

66405-1

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No. 66405-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,
 Respondent/Cross-Appellant,
 v.
 PAUL J. KIM
 Appellant/Cross-Respondent.

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

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. Mr. Kim's Fifth Amendment privilege against self-incrimination was violated when the court admitted his custodial statements to a law enforcement officer in the absence of proof Mr. Kim knowingly, intelligently, and voluntarily waived his constitutional right to remain silent.

2. The trial court erred by concluding that Mr. Kim understood and voluntarily waived his constitutional right to remain silent. (Conclusion of Law 3.3)

3. The trial court erred by concluding that Mr. Kim was not in custody and that a reasonable person in Mr. Kim's position would not have believed he was under arrest at the time he made statements. (Conclusion of Law 3.5).

4. The trial court erred by concluding Mr. Kim speaks English fluently and his language skills "did not hinder his ability to understand his Constitutional (Miranda) rights." (Conclusion of Law 3.6)

5. The trial court erred by concluding all statements made by Mr. Kim to the interrogating detective were voluntary and admissible. (Conclusion of Law 4.5)

6. The trial court erred by admitting evidence that Mr. Kim was an accomplice to sexual crimes against M.K. in 2009, five years after the end of the charging period.

7. The trial court erred by ordering Mr. Kim to pay for the victims' counseling and medical costs as a condition of community custody when no restitution was ordered.

8. The trial court erred by ordering Mr. Kim not to "possess or control sexual stimulus materials for your particular deviancy as defined by the supervising Community Corrections Officer and therapist except as provided for therapeutic purposes" as a condition of community custody.

9. The trial court erred by ordering Mr. Kim to "stay out of drug areas" as a condition of community custody.

10. The trial court erred by ordering Mr. Kim to undergo plethysmograph testing at the direction of his supervising community custody officer.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The state and federal constitutions guarantee a suspect the right not to incriminate himself. Prior to admission of a defendant's custodial statement, the court must determine if the defendant knowingly, intelligently and voluntarily waived his

constitutional rights to remain silent and to consult with an attorney.

At the police station, Mr. Kim was advised of his constitutional rights in English and signed a waiver of his constitutional rights in English. Where Mr. Kim was interviewed in a closed interview room at a police station by an armed detective who deliberately misled Mr. Kim about whether he was free to leave, would a reasonable person in Mr. Kim's position believe he was in custody?

(Assignments of Error 1-5)

2. Where Mr. Kim's native language is Korean, did the trial court improperly conclude he knowingly, intelligently, and voluntarily waived his constitutional rights before speaking to a police officer? (Assignments of Error 1-5)

3. Evidence of a defendant's other crimes or misconduct may be admitted to prove an important ingredient of the charged offenses only if the trial court determines the misconduct occurred, identifies a non-propensity purpose for admitting the evidence, determines its relevancy, and weighs its probative value against the prejudicial effect. The trial court admitted M.K.'s testimony that Mr. Kim forced him to engage in sexual misconduct over five years after the end of the charging period and the two therefore had a fight in which Mr. Kim slapped his son. Did the trial court err by

admitting the 2009 misconduct as part of the res gestae of the crimes without balancing the probative value of the evidence against its prejudicial effect? (Assignment of Error 6)

4. Under the Sentencing Reform Act (SRA), the trial court must set restitution. Did the court improperly delegate its authority to the Department of Corrections by ordering Mr. Kim to pay his children's medical and counseling costs as a condition of community custody without determining any restitution should be imposed? (Assignment of Error 7)

5. Due process requires that conditions of community custody must be definite enough that ordinary people can understand what conduct is and is not prohibited. Mr. Kim was ordered not to "possess or control sexual stimulus materials for your particular deviancy as defined" by his Community Corrections Officer and therapist. Where there was no determination of Mr. Kim's "particular deviancy," is the community custody condition unconstitutionally vague? (Assignment of Error 8)

6. Did the trial court improperly delegate its sentencing authority by imposing a condition of community custody that permitted the community corrections officer and therapist to define

Mr. Kim's deviancy and what "sexual stimulus materials for that deviancy" would be prohibited? (Assignment of Error 8).

7. The SRA authorized the trial court to impose "crime-related" prohibitions as conditions of community custody. In the absence of any evidence Mr. Kim used illegal drugs or that illegal drugs contributed to his offenses, is the condition of community custody requiring him to stay out of "drug areas" a crime-related prohibition authorized by the SRA? (Assignment of Error 9)

8. The due process clauses of the federal and state constitutions protect fundamental rights, such as the right to be free from government intrusion in one's body. Qualified professionals may utilize penal plethysmograph testing in the diagnosis and treatment of sexual deviancy, but the test should not be used to monitor conditions of community custody. Does the condition of community custody requiring Mr. Kim to submit to penal plethysmograph examinations as required by his community corrections officer violate his constitutional right to be free from bodily intrusions? (Assignment of Error 10).

C. STATEMENT OF THE CASE

Paul Kim was born and raised in South Korea and then immigrated with his parents to Alaska. 2RP 298-99.¹ Mr. Kim and his wife Jennifer moved to the Seattle area where he worked at a mortgage bank and later was the director of the Snohomish County Recreational Area. 2RP 299. The couple had three children: daughter V.K, born April 17, 1989; son M.K., born September 29, 1991, and daughter M.Y.K., born July 15, 1999. 1RP 57-60; 2RP 160-63, 210.

The Kims lived in an apartment in Edmonds for about three years beginning in 1995. 2RP 299-100, 310. They then moved to an apartment in Montlake Terrance where they resided for three or four years, then purchased a home in Lynnwood, and later bought a larger house in Mukilteo. 1RP 61-62; 2RP 301-02. Various family members lived with the Kims for much of this time. 1RP 60-61, 66-67; 2RP 183, 202, 305.

The Snohomish Court Prosecutor charged Mr. Kim by amended information with (1) three counts of rape of a child in the

¹ 1RP refers to the verbatim report of proceedings for September 20 and September 21, 2010 (marked Volume 1).

2RP refers to the revised verbatim report of proceedings for September 22-24, 2010 (marked Volume 2 (revised)).

All other volumes will be referred to by date.

first degree against V.K., occurring between April 17, 1995, and April 16, 2001, (2) three counts of rape of a child in the first degree against M.K., occurring between September 29, 2001, and September 28, 2003, and (3) three counts of child molestation in the first degree for M.Y.K., occurring between July 15, 2004, and July 14, 2006. CP 31-38, 66-67.

At trial in 2010, 18-year-old M.K. related that Mr. Kim directed him to have sexual intercourse with M.K.'s mother, Mrs. Kim, beginning when M.K. was nine years old.² 1RP 64, 67-77, 80-83. M.K. said this happened numerous times over the three-year charging period, when he was between the ages of nine and twelve. CP 67; 1RP 73.

In 2009, M.K. ran away from home to a cousin's home and told two cousins, an aunt, and a school counselor what had happened, leading to the involvement of the police. 1RP 91-94. M.K. later asked his older sister V.K. if she was aware of what happened to him, as she was sometimes asleep in their parents' bed when it occurred. V.K. was unaware of the abuse of M.K., and told her brother that their parents had not abused her. 1RP 128-29; 2RP 169-70. M.K. tried to keep an eye on his younger sister,

² Mrs. Kim was charged separately and did not testify at Mr. Kim's trial.

M.Y.K, and he did not see any sign that her parents sexually abused her. 1RP 129, 141-42.

