

No. 33701-4-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

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Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Respondent,

v.

SERGIO MAGANA, JR.

Appellant.

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

The Honorable Judge Robert Swisher

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE..... 2

D. ARGUMENT..... 6

Issue 1: Whether Mr. Magana’s constitutional right to silence was violated when an officer repeatedly testified that Mr. Magana failed to attend a scheduled meeting or contact law enforcement to discuss the case..... 6

Issue 2: Whether the court erred by denying the defendant’s motion for a mistrial where an officer testified as to a non-*Mirandized* statement that had been suppressed, also in violation of an order *in limine*, and thereby deprived Mr. Magana of a fair trial..... 13

Issue 3: Whether the court erred by admitting that portion of Exhibit One (the photo line-up sheet) that included a statement of the defendant’s purported date-of-birth, without any foundational proof as to how this out-of-court statement satisfied a hearsay exception..... 19

Issue 4: Whether remand is appropriate to strike or amend the 10-year no-contact-order, which exceeded the statutory maximum for the offense and was contrary to the five-year no-contact-order that was initially ordered by the court..... 27

Issue 5: Whether the court erred by imposing a jury demand fee of \$500 where the maximum jury demand fee allowed is \$250..... 28

Issue 6: Whether the court erred by entering several community custody conditions that were not crime-related or were unconstitutionally vague or overbroad..... 29

E. CONCLUSION 41

TABLE OF AUTHORITIES

Washington Supreme Court

State v. Armendariz, 160 Wn.2d 106, 156 P.3d 201 (2007).....27

State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008).....27, 30, 32, 33, 36

State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996).....7, 9

State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999).....30

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).....22

State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985).....9

State v. Johnson, 124 Wn.2d 57, 873 P.2d 514 (1994).....14

State v. Kreck, 86 Wn.2d 112, 542 P.2d 782 (1975).....20

State v. Lewis, 130 Wn.2d 700, 927 P.2d 235 (1996).....8, 11

State v. Mason, 160 Wn.2d 910, 162 P.3d 396 (2007).....20

State v. Powell, 126 Wn.2d 244, 893 P.2d 615 (1995).....22, 26

In re Pers. Rest. Of Rainey, 168 Wn.2d 367, 299 P.3d 686 (2010).....34

State v. Riles, 135 Wn.2d 326, 957 P.2d 655 (1998),
abrogated by State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010)...32

State v. Riley, 121 Wn.2d 22, 846 P.2d 1365 (1993).....31

State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008).....34, 37

State v. Weber, 99 Wn.2d 158, 659 P.2d 1102 (1983).....14

Washington Courts of Appeals

State v. Autrey, 136 Wn. App. 460, 150 P.3d 580 (2006).....31

State v. Bahl, 137 Wn. App. 709, 159 P.3d 416 (2007),

<i>reversed in part on other grounds</i> , 164 Wn.2d 739 (2008).....	31
<i>State v. Bunch</i> , 168 Wn. App. 631, 279 P.3d 432 (2012).....	28
<i>State v. Curtis</i> , 110 Wn. App. 6, 37 P.3d 1274 (2002).....	8, 10
<i>State v. Duran-Davila</i> , 77 Wn. App. 701, 892 P.2d 1125 (1995).....	20-27
<i>State v. Fateley</i> , 18 Wn. App. 99, 566 P.2d 959 (1977).....	22, 26
<i>State v. Gabino</i> , 185 Wn. App. 1025, <i>review denied</i> , 184 Wn.2d 1021 (2015).....	34, 37
<i>State v. Hathaway</i> , 161 Wn. App. 634, 251 P.3d 263, <i>review denied</i> , 172 Wn.2d 1021 (2011).....	28
<i>State v. Hudson</i> , 150 Wn. App. 646, 208 P.3d 1236 (2009).....	31
<i>State v. Irwin</i> , __ Wn. App. __, __ P.3d __, 2015 WL 8902184 *3, 5 (Wash. Ct. App. Dec. 14, 2015).....	31-35
<i>State v. Jones</i> , 118 Wn. App. 199, 76 P.3d 258 (2003).....	30
<i>State v. Keene</i> , 86 Wn. App. 589, 938 P.2d 839 (1997).....	7-9, 11
<i>State v. Miller</i> , 165 Wn. App. 385, 267 P.3d 524 (2011).....	17
<i>State v. Montague</i> , 31 Wn. App. 688, 644 P.2d 715 (1982).....	15, 16, 18
<i>State v. Moreno</i> , 173 Wn. App. 479, 294 P.3d 812 (2013).....	28
<i>State v. Moten</i> , 95 Wn. App. 927, 976 P.2d 1286 (1999).....	27
<i>State v. Perrett</i> , 86 Wn. App. 312, 936 P.2d 426 (1997).....	16, 18, 19
<i>State v. Rainey</i> , 180 Wn. App. 830, 327 P.3d 56 (2014).....	23, 27
<i>State v. Rodriguez</i> , 183 Wn. App. 947, 335 P.3d 448 (2014), <i>review denied</i> , 182 Wn.2d 1022 (2015).....	27
<i>State v. Romero</i> , 113 Wn. App. 779, 54 P.3d 1255 (2002)	6-9, 11, 12

<i>State v. Saavedra</i> , 128 Wn. App. 708, 116 P.3d 1076 (2005).....	7
<i>State v. Sansone</i> , 127 Wn. App. 630, 111 P.3d 1251 (2005).....	32, 33
<i>State v. Thompson</i> , 90 Wn. App. 41, 950 P.2d 977 (1998).....	14, 17
<i>State v. Warnock</i> , 174 Wn. App. 608, 299 P.3d 1173 (2013)	30
<i>State v. Wilson</i> , 176 Wn. App. 147, 307 P.3d 823 (2013), <i>review denied</i> , 179 Wn.2d 1012 (2014)	30

Federal Authorities

U.S. Const. Amend. V.....	6
U.S. Const. Amend XIV.....	6

Washington Constitution, Statutes, Court Rules

5B K. Tegland, <i>Wash. Prac., Evidence</i> § 333, at 19 (1989).....	19
13B Wash. Prac. §3612.....	28
ER 801(c).....	19
ER 802.	19
ER 803.....	20, 21, 25
ER 804	20
RCW 5.44.040	21
RCW 5.45.020.....	21, 24
RCW 9.94A.030.....	30
RCW 9.94A.703.....	30
RCW 9A.20.021	27
RCW 9A.44.079.....	22, 25, 27

RCW 10.01.160(2)	28
RCW 10.46.190.	28
RCW 36.18.016.....	28
Wash. Const. Art. I, §9.	6

Secondary Resources

<i>10 Everyday Household Appliances Now with Wi-Fi</i> , available at: http://webtrends.about.com/od/Mobile-Web-Beginner/tp/Wi-fi-Appliances.htm (last visited 1/31/2016).....	39
---	----

<i>A home controlled by wifi... in just two years: Nine in ten household devices will link to web, say experts</i> , available at: http://www.dailymail.co.uk/sciencetech/article-2899321/Home-future-Experts-say-nine-ten-household-appliances-fridges-toothbrushes-controlled-wi-fi-TWO-YEARS.html (last visited 1/31/2016).....	39
---	----

