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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

WILLIAM RICHARD, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stanley J. Rumbaugh

No. 17-1-00516-1

BRIEF OF RESPONDENT

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A. INTRODUCTION

When A.R. was just seven years old, her step-father, William Richard, grabbed her by the arm and took her into his bedroom. After he sat A.R. on the bed, Richard pulled down his pants and underwear and exposed his penis to her. Richard then grabbed A.R.'s hand and forced her to stroke his penis for several minutes. After leaving A.R.'s hand wet and "gooey," Richard told A.R. not to tell anyone what he did to her.

A.R. kept this secret for over a year. When she learned that a friend had been brave enough to talk about her own abuse, A.R. finally disclosed to her mother how Richard, the only father she had ever known, had sexually molested her. After initially denying that he abused A.R. and then feigning a memory lapse regarding molesting his step-daughter, Richard finally acknowledged what he did in several text messages he sent to A.R.'s mother.

On appeal, Richard claims that the prosecutor committed misconduct by "suggest[ing]" during cross-examination that he had a duty to produce evidence and by arguing during closing argument that his failure to do so "reflected upon his guilt." Richard also takes issue with the trial court's imposition of a community custody condition requiring him to "stay out of areas where children's activities regularly occur or are occurring," and of the court's imposition of community custody

supervision fees, collection costs, and interest on non-restitution legal financial obligations.

Except for Richard's claim that the trial court improperly imposed interest on non-restitution legal financial obligations, which the State concedes was in error, Richard's claims should be denied. The prosecutor properly cross-examined Richard as to the plausibility of his defense theory and based his closing argument on inferences from the evidence presented. Furthermore, the community custody condition Richard complains of is proper as the included illustrative list of prohibited locations provided Richard with fair warning of the proscribed conduct and contained standards definite enough to protect against arbitrary enforcement. Finally, not only did Richard forfeit his ability to raise on appeal his claim that the trial court improperly imposed community custody supervision fees and collection costs, such fees were properly imposed as they are not statutory "costs" of prosecution.

This court should remand the matter to the trial court to strike the interest accrual on non-restitution legal financial obligations and otherwise deny Richard's remaining claims and affirm the judgment and conviction.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the prosecutor commit misconduct by “shifting the burden” to the defense when he cross-examined Richard as to the plausibility of his defense theory and based his closing argument on inferences from the evidence?
2. Is the community custody condition imposed upon Richard requiring him to “stay out of areas where children’s activities occur or are occurring” unconstitutionally vague when the condition contains an illustrative list of prohibited locations?
3. Did the trial court properly impose upon Richard as part of his judgment and sentence community custody supervision fees, collection costs, and interest for non-restitution legal financial obligations?

C. STATEMENT OF THE CASE.

1. PROCEDURE

On February 2, 2017, the Pierce County Prosecuting Attorney’s Office filed an Information charging Richard with one count of child

molestation in the first degree. CP 3. On May 9, 2018, an Amended Information was filed against Richard, again charging him with one count of child molestation in the first degree. CP 20.

Following a jury trial in May 2018 before the Honorable Stanley J. Rumbaugh, the jury found Richard guilty as charged. CP 40. The jury also found true the allegations that Richard and A.R. were members of the same family or household, and that Richard used his position of trust, confidence or fiduciary responsibility to facilitate the commission of the crime. CP 41-42.

On July 13, 2018, the trial court imposed a standard range sentence of 66 months in prison and lifetime community custody. CP 57-59; 10RP 13-17. The trial court also imposed collection costs for unpaid legal financial obligations, community custody supervision fees, and interest on all legal financial obligations imposed in the judgment. CP 55, 59. Among other community custody conditions, the trial court ordered Richard to stay out of areas where children's activities regularly occur or are occurring. CP 69.

2. FACTS

Richard met A.R.'s mother, Courtney¹, in 2010 when A.R. was about three years old. 6RP 156. Richard moved in with A.R. and Courtney about six months later and Richard and Courtney got married in June 2014. 6RP 156-157. As A.R. did not have a relationship with her biological father, Richard became A.R.'s father figure and she called him, "Dad." 6RP 92-93, 141-142, 154; 7RP 17-18, 52; 8RP 101.

One evening, when A.R. was seven years old, Richard's other children were at their mother's house and Courtney was at work. Richard grabbed A.R.'s arm, guided her into his bedroom, and told her that she was going to "do him a favor." 6RP 93-94, 97, 129-131. After sitting A.R. on his bed, Richard pulled down his pants and underwear and exposed his flaccid penis to her. Richard then grabbed A.R.'s hand and put it on his penis; he moved her hand up and down for several minutes. 6RP 93-97, 131-133, 139-140; 7RP 44, 48. A.R. felt Richard's penis become erect and wet; Richard left A.R.'s hand feeling "goeey." 6RP 143-144, 150.

Afterwards, Richard told A.R. not to tell anyone, including her mother, what he had done. 7RP 112. After Richard molested her, A.R.

¹ As Courtney and appellant, Richard, share the same last name, the former will be referred to by her first name.

began having trouble sleeping and exhibited behavioral problems.

However, because A.R. was afraid of what Richard would do if she told anyone what Richard had done to her, she kept silent about the molestation for over a year. 6RP 96-97; 7RP 41-44, 100-103.

On October 15, 2016, A.R. overheard Courtney having a telephone conversation with her friend, Holly Etherington. Courtney and Etherington were discussing how Etherington's boyfriend had sexually abused Etherington's daughter, J.E. Upon realizing that J.E. was brave enough to tell her mother about what happened to her, A.R. felt she, too, should be brave and tell her mother what Richard had done to her. 6RP 98-101, 142; 7RP 21-25. A.R. wrote a note to her mother in her journal that read:

This is private information. Dad made me touch his private when I was like 7. I was scared to tell you, but [now] I'm not scared.

