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No. 35294-3-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

JOHNNY TALBERT, JR.,

Appellant

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

NO. 15-1-01359-2

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The trial court properly excluded irrelevant evidence, or otherwise properly exercised its discretion in ruling on admission of interview recording.
- B. The trial court properly instructed the jury prior to and during deliberations.
- C. The State concedes the defendant's third assignment of error regarding community custody conditions 8, 9, 10, and 15.

II. STATEMENT OF FACTS

On November 20, 2015, J.Q. was an eight-year-old female third-grader. RP¹ at 122; Ex. 17 at 2. On that date, she was called to the school counselor's office to discuss some "concerning things" the counselor heard from one or more other students. RP at 122-23. When J.Q. arrived, the school counselor asked J.Q. about the concerning information, and J.Q. stated that her stepfather, later identified as Johnny Talbert, Jr., had "licked [her] pussy." RP at 124.

The school counselor reported the incident to Child Protective Services, and law enforcement was quickly notified. RP at 127, 143. On November 25, 2015, J.Q. spoke with a child forensic interviewer. RP at 187. During that interview, J.Q. described several instances of sexual

interaction with the defendant between two addresses in Benton City: 1106 Ida Street (frequently referred to as “Peach House” in the record), and 1203 Fig Street (similarly, the “Red House” in the record). Ex. 17 at 23-27; RP at 152, 187-89, 332. During the forensic interview, J.Q. specifically described a pornographic video that the defendant showed her, which depicted six females performing oral sex on one another. Ex. 17 at 34-35.

On November 25, 2015, the defendant willingly submitted to questioning by law enforcement regarding the allegations, at which point he was told for the first time that he was the suspect of the investigation. RP at 464. Following the interview, the defendant was taken into custody and ultimately charged with one count of Rape of a Child in the First Degree, RCW 9A.44.703, and two counts of Child Molestation in the First Degree, RCW 9A.44.083, all charged with the aggravating circumstance allegation of Position of Trust, RCW 9.94A.535(3)(n). CP 7-9.

As part of the investigation, police obtained and executed a search warrant on November 27, 2015, for the current residence of the defendant, 1203 Fig Street. RP at 152-53. During the search, a hard drive connected to a television was recovered and eventually analyzed by a qualified investigator. RP at 384. Among several adult videos on the hard drive, the

¹ Unless otherwise indicated, RP refers to the verbatim report of proceedings of trial on

investigator identified a video very similar to the one described by J.Q. during her November 25, 2015, interview with the child forensic investigator. RP at 385.

Several months later at trial—when J.Q. was 10 years old—she described several acts she had performed with the defendant, to include descriptions of the following:

- touching and digital penetration of her vagina by the defendant (RP at 405);
- the defendant rubbing her vagina with his penis (RP at 407);
- the defendant penetrating her vagina with his penis (*id.*);
- J.Q. masturbating the defendant (RP at 408-09);
- witnessing the defendant's erect penis following her touching it (*id.*);
- the defendant masturbating himself while on top of J.Q. (RP at 410);
- the defendant licking J.Q.'s vagina (*id.*);
- something like semen coming from the penis of the defendant (*id.*);
- J.Q. cleaning this substance off her body with a wet rag (*id.*); and
- the defendant exposing J.Q. to pornographic material (RP at 412).

February 13, 15, 16, and 17, 2017.

With these descriptions, J.Q. was able to give extensive and very specific tactile details which could only reasonably come from personal experience. J.Q. also described at least three different locations where these sexual incidents occurred—the couch, the kitchen, and the bedroom. RP at 405-12. All acts were alleged to have occurred during the time that the defendant lived with J.Q.’s mother, which ended on or about November 25, 2015. RP at 352.

At trial, the defendant’s direct examination included a potential explanation for the accusations (i.e., J.Q.’s allegations were retaliation because the defendant had recently threatened to kick J.Q. and her mother out of his home). RP at 463, 468. Specifically, defense counsel asked on direct examination, “[c]ould you then or could you now come up with any reason, other than being faced with moving out, as to why [J.Q.] would say that?” RP at 468. The defendant replied that he could not think of any reason. *Id.* The defendant stated that the testimony he gave at trial was consistent with his interview with police. RP at 485-86.

On cross-examination, the State impeached the defendant’s testimony by showing several inconsistencies with statements he made to law enforcement, specifically, whether he was left alone with J.Q. while her mother ran errands and whether he told law enforcement about another collection of pornography in the home. RP at 472, 474-76. When asked,

the defendant stated that he could not remember if he was given the opportunity to explain why J.Q. would say these things. RP at 476-77. The State continued to impeach the defendant by presenting instances where he was indeed offered such an opportunity. RP at 476-82.

On redirect, defense counsel attempted to introduce the entire recording while traveling under a theory of admissibility arising from ER 801(d)(1)(ii). RP at 486-87. The State objected on the grounds of hearsay, and the trial court sustained the objection and ruled that ER 801 operated differently for defendants as proponents of statements, that no charge of recent fabrication had been made, and there was no showing that the recorded interview would show a prior consistent statement. RP at 485-91.

Following the jury trial, the defendant was found guilty on all counts, and a judgment of conviction entered. CP 69-80; RP at 592-94.

III. ARGUMENT

A. Double jeopardy and jury instructions.

1. **Considering the evidence, arguments, instructions, and special verdict form, it was manifestly apparent that the State was not seeking to impose multiple convictions for the same offense.**

State v. Mutch, 171 Wn.2d 646, 663-64, 254 P.3d 803 (2011), dealt with a similar issue and held that even with an unanimity instruction, the jury should also be advised that they must unanimously

agree that at least one particular act has been proved beyond a reasonable doubt for each count. Jury instructions that did not include distinct “to convict” instructions, or instructions that failed to demand that each count be based on separate and distinct acts, were not sufficient to ensure that it was manifestly apparent to the jury that the State was seeking punishment for separate acts. *Id.* at 663. “A unanimity instruction is adequate if it complies with the *Petrich* mandate to ensure jury unanimity,” and the question is not whether there is a possible different interpretation of the instruction, “but whether the ordinary juror would so interpret it.” *State v. Moultrie*, 143 Wn. App. 387, 393-94, 177 P.3d 776 (2008) (citing to *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984)). Such a test is an objective analysis of the instructions and whether they could be understood by the average juror. *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996); *State v. Cantabrana*, 83 Wn. App. 204, 208, 921 P.2d 572 (1996).

The jury instructions stated that “[a] separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.” CP 21; WPIC 3.01. The court gave separate instructions for all counts. CP 31, 32, 33. The jury was instructed that they must unanimously agree that only one particular act was the basis for Count I. CP 29. The jury was also

instructed that the particular act underlying a conviction for Rape of a Child in the First Degree could not also form the basis for the other counts. CP 30. The jury was further instructed that though the State alleged multiple acts of Child Molestation in the First Degree on multiple occasions, in order “[t]o convict the defendant on any count of Child Molestation in the First Degree, one particular act of Child Molestation in the First Degree must be proved beyond a reasonable doubt, and [the jury] must unanimously agree as to which act has been proved.” CP 30. The jury was provided with three separate verdict forms for each count, as well as three special verdict forms for the aggravating circumstances of each charge. CP 42-47. Shortly after the commencement of deliberations, the jury passed a question to the trial court regarding multiple counts of Child Molestation in the First Degree, and how they are to handle those counts. CP 48; RP at 588-90. With the agreement of both counsel, the trial court referred the jury back to the instructions as given. RP at 589. The jury made no further inquiries before returning a unanimous verdict.

Here, the jury instructions meet the requirement that it was manifestly apparent that the State was seeking multiple punishments for separate acts. The jury was instructed that they must be unanimous *on any other count* that one particular act of sexual intercourse occurred for Count

I, Rape of a Child in the First Degree. The jury was told that if they found the defendant guilty of Count I—which they could only do if they unanimously found a particular act of sexual intercourse—it would not control the other counts of Child Molestation in the First Degree. They were given separate “to-convict” instructions for each count. The jury was given an instruction on how to square multiple counts of Child Molestation in the First Degree with multiple alleged acts on multiple occasions.

Furthermore, the evidence supported three occasions, one of which included an alleged act of rape, and the other two alleged acts of molestation. J.Q. testified to three separate locations at potentially two separate addresses, and testified to different kinds of acts on these three encounters. Though there is some similarity to the acts that underpin the molestation charges, and some confusion on dates and locations by a child-witness, there was nevertheless sufficient clarity from the testimony that there were at least two different episodes of molestation, and one episode of rape.

It is very difficult to see how an average juror could conclude from these instructions that they could convict the defendant for two counts of Child Molestation in the First Degree based on the same act. The defendant’s argument that the question asked by the jury indicated that

they did not understand the instructions illustrates a misunderstanding of the “manifestly apparent” test, as the subjective understanding of the jurors in this matter is irrelevant to a test that is an objective look at what an *average* juror would conclude. In fact, a nearly identical instruction was held to have been manifestly apparent such that the average juror would not misinterpret the instruction. *Moultrie*, 143 Wn. App. at 393.

