Supreme Court No. 92025-7
COA No. 45587-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT BRUCE McKAY-ERSKINE,

Petitioner.

PETITION FOR REVIEW

MAUREEN M. CYR
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Washington Cases

United States Supreme Court Cases

Other Jurisdictions

Statutes

Rules

Other Authorities

A. IDENTITY OF PETITIONER/DECISION BELOW

Robert Bruce McKay-Erskine requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. McKay-Erskine, No. 45587-1-II, filed June 30, 2015. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. In a prosecution for child sexual abuse, ER 404(b) precludes admission of evidence tending to show the defendant has a sexual interest in children if the evidence has no connection to the alleged victim or facts of the current charge. Here, the trial court admitted out-of-court statements Mr. McKay-Erskine allegedly made to friends years earlier expressing a sexual interest in children, but the evidence had no connection to the alleged victim or facts of the current charges. Does the Court of Appeals' decision to affirm rest on a misunderstanding of ER 404(b) regarding evidence of motive, warranting review? RAP 13.4(b)(4).

2. Did the Court of Appeals err in concluding Mr. McKay-Erskine's asserted violation of his constitutional right to confront his accusers was harmless beyond a reasonable doubt?

3. Did the trial court err in admitting unreliable out-of-court statements made by the child complaining witness?

4. Did the deputy prosecutor commit prejudicial misconduct during closing argument warranting reversal?

5. Did cumulative error deny Mr. McKay-Erskine a fair trial?

C. STATEMENT OF THE CASE

Robert McKay-Erskine was charged with three counts of first degree rape of a child, RCW 9A.44.073, and two counts of first degree child molestation, RCW 9A.44.083. CP 1-3. The charges were based on allegations he sexually abused his young step-daughter, A.B.

Prior to trial, the State moved to admit out-of-court statements Mr. McKay-Erskine allegedly made in front of his friends Katherine Lavergne and Rachel Charles several years earlier, expressing a sexual interest in children in general. 9/26/13RP 23. The trial court granted the motion, ruling the statements were admissible under ER 404(b) as evidence of motive and intent. 9/26/13RP 35-36.

Thus, at the jury trial, Ms. Lavergne testified that in 2005, six years before the alleged events of the current case, Mr. McKay-Erskine said to her "that the thought of putting his penis in a child's mouth without any teeth sounded enticing because the child would treat it as if

it were a nipple and suck and chew." 10/14/13RP 9. She also said he told her several times that "[a] girl's first sexual experience should be with her father because no one can love them as much as their father." 10/14/13RP 10, 15. Rachel Charles testified she was present, with Ms. Lavergne, when Mr. McKay-Erskine made a comment about how a girl's first sexual experience should be with her father. 10/14/13RP 26.

Also, during trial, defense counsel moved to admit evidence suggesting that the child's mother, Ms. Erskine-McKay, was motivated by revenge to accuse Mr. McKay-Erskine. 10/14/13RP 44. Counsel asserted that, around the time the charges were filed, Ms. Erskine-McKay threatened Mr. Erskine-McKay's new girlfriend, Ms. Edwards, and said to her, "once I am done with the defendant, I am going to come after you." 10/14/13RP 44-46. The trial court ruled the evidence was inadmissible hearsay. 10/14/13RP 46-47.

The jury found Mr. McKay-Erskine guilty of each count as charged. CP 94-98. Mr. McKay Erskine appealed. The Court of Appeals affirmed the convictions.[1] Appendix.

---

[1] The Court of Appeals agreed with Mr. McKay-Erskine that conditions of community custody were entered in error. Slip Op. at 9-13. The court's holdings regarding community custody conditions are not at issue in this petition.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. This Court should grant review because the Court of Appeals' opinion affirming the trial court's decision to admit Mr. McKay-Erskine's statements made several years earlier expressing a sexual interest in children in general rests on a misapplication of ER 404(b) regarding the issue of "motive," presenting an issue of substantial public interest. RAP 13.4(b)(4)

The trial court admitted statements that Mr. McKay-Erskine allegedly made to friends several years before the events in this case, that "the thought of putting his penis in a child's mouth without any teeth sounded enticing," and that "[a] girl's first sexual experience should be with her father." 10/14/13RP 9-10, 15, 26. The court admitted the statements under ER 404(b) as evidence of motive and intent. 9/26/13RP 35-36. The Court of Appeals affirmed, holding the evidence was admissible to show motive. Slip Op. at 7-8.

But the evidence was relevant to motive only under a theory of propensity. That is, the only relevance of the evidence was to suggest that because Mr. McKay-Erskine expressed a sexual interest in children in the past, he must have had a similar interest in the present and was therefore more likely to have committed the current crimes. Because

evidence is not admissible if its only relevance is to show a defendant's propensity to commit the crime, the trial court's ruling was in error.

a. Evidence of a defendant's prior bad acts is admissible at trial only if it is logically relevant to a material issue through a theory other than propensity

Evidence of a defendant's "other crimes, wrongs or acts" is not admissible to show that he likely committed the crime charged, that he acted in conformity with his other acts, or that he had a propensity to commit the current crime. ER 404(b); State v. Fuller, 169 Wn. App. 797, 829, 282 P.3d 126 (2012), review denied, 176 Wn.2d 1006, 297 P.3d 68 (2013). Such evidence may be admissible for another purpose, including proof of motive, opportunity, intent, preparation, plan, knowledge, or identity. ER 404(b).

Other act evidence is admissible only if it is logically relevant to a material issue other than propensity. State v. Saltarelli, 98 Wn.2d 358, 361-62, 655 P.2d 697 (1982). If the evidence is admitted for another purpose, the trial court must identify that purpose and determine whether the evidence is relevant and necessary to prove an essential ingredient of the crime charged. State v. Powell, 126 Wn.2d 244, 258-59, 893 P.2d 615 (1995). Evidence is relevant and necessary

if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable. Id.

