

66405-1

66405-1

NO. 66405-1-I

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

STATE OF WASHINGTON

Respondent

v.

PAUL J. KIM,

Appellant

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 OCT -6 PM 2:54

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

KATHLEEN WEBBER
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

TABLE OF CONTENTS

I. ISSUES	1
II. STATEMENT OF THE CASE	2
III. ARGUMENT	6
A. THE DEFENDANT’S STATEMENTS WERE PROPERLY RULED ADMISSIBLE INTO EVIDENCE.....	6
1. The Trial Court’s Conclusions Regarding Disputed Facts Are Supported By Substantial Evidence.	8
2. Under The Totality Of The Circumstances The Defendant Was Not In Custody When He Agreed To Talk To The Detective.	12
3. The Defendant Knowingly, Voluntarily, And Intelligently Waived His Right To Remain Silent.	17
4. If There Was An Error In Admission Of The Defendant’s Statements It Was Harmless.....	21
B. EVIDENCE REGARDING THREE INCIDENTS INVOLVING M.K. WHICH OCCURRED OUTSIDE CHARGING PERIOD WAS ADMISSIBLE FOR VALID REASONS. ANY ERROR IN ADMISSION OF THAT EVIDENCE WAS HARMLESS.....	23
1. The Evidence Was Relevant To M.K.’s Credibility. It Constituted Res Gestae Evidence.....	23
2. Any Error Was Harmless.....	28
C. COMMUNITY CUSTODY CONDITIONS.....	29
1. Costs Of Crime Related Counseling And Medical Treatment....	30
2. Possession Of Sexual Stimulus Material For The Defendant’s Particular Deviancy.	30
3. Stay Out Of Drug Areas.....	31

4. Participate In Plethysmograph Testing As Directed By The
Supervising Community Corrections Officer.....32

IV. CONCLUSION36

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>Para-Medical Leasing, Inc. v. Hangen</u> , 48 Wn. App. 389, 739 P.2d 717, <u>review denied</u> , 109 Wn.2d 1003 (1987).....	9, 10
<u>State v. Athan</u> , 160 Wn.2d 354, 158 P.3d 27 (2007).....	7
<u>State v. Bahl</u> , 164 Wn.2d 739, 193 P.3d 678 (2008).....	30, 31
<u>State v. Bourgeois</u> , 133 Wn.2d 389, 945 P.2d 1120 (1997).....	28
<u>State v. Broadaway</u> , 133 Wn.2d 118, 942 P.2d 363 (1997).....	9
<u>State v. Burgess</u> , 71 Wn.2d 617, 430 P.2d 185 (1967).....	10
<u>State v. Cashaw</u> , 4 Wn. App. 243, 480 P.2d 528, <u>review denied</u> , 79 Wn.2d 1002 (1971).....	17
<u>State v. Cunningham</u> , 116 Wn. App. 219, 65 P.3d 325 (2003).....	12
<u>State v. Dennis</u> , 16 Wn. App. 417, 558 P.2d 297 (1976).....	16
<u>State v. Elmore</u> , 139 Wn.2d 250, 985 P.2d 289 (1999), <u>cert. denied</u> , 531 U.S. 837, 121 S.Ct. 98, 148 L.Ed.2d 57 (2000).....	27
<u>State v. Everybodytalksabout</u> , 145 Wn.2d 456, 39 P.3d 294 (2002).....	28
<u>State v. Fisher</u> , 165 Wn. 2d 727, 202 P.3d 937 (2009).....	25
<u>State v. Gross</u> , 23 Wn. App. 319, 597 P.2d 894, <u>review denied</u> , 92 Wn.2d 1033 (1979).....	17
<u>State v. Guloy</u> , 104 Wn.2d 412, 705 P.2d 1182 (1985), <u>cert. denied</u> , 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986).....	21
<u>State v. Harris</u> , 122 Wn. App. 498, 94 P.3d 379 (2004).....	11
<u>State v. Hill</u> , 123 Wn.2d 641, 870 P.2d 313 (1994).....	9, 10
<u>State v. Johnson</u> , 128 Wn.2d 431, 909 P.2d 293 (1996).....	9
<u>State v. Lane</u> , 125 Wn.2d 825, 889 P.2d 929 (1995).....	25
<u>State v. Riles</u> , 135 Wn.2d 326, 957 P.2d 655 (1998).....	32, 33, 35
<u>State v. Sargent</u> , 111 Wn.2d 641, 762 P.2d 1127 (1988).....	6
<u>State v. Smith</u> , 154 Wn. App. 695, 226 P.3d 195 (2010).....	15
<u>State v. Solomon</u> , 114 Wn. App. 781, 60 P.3d 1215 (2002), <u>review denied</u> , 149 Wn. 2d 1025, 72 P.3d 763 (2003).....	7, 10
<u>State v. Terranova</u> , 105 Wn.2d 632, 716 P.2d 295 (1986).....	17
<u>State v. Tharp</u> , 27 Wn. App. 198, 616 P.2d 693 (1980), <u>affirmed</u> , 96 Wn.2d 591, 637 P.2d 961 (1981).....	26
<u>State v. Valencia</u> , 169 Wn.2d 782, 239 P.3d 1059 (2010).....	33
<u>State v. Warren</u> , 134 Wn. App. 44, 138 P.3d 1081 (2006), <u>affirmed</u> , 165 Wn.2d 17, 195 P.3d 940 (2008), <u>cert. denied</u> , 129 S.Ct. 2007, 173 L.Ed.2d 1102 (2009).....	25, 26
<u>State v. Watt</u> , 160 Wn.2d 626, 160 P.3d 640 (2007).....	21