6RP 101-103, 107. A.R. left the journal in her mother's bathroom in hopes that Courtney would find and read her journal entry. 6RP 103-104, 137-138.

When Courtney found the journal, she returned it to her daughter unread. 6RP 104, 138. Still wanting her mother to know what happened, A.R. waited until Richard left the house the following evening and read

the journal entry to Courtney. 6RP 101-108. A.R. then told her mother the details of Richard's molestation of her. 7RP 26-29.

When Richard returned, Courtney confronted him about A.R.'s accusation. 6RP 111-112. Richard told her that he either did not know what A.R. was talking about or did not remember. 7RP 30-31, 93-96; 8RP 103-104. Courtney then took A.R. and her younger daughter and left the home. 6RP 112-113; 7RP 31-32; 8RP 104.

From the evening of October 16, 2016, until the morning of October 17, 2016, Courtney and Richard exchanged numerous text messages. In some of these text messages, later provided to law enforcement, Richard made incriminating statements acknowledging that he abused A.R. In one text sent on the morning of October 17, 2006, Richard stated:

I think I led her to the room and asked her to touch it. And then I realized it was fucked up. What am I -- what am I doing, and that was it. I'm trying to jog my memory to remember.

7RP 31-39; 8RP 104-108; 9RP 19-20.

D. ARGUMENT.

1. THE PROSECUTOR PROPERLY CROSS-EXAMINED RICHARD AS TO THE PLAUSIBILITY OF HIS DEFENSE THEORY AND BASED HIS CLOSING ARGUMENT ON INFERENCES FROM THE RECORD.

Richard claims that the prosecutor committed misconduct by “suggest[ing]” during cross-examination that Richard had a duty to produce evidence and by arguing during closing argument that Richard’s failure to do so “reflected upon his guilt.” Brief of Appellant at 10-14. Not so. Although a prosecutor may commit misconduct by stating that the jury should find a defendant guilty because he failed to present favorable evidence, an argument that the defense evidence is lacking does not improperly shift the burden of proof to the defendant. *State v. Osman*, 192 Wn. App. 355, 367, 366 P.3d 956 (2016); *State v. Anderson*, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009); *State v. Cleveland*, 58 Wn. App. 634, 647-49, 794 P.2d 546, *review denied*, 115 Wn.2d 1029, 803 P.2d 324 (1990) (error for prosecutor to generally imply that defendant had a duty to present any favorable evidence in existence). The prosecutor has wide latitude to make arguments based on reasonable inferences from the evidence. This latitude includes cross-examining witnesses as to the quality and quantity of the defense’s evidence and commenting on that evidence. *State v. Osman*, 192 Wn. App. at 367. As the prosecutor’s

cross-examination of Richard simply tested the plausibility of his account and his closing argument was based on reasonable inferences from the evidence, Richard's claim of prosecutorial misconduct should be denied.

To prove prosecutorial misconduct, the defendant bears the burden of proving that the prosecuting attorney's conduct was both improper and prejudicial." *State v. Weber*, 159 Wn.2d 252, 270, 149 P.3d 646 (2006), *cert. denied*, 127 S. Ct. 2986 (2007). A court reviews the defendant's allegations of prosecutorial misconduct under an abuse of discretion standard. *State v. Brett*, 126 Wn.2d 136, 174, 892 P.2d 29 (1995). The prosecutor's actions are reviewed "in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given." *State v. Bryant*, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998). If the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

A criminal defendant has no duty to present evidence, and it is error for the prosecutor to suggest otherwise. *State v. Cheatam*, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). An argument that shifts the State's burden to prove guilt beyond a reasonable doubt constitutes misconduct. *State v. Thorgerson*, 172 Wn.2d 438, 453, 258 P.3d 43

(2011). However, the prosecutor is entitled to point out the improbability or lack of evidentiary support for the defense theory of the case. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

Although defendants are not obligated to testify or produce evidence at trial, if the defendant chooses to testify, that testimony is not immunized from attack by the prosecution. *State v. Vassar*, 188 Wash.App. 251, 260, 352 P.3d 856 (2015). “On the contrary, the evidence supporting a defendant’s theory of the case is subject to the same searching examination as the State’s evidence.” *State v. Contreras*, 57 Wash.App. 471, 476, 788 P.2d 1114 (1990).

State v. Cardenas-Flores, 194 Wn. App. 496, 516, 374 P.3d 1217, 1228 (2016), *aff’d*, 189 Wn. 2d 243, 401 P.3d 19 (2017).

After Courtney confronted Richard about his abuse of A.R., she left the family home with A.R. 7RP 30-32. During the remainder of that night and into the next morning, Courtney continued to angrily confront Richard with phone calls and text messages regarding A.R.’s accusation. 7RP 32-35. In a number of these text messages, Richard admitted to abusing A.R. These texts included Richard’s admissions that he took A.R. into his bedroom and made her touch him, that he did not know why he abused A.R., that he knew what he did was wrong, and that he needed help. 7RP 32-35. One such text message, sent at 8:40 a.m., contained Richard’s following admission:

I think I led her to the room and asked her to touch it. And then I realized it was fucked up. What am I -- what am I

doing, and that was it. I'm trying to jog my memory to remember.

9RP 18-19.

Courtney provided copies of Richard's incriminating texts to law enforcement. 7RP 36-38 (Exs. 3-10). Courtney testified at trial that the texts she provided were not all of the texts Richard had sent, only the ones in which he incriminated himself. 7RP 32-35, 96-98. Courtney testified that she no longer had the phone on which these texts were received. 6RP 62-74; 7RP 50, 96-98.

Richard testified that he received over one hundred texts from Courtney during that evening and the next morning, but he did not respond to all of them. 8RP 104-105. He testified, however, that the texts included in Exhibits 3-10 did not include all of the texts that were sent. 8RP 104-108. Richard acknowledged that he had sent texts incriminating himself, but denied abusing A.R. 8RP 104, 107-108. Richard testified that he only sent the incriminating texts because he hoped Courtney would leave him alone if he told her what he thought she wanted to hear. 8RP 104-108. Richard also testified that the texts Courtney sent that prompted him to confess were texts questioning his manhood and threatening him that he would not see his children again. 8RP 110-130.

