

FILED
11/2/2017 2:42 PM
Court of Appeals
Division III
State of Washington

NO. 34806-7-III

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

STATE OF WASHINGTON,

Respondent

v.

PHILIP NOLAN LESTER,

Appellant,

BRIEF OF RESPONDENT

BRANDEN E. PLATTER
Prosecuting Attorney
237 4th Avenue N.
P.O. Box 1130
Okanogan County, Washington

509-422-7280 Phone
509-422-7290 Fax

Melanie R. Bailey
WSBA #38765
Deputy Prosecuting Attorney

TABLE OF CONTENTS

A. Table of Authorities	ii
B. Issues Pertaining to Review	1
C. Statement of the Case	2
D. Argument	7
1. Lester's Sixth Amendment Confrontation Rights were not violated when A.B. was found not competent to testify and her recorded interview was introduced at trial.	7
2. The date of offense is not an essential element of the charged crimes, but regardless, the evidence presented is sufficient to establish the criminal conduct occurred on or between December 1, 2014 and January 1, 2015.	15
3. The Community Custody conditions imposed by the Trial Court are proper.	21
4. The objections to appeal costs and cost bill are premature.	29
E. Conclusion	35

TABLE OF AUTHORITIES

Washington Cases

<i>Bellingham v. Struthers</i> , 109 Wn.App. 864, 38 P.3d 1021 (2001)	20
<i>City of Sumner v. Walsh</i> , 148 Wn.2d 490, 61 P.3d 1111 (2003)	28
<i>In re Custody of Smith</i> , 137 Wn.2d 1, 969 P.2d 21 (1998)	23
<i>In re Dependency of C.B.</i> , 79 Wn.App. 686, 904 P.2d 1171 (1995)	24
<i>In Re Sumey</i> , 94 Wn.2d 757, 621 P.2d 108 (1980)	24
<i>State v. Acevedo</i> , 159 Wn.App. 221, 248 P.3d 526 (2010)	23
<i>State v. Acrey</i> , 135 Wn.App. 938, 146 P.3d 1215 (2006)	22
<i>State v. Ancira</i> , 107 Wn.App. 650, 27 P.3d 1246 (2001)	21
<i>State b. Barklind</i> , 87 Wash.2d 814, 557 P.2d 314 (1976)	30
<i>State v. Beadle</i> , 173 Wash.2d 97, 265 P.3d 863 (2011)	7, 8, 12, 13,
<i>State v. Berg</i> , 147 Wn.App. 923, 198 P.3d 529 (2008)	26
<i>State v. Blank</i> , 131 Wash.2d 230, 930 P.2d 1213 (1997)	28, 29, 31, 32, 35
<i>State v. Blazina</i> , 182 Wash.2d 827, 344 P.3d 680 (2015)	31, 35
<i>State v. Carver</i> , 37 Wn.App. 122, 678 P.2d 842 (1984)	15
<i>State v. Corbett</i> , 158 Wn.App. 576, 242 P.3d 52 (2010)	26, 27,
<i>State v. Davis</i> , 154 Wn.2d 291, 111 P.3d 844 (2005)	12
<i>State v. Gassman</i> , 160 Wn.App. 600, 248 P.3d 155 (2011)	15
<i>State v. Guloy</i> , 104 Wn.2d 412, 705 P.2d 1182 (1985)	11, 12, 14
<i>State v. Hale</i> , 94 Wn.App. 46, 971 P.2d 88 (1999)	22

<i>State v. Hayes</i> , 81 Wn.App. 425, 914 P.2d 788 (1996)	15
<i>State v. Hopper</i> , 118 Wn.2d 151, 822 P.2d 775 (1992).....	20
<i>State v. Jones</i> , 118 Wn.App. 199, 76 P.3d 258 (2003)	23
<i>State v. Kjorsvik</i> , 117 Wn.2d 93, 812 P.2d 86 (1991).....	15, 17, 18
<i>State v. Lawrence</i> , 108 Wn.App. 226, 31 P.3d 1198.....	7
<i>State v. Letourneau</i> , 100 Wn.App. 424, 997 P.2d 436 (2000)	24
<i>State v. Llamas-Villa</i> , 67 Wn.App. 448, 836 P.2d 239 (1992)	21
<i>State v. Mahone</i> , 98 Wash.App. 342, 989 P.2d 583 (1999).....	28
<i>State v. Mavkle</i> , 118 Wn.2d 424, 823 P.2d 1101 (1992).....	6
<i>State v. McCarty</i> , 140 Wn.2d 420, 998 P.2d 296 (2000).....	17
<i>State v. Nolan</i> , 141 Wash.2d 620, 8 P.3d 300 (2000)	29
<i>State v. Parramore</i> , 53 Wn.App. 527, 768 P.2d 530 (1989)	21
<i>State v. Pham</i> , 75 Wn.App. 626, 879 P.2d 321 (1994)	7
<i>State v. Pillatos</i> , 159 Wn.2d 459, 150 P.3d 1130 (2007).....	22
<i>State v. Powell</i> , 167 Wn.2d 672, 223 P.3d 493 (2009).....	17
<i>State v. Riley</i> , 121 Wn.2d 22, 846 P.2d 1365 (1993).....	21, 24, 25
<i>State v. Robtoy</i> , 98 Wn.2d 30, 653 P.2d 284 (1982).....	28
<i>State v. Shafer</i> , 156 Wash.2d 381, 128 P.3d 87 (2006)	13
<i>State v. Sinclair</i> , 192 Wash.App. 380, 367 P.3d 612 (2016).....	29, 31
<i>State v. Smith</i> , 148 Wash.2d 122, 59 P.3d 74 (2002).....	14