<u>State v. White</u> , 76 Wn. App. 801, 888 P.2d 169 (1995), <u>affirmed</u> , 129 Wn.2d 105, 915 P.2d 1099 (1996).....	32
---	----

FEDERAL CASES

<u>Berkemer v. McCarty</u> , 468 U.S. 420, 104 S. Ct. 3138, 82 L.Ed.2d 317 (1984).....	7, 13
<u>Boulden v. Holman</u> , 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1969).....	17
<u>California v. Beheler</u> , 463 U.S. 1121, 103 S.Ct. 35 17, 77 L.Ed.2d 1275 (1983).....	7
<u>Coleman v. Dretke</u> , 395 F.3d 216 (5 th Cir. 2004), <u>cert denied</u> , 546 U.S. 938, 126 S.Ct. 427, 163 L.Ed.2d 325 (2005).....	34
<u>Minnesota v. Murphy</u> , 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984).....	7
<u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 964 (1966).....	13, 14, 16, 17
<u>Oregon v. Mathiason</u> , 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977).....	13
<u>Orozco v. Texas</u> , 394 U.S. 324, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969).....	15, 16
<u>Stansbury v. California</u> , 511 U.S. 318, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994).....	12
<u>United States v. Abou-Saada</u> , 785 F.2d 1 (1 st Cir. 1986), <u>cert.</u> <u>denied</u> , 477 U.S. 908, 106 S.Ct. 3283, 91 L.Ed.2d 572 (1986) ..	19
<u>United States v. Bernard S.</u> , 795 F.2d 749 (9 th Cir 1986).....	18
<u>United States v. Garibay</u> , 143 F.3d 534 (9 th Cir 1998).....	18, 20
<u>United States v. Kim</u> , 292 F.3d 969 (9 th Cir. 2002).....	14
<u>United States v. T.M.</u> , 330 F.3d 1235 (9 th Cir. 2003).....	33
<u>United States v. Weber</u> , 451 F.3d 552 (9 th Cir. 2006).....	33, 34, 35

OTHER CASES

<u>State v. Salcido-Corral</u> , 940 P.2d 11 (Kan. 1997).....	19
---	----

U.S. CONSTITUTIONAL PROVISIONS

Fourth Amendment.....	33
Fifth Amendment.....	7, 18
Fourteenth Amendment.....	33

WASHINGTON STATUTES

Laws of 2008, ch. 231 §57	31
Laws of 2009, ch. 28, §42	31
RCW 9.94A.010(10).....	32
RCW 9.94A.120	31
RCW 9.94A.505(8).....	31

RCW 9.94A.507	29
RCW 9.94A.700(4)	30
RCW 9.94A.700(5)	30, 31
RCW 9.94A.700(5)(a)	32
RCW 9.94A.715	30
RCW 9.94A.715(2)(a)	30

FEDERAL STATUTES

18 U.S.C. §3553(a)	33
18 U.S.C. §3583	34
18 U.S.C. §3583(d)(1)	33
18 U.S.C. §3583(d)(2)	33

COURT RULES

CrR 3.5	8, 11
ER 404(b)	25, 26, 27, 28

I. ISSUES

1. Where the record supports the trial court's conclusion that the defendant was not in custody at the time he was questioned by the police, and the defendant spoke English fluently, did the trial court err in admitting the defendant's statements into evidence?

2. If the trial court erred in admitting the defendant's statements into evidence was that error harmless?

3. Did the trial court abuse its discretion by permitting the State to introduce evidence that the defendant forced one of the victims to have sexual intercourse with the defendant's wife (the victim's mother) on three occasions outside of the charging period, when no details of those events were admitted and the evidence was relevant to establish the res gestae?

4. May the court require the defendant to pay the cost of his victim's counseling as a condition of community custody rather than as a separate restitution order?

5. May the court order the defendant to not possess sexual stimulus material for his particular deviancy as defined by the supervising community custody officer when the defendant continues to deny that he committed any sex offenses, had not

submitted to a sexual deviancy evaluation, and therefore had not at the time of sentencing had a particular deviancy diagnosed?

6. May the court order the defendant to stay out of drug areas as a condition of community custody?

7. Where the defendant has been ordered to participate in sexual deviancy treatment may it also order the defendant to submit to plethysmograph testing?

II. STATEMENT OF THE CASE

The defendant, Paul Kim, was born January 29, 1967 in Korea, and had lived in the United States since 1986. The defendant worked in a mortgage bank and as the director of the Snohomish County Recreation Center. The defendant was married to Jennifer Kim. They had three children, V.K. (born 1989), M.K. (Born 1991), and M.Y.K. (Born 1999). 1 RP 58-59, 2 RP 160, 163, 210, 299.¹

When V.K. was 6 years old the defendant started sexually abusing her. The first time the defendant came into V.K.'s room and touched her under her shirt and pants. The defendant then took off her clothes and had penile-vaginal intercourse with her.

¹ The report of proceeding is referred to by volume number for the trial and by date of hearing in all other cases. The reference to volume two of the trial relates to the revised report of proceedings for that date.

The defendant had sexual intercourse with V.K. on at least 25 occasions between the ages of 6 and 11. On one occasion, when the defendant came home drunk, he forced V.K. to orally copulate him. On one occasion M.K. was sleeping next to her when the defendant has sexual intercourse with her. V.K. tried to push the defendant away, but the defendant responded negatively. The defendant stopped having sexual intercourse with V.K. after she turned 12. However he did continue to fondle her. V.K. tried to push the defendant away and to avoid him. Finally when she was in the 9th grade the defendant stopped fondling her. 2 RP 171-179.