On cross-examination, Richard testified that he no longer had the phone on which he sent and received these texts because he got rid of the phone a few months after A.R.'s disclosure. 8RP 110-130. When the prosecutor asked Richard, "You didn't start saving a bunch of text messages, right?", defense counsel objected, "Objection. Burden shifting, your Honor." 8RP 111-112. After the trial court denied defense counsel's objection to "burden shifting," Richard testified that he had printed out screenshots of the other texts and kept them in a storage unit; however, he stated he lost the storage unit in 2017. 8RP 112-113. Richard acknowledged that the only major time gap in the admitted text messages was between 1:00 and 8:30 a.m., when he said Courtney may have shut his phone off because he wasn't responding to her.² 8RP 124-130; 9RP 18-19.

During closing argument, the prosecutor argued that the admitted evidence demonstrated Richard's guilt:

First he claims that the phone was shut off from possibly some time from 1 a.m. to 8:30 a.m. that morning. Well, think about that, right? You can use your common sense. What phone company shuts phones off from 1 a.m. to 8:30 a.m.? And for what purpose would Courtney do that, right? It's not a time that somebody actually makes a lot of phone calls. So shutting their phone off from 1 a.m. to 8:30 a.m. -- the Defendant created some claim that she was trying to coerce him in some way.

² Courtney and Richard were on the same cell phone plan and she had the ability to terminate his cell service. 8RP 107-108, 124-131.

Well, shutting off a phone they don't use in the middle of the night doesn't really coerce someone, right? That doesn't make any sense. When you look at it, none of that is reasonable, and so it doesn't provide reasonable doubt.

He then claimed that he got 40 plus calls in the night, and it could have been shut off at some point. Well, let's see. The first confession was at 11:30 p.m. Even if that's true, the 40 plus calls -- and I leave it to you whether or not -- you saw the cross-examination. You saw how those number changed all over the place. You saw how his testimony was first one thing and then another thing. I leave it to you whether to believe that testimony.

But even assuming he got 40 plus conversations that night, he didn't get those 40 plus conversations in the hour or hour and a half between the time she left and the time he confessed via text messages at 11:36 p.m. And even if he did, that's not going to coercive, right? That doesn't coerce him. We'll talk about that in a minute.

That's unreasonable. It doesn't create reasonable doubt. It's unreasonable for him to claim that 30 to 60 text messages were sent in that one night but that they conveniently went missing along with the phone and --

MR. CURRIE: Objection. Burden shifting, Your Honor.

THE COURT: The testimony --

MR. CURRIE: That they occurred --

THE COURT: It is clear that the State bears the burden of proof as indicated in the bottom of the slide or as was indicated in the prior slide. The Defendant has no duty to prove anything. This is a recapitulation of the way the State sees the evidence. Go ahead, Mr. Cummings.

MR. CUMMINGS: Thank you, Your Honor. And I'll reaffirm that.

This is a claim he made, right? He claims he has them. He claims he had these messages, so we have to evaluate whether that's reasonable. I would submit to you it's not, that there are not -- well, first he claims hundreds of missing text messages, right? And then he said, "Okay, maybe not hundreds. Maybe 30 to 60." But I submit to you that that was not reasonable.

I submit to you further that if the phone was actually shut off as he said, then he couldn't be getting text messages that were somehow coercive. It's one or the other. You can't make two completely contradictory and self-exclusionary claims and say that either one is reasonable. And it's unreasonable to say he was convinced to make a false confession in these circumstance[s].

I asked him specifically: "What were the words? What were the words that she said or the thing that she did that made you confess to bringing a 7-year-old into your room and having the 7-year-old touch your penis?" I don't remember the exact words. "She said she'd take everything I had. She said that I would never see my boys again."

But that's associated with the fact that she believes you molested her daughter. That's not like an additional thing. There was no additional fight. If somebody is going to make a false confession to molesting a 7-year-old, you think they would remember the specific words that made them do it. It's not reasonable to suggest that there are somehow hundreds of missing text messages between when she left and 11:30 -- I'd say 10 p.m. or 9:30 p.m. -- and a text messages two hours later where he confesses to what he had done. It's not reasonable. It doesn't provide reasonable doubt.

At the end of the day, we know what happened. The Defendant committed the crime. The crime was committed, and it was the Defendant who did it. There is no motive for anyone to make anything up. There is no motive for anyone to coach anybody else. There is simply none of it. What there is is there is a statement by [A.R.] about how he made

her rub his penis until it grew erect, and a confession by the Defendant that he did just that.

9RP 70-73.

Here, the prosecutor did not “shift the burden.” He did not suggest, during his cross-examination of Richard or during closing argument, that Richard had any burden – in fact, the prosecutor was explicit that any burden was the State’s and the State’s alone:

Remember, the Defense has no burden in this case. The burden is all on the State and it should be. It should always be. But if the Defense raises something, then we have to consider whether that produces reasonable doubt, right, so I have to address that. But by the next couple of slides, make no mistake. I’m not saying Defense has to show you anything. But they have brought you this through cross-examination, so you have to consider whether it provides reasonable doubt.

9RP 70. Rather, what the prosecutor did was properly demonstrate that Richard’s story was not plausible.

