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NO. 53194-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

WILLIE GARZA,

Appellant.

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

The Honorable Kitty-Ann van Doorninck, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. There is insufficient evidence to sustain appellant Willie Garza's conviction for first degree child molestation (count 3).

2. Prosecutorial misconduct in closing argument deprived Garza of a fair trial.

3a. The sentencing condition prohibiting Garza from possessing "pictures of any minors at all" is unconstitutionally overbroad.

3b. The sentencing condition prohibiting Garza from entering drug areas is not crime-related and is unconstitutionally vague.

3c. The sentencing condition ordering Garza to undergo an alcohol and chemical dependency evaluation is a clerical error.

3d. The trial court failed to make the requisite findings before ordering Garza to undergo a mental health evaluation.

Issues Pertaining to Assignments of Error

1. Must Garza's conviction for the third count of first degree child molestation be reversed for insufficient evidence, where the State failed to prove the essential element of sexual contact?

2. Must Garza's conviction for the third count of first degree child molestation be reversed, where the State argued facts unsupported by the record in closing argument, depriving Garza of a fair trial?

3a. Must the sentencing condition prohibiting Garza from possessing “pictures of any minors at all” be stricken where it is unconstitutionally overbroad?

3b. Must the sentencing condition prohibiting Garza from entering drug areas be stricken where it is not crime-related and is unconstitutionally vague?

3c. Must the sentencing condition ordering Garza to undergo an alcohol and chemical dependency evaluation be stricken where it is a clerical error, not reflective of the trial court’s intent?

3d. Must the sentencing condition ordering Garza to undergo a mental health evaluation be stricken where the trial court failed to make the requisite findings before ordering it?

B. STATEMENT OF THE CASE

Willie Garza is 63 years old. RP 463; CP 142. He is a grandfather and provided constant childcare for his daughter’s four children. RP 233, 327-28, 335-36, 465, 468. I.R., born in 2005, is the oldest of the four siblings. RP 231-33. The allegations against Garza came to light in 2017, when I.R. reported suicidal ideations and accused her parents of child abuse and Garza of sexual abuse. RP 303-04, 368-70, 417, 457-59.

On November 14, 2017, the State charged Garza with three counts of first degree child molestation, alleging he had sexual contact with I.R.

when she was younger than 12 years old. CP 3-4 (original information), 96-97 (amended information). The State further alleged Garza used his position of trust to facilitate the offenses. CP 3-4. I.R. testified to three alleged incidents at Garza's jury trial. I.R. could not remember how old she was at the time, so the State distinguished the allegations based on where they supposedly took place.

The first incident I.R. said occurred at Garza's Gig Harbor home. RP 247-49, 270-74. But Garza never lived in Gig Harbor—only Port Orchard from 2010 to 2012 and then Tacoma. RP 334-35, 463-64. I.R. testified her aunt and cousins were visiting for the weekend and everyone was sleeping in the living room at Garza's house. RP 270. I.R. recalled being alone with Garza in his bedroom, with her pants and underwear removed. RP 270-71. She claimed she was lying down on Garza's bed while he kissed her body and touched her vagina with his hands. RP 271-72. I.R. testified they heard a noise and Garza told her to put her clothes back on. RP 273.

Contrary to her trial testimony, I.R. said in a forensic interview and later in a defense interview that she had her underwear on and was standing up rather than lying down. RP 307-09. She also said the only touching that occurred was over her underwear. RP 307-09. The State elected this "Gig Harbor" incident for Count 1. RP 541-42; CP 179-80.

The jury could not reach a unanimous verdict, so the charge was dismissed without prejudice. CP 131-32, 144; RP 579-80.

The second incident I.R. said occurred sometime later, at a two-story townhouse where I.R. lived with her mother, siblings, and her mother's boyfriend. RP 257-59, 337. I.R. testified she was alone with Garza watching television on the couch. RP 275-76. I.R. claimed "then somehow I was on his lap, he was kissing me and he was touching me inside my shirt." RP 275. I.R. said Garza kissed her "[a]ll on my neck and on my face," and touched her "chest" underneath her shirt. RP 276-77. I.R. testified the touching stopped when a neighbor knocked on the front door. RP 275-76, 278.

The State elected this "town house" incident for Count 2. RP 544-45; CP 179, 181. The jury found Garza guilty on this count, along with the aggravating circumstance. CP 134, 136.