About the time that the defendant stopped having sexual intercourse with V.K. he began abusing his son M.K. The first time it happened M.K. was 9 years old. The family was all sleeping in the same room. The defendant grabbed M.K.'s hand and like a puppet, forced him to fondle his mother's breast and vagina. Within a short period of time the defendant physically directed M.K. to start sucking on his mother's breast. The defendant then had M.K. kiss his mother, and lick her vagina. This kind of sexual contact occurred on average 2 to 3 times per week while they lived in Lynnwood. 1 RP 67-75.

About eight months to one year after the defendant first forced M.K. to have sexual contact with his mother the defendant started having M.K. have sexual intercourse with her. While M.K. has sexual intercourse with his mother the defendant would watch. Sometimes the defendant would fondle her while M.K. had intercourse with her. Sometimes she would give the defendant oral sex while M.K. was having intercourse with her. After M.K. had sexual intercourse with his mother, the defendant would then have intercourse with her. While the defendant did that he would require M.K. to stay and watch. When M.K. was 12 years old he asked his father if he could stop having sexual contact with his mother as “a birthday present.” The defendant refused that request. 1 RP 75-82.

When M.K. was in the fifth grade the defendant showed him some porn videos. The videos depicted some adults engaging in sexual intercourse. Two of the videos depicted a mother and son having sexual intercourse. 1 RP 84-85.

The defendant continued to have M.K. have sexual intercourse with his mother until he was 17 years old. On the last three occasions M.K. and the defendant fought about whether M.K. should continue having sex with his mother. On June 1, 2009 M.K.

finally had enough. Although he previously had not left home because he had no place to go, he left that day and went to his cousin's home. M.K. had never told anyone before what had been going on with him and his parents. 1 RP 64, 87-94.

The defendant also molested his youngest child, M.Y.K. starting when she was about 5 years old. M.Y.K. was sleeping in bed with her parents when she woke up to her father fondling her vagina. The defendant fondled M.Y.K. four times. The first time was when they lived in Lynnwood. The defendant also fondled her when the family lived in Mukilteo. On one occasion M.Y.K. got the defendant to stop by moving over to the other side of her mother. On one other occasion she got the defendant to stop by leaving and going to her sister, V.K.'s room. 2 RP 216-225.

As a result of M.K. running away from home and telling his cousins what had happened a C.P.S report was generated and the police got involved. Detective Smith of the Mukilteo Police Department interviewed V.K. She had never told anyone about what had happened until she was interviewed. M.Y.K. did not disclose the abuse until about 4 months later. 2 RP 165-67, 244-45, 248, 260.

As part of the investigation Detective Smith interviewed the defendant. The defendant denied that he had sexual intercourse or sexual contact with either M.K. or V.K. Although he stated that due to the stress of his mother's recent health issues he had been drinking more, he said he generally limited his drinking 2 beers a night. 2 RP 255, 257.

The defendant was charged with 8 counts relating to the sexual abuse of his three children. The defendant presented evidence from family members who had lived with the family for periods of time in the preceding years. Each of those witnesses denied noticing anything wrong in the defendant's family. The defendant testified that he did not sexually assault any of his children. The jury rejected the defense evidence and convicted the defendant of all counts. 1 CP 4, 53-60, 66-68; 2 RP 269-71, 273, 275, 281-87.

III. ARGUMENT

A. THE DEFENDANT'S STATEMENTS WERE PROPERLY RULED ADMISSIBLE INTO EVIDENCE.

The Fifth Amendment privilege against self-incrimination generally must be asserted by the person holding that privilege. State v. Sargent, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988). A person who is not in custody and who does not assert his Fifth

Amendment right to remain silent is considered to have acted voluntarily if he chooses to respond to questions which could reasonably be expected to elicit incriminating evidence. Minnesota v. Murphy, 465 U.S. 420, 429, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984). The presumption of voluntariness dissipates once the person is taken into custody. Id. at 429-430. In that case before the defendant's statements are admitted into evidence the State must show that the defendant knowingly, voluntarily, and intelligently waived his Miranda rights by a preponderance of the evidence. State v. Athan, 160 Wn.2d 354, 380, 158 P.3d 27 (2007).

A suspect is in custody once his "freedom of action is curtailed to a 'degree associated with formal arrest.'" Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L.Ed.2d 317 (1984) quoting California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 35 17, 77 L.Ed.2d 1275 (1983). Whether a defendant is in custody for purposes of Miranda is a mixed question of fact and law. State v. Solomon, 114 Wn. App. 781, 787, 60 P.3d 1215 (2002), review denied, 149 Wn. 2d 1025, 72 P.3d 763 (2003). The factual question concerns the circumstances surrounding the interrogation. Id. The legal question determines whether a

reasonable person would have felt he was not at liberty to terminate the interrogation and leave. Id. at 788. The Court employs an objective test to resolve that question. Id.

1. The Trial Court's Conclusions Regarding Disputed Facts Are Supported By Substantial Evidence.

Prior to trial the court conducted a CrR 3.5 hearing to determine the admissibility of the defendant's statements to the detective at trial. After hearing from the detective and the defendant the court found the defendant's statements to the detective admissible. The court reasoned that under the facts the defendant was not in custody, and in any event he had been advised of his constitutional rights and made a knowing, intelligent, and voluntary waiver of those rights. 1 RP 47-51.

The trial court entered a certificate pursuant to CrR 3.5 some months after the trial in this case. The defendant assigns error to the court's conclusions regarding the disputed facts number 3.3, 3.5, and 3.6. Those findings are:

3.3 The defendant understood his rights and voluntarily agreed to waive them after asking whether a refusal to do so would get him arrested. The Court finds the Defendant's question supports the conclusion that the Defendant understood his right to refuse. His subsequent waiver was knowingly and voluntarily made.

