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NO. 35722-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL OWEN,

Appellant.

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

The Honorable Scott R. Sparks, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to convict.
2. The court erred in excluding relevant defense evidence.
3. Appellant's right to a unanimous jury verdict was violated.
4. The community custody condition prohibiting appellant from going "in establishments where the primary source of income is alcohol; bars, taverns, lounges" is not crime-related. CP 190 (condition 5).
5. The community custody condition requiring appellant to complete a substance abuse evaluation and comply with any recommended treatment was not authorized. CP 190 (condition 6).
6. The community custody condition prohibiting appellant from having contact "with female minors without the prior approval of the supervising Community Corrections Officer (CCO)" violates appellant's fundamental right to parent. CP 190 (condition 7).

Issues Pertaining to Assignments of Error

1. Where none of the state's witnesses identified the defendant as the perpetrator of the offense and the state presented no evidence – other than identity of names – to prove the defendant

was the person the witnesses testified about, did the state fail to carry its burden to prove guilt beyond a reasonable doubt?

2. Where the complainant testified “Mike” touched her inappropriately on two occasions, the state failed to elect one touching as the basis for the molestation charge and the court failed to instruct the jury it must be unanimous as to the touch relied upon to convict, did the proceeding fail to insure appellant’s right to a unanimous jury verdict?

3. Where the court excluded evidence the complainant described the perpetrator as dark skinned and bearded (unlike the defendant/appellant), on grounds the complainant’s statements did not qualify for admission under the child hearsay statute – but the statements were admissible as non hearsay under ER 801(d) – did the court abuse its discretion and violate appellant’s right to present evidence?

4. Where the community custody condition prohibiting appellant from frequenting bars and lounges is not crime related, should it be stricken?

5. Where the court made no finding that a chemical dependency contributed to the offense, should the community

custody condition requiring appellant to undergo a drug and alcohol evaluation and follow treatment recommendations be stricken?

6. Where appellant has two minor daughters who were in no way involved in the crime of conviction, should the condition prohibiting him from contact with all minor females – with no exception for his own children – be stricken as an unreasonable restriction on appellant's fundamental right to parent?

B. STATEMENT OF THE CASE

1. Procedural Facts

By an amended information, the Kittitas county prosecutor charged appellant Michael Owen with first degree child rape and/or first degree child molestation for allegedly abusing S.C. on January 22, 2017. CP 1, 13. The jury acquitted Owen of rape but convicted him of molestation. CP 37-38.

Owen had zero prior offenses and honorably severed in the military between 2009 and 2013. CP 48-49. At the time of the allegation which resulted in the current conviction, Owen was 36 years old, worked at Safeway and had sole custody of his three children, ages 13, 10 and 6. RP 46-47.

At sentencing on December 4, 2017, the court imposed a standard range sentence of 51 months to life and community

custody for life following Owen's release. CP 183. As conditions of community custody, the court imposed:

5) Not enter into or remain in establishments where the primary source of income is alcohol; bars, taverns, lounges.

6) Complete a substance abuse evaluation and comply with any recommended treatment program.

7) No contact with female minors without the prior approval of the supervising Community Corrections Officer (CCO).

CP 190. This appeal follows. CP 192-206.

2. Trial Testimony

Angela Cauchon has five daughters, including S.C. and her older sister M.C. RP 149-50. Cauchon testified that one day in early February 2017, M.C. came into the kitchen and told Cauchon that S.C. had a gross secret about Christie's boyfriend Mike. RP 155, 198.

Christie Templeman is Cauchon's sister.¹ Cauchon testified she met Mike Owen once at a school event and that he dated Christie briefly. RP 152. Cauchon remembered that on January 22, Christie took S.C. and M.C. swimming with Mike, because he had a family pass to the pool. RP 126, 165-66.

¹ Because S.C. refers to Templeman by her first name "Christie" in her statements and testimony, this brief will also refer to her as Christie for consistency.

Cauchon followed M.C. into the bathroom where she had been playing in the bath with S.C. and another sister. RP 155-566. Cauchon asked S.C. if what M.C. said was true. RP 156. S.C. said she didn't want to answer. RP 156.

Cauchon asked whether S.C. remembered "when you went swimming that day[.]" RP 157. It was the only time Cauchon could remember that S.C. spent any time with "this person." RP 158.

Cauchon "guided [S.C.] through the conversation" and slowly elicited that they went to Christie's after swimming and watched a movie. RP 158. Purportedly, "he" had a lotion that he showed S.C. on his fingers. RP 159. According to Cauchon, S.C. said he put some of it on his finger and "rubbed it on her vagina[.]" "just the top." RP 159.

In response to more questions, S.C. said Christie was there and saw the lotion. RP 159. Cauchon asked if S.C. tried to get away. S.C. said yes and that "He let me go." RP 159.

