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No. 35567-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

JEREMY ALVAREZ,

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION

Shortly after Jeremy Alvarez began staying at his father's home, his father's rebellious step-daughter became very angry at Mr. Alvarez. The next day, after she watched a video at school about how white men raped Indian women and children, the step-daughter accused Mr. Alvarez of molesting her the night before. The story later morphed into allegations of rape. The jury acquitted Mr. Alvarez of one count of rape of a child, but convicted him on a second count.

The conviction must be reversed. In violation of Mr. Alvarez's constitutional right to remain silent, the court permitted a police officer to testify that Mr. Alvarez did not appear surprised when told of the allegations. And Mr. Alvarez's right to have the jury decide the truth or falsity of the step-daughter's allegations was violated when the court permitted "expert" testimony that the step-daughter's statements were "consistent." These and other errors deprived Mr. Alvarez of a fair trial.

B. ASSIGNMENTS OF ERROR

1. In violation of the Fifth Amendment to the United States Constitution and article I, § 9 of the Washington Constitution, the court erred in admitting testimony from a police officer that Mr. Alvarez did not appear surprised when told of the allegations against him.

2. In violation of the rules of evidence and Mr. Alvarez's jury trial

rights under the Sixth Amendment to the United States Constitution and article I, §§ 21 and 22 of the Washington Constitution, the court erred by admitting testimony that the child's statement in the forensic interview was "consistent" with what she told police.

3. In violation of article IV, § 16 of the Washington Constitution, the trial court commented on the evidence thrice.

4. In violation of due process, cumulative error deprived Mr. Alvarez of a fair trial.

5. In violation of statute and constitutional guarantees, the court erred in entering numerous conditions of community custody. These consist of conditions (4) and (5) in the judgment and sentence, along with conditions (4), (5), (6), (12), (13), (14), (15), and (16) in Appendix A to the judgment and sentence.

C. ISSUES

1. The privilege against self-incrimination includes a right to prearrest silence. A police officer's comment at trial that a person did not appear surprised when told about a criminal allegation violates this constitutional guarantee. Over objection, the prosecutor elicited testimony from a police officer that Mr. Alvarez did not appear surprised when told of allegations of sexual misconduct against him. Did the admission of this testimony violate Mr. Alvarez's right against self-incrimination?

2. Opinion testimony on the veracity of a witness violates a defendant's jury trial rights. Witnesses are not permitted to give opinions unless the opinion would be helpful to the jury. No opinion, lay or expert, is needed for a jury to determine if statement "X" is consistent with statement "Y." Did the court err and violate Mr. Alvarez's jury trial rights by permitting "expert" testimony that the alleged victim's statement to her was "consistent" with her prior statement to the police?

3. Judicial comments on the evidence violate the state constitution. A court comments on the evidence when it resolves a factual issue for the jury. The ages of Mr. Alvarez and alleged victim were material facts. In the jury instructions, the court listed Mr. Alvarez's birthdate. During jury selection, the court told one juror who later deliberated that the court thought the alleged victim was 12 or 13 years old. The court also told the entire jury pool the birthdate of the alleged victim. Did the court improperly comment on the evidence?

4. Did cumulative error deprive Mr. Alvarez of a fair trial?

5. The lifetime conditions of community custody forbid Mr. Alvarez from having contact with any person under 18 years old, including any future biological children. Mr. Alvarez has a constitutional right to the care and custody of any biological children. Must these unconstitutional conditions be modified?

6. In the context of sex offenses, “children” refers to people who are less than 16 years old. Should the conditions referring to “children” be modified so that they apply only to those who are less than 16 years old?

7. Courts are permitted to impose crime-related conditions of community custody. Should two conditions requiring Mr. Alvarez to make disclosures to his sexual partners and to corrections officers about his sexual partners be stricken because they are not crime-related?

8. People have a right not to speak. Speech restrictions, including compelled speech, must be narrowly tailored to achieve a legitimate end. Although the crime did not involve his paramour’s daughter, a community custody condition requires Mr. Alvarez to inform sexual partners of his sexual criminal history, regardless of whether they have children. Does this overbroad condition violate the prohibition against compelled speech?

9. For a search of a person on community custody to be constitutional, there must at least be reasonable cause. Without any cause, a condition of community custody requires Mr. Alvarez to allow a full search of any electronic device, including cell phones and computers. Is this condition unconstitutional?

10. Although the crime did not involve controlled substances, the court forbade Mr. Alvarez from “unlawfully” possessing controlled substances and from consuming controlled substances absent a lawful

prescription. These vague terms do not state if marijuana, legalized under Washington law, is included. In Washington, medical marijuana is “authorized” by providers and is not prescribed due to federal law. Should the conditions be stricken because they are not crime-related, are vague, and are contrary to Washington’s medical marijuana laws?

11. The court found Mr. Alvarez was indigent and ordered he pay only mandatory legal financial obligations. A condition of community custody, however, requires that he pay for any future polygraphs. Should the provision requiring him to pay be stricken?

12. The Legislature recently eliminated a mandatory \$200 filing fee against convicted persons who are indigent. Courts must apply the law in effect. On remand, must the \$200 filing fee be stricken?

D. STATEMENT OF THE CASE

Jeremy Alvarez was having difficulty finding a place, so he accepted his father’s offer to stay at his home. RP 394. Mr. Alvarez’s father, Joseph, lived with his fiancée, Melissa Porter, and her daughter, “J.” RP 392. J was 13 years old. RP 422.

Mr. Alvarez and J did not know each other, but they soon got along fairly well. RP 394, 426. The two decorated J’s longboard. RP 426. J enjoyed skating. RP 426

J was rebellious. See RP 431-33. About two or three weeks before

Mr. Alvarez moved in, J's mother had taken away J's phone. RP 431-32. J argued with her mother and defied her mother's wishes. RP 432. For her defiance, J's mother forbid J from having sleepovers and from hanging out with her friends in neighboring Richland. RP 431-32.

Several days after Mr. Alvarez moved in, Mr. Alvarez and J went for a walk. RP 427. The walk was J's idea. RP 427. J wanted to walk about two houses down to an abandoned house and take pictures using Mr. Alvarez's new camera. RP 427. J firmly believed her mother heard them talking about it, so she assumed her mother knew where they were going. RP 427, 543.

During the walk, they decided to go further. RP 427-28. According to J, Mr. Alvarez said there was no need to go tell J's mother because she had heard that they were going on a walk. RP 427-28, 543. They walked by some nearby train tracks and took some pictures of some of the houses. RP 429. Nothing sexual happened. RP 542-43.

While they were out, J's mother became concerned because J had been missing for about half an hour. RP 374. Mr. Alvarez's father, Joseph, called Mr. Alvarez, who answered and said J was with him. RP 374. Joseph told them they needed to come home. RP 430.

J's mother and stepfather were upset at J. RP 430. They told her it was not okay for her to leave and not tell anyone. RP 431, 543. According

to J, Mr. Alvarez did not stick up for her. RP 430. He did not tell her parents that he told J going further on the walk was fine because her parents knew where she was. RP 430. She did not think she should have got into trouble. RP 543-44. After being scolded by her parents, J went upstairs to her room to calm down. RP 433. She was angry at her parents for blaming her, but she was most angry at Mr. Alvarez. RP 431, 543-44.

