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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

ISAIAS RAMOS-RAMIREZ, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Toni Sheldon, Judge

No. 17-1-00078-7

AMENDED BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENTS OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Ramos-Ramirez's trial counsel was not ineffective by not asking for a voluntary intoxication jury instruction because, although there was evidence that Ramos-Ramirez was intoxicated when he committed the three sex crimes at issue in this case, there was no evidence that his intoxication existed to such a degree that it would logically and reasonably affect his ability to form the requisite mental states.

    a) All of the crimes at issue in this case, to include child molestation, require proof of a mental element.

    b) Standard of review for claims of ineffective assistance of counsel.

    c) Ramos-Ramirez was not entitled to a voluntary intoxication jury instruction because there was insufficient evidence to support a logical and reasonable inference that his intoxication existed to a degree that it could have affected his ability to form the requisite mental states applicable to the charged offenses.

    d) Although the State maintains that the facts of this case did not merit a voluntary intoxication instruction, even if it was error for trial counsel not to request the instruction, Ramos-Ramirez's claim of ineffective assistance of counsel should fail because he cannot show any resulting prejudice.

    e) Although the State maintains that the facts of this case did not merit a voluntary intoxication instruction, even if error occurred because trial counsel didn't ask for the instruction or because the court did not sua sponte give the instruction, the error was nevertheless harmless and is not grounds for reversal.

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2. Because Ramos-Ramirez did not object when the trial court engaged in an abbreviated, limited inquiry into his ability to pay $1,445.16 in discretionary LFOs before imposing them, this Court should deny review of Ramos-Ramirez's unpreserved assignment of error.

3. The community custody condition prohibiting Ramos-Ramirez from loitering in or frequenting places where children congregate, such as parks, video arcades, and shopping malls is not unconstitutionally vague, because the prohibition is defined by a descriptive list of prohibited places.

4. The State concedes that the community custody condition that requires Ramos-Ramirez to submit to plethysmograph testing as a monitoring tool to be implemented at the discretion the community corrections officer is inappropriate and should be removed from the judgment and sentence, but the State contends that plethysmograph testing at the direction of Ramos-Ramirez's treatment provider is a valid community custody condition and should be retained in the judgment and sentence.

5. The community custody condition allowing a community custody officer to set a curfew for Ramos-Ramirez should be stricken from the judgment and sentence because it is not a crime-related restriction.

B. FACTS AND STATEMENT OF THE CASE

For the purposes of the issues raised in this appeal, the State accepts Ramos-Ramirez's statement of facts, except where additional or

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contrary facts are offered in the argument sections below, as needed to develop the State's arguments. RAP 10.3(b).

C. ARGUMENT

1. Ramos-Ramirez's trial counsel was not ineffective by not asking for a voluntary intoxication jury instruction because, although there was evidence that Ramos-Ramirez was intoxicated when he committed the three sex crimes at issue in this case, there was no evidence that his intoxication existed to such a degree that it would logically and reasonably affect his ability to form the requisite mental states.

The parties tried this case to a jury on a three-count information that included charges of child molestation in the first degree, indecent liberties, and incest in the second degree. CP 58-60. The jury returned guilty verdicts for each of the three charged offenses and found both that Ramos-Ramirez committed the crime of indecent liberties with forcible compulsion and that the victim was incapable of consent. CP 28-31.

a) All of the crimes at issue in this case, to include child molestation, require proof of a mental element.

Conviction for each of Ramos-Ramirez's three crimes, to include child molestation in the first degree, required proof of a mental element. The crime of incest in the second degree, as charged, has a knowledge

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element and is committed when a person "engages in sexual contact with a person whom he or she knows to be related to him or her...." RCW 9A.64.020(2)(a). The crime of indecent liberties, as charged, has a knowledge element and is committed when the perpetrator "knowingly causes another person to have sexual contact with him" by forcible compulsion, or when the victim is incapable of consent, or both. RCW 9A.44.100. As explained below, the crime of child molestation, also, requires proof of a mental element.

The statutory language defining child molestation in the first degree reads as follows:

> A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

RCW 9A.44.083(1). In the instant case, the State charged Ramos-Ramirez with personally having sexual contact with the victim rather than that he caused another person to do so; thus, as charged, there was no express mental element to the crime of child molestation in the first degree. CP 59. However, each of the three crimes charged in this case, to include the crime of child molestation, required proof that Ramos-Ramirez had

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"sexual contact" with the victim. CP 58-60; RCW 9A.44.083(1); RCW 9A.44.100(1); RCW 9A.64.020(2)(a). The term "sexual contact" is defined at RCW 9A.44.010 as follows: "As used in this chapter... (2) "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." Thus, the definition applies to the crimes of child molestation and indecent liberties because those crimes are defined in Chapter 44, but the term also applies to the crime of incest, because RCW 9A.64.020(3) states that "[a]s used in this section... (b) 'Sexual contact' has the same meaning as in RCW 9A.44.010[.]"