The probative value must outweigh its potential for prejudice. Saltarelli, 98 Wn.2d at 362. "A careful and methodical consideration of relevance, and an intelligent weighing of potential prejudice against probative value is particularly important in sex cases, where the prejudice potential of prior acts is at its highest." Id. at 363-64.

Even if the court identifies a proper purpose for admitting the evidence, that is not a "magic password[] whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in [its] name." Id. at 364 (internal quotation marks and citation omitted). The "other purposes" listed in ER 404(b) for which other act evidence may be admitted are not exceptions to the categorical bar on propensity evidence. State v. Gresham, 173 Wn.2d 405, 420-21, 269 P.3d 207 (2012). In other words, the trial court may not admit other act evidence to prove "motive," for example, if the only way the evidence is relevant to the issue of motive is by showing the defendant's character and action in conformity with that character. Id.

b. Evidence of a defendant's lustful disposition toward children is not admissible in a prosecution for child sexual abuse unless the evidence shows a lustful disposition toward the alleged victim of the current crime

Mr. McKay-Erskine allegedly made the statements at issue in 2005, at least six years before the alleged events underlying the current charges. 10/14/13RP 9. The statements do not express a lustful disposition toward A.B., the alleged victim of the current charges. Because the only relevance of the statements was to show that Mr. McKay-Erskine had a sexual interest in children in general, they were inadmissible propensity evidence.

Washington courts recognize that a great potential for unfair prejudice arises when evidence is admitted in a prosecution for a sex offense which tends to show the defendant has a general "lustful disposition" or an unusual sexual proclivity. Such evidence has a great potential for unfair prejudice and confusion of the issues because "[o]nce the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise." Saltarelli, 98 Wn.2d at 363-64 (internal quotation marks and citation omitted).

Thus, in State v. Coe, 101 Wn.2d 772, 779-81, 684 P.2d 668 (1984), a prosecution for first degree rape, this Court held the trial court abused its discretion in allowing Coe to be cross-examined about a novel he had worked on that described sexual activities. The implication of the cross-examination was that the writings showed a lustful disposition on Coe's part, which had no bearing on any element of the charges. The court recognized "[t]he evidence of Coe's sexually oriented writings was inflammatory on its face and carried with it a high probability of prejudice to his right to a fair trial." Id. at 780-81.

Similarly, evidence that a defendant viewed child pornography on an unrelated occasion is not admissible in a prosecution for a child sex offense because such evidence is generally relevant only for the improper purpose of showing the defendant's lustful disposition toward children. See State v. Sutherby, 165 Wn.2d 870, 884-86, 204 P.3d 916 (2009) (evidence that defendant possessed child pornography on unrelated occasion would not be cross-admissible in separate trial on charges of child rape and child molestation because "the evidence would merely show Sutherby's predisposition toward molesting children and is subject to exclusion under ER 404(b)"); State v. Medcalf, 58 Wn. App. 817, 823, 795 P.2d 158 (1990) (evidence that

defendant possessed X-rated videotape cassettes with children's film titles on them was inadmissible in prosecution for second degree statutory rape because there was no evidence that the alleged victim ever watched the movies); State v. Bush, 164 N.C. App. 254, 261, 595 S.E.2d 715 (2004) (evidence that Bush owned and watched pornographic videos of young women having sex was not admissible at trial on a charge of first degree sexual assault of a child because there was no evidence that Bush provided pornographic videotapes to the child or employed the tapes to seduce her; "[a]bsent proof that the tapes were so utilized, such evidence, so tenuously related to the crime charged, impermissibly injected defendant's character into the case to raise the question of whether defendant acted in conformity therewith at the times in question.").

Historically, evidence of a defendant's "lustful disposition" has been admissible in Washington only to show a lustful disposition toward the complaining witness. See, e.g., State v. Crowder, 119 Wash. 450, 451-52, 205 P. 850 (1922) (prior acts of sexual intercourse between parties admissible in rape prosecution to show lustful disposition of defendant toward complaining witness). Critically, the evidence must show a sexual desire for the particular victim. State v.

Ray, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991). Such evidence is arguably relevant to a legitimate issue because it is not offered to show a general propensity to commit sexual crimes, but to demonstrate the nature of the defendant's relationship to and feelings toward a specific individual, and is probative of the defendant's motivation and intent in subsequent situations. State v. Cox, 781 N.W.2d 757, 768 (Iowa 2010).

Here, Mr. McKay-Erskine's statements expressed a lustful disposition toward children in general and not toward the complaining witness in particular. Thus, they were relevant only to show he was predisposed to molest children. In affirming, the Court of Appeals ignored this long-standing case law regarding evidence of "lustful disposition." This Court should grant review and hold the statements were inadmissible under ER 404(b).

c. Contrary to the Court of Appeals' conclusion, the evidence was not admissible to prove motive because the only relevance of the evidence to motive was under a theory of propensity

Other act evidence may be admissible in some cases to prove motive. ER 404(b). "Motive" is "'[a]n inducement, or that which leads or tempts the mind to indulge [in] a criminal act.'" State v. Tharp, 96 Wn.2d 591, 597, 637 P.2d 961 (1981) (quoting Black's Law Dictionary

1164 (4th rev. ed. 1968)). Motive goes beyond gain and can demonstrate an impulse, desire, or any other moving power which causes an individual to act. Powell, 126 Wn.2d at 259.

Generally, the State may not attempt to prove motive through a defendant's prior bad acts. As with intent, there must be some connection linking the prior act with the current crime. In Saltarelli, for instance, the Court held that evidence of the defendant's prior assault was not admissible to prove motive because there was no showing the prior assault was a "motive or inducement for defendant's rape of a different woman almost 5 years later." Saltarelli, 98 Wn.2d at 365.