<i>State v. Stephens</i> , 93 Wn.2d 186, 607 P.2d 304 (1980).....	11
<i>State v. Valencia</i> , 169 Wn.2d 782, 239 P.3d 1059 (2010).....	25
<i>State v. Vangerpen</i> , 125 Wn.2d 782, 888 P.2d 1177 (1995).....	17, 20
<i>State v. Zillyette</i> , 178 Wn.2d 153, 307 P.3d 712 (2013).....	17

Federal Cases

<i>Crawford v. Washington</i> , 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)	7
<i>Davis v. Washington</i> , 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)	8
<i>Meyer v. Nebraska</i> , 262 U.S. 390, 43 S.Ct. 625 (1923).....	23
<i>Michigan v. Bryant</i> , 562 U.S. 344, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011)	8, 10
<i>Ohio v. Clark</i> , --- U.S. ---, 135 S.Ct. 2173, 192 L.Ed.2d 306 (2015)	7, 8, 9, 10
<i>Parker v. Randolph</i> , 442 U.S. 62, 99 S.Ct. 2131, 60 L.Ed.2d 713 (1979)	12
<i>Price v. Massachusetts</i> , 321 U.S. 158, 64 S.Ct. 438 (1944).....	24
<i>Troxel v. Granville</i> , 530 U.S. 57, 120 S.Ct. 2054 (2000).....	23

Other Jurisdictions

<i>State v. Bergin</i> , 214 Conn. 657, 574 A.2d 164 (1990)	15
--	----

Statutes

RCW 4.56.110.....	32
RCW 9A.44.073	16, 20
RCW 9A.44.083	16, 20
RCW 9A.44.120	10, 13
RCW 9.94A.030	21
RCW 9.94A.505	21
RCW 9.94A.703	22
RCW 10.01.160.....	31, 33, 34
RCW 10.37.050.....	15

RCW 10.73.160.....	28, 29, 30, 31, 32
RCW 10.82.090.....	32, 33, 34

A. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. The Confrontation Clause of the U.S. Constitution does not prohibit the introduction of child hearsay statements when the child is found to be incompetent and does not testify.
2. The forensic interview taken in response to a report of sexual abuse that is conducted with a Child Protective Services ("CPS") Investigator and a Police Detective is not "testimonial" within the meaning of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).
3. The admission of the forensic interview was proper and there was independent corroborating evidence of sexual abuse.
4. There is sufficient evidence to support the acts occurred during the one month period charged.
5. The community custody condition prohibiting unsupervised contact with all minors under the age of 18 does not interfere with Lester's right to parent his own child.
6. The trial court does have authority to impose conditions of community custody prohibiting possession or purchase of alcohol, and entry onto premises whose primary business is the sale of liquor.
7. The objections to appeal costs and cost bill are premature.

B. STATEMENT OF THE CASE

Philip Lester ("Lester") and Miranda Bishop ("Bishop") were neighbors and acquaintances. I RP 124, II RP 261. Lester lived with his girlfriend, Ashley Lamote ("Lamote"), and their son. I RP 125, II RP 207, 260-61. Bishop and Lamote were friends. I RP 126. Bishop lived with her daughter, A.B., who turned four years old on November 30, 2014. I PR 64, 124. A.B. referred to Lester as Uncle Junior. II RP 270.

Over a period from August 2014 to December 2014, for extra money, Lamote would babysit A.B. while Bishop went to work. I RP 127-28, 130, II RP 210. When Lamote would babysit, Bishop would take A.B. to Lester's house in the early morning hours, around 5:15 a.m. I RP 127-28, II RP 210. During this time, Lester was working for a logging contractor. II RP 208, 236-37. On occasion when Bishop would drop A.B. off, Lester would still be at the house. I RP 128. Bishop testified that sometime around September 2014, A.B. began to show changes in her behavior. I RP 137. A.B. began to have nightmares, she began to revert back to urinating in her pants, and had diarrhea off and on for about a month during which time she complained it hurt. I RP 137-38.

On Christmas 2014, Bishop and A.B. were invited to Lester's house to eat and celebrate the holiday. I RP 130, 160, II RP 212, 246, 266-67. An argument between Bishop and Lester ensued when Lester was playing video games and cussing, shortly thereafter Bishop and A.B. left. I RP 130-31, II RP 212-13, 246-47, 266-67. Bishop had no further contact with Lester until January 2. I RP 131.

On December 31, 2014, Bishop was in the front room of her home putting away Christmas items while A.B. was in the kitchen playing with her play-doh. I RP 138. A.B. came out of the kitchen and told her mom that the oblong shaped play-doh looked like "Uncle Junior's pee-pee". I RP 64, 138-39. Bishop asked A.B. what she meant, and A.B. disclosed that Lester had put his "pee pee" in her mouth, and also indicated her crotch and bottom areas. I RP 65, 138. Bishop then called law enforcement and reported the sexual abuse. I RP 65, 138.

Deputy Matthew Stewart responded to Bishop's residence but was unable to interview A.B. at that time. I RP 120, 139. Detective Debra Behymer received the complaint and arranged for a forensic interview with A.B. on January 3, 2015. I RP 117, 120-21. The interview was conducted in an interview room at the

Okanogan County Sheriff's Office, where it was audio and video recorded. I RP 121. Present at the interview with A.B. was a Child Protective Services ("CPS") investigator, David Kopp ("Kopp"), and Detective Behymer. I RP 121, II RP 173. The purpose of the interview was for forensic investigation, seeking out information regarding what happened in order to identify. I RP 182, 191-92.

[It should be noted that Appellant asserts that the prosecutor, Karl Sloan, was present for the forensic interview and asked questions of A.B. However, that is incorrect and is a scrivener's error in the transcript at I RP 36 through 48. I RP 121, II RP 173.]

