

COA NO. 74549-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

ANDREW TROTMAN,

Appellant.

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

The Honorable Roger S. Rogoff, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in refusing to grant a mistrial.
2. The court erred in admitting evidence of flight to show consciousness of guilt.
3. The court erred in imposing this community custody condition: "Do not enter sex-related businesses, including: x-rated movies, adult bookstores, strip clubs, and any location where the primary source of business is related to sexually explicit material." CP 107.
4. The court erred in imposing this community custody condition: "Do not possess, use, access or view any sexually explicit material as defined by RCW 9.68.130 or erotic materials as defined by RCW 9.68.050 or any material depicting any person engaged in sexually explicit conduct as defined by RCW 9.68A.011(4) unless given prior approval by your sexual deviancy provider." CP 108.
5. The court erred in imposing this community custody condition: "Inform the supervising CCO and sexual deviancy treatment provider of any dating relationship." CP 107.

Issues Pertaining to Assignments of Error

1. Whether the court erred in refusing to declare a mistrial after the alleged victim testified appellant had just been released from jail,

where the irregularity was serious, singular and under the circumstances not likely to be cured by court instruction to disregard?

2. Whether the court committed reversible error in admitting evidence that appellant fled from police because such evidence did not show consciousness of guilt for the charges crimes, considering the passage of time and other reasons for avoiding apprehension?

3. Whether community custody conditions addressing entry into sex-related businesses and possession of sexual material must be stricken because they are not crime-related?

4. Whether the community custody condition requiring appellant to inform his community corrections officer and treatment provider of any "dating relationship" violates due process because it does not provide fair warning of proscribed conduct and exposes appellant to arbitrary enforcement?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Andrew Trotman with second degree rape, first degree burglary, fourth degree assault with sexual motivation, and two counts of supplying liquor to a minor. CP 32-33. The jury acquitted Trotman of the burglary charge, found him guilty on the remaining charges, and did not return a special verdict on the sexual motivation

component of the fourth degree assault charge. CP 85-90. The court sentenced Trotman to an indeterminate sentence of 280 months to life in prison on the rape count, with the misdemeanor counts running concurrently. CP 51-52, 102. Trotman appeals. CP 91-93.

2. Pre-trial Ruling On Arrest And Flight Evidence

Before trial, defense counsel moved to exclude any evidence that Trotman was arrested, tased, handcuffed and booked into jail, as well as evidence that Trotman had a warrant out for his arrest in another case. CP 25-26. The State moved to admit evidence of Trotman's booking photo and opposed exclusion of the circumstances of arrest. CP 124.

The court asked why Trotman's booking photo and the facts of his arrest were relevant. RP¹ 22-23. The prosecutor said the arrest "really leads into the - to a major part of this" and then recited the factual basis for the position that the evidence was relevant. RP 23. The date of the charged offense was March 29. RP 23. On April 9, an officer who had seen the arrest bulletin located Trotman at a 7-11 in Federal Way. RP 23. The officer approached and told Trotman he was under arrest for rape and burglary, and told him to put his hands up. RP 23. Trotman ignored the officer's commands and got into another vehicle. RP 24. The people in

¹ The verbatim report of proceedings is referenced as follows: RP - three consecutively paginated volumes consisting of 7/17/15, 11/17/15, 11/19/15, 11/24/15, 11/30/15, 12/1/15, 12/2/15, 12/7/15, 12/8/15, 1/8/16.

that vehicle told him to get out, and he did. RP 23-24. Officers continued to tell him he was under arrest. RP 24. Trotman stried to run. RP 24. The officers tased him, without effect. RP 24. They attempted to atTest him. RP 24. Trotman resisted. RP 24. The officers ultimately subdued him. RP 24. During the course of events, Trotman suffered scrapes to his head and cheek, which the officers described and which are shown in the booking photo. RP 24. Surveillance video showed Trotman leaving the 7-11 and the officers give chase, one with a taser drawn and the other with a gun drawn as they run off the screen. RP 24.

The prosecutor argued evidence regarding the arrest was admissible as consciousness of guilt. RP 24-25. The booking photo and video conoborated the officer's statements. RP 25. The booking photo also showed Trotman's date of bilih, which showed a disparity of age between Trotman and AMC and cut against any defense argument that the sex was consensual. RP 25-26. Defense counsel offered to stipulate to Trotman's age. RP 26. The comi accepted the offer. RP 27. As for evidence related to the arrest, defense counsel argued it was irrelevant and unduly prejudicial. RP 26.

After initially reserving on the issue, the court ultimately excluded the booking photo as more prejudicial than probative. CP 35. The court also excluded evidence of Trotman's fight with police and physical

resistance, but admitted evidence that he attempted to flee the police. CP

37. The court's oral ruling is as follows:

In this case for Mr. Trotman the question is four-fold. Can you infer flight from his behavior, can you infer consciousness of guilt from that flight, can you infer guilt of the crime charged from consciousness of guilt, and can you infer actual guilt from consciousness of guilt.

In this particular case, there's no question that from Mr. Trotman's behavior you can infer flight. He ran from the officers. He was forcibly arrested. He resisted arrest, according to the officers. He engaged in behavior from which you could infer almost nothing else other than he was trying to get away from the police. So the answer to that first question is yes.

The second question is whether you can infer consciousness of guilt from that flight. According to what I've been told, the evidence will be that the police arrived on the scene, and they immediately told Mr. Trotman that he was under arrest. And it was based on their presence, plus their statements that he began trying to flee. And based on that evidence, I find that you can infer consciousness of guilt from that flight.

The more difficult questions are the last two -- well, the third one really. Whether you can infer guilt of the crime charged from the consciousness of guilt. So in this particular case, you have two potential bases upon which Mr. Trotman may have fled. One being the fact that he had a warrant for his arrest, and two being that he was suspected of committing this crime. Here, according to the information that I've been provided, the police walked up and told him that he was under arrest for a very specific offense. And it was at that point that he ran, or began running. They didn't tell him he was under arrest, period. That didn't tell him that they had a warrant. They didn't tell him anything more general than that. They told him he was under arrest for the specific crimes charged. And based on that, he ran. And therefore it is possible to infer guilt of the crime charged from consciousness of guilt.