The third incident I.R. said occurred at Garza's upstairs Tacoma apartment, where he lived from 2012 to 2014. RP 279-81, 464-65. Garza had a computer in his bedroom, which his grandchildren were allowed to use, with a time limit. RP 469. I.R. recalled one time she was using Garza's computer, "and ended up sitting on his lap after that and then he started putting his hands in my shirt." RP 280. She reiterated, "I was wearing a red shirt and he ended up having his hands underneath my

shirt.” RP 281. I.R. said she was not wearing a bra at the time because she was not old enough to wear one, but she did not say Garza touched her chest. RP 281. I.R. testified the touching stopped because her younger brother “came and asked to play with Nerf guns.” RP 280. “That’s all I remember,” she explained. RP 280.

The State elected this “upstairs apartment” incident for Count 3. RP 545-46; CP 179, 182. The jury found Garza guilty on this count, along with the aggravating circumstance. CP 137, 139.

I.R. told her mother about the alleged touching in 2015. RP 342-43. I.R.’s mother confronted Garza but did not report anything to the police. RP 343-44. Garza denied any inappropriate touching. RP 343. Afterwards, I.R.’s mother cut ties with Garza and did not allow him to babysit anymore. RP 343-44. Garza testified at trial and again denied any inappropriate touching. RP 467-69. Garza explained I.R. often misbehaved, jealous of the attention her younger siblings received. RP 471-73, 479, 484. No other evidence supported I.R.’s claims.<sup>1</sup>

The trial court sentenced Garza to the top of the standard range, 89 months, and imposed lifetime community custody. CP 146-47. The court

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<sup>1</sup> Over defense objection, the trial court instructed the jury: “In order to convict a person of child molestation in the first degree, as defined in these instructions, it shall not be necessary that the testimony of the alleged victim be corroborated. The jury is to decide all questions of witness credibility.” CP 106; RP 438-42, 519-20.

ordered Garza to undergo a psychosexual evaluation but did not believe the record supported a substance abuse evaluation. RP 591-92; CP 146. Garza filed a timely notice of appeal. CP 163.

C. ARGUMENT

1. THERE IS INSUFFICIENT EVIDENCE TO SUSTAIN GARZA'S CONVICTION FOR THE THIRD COUNT OF CHILD MOLESTATION.

In every criminal prosecution, due process requires the State prove beyond a reasonable doubt every fact necessary to constitute the crime charged. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A reviewing court must reverse a conviction for insufficient evidence where no rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt, viewing the evidence in the light most favorable to the State. State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013).

“[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation.” Id. at 16. Such inferences must “logically be derived from the facts proved, and should not be the subject of mere surmise or arbitrary assumption.” Bailey v. Alabama, 219 U.S. 219, 232, 31 S. Ct. 145, 55 L. Ed. 191 (1911). When there is insufficient evidence to support a conviction, the remedy is to reverse the conviction and

dismiss the charge with prejudice. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

A person is guilty of first degree child molestation “when the person has . . . sexual contact with another who is less than twelve years old and . . . the perpetrator is at least thirty-six months older than the victim.” RCW 9A.44.083. “Sexual contact” is defined as “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.” RCW 9A.44.010(2).

Direct contact with the genitals or breasts constitutes “sexual contact” as a matter of law. In re Welfare of Adams, 24 Wn. App. 517, 519, 601 P.2d 995 (1979). The term “intimate parts” has been interpreted to include “parts of the body in close proximity to the primary erogenous areas,” including the hips, buttocks, and lower abdomen. Id. at 519-21; State v. Powell, 62 Wn. App. 914, 917 n.3, 816 P.2d 86 (1991). “Intimate parts” does not, however, “mean every body part”—just those typically associated with sexual intimacy. State v. Howe, 151 Wn. App. 338, 346, 212 P.3d 565 (2009) (citing and discussing State v. R.P., 67 Wn. App. 663, 838 P.2d 701 (1992), aff’d in part, rev’d in part, 122 Wn.2d 735, 862 P.2d 127 (1993), which held kissing the victim’s neck was insufficient sexual contact to support an indecent liberties conviction).