The next morning, J's mother drove J to school and they discussed Mr. Alvarez. RP 375. Mr. Alvarez had offered to drive J to school that morning, but he did not have a valid driver's license. RP 375-76. J's mother told J she did not need to be afraid of him. RP 375.

At school during second period, J was watching a video in class about how white men raped Indian women and children. RP 458-59. J went to the school counselor and told the school counselor that Mr. Alvarez had sexually molested her the night before. RP 459. She did not tell her counselor everything that had happened. RP 459.

The counselor called in the campus police officer, Jory Parish. RP 503, 505. They interviewed J. RP 505-06. J alleged that the night before on the couch, Mr. Alvarez had fondled her breasts and touched her over her pants in her vaginal area. RP 510, 514. After moving off the couch, J said she went upstairs to her room and Mr. Alvarez had later come upstairs and placed her in a headlock. RP 513. Officer Parish did not recall if J said

anything sexual happened in the bedroom. RP 510.

Officer Michael Nelson arrived and interviewed J. RP 332. Officer Nelson's understanding at the time was that the allegation concerned molestation, not rape. RP 633-34. J told him that Mr. Alvarez touched her on her vaginal area outside her clothing. RP 629. J said she "jumped off" the couch and went to her room. RP 630. While J was organizing her room, Mr. Alvarez came up, grabbed her from behind, and choked her. RP 630-31. J said that Mr. Alvarez left her room laughing and that she did not see him until the following morning. RP 631.

Officer Nelson met with J's mother, who was at work and told her what J had said. RP 339. Officer Nelson also spoke with Mr. Alvarez's father on the phone, who was at work. RP 339. He told Officer Nelson to tell Mr. Alvarez to leave. RP 397.

Officer Nelson went to the home. RP 340. He met Mr. Alvarez there, who had appeared to have woken up recently. RP 343. Officer Nelson relayed Joseph's message telling Mr. Alvarez to leave. RP 345. Mr. Alvarez left. RP 357.

Four days later, J was interviewed at the Sexual Assault Response Center (SARC). RP 487, 632. The portion of the center for children is referred to as "Kids Haven." RP 348. Mari Murstig, a child forensic interviewer, conducted the interview. RP 347, 354-55. Detective Jesse

Romero observed the interview, which was recorded. RP 354, 365, 488. J now claimed to have been raped. RP 487, 487.

Because the allegation had changed, the police gathered clothing J thought she had been wearing. RP 461-62, 489. Some of these items were in a dirty laundry basket along with some towels, including a towel that Mr. Alvarez had used. RP 463. J's underwear tested positive for a fluid consistent with saliva. RP 523. It was unknown if the saliva came from a male or a female, but there was human male DNA in the area. RP 524, 529. Due to the potential for contamination, storing items to be tested for DNA in a dirty laundry basket would be improper. RP 497.

The prosecution charged Mr. Alvarez with two counts of child rape in the second degree. CP 161. As to count one, the prosecution's theory of the case was that J had gone downstairs around midnight to watch a movie and that during the movie, Mr. Alvarez had digitally penetrated J. RP 324-25. As to the second count, the prosecution claimed that Mr. Alvarez went upstairs to J's room after the movie, and then digitally and orally penetrated J. RP 325-26.

J testified that around midnight, Mr. Alvarez came upstairs to her room and asked if she wanted to watch a movie. RP 433. J, who was not sleeping well, agreed. RP 433. They went downstairs to the living room and watched "She's the Man" on DVD. RP 434. Sometime during the

movie, J claimed Mr. Alvarez began to touch her on her breast and on her vagina over her clothing. RP 436-37. J testified that Mr. Alvarez did not put his finger inside her downstairs. RP 437, 456.

Later, however, after watching a portion of her recorded interview at “Kids Haven,” J changed her testimony and stated Mr. Alvarez had touched her inside her vagina downstairs. RP 535.

After the movie, J went upstairs. RP 438. Before leaving, she told Mr. Alvarez if he needed anything, come upstairs and ask. RP 438. J’s room upstairs was the only room. RP 373-74. Joseph and J’s mother slept in a room in the basement. RP 373.

While J was upstairs organizing her things and looking at her lotions, J claimed that Mr. Alvarez appeared and placed her in a chokehold using his elbow. RP 446, 453-55, 548-49. After J told him to stop, he let go. RP 454. They went to the bed, where Mr. Alvarez rubbed lotion on J’s legs. RP 448. J testified that sometime during the next hour or so, Mr. Alvarez placed his fingers inside of her vagina and used his tongue on her vagina. RP 451.

Before Mr. Alvarez left, they discussed her being in karate. RP 550. J brought up that she planned to wear a dress to school the next day, and asked Mr. Alvarez if it looked cute. RP 551. J later decided to not wear the dress because she was told either before or that morning by her

mother that the dress was too short. RP 537, 554-55. J explained that she also thought her counselor might think it was odd if she wore a dress because she had not told anyone what had happened. RP 538.

After J's testimony, the jury heard that during an interview with defense counsel, J "forgot" to discuss what happened in her room with Mr. Alvarez. RP 610, 614. When asked what had happened, J discussed events downstairs, stated she went upstairs to bed, and then went to school the next morning. RP 610, 614.

During the trial, the court permitted Officer Nelson to testify over objection that Mr. Alvarez did not appear surprised when he told Mr. Alvarez of J's allegation. RP 343-45. The court also permitted over objection testimony from the forensic interviewer that J's statement to her was "consistent" with what J had told the police. RP 356-64.

The jury acquitted Mr. Alvarez of the first count, but found him guilty on the second count. RP 707. The prosecutor had identified count one as being downstairs and the second count as being upstairs. RP 661.

The court sentenced Mr. Alvarez to an indeterminate sentence of 110 months to life. CP 120. The court imposed many conditions for the term of community custody, which was life. CP 120. Mr. Alvarez appeals.

E. ARGUMENT

1. In violation of Mr. Alvarez’s right to silence, the court improperly admitted testimony from law enforcement that he appeared unsurprised when an officer told him he was alleged to have committed sexual misconduct. This constitutional error requires reversal and a new trial.

a. The right against self-incrimination includes a right to silence and pre-arrest silence cannot be used as substantive evidence of guilt.

The federal and state constitutions protect against self-incrimination. State v. Burke, 163 Wn.2d 204, 210, 181 P.3d 1 (2008); U.S. Const. amend. V; Const. art. I, § 9.¹ The right is “intended to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt.” State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996). Included within the privilege against self-incrimination is a right to silence. Id. at 241. This “right to silence exists prior to arrest.” Id. at 241.

The use of pre-arrest silence as evidence in a criminal trial against an accused may violate the right against self-incrimination. The right is violated when the defendant’s prearrest silence is used as substantive evidence of guilt, as opposed to impeachment. Burke, 163 Wn.2d at 206;

¹ The Fifth Amendment provides no person “shall . . . be compelled in any criminal case to be a witness against himself.”

Article I, section 9 states in relevant part: “No person shall be compelled in any criminal case to give evidence against himself.”

