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NO. 53221-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

DARYL ROGERS,

Appellant.

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

The Honorable Robert Lewis, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting improper expert testimony that vouched for the credibility of the complaining witness.

2. The trial court erred in denying appellant's mistrial motion after a witness violated a pre-trial ruling by telling the jury appellant had been in juvenile detention.

3. Appellant's right to a trial by an impartial jury was violated when the court failed to excuse a juror who declared that, without strong exculpatory defense evidence, the scale would be tipped in favor of the state and he would be unable to judge otherwise.

4. Cumulative error denied appellant a fair trial.

5. The court erred in imposing a community custody condition requiring his treatment provider to report to the Department of Corrections.

Issues Pertaining to Assignments of Error

1. It is inappropriate for experts to testify about general characteristics of sexually abused individuals. Did the trial court err in admitting speculative, irrelevant, and improper opinion testimony by a physician that sexual assault examinations generally do not show evidence of injury and by a counselor that self-harming behaviors are strongly correlated with child sexual abuse?

2. The trial court granted a pretrial motion excluding reference to appellant's juvenile criminal history. At trial, the complaining witness' mother twice mentioned appellant's time in juvenile detention, and the court instructed the jury to disregard. The court denied appellant's motion for a mistrial. Was a mistrial necessary to protect appellant's right to a fair trial?

3. Accused persons have a constitutional right to trial by an impartial jury. Before trial, Juror 16 declared his belief that, without strong exculpatory evidence, the scales were tipped in the state's favor and he would be unable to judge otherwise. Was appellant's right to an impartial jury violated because the court erred in failing to excuse the juror for cause?

4. Did the above-described errors operate cumulatively to deny appellant a fair trial?

5. Did the court exceed its statutory authority when it ordered, as a condition of Rogers' community custody, that his treatment provider submit reports to the Department of Corrections?

B. STATEMENT OF THE CASE

1. Procedural History

The Clark County prosecutor charged appellant Daryl Rogers with two counts of child molestation in the first degree and four counts of rape of a child in the first degree. CP 12-14. The jury could not agree on two of the

counts but found Rogers guilty of one count of child molestation in the first degree and three counts of rape of a child in the first degree. CP 52-60. The court imposed an indeterminate sentence with a minimum term of 277 months, the high end of the standard range, and a maximum term of life. CP 107-09. Notice of appeal was timely filed. CP 122.

2. Substantive Facts

At the age of 28, Rogers was accused by his former roommate's daughter of committing various sex acts with her nearly 10 years earlier. RP 195-236, 315, 328, 333. When the investigation began, Rogers voluntarily submitted to police questioning on three separate occasions, waiving his constitutional rights. RP 476. At trial, he took the stand and testified. He disagreed with the State's witnesses on many details of the time period in 2010 when he became friends and then later roommates with the complaining witness' mother. RP 586-602. He denied any inappropriate contact with the complaining witness, J.O. RP 608-09.

The small, three-bedroom house where Rogers lived in 2010 was home to Rogers, his brother Demetrius, his sister Shatyra, their friend Montrel Douglas, 10-year-old J.O., her mother, and her two younger brothers. RP 337-38. Rogers had one bedroom. RP 337. Demetrius and Douglas shared a second, and J.O. and her brothers shared the third. RP 337-38. J.O.'s mother and Shatyra slept on couches in the common living room

areas. RP 218. After a month or two, there was a dispute over payment of rent, and J.O.'s family moved out. RP 343-44. Nearly 10 years later, J.O. told her mother she had been sexually abused by Rogers. RP 258, 349.

At the time of her disclosure to her mother, J.O. was recovering from a recent concussion. RP 272. She told her mother during a dispute over J.O.'s teenaged behavior and a boyfriend the mother did not approve of. RP 260-61, 351-52, 366. When her mother told her that her behavior could lead to her being raped, J.O. told her mother that had already occurred. RP 365-66. J.O. also claimed to have told her best friend much closer in time to the incidents, but her friend did not recall this occurring until shortly before J.O. told her mother. RP 272, 308, 311.

