73904-2

No. 73904-2-I

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

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STATE OF WASHINGTON,

Respondent,

v.

CLIFTON EUGENE TURNER,

Appellant.



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

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# APPELLANT'S OPENING BRIEF

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2. The trial court erred in requiring Turner to engage in substance abuse treatment and submit to related monitoring conditions while on community custody.

3. If the State substantially prevails, this Court should decline to award appellate costs due to Turner's inability to pay.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Expert testimony is necessary where the question to be decided involves scientific, technical, or other specialized knowledge. Washington courts recognize that PTSD is a mental disorder that is beyond the ordinary understanding of laypersons. Here, the State presented evidence that the complaining witness suffered symptoms of PTSD as a result of the alleged crime, for the purpose of proving the crime occurred, but did not present expert testimony to explain how the alleged crime could have led to those symptoms. Did the trial court abuse its discretion in admitting evidence of PTSD symptoms in the absence of expert testimony to explain these symptoms to the jury?

2. A trial court may not require an offender to engage in drug or alcohol treatment as a condition of community custody unless the record shows the offender's use of drugs or alcohol contributed to the crime. Here there is absolutely no evidence that Turner's use of drugs or alcohol contributed to the crime. Yet the court imposed conditions of community custody requiring him to engage in drug and alcohol treatment and submit to related monitoring conditions. Must the conditions be stricken as not crime-related?

3. Where Turner is indigent and unable to pay legal financial obligations, should this Court deny appellate costs if the State substantially prevails?

C. STATEMENT OF THE CASE

Clifton Turner is a 61-year-old man who is a counselor and case manager for Compass Housing Alliance, providing services for the homeless. 6/24/15RP 343. He has been clean and sober since June 7, 2006. 6/24/15RP 344. He is active in recovery and goes to AA/NA meetings every week. RP 6/24/15344. He reads recovery books every day and takes his recovery very seriously. 6/24/15RP 345.

Turner met Lisa Leavitt while they were both in inpatient treatment for drug and alcohol abuse. 6/24/15RP 347. The two

became romantic and eventually started living together in an apartment in Mountlake Terrace. 6/24/15RP 349. They agreed to have no drugs or alcohol on the premises. 6/23/15RP 70; 6/24/15RP 351.

Leavitt has a daughter named M.L. 6/23/15RP 64. M.L. lived with her Aunt Denise but would visit her mother and Turner at their Mountlake Terrace apartment about every other weekend. 6/23/15RP 64-65. M.L. liked Turner and they got along well. 6/23/15RP 65. He made her mother happy. 6/23/15RP 63. When M.L. visited, they would go places as a family and do fun things together. 6/23/15RP 63.

At some point, M.L. told her sister Ashlee that Turner had showed her his "private parts." 6/23/15RP 95. She then told her Aunt Denise. 6/23/15RP 98. M.L.'s mother and sister took her to the police station, where she told a detective that Turner had inserted his fingers into her vagina, touched her vaginal area outside her clothing, and showed her his penis. 6/23/15RP 100.

Turner was charged with three counts of second degree child molestation and two counts of second degree rape of a child. CP 136-37.

At trial, it became apparent that M.L.'s allegations were inconsistent and had changed over time. M.L. told the police it was

painful when Turner inserted his fingers into her vagina, but later at trial she admitted it was never painful. 6/23/15RP 76-77. She told the police it was painful so that they would take her story seriously. 6/23/15RP 77. At trial, M.L. said Turner made her put her mouth on his penis three times, but earlier she had told the defense investigator that happened only one time. 6/23/15RP 85-84. At trial, M.L. said the incidents happened during the daytime, usually while she and Turner were wrestling. 6/23/15RP 71, 77, 80-82, 86. But earlier, M.L. had told her cousin Brandon that Turner sexually assaulted her while she was lying in bed at night. 6/23/15RP 258. Finally, M.L.'s statements about how many times the incidents occurred changed markedly over time. 6/23/15RP 142-43.

In response to questioning by the prosecutor, M.L. said that during her sophomore year in high school, she started skipping school, doing drugs, and drinking alcohol. 6/23/15RP 113.

Outside the presence of the jury, defense counsel objected, arguing the State could not present evidence that M.L. suffered from symptoms of PTSD unless the State presented expert testimony to tie M.L.'s symptoms to the allegations of abuse. 6/23/15RP 114-15. After all, M.L. did not start experiencing those symptoms until at least a year

and a half after the alleged abuse had stopped. 6/23/15RP 115. Counsel argued a layperson could not testify that M.L.'s troubling behavior, especially when it occurred so long after the fact, was connected to sexual abuse. 6/23/15RP 114.

