Supreme Court No. 102854-7
COA No. 83873-3-I

THE SUPREME COURT OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JACOB DEE VERNON,

Petitioner.

PETITION FOR REVIEW

On Appeal From King County Superior Court
The Honorable Julia Garratt, Presiding

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A. IDENTITY OF PETITIONER

Jacob Dee Vernon, the petitioner, asks this Court to accept review of the Court of Appeals' decision terminating review set out in Section B, *infra*.

B. COURT OF APPEALS' DECISION

Mr. Vernon seeks review of the unpublished opinion of the Court of Appeals, Division One, in *State of Washington v. Jacob Dee Vernon*, COA No. 83873-3-I, issued on February 5, 2024. Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Mr. Vernon used a peremptory challenge against a long-time former prosecutor from the jury. The State objected under GR 37 because the juror was Black. The trial court sustained the challenge without following the procedures set out in GR 37. On appeal, the court affirmed with a *de novo* standard of review, but also did not follow the procedures of GR 37.

a. Where the trial court fails to follow the procedures set out in GR 37, how should an appellate court conduct the GR 37 inquiry?

b. Could an objective observer would view race or ethnicity as a factor to a peremptory challenge to a former prosecutor?

2. Are RCW 9A.44.050(1)(a) and RCW 9A.44.010(3) -- second degree rape by forcible compulsion -- unconstitutionally vague and overbroad on their face or as applied to the facts of this case?

Subsidiary to this issue is the question of whether controlling U.S. Supreme Court precedent requires this Court to reconsider it prior holdings that the doctrine of facial vagueness does not extend to cases outside the First Amendment?

3. There was never a jury finding that Mr. Vernon engaged in sexual intercourse "by forcible compulsion," an

essential element of second degree rape. Does the doctrine of "invited error" prevent review an unconstitutional conviction?

4. Does *State v. Hubbard*, 1 Wn.3d 439, 527 P.3d 1152 (2023), require review of vague conditions of community custody even if the challenge is not "ripe?"

D. STATEMENT OF THE CASE

Mr. Vernon and M.Y. were involved in a long-term, but volatile, "on-again-off-again," relationship. Over time, their sex life grew more "adventurous" (as counsel referred to it, 3-RP-1103). They would mutually bite, choke, pull hair, have tickle fights, hold arms, and spank each other. 2-RP-521, 650-651, 654; 3-RP-1103-1104, 1110-1112, 1189-1191.

On September 13, 2018, at Vernon's house, after consuming alcohol and sitting in a hot-tub with others, M.Y. and Vernon took a shower together, and Vernon applied massage oil to M.Y.'s unclothed body, a practice sometimes preceded sex. Slip Op. at 2-3; 2-RP-554-557, 674. M.Y. backed up against

Vernon, and his penis entered her vagina. 3-RP-1155-1158. M.Y. ended up on her back with her legs over Vernon's shoulder, and he held her arms down (as they often did) while they had intercourse. When Vernon noticed M.Y. was crying, he stopped. 3-RP-1160-1164.

In contrast, M.Y. said that she told Vernon she did not want to have sex with him. He ignored her and forced her to have intercourse. Slip Op. at 3.

The State charged Vernon with rape in the second degree. CP 1. The case was tried to a jury in March and April 2022, the Hon. Julia Garratt presiding. The jury returned a verdict of "guilty." CP 124.

Five jurors wrote to the court and asked for leniency at sentencing. They believed Vernon did not have an intent to harm M.Y. or to willingly rape her but felt they had to convict based on the jury instructions. CP 240-45.

After imposing life sentence with a standard range minimum term, this appeal followed. CP 176-198. The Court of Appeals affirmed. App. A.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. *Where the State Used GR 37 to Prevent the Defense from Exercising a Peremptory Challenge a Long-time Former Prosecutor, Should This Court Accept Review*

a. Supplemental Facts

Mr. Vernon is white and was in a cross-racial relationship with a Black woman, M.Y. He had a significant interest in jury diversity. *Thomas v. Lumpkin*, ___ U.S. ___, 143 S. Ct. 4, 10, 214 L. Ed. 2d 154 (2022) (Sotomayor, J., dissenting to denial of *certiorari*) ("Historians have long recognized that interracial marriage, sex, and procreation evoke some of the most invidious forms of prejudice and violence.").

The State attempted to interfere with this diversity by exercising five of seven peremptory challenges to people of color.

Overall, Mr. Vernon exercised less peremptory challenges to people of color than the State. Post-Trial Ex. 1; CP 76.

Mr. Vernon used a peremptory challenge against Juror 8, a Black former police officer with mental health issues. The trial court rejected the State's GR 37 challenge to this juror. 1-RP-434-435.

Juror 22 was a Black lawyer. Now in private practice, he had spent decades as a prosecutor and had worked for the same office that prosecuted Vernon. Defense counsel had prior cases against Juror 22. 1-RP-438. During voir dire, Juror 22 said that although people had different perspectives on an event, "there's only one truth" and the "job" of jurors was "to determine what the actual facts are as to what occurred." 1-RP-140-141.

When counsel exercised a peremptory challenge against Juror 22, the State objected under GR 37. Counsel noted that he knew the juror and he was concerned his opinions would unduly influence the other jurors. 1-RP-438.

The trial court did not follow the procedures set out in the rule, did not make any findings about whether an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, and simply ruled that there was no indication that Juror 22 could not be fair. 1-RP-439-440. Juror 22 ended up on the jury and was the foreperson. CP 124-125; CP 220.

On appeal, the Court of Appeals never addressed the trial court's failure to follow the procedures of GR 37(e) and instead reviewed the issue *de novo*. Slip Op. at 5 n.4. The court concluded:

> Vernon did not ask juror 22 about whether his experience as a former prosecutor would affect his ability to serve as an impartial juror. And two of Vernon's first four strikes suggested a pattern of eliminating Black jurors. [Footnote omitted] Viewed in context of the accusation that a white defendant raped his Black girlfriend, especially where race played a role in the dynamics of their relationship, an objective observer could conclude that race contributed to Vernon's use of the peremptory strike.

Slip Op. at 8.

b. Argument

Through its manipulation of GR 37, the State was able to get a long-time prosecutor onto the jury (at the same time that it exercised a series of discriminatory peremptory challenges against people of color). The trial court never made any of the required findings under GR 37(e), and on appeal the Court of Appeals affirmed also without following the procedures of the rule.

This Court should accept review under RAP 13.4(b)(1), (3) & (4). There are a series of constitutional issues of public importance that are raised in this case.

GR 37 is designed to protect the equal protection rights of jurors and the right to a fair and impartial jury. U.S. Const. amends. VI & XIV; Const. art. I, §§ 12, 21 & 22. *State v. Tesfasilasye*, 200 Wn.2d 345, 356-57, 518 P.3d 193 (2022). While there is a question whether there is a constitutional right to

peremptory challenges,[1] still the institution of peremptory challenges is "an important state-created means to the constitutional end of an impartial jury and a fair trial." *Georgia v. McCollum*, 505 U.S. 42, 57, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992). By challenging Juror 22, Mr. Vernon was attempting to obtain a fair and impartial jury. On the other hand, the State's challenge was not, exercising its own discriminatory strikes.

There is no dispute that when the State raised its GR 37 challenge regarding Juror 22, the trial court did not follow the procedures set out in the rule. It never made any of the required findings under GR 37(e), never finding that an objective observer could view race or ethnicity as a factor in the challenge. Rather, the trial court erroneously evaluated the peremptory challenge as if it was a challenge for cause. 1-RP-439-440.