Even if jury instructions are found to have been deficient, the reviewing court may look to the entire record, including the evidence, arguments, and verdict forms, to determine “if it is not clear that it was ‘*manifestly apparent* to the jury that the State [was] not seeking to impose multiple punishments for the same offense’ and that each count was based on a separate act, there is a double jeopardy violation.” *Mutch*, 171 Wn.2d at 664 (quoting *State v. Berg*, 147 Wn. App. 923, 931, 198 P.3d 529 (2008)).

The State’s closing argument made clear that three separate charges were brought, and therefore three separate and distinct acts must underpin each of those charges. The State emphasized that an act of digital penetration that is possibly underpinning the Rape of a Child in the First Degree could not form the basis for a finding of guilt for “one of his child molestations.” RP at 529. Further illustrating this point, the State continued to say that an act of oral sex could be rape, but if so, the jury

cannot thereafter “use the count of rape to also find him guilty of a child molestation.” *Id.* The instructions were sufficiently clear, and such clarity was further buttressed by the entire record, to include the State’s closing argument, the evidence adduced at trial, and the verdict forms.

Although there was a question early in deliberations specifically about how to handle identical counts, the instructions were nevertheless very clear, and it was manifestly apparent that these were to be separate acts; therefore, it was proper to refer the jury back to the instructions rather than complicate them with additional instruction. *See State v. Melendrez*, No. 72210-7-I, 2015 WL 9462045, at *8-9 (Div. I Dec. 28, 2015) (unpublished) (attached as App. A) (discussing trial court fielding jury questions during deliberations regarding a nearly identical *Petrich* instruction). This is an unpublished opinion of the Washington Court of Appeals, Division I, and has no precedential value, is not binding on any court, and is cited only for such persuasive value as the Court deems appropriate. GR 14.1; *Crosswhite v. Wash. State Dep’t of Soc. and Health Servs.*, 197 Wn. App. 539, 389 P.3d 731 (2017). Once the jury was directed to the instructions as given, they asked no further questions regarding the multiple counts and returned a unanimous verdict. Given the instructions, evidence, closing arguments, and special verdict forms, it is

clear the jury could only conclude that separate acts were charged in Counts I, II, and III.

B. Sixth Amendment and the exclusion of interview recording.

The defendant argues that a separate set of evidentiary rules applies to this circumstance because it implicated his Sixth Amendment rights. *See generally Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). Though *Washington v. Texas* was a landmark case for the expansion of the Sixth Amendment, the Supreme Court has ruled that it does not reach to all classes of evidence to change the rules of admissibility. *See, e.g., Nevada v. Jackson*, 569 U.S. 505, 511, 133 S. Ct. 1990, 186 L. Ed. 2d 62 (2013) (holding that the admission of some impeachment evidence “may confuse the jury, unfairly embarrass the victim, surprise the prosecution, and unduly prolong the trial. No decision of this Court clearly establishes that the exclusion of such evidence for such reasons in a particular case violates the Constitution.”). Indeed, there is no constitutional right to irrelevant evidence regardless of what admissibility standards apply. *State v. Gregory*, 158 Wn.2d 759, 786 n.6, 147 P.3d 1201 (2006), *overruled on other grounds by State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014). Evidence of a prior consistent statement is irrelevant without a present *inconsistent* statement to contrast,

or further, an implied or express charge of fabrication to rebut. ER 802; ER 801(d)(1)(ii); ER 401; ER 402.

Despite the defendant's argument on appeal, the present case is easily distinguishable from *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010). *Jones* involved an evisceration of an entire available defense of consent by the trial court ruling such evidence inadmissible. *Id.* at 724-25. The evidence in *Jones* was highly probative on a material issue in that case, and highly probative of an affirmative defense. *Id.* at 721. Here, the proposed hearsay statements go to what is at best a collateral issue of consistency, if one even existed, and can hardly be said to be on the same level of the excluded evidence in *Jones*. Rather, there was a prior omission, which by its very nature cannot be inconsistent with trial testimony. Furthermore, there was no charge of recent fabrication, nor could there have been a statement in the proffered portions of the interview that would have been a prior consistent statement rebutting a hypothetical charge of recent fabrication.

1. A prior omission is not a basis for inconsistency.

Inconsistency is not shown by differing words or phrases alone, but by the whole impression or effect of the two compared statements. *Sterling v. Radford*, 126 Wash. 372, 218 P. 205 (1923). An omission may be admissible for impeachment purposes. *State v. Burke*, 163 Wn.2d 204,

219, 181 P.3d 1 (2008). Although, failing to recall every detail of an event during an interview with law enforcement is not per se an inconsistency.

Id.

The logic is that a defendant who is selectively remembering a previous statement impugns his own veracity before the jury while remaining “consistent.” Here, the defendant testified that his trial testimony was consistent with the statements he initially gave to law enforcement. The State illustrated several instances where the defendant omitted the possible explanation. That the defendant could not recall every detail of the conversation with law enforcement, but had testified that the trial testimony and the substance of his previous interview were consistent, was proper impeachment but did not show that the statements were inconsistent.

2. The trial court properly found there was no charge of recent fabrication.

A trial court’s discretion to find implied charge of recent fabrication will not be overturned without a showing of manifest abuse of discretion. *State v. Makela*, 66 Wn. App. 164, 831 P.2d 1109 (1992). A trial court abuses its discretion if its decision is based on untenable grounds or for untenable reasons. *State v. Lawrence*, 166 Wn. App. 378, 385, 271 P.3d 280 (2012). A claim of recent fabrication may be implied or

express. *State v. Thomas*, 150 Wn.2d 821, 866, 83 P.3d 970 (2004).

Impeachment by showing inconsistency in a witness's statement does not alone make an implied charge of recent fabrication. *State v. Braniff*, 105 Wash. 327, 177 P. 801 (1919); *State v. McWilliams*, 177 Wn. App. 139, 148, 311 P.3d 584 (2013). To constitute an express or implied charge of recent fabrication, the cross-examination or impeachment of a witness "must raise an inference sufficient to allow counsel to argue the witness had a reason to fabricate [the] story later." *State v. Bargas*, 52 Wn. App. 700, 702-03, 763 P.2d 470 (1988).

The State focused solely on the defendant's veracity during trial testimony and was attempting to impeach the defendant witness. Following the defendant testifying that he did not recall being given an opportunity to explain J.Q.'s allegations to the police, the State impeached the witness by showing that he was indeed given multiple opportunities and repeatedly said he did not know why J.Q. would say these things. RP at 477-87. The defendant testified on direct that he could not explain J.Q.'s allegations—either at the time of his police interview or in his present trial testimony—other than with the theory that J.Q. was doing this because the defendant threatened to evict her and her mother. RP at 468. The State then showed that he had presented a possible explanation to the police that was different from his trial testimony. RP at 480-81. In a side

bar, the State pointed out that the prior omission could reasonably be explained by the defendant now being removed from the immediate stress of the fresh allegations. RP at 490. This prior omission is not an inconsistent statement and therefore could not have constituted a recent fabrication, let alone a charge of one.

It was made clear that the defendant attempted to color his testimony in a more favorable fashion, while stating that he had never changed his story throughout the entire investigation and trial. While the defendant's testimony appears to have remained substantially consistent with the interview, the State successfully presented to the jury limited evidence that the defendant's veracity on the stand should be questioned, without implying a charge of recent fabrication.

3. There could not have been a prior statement in the interview that would properly rebut a potential charge of recent fabrication.

If cross-examination gives rise to an inference that the witness has altered a previous story in response to an external pressure, then a consistent statement made *before* that external pressure becomes highly probative of the witness's veracity. *Thomas*, 150 Wn.2d at 865. It is upon the proponent of a statement to show that the witness made the prior statement before the motive to fabricate arose. *Id.*; *State v. Ellison*, 36 Wn. App. 564, 569, 676 P.2d 531 (1984). Such statements must have been

made when a witness was unlikely to have foreseen the legal consequences of the statements. *Makela*, 66 Wn. App. at 168-69.

Here, all prior statements at issue were captured in the law enforcement interview after the defendant had been informed of the allegations against him. He was specifically made aware at the outset of the interview that the allegations involved his misconduct. Therefore, every statement at issue occurred after the defendant had considerable pressure to alter a previous story to outrun a rape and molestation investigation. Therefore, there could not reasonably have been a prior statement in the interview the defense sought to introduce that would rebut an alleged charge of recent fabrication.

4. Rule of Completeness does not save defendant's objection.

The remainder of a recorded statement or writing that would otherwise be inadmissible may be introduced if they “ought in fairness to be considered contemporaneously with [the admitted portion].” ER 106. However, “the trial judge need only admit the remaining portions of the statement which are needed to clarify or explain the portion already received.” *State v. Larry*, 108 Wn. App. 894, 910, 34 P.3d 241 (2001) (quoting *United States v. Haddad*, 10 F.3d 1252, 1258 (7th Cir. 1993) (discussing similar federal rule)). A trial court does not abuse its discretion

if there is an insufficient or no explanation as to how the statements made prior to trial related to the trial testimony. *State v. Simms*, 151 Wn. App. 677, 692-93, 214 P.3d 919 (2009).