<i>Home Automation</i> , available at: https://en.wikipedia.org/wiki/Home_automation (last visited 2/1/2016); <i>Your “smart” home devices can easily be hacked</i> , available at: http://www.cbsnews.com/news/how-your-internet-home-devices-could-be-hacked/ (last visited 2/1/2016).....	40
---	----

<i>Smart Home: Best smart home devices of 2016</i> , available at: http://www.cnet.com/topics/smart-home/best-smart-home-devices/ (last visited 2/1/2016).....	39
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. **A. ASSIGNMENTS OF ERROR**

1. The court erred by overruling defendant's objection when Detective Davis repeatedly testified that Mr. Magana failed to attend scheduled meetings or contact law enforcement to discuss the case during their investigation.
2. The court erred by denying the defendant's motion for a mistrial when Detective Davis testified about Mr. Magana's *non-Mirandized* statements that had been suppressed and excluded pursuant to an order *in limine*.
3. The court erred by overruling Mr. Magana's objection and admitting hearsay evidence regarding Mr. Magana's age.
4. The court erred by convicting Mr. Magana of third-degree rape of a child where the only substantial evidence of Mr. Magana's age consisted of a hearsay statement on the booking photo pages.
5. The court erred by imposing a 10-year no-contact-order.
6. The court erred by imposing a \$500 jury demand fee.
7. The court erred by imposing community custody conditions 14, 15, 18, 19 and 25.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether Mr. Magana's constitutional right to silence was violated when an officer repeatedly testified that Mr. Magana failed to attend a scheduled meeting or contact law enforcement to discuss the case.

Issue 2: Whether the court erred by denying the defendant's motion for a mistrial where an officer testified as to a *non-Mirandized* statement that had been suppressed, also in violation of an order *in limine*, and thereby deprived Mr. Magana of a fair trial.

Issue 3: Whether the court erred by admitting that portion of Exhibit One (the photo line-up sheet) that included a statement of the defendant's purported date-of-birth, without any foundational proof as to how this out-of-court statement satisfied a hearsay exception.

Issue 4: Whether remand is appropriate to strike or amend the 10-year no-contact-order, which exceeded the statutory maximum for the offense and was contrary to the five-year no-contact-order that was initially ordered by the court.

Issue 5: Whether the court erred by imposing a jury demand fee of \$500 where the maximum jury demand fee allowed is \$250.

Issue 6: Whether the court erred by entering several community custody conditions that were not crime-related or were unconstitutionally vague or overbroad.

C. STATEMENT OF THE CASE

On October 21, 2014, then fourteen-year-old Y.L. (DOB: 3/15/2000) went with her parents to the police station in Pasco, Washington. (RP 50, 121) Y.L. alleged that Sergio Magana, Jr., whom Y.L. said looked like he was “around his 20’s,” had sexual intercourse with Y.L. on October 3, 2014. (RP 136, 152-53)

Y.L. said that she first became “friends” with Mr. Magana on the social-media site Facebook. (RP 123, 139) Y.L. testified that she and Mr. Magana texted each other on October 2, 2014, making plans to meet up. (RP 125, 134-35; Exhibit 2) The following morning, the two met as arranged after Y.L. dropped her brother off at his bus stop. (*Id.*) Mr. Magana called Y.L. to let her know that he had arrived, and Y.L. got into Mr. Magana’s vehicle. (*Id.*) Soon thereafter, Mr. Magana dropped Y.L. off at or near her home. (*Id.*)

Y.L. said that, about an hour after dropping her off, Mr. Magana called Y.L. to ask if her dad had left yet, and she said he had. (RP 126) Shortly thereafter, Mr. Magana knocked at Y.L.'s door and she let him in the home. (RP 126-27) The two sat on the couch, but Y.L. said that Mr. Magana then got on top of her, asked her to be quiet, and forced her to have sexual intercourse with him. (RP 128-30) Y.L. said that Mr. Magana told her not to mention his name in the house, and later asked her to delete the messages between them because her "age scare[d]" him. (RP 90, 134; Exhibit 2)

After Mr. Magana left the home, Y.L. noticed that her father's iPad was missing. (RP 135) She exchanged text messages about the iPad with Mr. Magana, saying she was worried about her dad getting mad, that her dad leaves bruises when he hits her, and that her dad had locked her out when he learned the iPad was missing. (RP 104-06, 135, 141, 148; Exhibit 2) But Mr. Magana denied taking the iPad. (*Id.*) Mr. Magana also did not respond to repeated subsequent text messages from Y.L. that asked how he was doing and why he was ignoring her calls, though Mr. Magana finally responded a few days later to Y.L.'s ongoing contact attempts that he was working and had moved to Yakima. (RP 104; Ex. 2)

Weeks later at the police station, Y.L. identified Mr. Magana from a photo lineup. (RP 54-55, 137; Exhibit 1) She also provided her cell

phone to officers (with her parents' consent to search it) in order to extract the information from the phone, including text messages that Y.L. said were from Mr. Magana. (RP 68-71, 79, 83-84; Exhibit 2¹) The lineup included a police information page that stated Mr. Magana's date of birth and personal features, which was admitted over defense counsel's objection that this information was hearsay. (RP 56, 58, 159; Exhibit 1)

In the ensuing investigation, officers never asked Y.L. whether she may have fabricated the alleged sexual intercourse, as Mr. Magana suggested, because she was upset or worried about her father's reaction to the missing iPad. (RP 92-93, 112-16) Also, there was no physical evidence that any sexual intercourse had ever occurred. (RP 61, 100-01, 145) Nonetheless, law enforcement scheduled to speak with Mr. Magana about Y.L.'s allegations. (RP 97-98) Over repeated objections, Detective Jonathan Davis was then permitted to testify as follows:

Q [by prosecutor] Did he make arrangements to come in and meet with you?

A [by Detective Davis] Yes, he did.

Q What, if anything, happened next?

A He failed to appear.

¹ Exhibit 2 is a compact disc with 9,700-plus pages of data from the cell phone, whereas Exhibit 4 consists of a transcription of certain text messages obtained from that report. Exhibit 2 (the physical cd itself) was admitted to the jury for demonstrative purposes only; the contents of the cd were not published nor allowed into the jury room due to the voluminous hearsay contained within the cd. (RP 164)

[Defense counsel]: Objection, Your Honor. Whether he appeared or he didn't is a comment on my client's right to silence, I would move to strike.

THE COURT: I will overrule the objection.

A He failed to appear for the interview. He didn't show up. And afterwards, I went looking for him and could not locate him.

Q [by prosecutor]: Between December 8th of 2014 and January 5th of 2015, did the defendant make any efforts to come in and meet with you?

A: No.

[Defense counsel]: Objection, relevance.

THE COURT: He can answer.

A: None whatsoever.

(RP 97-98)

Mr. Magana did meet with Detective Davis on January 5, 2015, at which time he acknowledged meeting Y.L. on Facebook and visiting her apartment, but he consistently denied ever having sexual relations with Y.L. (RP 92-93, 114) Mr. Magana told Detective Davis that Y.L. likely made up the allegation because he had stolen her iPad. (RP 93, 107-08, 112-16) The detective then testified – in violation of an order in limine – that the defendant offered to help with narcotics cases if they could make the charges go away, which the court instructed the jury to disregard while denying the defendant's motion for a mistrial. (RP 94-95; CP 119; 4/28/2015 RP 2)

Mr. Magana exercised his right not to testify, and the jury subsequently found him guilty of third-degree rape of a child. (RP 193) He was sentenced within the standard range, and the court imposed three years of community custody, including several conditions that are set forth and challenged in detail below. (8/13/2015 RP 2-4; CP 16-18) The court also entered a 10-year no-contact-order after indicating that it was imposing a five-year no-contact-order. (CP 17-20; *c.f.* CP 29 and 8/13/15 RP 1-2, 6) Finally, among the legal financial obligations imposed, the court included a jury demand fee of \$500. (CP 27)

This appeal timely followed. (CP 13)

D. ARGUMENT

Issue 1: Whether Mr. Magana’s constitutional right to silence was violated when an officer repeatedly testified that Mr. Magana failed to attend a scheduled meeting or contact law enforcement to discuss the case.

