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

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STATE OF WASHINGTON,

Respondent,

v.

LUIS A. LANDEROS

Appellant.

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

The Honorable Judge Raymond F. Clary

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APPELLANT'S OPENING BRIEF

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### **A. ASSIGNMENTS OF ERROR**

1. The court erred in entering Finding of Fact 10 as follows: “Millie Morris had never seen the defendant prior to awakening to him lying next to her in her bed.” (CP 100)
2. The court erred in entering Finding of Fact 12 as follows: “When Millie Morris awoke the defendant was lying next to her in her bed.” (CP 100)
3. The court erred in entering Finding of Fact 13 as follows: “The defendant stroked her hair, pushing her head into the pillow.” (CP 100)
4. The court erred in finding that Ms. Morris is “a single woman alone.” (CP 100)(Finding of Fact 15)
5. The court erred in entering Conclusion of Law 5 as follows: “The defendant remained in the home for at least one reason, that being his sexual gratification.” (CP 103)
6. The court erred in entering Conclusion of Law 6 as follows: “On December 19, 2014, the defendant committed the crime of First Degree Burglary with sexual motivation and is found to be guilty of the underlying crime and enhancement.” (CP 103)
7. The court erred in imposing the following condition of community custody: “That you do not enter into romantic/sexual relationships without the prior approval of your CCO and/or Therapist.” (CP 97)

### **B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Issue 1: Whether the evidence was insufficient to establish first-degree burglary with sexual motivation where the State failed to prove beyond a reasonable doubt that the burglary was committed for the purpose of sexual gratification.

Issue 2: Whether the condition of community custody prohibiting a romantic relationship without prior approval of a community corrections officer is void for vagueness under the Fourteenth Amendment to the United States Constitution and Article 1, sec. 3 of the Washington State Constitution.

### **C. STATEMENT OF THE CASE**

On the evening of December 18, 2015, Milly Morris and her brother, Doug Soapes, celebrated the start of Mr. Soapes' Christmas vacation by drinking beers in their shared home in north Spokane. (RP 74, 94) After the two consumed about eight to nine beers, Mr. Soapes went to bed and Ms. Morris left to visit her other brother, Jerry Soapes<sup>1</sup>, who lived next door. (RP 74) Jerry had a friend visiting and the three of them listened to music and consumed about eighteen beers until they ran out of alcohol around 2:00 a.m. (RP 86, 95)

Jerry walked Ms. Morris home. (RP 84) Ms. Morris had a snack in the kitchen and then went to sleep in her bedroom. (RP 96) At some point later that morning, Ms. Morris awoke to find a man in her room. (RP 99) She was groggy and thought she might be dreaming and went back to sleep. When she awoke again, the man was pushing her head into a pillow and telling her, "It's okay." (RP 102) Ms. Morris was shaken and ran down the hall to her brother's bedroom to get help. (RP 75)

Mr. Soapes went to Ms. Morris' bedroom door where he saw Mr. Landeros standing in the middle of the room without a shirt. (RP 69) Mr. Soapes suspected Mr. Landeros had been drinking and ordered him to leave. (RP 76) Mr. Landeros refused to leave and explained that he and

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<sup>1</sup> For clarity, Jerry Soapes will be referred to as Jerry.

Ms. Morris had shared a couple beers. (RP 69) Mr. Soapes hit Mr. Landeros in the face knocking him to the ground. (RP 70) He then led Mr. Landeros to the back of the house where he noticed that the glass sliding back door had been broken. Mr. Landeros continued to remain in the house, despite Mr. Soapes' repeated orders to leave. (RP 70-71)

Police arrested Mr. Landeros as he exited the back door shortly after 7:00 a.m. (RP 23) Later, while walking through her bedroom with a police officer, Ms. Morris noticed an unused condom on her bed and a condom wrapper on the floor. (RP 128) When the officer questioned Ms. Morris about the incident, she reported that she had awakened to find a male standing in her room. (CP 2) She denied that the male had touched her in a sexual manner. (RP 135, CP 2)

The State charged Mr. Landeros with first-degree burglary with sexual motivation. (CP 15) Mr. Landeros waived his right to a jury trial. (RP 12, CP 44)