V.K. was 21 years old at the time of the trial. 2RP 160. Although her memory was “mostly blurry,” V.K. said her father would come into her bed, undress her, touch her chest and private area, and insert his penis in her vagina. 2RP 167, 172-74, 207. She said this occurred over 25 times beginning when she was probably six or seven years old and ending before she turned twelve. 2RP 174-75, 178, 181-83, 198. V.K. also related one incident where Mr. Kim forced his penis into her mouth. 2RP 179-80. V.K. also tried to protect her younger sister M.Y.K. and saw no evidence that M.Y.K. was abused. 2RP 194-95.

Eleven-year-old M.Y.K. testified that her father touched her on her “front private” part about four times. 2RP 210, 216-20. The first time, when M.Y.K. was about five years old, she was sleeping in her parents’ bed and woke up with her father’s hand between her legs. 2RP 217-18. She moved his hand away and went to use the bathroom, and her “front private” area hurt a bit. 2RP 216, 220. This occurred in when the family lived in Lynnwood. 2RP 221-022. M.Y.K. said the second time also occurred in her parents’ bed, and her father stopped when she moved to the other side of her mother.

That incident occurred when they were living in Mukilteo. 2RP 223-25. M.Y.K. could not describe any other time this occurred, but remembered that one time she left her parents' bedroom and went to sleep in the room she shared with her sister. 2RP 225-26.

Mr. Kim's mother lived with her son's family for six years in Edmonds and Mukilteo. 2RP 269-70. She did not see any indication of trouble between the children and either parent. 2RP 271. Mr. Kim's sister Juliet Kim and her daughter lived with the Kim family for six or seven years in Lynnwood. 2RP 273. Juliet was not working and spent a lot of time with the children. 2RP 273. She did not observe any problems and described the family as happy. 2RP 275.

Mr. Kim's niece Christina Kim was very close to her three younger cousins, especially V.K. 2RP 202-03, 279-82, 291, 296. Christina viewed Mr. Kim as a father figure, and she lived in his home for six to eight months in 2002-2003. 2RP 202, 280, 287-88. V.K, M.K, and M.Y.K never told Christina they were abused, and she never saw any unusual behavior or other indicators of child abuse. 2RP 203, 283, 284-85.

Mr. Kim was convicted as charged. CP 31-38. He appeals, and the Snohomish County Prosecutor's Office has filed a cross-appeal. CP 1-3.

D. ARGUMENT

1. MR. KIM'S CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION WAS VIOLATED WHEN THE COURT ADMITTED HIS CUSTODIAL STATEMENT IN RESPONSE TO POLICE INTERROGATION EVEN THOUGH HE COULD NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVE HIS CONSTITUTIONAL RIGHTS DUE TO THE LACK OF A KOREAN INTERPRETER

The federal and state constitutions provide an accused the right not to incriminate himself.³ U.S. Const. amends. V, XIV; Const. art. I, § 9. Due to the coercive nature of police custody, police officers must provide a basic advisement of this constitutional right to a suspect prior to questioning. Miranda v. Arizona, 384 U.S. 436, 467, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The suspect must be unequivocally advised of his right to remain silent, that anything he says may be used against him in court, that

³ The Fifth Amendment provides that no person "shall be compelled in any criminal action to be a witness against himself." The Fifth Amendment is applicable to the States through the Fourteenth Amendment. Miranda, 384 U.S. at 463-64.

Article 1, section 9 of the Washington Constitution states, "No person shall be compelled in any criminal case to give evidence against himself." Washington courts have given article 1, section 9 the same interpretation as the United States Supreme Court has given the Fifth Amendment. State v. Unga, 165 Wn.2d 95, 100, 196 P.3d 645 (2008).

he has the right to have an attorney present if he chooses to make a statement, and that an attorney will be appointed for him if he cannot afford one. Miranda, 384 U.S. at 479. The Miranda warnings are a bright-line constitutional requirement. Dickerson v. United States, 530 U.S. 428, 442-44, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000).

An individual may knowingly and intelligently waive his constitutional rights and answer questions or provide a statement to the police. Miranda, 384 U.S. at 479. The issue is not one of form, but of whether the suspect in fact knowingly and voluntarily waived the rights to remain silent and to counsel. Fare v. Michael C., 442 U.S. 707, 724, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979); North Carolina v. Butler, 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979).

a. Mr. Kim was in custody. The requirement that police officers administer Miranda warnings prior to interrogation applies to any suspect who “has been taken into custody or otherwise deprived of his freedom of action in any significant way.” Miranda, 384 U.S. at 444; accord Berkemer v. McCarty, 468 U.S. 420, 440, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). A suspect is in custody if, in light of the totality of the circumstances, a reasonable person

would have felt he “was not at liberty to terminate the interrogation and leave.” Thompson v. Keohane, 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995); State v. Heritage, 152 Wn.2d 210, 218, 95 P.3d 345 (2004).

In determining if a suspect is in custody, the reviewing court looks at “all of the circumstances surrounding the interrogation” to determine “how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action.” Yarborough v. Alvarado, 541 U.S. 652, 663, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004) (quoting Stansbury v. California, 511 U.S. 318, 325, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994) (per curiam)). Appellate courts review the trial court’s custody determination de novo. State v. Daniels, 160 Wn.2d 256, 261, 266, 156 P.2d 905 (2007), cert. denied, 130 S.Ct. 85 (2009); State v. Lorenz, 152 Wn.2d 22, 36, 93 P.3d 133 (2004). The first step in the process, determining the circumstances surrounding the interrogation, is a factual one. Thompson, 516 U.S. at 112-13. The second question, whether a reasonable person in those circumstances would believe he was not free to leave, is a mixed question of fact and law. Id.

Mr. Kim responded to a message from Mukilteo Police Detective Lance Smith, and met the detective at the police station. 1RP 14-15; Undisputed Findings of Fact 1.1 – 1.3.⁴ Detective Smith intended to arrest Mr. Kim, but he first wanted to interview him. 1RP 15, 20. The detective therefore escorted Mr. Kim to a small interview room and closed the door. 1RP 15, 32; Undisputed Finding of Fact 1.3. Detective Smith advised Mr. Kim of his constitutional rights but did not explain that he intended to arrest Mr. Kim at the conclusion of the interview and that Mr. Kim was thus not free to go. 1RP 17-19; Undisputed Finding of Fact 1.4. Mr. Kim was arrested as soon as the interview was over. 1RP 24-25.

The determination of whether a suspect is in custody for purposes of Miranda is based upon all of the circumstances surrounding the questioning. Yarborough, 541 U.S. at 663. The court determined Mr. Kim was not restrained in any way because the detective did not tell him he was not free to leave. Conclusions as to Disputed Fact 3.3, 3.5; Conclusion of Law 4.1; 1RP 49, 51.

The court, however, did not consider the compelling facts that the

⁴ The Certificate Pursuant to CrR 3.5 of the Criminal Rules for Superior Court (sub. no. 95, 5/16/11) was filed after Mr. Kim filed his Designation of Clerk's Papers. A copy is therefore attached to this brief, and a supplemental designation will be filed.

officer intended to arrest Mr. Kim and informed him of his constitutional rights as if Mr. Kim were in custody.

