

70547-4

70547-4

NO. 70547-4-1

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

ARTURO CAYETANO-JAIMES,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Susan K. Cook, Judge

RESPONDENT'S BRIEF

SKAGIT COUNTY PROSECUTING ATTORNEY
RICHARD A. WEYRICH, PROSECUTOR

By: ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Office Identification #91059

Courthouse Annex
605 South Third
Mount Vernon, WA 98273
Ph: (360) 336-9460

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I. SUMMARY OF ARGUMENT

Arturo Cayetano-Jaimes appeals from his conviction and sentence for Rape of a Child in the First Degree. He contends the trial court erred by not permitting the mother of the victim to testify by phone or via Skype at trial. He also contends the trial court improperly limited his closing argument by sustaining State's objection when he was arguing another individual did the offense. Finally, he contends certain conditions of community custody were improperly imposed.

The State contends the trial court properly decided to permit a deposition in advance of trial. Furthermore, the Court did not err in determining the poor quality of the Skype transmission and the inability to effectively cross-examine a witness via telephone allowed it to prohibit those methods of testimony. Finally, the State agrees the drug paraphernalia and use of false identity conditions were not related to the crime of convictions. Furthermore the condition requiring a plethysmograph should have required recommendation of a sex deviancy treatment provider.

Therefore, this Court must affirm the conviction but should direct the trial court to enter an order amending the community custody conditions.

II. ISSUES

1. Where a witness is out of the country and unavailable to travel to the United States, did the trial court err in denying a motion to admit the testimony of the witness by telephone, but permit a deposition?
2. Where the trial court determined that the quality of the proposed video testimony or testimony by telephone was inadequate, did the trial court err in precluding the testimony?
3. Did the sustained objection during closing argument preclude the argument that another individual committed the offense?
4. Were the community custody conditions regarding drugs, drug paraphernalia and false identity related to the crime of conviction?
5. Is the term “drug paraphernalia” unconstitutionally vague as a community custody condition?
6. Was the community custody condition providing for a plethysmograph properly assigned to the discretion of the community corrections officer, or should it have been left to the discretion of the sexual deviancy treatment provider?

III. STATEMENT OF THE CASE

1. Statement of Procedural History.

On October 29, 2103, Arturo Cayetano-Jaimes was charged with Child Molestation in the First Degree alleged to have occurred between February 1, 2006, and February 1, 2007. CP 1. Cayetano was alleged to have the daughter of the girlfriend of his brother perform oral sex by licking his penis. CP 4. The victim indicated it had occurred about two years before when she was eight years old. CP 4.

On May 11, 2010, the State amended the information to add a charge of Identity Theft in the Second Degree. CP 172.

On September 20, 2012, Cayetano was arraigned.

On November 19, 2012, the State amended the child molestation charge to Rape of a Child in the First Degree. CP 5-6.

On December 5, 2012, the defense filed a notice of defense claiming an alibi. CP 8.

On February 27, 2013, the State amended the information to change the time frame from February 1, 2006, to February 1, 2007, to October 31, 2004, to October 31, 2005. CP 27-8.

On March 27, 2014, the trial court heard a motion to permit testimony telephonically or in the alternative by a deposition. 3/27/13 RP 8-19.¹ The trial court denied the motion. 3/27/13 RP 20-1.

On May 20, 2013, the case proceeded to trial. 5/20/13 RP 35, 44. At the close of the State's evidence, the State moved to dismiss the charge of Identity Theft in the Second Degree. 5/21/13 RP 157-8.

On May 23, 2013, the jury found the defendant guilty of Rape of a Child in the First Degree. 5/23/13 RP 6, CP 154.

On June 26, 2013, Cayetano was sentenced to 123 months at the minimum of a determinate plus sentence under RCW 9.94.507. 6/26/13 RP 136.

On June 26, 2013, Cayetano timely filed a Notice of Appeal. CP173.

On July 17, 2013, the State filed a Notice of Cross-Appeal indicating it was appealing the trial court's decision to permit testimony from a witness outside of the country by electronic means. CP 174.