In the Court of Appeals case of *State v. Stevens*, 127 Wn. App. 269, 110 P.3d 1179 (2005), *aff'd*, 158 Wn.2d 304, 143 P.3d 817 (2006), this Court analyzed the crime of child molestation and distinguished between the elements of an offense and the definitions of those elements, but the Court found that regardless whether the term "sexual gratification" is an element of the crime or whether it is only the definition of an element, proof of the crime nevertheless requires the State to prove the defendant's intent to gratify sexual desire, *id.* at 274, and the Court found that "voluntary intoxication is relevant on the issue of [defendant's]

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intent." *Id.* at 275 (citations omitted). In its decision affirming the Court of Appeals, the Supreme Court stated as follows:

> Thus, while sexual gratification is not an explicit element of second degree child molestation, the State must prove a defendant acted for the purpose of sexual gratification. Intent is relevant to the crime of second degree child molestation because it is necessary to prove the element of sexual contact.

State v. Stevens, 158 Wn.2d 304, 309–10, 143 P.3d 817 (2006). The Supreme Court held that because "intent is a component of 'sexual contact,' [the defendant] was entitled to present evidence of his intoxication and to have the trial court instruct the jury on involuntary intoxication." *Id.* at 310.

b) Standard of review for claims of ineffective assistance of counsel.

In the instant case, Ramos-Ramirez's trial counsel did not request a voluntary intoxication instruction. Therefore, on appeal Ramos-Ramirez alleges that his attorney was ineffective. Br. of Appellant at 5-13.

Ineffective assistance of counsel is a two-pronged test that requires the reviewing court to consider whether trial counsel's performance was deficient and, if so, whether counsel's errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v.*

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Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011). To demonstrate prejudice, defendant must show that but for the deficient performance, there is a reasonable probability that the outcome would have been different. *Strickland*, 466 U.S. at 697; *State v. Foster,* 140 Wn. App. 266, 273, 166 P.3d 726 (2007). If one of the two prongs of the test is absent, the reviewing court need not inquire further. *Strickland v. Washington,* 466 U.S. 668, 697, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Foster,* 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

Legitimate trial tactics are not deficient performance. *Grier*, 171 Wn.2d at 33. The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson,* 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

c) Ramos-Ramirez was not entitled to a voluntary intoxication jury instruction because there was insufficient evidence to support a logical and

> reasonable inference that his intoxication existed to a degree that it could have affected his ability to form the requisite mental states applicable to the charged offenses.

To receive a jury instruction on voluntary intoxication, a defendant must show that: (1) the crime charged includes a particular mental state as an element, (2) there is substantial evidence of drinking, and (3) there must be evidence that the drinking affected the defendant's ability to form the requisite mental state. *State v. Everybodytalksabout,* 145 Wn.2d 456, 479, 39 P.3d 294 (2004). In the instant case, the State does not dispute that factors one and two are satisfied, but the State contends that factor three is not satisfied because there is insufficient evidence in the record to support a contention that Ramos-Ramirez was intoxicated to the degree that he could not form the requisite mental states.

The arresting officer testified that when he initially contacted him, Ramos-Ramirez was "highly intoxicated and was slurring his speech." RP 15. The officer saw a near-empty bottle of vodka and could smell a strong odor of intoxicants every time Ramos-Ramirez talked. RP 70, 80-81. The officer testified that Ramos-Ramirez was "really intoxicated" and that "it was a little bit difficult to understand" him. RP 124. Thus, there was

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evidence that Ramos-Ramirez had been drinking and that he was impaired, but there was no evidence from which it could be surmised that he was so impaired that he would not *know* that he was related to his own son or that he would not *know* that he was forcing his son to have sexual contact with him; nor was there evidence to suggest that Ramos-Ramirez was so intoxicated that he forced sexual contact on the victim for some purpose other than to sexually gratify himself. To the contrary, the State contends that, at the most, the evidence of Ramos-Ramirez's use of alcohol is sufficient only to suggest that it reduced his inhibitions and impaired his judgment, but there is no evidence that it impaired his ability to form the requisite mental states.

RCW 9A.16.090 provides that:

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his or her intoxication may be taken into consideration in determining such mental state.

Thus, when there is evidence that drinking affected a defendant's ability to form the requisite mental state, voluntary intoxication may negate the mental state element. *State v. Gabryschak*, 83 Wn. App. 249, 252, 921

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P.2d 549 (1996). However, before a defendant may receive a voluntary intoxication jury instruction, not only must there be evidence that the defendant had been drinking, but there must also be evidence that the drinking had some effect on the defendant's ability to form the requisite mental state. *Id.* at 252-53. "Under RCW 9A.16.090, it is not the fact of intoxication which is relevant, but the degree of intoxication and the effect it had on the defendant's ability to formulate the requisite mental state." *State v. Coates*, 107 Wn.2d 882, 891, 735 P.2d 64 (1987).