Cauchon asked if S.C. told Christie. S.C. said she went to look for Christie and found her in the bedroom. RP 160. S.C. said she told Christie "Mike just touched my vagina." RP 160. Christie reportedly said, "don't ever say that again." RP 160.

After speaking with S.C., Cauchon called Christie, but she did not remember S.C. saying anything happened that night. RP 161. M.C. was sick, and Christie reportedly was tending to her. RP 125, 162. Cauchon called police. RP 162-63.

Christie testified she met Mike Owen on a dating website in October 2016 and they dated occasionally. RP 227. In January 2017, she and Mike took M.C. and S.C. to the pool. RP 227. Afterward, they went to Christie's. RP 228.

Christie testified M.C. was sick and threw up on herself in the bathroom. RP 228. While getting M.C. fresh clothes and cleaning up, Christie was in and out of the living room. RP 228-230, 234. In the living room, S.C. was partially sitting on Mike's lap and partially sitting on the armrest of one of two green recliners. RP 229-30. Eventually, M.C. came into the living room and rested on the other recliner. RP 229. Christie pushed the recliners together and sat on the armrests with M.C. on one side and S.C. and Mike on the other, and they all watched a movie. RP 230.

Christie testified S.C. never said anything about Mike touching her vagina. RP 233. Christie did not have lotion or lubricant in her house. RP 236. She stopped dating Mike after Cauchon called her. RP 236.

Detective Jennifer Margheim testified she was involved in the investigation of Michael Owen.² RP 251. She interviewed S.C. on February 8, 2017. RP 251-52. Margheim testified that before the interview started, S.C. said she wanted to tell Margheim about Mike. RP 255. After explaining the rules of the interview, Margheim asked what S.C. wanted to tell her. RP 290.

S.C. said Mike is her aunt Christie's friend. RP 290-91. S.C. said Mike "squirted something gooey on his fingernail and put it on top of my vagina." RP 291. According to S.C., it was "like a bottle of soft stuff and Christie put it on his fingernail." RP 298. Christie reportedly told S.C. it was "supposed to make a vagina feel soft." RP 299. S.C. said this happened in the living room on the green chair of her aunt's house. RP 293, 303. Her sister was sleeping on the other green chair. RP 303.

S.C. testified she tried to run away but "his fingernail hooked like a little bit inside my vagina." RP 300. S.C. reportedly told Mike

² The state called S.C. to testify before Margheim. RP 217. S.C. testified she went to the pool with Christie, M.C. and "that guy Mike" but S.C. testified she did not remember anything else and that it was hard to talk about. RP 215-225. Defense counsel did not ask any questions. RP 225. During Margheim's testimony, as the state was about to elicit S.C.'s out-of-court statements to her, defense counsel objected that S.C.'s testimony was insufficient to satisfy the defendant's right to confront because S.C. did not testify about the allegations. RP 255-56. The state thereafter opted to interrupt Margheim's testimony to recall S.C. RP 258. The substance of S.C.'s testimony will be set forth following Margheim's.

to stop but he did not listen, so Christie told him to stop, and he did. RP 304-305. S.C. then went to tell Christie, who was in her room. RP 305. "Mike went back home when that happened." RP 302. S.C. testified Christie told her not to tell anyone. RP 305.

When S.C. was recalled (see note 2), she testified that while sitting on Mike's lap, he put lotion on his finger and put it on top of her vagina. RP 262, 265. She described the lotion as "see-through." RP 262. Afterward, he got up and went home. RP 265. S.C. testified it also happened earlier at the pool, but there was no lotion. RP 268.

On cross, defense counsel asked S.C. if she remembered giving a defense interview to co-counsel Etoy Alford, Jr. S.C. did not. RP 269. However, she did remember saying Mike told her lives in a tent by a soccer field. RP 272.

S.C. testified she does not know what Mike looks like. RP 274. She did not remember telling Alford he has dark skin and a beard. RP 274. Appellant Mike Owen is a tall Caucasian man with red hair. CP ___ (sub. no. 1, Person Information, 2/16/17). And he lived in an apartment, not a tent. Id.

At the close of the state's case, the defense indicated it sought to admit S.C.'s interview with defense counsel Alford. RP 340. The state objected the statement did not qualify under the child hearsay exception RCW 9A.44.120 on grounds it was not reliable. RP 340. Defense counsel argued the portion of the interview where S.C. described her assailant as having dark skin, a beard and living in a tent should come in as impeachment:

And I specifically asked of the child if she recalled saying certain things to Mr. Alford, and she said no, so I think that portion of it comes in as impeachment with regards to the statements that she made describing her assailant as dark-skinned with a beard as well as was told he lived in a tent.

RP 341.