3.5. Prior to his actual/formal arrest, at the end of his conversation with Detective Smith, the defendant was not in custody or restrained in any way, and nothing occurred that would lead a reasonable person to conclude that he was restrained to any degree associated with formal arrest.

3.6. The Defendant's first language is Korean but he speaks English fluently. The Court notes, from its file, that the defendant told the court about one year earlier that he had no need or desire for an interpreter. The Defendant requested an interpreter for this hearing, and for his trial, but answered many questions in English, while testifying at this hearing, even before the questions were interpreted in Korean. This Court finds and concludes that the defendant's language skills did not hinder his ability to understand his Constitutional (Miranda) rights.

When the defendant challenges findings of fact they are upheld if substantial evidence supports them. State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). Evidence is substantial if it is sufficient to persuade a fair-minded, rational person that the finding is true. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Unchallenged findings are treated as verities. Broadaway, 132 Wn.2d at 131. Conclusions of law are reviewed de novo. State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

The defendant characterizes the court's resolution of disputed facts as a "conclusion of law." A conclusion of law is a determination that a term which carries legal implications has been established. Para-Medical Leasing, Inc. v. Hangen, 48 Wn. App.

389, 397, 739 P.2d 717, review denied, 109 Wn.2d 1003 (1987). A finding of fact is a determination from the evidence offered by the parties. Id. The Court treats each for what it really is, regardless of the label applied by the parties. Id.

The findings challenged under subsection three of the certificate purport to resolve factual disputes presented by the evidence. The court's credibility determinations are not subject to review. Hill, 123 Wn.2d at 646, State v. Burgess, 71 Wn.2d 617, 619, 430 P.2d 185 (1967). The conclusions regarding the disputed finding of fact 3.3 and 3.6 do involve factual determinations. In light of the Court's decision in Solomon the court's conclusion regarding disputed facts 3.5 is a conclusion of law.

Substantial evidence presented at the hearing supports the findings regarding the disputed facts 3.3 and 3.6. With respect to the defendant's language skills, the record shows the detective was able to converse with the defendant in English. The defendant appeared at the police station when he said he would. He was able to convey to the detective the reason for the delay in meeting with him, and was able to ask the detective questions in English regarding the Miranda waiver. The defendant gave the detective no

indication that he was not able to comprehend what the detective was telling him. 1 RP 14-15, 18, 23.

Before the hearing defense counsel represented to the court that he did not believe the defendant needed an interpreter because the defendant had previously stated he did not need one. Defense counsel also stated that he observed the defendant's English was "pretty darn good." 1 RP 6. A criminal minute entry dated August 7, 2009 states counsel told the court the defendant does not need an interpreter. After questioning the defendant the court agreed that no interpreter was necessary. 3 CP (sub 15).

In another context defense counsel's opinion of his client's abilities is afforded considerable weight. State v. Harris, 122 Wn. App. 498, 505, 94 P.3d 379 (2004) (considering the defendant's competence to stand trial). Here trial counsel had represented the defendant for more than one year at the time of the CrR 3.5 hearing. 3 CP __ (sub 9). Defense counsel's opinion of the defendant's language skills should be entitled to at least the same amount of deference afforded counsel when the question of a defendant's competency to stand trial is considered.

The transcript of the hearing also shows the defendant answered sometimes in English and sometimes in Korean. The

prosecutor noted for the record the court reporter admonished the defendant when he testified because of the manner in which he was testifying. 1 RP 31-37.

The court's finding that the defendant voluntarily waived his rights was also supported by the evidence. The detective testified that the defendant acknowledged that he understood each right after it was read to him. The defendant questioned whether he would be arrested if he signed. He then signed the form after he was told that he would not be arrested if he did not sign the form. The detective testified that no threats or promises were made to the defendant before he waived his rights. 1 RP 19, 24.

2. Under The Totality Of The Circumstances The Defendant Was Not In Custody When He Agreed To Talk To The Detective.

To determine whether the defendant was in custody the court considers how a reasonable person in the same circumstances would have perceived the situation. State v. Cunningham, 116 Wn. App. 219, 228, 65 P.3d 325 (2003). The determination is made considering all of the circumstances surrounding the interrogation. Stansbury v. California, 511 U.S. 318, 322, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994). In circumstances similar to those presented in this case the Court has

concluded the defendant was not in custody for the purposes of Miranda.

Although Detective Smith testified he intended to arrest the defendant at the end of the interview, there was no evidence the defendant was ever told that. An officer's unarticulated plan to arrest the defendant has no bearing on the whether the suspect was in custody at the time of questioning. Berkemer, 468 U.S. at 442. Nor is a defendant in custody at the time of questioning because police suspect him of a crime. Oregon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977).

The location of the interrogation is also not determinative. A defendant may not be in custody even though the interrogation occurred in a police station. Mathiason, 429 U.S. at 495. In Mathiason, police contacted the defendant and left a message for him to call after he was identified as a suspect in a burglary. The defendant called back and arranged to meet police at the station. The defendant was taken into a closed room at the station and told he was a suspect in the burglary but that he was not under arrest. The defendant had not been given Miranda warnings, but confessed to the burglary. The Court held under these circumstances the defendant was not in custody; failure to

administer warnings before questioning was not a bar to admission of the defendant's confession. Id. at 495.

In contrast a defendant suspected of trafficking pseudoephedrine was in custody for Miranda purposes even though questioning occurred in her store in United States v. Kim, 292 F.3d 969 (9th Cir. 2002). There the defendant voluntarily went to her store when she was unable to reach her son who was working there at the time police arrived to serve a search warrant. She did not go with the understanding police would question her. Once she arrived she was permitted to enter the locked store, but was then isolated from her husband and son. The defendant had limited ability to speak English and was frightened by the police presence. Given previous police contact with her, the defendant had reason to believe she was a suspect in a crime. Under all these circumstances the Court concluded the defendant was in custody at the time police questioned her. Kim, 292 F.3d at 973-977.