Easter, 130 Wn.2d at 236-37; State v. Romero, 113 Wn. App. 779, 787, 54 P.3d 1255 (2002). For example, in Easter, where the defendant did not testify, the defendant's right to silence was violated by testimony that the defendant did not answer and looked away when first questioned by law enforcement. Easter, 130 Wn.2d 241.

In this case, a violation of Mr. Alvarez's constitutional right against self-incrimination occurred when the court admitted testimony from a law enforcement officer that Mr. Alvarez did not appear surprised when told of the allegation of sexual misconduct against a child.

b. Over Mr. Alvarez's objection, the court permitted the prosecutor to elicit testimony from a law enforcement officer that Mr. Alvarez did not appear surprised when told about the allegation.

The error occurred right out of the gate. As its first witness, the prosecution called Officer Michael Nelson. RP 330-31. Officer Nelson testified he interviewed J at the school counselor's office and that J made allegations of sexual misconduct against Mr. Alvarez. RP 332-337. After meeting with J's mother and speaking with Mr. Alvarez's father on the phone, Officer Nelson went to J's home. RP 337-40. At the home, he met Mr. Alvarez, who appeared to have woken up recently. RP 343. After eliciting that the officer told Mr. Alvarez about J's allegation, the prosecutor asked Officer Nelson how Mr. Alvarez reacted, drawing an

objection and side-bar:

Q Okay. And did you advise him of the allegation?

A I did.

Q How did he react?

MR. STOVERN: Objection, Your Honor. Can we have a side bar?

RP 343.

At the side-bar, Ms. Chen, the prosecutor, argued that she was trying to elicit testimony that Mr. Alvarez did not appear surprised. Defense counsel maintained his objection, arguing that the prosecutor was attempting to elicit testimony in violation of Mr. Alvarez's right to remain silent:

MS. CHEN: I am eliciting just the bare reaction of whether there was or wasn't. I have specifically advised the law enforcement officer that we are not to speak of the Mirandized or invoking and that's as far as I am going to go with the discussion of his meeting with Jeremy.

MR. STOVERN: The State is attempting to use the fact that Mr. Alvarez did not respond to their provocation as -- I mean, they are getting around his right to remain silent, his just to remain silent, his right to have a lawyer and remain silent. The fact that he did not respond shouldn't be -- I mean, it's unfairly prejudicial. It doesn't prove anything one way or another.

THE COURT: Is your -- and did he respond, or how did he respond? Just let me ask that. What's your question?

MS. CHEN: I think I asked, how did he respond? He is

going to say there was no surprise.

THE COURT: You mean his facial presentation showed no surprise?

MS. CHEN: Right.

THE COURT: And your same objection. Is that what you are saying?

MR. STOVERN: How on earth could that police officer know whether or not the defendant was surprised? He is choosing not to speak because he is in front of a police officer. He had not been Mirandized yet but it was coming. Now you are trying to hold the fact that he did not react against him. His decision not to speak is protected.

THE COURT: Well, has he been Mirandized at this point or not?

MR. STOVERN: No.

THE COURT: Then I -- okay.

MS. CHEN: It's just the facial expression.

MR. STOVERN: Which is speculation.

THE COURT: Well, it's allowed by his training and experience. I will allow it. Overruled. But it's a fine line so I think you have understood the line.

MS. CHEN: Okay. I will be very careful.

RP 343-44 (emphasis added).

After Mr. Alvarez's objection was overruled, the officer testified that Mr. Alvarez did not appear surprised when told he had been accused of sexual misconduct against a child:

Q When you advised him of the allegation was there any expression on his face?

A He had no expression whatsoever on his face, no. No shock or anything like that.

RP 345.

c. The admission of Mr. Alvarez's prearrest silence was error and violated Mr. Alvarez's right against self-incrimination.

The trial court should have sustained Mr. Alvarez's objection. "[I]t is constitutional error for the State to purposefully elicit testimony as to the defendant's silence." Romero, 113 Wn. App. at 790. Here, the prosecution purposefully elicited testimony from a law enforcement officer that Mr. Alvarez did not appear surprised when told by the officer about the criminal allegation for which he was on trial. This commented on Mr. Alvarez's right to silence. Easter, 130 Wn.2d 241; see State v. Holmes, 122 Wn. App. 438, 444-45, 93 P.3d 212 (2004) (testimony by officer that defendant did not act surprised and did not deny charges when placed under arrest commented on defendant's right to silence); State v. Knapp, 148 Wn. App. 414, 419-421, 199 P.3d 505 (2009) (detective's testimony about a lack of a reaction from defendant about being identified commented on right to silence); State v. Terry, 181 Wn. App. 880, 886, 328 P.3d 932 (2014).

Like the defendant in Easter, Mr. Alvarez did not testify so the

evidence was admitted as substantive evidence of guilt, not impeachment. Easter, 130 Wn.2d at 24. Following precedent, this Court should hold that the prosecutor improperly elicited testimony commenting on Mr. Alvarez's right to silence.

d. The State cannot meet its burden to prove the error harmless beyond a reasonable doubt.

Because the admission of testimony commenting on a defendant's right to silence is constitutional error, prejudice is presumed and the State bears the burden of proving the error harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); State v. Coristine, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). The State cannot meet this heavy burden.

The prosecution's case turned largely on credibility. Simply stated, the issue for the jury was whether to credit J's testimony that Mr. Alvarez did what she claimed he did. The jury had reason to doubt J's testimony. As defense counsel pointed out during closing argument, J's story was inconsistent and kept changing. RP 685-88. She had a motive to fabricate because she had been upset about being unfairly punished the previous day and blamed Mr. Alvarez. RP 682. She came up with the idea after seeing a video in school about native Americans being raped. RP 683-84. Although the jury evidently found J somewhat credible, the jury did not

find her completely credible because the jury acquitted Mr. Alvarez of count one. RP 707. The comment on Mr. Alvarez's silence may have convinced the jury to find J credible enough to convict on the second count. See Holmes, 122 Wn. App. at 446-47 (appellate court not in position to say jury would have necessarily reached the same result when the issue boils down to credibility).

Moreover, it must be recalled that the prosecutor elicited the improper testimony because it was powerful evidence. The testimony was essentially "an observation on [Mr. Alvarez's] failure to proclaim his innocence, and it provided a basis for an inference of guilt." Holmes, 122 Wn. App. at 444-45. The prosecutor knew the jury would wonder that if Mr. Alvarez was innocent, why did he not act surprised and proclaim his innocence? See Terry, 181 Wn. App. at 893 (reasoning that a juror would likely think a lack of surprise upon being arrested would show guilt). Moreover, the jury likely credited the officer's improper testimony because a law enforcement officer's testimony "carries a special aura of reliability." State v. Winborne, ___ Wn. App. 2d. ___, 420 P.3d 707, 722 (2018) (internal quotation omitted).

Consistent with the foregoing precedent, this Court should reverse and remand for a new trial. See, e.g., Easter, 130 Wn.2d at 242-43; Holmes, 122 Wn. App. at 647.