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[1] *Compare State v. Lupastean*, 200 Wn.2d 26, 50-52, 513 P.3d 781 (2022), *with* R. Jolly, "The Constitutional Right to Peremptory Challenges in Jury Selection," 77 *Vand. L. Rev*. 101 (2024).

The Court of Appeals specifically did not address the procedural flaws in the trial court's ruling. Rather, the court ruled that it would simply conduct its own *de novo* review. Slip Op. at 5 n.4.

In *State v. Tesfasilasye*, *supra*, this Court assumed that the standard of review of a GR 37 ruling was *de novo* particularly where there are "no actual findings of fact and none of the trial court's determinations apparently depended on an assessment of credibility. However, we leave further refinement of the standard of review open for a case that squarely presents the question based on a well-developed record." *Id.* at 356.

This case provides this Court with the opportunity to refine how *de novo* review works in the GR 37 context. Review should be granted under RAP 13.4(b)(4).

The problem with *de novo* review is how, where a trial court completely fails to engage in the procedures required under GR 37, an appellate court can, in the first instance, conduct a GR

37 analysis. Often, rulings about peremptory challenges are difficult as they "often rely on subtleties in human interactions that are absent from a cold written record. In some cases, the demeanor and body language of the jurors (and possibly the attorneys), as well as other nuances such as voice inflections, may affect whether an objective observer could view race as a factor for a peremptory challenge." *State v. Osborn*, COA No. 57282-6-II (11/14/23) (unpub.), Slip Op. at 16-17.

In this case, the Court of Appeals said it was conducting a *de novo* GR 37 analysis, but the rule's procedural requirements are difficult to leverage into an appellate setting. It is unclear if the articulated reasons for the peremptory challenge and the evaluation of such reasons under GR 37(d) and (e) are limited to what trial counsel said at the time of jury selection or whether an appellate court reviews the parties' *later* submissions and reasoning. Does this evaluation take place in the context of briefing and a ten-minute appellate argument or should there be

some other proceeding? *See, e.g., State v. Gregory*, 192 Wn.2d 1, 12, 427 P.3d 621 (2018) (describing special proceedings to resolve factual issues on an appeal).

In this case, the Court of Appeals' *de novo* review was perfunctory without much analysis. While two of Vernon's first four strikes were against Black jurors, the trial court overruled the GR 37 challenge to the police officer with mental health issues. 1-RP-440-442. Vernon's subsequent challenge to a lawyer who had been a career prosecutor simply does not suggest discrimination, any more than a prosecutor's challenge to a career defense lawyer who might be in the jury pool.

The Court of Appeals did not analyze in any depth the circumstances set out in GR 37(g) or the presumptively invalid reasons set out in GR 37(h) when evaluating why Mr. Vernon might not want a former career prosecutor who once worked for the same office prosecuting him on the jury. Nothing about a

challenge to a former prosecutor would trigger any of the concerns in GR 37(g)-(h).

The court's suggestion that Vernon would have wanted a less diverse jury because he was a white person accused of raping a Black woman is based only on stereotypes. It ignores how a person in a cross-racial long-term relationship would benefit from jury diversity and ignores how the State sought to interfere with diversity through its own discriminatory strikes.[2]

GR 37 requires that a court "evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances." GR 37(e). On appeal, Mr. Vernon gave as a reason for the strike of Juror 22, his statements in voir dire that the jury's job was not to determine with the State had proved its case beyond a reasonable doubt, but to determine that "one truth."

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[2] While Vernon did not raise a GR 37 challenge to the State's strikes below, if review is really *de novo*, the court on review should be able to consider this fact.

1-RP-140-141. These statements, not by a lay juror without legal experience but by a seasoned attorney, would be misconduct if argued in closing. *See State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) ("The jury's job is not to determine the truth of what happened.").

On appeal, Mr. Vernon argued this was a reason to strike the juror, not tied to race, and that the statements were actually the basis for a challenge for cause. AOB at 29-30, 33-34. Yet, review was truly de novo, the Court of Appeals erred when it did not follow GR 37(e) to evaluate these reasons or to determine if the juror's answers were a basis for a challenge for cause.

Below, counsel did not ask Juror 22 if he could be impartial despite his past career, but there is no requirement that a lawyer with personal knowledge about another lawyer who is a juror waste precious voir dire time asking such questions. In *State v. Farmer*, 116 Wn.2d 414, 426-27, 805 P.2d 200 (1991), this Court held that the defense did not have a right to information in the

prosecutor's office about potential jurors. The same principle applies here and there is no basis to require counsel to set out on the record the special knowledge they might have about a potential juror.

In the end, neither the trial court nor the Court of Appeals on *de novo* review ever engaged in the inquiry required by GR 37. This Court should accept review under RAP 13.4(b)(4) and clarify the way that GR 37's procedures interface with an appeal.

Once there is a determination that both courts below misapplied GR 37, the Court should then resolve whether reversal is required under *State v. Vreen*, 143 Wn.2d 923, 26 P.3d 236 (2001). In *Vreen*, this Court held that it was reversible error to deny a defense peremptory challenge if the challenged juror ended up on the jury. *Id.* at 932.

Although some Court of Appeals' decisions have declined to follow *Vreen*,[3] that case must be followed until reversed by this Court. *See State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). The State should have the burden of making a clear showing that *Vreen* was incorrect and harmful. *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970).

The State will be unable to make that showing. The drafters of GR 37 specifically rejected a rule (proposed GR 37(k)) that precluded reversal based on a disallowed peremptory challenge. *Proposed New GR 37—Jury Selection Workgroup,*

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[3] *State v. Matamua*, 539 P.3d 28, 37-38 (2023); *State v. Hillman*, 24 Wn. App. 2d 185, 195, 519 P.3d 593 (2022); *State v. Booth*, 22 Wn. App. 2d 565, 580-85, 510 P.3d 1025 (2022).

Final Report (2/16/18) at 13 & n. 16.[4] In light of this history, application of *Vreen* in the GR 37 context is entirely appropriate.

In any case, even if *Vreen* is not followed, the presence of a former prosecutor on the jury prejudiced Mr. Vernon. This was a close case with Mr. Vernon testifying to facts very different than M.Y., and a series of jurors were concerned about their decision convicting him. Vernon had a legitimate reason to keep a former career prosecutor off the jury, while the State's misuse of GR 37 actually did not advance the goal of reducing discriminatory jury selection practices.

Mr. Vernon's rights under GR 37, the Sixth and Fourteenth Amendments and article I, sections 3, 12, 21 and 22 were violated. This Court should accept review under RAP 13.4(b)(1), (3) & (4) and reverse.

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[4] Https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221Workgroup.pdf (accessed 3/5/24).

2. *This Court Should Accept Review of the Constitutional Challenge to the Third Degree Rape Statute*

In this appeal, Mr. Vernon challenges the constitutionality of RCW 9A.44.050(1)(b) that makes it a crime for a person to "engage[] in sexual intercourse with another person . . . . (a) By forcible compulsion." In RCW 9A.44.010(3), the term "forcible compulsion" is defined in part as "physical force which overcomes resistance."

This is archaic terminology resting on outdated and sexist stereotypes, focusing not on the force used by the defendant, but on how much "resistance" the alleged victim provides. *See State v. Baker*, 30 Wn.2d 601, 606, 192 P.2d 839 (1948) (jury instructed that unless victim was placed in fear of great bodily harm, "then resistance on her part to the utmost of her capacity would be necessary to constitute rape."). Putting the focus on what the alleged victim did or did not do "represents a retreat from current law back to antiquated notions of the rape survivor's

'appropriate' behavior, by shifting the focus of the trial to the survivor's (in)actions." *State v. Knapp*, 197 Wn.2d 579, 593, 486 P.3d 113 (2021).