When the interview was started, Detective Behymer attempted to review the interview rules with A.B., but before the Detective could complete this, A.B. began disclosing the sexual abuse. I RP 51. This disclosure was not in response to any questioning by either Kopp or Detective Behymer. I RP 51. During the interview, A.B. described "Uncle Junior" putting his pee-pee in her mouth and rubbing it on her. I RP 36-37, 51. A.B. also disclosed that "Uncle Junior" licked her butt, touched her foot, belly, boobs, hands, knees, and arms, and that he touched her with his butt. I RP 41-43. A.B. also disclosed that Uncle Junior said he wanted to put

his pee-pee “in my butt”. I RP 44. When asked if he did that, A.B. responded “yes” and that when he did, it “didn’t feel good ...”. I RP 44-45. A.B. also stated that Uncle Junior gave her “owies” on her butt. I RP 45. A.B. explained that Uncle Junior has a girlfriend named Ashley and a son with the same name as Lester’s son. I RP 39. It was not clear from A.B.’s disclosure exactly when or where the sexual abuse occurred or exactly how many times the abuse occurred. I RP 37, 46, 193-94.

At the end of the interview, when asked if anyone told her what to say, A.B. said, “My mom – (inaudible).” I RP 47. Bishop stated that after A.B. disclosed to her the sexual abuse she told A.B. “not to let anybody ever touch her.” I RP 139.

Detective Behymer interviewed Lester who was unable to accurately describe whether the disagreement with Bishop occurred on Thanksgiving or Christmas. I RP 187. Lester also initially denied that his girlfriend Lamote babysat for A.B., but later he admitted that she did. I RP 188.

Lester was charged with Rape of a Child in the First Degree and Child Molestation in the First Degree, with these acts occurring “on or between December 1, 2014 and January 1, 2015.” CP 179-80.

As a defense, Lester denied molesting A.B., and asserted that he was never alone with A.B. and that he was working much of the time when Lamote babysat A.B. II RP 210-11, 225-29, 262-65, 270.

Before trial, the court held a Child Hearsay Hearing pursuant to RCW 9A.44.120 to determine whether A.B. was competent to testify and whether her recorded statement was admissible. I RP 8, 12. While the trial court found that A.B. was not competent to testify and granted Lester's motion to exclude her as a witness, it did find that A.B.'s recorded interview was not testimonial and that it did not offend the Confrontation Clause. I RP 77-79, 84-86, CP 55. The recorded interview was played for the jury at trial. I RP 175, CP 56.

Lester was convicted on both counts. II RP 317, CP 58. He was sentenced to 200 months to life. CP 8. The trial court also entered conditions of community custody, including a term that prohibited Lester from having any contact with persons under age 18, without an adult present who has been approved by the Community Corrections Officer and Sex Offender Treatment Provider and terms that prohibited him from purchasing or possessing alcohol and from entering bars, taverns, lounges, or other places whose primary business is selling liquor. CP 22-24.

C. ARGUMENT

- 1. Lester's Sixth Amendment right to Confrontation was not violated by the introduction of the forensic interview of A.B. conducted by Detective Behymer and CPS Investigator Kopp after A.B. was found not competent to testify.**

Evidentiary rulings and the admissibility of child hearsay lies within the trial court's sound discretion, and will not be reversed absent manifest abuse of discretion. *State v. Mavkle*, 118 Wn.2d 424, 438, 823 P.2d 1101 (1992); *State v. Pham*, 75 Wn.App. 626, 631, 879 P.2d 321 (1994), review denied, 126 Wn.2d 1002, 891 P.2d 37 (1995). Judicial discretion is abused if exercised on untenable grounds or for untenable reasons. *State v. Lawrence*, 108 Wn.App. 226, 233, 31 P.3d 1198 (2001), review denied, 145 Wn.2d 1037 (2002).

"The Sixth Amendment's Confrontation Clause, which is binding on the States through the Fourteenth Amendment, provides: 'In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.'" *Ohio v. Clark*, ---- U.S. ----, 135 S.Ct. 2173, 2179, 192 L.Ed.2d 306, (2015). The U.S. Supreme Court, in *Crawford v. Washington*, 541

U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), explained that witnesses under the Confrontation Clause are those “who bear testimony”. *Id.* at 51, 124 S.Ct. 1354. The *Crawford* Court left “for another day any effort to spell out a comprehensive definitions of ‘testimonial.’” 541 U.S. at 68, 124 S.Ct. 1354. But the *Crawford* Court did note that an “accuser who make a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” *State v. Beadle*, 173 Wash.2d 97, 107, 265 P.3d 863 (2011) (*citing Crawford*, at 51, 124 S.Ct. 1354).

However, later the U.S. Supreme Court provided further guidance for determining what is testimonial versus nontestimonial. In *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), the United States Supreme Court provided guidance and explained that, within the context of police interrogations, whether statements are “testimonial” is determined by the primary purpose of the interrogations. In *Davis*, the Court also expressed that when “the primary purpose of an interrogation is to respond to an ‘ongoing emergency,’ its purpose is not to create a record for trial and thus is not within the scope of the

[Confrontation] Clause.” *Ohio v. Clark*, ---- U.S. ----, 135 S.Ct. 2173, 2179 -80, 192 L.Ed.2d 306 (2015) (citing *Michigan v. Bryant*, 562 U.S. 344, 358, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011)).