Richard decided to take the stand and therefore his credibility was put at issue. Richard’s story about whether and when his phone was shut off, when he got rid of his phone from which he sent and received these texts, and how he saved copies of these texts and what happened to them, was properly probed by the prosecutor. This examination did not “shift the burden” to Richard by implying that he had any duty to produce evidence, but only probed the credibility of his story - that Courtney

“badgered” him into confessing to a crime he did not commit. *See State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990) (“When a defendant advances a theory exculpating him, the theory is not immunized from attack. On the contrary, the evidence supporting a defendant’s theory of the case is subject to the same searching examination as the State’s evidence.”). Simply put, the prosecutor was entitled to cross-examine Richard after he decided to testify, and cross-examination necessarily entails testing the plausibility of a defendant’s account of what, when, and how something happened. *See United States v. Garcia-Guizar*, 160 F.3d 511, 521-22 (9th Cir.1998).

Likewise, during closing argument, the prosecutor argued from the admitted evidence, which included Richard’s testimony, that Richard’s story explaining why he “confessed” did not make sense. Again, in no way did the prosecutor state, or even imply, that Richard had any duty to produce any missing texts; the prosecutor only used the admitted evidence to challenge Richard’s general denial that he committed his crime in the first place. *See State v. Osman*, 192 Wn. App. at 367 (“The prosecutor’s argument did not impermissibly shift the burden of proof to the defense. The argument was based on the evidence. The prosecutor did not argue that the defense had failed to offer another reasonable explanation. Rather, the prosecutor argued that *the evidence* did not support any other

reasonable explanation.”) (emphasis in original); *State v. Blair*, 117 Wn.2d 479, 491, 816 P.2d 718 (1991) (“Here, nothing in the prosecutor’s comments said that the defendant had to present any proof on the question of his innocence. The prosecutor was entitled to argue the reasonable inference from the evidence presented.”).

In his opening brief, Richard is correct that this case is not a “missing witness” case. Brief of Appellant at 13-14. Under the missing witness doctrine, where a party fails to call a witness to provide testimony or produce evidence that would properly be a part of the case and is within the control of the party in whose interest it would be natural to produce that evidence, and the party fails to do so, the jury may draw an inference that the evidence would be unfavorable to that party. *State v. Blair*, 117 Wn.2d at 485–86. This inference only arises where the witness or evidence is peculiarly available to the party, i.e., peculiarly within the party’s power to produce. In addition, the witness’s absence or missing evidence must not be otherwise explained. *Id.* at 489–91.

Arguably, at least, the evidence of the “missing texts” was not within Richard’s peculiar power to produce and, again at least arguably, Richard offered an explanation as to why this evidence was “missing.” Therefore, unlike in a “missing witness doctrine” case, the prosecution here did not ask that the jury draw an inference against Richard because he

did not call a particular witness or produce particular evidence. Nor did the prosecutor ask the trial court to give a “missing witness” instruction or otherwise seek to invoke this doctrine. Rather, the prosecutor only properly commented on the evidence presented at trial and argued the implausibility of Richard’s defense denying he abused A.R.

Not only has Richard failed to demonstrate that the prosecutor’s actions were improper, he has failed to demonstrate any prejudice. The defendant bears the burden of establishing both the impropriety of the prosecutor’s remarks and their prejudicial effect. *State v. Finch*, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). Here, the trial court instructed the jury that “[t]he State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.” CP 25. A jury is presumed to understand the court’s instructions. *Bordynoski v. Bergner*, 97 Wn.2d 335, 342, 644 P.2d 1173 (1982). During closing argument, both the prosecution and the defense reiterated that any and all burdens regarding the defendant’s guilt was on the State. The prosecutor stated, “Remember, the Defense has no burden in this case. The burden is all on the State and it should be. It should always be. . . .I’m not saying Defense has to show you anything.” 9RP 70. Richard’s counsel argued,

. . . You've got to remember the instructions also tell you that the State has the burden of proof in a criminal case always. The Defense never has a burden of proof. They have that burden, and they will tell you that they welcome that burden.

But what does the burden of proof mean? First it means they have the burden of producing sufficient evidence to prove their case beyond a reasonable doubt. And then they have the burden -- what we call of proof, burden of production, burden of proof.

9RP 81.

Based on the instructions and argument, the jury understood that the State had the burden of proving guilt beyond a reasonable doubt and that Richard did not have an obligation to prove anything. Richard fully presented his defense theory – he did not abuse A.R., he only sent incriminating texts to Courtney because she was berating him and he wanted her to stop, and that there were other texts which he had initially saved but then later lost. That such texts were not actually produced are of no moment – Courtney *acknowledged* that what she gave the police were only the texts in which Richard incriminated himself and that there were other texts where he did not. That was not in dispute. The only purpose that producing these missing texts would accomplish is to corroborate *undisputed* facts – Courtney angrily confronted Richard about his abuse of A.R. and Richard sent Courtney some texts wherein he did not incriminate himself in abusing A.R. The actual production of these texts would have

done little to bolster Richard's defense of denying he abused A.R. Accordingly, there was no substantial likelihood that any cross-examination or argument here regarding the "missing texts," even if improper, affected the verdict. *See State v. Finch*, 137 Wn.2d at 839.

The prosecutor's cross-examination of Richard tested the plausibility of his account and his closing argument was based on reasonable inferences from the evidence. As the trial court did not abuse its discretion in overruling the defense's claims of prosecutorial misconduct due to "burden shifting," Richard's claim of prosecutorial misconduct should be denied.

2. THE TRIAL COURT PROPERLY IMPOSED UPON RICHARD A COMMUNITY CUSTODY CONDITION REQUIRING HIM TO "STAY OUT OF AREAS WHERE CHILDREN'S ACTIVITIES OCCUR OR ARE OCCURRING"

Richard claims that the community custody condition that prohibits him from being in areas where children's activities regularly occur or are occurring violates his rights because it is unconstitutionally vague. Brief of Appellant at 15-19. However, this condition provided Richard with fair warning of the proscribed conduct and contains standards definite enough to protect against arbitrary enforcement. Accordingly, this condition is not unconstitutionally vague and Richard's claim to the contrary should be rejected.