Here, the trial court invited explanation as to how the prior statements related to the cross-examination. RP at 487-89. In response, defense counsel only offered that they were related to the portions of the interview introduced by the State without offering a reason as to how or why they were relevant. RP at 487-91. Hearing no explanation of relevancy of the entire recording, the trial court properly denied the admission of the entire recording. RP at 490-91.

5. This was proper impeachment under ER 613(b).

“A witness may be impeached as to their credibility by a prior inconsistent statement.” *State v. Garland*, 169 Wn. App. 869, 885, 282 P.3d 1137 (2012) (citing *State v. Classen*, 143 Wn. App. 45, 59, 176 P.3d 582 (2008)). Impeachment is evidence solely going to the witness’s truthfulness. *Burke*, 163 Wn.2d at 219. This rule applies with equal force to testifying criminal defendants. *State v. Johnson*, 53 Wn.2d 666, 670, 335 P.2d 809 (1959). Impeachment by prior statements utilizes hearsay that would otherwise be inadmissible, and such evidence is not substantive evidence. *See State v. Sua*, 115 Wn. App. 29, 48-49, 60 P.3d 1234 (2003).

Here, the State successfully attacked the veracity of the defendant's trial testimony by impeaching the defendant with hearsay. Though this evidence could have been admitted for substantive purposes under ER 801(d)(2), the State emphatically stated the purpose of the cross-examination was impeachment. RP at 487. Though no limiting instruction was given regarding the non-substantive purpose of the evidence, none was requested. RP at 487-92. Furthermore, the State never argued the impeachment evidence as substantive evidence in closing arguments, or even mentioned this "fabrication." RP at 526-49, 571-73.

6. There was no abuse of discretion.

Because the trial court ruled on this evidentiary matter consistent with the rules of evidence and pertinent case law, the defendant is unable to make a showing that the trial court had abused its discretion at any point in ruling on the admissibility of the full transcript. To include some prior statements for the purposes of ER 613 or ER 801(d)(2), and to exclude other statements as offered by the defendant under ER 801(d)(1) and ER 106, is not a ruling made on untenable grounds or for untenable reasons.

For the foregoing reasons, the defendant was not denied any right guaranteed by the United States and Washington State constitutions.

C. Community custody conditions.

1. Conditions 8, 9, and 10.

The State concedes argument on the following community custody conditions:

- 8) Do not possess or view material that includes images of nude women, men and/or children;
- 9) Do not possess or view material that includes images of children wearing only undergarments and/or swimsuits;
- 10) Do not attend X-rated movies, peep shows, or adult book stores.

CP 82; *see* Br. of Appellant at 41-48.

2. Condition 15: “Inform the Community Corrections Officers of any romantic relationships to verify there are no minor aged children involved.”

A number of unpublished opinions by the Washington Court of Appeals have found the term “romantic” in similar conditions to be an unconstitutionally vague though inescapable part of the human condition. *See, e.g., State v. Dickerson*, 194 Wn. App. 1014, ¶18, 2016 WL 3126480 (2016) (unpublished) (attached as App. B) (no precedential value; cited only for such persuasive value as the Court deems appropriate; GR 14.1; *Crosswhite*, 197 Wn. App. 539); *see also, e.g., WOLFGANG AMADEUS MOZART, THE MARRIAGE OF FIGARO* (1786), JANE AUSTEN, *MANSFIELD*

PARK (Thomas Egerton, 1814), WHEN HARRY MET SALLY (Columbia Pictures 1989), and HE'S JUST NOT THAT INTO YOU (Flower Films 2009).

The State concedes any argument as to the phrasing of this condition and would suggest that the Court remand for resentencing with directions to impose the following condition as replacement: "Inform the supervising CCO and sexual deviancy treatment provider of any dating relationship. Disclose sex offender status prior to any sexual contact. Sexual contact in a relationship is prohibited until the treatment provider approves of such."

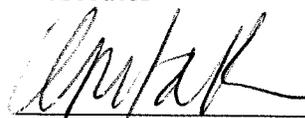
IV. CONCLUSION

Based on the foregoing, the State respectfully requests that this Court find the trial court committed no error and uphold the jury trial's finding of guilt. The State concedes argument on community custody conditions 8, 9, and 10 and requests the Court remand to modify community custody conditions as previously set forth.

RESPECTFULLY SUBMITTED on May 11, 2018.

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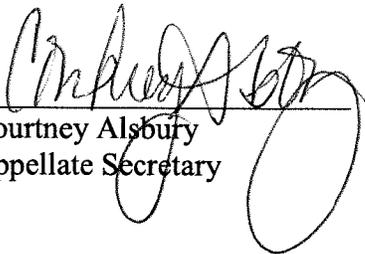
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on May 11, 2018.



Courtney Alsbury
Appellate Secretary

Appendix A

State v. Melendrez, No. 72210-7-I, 2015 WL 9462045
(Div. I Dec. 28, 2015) (unpublished opinion)

192 Wash.App. 1002

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NOTE: UNPUBLISHED OPINION,
SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 1.

STATE of Washington, Respondent,

v.

Vincent Paul MELENDREZ, Appellant.

No. 72210-7-I.

|

Dec. 28, 2015.

Attorneys and Law Firms

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Seattle, WA, for Respondent.

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UNPUBLISHED OPINION

LEACH, J.

*1 Vincent Melendrez appeals his convictions for child rape, incest, and witness tampering. Primarily, he raises constitutional and foundational challenges to the trial court's evidentiary rulings. The trial court's decisions about evidence did not violate Melendrez's right to present a defense or his privilege against self-incrimination. Because Melendrez's numerous other arguments also lack merit, we affirm.

FACTS

Substantive Facts

After Vincent Melendrez and his wife divorced in 2007, he raised their seven children in western Washington. R.M. is his oldest child, followed by two boys, W.M. and D.M. The family changed residences every year or so. For two long periods, they lived in Bremerton with Melendrez's brother Charlie and mother, Guadalupe. Melendrez began working nights at Microsoft in 2008.

In November 2010, the family moved into the Windsor Apartments in Renton.

Melendrez was a strict father. He set three rules for his family: never lie to or betray him, love each other, and defend the family. He posted a schedule on the refrigerator that governed his children's days. If they wanted to have friends over, Melendrez insisted he meet the friends first. When his children misbehaved by talking back, sneaking out, or having friends over without permission, Melendrez punished them physically, sometimes hitting them with a belt.

R.M. testified her father began having sex with her in 2008, when she was 12 or 13 and the family lived at Charlie's house in Bremerton. She described the first incident, during which she said Melendrez showed her pornography, put his mouth on her vagina, and had vaginal intercourse with her. She testified that Melendrez had sex with her regularly between 2008 and 2011. She said that her brothers, W.M. and D.M., found her naked in bed with Melendrez in January 2009, then told her grandmother, Guadalupe, what they saw. R.M. said Guadalupe told her, "You need to push him away" and "Don't say anything because you don't want to get the family in trouble." W.M., D.M., and Guadalupe contradicted R.M.'s testimony, saying these events never happened.

R.M. testified that Melendrez became more controlling after he began having sex with her, rarely letting her leave the house. She said sex became more frequent after the family moved to Renton and that her father virtually moved her into his bedroom.

R.M. told D.M. in early 2009 that she and her father "did it." When D.M. confronted Melendrez about it, he denied it. Afterward, Melendrez forced R.M. to retract her claim in front of the family. After this incident, R.M. told W.M. two more times that her father was raping her. She also told a friend. On Thanksgiving 2010, R.M. left her house and stayed at the friend's house for three days. She refused to return home. During that time, she told the friend that her father had been having sex with her. Melendrez persuaded R.M. by phone to return home to collect her things. When she arrived, he pulled her inside and slammed the door. As punishment for running away, Melendrez removed R.M. from public high school and enrolled her in online classes. She remained in online

school until the next school year began in September 2011, when he allowed her to return.

*2 R.M. continued living at home. That August, Melendrez found pictures of naked people on her phone. He grounded her and threatened to prevent her from returning to high school. Then on October 3, 2011, the manager of the family's apartment complex found R.M. and a 16-year-old boy engaging in oral sex in a common restroom. When the manager notified Melendrez, he appeared to take the news calmly. But R.M. testified that Melendrez then beat her, made her face bleed, shoved soap in her mouth, and called her a whore. She said Melendrez imprisoned her in his room for all of October 4, blocking the door with an ironing board, a mattress, and a shoe. R.M. testified that she had nothing to eat until her brothers arrived home from school and let her out. Her brothers again contradicted her testimony. They testified that R.M. was not barricaded in her father's bedroom that day but that she and D.M. had a fight in which D.M. hit R.M. in the face repeatedly, breaking her lip. D.M. said the fight began because R.M. told D.M. she was planning to lie about their father sexually abusing her.