Before trial, defense counsel asked the trial court to dismiss the sexual motivation allegation, arguing the mere presence of a condom was insufficient to support a sexual motivation finding. (CP 58-59) The court denied the motion and the case proceeded to trial. (CP 64-64)

A forensic expert for the state testified that he could not recover prints from the condom or its wrapper. (RP 150) Testimony and exhibits

were admitted consistent with the above facts, after which the trial court convicted Mr. Landeros as charged. (RP 193-94, CP 103)

At sentencing, the trial court considered a pre-sentence investigation report (PSI). In the report, Mr. Landeros denied that the condom belonged to him or touching Mr. Morris. (CP 80) He stated that he had been drinking all day with Ms. Morris and Mr. Soapes and that he was “totally wasted” when arrested. (CP 81, 83) The PSI noted that Mr. Landeros had no criminal history and an offender score of “0”.

The trial court sentenced Mr. Landeros to 42 months of incarceration, which included a mandatory 24-month enhancement for the sexual motivation finding. (RP 206, CP 109-110) *See* RCW 9.94A.533(8)(b) (“[A]ll sexual motivation enhancements under this subsection are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions.”)

The court also imposed a number of community custody conditions, including a condition prohibiting Mr. Landeros from entering “into romantic/sexual relationships without the prior approval of your CCO and/or Therapist.” (CP 97)

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#### **D. ARGUMENT**

**1. The evidence was insufficient to establish first-degree burglary with sexual motivation where the State failed to prove beyond a reasonable doubt that the burglary was committed for the purpose of sexual gratification.**

An allegation of sexual motivation requires the State to present evidence of “identifiable conduct” that the defendant committed the underlying crime for sexual gratification. *State v. Halstein*, 65 Wn. App. 845, 853, 829 P.2d 1145 (1992). In the absence of evidence that Mr. Landeros engaged in any form of sexual activity while committing the burglary, the trial court erred in concluding that Mr. Landeros remained in Ms. Morris’ home for sexual gratification.

The State must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970); Wash. Const. art. 1, sec.3; U.S. Const. Amend. XIV. Mere possibility, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.*

A conviction must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact

could have found each element beyond a reasonable doubt. *State v. Salinas*, 169 Wn. App. 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). “When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Salinas*, 119 Wn.2d at 201 (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)).

A trial court’s findings following a bench trial must be supported with substantial evidence and the findings must support the conclusions of law. *State v. Carlson*, 143 Wn. App. 507, 519, 178 P.3d 371 (2008). Substantial evidence is “evidence sufficient to persuade a fair-minded, rational person of the finding’s truth.” *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). Conclusions of law are reviewed de novo. *Stevenson*, 128 Wn. App. at 193.

An allegation of sexual motivation requires the State to prove that sexual gratification was one of the defendant’s purposes while committing the charged act. *State v. Thompson*, 169 Wn. App. 436, 476, 290 P.3d 996 (2012), *review denied*, 176 Wn.2d 1023 (2013)(citing RCW 9.94A.030(47)). Division One of this court clarified that the sexual motivation statute does not criminalize private thoughts – rather it targets “conduct forming part of the body of the underlying felony.” *State v.*

*Halstein*, 65 Wn. App. 845, 853, 829 P.2d 1145 (1992). Thus, a finding of sexual motivation is only established where the State presents “evidence of identifiable conduct by the defendant while committing the offense which proves beyond a reasonable doubt the offense was committed for the purpose of sexual gratification.” *State v. Halstein*, 122 Wn.2d 109, 120, 857 P.2d 270 (1993)(quoting *Halstein*, 65 Wn. App. at 853).

For example, in *State v. Vars*, 157 Wn. App. 482, 237 P.3d 378 (2010), the court found sufficient evidence of sexual motivation where the defendant walked naked for hours in the presence of others in a residential neighborhood and had three prior convictions for similar acts of indecent exposure. *Vars*, 157 Wn. App. at 489. In *State v. Halgren*, 87 Wn. App. 525, 942 P.2d 1027 (1997), *reversed on other grounds*, 137 Wn.2d 340, 971 P.2d 512 (1999), the court found sufficient evidence of sexual motivation where defendant had a history of sexually assaulting prostitutes and admitted that he committed the crime for sexual purposes. *Halgren*, 87 Wn. App. at 538. In *State v. Thompson*, sufficient evidence of sexual motivation was found in a case involving unlawful imprisonment charges where the defendant ordered a female in an elevator to remove her shirt and bra. *Thompson*, 169 Wn. App. at 476.