The problem I actually have in this case is number four, is whether you can infer actual guilt from consciousness of guilt in this case. Mr. Trotman, if you believe what the State has indicated the defense theory will be – which it may not be – which will be some sort of consent, or an unknowing sexual encounter that he believed was consensual, even if she didn't, or something like that with the girlfriend of his son. There are about a hundred different reasons that Mr. Trotman would be concerned about the police investigating that particular incident, not the least of which would be the relationship between him and his son, the inappropriateness of any relationship, whether illegal or not, the fact that during the course of that -- or the alleged fact that during the course of that night, he'd been with two underage girls who were drinking to the point of getting hammered. And all of those different issues that make it less likely that he ran because he was guilty of a rape, and just as likely that he ran because of all those other reasons.

And so I have some concerns about the scope of what exactly I am going to allow with regard to his flight. I think that the evidence that he physically resisted the police is incredibly prejudicial, and has very little to do with what was going on in his head. Once he started running and the police grabbed him, he can resist for a hundred different reasons; because you're scared, because you think you're going to get hurt, because you don't like the police. I can think of 50 different reasons that have nothing to do with whether you're guilty or not.

So I'm going to allow the fact that he did not immediately comply. I'm going to allow the fact that he got into the car and was told to get out of the car. And I'm going to allow the fact that he tried to leave the scene. But we're not going to have evidence that he physically resisted the officers, tried to beat anyone up, or whatever else happened during the course of the actual physical arrest. RP 52-55.²

² The court considered the officer's reports (marked as pre-trial exhibits 1 and 2) in making its ruling. RP 28-29. The court reserved ruling on the video. RP 335. The State did not seek admission of the video during trial.

3. Trial Evidence

Trotman (born 1976) is the father of 20-year-old Anthony Cox. RP 146-47, 374, 395. Cox was the boyfriend of 17-year-old AMC.³ RP 390, 395. AMC's friend, BE, was 16 years old. RP 299, 302, 309. At times, Trotman would be with his son when the latter was at AMC's house. RP 303-04, 377-78, 385, 398, 402. RP 402.

On March 28, 2015, AMC and BE were hanging out at AMC's house. RP 309. Cox contacted AMC that night and invited them to come out and drink alcohol. RP 311, 343, 349, 404, 446. They accepted the invitation. RP 311, 404. Cox arrived with his father in the car.⁴ RP 312-14, 405. The four of them drove around while a bottle of an alcoholic drink called Fireball was passed around, each taking turns drinking. RP 314-16, 408-09. Trotman and Cox encouraged the girls to drink by passing the bottle to them. RP 316, 319, 410-11. No one forced them to drink. RP 347, 409. At some point, BE felt drunk. RP 318. According to

The court never ruled on the motion to exclude evidence of the warrant, with defense counsel suggesting the motion depended on whether the court allowed evidence of flight. RP 46. Counsel did not follow up on the motion after the court admitted the flight evidence.

³ The two had broken up by the time of trial. RP 395.

⁴ AMC testified she was surprised by Trotman's presence because she thought Cox was coming by himself and she did not like Trotman at that point. RP 408.

BE, AMC looked drunk. RP 318-19. AMC testified she was not drunk because she could still walk, but felt dizzy. RP 412, 449.

The car tire popped while they were driving. RP 320-21, 414. Cox drove the car to the side of the road. RP 320-21. BE got out to look at the flat tire. RP 322. When BE returned, AMC opened the door and vomited. RP 322, 417. AMC felt better after throwing up and did not feel intoxicated. RP 448, 454. She did not have any more alcohol. RP 448. Cox and Trotman tried to call a tow truck, but were unsuccessful. RP 323.

According to BE, she was in the backseat with AMC while Cox was outside the car, and Trotman was in the driver's seat. RP 323-24. Trotman grabbed BE's knee and asked her to give him a kiss. RP 324. BE said no. RP 324. Trotman pulled BE's hair, drawing her closer to his face. RP 324, 348-49. BE pushed his hand away and told him to stop. RP 325-26. BE agreed with defense counsel that Trotman was "fooling around." RP 346. When Cox got back in the car, BE told him to tell his dad to stop. RP 326. Cox did so, and Trotman stopped. RP 326. AMC was still throwing up while this was going on. RP 326.

AMC testified she did not see anything happening between BE and Trotman. RP 420. She was in the car with Trotman and BE when Cox was outside checking on the tire, but did not notice Trotman touching BE at all. RP 448-49. When the two subsequently talked outside the car, BE

told her that she felt uncomfortable because Trotman was "feeling on her a little bit." RP 420.

BE called her older sister around 3 in the morning and asked to be picked up. RP 284, 326-27. Trotman drove to a nearby parking lot. RP 327-28. BE's sister arrived about a half hour later. RP 285. According to BE's sister, AMC and BE appeared intoxicated, although AMC walked normally and did not need any help getting to the car. RP 289, 296. Cox and Trotman were not invited to ride back with them. RP 423.

BE's sister drove BE and AMC to AMC's house, which took about 15 minutes.⁵ RP 287, 290-91. BE went inside the house with AMC, where they talked and BE grabbed her belongings. RP 329-30. According to BE, AMC still appeared drunk. RP 331-32. AMC was not walking straight, and BE helped her inside the house. RP 344-45. According to BE's sister, AMC did not have any problems getting out of the car and walking into the house. RP 296.