Under the due process clause, a community custody prohibition is void for vagueness if (1) it does not provide ordinary people fair warning of the proscribed conduct, and (2) it does not have standards that are definite enough to protect against arbitrary enforcement. *See State v. Irwin*, 191 Wn. App. 644, 652-53, 364 P.3d 830 (2015). “Unconstitutional vagueness” means that persons of ordinary intelligence must guess as to the proscribed conduct. *City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.3d 693 (1990). If persons of ordinary intelligence can understand what the condition proscribes, notwithstanding some possible areas of disagreement, the condition is sufficiently definite. *See State v. Bahl*, 164 Wn.2d 739, 754, 193 P.3d 678 (2008). An appellate court reviews community custody conditions for abuse of discretion and will reverse them only if they are manifestly unreasonable. *State v. Sanchez Valencia*, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010).

As part of Richard’s judgment and sentence, the trial court imposed the following probation condition:

Stay out of areas where children’s activities regularly occur or are occurring. This includes parks used for youth activities, schools, daycare facilities, playgrounds, wading pools, swimming pools being used for youth activities, play areas (indoor or outdoor), sports fields being used for youth sports, arcades, and any specified location identified in advance by DOC or CCO.

CP 69. Richard specifically argues that this condition is unconstitutionally vague because it is vulnerable to arbitrary enforcement. Brief of Appellant at 17.

Richard likens this case to *State v. Irwin*. Brief of Appellant at 16-17. *Irwin* held that absent “some clarifying language or an illustrative list of prohibited locations,” a condition which prohibited the defendant from “frequent[ing] areas where minor children are known to congregate, as defined by the supervising CCO,” failed to provide ordinary people fair warning of the conduct proscribed. *State v. Irwin*, 191 Wn. App. at 652.

The condition at issue here, however, *does* provide an illustrative list of areas Richard is prohibited from frequenting. The fact that the list does not contain a comprehensive itemization of locations does not render it vague merely because “a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.” *State v. Sanchez-Valencia*, 169 Wn.2d at 793 (internal quotation marks omitted). If persons of ordinary intelligence can understand what the condition proscribes, the condition is sufficiently definite. *See State v. Bahl*, 164 Wn.2d at 754. By including this illustrative list, the condition provided Richard with sufficient notice to understand the proscribed conduct, and therefore, the condition is not unconstitutionally vague. *State v. Irwin*, 191 Wn. App. at 655.

Nevertheless, Richard still contends that, because the condition encompasses a wide range of locations, it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. However, the condition at issue does not invite arbitrary standards for enforcement nor does it leave so much to the discretion of community corrections officers. Here, the condition does not give community custody officers unfettered discretion to designate prohibited locations because of the list of examples provided by the court. The phrase “areas where children’s activities regularly occur or are occurring” in the first sentence modifies the illustrative list of prohibited locations in the second sentence. Richard does not argue that any particular word or phrase in the condition is unclear. Thus, the language is specific enough provide ascertainable standards to protect against arbitrary enforcement.

In general, courts have relied on *Irwin*’s reasoning to uphold community custody conditions that prohibit defendants from frequenting places where children congregate if the condition contains an illustrative list. See *State v. Wallmuller*, 4 Wn. App. 2d 698, 704-714, 423 P.3d 282, 285-290 (2018) (Lee, J., dissenting) (discussing cases). In addition, courts have held that a condition that states, “‘Do not enter any parks, playgrounds, or schools where minors congregate,’ is not unconstitutionally vague or void for vagueness.” *State v. Norris*, 1 Wn.

App. 2d 87, 96, 404 P.3d 83 (2017), *rev'd on other grounds, State v. Hai Minh Nguyen*, 191 Wn.2d 671, 425 P.3d 847 (2018). The condition at issue here is consistent with this level of detail.

In *State v. Johnson*, 4 Wn. App. 2d 352, 421 P.3d 969 (2018), *review denied*, 192 Wn. 2d 1003, 430 P.3d 260 (2018), the court upheld a similar condition to the condition at issue in this case. In that case, the defendant was ordered to “[a]void places where children congregate to include, but not limited to: parks, libraries, playgrounds, schools, school yards, daycare centers, skating rinks, and video arcades.” The court found such a condition constitutional and not impermissibly vague:

As written, condition 14 indicates the first clause—places where children congregate—modifies the clause that provides the illustrative list. Viewed in its entirety, condition 14 provides fair warning of the areas Mr. Johnson is to avoid and it is not susceptible to arbitrary enforcement. *Cf. Irwin*, 191 Wash. App. at 652-53, 364 P.3d 830; *see also United States v. Paul*, 274 F.3d 155, 165-66 (5th Cir. 2001) (condition not unconstitutionally vague when phrase “in any area in which children are likely to congregate” modifies a list of specific locations) (quoting *United States v. Peterson*, 248 F.3d 79, 86 (2d Cir. 2001)). The fact that the list of prohibited places in condition 14 is not exhaustive does not render it invalid. *Paul*, 274 F.3d at 166-67; *Sanchez Valencia*, 169 Wash.2d at 793, 239 P.3d 1059 (“[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.”)(internal quotation marks omitted)(quoting *City of Seattle v. Eze*, 111 Wash.2d 22, 27, 759 P.2d 366 (1988)). None of the terms utilized in condition 14 make it confusing or difficult to follow. . . . While the exact confines of condition 14 are not amenable to description, the condition provides Mr. Johnson sufficient notice to allow for compliance and it comports with constitutional protections.

Id. at 360-61.

Although the court in *Wallmuller* disagreed with *Johnson*, that decision was based on a finding that a certain word in the condition at issue - “congregate” - was vague. But the word “congregate” was not included in Richard’s contested condition. In *Wallmuller*, the court found that the condition, “The defendant shall not loiter in nor frequent places where children congregate such as parks, video arcades, campgrounds, and shopping malls” was unconstitutionally vague. In so finding, the court focused its vagueness finding on the meaning of the word “congregate”:

The three primary dictionary definitions of “congregate” are (1) “to collect together into a group, crowd, or assembly,” (2) “to come together, collect, or concentrate in a particular locality or group,” and (3) “become situated together or in proximity to each other.” Webster’s Third New International Dictionary 478 (2002). This second definition seems most appropriate in this situation.

