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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

THOMAS BRAMBLEE, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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LAWRENCE H. HASKELL  
Prosecuting Attorney

Brett Pearce  
Deputy Prosecuting Attorney  
Attorneys for Respondent

County-City Public Safety Building  
West 1100 Mallon  
Spokane, Washington 99260  
(509) 477-3662

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## **I. APPELLANT'S ASSIGNMENTS OF ERROR**

1. The trial court erred in denying admission of Mr. Bramblee's excited utterance and the ruling interfered with his constitutional right to present a defense.
2. The trial court erred in entering community custody condition #12. (CP 170).
3. The trial court erred in imposing \$200 in court costs.
4. The trial court erred by imposing interest on legal financial obligations.

## **II. ISSUES PRESENTED**

1. If the trial court erred by excluding Mr. Bramblee's hearsay statement by relying on an incorrect analysis concerning the excited utterance hearsay exception, may this Court still affirm on a different basis that the statement was not spontaneous because it was clearly the product of premeditation and Mr. Bramblee was not under the influence of a startling event?
2. Did the trial court violate Mr. Bramblee's right to present a defense by excluding one hearsay statement that was cumulative to other evidence presented at trial, and Mr. Bramblee fully argued his theory of the case to the jury?
3. Did Mr. Bramblee waive his challenges to community custody condition 12 by failing to object, and, if not, is a prohibition on using internet social media, chat forums, or dating websites crime-related and narrowly tailored when law enforcement twice encountered him on the internet agreeing to have sex with minors?
4. Did the trial court err by imposing certain legal financial obligations no longer authorized by law?

### III. STATEMENT OF THE CASE

Thomas Bramblee appeals his conviction for attempted second degree child rape.

#### *Background facts*

Washington State's Missing and Exploited Children task force regularly conducts undercover social media operations in Washington. RP 29-31, 33.<sup>1</sup> Detective Kristl Pohl is part of that task force. RP 78-79.

In May of 2016, Detective Pohl knew that the task force would be conducting an operation in Spokane later that summer, and during a chat school training event, she perused the Spokane casual encounters page of internet website, Craigslist. RP 80-82. She observed a post by Mr. Bramblee which indicated Mr. Bramblee was searching for someone to enact incest fantasy roleplay with him. RP 85; Ex. 8. One of his enumerated fantasies was father-daughter; another was brother-younger sister. RP 85. This ad drew Detective Pohl's attention because of use of the words: "incest," "girls," and "younger." RP 85.

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<sup>1</sup> Unless otherwise indicated, "RP" refers to the Report of Proceedings from August 6, 2018, as reported by Joe Wittstock. All others will be referenced as "RP" followed by the date of hearing in parentheses.

Detective Pohl responded to Mr. Bramblee's post using an undercover persona of "Kay."<sup>2</sup> RP 86-88. Kay responded, "the title of your ad interested me except for the role play part. im a mom of a 12 year old (not role play) . . . if your not interested in that please dont reply." RP 88-89; Ex. 9. Mr. Bramblee asked her to explain, and she responded. "I had incest experience when i was younger, i'm looking for the same safe fun daddy relationship for my daughter except she doesn't have a daddy:)." RP 90; Ex. 9. Mr. Bramblee asked Kay to further explain what she wanted, and she replied:

my dad was in personally in charge of my sexual experimentation an education meaning everything I was curious about I told him about and we did it together I want that for my daughter, she of the age she is starting to get curious and she knows what kind of relationship i had with my dad and that it was special and not everyone understands it so we dont talk to just anyone about it

RP 91; Ex. 9. Mr. Bramblee said he understood, but also stated, "I'll be honest with you pretty scared right meow cuz there could be a lot of trouble on my end from what you're talking about" and "feels like I'm getting set up lol no offense just worried you know." RP 91-92; Ex. 9.

Kay responded that she could also get in trouble but gave him her email address of [runningmamaof1@gmail.com](mailto:runningmamaof1@gmail.com) so the two could exchange

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<sup>2</sup> For clarity, Detective Pohl's communications when acting as Kay will be referred to by the name of the persona.

pictures. RP 93. The next morning Mr. Bramblee asked Kay to send pictures of herself to prove she was not law enforcement. RP 94. She responded again that she did not know if he was law enforcement. RP 94. The two exchanged several correspondences to build rapport. RP 97.

Eventually, Mr. Bramblee told Kay to call him Tom, or Tommy if she was cute. RP 98. To direct the conversation back to the task force's goal, Kay replied "well that would be what my girl would call you then." RP 98. Mr. Bramblee then asked for a picture of only Kay's daughter, "Anna." RP 98, 100; Ex. 9. Mr. Bramblee also started asking for details of how "this thing" was going to work, how it would start, and what they would tell Anna. RP 98-99. Kay asked Mr. Bramblee if he was "interested in a real relationship with Anna" instead of just role play, because she did not want to waste his time. RP 100.

At Mr. Bramblee's insistence, Kay sent him a picture of Anna. RP 101. She told Mr. Bramblee that Anna was only 12. RP 102. Mr. Bramblee agreed that Anna was pretty, and when Kay sent a picture of herself as well, reiterated that both girls were gorgeous. RP 102-3. After additional correspondence, Kay again told Mr. Bramblee she was not looking for anything for herself but was only looking for someone to "teach and show" Anna. RP 105. Mr. Bramblee inquired whether Anna knew

what was going on. RP 105. He also asked for more pictures of Anna on several more occasions. RP 106, 108.