Mr. Magana is entitled to a new trial in this case, because the officer’s direct comment on his pre-arrest right to silence was improper, and the State cannot carry its burden of establishing that this constitutional error was harmless beyond a reasonable doubt.

No person shall be compelled in any criminal case to give evidence or be a witness against himself. U.S. Const. Amend. V; U.S. Const. Amend XIV; Wash. Const. Art. I, §9. This “constitutional right to silence applies in both pre and post-arrest situations.” *State v. Romero*, 113 Wn.

App. 779, 786, 54 P.3d 1255 (2002) (citing *State v. Easter*, 130 Wn.2d 228, 238, 922 P.2d 1285 (1996)). The State may not use a defendant's constitutionally permitted silence as substantive evidence of guilt in its case in chief. *Id.* at 787; *Easter*, 130 Wn.2d at 239. In other words, an "accused's right to remain silent and to decline to assist the State in its preparation of its criminal case may not be eroded by permitting the State in its case in chief to call to the attention of the trier of fact the accused's pre-arrest silence to imply guilt." *State v. Keene*, 86 Wn. App. 589, 593, 938 P.2d 839 (1997) (citing *Easter*, 130 Wn.2d at 243).

Specifically, "a police witness may not comment on the silence of a defendant so as to infer guilt from a refusal to answer questions." *State v. Saavedra*, 128 Wn. App. 708, 714, 116 P.3d 1076 (2005) (citing *Romero*, 113 Wn. App. at 787). It "is constitutional error for a police witness to testify that a defendant refused to speak to him or her." *Romero*, 113 Wn. App. at 790 (citing *Easter*, 130 Wn.2d at 241). "Similarly, it is constitutional error for the State to purposefully elicit testimony as to the defendant's silence." *Romero*, 113 Wn. App. at 790 (internal cites omitted). Even if the State does not "harp" on the officer's improper testimony, a conviction should be reversed based on the improper testimony where the "question and answer were injected into the trial for no discernable purpose, other than to inform the jury that the

defendant refused to talk to the police...” See *Romero*, 113 Wn. App. at 789 (quoting *State v. Curtis*, 110 Wn. App. 6, 13-14, 37 P.3d 1274 (2002)).

In *State v. Keene*, the Court reversed a rape of a child conviction after a detective testified that the defendant failed to attend a scheduled appointment and failed to return law enforcement phone calls to talk about the case. 86 Wn. App. at 591-92, 595. The *Keene* Court distinguished its circumstances from the indirect comment on the defendant’s right to silence in *State v. Lewis*. In *State v. Lewis*, the Court did not reverse a conviction because, although the detective there testified that he contacted Lewis to discuss the case, the “detective did not say that Lewis refused to talk to him, nor did he reveal the fact that Lewis failed to keep appointments.” *Id.* at 594 (citing *State v. Lewis*, 130 Wn.2d 700, 927 P.2d 235 (1996)). Whereas in *Keene*, the detective testified that she never heard from Keene after warning him she would turn the case over to the prosecuting attorney if she did not hear from him again. *Id.* at 594. This evidence constituted a comment that violated the defendant’s right to silence, and was improperly used to suggest guilt from the defendant’s exercise of his right to pre-arrest silence. *Id.*

Where an impermissible comment on the defendant’s right to silence is made, the State bears the burden of showing the error was

harmless. *Keene*, 86 Wn. App. at 594. That is, a “constitutional error is harmless if the court is convinced that any reasonable jury would have reached the same result in the absence of the error. *Id.* (citing *State v. Guloy*, 104 Wn.2d 412, 415, 705 P.2d 1182 (1985)). “We examine only the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt.” *Id.* (citing *Guloy*, 104 Wn.2d at 426). “Where the error is not harmless, a defendant is entitled to a new trial.” *Id.* (citing *Easter*, 130 Wn.2d at 242).

This case is akin to *State v. Keene* where the Court determined that the improper comment on the defendant’s right to silence was not harmless in light of the other untainted evidence. 86 Wn. App. at 595. In *Keene*, like here, the untainted evidence consisted of the child’s testimony regarding the improper sexual contact, supported by two reports that the child made to others. *Id.* The Court held:

This evidence is not so overwhelming that it necessarily leads to a finding of guilt... Accordingly, we are not convinced that any reasonable jury would have reached the same result in the absence of the error... Because the error was not harmless, we reverse the conviction and remand for a new trial.

State v. Keene, 86 Wn. App. at 595.

Similarly, in *State v. Romero*, a sergeant testified that the defendant chose not to waive *Miranda* and “would not talk to me.” 113 Wn. App. at 793. The court noted that the “sergeant’s testimony

surrounding Mr. Romero's silence served no probative purpose other than to infer that his silence and lack of cooperation 'was more consistent with guilt than with innocence.'" *Id.* at 794 (quoting *Curtis*, 110 Wn. App. at 14). The court found that this error was not harmless, particularly since the untainted evidence created a "credibility contest," such that the "jury could have been swayed by [the sergeant's] testimony." *Id.* at 795.

Here, Detective Davis testified that Mr. Magana "failed to appear" after making arrangements to come in and meet with the detective about the case. RP 98. After the defendant's objection was overruled, the detective continued: "He failed to appear for the interview. He didn't show up. And afterwards, I went looking for him and could not locate him." *Id.* The prosecutor did not let the improper commenting end there and instead "harped" on the issue by questioning the detective further about whether the defendant made any efforts to meet with the detective from December 8, 2014, to January 5, 2015. *Id.* With another objection overruled, the detective answered that Mr. Magana had not made any efforts to come in and meet with him during that timeframe. *Id.*

The detective's testimony was a direct comment on Mr. Magana's pre-arrest right to silence, which served no probative purpose other than to infer that Mr. Magana's silence and lack of cooperation with the investigation was more indicative of guilt than innocence. This type of

comment is classic constitutional error, made worse yet given that the comment on the right to silence was from an officer whose testimony carries significant weight with the jury.

In *State v. Lewis*, the court did not find an impermissible comment, noting that the “detective did not say that Lewis refused to talk to him, nor did he reveal the fact that Lewis failed to keep appointments.” *Lewis*, 130 Wn.2d at 706. But here, the detective did exactly what the Supreme Court warned against in *State v. Lewis*, testifying that Mr. Magana failed to keep his scheduled appointment or make timely contact while officers were investigating the case. This case is much more in line with *State v. Keene*, where the court found constitutional error after a detective testified that the defendant failed to attend a scheduled appointment or return officers’ calls to speak about the case. 86 Wn. App. at 595. Like in *Keene*, the detective’s testimony in this case was an improper, direct comment on Mr. Magana’s constitutional right to silence, which served no proper purpose in this trial and improperly suggested that the jury could infer guilt from Mr. Magana’s lack of contact with investigating officers.