In the instant case, there is no evidence that the use of alcohol had affected Ramos-Ramirez's ability to form the requisite mental states. To the contrary, evidence in the record shows that Ramos-Ramirez acted in a calculated and deliberate manner at the crime scene, indicating an understanding of his crimes, when he told the victim not to speak to the investigating officer. RP 75. Mere evidence of impairment, without evidence that the impairment affected the defendant's ability to form the requisite mental state, is insufficient to justify a voluntary intoxication jury instruction. *State v. Gabryschak,* 83 Wn. App. 249, 253-55, 921 P.2d 549 (1996); *State v. Gallegos*, 65 Wn. App. 230, 238-39, 828 P.2d 37 (1992). Generally, and as described below, cases that have found error based on a

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failure to propose a voluntary intoxication instruction are distinguishable from the instant case because, in contrast to the instant case, those cases involved evidence that the degree of impairment was sufficient to affect the requisite mental state or because the conduct alleged was such that the perpetrator's mental state could reasonably be called into doubt.

For example, the State contends that *State v. Jones*, 95 Wn.2d 616, 628 P.2d 472 (1981), represents a case where, in contrast to the instant case, the requisite mental state could reasonably be called into doubt by the available evidence of the defendant's degree of impairment. In *Jones*, the State charged the defendant with second-degree murder after he stabbed a man to death. *Id.* The circumstances of the killing were such that there were two plausible defenses from which the jury "could have found either that [the defendant] was so intoxicated as to be unable to form the intent to kill or, alternatively, that he acted in self-defense, but recklessly or negligently used more force than was necessary to repel the attack." *Id.* at 623.

The State contends that on the facts of *Jones* – where reasonably plausible, alternative theories existed to explain the defendant's mental state – evidence of impairment of any degree was potentially sufficient to

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affect the requisite mental state. In the instant case, however, where Ramos-Ramirez groped the victim's buttocks, shoved his tongue into his mouth, and licked his face and neck (RP 60, 70-77), no reasonable alternative explanation – apart from Ramos-Ramirez's intent to sexually gratify himself – was proffered or available.

In *State v. Brooks*, 97 Wn.2d 873, 651 P.2d 217 (1982), the Supreme Court considered whether a voluntary intoxication instruction was appropriate on the issue of premeditation in a murder case. There was evidence that the defendant was staggering around with a bottle of whiskey and had been drinking whiskey and rum throughout the day, that he ate a spider and washed it down with whiskey, that he had a blotchy face, bloodshot eyes, and slurred speech, and that he swayed back and forth, stumbled, staggered, and fell into some water. *Id.* at 877. Additionally, the defendant proffered the testimony of a psychologist to show that the defendant had a personality disorder and that the effects of alcohol on the disorder were such that the defendant probably acted in an "unpremeditated impulsive fashion." *Id.* at 877-78.

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Thus, the State contends that in *Brooks*, as compared to the instant case, there was a great deal more evidence of impairment and how it affected the defendant's ability to form the requisite mental state. Still more, the mental state at issue in *Brooks* was premeditation, which the Court defined as "the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." (Footnote omitted.) *Brooks,* at 876.

In *Brooks*, two reasonably plausible, alternative theories existed – the defendant may have killed with premeditation, or he may have killed impulsively – and while obvious, easily recognizable differences are imaginable in some cases, in practice the transition from the one mental state (murder without premeditation) to the other (premeditated murder) is often nuanced. Therefore, any degree of impairment might be an important consideration. In the instant case, however, the difference between Ramos-Ramirez's acts of deep-tongue kissing the victim, and groping his buttocks, all with the intent to sexually gratify himself – as compared to some other, yet undisclosed and unproffered, purpose – is not nuanced, and, apart from an intent to sexually gratify himself, there is no reasonably plausible, alternative explanation for Ramos-Ramirez's

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conduct. RP 71-74. The same or similar distinctions exist in each of the cases discussed below.

In *State v. Rice*, 102 Wn.2d 120, 683 P.2d 199 (1984), two codefendants who beat and stabbed a man to death were tried for second degree murder. The defendants proposed a voluntary intoxication jury instruction, which the trial court refused. *Id.* at 122. On review of the trial court's refusal to give the instruction, the Supreme Court stated as follows:

> The trial court's instructions informed the jury of the elements of second degree felony murder, including knowledge as the requisite mental state. The jury was not instructed that intoxication could be considered in determining whether the defendants acted with the mental state essential to commit the crime of felony murder. 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. at 123.

However, in addition to evidence that the defendants in *Rice* had consumed alcohol and were affected by it, there was also some evidence of how the effects of the alcohol affected the defendants' ability to form the requisite mental state. *Id.* A victim who escaped without being killed testified that the defendants spilled beer and could not hit a ping-pong ball, and he said that he "was under the presumption they were – drunk, or –

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not of normal mind." *Id.* at 122. Other evidence showed that the defendants had been drinking beer all day, had ingested two to five Quaaludes each, and that one of the defendants "was struck by a car earlier that evening but 'he was so loaded he didn't feel it.'" *Id.* at 123 (citation omitted in original). Thus, in *Rice* there was much greater circumstantial evidence of the effect of the defendant's impairment on his ability to form the requisite mental state as compared to the instant case. *Id.*

In the 2003 case of *State v. Kruger*, 116 Wn. App. 685, 67 P.3d 1147 (2003), the defendant was tried and convicted on the charge of third degree assault for headbutting a police officer. Conviction required proof that the defendant "intentionally" struck or touched the officer "in a harmful or offensive manner with intent to inflict bodily injury." *Id.* at 690. Defense counsel did not request a voluntary intoxication instruction; so, reasoning as follows, the Court of Appeals reversed the conviction due to ineffective assistance of counsel:

> The record reflects substantial evidence of Mr. Kruger's drinking and level of intoxication. And there is ample evidence of his level of intoxication on both his mind and body, e.g., his "blackout," vomiting at the station, slurred speech, and imperviousness to pepper spray. He was entitled to the instruction.