BE told AMC inside the house that she did not want to tell her what Trotman did to her to avoid ruining the night. RP 425. After five minutes, BE left and went with her sister to her home, where she stayed

⁵ AMC's mother testified she heard the door open at 4 a.m. RP 149, 158, 161. She heard AMC go to the bathroom a couple hours later, and thought her daughter went back to sleep. RP 162. She heard the front door open and close at the time. RP 167.

the rest of the night. RP 292, 332. AMC locked the front door to her house. RP 425. She texted or spoke with Cox on the phone. RP 425-27. She let him know that she would leave her bedroom window open so that he could come over. RP 427-28. She brushed her teeth, got ready for bed, and went to sleep. RP 430.

Later on, AMC received calls from Trotman's phone number, the first at 5:03 a.m. and the last at 5:47 a.m. RP 118-23, 430-32; Ex. 2. She thought Cox was trying to reach her on his father's phone because his own phone had died.⁶ RP 430-31. AMC answered but heard no response. RP 430-32. Hearing wind and fast movement, as if the phone was in a pocket, she surmised her number was being accidentally "butt" dialed. RP 431. She went back to sleep. RP 433.

The next thing she remembered was waking up in her bed. RP 433. She noticed her leggings and underwear were half way off. RP 434. She had no idea how that happened. RP 435. Someone was in her bed. RP 434. Assuming it was her boyfriend, AMC went to the bathroom. RP 434-35. She noticed a fluid that looked like semen coming out of her vagina. RP 435-36. She peeked into her bedroom and saw Trotman in her bed, sleeping. RP 435-37. She had not invited him into her room. RP

⁶ Cox earlier told her that his phone was about to die and she figured it had when he stopped replying to her. RP 429.

436. She looked around for Cox, but did not find him. RP 437. She returned to her room, by which time Trotman was awake. RP 437. Trotman asked what time it was. RP 437. It was 9 a.m. RP 437. When Trotman heard the family dog scratching from her mother's room, Trotman asked if her mother was home. RP 437. AMC said yes. RP 437-38. She asked him where Cox was. RP 438. Trotman answered he was at the car shop getting a new tire. RP 438. She asked him why he was there. RP 438. Trotman did not answer that question. RP 438. He left the room through the window. RP 438.

AMC testified she was not sure or not aware of what happened. RP 451. AMC called her sister and then contacted her friends BE and TG.⁷ RP 336-37, 379, 439-40. They got together at BE's sister's house. RP 292-93, 337. BE's sister asked if she wanted to go the police or the hospital. RP 293-94. AMC said she did not want to do anything. RP 294.

⁸ BE's sister said the only thing she could do was take her to the hospital.

⁷ AMC did not tell her mother because she did not want her to be disappointed or mad at her. RP 439.

⁸ TG testified that AMC said she was confused and did not know what to do. RP 381-82. AMC testified that it was BE's sister idea to go the hospital (RP 441), but also testified "my plan was just to go to the hospital" and "I was going to the hospital no matter what." RP 440, 452. She also testified she wanted to get a "kit" done so that she would know what happened. RP 441.

RP 294. TG testified that she told AMC she should go to the hospital. RP 381-82. AMC agreed to go. RP 294, 382.

At the hospital, a forensic nurse examined her and noticed three superficial tears inside the entrance to AMC's vagina. RP 169, 180, 187-88. The tears were generally consistent with forced penetration. RP 195, 213. An unusually large penis could cause such tears, and it is possible that a 17-year-old will have a smaller vaginal opening than an older female who has given birth before.⁹ RP 212-14. There were no other injuries. RP 213. Later testing showed the male DNA profile obtained from AMC's vaginal swab matched Trotman's DNA. RP 27-79.

On April 9, 2015, Federal Way police officer Lisle was on patrol when he saw a vehicle registered to Cox speed by and later park at a 7-11. RP 359-64. Trotman got out of the car and went into the 7-11. RP 364-65. Lisle parked his patrol car in the parking lot. RP 364. Officer Davis arrived as backup. RP 353. After a few minutes inside, Trotman put up the hood of his sweatshirt and then exited. RP 365-66. Lisle told Trotman to put his hands up and that he was under mTest for "rape first, burglary first." RP 366. Trotman had a blank stare and did not respond. RP 367. Trotman got into the backseat of another vehicle. RP 355-56, 367. The

⁹ Lubrication helps prevent injury. RP 196. Some women don't lubricate as much as others. RP 214. The nurse testified "Usually it's when they're older that they don't lubricate." RP 214.

occupant of the vehicle told him to get out, and he did. RP 356, 368. Officers told him to stop, but Trotman moved away without acknowledging the officers. RP 356-57, 368. The officers pursued and ultimately arrested Trotman. RP 357, 369.

4. Denial Of Mistrial Motion

During the direct examination of AMC, the prosecutor asked why Trotman would wait in the car or the living room when Cox came over to her house. RP 398. AMC answered "I just didn't want him in my house." RP 398. The prosecutor asked "Why didn't you want him in your house?" RP 398. AMC answered "Because he just got out of jail." RP 398. Defense counsel objected. RP 398. The jury was excused from the courtroom. RP 398.

Defense counsel moved for a mistrial. RP 398-99. Counsel contended evidence that Trotman had been in jail was precluded by the court's pretrial order. RP 399. The information was unduly prejudicial and tainted the jury so that Trotman could not get a fair trial. RP 399. The prosecutor apologized, saying he did not intend to elicit the fact that Trotman had been in jail. RP 399.¹⁰ The prosecutor said he forgot to discuss with AMC that she should not mention criminal history, believing

¹⁰ Defense counsel did not dispute the prosecutor's elicitation was unintentional. RP 399.

she was not aware of any. RP 400. The court reserved ruling on the mistrial motion, and announced the jury would be instructed to disregard AMC's statement. RP 400-01.

The jury was brought back into the courtroom. RP 401. The court told the jury "I sustained the objection to the last statement that was made by [AMC]. Let me go further and instruct as follows: you are not to consider that statement in any way. You are to disregard it in its entirety and consider only the other information that's provided during the course of this trial." RP 401-02.