The court ruled the interview would not be admitted because: it was not addressed at the child hearsay hearing and therefore "a little late;" the interviewer (Mr. Alford) appeared to have a "hearing problem;" and asked S.C. direct rather than open-ended questions. RP 342-44.

Following closing arguments, the defense moved to dismiss the charges on grounds none of the witnesses ever identified the defendant as the Michael Owen they testified about. RP 387. The prosecutor responded the defendant was identified by name. RP

387. The prosecutor argued it was sufficient “That was the name of the person as stated by Detective Margheim” and “[t]hat was the name of the person that was dating Christie Templeman[.]” RP 388. The court agreed the identify of names was sufficient. RP 388.

The defense renewed the motion to dismiss prior to sentencing on grounds identity of names is insufficient. RP 399-403. In response, the prosecutor noted the author of the Pre-Sentencing Investigation (PSI) Report, indicated the defendant admitted he was the one who went swimming with Christie and the kids. RP 404. The prosecutor also relayed that Christie looked directly at the defendant during her testimony. RP 404. The court denied the motion. RP 406.

C. ARGUMENT

1. THE CONVICTION SHOULD BE REVERSED BECAUSE THE STATE FAILED TO PROVE THE DEFENDANT/APPELLANT MICHAEL OWEN WAS THE “MIKE” THE WITNESSES TESTIFIED ABOUT.

“[T]he Due Process Clause [U.S. Const. amend. XIV] protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” In re Winship, 397 U.S. 358, 364,

90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). The beyond-a-reasonable-doubt requirement applies in state as well as federal proceedings. Sullivan v. Louisiana, 508 U.S. 275, 278, 113 S. Ct. 2078, 124 L.Ed.2d 182 (1993); State v. Smith, 174 Wash. App. 359, 366, 298 P.3d 785, 789 (2013).

In reviewing the sufficiency of the evidence, the test is whether, after viewing the evidence most favorable to the state, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wash. 2d 216, 221-22, 616 P.2d 628, 631 (1980).

The state has the burden to prove identity through relevant evidence. In State v. Hill, the Supreme Court stated:

It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense. Identity involves a question of fact for the jury and any relevant fact, either direct or circumstantial, which would convince or tend to convince a person of ordinary judgment, in carrying on his everyday affairs, of the identity of a person should be received and evaluated.

State v. Hill, 83 Wash.2d 558, 560, 520 P.2d 618 (1974).

In the context of bail jumping, or when criminal liability depends on the accused's being the person to whom a document

pertains, identity of names is insufficient to establish guilt. State v. Huber, 129 Wn. App. 499, 119 P.3d 388 (2005). Wayne Huber was charged with violating a protection order and tampering. He was released and ordered to next appear at court at a specified date. When he failed to appear, the state added a bail jumping charge. Huber, 129 Wn. App. at 500.

At trial, the court introduced Huber to the jury, as did defense counsel. As evidence of the bail jump, the state introduced certified copies: of an information charging Huber with violating a protection order and tampering; of a court order requiring him to appear in court on a specified date; and the clerk's minutes indicating Huber failed to appear on that date. The defense elected not to make an opening statement or present evidence. Huber, at 500-501.

In closing argument, the defense argued that even though the state proved that a person named Wayne Huber had jumped bail, it had not identified the person who had jumped bail as the person then in court. When the jury moved to deliberate, the defense moved to dismiss, arguing the evidence was insufficient. The court denied the motion and the jury convicted. Huber, 129 Wn. App. at 501.

On appeal, Huber made the same argument. Division Two noted that when identity is an issue, the state must prove – beyond a reasonable doubt – that the person named is the same person on trial. Id. at 502. This is required because “in many instances men bear identical names[.]” Id. at 502 (quoting Gravatt v. United States, 260 F.2d 498, 499 (10th Cir. 1958)). Thus, identity of names is insufficient. Huber, at 502.

Rather, the state must show by evidence independent of the record that the person named therein is the defendant in the present action. Such evidence may include otherwise-admissible booking photos, booking fingerprints, eyewitness identification, or distinctive personal information. Huber, at 502.

Turning to Huber’s case, the court found the state’s evidence insufficient to prove that the person named in the documents was the same person on trial. Id. at 503. It did so despite defense counsel’s introduction of Wayne Huber to the jury:

Here, the State produced documents in the name of Wayne Huber, but no evidence to show “that the person named therein is the same person on trial.” Hoping to overcome this deficiency, it now argues on appeal that defense counsel’s introduction of his client before jury selection started constitutes evidence sufficient to show that the person named in the documents was the person on trial. We cannot agree for at least two reasons. First, the statements

were remarks by counsel, and such remarks are not evidence. Second, even if the remarks were evidence, they had no logical tendency to show that the person whom counsel was introducing was the person named in the documents later offered and admitted by the State; counsel did not have those documents before him, and he simply did not address whether his client was the person named therein. Concluding that the evidence is insufficient to support a finding that the person on trial is the person in the State's exhibits, we reverse and remand with direction to dismiss the bail jumping charge with prejudice.