However, the *Bryant* court later went on to say that “there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony” and that an ongoing emergency is simply one factor to consider regarding “the ‘primary purpose’ of an interrogation.” *Ohio v. Clark*, 135 S.Ct. at 2180, 192 L.Ed.2d 306. “In the end, the question is whether, in light of all the circumstances, viewed objectively, the ‘primary purpose’ of the conversation was to ‘creat[e] an out-of-court substitute for trial testimony.” *Id.*

In *Ohio v. Clark*, the U.S. Supreme Court analyzed whether statements made by a 3-year-old victim of abuse to his preschool teacher in response to questions regarding his injuries were testimonial and admitted in trial in violation of the Confrontation Clause. 135 S.Ct. 2173, 2178, 192 L.Ed. 306 (2015). In *Ohio v. Clark*, the U.S. Supreme Court states, “[t]he teachers’ questions were meant to identify the abuser in order to protect the victim from

future attacks.” *Id.* at 2181, 192 L.Ed. 306. They also expressed that this conversation between the victim and his teacher was informal and spontaneous. *Id.* The questions were designed to determine who the assailant was and to protect the child and that the child was never informed that his answers were to be used to arrest or punish his abuser. *Id.* Additionally, the child never “hinted that he intended his statements to be used by the police or prosecutor”, and therefore they were ultimately found to be nontestimonial. *Id.* The Court in *Clark* goes on to say that “[s]tatements by very young children will rarely if ever, implicate the Confrontation Clause. Few preschool students understand the details of our criminal justice system.” *Id.* at 2182, 192 L.Ed. 306.

Thus, under the Confrontation Clause analysis, “a statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial.” *Ohio v. Clark*, 135 S.Ct. at 2180, 192 L.Ed.2d 306. If that is not the primary purpose, the “admissibility of the statement is the concern of state and federal rules of evidence, not the Confrontation Clause.” *Id.* at 2180, 192 L.Ed.2d 306, (*citing Michigan v. Bryant*, 562 U.S. 344, 359, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011)).

In the case at hand, A.B. is a young child of 4-years of age who likely has little to no understanding of the “details of our criminal justice system.” *Ohio v. Clark*, at 2182, 192 L.Ed. 306. At the very beginning of her recorded interview with Detective Behymer and CPS Investigator Kopp, before Detective Behymer could even finish the rules, A.B. began disclosing the sexual abuse. I RP 51. This was done without any questioning by either Detective Behymer or Kopp. I RP 51. Clearly, in this situation, while the statements were being provided to police and CPS, there was no intent by A.B. for these statements to be used as testimony and they were provided by A.B. spontaneously, not in response to questioning.

Based on the above, the statements were non-testimonial under the Confrontation Clause and properly admitted under RCW 9A.44.120. But even if this Court determines that A.B.’s statements to Detective Behymer and CPS worker Kopp were testimonial and improperly admitted, this Court should nonetheless find that admission of the statements were harmless error. “It is well established that constitutional errors, including violations of a defendant’s rights under the Confrontation Clause, may be so

insignificant as to be harmless.” *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986). “A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.” *Id.* at 425. Constitutional error is presumed to be prejudicial and the State bears the burden of providing that the error was harmless. *State v. Stephens*, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980); *Guloy*, 104 Wn.2d at 425. An appellate court uses the “overwhelming untainted evidence” test in the harmless error analysis. *Guloy*, 104 Wn.2d at 426. Under the test, we look only to the untainted evidence to determine whether the untainted evidence is so overwhelming that it “necessarily leads to a finding of guilt.” *Guloy*, 104 Wn.2d at 426 (citing *Parker v. Randolph*, 442 U.S. 62, 70-71, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979)); *see also State v. Davis*, 154 Wn.2d 291, 305, 111 P.3d 844 (2005), *aff’d* 126 S.Ct. 2266 (2006).

In *State v. Beadle*, 173 Wash.2d 97, 265 P.3d 863 (2011), B.A., a three-year-old girl, disclosed to her mother that her “potty” hurt. *Beadle* at 101, 265 P.3d 863. When questioned about her injury, B.A. disclosed that Beadle (her mom’s live-in boyfriend) had

tried to put his “tail” inside her. *Id.* This event took place in January 2006. *Id.* Beadle was arrested and incarcerated on other charges and had no further contact with B.A. *Id.* In approximately April 2006, B.A. began to draw pictures depicting “tails”. *Id.* In February 2007, B.A. disclosed to her step-father, that Beadle had helped her wash her hands after having her touch his “tail” because “it was all sticky.” *Id.* at 101-02. One day after this disclosure, B.A. was interviewed by Detective Buster and CPS worker Jensen. *Id.* at 102. She eventually disclosed to Jensen the sexual abuse by Beadle. *Id.* After a three day pretrial child hearsay hearing, the trial court determined that B.A. was not competent to testify and her recorded statement was nontestimonial and was admissible under *State v. Shafer*, 156 Wash.2d 381, 128 P.3d 87 (2006) and RCW 9A.44.120.

Ultimately the Washington Supreme Court affirmed the conviction ruling that her statements were in fact testimonial based and that the *Shafer* declarant-centric standard did not apply to statements made to law enforcement and therefore B.A.’s statements were testimonial; however, the court deemed this a harmless error “in light of B.A.’s nontestimonial statements” to other individuals. *Id.* at 109 and 119. Like in *Beadle*, if this Court

decides that the recorded interview was inadmissible testimonial hearsay, the error would be harmless due to the additional corroborating evidence and disclosures made by A.B. in this case.

Here, even without the hearsay statements that A.B. made to Detective Behymer and CPS worker Kopp, there is ample evidence to convict Lester through A.B.'s disclosure made to her mother and the play-doh creation of Lester's "pee-pee" by this young 4 year old. Also, the facts contained in A.B.'s disclosure to her mother reveal details about Lester's penis that surely no four-year-old child would know about an adult man – unless she had experienced them. Bishop explained how her daughter's behaviors changed. I RP 136-37. She explained how A.B. had nightmares, she would not go to people she knew, she would not let Bishop out of her sight. I RP 137. Bishop also testified about A.B. urinating in her pants when she had been potty-trained since 14 months old. I RP 137.