Similarly, where the evidence “shows touching through clothing, or touching of intimate parts of the body other than the primary erogenous areas,” courts require “some additional evidence of sexual gratification.” Powell, 62 Wn. App. at 917. For instance, rubbing the zipper area of a boy’s pants for 5 to 10 minutes was sufficient evidence of sexual gratification. State v. Camarillo, 115 Wn.2d 60, 63, 794 P.2d 850 (1990); see also State v. Johnson, 96 Wn.2d 926, 639 P.2d 1332 (1982) (evidence that accused wiped a five-year-old girl’s genitals with a wash cloth might be insufficient to prove he acted for purposes of sexual gratification had that act not been followed by her performing oral sex on him).

There is insufficient evidence that Garza had sexual contact with I.R. on count 3, the “upstairs apartment” incident. Garza was the primary babysitter for I.R. and her siblings. RP 254, 335-36. Garza had a computer in his bedroom, which he let his grandchildren use. RP 279, 469.

I.R. recalled she asked Garza if she could use his computer. RP 279. She explained, “And then what I remember is I ended up sitting on his lap after that and then he started putting his hands in my shirt.” RP 279. She reiterated, “then I ended up just being on his lap and then he ended up -- I was wearing a red shirt and he ended up having his hands underneath my shirt.” RP 280. I.R. testified the incident ended when her little brother her

younger brother “came and asked to play with Nerf guns.” RP 280. She did not remember any other details of the incident. RP 280-81.

I.R. did not describe where Garza touched her under her shirt. RP 279-81. She answered the prosecutor’s questions that she was not wearing a bra because she was not old enough to wear one. RP 280-81. But she never testified that Garza touched her chest or her breasts. RP 279-81. This stands in contrast to count 2, where I.R. clearly testified, “My chest,” when asked where Garza touched her. RP 277.

This record demonstrates the State failed to establish Garza had sexual contact with any of I.R.’s sexual or intimate parts during the third incident. I.R. testified Garza touched her under her shirt, but did not say he touched her breasts, any intimate part, or other erogenous area. Simply put, we do not know where Garza touched I.R. The case law is clear that sexual and intimate parts do not include every body part—just those “commonly associated with sexual intimacy.” Howe, 151 Wn. App. at 346 (quoting R.P., 67 Wn. App. at 668-69). The shoulders, back, and stomach, for instance, would all be under I.R.’s shirt but are not sexual or intimate parts.

The State’s questions about whether I.R. was wearing a bra were likely an attempt to establish Garza touched I.R.’s breasts during the third incident. RP 280-81. But I.R. did not so testify. RP 279-81 (entire testimony regarding the third incident); see also CP 102 (instructing the jury

“the lawyer’s statements are not evidence. The evidence is the testimony and the exhibits.”). I.R. said only that Garza touched her under her shirt. This is insufficient to establish sexual contact with a sexual or intimate part, as required for first degree child molestation.

The record also fails to establish the alleged touching was done for sexual gratification. I.R. said she “ended up sitting on [Garza’s] lap.” RP 279. But there was no evidence Garza had an erection. Garza did not touch I.R.’s genitals. RP 281. Nor was there any evidence of kissing, like the second count, which may have suggested sexual gratification. A young girl sitting on her grandfather’s lap does not, by itself, establish touching done for the purpose of sexual gratification. See Powell, 62 Wn. App. at 917 (“Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touching was for the purpose of sexual gratification.”).

In summary, on count 3, the State failed to prove Garza had sexual contact with I.R. for the purpose of sexual gratification. The record establishes Garza touched I.R. under her shirt but does not establish where. This is insufficient to sustain Garza’s conviction for first degree child molestation. This Court should reverse count 3 and remand for dismissal of the charge with prejudice. Hickman, 135 Wn.2d at 99.

2. GARZA WAS DEPRIVED OF A FAIR TRIAL WHEN THE PROSECUTOR REFERRED TO FACTS NOT IN EVIDENCE IN CLOSING ARGUMENT.

Prosecutors have a duty to ensure that an accused person receives a fair trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). When there is a substantial likelihood that improper comments affected the jury's verdict, the accused's rights to a fair trial and to be tried by an impartial jury are violated. U.S. CONST. amend. XIV; CONST. art. 1, §§ 3, 22; State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Reversal is required, even without defense objection, when the prosecutor's misconduct is so flagrant and ill-intentioned that no curative instruction could have erased the prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

A prosecutor is a quasi-judicial officer, obligated to seek verdicts free of prejudice and based on reason. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). A prosecutor has a special duty in trial to act impartially in the interests of justice and not as a "heated partisan." State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). He may "strike hard blows, [but] he is not at liberty to strike foul ones." Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).

