No. 43741-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ROBERT SANDERS,

Appellant.

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

The Honorable Lisa L. Sutton, Judge
Cause No. 11-1-00440-0

BRIEF OF RESPONDENT

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1. Whether the charging language for counts three and four was constitutionally deficient.

2. Whether the court imposed conditions of community custody that are not authorized by statute.

3. Whether the court was required to consider Sanders' ability to pay legal financial obligations when only those mandated by statute were imposed and his ability to pay was irrelevant.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the case. Any additional facts necessary to the State's argument will be included in the argument itself.

C. ARGUMENT.

1. The charging language in counts three and four were constitutionally adequate and included all the essential elements of the offenses.

Sanders challenges for the first time on appeal the constitutional adequacy of the charging language in counts three and four, the only two charges for which he was convicted. Those counts were charged by the following language:

> COUNT III – RAPE OF A CHILD IN THE SECOND DEGREE, RCW 9A.44.076 – CLASS A FELONY:
> In that the defendant, ROBERT LEE SANDERS, in the State of Washington, on or between July 5, 2010 and March 13, 2011, on a separate and distinct date than alleged in Counts I, II, and IV, did have sexual

> intercourse S.T.S., who was at least twelve years old but less than fourteen years old, and was not married to the defendant, and the defendant was at least thirty-six months older than S.T.S.
>
> COUNT IV – CHILD MOLESTATION IN THE SECOND DEGREE, RCW 9A.44.086 – CLASS B FELONY:
> In that the defendant, ROBERT LEE SANDERS, in the State of Washington, on or between July 5, 2010 and March 13, 2011, on a separate and distinct date than alleged in Counts I, II and III, did engage in sexual contact with S.T.S., and was at least thirty-six months older than a person who was at least twelve years of age but less than fourteen years of age and not married to the defendant.

CP 2-3.

A defendant may challenge the constitutional sufficiency of a charging document for the first time on appeal. State v. Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). The time at which a defendant challenges the charging document controls the standard of review for determining the charging document's validity. State v. Borrero, 147 Wn.2d 353, 360, 58 P.3d 245 (2002). When the charging document is challenged after the verdict, the language is construed liberally in favor of validity. Id. at 360. Viewed in this way, the charging document will be held to include all facts which are necessarily implied by the language of the allegations. Kjorsvik, 117 Wn.2d at 109. That is so to prevent sandbagging,

where a defendant fails to raise a defect in the charging document before trial, when it could be remedied, but instead waits to challenge it on appeal when the remedy would be an expensive and time-consuming reversal, remand, and retrial. Kjorsvik, 117 Wn.2d at 103.

In Kjorsvik, the Supreme Court adopted the federal standard of construction when a charging document is challenged for the first time on appeal. Kjorsvik, 117 Wn.2d at 105. There are two prongs to the analysis: 1) do the essential elements appear in any form, or by fair construction can they be found in the charging document; and, if so, 2) can the defendant show that he or she was actually prejudiced by the language of the charging document. Id. at 105-06.

The first prong of the test looks to the face of the charging document itself. State v. Tandecki, 153 Wn.2d 842, 849, 109 P.3d 398 (2005). The charging document can use the language of the statute if it defines the offense with certainty. State v. Elliott, 114 Wn.2d 6, 13, 785 P.2d 440, cert. denied, 498 U.S. 838 (1990). However, the charging document does not have to mirror the language of the statute, Tandecki, 153 Wn.2d at 846, or case law. Kjorsvik, 117 Wn.2d at 109.

The fundamental purpose of a charging document is to inform a defendant of the charge so that he is able to prepare a defense. A charging document is sufficient if it is fair to the defendant to require him to prepare his defense based on that language. Kjorsvik, 117 Wn.2d at 110. All essential elements of an offense must be contained in the charging language, including non-statutory court-imposed elements. Id. at 101-02. An "essential element is one whose specification is necessary to establish the very illegality of the behavior." State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992).

A challenge to the sufficiency of a charging document is reviewed de novo. State v. Williams, 162 Wn.2d 177, 182, 170 P.3d 30 (2007). In determining whether a defendant suffered actual prejudice as a result of a charging document's lack of specificity, a court is permitted to look outside the document itself. Id. at 186 (in that case the statement of probable cause).

a. Count III, Rape of a Child in the Second Degree.

Sanders argues that Count III fails to allege an essential element of the crime of second degree rape of a child because the word "with" was inadvertently omitted; the language reads "did have sexual intercourse S.T.S." rather than "did have sexual intercourse

with S.T.S." The State will agree that it is grammatically incorrect. There is no requirement that a charging document be grammatically perfect.