Similarly, in State v. Hieb, a prosecution for murder, evidence of the defendant's prior assaults on the victim and her sister were not admissible to prove motive because there was no showing the prior assaults were an inducement for Hieb's later assault on the victim. State v. Hieb, 39 Wn. App. 273, 283, 693 P.2d 145 (1984), rev'd on other grounds, 107 Wn.2d 97, 727 P.2d 239 (1986). For instance, there was no contention that the last assault was carried out in order to conceal the prior crimes. Id. Thus, "[t]he earlier assaults had no logical relevance to Hieb's motive for the last assault." Id.

In the absence of an explanation of how the prior conduct served as a motive or inducement for the current crime, the prior act evidence is inadmissible to prove motive. Saltarelli, 98 Wn.2d at 365. That is because the only relevance of the evidence is to show a propensity to commit the current crime, which is "precisely forbidden by ER 404(b)." Id.

Here, there is no showing of how Mr. McKay-Erskine's prior statements served as a motive or inducement for the current alleged crimes. There is no contention, for example, that he committed the crimes in order to cover up the prior statements. Instead, the only relevance of the evidence was to suggest that he must have been motivated to commit the crimes because he expressed an interest in having sexual contact with a child on a prior occasion. But again, that is just the inference that ER 404(b) forbids. The trial court erred in admitting the evidence to prove motive, and the Court of Appeals should not have affirmed. This Court should grant review and reverse.

2. The Court of Appeals erred in concluding the trial court's erroneous decision to preclude examination of Ms. Edwards about Ms. Erskine-McKay's out-of-court threat directed at her and Mr. McKay-Erskine was harmless beyond a reasonable doubt

During trial, defense counsel moved to admit evidence that Ms. Erskine-McKay had threatened Mr. McKay-Erskine and his girlfriend, Camber Edwards. 10/14/13RP 44-46. Counsel said Ms. Edwards would testify that, at around the time the charges were filed, Ms. Erskine-McKay said to her, "once I am done with the defendant, I am going to come after you." Id. Ms. Edwards took the threat seriously and petitioned the court for a restraining order against Ms. Erskine-McKay. Id. Counsel argued the evidence was admissible as evidence of bias under the state of mind exception to the hearsay rule, ER 803(a)(3). 10/14/13RP 45. The trial court disagreed and ruled the evidence was inadmissible hearsay. 10/14/13RP 46-47. On appeal, Mr. McKay-Erskine argued the trial court's ruling violated his constitutional right to impeach a witness with evidence of bias.

The Court of Appeals assumed without deciding that the trial court erred in excluding Ms. Erskine-McKay's statement, but concluded any error was harmless. Slip Op. at 8. This Court should grant review, as the error was not harmless beyond a reasonable doubt.

A defendant's right to impeach a prosecution witness with evidence of bias is guaranteed by the constitutional right to confront witnesses. Davis v. Alaska, 415 U.S. 308, 316-18, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998); U.S. Const. amend. VI; Const. art. I. § 22.

Because a defendant has a constitutional right to impeach a prosecution witness with evidence of bias, any error in excluding such evidence is presumed prejudicial. State v. Spencer, 111 Wn. App.401, 408, 45 P.3d 209 (2002). Reversal is required unless no rational jury could have a reasonable doubt that the defendant would have been convicted even if the error had not taken place. Id.

In assessing whether the error was harmless, the Court may not "speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it." Davis, 415 U.S. at 317. Instead, the Court must conclude "the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [the witness's] testimony." Id.

As the mother of the complaining witness, Ms. Erskine-McKay was a crucial State witness. Mr. McKay-Erskine was entitled to wide

latitude to explore her possible biases and motives. The evidence that was erroneously excluded suggested that, at the time the allegations arose, Ms. Erskine-McKay was strongly motivated by her desire for retribution against Mr. McKay-Erskine. It is likely that, had the jury heard the evidence, they would have been receptive to the suggestion that Ms. Erskine-McKay influenced the nature and content of her young daughter's allegations. The jury would likely have viewed the allegations with greater skepticism. Exclusion of the evidence was not harmless beyond a reasonable doubt.

3. The trial court erred in admitting unreliable out-of-court statements of the child

Hearsay statements of a child under 10 are admissible in a criminal case when the statements describe sexual or physical abuse of the child; the court finds the time, content, and circumstances of the statements provide sufficient indicia of reliability; and the child testifies at the proceedings. RCW 9A.44.120; State v. Kennealy, 151 Wn. App. 861, 880, 214 P.3d 200 (2009).

In Ryan, the Court established a non-exclusive list of nine factors to consider when analyzing the reliability of a child's out-of-court statements. State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984). Ryan instructed trial courts to consider: (1) whether the child

had an apparent motive to lie; (2) the child's general character; (3) whether more than one person heard the statements; (4) the spontaneity of the statements; (5) whether trustworthiness was suggested by the timing of the statement and the relationship between the child and the witness; (6) whether the statements contained express assertions of past fact; (7) whether the child's lack of knowledge could be established through cross-examination; (8) the remoteness of the possibility of the child's recollection being faulty; and (9) whether the surrounding circumstances suggested the child misrepresented the defendant's involvement. Id.

Here, the trial court misapplied the Ryan factors in determining the child's out-of-court statements were sufficiently reliable to be admitted.

4. The prosecutor committed prejudicial, reversible misconduct

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012); U.S. Const. amends. VI, XIV; Const. art. I, § 22. Prosecutorial

misconduct may deprive a defendant of his constitutional right to a fair trial. Glasmann, 175 Wn.2d at 703-04.

Here, the deputy prosecutor resorted to using denigrating remarks several times during closing argument, which jeopardized Mr. McKay-Erskine's constitutional right to a fair trial. See 10/15/13RP 708, 714-15, 725, 728-29, 732-34, 752, 753-55.