In contrast, the facts of this case do not support a sexual motivation finding. Several of the court’s findings either overstate the evidence or are

not supported by the evidence. Findings of fact 10 and 12 both state that Ms. Morris awoke to find Mr. Landeros “lying next to [Ms. Morris] in bed.” (CP 100) However, the only place in the record that mentions Mr. Landeros lying next to Ms. Morris is the State’s closing argument where the prosecutor argued, “I think everyone would want to think that when they wake up on their bed in the privacy of their home that the person laying next to them is not a stranger.” (RP 185) However, closing argument is not evidence and therefore the prosecutor’s statement does not support the findings. *State v. Miles*, 77 Wn.2d 593, 601, 464 P.2d 723 (1970).

The distinction between “sitting” or “lying” on a bed is crucial in a case requiring the State to prove sexual motivation. A finding that Mr. Landeros was lying next to Ms. Morris is significantly more suggestive of a sexual motive than simply sitting next to her. Because these findings are not supported by the evidence, Mr. Landeros asks this court to strike the unsupported portions of Findings of Fact 10 and 12.

Additionally, the portion of Finding of Fact 13 that states “[t]he defendant stroked [Ms. Morris’] hair” is unsupported. (CP 100) Ms. Morris testified that Mr. Landeros touched her hair and pushed her head into a pillow with a “medium” amount of force, but never characterized the touching of her hair as “stroking.” (RP 102, 105)

This is not a trivial matter of semantics. The word “stroke”, which is defined as “to rub gently in one direction”, is suggestive of sexual behavior and bolsters a sexual motivation finding. Webster’s Third New International Dictionary, 2265 (1993). Synonyms include “fondle” or “caress”. *Id.* The court’s leap to this finding is entirely unsupported. Accordingly, Mr. Landeros asks this court to strike this portion of the finding.

Finally, the trial court’s finding that Ms. Morris is a single woman who lives “alone” is also unsupported. (Finding of Fact 15 at CP 100) Both Ms. Morris and her brother testified that they share a home. Their respective bedrooms are only about twelve feet apart. (RP 75)

The unchallenged findings do not support a sexual motivation finding beyond a reasonable doubt. The court relies on the facts that Mr. Landeros was not wearing a shirt and that an unused condom was found in Ms. Morris’ bedroom, but there is no evidence that Mr. Landeros engaged in any sexual activity or made sexual comments that would be suggestive of sexual motivation. Ms. Morris denied any sexual assault or fondling. Significantly, Mr. Landeros did not flee the scene when confronted by Mr. Soapes, and had to be forced to leave the house. This is inconsistent with the behavior of a person committing a crime with a sexual purpose.

In the absence of substantial evidence to support the court's conclusion that Mr. Landeros committed the burglary for sexual gratification, the sexual motivation finding must be stricken and the sentencing enhancement reversed.

**2. The condition of community custody prohibiting a romantic relationship without the prior approval of a community corrections officer is void for vagueness under the Fourteenth Amendment to the United States Constitution and Article 1, sec. 3 of the Washington State Constitution.**

Due process requires laws not be vague. The community custody provision requiring Mr. Landeros to obtain prior approval from his CCO/therapist before entering into a romantic relationship is open to arbitrary enforcement by a CCO. Without objective criteria with which to define the term "romantic", the condition is unconstitutionally vague.

The Fourteenth Amendment to the United States Constitution and Article I, section 3 of the Washington Constitution require that citizens have fair warning of proscribed conduct. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). A condition is void for vagueness if the condition either (1) does not define the prohibition "with sufficient definiteness that ordinary people can understand what conduct is proscribed" or (2) does not "provide ascertainable standards of guilt to protect against arbitrary enforcement." *State v. Norris*, -- Wn. App. -- , 404 P.3d 83 (2017) (quoting *State v. Sanchez Valencia* , 148 Wn. App.