2. Violating the rules of evidence and Mr. Alvarez’s jury trial rights, a child forensic interviewer was permitted to give her “expert” opinion that the child’s statement was “consistent” with a prior statement.

a. Opinion testimony is inadmissible if it is unhelpful or does not assist the jury.

The rules of evidence restrict opinion testimony by witnesses.

Expert opinion testimony is admissible if it will assist the trier of fact:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 702 (emphasis added). Relatedly, lay witness opinion is limited to testimony that is helpful:

If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

ER 701 (emphasis added).

Restricting opinion testimony is sound because opinion testimony may invade the province of the jury. See State v. Quaale, 182 Wn.2d 191, 199-200, 340 P.3d 213 (2014) (opinions on guilt improper because they infringe on right to jury trial). As explained by our Supreme Court over a century ago:

When all relevant facts can be or have been introduced before the jury, and the latter are able to deduce a reasonable inference from them, no reason exists for receiving opinion evidence, and it is inadmissible.

Pearson v. Alaska Pac. S.S. Co., 51 Wash. 560, 565, 99 P. 753 (1909).

b. Overruling Mr. Alvarez’s objection, the court permitted an “expert” to opine that J’s statement to her was “consistent” with what she told police.

Following Officer Nelson’s testimony, the prosecution called Mari Murstig, a child forensic interviewer, to testify. RP 347-48. Ms. Murstig interviewed J at “Kids Haven” for about 45 minutes. RP 348, 354-56.

During the prosecutor’s direct examination, defense counsel made a hearsay² objection after the prosecutor asked Ms. Murstig if what J disclosed was “consistent with what” Ms. Murstig “had been told”:

Q Before you began the interview did you know the gist of what was alleged in [J]’s case?

A Yes.

Q How much did you know?

A I had received a copy of the police report and the CPS referral.

Q Okay. And was she able to tell you about the allegations of sexual abuse?

A Yes.

² Under the rules of evidence, hearsay is generally inadmissible. ER 802. Hearsay is an out-of-court statement offered “to prove the truth of the matter asserted.” ER 801(c).

Q Was her disclosure consistent with what you had been told?

MR. STOVERN: Objection, Your Honor. It's referencing hearsay statements.

THE COURT: Ms. Chen.

MS. CHEN: He is not claiming it's hearsay. He is saying it's referencing hearsay statements. I am asking if it's consistent.

THE COURT: Anything further?

MR. STOVERN: They are asking for an opinion based on a document that is never going to be shown to the jury.

THE COURT: I thought she -- okay. Why don't we do a side bar. One moment.

RP 356-57.

A lengthy side-bar ensued. The prosecutor maintained the testimony was not hearsay and that Ms. Murstig should be permitted to give her "expert" opinion. Defense counsel responded that Ms. Murstig being an "expert" did not matter because she was not making an expert opinion that would be helpful for the jury:

MR. STOVERN: It's clearly hearsay. Anything that that, that [J] told to Ms. Murstig is hearsay. So just asking for an opinion based on cumulative hearsay doesn't get around the fact that you are asking her to have an opinion about the hearsay.

She is trying to shoehorn this in and have the expert say,

yes, she agreed with everything in the police report without showing the jury what's in the police report or saying specifically what she said which makes it really hard to question her about it. It is hearsay what that child said to her; so you can't have an opinion based on it and get around the hearsay rule.

THE COURT: Go ahead.

MS. CHEN: The definition of hearsay is an out of court statement offered to prove the truth of the matter asserted. She is not testifying to any statement.

MR. STOVERN: She --

MS. CHEN: She --

MR. STOVERN: Sorry.

MS. CHEN: She is an expert. She reviewed it. She didn't say whether it's different than what was there. It is the Defense's argument that these statements were inconsistent but he is now saying that nothing is going to come in to show one way or the other what those statements are. This doesn't make any sense.

It's not hearsay. It's her reviewing a report and saying, is it different. Anybody can look at a report and say that's not what was said. That's different.

MR. STOVERN: If anyone can do it then her expert testimony is not needed by definition.

THE COURT: Under the evidence rules what the opinion is based on if it's hearsay doesn't have to be. It can be based on hearsay and doesn't have to be admissible.

MR. STOVERN: State's argument is that anyone can do what she is asking her to do which means it's not the province of an expert. The expert is only allowed to have opinions when it is useful for laypeople to understand. She

is not -- you don't -- the State just said you don't need an expert for that; anyone can do it. So it is proper that the jury do it and not the expert.

RP 357-59 (emphasis added). After the prosecutor clarified that Ms. Murstig had read a police report, the court then ruled that the testimony was not objectionable as hearsay under ER 703:

THE COURT: Let's make one thing clear from the court's perspective. In light of the question being asked what she told you, is that consistent with what she told Officer Romero being based on the report that you read? If that's the essence of the question the State is asking and you are objecting to, I am allowing. I am going to allow that under the evidence rules. I don't know how to cite it off the top of my head. But I already referenced, I think, it's 703 and this is essentially so I happen to allow it. And I believe it's proper of her to do so under that rule. Appreciate that you are going to make an exception for the record. And my only point of making this statement right now is that you are clarifying on what she is saying is subsequent. So if Officer Romero gets on the stand you have an opportunity to address if you think there is some inconsistency.

...

THE COURT: Based on that I will allow that testimony to come in.

RP 360 (emphasis added). Defense counsel objected further, maintaining that this was improper opinion testimony, but the court adhered to its ruling:

MR. STOVERN: I am objecting for clarity that this is something the State has already said; does not require an expert. Under the expert rule you can only have an opinion when it would be helpful for a layperson. The State has

already admitted it is not necessary for an expert to do this. If that is the case the expert is not allowed to make an opinion because that is the role of the jury.

THE COURT: Okay. Anything further?

MS. CHEN: No, Your Honor.

THE COURT: Well, to address that issue the court will indicate that if she is, in fact, a witness for the State -- is that your position? That she is a fact witness or that she is an expert witness?

MS. CHEN: She is both an expert and a fact witness.

THE COURT: Is what you are trying to elicit an opinion or a fact?

MS. CHEN: It could be interpreted either way. But let's say for example the report said she thought the dress was orange and she interviewed her and she said the dress was orange. Anybody can say that's consistent.

THE COURT: That's a fact or conclusion?

MS. CHEN: It's probably more of the facts in this case.

THE COURT: We are back to your objection on that basis.

MR. STOVERN: I agree that this would be a fact. Clearly with a -- two statements similar is an opinion. It is not, was something orange or not orange? We are talking about a very detailed story of some length.

THE COURT: I am going to allow it. Overruled.

362-63 (emphasis added).

Ms. Murstig then testified that J's disclosure was "consistent" with what she read in Officer Nelson's report. RP 363-64.

c. The court erred by permitting “expert” opinion testimony stating that the child’s story to her was consistent with the child’s story to the police, as set out in a police officer’s report.

As defense counsel argued, the “expert” opinion was unhelpful. As the prosecutor conceded, the jurors were more than capable of comparing two statements and judging if the two statements are “consistent.”