Even if there had been an error of constitutional magnitude, it would be harmless if shown beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. *State v. Smith*, 148 Wash.2d 122, 139, 59 P.3d 74 (2002). Thus even without the recorded interview of A.B. made by

Detective Behymer and CPS worker Kopp, there was still “overwhelming untainted evidence” to convict Lester beyond a reasonable doubt. *Guloy, supra*. Accordingly, any error in admitting the recorded statement was harmless and Lester’s conviction should be upheld.

2. The evidence presented is sufficient to establish that the alleged events occurred on or between December 1, 2014 and January 1, 2015.

In *State v Hayes*, 81 Wn.App. 425, 433, 914 P.2d 788 (1996), the Court very clearly ruled that time is not an element of crimes regarding child sexual abuse. “All essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him. *State v. Kjorsvik*, 117 Wn.2d, 93, 97, 812 P.2d 86 (1991). Likewise, RCW 10.37.050(5) only requires that a charging document set forth sufficient facts to demonstrate the statute of limitations has not expired. Unless time is an essential element, the State need not plead anything more specific. *State v. Carver*, 37 Wn.App. 122, 126, 678 P.2d 842, *review denied*, 101 Wn.2d 1019 (1984) (noting that the “test is whether the lack of specificity is prejudicial to the defendant”). Moreover, where “the [information] alleges that an offense

occurred “on or about” a certain date, the defendant is deemed to be on notice that the charge is not limited to a specific date.” *State v. Gassman*, 160 Wn.App. 600, 616, 248 P.3d 155 (2011) (*quoting State v. Bergin*, 214 Conn. 657, 574 A.2d 164, 173 (1990) (editing the Court’s), *review denied*, 172 Wn.2d 1002 (2011)).

The defendant argues that the time of the offense is a material element of the crime, but that is clearly not the case. The statutes in question do not require that the sexual abuse take place within a certain date range; rather, the statutes require, in part, that the victim be less than twelve and that the defendant be at least 24 months older than the victim for the charge of Rape of a Child in the First Degree and 36 months older than the victim for the Child Molestation in the First Degree charge, which the information clearly states. CP 179-80; RCW 9A.44.073; and RCW 9A.44.083.

The information in this case provided the defendant with notice of all the statutory elements of the crime. It reads, in pertinent part:

RCW 9A.44.073 – Rape of a Child in the First Degree

On or between December 1, 2014 and January 1, 2015, in the State of Washington, the above-named

defendant did have sexual intercourse with A.B. (DOB 11/30/2010, who is less than twelve years old and not married to the defendant and the defendant was at least twenty-four months older than A.B. ...

RCW 9A.44.083 – Child Molestation in the First Degree

On or between December 1, 2014 and January 1, 2015, in the State of Washington, the above-named Defendant, being at least thirty-six (36) months older than A.B. (DOB 11/30/2010, had sexual contact with A.B., who was less than twelve (12) years old and not married to the defendant ...

CP 179-80.

Both the Federal and State Constitutions give defendants the right to be informed of the charges against them. *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). Specifically, the Sixth Amendment to the U.S. Constitution requires that the defendant shall have the right to be informed of the nature and cause of the accusations. Likewise, under our State Constitution the defendant enjoys similar rights.

Therefore, to pass constitutional muster, charging documents must include “all essential elements of a crime, statutory and nonstatutory.” *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). Essential elements are defined as “those facts that must be proved beyond a reasonable doubt to

convict a defendant of the charged crime.” *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013) (quoting *State v. Powell*, 167 Wn.2d 672, 683, 223 P.3d 493 (2009)).

When the defendant does not challenge the charging document until after the verdict, courts “more liberally construe [the document] in favor of validity.” *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). The Courts apply a two-prong test: “(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?” *Id.* at 105-06. With the first prong, essentially the question is “whether all the words used would reasonably apprise an accused of the elements of the crime charged.” *Id.* at 109. Whereas the second prong looks at whether the defendant “actually received notice of the charges he or she must have been prepared to defend against.” *Id.* at 106.

In the case at hand, it is clear the defendant was on notice of the charges. The date is not an essential element of either Rape of a Child in the First Degree or Child Molestation in the First Degree. The essential elements would be the age of the victim and the age

of the defendant at the time of the sexual abuse and whether the charges were filed within the statute of limitations. Clearly the defendant was appraised of the charges and the essential elements of those charges, including that A.B. was born 11/30/2010 and that Lester was 39 at the time of trial. II RP 259, CP 179. It is clear from the record that the defendant's girlfriend babysat A.B. periodically from August 2014 to December 2014. I RP 130, 140. The defendant was aware of this time period as he testified to the history of when he first was introduced to A.B. II RP 261.

The defendant has also failed to demonstrate any prejudice to his asserted defense. In addition to Bishop's testimony and the recorded statements of A.B., there was testimony from Lester himself that during December 2014, there were several days where he did not start work until 7 or 8 a.m., left work early, or did not work at all; all of which would have given him access to A.B. while Lamote babysat. II RP 271-272. Therefore, there was evidence presented to show that the sexual abuse of A.B. was during the time period contained in the charging document.

If the defendant could show some prejudice the date might be sufficient for reversal. However, there was no prejudice. The

defendant's defense was a general denial throughout the case. The defendant elected to proceed upon a theory that he worked a great deal and that he did not spend any time alone with A.B. II RP 263-270. The defendant never expressed a wish to present an alibi defense and one was never presented.