With regards to the incidents that led to the convictions, J.O. claimed Rogers had rubbed his penis between her thighs, slightly penetrating her labia on one occasion, and on two other occasions had put his penis in her mouth. RP 223-24, 230, 249-50. These she claimed occurred while she and her mother were roommates of Rogers in spring 2010. The first incident with rubbing and penetration occurred, according to J.O., after she had fallen asleep on the living room couch. RP 222-24. The other incidents she claimed occurred in Rogers' room, where she was watching television, and in Demetrius' room, where she was playing with his drum set. RP 230-36, 249-51.

Since that time, J.O. claimed to have developed self-harming behaviors and nightmares. RP 261-62, 266-67. Her mother also testified she noticed sleep disturbances and signs of self-harm. RP 350. The State attempted to transform these observations into medical corroboration of J.O.'s accusations. Over defense objection, the court admitted expert testimony by J.O.'s counselor and by the physician who performed a medical examination when she reported the alleged abuse. RP 389-96, 425-29.

Counselor Maureen Garrett diagnosed J.O. with Post-Traumatic Stress Disorder (PTSD). RP 407, 411. Garrett explained that PTSD can result from a variety of different traumatic experiences, and sex abuse would qualify as one such trauma. RP 406-07. She also based her diagnosis on J.O.'s self-reported other symptoms including startle reflex, edginess, mood swings, sensory overload, slight paranoia about men in public, nightmares, flashbacks, avoidance of the dark, difficulty sleeping, and difficulty talking about sex abuse due to reliving the experience. RP 405.

Garrett also testified to general information about child sex abuse based on her training and experience. She explained that delayed reporting is common for a variety of reasons. RP 408-09. She testified there is a "strong correlation" between self-harming behaviors and sexual abuse. RP 409-10.

Dr. Kimberly Copeland testified that J.O.'s medical examination results were normal and suggested nothing about whether or not J.O. had

experienced vaginal penetration at an early age. RP 444, 447. Copeland explained that only about five percent of penetrative abusive events lead to any sort of abnormal medical finding. RP 444. She testified this type of abuse can occur without any physical damage to the tissue and the body tends to heal any damage quite rapidly. RP 445-46.

In closing, Rogers argued that, in light of his busy schedule and the sheer number of people in the house, it was extremely unlikely that the events described by J.O. could have occurred at all, much less without someone noticing. RP 740-42, 745. He also pointed out the lack of any evidence corroborating J.O.'s allegations, the inconsistencies in her accounts, and the circumstantial reasons to doubt the veracity of her account. RP 724, 729-30, 733. Additional facts will be set forth in the pertinent argument sections below.

C. ARGUMENT

1. THE REFERENCES TO ROGERS' EXCLUDED JUVENILE CRIMINAL HISTORY NECESSITATED A MISTRIAL.

In addition to the rulings admitting Garrett's and Copeland's testimony, there was a ruling in limine precluding mention of Rogers' juvenile criminal history. RP 53. Despite this ruling, J.O.'s mother's twice mentioned Rogers had spent time in juvenile detention. RP 318. A mistrial

motion was denied. RP 318- 320. Instead, the court warned the mother not to volunteer any further information and instructed the jury as follows:

> Before we proceed, I'm going to give you an instruction regarding a remark the witness made and that wasn't in response to a question. It was some reference made by the witness to – the possibility defendant may have been in juvenile detention at some point. That was inappropriate. That has nothing to do with this case. It's irrelevant to this case. I'm instructing you at this time to disregard that remark and not to consider it or discuss it during your deliberations.

RP 321-22. Rogers' conviction should be reversed because a mistrial was necessary to protect his right to a fair trial.