In June 2016, Mr. Bramblee reaffirmed his desire to hang out and “do things” with Anna. RP 109-110. The two began to exchange messages over Google Hangout via phone number. RP 110. On June 18, 2016, the two stopped exchanging messages. RP 123.

Around July 5, 2016, the task force began its operation in Spokane. RP 113. Detective Kay encountered another Craigslist post from Mr. Bramblee looking for incest roleplay. RP 112. This post was identical to the one she had found in May, but he had posted this ad in July. RP 112-13. Detective Pohl did not realize that it was the same ad, or the same person. RP 113-15. She posted a reply similar to her original reply, that she was not into roleplay but was seeking someone to teach her daughter. RP 115-16. She again stated that her daughter was 12. RP 116. Each party again accused the other of being law enforcement. RP 117. Mr. Bramblee questioned if she was pimping out Anna, because he stated it was important that her daughter be handled by someone who is loving and caring in this situation, not someone who is just paying for sex. RP 117.

Several days later, on July 10, 2016, Mr. Bramblee initiated texting Kay again at the same account she had given in June, with his same number. RP 117-21; Ex. 10-12. Mr. Bramblee asked how Kay and Anna were.

RP 124. Kay revealed that she had moved to Spokane Valley, which was not far from his home in Idaho. RP 125-26. Mr. Bramblee asked “How’s Anna doing? May I see some more pics of your beautiful Anna?” without asking for any pictures of Kay. RP 126. Kay told Mr. Bramblee she did not want to waste his time if he was not interested in Anna, but he assured her that he was interested and simply did not know she was in Spokane. RP 126-27. Kay told him she had made a post looking for the same type of “help” the two originally had discussed. RP 127. Mr. Bramblee told Kay that if no one had “helped” Anna yet, she should take down her post because he would “be her man,” but would only do so if no other men were involved because he does not “share well.” RP 127. Mr. Bramblee agreed that he did not just want to have sex with Anna once and run, and that he could be the person to give her long term love and teaching. RP 127.

Kay gave Mr. Bramblee some rules: no pain, no anal sex, condoms required every time and Mr. Bramblee must exercise self-control. RP 128. Mr. Bramblee agreed, but asked if he could perform oral sex on Anna and also asked for more photographs of Anna. RP 128. After more conversation, Kay clarified again that while she would be watching, she was not going to “be with” Mr. Bramblee, to which he replied “Yeah I figured.” RP 133. Mr. Bramblee then asked if he could perform another version of oral sex on Anna that night, because he thought his attempts to penetrate

her would be unsuccessful. RP 134-35. He then again expressed that he was a “worry wart” about the situation. RP 136. After asking one more time for Kay to join in with him and Anna, he agreed to meet the two. RP 136-37.

As part of the task force’s operational procedure, Kay first directed Mr. Bramblee to a convenience store for a surveillance team to follow him to her location. RP 138-39. Mr. Bramblee complied, but started to get cold feet, explaining that “[a]ll kinds of flags are goin off and I’m bout ready to ditch the whole thing cuz it doesn’t feel right and I have everything to lose.” RP 139. Kay apologized and said she was paranoid, to which he responded, “And you think you’re paranoid? If the cops I’m spending the rest of my life in jail.” RP 139-40.

Mr. Bramblee eventually arrived at the location Kay provided, and an arrest team placed him under arrest. RP 140-42. Simultaneously with his arrest, Mr. Bramblee stated that he “was there for the mother.” RP (4/20/18) 18. Later, Mr. Bramblee gave an interview with police where he made other inconsistent claims, such as that he was there to rescue Anna from Kay.<sup>3</sup> RP (4/20/18) 28-29. Law enforcement found a condom on Mr. Bramblee’s person when they arrested him. RP 186.

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<sup>3</sup> Neither party elicited these statements, but they are relevant to the appeal.

*Procedural history*

The State charged Mr. Bramblee with attempted second degree rape of a child. CP 11. The State moved in limine to exclude Mr. Bramblee from eliciting from witnesses other than himself any hearsay statements he made when arrested and from his interview with law enforcement. CP 53. The State cited *State v. Finch*, 137 Wn.2d 792, 975 P.2d 967 (1999), and *State v. Ammlung*, 31 Wn. App. 696, 703, 644 P.2d 717 (1982), for the proposition that a criminal defendant cannot insulate him or herself from cross-examination by eliciting his or her own self-serving hearsay statements from other witnesses. CP 53. The court reserved ruling on the motion, providing the parties an opportunity to further brief the issue. CP 85.

During argument, Mr. Bramblee pointed out that there is no blanket “self-serving hearsay” rule, citing *State v. Pavlik*, 165 Wn. App. 645, 268 P.3d 986 (2011). The court instead analyzed whether Mr. Bramblee was available as a witness. RP (4/20/18) 20-24. The State agreed with Mr. Bramblee that witness availability did not have any bearing on the ER 803(a)(2) analysis. RP (4/20/18) 26. The State also agreed with Mr. Bramblee that *Pavlik* was controlling and argued that Mr. Bramblee’s statement was not an excited utterance because: (1) he had motive to fabricate it, (2) it was not spontaneous, and (3) he was not under the

influence of a startling event because he had known for months that he might be talking to law enforcement. RP (4/20/18) 25-26. The court again reserved its ruling, so the parties could conduct further research. RP (4/20/18) 27.