5. Cumulative error denied Mr. McKay-Erskine a fair trial

Under the cumulative error doctrine, reversal is required when several trial errors occurred which standing alone may not be sufficient to justify reversal but when combined have denied a defendant a fair trial. See, e.g., State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (three instructional errors and prosecutor's remarks during voir dire required reversal); State v. Alexander, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992) (reversal required because (1) a witness impermissibly suggested victim's story was consistent and truthful, (2) prosecutor impermissibly elicited defendant's identity from victim's mother, and (3) prosecutor repeatedly attempted to introduce inadmissible testimony during trial and in closing); State v. Whalon, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (reversing conviction because of (1) court's severe

rebuke of defendant's attorney in presence of jury, (2) court's refusal of testimony of defendant's wife, and (3) jury listened to tape recording of lineup in absence of court and counsel).

Here, even if the above trial errors do not individually require reversal, when combined, they cumulatively denied Mr. McKay-Erskine a fair trial and reversal is therefore warranted.

E. CONCLUSION

For the reasons given, this Court should grant review.

Respectfully submitted this 30th day of July, 2015.

MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBERT BRUCE McKAY-ERSKINE, Appellant.	No. 45587-1-II UNPUBLISHED OPINION

MAXA, J. — Robert McKay-Erskine (McKay) appeals his convictions and sentence for child molestation and child rape resulting from the sexual abuse of his stepdaughter, AB. We hold that (1) the trial court did not err by admitting McKay's past statements regarding sexual conduct with young children because they provided evidence of his motive; (2) even if the trial court erred in excluding evidence that McKay's ex-wife made a statement to his girlfriend that could be interpreted as a threat against McKay, the error was harmless; and (3) several issues McKay raised in his statement of additional grounds (SAG) have no merit. Accordingly, we affirm McKay's convictions.

However, we hold that the trial court erred in sentencing by imposing certain community custody conditions. We remand to the trial court to strike the community custody conditions requiring substance abuse and mental health evaluations unless it makes necessary factual findings to support those conditions and to reevaluate the community custody condition prohibiting contact with vulnerable individuals.

FACTS

Background

In the mid-1990s, McKay and Pyxey Erskine-McKay (Erskine) were members of a group of itinerant youths known as the Ave Rats, who congregated on and around University Way in Seattle's University District. Over the following two decades, many members of the Ave Rats moved away, but they remained a fairly close-knit group and often lived communally. The Ave Rats also engaged in communal sexual relationships, and McKay and Erskine each had several children of varying parentage. AB was Erskine's child with a father other than McKay.

Around 2009, McKay and Erskine entered into a committed relationship and began to cohabitate and raise their children together. At the time, AB was three or four years old. In 2011, McKay and Erskine married and moved with their children into a friend's house in Puyallup and later into a house in Tacoma. McKay took on a parenting and caretaking role for his and Erskine's children, including AB.

In early 2012, Camber Edwards, a friend of both McKay and Erskine, moved in with them. In May 2012, McKay and Edwards began a sexual relationship. Hostility arose when Erskine found out about the affair, and McKay and Edwards soon left the house.

Sexual Abuse of AB

Later in 2012, AB told two family friends living with them in Tacoma that McKay had abused her. The friends told Erskine, who asked them to take AB to school so she could report what happened. AB reported the abuse to the school counselor, and the next day to a Child Protective Services (CPS) social worker. CPS reported the abuse to the police, and AB subsequently repeated her story to an investigator and a medical examiner.

According to AB's testimony, McKay began to sexually abuse her while the family was living in Puyallup and continued during their time in Tacoma. McKay forced AB to engage in oral and vaginal intercourse multiple times while other members of the family were away. AB was six or seven years old at the time.

The State charged McKay with two counts of first degree child molestation and three counts of first degree child rape. The State also alleged aggravating circumstances for all five counts due to McKay's alleged abuse of his position of trust as her stepfather and caretaker.

McKay's Statements Regarding Sex and Children

The State moved before trial to introduce statements McKay had made to friends several years earlier indicating a sexual interest in young children and a belief that sexual relationships between a father and a young daughter were appropriate. The trial court granted the State's motion and ruled that it would allow testimony on the statements. To support the ruling, the trial court specifically found that (1) by a preponderance of the evidence, McKay had made the statements at issue; (2) the statements were relevant to show McKay's motive and intent in committing the crimes; and (3) the probative value of the statements outweighed their prejudicial potential.

At trial, one friend testified that in 2005 McKay said "he believed that the thought of putting his penis in a child's mouth without any teeth sounded enticing." Report of Proceedings (RP) (Oct. 14, 2013) at 9. The friend also testified that McKay "told me that he enjoyed the feeling of a child's mouth on his penis." RP (Oct. 14, 2013) at 14-15. In addition, that friend testified that McKay told her during the same conversation, and at various other times, that "[a] girl's first sexual experience should be with her father because no one can love them as much as

their father." RP (Oct. 14, 2013) at 10. Another friend also testified that McKay had made similar statements to her that a girl should have her first sexual experience with her father.

Erskine's Statement to Edwards

At trial, McKay's attorney stated that he intended to ask Edwards, McKay's girlfriend, about a statement Erskine made to Edwards at some point after the fall of 2012. Edwards apparently was prepared to testify that Erskine had said something like "once I am done with [McKay], I am going to come after you." RP (Oct. 14, 2013) at 44. The State moved to exclude any such testimony on hearsay grounds. McKay argued that the evidence was admissible as evidence of Erskine's mental state at the time, but the trial court ruled that the evidence was inadmissible hearsay.

McKay's Convictions and Sentence

The jury found McKay guilty of each charged count and found that he had abused his position of trust with AB to commit those crimes. The trial court sentenced McKay to 318 months to life in prison and imposed community custody for the remainder of his life should he be released from confinement. The trial court imposed a number of community custody conditions. One of these conditions instructs McKay, "[d]o not have any contact with physically or mentally vulnerable individuals." Clerk's Papers (CP) at 123. Another condition requires him to "[o]btain a Substance Abuse Evaluation, a Mental Health Evaluation, and a psychosexual evaluation, and comply with any/all treatment recommendations." CP at 124.

