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NO. 50911-3-II

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

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STATE OF WASHINGTON,

Respondent,

v.

ISAIAS RAMOS RAMÍREZ,

Appellant.

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

The Honorable Toni Sheldon, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Defense counsel was ineffective for failing to request a jury instruction support the defense of lack of knowledge due to intoxication.

2a. To the extent the trial court found Isaias Ramos Ramírez<sup>1</sup> able to pay discretionary legal financial obligations (LFOs), its finding was error.

2b. The trial court failed to make an adequate inquiry into Ramos's financial resources and current and future ability to pay before imposing discretionary LFOs.

3. The portion of the community custody condition prohibiting Ramos from loitering or frequenting "places where children congregate" is unconstitutionally vague.

4. The community custody condition granting discretion to a community corrections officer (CCO) to order penile plethysmograph testing violates Ramos's constitutional right to be free from unreasonable bodily intrusions.

5. The community custody condition subjecting Ramos to a nightly curfew is not crime-related and therefore exceeds the trial court's authority.

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<sup>1</sup> In the trial court, the parties referred to Ramos by his second surname, Ramírez. In the Spanish-speaking world, each person has two last names, a father's surname and a mother's surname, respectively. The name-shortening convention is to drop the mother's surname. Thus, Ramos Ramírez will refer to himself by Ramos or Ramos Ramírez throughout his briefing.

Issues Pertaining to Assignments of Error

1. Ample evidence presented at trial indicated that Ramos was extremely intoxicated at the time the alleged criminal conduct occurred. Was defense counsel ineffective for failing to request a voluntary intoxication instruction?

2. Did the trial court exceed its statutory authority under RCW 10.01.160(3) when it imposed discretionary LFOs without making adequate inquiry into Ramos's financial resources and current and future ability to pay, assuming it made any inquiry at all?

3. Is the portion of the community custody condition prohibiting Ramos from loitering in or frequenting "places where children congregate" void for vagueness?

4. Does the portion of the community custody condition that grants sole discretion to the CCO to order plethysmograph testing violate Ramos's constitutional right to be free from bodily intrusions?

5. Does the community custody condition subjecting Ramos to a nightly curfew exceed the trial court's sentencing authority because it is not crime-related?

B. STATEMENT OF THE CASE

The State charged Ramos with child molestation in the first degree, indecent liberties, and incest in the second degree. CP 58-66.

The charges arose from Ramos Ramírez's conduct with his eight-year-old son, S.P.R. A Shelton police officer, Hector Diaz, testified he observed Ramos kissing S.P.R. on the lips with his tongue going into this mouth. RP 72-73. Diaz indicated that Ramos was also thrusting into S.P.R. with his body in an up-and-down motion. RP 74. Another witness said she saw Ramos's hand on S.P.R.'s buttocks and "[h]e was just holding him trying to get him to kiss him." RP 61. Other witnesses who were farther away believed they were witnessing either adults or teenagers making out. RP 33-36, 51.

Diaz approached Ramos and noted an empty or almost empty bottle of vodka nearby. RP 75. Ramos was very intoxicated: "Vodka and the strong odor of . . . intoxicants was coming off from his person. He's -- every time he talked you can smell the alcohol." RP 81. Diaz separated Ramos and S.P.R. and "observed [S.P.R.'s] whole side of his face was wet with saliva. His whole mouth and nose area, the side of his ear was just wet with saliva." RP 76. Diaz also noticed Ramos's zipper was down, but did not notice whether Ramos had an erection, had ejaculated, or was otherwise sexually aroused. RP 76, 83-84.

Diaz indicated that, due to his drunkenness, Ramos Ramírez was difficult to understand. RP 124. Initially Ramos was not cooperative and would not provide his name or date of birth but then suddenly provided Diaz with his identification cards. RP 76-77, 124-25.

In closing, defense counsel referred to Ramos's intoxication to address the fact that Ramos's fly was open, suggesting that, because he was drunk, he may have just forgotten to zip his pants after peeing. RP 169. Despite arguing intoxication in this manner, defense counsel did not request an involuntary intoxication instruction.

The jury returned guilty verdicts on first degree child molestation, indecent liberties, and second degree incest. CP 29-31; RP 178. With respect to the indecent liberties charge, the jury returned a special verdict indicating the sexual contact was caused by forcible compulsion, which makes indecent liberties a class A felony. CP 28; RCW 9A.44.100(2)(b).