Even taking into account the missing "with", no reasonable person would misunderstand the meaning of the charging language. Construing the language liberally in favor of validity, there is simply no other sensible interpretation than that Sanders is accused of having sexual intercourse with S.T.S. Count I, which charged first degree rape of a child, is nearly identical and includes the elusive "with." The document includes the statutory citation, RCW 9A.44.076, which does have the word "with" in the appropriate place. While a charging document must define the offense with certainty, there is no requirement that a defendant be treated as if he were of subnormal intelligence, particularly when he is represented by counsel. "There is nothing unconstitutional about common sense." State v. Dixon, 78 Wn.2d 796, 798, 479 P.2d 931 (1971).

Sanders does not claim any prejudice, instead arguing that prejudice is presumed. But because the elements of the offense can, by fair construction, be found in this language, he must show that he was prejudiced by it. Nowhere does the record reflect any

misunderstanding on the part of the defense or any confusion as to the exact nature of the charge. In closing, defense counsel discussed the facts of the case, including intercourse with S.T.S. RP 683-84, 688, 693.[1] Sanders vigorously defended himself against the allegation that he had sexual intercourse *with* S.T.S. There was no prejudice.

b. Count IV, Child Molestation in the Second Degree.

Sanford argues that because the language of the charging document listed the elements of the crime but did not specify that S.T.S. was the "person" referred to in the charge, it fails to charge a crime. As with the previous argument, it takes a very strained interpretation of the charging language to reach the conclusion Sanders reaches.

Second degree child molestation is defined in RCW 9A.44.086:

> (1) A person is guilty of child molestation in the second degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who Is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

[1] Unless otherwise noted all references to the Verbatim Report of Proceedings are to the four-volume trial transcript dated June 4-8, 2012.

The charging language in Sanders' case used the language of the statute, in a different order, but every essential element of the offense is present. No reasonable person reading the information would conclude that Sanders was charged with having sexual contact with some person other than S.T.S., who happened to be between 12 and 14 years of age and not married to him. If he had any question about the identity of the victim, he could have requested a bill of particulars or brought a motion for an amendment of the information. When a charge states an offense but is vague as to the particulars, either of those remedies are available. If the defendant does not request them, he cannot raise the deficiencies on appeal. State v. Bonds, 98 Wn.2d 1, 17, 653 P.2d 1024 (1982).

As with the charge of second degree child rape, Sanders has not claimed or demonstrated any prejudice. His defense clearly shows that he was aware he was accused of having sexual contact with S.T.S. In fact, he brought a motion to dismiss all the charges after the State rested, on the grounds that there was insufficient evidence that he and S.T.S. were not married to each other. RP 518-21.

The essential elements of the offense of second degree child molestation were included in the charging document. A common sense reading of the language makes it apparent that S.T.S. was the alleged victim. Sanders defended himself solely on the theory that S.T.S. was the only victim alleged. There was no error and no prejudice.

> 2. The court did not exceed its authority in ordering Sanders to submit to random urinalysis. However, because the court did not order him to abstain from alcohol, there was no basis to prohibit him from entering bars, taverns, or cocktail lounges.

A community custody condition must be authorized by the legislature because it is solely within the legislature's province to determine legal punishments. State v. Kolesnik, 146 Wn. App. 790, 806, 192 P.3d 937 (2008), *review denied*, 165 Wn.2d 1050 (2009). A criminal defendant always has standing to challenge his or her sentence on grounds of illegality. State v. Sanchez Valencia, 169 Wn.2d 782, 787, 239 P.3d 1059 (2010). An appellate court reviews the imposition of community custody conditions for abuse of discretion and will reverse only if the trial court's decision is manifestly unreasonable or based on untenable grounds. State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). A condition may

be manifestly unreasonable if the court has no authority to impose it. State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003)

> Although the conduct prohibited during community custody must be directly related to the crime, it need not be causally related to the crime. State v. Llamas-Villa, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). For example, this court affirmed a crime-related prohibition requiring a person who was convicted of delivery of marijuana to undergo urinalysis to monitor his use of marijuana, even though his crime did not involve the use of marijuana. [State v.] Parramore, 53 Wn. App. [527] at 531 [768 P.2d 530 (1989)]. But in the same case, we struck a condition prohibiting that person from consuming alcohol because the State failed to show any connection between his use of alcohol and his delivery of marijuana conviction. *Id.*

State v. Letourneau, 100 Wn. App. at 432.

