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No. 98210-4
Court of Appeals No. 78460-9-I

THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LEVI STAPLES JR.,

Petitioner.

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

Petition for Review

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TABLE OF CONTENTS

A. Identity of Petitioner..... 1

B. Opinion Below..... 1

C. Issues Presented..... 2

D. Statement of the Case 3

E. Argument..... 7

1. The trial court repeatedly violated Article I, section 10 by permitting the filing of numerous pleadings employing redacted names and pseudonyms 7

2. The State’s use of pseudonyms and initials in State’s appellate brief and pleadings in the Court of Appeals without meeting the requirements of Ishikawa..... 11

3. The use of pseudonyms in the instructions to the jury violates Article I, section 16..... 12

4. The use of initials to identity the alleged victim in jury instructions undermines the presumption innocence demanded by the Due Process Clause.... 17

F. Conclusion..... 18

TABLE OF AUTHORITIES

Washington Constitution

Const. Art. I, § 10.....	1, 2, 6, 7, 8, 9, 10, 11, 18
Const. Art. IV, § 16	1, 2, 3, 6, 12, 17, 19

United States Constitution

U.S. Const. amend. VI.....	18
U.S. Const. amend. XIV	18

Washington Supreme Court

<i>Allied Daily Newspapers of Washington v. Eikenberry</i> , 121 Wn.2d 205, 848 P.2d 1258 (1993)	8, 11
<i>Doe G. v. Dep't of Corr.</i> , 190 Wn.2d 185, 410 P.3d 1156 (2018)	9, 12
<i>Dreiling v. Jain</i> , 151 Wn.2d 900, 93 P.3d 861 (2004)	7
<i>Hundtofte v. Encarnacion</i> , 181 Wn.2d 1, 330 P.3d 168 (2014)	7, 8, 9, 11
<i>Seattle Times Co. v. Ishikawa</i> , 97 Wn.2d 30, 640 P.2d 716, 720 (1982).....	1, 2, 3, 6, 8, 9, 10, 11, 12
<i>State v. Bennett</i> , 161 Wn.2d 303, 165 P.3d 1241 (2007)	18
<i>State v. Bone-Club</i> , 128 Wn.2d 254, 906 P.2d 325 (1995).....	10
<i>State v. Brightman</i> , 155 Wn.2d 506, 122 P.3d 150 (2005)	7
<i>State v. Johnson</i> , 180 Wn.2d 295, 325 P.3d 135 (2014)	16
<i>State v. Levy</i> , 156 Wn.2d 709, 132 P.3d 1076 (2006)	12
<i>State v. Magers</i> , 164 Wn.2d 174, 164 Wn.2d 174 (2008).....	17
<i>State v. Mills</i> , 154 Wn.2d 1, 109 P.3d 415 (2005).....	16

Washington Court of Appeals

<i>State v. Alger</i> , 31 Wn. App. 244, 640 P.2d 44 (1982).....	16
<i>State v. Sivins</i> , 138 Wn. App. 52, 155 P.3d 982 (2007)	12

United States Supreme Court

<i>Sullivan v. Louisiana</i> , 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)	18
<i>Victor v. Nebraska</i> , 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994)	18

Washinton Statutes

RCW 10.52.100 8, 13
RCW 10.97.130 13
RCW 42.56.240 13
RCW 7.69A.030..... 13

Court Rules

GR 14.1..... 15
RAP 13.4..... 1, 11, 12, 17, 18, 19

Other Authorities

Doe v. Cabrera, 307 F.R.D. 1 (D.D.C. 2014) 13, 15
Doe v. Rose, 2016 WL 9150620 (C.D. Cal. 2016) 15
Does I thru XXIII v. Advanced Textile Corp., 214 F.3d
1058 (9th Cir. 2000)..... 14
Gen. Order 2011-1 of Division II, *In re the Use of Initials
or Pseudonyms for Child Witnesses in Sex Crime Cases* 13
Gen. Order of Division III, *In RE the Use of Initials or
Pseudonyms for Child Victims or Child Witnesses*..... 13

A. Identity of Petitioner

Levi Staples asks this Court to accept review pursuant to RAP 13.4 of the Opinion of the Court of Appeals in *State v. Levi Staples*, 78460-9.

B. Opinion Below

Mr. Staples appealed his convictions arguing the trial court repeatedly violated Article I, section 10 by permitting the filing of documents using initials or pseudonyms in place of the alleged adult victim's name. The never engaged in any analysis as required in *Seattle Times Co. v. Ishikawa*. Mr. Staples also contended that similar redactions and use of acronyms in the jury instructions was a comment on the evidence in violation of Article IV, section 16.

Even on appeal the State filed briefing using initials and pseudonyms in place of witness names. The State did so ignoring the plain dictates of *Ishikawa*, never demonstrating any need, nor asking the Court to engage in the required analysis. Even when Mr. Staples objected, the Court of Appeals never addressed the criteria of *Ishikawa*.

In its opinion, the Court of Appeals agreed the use of initials implicated the provisions of Article I, section 10, but did not violate them. The court also concluded the trial court's practice did not violate Article IV, section 16.