A mistrial should be granted when a trial irregularity occurs and the accused has been so prejudiced that nothing short of a new trial can ensure a fair trial. State v. Gamble, 168 Wn.2d 161, 177, 225 P.3d 973 (2010) (citing State v. Greiff, 141 Wn.2d 910, 920-21, 10 P.3d 390 (2000)). The decision to deny a mistrial motion should be overturned when there is prejudice, i.e., a substantial likelihood that the verdict was affected. Id. The trial court's ruling on a mistrial motion is reversible error when the trial court abuses its discretion in light of the facts and circumstances. State v. Escalona, 49 Wn. App. 251, 254-55, 742 P.2d 190 (1987).

When the irregularity consists of improper witness testimony, the question is whether, when viewed against the backdrop of all the evidence, the accused did not have a fair trial. Gamble, 168 Wn.2d at 177. The court

determines the prejudice caused by a trial irregularity based on (1) the seriousness of the error; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it. Id.

"A violation of a pretrial order is a serious irregularity." Id. at 178 (citing State v. Thompson, 90 Wn. App. 41, 46, 950 P.2d 977 (1998)). Similarly, references to prior unrelated criminal conduct have been deemed a serious irregularity. Gamble, 168 Wn.2d at 178. Here, the references to Rogers' time in juvenile detention were a serious irregularity because they constituted a violation of a ruling in limine and introduced the jury to the idea of prior criminal conduct by Rogers. The error thus greatly increased the likelihood the jury would convict him based on a propensity for lawless behavior.

The references to Rogers' time in juvenile detention were not cumulative of any other, properly admitted evidence. His criminal history was excluded by pre-trial ruling. RP 53. No other witnesses brought it up.

Finally, the court's instruction to disregard only served to emphasize Rogers' juvenile criminal history in the eyes of the jury. Although the court instructed the jury to disregard, the instruction was insufficient to ensure a fair trial because it emphasized the inadmissible and prejudicial evidence. In Gamble, the court found it significant that the court instructed the jury to

disregard and did so in a way that did not further emphasize the improper evidence. 168 Wn.2d at 178. That is not the case here.

Here, the court emphasized the fact that Rogers had spent time in juvenile detention by repeating it. RP 321-22. The court told the jury, "It was some reference made by the witness to – the possibility defendant may have been in juvenile detention at some point. That was inappropriate. That has nothing to do with this case. It's irrelevant to this case. I'm instructing you at this time to disregard that remark and not to consider it or discuss it during your deliberations." RP 321-22. Although jurors are generally presumed to follow the court's instructions, in cases where inflammatory information is presented, this presumption no longer holds true. State v. Emery, 174 Wn.2d 741, 763, 278 P.3d 653 (2012). "The bell once rung cannot be unrung." State v. Trickel, 16 Wn. App. 18, 30, 553 P.2d 139 (1976).

By repeating the information in instructing the jury, the court added emphasis to the fact that Rogers had spent time in juvenile detention. Because there was no way for jurors to put this idea out of their minds, a mistrial was the only way to ensure a fair trial.

2. EXPERT TESTIMONY REGARDING COMMON FINDINGS IN CHILD SEX ABUSE CASES WAS IRRELEVANT, INADMISSIBLE, AND AMOUNTED TO AN IMPERMISSIBLE OPINION ON ROGERS' GUILT AND J.O.'S CREDIBILITY

Rogers was denied a fair trial when two experts were allowed to offer opinion testimony that was indistinguishable from an explicit opinion that J.O. was truthful and he was, therefore, guilty. Generalized statements about the behavior of sexual abuse victims are generally inadmissible to show that the person has, in a given instance, suffered such abuse. State v. Jones, 71 Wn. App. 798, 818-19, 863 P.2d 85 (1993). By contrast, such statements may be admissible to rebut a defense claim that the alleged victim's specific behavior is incompatible with the substance of her allegations. Here, no such defense claim was made. Yet the court permitted the State to present, in its case in chief, expert opinion that the absence of medical findings is common in child sexual abuse cases and that there is a strong correlation between self-harming behaviors and child sexual abuse. RP 409-10, 444-48. This testimony amounted to an improper opinion on J.O.'s credibility and, therefore, on Rogers' guilt, in violation of his right to a fair trial by an impartial jury.