Here the court correctly concluded the defendant was not in custody at the time he was questioned by Detective Smith. The defendant voluntarily came to the police station knowing the detective wanted to ask him questions. Although he was in a small

interview room located in the police station he was not told that he was under arrest. He was not restrained in any way when he spoke with the detective. His question to the detective regarding whether he would be arrested if he did not sign the waiver form establishes that at that time he did not believe that he was under arrest or in custody. Because the defendant was not in custody at the time he spoke to the detective his statements were necessarily voluntary and appropriately admissible.

The defendant argues the evidence showed he was in custody at the time of questioning because he was in a private interview room located in the police station by an armed detective. As noted, where questioning occurred is not controlling. The firearm was holstered. There was no evidence Detective Smith use it in any way used it to indicate to the defendant that he was not free to leave. A suspect is not seized simply because the officer who questions him is visibly armed with a firearm. State v. Smith, 154 Wn. App. 695, 700, 226 P.3d 195 (2010).

The defendant's cited authority involves very different facts from the ones presented here. They do not support his argument that he was in custody. The defendant was actually under arrest at the time he was questioned in Orozco v. Texas, 394 U.S. 324, 89

S.Ct. 1095, 22 L.Ed.2d 311 (1969). In Dennis the officer questioning the defendants in their home specifically told them that (1) they could not leave and (2) that a warrant had been obtained and was en route to the apartment in order to be served. State v. Dennis, 16 Wn. App. 417, 421-22, 558 P.2d 297 (1976). Here the defendant had not been told that he was under arrest or that he could not leave the police station.

The defendant also argues he was in custody because he was read his Miranda rights, and the detective intentionally deceived him regarding whether he would be arrested. He cites no authority for the proposition that advice of constitutional rights turns an otherwise non-custodial interrogation into a custodial one. Although he argues what "most citizens" are aware of, his question regarding whether he would be arrested if he did not sign the waiver form clearly establishes that he did not think he was under arrest or not free to leave at that time. The officer did not deceive the defendant but rather answered the direct question that was asked; the defendant would not be arrested as a result of not signing the waiver form. The defendant did not ask, and the detective did not state, that the defendant would never be arrested.

3. The Defendant Knowingly, Voluntarily, And Intelligently Waived His Right To Remain Silent.

Even if the defendant had been in custody his statements were properly admitted because he waived his right to remain silent.

A suspect in a criminal case may waive his right to remain silent provided such waiver is made knowingly, voluntarily and intelligently. If these elements are satisfied, comments a suspect makes are admissible as evidence. A valid waiver may be expressly made by a suspect or implied from the facts of a custodial interrogation.

State v. Terranova, 105 Wn.2d 632, 646, 716 P.2d 295 (1986).

A valid waiver of rights is determined from the totality of the circumstances. Boulden v. Holman, 394 U.S. 478, 480, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1969), State v. Cashaw, 4 Wn. App. 243, 247, 480 P.2d 528, review denied, 79 Wn.2d 1002 (1971). The trier of fact is entitled to draw all reasonable inferences from the evaluation of the circumstances. State v. Gross, 23 Wn. App. 319, 324, 597 P.2d 894, review denied, 92 Wn.2d 1033 (1979).

The defendant argues his waiver was not valid because a language barrier prevented him from knowingly and intelligently waiving his rights. A suspect's language skills are one factor the court considers when determining whether a defendant validly

waived his Fifth Amendment rights. United States v. Garibay, 143 F.3d 534 (9th Cir 1998).

In Garibay the evidence showed the defendant primarily spoke Spanish, and only understood a few things in English. He was not asked if he would prefer to conduct the interrogation in Spanish rather than English. Testimony the defendant told the officer he understood English was undermined by testimony from the defendant's coach that when under stress or interacting with persons in authority the defendant would often claim to understand English when he did not. In addition, the evidence showed the defendant had a low I.Q. and was borderline retarded. Garibay, 143 F.3d at 537-38. Under these circumstances the Court found the defendant had not validly waived his rights. Id. at 539.

In contrast Courts which have found non-native English speakers were questioned validly waived their rights when the evidence demonstrated the defendant had sufficient command of the English language to understand what was said. A defendant who spoke to the officer in English, never said he did not understand English, and confirmed he understood each right as it was read to him validly waived his rights in United States v. Bernard S., 795 F.2d 749, 752 (9th Cir 1986). A Saudi Arabian

defendant validly waived his rights when the evidence showed he had been in the United States for 16 years, police had no trouble conversing in English with the defendant, and at the suppression hearing the defendant demonstrated his understanding of English by occasionally answering questions in English before they had been translated. United States v. Abou-Saada, 785 F.2d 1 (1st Cir. 1986), cert. denied, 477 U.S. 908, 106 S.Ct. 3283, 91 L.Ed.2d 572 (1986). Where others who knew the defendant told police that he spoke English, and the defendant agreed to talk to police in English, and said he understood his rights the defendant validly waived those rights. State v. Salcido-Corral, 940 P.2d 11, 21-23 (Kan. 1997).