The next day, October 5, R.M. spoke to a counselor at her high school. During that interview, she told the counselor that her father had been having sex with her since 2008. The police arrested Melendrez later that day. Susan Dippery, a sexual assault nurse examiner, examined R.M. the same day.

At trial, the State presented DNA (deoxyribonucleic acid) evidence taken from the underwear R.M. wore to school on October 5 and from the boxers Melendrez was wearing when arrested, along with DNA evidence gathered during the sexual assault examination of R.M. The DNA analysis showed Melendrez's sperm and semen on the exterior of R.M.'s genitals. It also found R.M.'s DNA on the fly of Melendrez's boxers.

Procedural Facts

The trial court let the State amend the information three times during trial. The second amendment came a month into trial when the State dismissed count II and enlarged the charging period of count I to include the period charged in count II.¹ Melendrez asked for a bill of particulars, which the court denied.

Nurse Dippery noted in her examination that part of R.M.'s hymen remained intact. The State asked her if she would be surprised, based on her experience, to observe with this remnant a 16-year-old girl who had had sex 100 times. Melendrez objected that the question exceeded the scope of Dippery's expertise. The court overruled the objection, and Dippery answered, "No."

Melendrez's defense focused on R.M.'s motive to lie. He tried to introduce evidence that R.M. constantly misbehaved by sneaking out of the house, "sexting," having boys over without permission, and engaging in sexual activity; that Melendrez disciplined her in response to her behavior; and that, in retaliation and to break free, R.M. fabricated a story of sex abuse. The State objected to the introduction of misbehavior evidence as irrelevant, prohibited by the rape shield statute, RCW 9A.44.020, and improper evidence of past specific acts under ER 404(b). The trial court ruled Melendrez could introduce this evidence if he first presented evidence that he knew of the misbehavior and disciplined R.M. in response to it. Ultimately, Melendrez introduced numerous instances of misbehavior. Melendrez testified after three other defense witnesses. His testimony was then interrupted several times by that of several other defense witnesses to accommodate their schedules.

*3 Late in the trial and in the jury's presence, the judge asked, "Is the jail able to staff until 4:30 tomorrow afternoon?" Melendrez moved for a mistrial outside the jury's presence, arguing this comment informed the jury he was in custody. The court denied his motion.

The trial court instructed the jury that to convict Melendrez of count IV, incest committed between April 29, 2011, and October 4, 2011, the jury had to find "one particular act of Incest in the First Degree ... proved beyond a reasonable doubt" and that it "must unanimously agree as to which act has been proved." During deliberations, the jury asked the court, "Do we need to point to a specific incident or just agree an act occurred during this time frame [?]" The court reasoned that it would be hard "to explain it any more plainly than it exists in the jury instruction" and that changing instructions in such situations "can sometimes create more problems than ... solutions." Accordingly, it referred the jury back to the relevant parts of the instructions.

STANDARD OF REVIEW

We review questions of law de novo, including alleged violations of the Sixth Amendment right to present a complete defense and Fifth Amendment privilege against self-incrimination,² alleged violations of the right to an impartial jury and the presumption of innocence,³ and the constitutional adequacy of jury instructions.⁴ We use common sense to evaluate the effect of an act on the judgment of jurors.⁵

We review evidentiary rulings, denials of motions for bills of particulars, and denials of motions for a new trial for abuse of discretion.⁶

ANALYSIS

Right To Present a Complete Defense

The trial court ruled that evidence of R.M. sneaking out, “sexting,” having boys over, and having sex was relevant and thus admissible only if Melendrez presented evidence he knew of that behavior. Melendrez contends that this ruling violated his Sixth Amendment right to present a complete defense.

The State responds first that we should decline to consider this issue because Melendrez raised it for the first time on appeal. A failure to object to a trial court error generally waives a party's right to raise the challenge on appeal unless a “manifest error affecting a constitutional right” occurred.⁷ This court previews the merits of a claimed constitutional error to determine whether the argument is likely to succeed.⁸

Under the Sixth Amendment, defendants have a right to “a meaningful opportunity to present a complete defense.”⁹ This does not give them a right to present irrelevant evidence, however.¹⁰ The trial court has discretion to determine the relevance of evidence.¹¹

In *State v. Jones*,¹² the Supreme Court ruled that a trial court's refusal to allow a defendant to testify to the circumstances of an alleged sexual assault violated the defendant's right to present a defense. The proffered

testimony indicated that the sexual contact occurred consensually during an alcohol-fueled sex party and was not rape as the complaining witness claimed.¹³ The court distinguished “between evidence of the general promiscuity of a rape victim and evidence that, if excluded, would deprive defendants of the ability to testify to their versions of the incident.”¹⁴ The court reasoned that the proffered evidence was not “marginally relevant” but of “extremely high probative value,” since it was the defendant's “entire defense.”¹⁵

*4 In contrast, the evidence Melendrez sought to introduce was not his “entire defense.” Excluding evidence of R.M.'s perceived misbehavior did not deprive Melendrez of the ability to testify to his version of any incident, as in *Jones*.¹⁶ Instead, testimony that R.M. was sexually active, used drugs, and broke her father's rules resembled general promiscuity evidence, which, as the trial court correctly ruled, could only be relevant to show bias. Even then, its probative value was slight. The evidence Melendrez sought to introduce was thus “marginally relevant,” not “high[ly] probative.”¹⁷

In addition, defendants seeking appellate review of a trial court's decision to exclude evidence generally must have made an offer of proof at trial.¹⁸ An extended colloquy in the record can substitute for this offer of proof if it makes clear the substance of the evidence a party wished to introduce.¹⁹ If Melendrez wanted to preserve error as to the exclusion of an item of evidence, he should have made an offer of proof at trial. He concedes that he did not do so. And neither the record nor oral argument makes clear the substance of the evidence Melendrez wished to introduce. Melendrez thus did not preserve the right to request review of the exclusion of evidence about R.M.'s perceived misbehavior.

Further, Melendrez *did* introduce evidence of that behavior and the discipline he imposed in reaction to it. Before trial, Melendrez's counsel argued that the trial court should allow Melendrez to present evidence showing why he took disciplinary steps against R.M. This evidence included R.M.'s brothers' discovery of “sexts” on her phone and the ensuing conversations between R.M., her brothers, and Guadalupe. It also may have included evidence referred to in Melendrez's trial briefing, including suspected drug use, sexual activity, lying, and generally

hanging out with the wrong crowd. Either the State or Melendrez eventually introduced evidence of all this behavior. Thus, not only did Melendrez fail to preserve this issue by making an offer of proof at trial, but he has not shown that the trial court excluded any highly probative evidence.

Melendrez claimed that he had reason to punish R.M. and this gave R.M. a motive to lie about Melendrez raping her. The facts introduced at trial to support this defense gave the jury ample opportunity not to believe R.M. That it believed her does not give Melendrez grounds for appeal.

Melendrez further contends that repeated interruptions “fragment[ed]” his testimony and violated his “right to a complete and meaningful defense.” But Melendrez cites no case in which a court found constitutional error in an evidentiary ruling because it interrupted a defendant’s testimony. Melendrez’s counsel made no objection to the interruptions at trial. And an objection would have made no sense, as the schedules of Melendrez’s own witnesses made the interruptions necessary.²⁰

*5 Because our preview of the merits shows that Melendrez likely will not succeed on his Sixth Amendment claim, Melendrez does not show a manifest constitutional error on appeal. We therefore decline to review his Sixth Amendment claim under RAP 2.5(a).

Privilege against Self-Incrimination

Melendrez also contends that the trial court’s evidentiary rulings violated his privilege against self-incrimination by compelling him to testify in order to introduce evidence about R.M.’s behavior.

A state law requiring a defendant to testify before any other defense witnesses violates that defendant’s Fifth Amendment right against self-incrimination.²¹ This rule is not “a general prohibition against a trial judge’s regulation of the order of trial in a way that may affect the timing of a defendant’s testimony.”²² An evidentiary ruling can thus affect the order of defense witnesses without violating the defendant’s right to present a defense.²³ ER 611(a) gives the trial court wide discretion over the order and presentation of evidence.²⁴

In *Menendez v. Terhune*,²⁵ the Ninth Circuit held that the trial court’s ruling that certain evidence was inadmissible without the defendants testifying first did not violate the defendants’ due process rights. The defendants sought to introduce evidence to explain their alleged fear of their parents to bolster the defendants’ claim of self-defense in killing them.²⁶ The trial court ruled that the defendants’ witnesses could not testify until after the defendants laid a foundation by testifying “about their actual belief of imminent danger.”²⁷ The Ninth Circuit reasoned that the trial court judge “merely regulated the admission of evidence, and his commentary as to what evidence might constitute a foundation did not infringe on [the defendants’] right to decide whether to testify.”²⁸ The court distinguished the Supreme Court’s decision in *Brooks v. Tennessee*, which invalidated a statute that compelled a defendant to testify first if at all,²⁹ noting that unlike a defendant under the Tennessee statute, the defendants “had the opportunity, at every stage of the trial, to decide whether or not to take the stand.”³⁰

Here, unlike in *Brooks*, no statute or rule compelled Melendrez to testify first or at all. In fact, three of six defense witnesses testified before him. Melendrez argues that the trial court specified the order of his witnesses and “forced him to testify in order to admit relevant evidence,” but that begs the question. Like the trial court in *Menendez*, the trial court here ruled that the misbehavior evidence Melendrez sought to admit was *not* relevant unless Melendrez laid a foundation by presenting evidence that he knew about the misbehavior. One way, but not the only way, Melendrez could do so was by testifying himself. In so ruling, the trial court properly used its discretion to “exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence.”³¹ We therefore reject Melendrez’s Fifth Amendment argument.