Huber, at 503-04.

Identity was an issue in this case. Defense counsel argued in closing:

The only person in this room throughout the last two days, whoever pointed to my client, was the prosecutor. Let that sink in for a minute.

We've got an investigation that happens, and we'll get into more about that later, but Detective Margheim goes in, has never met any of these people, goes in and takes this testimony. Does she go out and does she do a photo lineup and say, hey, is this the person who did this here? No. Did they even ask her, is that the guy who did this to you? No. Why not? Because she wouldn't have pointed to my client.

RP 373.

And as defense counsel pointed out in his motion to dismiss, no one ever identified the defendant (appellant herein) as the Mike or Mike Owen they were talking about. In fact, S.C. testified she did not know what Mike looked like but said he lived in a tent by a

ball field. And in an interview the jury did not get to hear about (see argument infra), S.C. described her assailant as dark skinned, which appellant Michael Owen is not. CP 40 (pale Caucasian man).

Granted, Huber was a case where guilt depended upon the accused's being the person to whom a document pertained. However, Hill was not. State v. Hill, 83 Wn.2d 558 (1974). There, the defendant argued he was not identified at trial as the person in possession of a narcotic drug. Hill, 83 Wn.2d at 558. The court still required the state to prove that the defendant at trial was the same person to which the testimony referred, although the court found the state satisfied that burden in Hill's case:

In the case at bench, the defendant was present in the courtroom at all pertinent times throughout the course of the trial, during which there were numerous references in the testimony to "the defendant" and to "Jimmy Hill." The arresting officer testified it was "the defendant" whom he observed at the scene of the arrest, that he had ordered "the defendant" to a halt, and that it was "the location where the defendant was finally stopped that the Kleenex was found." The jury verdict was in the form: "We, the Jury ..., find the defendant (Jimmy Hill) GUILTY ..."

Although we do not recommend the omission of specific in-court identification where feasible, we are satisfied that the evidence as it developed in the instant case was adequate to establish the

defendant's identity in connection with the offense for which he stood accused.

Hill, 83 Wn.2d at 560.

In contrast here, none of the witnesses ever referenced "the defendant" in her testimony. Thus, this is not a case where the omission of specific in-court identification can be excused.

In response, the state may argue as it did below that appellant admitted to the PSI writer that he was the one who went swimming with Christie and her nieces. However, that statement was not presented to the jury and is not evidence that can legally support the conviction.

In sum, the only evidence the state presented that appellant was the "Mike" to which the testimony related was identity of names. Under the case law that is insufficient. Under Huber and Hill, Appellant's conviction must be reversed.

2. THE COURT ERRED IN EXCLUDING RELEVANT DEFENSE EVIDENCE.

Assuming arguendo this Court disagrees that the state failed to prove identity, Owen should have been allowed to present S.C.'s prior identification of her abuser as dark-skinned and bearded to rebut or impeach the identification of Owen as the culprit. The court wrongly excluded this evidence on grounds it did not satisfy

the child hearsay exception of RCW 9A.44.120.³ Specifically, the court found S.C.'s statements not admissible on grounds defense counsel's request to admit them was untimely and because the court did not find the statements reliable. This was an abuse of discretion and violated Owen's right to present evidence material to his defense.

³ Under this provision,

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if:

(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his or her intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

(i) The Court Abused Its Discretion

The interpretation of an evidentiary rule is a question of law this Court reviews de novo. Diaz v. State, 175 Wn. 457, 462, 285 P.3d 873 (2012). And this Court reviews the trial court's decision to admit or exclude evidence for an abuse of discretion. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). The appellant bears the burden of proving an abuse of discretion. State v. Wade, 138 Wash.2d 460, 464, 979 P.2d 850 (1999); State v. Ashley, 186 Wash. 2d 32, 38–39, 375 P.3d 673, 676 (2016).

The court abused its discretion in excluding S.C. statements under RCW 9A.44.120 because that statute was not applicable. First, S.C.'s statements (that defense counsel sought to admit) were not describing sexual contact. Rather, they were statements of identity and under ER 801(d), not even considered to be hearsay.