Furthermore, the State cannot carry its burden herein of proving that the constitutional error was harmless beyond a reasonable doubt. *Romero*, 113 Wn. App. at 790. Like in *State v. Romero*, the untainted evidence in this case created a “credibility contest” for the jury. *Id.* at 795.

There was no physical evidence that Mr. Magana had sexual intercourse with Y.L.; Mr. Magana consistently denied that he ever had intercourse with Y.L.; the text messages that were admitted show that a relationship may have existed but are not conclusive that it was a sexual one; Y.L. delayed her report for nearly a month; and Y.L. did have motive to fabricate the allegation against Mr. Magana due to her fear of excessive punishment from her father or being upset toward Mr. Magana for either taking the iPad or for ignoring her many attempts to have further contact.

Ultimately, like in *State v. Romero*, the jury was faced with a credibility determination, and the detective's improper comment could very well have swayed that credibility determination so that the constitutional error in this case would not be harmless beyond any reasonable doubt. The untainted evidence of the alleged sexual intercourse itself rested on Y.L.'s testimony. But in *State v. Keene*, the child's testimony alone (along with reports she made to others alleging the same) was considered "not so overwhelming that it necessarily leads to a finding of guilt...[such that] any reasonable jury would have reached the same result in the absence of the error." 86 Wn. App. at 595.

Here, too, the child's testimony, even if repeated to others like in *Keene*, was not so overwhelming that the significant constitutional error would be harmless beyond a reasonable doubt. Indeed, given the lack of

physical evidence, Y.L.'s delayed reporting and motive(s) to fabricate the allegation, and Mr. Magana's steadfast denial of the intercourse, it is possible that another, untainted jury would have had reason to doubt Mr. Magana's guilt. The untainted evidence in this case does not "necessarily lead" to a finding of guilt by any jury. The erroneous comment on Mr. Magana's constitutional right to silence was, therefore, not harmless beyond a reasonable doubt. A new trial is warranted in this case.

Issue 2: Whether the court erred by denying the defendant's motion for a mistrial where an officer testified as to a non-Mirandized statement that had been suppressed, also in violation of an order *in limine*, and thereby deprived Mr. Magana of a fair trial.

Detective Davis testified that Mr. Magana asked to help the police department with narcotics related cases if officers could make this charge go away. RP 94-95. This testimony violated the stipulated suppression order, which suppressed Mr. Magana's custodial statements that were made prior to *Miranda* warnings. 4/28/2015 RP 2; CP 119. And, the testimony violated the court's order in limine that reminded the parties that this testimony was specifically excluded. 7/23/2015 RP 8. Given the blatant violation of the orders by the State's representative officer, and the likelihood that the damage to the jury could not be cured by the court's instruction to disregard so as to guarantee Mr. Magana a fair trial, the court erred by denying the defendant's motion for a mistrial (RP 94-95).

A trial court's decision on a motion for mistrial is reviewed for abuse of discretion. *State v. Johnson*, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). A trial court should grant a motion for mistrial when a defendant has been so prejudiced by the trial irregularity that only a new trial can ensure the defendant receives a fair trial. *Id.* On appeal, the reviewing court determines whether mistrial should have been granted by considering (1) the seriousness of the trial irregularity; (2) whether the statement in question was cumulative evidence on the issue; and (3) whether the prejudice against the defendant was cured by a proper instruction for the jury to disregard the irregularity. *Id.*; *State v. Weber*, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983). In so reviewing, a jury is presumed to follow a court's instructions. *State v. Thompson*, 90 Wn. App. 41, 47, 950 P.2d 977 (1998). Ultimately, this Court "must ask whether the remark, when viewed against the background of all the evidence, so prejudiced the jury that [the defendant] did not get a fair trial." *Id.* at 48. "Only those errors which may have affected the outcome of the trial are prejudicial." *Weber*, 99 Wn.2d at 165.

A trial irregularity may be considered sufficiently serious where a detective's remarks violate a motion in limine to exclude the testimony. *See e.g., Thompson*, 90 Wn. App. at 46 (the court ultimately found that, although the detective's testimony on an ultimate legal issue of the

defendant's guilt was a serious irregularity, the ample cumulative evidence of the defendant driving recklessly and the court's instruction to disregard the improper statement were sufficient to still provide the defendant a fair trial).

In *State v. Montague*, the Court held that it was error to deny a motion for a mistrial in a rape case where a prosecutor's question and witness's testimony alluded to inadmissible evidence of the defendant's former rape investigation. *State v. Montague*, 31 Wn. App. 688, 690-92, 644 P.2d 715 (1982). The Court noted that it is "incumbent upon the prosecution to obtain a verdict free from prejudice." *Id.* at 691 (internal citations omitted). The Court explained:

A prejudicial error may be defined as one which affects or presumptively affects the final results of the trial... When the appellate court is unable to say from the record before it whether the defendant would or would not have been convicted but for the error committed in the trial court, then the error may not be deemed harmless, and the defendant's right to a fair trial requires that the verdict be set aside and that he be granted a new trial.

Montague, 31 Wn. App. at 691.

The *Montague* Court discussed the untainted evidence supporting the conviction, concluding that the defendant's right to a fair trial was prejudiced. The Court explained:

[T]his case, as with most rape cases, was based almost entirely upon the credibility of the complaining witness and the defendant. The circumstances surrounding the alleged rape support either party's story. Moreover, the investigating officer's report

regarding his investigation of the scene of the alleged rape was inconclusive and the examining doctor's report did not fully support either version of the incident. This is a case where a reference to a former rape investigation could have tilted the scales against the defendant. Therefore, although we are persuaded that the complaining witness's testimony was credible, we cannot say from the record the defendant would have been convicted without the reference to another rape.

Montague, 31 Wn. App. at 691-02.

Finally, even if a court may conclude that certain errors would not require reversal standing alone, the cumulative error doctrine may require reversal when the multiple errors and their prejudicial impact on the defendant's right to a fair trial are considered together. *State v. Perrett*, 86 Wn. App. 312, 321-23, 936 P.2d 426 (1997) (reversing and remanding for a new trial after finding that the following errors, while not requiring reversal standing alone, did require reversal when considered together: improper admission of testimony concerning the defendant's prior bad act, refusal to admit proper impeachment evidence of a witness against the defendant, and a deputy's improper testimony concerning the defendant's right to silence.)

Here, Detective Davis clearly inserted improper testimony into this trial that constituted a serious trial irregularity. The detective testified that the defendant offered to help with narcotics related cases if they could make this charge go away. RP 94-95. This evidence was highly suggestive of the defendant having a guilty conscience, and it was

inadmissible as a result of the court's order in limine and the parties' stipulated suppression due to the statement being made during a custodial interrogation before proper *Miranda* warnings. See *State v. Miller*, 165 Wn. App. 385, 388, 267 P.3d 524 (2011) (citing *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (generally setting forth when custodial statements are inadmissible)).

Whether or not the prosecutor specifically elicited this testimony is of no moment. The improper testimony was a sufficiently serious trial irregularity, because it was constitutionally inadmissible for lack of proper *Miranda* warnings and the testimony blatantly violated the court's order in limine. *Thompson*, 90 Wn. App. at 46. The prosecutor should have better prepared the detective, an experienced officer familiar with investigations and court proceedings, to avoid this serious trial irregularity; it was "incumbent upon the prosecution to obtain a verdict free from prejudice." *Montague*, 31 Wn. App. at 691.