After another lengthy conversation about the issue, the trial court disagreed with both parties, and determined that the declarant's availability was controlling of whether the hearsay statements may be admitted. RP (4/20/18) 65-70. The court precluded Mr. Bramblee from eliciting from other witnesses his arrest statement that he "was only there for the mother." RP (4/20/18) 70-71. Despite there being at least three different conversations about the statement, Mr. Bramblee never objected or argued to the trial court that the ruling would prevent him from presenting a defense. *See* RP *passim*. Critically, the trial court told counsel for Mr. Bramblee, "I don't know whether I agree with you or not whether it's an excited utterance in order to be exempted from the hearsay exclusion, but I will get to that question if and when Mr. Bramblee makes himself available as a witness. If he is available, then we'll go further in the analysis. If he's not available, then I don't think it comes in under 803." RP (4/20/18) 70.

During the first trial, Mr. Bramblee realized that the second ad he had posted—and Kay had responded to—had not been disclosed by the

State. RP (4/25/18) 126. In essence, Craigslist exchanges come from anonymous identification numbers, and when Detective Pohl had responded to Mr. Bramblee's second post she had not realized he was the same person with whom she exchanged messages in May. RP (4/25/18) 129-32. Mr. Bramblee successfully moved the court to declare a mistrial, to allow him time to further investigate. RP (4/25/18) 137.

During a pre-trial conference prior to the second trial, Mr. Bramblee indicated his intent to rely on an entrapment theory of defense, which he had not relied on in the first trial,<sup>4</sup> presumably related to the second set of Craigslist communications. RP (6/27/18) 3.

At the second trial, defense counsel elicited testimony from Detective Pohl that some of the messages between Kay and Mr. Bramblee could be seen as flirtatious. RP 163-65. Counsel also elicited testimony from Detective Pohl that Mr. Bramblee several times "made advances" toward Kay, and that she had needed to rebuff him. RP 165-66. Detective Pohl testified she repeatedly made sure there was no confusion that Kay was not looking for role play, and Kay was not interested in any sexual encounter with Mr. Bramblee for herself. RP 89.

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<sup>4</sup> RP (4/20/18) 10.

Greg Ross, a friend of Mr. Bramblee's, was the only defense witness. RP 206. He testified that he advised Mr. Bramblee to call police after the two discussed Mr. Bramblee's online conversations with Kay. RP 206-07.

Defense counsel argued that the above evidence supported his theory that he had only intended to have sex with Kay in support of his requested jury instruction on entrapment, and again during closing argument. RP 211, 264-65. According to defense counsel, because some of the messages Mr. Bramblee sent to Kay evinced his interest in Kay, he did not have the intent to have sexual intercourse with Anna. RP 262-64.

The jury found Mr. Bramblee guilty as charged. CP 143. On October 4, 2018, the case proceeded to sentencing. RP (10/4/18) 1-18. The trial court sentenced Mr. Bramblee to a standard range sentence of 58.5 to 76.5 months to life confinement. CP 179. Because Mr. Bramblee committed a sex offense, the court ordered him to serve community custody if released before the expiration of the statutory maximum, which is life. CP 182. Community custody condition 12 forbids Mr. Bramblee from accessing social media sites, including chat forums and dating sites, or from soliciting sex on the internet. CP 170, 182. The trial court also imposed legal financial obligations (LFOs): a \$500 victim assessment, \$200 criminal filing fee, and \$100 DNA collection fee. CP 183-84. The judgment and

sentence also provided for interest to accrue on the LFOs. CP 184.

Mr. Bramblee appeals. CP 192.

#### **IV. ARGUMENT**

##### **A. EXCITED UTTERANCE HEARSAY EXCEPTION**

Mr. Bramblee argues the trial court restricted his constitutional right to present a defense by refusing to admit one hearsay statement<sup>5</sup> after applying the wrong legal standard. The State concedes that the trial court used an incorrect legal analysis to determine whether the hearsay statement at issue was admissible under the excited utterance exception. Importantly, the State agreed with Mr. Bramblee's argument and authority during a hearing on the defendant's availability issue and argued that the statement was not an excited utterance because it was not spontaneous. The trial court nonetheless ruled based on the defendant's unavailability and excluded the hearsay statement. However, this Court may affirm on any basis in the record and the hearsay statement was not an excited utterance under the correct legal analysis.

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<sup>5</sup> There is no debate the statement is hearsay. Under ER 801(d)(2), the statement would not be hearsay if the State offered it against Mr. Bramblee, but here Mr. Bramblee sought to offer his own out-of-court declaration for the truth of the matter asserted in support of his own case. He must identify an exception to make the statement admissible.

1. *Standard of review*

An appellate court reviews a trial court's determination that a hearsay statement fell within the excited utterance exception for abuse of discretion. *State v. Ohlson*, 162 Wn.2d 1, 7, 168 P.3d 1273 (2007); *State v. Davis*, 141 Wn.2d 798, 841, 10 P.3d 977 (2000). A trial court abuses its discretion when it exercises discretion without tenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A trial court abuses its discretion if it applies the wrong legal standard. *State v. Madsen*, 168 Wn.2d 496, 504, 229 P.3d 714 (2010).