The court overruled the objection. 6/23/15RP 117. The court ruled M.L. could testify about her feelings and behavior, as long as the prosecutor did not ask questions that would lead to a medical conclusion. 6/23/15RP 117.

Thus, M.L. testified that, at the beginning of her sophomore year, she began engaging in troubling behavior. She quit playing softball. 6/23/15RP 118. She started using marijuana and drinking alcohol every day. Before that, she had used marijuana only occasionally and did not drink. 6/23/15RP 119, 175. She became depressed and suicidal and was admitted to the hospital a couple of times for suicidal ideation. 6/23/15RP 119-20. She started burning and cutting herself. 6/23/15RP 120.

M.L.'s Aunt Denise also testified that after M.L. disclosed allegations of sexual abuse, she started skipping school, drinking alcohol, and smoking marijuana. 6/24/15RP 304-05. She used to have a lot of friends but no longer does. 6/24/15RP 304. She started cutting

her arms, pulling her hair out, and saying that she wanted to kill herself. 6/24/15RP 304.

No expert testimony was presented to explain why or how these symptoms could have been caused by sexual abuse.

All of the witnesses who spent time with Turner said they never saw him drink or use drugs. M.L. said Turner was sober when she knew him; she never saw him not sober. 6/23/15RP 62, 178. She confirmed that he was serious about recovery and spent a lot of time reading the Bible and recovery materials, and talking and thinking about recovery. 6/23/15RP 123-24, 178. Her sister Ashlee also said she never knew Turner to relapse or use drugs or alcohol. 6/23/15RP 227-28.

Turner testified at trial and denied the allegations. He said he started wrestling with M.L. because Leavitt asked him to. 6/24/15RP 368 M.L. was being bullied at school and Leavitt wanted her to learn how to defend herself. 6/24/15RP 368. Turner taught M.L. defensive moves and techniques. 6/24/15RP 369. Turner loves Leavitt and her daughters and cannot understand why they made these allegations. 6/24/15RP 380.

The jury found Turner guilty as charged of two counts of second degree child molestation and guilty of one count of the lesser-included offense of fourth degree assault. CP 72-73, 77, 79. The jury found him not guilty of two counts of second degree rape of a child. CP 74-75.

At sentencing, the court imposed 36 months of community custody. CP 31. As conditions of community custody, the court ordered Turner to participate in substance abuse treatment and submit to related monitoring conditions. CP 42.

D. ARGUMENT

**1. The trial court abused its discretion in admitting evidence of M.L.'s symptoms of PTSD in the absence of expert testimony to explain the nexus between the alleged symptoms and the allegations of sexual abuse.**

M.L. and her Aunt Denise testified M.L. started exhibiting troubling behaviors long after the alleged incidents of sexual abuse had stopped. M.L. started skipping school, doing drugs, and drinking alcohol in her sophomore year of high school. 6/23/15RP 113. She lost friends. 6/24/15RP 304. She became depressed and suicidal. 6/23/15RP 119-20; 6/24/15RP 304. She started burning and cutting herself. 6/23/15RP 120. These behaviors were uncharacteristic of her. 6/23/15RP 119, 175.

The State presented this evidence of M.L.'s downward spiral as proof of the underlying allegations of sexual abuse. 6/23/15RP 115-16. Yet the State did not present any expert testimony to explain how or why a person could start experiencing such symptoms of PTSD so long after the alleged traumatic event had ended. PTSD is a mental disorder that is beyond the understanding of an ordinary layperson. Expert testimony was therefore necessary to explain M.L.'s symptoms and establish any nexus between them and the underlying allegations of abuse. The court abused its discretion in refusing to require the State to present expert testimony regarding M.L.'s purported mental disorder.

A lay witness may not express an opinion as to matters that are beyond the realm of common experience and that require the special skill and knowledge of an expert witness. Randolph v. Collectramatic, Inc., 590 F.2d 844, 846-47 (10th Cir. 1979). "[W]here the Topic requires special experience, only the testimony of a person of that special experience will be received." Id. (citation omitted).