Sufficiency of the Information and Denial of Bill of Particulars

*6 Melendrez next contends that because the information covered long periods, giving him little information about when the alleged crimes occurred, he could not effectively defend against the charges with an alibi. Melendrez did present evidence that he worked the night shift at Microsoft and was dependable in showing up for work to counter R.M.’s testimony that Melendrez

frequently raped her at night and eventually moved her into his bedroom.

An information that accurately states the elements of the crime charged is not constitutionally defective.³² The information must also allege facts supporting those elements.³³ This requirement's purpose "is to give notice to an accused of the nature of the crime that he or she must be prepared to defend against."³⁴

Melendrez makes no claim that the information omits any element of any crimes charged. Instead he argues that the information was not specific enough about the time period in count I to provide him with adequate notice. But in child sex abuse cases, "whether single or multiple incidents of sexual contact are charged, a defendant has no due process right to a reasonable opportunity to raise an alibi defense."³⁵ Alibi is not likely to be a valid defense where, as here, "the accused child molester virtually has unchecked access to the victim," "because in such cases "[t]he true issue is credibility."³⁶

Melendrez relies on a South Carolina case, *State v. Baker*,³⁷ where the court held an indictment to be unconstitutionally overbroad. There, the State amended the information two weeks before trial to enlarge by over three years the period when the defendant committed alleged child abuse.³⁸ The defendant's only available complete defense was alibi. The court ruled that the late amendment of the charging instrument made that defense impossible.³⁹

Baker is the only authority Melendrez cites for the proposition that a long charging period can violate a defendant's constitutional rights. But apart from being nonbinding authority, *Baker* is distinguishable. Unlike the defendant in *Baker*, Melendrez had ample notice of the charges and the period they encompassed. The amended information did not change the charging period; it simply combined the periods for counts I and II and eliminated count II. Melendrez knew for nearly two years before trial that he had to defend against charges that he raped his daughter during the 16-month period described in the amended count I.⁴⁰ Thus, the information satisfied constitutional notice requirements.⁴¹

Melendrez also contends that even if the information was not deficient, the trial court abused its discretion in denying Melendrez a bill of particulars because without it he could not adequately prepare a defense.

An information may be constitutionally sufficient but still so vague as to make it subject to a motion for a more definite statement.⁴² A trial court should grant a bill of particulars if the defendant needs the requested details to prepare a defense and to avoid "prejudicial surprise."⁴³ If the bill of particulars is not necessary, then the trial court does not abuse its discretion in denying it.⁴⁴

*7 In *State v. Noltie*,⁴⁵ this court rejected challenges to an information with a lengthy charging period and the denial of a bill of particulars, holding the defendant had adequate notice of the charges against him. The charges "spanned a 3-year period and presented a pattern of frequent and escalating abuse" of the defendant's stepdaughter.⁴⁶ The defendant claimed he lacked adequate notice to prepare a defense because the information was too vague for him to "separate the charged acts from the 'hundreds of innocent contacts' he had with [the victim] during the charging period."⁴⁷ This court rejected that argument, noting the defendant had an opportunity to interview the complaining witness. The court also noted that the defendant did not point to any "information that surprised him at trial [] that would have provided additional notice of the charges."⁴⁸ The court concluded that the trial court did not abuse its discretion.⁴⁹

Here, as in *Noltie*, the charges did not surprise the defendant, even without a bill of particulars.⁵⁰ Like *Noltie*, Melendrez's counsel interviewed the complaining witness, R.M., at length and in advance of trial. And like *Noltie*, Melendrez fails to point out any information that would have given him additional notice of the charges. His only specific contention as to prejudice is that he lacked the dates he needed to present an alibi defense. But "a defendant has no due process right to a reasonable opportunity to raise an alibi defense" against a charge of child sex abuse.⁵¹ And as the State points out, the period over which the alleged crimes took place didn't change with the amendment, which merely combined counts I and II. Melendrez thus failed to show how a bill of particulars

would have helped his defense. The trial court did not abuse its discretion in denying a bill of particulars.

Expert Testimony

Next, Melendrez contends that Nurse Dippery's testimony that she would not be surprised to see part of the hymen intact on a 16-year-old girl who had had sex over 100 times "was highly speculative and lacked foundation."

ER 702 permits "a witness qualified as an expert by knowledge, skill, experience, training, or education" to testify where her "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue."

Melendrez again fails to cite the facts of any case that would support a reversal. He also fails to explain how Dippery's statement lacked a foundation. Dippery testified to her extensive qualifications: seven years examining patients at Harborview Medical Center for signs of sexual assaults and around 900 sexual assault examinations performed, roughly half of them on teenagers. She testified without objection that it is "possible for someone to have a relatively intact hymen, even after sexual activity" and that R.M.'s was partially intact. The trial court could reasonably conclude Dippery was qualified to make the challenged statement and that the statement would "assist the trier of fact to understand the evidence" gained in R.M.'s sexual assault exam.⁵² The trial court did not abuse its discretion in overruling Melendrez's ER 702 objection.

Right to a Fair Trial

*8 Melendrez next asserts that the trial court violated his right to a presumption of innocence by asking the bailiff in the jury's presence, "Is the jail able to staff until 4:30 tomorrow afternoon?"

"The right to a fair trial includes the right to the presumption of innocence."⁵³ This includes " 'the physical indicia of innocence,' " i.e., freedom from shackles or other restraints.⁵⁴ It also precludes a court from deliberately drawing the jury's attention to a defendant's custody with a preliminary instruction.⁵⁵ Such violations are subject to harmless error analysis.⁵⁶

In *State v. Gonzalez*,⁵⁷ Division Three of this court held that a trial court's "special announcement" informing the jury the defendant "was indigent, incarcerated, had been transported in restraints, and was being tried under guard" violated the defendant's right to a fair trial. In *State v. Escalona*,⁵⁸ this court ruled that the defendant's right to a fair trial was violated where the victim disclosed that the defendant had previously been convicted of an identical crime to the one he was on trial for. In contrast, in *State v. Condon*,⁵⁹ this court held that a witness twice mentioning that the defendant had been in jail did not violate the defendant's right to a fair trial. The trial court admonished the witness, denied the defendant's motion for a mistrial, and gave the jury a curative instruction.⁶⁰ This court reasoned that the references to the defendant's custody were more ambiguous and thus less prejudicial than the statements in *Escalona*.⁶¹ The *Condon* court also pointed out that being in jail does not necessarily mean the defendant has a propensity to commit murder or has been convicted of a crime.⁶² It held that the statements were not serious enough to merit a mistrial and the trial court's instruction cured their "potential for prejudice."⁶³

Melendrez again fails to cite any case in his favor. He bore no physical indicia of being in custody. And unlike the trial court in *Gonzalez*, the trial court here did not explicitly and intentionally call the jury's attention to Melendrez's custodial status. Rather, it made a comment that it reasonably concluded was ambiguous in denying Melendrez's motion for a mistrial. As both the trial court and the State note, the jury could infer from the judge's question that Melendrez was in custody, but it could just as easily think jail staff was responsible for courtroom security. And even an implication of custody would not warrant reversal unless it was particularly prejudicial, like the testimony in *Escalona*.⁶⁴ The trial court's fleeting, inadvertent, and ambiguous comment did not abridge Melendrez's presumption of innocence.

Manifestly Apparent Legal Standard

Melendrez contends that the trial court failed to make the relevant legal standard "manifestly apparent" in answering the jury's question of whether it needed to "point to a specific incident or just agree an act occurred during" the charging period for count IV. This, Melendrez argues, warrants reversal of his conviction on that count, as the trial court should have told the jury it needed to

agree on a specific incident in order to find Melendrez guilty.

*9 “Jury instructions must make the relevant legal standard manifestly apparent to the average juror.”⁶⁵ Melendrez cites *State v. Cantabrana*,⁶⁶ in which the court found reversible error in a jury instruction that was wrong about the law. But he does not cite any case in which a legally accurate jury instruction failed to “make the relevant legal standard manifestly apparent.” Nor does he contend that the trial court's original instruction or response to the jury's question were incorrect.