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Id. at 692. Thus, in *Kurger,* too, there was much greater evidence of the effect of the defendant's impairment on his ability to form the requisite mental state as compared to the instant case. *Id.* And, significantly, it was also important to the Court that "[d]uring deliberations, the jury asked for clarification: 'Need clarification between intent & resisting.'" *Id.* at 689.

In the 2006 case of *State v. Stevens*, 158 Wn.2d 304, 143 P.3d 817 (2006), discussed *supra* in relation to the necessity of proving intent when proving sexual contact, evidence at trial showed that the defendant had drunk two 40-ounce bottles of beer and two shots of whiskey before he placed his hand over the 12-year old victim's breast when posing for a photo with her. *Id.* at 306-07. At his trial on the charge of second degree child molestation, the defendant did not deny the act, but he testified that it was just a "sick joke" and that he wanted it to look like he was grabbing the breast, but that he did not actually intend to grab it. *Id.* at 307. The Court held that the trial court erred by refusing to give a voluntary intoxication instruction and reasoned that "[h]ad the jury believed Stevens' evidence, and had they been properly instructed, the jury could reasonably have found Stevens' intoxication prevented him from acting for the purpose of sexual gratification." *Id.* at 310.

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Stevens resembles the instant case in that in *Stevens*, as in the instant case, there was but slight evidence of how the defendant's impairment affected his ability to form the requisite mental state. *Id.* at 306-07. However, distinct from the instant case, the defendant in *Stevens* proffered a reasonably plausible, alternative explanation for his conduct. *Id.* at 307. Still more, the defendant's act in *Stevens* – placing his hand over the victim's breast on the outside of her clothing while posing for a photo – could reasonably have been a drunken joke rather than an act of sexual gratification. In the instant case however, Ramos-Ramirez's conduct is much more extreme, and his act of deep-tongue kissing the victim while groping the victim's buttocks while licking his face and neck, cannot be explained by any degree of alcohol impairment short of insanity, and on the facts of this case cannot be explained by insanity or by any theory other than an intent for sexual gratification. RP 71-74.

In the 2011 case of *State v. Walters*, 162 Wn. App. 74, 255 P.3d 835 (2011), the Court of Appeals found error where the trial court denied defendant's request for a voluntary intoxication instruction. The Court noted that, "[w]hile the degree of intoxication was in dispute, there was no

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question but that [the defendant] had consumed at least nine drinks over the course of the evening and that they had affected him." *Id.* at 82-83. The Court also noted that "[t]his case presents a close fact pattern because there is no *direct* evidence that intoxication affected [the defendant's] mental state." *Id.* at 83 (emphasis added). However, the Court also noted substantial circumstantial evidence, in that the evidence showed that the defendant swayed and had slurred speech and droopy, bloodshot eyes, that he did not respond to pain compliance techniques, and that police had to twice use a stun gun to restrain him. *Id.* at 83. Still more, in *Walters* the defendant testified to his own mental state and said that he did not remember leaving the bar and that he had little memory of interacting with the officers. *Id.* at 79.

It is also significant that in *Walters* the three charges at issue were third degree theft, third degree assault, and resisting arrest. *Id.* at 79. The theft occurred when the defendant left a bar with the bar owner's keys. *Id.* at 78-79. The resisting arrest and the third degree assault offenses occurred afterward when police contacted defendant in response to the theft report. *Id.* at 79. The Court ruled that the trial court erred by not giving the voluntary intoxication instruction, but the Court noted that "[a]

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nonconstitutional error such as this one is harmless if it did not, within reasonable probability, materially affect the verdict." *Id.* at 84. On this basis the Court reversed the theft conviction but held that the error was harmless in relation to the resisting arrest and the third degree assault convictions. *Id.* at 84-85.

In contrast to the instant case, in each of the cases discussed above there is a logical balance between the degree of mental impairment possibly shown by the evidence and the quality of the offensive conduct alleged. For example, in *Jones*, although unlikely, it was at least reasonably possible that due to drunkenness the defendant was ignorant of the risk of death when he stabbed the victim, or, that due to his drunkenness, the defendant may have believed that he was acting in self-defense. *State v. Jones*, 95 Wn.2d 616, 628 P.2d 472 (1981). In *State v. Brooks*, 97 Wn.2d 873, 651 P.2d 217 (1982), unpremeditated murder was an alternative theory to premeditated murder; so, it was logical to question whether the defendant's impairment caused him to act impulsively rather than with premeditation. Likewise, in *State v. Rice*, 102 Wn.2d 120, 683 P.2d 199 (1984), evidence of the defendant's impaired mental state was sufficiently strong that it was reasonable to question whether the defendant