Finally, the Court does not generally treat a technical error in the information as an omission of an element warranting reversal. Technical errors include "the date of the crime." *Bellingham v. Struthers*, 109 Wn.App. 864, 867, 38 P.3d 1021 (2001) (*Citing State v. Vangerpen*, 125 Wn.2d 782, 790, 888 P.2d 1177 (1995)), *review denied*, 146 Wn.2d 1019 (2002). The Court has consistently upheld the convictions despite technical defects in the information. *State v. Hopper*, 118 Wn.2d 151, 160, 822 P.2d 775 (1992).

Therefore, based on the above there is sufficient evidence in the record to show that the crimes occurred during the dates charged. However, in our case, neither of the charges have a specific date as an essential element. RCW 9A.44.073 and RCW 9A.44.083.

3. The community custody conditions imposed by the trial court did not exceed its sentencing authority.

A trial court is authorized to order persons convicted of felony offenses to comply with crime-related prohibitions during the period of community custody following release from total confinement. RCW 9.94A.505(8). "Crime-related prohibitions" 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). Although the conduct prohibited during community custody must be directly related to the crime, it need not be causally related to the crime. *State v. Llamas-Villa*, 67 Wn.App. 448, 456, 836 P.2d 239 (1992). Determining whether a relationship exists between the crime and the conditions "will always be subjective, and such issues have traditionally been left to the discretion of the sentencing judge." *State v Parramore*, 53 Wn.App. 527, 530, 768 P.2d 530 (1989) (quoting David Boemer, *Sentencing in Washington* §4.5 (1985)).

A trial court's imposition of a crime-related prohibition is reviewed for an abuse of discretion. *State v Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). Abuse of discretion occurs when a decision is manifestly unreasonable or exercised on untenable

grounds or for untenable reasons. *State v. Ancira*, 107 Wn.App. 650, 653, 27 P.3d 1246 (2001).

a. Prohibiting Lester from possessing or consuming alcohol or from entering the premises where the primary business is the sale of liquor.

The legislature explicitly authorized the prohibition of alcohol consumption as a condition of community custody without regard to whether alcohol use contributed to the crime. RCW 9.94A.703(3)(e).

It is up to the legislature, not the courts, to authorize punishment of various crimes. *State v. Pillatos*, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007) (“This court has consistently held that the fixing of legal punishment for criminal offenses is a legislative function.” (citation and internal quotation marks omitted)). A trial court only possesses the power to impose sentences provided by law. *State v. Acrey*, 135 Wn.App. 938, 942, 146 P.3d 1215 (2006). Where a court exceeds its sentencing authority as granted by the legislature, it commits reversible error. *E.g.*, *State v. Hale*, 94 Wn.App. 46, 53-54, 971 P.2d 88 (1999). Under RCW 9.94A.703(3)(e), when a sentencing court imposes community

custody, the Washington Legislature has explicitly authorized the court to prohibit the defendant from consuming alcohol.

There is no statutory language that requires the courts' imposition of alcohol prohibition be crime-related. Instead, the language unambiguously permits a court to prohibit consumption of alcohol regardless of whether the offense was related to alcohol. Additionally, Division II has addressed this question and held that a trial court could prohibit a defendant's consumption of alcohol "regardless of whether alcohol had contributed to the offense." *State v. Jones*, 118 Wn.App. 199, 207, 76 P.3d. 258 (2003) ("[W]e hold that the trial court had authority to order Jones not to consume alcohol, despite the lack of evidence that alcohol contributed to his offense.") *see also State v. Acevedo*, 159 Wn.App. 221, 233, 248 P.3d 526 (2010).

b. Prohibiting Lester from contact with minors

Parents have a fundamental right to raise their children without State interference. *In re Custody of Smith*, 137 Wn.2d 1, 15, 969 P.2d 21 (1998) (recognizing a parent's right to rear his or her children without State interference as a constitutionally-protected fundamental liberty interest), *aff'd, Troxel v. Granville*, 530 U.S. 57,

120 S.Ct. 2054 (2000); *see also Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625 (1923). However, parental rights are not absolute and may be subject to reasonable regulation. *Price v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438 (1944).

Prevention of harm to children is a compelling state interest. *In re Dependency of C.B.*, 79 Wn.App. 686, 690, 904 P.2d 1171 (1995). The State is obligated to intervene and protect a child when a parent's "actions or decisions seriously conflict with the physical or mental health of the child." *In re Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980). Limitations on fundamental rights are constitutional only if they are "reasonably necessary to accomplish the essential needs of the state." *State v. Riles*, 135 Wn.2d 326, 350, 957 P.2d 655 (1998). The fundamental right to parent can be restricted by a condition of a criminal sentence if the condition is reasonably necessary to prevent harm to the child. *State v. Letourneau*, 100 Wn.App. 424, 439, 997 P.2d 436 (2000). Here, the record supports the proposition that prohibiting Lester from unsupervised contact with his biological child is reasonably necessary to protect the child from harm by Lester.

Where there is no relation between the crime victim and the trial court's crime-related prohibition at sentencing, imposition of such a prohibition constitutes an abuse of discretion. *State v. Riles*, 135 Wn.2d 326, 349-52, 957 P.2d 655 (1998). *abrogated on other grounds, State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010). In *Riles*, one of the defendants was convicted of raping a 19-year-old woman. 135 Wn.2d at 349. The trial court ordered the defendant not to have contact with "any minor-aged children." *Id.* The Washington Supreme Court found the record did not show that minors were at risk and required special protection from the defendant. *Id.* As a result, the Court struck that condition of his sentence. *Id.*

Unlike *Riles*, where the defendant was convicted of raping an adult and the record contained no evidence that the defendant was a threat to minors, in this case, there is a direct factual connection between the crime and the no contact with minor conditions. Lester was convicted of Rape of a Child in the First Degree and Child Molestation in the First Degree. II RP 317, CP 58. The victim, A.B., was a young child at the time of the sexual abuse and at the time of trial. Therefore, the trial court's imposition

of a no-contact order with minors as a condition of his sentence is a crime-related prohibition directly related to the crime.