¹ The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

2/28/13 RP	Trial confirmation and continuance
3/27/13 RP	Motion for Telephonic Testimony
5/2/13 RP	Trial Confirmation
5/20/13 RP	Trial – Day 1: Motions
5/21/13 RP	Trial – Day 2: Testimony
5/22/13 RP	Trial – Day 3: Testimony, Closing Argument
5/23/13 RP	Jury verdicts
6/22/13 RP	Sentencing.

2. Pretrial Motion Regarding Testimony Telephonically or by Deposition.

On March 27, 2014, the trial court heard a motion to permit testimony telephonically or in the alternative by a deposition. 3/27/13 RP 8-19. The defense had filed a written motion. CP 35-49. The State filed a response. CP 59-71. The defense was seeking the testimony of the defendant's wife based upon hardship of travel from New York State and from the victim's mother from Mexico based upon the inability to travel to the United States. CP 35-49.

The trial court ordered a video deposition, and permitted it to be completed by way of Skype or a video conference call.

But at the very least I would require a video deposition, which apparently would have to be arranged under some type of a Skype arrangement or video conferencing call, valid verification of her identity, and the ability for the state to cross-examine her on camera, albeit with an interpreter, so that the jury would see not only -- not only hear her responses, but be able to see her.

I'm not suggesting that these arrangements can be made between now and trial, but I'm only suggesting that would be the only way under which this Court would allow her testimony. A voice at the end of a telephone line in a foreign country presents lots of problems in terms of even verifying who the person is, the oath and its meaning to that person in that country, and the ability of the jury to have any idea how to evaluate that person's testimony -- these all create major problems, for this Court's thinking.

So the request for Ms. Rodriguez to appear telephonically is denied. The request for Ms. Camacho to appear in some other means would only be granted if it were through a video direct link or video deposition that could be

recorded ahead of trial where the state had an opportunity to participate eye-to-eye, if you will, and the jury would have the ability to watch that video.

I do believe that the rules require consent of both parties before the Court will allow telephonic testimony in any case, absent these very narrow exceptions that I've already discussed.

3/27/13 RP 21-2. Defense counsel inquired about the ability to have testimony at trial by way of a live video feed as opposed to a deposition.

MS. RIQUELME: So then if there was a way that we could get this to happen over a live video, then she could testify live over video from Mexico? Is that my understanding?

THE COURT: And I'm certainly not trying to tease anyone. I don't know that we even have that capability at this end.

MS. RIQUELME: Right.

THE COURT: But it would have to be a verification of identity, and the ability to cross-examine a question on film, or video.

MS. RIQUELME: Okay.

3/27/13 RP 24

3. Trial Proceedings Relating to Testimony by Phone or Skype.

Toward the end of the first day of trial defense counsel suggested that the testimony of the victim's mother would be by Skype from Mexico.

MS. RIQUELME: And so I will point out to the Court, though, that I have -- I think that I have Laura Camacho, the witness in Mexico, able to testify tomorrow, but I'm going to want to come in here a little early to play around with it to see if technically this is really going to work.

THE COURT: Okay, all right. It's like Skype? She is going to be able to see us, and we are going to be able to see her?

MS. RIQUELME: That's the plan.

MS. DYER: And I would like to know ahead of time how this is supposed to happen, because I think Judge Needy's ruling was very specific about the manner in which this was to occur, because I don't know the method or means.

MS. RIQUELME: And at this point we're planning on Skype, because the program that our IS wants her to use is not something she has access to in a cyber cafe she will be using in this town, so I will be bringing my personal computer in, using my Skype account, and hopefully the WiFi signal in here is strong enough that we can make it work.

THE COURT: Hopefully.

MS. RIQUELME: But yes, there is a camera, and so we -- so we would be able to see her.

5/21/13 RP 158-9.

The next day after defense counsel arranged the proposed video call, the trial court found it inadequate.

I know this was a lot of work, Ms. Riquelme, but this just isn't sufficient. I can't see the features on her face. I can barely see her face. And then the background noise is such that we're going to have a hard time hearing what she has to say in communicating with her.