McKay appeals his convictions and sentence.

ANALYSIS

A. ADMISSIBILITY OF MCKAY'S STATEMENTS

McKay argues that his statements that sexual contact with young children sounded enticing and that daughters should engage in their first sexual encounters with their fathers were inadmissible under ER 404(b) because they amounted to character evidence relevant only to show a propensity to sexualize children. We disagree and hold that the evidence was relevant to show McKay's motive in committing the crimes against AB.

1. Legal Principles

Under ER 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." However, this evidence may be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). We review the trial court's interpretation of ER 404(b) de novo as a matter of law. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). If the trial court interprets the rule correctly, we review the decision to admit evidence under ER 404(b) for abuse of discretion. *Id.* A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State v. Hassan*, 184 Wn. App. 140, 151, 336 P.3d 99 (2014).

Before a trial court admits evidence under ER 404(b), it must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the

probative value of the evidence against its prejudicial effect under ER 403.[1] *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014).

Here, the trial court properly interpreted ER 404(b) as allowing the admission of evidence regarding McKay's prior statements to show intent and motive. The trial court also analyzed the evidence and made the necessary findings on the record to support the admission of McKay's statements under ER 404(b). The question here is whether the trial court abused its discretion in admitting the statements to show intent and motive.

2. Applicability of ER 404(b) to Verbal Statements

Initially, the State argues that ER 404(b) applies only to a defendant's acts, and not to verbal statements or other expressions. We disagree because statements fall within the provisions of ER 404(b).

As the State points out, the language of ER 404(b) limits its application to "evidence of other crimes, wrongs, or acts." However, the rule "encompasses not only prior bad acts and unpopular behavior but *any* evidence offered to 'show the character of a person to prove the person acted in conformity' with that character at the time of a crime." *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (quoting *State v. Everybodytalksabout*, 145 Wn.2d 456, 466, 39 P.3d 294 (2002)).

We previously have applied ER 404(b) to verbal statements. *See State v. Venegas*, 155 Wn. App. 507, 525-26, 228 P.3d 813 (2010). And our Supreme Court has subjected expressive

[1] ER 404(b) must be read in conjunction with ER 403, which requires the trial to court to exercise its discretion in evaluating whether relevant evidence is unfairly prejudicial. *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014). However, McKay does not argue that this evidence was inadmissible under ER 403. Therefore, we do not address this issue.

acts to ER 404(b) analysis as well. *Foxhoven*, 161 Wn.2d at 175 (analyzing the admissibility of "tag" graffiti); *State v. Coe*, 101 Wn.2d 772, 776, 684 P.2d 668 (1984) (analyzing the admissibility of evidence that, among other things, the defendant "used certain vulgar terms" during sex). Because the State has not identified any compelling reason to depart from these cases, we hold that ER 404(b) applies to McKay's statements.

3. Evidence of Motive

The trial court ruled that McKay's statements "show motive and intent due to the similarity [to the charged crimes], and as such, they are relevant to this case." RP (Sept. 26, 2013) at 35. We hold that the trial court did not abuse its discretion in admitting McKay's statements to show motive.

Under ER 404(b), prior act evidence can be admissible to prove motive. *See, e.g.*, *State v. Yarbrough*, 151 Wn. App. 66, 83-84, 210 P.3d 1029 (2009) (holding that gang affiliation is admissible under ER 404(b) to show motive for the murder of a rival gang member). Motive is an "impulse, desire, or any other moving power which causes an individual to act." *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995). Evidence of motive is admissible even when it is a not an element of the charged crime. *Yarbrough*, 151 Wn. App. at 83.

Here, the trial court did not have to attempt to infer motive from prior acts. Instead, McKay expressly stated why he might be motivated to molest and rape AB: because he thought that receiving oral sex from a young child was enticing and because he thought a daughter's first sexual encounter should be with her father. As a result, the evidence was not admitted to show that McKay acted in conformity with some propensity to have sex with children or his daughters

as McKay argues. It was admitted to show the impulse, desire, or moving power that caused him to act. *Powell*, 126 Wn.2d at 259.

Because McKay's statements were relevant to establish his motive in molesting and raping AB, we hold that the trial court did not abuse its discretion by admitting them.

B. ADMISSIBILITY OF ERSKINE'S STATEMENT

McKay argues that the trial court violated his constitutional right of confrontation by precluding him from impeaching Erskine with evidence of a statement she made to Edwards, which he interpreted as a threat to set him up. McKay claims the statement was relevant to show that Erskine was biased against him. Even assuming without deciding that the trial court erred in excluding evidence of Erskine's statement, we hold that any such violation was harmless error.

Under the Sixth Amendment's confrontation clause, a defendant has a right to confront the witnesses against him through cross-examination. *Fisher*, 165 Wn.2d at 752. This right of confrontation includes a right to call a witness to impeach a prosecution witness by showing bias. *State v. Spencer*, 111 Wn. App. 401, 408-11, 45 P.3d 209 (2002). However, any error in excluding such evidence is subject to a harmless error analysis. *Id.* at 408. "[R]eversal is required unless no rational jury could have a reasonable doubt that the defendant would have been convicted even if the error had not taken place." *Id.*

Here, evidence of Erskine's statement would not have altered the reasoning of any rational juror. The evidence was repetitive, as Erskine's probable bias was clear from other evidence before the jury. The jury could strongly infer bias from other portions of Erskine's testimony, and the State readily admitted during closing argument that Erskine had an "ax to grind" with McKay. RP (Oct. 15, 2013) at 729.

Further, Erskine was not a crucial prosecution witness. She did not testify about McKay's abuse of AB or about any statements AB made about the abuse. She testified only to background facts that provided context and corroborated the testimony of other witnesses. Because Erskine did not provide any evidence crucial to McKay's conviction, there is no reason to believe that McKay would not have been convicted if evidence of Erskine's alleged threat had been admitted.