C. Issues Presented

1. Article I, section 10 of the Washington Constitution guarantees that "justice in all cases shall be administered openly." Courts may not redact or seal court documents without engaging in an on-the-record analysis as outlined in *Seattle Times Co. v. Ishikawa*. The redaction of the alleged victim's, Ana Prado, name in nearly all trial court documents, including the jury instructions violated Article I, section 10.

2. The State violated the plain requirements of *Ishikawa* and Article I, section 10 by filing numerous pleadings in the Court of Appeals that used initials and pseudonyms in place of witness's names without ever filing a motion as required by *Ishikawa*.

3. The Court of Appeals violated Article I, section 10 when it permitted the State to file numerous pleadings

including briefs that used initials and pseudonyms in place of witness's names without ever engaging in any analysis as required by *Ishikawa*.

4. Article IV, section 16 prohibits judges from commenting on the evidence, including the credibility of witnesses. Where the trial court instructed the jury in a way as to communicate to the jury the court's resolution of a disputed fact, that Ms. Prado was the victim of a crime the court violated this provision?

5. Mr. Staples has a right to due process, including the presumption of innocence. The Court's instructions to the jury undermined this presumption and relieved the State of its burden of proof.

D. Statement of the Case

In 2007, when he was 19 years old, Levi Staples went to an apartment complex where he had lived as a child. RP 215, 712. Mr. Staples was there to pick up his cousin who still lived in the complex. RP 215, 226.

While waiting, Mr. Staples saw Ana Prado talking on her cell phone inside her apartment. RP 225-27. He decided to steal the phone and knocked on her door. RP 229. According to Ms. Prado, after she answered her door, Mr. Staples pushed his way into the apartment, threatened her with a knife, and attempted to take off her clothes and grope her. RP 1099, 1101-03. Mr. Staples has consistently denied any sexual contact, while admitting the two fought when he tried to grab Ms. Prado's phone. RP 818-22. Ms. Prado ultimately struck Mr. Staples on the head with a pot, causing him to bleed profusely. RP 820, 910. Ms. Prado ran from her apartment and reported the incident to law enforcement. Because she was not familiar with Mr. Staples, the case went unresolved. See RP 1097, 1110, 1118.

In 2015, law enforcement obtained Mr. Staples' DNA in the course of investigating an unrelated matter.¹ The DNA

¹ The State charged Mr. Staples in the 2015 matter, and he ultimately pled guilty to Assault in the Second Degree based upon allegations that he engaged in sexual contact with a woman while she was sleeping at a party. CP 84, 103. Although charged separately, the 2007 and 2015 matters were, *sua sponte*, consolidated and the case filed in the 2007 incident (15-1-06618-4 KNT) was administratively closed in August 2016. CP 3. An amended information was

matched the blood collected from Ms. Prado's residence in 2007 and, in November 2015, the State charged Mr. Staples with Indecent Liberties. CP ____ (Sub. no. 142).

Although Ms. Prado was 21 years old at the time of the incident and nearly 30 years old when the charges were filed, the prosecutor and police concealed Ms. Prado's identity by using her initials, "A.P.", in the Information as well as the Certification of Probable Cause. CP 105-153. The State never filed a motion to redact the court records or to use pseudonyms, and there is no evidence that the court ever considered the need for redaction in Ms. Prado's case. *See* CP 1-149. In March 2018, the State filed a First Amended Information, again redacting Ms. Prado's name. CP 6. Both the prosecution and defense counsel continued to conceal Ms. Prado's identity in pretrial briefing. CP 8-26.

The case proceeded to trial nearly two-and-a-half years after the State began to conceal Ms. Prado's identity. RP 358.

filed charging each incident as a separate count. CP 6. The two counts were later severed for trial by agreement of the parties. CP 28. After being found guilty on count 2 (the 2007 case), Mr. Staples pled guilty to count 1 (the 2015 case), and a single Judgment and Sentence was entered as to both counts. CP 107-121.

Ms. Prado testified at trial under her true name. RP 1067. Although the parties referred to her by name during trial, the trial court again redacted the court records by using Ms. Prado's initials in the proposed and final to-convict jury instructions. CP 49, 77. The court concealed Ms. Prado's identity yet again in the Judgment and Sentence. CP 109-10, 113, 119.

On appeal, Mr. Staples challenged the repeated use of initials and pseudonyms in court filings and in the court's instructions. He argued that practice violated Article I, section 10, and Article IV, section 16, and required the trial court engage in an *Ishikawa* analysis.

On appeal, as it had at trial, the State filed numerous pleadings including briefs, which replaced witness names with initials and pseudonyms. The State never filed a motion requesting the court engage in an *Ishikawa* analysis. Even after Mr. Staples objected, the Court of Appeals failed to engage in that analysis. Even after it concluded the use of initials is akin to a redaction, and after noting redactions

require and *Ishikawa* analysis, the court still failed to engage in that analysis with respect to the pleadings and briefs filed by the State in the Court of Appeals.