I realize that she is an important witness to the defense, and I would like to allow her to testify ¹⁰ if it was at all possible. But sitting in the jury box, I ¹¹ can't make out her features. I can't -- she's holding the telephone to her - - to the side of her face, and the quality of the picture is such that they're not going to be able to judge anything about her testimony by watching her demeanor or any of the other things the jury is supposed to use to evaluate testimony. There just too many problems with this, I'm sorry, but I don't think that we can have it played for the jury under this fashion.

5/22/13 RP 11. Defense renewed the motion for testimony to be telephonic. The trial court denied the motion.

All right. I'm not going to allow that either. I think the jury is entitled to evaluate the credibility of the witnesses. It's a really important part of the trial, particularly this trial, because the jury is going to have to decide who to believe here. And they're not going to be able to evaluate Ms. Camacho's testimony using this method, nor are they going to be able to evaluate it over the telephone. I just don't think that's appropriate.

5/22/13 RP 11-2.

4. Summary of Trial Testimony.

V.B. was a fifteen year old high school freshman at the time of trial. 5/21/13 RP 44-5. Her mother was living in Mexico. 5/21/13 RP 75. She was living with her aunt, uncle, a younger sister and a younger brother. 5/21/13 RP 46. V.B.'s sister is two years younger than her. 5/21/13 RP 77. Prior to living with her aunt and uncle she lived with her mother and stepfather. 5/21/13 RP 47. She recalled living with them at the Sunrise apartments in Mount Vernon. 5/21/13 RP 48. She met her stepfather's brothers and sisters including the defendant, Arturo Cayetano-Jaimes. 5/21/13 RP 48-9. V.B. would see Cayetano from time to time at family gatherings and during holidays. 5/21/13 RP 50, 80. The defendant's siblings would also babysit V.B. 5/21/13 RP 51. V.B. spoke Spanish as did Cayetano. 5/21/13 RP 74

V.B. recalled one occasion when Cayetano babysat her for the day. 5/21/13 RP 53-4. V.B. was able to identify the places where Cayetano

lived, but could not identify at which location the babysitting incident occurred. 5/21/13 RP 55-7.

V.B. was driven to the house by her mother and stepfather. 5/21/13 RP 86. V.B. recalled being at the house watching television and playing with her cousins. 5/21/13 RP 59. Cayetano's two children and V.B.'s sister Viviana was at the house. 5/21/13 RP 59. Cayetano's wife was there, but she left to go to the store. 5/21/13 RP 59-60.

V.B.'s sister came into the room and told V.B. that Cayetano wanted V.B. to go to Cayetano's room. 5/21/13 RP 60. V.B. went into the room and Cayetano was lying on the bed. 5/21/13 RP 61. Cayetano then told V.B. to lick his privates. 5/21/13 RP 63. V.B. was scared, but proceeded to lick Cayetano's penis. 5/21/13 RP 63-4. Cayetano covered V.B. with a blanket while she put his penis in her mouth. 5/21/13 RP 65. It tasted gross. 5/21/13 RP 65. V.B. told Cayetano she did not want to do it anymore, but he told her to do it longer. 5/21/13 RP 66. She was allowed to stop when Cayetano's wife came home. 5/21/13 RP 66. When V.B. walked out of the room, Cayetano's wife was carrying grocery bags. 5/21/13 RP 66, 96. She only assumed that she had driven in the car, but did not actually see her leave or return. 5/21/13 RP 96, 99-100.

V.B. did not tell anyone at that time, what had happened because she was scared. 5/21/13 RP 66-7. V.B. did not recall precisely how old

she was, but believed she was six or seven years old. 5/21/13 RP 67. She was able to place the incident as having occurred a year and a half before the arrest of her parents. 5/21/13 RP 67.

By stipulation the parties agreed that V.B.'s mother and stepfather were arrested on December 1, 2006. 5/21/13 RP 68.

After the arrest of her parents, V.B. went to live with her stepfather's mother. 5/21/13 RP 69. She then went to live with her aunt and uncle and was later adopted by them. 5/21/13 RP 69, 71.