Consistent with these duties, prosecutors may not misstate the evidence or argue facts unsupported by the record that may prejudice the jury's assessment of the case. State v. Reeder, 46 Wn.2d 888, 892, 285 P.2d 884 (1955); State v. Guizzotti, 60 Wn. App. 289, 296, 803 P.2d 808 (1991). “Although prosecuting attorneys have some latitude to argue facts and inferences from the evidence, they are not permitted to make prejudicial statements unsupported by the record.” State v. Jones, 144 Wn. App. 284, 293, 183 P.3d 307 (2008); accord State v. Pierce, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012) (“[A] prosecutor commits reversible misconduct by urging the jury to decide a case based on evidence outside the record.”).

With regard to count 3, the upstairs apartment incident, the prosecutor summarized in closing argument: “She comes over there, sits on his lap, starting rubbing up underneath her shirt, kissing her in places that grandpas are not supposed to kiss their grandchildren, rubbing on her bare chest, that she wasn't wearing a bra, because she wasn't old enough to be wearing a bra.” RP 546 (emphasis added). In his closing PowerPoint, the prosecutor likewise summarized, “[r]ubbing under her shirt.” CP 182.

The prosecutor misstated the evidence and argued facts supported by the record. As discussed in argument 1 above, I.R. did not testify Garza touched, let alone rubbed, her chest. RP 279-81. She testified only that “he ended up having his hands underneath my shirt.” RP 280. While the

prosecutor asked whether I.R. was wearing a bra, I.R. never said Garza touched her chest during the incident. RP 280-81. The prosecutor was incorrect in arguing Garza was “rubbing on her bare chest” during the upstairs apartment incident. RP 546.

Furthermore, there was no allegation whatsoever that Garza kissed I.R. during this incident. RP 279-81. I.R. said only that Garza put his hands under her shirt—she did not recall any other kind of touching and said nothing about kissing. RP 279-81. The prosecutor misrepresented the evidence by contending Garza was “kissing her in places that grandpas are not supposed to kiss their grandchildren.” RP 546.

The prosecutor’s misstatement of the evidence related to count 3 was especially significant—and damaging to Garza’s case—given the insufficient evidence supporting that count. When considering the prosecutor’s closing argument, it is understandable why the jury convicted on count 3 even though I.R. did not testify where Garza touched her. The prosecutor claimed Garza “rubbed” I.R.’s “bare chest” and kissed her “in places that grandpas are not supposed to kiss their grandchildren.” RP 546. This would be sufficient to sustain a child molestation conviction. But the actual evidence introduced at trial—that Garza put his hands under I.R.’s shirt—was not.

The misconduct could not have been cured by a remedial instruction. The State may emphasize the jury was instructed it “must disregard any remark, statement, or argument that is not supported by the evidence or the law in the [court’s] instructions.” CP 102. But, as discussed, the misstatements were particularly harmful where insufficient evidence supported count 3. And the prosecutor’s misrepresentation of the record made the “upstairs apartment” sound nearly identical to the “townhouse incident,” where I.R. actually testified Garza kissed her and touched her chest. RP 276-77. The argument could have easily misled or confused the jury, who did not have the benefit of reviewing the written transcript and carefully parsing the three alleged incidents.

Under the circumstances, the prosecutor’s flagrant and ill-intentioned misrepresentation of the evidence deprived Garza of a fair trial. This Court should reverse his conviction on count 3 and remand for a new trial.

3. SEVERAL COMMUNITY CUSTODY CONDITIONS SHOULD BE STRICKEN FROM GARZA’S JUDGMENT AND SENTENCE.

A trial court may generally impose crime-related prohibitions or affirmative conditions as part of a sentence. RCW 9.94A.505(9). However, a court may only impose a sentence authorized by statute. In re Post Sentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). An

illegal or erroneous sentence may therefore be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

- a. The condition prohibiting Garza from possessing “pictures of any minors at all” is unconstitutionally overbroad.