The Lorenz Court found the defendant was not in custody when police officers interrogated her on the front porch of her trailer and specifically told her she was not under arrest and was free to leave. Lorenz, 152 Wn.2d at 27, 37-38. Here, in contrast, Mr. Kim was in a small private “interview room” at a police station being questioned by an armed detective. 1RP 15, 16-17. His movement was thus constrained by the detective. See Orozco v. Texas, 394 U.S. 324, 326-27, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969) (custodial interrogation when officers questioned suspect in his boardinghouse); State v. Dennis, 16 Wn.App. 417, 419, 421-22, 558 P.2d 297 (1976) (defendants in custody in own home because officers conscribed their freedom of movement within the home).

Additionally, Mr. Kim was advised of his Miranda rights prior to the interrogation and asked to waive those rights. 1RP 17-20. Most citizens are aware that the Miranda rights are read to suspects upon arrest. The subsequent “substantial, lengthy” interrogation lasted one and a half to two hours. 1RP 23. A reasonable person in Mr. Kim’s position would not have believed he was free to end the interview whenever he wanted.

In addition, the detective intentionally deceived Mr. Kim. The detective intended to arrest Mr. Kim whether or not he spoke to the detective and no matter what he said. 1RP 20. When Mr. Kim asked if he would be arrested if he did not sign the form waiving his Miranda rights, the detective told him no. 1RP 27. Detective Smith did not volunteer the truth – that Mr. Kim would be arrested whether or not he signed the waiver form. The fact that the detective affirmatively misrepresented the custodial nature of the interview should not support a conclusion that a reasonable person in Mr. Kim's position would have believed he was free to leave.

Mr. Kim was in a closed room in a police station with an armed detective, read his Miranda rights, and subjected to an hour-and-a-half long interview. A reasonable person in Mr. Kim's position would have believed he was free to leave.

b. Mr. Kim did not knowingly and intelligently waive his Miranda rights. If a suspect waives his constitutional rights and interrogation continues without an attorney, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." Miranda, 384 U.S. at 475. The government must establish that the defendant was aware

of the “nature of the right being abandoned and the consequences of the decision to abandon it.” Moran v. Burbine, 475 U.S. 412, 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986). The court must review the totality of the circumstances -- including the defendant’s background, experience, and conduct -- to ascertain if the respondent’s waiver of his constitutional rights was in fact knowing and voluntarily. Butler, 441 U.S. at 374; Miranda, 384 U.S. at 475-7; see Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

The accused’s ability to understand English is one of the factors that make up the totality of the circumstances. State v. Teran, 71 Wn.App. 668, 862 P.2d 137 (1993), rev. denied, 123 Wn.2d 1021 (1994); United States v. Garibay, 143 F.3d 534, 537 (9th Cir. 1998). The Garibay Court found a defendant’s waiver of the Miranda rights was not valid where a defendant whose primary language was Spanish was only provided Miranda warnings in English. Garibay, 143 F.3d at 537-39. The officers had not offered to conduct the interrogation in Spanish even though there were Spanish-speaking officers available at the time and simply assumed Garibay could understand the Miranda rights in English. Id. at 537, 538.

This is what happened in Mr. Kim's case. Detective Smith only provided the Miranda warnings in English, assumed Mr. Kim could understand them, and did not offer to provide a Korean translation even though a the department employed a Korean-speaking officer. 1RP 29. Additionally, as in Garibay, Mr. Kim had no prior experience with the criminal justice process. 1RP 34; Garibay, 143 F.3d at 539. Mr. Kim believed he was going to talk to the police about finding his son M.K. who had run away; his personal life experiences do not demonstrate that he was familiar with the Miranda rights. 1RP 38

The trial court ignored this problem, instead seizing upon Detective Smith's testimony that Mr. Kim appeared to be able to converse in English. Finding of Fact 2.3; Conclusion of Law 3.1. Mr. Kim's testimony, however, is not that of a man who is so fluent in English that he understood the Miranda warnings and waiver form. While the court noted that he sometimes answered questions at the CrR 3.5 hearing in English, the transcript shows that virtually every answer was through the interpreter. 1RP 31-38. Mr. Kim's English answers were all short and do not reveal sophistication. 1RP 31-32 (Mr. Kim gives his name, says he communicated "by cell phone" with "Mr. Smith, Detective Smith," and arrived at the

police station “a little after 5, I believe”), 33 (“I didn’t understand it [waiver form] that much, no”), 34 (“Snohomish County Jail, Snohomish Corrections Department. I never heard of if in my life.”).

Additionally, Mr. Kim’s mother had recently had a stroke and his teenage son had run away from home. He was not “in normal condition” due to his concern for them both. 1RP 32. 35. This is another factor in the totality of the circumstances not considered by the trial court in determining the validity of Mr. Kim’s waiver of his constitutional rights.

The court was also swayed by the fact that Mr. Kim had appeared in court one prior time without an interpreter. Finding of Fact 3.6. That hearing, however, simply addressed an agreed continuance of the trial date, and Mr. Kim was represented by counsel. 8/7/09RP 1. Mr. Kim was also able to answer some questions during the CrR 3.5 hearing in English. Finding of Fact 3.6. The questions posed, however, were factual and Mr. Kim was represented by a lawyer. These events are not analogous to understanding the complicated Miranda rights without the assistance of an attorney, and they do not demonstrate Mr. Kim intelligently waived his constitutional rights.

c. The admission of Mr. Kim's statements to Detective Smith was not harmless. When the defendant's constitutional right to remain silent is violated, the appellate court must reverse unless the State demonstrates the error is harmless beyond a reasonable doubt. Arizona v. Fulminante, 499 U.S. 279, 295, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). An error is not harmless beyond a reasonable doubt when there is a reasonable possibility that the outcome of the trial would have been different if the error had not occurred. Id. at 24. Washington courts look at whether, in the absence of the improperly admitted testimony, overwhelming untainted evidence supports the conviction. State v. Cervantes, 62 Wn.App. 695, 701, 814 P.2d 1232 (1991)

Mr. Kim told the detective that he did not commit the crimes described by M.K. and V.K.⁵ 2RP 255, 261-62. The State, however, elicited testimony that Mr. Kim could not explain why either M.K. or V.K. would lie about it. 2RP 256-57. The detective further testified that he asked Mr. Kim about his use of alcohol, and Mr. Kim related that he drinks almost every night and sometimes

⁵ The police were unaware of any allegations regarding M.Y.K.

has to apologize in the morning because he had no memory of what had happened. 2RP 257, 264.

This information was then used by the prosecutor to discredit Mr. Kim's testimony. The prosecutor, for example, could not have asked Mr. Kim whether or why his children were lying, as witnesses may not be asked to testify about whether other witnesses are telling the truth. State v. Chirnos, ___ Wn.App. ___, 2011 WL 1833462 at * 7-8 (No. 64725-3-I, 5/16/11); State v. Jerels, 83 Wn.App. 503, 507, 925 P.2d 209 (1996). Yet by introducing this small portion of Mr. Kim's statements to Detective Smith, the prosecutor was able to argue in closing the Mr. Kim had no explanation for why his any of his three children would lie. 2RP 355.

You are the sole judges of credibility. You decide whether or not there is a reason to doubt what they've [the children] said.

As you're doing that, I ask that you constantly remind yourself of this question: If it didn't happen, why are they saying it did? If it didn't happen, why are they saying it did? Detective Smith asked the defendant. He had no explanation whatsoever. You saw him on the witness stand this morning.

When I tried to confirm, there's still no explanation. . .

. If it didn't happen, why are they saying it did? . . .