The first person she told about the incident was to her aunt. 5/21/13 RP 72. She was about ten years old at the time. 5/21/13 RP 90. Her aunt had gotten upset at V.B. about the way V.B. put a little play coffeemaker in her mouth and used her tongue. 5/21/13 RP 72, 90. Her aunt had described it as bad, which prompted V.B. to mention what had occurred with Cayetano. 5/21/13 RP 72-3. V.B. later talked about the incident with a child interview specialist and with the defense counsel. 5/21/13 RP 73-4, 134-5.

V.B.'s sister Viviana testified. 5/21/13 RP 101. She was twelve at the time of trial. 5/21/13 RP 101. Viviana would go to Cayetano's house and play with his kids. 5/21/13 RP 106. Viviana recalled one occasion when Cayetano told her to go get her sister and tell her to go to his room. 5/21/13 RP 106. She did not know why he asked, but she told her sister to

go. 5/21/13 RP 106-7. Viviana did not go into the room with her sister but stayed in the other room playing with Cayetano's children. 5/21/13 RP 107.

Martha Banuelos testified. 5/21/13 RP 116. She was from Mexico but had lived in the United States since 1968. 5/21/13 RP 116. She adopted V.B., Viviana and her brother. 5/21/13 RP 118. They had come to live with her in December of 2007. 5/21/13 RP 119.

Banuelos described an incident where she saw V.B. with a blender in her mouth. 5/21/13 RP 120. It concerned Banuelos because of the way V.B.'s mouth was shaking and the way she was doing things with her tongue. 5/21/13 RP 121, 129. V.B. proceeded to tell Banuelos about something that had occurred to her. 5/21/13 RP 121. V.B. was crying when she described what happened. 5/21/13 RP 123. Banuelos reported it to the Mount Vernon Police. 5/21/13 RP 122-3.

Detective Marker of the Mount Vernon Police was assigned to investigate the case. 5/21/13 RP 130-3. He received a report from child protective services and arranged for an interview of the V.B. and her sister. 5/21/13 RP 132-3. The interview was August 13, 2008. 5/21/13 RP 133. Marker was unable to find Cayetano. 5/21/13 RP 133-4. About a year later, Marker met with V.B. to show her a picture of Cayetano.

5/21/13 RP 135. V.B. was able to identify the person in the photograph as Cayetano. 5/21/13 RP 135.

Marker was able to get identifying information about Cayetano from the FBI. 5/21/13 RP 131. Marker was unable to use the information to locate Cayetano. 5/21/13 RP 141-2.

Detective Sergeant Michael Don testified that he did follow-up investigation on the case. 5/21/13 RP 148-9. Don checked various address histories for the defendant and took photographs. 5/21/13 RP 149. He identified the photographs of the addresses which were admitted. 5/21/13 RP 150-3.

Maria Jaimes testified she was the defendant's mother. 5/22/13 RP 18-9. V.B. was the stepdaughter to another one of her sons, Francisco Cayetano-Jaimes. 5/22/13 RP 19-20. Jaimes said that Francisco had lived with his wife Laura Camacho Banuelos at the Sunrise apartments. 5/22/13 RP 21. Jaimes said Arturo had lived with his wife at the La Paloma apartments with his children and they would see relatives at birthday parties. 5/22/13 RP 22-3. Jaimes claimed she never saw Cayetano and Francisco's family together. 5/22/13 RP 25.

On cross-examination, Jaimes acknowledged she did not know Cayetano's comings and goings on a daily basis. 5/22/13 RP 27. She acknowledged that Cayetano had moved from New York to Washington in

2001. 5/22/13 RP 27. Jaimes testified she was unable to recall what year Cayetano moved to New York. 5/22/13 RP 28. She said she did not recall twice telling the defense investigator when Cayetano had moved to New York in 2005. 5/22/13 RP 29-30.

On redirect examination, Jaimes testified she did not know when Cayetano left for New York. 5/22/13 RP 32-3.