Because Erskine's potential for bias was evident and admitted, and because Erskine was not a crucial witness, we hold that any error in excluding evidence of Erskine's statement to Edwards could not have affected a rational jury's verdict and therefore was harmless.[2]

C. COMMUNITY CUSTODY CONDITIONS

McKay argues that two of the community custody conditions imposed on him as part of his sentence were unauthorized under the circumstances of his case. First, he challenges a condition requiring evaluations for substance abuse and mental health. Second, he challenges a condition prohibiting contact with physically or mentally vulnerable individuals. We hold that the trial court's findings did not sufficiently support the condition requiring substance abuse and mental health evaluations and that on remand the trial court also should reevaluate the community custody condition prohibiting contact with vulnerable individuals.

[2] McKay also argues that the cumulative impact of the errors he alleges denied him a fair trial. Cumulative error may warrant reversal, even if errors are individually harmless. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). However, because we hold that the trial court did not err in admitting McKay's statement, the only possible error was excluding Erskine's statement. And that error was harmless. Therefore, we reject this argument.

1. Legal Principles

In general, the Sentencing Reform Act (SRA), ch. 9.94A RCW, authorizes imposition of prohibitions and affirmative conditions as part of any sentence if they are related to the crimes for which the defendant has been convicted. RCW 9.94A.505(8). Other provisions of the SRA govern the circumstances under which particular conditions may be imposed.

We review a sentencing court's imposition of community custody conditions for an abuse of discretion. *State v. Johnson*, 184 Wn. App. 777, 779, 340 P.3d 230 (2014). A sentencing court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds, and imposition of a condition without authorization is manifestly unreasonable. *Id.*

2. Substance Abuse and Mental Health Evaluations

McKay's sentence included a community custody condition imposing a requirement that he "[o]btain a Substance Abuse Evaluation, a Mental Health Evaluation, and a psychosexual evaluation, and comply with any/all treatment recommendations." CP at 124. McKay argues that the trial court imposed without authorization the portion of this condition requiring substance abuse and mental health evaluations. We agree that imposition of these conditions was not authorized under the circumstances.

a. Substance Abuse Evaluation

McKay argues that the trial court was not authorized to impose a substance abuse evaluation condition because his crimes were unrelated to substance abuse. We agree.

RCW 9.94A.703(3)(d) authorizes a court to order a defendant as part of his sentence to participate in crime-related treatment or counseling services or rehabilitative programs "related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the

community." In *State v. Jones*, we held that substance abuse treatment reasonably relates to the offender's risk of reoffending and to the safety of the community only if the evidence shows that substance abuse contributed to the offense. 118 Wn. App. 199, 208, 76 P.3d 258 (2003).

Here, there is no evidence that substance abuse played a role in McKay's commission of the crimes against AB. The record shows that McKay had issues with substance abuse. But the only evidence in the record indicating that this substance abuse was relevant in this case was testimony that a friend thought McKay's statements regarding sex and children were the product of his drug use, rather than reflections of his actual beliefs. No evidence directly or indirectly linked McKay's drug use to his commission of the crimes against AB.

Because the evidence did not show that McKay's substance abuse contributed to his offenses, it was manifestly unreasonable for the trial court to impose a community custody condition requiring a substance abuse evaluation. Therefore, we remand to the trial court with instructions to strike that condition unless it finds that McKay's substance abuse contributed to the abuse of AB.

b. Mental Health Evaluation

McKay argues that the trial court was not authorized to impose a mental health evaluation condition because his crimes were unrelated to any mental illness. The State concedes that the trial court was unauthorized to impose this condition because it made no finding that McKay suffered from a mental illness related to the crimes against AB. We accept the State's concession and hold that the mental health evaluation condition was improper.

Like substance abuse counseling and treatment, mental health counseling and treatment may be required as a sentencing condition under RCW 9.94A.703(3)(c) and (d) as long as the

counseling and treatment is "crime-related" or "reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." However, RCW 9.94B.080 further requires that mental health evaluation and treatment may only be imposed

> if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment must be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity.[3]

We held in *Jones* that mental health treatment and counseling "reasonably relates" to the offender's risk of reoffending and to the safety of the community "only if the court obtains a presentence report or mental status evaluation and finds that the offender was a mentally ill person whose condition influenced the offense." 118 Wn. App. at 210.

Here, a presentence report submitted to the trial court indicated that McKay suffered from some mental health issues and recommended imposing a mental health evaluation at sentencing. But the trial court made no finding that McKay was mentally ill or that any mental illness influenced his offenses. Therefore, under *Jones*, the trial court was not authorized to impose mental health counseling or treatment.

We hold that the trial court abused its discretion by imposing the mental health evaluation condition without finding that McKay was a mentally ill person whose illness influenced the

---

[3] The title of chapter 9.94B RCW indicates that the chapter applies only to crimes committed before July 1, 2000. Similarly, RCW 9.94B.010(1) provides that "[t]his chapter codifies sentencing provisions that may be applicable to sentences for crimes committed prior to July 1, 2000." However, a 2008 amendment to chapters 9.94A and 9.94B RCW included an express statement that the provision currently codified at RCW 9.94B.080 applies to crimes committed after August 1, 2009. *See* LAWS of 2008, ch. 231, § 55. Because McKay committed his crimes in 2012, RCW 9.94B.080 applies to his sentencing.

offense. Therefore, we remand for the trial court to strike the condition unless it finds, based on evidence presented at sentencing, that McKay was a mentally ill person whose condition influenced the abuse of AB.

3. No Contact with Physically or Mentally Vulnerable Individuals

McKay's sentence included a condition that he "not have any contact with physically or mentally vulnerable individuals." CP at 123. McKay argues that this condition was not related to the crimes for which he was convicted because AB was not physically or mentally vulnerable, and therefore that imposition of the condition was unauthorized. We decline to address this argument because of our decision in *State v. Johnson*, 180 Wn. App. 318, 327 P.3d 704 (2014), which we issued after briefing in this case.