The court later reviewed case law on trial irregularities and heard argument on the mistrial motion. RP 458-61. Defense counsel worried "it's hard to unring the bell" despite the court's instruction. RP 461. "However, with the presumption that they'll adhere to the Court's ruling, I think is -- is something that we need to stand on. With that said, your Honor, I'd defer to the Comi." RP 461.

The court had originally anticipated Trotman was going to testify, at which point the jury would learn of a prior conviction for a crime of dishonesty, which "would have lessened the prejudice significantly." RP 462. But Trotman chose not to testify, so the court wanted to think about the mistrial motion some more. RP 462.

The court returned to the mistrial motion a few days later. RP 469-70. The court asked the prosecutor to explain why he did not talk to AMC before she testified about Trotman being in jail. RP 470. The prosecutor said he simply forgot and had no reason to believe she knew Trotman had been in jail recently. RP 470. The prosecutor did not recall that AMC had said anything in any prior interview about him being in jail. RP 470. The court asked the prosecutor why he asked the question that elicited the problematic answer. RP 470. The prosecutor answered vaguely that he felt it was important to do so. RP 471. Trotman pointed out AMC had mentioned in a prior interview that he had been in jail. RP 471-72. Upon realizing this, the prosecutor apologized, saying he must have "missed" this. RP 472. The court denied the mistrial motion, finding the irregularity was not so serious that the instruction to disregard would be ineffectual. RP 472-74.

C. ARGUMENT

1. THE COURT DENIED TROTMAN'S RIGHT TO A FAIR TRIAL IN FAILING TO GRANT A MISTRIAL AFTER THE JURY HEARD EVIDENCE THAT TROTMAN HAD BEEN IN JAIL ON ANOTHER CASE.

AMC's testimony that she did not want Trotman in her house because he had "just got out of jail" constitutes a trial irregularity. RP 398. There was no dispute that Trotman's criminal history should have been

excluded as evidence at trial. Given the seriousness of the irregularity and the questionable effect of an instruction to disregard, the trial court abused its discretion in failing to grant a mistrial.

A criminal defendant is guaranteed the right to a fair trial by article I, sections 3 and 22 of the Washington Constitution as well as the Sixth and Fourteenth amendments of the U.S. Constitution. State v. Mullin-Coston, 115 Wn. App. 679, 692, 64 P.3d 40 (2003), aff'd, 152 Wn.2d 107 (2004). The erroneous denial of a motion for mistrial violates that right. State v. Weber, 99 Wn.2d 158, 164, 659 P.2d 1102 (1983).

The trial court's decision to deny a motion for a mistrial is generally reviewed for an abuse of discretion. State v. Escalona, 49 Wn. App. 251, 254-55, 742 P.2d 190 (1987). A trial court must grant a mistrial where a trial irregularity may have affected the outcome of the trial, thereby denying an accused his right to a fair trial. Escalona, 49 Wn. App. at 254. In deciding whether a trial irregularity had this impact, courts examine (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether a curative instruction was capable of curing the irregularity. *Id.*

First, the irregularity in Trotman's case is serious. Evidence that a defendant has been previously arrested on an unrelated matter qualifies as evidence of prior misconduct under ER 404(b). State v. Acosta, 123 Wn.

App. 424, 433, 98 P.3d 503 (2004). Such evidence can be improperly used by a jury to infer a propensity to commit the charged crimes. Acosta, 123 Wn. App. at 433; State v. Sanford, 128 Wn. App. 280, 286-87, 115 P.3d 368 (2005) (admission of Sanford's booking photo constituted reversible error; the photo's presence in the police computer system clearly implied that he had previously been arrested for some other crime and raised a prejudicial inference of criminal propensity); see also State v. Henderson, 100 Wn. App. 794, 803, 998 P.2d 907 (2000) (prosecutor's suggestion that defendant had previously been arrested or convicted on another charge was misconduct (citing United States v. Fosher, 568 F.2d 207, 213 (1st Cir. 1978) ("[M]ug shots from a police department 'rogues gallery' are generally indicative of past criminal conduct and will likely create in the minds of the jurors an inference of such behavior."))).

Admission of evidence relating to a defendant's prior criminal conduct impermissibly shifts the jury's attention to the defendant's propensity for criminality. State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426, review denied, 133 Wn.2d 1019 (1997). Evidence of other misconduct is also prejudicial because jurors may convict on the basis that they believe the defendant deserves to be punished for a series of immoral actions. State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987),

abrogated on other grounds by *State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995).

Moreover, violation of a pre-trial order is a serious trial irregularity. *State v. Gamble*, 168 Wn.2d 161, 178, 225 P.3d 973 (2010). Although the pre-trial ruling in this case did not specifically reference evidence that Trotman was *previously* jailed, it did exclude the booking photo on the ground that evidence of Trotman being jailed in the present case was unduly prejudicial. CP 35. If evidence of being jailed on the current charges was improper, then evidence of being previously jailed in an unrelated case was necessarily improper as well.

In addressing how to handle AMC's improper testimony, the trial judge and the parties understood that any reference to Trotman previously being jailed was forbidden and that such testimony violated the pre-trial ruling on the matter. The trial prosecutor apologized for failing to inform AMC that she was not to mention Trotman's criminal history, and that he overlooked the fact that AMC knew Trotman had been jailed before. RP 470, 472. "It is the duty of every trial advocate to prepare witnesses for trial," including prepping a witness so as to avoid violation of a pre-trial ruling. *State v. Montgomery*, 163 Wn.2d 577, 592, 183 P.3d 267 (2008). While the prosecutor did not intentionally elicit the problematic evidence, "the judge should not consider whether the statement was deliberate or

inadvertent. That inquiry diverts the attention from the correct question: Did the remark prejudice the jury, thereby denying the defendant his right to a fair trial?" Weber, 99 Wn.2d at 164-65.

The second factor in assessing the effect of an irregularity is whether the statement in question was cumulative of properly admitted evidence. Escalona, 49 Wn. App. at 254. The jury did not otherwise hear that Trotman had been in jail before or had any other criminal history. The evidence was therefore not cumulative. This factor weighs in favor of a mistrial. The improper testimony is a singularity, not something that jurors would have heard anyway in another form.