A statement is not hearsay if—

(1) *Prior Statement by Witness*. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of

recent fabrication or improper influence or motive, or
**(iii) one of identification of a person made after
perceiving the person[.]**

S.C.'s statement describing her attacker as dark-skinned and bearded was one of identification of a person made after perceiving the person. State v. Stratton, 139 Wn. App. 511, 161 P.3d 448 (2007). Torrance Stratton was convicted of five counts of assault for reportedly barging into a party with two other men and firing shots at the partygoers. One of the victims – Ms. Macias – identified the shooter as wearing a “bright” shirt. Officer Chavez later pulled over a vehicle matching the dispatch description and took into custody a man wearing a yellow shirt who he identified as Torrance Stratton. During a show-up, Ms. Macias identified the man in the yellow shirt as one of the shooters. Stratton, 139 Wn. App. at 513.

At trial, one of the other witnesses – Francisco – could not remember what color shirt the black man with the gun was holding.⁴ However, he remembered describing the shooters' clothing to police at the hospital. Stratton, at 514.

Officer Nelson testified he interviewed Francisco at the hospital that night. Defense counsel unsuccessfully objected when

the state asked Nelson to repeat what Francisco said. Nelson then related that Francisco told him the black man who was holding the silver and black firearm was wearing a yellow shirt. Officer Nelson testified that Francisco identified Stratton in a photomontage as the one wearing the yellow t-shirt. Id.

On appeal, Stratton argued the court erred in admitting Nelson's testimony regarding Francisco's hospital identification. This Court disagreed on grounds the evidence was admissible under ER 801(d):

A statement is not hearsay if "the declarant testifies at the trial ... and is subject to cross-examination concerning the statement, and the statement is ... (iii) one of identification of a person made after perceiving the person." ER 801(d)(1). In Porter v. United States, 826 A.2d 398, 410 (D.C.App.2003), the court considered a similar rule in the context of an officer's testimony about a witness's identification of the defendants from a photo array and the role that each played in the crimes. The court observed that "the complaining witness' description of the offense itself is admissible under this exception *only as to the extent necessary to make the identification understandable to the jury.*" Id. at 409–10 (citing Williams v. United States, 756 A.2d 380, 387 (D.C.App.2000)) (emphasis added).

Further, "[t]here is no logical reason to permit the introduction of a witness's out-of-court identification and to exclude statements identifying the various physical characteristics of a person perceived

⁴ The state admitted an in-car video of the man with the yellow shirt after he was taken into custody by Chavez. Stratton, 139 Wn. App. at 513.

by the witness, or the composite of all those physical characteristics, which is no more than the sum of the parts perceived.” Commonwealth v. Weichell, 390 Mass. 62, 72, 453 N.E.2d 1038 (1983); see also Commonwealth v. Morgan, 30 Mass.App.Ct. 685, 573 N.E.2d 989, 992 (1991) (“We assume, at least for purposes of this case, that any hearsay exception relating to extrajudicial identifications would also relate to an extrajudicial description of clothing.”).

Here, the various witnesses did not know Mr. Stratton by name. Therefore, they identified him by describing his clothing. ER 801(d) allows this type of identification.

Stratton, 139 Wash. App. at 517.

S.C.’s out-of-court description to Alford of her abuser as dark-skinned and bearded was likewise admissible as a statement made of identification after perceiving a person. Defense counsel correctly sought to admit S.C.’s description as impeachment and to rebut the implied identification of Owen as the culprit. The court abused its discretion in excluding the evidence based on the child hearsay statute. See e.g. In re Marriage of Littlefield, 133 Wash. 2d 39, 46–47, 940 P.2d 1362, 1366 (1997) (A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons).

Evidentiary error is grounds for reversal only if it results in prejudice. State v. Neal, 144 Wash. 2d 600, 611, 30 P.3d 1255, 1261 (2001), as amended (July 19, 2002). An error is prejudicial if, “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” Neal, at 611 (quoting State v. Smith, 106 Wash.2d 772, 780, 725 P.2d 951 (1986)).

The exclusion of S.C.’s statements of identity after perceiving her abuser was prejudicial. S.C. accused “Mike” of abusing her, yet her description of Mike to defense counsel Alford did not match the defendant/appellant at trial. It is within reasonable probabilities that the outcome of the trial would have been different had defense counsel been allowed to present this material exculpatory evidence.

(ii) The Court's Exclusion of Relevant Defense Evidence Violated Owen's Right to Present A Defense.

In ruling to exclude the evidence, the court also violated Owen's right to present relevant defense evidence. The Sixth⁵ and Fourteenth⁶ Amendments, as well as article 1, § 2⁷ of the Washington Constitution, guarantee the right to trial by jury and to defend against the state's allegations. These guarantees provide criminal defendants a meaningful opportunity to present a complete defense, a fundamental element of due process. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). **Error! Bookmark not defined.**

Absent a compelling justification, excluding exculpatory evidence deprives a defendant of the fundamental right to put the prosecutor's case to the crucible of meaningful adversarial testing.

⁵ The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

⁶ The Fourteenth Amendment provides, in pertinent part, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Crane v. Kentucky, 476 U.S. 683, 689- 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) (quoting United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)).