This Court may affirm on any basis supported by the briefing and the record. *Huff v. Wyman*, 184 Wn.2d 643, 648, 361 P.3d 727 (2015).

2. *Excited utterance hearsay exception rules*

Mr. Bramblee correctly argues that witness unavailability is irrelevant for purposes of ER 803(a)(2). *State v. Palomo*, 113 Wn.2d 789, 795, 783 P.2d 575 (1989) (“the statement ... was admitted under the *excited utterance* exception to the hearsay rule which *does not require unavailability of the declarant*”) (emphasis in original). Mr. Bramblee also is correct that *Pavlik* is a highly helpful and persuasive authority, because the record indicates some of the concepts the trial court struggled with were the self-serving nature of Mr. Bramblee's statement and its spontaneity. 165 Wn. App. 645. In that case, this Court extensively analyzed the history

of: (1) the excited utterance hearsay exception contained in ER 803(a)(2), (2) the pre-rule test for the admission of excited utterances, and (3) the problem of self-serving hearsay. *Id.* at 651-54. After analysis, this Court held there is “no self-serving hearsay bar that excludes an otherwise admissible statement.” *Id.* at 653.

*Pavlik*’s historical analysis is relevant to this discussion because it underlies the transition from pre-rule excited utterance analysis to post-rule excited utterance analysis. Prior to the adoption of the rules of evidence, the leading case was *Beck v. Dye*, 200 Wash. 1, 92 P.2d 1113 (1939). For excited utterances (with which present sense impression was collectively referred to as “res gestae”) the Court held:

the rule as adopted, declared and followed by this court requires that the statement or declaration concerning which testimony is offered must, in order to make such evidence admissible, possess at least the following essential elements: (1) The statement or declaration made must relate to the main event and must explain, elucidate, or in some way characterize that event; (2) it must be a natural declaration or statement growing out of the event, and not a mere narrative of a past, completed affair; (3) it must be a statement of fact, and not the mere expression of an opinion; (4) it must be a spontaneous or instinctive utterance of thought, dominated or evoked by the transaction or occurrence itself, and not the product of premeditation, reflection, or design; (5) while the declaration or statement need not be coincident or contemporaneous with the occurrence of the event, it must be made at such time and under such circumstances as will exclude the presumption that it is the result of deliberation, and (6) it must appear that the declaration or statement was made by one who either participated in the transaction or

witnessed the act or fact concerning which the declaration or statement was made.

*Id.* at 9-10. After the adoption of ER 803, the analysis changed.

Now, an out-of-court statement offered to prove the truth of the matter asserted is admissible at trial under the excited utterance exception if the statement relates to “a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” ER 803(a)(2). Three closely connected requirements must be satisfied in order for a hearsay statement to qualify as an excited utterance: (1) a startling event or condition must have occurred, (2) the statement must have been made while the declarant was under the stress or excitement caused by the startling event or condition, and (3) the statement must relate to the startling event or condition. *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992). This is a highly factual determination. *State v. Ramirez*, 109 Wn. App. 749, 757-58, 37 P.3d 343 (2002). “A key focus is whether the statement is the result of fabrication, intervening actions, or the exercise of choice or judgment. Spontaneity is critical.” *Id.* at 758 (citations omitted).

The key concept in both pre-rule and post-rule analysis is that spontaneity must be critical to the court’s analysis. The pre-rule cases explicitly recognized this by noting that the statement could not be the

product of *premeditation or design*. *Beck*, 200 Wash. at 9 (fourth factor). The post-rule cases recognize spontaneity is key but focus on intervening actions or the length of time between the startling event and when the statement is made, seeming to disregard the earlier analysis of whether a declarant could have premeditated a statement to utter later in an effort to shield him or herself from liability.

### 3. *Analysis*

Here, Mr. Bramblee does not establish that he meets the excited utterance test because the record is clear both that his statement was the result of calculated deliberation, and that Mr. Bramblee was not under the influence of a startling event. The State argued this theory of exclusion to the trial court during several of the discussions on the issue. The State argued Mr. Bramblee's statement was not spontaneous, that Mr. Bramblee was trying to think of a justification for being present and had a motive for fabrication, all of which were counter to the purpose of the excited utterance exception. The trial court expressed its doubts but did not definitively rule whether the statement was an excited utterance.

Mr. Bramblee's statement was not so much a product of reflective thought because it happened contemporaneously with his arrest rather than after the arrest. Instead, his statement was the product of his willful design: he communicated several times with Kay that he was worried that she was

law enforcement, that his life would be ruined, or that he would be forced to register as a sex offender. He went to the meeting with condoms in his pocket and a self-serving, pre-planned exculpatory statement ready for use. The fact that Mr. Bramblee repeatedly voiced his fears to Kay that she was law enforcement underscores his planning.

It also contradicts any assertion that Mr. Bramblee was under the emotional influence of being placed under arrest. Two months passed between when Mr. Bramblee and Kay first had contact and cautiously discussed the probability of each other being law enforcement, until his arrest. Mr. Bramblee had months to deliberate about whether Kay might be law enforcement, and repeatedly accused her of being such. That he, in fact, was communicating with law enforcement could not have been such a shock to him that his arrest came as a surprise, when he had clearly contemplated the possibility for two months.