With the State's concession, the trial court determined that the indecent liberties and incest charges were the same criminal conduct, and therefore did not impose a sentence for the incest count. CP 12; RP 183-84.

The trial court imposed concurrent high-end indeterminate standard range sentences of 89 months to life for the first degree child molestation and indecent liberties. CP 12; RP 190. The trial court also imposed lifetime community custody. CP 13; RP 190.

As for LFOs, the trial court asked defense counsel about Ramos's ability to work. RP 191. Defense counsel responded that Ramos had worked as a brush picker but was uncertain about his employment prospects after release due to "certain[ty] he'll be deported." RP 191. Nonetheless, the trial

court determined Ramos was able to work—but not able to pay—and imposed sheriff's fees of \$241.50, \$600 for court-appointed counsel, \$283.50 for the cost of a defense investigator, a jury demand of \$250, and witness fees of \$70.16. CP 14; RP 191.

The trial court also imposed the following community custody conditions:

4. The defendant shall abide by a nightly curfew if established by the CCO; . . .

15. The defendant shall not loiter in nor frequent places where children congregate such as parks, video arcades, and shopping malls; . . .

17. The defendant shall undergo periodic polygraph and/or plethysmograph testing to measure treatment progress and compliance at a frequency determined by his/her treatment provider and/or his/her Community Corrections Officer[.]

CP 21-22.

Ramos Ramírez timely appeals. CP 6.

C. ARGUMENT

1. DEFENSE COUNSEL'S ASSISTANCES WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO REQUEST A VOLUNTARY INTOXICATION INSTRUCTION

Defense counsel decided to proceed to trial with a defense of general denial despite significant evidence that Ramos Ramírez was extremely intoxicated at the time of the events leading to the charges. Because this was not a reasonable tactic and because it undermines confidence in the outcome

of his trial, Ramos's did not receive effective assistance of counsel. Ramos therefore requests that his indecent liberties and incest convictions be reversed and remanded for a new trial at which he is represented by effective counsel.

The accused enjoys the right to effective assistance of counsel. US. CONST. amend. VI; CONST. art. I, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn. 222, 229, 743 P.2d 816 (1987). “[T]he defendant must show both (1) deficient performance and (2) resulting prejudice to prevail on an ineffective assistance claim.” State v. Estes, 188 Wn.2d 450, 457-58, 395 P.3d 1045 (2017). Performance is deficient if it falls below an objective standard of reasonableness considering all the circumstances. Id. at 458. Prejudice exists if there is a reasonable probability the outcome of trial would have differed but for counsel's deficient performance; “a ‘reasonable probability’ is lower than a preponderance standard”—“it is a probability sufficient to undermine confidence in the outcome.” Id. (quoting Strickland, 466 U.S. at 694).

a. Ramos was entitled to a voluntarily intoxication instruction

The defense is entitled to a jury instruction on its theory of the case when that theory is supported by substantial evidence. State v. Kruger, 116 Wn. App. 685, 693, 67 P.3d 1147 (2003). Evidence of intoxication and its effect on mental functioning may be used to negate the mental state of an

offense. RCW 9A.16.090; State v. Carter, 31 Wn. App. 572, 575, 643 P.2d 916 (1982). The standard voluntary intoxication instruction provides:

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant [acted][or][failed to act] with (fill in requisite mental state).

11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 18.10, at 282 (3d ed. 2008). “Intoxication” means “an impaired mental and bodily condition which may be produced either by alcohol, which is a drug, or by any other drug.” State v. Dana, 73 Wn.2d 533, 535, 439 P.2d 403 (1968).

The trial court must instruct on voluntary intoxication when (1) the charged crime includes a mental state, (2) there is substantial evidence of intoxication, and (3) there is evidence the intoxication affected the individual’s ability to form the requisite mental state. Kruger, 116 Wn. App. at 691. When these three elements are met, the trial court’s refusal to give a voluntary intoxication instruction is reversible error.

When evaluating whether substantial evidence supports a defense instruction, the court must interpret the evidence “most strongly” in the defendant’s favor and “must not weigh the proof, which is an exclusive jury function.” State v. Douglas, 128 Wn. App. 555, 561-62, 116 P.3d 1012 (2005).