In Washington, State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983) and State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002), define the scope of a criminal defendant's right to present evidence in his defense. A defendant must be permitted to present even minimally relevant evidence unless the state can demonstrate a compelling interest for its exclusion. No state interest is sufficiently compelling to preclude evidence of high probative value. Darden, 145 Wn. 2d at 621-22; Hudlow, 99 Wn.2d at 16.

Relevant evidence is evidence that tends to "make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." State v. Stenson, 132 Wash.2d 668, 701-02, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998); ER 401. Under this definition, evidence is relevant if (1) it has a tendency to prove or disprove a fact (probative value), and (2) that fact is of consequence in the context of the other facts and the applicable substantive law (materiality). 5

⁷ Article 1, § 21 provides, "The right of trial by jury shall remain inviolate."

Karl B. Tegland, Washington Practice, Evidence sec. 82, at 227 (1989); State v. Rice, 48 Wn. App. 7, 12, 737 P.2d 726 (1987);

S.C.'s prior description of her abuser as dark skinned and bearded was material because it tended to disprove the defendant/appellant was the abuser because he is not dark skinned and bearded. Accordingly, unless the state had a compelling state interest in precluding this evidence, Owen should have been allowed to present it.

The only justification offered to preclude admission of S.C.'s statements describing the perpetrator was the child hearsay statute RCW 9A.44.120. However, the statements were not hearsay and RCW 9A.44.120 did not apply. Thus, the court's ruling violated Owen's right to present evidence.

As indicated above, the trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. "An erroneous evidentiary ruling that violates the defendant's constitutional rights, however, is presumed prejudicial unless the State can show the error was harmless beyond a reasonable doubt." State v. Franklin, 180 Wash.2d 371, 377 n. 2, 325 P.3d 159 (2014).

The state cannot make that showing here. At trial, S.C. did not know what “Mike” looked like. Yet, she previously described him as dark skinned and bearded, which the defendant/appellant is not. Thus, it cannot be proved beyond a reasonable doubt that the exclusion of this evidence was harmless.

3. OWEN WAS DEPRIVED OF HIS RIGHT TO A UNANIMOUS JURY VERDICT.

An accused person has the constitutional right to a unanimous jury verdict. Const. amend. 6; Const. art. 1, § 22; Richardson v. United States, 526 U.S. 813, 817, 119 S. Ct. 1707, 143 L. Ed. 2d 985 (1995); United States v. Gonzalez, 786 F.3d 714, 716-17 (9th Cir. 2015); State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), overruled in part on other grounds by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988). When evidence is presented of multiple acts, any one of which could constitute the charged crime, the court must ensure the jury is unanimous as to which of the acts was committed. Petrich, 101 Wn.2d. at 572; State v. Furseth, 156 Wn. App. 516, 517-18, 233 P.3d 902 (2010). Jury unanimity may be preserved either by instructing the jury it must unanimously agree which act has been proved or by the prosecutor

clearly electing one of the acts to rely on. Petrich, 101 Wn.2d at 572.

A unanimity instruction is required whenever the case is a multiple acts case. United States v. Echeverry, 719 F.2d 974, 975 (9th Cir. 1986); Furseth, 156 Wn. App. at 520 (citing State v. Bobenhouse, 166 Wn.2d 881, 892, 214 P.3d 907 (2009)). A multiple acts prosecution occurs when several acts are alleged and any one of them could constitute the crime charged. Furseth, 156 Wn. App. at 520 (quoting Kitchen, 110 Wn.2d at 411).

Under RCW 9A.44.083:

A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

First degree child molestation requires proof of “sexual contact” with a child. RCW 9A.44.083(1). Sexual contact means “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.” RCW 9A.44.010(2).

The state presented evidence of two separate incidents of molestation. S.C. testified Mike touched her vagina with see-

through lotion on the green recliner at her aunt's house. But she also testified it happened earlier, at the pool, but with no lotion. While the prosecutor focused on the touching that reportedly occurred at Christie's, he made no formal election indicating to jurors that he was relying on this act alone. RP 360-372, 382-385. Nor was any unanimity instruction given. CP 16-34. This was error and failed to ensure a unanimous jury verdict.

The error in failing to require unanimity in a multiple acts case stems from the possibility that some jurors may have relied on one act or incident and some jurors may have relied on a different act, resulting in a lack of unanimity on all of the elements necessary for a valid conviction. *State v. Bobenhouse*, 166 Wn.2d 881, 893, 214 P.3d 907 (2009). The failure to ensure jury unanimity is constitutional error, and reversal is required unless the state proves beyond a reasonable doubt that the error was not prejudicial. *State v. Vander Houwen*, 163 Wn.2d 25, 39, 177 P.3d 93 (2008).