The defendant's sister, Edith Cayetano-Jaimes, testified. 5/22/13 RP 34-5. She had watched her brother Francisco's step children, V.B. and Viviana from time to time. 5/22/13 RP 36. She said that Cayetano and his wife had lived in Washington but moved to New York. 5/22/13 RP 38. When asked if she knew the year she said "No. I know in 2004, -5, they were not here." 5/22/13 RP 38.

Defense investigator Shauna Snyder testified she was present during an interview of V.B. on November 13, 2012. 5/22/13 RP 43-4. She indicated during the interview that V.B. had made statements that the defendant's wife, Irena Rodriguez had been driving a vehicle. 5/22/13 RP 46.

The defendant's wife, Irene Rodriguez, testified. 5/22/13 RP 48. She lived in New York City at the time of trial. 5/22/13 RP 48. She had moved to Washington in 2001. 5/22/13 RP 54. She testified she moved from Washington to New York City in 2005. 5/22/13 RP 48-9. They had

been evicted from an apartment in 2005 for not paying rent. 5/22/13 RP 60. Rodriguez testified to where she and her husband had lived in Washington State. 5/22/13 RP 49-50. Rodriguez knew her brother-in-law Francisco lived with Laura Camacho and two children, V.B. and Viviana. 5/22/13 RP 51. She did not know if they were his daughters. 5/22/13 RP 51. She said they did not get along and they did not meet at any family gatherings. 5/22/13 RP 51-2.

Rodriguez said that V.B. and Viviana never came over to her house by themselves and she never watched them. 5/22/13 RP 52-3. Rodriguez also claimed she did not have a license and did not drive while she lived in Washington. 5/22/13 RP 53. .

The defendant testified he moved to Mount Vernon “around 2001 or somewhere in there.” 5/22/13 RP 62. He moved in to the Casa Grande apartments where he lived with his mother for “a year and a half, somewhere around there.” 5/22/13 RP 64. He said he then he moved to a trailer for “less than a year and a half, somewhere around there. 5/22/13 RP 64-5. He then lived at the La Paloma apartments for “a year a year and a half or two, somewhere in there.” 5/22/13 RP 65. He said he moved to New York at that time and did not return until the year before trial. 5/22/13 RP 65-6.

When he moved to New York, his brother was still living in Mount Vernon. 5/22/13 RP 66. He saw his brother at family events like birthdays.

5/22/13 RP 67. He said his brother never visited his home and he never visited his brother's home. 5/22/13 RP 67. He said the victim never visited his home. 5/22/13 RP 68.

The defendant contended he never was in charge of watching the girls. 5/22/13 RP 70.

On rebuttal, the State called the defense investigator who indicated Maria Jaimes had told her that Cayetano moved to New York in October, 2005. 5/22/13 RP 77.

5. Community Custody Conditions.

Cayetano objected to some conditions of the community custody conditions in Appendix F. 6/26/13 RP 131-2. Cayetano objected to the following conditions: 9 and 10 regarding drugs and drug paraphernalia; 11, 12, 14, and 16 regarding computer use; conditions 13 regarding use of a false identity; and 21 regarding obtaining a mental health evaluation. 6/26/13 RP 132-3. The State agreed that conditions 11, 12, 13, 14 and 21 should be deleted. 6/26/13 RP 133-4. The court imposed conditions 1 through 10, 13, 15, 17, 18, 19 and 20, while deleting conditions 11, 12, 14, 16 and 21. 6/26/13 RP 136, CP 168-170.

IV. ARGUMENT

1. Where the credibility of the witness was important, the trial court did not violate the defendant's right to compulsory process or err in determining that the video or telephonic testimony was not appropriate.

Cayetano contends the trial court erred in denying his request for the victim's mother to testify at trial by telephone or Skype. Brief of Appellant at page 12.

The State contends the trial court properly evaluated the propriety of testimony from a foreign jurisdiction by electronic means.