It is true that the trial court instructed the jury to disregard the improper comment in this case. But the irreversible damage had already been done. And there was not sufficient cumulative evidence, when viewing the improper testimony against the backdrop of all the evidence as a whole, to conclude that the defendant received a fair trial or that the outcome of the trial was not prejudiced by the improper testimony. The

detective's reference to the suppressed statements certainly could have unfairly "tilted the scales against the defendant." *Montague*, 31 Wn. App. at 690-92.

Like in *Montague*, as with most rape cases, the evidence in this case was based almost entirely upon the credibility of the complaining witness verses the credibility of the defendant's statements to officers where he denied any sexual intercourse. *See Montague*, 31 Wn. App. at 692. The circumstances surrounding Y.L.'s allegations – including a lack of physical evidence, delayed reporting, text messages that suggested a relationship but were inconclusive as to whether that relationship was sexual, and Y.L.'s possible motivation to fabricate the allegations – supported either party's story. *Accord Montague*, 31 Wn. App. at 690-92. Thus, like in *Montague*, even if this Court viewed Y.L.'s testimony as credible, it is not necessarily clear that the defendant would have been convicted absent the officer's improper reference to Mr. Magana's statements about helping with narcotics cases instead of facing this charge, which invited the jury to infer guilt based on the inadmissible evidence.

Finally, even if this Court does not conclude that the trial court erred by denying the defendant's motion for a mistrial, the cumulative error doctrine would still support a new trial in this case. Like in *State v. Perrett*, the detective here testified over objection in violation of the

defendant's pre-arrest right to silence, suggesting that the jury should infer guilt from the defendant's failure to keep appointments or return law enforcement's messages to discuss the case (see Issue One above). This highly improper testimony, combined with the detective's blatant disregard of the suppressed non-*Mirandized* statements and the court's order in limine, improperly invited the jury to infer guilt based on the detective's inadmissible testimonies. The cumulative prejudicial impact on the defendant's right to a fair trial requires reversal in this case. *Accord Perett*, 86 Wn. App. at 321-23.

Issue 3: Whether the court erred by admitting that portion of Exhibit One (the photo line-up sheet) that included a statement of the defendant's purported date-of-birth, without any foundational proof as to how this out-of-court statement satisfied a hearsay exception.

The court erred by admitting hearsay to prove the defendant's date of birth, thereby depriving the defendant of his constitutional confrontation rights. Without the inadmissible evidence, Mr. Magana's conviction is not supported by substantial evidence on each element of third-degree rape of a child, including that the defendant was at least 48 months older than Y.L. The error cannot be considered harmless beyond a reasonable doubt based on the untainted evidence in this case.

Hearsay—an out of court statement admitted to prove the truth of the matter asserted— is generally inadmissible. ER 801(c); ER 802.

“Whether the statement is hearsay depends upon the purpose for which it

is offered. If it is offered to prove the truth of the matter asserted, the evidence is hearsay. If it is offered for some other purpose, it is not.” 5B K. Tegland, *Wash. Prac., Evidence* § 333, at 19 (1989). Improper admission of hearsay implicates a defendant’s constitutional right to confront witnesses. *State v. Kreck*, 86 Wn.2d 112, 116-17, 542 P.2d 782 (1975). A trial court’s decision to admit or exclude hearsay is reviewed for abuse of discretion. *State v. Mason*, 160 Wn.2d 910, 922, 162 P.3d 396 (2007) (internal citations omitted). Discretion is abused where the trial court’s decision is “manifestly unreasonable or is based on untenable reasons or grounds.” *Id.*

In *State v. Duran-Davila*, the defendant was charged with involving a minor in a controlled substance transaction, which required proof of the minor’s age. *State v. Duran-Davila*, 77 Wn. App. 701, 702-06, 892 P.2d 1125 (1995). To prove the age element, a detective testified that he had seen the minor’s birthdate on her booking sheet. *Id.* at 704. The Court held that “[t]his declaration by a non-witness, offered to prove [the minor’s] correct age, clearly was inadmissible hearsay, unless subject to an exception to the hearsay rule.” *Id.* at 704 (citing ER 803; ER 804.) Because no hearsay exception was suggested by the State in that case, the Court assumed that no exception applied. *Id.* at 704n.3 (the Court noted that the evidence may have been admissible “if the State had laid the

proper foundation under one or more [hearsay] exceptions...” such as reputation concerning personal or family history, uniform business records, or certified copies of public records.)

Ultimately, the Court in *Duran-Davila* reversed and remanded for a new trial because, without the improper hearsay evidence of the minor’s age, the remaining evidence of age consisted only of the detective having seen the minor at a remand hearing in juvenile court. 77 Wn. App. at 706. “This evidence, alone, was insufficient to prove beyond a reasonable doubt that [the alleged minor] was under 18 years old at the time of the offense.” *Id.*

As the *Duran-Davila* Court noted above, hearsay evidence pertaining to a person’s age may be admitted if it falls under an exception. *See e.g.* ER 803(a)(19) (allowing, with proper foundation, admission of evidence concerning a person’s birth that is known among members of a person’s family, associates, or in the community); RCW 5.44.040 (allowing admission of certified copies of public records); RCW 5.45.020 (allowing admission of business records so long as the “custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business...”)

Where hearsay is improperly admitted and thereby deprives the defendant of his right to confrontation, the State must show that the error

was harmless beyond a reasonable doubt. *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995). “An error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred.” *Id.*

A person is guilty of rape of a child in the third degree when the person has sexual intercourse with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim. RCW 9A.44.079(1) (emphasis added). “A conviction not supported by sufficient evidence violates the constitutional right to due process.”

Duran-Davila, 77 Wn. App. at 703-04. “Evidence is sufficient to support a criminal conviction if a rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* at 704 (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). Sufficient means more than a mere scintilla of evidence; there must be that quantum of evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved. *State v. Fateley*, 18 Wn. App. 99, 102, 566 P.2d 959 (1977).

In *State v. Duran-Davila*, the Court found that, once the inadmissible hearsay of the minor’s age was disregarded, the remaining

evidence of age was insufficient to prove the age element of the charge beyond a reasonable doubt. 77 Wn. App. at 706. The Court reversed and remanded for a new trial. *Id. Accord State v. Rainey*, 180 Wn. App. 830, 845, 327 P.3d 56 (2014) (reversing and remanding for a new trial after testimonial hearsay of the defendant’s licensing records and licensing suspension was erroneously admitted).

Exhibit 1 in this case consists of a photo lineup page that Y.L. had viewed before identifying Mr. Magana, along with an accompanying identification page that was prepared by Officer Christopher Caicedo, both of which he said were kept in the regular course of business. Exhibit 1; RP 54-55. The identification sheet that was attached to the photo lineup is challenged here; this sheet included typed-written statements identifying the defendant’s name, birthdate, and personal features.² Exhibit 1; RP 58. It is not clear from the record where Officer Caicedo obtained the information that he then typed or caused to be printed on the identification sheet. RP 159. Defense counsel objected that this identifying information regarding the defendant’s birthdate should be excluded as hearsay and on confrontation grounds, but his objections were twice overruled. RP 58, 159.