Here the record supports the trial court's finding that the defendant's language skills did not hinder his ability to understand his Constitutional rights and its conclusion that the defendant knowingly, intelligently and voluntarily waived those rights. Defense counsel, who had worked with the defendant for about one year at the time of trial, represented that the defendant spoke English well. 1 RP 6. The unchallenged findings of facts were that the defendant's entire contact with the detective was in English. The defendant arrived at the place and time he had discussed

meeting with the detective. The defendant acknowledged that he understood each right after the detective read it to him. The defendant answered some of the questions asked at the suppression hearing in English. Unlike the defendant in Garibay the record here shows the defendant had at least average intelligence. At the hearing held one year earlier in which the defendant was questioned in English by the court, the defendant was able to answer all of the court's questions without any indication that he did not understand what he was asked. The defendant revealed that he was college educated, having studied electrical engineering in Alaska from 1986 to 1991. 8-7-09 RP 1-2.

The totality of the facts and circumstances presented to the court show the defendant's English comprehension was sufficient for him make a knowing, intelligent, and voluntary waiver of his rights. The court's assessment of the defendant's English language skills was confirmed at trial. The judge noted at the original sentencing hearing that the defendant testified mostly in English. 10-25-10 RP 3. The record supports the trial court's conclusion that the defendant validly waived his Constitutional rights.

4. If There Was An Error In Admission Of The Defendant's Statements It Was Harmless.

Detective Smith testified that when he spoke to the defendant, the defendant did not confirm M.K. or V.K.'s report, but he could not say why either M.K. or V.K. would fabricate their statements. The defendant did confirm his alcohol use, stating sometimes he drank to the point of blackouts. 2 RP 257. If the trial court erred in permitting this evidence it was harmless.

Error involving constitutional right is harmless if the court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). To assess whether a constitutional error is harmless the court will look to the untainted evidence to determine if that evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986).

Here any error in admission of the defendant's statements was harmless because the substance of those statements was introduced through other sources. M.K. testified that when he was sexually abused that he could smell alcohol on his father's breath.

When M.K. got older he made the connection between the defendant's alcohol consumption and forcing M.K. to have sex with his mother. 1 RP 73-74. In response the defendant testified that he did not drink to intoxication, but usually drank one to two beers after work at night. He clarified that he did not tell Detective Smith he habitually got drunk to the point of blacking out. Rather in the past couple of weeks he had drunk more than normal due to the stress of his mother falling ill with a stroke on the anniversary of his father's death. 2 RP 213-15. The defendant's niece who lived with the family confirmed the defendant's account of how much he had to drink. 2 RP 286. Additionally the defendant denied he has sexually abused any of his children. 2 RP 317-318.

Even if the court had excluded the defendant's statements it would have no impact on the outcome of the case. The defendant was still faced with evidence that he drank, and then sexually abused his children. He still had the choice to either not refute the evidence, or to refute it in the manner that he did. While the defendant's statements to the detective somewhat confirmed the degree to which the defendant drank, that made no difference in the outcome of the case. There was still a link between the defendant's use of alcohol and the sexual abuse. The defendant

did not deny he consumed alcohol on a daily basis. It is reasonable to believe the jury's assessment of the evidence and credibility of the witnesses would have been the same even without hearing the defendant's out of court statements to Detective Smith.

B. EVIDENCE REGARDING THREE INCIDENTS INVOLVING M.K. WHICH OCCURRED OUTSIDE CHARGING PERIOD WAS ADMISSIBLE FOR VALID REASONS. ANY ERROR IN ADMISSION OF THAT EVIDENCE WAS HARMLESS.

1. The Evidence Was Relevant To M.K.'s Credibility. It Constituted Res Gestae Evidence.

During his direct testimony M.K. testified that his father forced him to have sexual intercourse with his mother from the time that he was about nine years old until he ran away from home on June 1, 2009. 1 RP 64, 75-76. The defendant did not object to this testimony. Later in his direct testimony M.K. was asked if he remembered the last time he had sexual activity with his mother. When M.K. began to answer with details of the event defense counsel objected on the basis that the testimony was beyond the charging dates, and was therefore not relevant. The prosecutor argued the testimony was admissible as res gestae to explain how the police were contacted. The court overruled the objection. 1 RP 87-88.

The prosecutor then directed M.K. to answer without describing the details of the events. M.K. testified about the timeframe in which the last three incidents occurred. M.K. testified that on the third to the last occasion he had a big fight with his father, trying to get his father to stop forcing him to have sexual contact with his mother. He was not successful.

The prosecutor asked M.K. "what prompted you to run away on June 1?" M.K. said the culmination of the last three incidents caused him to run off. When the prosecutor asked for a time frame between the last incident and running off the defense again objected on the basis that the uncharged acts were offered only to discredit the defendant. The prosecutor argued the evidence was relevant to show why "this" did not stop sooner, and why it stopped when it did stop. The objection was overruled. The prosecutor then asked M.K. "why had you not run away before June 1?" M.K. said he had no place to go, but by June 1 it did not matter anymore "because I was tired of it, I was sick of it...my plan was to run away to my cousin's and to stay there and never see my family again." 1 RP 91-92.

The defendant argues evidence that there were three incidents of sexual contact with M.K.'s mother that occurred in the

three months before M.K. ran away from home were improperly admitted as irrelevant misconduct that had no permissible purpose under ER 404(b). The evidence was relevant to M.K.'s credibility. Its probative value was not outweighed by any prejudice to the defendant. Therefore the trial court did not abuse its discretion when it overruled the objection to that testimony.

While evidence of prior misconduct is not admissible to show the defendant acted in conformity with that conduct on a particular occasion, it is admissible for other purposes. ER 404(b). To be admissible under ER 404(b) the evidence must be relevant for some purpose other than the defendant's propensity to commit a particular crime, and its probative value must not be unfairly prejudicial. State v. Lane, 125 Wn.2d 825, 832, 889 P.2d 929 (1995). The Court reviews the trial court's interpretation of ER 404(b) de novo. If the trial court has identified a proper purpose to admit the evidence then the Court reviews the decision to admit or exclude the evidence for an abuse of discretion. State v. Fisher, 165 Wn. 2d 727, 745, 202 P.3d 937 (2009).