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intended to cause the death of the victim when he stabbed him. In *State v. Kruger*, 116 Wn. App. 685, 67 P.3d 1147 (2003), the conviction for third degree assault required proof that the defendant intended to inflict bodily harm when he struck the officer, but a reasonably possible alternative explanation was that due to drunkenness the defendant did not comprehend the risk that merely striking the officer might result in bodily harm to him. In *State v. Stevens*, 158 Wn.2d 304, 143 P.3d 817 (2006), evidence of the effect of alcohol on the defendant's mental state was slight, but the facts supporting the allegation that the defendant acted for the purpose of sexual gratification were nuanced or ambiguous to the point that misinterpretation of the defendant's mental state was a possibility; thus, the State contends that, distinct from the instant case, in *Stevens* even slight impairment was an important consideration when striking a logical balance between the degree of the defendant's mental impairment and the quality of the offensive conduct alleged. Finally, in *State v. Walters*, 162 Wn. App. 74, 255 P.3d 835 (2011), the balance between the defendant's degree of intoxication and the intent element of theft was such that the defendant's degree of impairment provided a reasonably possible alternative explanation for the defendant's conduct related to the theft

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charge, in that the defendant may have simply walked out of the bar with the victim's keys without knowing it or without knowing why. And similarly, the defendant's drunkenness presented a reasonably possible alternative explanation for the charges of assault and resisting arrest, because the possibility was not outlandish that he was simply throwing a tantrum rather than intending to injure the officers or to resist arrest.

Distinguishable from the above cases, however, in the instant case there was very little evidence from which it could be surmised that alcohol impairment affected the defendant's ability to form the requisite mental states. RP 32-127. In the record of the instant case, there are no facts to suggest that Ramos-Ramirez was intoxicated to the extent that his ability to *know* his own child, or to *know* that he was forcing sexual contact with the child, could have been sufficiently diminished to allow for acquittal. *Id.* Nor do the facts support any possible explanation for Ramos-Ramirez's sexual contact with the child other than Ramos-Ramirez's pursuit of sexual gratification, and the amount of alcohol impairment shown in this case is insufficient to otherwise explain it. *Id.*

The egregious nature of the conduct in the instant case is similar in effect to the nature of the conduct at issue in *State v. Gallegos*, 65 Wn.

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App. 230, 828 P.2d 37 (1992). In *Gallegos* the defendant dragged a female victim into an alley by her feet and attempted to rape her. *Id.* at 233. When the victim screamed, the defendant put his hand over her mouth and told her to be quiet. *Id.* He straddled her, held her arms, pulled at her clothing, and unzipped his pants. *Id.* The reviewing court held that proof of the offense of attempted rape required proof that the defendant "intend[ed] to engage in sexual intercourse with [the victim] by forcible compulsion." *Id.* at 239. As in the instant case, the evidence in *Gallagos* showed that the defendant was extremely impaired; however, as in the instant case, in *Gallagos* there also was no evidence indicating that [the defendant's] drinking prevented him from acquiring the requisite intent or that he lacked awareness of his actions at the time of the incident in question." *Id.* The Court of Appeals thus held that the defendant was not entitled to a voluntary intoxication instruction. *Id.* The State contends that the facts of *Gallegos* are comparable to those of the instant case,

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because in both cases the facts do not give rise to any logical and reasonable theory as an alternative to the alleged mental states.

Similarly, in *State v. Gabryschak*, 83 Wn. App. 249, 921 P.2d 549 (1996), the Court of Appeals held that even though there was substantial evidence that the defendant was very intoxicated, the defendant was not entitled to a voluntary intoxication instruction. The facts of *Gabryschak* showed that the defendant, while in a drunken rampage, assaulted his elderly mother, that he maliciously damaged his mother's household furnishings, that after his arrest he attempted to escape, and that he threatened to kill one of the arresting officers. *Id.* at 251.52. At trial, the trial court denied the defendant's request for a voluntary intoxication instruction. *Id.* at 252. On appeal of the trial court's refusal to give the voluntary intoxication instruction, the Court of Appeals reasoned as follows when affirming the trial court:

> [W]e find no evidence in the record from which a rational trier of fact could reasonably and logically infer that Gabryschak was too intoxicated to be able to form the required level of culpability to

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> commit the crimes with which he was charged. At best, the evidence shows that Gabryschak can become angry, physically violent, and threatening when he is intoxicated.
>
> Intoxication is not an all-or-nothing proposition. A person can be intoxicated and still be able to form the requisite mental state, or he can be so intoxicated as to be unconscious. *State v. Coates,* 107 Wn.2d 882, 891, 735 P.2d 64 (1987). Somewhere between these two extremes of intoxication is a point on the scale at which a rational trier of fact can conclude that the State has failed to meet its burden of proof with respect to the required mental state.

Id. at 254. *See also*, *State v. Priest*, 100 Wn. App. 451, 997 P.2d 452 (2000) (following *Gabryschak* and *State v. Coates,* 107 Wn.2d 882, 735 P.2d 64 (1987), and holding that mere evidence of impairment is insufficient to warrant an involuntary intoxication instruction because what "is relevant is the degree of intoxication and the effect it had on the defendant's ability to formulate the requisite mental state").