E. Argument

1. The trial court repeatedly violated Article I, section 10 by permitting the filing of numerous pleadings employing redacted names and pseudonyms.

The Washington Constitution guarantees that “[j]ustice in all cases shall be administered openly.” Const. art. I, § 10. Despite that plain command, the State, trial court, and even defense counsel repeatedly concealed Ms. Prado’s identity throughout pretrial and trial proceedings.

Transparency is critical in fostering understanding and trust in the judicial system and ensuring a fair trial. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005), *Dreiling v. Jain*, 151 Wn.2d 900, 903-04, 93 P.3d 861 (2004). Indeed, “[t]he open administration of justice is a vital constitutional safeguard,” necessary to protect the integrity of the courts. *Hundtofte v. Encarnacion*, 181 Wn.2d 1, 7, 330 P.3d 168 (2014).

It is the court's obligation, and not counsel's, to meet its "independent obligation to protect the open administration of justice" as required by Article I, section. 10. *Hundtofte*, 181 Wn.2d at 9. Court records, like courtrooms, are presumed open. *See Hundtofte*, 181 Wn.2d at 7. "Each time restrictions on access to criminal hearings or the records from hearings are sought, courts must follow these steps" *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37, 640 P.2d 716, 720 (1982).

Article I, section 10 applies to the alteration of the names of litigants, alleged victims or witnesses in court documents are encompassed by and subject to an *Ishikawa* analysis. Indeed, the Court has found it unconstitutional to preclude disclosure of the identity of child victims of sexual assault absent an *Ishikawa* analysis. *Allied Daily Newspapers of Washington v. Eikenberry*, 121 Wn.2d 205, 848 P.2d 1258 (1993). *Eikenberry* struck down RCW 10.52.100, which barred disclosure of names and other identifying information of child victims of sexual assault, finding it implicated Article I, section 10. 121 Wn.2d at 208-09.

Hundtofte, found that alteration of a case title in SCOMIS conceal the litigant's names implicated Article I, section 10. 181 Wn.2d at 7-9. This Court has recognized “While Washington courts have allowed pseudonymous litigation, in some circumstances this court has still required a showing that pseudonymity was necessary. *Doe G. v. Dep’t of Corr.*, 190 Wn.2d 185, 200, 410 P.3d 1156 (2018) (citing *Ishikawa*, 97 Wn.2d at 37).

The Court of Appeals properly recognized efforts to conceal the identity of case participants implicates Article I, section 10. Opinion at 6. However, the court reasoned no violation occurred because other portions of the trial and record were open to the public. Opinion at 6-7. Such a conclusion ignores the plain holding of *Ishikawa*.

Ishikawa requires applications of its framework “each time” there is a restriction on access. 97 Wn.2d at 37. Thus, a violation occurs by any an improper redaction or sealed record even if the information might be shared in open court or is available in other ways. *Id.* It cannot matter under *Ishikawa*

that other portions of the proceeding or record do not contain similar restrictions.

Instead, whenever a party seeks to shield the identity of a witness or court participant the courts must engage in an on-the-record analysis the framework outlined in *Ishikawa*, 97 Wn.2d at 37-39; *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). That did not happen in this case.

Opinion of the Court of Appeals excuses the trial failure to comply with *Ishikawa* and Article I, section 10. By the logic of the opinion, no violation occurs unless the entirety of the proceedings and record is closed. The Court of Appeals concludes that as long as the information is available somewhere else, *Ishikawa* need not be followed. Such a conclusion renders *Ishikawa* and Article I, section 10 almost meaningless.

The opinion of the Court of Appeals is contrary to *Ishikawa* and numerous other decisions of this Court. Moreover, the opinion substantially weakens and nearly

eliminates the previously robust protections of Article I, section 10. This Court should grant review under RAP 13.4.

2. The State's use of pseudonyms and initials in State's appellate brief and pleadings in the Court of Appeals without meeting the requirements of Ishikawa, violates Article I, section 10.

Mr. Staples moved to strike the State's brief filed in the Court of Appeals. The State's brief, as with its trial court findings replaced Ms. Prado's name with initials. The State never filed a motion for permission to do so or asking the court to engage in the required *Ishikawa* analysis.

The court's opinion acknowledges, that the use of initials in court documents implicates the provisions of Article I, section 10. Despite that, and without addressing any of the criteria set forth in *Ishikawa*, the court denied Mr. Staples' motion to strike the State's brief. Thus, the court concluded it is permissible for litigants to unilaterally use pseudonyms, initials or otherwise redact pleadings without ever engaging in an *Ishikawa* analysis. That reasoning is plainly contrary to *Eikenberry*, *Hundtofte*

Doe G., and *Ishikawa*. This Court should accept review under RAP 13.4.

3. The use of pseudonyms in the instructions to the jury violates Article I, section 16.

Beyond the violation of the constitutional guarantee of open proceedings, the trial court's use of Ms. Prado's initials in the to-convict instructions was a prejudicial comment on the evidence.