RCW 9A.44.050(1)(b) does not contain a *mens rea* element. *State v. Walden*, 67 Wn. App. 891, 895-96, 841 P.2d 81 (1992). Thus, in a case where people regularly used mild force during sex (as Vernon and M.Y. both agreed they did) it is not clear when the force used to "overcome resistance" is a crime or not. The statute is unconstitutionally vague and overbroad in violation of due process of law, protected by the Fourteenth Amendment and article I, section 3. AOB at 53-67.

The Court of Appeals rejected Mr. Vernon's facial vagueness challenge, citing to this Court's decisions that facial vagueness only applies in the free speech realm. Slip Op. at 16-18 & n.8 (citing, *inter alia*, *State v. Fraser*, 199 Wn.2d 465, 484, 509 P.3d 282 (2022)).

However, the United States Supreme Court has disavowed this doctrine and has found statutes unconstitutionally vague outside the free speech area. *Johnson v. United States*, 576 U.S. 591, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015) ("residual clause" of the Armed Career Criminal Act (18 U.S.C. § 924(e)(2)(B)) was facially vague); *see also United States v. Davis*, 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019) (residual clause of a criminal statute that authorized enhanced penalties for certain firearms offenses); *Sessions v. Dimaya*, 584 U.S. 148, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (2018) (residual clause in immigration statute); *City of Chicago v. Morales*, 527 U.S. 41, 55, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999) (plurality) (striking down "gang loitering" ordinance: "When vagueness permeates the text of such a law, it is subject to facial attack.").

This Court too has found statutes unconstitutionally vague even if they do not impact free speech. *See Sumner v. Walsh*, 148 Wn.2d 490, 500, 61 P.3d 1111 (2003) (plurality) (striking down

juvenile curfew ordinance, involving right to travel, on facial vagueness grounds); *see also State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021) (VUCSA statute facially violates due process).

While there are continued disputes about the meaning of *Johnson*, *Dimaya* and *Davis* in the federal courts,[5] this Court should accept review under RAP 13.4(b)(3) to assess whether its prior authority should be followed in light of these controlling Supreme Court cases.

The Court of Appeals also concluded that Mr. Vernon could not make an overbreadth challenge because sexual behavior did not have a First Amendment component. Slip Op. at 19. This is wrong. Sexual behavior is protected by the general right to privacy encompassed in a series of constitutional amendments, including the First Amendment. *See Griswold v. Connecticut*,

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[5] *See United States v. Hasson*, 26 F.4th 610, 619 (4th Cir. 2022); *Kashem v. Barr*, 941 F.3d 358, 376 (9th Cir. 2019); *Guerrero v. Whitaker*, 908 F.3d 541, 544 (9th Cir. 2018).

381 U.S. 479, 483, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) ("[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion."). The impact of Government regulations of sex, procreation, and privacy on the First Amendment is one reason why the Supreme Court's prior abortion jurisprudence allowed for facial challenges. *See Colautti v. Franklin*, 439 U.S. 379, 390-91, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979), *abrogated by Dobbs v. Jackson Women's Health Org.*, ___ U.S. ___, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022).

The Court of Appeals rejected Mr. Vernon's arguments and then his "as applied" challenges based on its conclusion that "the facts here do not support finding that Vernon engaged in consensual sex. . . . An ordinary person in Vernon's position would know that M.Y. was resisting sexual intercourse." Slip Op. at 18-19.

This conclusion is wrong because it is circular, assuming that because Mr. Vernon was convicted he cannot challenge the

constitutionality of the statute as it was applied to him. It assumes that the State's version of the facts was the only version and ignores Mr. Vernon's testimony and the evidence that corroborated his version, rather than M.Y.'s. Indeed, a number of jurors questioned M.Y.'s version and felt compelled to convict Mr. Vernon based on the instructions that were given to them. CP 240-45. Given the testimony from both M.Y. and Vernon that they both used mild force during sex, the constitutionality of the statute should not be assessed based on the State's chosen narrative.

RCW 9A.44.050(1)(a), based on the definition of "forcible compulsion" in RCW 9A.44.010(3), is unconstitutionally vague and overbroad, on it face and as applied to the facts of this case in violation of the Fourteenth Amendment and article I, section 3. This Court should accept review under RAP 13.4(a)(3) & (4), and reverse.

3. *Mr. Vernon Was Never Convicted of a Crime*

In Washington, someone commits second degree rape when "the person engages in sexual intercourse with another person . . . (a) By forcible compulsion." RCW 9A.44.050(1)(a). In this case, Instruction No. 9, the "to convict" instruction, differed from the statutory language by its use of passive language:

> (1) That on or about September 13, 2018, the defendant engaged in sexual intercourse with [M.Y.]; and
>
> (2) *That the sexual intercourse occurred by forcible compulsion* . . . .

CP 117 (emphasis added). The defense did not except to this instruction, and proposed a similar instruction. CP 85.

Mr. Vernon challenges the conviction because there was never a jury finding that he used force to have sex with M.Y. -- there was only a jury finding that he had sex and that the sex "occurred by forcible compulsion." In light of the testimony that M.Y. backed into him, 3-RP-1159, 1186, Trial Ex. 1 at 7, and in

light of the jurors who felt like they had to convict Mr. Vernon given the instructions, the difference between the active voice required by the statute and the passive voice in instruction is significant.

It "is a fundamental due process violation to convict and incarcerate a person" for a nonexistent crime. *In re Pers. Restraint of Hinton*, 152 Wn.2d 853, 859, 100 P.3d 801 (2004)) (citing *Fiore v. White*, 531 U.S. 225, 228-29, 121 S. Ct. 712, 148 L. Ed. 2d 629 (2001)); *see* U.S. Const. amend. XIV; Const. art. I, § 3. The Sixth and Fourteenth Amendments and article I, sections 21 and 22, also require a jury determination that the defendant is guilty of every element of the crime beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). These protections are violated where someone is convicted of a stigmatizing crime -- rape -- without a jury finding on a key element -- that the defendant forced someone to have sex.

The Court of Appeals did not reach the issue because Mr. Vernon's lawyer proposed an instruction similar to that given and thus it concluded there was "invited error" -- a "harsh result[]," the court concluded. Slip Op. at 13. This Court should not allow someone to be convicted, incarcerated and stigmatized as a rapist -- a very harsh result -- if they are convicted of a non-existent crime.

Mr. Vernon did not "invite" the error. He did not assign error to Instruction No. 9, and to the extent his lawyer proposed an instruction that did not match the elements of the crime, that is not Vernon's problem -- his lawyer was not a "law clerk" for the prosecutor. *State v. Hobbs*, 71 Wn. App. 419, 424, 859 P.2d 73 (1993).

Generally, one cannot invite a conviction to a non-existent crime, even by pleading guilty. *See Hinton*, 152 Wn.2d at 860-61 ("The fact that some of the petitioners pleaded guilty does not make any difference."); *In re Pers. Restraint of Thompson*, 141

Wn.2d 712, 723, 10 P.3d 380 (2000) (a plea agreement to plead guilty to a nonexistent crime does not foreclose collateral relief); *In re Pers. Restraint of Knight*, 4 Wn. App. 2d 248, 254, 421 P.3d 514 (2018) ("The fact Knight pleaded guilty to and was sentenced for a nonexistent crime demonstrates prejudice."). If one cannot "invite" a constitutional error pleading guilty to a non-existent crime, proposing an instruction also cannot "waive" the right to not be sentenced to prison without a jury determination that all essential elements of a crime have been proven beyond a reasonable doubt.[6]

There was never a jury determination that Mr. Vernon forced M.Y. to have sex. His conviction for a non-existent crime violated the Sixth and Fourteenth Amendments and article I,

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[6] None of the published cases after *In re Personal Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002), barred relief because of "invited error" even though undoubtedly many of the defendants would have proposed instructions based on second degree assault felony murder.

sections 3, 21 and 22. This Court should accept review under RAP 13.4(b)(1), (3) and (4) and reverse.