² This “identification page” was not shown to Y.L. RP 58.

The court abused its discretion by admitting the identifying information page of Exhibit 1. The written statement of Mr. Magana's date of birth was prepared out of court and was relied upon to prove that Mr. Magana was 48 months older than Y.L. This statement constituted categorical hearsay, and the court's decision to admit the information sheet was manifestly unreasonable given that no foundation for a hearsay exception was established. As in *Duran-Davila*, the State did not offer any hearsay exception for admitting the type-written or print-out of the defendant's birthdate. 77 Wn. App. at 706.

Even if the photo lineup itself was a regularly maintained record by Officer Caicedo in the course of his official duties, like a booking sheet might be, the hearsay within that document pertaining to the defendant's birthdate must also satisfy a hearsay exception in order to be admissible. *Accord Duran-Davila*, 77 Wn. App. at 704 (detective's declaration that he viewed the birthdate on the booking sheet was inadmissible hearsay).

It is not clear in this record where Officer Caicedo obtained the information about the defendant's birthdate. The information on Exhibit 1 is not a copy of the defendant's driver's license, and no one with information about the defendant's birthdate from his license (such as a Department of Licensing official) ever testified that the birthdate was accurate according to official records. C.f. RCW 5.45.020. Here, no

records custodian or other qualified witness testified about the defendant's birthdate as stated on his driver's license, for example, so that the business records hearsay exception would apply.

There was similarly no foundation laid for admitting the information about the defendant's birthdate under ER 803(a)(19). There was no evidence showing that Officer Caicedo is a family member or among Mr. Magana's associates so that he would be personally familiar with the defendant's birthdate. And, Officer Caicedo did not testify how he, as a member of the community, would be personally familiar with Mr. Magana's date of birth.

Likewise, the birthdate information was not admitted pursuant to RCW 5.44.040, which would allow admission of certified copies of public records. Exhibit 1 was not a certified copy of a public record.

The court abused its discretion by admitting the attached page to Exhibit 1 that included Mr. Magana's purported personal identifying information, including his birthdate. This information was inadmissible hearsay offered to prove an essential element of the charged crime in this case. RCW 9A.44.079(1).

Furthermore, the error in this case was not harmless beyond a reasonable doubt. When disregarding the impermissible hearsay, the remaining, untainted evidence in this case is not substantial; there is a

reasonable probability that the outcome would have been different but for the impermissible evidence, sufficient to undermine confidence in the outcome of this case. *Powell*, 126 Wn.2d at 267. Ultimately, without the improper hearsay, there was insufficient proof that Mr. Magana was 48-months-older than Y.L.

Like in *Duran-Davila*, there was some other evidence that would suggest the pertinent age evidence. 77 Wn. App. at 706. In *Duran-Davila*, that evidence of the “minor” being under age 18 consisted of the detective’s permissible testimony that he had recently seen the “minor” in juvenile court, suggesting the minor was indeed under age 18. *Id.* But the *Duran-Davila* Court held that this evidence was not alone substantial enough to affirm the conviction in light of the hearsay error. *Id.*

Similarly, in this case, Y.L. testified that she thought Mr. Magana looked to be in his twenties, but Y.L.’s testimony was not clear or substantial enough to establish the defendant’s age; this evidence alone should not be sufficient to affirm Mr. Magana’s conviction, particularly in light of the confrontation hearsay error. RP 152-53. Y.L.’s speculative testimony of the defendant’s age was no more than a mere scintilla, an insufficient quantum of evidence to establish Mr. Magana’s age to the jury beyond a reasonable doubt, or that the error in this case was harmless beyond a reasonable doubt. *Fateley*, 18 Wn. App. at 102.

The remedy for the improper admission of hearsay evidence in this case is to remand for a new trial. *Rainey*, 180 Wn. App. at 845; *Duran-Davila*, 77 Wn. App. at 706 (setting forth this remedy).

Issue 4: Whether remand is appropriate to strike or amend the 10-year no-contact-order, which exceeded the statutory maximum for the offense and was contrary to the five-year no-contact-order that was initially ordered by the court.

In general, sentencing conditions, including the terms of a no contact order, cannot exceed the maximum term for the crime. *State v. Rodriguez*, 183 Wn. App. 947, 959, 335 P.3d 448 (2014), *review denied*, 182 Wn.2d 1022 (2015); *accord State v. Armendariz*, 160 Wn.2d 106, 120, 156 P.3d 201 (2007). Illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Remand is also generally appropriate to correct scrivener's errors. *State v. Moten*, 95 Wn. App. 927, 929, 976 P.2d 1286 (1999).

Here, Mr. Magana was convicted of third-degree rape of a child, a class C felony that has a statutory maximum sentence of five years. RCW 9A.44.079(2); RCW 9A.20.021(1)(c). The court indicated at sentencing that it was imposing a five-year no-contact-order and included this term in its judgment and sentence. 8/13/2015 RP 6; CP 29. But then the court entered an appendix to the judgment and sentence and imposed a 10-year no-contact-order (CP 17-18). An additional order was entered, indicating

that any sexual assault protection order would remain in effect until two years following the expiration of any sentence of imprisonment and subsequent period of community custody. CP 19-20. Whether due to a scrivener's error or the court mistakenly entering an order that exceeded the statutory maximum for the crime, this sentencing error should be corrected on remand.

Issue 5: Whether the court erred by imposing a jury demand fee of \$500 where the maximum jury demand fee allowed is \$250.

“Every person convicted of a crime... shall be liable to all the costs of the proceedings against him or her, including, when tried by a jury in the superior court..., a jury fee...” RCW 10.46.190. But, it is well settled that any jury demand fee is capped at a maximum of \$250. RCW 10.01.160(2); RCW 36.18.016; 13B Wash. Prac. §3612; *State v. Hathaway*, 161 Wn. App. 634, 652-53, 251 P.3d 263, *review denied*, 172 Wn.2d 1021 (2011); *State v. Moreno*, 173 Wn. App. 479, 499, 294 P.3d 812 (2013); *State v. Bunch*, 168 Wn. App. 631, 633-34, 279 P.3d 432 (2012).

Here, the court imposed a \$500 jury demand fee, ostensibly charging Mr. Magana the cost of the jury that tried and convicted him along with a fee for the jury that was initially impaneled before a mistrial was declared. 8/13/15 RP 5. But RCW 10.46.190 only provides for “a jury fee” that is capped at \$250, rather than multiple jury fees, and the fee

is only authorized when a defendant is “tried by a jury in the superior court.” Mr. Magana was never tried by the first jury (a mistrial was declared before any testimony began, CP 103-04), and the law caps the amount Mr. Magana could be charged for a jury demand fee at \$250. The \$500 jury demand fee should be stricken or reduced.

Issue 6: Whether the court erred by entering several community custody conditions that were not crime-related or were unconstitutionally vague or overbroad.

The court imposed the following community custody conditions that were not crime-related or were unconstitutionally overbroad or vague:

(14) Do not frequent parks, schools, malls, family missions or establishments where children are known to congregate or other areas as defined by supervising CCO, treatment providers...

[Mr. Magana argues that this condition is vague, overbroad and not crime related.]

(15) Do not frequent X-Rated movies or adult book stores while on community custody...

[Mr. Magana argues this condition is not crime related.]

(18) Do not use, purchase, or own any electronic device which allows the offender to use social media sites or networks or the internet. This includes smartphone, computer or other devices...