Article IV, section 16 of the Washington Constitution states that "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." A jury instruction constitutes an improper comment on the evidence when it reveals the court's personal evaluation of the credibility, weight, or sufficiency of evidence presented at trial. *State v. Sivins*, 138 Wn. App. 52, 58, 155 P.3d 982 (2007). "[T]he court's personal feelings on an element of the offense need not be expressly conveyed to the jury; it is sufficient if they are merely implied." *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

Here, without explanation, the court used instructions that conspicuously concealed Ms. Prado's identity by using her initials in lieu of her name.² CP 77. This was tantamount to declaring her a victim. Numerous statutes and rules seek to convey status on alleged victims and certain witnesses by use of initials and pseudonyms. See RCW 10.52.100; RCW 7.69A.030; RCW 10.97.130; RCW 42.56.240; Gen. Order 2011-1 of Division II, *In re the Use of Initials or Pseudonyms for Child Witnesses in Sex Crime Cases*; Gen. Order of Division III, *In RE the Use of Initials or Pseudonyms for Child Victims or Child Witnesses*.

Several federal courts have found that the use of pseudonyms in civil sexual assault trials constitutes a judicial comment on the evidence prejudicing the defendant. In *Doe v. Cabrera*, 307 F.R.D. 1 (D.D.C. 2014), while allowing a victim

² The first element in the form "to convict" instruction for indecent liberties WPIC 49.02 provides, (1) That on or about (date) the defendant knowingly caused (*name of person*) to have sexual contact with the defendant[.]" (emphasis added). Because the incident occurred when RCW 9A.44.100 included a marital exception requiring the State to prove Ms. Prado was not married to Mr. Staples, the court used her initials a second time in the to-convict instruction. CP 77.

of sexual assault to proceed anonymously pretrial, the court refused to extend the use of pseudonyms to the trial phase, reasoning,

the defendant's ability to receive a fair trial will likely be compromised if the Court allows the plaintiff to continue using a pseudonym, ***as the jurors may construe the Court's permission for the plaintiff to conceal her true identity as a subliminal comment on the harm*** the alleged encounter with the defendant has caused the plaintiff.

Id. at 10 (emphasis added) (citing *E.E.O.C. v. Spoa, LLC*, No. Civ. CCB-13-1615, 2013 WL 5634337, at *3 (D. Md. 2013) for the proposition that “the court’s limited grant of anonymity would implicitly influence the jury should this case advance to trial.”); *see also Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000).

It is not difficult to appreciate that jurors may infer that the Court has an opinion about the harm the plaintiff has allegedly suffered by its decision to permit the plaintiff to conceal her true identity. The Court cannot afford the plaintiff that potential advantage at the expense of the defendant, who like the plaintiff is also entitled to a fair trial.

Cabrera, 307 F.R.D. at 10, n. 15.

Similarly, in *Doe v. Rose*, a California district court allowed a plaintiff in a sexual assault case to move forward anonymously pretrial, but precluded use of a pseudonym at trial, noting that several courts have concluded the practice may be interpreted as a comment on the evidence. 2016 WL 9150620 at *3 (C.D. Cal. 2016).³ Citing *Cabrera*, the *Rose* court went further, determining that, beyond a “subliminal suggestion,” use of a pseudonym “is perhaps more accurately characterized as an overt suggestion” that the alleged harm occurred, the prejudice of which could not be overcome even by a limiting instruction. *Id.* This suggestion is even more alarming in criminal cases such as this one, where the defendant is facing an indeterminate sentence and potentially life-long deprivation of liberty.

³ Under GR 14.1, a party may cite to unpublished cases from other jurisdictions as authority if citation is permitted in the jurisdiction of the issuing court. Pursuant to Federal Rule of Appellate Procedure (FRAP) 32.1, a court cannot restrict citation to unpublished federal judicial opinions issued after January 1, 2007.

Concealing Ms. Prado's identity as part of the to-convict instruction is uniquely damaging. "The 'to convict' instruction carries with it a special weight because the jury treats the instruction as a 'yardstick' by which to measure a defendant's guilt or innocence." *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). It is the to-convict instruction that the jury returns to time and time again. For this reason, additional instructions cannot adequately supplement a defective "to convict" instruction. *State v. Johnson*, 180 Wn.2d 295, 306, 325 P.3d 135 (2014).

The Court of Appeals brushes all this aside, suggesting courts have previously found the use of the term "victim" in jury instructions was proper. Opinion at 7. But that is not the case.

First, the Court of Appeals, cites to *State v. Alger*, 31 Wn. App. 244, 640 P.2d 44 (1982), as approving the practice. But that case addressed a single use of the word "victim" in a stipulation of the parties read by the court and concluded it might be error. However, the error was both invited and

harmless error in any event. At no point did the court conclude the use of the term “victim” in a jury instruction was proper.

Second, the opinion cites to this Court’s decision in *State v. Magers*, 164 Wn.2d 174, 164 Wn.2d 174 (2008) as approving the practice. But that opinion says no such thing. There was no argument in *Magers* concerning improper judicial comments. There was no discussion of the propriety of the use of the term “victim” in any instruction.