Here, the State contends that the instant case is similar to *Gabryschak* because, while there is evidence that Ramos-Ramirez had been drinking and that he was very intoxicated, there was no evidence to show that his intoxication had impaired his ability to form the requisite mental states. And the degree of Ramos-Ramirez's intoxication was not so far along on the scale that a rational trier of fact could logically and reasonably conclude from it that he was too intoxicated to know that his

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victim was his own son, or to know that he was forcing the victim to engage in sexual contact with him, or to intend sexual gratification when he sexually assaulted the victim. Accordingly, the State contends that even if Ramos-Ramirez's trial counsel would have requested a voluntary intoxication instruction, on the record of this case he was not entitled to receive it because he failed to meet the part three of the three-part test set forth by *State v. Everybodytalksabout*, 145 Wn.2d 456, 479, 39 P.3d 294 (2002) (defendant not entitled to voluntary intoxication instruction unless there is evidence "that the drinking affected [the defendant's] ability to acquire the required mental state"). Defense counsel's performance is not deficient when he does not request jury instructions that are unsupported by the evidence. *See State v. Staley,* 123 Wn.2d 794, 803, 872 P.2d 502 (1994); *State v. King,* 24 Wn. App. 495, 501, 601 P.2d 982 (1979). Because Ramos-Ramirez was not entitled to the instruction, his trial counsel was not deficient for failing to request it. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011).

d) Although the State maintains that the facts of this case did not merit a voluntary intoxication instruction, even if it was error for trial counsel not to request the

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> instruction, Ramos-Ramirez's claim of ineffective assistance of counsel should fail because he cannot show any resulting prejudice.

To demonstrate prejudice, defendant must show that but for the deficient performance, there is a reasonable probability that the outcome would have been different. *Strickland*, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007). Here, Ramos-Ramirez has not made this showing, and the facts of this case cannot support a showing of prejudice.

The evidence at trial was overwhelming that Ramos-Ramirez touched his child in a sexually offensive manner. RP 71-74. There was evidence that Ramos-Ramirez had been drinking alcohol and that he was impaired by it, but the degree of impairment that he exhibited was insufficient to affect his ability to form the requisite mental states for the charged offenses. *Id.* Ramos-Ramirez was not so impaired that he did not *know* that the victim was his own child, nor was he so impaired that he did not *know* that he was forcing the child to submit to sexual contact. Nor is the degree of impairment in this case substantial to the degree that it would offer a reasonable theory as an alternative to sexual gratification to explain Ramos-Ramirez's assault of the victim.

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A voluntary intoxication jury instruction would not have changed these facts or the jury's perception of the facts. Therefore, Ramos-Ramirez cannot make the required showing of prejudice. Without the required showing of prejudice, Ramos-Ramirez's claim of ineffective assistance of counsel must fail. *Strickland*, 466 U.S. at 697; *State v. Foster,* 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

e) Although the State maintains that the facts of this case did not merit a voluntary intoxication instruction, even if error occurred because trial counsel didn't ask for the instruction or because the court did not sua sponte give the instruction, the error was nevertheless harmless and is not grounds for reversal.

Although the State contends that the evidence in this case was insufficient to entitle Ramos-Ramirez to a voluntary intoxication jury instruction, even if it was error to fail to give the instruction, such failure is nonconstitutional error and can be shown to be harmless if it "did not, within reasonable probability, materially affect the verdict." *State v. Walters*, 162 Wn. App. 74, 84, 255 P.3d 835 (2011) (citing *State v. Zwicker*, 105 Wn.2d 228, 243, 713 P.2d 1101 (1986)). Here, as argued in subsection (d), above, overwhelming evidence establishes Ramos-Ramirez's guilt for the charged offenses, and the degree of intoxication

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that Ramos-Ramirez exhibited is insufficient to negate evidence of the mental states requisite to each offense. RP 71-74. Accordingly, the evidence shows that the absence of the voluntary intoxication jury instruction did not, within any reasonable probability, affect the verdict, and as such, the failure to give the instruction was harmless. *State v. Walters*, 162 Wn. App. 74, 84, 255 P.3d 835 (2011); *State v. Zwicker*, 105 Wn.2d 228, 243, 713 P.2d 1101 (1986).

2. Because Ramos-Ramirez did not object when the trial court engaged in an abbreviated, limited inquiry into his ability to pay $1,445.16 in discretionary LFOs before imposing them, this Court should deny review of Ramos-Ramirez's unpreserved assignment of error.

Ramos-Ramirez contends that the trial court erred by ordering him to pay $1,445.16 in discretionary costs. Br. of Appellant at 14. Specifically, Ramos-Ramirez contends that the court erred because it ordered these discretionary costs without first undergoing an inquiry into his ability to pay as required by RCW 10.01.160(3). *Id.*

Before imposing these costs, the trial court judge first asked Ramos-Ramirez's trial counsel to "speak to [Ramos-Ramirez's] ability to work." RP 191. Defense counsel responded as follows:

> Up until the time he was incarcerated, Your Honor, Mr. Ramirez was a brush picker. And I don't 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, the trial court then imposed the discretionary costs that are now at issue on appeal. *Id.* Ramos-Ramirez did not object in the trial court. *Id.*

There are no facts in our record to indicate that Ramos-Ramirez suffers from any disability or that he is anything other than a physically and mentally healthy young man who is capable of paying his own way in life. If Ramos-Ramirez is capable of performing manual labor, he is capable of many, many things. There are no facts in the record, and there are no facts from any source, to indicate that one who is currently employed as a brush picker cannot make sufficient income to pay $1,445.16 in costs; nor is there any record from which to conclude that only one who is employed in the United States can pay a debt of this size. A debt of $1,445.16 may be disappointing, particularly for one who has no savings and who currently works for low wages, but it is not so extreme or out of reach that it is oppressive. If Ramos-Ramirez chooses to, he can pay this debt faster than it accrues interest.