RCW 9.94A.703(2)(c) establishes a waivable condition prohibiting the consumption or possession of controlled substances except pursuant to lawfully issued prescriptions. The trial court may require affirmative acts necessary to monitor compliance with other conditions or orders. *See* State v. Acevedo, 159 Wn. App. 221, 233-34, 248 P.3d 526 (2010) (confirming a court's authority to impose polygraph and urinalysis conditions to ensure compliance with other conditions, including a non-crime-related prohibition against alcohol consumption.)

Sanders was ordered not to use illegal or controlled substances. CP 17. To verify compliance, the court further ordered random urinalysis testing as directed by his supervising Community Corrections Officer. Id. Sanders maintains that the court may only require affirmative conduct for purposes of monitoring compliance with crime-related prohibitions. While it is true that RCW 9.94A.030(10) specifically permits acts necessary for compliance with crime-related prohibitions, Acevedo permits the court to require conduct necessary to monitor compliance with any prohibition. Indeed, it makes little sense to permit the court to order a defendant not to use illegal substances but prohibit it from ascertaining if the defendant has complied.

On the other hand, although the court could have ordered Sanders to abstain from alcohol, RCW 9.94A.703(3)(e), it did not. There is no apparent reason, therefore, for prohibiting him from entering bars, taverns, and cocktail lounges, and the State agrees that this condition should be stricken.

> 3. The court imposed only the legal financial obligations over which it had no discretion. There was no reason for the court to consider Sanders' ability to pay. Because the finding concerning a defendant's ability to pay has no impact on Sander' rights, it need not be reviewed.

At sentencing, the court reserved ruling on restitution and imposed the $500 crime victim assessment, $200 in court filing costs, and the $100 DNA fee. 07/25/12 RP 20, CP 7. Sanders does not challenge the imposition of these costs, only that the court found he had the ability to pay without making a record of such. Appellant's Opening Brief at 11-12, CP 6. This challenge need not be considered, because it has no impact on his rights or obligations.

Costs are authorized by statute. "[S]tatutes authorizing costs are in derogation of common law and should be strictly construed." State v. Moon, 124 Wn. App. 190, 195, 100 P.3d 357 (2004).

a. Crime victim assessment.

A crime victim assessment is required by RCW 7.68.035.

> When any person is found guilty in any superior court of having committed a crime, [other than certain motor vehicle crimes], there shall be imposed by the court upon such convicted person a penalty assessment. The assessment shall be in addition to any other penalty or fine imposed by law and shall be five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor and two hundred fifty dollars for any case or cause of action that includes convictions of only one or more misdemeanors.

RCW 7.68.035(1)(a). Subsequent sections of this statute direct the collection and disbursement of this money to assist victims of crime.

The victim assessment of $500 is mandatory. State v. Curry, 118 Wn.2d 911, 917, 829 P.2d 166 (1992); State v. Suttle, 61 Wn. App. 703, 714, 812 P.2d 119 (1991); State v. Eisenman, 62 Wn. App. 640, 646, 810 P.2d 55 (1991) (victim assessment is not a "cost"); State v. Bower, 64 Wn. App. 808, 812, 827 P.2d 308 (1992). As such, it follows that the defendant's financial circumstances are irrelevant.

b. Court costs.

Court costs are allowed by RCW 10.01.160 and 9.94A.760(1). "The court *may* require a defendant to pay costs." RCW 10.01.160(1), emphasis added. Costs are limited to the expenses the State specifically incurred in prosecuting the defendant's case. RCW 10.01.160(2). Because the term "costs" refers to expenses incurred by the State, restitution and victim assessments would not be included as "costs." RCW 10.46.190 provides that a person convicted of a crime is liable for the costs of the proceedings against him, including a jury fee "as provided for in civil actions." RCW 36.18.016(3)(b) allows a jury demand fee of

$250 for a jury of twelve in criminal cases, the same amount as allowed in RCW 36.18.016(3)(a) for civil cases. The court is directed to take into account the financial resources of the defendant and not order costs if the defendant cannot pay them. RCW 10.01.160(3); State v. Bertrand, 165 Wn. App. 393, 404, 267 P.3d 511 (2011), *review denied*, 175 Wn.2d 1014 (2012). Bertrand did not address which, if any, of the legal financial obligations the court may impose are mandatory.

c. Court filing fee

Although this is listed with court costs on the judgment and sentence, the $200 filing fee is mandatory and cannot be waived.