The third factor is whether the irregularity could be cured by an instruction to disregard the remark. *Id.* The court here gave such an instruction, but some errors simply cannot be fixed in this manner. RP 401-02; see Dunn v. United States, 307 F.2d 883, 887 (5th Cir. 1962) ("If you throw a skunk into the jury box, you can't instruct the jury not to smell it."); Krulewitch v. United States, 336 U.S. 440, 453, 69 S. Ct. 716, 93 L. Ed. 790 (1949) (Jackson, J., concurring) ("the naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.").

While jurors are presumed to follow the court's instructions to disregard testimony, "no instruction can remove the prejudicial impression

created by evidence that is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors." Escalona, 49 Wn. App. at 255 (in assault prosecution for threatening complainant with a knife, testimony that Escalona stabbed someone else in the past required a mistrial, despite court's curative instruction) (quoting State v. Miles, 73 Wn.2d 67, 70-71, 436 P.2d 198 (1968) (prejudicial effect of testimony suggesting defendant had committed other crimes was not removed by trial court instruction to disregard)). "Although we ordinarily assume that instructing the jury to disregard extraneous evidence sufficiently ensures that inadmissible evidence will not influence the jury . . . where the extrajudicial statement concerns a defendant's prior criminal acts, the efficacy of such instructions is subject to serious doubt." Dickson v. Sullivan, 849 F.2d 403, 408 (9th Cir. 1988).

As courts have recognized, there are times when jurors cannot reasonably be expected to insulate themselves from a prejudicial reference. AMC's testimony falls into this category. Defense counsel was in a difficult position. The objection was absolutely justified, but it also carried the risk of emphasizing the improper testimony in the minds of jurors that might otherwise have been passed over without a second thought. An objection can unduly emphasize damaging trial testimony. State v. McLean, 178 Wn. App. 236, 247, 313 P.3d 1181 (2013), review

denied, 179 Wn.2d 1026 (2014). For this reason, an objection and request for a curative instruction frequently does more harm than good. See State v. Curtis, 110 Wn. App. 6, 15, 37 P.3d 1274 (2002) (addressing impermissible comment on right to silence) (citing Perrett, 86 Wn. App. at 322 ("The court said he would strike the comment if Perrett desired. The court warned, however, that 'to strike is to simply raise the issue to the mind of the jury.' Perrett opted not to strike the comment."))).

This is true in Trotman's case. AMC's objectionable testimony was not simply elicited and then passed over without further comment. Testimony that Trotman had just got out of jail was not something that jurors were likely to forget, given that they were pulled from the courtroom and kept waiting after defense counsel requested a sidebar immediately following AMC's improper testimony. After sitting outside the courtroom, inevitably reflecting on the objectionable testimony that prompted their removal, they were then brought back and told to disregard the testimony. The objection, the removal from the courtroom, and the instruction to disregard had the inevitable effect of cementing the improper testimony in the minds of jurors.

Further, consideration must be given to *who* uttered the improper testimony. AMC was the star witness in this case. The jury could not reasonably be expected to just forget what she said when what she had to

say was crucial to the State's case against Trotman. The jury could reasonably be expected to latch onto the improper testimony about Trotman being in jail because it provided insight into the relationship between Trotman and AMC. As it sought to understand the dynamics of any relationship between Trotman and AMC, the jury could conclude a 16-year-old girl would not be in a romantic relationship or engage in consensual sex with a bad guy, i.e., an adult with criminal history.

In denying the motion for mistrial, the trial court relied on State v. Condon, 72 Wn. App. 638, 865 P.2d 521 (1993), review denied,

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Wn.2d 1031, 877 P.2d 694 (1994). In Condon, a State's witness testified the defendant had been in jail, in violation of a pre-trial order excluding such evidence. Condon, 72 Wn. App. at 648. The Court of Appeals held the remarks were not so serious as to warrant a mistrial. Id. at 649-50. The court noted the reference to being in jail was ambiguous and did not indicate a propensity to commit the charged murder, nor did it "necessarily" mean the defendant had been convicted of a crime. Id. at 649. The court also noted the curative instruction alleviated any resulting prejudice, and that unlike in Escalona, it was not a "close case," as the evidence against Condon was "very strong." Id. at 650, n. 2.

Trotman takes issue with some of the reasoning in Condon. Although a reference to being in jail does not "necessarily" mean the

defendant was convicted of a crime, the jail reference in and of itself is still prejudicial. Sanford, a more recent case, recognized this in reversing conviction. Sanford, 128 Wn. App. at 286-87. "The law has long recognized that evidence of prior crimes is inherently prejudicial to a defendant in a criminal case." State v. King, 75 Wn. App. 899, 905, 878 P.2d 466 (1994). "Statistical studies have shown that even with limiting instructions, a jury is more likely to convict a defendant with a criminal record. H. Kalven & H. Zeise!, The American Jury 146, 160-69 (1966). It is difficult for the jury to erase the notion that a person who has once committed a crime is more likely to do so again." King, 75 Wn. App. at 905 (quoting State v. Jones. 101 Wn.2d 113, 120, 677 P.2d 131 (1984), overruled on other grounds by State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989)). The mere fact of arrest meant the police officers believed he committed a crime, a belief which jurors are apt to respect. See Montgomery, 163 Wn.2d at 595 (police officer's expertise is in determining when an arrest is justified).