4. *The Court Should Accept Review of the Community Custody Issues*

The judgment in this case contained a condition of community custody that provided in part:

> Disclose sex offender status prior to any sexual contact. Sexual contact in a relationship is prohibited until the treatment provider approves of such.

CP 178 (No. 5). Mr. Vernon challenges this condition because is unconstitutionally vague in violation of the Fourteenth Amendment and article I, section 3.

First, the condition does not state to whom Mr. Vernon is supposed to disclose his status -- to a sexual partner or to his CCO. Moreover, the term "sex offender status" does not make it clear whether Vernon is to disclose his registration status, the conviction, or the nature of the facts that gave rise to the conviction.

The Court of Appeals rejected this argument, but made it clear for the future that Vernon must disclose only that he is "a convicted felony sex offender" "to persons with whom he intends to engage in sexual contact." Slip Op. at 21-22. If the DOC in the future is bound by this holding -- and does not seek to expand the scope of this holding during lifetime supervision -- then the condition is not unconstitutionally vague.

Mr. Vernon also contested the vagueness of the sentence: "Sexual contact in a relationship is prohibited until the treatment provider approves of such," noting he may not have a treatment provider as he may not even need sexual deviancy treatment or such treatment may be complete decades before DOC seeks to enforce this provision.

The Court of Appeals refused to consider Vernon's challenge because it was not "ripe":

> Vernon's challenge requires further factual development—a sexual deviancy evaluation that will determine whether he will have a treatment

> provider from whom to seek approval. And deferring consideration of Vernon's argument until that time does not create an undue hardship. So, we do not address his challenge to this condition.

Slip Op. at 22. *See also State v. Cates*, 183 Wn.2d 531, 534-36, 354 P.3d 832 (2015).

The court did not explain how exactly Vernon could ever get "further factual development" and how the courts can defer consideration of his argument. Indeed, in *State v. Hubbard*, *supra*, this Court recognized that factual circumstances might change after a person is sentenced, and that such changes might merit modifying one or more community custody conditions. However, this Court then held that, absent a carefully written condition or grant of express authority by the legislature, there is no avenue for relief once a sentence becomes final. *Id.* at 452.

Hubbard now requires that the utmost scrutiny be applied to the precise wording of each and every condition of community custody as, once the sentence becomes final, those conditions are

also final and are not subject to modification, ever. After *Hubbard*, there is no place for someone to challenge a vague condition in the future, even as applied. The condition is the condition – forever – unless the Court of Appeals or this Court modifies and clarifies on it now before the condition becomes final.

The Court of Appeals' opinion conflicts with *Hubbard*. Review is proper under RAP 13.4(b)(1). Because Condition 5 is unconstitutionally vague, the Court should grant review under RAP 13.4(b)(3).

//

F. CONCLUSION

This Court should accept review and reverse the conviction or the judgment, and remand for a new trial, dismissal or a new sentencing hearing.

DATED this 5th day of March 2024.

I certify that this pleading contains 5000 words (as calculated with the WordPerfect Word Count function), excluding the categories set out in RAP 18.17.

Respectfully submitted,

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APPENDIX A

FILED
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Division I
State of Washington

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

THE STATE OF WASHINGTON, Respondent, v. JACOB DEE VERNON, Appellant.	No. 83873-3-I UNPUBLISHED OPINION

BOWMAN, J. — Jacob Dee Vernon appeals his conviction for domestic violence (DV) second degree rape, arguing the trial court erred by granting the State's GR 37 challenge to his peremptory strike of a Black juror, excluding evidence as hearsay, and inaccurately instructing the jury. Vernon also argues that RCW 9A.44.050(1)(b) is unconstitutionally vague and overbroad. Finally, Vernon argues that the trial court abused its discretion by imposing unconstitutionally vague conditions of community custody. We affirm.

FACTS

Vernon and M.Y. met in high school in 2011. Vernon is a white male and M.Y. is a Black female. They dated briefly until M.Y. moved to another state in November 2011. Three years later, M.Y. returned to Washington, and the couple resumed their relationship in June 2014.[1] Almost two months later, M.Y. moved into Vernon's Burien house, which they shared with his grandmother and mother, Amber Akai. Akai's boyfriend, Bentley Artisan, was often in the home, too.

[1] M.Y. was 19 years old and Vernon was 18.

Vernon and M.Y. had an unstable relationship. Vernon often broke up with M.Y. for a "variety" of reasons and would kick her out of his home, forcing her to stay with family. Then he would apologize and M.Y. would return. During conflicts, Vernon sometimes told M.Y. that he would prefer to date a white person and questioned whether their children "would be [B]lack."

In late 2017, M.Y. began living with her aunt in Federal Way. On Saturday, September 9, 2018, Vernon and M.Y. got in a fight while out dancing with M.Y.'s friend. Vernon told M.Y., " 'I don't want to be with you,' " " 'You're a bitch,' " and, " 'It's better if I date a white girl.' " Feeling embarrassed about how he treated her in front of other people, M.Y. tried to end the relationship. But after Vernon said he would go to therapy, M.Y. agreed to "attempt to start fresh."

Later that week on September 13, 2018, M.Y. planned to spend the night at Vernon's house. She arrived at his house in the early evening. M.Y.'s friend Kamari Mack also came over. Vernon's mother Akai and her boyfriend Artisan were also home but mostly stayed in Akai's room.

Vernon, M.Y., and Mack drank alcohol for a couple hours and then decided to get in the hot tub. While in the hot tub, Vernon expressed that he no longer wanted to go to therapy, which provoked an argument. After soaking about 30 minutes, Vernon and M.Y. left the hot tub to take a shower. M.Y. described herself as "tipsy, especially after the hot tub."[2]

After showering, the couple dried off in Vernon's room and got ready for bed. M.Y. asked Vernon to rub oil on her back. As he did, he began to rub his

[2] M.Y. testified that she had "[m]aybe two" drinks.

erection against her. M.Y. told Vernon that she "wasn't interested in having sex that night." Vernon backed off for a moment, but then continued to rub against her. M.Y. turned around, pushed Vernon away, and told him again, " 'I do not want to have sex tonight.' "

Vernon grabbed M.Y. and "threw" her onto the bed. M.Y. continued to tell Vernon to stop, but he did not. Vernon "crawled" toward her while she tried to kick him away, "telling him to stop." Vernon grabbed her legs and put them over his shoulders. He then pinned her hands above her head. M.Y. continued to tell Vernon "no" and "stop," but Vernon ignored her and forced her to have sex. Throughout the rape, she continued to pull away and tell Vernon to stop. After a few minutes, M.Y. started to cry, and Vernon "began smiling at [her]." He then stopped and moved under the bed covers.

M.Y. got dressed and told Vernon that "he raped [her]." Vernon responded by asking, " 'You're seriously crying right now?' " M.Y. grabbed her things and left. She drove about five blocks, then decided to return to Vernon's house to confront him. When she arrived back at his house, Vernon and Mack were sitting in the living room, "joking" and "laughing." M.Y. sat down with them and after a short conversation, she said, " 'Rape is bad,' " upsetting Vernon and prompting Mack to leave.