Determining whether J’s story was consistent was a question of fact for the jury, not Ms. Murstig. As stated by our Supreme Court:

[I]t is not proper to permit a witness to give his opinion on questions of fact requiring no expert knowledge when the opinion involves the very matter to be determined by the jury, and the facts are capable of being presented to the jury on which the witness founds his opinion.

Johnson v. Caughren, 55 Wash. 125, 130, 104 P. 170 (1909).

In other words, “[i]f the issue involves a matter of common knowledge about which inexperienced persons are capable of forming a correct judgment, there is no need for expert opinion.” State v. Smissaert, 41 Wn. App. 813, 815, 706 P.2d 647 (1985). For example, the effect caused by the consumption of alcohol is commonly known and requires no expert testimony. Id.; see also State v. Swan, 114 Wn.2d 613, 655-56, 790 P.2d 610 (1990) (exclusion of defense proposed expert proper in part because proposed testimony about the dangers and suggestiveness of child interviews was within the understanding of the jury).

Similarly, whether statement “X” is consistent with statement “Y” requires no expertise. And it is not the type of opinion that is appropriate for a lay witness. See United States v. Cox, 633 F.2d 871, 875 (9th Cir. 1980) (“Lay witnesses are normally not permitted to testify about their subjective interpretations or conclusions as to what has been said.”). The consistency of J’s story was an issue for the jury.³ The court should have sustained the objection.

d. The “expert” opinion testimony violated Mr. Alvarez’s constitutional right to a jury trial by commenting on the child’s veracity.

Independent of the foregoing analysis, the testimony was improper opinion testimony concerning whether J was telling the truth. Personal opinions on the veracity or credibility of a witness violates the defendant’s constitutional right to a jury trial.⁴ Quaale, 182 Wn.2d at 200; State v. Stevens, 127 Wn. App. 269, 275-76, 110 P.3d 1179 (2005), affirmed on other grounds, 158 Wn.2d 304, 143 P.3d 817 (2006). The right to a jury

³ Of course, the problem for the prosecution was that Officer Nelson’s report was inadmissible hearsay. So unless the report was admitted with a limiting instruction (which would not be effective), the jury could not compare it to what J told Ms. Murstig (which presents the same hearsay problem). The court’s ruling allowing Ms. Murstig to opine that what J said was consistent with what Officer Nelson wrote in his report was a runaround of the hearsay rules, as the defense argued.

⁴ Const. art. I, §§ 21, 22; U.S. Const. amend. VI.

trial “includes the independent determination of the facts by the jury.”
Quaale, 182 Wn.2d 199. This is manifest constitutional error that Mr.
Alvarez can raise it for the first time on appeal. State v. Johnson, 152 Wn.
App. 924, 934, 219 P.3d 958 (2009).

This Court’s opinion in Stevens is on point. There, the prosecutor
was permitted to ask a law enforcement officer whether statements by the
two complaining witnesses were consistent. Stevens, 127 Wn. App. at
275. This Court rejected the State’s argument that the testimony was
proper, concluding the questioning was just an indirect way of asking the
officer if the girls were being truthful:

The prosecutor’s question of whether the victims gave
consistent statements was not a direct question on whether
the girls were telling the truth. But the question was
relevant only on the issue of their truthfulness. Lack of
consistency would suggest that the victims were either
lying or at least mistaken. Consistency would suggest that
the victims were truthful and accurate. Because the
consistency question bears only on the victims’ truthfulness
and reliability, it is simply an indirect way of asking the
officer if the girls were telling the truth. As such, the
question was improper.

Id. at 275-76 (emphasis added).

The same reasoning applies in this case. Whether J was consistent
in her story suggested truthfulness and accuracy. Asking Ms. Murstig if
J’s story was consistent with the story she told Officer Nelson (as stated in
his report) was an indirect way of asking if J was telling the truth. The

question and answer was improper and is constitutional error. Id.

e. The error was prejudicial.

Because the error violated Mr. Alvarez’s constitutional rights, the constitutional harmless error test applies and the prosecution must prove the error harmless beyond a reasonable doubt. Quaale, 182 Wn.2d at 202.⁵

“The courts have often referred to an expert’s “aura of reliability” that may be prejudicial when the jurors are capable of evaluating the facts for themselves.” 5B Wash. Prac., Evidence Law and Practice § 702.16 (6th ed.). For this reason, the erroneous admission of “expert” opinion testimony in child sex cases is highly prejudicial. See State v. Maule, 35 Wn. App. 287, 293, 667 P.2d 96 (1983).

This case is no different. In fact, the prosecutor seized upon the court’s error, arguing that the jury should reject the defense’s argument that J’s story was inconsistent because Ms. Murstig, “the expert,” did not find J’s story inconsistent:

I think you have heard that the Defense believes that her -- she will be inconsistent on crucial important details. Well, we had Ms. Murstig testify. She was the one who conducted the 45-minute interview. She is the expert and she did not find it inconsistent.

⁵ If not constitutional error, evidentiary error requires reversal if there is a reasonable probability that the evidence materially affected the outcome of the trial. State v. Gunderson, 181 Wn.2d 916, 926, 337 P.3d 1090 (2014).

RP 667 (emphasis added).

Mr. Alvarez's defense turned on the jury not finding J to be credible because her story was inconsistent and differed each time it was told. The improperly admitted evidence may have swayed the jury to reject the defense's contention. The State cannot prove the error harmless beyond a reasonable doubt and there is a reasonable probability of a different result absent the error. This Court should reverse.

3. The court commented on the evidence in violation of our state constitution. The prosecution cannot prove no prejudice resulted, requiring reversal of the conviction.

a. The Washington Constitution forbids judicial comments on the evidence.

“Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” Const. art. IV, § 16. “A judge is prohibited by article IV, section 16 from ‘conveying to the jury his or her personal attitudes toward the merits of the case’ or instructing a jury that ‘matters of fact have been established as a matter of law.’” State v. Jackman, 156 Wn.2d 736, 743-44, 132 P.3d 136 (2006), quoting State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). For example, in Jackman, the Washington Supreme Court held the trial court commented on the evidence by providing jury instructions which contained birthdates of the alleged child victims because minority was an essential element.

Jackman, 156 Wn.2d at 743-44.

b. The court commented on the evidence at least three separate times.

To prove the charge of second degree rape of a child, the prosecution had to prove that, at the time of the alleged act, J was at least 12 years old but less than 14, and that she was at least three years younger than Mr. Alvarez. CP 50 (“to-convict” instruction); RCW 9A.44.076(1).

In this case, the trial court commented on the evidence at least three separate times. First, the court commented on the evidence by instructing the jury on Mr. Alvarez’s date of birth. Second, the court commented on the evidence by telling one of the potential jurors, who sat on the jury and deliberated, that the court thought the alleged victim was 12 or 13 years old. And third, the court commented on the evidence by telling the jury pool the birthdate of the alleged victim.

c. The court commented on the evidence by instructing the jury on Mr. Alvarez’s date of birth.

The cover page of the jury instructions contains the caption of the case and lists a date of birth below Mr. Alvarez’s name:

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF FRANKLIN

STATE OF WASHINGTON,)
Plaintiff,) NO. 17-1-50214-11
vs.)
JEREMY JOSEPH ALVAREZ)
D.O.B.: 06/12/1990)
Defendant.)
Amended
INSTRUCTIONS OF THE COURT

CP 40.