The right to have factual questions decided by the jury is crucial to the constitutional right to a jury trial. U.S. CONST. amend. VI; CONST. art. I, §§ 21, 22; Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711

(1989). Constitutional violations are reviewed de novo. State v. Siers, 174 Wn.2d 269, 273-74, 274 P.3d 358 (2012) (citing State v. Vance, 168 Wn.2d 754, 759, 230 P.3d 1055 (2010)). "To the jury is consigned under the constitution 'the ultimate power to weigh the evidence and determine the facts.'" State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008) (quoting James v. Robeck, 79 Wn.2d 864, 869, 490 P.2d 878 (1971)). Likewise, it is exclusively "the function of the jury to assess the credibility of a witness and the reasonableness of the witness's responses." State v. Demery, 144 Wn.2d 753, 762, 30 P.3d 1278 (2001) (plurality opinion).

Therefore, no witness may testify to an opinion as to the guilt of a defendant, either directly or by inference. State v. Black, 109 Wn.2d 336, 348, 754 P.2d 12 (1987). Similarly, no may a witness give an opinion on another witness' credibility or that of the defendant. State v. Carlson, 80 Wn. App. 116, 123, 906 P.2d 999 (1995). Such testimony is improper "[b]ecause issues of credibility are reserved strictly for the trier of fact." City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993).

Garrett's and Copeland's testimony violated these principles and violated Rogers' constitutional right to have the jury remain as the sole arbiter of credibility and guilt. Over defense objection, Garrett was allowed to testify that self-harming behaviors, such as those reported by J.O., are "strongly correlated" with childhood sexual abuse. RP 409-10. Copeland

was allowed to testify that the absence of abnormal medical findings is unsurprising in cases of childhood sexual abuse. RP 444-48. This testimony unfairly vouched for J.O.'s credibility and, indirectly, Rogers' guilt.

The law does not allow an expert to opine that a child exhibits traits that are common among sexually abused children. Two cases illustrate this point. In State v. Maule, 35 Wn. App. 287, 289-90, 667 P.2d 96 (1983), a caseworker at a sexual assault center testified that most child sex abuse cases are ongoing and involve a male parent figure. Id. at 289. She further claimed that, in her experience, very few children made false reports about sexual abuse. Id. at 289-90. The court of appeals reversed, holding this testimony was improperly admitted "as substantive evidence to help persuade the jury that Maule was guilty." Id. at 293.

Jones involved charges of rape and molestation of a child. 71 Wn. App. at 802. A CPS investigator testified the child's nightmares and sexualized behavior were common among sexually abused children. Id. at 813-14. The Court of Appeals held testimony about the nightmares was improper, but testimony about the sexualized behavior properly rebutted the defense that the child's sexual behaviors were inconsistent with her allegations of abuse. Id. at 820-21.

Under Maule and Jones, Garrett's testimony that self-harm is strongly correlated with child sex abuse is impermissible profile testimony.

Copeland's testimony that an absence of abnormal medical findings is common fails under the same principle. Both purport to vouch for J.O.'s credibility by offering allegedly common traits among victims of child sex abuse.

Where defense counsel lodges a timely objection, as here, a witness's opinion on an ultimate issue of fact is constitutional error because it invades the province of the jury. Jones, 71 Wn. App. at 813. Constitutional error is presumed prejudicial, and the State bears the burden of establishing the error was harmless beyond a reasonable doubt. State v. Olmedo, 112 Wn. App. 525, 533, 49 P.3d 960 (2002). Constitutional error is harmless only if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. Id.

