarded visitation to one parent. 87 Wn.App. at 109. There, the reviewing court noted that the trial court was simply applying common sense to the facts of the dispute to make a decision and concluded that “[w]hen the judge is a trier of fact, illustrative comments phrased in the first person are not improper unless they evidence bias, prejudice, or other impropriety.” *Id.*

In *State v. Grayson*,⁸ our Supreme Court reversed a trial court’s refusal to grant the defendant a drug offender sentencing alternative

⁷ In reference to a video showing the child stiffening while being placed in car seat, which was offered to show the child suffering trauma, the court stated the following: “[f]or heaven’s sake, I had three children and ten grandchildren and a couple of great-grandchildren, and I’m telling you, I’ve seen that happen so many times. Just to deprive the child of some trivial little thing, and they’ll stiffen their back or they’ll swing or they’ll throw something.” *Nieswandt*, 87 Wn.App. at 109 FN 1.

⁸ While ER 605 is not referenced, *Grayson* confronts that same issues at play when ER 605 is raised, i.e., the inability to cross-examine the trial court and information from outside the record playing a possible role in a trial court’s decision.

(DOSA) sentence when the trial court relied on its extrajudicial understanding that the DOSA program was underfunded to support its refusal to consider the sentencing alternative. 154 Wn.2d 333, 111 P.3d 1183 (2005). In fact, the trial court did not articulate *any* other reasons for denying the DOSA sentence and pointedly refused the State’s suggestion that more reasons be placed on the record. 154 Wn.2d at 342. Despite reversing in *Grayson* our Supreme Court did remark that:

Our judiciary benefits from and relies upon judges who have studied and become learned in the law and whose personal experiences have taught them a practical understanding of the world we live in and how people live, work, and interact with the world around them.

We do not believe the legislature intended that judges leave their knowledge and understanding of the world behind and enter the courtroom with blank minds. Judges are not expected to leave their common sense behind. Nor do we believe the legislature expected judges to hold hearings on whether fire is hot or water is wet. We prize judges for their knowledge, most of which is obtained outside of the courtroom.

Id. at 339. While the above cases help guide an analysis under ER 605 the boundaries of the rule—when a trial court becomes a witness—remain undefined. *See Estate of Hayes*, 185 Wn.App. at 598-601.

If a trial court errs, however, by becoming a witness under ER 605, the error is harmless if, “without it, the trial court would necessarily have arrived at the same conclusion.” *Reece*, 120 Wn.App. at 652 (citing

cases). Thus, there must be “independent evidence” that supports the trial court’s ruling. *Estate of Hayes*, 185 Wn.App. at 601.

Here, on a total of five occasions during the seven witness, multiple day CrR 3.5 hearing the trial court either asked an interpreter for clarification of a translation or asked a witness about the interplay of Maya and Spanish. RP 167, 175-76, 187-88, 260-61. These types of questions are straightforwardly proper, provide information to counsel, do not introduce outside-the-record information into the trial court’s decision, and do not turn the trial court into a witness. *Gross*, 31 Wn.2d at 219. The trial court’s request of two witnesses to translate about 10 words from Spanish to English is of a different nature as compared to the other court initiated questioning as the answers likely were of little, if any, help to counsel and the questions did depend on the court’s knowledge of Spanish. Nonetheless, the questions were minor departures, in substance and duration, in the lengthy hearing and the answers did not determine the legal outcome.⁹ Whatever the line is that transforms a trial court into a witness by virtue of asking questions, the trial court’s request for some translations could not have crossed it.

⁹ The trial court did note Lt. Hullinger’s translations in its oral findings, but these comments were superfluous since the court had already reached a conclusion regarding Lt. Hullinger’s fluency in Spanish and were not memorialized in the controlling written findings. RP 303; CP 180 (Finding of Fact #6).

Moreover, the trial court, in response to Mr. Cocom-Vazquez's complaint that it had "us[ed] its own perceived knowledge and skill to make conclusions based on facts that are not part of the record" stated that "[i]n this case I'm relying on the translation of Counsel [sic]" and that its "ruling was not based on my use of interpretive skills really at all; it was really on the record that was made by the State and the Defense." RP 313; CP 152. The record, the court's findings, and the court's other statements bear this out.

Lt. Hullinger testified that Mr. Cocom-Vazquez's Spanish was "very clear, very deliberate, [sic] very articulate." RP 51. Importantly, the court determined, based on this testimony that Lt. Hullinger "had a conversation with Mr. Cocom-Vazquez and had no indication of any difficulty in understanding the exchange and, in fact, that the defendant provided some detailed information in response to the questioning which was highly indicative of an ability to understand and communicate in Spanish." RP 303; CP 180 (Finding of Fact #7, Finding of Fact #8). Substantial evidence supported this conclusion, to include the testimony of Det. Brown that Mr. Cocom-Vazquez told him that he spoke Spanish, that Mr. Cocom-Vazquez had lived in the United States for 19 years, and that Mr. Cocom-Vazquez's own expert indicated that method employed by Lt. Hullinger to make sure that Mr. Cocom-Vazquez understood his

rights was the exact method that she would have used. RP 204-05, 247-48, 259-260. When combined with the fact that Mr. Cocom-Vazquez had faced criminal charges in other courts and had attorneys appointed to represent him, did not express confusion about this rights to either Det. Brown (through the language line) or Lt. Hullinger, and signed off on the rights form, there is overwhelming independent evidence to support the trial court's ruling that Mr. Cocom-Vazquez did in fact knowingly, voluntarily, and intelligently waive his rights. RP 188-190; CP 181 (Conclusion of Law #7). Thus, any error the trial court made by asking questions or utilizing his Spanish skills, even if in violation of ER 605, was harmless.

II. The State concedes that the community custody condition that states “[n]o unauthorized use of electronic media” is invalid because it is void for vagueness and/or constitutionally overbroad.

The State concedes that the community custody condition that states “[n]o unauthorized use of electronic media” is invalid because it is void for vagueness and/or constitutionally overbroad. Said condition provides no guidance to Mr. Cocom-Vazquez as to what electronic media is authorized or unauthorized, could prohibit activities that are not crime related, and could lead to arbitrary enforcement. This Court should

remand for the condition to be stricken and corrected with a constitutionally permissible condition.

III. The State concedes that the judgment and sentence contains a scrivener's error regarding the date of Mr. Cocom-Vazquez's bench trial that requires correction.

The State concedes that the judgment and sentence contains a scrivener's error regarding the date of Mr. Cocom-Vazquez's bench trial that requires correction. The judgment and sentence, Section 2.1, incorrectly listed the date of the non-jury trial as April 28, 2017. CP 183. The court actually heard the stipulated facts, non-jury trial, to include issuing its verdict, on March 27, 2017. CP 172-77; RP 327-32. Mr. Cocom-Vazquez's case should be remanded to the trial court for correction of the date.

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CONCLUSION

For the reasons argued above, this Court should affirm Mr. Cocom-Vazquez's convictions and remand to the trial court to strike and correct the impermissible condition and correct the scrivener's error in the Judgment and Sentence.

DATED this 30 day of Jan, 2018.

Respectfully submitted:

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