Identifying an adult witness in a way that plainly conveys to the jury that she is the victim of a sexual assault, when that fact is very much in dispute, is a plain violation of Article, section 16. The opinion of the Court of Appeals presents a significant constitutional question. Review is warranted under RAP 13.4.

4. The use of initials to identify the alleged victim in jury instructions undermines the presumption innocence demanded by the Due Process Clause.

“The presumption of innocence is the bedrock upon which the criminal justice system stands.” *State v. Bennett*,

161 Wn.2d 303, 165 P.3d 1241 (2007); U.S. Const. amends. VI, XIV. Jury instructions must accordingly convey the State's burden to prove every element beyond a reasonable doubt. *Id.* (citing *Victor v. Nebraska*, 511 U.S. 1, 5-6, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994)). Reversal is warranted where the jury is instructed in a manner that relieves the State of this high burden of proof as to any element. *See Bennett*, 161 Wn.2d at 307; *Sullivan v. Louisiana*, 508 U.S. 275, 277, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

Referring to Ms. Prado in the jury instructions by her initials conveyed to the jury she was a victim. That left it to Mr. Staples to prove his innocence. Mr. Staples was deprived his right to due process and a fair and impartial jury. This Curt should accept review pursuant to RAP 13.4.

F. Conclusion

The use pseudonyms or initials to shield the identity of a victim or witness violates article I, section 10. The use of pseudonyms or initials in place of an alleged victim's name in

jury instructions violates Article IV, section 16, and the right to due process.

This Court should grant review pursuant to RAP 13.4.

Dated this 26th day of February, 2020.

A handwritten signature in black ink, appearing to read "Gregory C. Link". The signature is written in a cursive style with a large, stylized initial "G".

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

THE STATE OF WASHINGTON ,

Respondent,

v.

LEVI QUERILLA STAPLES, JR.,

Appellant.

No. 78460-9-I

ORDER DENYING MOTION
TO PUBLISH

Non-party Igor Lukashin has filed a motion to publish the opinion filed on December 30, 2019. The court has determined that said motion should be denied.

ORDERED that the motion to publish is denied.


Judge

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON ,

Respondent,

v.

LEVI QUERILLA STAPLES, JR.,

Appellant.

No. 78460-9-1

DIVISION ONE

UNPUBLISHED OPINION

FILED: December 30, 2019

APPELWICK, C.J. — A jury found Staples guilty of breaking into a woman's home and forcibly groping her. Staples contends that the use of the victim's initials in various court documents violated the public trial right and in the jury instructions was a judicial comment on the evidence. He contends that community custody conditions imposed upon him are not crime-related and infringe on his constitutional rights to free speech and privacy. He also challenges sufficiency of the evidence. We affirm.

FACTS

On November 25, 2007, Levi Staples observed the victim¹ talking on her cell phone through her window in the Country Hills Apartments in Renton. Staples knocked on the victim's door and asked if he could borrow her phone.

Staples claims that the victim then invited him into her home to use the phone. Once inside the house, he claims that he tried to take the phone, but that

¹ The identity of the victim is not necessary for the analysis in this opinion.

the victim hit him with a pot that she had been holding in her hand since opening the door, and he fled.

The victim's version of events is different. She claims that she partially opened her door and gave him the phone. She then observed Staples pretend to make a phone call. He then returned the phone to the victim. Staples forced his way into the apartment through the door. He shut the door and locked it behind him.

The victim started screaming, and Staples covered her mouth, put a knife to her throat, and said, "[b]itch shut the f**** up, I've got a knife." Staples then began groping the victim and whispering "perverse" comments in her ear. The victim resisted, and the two wrestled around the apartment, with Staples continuing to grope the victim. The wrestling eventually moved into the kitchen, where the victim was able to grab a pot from the stove and strike Staples in the head. The blow caused Staples's blood to splatter in the kitchen and allowed the victim to escape. She fled the apartment but observed Staples enter her bedroom before he fled.

The victim banged on her neighbor's door, screaming, "Let me in, let me in. He tried to rape me." Her neighbor let her in and locked the door. She described the victim as "hysterical" and "petrified." She called the police.

The victim told the officer that arrived that she had been sexually assaulted. The officer described her as "visibly upset" and crying. The officer did not notice any visible injuries on the victim. Upon walking through the apartment, the officer found blood in the kitchen, the hallway, and on the victim's bedroom door.

The victim had never met or seen her assailant prior to the assault. The case went unsolved until police collected Staples' DNA (deoxyribonucleic acid) in a separate investigation in 2015 and matched it to the DNA collected from the victim's apartment.

Staples was charged with indecent liberties.² Both the State and defense identified the victim by her initials in their documents. Her name was used at the CrR 3.5 hearing. She testified under her full name and was referred to by her full name throughout trial.

The jury found Staples guilty as charged. He was sentenced to 62 months to life imprisonment, with a lifetime of community custody if released from prison. As conditions of community custody, Staples is required to notify his supervising community corrections officer (CCO) of any dating relationship, disclose his sex offender status prior to any sexual contact, and refrain from sexual contact unless approved by a treatment provider. He is also required to obtain his CCO's permission before changing work locations.