But even that definition creates uncertainty and gives rise to several questions: (1) Must the children join together in a formal group to “congregate,” or is it sufficient that children be at the same place even if they are unconnected? (2) Similarly, must the children intend to join together with other children to “congregate,” or can they end up at the same place by happenstance? (3) How many children are

required to congregate to invoke the condition? Is two enough, or is some unstated larger number required? (4) How often must children congregate in a place to invoke the condition? Is once enough, or is some unstated frequency required? (5) Assuming that children must have actually rather than potentially congregated at a place to invoke the condition, how recently must they have congregated there? Is one prior instance of children congregating in a place sufficient regardless of when it occurred? These questions suggest that the condition does not sufficiently define the proscribed conduct.

State v. Wallmuller, 4 Wn. App. 2d at 702-703, *rev. granted*, 192 Wn.2d 1009 (2019).³

In the present case, the condition does not include the word “congregate”; rather, it states, “where children’s activities regularly occur or are occurring” a far more easily discernible term than “congregate.” As written here, the condition at issue is not unconstitutionally vague because it satisfies both prongs of the vagueness analysis – it provides fair warning of the proscribed conduct and contains standards definite enough to protect against arbitrary enforcement. Therefore, the trial court did not abuse its discretion by imposing this condition and Richard’s claim to the contrary should be denied.

³ The Washington State Supreme Court accepted review of this case and recently held oral argument. A decision is pending.

3. AS PART OF RICHARD'S JUDGMENT AND SENTENCE, THE TRIAL COURT PROPERLY IMPOSED COMMUNITY CUSTODY SUPERVISION FEES AND COLLECTIONS COSTS; THE STATE CONCEDES THAT THE INTEREST ACCRUAL LANGUAGE FOR NON-RESTITUTION LEGAL FINANCIAL OBLIGATIONS WAS IMPROPERLY IMPOSED AND SHOULD BE STRICKEN.

Richard claims that the trial court improperly imposed discretionary costs and interest on non-restitution legal financial obligations ("LFOs"). Specifically, Richard argues that because he is indigent, the court-imposed collections costs, community custody supervision fees, and interest on non-restitution LFOs are improper. Brief of Appellant at 20-27. Although the State agrees that the interest on non-restitution LFOs should be stricken, Richard has forfeited his ability to raise his remaining contentions on appeal. Even if this court reaches these contentions on the merits, Richard's arguments fail as the trial court properly imposed community custody supervision fees and collections costs.

a. Richard Failed to Object to the Imposition of Supervision Fees and Collections Costs and Has Failed to Preserve These Issues for Review

For the first time on appeal, Richard raises an objection to the trial court's imposition of community custody supervision fees and collection costs. Because Richard has not preserved this issue for review, this court should decline to reach the merits of his claim.

An appellate court may refuse to review any claim of error that was not raised below. RAP 2.5(a). Specifically, a defendant who makes no objection at sentencing to the imposition of discretionary LFOs has no right to appellate review. *State v. Blazina*, 182 Wn.2d 827, 832-33, 344 P.3d 680 (2015). Richard did not object below to the imposition of supervision fees or collection costs in his judgment and sentence. *See* 10RP 7-17. Thus, this court should decline to address this unpreserved issue.

Although a defendant has the obligation to properly preserve a claim of error, an appellate court may use its discretion to reach unpreserved claims of error consistent with RAP 2.5. *State v. Blazina*, 182 Wn.2d at 830. Should this court exercise its discretion to reach the merits of Richard's unpreserved claims, it should deny his request to strike the supervision fees and collection costs.

b. The Trial Court Properly Imposed a Community Custody Condition That Richard Pay Supervision Fees as Determined by the Department of Corrections

The trial court properly imposed a community custody condition that the defendant pay a supervision fee as determined by the Department of Corrections (DOC). CP 59. There is no prohibition to authorizing the supervision fee because it is not a “cost” governed by RCW 10.01.160.

The State does not dispute that the law now prohibits the imposition of discretionary costs on indigent defendants. Effective June 7, 2018, the Legislature enacted House Bill 1783, which amends former RCW 10.01.160(3) to prohibit the imposition of any discretionary costs on indigent defendants. *State v. Ramirez*, 191 Wn.2d 732, 739, 426 P.3d 714 (2018).

In *Blazina*, the Court held that RCW 10.01.160(3) requires the sentencing court to consider a defendant’s ability to pay before imposing discretionary costs such as recoupment for public defense costs and extradition costs. *State v. Blazina*, 182 Wn.2d at 830-32, 837-38. But RCW 10.01.160(3) does not apply to the DOC supervision fee because it is not a “cost” as defined by that statute. RCW 10.01.160(2) defines what “costs” are: “Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred

prosecution program under chapter 10.05 RCW or pretrial supervision.” The fee imposed by DOC does not fall within this definition. In contrast, the costs at issue in *Blazina* fall squarely within this definition because they are expenses incurred in prosecuting the defendant. Similarly, in *Ramirez*, the only discretionary costs at issue were the recoupment of defense attorney fees and the filing fee. *State v. Ramirez*, 191 Wn.2d at 736, 748-50.

Here, the trial court found the defendant indigent at sentencing and waived all discretionary costs. CP 46-47; 10RP 17. As part of the community custody conditions, the trial court entered the following order: “While on community placement or community custody, the defendant shall...pay supervision fees as determined by DOC[.]” CP 59. Richard argues that this community supervision fee is discretionary and must be stricken from the judgment and sentence. He relies on dicta contained in a footnote in *State v. Lundstrom*, 6 Wn. App.2d 388, 396 n.3, 429 P.3d 1116 (2018) to support his claim that the costs of community custody are discretionary. Brief of Appellant at 26. This court should deny Richard’s request to strike the supervision fee because it is not a “cost” under RCW 10.01.160 and because it does not appear that they are discretionary.