The State agrees with Mr. Bramblee that the trial court used an incorrect excited utterance legal analysis. However, the record clearly supports affirming the court's ruling on the basis that Mr. Bramblee's statement was not an excited utterance under the appropriate test because it was a considered statement made while not under the influence of a startling event. The State made that argument, and before the court decided witness

availability controlled the analysis, the trial court also expressed its doubts with Mr. Bramblee's counsel that the statement was an excited utterance.

## **B. RIGHT TO PRESENT A DEFENSE**

The hearsay statement at issue in this case was not an excited utterance, and therefore inadmissible. Mr. Bramblee did not object to alert the trial court that he viewed this evidence as critical to his defense, and therefore is not manifest error. The court properly excluded it, even if for the wrong reason, and the Constitution does not guarantee a right to present inadmissible evidence. Even if the trial court incorrectly excluded the evidence, the error did not deprive Mr. Bramblee of his right to present his defense because it was merely cumulative, and he fully argued his theory to the jury.

### *1. Preservation*

A party may assign evidentiary error on appeal only on the specific ground made at trial. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). Unpreserved claims of error generally may be raised for the first time on appeal only if they involve manifest error affecting a constitutional right. *Id.* at 926-27; RAP 2.5(a)(3). "Manifest error" requires a showing of actual prejudice to the defendant's constitutional rights at trial. *Kirkman*, 159 Wn.2d at 926-27. A manifest error is one "truly of constitutional magnitude." *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). The

defendant has the initial burden of showing that an alleged error was manifestly unconstitutional. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010). A defendant cannot simply assert that an error occurred at trial and label the error “constitutional.” *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). This Court must construe the exceptions in RAP 2.5(a) narrowly. *State v. WWJ Corp.*, 138 Wn.2d 602, 603, 980 P.2d 1257 (1999).

Mr. Bramblee asserts that this single evidentiary decision so undermined his right to present a defense that this Court should remand for a new trial. But the decision excluding the hearsay statement was not manifest constitutional error for a variety of reasons. Although there were several discussions about this hearsay statement on different days, Mr. Bramblee never argued to the trial court that the lack of this one particular statement would prevent him from arguing that he was not interested in Anna. In fact, Mr. Bramblee *did* present his defense of entrapment to the jury, and elicited evidence that he sent Kay several messages that a fact finder might determine he directed only at her. He made that argument in closing. His own statement about his intent would only be cumulative to the evidence he elicited on cross-examination. The court’s ruling, though erroneous, never prevented Mr. Bramblee from

taking the stand and testifying to his statement because the court predicated its analysis on availability.

By framing the trial court's decision as denying him a right to present a defense instead of the preserved evidentiary error, Mr. Bramblee seeks to change this Court's analysis from harmless error to constitutional harmless error. Trial counsel argued this as a purely evidentiary decision. The record does not support a conclusion that the error is manifest, so this Court should decline review.

2. *Standard of review and rules of law*

Under both the Sixth Amendment to the United States Constitution and article I, section 22, of the Washington Constitution, a defendant has the right to obtain witnesses and present a defense. *State v. Thomas*, 150 Wn.2d 821, 857, 83 P.3d 970 (2004). The right does not mean that a defendant may introduce whatever evidence they wish. *State v. Sanchez*, 171 Wn. App. 518, 554, 288 P.3d 351 (2012). The "right does not extend to the introduction of otherwise inadmissible evidence." *State v. Aguirre*, 168 Wn.2d 350, 363, 229 P.3d 669 (2010). "Whether the exclusion of testimony violated the defendant's Sixth Amendment right to present a defense depends on whether the omitted evidence evaluated in the context of the entire record, creates a reasonable doubt that did not otherwise exist." *State v. Duarte Vela*, 200 Wn. App. 306, 326, 402 P.3d 281 (2017), *as*

*amended on denial of reconsideration* (Oct. 31, 2017), *review denied sub nom. State v. Vela*, 190 Wn.2d 1005 (2018).

Even a constitutional error may be harmless, if the reviewing court is convinced beyond a reasonable doubt that a reasonable jury would have reached the same result. *State v. Jones*, 168 Wn.2d 713, 724, 230 P.3d 576 (2010). Courts have found constitutional error harmless where the evidence was cumulative. *See, e.g., State v. Todd*, 78 Wn.2d 362, 372, 474 P.2d 542 (1970) (“[E]vidence which is merely cumulative is not prejudicial error”). If the court finds an “evidentiary error which is not of constitutional magnitude,” it should reverse only if the error “materially affected the outcome of the trial.” *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). Even when this Court reviews a trial court’s evidentiary rulings for an abuse of discretion, it still reviews an alleged denial of Sixth Amendment rights de novo. *Jones*, 168 Wn.2d at 719.