After Mack left, Vernon apologized for the assault and said it would not happen again. But then he accused M.Y. of "being dramatic and trying to start problems." M.Y. decided to leave again. As she left the house, Akai came into the kitchen and overheard M.Y. tell Vernon, " 'You know what happened.' " M.Y.

then called Akai from the car and told her about the rape.[3] A few days later, she reported the rape to Burien police.

The State charged Vernon with one count of DV second degree rape. At trial, Vernon tried to use a peremptory strike on juror 22, a Black man. The State challenged the strike under GR 37. The court granted the State's objection and refused to strike the juror.

Vernon testified at trial and denied raping M.Y. According to Vernon, when M.Y. returned to his house to "confront" him, he left for about 10 minutes to get food from Taco Bell. When he returned, Mack had left, and his mom was coming and going from the kitchen while he and M.Y. sat in the living room talking. Akai testified that she heard M.Y. and Vernon in the shower, and about 35 minutes later, saw M.Y. and Mack in the hallway, "talking and laughing." Shortly after, Vernon arrived home with Taco Bell, and he and M.Y. sat in the living room talking while he ate the food. Artisan testified that he went to the kitchen at about 10:15 p.m., saw M.Y. and Mack "talking and laughing," then Vernon arrived home with Taco Bell. On cross-examination, M.Y. testified that she did not remember Vernon leaving to get food.

Vernon sought to elicit testimony from Akai that on the night of the incident, she heard M.Y. tell Vernon, " 'I never said you raped me, but I said stop and you didn't.' " The State objected to the testimony as hearsay and the court excluded it.

[3] M.Y. also told her mother, her aunt, and a friend about the rape that night. When she got home, her friend picked her up and drove her to the hospital. M.Y. underwent a sexual assault examination but did not tell hospital staff who raped her.

The court gave the jury the to-convict instruction as proposed by both parties. The jury found Vernon guilty as charged. The trial court imposed a low-end, standard-range, indeterminate sentence of 78 months to life and several community custody conditions.

Vernon appeals.

ANALYSIS

Vernon argues that the trial court erred by granting the State's GR 37 challenge to his peremptory strike of a Black juror, excluding evidence as hearsay, and inaccurately instructing the jury. And he argues that the second degree rape statute, RCW 9A.44.050(1)(b), is unconstitutionally vague, overbroad, and violates his substantive due process rights. Finally, Vernon argues that the trial court abused its discretion by imposing unconstitutionally vague conditions of community custody. We address each argument in turn.

1. GR 37

Vernon argues the trial court erred by granting the State's GR 37 challenge to his peremptory strike of a Black juror. We disagree.

We review a trial court's decision on a GR 37 challenge de novo. *State v. Omar*, 12 Wn. App. 2d 747, 751, 460 P.3d 225 (2020).[4] Under GR 37(c), a party or the court "may object to the use of a peremptory challenge to raise the issue of

[4] In *State v. Tesfasilasye*, 200 Wn.2d 345, 355-56, 518 P.3d 193 (2022), our Supreme Court applied de novo review to a GR 37 challenge when "there were no actual findings of fact and none of the trial court's determinations apparently depended on an assessment of credibility." Because the parties do not assert that a different standard applies here, we review the trial court's decision de novo. And because we review the decision de novo, we do not address Vernon's arguments about procedural error.

improper bias." If there is such an objection, the party exercising the challenge must "articulate the reasons the peremptory challenge has been exercised." GR 37(d). The court evaluates those reasons in light of the totality of the circumstances, and if "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied." GR 37(e). "[A]n objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington." GR 37(f). The same standards apply whether the State or a defendant makes a GR 37 challenge to a peremptory strike. *State v. Booth*, 22 Wn. App. 2d 565, 572, 510 P.3d 1025 (2022).

Under the objective observer standard, we take a rational view of the totality of the circumstances. *Booth*, 22 Wn. App. 2d at 572. We evaluate the reasons given to justify the challenge in light of the totality of the circumstances to understand whether the striking party's reasons for exercising the strike could have masked either a conscious or unconscious decision based on race. *Id.* at 572-73. Under GR 37(g), some circumstances we consider are

> (i) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it;
>
> (ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors;

(iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;

(iv) whether a reason might be disproportionately associated with a race or ethnicity; and

(v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.

Here, during voir dire, Vernon's attorney questioned juror 22, a former prosecuting attorney:

[DEFENSE COUNSEL]: Good morning. I see that you've never served on a jury, but you certainly have some experience in the criminal justice system. Is that right?
JUROR 22: That is true. Professional experience, to be clear.
[DEFENSE COUNSEL]: Professional, of course. What are some of the things that you look at in your capacity as an attorney to evaluate people's credibility?
JUROR 22: The facts. Look at the information that's presented, and the logic behind it as well. If one thing is true, then that means that several other things along the line have to be true as well. So, I look at the facts and the information and take the information that's presented, compare it to the objective information to the extent that we have it.
[DEFENSE COUNSEL]: When you're evaluating credibility, do you also consider the bias or motivations of one or the other of the parties?
JUROR 22: If it's made clear. I think it's part of the evaluation process, sure.
[DEFENSE COUNSEL]: And how many versions of the truth are there? Kind of an interesting question, but how many versions of the actual truth exist?
JUROR 22: In my mind, there's one, but there's many perspectives that could bear on how we arrive on that one piece of the truth.
[DEFENSE COUNSEL]: Explain that a little bit more.
JUROR 22: If everyone has their own perspective in terms of how they see things, — and this is from my experience. But in terms of what actually happened and what the truth is, there's only one truth. Sometimes we may not get to it. Sometimes we may get close to it. But you look at different people's perspectives and then

> as jurors it would be our job to determine what the actual facts are as to what occurred.
>
> [DEFENSE COUNSEL]: So would you agree with the statement that there may be one truth but there may be more than one perception of that truth?
>
> JUROR 22: Agreed.

After voir dire, three Black jurors remained subject to peremptory strikes.[5] The court allowed Vernon to strike juror 8 first, a Black juror and former police officer suffering from anxiety. As his fourth strike, Vernon asked to excuse juror 22. The State objected under GR 37. Vernon's attorney explained that he personally knew the juror for over 25 years and sought to excuse him because juror 22 was a former prosecutor and city attorney. He argued that juror 22 would favor the State's evidence and influence the other jurors. The court upheld the State's GR 37 challenge.

The trial court did not err by granting the State's GR 37 objection to striking juror 22. Vernon did not ask juror 22 about whether his experience as a former prosecutor would affect his ability to serve as an impartial juror. And two of Vernon's first four strikes suggested a pattern of eliminating Black jurors.[6] Viewed in context of the accusation that a white defendant raped his Black girlfriend, especially where race played a role in the dynamics of their relationship, an objective observer could conclude that race contributed to Vernon's use of the peremptory strike.

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[5] The court allowed each side eight peremptory strikes.

[6] The record also shows Vernon asked to strike juror 30, the third Black juror in the venire. The trial court upheld the State's GR 37 challenge and denied Vernon's peremptory strike. Vernon does not challenge that decision on appeal.