2RP 355-56. The introduction of Mr. Kim's custodial statements thus permitted the prosecutor to urge the jury to

decide the case based on whether Mr. Kim explained why his children testified as they did rather than whether the State had proven its case beyond a reasonable doubt. State v. Fleming, 83 Wn.App. 209, 213, 921 P.2d 1076 (1996) (misconduct for prosecutor to argue that jury could only acquit defendant if it found State's witnesses were lying or mistaken because argument "misstated the law and misrepresented both the role of the jury and the burden of proof."), rev. denied, 131 Wn.2d 1018 (1997). In fact, the jury was "required to acquit unless it had an abiding conviction in the truth" of the children's testimony. Id. (emphasis in original).

The portion of Mr. Kim's statement admitting alcohol use was also prejudicial. M.K. testified that Mr. Kim sometimes came home late smelling of alcohol, 1RP 86, and Y.K. said she occasionally smelled alcohol on his breath. 2RP 178-80. The prosecutor, however, tried to use the statement in cross-examining Mr. Kim to show he was a heavy drinker. 2RP 329-30.

The evidence introduced through Mr. Kim's statements to Detective Smith was prejudicial, and the State was able to use it to argue there was no reason for all three children to lie and to portray

Mr. Kim as an alcoholic. There was no physical evidence to corroborate the claims of any of the children. There were no witnesses to the conduct, and none of the children had any indication their siblings were abused. Thus, the jury was faced with deciding who was telling the truth. The State therefore cannot demonstrate the admission of portions of Mr. Kim's custodial statement was harmless beyond a reasonable doubt. See State v. Barr, 123 Wn.App. 373, 384, 98 P.2d 518 (2004) (court cannot find error harmless where, "at its heart", ultimate issue for jury was the assessment of credibility of defendant and alleged victim), rev. denied, 154 Wn.2d 1009 (2005). Mr. Kim's convictions must be reversed and remanded for a new trial. Fulminante, 499 U.S. at 296; Garibay, 143 F.3d at 540.

2. THE ADMISSION OF M.K'S TESTIMONY THAT MR. KIM SEXUALLY ABUSED HIM LONG AFTER THE CHARGING PERIOD VIOLATED MR. KIM'S RIGHT TO A FAIR TRIAL.

The State charged Mr. Kim with three counts of first degree rape of a child, M.K., between September 29, 2001, and September 28, 2003, but elicited testimony that Mr. Kim forced M.K. to have sexual intercourse with M.K.'s mother in 2009. The trial court erred by overruling Mr. Kim's objection to the testimony,

a. Mr. Kim objected when M.K. related three instances of sexual abuse and a time his father slapped him in 2009. M.K. testified that his father forced him to have sexual intercourse with M.K.'s mother beginning when he was about nine years old until he ran away from home on June 1, 2009, at age 17. 1RP 58-59, 63-64. The State charged Mr. Kim with three counts of rape of child in the first degree for the period of time M.K. was between nine and twelve years of age: September 29, 2001, to September 28, 2003. CP 54-56, 67. M.K. was permitted to testify, however, that Mr. Kim told him to have sex with Mrs. Kim in 2009.

When the prosecutors asked M.K. about the "last time" he had sexual activity with his mother, M.K. responded that it occurred on June 1, 2009. 1RP 87. Mr. Kim objected that the evidence was not relevant because it was "beyond the charging dates." 1RP 87-88. The prosecutor responded that the evidence was "primarily res gestae" and would lead into a discussion of how the police became involved. 1RP 88. The court overruled Mr. Kim's objection, apparently on the grounds asserted by the State. 1RP 88. M.K. then told the jury that he also had sex with his mother at Mr. Kim's direction three or four weeks before June 1, 2009, and also about three months before that date. 1RP 88.

Mr. Kim again objected on the ground that the evidence concerned events long after the charging period when M.K. said that at the time of the “third to the last” sexual contact with his mother in 2009, he tried to convince his father to stop the sexual activity. M.K. said the discussion turned into an argument, and Mr. Kim slapped M.K. 1RP 88-90. Defense counsel pointed out the evidence went beyond the prosecutor’s purported goal of explaining how the police got involved in the case. 1RP 90. The prosecutor again asserted the evidence was admissible “under res gestae,” and Mr. Kim’s objection was overruled. 1RP 90.

M.K. then testified he had an argument with his father a couple of months earlier, but ran away on June 1 because of the “last three incidents.” 1RP 91. Defense counsel objected that the testimony was irrelevant and overly prejudicial. 1RP 91-91.

We’re just rehashing things which are not charged for the pure purpose of trying to, for lack of a better term, trash my client here about things which he’s not charged with. And I don’t think there’s any point to this other than dragging his name through the mud here, make it sound worse than it would otherwise. We just got to the point of why he went to the police.

1RP 92. The prosecutor, however, argued that why the crimes did not stop earlier was “relevant.” 1RP 92. The court again overruled Mr. Kim’s objection. M.K. then went on testify that he ran away

because “I was sick of it,” went to his cousin’s house, and told his cousin what had happened 1RP 92-93.

b. The 2009 misconduct evidence was not relevant or admissible under ER 404(b). Irrelevant evidence is not admissible. ER 402. While the court did not announce the reasons for its ruling, the prosecutor argued the evidence was part of the res gestae and necessary to show the jury how the police became involved in the case and why the sexual activity did not end sooner. 1RP 88, 90, 92. This information, however, is not relevant to whether or not Mr. Kim committed first degree rape of a child in the charging period, which concluded over five years earlier. The jury could certainly understand that a child under the age of 12 would not report abuse by his parents to the police. Moreover, when the abuse ended and why the police became involved were not relevant to the jury determination.

Even if the evidence was in some way relevant to determining what happened in 2001-2003, any relevance was outweighed by its prejudicial effect. Washington’s evidence rules prohibit the introduction of evidence of a defendant’s character or character traits, and a defendant’s other misconduct is not admissible to prove the defendant’s character or show that he

acted in conformity with that character. ER 404; State v. Everybodytalksabout, 145 Wn.2d 456, 464, 39 P.3d 294 (2002); State v. Smith, 106 Wn.2d 772, 775, 725 P.2d 951 (1986).

Evidence of a defendant's misconduct may not be used to demonstrate the defendant is the type of person who would commit the charged offense. State v. Fisher, 165 Wn.2d 727, 744, 202 P.3d 937 (2009); Everybodytalksabout, 145 Wn.2d at 466.

The rule, however, permits evidence of other misconduct when logically relevant to prove an ingredient of the offense charged. The rule reads:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of the person in order to show action in conformity therewith. It may, however, 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).

In determining if evidence of prior misconduct is admissible under ER 404(b), the trial court must

(1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose of admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect of the evidence.

Id. In doubtful cases, the evidence should be excluded. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); Smith, 106 Wn.2d at 776. The trial court, however, did not review these factors in determining M.K.'s testimony was admissible.

A review of the ER 404(b) factors demonstrates that M.K.'s testimony about 2009 offenses was not admissible. The identified purpose of the evidence was to show when the abuse ended and how the police became involved. Neither of these facts is relevant to the elements of the crime – whether Mr. Kim was an accomplice to Mrs. Kim's sexual intercourse with M.K. while M.K. was under the age of 12. RCW 9A.44.073; CP 54-56.