Staples appeals.

DISCUSSION

Staples alleges four errors. First, he argues that the use of the victim's initials rather than her full name in various court documents violated article I, section 10 of the Washington Constitution. Second, he claims the use of the

² Staples was also charged with assault in the second degree as a result of the above referenced investigation. That crime involved Staples having sexual contact with an acquaintance while she was sleeping. Staples pleaded guilty to that charge.

victim's initials in the jury instruction constituted a judicial comment on the evidence. Third, he argues the court erred in imposing various special conditions of community custody upon him, because those conditions were not crime-related and infringed on his constitutional rights. Last, he argues that there was insufficient evidence to support his conviction.

I. Public Trial Right

Staples argues that the use of the victim's initials in various court documents violated article I, section 10 of the Washington Constitution. The Washington Constitution demands that "justice in all cases shall be administered openly" and also gives defendants an individual right to a public trial. CONST. art. I, §§ 10, 22. These related constitutional provisions are often collectively called the "public trial right." State v. Love, 183 Wn.2d 598, 605, 354 P.3d 841 (2015). Staples does not allege a violation of his own right to a public trial under section 22. Rather, he asserts a violation of section 10, "justice in all cases shall be administered openly," which is a "command to the judiciary" rather than an individual right of the defendant. State v. Herron, 177 Wn. App 96, 105, 318 P.3d 281 (2013), aff'd, 18 Wn.2d 737, 356 P.3d 709 (2015). Article I, section 10 protects all members of the public. In re Det. of Ticeson, 159 Wn. App. 374, 381-82, 246 P.3d 550 (2011), abrogated on other grounds by State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012). As a member of the public, Staples has standing to challenge a violation of article I, section 10. Id. Staples did not object to the use of the victim's initials at trial. He nevertheless argues that he is not precluded from raising the issue for the first time on appeal because it is a manifest error affecting a constitutional right.

Improper courtroom closure is a constitutional error that may be raised for the first time on appeal. Ticeson, 159 Wn. App. at 382-83. Whether the public trial right has been violated is a question of law reviewed de novo. Id. at 379.

Courts may restrict the public's access to court records to protect other interests. Hundtofte v. Encarnación, 181 Wn.2d 1, 5-6, 330 P.3d 168 (2014); Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982). The Ishikawa court laid out five factors³ that must be considered before a restriction of the public's article I, section 10 right may take place. See id. at 37-39. However, not all arguable courtroom closures require satisfaction of the five-part test. State v. Slert, 181 Wn.2d 598, 604, 334 P.3d 1088 (2014). The court must first utilize the "experience and logic" test to determine whether the public trial right is implicated by a purported court closure. Id. The "experience" prong asks whether the place and process have historically been open to press and general public. Id. The "logic" prong asks whether public access plays a significant positive role in the functioning of the particular process in question. Id. If the answer to both questions is yes, then the public trial right attaches. Id. The court must then determine if a closure has in fact occurred. Love, 183 Wn.2d at 605. The appellant bears the burden of showing both that the public trial right has attached, and that a closure

³ (1) the proponent of the closure and/or sealing must make a showing of need; (2) anyone present when the closure motion is made must be given an opportunity to object; (3) the court, proponents, and objectors should analyze whether the requested method of curtailing access is the least restrictive means available to protect the threatened interest; (4) the court must weigh the competing interests of the defendant and the public and (5) The order must be no broader than necessary to serve its purpose. Ishikawa, 97 Wn.2d at 37-39.

has occurred. Id. at 605. If the appellant can carry their burden, it shifts to the proponent of the closure to prove that it was justified. Id.

We need not engage in a full experience and logic analysis when case law has applied the public trial right to the proceeding at issue. Id. at 605. Prior cases make clear that court records are open to the public unless sealed by the court. See Rufer v. Abbott Labs., 154 Wn.2d 530, 540, 114 P.3d 1182 (2005). This presumption applies to all records filed with the court in anticipation of a court decision. See id. at 549. Our Supreme Court has also held in the past that the use of initials in these records is a redaction. Hundtofte, 181 Wn.2d at 5-6. Such a redaction can be considered a closure.⁴ See id. at 6-7. However, Staples has failed to establish that a closure has occurred.

The facts here are similar to Love, 183 Wn.2d at 601-04. There, both parties conducted preemptory challenges during jury selection in writing rather than orally. Id. at 602-03. After that process concluded the struck jury list was filed in the court record. Id. at 603. The argument was that this restricted the public's access to that information. Id. at 604. Our Supreme Court, however, found no closure had occurred because the public was able to witness the entire process, including the judge later reading in open court the names of the jurors who remained. Id. at 603, 607.

⁴ In Hundtofte, the use of initials was ordered by the court to remove information that was previously in the record. 181 Wn.2d at 3-4. Here, the party's spontaneously utilized initials without order of the court, and so did not remove information that was previously in the record. Finding no case directly on point, we choose to treat the use of initials as a redaction.