Moreover, the trial court's instructions did “make the relevant legal standard manifestly apparent to the average juror.” This court held in *State v. Moultrie*⁶⁷ that an almost identical *Petrich*⁶⁸ instruction adequately addressed the legal standard for the average juror. In arguing that “[t]he jury's question indicated that it did not understand the instruction,” Melendrez misunderstands the “manifestly apparent” test. The subjective understanding of the jurors in Melendrez's case is irrelevant because the test is objective. The instruction only has to make the standard “manifestly apparent to the average juror,”⁶⁹ and in *Moultrie* this court found that an almost identical instruction did so.⁷⁰

Issues Raised in Statement of Additional Grounds for Review

Melendrez raises several more issues in his statement of additional grounds for review. Each of these lacks merit. First, Melendrez contends the trial court failed to properly address evidence discovered during trial, violating his rights to due process and a fair trial. An error by a trial court resulting in a failure to disclose relevant evidence does not warrant reversal unless the exculpatory evidence was constitutionally material.⁷¹ Evidence is not constitutionally material if the defendant was able to obtain the substantial equivalent of the evidence and use it to cross-examine the witness.⁷² Here, the State spoke to R.M. during a trial recess and gave Melendrez a summary of its notes. The interview contained two items of information the defense thought was relevant.⁷³ The trial court noted that this information could be used on cross-examination and “elicited, if relevant, for contradictory testimony.” Melendrez does not allege the

State failed to disclose any relevant information. And the asserted “delay” in the State reporting the interview was reasonable as it was between a Friday afternoon and the following Monday morning. We reject Melendrez's first pro se argument.

Second, Melendrez claims that because R.M.'s testimony at trial was inconsistent with her previous formal statements, the State made “knowing use of perjured testimony,” warranting reversal, quoting *State v. Larson*.⁷⁴ Melendrez has not shown, and the record does not support, that R.M. lied in her trial testimony or that the State knew any of her testimony to be false.⁷⁵ Melendrez was able to thoroughly cross-examine R.M. about her inconsistent statements. Whether R.M. lied at trial was a question of credibility properly left to the jury.⁷⁶ We therefore reject Melendrez's second argument.

*10 Third, Melendrez contends that the trial court abused its discretion in ruling irrelevant the identity of the boy R.M. was caught in a restroom with. Melendrez argues that the trial court's ruling denied him the ability to question the boy and that the boy's testimony would have helped establish R.M.'s bias against her father.

“[A] defendant has a constitutional right to impeach a prosecution witness with bias evidence” using an independent witness.⁷⁷ An error in excluding such evidence is harmless if “no rational jury could have a reasonable doubt that the defendant would have been convicted even if the error had not taken place.”⁷⁸

Melendrez offers only one theory about the relevance of the boy's identity, that the boy could have information about R.M.'s “behavior-based issues.” As noted above, the trial court properly limited evidence of R.M.'s behavior to events known to Melendrez. Melendrez does not explain how the boy could be unknown to him, yet know about behavior that Melendrez was aware of. But we need not decide whether the trial court erred in denying Melendrez the ability to introduce testimony from the boy because any error in doing so was harmless. “[N]o rational jury could have a reasonable doubt” that Melendrez would have been convicted even if the trial court had not excluded evidence of the boy's identity. Melendrez presented ample evidence of R.M.'s potential bias without the boy. And R.M.'s testimony, along with the DNA evidence, would have been unchanged.

Next, Melendrez contends that the trial court erred in allowing the State to ask D.M. questions that suggested D.M. was being untruthful. D.M. testified that R.M. told him before their father's arrest that she was planning to lie about their father abusing her. The trial court allowed the State to ask D.M. whether he had been formally interviewed about his knowledge of the alleged crimes. D.M. replied he had not. The State then asked, without objection by Melendrez, whether D.M. ever told anyone, "My sister told me she's going to make this up." D.M. again replied he had not.

"[A] prosecutor who asks the accused a question that implies the existence of a prejudicial fact must be prepared to prove that fact." ⁷⁹ Melendrez asserts that the State implied the "prejudicial fact" that D.M. had interacted with the authorities after his father's arrest. Melendrez claims this prejudiced him because D.M. may not have had any interaction with those authorities and thus no opportunity to tell them what his sister had said. This was the subject of a lengthy colloquy in the trial court, in which the parties and the judge agreed the problem would be addressed if the State first asked whether any such conversations happened. This was exactly what the State did, without objection. Melendrez's argument at this stage is therefore meritless.

Finally, in its closing argument, the State said D.M. "didn't tell anybody" that R.M. told him she was going to lie "because it didn't happen." Melendrez contends that the trial court erred in allowing the State to directly state in closing that D.M. testified untruthfully.

*11 A "defendant's right to a fair trial is denied when the prosecutor makes improper comments and there is a substantial likelihood that the comments affected the jury's verdict." ⁸⁰ But "[t]he State is generally afforded wide latitude in making arguments to the jury." ⁸¹ A prosecutor can "draw reasonable inferences from the evidence and may freely comment on witness credibility

based on the evidence" but cannot opine about a witness's credibility. ⁸² The State's remark during closing arguments was not an opinion about D.M.'s credibility. Rather, the prosecutor asserted a reasonable inference based on the evidence in the case as a whole and on D.M.'s statements on cross-examination in particular.

CONCLUSION

Because Melendrez did not raise his Sixth Amendment challenge below and he does not show a manifest error, we decline to review it. Because the trial court did not force Melendrez to testify first and properly exercised its discretion to exclude irrelevant evidence and control the order of testimony, we reject Melendrez's Fifth Amendment claim. Because Melendrez had ample notice of the charges against him and there was no chance of "prejudicial surprise," the charging information was constitutionally adequate and the trial court did not abuse its discretion in denying Melendrez a bill of particulars. Because Melendrez makes no argument about Nurse Dippery's qualifications to present her expert opinions, he fails to show that the trial court abused its discretion in allowing her testimony. Because the trial court's question in the jury's custody was fleeting, inadvertent, and ambiguous, it did not abridge Melendrez's presumption of innocence. Because this court has already upheld a substantively identical *Petrich* instruction, the trial court's instruction made the legal standard "manifestly apparent to the average juror." And Melendrez's several pro se arguments are equally meritless. For all these reasons, we affirm.

WE CONCUR: DWYER, SCHINDLER, JJ.

All Citations

Not Reported in P.3d, 192 Wash.App. 1002, 2015 WL 9462045

Footnotes

- 1 Both counts were for rape of a child in the second degree.
- 2 *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).
- 3 *State v. Gonzalez*, 129 Wn.App. 895, 900, 120 P.3d 645 (2005).
- 4 *State v. Gonzalez-Lopez*, 132 Wn.App. 622, 637, 132 P.3d 1128 (2006).
- 5 *Gonzalez*, 129 Wn.App. at 900-01.

- 6 *State v. Garcia*, 179 Wn.2d 828, 846, 318 P.3d 266 (2014); *State v. Dictado*, 102 Wn.2d 277, 286, 687 P.2d 172 (1984),
abrogated on other grounds by *State v. Harris*, 106 Wn.2d 784, 725 P.2d 975 (1986); *State v. Robinson*, 79 Wn.App.
386, 396, 902 P.2d 652 (1995).
- 7 RAP 2.5(a); *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015).
- 8 *State v. Huyen Bich Nguyen*, 165 Wn.2d 428, 433–34, 197 P.3d 673 (2008).
- 9 *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (internal quotation marks omitted)
(quoting *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986)); see *State v. Lynch*, 178 Wn.2d
487, 491, 309 P.3d 482 (2013).
- 10 *Jones*, 168 Wn.2d at 720.
- 11 *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668, 230 P.3d 583 (2010).
- 12 168 Wn.2d 713, 721, 230 P.3d 576 (2010).
- 13 *Jones*, 168 Wn.2d at 721.
- 14 *Jones*, 168 Wn.2d at 720–21.
- 15 *Jones*, 168 Wn.2d at 721.
- 16 See *Jones*, 168 Wn.2d at 720–21.
- 17 See *Jones*, 168 Wn.2d at 721.
- 18 *State v. Vargas*, 25 Wn.App. 809, 816–17, 610 P.2d 1 (1980).
- 19 *State v. Ray*, 116 Wn.2d 531, 539, 806 P.2d 1220 (1991); ER 103(a)(2).
- 20 For example, Melendrez’s counsel stated at one point, “So I think we can fill the day tomorrow.... I can have one witness
available at 9, I can have the Skype [live video chat and long-distance voice calling service] testimony after that, I can
have another witness here at 1:30, and we could have Mr. Melendrez fill all the points in between.”
- 21 *Brooks v. Tennessee*, 406 U.S. 605, 607, 92 S.Ct. 1891, 32 L.Ed.2d 358 (1972).
- 22 *Harris v. Barkley*, 202 F.3d 169, 173 (2d Cir.2000).
- 23 See *Menendez v. Terhune*, 422 F.3d 1012, 1031 (9th Cir.2005); *Johnson v. Minor*, 594 F.3d 608, 613 (8th Cir.2010).
- 24 *Sanders v. State*, 169 Wn.2d 827, 851, 240 P.3d 120 (2010). “The court shall exercise reasonable control over the
mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation
effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from
harassment or undue embarrassment.” ER 611(a).
- 25 422 F.3d 1012, 1032 (9th Cir.2005).
- 26 *Menendez*, 422 F.3d at 1030.
- 27 *Menendez*, 422 F.3d at 1030–31.
- 28 *Menendez*, 422 F.3d at 1032; see also *Johnson*, 594 F.3d at 613.
- 29 406 U.S. 605, 607, 92 S.Ct. 1891, 32 L.Ed.2d 358 (1972).
- 30 *Menendez*, 422 F.3d at 1031.
- 31 ER 611(a).
- 32 *State v. Bonds*, 98 Wn.2d 1, 17, 653 P.2d 1024 (1982); *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013).
- 33 *State v. Nonog*, 169 Wn.2d 220, 226, 237 P.3d 250 (2010).
- 34 *Zillyette*, 178 Wn.2d at 158–59 (quoting *State v. Kjorsvik*, 117 Wn.2d 93, 101, 812 P.2d 86 (1991)).
- 35 *State v. Cozza*, 71 Wn.App. 252, 259, 858 P.2d 270 (1993).
- 36 *State v. Hayes*, 81 Wn.App. 425, 433, 914 P.2d 788 (1996) (quoting *State v. Brown*, 55 Wn.App. 738, 748, 780 P.2d
880 (1989)).
- 37 411 S.C. 583, 769 S.E.2d 860, 865 (2015).
- 38 *Baker*, 769 S.E.2d at 864.
- 39 *Baker*, 769 S.E.2d at 864.
- 40 The first information is dated March 2012; the trial began in January 2014.
- 41 See *Zillyette*, 178 Wn.2d at 158.
- 42 *Bonds*, 98 Wn.2d at 17; *Dictado*, 102 Wn.2d at 286.
- 43 *State v. Allen*, 116 Wn.App. 454, 460, 66 P.3d 653 (2003) (quoting 1 CHARLES ALAN WRIGHT, FEDERAL PRACTICE
AND PROCEDURE § 129 (3d ed.1999)).
- 44 *Dictado*, 102 Wn.2d at 286.