The court apparently believed the evidence was admissible as “res gestae” evidence. Washington courts have found that other misconduct may be admissible if it is so connected with the crime that the other bad acts are necessary to completely describe the charged crime. As described by the Brown Court, evidence of other misconduct may be admitted where it is “a ‘link in the chain’ of an unbroken sequence of events surrounding the charged offense . . . ‘in order that a complete picture be depicted for the jury.’” State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998) (quoting State v. Tharp, 96 Wn.2d 591, 594,

637 P.2d 961 (1981)). The evidence must still be relevant to a material issue and its probative value must outweigh its prejudicial effect. Id.

Thus, evidence that Brown raped and assaulted one woman was admissible in his trial for raping and killing a different woman because the defendant killed one woman in order to cover up his crimes so that he could join the other woman. The crimes were thus linked in significant ways. Brown, 132 Wn.2d at 572-76. Similarly, in Elmore, the defendant's prior molestation of the murder victim was admissible at a death penalty proceeding because the defendant and victim discussed the molestation the day of the murder and the defendant killed the victim to keep her from disclosing the abuse. State v. Elmore, 139 Wn.2d 250, 285-88, 985 P.2d 289 (1999), cert. denied, 531 U.S. 837 (2000).

The misconduct evidence also does not fall within other recognized reasons for admitting evidence of a defendant's other bad acts. For example, the evidence in this case is not relevant to prove motive, opportunity, plan, identity, or the absence of mistake, examples provided in ER 404(b). The evidence is not relevant as to Mr. Kim's intent, and intent is not an element of first degree rape of a child. RCW 9A.44.073.

Nor would the slapping incident be relevant to explain M.K.'s delay in reporting the offenses. The Fisher Court notes incidents of physical abuse may be relevant if they are the reason a victim did not report sexual abuse. But the court clarified that physical abuse the victim was unaware of or which occurred significantly before or after the sexual abuse could not logically explain a failure to report sexual abuse. Fisher, 165 Wn.2d at 760. Additionally, Mr. Kim did not attack the witnesses for failing to report earlier. See Fisher, 165 Wn.2d 750 (evidence of physical abuse not admissible because defendant did not raise issue of delay in reporting).

c. Mr. Kim's convictions must be reversed. This Court reviews the trial court's interpretation of ER 404(b) de novo as a matter of law. Fisher, 165 Wn.2d at 745. If the trial court's interpretation of ER 404(b) is correct, the ruling is reviewed for abuse of discretion, which is violated if the court does not follow the rule's requirements. Id.

The trial court admitted evidence that Mr. Kim continued to force M.K. to engage in sexual intercourse with his mother five years after the charging period. The trial court did not engage in the required analysis before admitting the evidence, and the

evidence should not have been admitted as it was not relevant yet highly prejudicial. The trial court thus abused its discretion.

The error in admitting evidence of that Mr. Kim continued to commit sexual crimes against M.K. long after the charging period is not harmless. An evidentiary error requires reversal of a criminal conviction if the appellate court determines that it is reasonably possible that the error contributed to the jury verdict.

Everybodytalksabout, 145 Wn.2d at 468-69.

The State presented no evidence to corroborate the testimony of M.K., V.K., and M.Y.K., as there were no other witnesses and no physical evidence. Mr. Kim testified he did not have sexual intercourse or contact with his children, and several family members who had lived in the Kim's home stated they saw no evidence of sexual abuse. Thus, the case turned on whether the jury believed the three children or whether they believed Mr. Kim. See State v. Venegas, 155 Wn.App. 507, 526-27, 228 P.3d 813 (reversing three counts of assault against a child based upon various errors, including improper admitted ER 404(b) evidence, where the parties presented "two diametrically opposed versions of the events" and the case turned largely on witness credibility), rev. denied, 170 Wn.2d 1003 (2010). The jury, however, was also

presented with irrelevant and prejudicial testimony that Mr. Kim continued to abuse M.K. for many years, specifically in 2009. Given the nature of the case, this error is not harmless, and Mr. Kim's convictions must be reversed and remanded for a new trial. Everybodytalksabout, 145 Wn.2d at 480-82; Venegas, 155 Wn.App. at 527.

3. THE CONDITION OF COMMUNITY CUSTODY
REQUIRING MR. KIM TO PAY THE COSTS OF
CRIME-RELATED COUNSELING AND MEDICAL
TREATMENT IS NOT AUTHORIZED BY THE SRA

When a person is convicted of a felony, the sentencing court may impose punishment only as authorized by the Sentencing Reform Act (SRA). RCW 9.94A.505(1); In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007) (court has sentencing authority only as provided by Legislature). The sentencing court must comply with the sentencing statutes in effect at the time the defendant committed the offense. RCW 9.94A.345; State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004). Here, Mr. Kim was convicted of crimes occurring over a period of several years – approximately April 17, 1999, to July 14, 2006. While the SRA has been amended numerous times during this time period, it has always required the trial court to determine and order

restitution, and payment of a victim's medical or counseling costs has never been an authorized condition of community custody that may be imposed by the trial court. The sentencing court did not order Mr. Kim pay restitution, but nonetheless required Mr. Kim to pay the victims' unspecified counseling and medical costs. CP 10, 16. This condition of community custody is invalid.

The SRA requires the sentencing court to order restitution. Former RCW 9.94A.120(19); RCW 9.94A.505(7). The court may order an offender to pay restitution to compensate the crime victims for medical treatment and for counseling reasonably related to the offense. Former RCW 9.94A.142(1); RCW 9.94A.750(3). Here, however, the State did not request restitution at the sentencing hearing, and the court did not order restitution. CP 10; 12/7/10RP 17. The court indicated restitution could be set at a later date, but it was not. CP 10.

Requiring Mr. Kim to pay counseling and medical costs as a condition of community custody essentially delegates the court's duty to determine restitution to the Department of Corrections (DOC). It is the function of the judiciary to determine guilt and impose sentence. State v. Sansone, 127 Wn.App. 630, 642, 111 P.3d 1251 (2005). The SRA makes it clear that the court is

responsible for determining restitution. The court may not delegate its authority to set the amount of restitution to another agency.

State v. Forbes, 43 Wn.App. 793, 800, 719 P.2d 941 (1986) (court could not order the defendant to pay restitution “in the amount set by King County Prosecutor’s Office VAU.”).

This Court addressed a condition of community placement that forbade the defendant from possessing or viewing pornography without approval of his probation officer and found the condition unconstitutionally vague in Sansone. Because the community placement condition gave the probation officer the discretion to define “pornography,” it was also an improper delegation of sentencing authority. Sansone, 127 Wn.App. at 641-43. “The definition of pornography was not an administrative detail that could be properly delegated to the CCO.” *Id.* at 642.

Additionally, the statutes authorizing the sentencing court to impose community custody requirements have never permitted the court to order the offender to pay the costs of a crime victim’s counseling and medical treatment as a condition of community custody apart from a restitution order. Former RCW 9.94A.120(10)(a) required the sentencing court to impose the conditions found at Former RCW 9.94A.120(9)(b) and permitted the

court to include conditions found at Former RCW 9.94A.120(9)(c). Former RCW 9.94A.120(9)(c) included standard conditions, such as reporting to the DOC and living in an approved setting. The discretionary conditions included residing in a specific geographical area, undergoing crime-related counseling and following crime-related prohibitions, not consuming alcohol, and forbidding contact with crime victims or a class of people, and forbidding contact with minors. Former RCW 9.94A.120(9)(c).