As a condition of community custody, the trial court ordered: “17 [X] Have no direct and/or indirect contact with minors, nor pictures of any minors at all, to include relatives.” CP 157 (emphasis added). The emphasized portion of the condition is unconstitutionally overbroad because it prohibits a real and substantial amount of protected speech. State v. Riles, 135 Wn.2d 326, 346, 957 P.2d 655 (1998), overruled on other grounds by State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010).

Sentencing courts may order offenders to comply with crime-related prohibitions, which must “directly relate[] to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). But a sentencing condition that limits an offender’s fundamental rights must be more than just crime-related. Bahl, 164 Wn.2d at 757. “[A] condition that touches on First Amendment rights must be narrowly tailored and directly related to the goals of protecting the public and promoting the defendant’s rehabilitation.” Id. Put another way, the condition “must be clear and must be reasonably necessary to accomplish essential state needs and public order.” Id. at 758.

For instance, in State v. Padilla, 190 Wn.2d 672, 676, 416 P.3d 712 (2018), Padilla was convicted of communication with a minor for immoral purposes. The court imposed a sentencing condition prohibiting Padilla’s possession of and access to pornographic materials, as directed by his community corrections officer (CCO). Id. at 676. The term “pornographic material” was defined as “images of sexual intercourse, simulated or real, masturbation, or the display of intimate body parts.” Id.

The Padilla court held this condition was both unconstitutionally vague and overbroad: “The prohibition against viewing depictions of intimate body parts impermissibly extends to a variety of works of arts, books, advertisements, movies, and television shows.” Id. at 681. The court further reasoned there was “no connection in the record between Padilla’s inappropriate messaging and imagery of adult nudity or simulated intercourse.” Id. at 684.

Padilla controls here. “Pictures of any minors at all” encompasses a vast array of protected material, like innocuous magazines, movies, and family photos. I.R. testified Garza had pictures of “girls in their bikinis” at his computer desk. RP 279. But there was no evidence Garza used photographs of minors in the commission of the offenses, such as grooming I.R. with them. Moreover, the condition is not limited to nude or scantily clad minors, but extends broadly to “any minors at all.” CP 157. It is neither

crime-related nor narrowly tailored to achieve a compelling government interest. The portion of the condition prohibiting Garza from possessing pictures of “any minors at all” should therefore be stricken from the judgment and sentence.

- b. The condition prohibiting Garza from entering drug areas is not crime-related and is unconstitutionally vague.

As a condition of community custody, the trial court ordered Garza: “21 [X] Do not enter drug areas as defined by court or CCO.” CP 157. This condition is not crime-related, where the trial court expressly refused to order a substance abuse evaluation. RP 591-92. The court found, “I don’t think there’s enough evidence in the record that I have, directly, that that’s an issue for him.” RP 592. The court was correct—there was no evidence introduced at trial that drug or alcohol use contributed to the offenses. The condition should be stricken as not crime-related and not reflective of the court’s intent to waive drug-related conditions.

The condition is also unconstitutionally vague. A sentencing condition is void for vagueness if it does not (1) define the offense with sufficient definiteness such that ordinary people can understand what conduct is proscribed; or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53.

In Bahl, the trial court imposed the following condition: “Do not possess or access pornographic materials, as directed by the supervising Community Corrections Officer.” 164 Wn.2d at 743. The supreme court held this to be unconstitutionally vague. Id. at 758. The court explained, “The fact that the condition provides that Bahl’s community corrections officer can direct what falls within the condition only makes the vagueness problem more apparent, since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement.” Id.

In Sanchez Valencia, the challenged condition specified the defendant “shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, police scanners, and hand held electronic scheduling and data storage devices.” 169 Wn.2d at 785. The supreme court held the condition failed both prongs of the vagueness test.

First, the term “paraphernalia,” without specifying *drug* paraphernalia, was so broad that it failed “to provide the petitioners with fair notice of what they can and cannot do.” Id. at 794. Second, the condition “might potentially encompass a wide range of everyday items,” like sandwich bags or paper, depending on the particular community correction officer’s (CCO) whim. Id. “A condition that leaves so much to the

discretion of individual community corrections officers is unconstitutionally vague.” Id. at 795.