- 45 57 Wn.App. 21, 30, 786 P.2d 332 (1990), *aff'd*, 116 Wn.2d 831, 841–42, 809 P.2d 190 (1991).
- 46 *Noltie*, 116 Wn.2d at 845.
- 47 *Noltie*, 57 Wn.App. at 30.
- 48 *Noltie*, 57 Wn.App. at 31.
- 49 *Noltie*, 57 Wn.App. at 31.
- 50 *Noltie*, 116 Wn.2d at 845.
- 51 *Cozza*, 71 Wn.App. at 259.
- 52 See ER 702.
- 53 *Gonzalez*, 129 Wn.App. at 900.
- 54 *Gonzalez*, 129 Wn.App. at 901 (quoting *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999)).
- 55 *Gonzalez*, 129 Wn.App. at 901.
- 56 *Finch*, 137 Wn.2d at 859.
- 57 129 Wn.App. 895, 901, 129 P.3d 645 (2005).
- 58 49 Wn.App. 251, 255–56, 742 P.2d 190 (1987).
- 59 72 Wn.App. 638, 649–50, 865 P.2d 521 (1993).
- 60 *Condon*, 72 Wn.App. at 648.
- 61 *Condon*, 72 Wn.App. at 648.
- 62 *Condon*, 72 Wn.App. at 649.
- 63 *Condon*, 72 Wn.App. at 649–50.
- 64 See *Condon*, 72 Wn.App. at 648.
- 65 *State v. Cantabrana*, 83 Wn.App. 204, 208, 921 P.2d 572 (1996).
- 66 83 Wn.App. 204, 208–09, 921 P.2d 572 (1996).
- 67 143 Wn.App. 387, 392, 177 P.3d 776 (2008). The instruction in *Moultrie* read in part,
To convict the defendant of rape in the second degree, one particular act of rape in the second degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of rape in the second degree.
- 68 *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).
- 69 *Cantabrana*, 83 Wn.App. at 208 (emphasis added).
- 70 See *Moultrie*, 143 Wn.App. at 394.
- 71 *State v. Garcia*, 45 Wn.App. 132, 139, 724 P.2d 412 (1986).
- 72 *Garcia*, 45 Wn.App. at 140.
- 73 Those items were an acknowledgment that R.M. had oral sex in the apartment complex restroom and a statement that her father at times rewarded her with food for sex.
- 74 160 Wn.App. 577, 594, 249 P.3d 669 (2011).
- 75 See *Larson*, 160 Wn.App. at 594.
- 76 See *Larson*, 160 Wn.App. at 594–95.
- 77 *State v. Spencer*, 111 Wn.App. 401, 408, 45 P.3d 209 (2002).
- 78 *Spencer*, 111 Wn.App. at 408.
- 79 *State v. Babich*, 68 Wn.App. 438, 444, 842 P.2d 1053 (1993) (quoting *United States v. Silverstein*, 737 F.2d 864, 868 (10th Cir.1984)).
- 80 *State v. Jungers*, 125 Wn.App. 895, 901, 106 P.3d 827 (2005).
- 81 *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006), *overruled in part on other grounds by State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014).
- 82 *State v. Lewis*, 156 Wn.App. 230, 240, 233 P.3d 891 (2010).

Appendix B

State v. Dickerson, 194 Wn. App. 1014, 2016 WL
3126480 (2016) (unpublished)

194 Wash.App. 1014

NOTE: UNPUBLISHED OPINION, SEE WA R GEN
GR 14.1

Court of Appeals of Washington,
Division 3.

STATE of Washington, Respondent,

v.

Gregory E. DICKERSON, Appellant.

No. 32899–6–III

|

Filed May 26, 2016

Appeal from Spokane Superior Court, Docket No: 13–1–
00284–2, Honorable James M. Triplet.

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2043, Counsel for Respondent.

Opinion

Siddoway, J.

*1 ¶ 1 Gregory Dickerson was convicted of one count of first degree rape with a deadly weapon. The trial court imposed a community custody condition that prohibits him from engaging in any romantic relationship without approval from his community custody officer and therapist. On appeal, Mr. Dickerson contends this condition is not crime-related and violates his United States Constitution First Amendment freedom of association. While we find no First Amendment violation, we conclude the condition is unconstitutionally vague. We remand with directions to strike the condition, leaving in place a related provision that more clearly addresses the sentencing court's concern.

FACTS AND PROCEDURAL BACKGROUND

¶ 2 In May 2014, a jury found Gregory Dickerson guilty of first degree rape with a deadly weapon. The victim

was Mr. Dickerson's ex-girlfriend, whom he had dated for four years and with whom he has two children. The court sentenced him to 128 months incarceration, and imposed a number of community custody conditions that will take effect upon his release. Only the following two conditions are relevant to his appeal:

(17) That you do not have sexual contact with anyone without their approval and awareness of your sexual offense conviction.

(18) That you do not enter a romantic relationship without the prior approval of the [community corrections officer] and Therapist.

Clerk's Papers (CP) at 97. Mr. Dickerson challenges only condition 18.

ANALYSIS

¶ 3 Mr. Dickerson argues that community custody condition 18, which prohibits him from entering into a “romantic relationship” without permission, is not crime-related and violates his First Amendment right to association because it is overbroad.

¶ 4 Though Mr. Dickerson did not object to the condition at trial, challenges to community custody conditions as illegal or erroneous may be made for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

The issue is ripe for review

¶ 5 As a threshold matter, because Mr. Dickerson is currently incarcerated and has not yet been charged with violating the challenged community custody condition, we must determine whether the challenge is ripe for review. *See State v. Sanchez Valencia*, 169 Wn.2d 782, 786, 239 P.3d 1059 (2010). Preenforcement challenges to community custody conditions are ripe for review “ ‘if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.’ ” *Bahl*, 164 Wn.2d at 751 (quoting *First United Methodist Church v. Hr'g Exam'r*, 129 Wn.2d 238, 255–56, 916 P.2d 374 (1996)). The court must also consider any hardship to the parties that may result from withholding court consideration. *Id.*

¶ 6 In this case the issue is ripe for review. First, the questions raised—whether the condition is crime-related and whether it is unconstitutional—are pure issues of law. See *Sanchez Valencia*, 169 Wn.2d at 788. Regardless of the manner in which the community custody officer or therapist implement the condition in the future, the extent to which it is crime-related or infringes on a fundamental right will not change with time. *Id.*

*2 ¶ 7 Second, the issue does not require further factual development. The condition limits Mr. Dickerson as soon as he is placed in community custody, and requires no further State action. *Id.* at 788–89. Third, the challenged action is final. *Id.* at 789.

¶ 8 Finally, Mr. Dickerson would suffer significant risk of hardship if the court declined to review his challenge at this time. The fact that Mr. Dickerson will have to request permission to enter into a romantic relationship to avoid a penalty under a potentially illegal regulation is a hardship in itself. *Bahl*, 164 Wn.2d at 747. That Mr. Dickerson would have to expose himself to arrest or prosecution in order to challenge a condition he claims violates his constitutional rights is a significant hardship. *Id.* The claim is therefore ripe for review.