When the statute was re-codified, Former RCW 9.94A.712 referred the court to Former RCW 9.94A.700(4) for mandatory community custody conditions and permitted the court to order rehabilitative programs or other conditions found at Former RCW 9.94A.700(5). Again, Former RCW 9.94A.700(4) listed standard conditions, such as reporting to the DOC and not possessing controlled substances. Former RCW 9.94A.700(5) did not mention restitution or payment for a victim's medical or counseling costs. Instead, it permitted the court to require the defendant to remain within geographical boundaries, have no contact with victims or a class or victims, no contact with minors, undergo crime-related treatment or counseling, obey crime-related prohibitions, and not consume alcohol.

Mr. Kim may challenge this erroneous condition of community supervision for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744-45, 193 P.3d 678 (2008); State v. Julian, 102 Wn.App. 296, 304, 9 P.3d 851 (2000), rev. denied, 143 Wn.2d 1003 (2001). Determining the restitution an offender is required to pay is function of the sentencing court, not an administrative detail that may be delegated to DOC. This Court must strike the condition of community custody requiring Mr. Kim to pay the victims' unspecified costs of counseling and medical treatment.

4. THE CONDITION OF COMMUNITY CUSTODY PROHIBITING MR. KIM FROM POSSESSING OR CONTROLLING "SEXUAL STIMULUS MATERIAL FOR YOUR PARTICULAR DEVIANCY" AS DETERMINED BY HIS COMMUNITY CORRECTIONS OFFICER IS UNCONSTITUTIONALLY VAGUE AND AN IMPROPER DELEGATION OF AUTHORITY

The due process clauses of the federal and state constitutions require that citizens be provided with fair warning of what conduct is illegal. U.S. Const. amend. XIV; Const. art. I, § 3; Bahl, 164 Wn.2d at 752. As a result, a condition of community custody must be sufficiently definite that ordinary people understand what conduct is illegal and the condition must provide ascertainable standards to protect against arbitrary enforcement.

Id. at 752-53. Offenders on community custody retain a limited constitutional right to free expression. See Procunier v. Martinez, 416 U.S. 396, 408-09, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974) (inmates retain First Amendment right of free expression through use of the mail). When a condition of community custody addresses material protected by the First Amendment, a vague standard may have a chilling effect on the exercise of First Amendment rights. Bahl, 164 Wn.2d at 752. An even stricter standard of definiteness therefore applies when community custody condition prohibits access to material protected by the First Amendment. Id.

Here, the trial court ordered Mr. Kim not to “posses or control sexual stimulus material for your particular deviancy as defined by the supervising Community Corrections Officer and therapist except as provided for therapeutic purposes.” CP 16. This term of community custody is unconstitutionally vague. Bahl, 164 Wn.2d at 761. Bahl argued an identical condition of community custody was vague because the term “sexual stimulus” did not provide him with notice of what those items could be and because the condition gave the community corrections officer unfettered authority to define what “sexual stimulus materials” he could not possess. Id.

The court, however, found the condition was unconstitutionally vague because Bahl's "deviancy" had not been identified. Id.

The condition cannot identify materials that might be sexually stimulating for a deviancy when no deviancy has been diagnosed, and this record does not show that any deviancy has yet been identified. Accordingly, the condition is utterly lacking in any notice of what behavior would violate it.

Id.

The same is true in Mr. Kim's case, as there is no evidence that he had ever undergone a sexual deviancy evaluation. The condition does not provide Mr. Kim with any notice of what it forbids and is therefore unconstitutionally vague.

In addition, the community custody condition delegates to the supervising community corrections officer the authority to determine what "sexual stimulus material" for Mr. Kim's "deviancy" might be. Just as the court improperly delegated the authority to determine what constituted "pornography" to a probation officer in Sansone, 127 Wn.App. at 642-43, here the court improperly gave authority to Mr. Kim's community corrections officer to determine what constitutes "sexual stimulus material" for Mr. Kim. The condition is also invalid as an unconstitutional delegation of the authority to the community corrections officer.

5. THE CONDITION OF COMMUNITY CUSTODY
FORBIDDING MR. KIM FROM BEING IN “DRUG
AREAS” IS NOT CRIME-RELATED OR
REASONABLY RELATED TO HIS REHABILITATION

There was no evidence presented at trial or sentencing that demonstrated that drug use contributed to Mr. Kim’s offenses or that he had a drug problem. The trial court nonetheless entered a special condition of community custody forbidding Mr. Kim from entering “drug areas.” This condition must be vacated because it is not crime-related and therefore not authorized by the sentencing statutes.

As mentioned, Mr. Kim was convicted of crimes occurring over a period of several years – approximately April 17, 1999, to July 14, 2006. While the SRA has been amended during this time period, a condition such as a “stay out of drug area” order is only authorized if the prohibition is crime-related. Former RCW 9.94A.120(9)(c); Former RCW 9.94A.700(5); RCW 9.94A.505(8); see Bahl, 164 Wn.2d at 744.

Logically, the burden is on the State to demonstrate the condition of community supervision is statutorily authorized. See State v. McCorkle, 137 Wn.2d 490, 495-96, 973 P.2d 461 (1999) (SRA clearly places mandatory burden on State to prove nature

and existence of out-of-state conviction necessary to establish offender score and standard sentence range); State v. Ford, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999) (accord); United States v. Weber, 451 F.3d 552, 558-59 (9th Cir. 2006) (placing burden on government to demonstrate discretionary supervised release condition is appropriate in a given case).

The trial court ordered Mr. Kim to “Stay out of drug areas, as defined in writing by the supervising Community Corrections Officer.” CP 17. A “crime-related prohibition” is “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” Former RCW 9.94A.030(13) (2001).⁶ No evidence produced at trial showed that Mr. Kim ever used illegal drugs or was under the influence of drugs when he committed the crimes. The State did not claim at sentencing that Mr. Kim had a drug problem.

The condition of community custody forbidding Mr. Kim from entering “drug areas” is thus not authorized by the SRA and must be stricken. State v. Riles, 135 Wn.2d 326, 353-53, 957 P.2d 655 (1998) (striking condition of community placement not reasonably related to offense and therefore not authorized by statute).

⁶ This definition has not been subsequently amended, and is now found at RCW 9.94A.505(10).

6. THE CONDITION OF COMMUNITY CUSTODY
REQUIRING MR. KIM TO UNDERGO
PLETHYSMOGRAPH TESTING AS REQUIRED BY
HIS COMMUNITY CORRECTIONS OFFICER
VIOLATES MR. KIM'S CONSTITUTIONAL RIGHT
TO BE FREE FROM BODILY INTRUSIONS

The trial court ordered Mr. Kim to undergo penile plethysmograph testing as required by his community corrections officer. CP 17. Plethysmograph testing is used in the diagnosis and treatment of sexual offenses, but is not a monitoring tool to be used by a community corrections officer. Given the invasive nature of the test, the requirement of plethysmograph testing at the discretion of a CCO rather than a qualified treatment provider violates Mr. Kim's constitutional right to be free from bodily intrusions.

a. Mr. Kim has a fundamental privacy interest in freedom from government intrusions into his body and private thoughts. The due process clauses of the state and federal constitutions include a substantive component providing heightened protection against government interference with certain fundamental rights and liberty interests.⁷ Troxell v. Granville, 530 U.S. 57, 65, 120 S.Ct. 2054,

⁷ In addition to the due process protection found at Article 1, section 3, Article 1, section 7 of the Washington constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

147 L.Ed.2d 49 (2000). The right to privacy protects the right to non-disclosure of intimate information. Butler v. Kato, 137 Wn.App. 515, 527, 154 P.3d 259 (2007) (citing O'Hartigan v. State Dep't of Personnel, 118 Wn.2d 111, 117, 821 P.2d 44 (1991)); Jason R. Odeshoo, "Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders," 14 Temp. Pol. & Civ. Rts. L. Rev. 1 (2004). Additionally, both the Fourth and Fourteenth Amendments protect a citizen from bodily invasion. Sell v. United States, 539 U.S. 166, 177-78, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003); Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed.2d 183 (1952); In re Marriage of Parker, 91 Wn.App. 219, 224, 957 P.3d 256 (1998).