In *State v. McCabe*, 161 Wn. App. 781, 251 P.3d 264 (2011), the defendant sought to admit the testimony of his mother by telephone due to her physical condition. The trial court denied the motion finding that the "jury has a right to observe her demeanor and manner of testifying and all the other issues that they are to consider when they're adjudicating credibility." *State v. McCabe*, 161 Wn. App. at 786, 251 P.3d 264 (2011). On appeal, the defendant argued the trial court's ruling denied the defendant of compulsory process. The *McCabe* court denied the argument holding the right to compulsory process was not absolute.

A defendant's right to compulsory process is also subject to established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. *State v. Finch*, 137 Wn.2d 792, 825, 975 P.2d 967 (citing *Chambers v. Mississippi*, 410 U.S. 284, 302,

93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)), *cert. denied*, 528 U.S. 922 (1999).

State v. McCabe, 161 Wn. App. 781, 788, 251 P.3d 264 (2011)

The *McCabe* court concluded that the defendant's right to compel attendance was subject to the right of the State to subject the witness to cross-examination and a meaningful assessment of her credibility by the jury. *Id.*

The defendant in *McCabe* also contended the trial court abused its discretion by refusing to permit the testimony under ER 611. ER 611 provides the trial court "shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence, so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

As in *McCabe*, both trial judges here were aware of their discretion to permit the testimony and would have permitted the testimony if a video deposition had been arranged in advance of trial, or the Skype testimony had been adequate to permit the jury to evaluate the credibility of the witness.

As Judge Cook held:

I think the jury is entitled to evaluate the credibility of the witnesses. It's a really important part of the trial, particularly this trial, because the jury is going to have to decide who to believe here. And they're not going to be able to evaluate

Ms. Camacho's testimony using this method, nor are they going to be able to evaluate it over the telephone. I just don't think that's appropriate.

5/22/13 RP 11-2.

2. Where the defendant's counsel was able to argue the victim could have been mistaken about who had raped her the objection which was sustained did not limit the defendant's argument.

Cayetano contends the trial court limited his ability to argue other suspect evidence when the trial court ruled on a State's objection to the defense closing argument. Brief of Appellant at page 26-7.

The State contends Cayetano takes the objection and trial court ruling out of context. And immediately after the ruling, the defendant proceeded to argue there was possibly another perpetrator.

Courts review a trial court's action limiting the scope of closing argument for abuse of discretion. *State v. Perez-Cervantes*, 141 Wn.2d 468, 475, 6 P.3d 1160 (2000). Courts will find that a trial court abused its discretion “only if *no reasonable person* would take the view adopted by the trial court.” *Id.* (quoting *State v. Huelett*, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979)). However a trial court cannot unduly limit the scope of defense counsel's closing argument, since it may infringe upon a defendant's Sixth Amendment right to counsel. *State v. Frost*, 160 Wn.2d 765, 773, 161 P.3d 361 (2007), *reversed on other grounds*, *Frost v. Van Boening*, ___ F.3d

___, 2014 U.S. App. LEXIS 8024, 18, 2014 WL 1677820 (9th Cir. Wash. Apr. 29, 2014)². The State contends there was no such undue limitation.

Cayetano noted the prosecutor objected on the ground the defense argument assumed facts not in evidence and that the trial court sustained the objection. Brief of Appellant at page 27. However, Cayetano failed to indicate the trial court directed the jury to strike the reference “that something happened” to V.B. 5/22/13 RP 121. The entire exchange reads as follows:

Did something happen to V[B]? Possibly. Possibly something happened to V[B] after Arturo and Irene left, and they moved to New York City, and somebody took advantage of her, and she's mistaken. This has been a really long time.

MS. DYER: Objection. Assumes facts [not] in evidence.³

MS. RIQUELME: This is argument.

THE COURT: Sustained.

MS. DYER: Move to strike, your Honor.

THE COURT: All right. The reference to something happened to V[B] is stricken, ladies and gentlemen. You are instructed to disregard.

5/22/13 RP 101-2. The State contends the objection was directed at the comment about something happening to V.B., not about the argument of others taking advantage of her. This position is corroborated by the fact that immediately after this objection Cayetano’s counsel conducted an extensive

² A petition for writ of certiorari was filed to the United States Supreme Court on July 25, 2014.