Here, as in Love, information that was temporarily inaccessible to the public was made readily available elsewhere in the record. The victim's name was used at the CrR 3.5 hearing. She testified under her full name and was referred to by her full name throughout trial. As in Love, the goals of transparency that animate article I, section 10 are served here because the public was able to monitor the proceedings and observe the victim testify under her full name in open court.

We hold that the Staples has failed to establish that a closure has occurred.

II. Judicial Comment on the Evidence

Staples contends that the use of the victim's initials in the to convict instruction constituted a judicial comment on the evidence. The Washington Constitution article IV, section 16 prohibits judges from commenting on matters of fact. A jury instruction constitutes an improper comment on the evidence when it reveals the court's personal evaluation of the credibility, weight, or sufficiency of the evidence presented at trial. See State v. Sivins, 138 Wn. App. 52, 58, 155 P.3d 982 (2007). This court reviews jury instructions de novo within the context of the jury instructions as a whole. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

Staples contends that the use of the victim's initials implied to the jury that the court considered her a victim of sexual assault in need of protection. The first element of the pattern instruction used in this case as the to convict instruction, reads as follows: "That on or about (date) the defendant knowingly caused (name of victim) to have sexual contact with the defendant." 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 49.02, at 1005 (4th ed. 2016).

Staples argues that “(name of victim)” may be replaced only with the victims full name or the term “alleged victim” to avoid judicial comment on the evidence.⁵ We disagree.

We have held that the use of a victim’s full name in the jury instructions does not constitute a comment on the evidence. See Levy, 156 Wn.2d at 722. We have also found that the use of the term “the victim” does not ordinarily convey to the jury the court’s personal opinion on the case. State v. Alger, 31 Wn. App 244, 249, 640 P.2d 44 (1982).⁶ We reject Staples argument that the use of initials is a comment on the evidence.

We hold that the jury instruction was not a judicial comment on the evidence.

III. Due Process Violation

Staples also contends that the use of the victim’s initials in the jury instructions undermined the presumption of innocence by identifying her as a victim. As noted above, a juror would likely not presume the victim was a victim simply because of the use of her initials. The jury was also specifically instructed that Staples was presumed innocent, and that the state must prove all elements beyond as reasonable doubt. The instructions, when viewed as a whole, did not lower the burden of proof.

We hold that use of initials did not violate due process.

⁵ Staples made this argument explicitly for the first time at oral argument.

⁶ Our Supreme Court has found no issue with the use of the word “victim” in jury instructions. State v. Mayers, 164 Wn.2d 174, 186-87, 189 P.3d 126 (2008).

IV. Community Custody Conditions

Staples argues that the trial court erred in imposing various community custody conditions upon him. The imposition of community custody conditions are governed by RCW 9.94A.703. RCW 9.94A.703(3)(c) gives the sentencing court discretion to order the offender to participate in crime-related counselling services. RCW 9.9A.703(3)(d) gives the sentencing court discretion to order the offender to participate in rehabilitative programs or perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community. We review imposition of community custody conditions for abuse of discretion and will reverse them only if they are manifestly unreasonable. State v. Padilla, 190 Wn.2d 672, 677, 416 P.3d 712 (2018). A sentencing court abuses its discretion when it imposes an unconstitutional condition. Id.

A. Special Condition Number 5

Staples objects to special condition number 5, which requires Staples to [i]nform the supervising CCO and sexual deviancy provider of any dating relationship. Disclose sex offender status prior to any sexual contact. Sexual contact in a relationship is prohibited until the treatment provider approves of such.

He contends that the condition is not crime related and infringes upon his constitutional rights to free speech and due process.

1. Crime Related

Staples contends that special condition number 5 was not crime related under RCW 9.9A.703(3)(c)-(d). There need be only "some basis" connecting the

community custody condition to the crime. State v. Irwin, 191 Wn. App. 644, 657, 364 P.3d 830 (2015). Staples argues that there is no basis for this condition because the two incidents for which he was sentenced did not involve a domestic partner. Staples's sentencing was for both his 2007 attack on the victim, and a 2015 incident where he had sexual contact with an acquaintance while she was sleeping. This second conviction forms a reasonable basis for special condition number 5 because it shows that Staples's propensity for sex crimes is not limited to strangers. That neither woman was in a dating relationship with Staples does not preclude the trial court from utilizing its discretion to impose this condition.

We find that special condition number 5 is crime related.

2. Free Speech

Staples contends that special condition number 5 violates his free speech rights. He specifically objects to the conditions requiring him to disclose his status as a sex offender status prior to any sexual contact, and to disclose any dating relationship to his CCO and treatment provider. The state generally cannot force an individual to speak against his will. State v. K.H.-H, 185 Wn.2d 745, 749, 374 P.3d 1141 (2016). Speech rights are lessened in the context of prison or probation. Id. Sentencing judges have broad discretion to impose conditions affecting free speech rights if they are reasonably related to permissible purposes. Id. at 750.