(19) If deemed necessary by treatment provider, computer for work purposes only, are to be approved and monitored solely by a certified sex offender therapist...

[Mr. Magana argues these conditions are overbroad and not crime related.]

(25) You shall not use or physically/electronically possess sexually explicit material; meaning any pictorial material displaying direct physical stipulation of unclothed genitals, masturbation, sodomy (i.e. bestiality or oral or anal intercourse), flagellation or torture in the context of a sexual relationship, or emphasizing the depiction of adult or child human genitals; provided however, that works of art of anthropological significance shall not be deemed to be within the foregoing definition as defined in RCW 9.68.130(2).

[Mr. Magana argues this condition is not crime related.]

CP 17-18.

Defendants can object to community custody conditions for the first time on appeal. *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003); *State v. Wilson*, 176 Wn. App. 147, 151, 307 P.3d 823 (2013), review denied, 179 Wn.2d 1012 (2014) (citing *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)); *State v. Bahl*, 164 Wn.2d 739, 744-45, 193 P.3d 678 (2008) (citing cases). The trial court may impose a community custody condition only if it is authorized by statute. *State v. Warnock*, 174 Wn. App. 608, 611, 299 P.3d 1173 (2013) (citation omitted). Pursuant to RCW 9.94A.703, in pertinent part, the court may order an offender to “[c]omply with any crime-related prohibitions.” RCW 9.94A.703(3)(f). “Crime-related prohibition” means:

an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted....

RCW 9.94A.030(10).

The reviewing court does not presume that community conditions are constitutional and “reviews the factual bases for crime-related conditions under a “substantial evidence’ standard.” *State v. Irwin*, ___ Wn. App. ___, ___ P.3d ___, 2015 WL 8902184 *3, 5 (Wash. Ct. App. Dec. 14, 2015) (internal citations omitted). A community custody condition may be considered unconstitutionally overbroad where it encompasses matters that are not crime related or restricts lawful conduct not directly related to the crime. *See e.g. State v. Bahl*, 137 Wn. App. 709, 714-15, 159 P.3d 416 (2007), *reversed in part on other grounds*, 164 Wn.2d 739 (2008). Whether a community custody condition is crime-related is reviewed for abuse of discretion. *State v. Autrey*, 136 Wn. App. 460, 466, 150 P.3d 580 (2006) (citing *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993)). “A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons[.]” *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009).

Community custody conditions must also not be vague. *Irwin*, 2015 WL 8902184 *3-5. “The guarantee of due process, contained in the

Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution requires that laws not be vague.” *Irwin*, 2015 WL 8902184 *3. A community custody condition is not vague merely because a person cannot predict with absolute certainty what conduct is prohibited. *Id.* However, the condition “must (1) provide ordinary people fair warning of proscribed conduct, and (2) have standards that are definite enough to ‘protect against arbitrary enforcement.’” *Id.* The imposition of an unconstitutionally vague condition is manifestly unreasonable and, therefore, constitutes an abuse of the trial court’s discretion. *Id.* at *5.

In *State v. Irwin*, the Court recently reviewed a community custody condition that prohibited the defendant from frequenting areas where minor children are known to congregate, as defined by the supervising CCO. 2015 WL 8902184 *3. The Court noted that a previous case that upheld a similar condition did so under a standard of review that has since been disproved. *Id.* at *4 (citing *State v. Riles*, 135 Wn.2d 326, 349, 957 P.2d 655 (1998), *abrogated by State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010)). The *Irwin* Court instead followed the reasoning of *State v. Bahl* and *State v. Sansone*, where courts found community custody conditions unconstitutionally vague, particularly because those conditions required further definitions from the CCOs as to what conduct was

proscribed. *Id.* (citing *Bahl*, 164 Wn.2d at 751; *State v. Sansone*, 127 Wn. App. 630, 638, 111 P.3d 1251 (2005)). The Court explained:

While *Bahl* and *Sansone* involved the intractably undefinable term ‘pornography,’ this case simply requires ordinary people to understand where ‘children are known to congregate.’ But, as Irwin points out, whether that would include ‘public parks, bowling alleys, shopping malls, theaters, churches, hiking trails’ and other public places where there may be children is not immediately clear...

Irwin, __ Wn. App. __, 2015 WL 8902184 *4.

The *Irwin* Court also addressed whether an illustrative list of places where children are known to congregate would have cured the vagueness problem in that case. 2015 WL 8902184 *4. But the Court held that, even once the CCO provided examples of locations where children are known to congregate, such a list would only help satisfy the first prong of the vagueness analysis (notice of what conduct is proscribed) while still failing the second prong of a vagueness analysis (standards too indefinite to protect against arbitrary enforcement). *Id.* at *5. The illustrative list would “leave the condition vulnerable to arbitrary enforcement...” *Id.* The Court, therefore, struck the condition as being void for vagueness. *Id.*

Finally, “[m]ore careful review of sentencing conditions is required when those conditions interfere with a fundamental constitutional right.” *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008).

Conditions burdening a fundamental right “‘must be ‘sensitively imposed’ so that they are ‘reasonably necessary to accomplish the essential needs of the State and public order.’” *State v. Gabino*, 185 Wn. App. 1025, review denied, 184 Wn.2d 1021 (2015) (quoting *In re Pers. Rest. Of Rainey*, 168 Wn.2d 367, 374, 299 P.3d 686 (2010) (quoting *Warren*, 165 Wn.2d at 32)).

Here, Mr. Magana challenges conditions 14, 15, 18, 19, and 25 as being non-crime-related and unconstitutionally overbroad, or unconstitutionally vague.

Condition 14: “Do not frequent parks, schools, malls, family missions or establishments where children are known to congregate or other areas as defined by supervising CCO, treatment providers...”

This condition is strikingly similar to the community custody condition that was recently struck down as unconstitutionally vague in *State v. Irwin*, 2015 WL 8902184. The condition prohibits Mr. Magana from frequenting “establishments where children are known to congregate or other areas as defined by supervising CCO, treatment providers.” CP 17 (emphasis added). First of all, the emphasized portion of this condition fails to provide ordinary persons of fair notice as to what conduct is proscribed. Indeed, as a non-exhaustive list of examples, it is not immediately clear from the condition whether Mr. Magana would be in violation of the terms of his community custody if he went to a

campground, lake, beach, hiking trail, ski resort, grocery store, “box” superstore, library, theater, bowling alley, hotel, swimming pool, public outdoor event, swap meet or market, festival, fair, restaurant, doctor’s office, public assistance building, bus or train station, museum, amusement park, adult sporting event, etcetera. Because ordinary persons would have to guess at whether Mr. Magana is prohibited from going to any of these locations, the condition must be stricken under the first prong of the vagueness analysis (inadequate notice of what conduct is proscribed).

It is true that the condition in this case provides a short illustrative list of places where children may be known to congregate, including parks, schools, malls, and family missions. CP 17. However, as the Court warned in *Irwin*, an illustrative list of places children may frequent does not necessarily cure the problem under the second prong of the vagueness analysis. That is, the standards of the condition are not definite enough to protect against arbitrary enforcement. *Irwin*, 2015 WL 8902184 *3. The fact that the condition calls upon the CCO or therapist to specify where Mr. Magana may or may not go only highlights the vagueness problem, demonstrating that the ordinary person would not know what conduct is proscribed based on the condition alone and would have to rely on the CCO’s or therapist’s identification of appropriate locations to visit.