RCW 36.18.020(2)(a) directs the clerk of the superior court to collect a $200 filing fee for the initiation of most litigation. RCW 36.18.020(2)(h) provides:

> Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, a defendant is a criminal case shall be liable for a fee of two hundred dollars.

Because the court has no discretion regarding court costs, a court's failure to find the defendant has the ability to pay is surplusage and he is not prejudiced by the lack of support in the record.

d. DNA collection fee.

A fee for DNA collection is required by RCW 43.43.7541: "Every sentence imposed for a crime specified in RCW 43.43.754 *must* include a fee of one hundred dollars." (Emphasis added.) All other financial obligations take precedence and the DNA collection fee is the last to be collected, but it is mandatory. The fee is a "court-ordered legal financial obligation as defined in RCW 9.94A.030." RCW 43.43.754. RCW 9.94A.030(29) provides, in part, that a "legal financial obligation" is an amount of money ordered by the court and may include, restitution, crime victims' compensation fees, court costs, drug funds, attorney fees, costs of defense, fines, and "any other financial obligation that is assessed to the offender as a result of a felony conviction."

The imposition of a $100 DNA collection fee is mandatory, and has been since June 12, 2008. RCW 43.43.7541, State v. Thompson, 153 Wn. App. 325, 336, 338, 223 P.3d 1165 (2009). Therefore, Sanders' ability to pay was irrelevant to the imposition of that amount.

Sanders did not object to these costs in the lower court, and cannot appeal them as of right.

An appellant's challenge to a legal financial obligation ("LFO"), imposed as part of a judgment and sentence upon conviction, will normally not be considered on appeal as a matter of right. State v. Smits, 152 Wn. App. 514, 523-25, 216 P.3d 1097 (2009) (reasoning, for Division One, that an LFO is not a final judgment, that the defendant has an opportunity to petition for a waiver or modification of the obligation "at any time," and that until the government seeks payment on the LFO the appellant is not "an aggrieved party" under RAP 3.1); *see* RAP 3.1. A trial court's decision to impose costs might, however, be eligible for discretionary review. Smits, 152 Wn. App. at 523.

The Court of Appeals, in State v. Hathaway, agreed to review an appellant's claim that the sentencing court had imposed jury costs in excess of its statutory authority. State v. Hathaway, 161 Wn. App. 634, 651, 251 P.3d 253 (2011) (holding that a jury demand fee cannot exceed $125.00 for a six-person jury or $250.00 for a twelve-person jury); *see* RCW 10.01.160(1); former RCW 10.01.160(2); RCW 10.46.190; RCW 36.18.016(3)(b). The court, while acknowledging that the issue of jury costs could not properly be considered as a matter of right under Smits, held that its authorization under RAP 1.2(c) to waive or alter the rules of

appellate procedure "in order to serve the ends of justice" allowed it to consider "this purely legal question." Hathaway, 161 Wn. App. at 651-52 (noting that doing so would "facilitate justice and likely conserve future judicial resources."); *see* RAP 1.2(c).

An improper award of costs following conviction does not, by itself, rise to the level of constitutional error such that it might be considered if raised for the first time on appeal. State v. Phillips, 65 Wn. App. 239, 243, 828 P.2d 42 (1992) (holding that a court's award of costs without considering defendant's ability to pay, while unauthorized, could not be challenged on constitutional grounds until an attempt at enforced collection is made); RAP 2.5(a)(3). For this reason, an appellant who does not object to a sentencing court's award of costs at trial is held to have waived his objection until the government attempts to enforce collection of the judgment. Id. at 244; State v. Snapp, 119 Wn. App. 614, 626 n.8, 82 P.3d 252, *review denied*, 152 Wn.2d 1028 (2004) (refusing to consider an appellant's challenge to costs imposed at judgment when the issue was not raised at sentencing).

The only relief Sanders seeks is to have the judgment and sentence amended to remove the finding that he has the ability to pay his legal financial obligations. Even if the court had been in

error to fail to inquire into his financial status, it made absolutely no difference to Sanders' rights, and removing the finding from the judgment and sentence would likewise make no difference whatsoever. If this court chooses to review his claim, it should be denied.

D. CONCLUSION.

Based upon the foregoing arguments and authorities, the State respectfully asks this court to affirm both of Sanders' convictions.

Respectfully submitted this 30th day of April, 2013.

Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of Respondent's Brief, on the date below as follows:

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

Dated this 30th day of April, 2013, at Olympia, Washington.

Chong McAfee

THURSTON COUNTY PROSECUTOR

April 30, 2013 - 11:46 AM

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