Trial courts may impose orders prohibiting contact with a defendant's minor biological children even when those children are not the victim of his crime. *State v. Berg*, 147 Wn.App. 923, 198 P.3d 529 (2008). In *Berg*, the defendant was convicted of Rape of a Child in the Third Degree and two counts of Child Molestation in the Third Degree. 147 Wn.App. at 930. The 14-year-old victim was not Berg's biological daughter, but the daughter of a woman Berg lived with and with whom Berg had a 2-year-old daughter. *Id.* at 926. At sentencing, the trial court prohibited Berg from having contact with all female minors unless supervised by a responsible adult who has knowledge of the conviction. *Id.* at 930. The Court of Appeals affirmed the order prohibiting contact, holding that an order restricting contact with other female children who lived in the home was reasonable to protect those children from the same type of harm that befell the victim. *Id.* at 944. In support of its holding, the Court of Appeals noted that Berg lived with the victim and committed the abuse in the home. *Id.* at 944.

The Court of Appeals has affirmed similar orders prohibiting contact in other cases. *State v. Corbett*, 158 Wn.App. 576, 242 P.3d 52 (2010). In *Corbett*, the defendant was convicted of four counts of Rape of a Child in the First Degree for offenses against his stepdaughter. 158 Wn.App. at 582-86. The trial court ordered the defendant have no contact with minors without prior approval of a Department of Corrections Community Custody Officer. *Id.* at 586. The Court of Appeals affirmed the order prohibiting contact with Corbett's biological children regardless of gender, in part because the offenses occurred in his home while he was parenting the victim. *Id.* at 600.

In this case, the order prohibiting unsupervised contact with minors, including Lester's biological child, is reasonably necessary to prevent harm to that child as A.B. was a very young child when this sexual abuse occurred in Lester's home.

The prohibition in this case is also narrowly tailored to serve the State's compelling interest in protecting children. The no-contact order in this case is not a blanket prohibition. Rather, the order authorizes Lester to have contact with children if it is supervised by an adult who has been approved by the Community

Corrections Officer and Sex Offender Treatment Provider. Lester is only prevented from having unsupervised contact with minors. In light of the facts of this case, the condition is narrowly tailored to mitigate the impact on Lester's right to parent while still furthering a compelling State interest of prevention of harm to children.

To prevail on appeal, the defendant must prove that no reasonable person would have taken the position adopted by the trial court. *State v. Robtoy*, 98 Wn.2d 30, 42, 653 P.2d 284 (1982). The limited restrictions here directly related to the circumstances of the crime and were reasonably necessary to further the State's compelling interest in protecting children. *See City of Sumner v. Walsh*, 148 Wn.2d 490, 503, 61 P.3d 1111 (2003) (State has a compelling interest in protecting children from becoming victims of crime). The defendant has failed to show that the sentencing court abused its discretion. Therefore, based on the foregoing, these community custody conditions should be upheld as the Appellant has failed to meet the burden of proof to show abuse of discretion.

4. The objections to appeal costs and cost bill are premature.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wash.2d 230, 234, 930 P.2d 1213 (1997); *State v. Mahone*, 98 Wash.App. 342, 989 P.2d 583 (1999). The award of appellate costs to a prevailing party is within the discretion of the appellate court. RAP 14.2; *State v. Nolan*, 141 Wash. 2d 620, 8 P.3d 300 (2000).

In *Nolan*, 141 Wash.2d 620, as in most of other cases discussing the award of appellate costs, the defendant began review of the issue by filing an objection to the State's cost bill. *Nolan*, 141 Wash. 2d at 622. As suggested by the Supreme Court in *Blank*, 131 Wash. 2d at 244, this is an appropriate manner in which to raise the issue. The procedure invented by Division I in *State v. Sinclair*, 192 Wash. App. 380, 389–390, 367 P.3d 612, *review denied*, 185 Wash. 2d 1034, 377 P.3d 733 (2016), prematurely raises an issue that is not before the Court. *If* the defendant does not prevail; and *if* the State files a cost bill, the defendant can argue regarding the Court's exercise of discretion in an objection to the cost bill.

If appellate costs are imposed, the Legislature has provided a remedy in the same statute that authorizes the imposition of costs. RCW 10.73.160(4) provides:

A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment may at any time petition the court that sentenced the defendant or juvenile offender for remission of the payment of costs or of any unpaid portion. If it appears to the satisfaction of the sentencing court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the sentencing court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

The defendant argues that the Court should not impose costs on indigent defendants. However, through the language and provisions of RCW 10.73.160, the Legislature has demonstrated its intent that indigent defendants contribute to the cost of their appeal. This is not a new policy.

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In 1976, the Legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. *Id.*, .160(2). In *State v. Barklind*, 87 Wash. 2d 814,

814, 557 P.2d 314 (1976), the Supreme Court held that requiring a defendant to contribute toward paying for appointed counsel under this statute did not violate, or even “chill” the right to counsel. *Barklind*, 87 Wash. 2d at 818.

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. In *Blank*, 131 Wash. 2d 230, the Supreme Court held this statute constitutional, affirming this Court’s holding in *State v. Blank*, 80 Wash. App. 638, 641–642, 910 P.2d 545 (1996), *aff’d*, 131 Wash. 2d 230, 930 P.2d 1213 (1997).

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burden of persons convicted of crimes, the Legislature has yet to show any sympathy.