The State cannot meet that burden here. There is virtually no untainted evidence. The only evidence that any crime occurred is J.O.'s testimony. The improper expert opinion gave her testimony the false appearance of scientific backing. This improper testimony intruded on the jury's proper role in violation of Rogers' constitutional rights and requires reversal of his conviction.

3. ROGERS WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY.

During voir dire, defense counsel asked various jurors about what their verdict would be if he presented no defense case whatsoever. Juror 16 answered, "without strong exculpatory evidence on the defense part, the state has the scales tipped in their favor. There is just no way I could look at everything they present without a defense and judge otherwise." RP 134-35. No attempt was made to follow up or otherwise ensure juror 16 could be fair and uphold the presumption of innocence. No party exercised any challenges against juror 16, who was selected to serve on the jury. RP 166-67. Juror 16's statement shows actual bias. Yet the court failed to take action to protect Rogers' right to a fair trial by an impartial jury. His convictions must be reversed.

Every accused person enjoys a constitutional right to a fair and impartial jury. State v. Irby, 187 Wn. App. 183, 192, 347 P.3d 1103 (2015), rev. denied, 184 Wn.2d 1036 (2016) (citing Taylor v. Louisiana, 419 U.S. 522, 526, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975); State v. Brett, 126 Wn.2d 136, 157, 892 P.2d 29 (1995)). Potential jurors must be excused for cause when their views would "'prevent or substantially impair the performance of [their] duties as a juror.'" State v. Gonzales, 111 Wn. App. 276, 277-78, 45 P.3d 205 (2002) (quoting State v. Hughes, 106 Wn.2d 176, 721 P.2d 902

(1986)). Even if only one juror is biased or prejudiced, the accused's constitutional right to an impartial jury has been violated. Irby, 187 Wn. App. at 193 (citing In re Personal Restraint of Yates, 177 Wn.2d 1, 30, 296 P.3d 872 (2013)).

a. Juror 16 should have been excused due to actual bias.

Juror 16's statements indicated actual bias and an inability to honor the presumption of innocence and the burden of proof beyond a reasonable doubt. RP 134-35; RCW 4.44.170. Actual bias warranting dismissal of a potential juror is defined as "a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170. A juror's mere opinion does not necessarily require dismissal; but the juror must be dismissed when it appears, "from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially." RCW 4.44.190; Irby, 187 Wn. App. at 193-94 (citing Gonzales, 111 Wn. App. at 278).

Certain statements are "clear indicator[s] of bias" that should prompt either questioning to neutralize the bias or a challenge for cause. Irby, 187 Wn. App. at 195 (discussing Gonzales, 111 Wn. App. at 282). Juror 16's statements are of this kind. He declared in open court, "without strong exculpatory evidence on the defense part, the state has the scales tipped in

their favor. There is just no way I could look at everything they present without a defense and judge otherwise." RP 134-35. This comment is similar to those deemed to show actual bias in Gonzales.

In Gonzales, Juror 11 declared, "the way I was brought up, the police are always, you know-unless they are proven otherwise, they are always honest and straightforward, and tell the truth. So I would have a very difficult time deciding against what the police officer says." Gonzales, 111 Wn. App. at 278. Defense counsel clarified and asked if, given conflicting stories, she would "presume the police officer was telling the truth." Id. at 279. She answered, "Yes, I would." Id. Defense counsel followed up again, asking whether she could follow an instruction to presume the defendant innocent, and she answered, "I don't know." Id. Later the prosecutor asked a similar question, whether the defendant still has a presumption of innocence even if a police officer takes the stand against him. Id. She again answered, "I don't know." Id. No further questions were asked of her and the court denied defense counsel's challenge for cause. Id. at 280.