The first element is met as to the indecent liberties and second degree incest charges because both include mental states.<sup>2</sup> RCW 9A.44.100(1) (“A person is guilty of indecent liberties when he or she knowingly causes another person to have sexual contact with him or her . . . .” (emphasis added)); RCW 9A.64.020(2)(a) (“A person is guilty of incest in the second degree if he or she engaged in sexual contact with a person whom he or she knows to be related to him or her . . . .” (emphasis added)). Both second degree incest and indecent liberties require proof of knowledge, making voluntary intoxication an avenue of defense with respect to this mental state.

The second Kruger factor is also met. Hector Diaz of the Shelton Police Department stated, “the first thing I observed, empty, almost empty bottle of vodka.” RP 75. Ramos was initially uncooperative, refusing to give his name, date of birth or other information. RP 76-77, 79. Diaz immediately removed the bottle from Ramos, as Ramos attempted to give Diaz “a bunch of ID cards.” RP 76-77. Diaz stated Ramos was intoxicated: “Vodka and the strong odor of . . . intoxicants was coming off from his person. He’s -- every time he talked you can smell the alcohol.” RP 80-81. Diaz also stated, “He was really intoxicated, so it was -- it was a little bit difficult to understand. But

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<sup>2</sup> Ramos acknowledges that first degree child molestation lacks a mental state and therefore voluntary intoxication provides no defense. See RCW 9A.44.083 (establishing guilt for “child molestation in the first degree when the person has . . . sexual contact with another who is less than [12] years old and not married to the perpetrator and the perpetrator is at least [36] months older than the victim”).

I was -- I can figure out what he was trying to tell me.” RP 124. There can be little question that there was substantial evidence of Ramos’s intoxication at trial.

The third factor is also met. However, the case law is inconsistent on this factor. See State v. Walters, 162 Wn. App. 74, 83, 255 P.3d 835 (2011) (noting inconsistent approaches). For instance, a voluntary intoxication instruction was necessary where the defendants drank beer all day, ingested several Quaaludes, spilled beer and uncoordinatedly played ping pong, and one felt no pain when hit by a card. Rice, 102 Wn.2d at 122-23. In contrast, the defendant was not entitled to an instruction where he was obviously intoxicated and angry, but there was no sign of the alcohol’s impact on his reasoning abilities. State v. Gabryschak, 83 Wn. App. 249, 253-55, 921 P.2d 549 (1996). Similarly, in State v. Priest, 100 Wn. App. 451, 455, 997 P.2d 452 (2000), the court determined no intoxication instruction was warranted given Priest was able to operate a motor vehicle, communicate clearly with a state trooper, purposefully provide false information, and attempt to reduce his charges by becoming an informant.

Comparing these cases, the Walters court concluded that “physical manifestations of intoxication provide sufficient evidence from which to infer that mental processing also was affected, thus entitling the defendant to an intoxication instruction.” 162 Wn. App. at 83.

Here, there were clearly physical manifestations of Ramos's intoxication as discussed above. The investigating officer repeatedly stated that Ramos smelled strongly of alcohol and was difficult to understand when speaking. RP 81, 124. Although Ramos was initially uncooperative, he seemed to just offer up his ID cards moments later. RP 79, 124-25.

In addition, the circumstances of the investigation themselves suggest that intoxication affected Ramos's ability to form the requisite mental state. Ramos is alleged to have been deeply kissing, licking, thrusting toward, and caressing the buttocks of his eight-year-old son in full public view outside of a Shelton Safeway. RP 61, 72-74. The mere fact that this behavior was exposed to public view suggests that intoxication was clearly impacting Ramos's judgment.

In sum, the record reflects substantial evidence of Ramos's intoxication. And there is ample evidence of the vodka's effect on his mind and body. Ramos was entitled to a voluntary intoxication instruction.

b. Counsel's deficiency in failing to request the instruction prejudiced the outcome of Ramos's trial

Counsel's performance is deficient when it falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Counsel has an affirmative duty to research, investigate, and apply the law to their clients' circumstances. Estes, 188 Wn.2d at 460; In re Pers. Restraint of Tsai, 183

Wn.2d 91, 102, 351 P.3d 138 (2015); State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Here, defense counsel failed to do so.