The State bore the burden of proving that J was at least three years younger than Mr. Alvarez. Mr. Alvarez’s age was a factual issue for the jury. By telling the jury in its instructions that Mr. Alvarez was born on June 12, 1990, the court commented on the evidence. See Jackman, 156 Wn.2d at 744 (“By stating the victims’ birth dates in the instructions, the court conveyed the impression that those dates had been proved to be true.”).

d. The court commented on the evidence by telling one of the potential jurors, who sat on the jury, that the court thought the alleged victim was 12 or 13 years old.

“[A]ny remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as judicial comment.” State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

During jury selection, the court questioned many of the jurors

individually. One of these jurors was juror number 13.

THE COURT: All right. And so appreciating that this case involves a charge, charges that are sex crimes against a child, a minor who is, I think, 12, 13 years of age approximately, are you able to follow the court's instructions, set aside any impact that case might have had on you and give a decision solely based on the evidence provided in court?

JUROR NO. 13: I believe so.

RP 63-64 (emphasis added). Juror no. 13 later sat on the jury and deliberated. Supp. CP __ (sub. nos. 35, 36, 39, 40); RP 700-11.

Here, the court commented on evidence by telling a potential juror that the court thought the alleged victim was 12 or 13 years old. The State bore the burden of proving that J was 12 or 13 years old. Thus, the court's statement suggested that the minority element was established. See Jackman, 156 Wn.2d at 744.

e. The court commented on the evidence by telling the jury pool the birthdate of the alleged victim.

Similar to the court's judicial comment to juror no. 13, the court commented on the evidence when reading the jury the State's charging document. In reading the charging document, the court did not omit language the prosecution had including stating J's date of birth:

THE COURT: Thank you, counsel.

The defendant is charged by a first amended information as follows: Count I, rape of a child in the

second degree, a class A felony committed as follows:

That the said Jeremy Joseph Alvarez in the county of Franklin, State of Washington on or about April 19th, 2017, then and there did engage in sexual intercourse with and was at least 36 months older than J.M. -- excuse me. J.M.P., date of birth 10/23/2003, a person who was at least 12 years of age but less than 14 years of age and not married to the defendant.

Count II, rape of a child in the second degree, a class A felony; that the said Jeremy Joseph Alvarez in the county of Franklin, State of Washington on or about April 19th, 2017, then and there did engage in sexual intercourse with and was at least 36 months older than J.M.P., date of birth 10/23/2003, a person who was at least 12 years of age but less than 14 years of and not married to the defendant.

RP 206-07 (emphasis added). The court then continued to read preliminary instructions and jury selection continued. RP 206-09.

There was no need for the court to include the statement about J's date of birth in reading the charges. The court properly omitted language from the charging document that second degree rape of a child is a class A felony. CP 161. The court should have done the same regarding the allegation about J's date of birth.

In reading the charges, the court told the jury that J's birthdate was October 23, 2003. The court's comment was made in conjunction with preliminary instructions to the jury. The court's remark established J's birthdate. To prove the charges, the State bore the burden of proving J's age. Under these circumstances, the court commented on the evidence.

See Jackman, 156 Wn.2d at 744; State v. Painter, 27 Wn. App. 708, 714, 620 P.2d 1001 (1980) (whether there is a comment on the evidence “depends upon the facts and circumstances of each case.”).

f. The State cannot meet its burden to affirmatively prove that no prejudice could have resulted from any of the three judicial comments on the evidence.

“A judicial comment is presumed prejudicial and is not prejudicial only if the record affirmatively shows no prejudice could have resulted.” State v. Sinrud, 200 Wn. App. 643, 651, 403 P.3d 96 (2017). The State bears the burden to show that Mr. Alvarez was not prejudiced by any judicial comment on the evidence. State v. Boss, 167 Wn.2d 710, 721, 223 P.3d 506 (2009). The State cannot meet its burden.

As set out by our Supreme Court, if is “conceivable” that the jury could have reached a contrary conclusion absent the judicial comment, reversal is required. Jackman, 156 Wn.2d at 745. In Jackman, the minority of the alleged victims was an element the State had to prove. Id. The trial court commented on the evidence by including the alleged victims’ birthdates in the jury instructions. Id. at 740 & n.3, 744. Despite testimony about the alleged victims’ birthdates, corroborating evidence, and a lack of any challenge by the defendant to the minority element, our Supreme Court held the State had not met its burden to prove the defendant was not prejudiced. Id. at 745. It remained “conceivable” that the jury would have

reached a different result absent the judicial comments. Id.

The same is true in this case. To be sure, there was testimony about how old Mr. Alvarez and J were, and their birthdates. RP 367, 393-94, 422. But absent the judicial comments, it is conceivable that the jury could have reached a different conclusion regarding either J's age or Mr. Alvarez's age. If the jury had a reasonable doubt as to whether J was 12 or 13 years old, or whether Mr. Alvarez was more than three years older than J, the jury was required to acquit. CP 49-50. Under Jackman, reversal is required.

4. Cumulative error deprived Mr. Alvarez of a fair trial.

“An accumulation of non-reversible errors may deny a defendant a fair trial.” State v. Perrett, 86 Wn. App. 312, 322-23, 936 P.2d 426 (1997). Reversal is warranted for cumulative error when the combination of errors denies the defendant a fair trial, even if each individual error is harmless by itself. State v. Salas, 1 Wn. App. 2d 931, 952, 408 P.3d 383 (2018), review denied, 190 Wn.2d 1016, 415 P.3d 1200 (2018).

There is a reasonable probability that the cumulative effect of any combination of the errors materially affected the outcome. The court improperly admitted testimony from state witnesses commenting on Mr. Alvarez's right to silence and on J's veracity. And the court improperly commented on the evidence. The evidence against Mr. Alvarez was not

overwhelming. Cf. id. (cumulative error doctrine applied where evidence against the defendant was not overwhelming). J told different stories about what happened. The jury acquitted on the first count. Given the errors, Mr. Alvarez was deprived of a fair trial, requiring reversal. See, e.g., State v. Alexander, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992) (reversing rape of child convictions due to accumulation of errors, which included improper vouching testimony).

5. The trial court entered several conditions of community custody that are unlawful. Remand is necessary to remedy the errors.

a. Community custody conditions must be constitutional, authorized by statute, and reasonable.

The trial court ordered lifetime community custody. CP 120. The trial court entered several conditions of community custody that are unlawful. This Court should order them stricken or modified.

A trial court is authorized to impose discretionary community custody conditions as part of a sentence. RCW 9.94A.703(3). In addition to listing several discretionary conditions, the statute permits a court to impose “crime-related” conditions:

As part of any term of community custody, the court may order an offender to:

...

(c) Participate in crime-related treatment or counseling

services;

(d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;

...

(f) Comply with any crime-related prohibitions.

RCW 9.94A.703(3)(f) (emphasis added). A crime-related prohibition “means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.”

RCW 9.94A.030(10). This means the conditions must be “reasonably related” to the crime. State v. Johnson, ___ Wn. App. 2d. ___, 421 P.3d 969, 972 (2018).