In *Johnson*, we held that a community custody condition prohibiting "any contact with physically or mentally vulnerable individuals" was unconstitutionally vague. *Id.* at 326-329. McKay did not raise this issue on appeal. However, we remand for the trial court to reevaluate the "vulnerable individuals" community custody condition in light of *Johnson*.

D. SAG Assertions

In his SAG, McKay makes seven further claims of error. Two of the issues he raises do not warrant review. None of his other assertions have merit.

1. Issues Not Warranting Review

McKay challenges the use of his past statements on grounds that they amounted to character evidence offered to show a propensity to commit sex crimes against children. But his attorney ably presented this issue in the main appeal, and it is addressed in section A above. McKay presents no grounds for further review of this issue.

McKay also asserts that several admitted exhibits contained inadmissible hearsay, and that their admission violated his confrontation right. However, these exhibits are not part of the record on appeal. We cannot consider matters outside the record on a direct appeal. *State v. Ellison*, ___ Wn. App. ___, 346 P.3d 853, 856 (2015), *petition for review filed*, No. 91612-8 (Wash. Apr. 30, 2015). If McKay wishes to raise this issue, the appropriate avenue would be a personal restraint petition. *See State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

2. Other Issues

a. Admissibility of Child Hearsay

McKay asserts that the trial court violated his confrontation right by allowing witnesses to testify about AB's out-of-court statements without adequately analyzing the reliability factors necessary to admit child hearsay. We disagree.

Hearsay statements of a child under the age of 10 are admissible in a criminal case when the statements describe sexual or physical abuse of the child; the court finds that the time, content, and circumstances of the statements provide sufficient indicia of reliability; and the child testifies at the proceedings. RCW 9A.44.120; *State v. Kennealy*, 151 Wn. App. 861, 880, 214 P.3d 200 (2009). We review a trial court's decision to admit child hearsay statements for an abuse of discretion. *Kennealy*, 151 Wn. App. at 879.

In determining the reliability of child hearsay statements, the trial court considers the *Ryan*[4] reliability factors: (1) whether there is an apparent motive to lie, (2) the general character of the declarant, (3) whether more than one person heard the statements, (4) the spontaneity of

[4] *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984).

the statements, (5) the timing of the declaration and the relationship between the declarant and the witness, (6) whether the statement contained express assertions of past fact, (7) whether the declarant's lack of knowledge could be established through cross-examination, (8) the remoteness of the possibility of the declarant's recollection being faulty, and (9) whether the surrounding circumstances suggested the declarant misrepresented the defendant's involvement. *Kennealy*, 151 Wn. App. at 880. No single *Ryan* factor is decisive, but the factors must be "substantially met" to indicate sufficient reliability. *Id.* at 881.

The trial court found that the *Ryan* factors were substantially met under the circumstances of this case. McKay challenges this determination, arguing that each factor should have weighed against this finding.

Regarding factors one and two, McKay argues that AB had a motive to lie and a general character indicating that her statements were unreliable. He bases this argument on the possibility that Erskine coached AB or otherwise influenced her to concoct false stories of the sexual abuse. He points out that Erskine had a motive to influence AB in this way. However, Erskine's motives are not relevant to an analysis of AB's motives or character, and therefore they do not bear on these reliability factors. The testimony at the hearing established that AB was actually quite trustworthy and did not dislike or fear the defendant prior to the abuse. In fact, McKay himself seems to indicate that AB had no ill will toward him.

Regarding factor three, McKay notes that while AB made the same general statements to more than one person, some of the details were inconsistent. But the fundamental details of the oral and vaginal intercourse and digital molestation were consistent. When several statements describe a "substantially similar account of the events to multiple people sequentially, [it]

supports the trial court's ruling on the statements' reliability and trustworthiness." *Kennealy*, 151 Wn. App. at 883. Because AB's statements, as recounted at the hearing, established a substantially similar account of the events, this factor weighs toward reliability.

Regarding factor four, McKay asserts that AB's statements were not spontaneous. He correctly notes that AB's statements were made in response to questions. But "for purposes of determining the reliability of a statement made by a child victim of sexual abuse, any statements made that are not the result of leading or suggestive questions are spontaneous" for purposes of assessing their reliability. *In re Dependency of S.S.*, 61 Wn. App. 488, 497, 814 P.2d 204 (1991). The questions to which AB responded were open-ended, and her responsive statements were therefore "spontaneous."

Regarding factor five, McKay seems to suggest that the timing of AB's statements and AB's relationship with the people she told about the abuse indicate a lack of reliability. But he argues only that one of the hearsay witnesses had mental health problems and a history of sexual abuse, and that the witness may have prompted AB's statements. This argument does not address AB's relationship with that witness or the importance of the timing of her statements, and therefore does not address the impact of that relationship on the reliability of AB's statements. *See Kennealy*, 151 Wn. App. at 884.

Regarding factor seven, McKay argues that AB's lack of knowledge about the abuse could not be drawn out on cross-examination, and that this weighed against a finding of reliability. McKay seems to suggest that cross-examination about the abuse would have shown AB's lack of knowledge had he been allowed to cross-examine her on that topic. The trial court limited the scope of cross-examination at the hearing, excluding questions about the abuse to

protect AB from unnecessary trauma. But the trial court allowed cross-examination as to AB's memory and general lack of knowledge. McKay chose not to cross-examine her on those topics, but it cannot be said that he was unable to show her lack of knowledge via cross-examination.

In summary, none of McKay's arguments establish that the trial court's decision to admit AB's hearsay statements was unreasonable under the circumstances. Because he fails to show that the trial court acted unreasonably in finding that the *Ryan* factors showed sufficient reliability in this case, the trial court did not abuse its discretion by allowing the child hearsay testimony.

b. Admissibility of Hearsay

McKay challenges the admission of testimony by social workers and investigators who interviewed AB recalling AB's statements to them about the abuse. He appears to assert that the testimony violated both his constitutional right of confrontation and the rules of evidence governing admission of hearsay statements. We reject both arguments.