Evidence which relates to the credibility or probative value of other evidence is relevant. State v. Warren, 134 Wn. App. 44, 63, 138 P.3d 1081 (2006), affirmed, 165 Wn.2d 17, 195 P.3d 940

(2008), cert. denied, 129 S.Ct. 2007, 173 L.Ed.2d 1102 (2009). Here the evidence was relevant to M.K.'s credibility. In closing defense counsel argued M.K. was not credible because his testimony was implausible and had the abuse actually happened it would have been reported earlier. 2 RP 376-79. Why M.K. reported at the time he did directly addresses this argument.

The defendant also attacked M.K.'s credibility by testifying that M.K. had lied to his father on several occasions about his grades and school attendance. M.K.'s school performance and M.K.'s other misconduct resulted in arguments between father and son. 2 RP 319-23, 333-34. By implication M.K. ran away due to these arguments, and not as a result of sexual abuse. Because M.K.'s credibility had been made an issue, any evidence which supported his credibility was relevant to proving the charged incidents of sexual abuse occurred.

In addition to M.K.'s credibility it was relevant to the res gestae of the offense. Under the res gestae exception to ER 404(b) evidence is admissible to "complete the story of the crime on trial by proving its immediate context of happenings near in time and place." Id. quoting State v. Tharp, 27 Wn. App. 198, 204, 616 P.2d 693 (1980), affirmed, 96 Wn.2d 591, 637 P.2d 961 (1981).

Evidence may qualify under the res gestae exception to ER 404(b) even though several years separate the crime and the act testified to. In Elmore the Court held evidence the defendant had molested the victim nine years before he murdered her was properly admitted as res gestae evidence because a discussion between the defendant and victim about the prior molestation precipitated the murder. State v. Elmore, 139 Wn.2d 250, 285-88, 985 P.2d 289 (1999), cert. denied, 531 U.S. 837, 121 S.Ct. 98, 148 L.Ed.2d 57 (2000).

Here, the offense occurred between September 28, 2001 and September 28, 2003. The challenged evidence occurred between five and six years later, just before M.K. reported the abuse on June 1, 2009. Evidence that the defendant required M.K. to have sexual contact with his mother on those three incidents explained the argument M.K. had with the defendant which was the catalyst for M.K. running away and making a police report. It thus completed the picture of what had happened. The court did not abuse its discretion when it permitted limited evidence that the defendant forced M.K. to have sexual contact with his mother on three occasions in the two months leading up to M.K.'s report.

2. Any Error Was Harmless.

Even if the trial court erred in permitting the evidence the error was harmless. Erroneous admission of ER 404(b) evidence is grounds for reversal only if within reasonable probability it materially affected the outcome of the case. State v. Everybodytalksabout, 145 Wn.2d 456, 468, 39 P.3d 294 (2002). The error is harmless if “the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.” State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

With one exception the evidence the defendant complains about consists of a reference to three incidents in which M.K. had sex with his mother, without any testimony regarding the details of those incidents. The only detail that M.K. testified to was that on one incident the defendant came into M.K.’s room and told him to go upstairs where his mother should be. 1 RP 87-89. M.K. was permitted to testify without objection that he was forced to have sex with his mother from the time he was 9 years old until the day he ran away from home. 1 RP 64. M.K. had testified to the details of his father’s offenses against him during the charging period. In light of these circumstances, the testimony the defendant argues was

erroneously admitted did not likely have any effect on the outcome of the case.

In addition it is unlikely that the testimony had an impact on the outcome of the counts involving V.K. and M.Y.K. Under the circumstances in which they reported it is not likely the two girls reported their father's abuse against them as a result of what M.K. reported. Each child was ignorant of the other children's abuse until M.K. reported. V.K. did not report until questioned by someone in authority. M.Y.K did not disclose any abuse until approximately three and one-half months later. 2 RP 167-170, 231-32, 260. Each girl's testimony was not merely a repetition of what the other said, but had independent details.

C. COMMUNITY CUSTODY CONDITIONS.

The defendant was sentenced to a determinate sentence on counts 1 through 3 followed by a period of 36 months community custody. He was sentenced pursuant to RCW 9.94A.507 to an indeterminate sentence on counts 4 through 8. That sentence included community custody for the maximum term of each count which was life. The court imposed conditions of community custody as set forth in Appendix F to the judgment and sentence. 1 CP 16-17. The defendant challenges four of those conditions.

1. Costs Of Crime Related Counseling And Medical Treatment.

The defendant was sentenced to serve a term of community custody pursuant to former RCW 9.94A.715.² Accordingly the court had authority to impose conditions of community custody as set out in RCW 9.94A.700(4) and (5). Former RCW 9.94A.715(2)(a). The court ordered the defendant pay for crime related counseling and medical treatment for V.K., M.Y.K., and M.K. 1 CP 16. Payment for the cost of crime related counseling and medical treatment is not a condition which the court may impose pursuant to that statute. Thus it is appropriate to remand the case to the trial court to strike that condition.

2. Possession Of Sexual Stimulus Material For The Defendant's Particular Deviancy.

The court also ordered the defendant “not possess or control sexual stimulus material for your particular deviancy as defined by the supervising Community Corrections Officer and therapist except as provided for therapeutic purposes.” 1 CP 16. The defendant challenges this condition as unconstitutionally vague. The Court considered that question in State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008). Where an offender's deviancy has not been identified

or diagnosed, the Court found the condition gives the offender no notice as to what is prohibited, and is therefore unconstitutionally vague. Bahl, 164 Wn.2d at 761.