Further, Condon downplayed the significance of being in jail as ambiguous, such that it did not indicate a propensity to commit the crime charged. Condon, 72 Wn. App. at 649. But evidence of being in jail on another matter is classic propensity evidence. Sanford, 128 Wn. App. at 286-87; Acosta, 123 Wn. App. at 433. Such evidence may not *necessarily*

show a propensity to commit the crime charged, but that is certainly an available inference. And it is an inference that jurors have a hard time resisting. "A juror's natural inclination is to reason that having previously committed a crime, the accused is likely to have reoffended" by acting in conformity with that character. State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990). Prejudice resides in the inflammatory nature of evidence showing a criminal character. And where, as here, jurors are not informed of the offense for which a person has been jailed, they are left to their own devices to fill in the void with whatever their imaginations can conjure. A juror could believe, given the serious charge of rape leveled against Trotman, that he had committed a serious crime in the recent past, having "just" got out of jail. That would be acting in conformity with character. This is the bottom line: "It is difficult for the jury to erase the notion that a person who has once committed a crime is more likely to do so again." Jones, 101 Wn.2d at 120.

This Court is not bound by Condon. This Court can disagree with another Court of Appeals' decision if it finds the decision unpersuasive. Grisby v. Herzog, 190 Wn. App. 786, 806-11, 362 P.3d 763 (2015). For the reasons articulated, Trotman asks this Court to depart from the reasoning employed in Condon.

In any event, "[e]ach case must rest upon its own facts, and in some instances the error may be so serious that an instruction, no matter how framed, will not avoid the mischief." State v. Marsette, 7 Wn. App. 783, 789, 502 P.2d 1234 (1972) (quoting State v. Albutt, 99 Wn. 253, 259, 169 P. 584, 586 (1917)). Condon was not a close case -the evidence against the defendant was so strong that the irregularity could not have affected the outcome. Condon, 72 Wn. App. at 650 n. 2. In Trotman's case, evidence supporting the rape and assault charges was not overwhelming. BE testified that Trotman grabbed her knee, pulled her hair and tried to kiss her inside the car. RP 323-26. AMC, on the other hand, did not observe any such conduct take place, even though she was sitting in the car with them at the time. RP 420, 448-49. That inconsistency by itself is enough for reasonable doubt on the assault charge.

There was also a rational basis to question whether the State proved the rape charge beyond a reasonable doubt. AMC claimed not to like Trotman and did not even want him in her house, which taken at face value supported the State's theory that the sexual intercourse occurred without her consent. RP 398, 408. Yet she freely chose to socialize and

go out drinking with Trotman. That is curious behavior for someone who claimed not to even like him.¹¹

Significantly, she kept Trotman's personal phone number stored on her cell phone, such that when he called his identifying information ("Anthony's Dad") displayed itself. Ex. 2; RP 118-23, 430-33. A reasonable juror could question if there was more to her relationship with Trotman than AMC let on and discount her testimony accordingly. Why on earth would she have Trotman's number on her phone if, as she claimed, she did not like him and had no relationship with him? That does not make sense. And from that, a reasonable juror could question whether AMC was telling the truth when she testified the calls she received from Trotman's phone in the early morning were only accidental "butt" dials in which no conversation took place. RP 430-33. The last two calls were for 40 and 49 seconds respectively, long enough for a conversation to take place and a meet-up arranged. Ex. 2. A reasonable juror could find AMC was not telling the truth when she testified that she did not speak with Trotman on the phone, and question whether the two had in fact agreed to meet up for consensual sex.

¹¹ AMC used the familiar diminutive of "Drew" in referring to Trotman, instead of a formal name. RP 397.

A mistrial is warranted when an irregularity in the trial proceedings, when viewed against the backdrop of all the evidence, is so prejudicial that it deprives the defendant of a fair trial. State v. Babcock, 145 Wn. App. 157, 163, 185 P.3d 1213 (2008); Weber, 99 Wn.2d at 164. The common assumption triggered by AMC's improper jail reference is that "since he did it once, he did it again." Bacotgarcia, 59 Wn. App. at 822. Evidence of prior criminal misconduct "inevitably shifts the jury's attention to the defendant's general propensity for criminality, the forbidden inference; thus, the normal 'presumption of innocence' is stripped away." Bowen, 48 Wn. App. at 195. "This forbidden inference is rooted in the fundamental American criminal law belief in innocence until proven guilty, a concept that confines the fact-finder to the merits of the present case in judging a person's guilt or innocence." State v. Wade, 98 Wn. App. 328, 336, 989 P.2d 576 (1999).

When viewed against the backdrop of the entire trial, a mistrial was the only remedy that ensured an unfair trial would be avoided. Potential reasonable doubt existed on the rape and assault charges, but the jury still convicted Trotman of those crimes. AMC's testimony that Trotman had just gotten out of jail may have swayed the jury to convict. That testimony was entirely irrelevant and inflammatory. "A trial in which irrelevant and inflammatory matter is introduced, which has a

natural tendency to prejudice the jury against the accused, is not a fair trial." Miles, 73 Wn.2d at 70. Such is the case here. The rape and assault convictions should be reversed.

2. THE COURT WRONGLY ADMITTED FLIGHT EVIDENCE NOT PROBATIVE OF GUILT AND SUBSTANTIALLY OUTWEIGHED BY UNFAIR PREJUDICE.

The trial court committed reversible error in admitting evidence of Trotman's flight from police. Evidence that Trotman attempted to flee from police when confronted at the convenience store 11 days after the alleged crimes at issue took place did not show consciousness of guilt, considering the amount of time that passed between the alleged crimes and the flight, as well as the fact that Trotman had other reasons for trying to escape apprehension, including an outstanding warrant in another case. Whatever marginal relevance the evidence had was outweighed by its unfair prejudicial effect under ER 403.

The United States Supreme Court has "consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime." Wong Sun v. United States, 371 U.S. 471, 484, n.10, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) (collecting cases). The Court has recognized that "it is not universally true that a man who is conscious that he has done a wrong will pursue a certain course not

in harmony with the conduct of a man who is conscious of having done an act which is innocent, right, and proper, since it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses." Alberty v. United States, 162 U.S. 499, 511, 16 S. Ct. 864, 40 L. Ed. 1051 (1896) (internal quotations marks omitted).