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If these costs pose an undue or insurmountable hardship for Ramos-Ramirez, he could have objected to them in the trial court, but he did not. RP 191. One reason why he may have refrained from objecting is that an objection would have been without merit, and thus pointless, because he has the ability to pay these costs. If Ramos-Ramirez would have objected, then the trial court could have received additional information and could have addressed any circumstances that might have altered the trial court's perception of the plain facts about Ramos-Ramirez's ability to pay $1,445.16 in discretionary costs.

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), preserves the discretion of reviewing courts to review unpreserved assignments of error in regards to legal financial obligations, but *Blazina* does not require this court to do so. An "appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). "A defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review." *Blazina* at 832. The State contends that on the facts of the instant case, this Court should deny review of Ramos-Ramirez's unpreserved assignment of error.

3. The community custody condition prohibiting Ramos-Ramirez

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> from loitering in or frequenting places where children congregate, such as parks, video arcades, and shopping malls is not unconstitutionally vague, because the prohibition is defined by a descriptive list of prohibited places.

As one of several conditions of community custody, the trial court ordered as follows: "The defendant shall not loiter in nor frequent places where children congregate such as parks, video arcades, campgrounds, and shopping malls[.]" CP 22 (Condition No. 15). On appeal, Ramos-Ramirez cites *State v. Irwin*, 191 Wn. App. 644, 364 P.3d 830 (2015), and *State v. Norris*, 1 Wn. App.2nd 87, 404 P.3d 83 (2017), to support his contention that this restriction is unconstitutionally vague.

The wording of the restriction at issue in *Norris* was as follows: "Do not enter any parks/playgrounds/schools and or any places where minors congregate." *Norris* at 87. The *Norris* Court held that the removal of the words "any places," so that the condition reads, '"Do not enter any parks, playgrounds, or schools where minors congregate"' would resolve the unconstitutionality and that the resulting condition "is not unconstitutionally vague or void for vagueness." 404 P.3d at 96.

The wording of the restriction that was at issue in *Irwin* had two flaws that are not present in the instant case. *Id.* The wording of the

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restriction at issue in *Irwin* was as follows: "Do not frequent areas where minor children are known to congregate, as defined by the supervising CCO." *Irwin* at 652 (internal quotation marks omitted).

The court in *Irwin* found one of the two flaws with this language to be that the restriction was unconstitutionally vague because it required further definition by a corrections officer, which potentially permitted arbitrary application. *Id.* at 654-55. The second flaw was that "[w]ithout some clarifying language or an illustrative list of prohibited locations…, the condition does not give ordinary people sufficient notice to "understand what conduct is proscribed." *Id.* at 655 (quoting *State v. Bahl,* 164 Wn.2d 739, 753, 193 P.3d 678 (2008)).

The language at issue in the instant case does not suffer from either of these two constitutional flaws. CP 22 (Condition No. 15). The language at issue here – "[t]he defendant shall not loiter in nor frequent places where children congregate such as parks, video arcades, campgrounds, and shopping malls" – does not require further definition by a corrections officer. CP 22 (Condition No. 15). And the language at issue here provides "clarifying language" and "an illustrative list of

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prohibited locations" of the sort that was missing from the language at issue in *Irwin.*

The due process clauses of the 14th Amendment to the United States Constitution and article I, section 3 of the Washington Constitution require that community custody conditions such as the one at issue in the instant case not be vague. *Irwin* at 652-53. To sustain a constitutional vagueness challenge, the community custody condition at issue must provide ordinary people with fair warning of what conduct is proscribed and must have standards are that are definite enough to guard against arbitrary enforcement. *Id.* at 652-53 (citing *Bahl*, 164 Wn.2d at 752-53). "However, "'a community custody condition is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.'"" *Irwin* at 653 (quoting *State v. Sanchez Valencia,* 169 Wn.2d 782, 793, 239 P.3d 1059 (2010) (internal quotation marks omitted) (quoting *State v. Sanchez Valencia,* 148 Wn. App. 302, 321, 198 P.3d 1065 (2009))).

The State contends that the language at issue here complies with the requirements of the 14th Amendment and Wash. Const. art. I, section 3,

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because the language here does not delegate interpretation to a corrections officer, and because it provides a list of clear examples of the kinds of places where children congregate. Likewise, the language here does not contain an undefined, catchall prohibition of the type at issue in Norris, which prohibited the defendant from going to certain specified places "and or any places where minors congregate." *Norris*, 404 P.3d at 87.