2. Hearsay Evidence

Vernon argues that the trial court erred by excluding as hearsay Akai's testimony that she overheard M.Y. tell him, " 'I never said you raped me, but I said stop and you didn't.' " According to Vernon, the statement was admissible as an excited utterance.[7]

We review a trial court's evidentiary rulings for an abuse of discretion. *Saldivar v. Momah*, 145 Wn. App. 365, 394, 186 P.3d 1117 (2008). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Id.* A decision is "manifestly unreasonable" if it "falls 'outside the range of acceptable choices, given the facts and the applicable legal standard.' " *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013) (quoting *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). " '[E]videntiary error is grounds for reversal only if it results in prejudice.' " *Bengtsson v. Sunnyworld Int'l, Inc.*, 14 Wn. App. 2d 91, 99, 469 P.3d 339 (2020) (quoting *City of Seattle v. Pearson*, 192 Wn. App. 802, 817, 369 P.3d 194 (2016)).

"Hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is not admissible except as provided by rule or statute. ER 802. Statements made as an excited utterance are one such

[7] Vernon also argues for the first time on appeal that the statement was admissible "to complete the picture and offer evidence from others that contradicted M.Y.'s testimony about her own hearsay." Because Vernon did not argue admissibility on that basis below, we do not address the claim on appeal. *See State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988) (citing RAP 2.5(a) giving appellate court discretion to refuse to review any claim of error not raised below).

exception to the hearsay rule. ER 803(a)(2). The proponent of excited utterance evidence must satisfy three closely connected requirements that (1) a startling event occurred, (2) the declarant made the statement while under the stress of excitement of the startling event, and (3) the statement related to the startling event. *State v. Young*, 160 Wn.2d 799, 806, 161 P.3d 967 (2007); ER 803(a)(2).

The excited utterance exception presumes that " 'under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control.' " *State v. Briscoeray*, 95 Wn. App. 167, 173, 974 P.2d 912 (1999) (quoting *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992)). So, often, the key determination is whether the statement "was made while the declarant was still under the influence of the event to the extent that the statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment." *State v. Woods*, 143 Wn.2d 561, 597, 23 P.3d 1046 (2001). A delayed statement is not necessarily precluded as an excited utterance if the witness made the statement while still under the continued stress of the incident. *See State v. Thomas*, 150 Wn.2d 821, 854-55, 83 P.3d 970 (2004) (statement made one and a half hours after startling event admissible as excited utterance), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). So, while we look to the time between the startling event and the utterance, we also consider "any other factors that indicate whether the witness had an opportunity to reflect on the event and fabricate a story about it." *Briscoeray*, 95 Wn. App. at 174.

Whether a declarant was still under the influence of an event at the time they made statements about it is a preliminary finding of fact for the trial judge. ER 104(a); *State v. Bache*, 146 Wn. App. 897, 903, 193 P.3d 198 (2008). We review that decision for substantial evidence. *Bache*, 146 Wn. App. at 903. Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding's truth. *State v. Stewart*, 12 Wn. App. 2d 236, 240, 457 P.3d 1213 (2020).

Here, the trial court found:

> [Defense] counsel's attempting to bring [M.Y.'s statement] under excited utterance, but you've had two witnesses testify[,] "I came out. [M.Y.] was talking with [Mack]. They were laughing and joking in the kitchen." [Vernon] was getting something at Taco [Bell], then comes back. Where's the excited utterance when this time period goes by? I mean, your witnesses are testifying that there's this jovial conversation happening while somebody else is going off to get food and coming back. That falls completely outside the parameters of excited utterance.

The finding is supported by substantial evidence. Akai and Artisan both testified that they saw M.Y. and Mack laughing together after the rape. And they recalled that at some point, Vernon left to get Taco Bell. After Vernon returned, Mack left, and the witnesses testified that Vernon ate the food while he and M.Y. sat in the living room talking. Akai testified that M.Y. then became "confrontational," and she heard M.Y. say, " 'I never said you raped me, but I said stop and you didn't.' "

Vernon argues that M.Y.'s own testimony shows she was still experiencing stress from the rape at the time she allegedly made the statement. While M.Y. did testify that she was still "shock[ed]" and upset after the encounter with

Vernon, the evidence also shows she drove for five blocks before choosing to return to Vernon's house to confront him. In any event, we do not reweigh the evidence on appeal and will uphold the trial court's factual determinations so long as they are supported by substantial evidence. *See State v. Ramos*, 187 Wn.2d 420, 451-53, 387 P.3d 650 ("Although we cannot say that every reasonable judge would necessarily make the same decisions as the court did here, we cannot reweigh the evidence on review," and the trial court did not err in finding substantial and compelling reasons to impose an exceptional sentence downward.), *cert. denied*, 538 U.S. 995, 138 S. Ct. 467, 199 L. Ed. 2d 355 (2017).

The trial court did not abuse its discretion by refusing to admit Akai's hearsay testimony.

3. Jury Instructions

Vernon argues that the trial court provided the jury an inaccurate to-convict instruction. According to Vernon, the instruction's wording left room for the jury to convict him even if it concluded M.Y. initiated sexual intercourse by force. The State argues that Vernon invited any error. We agree with the State.

The invited error doctrine precludes a criminal defendant from seeking appellate review of an error he helped create. *State v. Mercado*, 181 Wn. App. 624, 629-30, 326 P.3d 154 (2014). Under the doctrine, we will not review a party's assertion of error to which the party affirmatively assented, materially contributed, or benefited from at trial. *Id.* at 630. We apply the doctrine when the defendant proposed a jury instruction or agreed to its wording. *State v. Winings*,

126 Wn. App. 75, 89, 107 P.3d 141 (2005). The doctrine applies even to manifest constitutional errors that would otherwise be reviewable for the first time on appeal under RAP 2.5. *State v. Elmore*, 139 Wn.2d 250, 280, 985 P.2d 289 (1999) (citing *State v. Henderson*, 114 Wn.2d 867, 869-70, 792 P.2d 514 (1990)). We apply the invited error doctrine strictly, sometimes with harsh results. *See, e.g.*, *State v. Studd*, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999) (even though it was a standard pattern instruction at the time, invited error doctrine prohibited review of legally erroneous jury instruction because defendant proposed it).

Before trial, Vernon proposed the following to-convict jury instruction:

> To convict the defendant of the crime of rape in the second degree, each of the following three elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about September 13, 2018 the defendant engaged in sexual intercourse with [M.Y.];
> (2) That the sexual intercourse occurred by forcible compulsion; and
> (3) That this act occurred in the State of Washington.

The State proposed an identical instruction, and the court agreed to give the instruction to the jury. Vernon now argues that the instruction's passive voice suggested the State needed to prove only that sexual intercourse occurred by forcible compulsion, "whether he was the one who used force or not." And the second degree rape statute requires that the State prove Vernon was the person who used force. *See* RCW 9A.44.050(1)(a) ("A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person . . . [b]y forcible compulsion."). Because Vernon proposed the instruction from which he now complains, his challenge is barred as invited error.

Vernon tries to sidestep the invited error doctrine by reframing the issue as a violation of his due process rights. According to Vernon, he was "convicted of conduct that does not constitute a crime in . . . Washington — having [consensual] sexual intercourse that occurred by forcible compulsion." In support of his argument, Vernon relies on *In re Personal Restraint of Hinton*, 152 Wn.2d 853, 100 P.3d 801 (2004), and *Fiore v. White*, 531 U.S. 225, 121 S. Ct. 712, 148 L. Ed. 2d 629 (2001).