"When evidence of flight is admissible, it tends to be only marginally probative as to the ultimate issue of guilt or innocence." State v. Freeburg, 105 Wn. App. 492, 498, 20 P.3d 984 (2001). "[W]hile the range of circumstances that may be shown as evidence of flight is broad, the circumstance or inference of consciousness of guilt must be substantial and real, not speculative, conjectural, or fanciful." Freeburg, 105 Wn. App. at 498. The probative value of flight evidence as circumstantial evidence of guilt depends upon the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged. Id. (citing United States v. Myers, 550 F.2d 1036, 1049 (5th Cir. 1977)).

Courts "will not accept '[p]yramiding vague inference upon vague inference [to] supplant the absence of basic facts or circumstances from which the essential inference of an actual flight must be drawn.'" State v. McDaniel, 155 Wn. App. 829, 854, 230 P.3d 245 (2010) (quoting State v. Bruton, 66 Wn.2d 111, 113, 401 P.2d 340 (1965)). Instead, "the government must make certain that each link in the chain of inferences that concludes with a consciousness of guilt of the crime charged is sturdily supported." United States v. Wright, 392 F.3d 1269, 1278 (11th Cir. 2004) (citing Myers, 550 F.2d at 1049).

In this case, 11 days had elapsed between the time Trotman allegedly committed the crimes and the time he was confronted by police at the 7-11. The passage of time between the charged criminal conduct and alleged flight is a factor to consider. United States v. Blanco, 392 F.3d 382, 395-96 (9th Cir. 2004). "The more remote in time the alleged flight is from the commission or accusation of an offense, the greater the likelihood that it resulted from something other than feelings of guilt concerning that offense." Myers, 550 F.2d at 1051. "The immediacy requirement is important. It is the instinctive or impulsive character of the defendant's behavior, like flinching, that indicates fear of apprehension and gives evidence of flight such trustworthiness as it possesses." Id. The passage of 11 days between the alleged crimes at issue and the police

contact does not support the conclusion that Trotman's behavior showed consciousness of guilt for the charged crimes. Immediate flight from a crime scene is markedly more probative than flight or concealment from law enforcement after the crime. See United States v. Howze, 668 F.2d 322, 325 (7th Cir. 1982) (without immediacy between flight and crime, court must find flight conduct was specifically related to the charged crime).

Moreover, Trotman had a warrant out for his arrest at the time he was confronted by police. RP 54; CP 26. This fact further cuts the link between Trotman's behavior and consciousness of guilt for the charged crimes. See McDaniel, 155 Wn. App. at 855 (fact that defendant was wanted on several warrants, not just the one related to the charged incident, was a factor weighing against finding of consciousness of guilt for charged crime). Trotman may have fled for a reason that had nothing to do with the charged crimes. He may have tried to evade police apprehension because he knew he would be jailed on the outstanding warrant in an unrelated matter.

The trial judge recognized "you have two potential bases upon which Mr. Trotman may have fled. One being the fact that he had a warrant for his arrest, and two being that he was suspected of committing this crime." RP 54. But the judge drew the inference of guilt concerning

the crime charged because the police told Trotman he was under arrest for rape and burglary, without mentioning the warrant, and "based on that, he ran." RP 54. The judge did not properly take into account what Trotman may have been thinking at the time. The police did not mention Trotman was being arrested based on the warrant, but Trotman would know about the warrant and also know that if he were detained the police would learn about it as well. So the potential that he ran because of the warrant, and not with anything having to do with the rape and burglary charges, remains.

When there are other reasons why a person might flee, the inference that flight shows consciousness of guilt for the charged crime loses its footing. See Myers, 550 F.2d at 1050 (fact that alleged flight occurred after two robberies (Florida and Pennsylvania), only one of which he stood trial on (Florida), did not allow finding of consciousness of guilt on charged robbery because "it is impossible to say whether the California flight resulted from feelings of guilt attributable to the Florida and Pennsylvania robberies or from consciousness of guilt about the Pennsylvania robbery alone.").

The trial judge understandably struggled with whether consciousness of guilt in this case could be inferred: "There are about a hundred different reasons that Mr. Trotman would be concerned about the

police investigating that particular incident, not the least of which would be the relationship between him and his son, the inappropriateness of any relationship, whether illegal or not, the fact that during the course of that - - or the alleged fact that during the course of that night, he'd been with two underage girls who were drinking to the point of getting hammered. *And all of those different issues that make it less likely that he ran because he was guilty of a rape, and just as likely that he ran because of all those other reasons.*" RP 54 (emphasis added).

The judge in this manner articulated the reason why evidence of flight should have been excluded. The judge, however, did not attempt to resolve the dilemma, but rather simply announced what evidence he would allow and not allow. RP 55. It seems that the judge attempted to justify allowing evidence of flight by disallowing evidence of Trotman's resistance and struggle with police, in effect "splitting the baby" as in the biblical story of King Solomon. But the reasoning is untenable. Simply because the judge stopped short of admitting all of the available evidence associated with Trotman's interaction with police does not mean the evidence that was admitted was of sufficient probative evidence to show consciousness of guilt for the rape and burglary charges. One does not follow from the other. Either the evidence that was admitted is of sufficient probative value or it isn't. The judge himself articulated why it

wasn't — there were other reasons for Trotman's behavior — but then ruled the flight evidence would be admitted anyway. That was an abuse of discretion.

Evidence of flight is inherently unreliable. Myers, 550 F.2d at 1050. At best, such evidence is only "marginally probative." Freeburg, 105 Wn. App. at 498. So there'd better be a strong evidentiary link to allow for the consciousness of guilt inference. That kind of link is missing here. There are too many other reasons for Trotman's flight behavior. Counsel argued the flight evidence was irrelevant and unduly prejudicial. RP 26. Counsel was right. Not only was this evidence insufficiently probative, it was unduly prejudicial. This evidence permitted jurors to conclude Trotman was a criminal type person who tried to evade law enforcement and therefore was consciously guilty of the charged crimes. Given that the flight evidence was at best weakly probative of guilt and any probative value was substantially outweighed by unfair prejudice, the flight evidence should have been excluded under ER 403.¹²

¹²ER 403 provides "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Evidentiary error requires reversal if there is a reasonable probability the error affected the outcome. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). "A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." State v. Britton, 27 Wn.2d 336, 341, 178 P.2d 341 (1947). In assessing whether the error was harmless, admissible evidence of guilt is measured against the prejudice caused by the inadmissible testimony. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Harmless error occurs only when the evidence is of "minor significance in reference to the overall, overwhelming evidence as a whole." Bourgeois, 133 Wn.2d at 403.