Accord id.; Bahl, 164 Wn.2d 739. This circumstance renders the condition void for vagueness under the second prong of the vagueness analysis (i.e., the condition is unconstitutionally subject to arbitrary enforcement by the CCO or therapist). *Irwin*, 2015 WL 8902184 *3-5.

Next, the condition that Mr. Magana not frequent parks and schools is unconstitutionally overbroad and not crime-related to the extent that the condition prohibits Mr. Magana from attending adult schools or parks and other locations when children are not present. The condition does not state that Mr. Magana shall not frequent primary or secondary schools where children may congregate, but simply states that Mr. Magana may not frequent schools. As written, Mr. Magana may be found in violation of his terms of community custody if he attends any school, including a college or adult vocational school, whether or not children congregate there. Similarly, Mr. Magana may be found in violation of his community custody terms if he visits a dog park, sporting park or any other park, even during school hours or at other times when children are not present. As a result, the condition proscribes more conduct than is lawful. The condition is unconstitutionally overbroad and is not directly related to Mr. Magana's crime.

Conditions 15 and 25: Do not frequent X-Rated movies or adult book stores while on community custody... You shall not use or physically/electronically possess sexually explicit material; meaning any pictorial material displaying direct physical stipulation of unclothed genitals, masturbation, sodomy (i.e. bestiality or oral or anal intercourse), flagellation or torture in the context of a sexual relationship, or emphasizing the depiction of adult or child human genitals; provided however, that works of art of anthropological significance shall not be deemed to be within the foregoing definition as defined in RCW 9.68.130(2).

These conditions should be stricken in this case, because they are not directly related to Mr. Magana's crime. Crime-related conditions must be supported by substantial evidence in the record, but there is no evidence that Mr. Magana committed the offense in this case after having frequented an X-Rated movie or an adult book store. The alleged offense involved sexual relations with a 14-year-old girl; prohibiting Mr. Magana's viewing of *adult* sexual materials or presence at adult movies or book stores was not crime related. There is no indication that Mr. Magana ever attended these adult locations or viewed sexually explicit material prior to or around the time of committing any offense.

Moreover, because the conduct proscribed involves protected First Amendment speech, such as that found at adult book stores and movies, this Court must conduct a stricter review to ensure that the conditions are "sensitively imposed" and are "reasonably necessary to accomplish the essential needs of the State and public order." *See e.g. Warren*, 165 Wn.2d at 32; *Gabino*, 185 Wn. App. 1025. There is not substantial

evidence to show that Mr. Magana's presence at adult movies or book stores, or viewing of sexually explicit materials that are constitutionally protected speech, is directly related to his crime. As such, this condition too must be stricken.

Conditions 18 and 19: Do not use, purchase, or own any electronic device which allows the offender to use social media sites or networks or the internet. This includes smartphone, computer or other devices... If deemed necessary by treatment provider, computer for work purposes only, are to be approved and monitored solely by a certified sex offender therapist...

These final challenged conditions should be stricken, because they are not sufficiently crime-related and are unconstitutionally overbroad; the conditions proscribe more contact than is lawful under the circumstances of this case.

The evidence indicated that Mr. Magana met Y.L. on Facebook, a social media site, and that he may have met another teenage girl(s) on the same forum according to his presentence investigation report. However, the conditions imposed do not merely prohibit Mr. Magana from going on social media sites, which would arguably be related to his crime. Instead, the condition broadly prohibits Mr. Magana from using, purchasing or owning any device that is capable of connecting to the Internet, whether or not the device is capable of connecting to a social media site, whether or not Mr. Magana acquires Internet service, and whether or not Mr. Magana actually connects to the Internet or any social media site using the device.

The condition, as written, is unconstitutionally overbroad, proscribing more conduct than is lawful based on the circumstances of Mr. Magana's crime. In our modern technology world, electronic devices that are capable of connecting to the Internet have become the standard. Based on the challenged condition(s), Mr. Magana could be found in violation of his terms of community custody for using, purchasing or owning any device that allows Mr. Magana to connect to the Internet. Countless devices are now capable of connecting to the Internet (some require the purchase of Internet or another service). Mr. Magana's community custody condition makes no distinction of what conduct is prohibited based on the Internet service acquired or the Internet site visited and simply bans all devices that are capable of connecting to the Internet.

Mr. Magana asks that this Court take notice³ of the non-exhaustive list of common, every-day "smart" devices, all of which allow the user to

³ See e.g. *10 Everyday Household Appliances Now with Wi-Fi*, available at: <http://webtrends.about.com/od/Mobile-Web-Beginner/tp/Wi-fi-Appliances.htm> (last visited 1/31/2016); *A home controlled by wifi... in just two years: Nine in ten household devices will link to web, say experts*, available at: <http://www.dailymail.co.uk/sciencetech/article-2899321/Home-future-Experts-say-nine-ten-household-appliances-fridges-toothbrushes-controlled-wi-fi-TWO-YEARS.html> (last visited 1/31/2016); *Smart Home: Best smart home devices of 2016*, available at: <http://www.cnet.com/topics/smart-home/best-smart-home-devices/> (last visited 2/1/2016); *Home Automation*, available at: https://en.wikipedia.org/wiki/Home_automation (last visited 2/1/2016); *Your "smart" home devices can easily be hacked*, available at:

connect to the Internet. Such devices may include, but are not limited to: video gaming consoles, televisions, satellite television, Kindle or other reader, dvd player, vehicles, stereo receiver, digital picture frame, thermostat, refrigerator, toys, alarm system, coffee maker, washing machine and dryer, cooking devices, lights, water purification system, vacuums, garage door openers, watches, sunglasses, etcetera. In today's modern world, it is difficult to imagine many devices that would not allow their users to connect to the Internet. Even if Mr. Magana wanted to apply for a job, the business may require him to fill out an in-store application using a device that connects to the Internet. And, if Mr. Magana bought any electronic device as, for example, a gift for someone else, whether or not he was aware of the device's new technology that allows it to connect to the Internet, Mr. Magana would be in violation of his terms of community custody. Such stifling conditions create an almost certainty that Mr. Magana would end up in violation of his community custody terms at some point, and he would face incredible difficulty re-entering our modern, technology-based society.

The evidence may support a prohibition on Mr. Magana using an electronic device to access social media sites. But the condition prohibiting him from using, owning or purchasing any electronic device

<http://www.cbsnews.com/news/how-your-internet-home-devices-could-be-hacked/> (last visited 2/1/2016).

that is capable of connecting to the Internet is an absurd and impossible standard with which to comply in today's modern world. The condition must be stricken as unconstitutionally overbroad and not sufficiently crime-related.

E. CONCLUSION

Based on the foregoing, Mr. Magana respectfully requests that his third-degree rape conviction be reversed and the matter remanded for a new trial due to the detective's impermissible comment on his right to silence, the detective's violation of an order in limine that could not be cured with the instruction to the jury to disregard, and/or the improper admission of hearsay to satisfy the age element of the charged crime.

Whether or not this Court reverses, Mr. Magana respectfully requests that this Court address the challenged sentencing errors, as they would be likely to recur if Mr. Magana is reconvicted.

Respectfully submitted this 1st day of February, 2016.

/s/ Kristina M. Nichols
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