*The community custody condition
violates the Fourteenth Amendment*

¶ 9 Mr. Dickerson challenges the community custody condition under the United States Constitution First Amendment freedom of association. However, we believe his challenge more properly falls under the right to intimate association protected by the United States Constitution Fourteenth Amendment's due process clause.

¶ 10 In *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984), the Supreme Court identified two types of associational rights protected by the Constitution: the freedom of “expressive association” and freedom of “intimate association.” The Court explicitly stated the right of expressive association stems from the First Amendment and guards speech, assembly, petition for the redress of grievances, and the exercise of religion. *Id.* at 618.

¶ 11 The Court was less clear about the source of the right to intimate association, stating only that it “receives protection as a fundamental element of personal liberty.” *Id.* The Court appeared to acknowledge that it was not identifying where the right comes from:

The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State. *Without precisely identifying every consideration that may underlie this type of constitutional protection*, we have noted that certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State. Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity *that is central to any concept of liberty.*

Id. at 618–19 (emphasis added) (citations omitted).

¶ 12 This right protects the

choices to enter into and maintain certain intimate human relationships [that] must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.

*3 *Id.* at 617–18. These certain “intimate human relationships” are those “that attend the creation and sustenance of a family.” *Id.* at 617, 619. They include marriage, childbirth, the raising and educating of one's children, and cohabitation with one's relatives. *Id.* at 619. The right does not extend to choosing one's fellow employees. *Id.* at 620. However, the Court noted that between the ability to choose one's spouse and the ability to choose one's fellow employees

lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State. Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments. We need not mark the potentially significant points on this terrain with any precision. *We note only that factors that may be relevant include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent.*

Id. at 620 (emphasis added) (citation omitted).

¶ 13 Since the Supreme Court issued *Roberts*, courts have disagreed about the source and scope of the right to intimate association.¹ Washington has taken the position that this right stems from the Fourteenth Amendment's due process clause and “principles of liberty and privacy.” *City of Bremerton v. Widell*, 146 Wn.2d 561, 575, 51 P.3d 733 (2002); *Am. Legion Post No. 149 v. Dep't of Health*, 164 Wn.2d 570, 601, 192 P.3d 306 (2008). Accordingly, the right Mr. Dickerson asserts implicates the Fourteenth, rather than the First Amendment.

¶ 14 The source of the right is critical, because it affects the grounds on which the community custody condition may be challenged. Mr. Dickerson challenges the community

custody condition on grounds of overbreadth, but courts have “generally confined the overbreadth argument to statutes or ordinances impinging on First Amendment activities.” *City of Seattle v. Montana*, 129 Wn.2d 583, 598 n.7, 919 P.2d 1218 (1996). Because the associational right Mr. Dickerson asserts stems from the Fourteenth Amendment, his overbreadth challenge fails.²

*4 ¶ 15 The condition may, however, be struck on due process vagueness grounds under the Fourteenth Amendment for reasons similar to those argued by Mr. Dickerson. “The due process vagueness doctrine under the Fourteenth Amendment ... requires that citizens have fair warning of proscribed conduct.” *Bahl*, 164 Wn.2d at 752. The purpose of the vagueness doctrine is to ensure criminal offenses are defined “‘with sufficient definiteness that ordinary people can understand what conduct is proscribed,’ ” and to “‘provide ascertainable standards of guilt to protect against arbitrary enforcement.’ ” *Id.* at 752–53 (quoting *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990)).

¶ 16 “Generally, ‘imposing conditions of community custody is within the discretion of the sentencing court and will be reversed if manifestly unreasonable.’ ” *Sanchez Valencia*, 169 Wn.2d at 791–92, (quoting *Bahl*, 164 Wn.2d at 753). An unconstitutional condition is manifestly unreasonable. *Bahl*, 164 Wn.2d at 753. Unlike statutes or ordinances, conditions of community custody are not presumed to be constitutional. *Sanchez Valencia*, 169 Wn.2d at 793.

¶ 17 Other jurisdictions have considered a similar condition with varying results. For example, in *United States v. Reeves*, 591 F.3d 77, 80 (2d Cir. 2010), the defendant was convicted of possession of child pornography and the trial court imposed a condition of supervised release that required the defendant to “‘notify the Probation Department when he establishes a significant romantic relationship.’ ” On appeal, the court found this condition unconstitutionally vague:

We easily conclude that people of common intelligence (or, for that matter, of high intelligence) would find it impossible to agree on the proper application of a release condition triggered by entry into a “significant romantic

relationship.” What makes a relationship “romantic,” let alone “significant” in its romantic depth, can be the subject of endless debate that varies across generations, regions, and genders. For some, it would involve the exchange of gifts such as flowers or chocolates; for others, it would depend on acts of physical intimacy; and for still others, all of these elements could be present yet the relationship, without a promise of exclusivity would not be “significant.” *See, e.g.,* Wolfgang Amadeus Mozart, *The Marriage of Figaro* (1786); Jane Austen, *Mansfield Park* (Thomas Egerton, 1814); *When Harry Met Sally* (Columbia Pictures 1989); *He's Just Not That Into You* (Flower Films 2009).

Id. at 81. The court stated that the defendant's “continued freedom during supervised release should not hinge on the accuracy of his prediction of whether a given probation officer, prosecutor, or judge would conclude that a relationship was significant or romantic.” *Id.*

¶ 18 Conversely, in *United States v. Pennington*, 606 Fed.Appx. 216, 223 (5th Cir. 2015), *cert. denied*, — U.S. —, 136 S. Ct. 166, 193 L. Ed. 2d 122 (2015), the court found a condition that prohibited the defendant from “dating” or “engaging in a relationship” with individuals with minor children without the consent of his probation officer was not unconstitutionally vague. The court stated that “the requirement of romantic involvement provides sufficient specificity to put [the defendant] on notice of when he must notify and seek approval from his probation officer.” *Id.* The court went on to explain its disagreement with the court in *Reeves*:

We may part ways here with the Second Circuit.... The Second Circuit cites Hollywood for the truth that relationships often begin, and continue, with romantic uncertainty. However, while the line between friendship and romance may not be immediately clear to a moviegoer, or even to the

target of affections, [the defendant] should know when he intends to become romantically involved with another person. Regardless, courts every day are obliged to adjudicate criminal cases, even with arrested persons and not twice-convicted sex offenders, and must assess and impose no-contact orders, as well as lesser restrictions on personal associations.

*5 *Pennington*, 606 Fed.Appx. at 223 n.3 (some citations omitted).

¶ 19 We find the analysis in *Reeves* more persuasive. In the case of condition 18 imposed on Mr. Dickerson, it is not clear which relationships will require the permission of both the community custody corrections officer and therapist. In addition, though the *Pennington* court disagreed, its analysis focused on the fact that a defendant would know when he intended to become romantically involved with another person as the basis for declining to follow *Reeves*. However, it is the community custody officer and therapist who are ultimately charged with determining whether Mr. Dickerson has entered into a romantic relationship and violated his community custody term. It is possible Mr. Dickerson's community custody officer or therapist could interpret Mr. Dickerson's friendship with an individual as romantic, even where Mr. Dickerson does not intend to enter into a romantic relationship. The condition is open to arbitrary enforcement by community custody officers and therapists with different ideas about the point at which a relationship becomes romantic. The condition is therefore unconstitutionally vague.³

¶ 20 In contrast to condition 18, condition 17—which prohibits Mr. Dickerson from having sexual contact with anyone without notifying them of his sexual offense—is both clear, and a reasonable means of protecting Mr. Dickerson's future sexual partners.

¶ 21 We remand with instructions to strike the vague condition.

¶ 22 A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports,

but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

All Citations

WE CONCUR:

Not Reported in P.3d, 194 Wash.App. 1014, 2016 WL 3126480

Korsmo, J.

Footnotes

- 1 See Collin O'Connor Udell, *Intimate Association: Resurrecting a Hybrid Right*, 7 TEX. J. WOMEN & L. 231 (1998) (noting that the Seventh and Tenth circuits have held the right to intimate association stems from the Fourteenth Amendment, that the Fifth, Sixth, Ninth, and Eleventh circuits have held the right stems from the First Amendment, and that the Third Circuit's position is unclear); Nancy Catherine Marcus, *The Freedom of Intimate Association in the Twenty First Century*, 16 GEO. MASON U. CIV. RTS. L.J. 269 (2006) (noting that the confusion and circuit split has not been resolved).
- 2 Even if the condition could be challenged on First Amendment grounds, Mr. Dickerson has failed to show his relationships with future potential romantic partners are protected under the right to intimate association. While Washington has refused to hold that the right to intimate association is limited only to familial relationships, it has found that "an engaged couple who is not cohabitating is not entitled to constitutional protection." *City of Bremerton*, 146 Wn.2d at 577. If an engaged couple cannot claim the right to intimate association, Mr. Dickerson cannot claim it with respect to his more attenuated relationships.
- 3 Mr. Dickerson also contends the community custody condition is not crime-related. Because we strike the condition on other grounds, we do not address this argument.

BENTON COUNTY PROSECUTOR'S OFFICE

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