### 3. *Analysis*

Mr. Bramblee argued a theory of entrapment to the jury. Part of that theory included his argument that he had engaged with and flirted with Kay during the months of communications between the two, which was proof that he was only interested in her. The State elicited all of these communications during its case-in-chief, published them to the jury after admission, and defense counsel further explored them during cross-

examination of the State's witnesses. Ex. 9. Mr. Bramblee argued this theory to the jury during closing argument. *See* RP 257, 262-63. During closing argument, he insisted that his only intent was to romance Kay, and that law enforcement induced him into detailing his intentions to have sexual intercourse with Anna.

The exclusion of his hearsay statement that he only "was there for" Kay was merely cumulative to the evidence he asked the jury to draw an inference from: flirtatious messages to Kay and the other communications where he encouraged or asked Kay to join him when he enacted his fantasies with Anna. Self-serving hearsay statements, though sometimes admissible under various hearsay exceptions, have questionable probative value. *W.W. Conner Co. v. McCollister & Campbell*, 9 Wn.2d 407, 412-13, 115 P.2d 370 (1941) (pre-rule case); *see also Finch*, 137 Wn.2d 792 (post-rule case but pre-rule analysis); *State v. Bennett*, 20 Wn. App. 783, 787, 582 P.2d 569 (1978) (defendant's attempt to place his version of the incident before the jury without taking the stand deprives the State of cross-examination, which deprives the jury of an objective standard for determining probative value of the statement) (pre-rule case).

First, if the statement is inadmissible for not meeting the excited utterance exception test as argued, this inquiry may end because the

Constitution does not secure a right to present inadmissible evidence in one's defense.

Second, one self-serving statement with very limited probative value—that was also cumulative to other evidence elicited at trial—could not have created a reasonable doubt that did not otherwise exist. The jury heard evidence that Mr. Bramblee: (1) repeatedly asked for photographs of Anna, (2) sent graphic messages detailing the sexual acts he wished to perform on Anna, (3) told Kay that he would be the man for Anna and that she could remove any other Craigslist posts because he did not want to share Anna, and (4) repeatedly communicated his fear that he would go to prison because he knew that he should not attempt to have sexual intercourse with a 12-year-old. Mr. Bramblee elicited testimony that a few of his several dozen messages to Kay were flirtatious or asked her to join in, and later asked the jury to consider those messages of his interest in Kay when determining his intent.<sup>6</sup> The jury rejected that evidence and disbelieved his argument.

In the context of the entire record, the evidence could not create a reasonable doubt that would not otherwise exist without the evidence.

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<sup>6</sup> Although this is circumstantial evidence rather than direct evidence of his intent, the two are given equal weight by the law and the jury was instructed accordingly. CP 130.

Counsel elicited evidence that Mr. Bramblee was interested in Kay, but the jury could rightfully consider that Mr. Bramblee was interested in Anna—or both Kay and Anna—given the rest of the evidence. Most of Mr. Bramblee’s messages were about Anna. Even if Mr. Bramblee did have an interest in Kay, that would not negate an interest in Anna. The trial court did not infringe on Mr. Bramblee’s right to present a defense by excluding the statement to law enforcement that he was “there for the mother.”

To that point, the trial court’s ruling on the State’s motion in limine only excluded Mr. Bramblee eliciting his *own* hearsay statement through *another* witness on this subject. This is unlike *Duarte Vela*, where the trial court would not permit the defendant *himself* to testify as to any of the prior bad acts known to him, which were relevant and highly probative as to his theory of self-defense. 200 Wn. App. at 326-27. Because the trial court analyzed the hearsay exception as an availability issue, its ruling did not prevent Mr. Bramblee from testifying that he was there to see the mother and had only extensively pretended to want Anna in order to achieve that goal. Instead, Mr. Bramblee made a calculated, strategic decision not to take the stand, in order to avoid cross-examination on why he repeatedly asked for more photographs of Anna or sent several graphic messages to Kay detailing the sexual acts he wished to perform on Anna. This strategic

decision also allowed Mr. Bramblee to avoid explaining his several other inconsistent statements to law enforcement post-arrest, such as that he was actually there to save Anna from Kay. Detective Rodriguez testified during direct examination that perpetrators of these crimes when caught nearly uniformly claim that they are “there for the mom” or “trying to rescue the children.” RP 45-46. Mr. Bramblee first stated he was there for Kay when he was arrested, and then during his interview with detectives instead claimed that he was there to rescue Anna.

In sum, the excluded hearsay statement was cumulative to evidence at trial and held little probative value. If admitted, the statement would not have created a reasonable doubt which did not otherwise exist. The jury saw Mr. Bramblee’s communications to Kay and heard argument that he only was pursuing Kay. Mr. Bramblee fully argued his theory that he was only romantically pursuing Kay before law enforcement entrapped him to the jury, and the jury rejected his argument. The inclusion of this statement made at arrest would not have changed this result. The jury reasonably reached this verdict because even if Mr. Bramblee asked Kay to join him and Anna, the majority of the communications focused on the subject of Mr. Bramblee having sexual intercourse with Anna. The trial court’s ruling did not infringe Mr. Bramblee’s right to present a defense.

### C. COMMUNITY CUSTODY CONDITION 12

Mr. Bramblee challenges a community custody condition that forbids him from using specific internet websites on several grounds. Mr. Bramblee waived his challenge for whether the condition is crime-related, but the record supports the prohibition. The condition is not overbroad because it is narrowly tailored to further the State's interest in protecting children from these types of crimes.