³ The State believes the prosecutor likely was contending the argument was assuming facts not in evidence.

argument suggesting another suspect committed the offense. And the prosecutor did not object.

MS. RIQUELME: A lot of time has passed since these incidents have been alleged to have happened since this trial. And even between these alleged incidents, or this alleged incident, and when Vanessa came forward, she was apparently pretty young when she thinks that this happened to her, **and so is she perhaps mistaken that this was Arturo Cayetano?** The families were not very close, they didn't know each other well. She can't even remember what his wife looks like. **So how do we know that that is who she is really talking about?**

Of course she sits here today and she identifies Arturo Cayetano. Well, he's sitting in the defendant's chair. And a police officer, in 2009, hands her a photo of Arturo Cayetano, and she identifies him, but he's not in a lineup. There aren't any other photos of any other people. How is she going to -- she's in a position where this is the person she's going to identify. I mean, perhaps if he looked -- if he was a black man who was eighty years old, she might not identify him, **but someone who vaguely meets the description of a person who might have done this to her, she's going to identify that person. And he's had contact with other people. There were other people, there were babysitters, other people, adult men who lived in her home before her parents were arrested.**

5/22/13 RP 102 (bold emphasis added). There was no greater record made as to the scope of the objection at the end of oral argument. In the absence of more detail, the ruling and argument cannot be read as having resulted in precluding Cayetano from arguing that someone else committed the offense.

3. Error, if any, was harmless and does not merit reversal.

Cayetano argues the case presents a situation of cumulative error based upon the exclusion of the witness and the content of the oral argument. Brief of Appellant at page 35-6.

The State contends that should this court find error, contrary to the argument above, that any error was harmless beyond a reasonable doubt. In determining whether a claimed constitutional error is harmless, the test is whether beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *Neder v. United States*, 527 U.S. 1, 15, 119 S.Ct. 1827, 1837, 144 L.Ed.2d 35, 51 (1999).

Regarding the exclusion of the victim's mother as witness by denying the testimony by electronic means, if the testimony had been presented, it would have been cumulative of other testimony presented by the defendant, his wife and his mother. Each of them had indicated that the victim did not spend any time alone with the defendant at his residence. 5/22/13 RP 25, 52-3, 70. This is the same as the proposed testimony of the victim's mother. 5/22/13 RP 15.

In addition, the claimed error based upon the ruling of the trial court during closing argument did not limit the defendant from arguing that another individual may have been the one who committed the offense. The defendant did actually make that argument contending she was "mistaken

that this was Arturo Cayetano” and that “[t]here were other people, there were babysitters, other people, adult men who lived in her home before her parents were arrested.” 5/22/13 RP 101. A trial court’s preclusion of arguing competing defenses which would constitute structural error meriting reversal. *Frost v. Van Boening*, ___ F.3d ___, 2014 U.S. App. LEXIS 8024, 18, 2014 WL 1677820 (9th Cir. Wash. Apr. 29, 2014), Slip Op. at page 23. But here, the defendant was permitted to and actually did make the argument that another suspect committed the offense. Thus, any error in the ruling did not rise to the level of structural error and is subject to a harmless error analysis.

For these reasons the claimed error, if any, was harmless beyond a reasonable doubt.

4. The challenged community custody conditions should be modified or stricken.

Cayetano contends three of the community custody conditions were inappropriately imposed. Brief of Appellant at pages 37-46. The State concedes that prohibition against possessing drugs, drug paraphernalia and false identities are not related to the offense and should be stricken. The State believes that condition 19 regarding the plethysmograph should be modified to specify that it may be ordered if recommended by the sexual deviancy treatment provider.

Appellate courts review de novo whether the trial court had statutory authority to impose these challenged conditions of community custody. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

RCW 9.94A.505(8) permits imposition of “crime-related prohibitions and affirmative conditions” as a part of community custody.