On appeal, the court concluded Juror 11 had "unequivocally admitted a bias regarding a class of persons (here, a bias in favor of police witnesses)." Id. at 281. The court found Juror 11 had demonstrated actual bias and did not express confidence in her ability to follow the court's instructions on the presumption of innocence. Id. at 282. The court held Juror

11 should have been excused and Gonzales was entitled to a new trial. Id. Juror 16's statements in this case were also an unequivocal statement that he could not follow the presumption of innocence or hold the state to its burden of proof beyond a reasonable doubt. RP 134-35.

Even when a juror indicates actual bias, the juror can be rehabilitated if he or she subsequently expresses the ability, or at least the willingness to try, to follow the court's instructions to be impartial. But here, as in Gonzales, "no rehabilitation was attempted." 111 Wn. App. at 281. Group questioning, as occurred in the remainder of the voir dire in this case, cannot rehabilitate a biased juror: "questions directed to the group cannot substitute for individual questioning of a juror who has expressed actual bias. Irby, 187 Wn. App. at 196. Here, there was no attempt to neutralize the bias or gain an individual assurance from Juror 16 that he would be fair. The record shows he would instead vote in favor of the state unless there was strong exculpatory evidence brought forth by the defense. The record indicates Juror 16 was actually biased.

b. The court erred in failing to dismiss Juror 16.

Trial judges have an independent obligation to ensure an impartial jury by not seating a juror who has manifested actual bias. Irby, 187 Wn. App. at 193. CrR 6.4 (c)(1) states that "[i]f the judge after examination of any juror is of the opinion that grounds for challenge are present, he or she

shall excuse that juror from the trial of the case." This rule makes clear not that a trial judge *may* excuse a potential juror where grounds for a challenge for cause exist. State v. Davis, 175 Wn.2d 287, 316, 290 P.3d 43 (2012). "In fact, the judge is obligated to do so." Id.

Although the court has discretion in considering all the circumstances, removal of the juror is mandatory when the juror is unable to try the issues impartially. Irby, 187 Wn. App. at 194-96; Gonzales, 111 Wn. App. at 277-278; RCW 4.44.170 (2). "When a juror makes an unqualified statement expressing actual bias, seating the juror is a manifest constitutional error." Id. at 188. Thus, this issue is properly raised for the first time on appeal. RAP 2.5; Irby, 187 Wn. App. at 193. As discussed above, Juror 16 manifested actual bias in favor of the state and an inability to apply the presumption of innocence and the burden of proof beyond a reasonable doubt. RP 134-35.

This court should follow Irby in rejecting any argument that Juror 16's statement should not be taken literally. Irby, 187 Wn. App. at 197. In Irby, a potential juror declared she would "like to believe he's guilty." Id. The State, however, argued there may have been something in the juror's tone or demeanor that outweighed the literal meaning of the words. Id. The court rejected this proposition on two grounds. First, it would make juror bias claims essentially unreviewable without an objection in the trial court.

Id. Second, the court was "unable to imagine how the sentence 'I would like to say he's guilty' could be uttered in a tone of voice that would excuse the complete lack of follow-up questions." Id.

The Irby court's reasoning is consistent with federal case law indicating that any doubts about bias must be resolved against the juror. United States v. Nell, 526 F.2d 1223 (5th Cir. 1976). The court in Nell expressed reservations about the ability to gauge juror fitness and declared that, as a result, "Doubts about the existence of actual bias should be resolved against permitting the juror to serve, unless the prospective panelist's protestations of a purge of preconception is positive, not pallid." Id. at 1230. Even assuming the court had some doubt about Juror 16, the court was required to resolve that doubt against the juror and in favor of Rogers' right to an impartial jury. As in Irby, the court abused its discretion in failing to discharge Juror 16 or at least inquire further.