Community custody conditions are reviewed for an abuse of discretion. State v. Padilla, 190 Wn.2d 672, 677, 416 P.3d 712, 715 (2018). A trial court abuses its discretion by imposing conditions that are unconstitutional, unauthorized by statute, or manifestly unreasonable. Id. For example, impermissibly vague community custody conditions are invalid because they violate the constitutional prohibition against vague laws. State v. Bahl, 164 Wn.2d 739, 745, 758-61, 193 P.3d 678 (2008).

b. The conditions forbidding contact with children do not include an exception for any future biological children and should be limited to minors 16 years or younger.

Natural parents have a fundamental right under the due process in the “care, custody, and management” of their children. Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); U.S. Const. amend. XIV; Const. art. I, § 3.

Although Mr. Alvarez does not appear to have any children, he may in the future. Several of the conditions, however, restrict Mr. Alvarez’s contact with children, contain no exception, and one explicitly states this includes biological family members. Conditions 4, 14, 15, and 16 in appendix A state:

(4) No contact with minor aged male or female children under the age of 18, to include biological family members who are minor aged, unless an exception is specifically specified by the sentencing court in the body of the Judgment and Sentence.

...

(14) Do not work or hold a position or employment that would require the offender to interact or watch over children in the community.

(15) No minor aged children allowed in offender’s registered address at any time.

(16) No babysitting minor aged children

Supp. CP __ (sub. no. 64) (emphasis added).

As to condition 4, no exception is listed in the judgment and sentence. CP 115-26.

Should Mr. Alvarez have a child, these conditions unconstitutionally infringe on Mr. Alvarez's parenting rights. See In re Pers. Restraint of Rainey, 168 Wn.2d 367, 381-82, 229 P.3d 686 (2010) (record did not show that lifetime duration of no-contact order as to daughter was reasonably necessary); State v. Ancira, 107 Wn. App. 650, 656, 27 P.3d 1246 (2001) (order forbidding defendant from contacting children for five years not reasonably necessary); State v. Letourneau, 100 Wn. App. 424, 427, 997 P.2d 436 (2000) (limitations on mother's contact with her children not reasonably necessary because rape of a child conviction concerned child to whom she was not related). Accordingly, this Court should instruct that the trial court clarify that the conditions do not apply to any children of Mr. Alvarez's.

The Court should also instruct the conditions be rewritten to apply only to children under the age of 16. "In the context of a sex offense, the term "children" refers to individuals under the age of 16." Johnson, 421 P.3d at 973 (citing RCW 9A.44.073-.089). Forbidding Mr. Alvarez from contact with minors 16 years or older is unreasonable. See id. at 973 n.3 (ordering condition that person avoid places where children congregate be modified to say "children under 16"). It is also not crime-related because

the offense did not involve a 16 or 17-year-old.

c. The conditions compelling Mr. Alvarez to speak are not crime-related and violate the First Amendment.

The trial court ordered that Mr. Alvarez, as part of his life-time community custody, disclose his sexual criminal history to any person he forms a sexual relationship with. He is also required to inform the State of any partners. Conditions 12 and 13 in the appendix require Mr. Alvarez to:

(12) Advise assigned community corrections officer/sex offender/mental health treatment provider of any current sexual partners/relationships and provide name and identification of sexual partner to assigned community corrections officer;

(13) Disclose sexual criminal history/community custody conditions/prohibitions to any current or future individuals with whom you form or establish a sexual relationship with;

Supp. CP __ (sub. no. 64). Neither of these conditions are crime-related. Mr. Alvarez did not commit sexual misconduct against his paramour's child. The child was his father's stepdaughter. Mr. Alvarez was invited to stay at the house by his father. The above conditions are not reasonably related to the crime. They should be stricken.

The conditions compel Mr. Alvarez to speak. For example, under condition 13, Mr. Alvarez must tell any future partner (presumably immediately upon forming the sexual relationship) that he was convicted for second degree rape of a child.

This compelled speech violates the state and federal constitutions. U.S. Const. amend. I; Const. art. I, § 5. The right to freedom of speech includes the right to not speak. Wooley v. Maynard, 430 U.S. 705, 714, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977); State v. K.H.-H., 185 Wn.2d 745, 749, 374 P.3d 1141 (2016).

To be sure, a criminal conviction results in the diminishment of constitutional rights. K.H.-H., 185 Wn.2d at 749. But the fact of a criminal conviction does not result in the complete forfeiture of a person's constitutional rights, including speech. For example, the United States Supreme Court recently held that a state law restricting convicted sex offenders' access and use of social networking websites violated the First Amendment. Packingham v. North Carolina, ___ U.S. ___, 137 S. Ct. 1730, 1735-38, 198 L. Ed. 2d 273 (2017); accord Mutter v. Ross, 240 W. Va. 336, 811 S.E.2d 866 (2018) (applying Packingham to parole condition that imposed complete ban on a parolee's use of the internet and holding ban violated First Amendment). The Court reasoned the State had not met its burden to show that the very broad law was necessary to serve the purpose of keeping convicted sex offenders away from vulnerable victims. Packingham, 137 S. Ct. at 1737.

In K.H.-H., a juvenile adjudicated guilty of fourth degree assault was required to write an apology letter to the victim. 185 Wn.2d at 748.

Our Supreme Court upheld the requirement. Id. at 756. Although not settling on a framework, the court held the requirement passed two possible frameworks, both of which examine “the underlying purpose of the act as well as the nature of the crime in determining whether the condition is appropriate.” Id. at 751. The court reasoned the apology letter condition was “specific and concrete,” reasonably related to crime the juvenile was convicted of, and furthered the goals of rehabilitating the juvenile, the underlying purpose of the act. Id. at 754.

Here, the condition requires Mr. Alvarez to inform any person he forms a sexual relationship with about his sexual criminal history along with probation conditions. Even assuming a legitimate purpose, it is overly broad because it applies to persons who do not have children. Thus, it is improper under the Packingham framework. For the same reasons, it is also improper under the K.H.-H. framework because it is not concrete, not reasonably tied to the crime, and is not tailored to the goal of protecting the public.

Both conditions should be stricken because they are not crime-related. Condition 13 should be stricken or ordered reformed because it violates the First Amendment.

d. The condition that Mr. Alvarez allow a full search of his cell phone, computer, and any other electronic device, violates article, I, § 7 and the Fourth Amendment.

In condition 6 of the appendix, the court ordered that Mr. Alvarez “Allow a full search of your cell phone/computer or other electronic device as directed by DOC staff.” Supp. CP __ (sub. no. 64).

This condition is not crime-related. The crime did not involve the use of a cell phone, computer, or other electronic device. For this simple reason, the condition should be ordered stricken.

The condition also violates the state and federal constitutions. Const. art. I, § 7; U.S. Const. amend. IV. Persons on community custody retain their constitutional right against searches and seizures, although that right is diminished. State v. Winterstein, 167 Wn.2d 620, 628-29, 220 P.3d 1226 (2009); Griffin v. Wisconsin, 483 U.S. 868, 873, 107 S. Ct. 3164, 97 L. Ed. 2d. 709 (1987). For example, under article I, § 7, a corrections officer may not search the home or personal effects of a person on community custody without a warrant unless the officer has reasonable cause to believe the offender has violated a condition or requirement of the sentence. Winterstein, 167 Wn.2d at 628-29. Statute also requires “reasonable cause.” RCW 9.94A.631(1).