The error is prejudicial unless the evidence offers no basis for the jury to rationally discriminate between the multiple acts. *Bobenhouse*, 166 Wn. 2d at 894-95 (discussing *State v. Camarillo*, 115 Wn.2d 60, 63, 794 P.2d 850 (1990)). Here, there was a basis for the jury to discriminate between the reported pool touching and

the reported recliner touching. Regarding the second, Christie testified she had no idea anything happened because S.C. never said anything to her. Moreover, Christie said she did not have lotion or lubricant in the house. In addition, S.C. also claimed Christie was involved but then also that Christie was not in the room. Thus, some jurors may have had a reason to doubt the recliner touching ever occurred.

Regarding the pool, however, S.C. said there was no lotion involved and she did not claim to have told anyone about it. Plus, there was no similarly confusing testimony about Christie being involved. Thus, some jurors may have found this allegation more credible. At the same time, however, others may have doubted the allegation because S.C.'s testimony about it was fleeting.

The State cannot meet its burden to prove that the error in failing to ensure a unanimous jury verdict was harmless beyond a reasonable doubt. This Court should therefore reverse Owen's conviction. State v. Petrich, 101 Wn.2d at 569.

4. THE COMMUNITY CUSTODY CONDITION PROHIBITING OWEN FROM ENTERING ESTABLISHMENTS WHERE THE PRIMARY SOURCE OF INCOME IS ALCOHOL IS NOT CRIME-RELATED.

The trial court's authority to impose sentence in a criminal proceeding is strictly limited to that authorized by the legislature in the sentencing statutes. State v. Johnson, 180 Wn. App. 318, 325, 327 P.3d 704 (2014). Any sentencing condition that is not expressly authorized by statute is void. Id.

This Court reviews de novo whether a sentencing court has statutory authority to impose a given condition. Id. In contrast, a trial court's decision to impose a condition is reviewed for abuse of discretion only if that court had statutory authorization to impose it. Id. at 326.

While defense counsel did not object to the improper community custody condition in the court below, erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

RCW 9.94A.703 lists conditions of community custody, some mandatory, some waivable, and some discretionary. No condition related to bars, taverns or lounges is expressly listed. RCW

9.94A.703. However, a court may impose other “crime-related prohibitions.” RCW 9.94A.703(3)(f).

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, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct.” RCW 9.94A.030(10).

Courts interpret statutes by first looking to their plain language as the indicator of legislative intent. TracFone Wireless, Inc. v. Dep’t of Revenue, 170 Wn.2d 273, 281, 242 P.3d 810 (2010). Although the issue of crime-relatedness arises frequently in Washington, to date no court has squarely tackled the phrase “directly relates to the circumstances of the crime” based on its plain meaning.

Generally, where the words in a statute are undefined, a court will rely on dictionary definitions. State v. Kintz, 169 Wn.2d 537, 547, 238 P.3d 470 (2010). If a statute’s meaning is plain on its face, the court must apply that meaning. State v. Costich, 152 Wn.2d 463, 470, 98 P.3d 795 (2004).

The word “circumstance” appears in the statutory definition of crime-related prohibition. “Circumstance” is undefined in the statute but is defined in the dictionary as

a specific part, phase, or attribute of the surroundings or background of an event, fact, or thing or of the prevailing conditions in which it exists or takes place : a condition, fact, or event accompanying, conditioning, or determining another : an adjunct or concomitant that is present or logically is likely to be present[.]

WEBSTER’S THIRD NEW INT’L DICTIONARY 410 (1993). Thus, a circumstance of the crime is a part or attribute of the crime, or something that accompanies, conditions, or determines the crime.

The fact that “establishments where the primary source of income is alcohol” played no part in Owen’s crime means that such establishments do not qualify as a circumstance of the crime.

But RCW 9.94A.030(10) is even more demanding. It does not permit a prohibition based upon a *loose* connection to a circumstance of the crime, but only one that “directly relates” to such a circumstance.

To “relate” means “to show or establish a logical or causal connection between.” WEBSTER’S, *supra*, 1916. “Directly” means “in close relational proximity.” *Id.* at 641. Understood in this manner, the crime-related prohibition must pertain to the actual

crime, not just to any potential crime within a broad and varied category of criminal activity.

For instance, in State v. O'Cain, 144 Wn. App. 772, 184 P.3d 1262 (2008), Division One struck a condition prohibiting Internet access because there was

no evidence O'Cain accessed the internet before the rape or that internet use contributed in any way to the crime. This is not a case where a defendant used the internet to contact and lure a victim into an illegal sexual encounter. The trial court made no finding that internet use contributed to the rape.

Id. at 775.