As discussed, numerous cases support proposing a voluntary intoxication in similar circumstances and have held defense counsel is ineffective for failing to request such instructions. See, e.g., Thomas, 109 Wn.2d at 229 (ineffective for failing to request voluntary intoxication instruction); Kruger, 116 Wn. App. at 688 (same); see also State v. Powell, 150 Wn. App. 139, 155-57, 206 P.3d 703 (2009) (failure to request reasonable belief instruction).

In Kruger, the court determined counsel was ineffective because there was substantial evidence of Kruger's intoxication. 116 Wn. App. at 692-93. Because the defense theory was lack of intent, the court concluded there was no strategic reason for not requesting the instruction. Id. at 693-94. Reversal was required because "[e]ven if the issue of Mr. Kruger's intoxication was before the jury, without the instruction, the defense was impotent." Id. at 694-95.

In Rice, the jury was not instructed that intoxication could be considered in determining whether the defendants acted with the mental state essential to commit felony murder. 102 Wn.2d at 123. "Consequently, the jury, without the requested instruction, was not correctly apprised of the law, and defendants' attorneys were unable to effectively argue their theory of an

intoxication defense.” Id. A properly instructed jury “could well have returned a different verdict.” Id.

At this trial, there was no dispute that had touched S.P.R., even inappropriately so. Instead, defense counsel’s dispute centered on whether the touching constituted sexual contact and whether it was done for sexual gratification. RP 166-70 (arguing that there was no evidence of sexual contact or gratification). As part of this argument, defense counsel addressed the fact that police found Ramos with his zipper down and tried to explain it by noting Ramos’s drunkenness:

His zipper was down. He was drunk. Maybe peed beforehand and he didn’t pull his zipper up. You have no evidence of sexual gratification. There was no testimony that Mr. Ramirez had an erection. There was no testimony that he ejaculated. There’s no testimony that he was trying to masturbate while this was going on. So there was no sexual contact, no sexual gratification.

RP 169-70.

Defense counsel’s argument suggested at least some of Ramos’s actions could be explained by his intoxicated state. Yet defense counsel did not meaningfully pursue this legitimate defense in attacking the State’s evidence to show Ramos knew what he was doing when he kissed and groped S.P.R. The only way counsel could have legitimately used Ramos’s intoxication to his advantage was to request a voluntary intoxication instruction, which would have been amply supported by the case law

discussed above. Counsel's failure to pursue this line of defense constituted deficient performance.

This deficient performance was extremely prejudicial in a somewhat bizarre case like this. It is certainly not commonplace for fathers to be kissing, licking, thrusting against, and groping their sons. It is even less commonplace for them to do so in full public view. And, aside from the actions themselves, there was no other evidence to support Ramos's sexual motivation. There was no evidence Ramos had made sexual demands of S.P.R. or touched his genitals, or that Ramos was sexually aroused. What is clear from the evidence, however, is that Ramos was extremely intoxicated when the events occurred. Had jurors been instructed on voluntary intoxication and had that theory presented to them, the jurors may well have found evidence that Ramos was unaware of his actions, that he lacked the requisite knowledge to support criminal culpability. The failure to pursue the voluntary intoxication defense and instruction undermines confidence in the outcome of Ramos's trial. Because defense counsel failed to provide effective assistance, reversal and retrial is required. Kruger, 116 Wn. App. at 695.

2. THE TRIAL COURT'S INQUIRY INTO RAMOS'S FINANCIAL CIRCUMSTANCES WAS INADEQUATE TO SATISFY RCW 10.01.160

At sentencing, the trial court inquired of defense counsel about Ramos's ability to work. RP 191. Defense counsel responded that Ramos

Ramírez had worked as a brush picker but that he did not “know what his prospects for employment would be after he’s released from Department of Corrections. I’m pretty certain he’ll be deported.” RP 191. Without further inquiry or analysis, the court found Ramos able to pay several discretionary LFOs, including a sheriff’s fee of \$241.50, \$600 for court-appointed counsel, \$283.50 for the cost of a defense investigator, a \$250 jury demand, and witness fees of \$70.16. RP 191; CP 14. The trial court’s inquiry fell short of satisfying RCW 10.01.160(3) for several reasons.