“Crime-related prohibition” means an order of a court **prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted**, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

RCW 9.94A.030(10) (bold emphasis added).

i. The drug paraphernalia condition is not crime related.⁴

The State concedes that no evidence was presented in the testimony at trial or at sentencing indicating the offenses were as a result of use of drugs or connected to possession of drug paraphernalia. *State v. Land*, 172 Wn, App. 593, 605, 295 P.3d 782, *rev. denied*, 172 Wn.2d 1016 (2013). Although Cayetano has not sought the deletion of condition 9 at this time, the State believes that condition should be stricken as well since it does not

⁴ The State is not conceding that the term “drug paraphernalia” is unconstitutionally vague. Given the statutory definition of drug paraphernalia under RCW 69.50.102, probations would have fair notice of the prohibited conduct and enforcement would not be

relate to the crime of conviction. Thus, this Court should enter an order directing the trial court to delete conditions 9 and 10.

ii. The false identity condition is not crime related.

Although Cayetano was initially charged with Identity Theft in the Second Degree, the State's dismissal of that charge and the imposition of the false identity condition does not relate to the crime of conviction of Rape of a Child in the First Degree, merit's deletion of condition 13 as well.⁵

iii. The condition that includes plethysmographs as recommended by the community corrections officer should be amended to indicate if ordered by the sexual deviancy treatment provider.

The community custody condition providing for "plethysmograph examinations as directed by the Community Corrections Officer" was not addressed in the trial court.

The defendants in both *State v. Riles*, 135 Wn.2d 326, 957 P.2d 655 (1998) (abrogated in part by *State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010)) and *State v. Castro*, 141 Wn. App. 485, 170 P.3d 78 (2007), challenged the trial court's order, as part of their community custody conditions, to "[s]ubmit to polygraph and plethysmograph testing upon the

arbitrary. *State v. Valencia*, 169 Wn.2d 782, 795, 239 P.3d 1059 (2010) (J.M. Johnson, concurring).

⁵ At sentencing the prosecutor conceded the condition should be deleted. 6/26/13 RP 133.

request of [his] therapist and/or Community Corrections Officer”. *Castro*, 141 Wn. App. at 493, *Riles*, 135 Wn.2d at 337.

It is not permissible for a court to order plethysmograph testing without also imposing crime-related treatment which reasonably would rely upon plethysmograph testing as a physiological assessment measure. Unlike polygraph testing, plethysmograph testing does not serve a monitoring purpose. It is a gauge for determining immediate sexual arousal level in response to various stimuli used as part of a treatment program for sex offenders. **Plethysmograph testing serves no purpose in monitoring compliance with ordinary community placement conditions. It is instead a treatment device that can be imposed as part of crime-related treatment or counseling under RCW 9.94A.120(9)(c)(iii).**

State v. Riles, 135 Wn.2d 326, 345, 957 P.2d 655 (1998) (bold emphasis added).

Castro, *supra*, reiterated the *Riley* holding that plethysmograph testing can properly be ordered incident to crime related treatment. *Castro*, 141 Wn. App. at 494. The remedy should not be to strike the condition but to remand to the trial court to revise the condition to require plethysmograph testing only at the direction of his sexual deviancy treatment provider. *Accord*, *State v. Land*, 172 Wn. App. at 605, 295 P.3d 782, 787 (2013) (testing can properly be ordered incident to crime-related treatment by a qualified provider).

Thus, this Court should remand the case to order the trial court to add the phrase “upon the recommendation of the qualified provider” in front of the term plethysmograph.

V. CONCLUSION

For the foregoing reasons the appellant’s conviction must be affirmed. Additionally, this Court should order the trial court to delete community custody conditions 9, 10 and 13 and modify condition 19 to allow a plethysmograph only on the recommendation of a qualified provider.

DATED this 20th day of August, 2014.

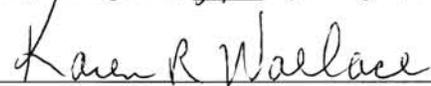
SKAGIT COUNTY PROSECUTING ATTORNEY

By: 
ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Skagit County Prosecutor’s Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Elaine L. Winters, addressed as Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101 . I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 21st day of August, 2014.


KAREN R. WALLACE, DECLARANT