The defendant has repeatedly denied raping or molesting his children. 2 RP 255, 317-18; 12-7-10 RP 24. Not surprisingly there is no sexual deviancy evaluation in the record which identifies or diagnoses the defendant's particular deviancy. Pursuant to the Court's reasoning in Bahl, that condition which prohibits "sexual stimulus material" should be struck as a court ordered condition of community custody.

3. Stay Out Of Drug Areas.

The defendant challenges the condition that he stay out of drug areas, as defined in writing by the supervising Community Corrections Officer. 1 CP 17. The defendant argues this condition is only justified as a crime related prohibition under former RCW 9.94A.120, former RCW 9.94A.700(5), and former RCW 9.94A.505(8). A crime related prohibition is an order of the court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted. RCW

² Repealed by Laws of 2008, ch. 231 §57 and Laws of 2009, ch. 28, §42, effective August 1, 2009. This statute applies to the defendant because his offense was committed prior to the effective date of repeal.

9.94A.010(10). There was no evidence that the defendant used drugs to perpetrate his crime, or that drug use related to the circumstances of his crime. Thus the condition cannot be justified as a crime related prohibition.

The Court does have authority to order the defendant remain within or outside of certain specified geographical areas. State v. White, 76 Wn. App. 801, 811, 888 P.2d 169 (1995), affirmed, 129 Wn.2d 105, 915 P.2d 1099 (1996), Former RCW 9.94A.700(5)(a). Drug areas are a specified geographic area. The condition is therefore was a permissible condition.

4. Participate In Plethysmograph Testing As Directed By The Supervising Community Corrections Officer.

The trial court ordered that as a condition of community custody the defendant “participate in...plethysmograph examinations as directed by the supervising Community Corrections Officer.” 1 CP 17. The court also ordered that the defendant “participate in sexual deviancy treatment with a certified provider and make progress in ay recommended course of treatment. Follow all conditions outlined in your treatment contract. ..” 1 CP 17. Plethysmograph testing may be ordered to monitor an offender’s compliance with sex offender treatment. State v. Riles,

135 Wn.2d 326, 344-45, 957 P.2d 655 (1998), abrogated on other grounds, State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010). Because sex offender treatment was ordered the trial court was permitted to also order the defendant participate in plethysmograph testing.

The defendant argues the plethysmograph condition should be stricken because it violated his right to be free from bodily intrusions which he states is protected by the Fourth and Fourteenth Amendment. Many of the cases cited by the defendant are not determinative of this question because they deal with persons who have not been convicted of a crime. Two of the cases cited by the defendant that consider the propriety of post release conditions imposed at sentencing consider those only as it relates to federal statutory authority, and not pursuant to any constitutional limitations. United States v. T.M., 330 F.3d 1235 (9th Cir. 2003) (Considering 18 U.S.C. §3583(d)(1) and (2),and § 3553(a) in light of supervised release conditions requiring an offender convicted of a drug offense submit to plethysmograph testing based on a history of a 40 year old arrest for a sexual assault and a 20 year old conviction for kidnapping), United States v. Weber, 451 F.3d 552 (9th Cir. 2006) (considering the procedure required before imposing

any specific supervised release condition under 18 U.S.C. §3583.) While the condition at issue in Weber was the propriety of imposing plethysmograph testing on the defendant he did not raise a substantive due process claim. “Because the issue is not before us, we express no opinion on the question whether requiring plethysmograph testing as a condition of supervised release amounts to a substantive due process violation.” Weber, 451 F.3d at 564 n. 14.

The Court did consider an offender’s Due Process rights in connection with sentencing conditions in Coleman v. Dretke, 395 F.3d 216 (5th Cir. 2004), cert denied, 546 U.S. 938, 126 S.Ct. 427, 163 L.Ed.2d 325 (2005). The Court stated that an offender’s liberty interest may be circumscribed when he has been convicted of a crime. Id. at 221. Because persons who have not been convicted of a sex offense have a liberty interest in freedom from sex offender classification and such conditions were such a “dramatic departure” from normal conditions in those cases, the defendant was entitled to procedural protections before those conditions could be imposed. Id. at 222.

Here the defendant was convicted of a sex offense. Sexual deviancy treatment and the mechanisms used to accomplish that

treatment are not a dramatic departure from the normal conditions imposed on sex offenders. Weber noted that although there was some disagreement among psychologists regarding the use of plethysmograph testing, it “has been recognized by some psychologists and researchers as a useful technique in the treatment of sexual offenders.” Weber, 451 F.3d at 555. (emphasis in the original). The defendant nevertheless argues that because the condition is imposed at the direction of his community corrections officer, and not a therapist, that it could be ordered as a monitoring device, rather than as part of treatment as prohibited by the Court in Riles. That mere possibility, he states, means the condition is invalid and should be struck.

The community custody conditions should not be each read in isolation, but as a whole. Condition 19 sets forth monitoring conditions including plethysmograph testing. It immediately follows two conditions directing treatment for sexual deviancy and substance abuse. Read together and in light of the Court’s holding in Riles, it is clear that the community corrections officer’s authority to direct plethysmograph testing is limited to ordering it in the context of sexual deviancy treatment. The condition is valid under Riles and the Court should not strike it.

IV. CONCLUSION

For the forgoing reasons the State requests the Court affirm the defendant's conviction. The State also requests that the Court affirm the conditions of community custody requiring the defendant to stay out of drug areas and submit to plethysmograph testing. The case should be returned to the trial court to strike the conditions of community custody requiring the defendant to pay for counseling of his victims, and to not possess sexual stimulus material.

Respectfully submitted on October 5, 2011.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: *Kathleen Webber*
KATHLEEN WEBBER WSBA #16040
Deputy Prosecuting Attorney
Attorney for Respondent