RCW 9.94A.704(3)(d) provides, “If the offender is supervised by the department, the department shall at a minimum instruct the offender

to...[p]ay the supervision fee assessment.” RCW 9.94A.703 includes a list of mandatory, waivable, and discretionary conditions for the court to impose at sentencing. The “mandatory conditions” provision provides, “As part of any term of community custody, the court shall...[r]equire the offender to comply with any conditions imposed by the department under RCW 9.94A.704[.]” RCW 9.94A.703(1)(b). The “waivable conditions” provision provides, “Unless waived by the court, as part of any term of community custody, the court shall order an offender to...[p]ay supervision fees as determined by the department[.]” RCW 9.94A.703(2)(b). The section of the statute addressing “discretionary conditions” does not include any reference to costs or fees. RCW 9.94A.703(3). Thus, it does not appear that supervision fees are discretionary costs, and the trial court did not err by ordering Richard to pay supervision fees as determined by DOC.

c. The Trial Court Properly Ordered Richard to Pay the Costs of Services to Collect Any Unpaid Legal Financial Obligations

The trial court properly ordered the defendant to “pay the costs of services to collect unpaid legal financial obligations” pursuant to the statutes. CP 55. Because the case has not been sent to collections, this language serves to provide notice only that the clerk has discretion to do so. This is not a prohibited discretionary cost for indigent defendants.

i. Collections costs are not costs of prosecution for which an ability-to-pay inquiry is required.

Richard challenges the clerk's possible, future use of collection agencies to collect the crime victim penalty assessment as authorized under various statutes. He argues that collection costs are a discretionary cost that may not be imposed on indigent defendants under *State v. Ramirez*, 191 Wn.2d 732 and RCW 10.01.160(3). Brief of Appellant at 23-26. This argument demonstrates a fundamental misperception of the ability-to-pay jurisprudence and the function of collection costs.

State v. Ramirez interpreted RCW 10.01.160(3), a statute which has no application to collection costs. The recoupment statute was crafted and approved as a safeguard for the right to counsel. Criminal defendants have a constitutional right to the assistance of counsel without cost. U. S. Const. amend. 14; *State v. Barklind*, 87 Wn.2d 814, 815, 557 P.2d 314 (1976). Defendants "cannot be influenced to surrender that right by the imposition of a penalty on the exercise thereof." *Id.* A reimbursement requirement may chill that exercise. *Fuller v. Oregon*, 417 U.S. 40, 51, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974). Therefore, a recoupment procedure must pass constitutional muster. Washington's does, because the costs of prosecution (i.e. fees for appointed counsel and associated defense costs

prior to conviction) may not be imposed upon indigent defendants who lack the ability to pay.

In *Fuller v. Oregon*, the court reviewed an Oregon recoupment statute identical to Washington's. *State v. Barklind*, 87 Wn.2d at 818. Fuller was represented by appointed counsel who hired an investigator. *Fuller v. Oregon*, 417 U.S. at 41. And the state assumed both fees. *Id.* The defendant eventually pled guilty and the fees were transferred to his judgment. *Id.* at 41-42. Fuller challenged the constitutionality of Or. Rev. Stat. § 161.665 which required him to repay the state for the costs of his counsel and investigator.

The United States Supreme Court held the statute was constitutional because it contained safeguards against oppressive application. *Fuller v. Oregon*, 417 U.S. at 44-47.

Repayment must not be mandatory;

Repayment may be imposed only on convicted defendants;

Repayment may only be ordered if the defendant is or will be able to pay;

The financial resources of the defendant must be taken into account;

A repayment obligation may not be imposed if there is no likelihood the defendant's indigency will end;

The convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion;

The convicted person cannot be held in contempt for failure to repay if the default was not attributable to an intentional refusal to obey the court order or a failure to make a good faith effort to make repayment.

State v. Blank, 131 Wn.2d 230, 237-38, 930 P.2d 1213 (1997).

While some legal professionals have fixated on the discretionary/mandatory⁴ distinction, for the purpose of RCW 10.01.160, the only relevant question under the statute and constitution is: Is the LFO a “cost” within the context of the recoupment statute? If it is, then it cannot be imposed upon defendants who are indigent or who lack the ability to pay.⁵ RCW 10.01.160(3).

In the context of the recoupment statute, “costs” are “limited to expenses incurred by the state in prosecuting the defendant.” RCW 10.01.160(2). The costs of prosecution would be such costs as attorney fees, investigator fees, and fees to obtain witnesses and jurors. Not every LFO is a cost. *State v. Clark*, 191 Wn. App. 369, 376, 362 P.3d 309, 312 (2015) (the definition of “cost” in RCW 10.01.160(2) does not include “fines”). Costs do not include post-conviction punishment or penalties, e.g. the discretionary fine under RCW 9A.20.021 or the mandatory crime

⁴ See e.g. *State v. Clark*, 191 Wn. App. 369, 374, 362 P.3d 309 (2015); *Matter of Cargill*, 3 Wn. App. 2d 1040, 2018 WL 2021805 at *2 (2018) (unpublished) (focusing on the clerk’s discretion rather than whether collection services are a cost of prosecution).

⁵ Laws of 2018, ch. 269, § 6 amended RCW 10.01.160(3) to replace the “ability to pay” standard with an “indigency” standard.

victim penalty assessment. They do not include reparative or restorative consequences like restitution. And they do not include collection costs which are an alternative means to criminal contempt for enforcing a judgment.