In *State v. Blazina*, 182 Wash. 2d 827, 344 P.3d 680 (2015), the Supreme Court interpreted the meaning of RCW 10.01.160(3). As *Blazina* instructed, trial courts should carefully consider a

defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, *Blazina* does not apply to appellate costs. As *Sinclair* points out at 389, the Legislature did not include the "individual financial circumstances" provision in RCW 10.73.160. Instead, it provided that a defendant could petition for the remission of costs on the grounds of "manifest hardship". See RCW 10.73.160(4).

The Legislature's intent that indigent defendants contribute to the cost of representation is also demonstrated in RCW 10.73.160(4), above, which permits a defendant to petition for remission of part or all of the appellate costs ordered. In *Blank*, 131 Wash. 2d 230, the Supreme Court found that this relief provision prevented RCW 10.73.160 from being unconstitutional.

Not only does the Legislature intend indigent defendants to contribute to the costs of their litigation, the Legislature has decided that the defendants should pay interest on the debt. RCW 10.82.090(1) provides that such legal debts shall bear interest at the rate applicable to civil judgments, which is found in RCW 4.56.110. This can be as much as 12%. *Blazina*, 182 Wash. 2d 827. RCW 10.82.090(2) establishes a means for defendants to obtain some relief from the interest, much as the cost remission

procedure in RCW 10.73.160(4). But, the limits included in statutory scheme show that the Legislature intends that even judgments on defendants serving prison sentences accrue interest:

(2) The court may, on motion by the offender, following the offender's release from total confinement, reduce or waive the interest on legal financial obligations levied as a result of a criminal conviction...

RCW 10.82.090. The rest of the "relief" is equally limited and demonstrative of the Legislature's intent and presumption that the debts be paid:

- (a) The court shall waive all interest on the portions of the legal financial obligations that are not restitution that accrued during the term of total confinement for the conviction giving rise to the financial obligations, *provided the offender shows that the interest creates a hardship for the offender or his or her immediate family*;
- (b) The court may reduce interest on the restitution portion of the legal financial obligations only if the principal has been paid in full;
- (c) The court may otherwise reduce or waive the interest on the portions of the legal financial obligations that are not restitution *if the offender shows that he or she has personally made a good faith effort to pay and that the interest accrual is causing a significant hardship. For purposes of this section, "good faith effort" means that the offender has either (i) paid the principal amount in full; or (ii) made at least fifteen monthly payments within an eighteen-month period, excluding any payments mandatorily deducted by the department of corrections*;
- (d) For purposes of (a) through (c) of this subsection, the court may reduce or waive interest on legal financial obligations *only as an incentive for the offender to meet his or her legal financial obligations*. The court may grant the motion, establish a payment schedule, and retain jurisdiction

over the offender for purposes of reviewing and revising the reduction or waiver of interest.

RCW 10.82.090(2)(emphasis added). This is not some legislative relic of the past. It was enacted in 1989, after RCW 9.94A, the Sentencing Reform Act, and most recently amended in 2015.

Most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes “recoupment of fees for court-appointed counsel”. Obviously, all these defendants have been found indigent by the court. If the Court decided on a policy to excuse every indigent defendant from payment of costs, such a policy would, in effect, nullify RCW 10.73.160(3).

The question for the Court is not whether the Legislative intent or result of these laws is wise or even fair. The question is: are these laws legal or constitutional? Those questions were settled in the affirmative by the Supreme Court in *Blank*, and what the Court did *not* do in *Blazina*. It is for the Legislature to change the statute if it so desires.

D. CONCLUSION

First, if the Court has any uncertainty from the record of the recorded interview of A.B. and whether the Prosecutor, Karl Sloan, was present at the interview, the State would request a reference hearing to clarify the record.

Next, for the foregoing reasons above the State respectfully requests that Lester's convictions be affirmed, his appeal be denied, and that the community custody conditions imposed by the trial court be upheld.

Finally, the defendant's argument regarding costs is premature.

Dated this 2nd day of November 2017.

Respectfully Submitted by:



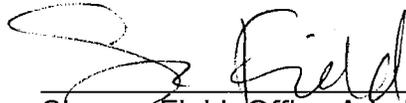
MELANIE R BAILEY, WSBA #38765
Okanogan Criminal Deputy Prosecutor
Attorney for Respondent

PROOF OF SERVICE

I, Shauna Field, do hereby certify under penalty of perjury that on the 2nd day of November, 2017, I provided email service to the following by prior agreement (as indicated), a true and correct copy of the Brief of Respondent:

E-mail: Andrea@2arrows.net

Andrea Burkhart
Two Arrows, PLLC
PO Box 1241
Walla Walla, WA 99362



Shauna Field, Office Administrator

BRANDEN E. PLATTER
Okanogan County Prosecuting Attorney
P. O. Box 1130 • 237 Fourth Avenue N.
Okanogan, WA 98840
(509) 422-7280 FAX: (509) 422-7290

OKANOGAN COUNTY PROSECUTING ATTORNEY'S OFFICE

November 02, 2017 - 2:42 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 34806-7
Appellate Court Case Title: State of Washington v. Philip Nolan Lester
Superior Court Case Number: 15-1-00009-6

The following documents have been uploaded:

- 348067_Briefs_20171102143729D3596004_4186.pdf
This File Contains:
Briefs - Respondents
The Original File Name was 11.2.17 Brief of Respondent.pdf

A copy of the uploaded files will be sent to:

- Andrea@2arrows.net
- bplatter@co.okanogan.wa.us

Comments:

Sender Name: Shauna Field - Email: sfield@co.okanogan.wa.us

Filing on Behalf of: Melanie R Bailey - Email: mbailey@co.okanogan.wa.us (Alternate Email: sfield@co.okanogan.wa.us)

Address:
PO Box 1130
Okanogan, WA, 98840
Phone: (509) 422-7288

Note: The Filing Id is 20171102143729D3596004