In *Hinton*, our Supreme Court invalidated the petitioners' convictions for second degree murder, determining they were "convicted of crimes under a statute that, as construed in *Andress*, did not criminalize their conduct as second degree felony murder." 152 Wn.2d at 859-60; *see In re Pers. Restraint of Andress*, 147 Wn.2d 602, 615-16, 56 P.3d 981 (2002) (holding assault cannot serve as the predicate crime to convict a defendant of second degree felony murder under former RCW 9A.32.050(1)(b) (1976)). In *Fiore*, the United States Supreme Court held that under the due process clause, a state cannot convict a defendant for conduct that its criminal statute, as later interpreted by the state's highest court, did not prohibit. 531 U.S. at 228-29. The Court noted that under the circumstances in *Fiore*, the State's failure to prove all the elements of the crime beyond a reasonable doubt violated due process. *Id.*

Vernon's reliance on *Hinton* and *Fiore* is misplaced. He does not challenge the sufficiency of the elements of the second degree rape statute. Instead, he argues that the language in his proposed to-convict jury instruction

leaves room for the jury to convict him based on facts that do not amount to a crime. Invited error precludes his challenge.

4. Constitutionally of Second Degree Rape Statute

Vernon argues that RCW 9A.44.050(1)(b) is unconstitutionally vague and overbroad. We review the constitutionality of a statute de novo. *State v. Watson*, 160 Wn.2d 1, 5, 154 P.3d 909 (2007). We presume a statute is constitutional, and the party challenging a statute has the heavy burden of proving it is unconstitutional beyond a reasonable doubt. *State v. Coria*, 120 Wn.2d 156, 163, 839 P.2d 890 (1992).

A. Vagueness

The due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution require that statutes afford citizens a fair warning of prohibited conduct. *State v. Murray*, 190 Wn.2d 727, 736, 416 P.3d 1225 (2018). A party challenging a statute as vague must show that either (1) the statute does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) the statute does not provide ascertainable standards of guilt to protect against arbitrary enforcement. *Coria*, 120 Wn.2d at 163.

A statute "is 'void for vagueness if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.' " *City of Seattle v. Eze*, 111 Wn.2d 22, 26, 759 P.2d 366 (1988) (quoting *O'Day v. King County*, 109 Wn.2d 796, 810, 749 P.2d 142 (1988)). But a statute is not unconstitutionally vague just because it fails to

define some terms. *In re Pers. Restraint of Troupe*, 4 Wn. App. 2d 715, 723, 423 P.3d 878 (2018). We attribute to those terms their plain and ordinary dictionary definitions, looking to the entire enactment's context. *Id.*

Nor do we require "impossible standards of specificity." *Eze*, 111 Wn.2d at 26. That is, "a statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct." *Id.* at 27. If persons " 'of ordinary intelligence can understand a penal statute, *notwithstanding some possible areas of disagreement*, it is not wanting in certainty.' " *Id.* (quoting *State v. Maciolek*, 101 Wn.2d 259, 265, 676 P.2d 996 (1984)). For a statute to be unconstitutionally vague, its terms must be so loose and obscure that no one can apply them clearly in any context. *State v. Alphonse*, 147 Wn. App. 891, 907, 197 P.3d 1211 (2008).

Our first step in resolving a vagueness challenge is to determine whether we review the statute facially or as applied to the facts of a particular case. *City of Spokane v. Douglass*, 115 Wn.2d 171, 181-82, 795 P.2d 693 (1990). A defendant whose conduct is clearly prohibited cannot be the one to facially challenge a statute. *State v. Duncalf*, 177 Wn.2d 289, 297, 300 P.3d 352 (2013) (citing *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18-19, 130 S. Ct. 2705, 177 L. Ed. 2d 355 (2010)). But a defendant challenging a statute that impacts their right to free speech can bring a facial challenge because both the federal and Washington constitutions protect the right to free speech. *State v. Mireles*, 16 Wn. App. 2d 641, 649, 482 P.3d 942 (2021); U.S. CONST. amend. I; WASH.

CONST. art. I, § 5. If a statute does not involve First Amendment rights, then we evaluate a vagueness challenge by examining the statute as applied to the particular facts of the case.[8] *Douglass*, 115 Wn.2d at 182.

Vernon brings a facial challenge to the second degree rape statute. Citing several cases that "recognize the importance of a person's ability to make their own decisions regarding private, sexual matters," he argues that the First Amendment protects his "right to use very mild force in a private sexual relationship." But none of the cases cited by Vernon support his argument that the First Amendment protected his conduct here. *See Lawrence v. Texas*, 539 U.S. 558, 578-79, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (right to consensual sexual activity in the home protected under the Fourteenth Amendment's due process clause); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 693-94, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977) (minors' privacy rights in accessing contraceptives constitutionally protected); *Griswold v. Connecticut*, 381 U.S. 479, 480, 484-85, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (prosecuting physicians for educating married persons about "the means of preventing conception" violates constitutional rights to privacy); *Skinner v. Oklahoma*, 316 U.S. 535, 537-38, 541,

[8] Citing two United States Supreme Court cases, Vernon argues this long-standing rule no longer applies to vagueness challenges. *See Johnson v. United States*, 576 U.S. 591, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015); *Sessions v. Dimaya*, 584 U.S. 148, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (2018). But the Ninth Circuit clarified that "*Johnson* and *Dimaya* did not alter the general rule that a defendant whose conduct is clearly prohibited cannot be the one to make a facial vagueness challenge to a statute." *Kashem v. Barr*, 941 F.3d 358, 376 (9th Cir. 2019). And our Supreme Court continues to apply the rule. *See State v. Fraser*, 199 Wn.2d 465, 484, 509 P.3d 282 (2022) (when a "statute does not implicate First Amendment rights, [it] 'must be evaluated in light of the particular facts of each case' ") (quoting *State v. Halstien*, 122 Wn.2d 109, 117, 857 P.2d 270 (1993)).

62 S. Ct. 1110, 86 L. Ed. 1655 (1942) (fundamental right to marriage and procreation protected under equal protection and due process clauses).

Because Vernon cites no persuasive authority that he engaged in conduct protected under the First Amendment, we decline to address his facial challenge to RCW 9A.44.050(1)(b).

Vernon also fails to show that the second degree rape statute is unconstitutional as applied to the facts of his case. RCW 9A.44.050(1)(a) prohibits engaging "in sexual intercourse with another person . . . [b]y forcible compulsion." RCW 9A.44.010(3) defines "forcible compulsion" as "physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped."

Vernon argues that RCW 9A.44.010(3) is vague because it focuses on the victim's "level of resistance to mild force." He asserts that he could be "convicted and imprisoned for a highly stigmatizing crime" for engaging in consensual forcible sex without knowing that he had crossed this "subjective" line. But the facts here do not support finding that Vernon engaged in consensual sex.

M.Y. testified that Vernon forced sexual intercourse with her after she clearly told him at least twice that she did "not want to have sex." Despite her refusals, Vernon shoved M.Y. onto the bed, got on top of her, forced her legs over his shoulders, held her hands above her head, and forced sexual intercourse. M.Y. tried to push Vernon away, told him "no" and "stop," kicked at

him, and repeated her objections throughout the rape. An ordinary person in Vernon's position would know that M.Y. was resisting sexual intercourse.

Vernon fails to show that RCW 9A.44.050(1)(b) is unconstitutionally vague as applied to the facts of his case.

B. Overbreadth

Vernon argues that the second degree rape statute is overbroad because "it sweeps within it constitutionally protected sexual behavior without a necessity of finding of lack of consent and without a mens rea requirement."