The Fourteenth Amendment does not permit any infringement upon fundamental liberty interests unless the infringement is narrowly tailored to serve a compelling state interest. Washington v. Glucksberg, 521 U.S. 702, 721, 117 S.Ct. 2258, 117 S.Ct. 2302, 138 L.Ed.2d 772 (1997). People convicted of crimes retain certain fundamental liberty interests. Turner v. Safley, 482 U.S. 78, 84, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987); Weber, 451 F.3d at 570-71 (Noonan, J., concurring) ("[A] prisoner

The enumeration of certain rights in the state constitution "shall not be construed to deny others retained by the people." Wash. Const. art. 1, § 30.

should not be compelled to stimulate himself sexually in order for the government to get a sense of his current proclivities. There is a line at which the government must stop. Penile plethysmography testing crosses it.”).

b. Penile plethysmograph testing implicates the constitutional right to freedom from bodily restraint. The freedom from bodily restraint is at the core of the interests protected by the Due Process Clause. Parker, 91 Wn.App. at 222-23. Courts have noted that penile plethysmograph testing implicates this liberty interest and that the reliability of this testing is questionable. In re Marriage of Ricketts, 111 Wn.App. 168, 43 P.3d 1258 (2002) (recognizing liberty interest); Parker, 91 Wn.App. at 226 (test violated father’s constitutional interests in privacy, noting no showing of reliability of penile plethysmograph testing or absence of less intrusive measures); Weber, 451 F.3d at 562, 564 (explaining that plethysmograph testing is not a “run of the mill” medical procedure and studies have shown its results may be unreliable); Coleman v. Dretke, 395 F.3d 216, 223 (5th Cir. 2004) (concluding the “highly invasive nature” of the test implicates significant liberty interests), cert. denied, 546 U.S. 938 (2005); Harrington v. Almy, 977 F.2d 37, 44 (1st Cir. 1992) (stating there has been “no showing”

regarding the test's reliability or that other less intrusive means are not available for obtaining the information); see United States v. Powers, 59 F.3d 1460, 1471 (4th Cir. 1995) (holding trial court did not abuse its discretion by refusing to admit plethysmograph test results as evidence because test fails to satisfy "scientific validity" prong of Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)), cert. denied, 516 U.S. 1077 (1996)); see Odeshoo, 14 Temp. Pol. & Civ. Rts. L. Rev. at 43.

The Ninth Circuit Court's opinion in Weber is instructive. Weber pled guilty to possession of child pornography, and the district court ordered special conditions of supervised release that included participation in mental health counseling and/or a sexual offender treatment program. Weber, 451 F.3d at 555. The court further ordered Weber to comply with all conditions of his treatment program, including submission to risk assessment evaluations, and physiological testing, including but not limited to polygraph, plethysmograph and Abel testing. Id. Weber objected only to the requirement that he undergo plethysmograph testing. Id.

Under the federal statute governing supervised release after a prison term, the district court has wide discretion to impose special conditions of supervised release, even conditions that

infringe upon fundamental rights. Weber, 451 F.3d at 557.

Conditions of supervision, however, must be rationally related to the “goal of deterrence, protection of the public, or rehabilitation of the offender.” Id. at 558 (quoting United States v. T.M., 330 F.3d 1235, 1240 (9th Cr. 2003), citing 18 U.S.C. §§ 3553(a), 3583(d)). Special conditions may involve “no greater deprivation of liberty than is necessary for the purposes of supervised release.” Id. (quoting T.M., 330 F.3d at 1240, in turn quoting 18 U.S.C. § 3583(d)(2)).

The Weber Court reviewed psychological studies both critical and supportive of plethysmographic testing of sex offenders. Although the court concluded that it could not categorically rule out plethysmograph testing for all offenders, it noted problems with the test. Weber, 451 F.3d at 566. The American Psychiatric Association, for example, has expressed reservations concerning the reliability and validity of plethysmograph testing. Id. at 564 (citing Am. Psychiatric Ass’n, Diagnostic and Statistical Manual of Mental Disorders: DSM-IV-R 567 (4th ed. 2000)).

The court went on to point out the relevant question is whether plethysmograph testing will promote the goals of rehabilitation and deterrence in an individual case, because

supervised release conditions must be “‘reasonably related’ to ‘the nature and circumstances of the offense and the history and character of the defendant.’” Id. (quoting 18 U.S.C. § 3583(d)(1), 3553(a)(1)). “Only a finding that plethysmograph testing is likely given the defendant’s characteristics and criminal background to reap its intended benefits can justify the intrusion into a defendant’s significant liberty interest in his own bodily integrity.” Id. at 567. Even then, the district court must consider if other less invasive alternatives are open, as there are several alternatives available in the treatment of sexual offenders. Id. at 567-68. The court therefore remanded Weber’s case for an evidentiary hearing. Id. at 570.

c. Mr. Kim’s constitutional right to freedom from bodily intrusion is violated by the requirement that he submit to penile plethysmograph testing at the pleasure of his community corrections officer. The Washington Supreme Court recognized the usefulness of plethysmograph testing in the diagnosis and treatment of sex offenses. Riles, 135 Wn.2d at 343-44. As a result, the court upheld plethysmograph testing for a sex offender as part of court-ordered sexual deviancy therapy, but not for an offender who was not ordered to undergo sexual deviancy

treatment. Id. at 344-46. “[P]lethysmograph testing does not serve a monitoring purpose . . . It is instead a treatment device that can be imposed as part of crime-related treatment or counseling.” Id. at 345.

Here, the court required Mr. Kim to submit to such testing as directed by his community corrections officer rather than at the direction of his sexual deviancy treatment provider. CP 17. The testing was ordered in the same sentence with breathalyzer and polygraph testing, which are utilized by DOC to monitor compliance. Riles, 135 Wn.2d at 342-43.

The danger is that the testing is not connected to Mr. Kim’s sexual deviancy diagnosis or treatment, but can be ordered by the CCO for any reason, including monitoring Mr. Kim’s compliance with community custody conditions. In this circumstance, the testing requirement violated Mr. Kim’s constitutional right to be free from bodily intrusions. This Court should strike the requirement that Mr. Kim submit to plethysmograph testing as required by his CCO.

E. CONCLUSION

Mr. Kim’s convictions must be reversed and remanded for a new trial because (1) the trial court admitted his custodial

statements where he did not knowingly, intelligently and voluntarily waive his constitutional rights to remain silent and consult with counsel, and (2) the trial court admitted irrelevant and prejudicial evidence that Mr. Kim was involved in sexual offenses against M.K. over five years after the end of the charging period.