Thus, if a party wishes to present evidence regarding matters outside the realm of common experience, it must do so through the testimony of an expert. Under ER 702, expert testimony is admissible "[i]f scientific, technical, or other specialized knowledge will assist the

trier of fact to understand the evidence or to determine a fact in issue." ER 702. Expert testimony is admissible under ER 702 if it will be helpful to the jury in understanding matters outside the competence of ordinary lay persons. State v. Green, 182 Wn. App. 133, 146, 328 P.3d 988, review denied, 337 P.3d 325 (2014).

The trial court's decision to admit or exclude expert testimony is reviewed for abuse of discretion. Id.

Washington courts recognize that mental disorders—specifically PTSD—are beyond the understanding of ordinary lay persons. Id. at 146-47 (citing State v. Janes, 121 Wn.2d 220, 236, 850 P.2d 495 (1993); State v. Ciskie, 110 Wn.2d 263, 273-74, 751 P.2d 1165 (1988); State v. Allery, 101 Wn.2d 591, 597, 682 P.2d 312 (1984); State v. Bottrell, 103 Wn. App. 706, 717, 14 P.3d 164 (2000)).

Washington case law also acknowledges that PTSD is a mental disorder recognized within the scientific and psychiatric communities. Bottrell, 103 Wn. App. at 717. According to the American Psychiatric Association, the essential feature of PTSD is

> "the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing an event that involves death, injury, or a threat to the physical

> integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate."

American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 424 (4th ed.1994) (quoted in Bottrell, 103 Wn. App. at 717).

Because PTSD is a recognized mental disorder that is beyond the understanding of ordinary laypersons, when the State presents evidence of PTSD to prove the elements of a crime, the State must also present expert testimony to explain the disorder to the jury and elucidate how it is related to the crime. ER 702; Green, 182 Wn. App. at 146; Bottrell, 103 Wn. App. at 717; Randolph, 590 F.2d at 846-47.

Here, the State presented extensive testimony of M.L.'s purported symptoms of PTSD as evidence to prove that the alleged abuse actually occurred. But the trial court did not require the State to present expert testimony to explain any nexus between M.L.'s purported symptoms and the alleged offenses. As ordinary lay people, the jurors were not capable of understanding how or why a person might experience symptoms of PTSD long after the underlying trauma had ended. The trial court's ruling refusing to require the State to provide an expert to explain this mental disorder to the jury and how it

related to the crime is contrary to the above authorities. The court therefore abused its discretion.

The court's error in refusing to require expert testimony was not harmless. Evidentiary errors require reversal if, "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Thomas, 35 Wn. App. 598, 609, 668 P.2d 1294 (1983).

The court's error was harmful because the jury was allowed to speculate, without the assistance of an expert, that M.L.'s troubling behaviors and downward spiral must have been the result of sexual abuse. This significantly bolstered the State's case. The evidence of sexual abuse was otherwise equivocal. The only other evidence offered to prove sexual contact were M.L's statements. But those statements were incomplete, inconsistent, and changed over time. 6/23/15RP 71, 76-77, 80-86, 142-43, 258.

The jury plainly had difficulty believing M.L.'s testimony. This is demonstrated by the jury's decision to acquit Turner of two charges of rape of a child and convict him of the lesser-included offense of fourth degree assault for one of the child molestation charges. CP 72-75, 77, 79. Had the jury not heard the evidence of PTSD, it very well

might have acquitted Turner of all of the charges. Because the error in refusing to require expert testimony was not harmless, the convictions must be reversed.

**2. The court erred in requiring Turner to engage in drug and alcohol treatment and submit to monitoring conditions while on community custody because there is no evidence that Turner's use of drugs or alcohol contributed to the offense.**

A trial court's authority to impose sentencing conditions is derived wholly from statute. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). This Court reviews de novo whether the trial court had statutory authority to impose a challenged condition of community custody. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

Turner may challenge the erroneous sentencing conditions for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

The Sentencing Reform Act generally authorizes a trial court to impose prohibitions or affirmative conditions of community custody only if they are "crime-related." RCW 9.94A.505(9); State v. Brooks, 142 Wn. App. 842, 850, 176 P.3d 549 (2008). A "crime-related"

condition is one that "directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10).

A condition of community custody requiring the offender to participate in alcohol or drug counseling must be "crime-related." RCW 9.94A.703(3); State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003); State v. Parramore, 53 Wn. App. 527, 529, 768 P.2d 530 (1989). To justify such a condition, the evidence must show and the court must find that alcohol or drugs contributed to the crime. Jones, 118 Wn. App. at 203, 208. Alcohol or drug counseling "'reasonably relates' to the offender's risk of reoffending, and to the safety of the community, only if the evidence shows that alcohol [or drugs] contributed to the offense." Id. at 208.