#### *1. Additional relevant testimony*

Detective Rodriguez testified that the task force used a variety of different social media platforms in its operations. RP 31, 33. For this specific operation they chose the social media platform, Craigslist. RP 33. In addition to his and Detective Pohl's testimony at the second trial, Detective Rodriguez gave an illustrative list of social media platforms when he was called at the first trial:

...websites we use, we've used Craigslist, Backpage, and then there are a number of different dating applications, Tinder, Bumble, SCRUFF, Grindr, you name it. Facebook, we're contacted on Facebook. So really, any type of social media platform we have received contact from people.

RP (4/24/18) 80.

He described Craigslist as a place where people can make posts and communicate with others. RP 33-34. A person posting on Craigslist can choose their geographic area and then a narrower topic of posts to view.

RP 35. The personals section includes categories of posts including “rants and raves,” “strictly platonic,” “missed connections,” and—the one at issue in this case—“casual encounters,” which is used for dating and hookups. RP 35-36, 39; Ex. 7. Anyone with an internet connection may access Craigslist. RP 40. Condition 12 is a discretionary condition that Mr. Bramblee “not access social media sites to include chat forums, dating sites, or solicit sex on the Internet.” CP 170.

2. *Challenge for whether the condition is crime-related*

This Court recently clarified that a defendant may waive a crime-relatedness challenge to a community custody condition if not raised at the trial court. *State v. Peters*, No. 31755-2-III, slip op. at 2-5 (Sept. 17, 2019). After reviewing the interplay of RAP 2.5, *Blazina*,<sup>7</sup> and *Ford*,<sup>8</sup> this Court summarized which challenges are reviewable: “for an objection to a community custody condition to be entitled to review for the first time on appeal, it must (1) be manifest constitutional error or a sentencing condition that, as *Blazina* explains, is ‘illegal or erroneous’ as a matter of law, and (2) it must be ripe. If it is ineligible for review for one reason, we need not

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<sup>7</sup> *State v. Blazina*, 182 Wn.2d 827, 833-34, 344 P.3d 680 (2015).

<sup>8</sup> *State v. Ford*, 137 Wn.2d 472, 973 P.2d 452 (1999).

consider the other.” *Peters*, No. 31755-2-III, slip. op at 5. Concerning crime-related challenges, this Court stated:

The crime relatedness of the condition is not eligible for review. The Supreme Court emphasized in *Hai Minh Nguyen*<sup>9</sup> that we review sentencing conditions for an abuse of discretion, and “[a] court does not abuse its discretion if a ‘reasonable relationship’ between the crime of conviction and the community custody condition exists”; stated differently, “there must be ‘some basis for the connection.’” 191 Wn.2d at 684 (quoting *Irwin*, 191 Wn. App. at 658-59, 657). We review the factual basis for a trial court’s implicit finding that a condition is crime related using a “substantial evidence” standard. *State v. Padilla*, 190 Wn.2d 672, 683, 416 P.3d 712 (2018).

As this court recently pointed out in *Casimiro*,<sup>10</sup> where there is no objection to community custody conditions in the trial court, there is no reason for the parties or the court to create a record on the relationship between the crime and the conditions imposed. 8 Wn. App. 2d at 249. We are not required to consider an argument that a sentencing condition is not crime related when the offender had the opportunity to raise the contention in the trial court, creating a record, and failed to do so.

*Peters*, No. 31755-2-III, slip op. at 15.

This is a similar factually based challenge that Mr. Bramblee waived at sentencing. *See* RP (10/4/18) 2-3. The State had no reason to further develop the record about the now challenged condition. The presentence

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<sup>9</sup> *State v. Nguyen*, 191 Wn.2d 671, 425 P.3d 847 (2018).

<sup>10</sup> *State v. Casimiro*, 8 Wn. App. 2d 245, 438 P.3d 137, *review denied*, 193 Wn.2d 1029 (2019).

investigation report suggested the condition after a review of the case and interview with Mr. Bramblee. CP 161.

Although this Court should treat the alleged error as waived, and the State urges this Court to resolve the issue on that basis rather than reaching the merits, the record clearly supports the condition. This Court reviews conditions of community custody for abuse of discretion, reversing such conditions only if they are manifestly unreasonable. *Padilla*, 190 Wn.2d at 677. The imposition of an unconstitutional condition is manifestly unreasonable. *State v. Valencia*, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010). The Sentencing Reform Act of 1981 (SRA) provides that when a court sentences a person to a term of community custody, the court shall impose conditions of community custody. RCW 9.94A.703. The act identifies certain conditions as mandatory, others as waivable, and others as discretionary. *Id.* Among discretionary conditions that the court is authorized to impose are orders that an offender “[c]omply with any crime-related prohibitions.” RCW 9.94A.703(3)(f). “Crime-related prohibitions” are orders “prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10).

Detectives Pohl and Rodriguez testified that the task force uses social media sites and chose to carry out this operation on Craigslist. Law enforcement caught Mr. Bramblee—not once, but twice—prowling

Craigslist for sexual encounters with minors. It is unclear how a website in which a person may make a post that anyone can view, and then also receive messages from people in return, is different from any other social media website such as Twitter or Facebook. Ex. 7. Whether the site is “typically used” to post advertisements is unclear; on this record Mr. Bramblee was using the personal connections feature of Craigslist to search for other users with whom to enact his sexual fantasies. A prohibition on social media or chat forums is clearly related to the crime.