In the alternative, this court must vacate conditions of community custody: (1) requiring Mr. Kim to pay the victims' counseling and medical costs in the absence of a restitution order, (2) forbidding him from possessing or controlling "sexual stimulus material designed for his particular deviancy" when no deviancy has been identified, (3) barring him from drug areas even though drugs were not involved in his offenses, and (4) requiring him to undergo plethysmograph examinations at the direction of his community corrections officer rather than a licensed therapist.

DATED this 26th day of July 2010.

Respectfully submitted,



Elaine L. Winters – WSBA # 7780
Washington Appellate Project
Attorneys for Appellant



FILED

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SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,	
	Plaintiff,
v.	
PAUL J. KIM,	
	Defendant.

No. 09-1-01181-2

CERTIFICATE PURSUANT TO
CrR 3.5 OF THE CRIMINAL RULES
FOR SUPERIOR COURT

The undersigned Judge of the above court hereby certifies that a hearing was held September 20, 2010, in the absence of a jury, pursuant to Rule 3.5 of the Criminal Rules for Superior Court, and now sets forth:

1. The Undisputed Facts

1.1) On June 9, 2010, Detective Lance Smith, employed by the Mukilteo Police Department, called the Defendant's cell phone and left a message asking the Defendant to call him (Det. Smith) back. Detective Smith spoke English.

1.2) Later the same day, the Defendant returned Detective Smith's call and spoke to Detective Smith. The two discussed scheduling and selected a mutually agreeable time to meet at the Mukilteo Police Department. The two spoke English.

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1.3) Later the same day, the Defendant arrived at the police department and was greeted by Detective Smith. The detective asked if the Defendant has spoken with his wife, Jennifer Kim, and whether he knew what it was the detective wanted to talk about. The Defendant said yes, he did speak to his wife and she did tell him about their son's allegation against the Defendant. They both spoke English. The detective escorted the Defendant to an interview room.

1.4) Detective Smith used a standard form to advise the Defendant of his Constitutional (Miranda) rights. A copy of the form was admitted into evidence and is incorporated herein by reference. The form sufficiently advised the Defendant of his rights. The form was written in English. Detective Smith read the form aloud to the Defendant, in English.

1.5) The Defendant said he understood his rights and signed the form confirming so.

1.6) Detective Smith next read the Defendant the waiver portion of the form (see "The Disputed Facts" below regarding what happened next).

1.7) The Defendant signed the waiver portion of the rights form.

1.8) Detective Smith and the Defendant spoke at length about the allegation made by the Defendant's son. The entire conversation was in English.

1.9) The Defendant was arrested, transported, and booked into jail. The only statement made by the Defendant upon arrest was a request for Detective Smith to give a car key and some papers to Jennifer Kim. Detective Smith agreed to do so.

2. The Disputed Facts

2.1) According to Detective Smith, after reading the Defendant the waiver portion of the Constitutional rights form, the Defendant responded by asking whether he (the Defendant) would be arrested if he refused to sign the form. Detective Smith answered the Defendant by stating that he (Detective Smith) would not arrest the Defendant just for refusing to waive his

rights. He further advised the Defendant that, even if he (the Defendant) waived his rights, he could still stop talking at any time he chose to. The Defendant said he understood his options and signed the waiver.

2.2) According to the Defendant's testimony, he was shown the form in a tiny room and did not understand the words so he mentioned that he wanted to speak with a lawyer. He testified that he did sign the form because he thought it would be a free conversation. He testified that he does not recall whether he read the form. He also testified, however, that he didn't understand, that he wanted to talk to a lawyer, that he asked to use a phone, and that Detective Smith denied his requests. The Defendant said he was afraid he would go to jail if he did not sign the form, and that Detective Smith told him he would go to jail if he did not sign the form.

2.3) According to Detective Smith, the Defendant appeared to understand everything that was happening and everything that was discussed between them. No threats or promises were made. The Defendant showed no reluctance to waive his rights and speak with Detective Smith. The Defendant never made any mention whatsoever regarding an attorney.

2.4) According to the Defendant, he does not have good recall of the interview and was not quite normal because of circumstances related to his mother's health.

3. Court's Conclusions as to Disputed Facts

3.1) Detective Smith's testimony describing the facts and circumstances relating to the Defendant's statements are accurate and more credible than those described differently by the Defendant. The Defendant lacks accurate recall of the event.

3.2) There was never any communication or other indication that the Defendant was not free to leave, prior to his actual/formal arrest. No threats or promises were made to the

Defendant to obtain his waiver and/or statement. He was not threatened (expressly or implicitly) with arrest for refusing to sign the waiver.

3.3) The Defendant understood his rights and voluntarily agreed to waive them after asking whether a refusal to do so would get him arrested. The Court finds the Defendant's question supports the conclusion that the Defendant understood his right to refuse. His subsequent waiver was knowingly and voluntarily made.

3.4) The Defendant did not ask for the assistance of an attorney before or during his conversation with Detective Smith, and the Defendant did not ask to call an attorney before or during his conversation with Detective Smith.

3.5) Prior to his actual/formal arrest, at the end of his conversation with Detective Smith, the Defendant was not in custody or restrained in any way, and nothing occurred that would lead a reasonable person to conclude that he was restrained to any degree associated with formal arrest.

3.6) The Defendant's first language is Korean but he speaks English fluently. The Court notes, from its file, that the Defendant told the Court about one year earlier that he had no need or desire for an interpreter. The Defendant requested an interpreter for this hearing, and for his trial, but answered many questions in English, while testifying at this hearing, even before the questions were interpreted to Korean. This Court finds and concludes that the Defendant's language skills did not hinder his ability to understand his Constitutional (Miranda) rights.

4. Court's Conclusions as to Confessions Voluntary and Admissible or Involuntary and Inadmissible With Reasons in Either Case

4.1) The Defendant was not under arrest, or restrained to any degree associated with formal arrest, until after his conversation with Detective Smith. The questions and answers were not "custodial" so "Miranda warnings" were not required under the circumstances.

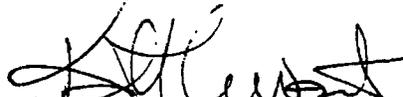
4.2) Despite not being legally necessary, the Defendant was advised of his Constitutional (Miranda) rights anyway and knowingly, intelligently, and voluntarily waived them.

4.3) The few introductory remarks between Detective Smith and the Defendant, prior to the Defendant waiving his Constitutional (Miranda) rights, were not "custodial" and were not "interrogation" (i.e. they were not designed, or reasonably likely, to provoke an incriminating response).

4.4) The Defendant's request to Detective Smith after his actual/formal arrest (regarding a key and some papers – see ¶ 1.9) was not "interrogation."

4.5) All statements made by the Defendant to Detective Smith were voluntary and admissible at trial herein, subject to other evidentiary objections.

DATED this 13th day of MAY, 2011.



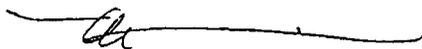
JUDGE KENNETH L. COWSERT
Snohomish County Superior Court

Presented by:



MATT HUNTER, WSBA No. 24021
Deputy Prosecuting Attorney

Approved for entry;
Notice of presentation waived:



MAX P. HARRISON, WSBA No. 12243
Attorney for Defendant

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

STATE OF WASHINGTON,)	
)	
Respondent/Cross-appellant,)	NO. 66405-1-I
)	
)	
PAUL KIM,)	
)	
Appellant/Cross-Respondent.))	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF JULY, 2011, 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 26TH DAY OF JULY, 2011.

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