Electronic devices, particularly modern cell-phones, store vast

information, and “a cell phone search would typically expose to the government far more than the most exhaustive search of a house.” Riley v. California, ___ U.S. ___ 134 S. Ct. 2473, 2491, 189 L. Ed. 2d 430 (2014). Despite the privacy interests at stake, the condition here does not require *any* cause before a search. The condition is unconstitutional.

The State may claim that this challenge is not ripe. State v. Cates, 183 Wn.2d 531, 535, 354 P.3d 832 (2015). Cates involved the following condition:

You must consent to [Department of Corrections] home visits to monitor your compliance with supervision. Home visits include access for the purposes of visual inspection of all areas of the residence in which you live or have exclusive/joint control/access, to also include computers which you have access to.

Cates, 183 Wn.2d at 533-34. In determining the issue was not ripe for review, the court emphasized the “condition as written does not authorize any searches.” Id. at 535.

In contrast, the condition here plainly authorizes “a full search” of any electronic device Mr. Alvarez possesses. Supp. CP ___ (sub. no. 64). Thus, Cates does not control and the challenge is ripe. The condition should be stricken because it is unconstitutional.

e. The prohibition against “unlawfully possessing controlled substances” is not crime-related, is vague, and should be stricken.

Unless waived, a trial court must order, as part of a term of community custody, that the offender “[r]efrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions.” RCW 9.94A.703(2)(c).

The trial court ordered two conditions that are similar to this condition. Conditions 4 and 5 in the judgment and sentence state that Mr. Alvarez “(4) not consume controlled substances except pursuant to lawfully issued prescription” and “(5) not unlawfully possess controlled substances while in community custody.” CP 121.

Although condition 4 is authorized by RCW 9.94A.703(2)(c), condition 5 is not. Moreover, the crime did not involve controlled substances, so this condition is not crime related. Therefore, that condition should be stricken.

Both conditions are also unconstitutionally vague. The term “controlled substances” is undefined both in the relevant chapter and the judgment and sentence. RCW 9.94A.030. It is unclear whether “controlled substances” includes marijuana, which has generally been legalized under Washington law. RCW 69.50.4013(3). Further, even if marijuana is a “controlled substance,” it is unclear what the “not unlawfully” language in

condition 5 means. It does not specify if “unlawfully” refers to both state and federal law. Because a person of ordinary intelligence cannot understand if marijuana is proscribed under these conditions, the conditions are unconstitutionally vague. See Bahl, 164 Wn.2d at 754.

Moreover, the conditions are inconsistent with Washington’s medical marijuana laws. State law shields medical marijuana users from arrest or criminal sanctions if the user follows the legal requirements. RCW 69.51A.040. Condition 4 permits consumption of controlled substances if authorized by a lawfully issued prescription, but healthcare providers in Washington can only “authorize” use of medical marijuana. RCW 69.51A.030.⁶ They cannot “prescribe” medical marijuana because that is inconsistent with federal law. See Conant v. Walters, 309 F.3d 629 (9th Cir. 2002).

The State may cite RCW 69.51A.055(2). That provision provides that “RCW 69.51A.040 does not apply to a person who is supervised for a criminal conviction by a corrections agency or department, including local governments or jails, that has determined that the terms of this chapter are inconsistent with and contrary to his or her supervision.” RCW 69.51A.055(2). But this provision applies to corrections agencies or

⁶<https://www.doh.wa.gov/YouandYourFamily/Marijuana/MedicalMarijuana/AutORIZATIONForm>

departments, not courts. By its plain terms, it does not apply.

In sum, condition 5 should be stricken. In light of the medical marijuana scheme and issues of vagueness, the trial court should be instructed to clarify condition 4 or strike it.

f. The polygraph condition should be modified.

Condition 5 in appendix A requires Mr. Alvarez to “[c]omply with routine polygraph examinations as directed to include a full-disclosure polygraph at the offender’s expense.” Supp. CP __ (sub. no. 64).

For purposes of monitoring compliance with community custody, polygraph testing is permitted. State v. Riles, 135 Wn.2d 326, 338–39, 957 P.2d 655 (1998), overruled on other grounds by State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010).

Here, the condition is not limited to monitoring Mr. Alvarez’s compliance with other community custody conditions. It should contain this limitation. State v. Combs, 102 Wn. App. 949, 953, 10 P.3d 1101 (2000). This Court should direct the trial court to add the limiting language to this condition. State v. Landrum, 199 Wn. App. 1037 (2017) (unpublished).⁷

⁷ GR. 14.1. The decision is cited only for persuasive value and is not precedential or binding. Crosswhite v. Washington State Dep’t of Soc. & Health Servs., 197 Wn. App. 539, 544, 389 P.3d 731 (2017).

Further, the condition requires that Mr. Alvarez pay for testing. Although Riles upheld a condition requiring the offender to pay, that portion of the condition was not at issue. Riles, 135 Wn.2d 338-39. There does not appear to be a statute authorizing the court to require that the offender pay the costs of a polygraph to monitor compliance.

Moreover, Mr. Alvarez is indigent. CP 145. The court rejected a proposed finding that Mr. Alvarez has the ability to pay legal financial obligations. CP 116. The court waived all discretionary legal financial obligations, imposing only mandatory legal financial obligations. CP 117-18. Requiring Mr. Alvarez to pay the costs of what appears to be a discretionary condition when he does not have the ability to pay is improper. See City of Richland v. Wakefield, 186 Wn.2d 596, 606-07, 380 P.3d 459 (2016); State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015).

6. On remand, the \$200 criminal filing fee should also be stricken unless Mr. Alvarez is determined to not be indigent.

If the Court remands, the Court should also order the \$200 criminal filing fee stricken unless the trial court determines Mr. Alvarez is not indigent. The Legislature recently amended RCW 36.18.020, the criminal filing fee statute. Laws of 2018, ch. 269, § 17. Under the amendment to RCW 36.18.020(2)(h), the \$200 fee may not be imposed on an individual

who is indigent under RCW 10.101.010(3) (a) through (c). Laws of 2018, ch. 269, § 17. This law would be binding on the trial court on remand because courts must apply the law in effect. In re Dependency of A.M.M., 182 Wn. App. 776, 789, 332 P.3d 500 (2014).

F. CONCLUSION

In violation of Mr. Alvarez’s right against self-incrimination, the court permitted a police officer to comment on Mr. Alvarez’s silence. This error was compounded by the court’s ruling permitting testimony from an “expert” that J’s story was “consistent.” That testimony violated Mr. Alvarez’s jury trial rights. The court also commented on the evidence thrice. The conviction should be reversed and the case remanded for a new trial. Alternatively, the unlawful conditions of community should be ordered stricken or reformed.

DATED this 28th day of August, 2018.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 35567-5-III
)	
JEREMY ALVAREZ,)	
)	
APPELLANT.)	

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