Our overbreadth analysis under article I, section 5 of the Washington Constitution follows that of the First Amendment to the federal constitution. *Mireles*, 16 Wn. App. 2d at 649. A statute is overbroad under the Washington and federal constitutions if it unlawfully prohibits a substantial amount of protected speech. *Id.* In determining whether a statute is overbroad, we first consider whether the statute reaches a substantial amount of constitutionally protected speech. *Id.* If so, we then determine whether the constitution allows regulation of the protected speech. *Id.*

But while the doctrine of overbreadth has been accorded standing because of the " 'chilling effect' " that a statute might have on the right to free speech, the doctrine is not applied in contexts other than those relating to the First Amendment. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 168, 92 S. Ct. 1965, 32 L. Ed. 2d 627 (1972). As discussed above, Vernon fails to show that the First Amendment protected his conduct. So, we decline to address his overbreadth challenge.

5. Community Custody Conditions

Vernon argues that several of his community custody conditions are unconstitutionally vague. We disagree.

As part of any term of community custody, a sentencing court may order an offender to comply with crime-related prohibitions. RCW 9.94A.703(3)(f). A crime-related condition "prohibit[s] conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). We review a trial court's imposition of crime-related conditions of community custody for abuse of discretion. *State v. Irwin*, 191 Wn. App. 644, 656, 364 P.3d 830 (2015). A trial court necessarily abuses its discretion if it imposes an unlawfully vague condition that curtails constitutional rights. *State v. Padilla*, 190 Wn.2d 672, 677, 416 P.3d 712 (2018).

A community custody condition is unconstitutionally vague if "(1) it does not sufficiently define the proscribed conduct so an ordinary person can understand the prohibition or (2) it does not provide sufficiently ascertainable standards to protect against arbitrary enforcement." *Padilla*, 190 Wn.2d at 677. When considering the meaning of a community custody condition, "the terms are not considered in a 'vacuum,' rather, they are considered in the context in which they are used." *State v. Bahl*, 164 Wn.2d 739, 754, 193 P.3d 678 (2008) (quoting *Douglass*, 115 Wn.2d at 180). " '[I]f persons of ordinary intelligence can understand what the [law] proscribes, notwithstanding some possible areas of

disagreement, the [law] is sufficiently definite.' " *State v. Nguyen*, 191 Wn.2d 671, 679, 425 P.3d 847 (2018)[9] (quoting *Douglass*, 115 Wn.2d at 179).

Here, the trial court ordered that Vernon shall:

> 4. Within 30 days of release from confinement (or sentencing, if no confinement is ordered) obtain a sexual deviancy evaluation with a State certified therapist approved by your Community Corrections Officer (CCO) and follow all recommendations of the evaluator. . . .
> 5. Inform the supervising CCO and sexual deviancy treatment provider of any dating relationship. Disclose sex offender status prior to any sexual contact. Sexual contact in a relationship is prohibited until the treatment provider approves of such.

Vernon argues that the condition to "[d]isclose sex offender status prior to any sexual contact" is vague because it does not specify to whom he must disclose. He suggests that it is unclear whether the condition requires him to disclose his sex offender status to his CCO or a sexual partner. But a person of ordinary intelligence would understand that the condition is meant to warn potential partners of the risks he may pose. Vernon's CCO is already aware of Vernon's sex offender status. So, the condition clearly requires Vernon to disclose his sex offender status to persons with whom he intends to engage in sexual contact.

Vernon also argues that the term "sex offender status" is vague. He says it does "not make it clear whether [he] is to disclose his registration status, the conviction, or the nature of the facts that gave rise to the conviction." But the plain language of the condition requires that Vernon disclose his status as a sex offender. A "sex offense" is "[a] felony that is a violation of chapter 9A.44 RCW,"

[9] Second and third alterations in original.

which includes rape in the second degree. RCW 9.94A.030(47)(a)(i); RCW 9A.44.050(2). So, a person of ordinary intelligence would understand that "sex offender status" means being a convicted felony sex offender.

Finally, Vernon argues that the language "[s]exual contact in a relationship is prohibited until the treatment provider approves of such" is vague because Vernon may not have a treatment provider. But Vernon's challenge is not ripe for review.

Community custody conditions are ripe for review on direct appeal " 'if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.' " *Bahl*, 164 Wn.2d at 751 (quoting *First United Methodist Church of Seattle v. Hr'g Exam'r for Seattle Landmarks Pres. Bd.*, 129 Wn.2d 238, 255-56, 916 P.2d 374 (1996) (Dolliver, J., dissenting)). "The court must also consider 'the hardship to the parties of withholding court consideration.' " *Id.* (quoting *First United*, 129 Wn.2d at 255). Vernon's challenge requires further factual development—a sexual deviancy evaluation that will determine whether he will have a treatment provider from whom to seek approval. And deferring consideration of Vernon's argument until that time does not create an undue hardship. So, we do not address his challenge to this condition.

In sum, the trial court did not err by granting the State's GR 37 challenge to his peremptory strike of a Black juror, excluding evidence as hearsay, and giving the parties' proposed to-convict jury instruction. And Vernon fails to show that RCW 9A.44.050(1)(d) is unconstitutionally vague or overbroad or that the

trial court's conditions of community custody are unconstitutionally vague. We affirm.

WE CONCUR:

STATUTORY APPENDIX

GR 37 (attached separately)

Proposed GR 37(k) provided:

> **(k) Appellate Review**. Disallowing a peremptory challenge under this rule shall not be deemed reversible error absent a showing of prejudice.

RAP 13.4 provides in part:

> (b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RCW 9A.44.010(3) provides:

> (3) "Forcible compulsion" means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.

RCW 9A.44.050 provides in part:

> (1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:
>
> (a) By forcible compulsion; . . .
>
> . . .
>
> (2) Rape in the second degree is a class A felony.

U.S. Const. amend. I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his

favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. XIV, § 1 provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wash. Const. art. I, § 3 provides:

> No person shall be deprived of life, liberty, or property, without due process of law.

Wash. Const. art. I, § 12 provides:

> No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

WA Const. art. I, § 21 provides:

> The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of

> record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Wash. Const. art. 1, § 22 (Amendment 10) provides in part:

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases . . . .

GR 37
JURY SELECTION

(a) Policy and Purpose. The purpose of this rule is to eliminate the unfair exclusion of potential jurors based on race or ethnicity.

(b) Scope. This rule applies in all jury trials.

(c) Objection. A party may object to the use of a peremptory challenge to raise the issue of improper bias. The court may also raise this objection on its own. The objection shall be made by simple citation to this rule, and any further discussion shall be conducted outside the presence of the panel. The objection must be made before the potential juror is excused, unless new information is discovered.

(d) Response. Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons the peremptory challenge has been exercised.

(e) Determination. The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge. The court should explain its ruling on the record.

(f) Nature of Observer. For purposes of this rule, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.

(g) Circumstances Considered. In making its determination, the circumstances the court should consider include, but are not limited to, the following:

(i) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it;

(ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors;

(iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;

(iv) whether a reason might be disproportionately associated with a race or ethnicity; and

(v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.

(h) Reasons Presumptively Invalid. Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Washington State, the following are presumptively invalid reasons for a peremptory challenge:

(i) having prior contact with law enforcement officers;

(ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;

(iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime;

(iv) living in a high-crime neighborhood;

(v) having a child outside of marriage;

(vi) receiving state benefits; and

(vii) not being a native English speaker.

(i) Reliance on Conduct. The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection in Washington State: allegations that the prospective juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers. If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.

[Adopted effective April 24, 2018.]

Certificate of Service

I, Alex Fast, certify and declare as follows:

On March 5, 2024, I served a copy of the attached pleading by filing it with the Appellate Portal which will send a copy to all parties in this matter.

I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 5th day of March 2024, at Seattle, WA.

s/ Alex Fast
Legal Assistant
Law Office of Neil Fox PLLC

LAW OFFICE OF NEIL FOX PLLC

March 05, 2024 - 1:20 PM

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