Collection costs as applied in this judgment have no relation to the constitutional right to counsel. They are not related to the prosecution of a conviction. They are a means of enforcing a judgment on recalcitrant parties. Accordingly, they are not a “cost” within the meaning of RCW 10.01.160(3). A party’s indigency as broadly defined in RCW 10.101.010(3) will not prevent the clerk from sending a case to collection. The clerk will, however, consider all extenuating circumstances when considering an exemption or deferral of all LFOs. RCW 9.94A.780(7) (referencing subsection (1)).

ii. There is no lawful reason to strike the provision.

Collection costs are specifically authorized by statute. After a defendant has completed his supervision, if LFOs remain, the county clerk assumes legal responsibility for collection. RCW 9.94A.780(7). The clerk’s office may act as the collector and may assess upon the debtor the collection costs the office incurs. *Id.* Because many county clerks do not always have the staffing resources to provide collection services to the

court, they are authorized to contract with collection agencies to collect unpaid LFOs. RCW 36.18.190. If they do, the debtor again bears the collection costs of the agencies. *Id.* This is no different from any other civil debt. RCW 19.16.500.

The challenged judgment merely summarizes the law. There is no lawful basis to strike an accurate recitation of the law.

Richard relies on *State v. Ramirez*, a case which interpreted RCW 10.01.160(3). *See Ramirez*, 191 Wn.2d at 740. But collection costs are not subject to RCW 10.01.160(3). RCW 10.01.160(2) (defining “costs” as the costs specially incurred by the state “in prosecuting” the defendant). They are authorized under different statutes. Therefore, the interpretation of RCW 10.01.160(3) has no bearing on this matter.

Richard relies on HB 1783 (Laws of 2018, ch. 269). This bill amended many statutes. However, it made no modifications to RCW 36.18.190, RCW 9.94A.780, or RCW 19.16.500. Therefore, HB 1783 has no bearing on this matter.

Notably the bill did not do away with LFOs entirely. Specifically, it left intact or added the crime victim assessment in various places. Laws of 2018, ch. 269, §§ 7(2)(c), (8)(5), 13(3)(f), (14)(1), (2)(c) and (5), 15(4)(f). The assessment remains mandatory regardless of ability to pay. Because in this bill, the Legislature did not do away with LFOs altogether,

a collection mechanism remains necessary to enforce the court's order.

The provision in the judgment references the law as it exists.

iii. Striking the provision will not restrict the Clerk's authority.

The challenged provision only accurately recites the statutes.

Therefore, removing this language from the judgment will have no effect on the clerk's ability to send a case to collections. The clerk's office is statutorily authorized to do so under RCW 36.18.190. *See State v. Roy*, 198 Wn. App. 1015, 2017 WL 993106 at *4 (2017) (unchecked "collection cost" box on a judgment and sentence meant the document did not independently authorize imposition of such costs, but clerk has independent authority to impose it.)⁶

iv. The courts must respect a constitutional statute.

The Legislature created the collection mechanism. It made no changes to this system in HB 1783. If the law is constitutional, the courts must uphold it. The laws are presumptively constitutional. *State v. Glas*, 147 Wn.2d 410, 422, 54 P.3d 147, 154 (2002) (a court will make every presumption in favor of constitutionality where the statute's purpose is to

⁶ GR 14.1 allows citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013. The unpublished decision cited above has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

promote safety and welfare and bares a reasonable and substantial relationship to that purpose). Richard does not claim or demonstrate otherwise.

The Washington Supreme Court has found the mandatory victim penalty assessment in RCW 7.68.035 to be constitutional. *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166, 169 (1992) (noting there are sufficient safeguards in RCW 10.01.160(4) to prevent imprisonment of indigent defendants). As applied here, the collection statute implements the assessment. And, because collection agencies have other methods of persuasion that do not involve potential confinement, allowing collection through a third-party agency reduces the threat of incarceration.

The county clerk is authorized to exempt or defer LFO payments and shall consider a defendant's diligent attempts at employment, school attendance, age, support of dependents, undue hardship, and any extenuating circumstance. RCW 9.94A.780(7) (referencing subsection (1)). On a case-by-case basis, for intractable debtors, the clerk may choose to refer cases to collection.

In many counties, clerks' offices simply do not have the ability to enforce collections without the assistance of collections agencies. If the clerk could not refer case to collections, as a practical matter, the court's orders for mandatory assessments and restitution would be unenforceable.

This Court must respect the Legislature's separate power to authorize this mechanism which enforces court orders.

d. The State Concedes That Remand is Appropriate to Amend the Interest Accrual Language in the Judgment and Sentence

The State concedes that the language in Richard's judgment and sentence involving interest accrual should be amended to reflect a recent change in the law. Restitution imposed in a judgment and sentence shall bear interest from the date of judgment until payment. RCW 10.82.090(1). But as of June 7, 2018, "no interest shall accrue on nonrestitution legal financial obligations." RCW 10.82.090(1). Although the trial court sentenced Richard after this effective date, his judgment and sentence includes boilerplate language indicating that the "financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments." CP 55. The State agrees that the recent change in law provides that interest shall not accrue for non-restitution LFOs. Thus, remand is appropriate for the trial court to amend the interest accrual language in the judgment and sentence to reflect the following: "The restitution obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to

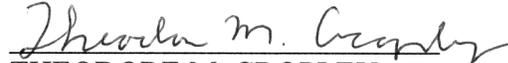
civil judgments. No interest shall accrue on non-restitution obligations imposed in this judgment. RCW 10.82.090.”

E. CONCLUSION.

For the foregoing reasons, this Court should remand the matter to the trial court to strike the interest accrual on non-restitution LFOs and otherwise deny Richard’s remaining claims and affirm the judgment and conviction.

DATED: July 12, 2019

MARY E. ROBNETT
Pierce County Prosecuting Attorney


THEODORE M. CROPLEY
Deputy Prosecuting Attorney
WSB # 27453

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.


Date 7/12/19 Signature

PIERCE COUNTY PROSECUTING ATTORNEY

July 12, 2019 - 10:48 AM

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