Allowing a biased juror to serve requires reversal of Rogers' convictions. In Irby, where Juror 38 declared, "I would like to say he's guilty," the court held that the juror "demonstrated actual bias and that seating her was manifest constitutional error requiring reversal of all convictions." 187 Wn. App. 197. The court further noted, "The presence of a biased juror cannot be harmless; the error requires a new trial without a showing of prejudice." Id. at 193 (citing United States v. Gonzalez, 214 F.3d

1109, 1111 (9th Cir. 2000)). Juror 16's statement was a no less egregious indication of bias in favor of the State and against the accused's presumption of innocence. Rogers' convictions must be reversed.

4. CUMULATIVE ERROR DEPRIVED ROGERS OF A FAIR TRIAL

At a minimum, the accumulated effects of 1) the improper opinion testimony by expert witnesses, 2) the improper references to Rogers' juvenile criminal history, and 3) the presence of a biased juror violated Rogers' right to a fair trial. Every accused person has the constitutional due process right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. Amend. XIV; Const. art. 1, § 3. Under the cumulative error doctrine, a defendant is entitled to a new trial when the errors at trial, even if individually harmless, accumulate to deny the accused a fair trial. State v. Venegas, 155 Wn. App. 507, 520, 228 P.3d 813 (2010) (citing State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006)). That is the case here.

In Venegas, the court noted that the case hinged on witness credibility and, rather than trusting the jury to make its determination based on the evidence, the prosecutor resorted to unfair tactics. Venegas, 155 Wn. App. at 526. The court reversed based on cumulative error. Id. at 527. Like Venegas, this case also hinged on credibility. Even if the jury may not have

been swayed by only one instance of improper testimony, this case involved not one, but several.

There was vouching, by two expert witnesses, for the credibility of the State's only witness with any personal knowledge of the charged incidents. There was defamation of Rogers' credibility by mention of his time in juvenile detention, twice by a witness and once by the court. And on the jury was a person who had declared himself unable to acquit without strong exculpatory evidence by the defense, in violation of the presumption of innocence and the burden of proof beyond a reasonable doubt. In a case that hinged entirely on credibility, the combined effect of these errors denied Rogers a fair trial.

5. THE COURT EXCEEDED ITS AUTHORITY IN ORDERING, AS A CONDITION OF ROGERS' COMMUNITY CUSTODY, THAT HIS TREATMENT PROVIDER SUBMIT REPORTS TO THE DEPARTMENT OF CORRECTIONS.

Community custody condition 8 requires Rogers' treatment provider to file reports with the Department of Corrections. CP 118. This condition must be stricken because it exceeds the Court's authority.

A trial court may impose only a sentence that is authorized by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). Because it is solely the legislature's province to fix legal punishments, community custody conditions must be authorized by the

legislature. State v. Kolesnik, 146 Wn. App. 790, 806, 192 P.3d 937 (2008) (citing State v. Pillatos, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007)).

Whether a trial court exceeded its statutory authority under the Sentencing Reform Act by imposing an unauthorized community custody condition is an issue of law reviewed de novo. State v. Coombes, 191 Wn. App. 241, 249, 361 P.3d 270 (2015) (citing State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007)). Unlawful sentencing conditions may be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

The statute authorizes sentencing courts to require affirmative conduct such as mental health treatment by those who are convicted of a criminal offense. RCW 9.94A.703. However, no law authorizes the court to require anyone other than Rogers to comply with conditions of his community custody. This poorly worded condition would permit the Department of Corrections to sanction Rogers if his treatment provider neglects to submit the required report. This condition must be stricken.

D. CONCLUSION

For the foregoing reasons, Rogers asks this Court to reverse his convictions or, at a minimum, remand to strike the improper community custody condition.

DATED this 6th day of September, 2019.

Respectfully submitted,

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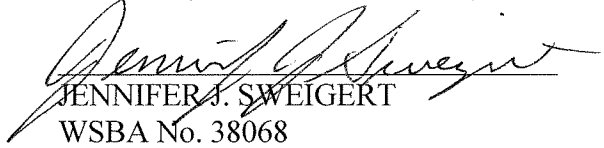

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