302, 321, 198 P.3d 1065 (2009)). “A condition will withstand a vagueness challenge if “persons of ordinary intelligence can understand what the [law] proscribes, notwithstanding some possible areas of disagreement.” *Norris*, 404 P.3d at 87 (quoting *City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693 (1990)).

Generally, the imposition of community custody conditions is discretionary with the sentencing court and will be reversed only if manifestly unreasonable. *Bahl*, 164 Wn.2d at 753. An unconstitutional condition is manifestly unreasonable. *Id.* Challenges to community custody conditions as illegal may be raised for the first time on appeal. *Id.* at 744.

“A defendant may assert a preenforcement challenge to community custody conditions for the first time on appeal ‘if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.’” *Id.* at 751 (quoting *First United Methodist Church v. Hr’g Exam’r*, 129 Wn.2d 238, 255-56, 916 P.2d 374 (1996)). These conditions are met here. The challenge to the constitutionality of the prohibition is purely legal, does not require additional factual development, and is final.

The court here imposed an impermissibly vague community custody provision that prohibited Mr. Landeros from entering into

“romantic/sexual relationships” without the prior approval of his community corrections officer or therapist. (CP 97) In *United State v. Reeves*, 591 F.3d 77, 80 (2d Cir. 2010), the Second Circuit concluded that a nearly identical condition requiring the offender to notify the probation department “when he establishes a significant romantic relationship” was insufficiently defined:

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 promise of exclusivity, would not be significant.

*Reeves*, 591 F.3d at 81.

In concluding that the qualifiers “significant” and “romantic” are too vague to inform the offender of the type of relationship that he was required to report, the court noted there were no objective criteria with which to define the terms, and 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.*

Similarly here, Mr. Landeros should not have to guess whether his community corrections officer might deem a friendship “romantic” and cite him with a community custody violation, even though he had no

intention of entering into a romantic relationship. The term covers a wide range of activities and gives too much discretion to the CCO to determine whether a violation has occurred. Mr. Landeros requests the court to strike this unconstitutionally vague condition.

**3. In the event the State substantially prevails on appeal, any request for appellate costs should be denied.**

Mr. Landeros was found indigent at the end of trial in the superior court. Because the presumption of indigency continues throughout the review process, this court should decline to impose appellate costs on Mr. Landeros. If the State substantially prevails on appeal, Mr. Landeros requests no costs of appeal be authorized under title 14 of the Rules of Appellate Procedure.

The Court of Appeals has discretion to deny a cost bill even where the State is the substantially prevailing party. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016). The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court's discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

Mr. Landeros was homeless and unemployed at the time of his arrest. (CP 81-82) The trial court did not impose discretionary LFOs and found Mr. Landeros indigent at the end of the trial in superior court. (CP 125, 137) This status is unlikely to change.

The presumption of indigency continues throughout the review process. *Sinclair*, 192 Wn. App. at 393. RAP 14.2 provides:

When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.

The State is unable to provide any evidence that Mr. Landeros' financial situation has improved since he was found indigent by the trial court. If the state substantially prevails on this appeal, this court should exercise its discretion to deny any request for appellate costs.

#### F. **CONCLUSION**

For the reasons stated, Mr. Landeros asks the court to strike the sexual motivation finding based on insufficient evidence. The matter should be remanded for resentencing to strike the 24-month sexual motivation enhancement and the unconstitutionally vague community custody provision requiring Mr. Landeros to obtain prior approval of his CCO and/or therapist before entering into a romantic relationship.

If the state substantially prevails on appeal, this court should decline to impose appellate costs on Mr. Landeros who is indigent.

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Respectfully submitted this 21<sup>st</sup> day of December, 2017.

/s/ Maurina A. Ladich

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Attorneys for Appellant

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON ) COA No. 35478-4-III  
Plaintiff/Respondent )  
vs. ) Spokane Co. No. 15-1-04788-5  
)  
LUIS A. LANDEROS ) PROOF OF SERVICE  
Defendant/Appellant )  
\_\_\_\_\_ )

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on December 21, 2017, I mailed by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Luis A. Landeros, DOC #399781 (Appellant)  
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Having obtained prior permission, I also served the Respondent at [scpaappeals@spokanecounty.org](mailto:scpaappeals@spokanecounty.org) through the electronic filing email service portal.

Dated this 21<sup>st</sup> day of December, 2017.

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