4. The State concedes that the community custody condition that requires Ramos-Ramirez to submit to plethysmograph testing as a monitoring tool to be implemented at the discretion the community corrections officer is inappropriate and should be removed from the judgment and sentence, but the State contends that plethysmograph testing at the direction of Ramos-Ramirez's treatment provider is a valid community custody condition and should be retained in the judgment and sentence.

As one of several conditions of community custody, the trial court ordered as follows:

> The defendant shall undergo periodic polygraph and/or plethysmograph testing to measure treatment progress and compliance with conditions of community custody at a frequency determined by his/her treatment provider and/or his/her Community Custody Officer[.]

CP 22 (Condition No. 17).

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It is within the statutory authority of the court to order Ramos-Ramirez to perform affirmative acts that assure compliance with sentencing conditions. RCW 9.94A.505(8), .703(3)(c) & (d); *State v. Riles*, 135 Wn.2d 326, 342-46, 957 P.2d 655 (1998), abrogated on other grounds by *State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010). It is apparently undisputed in the instant case that it was appropriate for the court to order Ramos-Ramirez to undergo sex offender treatment. And it is within the authority of the court to order plethysmograph testing where it is to be used as a treatment device by the treatment provider. *Riles* at 345-46. But "plethysmograph testing does not serve a monitoring purpose." *Id.* at 345. "Plethysmograph testing serves no purpose in monitoring compliance with ordinary community placement conditions." *Id.*

The condition at issue in the instant case is similar to one that was at issue in the recent case of *State v. Land*, 172 Wn. App. 593, 295 P.3d 782 (2013). The trial court in *Land* ordered the defendant to '"[p]articipate in... plethysmograph examinations as directed by your Community Corrections Officer."' *Id.* at 605 (quoting the trial court order). On review, the Court of Appeals disapproved of the trial court

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condition, remanded the matter to the trial court with instructions to strike the condition, and ruled as follows:

> Plethysmograph testing is extremely intrusive. The testing can properly be ordered incident to crime-related treatment by a qualified provider. *State v. Castro,* 141 Wn. App. 485, 494, 170 P.3d 78 (2007). But it may not be viewed as a routine monitoring tool subject only to the discretion of a community corrections officer.

Id. at 605-06.

Thus, the State in the instant case must concede that while it was proper for the trial court to order Ramos-Ramirez to undergo plethysmograph testing as directed by his treatment provider, it was beyond the court's statutory authority to order him to undergo plethysmograph testing at the unrestrained discretion of his community corrections officer. The State, therefore, asks the court to vacate the portion of community custody condition that requires Ramos-Ramirez to submit to plethysmograph testing at the discretion of the community corrections officer, but to otherwise leave in place and sustain the trial court's order relating to polygraph and plethysmograph testing. CP 22 (Condition No. 17).

5. The community custody condition allowing a community custody officer to set a curfew for Ramos-Ramirez should

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be stricken from the judgment and sentence because it is not a crime-related restriction.

As one of several conditions of community custody, the trial court ordered as follows: "The defendant shall abide by a nightly curfew if established by the CCO[.]" CP 21 (Condition No. 4).

A trial court may only impose a sentence that is authorized by statute. *State v. Miller*, 159 Wn. App. 911, 930-31, 247 P.3d 457 (2011). RCW 9.94A.703(3)(f) provides the trial court with discretionary authority to require that defendants "[c]omply with any crime-related prohibitions." Under RCW 9.94A.030(10), a "[c]rime-related prohibition" is one that involves "conduct that directly relates to the circumstances of the crime for which the offender has been convicted." The imposition of crime-related prohibitions are reviewed for abuse of discretion. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

A review of the record of the instant case reveals no facts to support a finding that the imposition of a curfew is in any way related to Ramos-Ramirez's crimes of conviction. The State, therefore, respectfully concedes that this community custody condition allowing the corrections

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officer to impose a curfew should be removed from Ramos-Ramirez's judgment and sentence.

D. CONCLUSION

Because there was no evidence that intoxication affected Ramos-Ramirez's ability to form the mental states requisite to his crimes of conviction, a voluntary intoxication instruction was not appropriate on the unique facts of this case, and his trial counsel was, therefore, not ineffective for not proposing the instruction.

This Court should decline to review the trial court's order requiring Ramos-Ramirez to pay $1,445.16 in discretionary costs, because Ramos-Ramirez failed to preserve the issue for review by properly objecting in the trial court.

The community custody condition that prohibits Ramos-Ramirez from frequenting places where children congregate is not unconstitutionally vague, because the language of the condition includes a descriptive list of prohibited places and thereby defines the scope of the prohibition.

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The community custody condition that requires Ramos-Ramirez to submit to plethysmograph testing at the direction of a community custody officer as a monitoring tool is overbroad and should be modified to require plethysmograph testing only as a treatment tool and only at the direction of a treatment provider.

Finally, the community custody condition that requires Ramos-Ramirez to abide by a curfew to be set by a community custody officer is not crime related and should, therefore, be removed from the judgment and sentence.

DATED: February 5, 2018.

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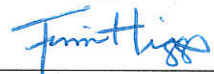

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