3. *Challenge for an overbroad infringement on free speech*

Although not addressed by *Peters*, this Court should also determine that Mr. Bramblee waived a challenge for overbreadth. This is because when appellate courts consider whether a community custody condition is overbroad, the focus is mainly on whether a prohibition is crime-related.

“[A]n offender’s constitutional rights during community placement are subject to SRA-authorized infringements, including crime-related prohibitions.” *State v. McKee*, 141 Wn. App. 22, 37, 167 P.3d 575 (2007). If this Court’s analysis hinges on whether the infringement is sufficiently crime-related, waiver of this claim of error is appropriate because the State did not have an opportunity to develop the record.

If this Court reaches the claim, Mr. Bramblee cannot demonstrate the condition is overbroad. The State has a compelling interest in

preventing harm to children. *State v. Corbett*, 158 Wn. App. 576, 598, 242 P.3d 52 (2010). The passage in *Padilla*, cited by Mr. Bramblee addressed a vagueness challenge to a community custody condition on First Amendment grounds, not an overbreadth challenge. The SRA authorizes infringements of an offender's constitutional rights. *McKee*, 141 Wn App. at 37.

Here, Mr. Bramblee used an internet forum to prowl for sex, and used a connection he made on the website to attempt to have sex with a fictitious child. The trial court's order only restricts Mr. Bramblee from using social media—including chat forums and dating sites—or soliciting sex on the internet. He is still permitted to use the remainder of the internet in accordance with a safety plan approved by his therapist and community custody officer for any other reason. In similar circumstances, this Court has upheld a similar restriction on restricting social media sites and internet access. *See State v. Magana*, 197 Wn. App. 189, 201, 389 P.3d 654 (2016) *abrogated on other grounds by State v. Johnson*, 4 Wn. App. 2d 352, 421 P.3d 969 (2018). Given the State's compelling interest and the narrow scope of the prohibition, the condition is not an overbroad infringement on Mr. Bramblee's free speech right.

Although in an unpublished decision, Division 2 also upheld a near total prohibition on the internet in remarkably similar circumstances. *See*

*State v. Talbot*, 1 Wn.App.2d 1029, 2017 WL 5608941 at \*7-8 (Nov. 21, 2017) (unpublished).<sup>11</sup> In that case, Mr. Talbot used the internet to respond to a post<sup>12</sup> made by a detective posing as the single mom looking for a discreet friend for her 12-year-old daughter that she could “learn” from. *Id.* at 1. After Mr. Talbot’s conviction for child-related sex offenses, the court ordered him not possess any electronic device capable of accessing the internet or accessing the internet in general without prior authorization from his community custody officer. *Id.* at 7. The court noted that because Mr. Talbot committed the crime through use of the internet and arranged for sexual contact with a 12-year-old girl, the prohibition was necessary to prevent related offenses and did not improperly infringe on his First Amendment rights. *Id.* at 8. A similar result should follow here.

#### **D. LEGAL FINANCIAL OBLIGATIONS**

The boilerplate LFO language within Mr. Bramblee’s judgment and sentence document ordered him to pay a \$200 criminal filing fee pursuant

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<sup>11</sup> Under GR 14.1, a party may cite to an unpublished decision of the Court of Appeals filed on or after March 1, 2013. Unpublished opinions of the Court of Appeals have no precedential value, are not binding on any court, and may be accorded such persuasive value as the court deems appropriate. GR 14.1(a).

<sup>12</sup> It is unclear from the opinion whether law enforcement made this post on Craigslist, but the other similarities are striking.

to RCW 36.18.020(2)(h) and provided for interest on all legal financial obligations. CP 201-2.

The State agrees with Mr. Bramblee's position that recent changes in the law made effective June 7, 2018, prohibit imposing the two challenged legal financial obligations he identifies on appeal. *See* RCW 36.18.020(2)(h); RCW 10.82.090. Mr. Bramblee met the standard for indigency at the time of sentencing. *See* CP 210-13. The State agrees with Mr. Bramblee's request to have this Court strike the \$200 filing fee and interest provisions.

## **V. CONCLUSION**

The State respectfully requests this Court affirm. Although the trial court used an incorrect legal standard for ruling Mr. Bramblee's hearsay statement inadmissible, the record supports affirming on the basis it was not an excited utterance. It was also a standard evidentiary decision by the trial court and not an issue of constitutional magnitude. Regardless, the error was harmless beyond a reasonable doubt. Mr. Bramblee waived his challenges to community custody condition 12, but if this Court chooses to address them, the condition is a permissible crime-related prohibition that

is not an overbroad restriction on his rights. The State agrees with Mr. Bramblee regarding LFOs.

Dated this 23 day of September, 2019.

LAWRENCE H. HASKELL  
Prosecuting Attorney



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Brett Pearce, WSBA #51819  
Deputy Prosecuting Attorney  
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

THOMAS BRAMBLEE,

Appellant.

NO. 36396-1-III

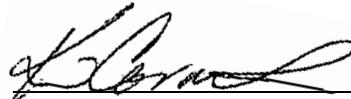
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Laura Chuang and Jill Reuter  
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