RCW 10.01.160(3) provides,

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

This statute is mandatory: “it creates a duty rather than confers discretion.” State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). “Practically speaking . . . the court must do more than sign a judgment and sentence with boilerplate stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant’s current and future ability to pay.” Id. (emphasis added). This inquiry must include consideration of “important factors . . . such as incarceration and a defendant’s other debts . . . when determining a defendant’s ability to pay.”

Id. The Blazina court also instructed courts engaged in this inquiry to “look to the comment in court rule GR 34 for guidance.” Id. The court referred to Washington’s LFO system as “broken” and noted in detail how it creates a permanent underclass in light of the astronomically high 12-percent interest rate assessed, especially for Latino defendants. Id. at 8365-37.

Here, the trial court’s inquiry was insufficient. The trial court asked defense counsel to speak only to “ability to work.” RP 191. This did not “take account of the financial resources of the defendant” or the “burden that payment of costs will impose.” RCW 10.01.160(3). In addition, when it imposed discretionary LFOs, the trial court had just heard that defense counsel could not speak to Ramos’s ability to work because he was likely to be deported upon release. RP 191. Yet the trial court robotically imposed discretionary LFOs anyway, finding Ramos able to work. Being able to work is not the equivalent of being able to pay. RCW 10.01.160 concerns the latter, which the trial court failed to apprehend.

Nor did the trial court follow Blazina’s instruction to look to GR 34 for guidance. 182 Wn.2d at 838-39. There was no inquiry about the nature of Ramos’s work or the income he earned as a brush picker. However, it is common knowledge that unskilled manual labor does not pay much. And the trial court imposed discretionary LFO knowing that Ramos had no real property, no personal property, and no income from any source. CP 4-5. Had

the trial court engaged in a GR 34 inquiry and “seriously question[ed]” Ramos’s ability to pay, the trial court would have imposed more than \$1,400 in discretionary LFOs. The trial court failed to comply with RCW 10.01.160 or Blazina.

In response, the State might argue that this issue was not adequately preserved for appellate review, as the State almost always does. However, the issue was preserved by defense counsel stating he believed his client lacked the ability to pay discretionary LFOs, particularly because he believed his client would be deported upon release. Defense counsel’s assertion qualifies as an objection to the imposition of discretionary LFOs.

Even if it did not, however, this court should consider the LFO issue, just as the Blazina court did. See 192 Wn.2d at 834 (“National and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case.”). RAP 1.2, moreover, expresses a clear preference to liberally interpret the rules of appellate procedure “to promote justice and facilitate a decision of cases on the merits.” Ramos asks this court to review his claim, vacate the LFO award, and remand for resentencing at which the trial court can comply with the strictures of RCW 10.01.160.

3. THE COMMUNITY CUSTODY CONDITION PROHIBITING RAMOS FROM LOITERING OR FREQUENTING PLACES WHERE CHILDREN CONGREGATE IS UNCONSTITUTIONALLY VAGUE

The portion of community custody condition prohibiting Ramos from loitering or frequenting “places where children congregate” is unconstitutionally vague. See CP 22 (community custody condition 15). Several cases have recently so held. E.g., State v. Norris, \_\_\_ Wn. App. \_\_\_, 404 P.3d 83, 87-88 (2017); State v. Irwin, 191 Wn. App. 644, 654-55, 364 P.3d 830 (2015); State v. Santos Santiago, noted at \_\_\_ Wn. App. \_\_\_, 2017 WL 5569209, at \*5-\*6 (2017) (unpublished); State v. Bruno, noted at \_\_\_ Wn. App. \_\_\_, 2017 WL 5127781, at \*7 (2017) (unpublished); State v. Kirkwood, noted at 199 Wn. App. 1061, 2017 WL 3169007, at \*5-\*6 (2017) (unpublished); State v. Nguyen, noted at 199 Wn. App. 1056, 2017 WL 3017516, at \*6 (2017) (unpublished); State v. Padilla, noted at 198 Wn. App. 1049, 2017 WL 1483979, at \*4 (2017) (unpublished); State v. Padilla, noted at 198 Wn. App. 1050, 2017 WL 1533231, at \*3 (2017) (unpublished).<sup>3</sup> Accordingly, remand is required for this portion of the community custody condition to be stricken.

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<sup>3</sup> Pursuant to GR 14.1, Ramos cites unpublished opinions, which are not binding, but asks the court to give the unpublished opinions significant persuasive value.