Staples claims this condition is overly broad and not reasonably tied to his crime. Staples was convicted of attempting nonconsensual sex on separate occasions with a stranger and an acquaintance. The requirement that he inform his treatment provider of any dating relationship is rationally related to the success

of his treatment program. The requirement that he disclose his status as a sex offender prior to engaging in future sexual behavior is rationally related to ensuring his future sexual pursuits are entirely consensual.

We find special condition number 5 does not violate Staples's free speech rights.

3. Due Process

Staples also argues that special condition number 5 is an infringement of his rights to privacy and marriage. People are entitled to privacy, including to have consensual sex in their own homes. See generally Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003). Physical intimacy is recognized as an important part of the marital bond. See Obergefell v. Hodges, 135 S. Ct. 2584, 2599, 192 L. Ed. 2d 609 (2015).

Restrictions on privacy in community custody conditions are justified when reasonably necessary to protect the community. In re Pers. Restraint of Waggy, 111 Wn. App. 511, 517-18, 45 P.3d 1103 (2002). The conditions are justified here because of Staples's criminal sexual conduct towards both strangers and acquaintances. Condition number 5 refers to "dating relationships" and therefore is not applicable to Staples's existing marriage.

We find no due process violation in the community custody conditions.

B. Special Condition Number 6

Staples contends that the trial court abused its discretion by imposing special condition number 6 because is not crime related and not required by statute. Special condition number 5 requires Staples to "[o]btain prior permission

of the supervising CCO before changing work location.” This condition is related to the condition that Staples must work at “department approved employment,” which is a waivable condition under RCW 9.9A.703(2)(b). Unlike conditions under RCW 9.9A.703(3)(c)-(d), this condition does not contain language requiring the condition to be crime related. Compare RCW 9.9A.703(2)(b), with RCW 9.9A.703(3)(c)-(d). The condition is reasonably necessary to help Staples’s CCO to know of his whereabouts and movements. Its imposition is not manifestly unreasonable by the trial court.

Staples further contends that the condition is unconstitutionally vague because it invites arbitrary enforcement. A condition is vague if (1) it does not define the offense such that an ordinary person can understand the prohibition; or (2) the condition does not provide sufficiently ascertainable standards to protect against arbitrary enforcement. See State v. Bahl, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008). The condition here is easy for an ordinary person to understand: prior to changing work location, you must obtain approval from your CCO. The condition does not provide standards for the CCO to utilize in approving a work location change request. But, the vagueness doctrine is concerned with arbitrary enforcement resulting from uncertainty in terms. State v. Smith, 130 Wn. App. 721, 728, 123 P.3d 896 (2005). Here, the terms are clear: whenever a change in work location is sought, the condition is implicated.

We find no abuse of discretion or unconstitutional vagueness in special condition number 6.

V. Statement of Additional Grounds


Staples contends that there was insufficient evidence to convict him at trial. He contends this is so because (1) no knife was recovered from the scene, (2) the victim presented no visible injuries, and (3) the victim's shirt was not ripped. Sufficiency of the evidence is a question of constitutional law that this court reviews de novo. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). The State is required to prove all elements of the charged offense beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The elements the state needed to prove in this case were that Staples knowingly caused the victim to have sexual contact with him by forcible compulsion, and that he was not married to her. Evidence is sufficient to support a conviction if "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (emphasis omitted) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L. Ed. 2d 560 (1979)), overruled on other grounds by Schlup v. Delo, 513 U.S. 928, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). It is the function of the jury to determine the credibility of witnesses. State v. Holbrook, 66 Wn.2d 278, 279, 401 P.2d 971 (1965). When a defendant challenges the sufficiency of the evidence, they admit the truth of all the state's evidence. State v. Cardenas-Flores, 189 Wn.2d 243, 265, 401 P.3d 19 (2017).

Here, the victim testified to all the elements of the crime. Assuming her testimony was true, a rational juror need not have found any of the shortcomings

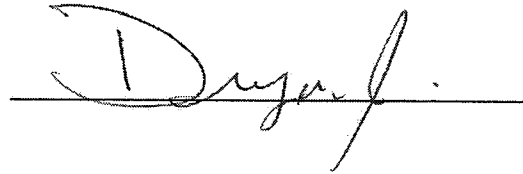
that Staples raised to find the elements of the crime proven beyond a reasonable doubt.

We reject Staples' claim of insufficiency of the evidence.

We affirm.

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WE CONCUR:

A handwritten signature in cursive script, appearing to read "Smith, J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Dwyer, J.", written over a horizontal line.

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

THE STATE OF WASHINGTON ,

Respondent,

v.

LEVI QUERILLA STAPLES, JR.,

Appellant.

No. 78460-9-I

ORDER DENYING MOTION
TO STRIKE

The appellant, Levi Staples, has filed a motion to strike the respondent's brief. The respondent, State of Washington, has filed a response and Staples has filed a reply. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion to strike is denied.


Judge

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. 78460-9-I**, 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 or residence address as listed on ACORDS:

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Washington Appellate Project

Date: February 26, 2020

WASHINGTON APPELLATE PROJECT

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