The philosophy underlying the "crime-related" provision is that offenders may be punished for their crimes and may be prohibited from doing things that are directly related to their crimes, but they may not be coerced into doing things that are believed to rehabilitate them. State v. Riley, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993); David Boerner, Sentencing in Washington, §4.5, at 4-7 (1985).

Here, the court imposed conditions of community custody requiring Turner to engage in drug and alcohol treatment and submit to

related monitoring conditions. The court imposed a condition requiring Turner to "[p]articipate in substance abuse treatment as directed by the supervising Community Corrections Officer." CP 42. The court also imposed a condition requiring Turner to "[p]articipate in urinalysis, Breathalyzer, and polygraph examinations as directed by the supervising Community Corrections Officer, to monitor compliance with conditions of community custody." CP 42.

The court exceeded its statutory authority in imposing these conditions because there was absolutely no evidence to show that Turner's use of drugs or alcohol contributed to the offense. In fact, the opposite is true. All of the evidence presented on the question shows unequivocally that Turner did not use alcohol or drugs during the relevant time period. Turner was active in recovery and had been sober since June 2006. 6/24/15RP 344-45. Both M.L. and her sister Ashlee agreed they never saw Turner use drugs or alcohol or waiver from his commitment to sobriety. 6/23/15RP 62, 123-34, 178, 227-28.

Because the conditions requiring Turner to participate in substance abuse treatment and comply with related monitoring conditions are not crime-related, they must be stricken. Jones, 118 Wn. App. at 203, 208.

### 3. Any request that costs be imposed on Turner for this appeal should be denied because he does not have the present or likely future ability to pay them.

This Court has broad discretion to disallow an award of appellate costs if the State substantially prevails on appeal. RCW 10.73.160(1); State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); State v. Sinclair, 192 Wn. App. 380, 388, 367 P.3d 612 (2016); RCW 10.73.160(1). An offender's inability to pay is an important consideration to take into account in deciding whether to disallow costs. Sinclair, 192 Wn. App. at 389.

Turner does not have a realistic ability to pay appellate costs. At sentencing, the court found Turner was indigent and imposed only those LFOs it deemed mandatory. 8/21/15RP 28; CP 33.

The court also entered an order authorizing Turner to seek review at public expense and appointing public counsel on appeal. As the Court noted in Sinclair, RAP 15.2(f) requires that a party who has been granted such an order of indigency is required to notify the trial court of any significant improvement in financial condition. Sinclair, 192 Wn. App. at 393. Otherwise, the indigent party is entitled to the benefits of the order of indigency throughout the review process. Id.;

RAP 15.2(f). There is no trial court record showing Turner's financial condition has improved.

Nor is Turner's financial situation likely to improve to the point where he will be able to pay appellate costs. Turner was convicted of two counts of second degree child molestation and received a sentence of 53 months in prison. CP 27-42. Upon his release, he will be subject to 36 months of community custody and will be required to register as a sex offender. Id. At the time of trial, Turner was 61 years old. 6/24/15RP 343.

Due to these circumstances, "[t]here is no realistic possibility that [Turner] will be released from prison in a position to find gainful employment that will allow him to pay appellate costs." Sinclair, 192 Wn. App. at 393.

Imposing appellate costs on Turner would significantly reduce any possibility of his re-entering society successfully. Id. at 391; see also State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015). Because Turner is indigent and unlikely ever to be able to pay appellate costs, this Court should exercise its discretion and decline to award costs if the State substantially prevails on appeal.

E. CONCLUSION

The trial court abused its discretion in refusing to require the State to present expert testimony to support its position that M.L. suffered symptoms of PTSD as a result of the alleged sexual abuse. The convictions must therefore be reversed. In the alternative, this Court should strike the conditions of community custody requiring Turner to engage in substance abuse treatment and submit to related monitoring conditions because they are not crime-related.

Respectfully submitted this 3rd day of June, 2016.

/s/ Maureen M. Cyr

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

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| STATE OF WASHINGTON,<br><br>Respondent/Cross-appellant,<br><br><br>CLIFTON TURNER,<br><br>Appellant-Cross-respondent. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | NO. 73904-2-I |

## DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 3RD DAY OF JUNE, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON, THIS 3RD DAY OF JUNE, 2016.

X_____

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