4. THE COMMUNITY CUSTODY CONDITION AUTHORIZING A COMMUNITY CORRECTIONS OFFICER TO DIRECT PLETHYSMOGRAPH VIOLATES RAMOS'S CONSTITUTIONAL RIGHT TO BE FREE FROM BODILY INTRUSIONS

One community custody condition authorizes “periodic polygraph and/or plethysmograph testing to measure treatment progress and compliance at a frequency determined by his/her treatment provider and/or his/her Community Corrections Officer.” CP 22 (condition 17). To the extent this permits a CCO to order plethysmograph testing as a monitoring tool, the condition is erroneous. This portion of the condition must be stricken.

Trial courts are authorized to impose community custody conditions that monitor compliance with treatment. State v. Riles, 135 Wn.2d 326, 342-43, 957 P.2d 655 (1998), abrogated on other ground by State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010). However, “plethysmograph testing does not serve a monitoring purpose” and such testing implicates a defendant’s due process right to be free from bodily intrusions. State v. Land, 172 Wn. App. 593, 605, 295 P.3d 782 (2013). “Plethysmograph testing is extremely intrusive” and “can properly be ordered incident to crime-related treatment by a qualified provider. But it may not be viewed as a routine monitoring tool subject only to the discretion of a community corrections officer.” Id. (emphasis added) (citation omitted).

Community custody condition 17 subjects Ramos to plethysmograph testing at the sole discretion of his CCO as a routine monitoring tool.<sup>4</sup> Indeed, it states, in pertinent part, “The defendant shall undergo periodic . . . plethysmograph testing to measure treatment progress and compliance at a frequency determined by . . . his/her Community Corrections Officer.” CP 22. Because this condition permits plethysmograph monitoring “subject only to the discretion of a community corrections officer” rather than a treatment provider, the condition must be revised to disallow Ramos’s CCO discretion to order plethysmograph testing. Land, 172 Wn. App. at 605.

5. THE COMMUNITY CUSTODY CONDITION PERMITTING THE COMMUNITY CORRECTIONS OFFICER TO ESTABLISH A NIGHTLY CURFEW IS NOT CRIME-RELATED AND THEREFORE EXCEEDED THE TRIAL COURT’S SENTENCING AUTHORITY

Under, RCW 9.94A.703(3)(f), the trial court may require an offender to “[c]omply with any crime-related prohibitions.” A crime-related prohibition “means an order of a court prohibiting conduct that directly relates to the circumstances of the crime . . . .” RCW 9.94A.030(10) (emphasis added). The sentencing court may also order an offender to participate in

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<sup>4</sup> Ramos does not dispute the condition insofar as it authorizes plethysmograph testing “incident to crime-related treatment by a qualified [treatment] provider.” Land, 172 Wn. App. at 605 (citing State v. Castro, 141 Wn. App. 485, 494, 170 P.3d 78 (2007)).

rehabilitative programs or perform affirmative conduct reasonably related to the circumstances of the offense. RCW 9.94A.703(3)(d).

Here, the trial court imposed a condition that stated, “The defendant shall abide by a nightly curfew if established by the CCO.” CP 21 (community custody condition 4). Regardless of whether this condition is treated as a prohibition or as affirmative conduct under RCW 9.94A.703, it must be stricken because it is not crime-related and therefore exceeds the trial court’s authority.

The alleged acts did not occur at night. They occurred before 7:14 p.m. on March 10, 2017, a Friday evening. CP 70; RP 34, 71. There is no evidence in the record that indicates Ramos would not have been able to commit the crimes if he had been confined nightly. Because no evidence in the record supports any curfew, the condition is not crime-related. See State v. Kinzle, 181 Wn. App. 774, 785, 326 P.3d 870 (2014) (striking condition for sexually explicit materials “because no evidence suggested that such materials were related to or contributed to [Kinzle’s] crime”); State v. O’Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (striking prohibition on internet use because the “trial court made no finding that internet use contributed to the rape”). The condition that permits a curfew to be imposed on Ramos must be stricken.

D. CONCLUSION

The second degree incest and indecent liberties convictions must be reversed because Ramos was deprived of effective counsel. In addition, resentencing is required to assess Ramos's ability to pay discretionary LFOs and to strike the challenged community custody conditions.

DATED this 30<sup>th</sup> day of November, 2017.

Respectfully submitted,

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