McKay asserts that the admission of the child hearsay evidence violated his confrontation right because AB's statements to social workers and investigators were testimonial. However, even if the statements were testimonial, a trial court violates a criminal defendant's confrontation right by admitting hearsay evidence only if the defendant is unable to cross-examine the hearsay declarant. *State v. Price*, 158 Wn.2d 630, 640, 146 P.3d 1183 (2006). Because AB testified at trial and was cross-examined by McKay, the trial court did not violate McKay's right to confront her.

McKay also seems to assert that the hearsay statements should not have been admissible as statements related to medical treatment. But there is no indication that the trial court admitted

the testimony pursuant to that hearsay exception. The testimony was instead admissible under RCW 9A.44.120 and application of the *Ryan* child hearsay factors. Moreover, McKay seems to challenge only testimony offered at the child hearsay hearing, which is not subject to the rules of evidence. *See* ER 1101(c)(3). Therefore, we hold that McKay's arguments relating to hearsay evidence lack merit.

c. Prosecutorial Misconduct

McKay asserts that the prosecutor committed prejudicial misconduct during closing argument. However, McKay did not object to any of the argument he now characterizes as improper. We hold that he waived this issue by failing to object.

To prevail on a claim of prosecutorial misconduct, a defendant must show that "in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial." *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). We review the prosecutor's conduct and whether prejudice resulted therefrom by examining that conduct in the full trial context, including the evidence presented, the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011).

When the defendant fails to object to the challenged portions of the prosecutor's argument, he is deemed to have waived any error unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). The defendant must show that (1) no curative instruction would have eliminated the prejudicial effect, and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the verdict. *Id.*

McKay argues that the prosecutor improperly resorted to denigrating remarks about Erskine and the Ave Rats as a group. The prosecutor implied that Erskine could not have coached AB to fabricate her accusations because Erskine was not intelligent enough to concoct such a scheme. The prosecutor also implied that the other members of the Ave Rats whose testimony corroborated AB's story were too unintelligent and unmotivated to go along with any such scheme. While the trial testimony arguably supported these inferences, the prosecutor likely went too far in so commenting on Erskine and the other witnesses. But the remarks appear to have been intended to support the credibility of the witnesses they denigrated. While different phrasing would have been more appropriate and could have better illustrated the prosecutor's point, there is no indication that the prosecutor's statements were flagrant or ill-intentioned or that an instruction could not have cured any prejudice.

McKay also argues that the prosecutor misrepresented the evidence by referring to facts not substantiated by the evidence presented at trial. During closing argument, the prosecutor repeatedly stated that AB urinated on herself twice when discussing her abuse with her school counselor. The school counselor testified that AB "wet her pants in my office on two occasions, but *I can't recall if that was during the disclosure or afterwards or before*." RP (Oct. 9, 2013) at 372 (emphasis added). While the prosecutor arguably misrepresented the evidence on this issue, a curative instruction could have easily remedied any resulting prejudice had McKay objected. But McKay did not object, and nothing in the record shows that the prosecutor's description of AB's incontinence was flagrant and ill-intentioned misconduct warranting reversal.

Finally, McKay argues that the prosecutor inappropriately appealed to the jury's sympathy for AB. But the prosecutor's comments appear to explain AB's behavior by emotionally

contextualizing her discussions with investigators and testimony at trial. Because AB's credibility was key in this case, and McKay's primary defense theory was that she was coached to give false testimony, the prosecutor did not commit misconduct by highlighting that emotional context and the difficulty AB faced in accusing McKay and testifying. And any prejudice due to sympathy was effectively cured by the trial court's instruction to the jurors not to allow their emotions to govern their deliberations.

Because McKay does not show flagrant, ill-intentioned misconduct resulting in incurable prejudice, we hold that he has waived his claims of prosecutorial misconduct.

d. Same Criminal Conduct

McKay asserts that the trial court erred by failing to count all five of his offenses as the same criminal conduct for purposes of calculating his offender score at sentencing. We disagree.

For purposes of calculating an offender score, offenses which constitute the same criminal conduct are counted as one offense. RCW 9.94A.525(5)(a)(i). " 'Same criminal conduct . . .' means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). If any element of the same criminal conduct analysis is missing, a trial court must count the offenses separately when calculating the offender score. *State v. Walker*, 143 Wn. App. 880, 890, 181 P.3d 31 (2008).

Here, McKay committed multiple acts against AB on different occasions and in different locations. Therefore, the acts clearly were not committed at the same time and place, and the trial court correctly considered McKay's five offenses to be distinct criminal conduct for

purposes of calculating the offender score. We therefore reject McKay's same criminal conduct argument.

e. Cumulative Error

McKay asserts that the aggregate impact of these cumulative errors denied him a fair trial. However, because the trial court did not commit the errors McKay asserts, there was no cumulative error.

We affirm McKay's convictions. But we remand to the trial court to strike the community custody conditions requiring substance abuse and mental health evaluations unless it makes necessary factual findings to support those conditions, and to reevaluate the community custody condition prohibiting contact with vulnerable individuals.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA, J.

We concur:

WORSWICK, P.J.

LEE, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 45587-1-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Brian Wasankari, DPA
[PCpatcecf@co.pierce.wa.us]
Pierce County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: July 30, 2015

WASHINGTON APPELLATE PROJECT

July 30, 2015 - 3:49 PM

Transmittal Letter

Document Uploaded: 6-455871-Petition for Review.pdf

Case Name: STATE V. ROBERT MCKAY-ERSKINE

Court of Appeals Case Number: 45587-1

Is this a Personal Restraint Petition? Yes ● No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

● Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: maria@washapp.org

A copy of this document has been emailed to the following addresses:

PCpatcecf@co.pierce.wa.us