Similarly, in State v. Zimmer, 146 Wn. App. 405, 413-14, 190 P.3d 121 (2008), this Court struck a condition prohibiting possession of cell phones or data storage devices because no evidence in the record showed Zimmer used or intended to use such devices to possess or distribute methamphetamine. This was so even recognizing that such devices were commonly used to distribute illegal drugs. Id. at 414.

Where the record does not support a factual nexus between the prohibition and the commission of the crime, the prohibition may not be imposed as a crime-related prohibition under RCW 9.94A.030(10). There was no evidence bars, taverns or lounges

had anything to do with Owen's offense. Accordingly, the condition prohibiting him from entering establishments where the primary source of income is alcohol is not crime-related and therefore should be stricken.

5. THE CONDITION REQUIRING OWEN TO UNDERGO A DRUG AND ALCOHOL EVALUATION AND FOLOW TREATMENT RECOMMENDATIONS WAS NOT AUTHORIZED.

The trial court lacks authority to impose a community custody condition unless authorized by the legislature. State v. Kolesnik, 146 Wash.App. 790, 806, 192 P.3d 937 (2008). RCW 9.94A.505(9) provides, "As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter." And under RCW 9.94A.703(3)(c)–(d), as a condition of community custody, the court is authorized to require an offender to "[p]articipate in crime-related treatment or counseling services" and 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."

The SRA specifically authorizes the court to order an offender to obtain a chemical dependency evaluation and to comply

with recommended treatment only if it finds that the offender has a chemical dependency that contributed to his or her offense:

Where the court finds that the offender has a chemical dependency that has contributed to his or her offense, the court may, as a condition of the sentence and subject to available resources, order the offender to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which the offender has been convicted and reasonably necessary or beneficial to the offender and the community in rehabilitating the offender.

RCW 9.94A.607(1). If the court fails to make the required finding, it lacks statutory authority to impose the condition. State v. Warnock, 174 Wn. App. 608, 612, 299 P.3d 1173 (2013).

Here, there was no evidence of a chemical dependency contributing to the offense. The court also failed to make the required finding. It was therefore without authority to impose the requirement of drug and alcohol evaluation and treatment. This Court should therefore strike the condition.

6. THE CONDITION PROHIBITING OWEN FROM HAVING CONTACT WITH FEMALE MINORS WITHOUT PRIOR APPROVAL OF THE CCO INTERFERES WITH OWEN'S FUNDAMENTAL RIGHT TO PARENT.

Owen has a daughter who is 13 years old, another daughter who is ten and a son who is six. CP 50. At sentencing, he asked that

he be allowed contact with all of his children, including his daughters. RP 410. Defense counsel objected to the condition prohibiting Owen from contact with his daughters, noting there has never been any issue respecting them. RP 412. The court nonetheless adopted the condition proposed by the state prohibiting contact with female minors, with no exception for Owen's own children. CP 190; RP 410.

As a condition of community custody, courts may order an offender to "[r]efrain from direct or indirect contact with the victim of the crime or a specified class of individuals." RCW 9.94A.703(3)(b). Likewise, courts may impose crime-related prohibitions, including "an order of a court prohibiting contact that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10).

Individuals have fundamental rights to the "care, custody, and management" of their children. Loving v. Virginia, 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967); Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). State interference with these fundamental rights is subject to strict scrutiny. State v. Warren, 165 Wn.2d 17, 34, 195 P.3d 940 (2008). "[C]onditions that interfere with fundamental rights must be sensitively

imposed,” with “no reasonable alternative way to achieve the State’s interest.” Id. at 32, 35.

A court may not prohibit contact between a defendant and his children as a matter of routine practice. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 377-82, 229 P .3d 686 (2010). Instead the court must consider whether prohibiting contact is reasonably necessary in scope and duration to prevent harm to the child. Id.

The condition prohibiting contact with female minors without the prior approval of his CCO unreasonably restricts Owen’s contact with his children. 4RP 266. There is no basis in the record to conclude such a prohibition is crime-related, as his children were not victims of any alleged crimes.

This Court should remand for the trial court to clarify the condition so it does not burden Owen’s relationship with his children.

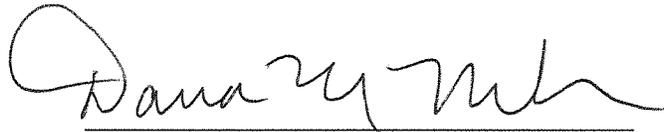
D. CONCLUSION

The conviction must be reversed and dismissed for insufficient evidence. Alternatively, this Court should reverse and remand for a new trial because the court wrongly excluded relevant defense evidence and failed to insure a unanimous jury verdict. If Owen's conviction is affirmed, this Court should strike the three community custody conditions challenged above.

Dated this 18th day of July, 2018

Respectfully submitted

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "Dana M. Nelson", written over a horizontal line.

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