Here, the condition requiring Garza to not enter “drug areas,” as defined by the court or CCO, does not provide sufficient definiteness such that Garza knows where he can or cannot go. “Drug areas” is an extremely broad term that could potentially encompass an entire city. How expansively does it stretch: Tacoma? Third Avenue in Downtown Seattle? A particular apartment building? A specific apartment in that building? All could conceivably be drug areas. Because an ordinary person would not know what conduct is prohibited, the condition fails the first prong of the vagueness test.

The condition also fails the second prong of the vagueness test. Bahl and Sanchez Valencia involved delegation to the CCO to define the parameters of a vague condition. This did not sufficiently protect against arbitrary enforcement. The same is true here. A creative CCO could come up with almost any location that constitutes a drug area. The Sanchez Valencia court held that where a condition leaves so much discretion to an individual CCO, it is unconstitutionally vague. 169 Wn.2d at 795. The condition gives Garza’s CCO unfettered discretion to define drug areas. This “virtually acknowledges that on its face,” that the condition “does not provide ascertainable standards for enforcement. Bahl, 164 Wn.2d at 758.

The condition here is unconstitutional because it fails to provide reasonable notice as to what conduct is prohibited and exposes Garza to arbitrary enforcement. As such, the condition does not meet the requirements of due process and should be stricken from the judgment and sentence. State v. Irwin, 191 Wn. App. 644, 655, 364 P.3d 830 (2015).

- c. The trial court expressly refused to order a substance abuse evaluation, yet that evaluation is included in the conditions of community custody.

At sentencing, the trial court ordered that Garza undergo a psychosexual evaluation. RP 591-92. But the court declined to order a substance abuse evaluation, finding, “I don’t think there’s enough evidence in the record that I have, directly, that that’s an issue for him.” RP 592. Within the judgment and sentence, the court ordered only the psychosexual evaluation and follow-up treatment. CP 146, 148.

But the trial court also incorporated Appendix H into the judgment and sentence, which imposed several more conditions of community custody. CP 148, 156-57. Within Appendix H, condition 23 was checked as follows: “[X] Obtain [X] alcohol [X] chemical dependency evaluation upon referral and follow through with all recommendations of the evaluation.” CP 157. This condition is contrary to the trial court’s express intent not to order a substance abuse evaluation. It is a clerical error. State v. Rooth, 129 Wn.

App. 761, 770, 121 P.3d 755 (2005) (explaining a clerical error is one where the judgment, as amended, embodies the trial court's intention).

The proper remedy is to remand for correction of this clerical error, i.e., striking the erroneous condition. In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701-02, 117 P.3d 353 (2005).

- d. The trial court failed to make the requisite findings before ordering Garza to undergo a mental health evaluation.

RCW 9.94B.080<sup>2</sup> provides:

The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment may be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.

Thus, RCW 9.94B.080 authorizes a trial court to order a mental health evaluation as a condition of community custody only when the court follows specific procedures. State v. Brooks, 142 Wn. App. 842, 851, 176 P.3d 549 (2008). First, the court must find that reasonable grounds exist to

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<sup>2</sup> Although the heading to RCW 9.94B.080 indicates that it applies to crimes committed prior to July 1, 2000, the statute is applicable to crimes committed after that date. See Laws of 2008, ch. 231, § 55.

believe the offender is mentally ill. Id. Second, the court must find this mental health condition likely influenced the offense. Id.

In Appendix H, the trial court ordered Garza to obtain a mental health evaluation and follow all provider recommendations. CP 156-57. However, the court did not make either of the requisite findings under RCW 9.94B.080. The court made no finding that Garza is mentally ill or that a qualifying mental illness influenced the offense. RP 591-92 (ordering psychosexual evaluation but no other evaluations). The court therefore erred in imposing the mental health evaluation condition. State v. Jones, 118 Wn. App. 199, 202, 76 P.3d 258 (2003). This Court should remand for the trial court to strike the condition. Id.

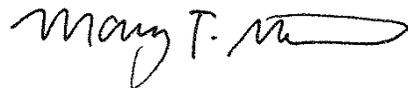
D. CONCLUSION

For the reasons discussed above, this Court should reverse Garza's conviction on count 3 for insufficient evidence and remand for dismissal of the charge with prejudice. Alternatively, this Court should reverse the same count for prosecutorial misconduct and remand for a new trial. Finally, this Court should remand for several community custody conditions to be stricken from the judgment and sentence.

DATED this 15th day of August, 2019.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Mary T. Swift", with a stylized flourish at the end.

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