As argued in section C.1, supra, the evidence against Trotman on the rape and assault counts was not overwhelming. And because it was not overwhelming, the flight evidence error cannot be considered trivial or insignificant. Evidence that Trotman fled from arrest when confronted at the 7-11 was extremely damaging and succeeded in painting Trotman as a guilty fugitive. In closing argument, the prosecutor pointed to the flight evidence to argue "He does not act surprised, he does not act confused. He knew what he did was wrong. He knew he had been caught, and he tried to escape." RP 508. The prosecutor exhorted the jury to convict

based on the flight evidence. The danger is that the jury took the prosecutor up on this offer. Within a reasonable probability, this flight evidence affected the outcome of Trotman's trial. This error is grounds for reversal of the rape and assault counts.

3. THE COURT EXCEEDED ITS STATUTORY AUTHORITY IN IMPOSING TWO COMMUNITY CUSTODY CONDITIONS THAT ARE NOT CRIME-RELATED.

"As a policy matter, cautious attention to detail in the sentencing forms will serve to better inform offenders of their rights, ensure protection of those rights, .. and prevent confusion among judges, defendants and community corrections officers regarding the applicable legal standard." State v. Combs, 102 Wn. App. 949, 953, 10 P.3d 1101 (2000). Pre-printed community custody conditions in Trotman's judgment and sentence provide a textbook example of incautious attention to detail. Two of them are unauthorized by statute because they are not related to the crime. Yet Trotman is exposed to sanction for violating them upon supervised release. The challenged conditions, set forth below, must be stricken as unauthorized by statute.

a. The appellate court reviews de novo whether the trial court exceeded its statutory authority to impose a community custody condition.

The court's authority to impose sentence in a criminal case is strictly limited to that authorized by the legislature. State v. Jolmson, 180 Wn. App. 318, 325, 327 P.3d 704 (2014). Any sentencing condition that is not expressly authorized by statute is void. Johnson, 180 Wn. App. at 325. Whether the court had statutory authority to impose a given condition is reviewed de novo on appeal. Id. The trial court's decision is reviewed for abuse of discretion only if it had statutory authorization. Id. at 326. Defense counsel did not object to the improper community custody conditions below, but erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

b. The conditions pertaining to sex-related businesses and sexual materials are not crime-related.

As part of the felony sentence for rape, the court ordered "Do not enter sex-related businesses, including: x-rated movies, adult bookstores, strip clubs, and any location where the primary source of business is related to sexually explicit material." CP 107. The court also ordered "Do not possess, use, access or view any sexually explicit material as defined by RCW 9.68.130 or erotic materials as defined by RCW 9.68.050 or any

material depicting any person engaged in sexually explicit conduct as defined by RCW 9.68A.011 (4) unless given prior approval by your sexual deviancy provider." CP 108.

RCW 9.94A.703 lists conditions of community custody, some mandatory, some waivable. The above conditions are not listed. RCW 9.94A.703. However, a court may impose other "crime-related prohibitions." RCW 9.94A.703(3)(t). A condition is "crime-related" only if it "directly relates to the circumstances of the crime." RCW 9.94A.030(10). The condition need not be causally related to the crime, but it must be directly related to the crime. *State v. Zimmer*, 146 Wn. App. 405, 413, 190 P.3d 121 (2008). Thus, crime-related conditions of community custody must be supported by evidence showing the factual relationship between the crime punished and the condition imposed. *State v. PaITamore*, 53 Wn. App. 527, 531, 768 P.2d 530 (1989). Substantial evidence must support a determination that a condition is crime-related. *State v. Motter*, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007), overruled on other grounds, *State v. Sanchez Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010).

Neither of the conditions at issue here are crime-related. There must be a nexus between the crime and the prohibition. *Johnson*, 180 Wn. App. 330-31. There is no evidence that presence in a sex-related business

had any connection with the crime for which Trotman was convicted. There is no evidence Trotman accessed sexually explicit materials and the like as part of the rape offense. Because the rape offense for which he was convicted does not involve any such activity, these conditions are not crime-related under RCW 9.94A.703(3)(f) and should be stricken. See State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008)

(remanding to the trial court to strike a condition of community custody that was not crime-related).

4. THE COMMUNITY CUSTODY CONDITION REQUIRING TROTMAN TO INFORM THE COMMUNITY CORRECTIONS OFFICER OR TREATMENT PROVIDER OF ANY DATING RELATIONSHIP IS UNCONSTITUTIONALLY VAGUE.

The court erred in imposing the following condition of community custody: "Inform the supervising CCO and sexual deviancy treatment provider of any dating relationship." CP 107. The condition violates due process because it is insufficiently definite to apprise Trotman of prohibited conduct and does not prevent arbitrary enforcement.

The due process vagueness doctrine requires the State to provide citizens with fair warning of proscribed conduct under the Fomieenth Amendment to the U.S. Constitution and article I, section 3 of the Washington Constitution. Bahl, 164 Wn.2d at 752. The doctrine also

protects from arbitrary, ad hoc or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is therefore void for vagueness if it does not (1) define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited; or (2) provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53; State v. Sullivan, 143 Wn.2d 162, 181-82, 19 P.3d 1012 (2001). Claimed due process violations are reviewed de novo. State v. Autrey, 136 Wn. App. 460, 467, 150 P.3d 580 (2006).

The condition here does not provide Trotman with adequate notice of what he must do to avoid sanction and does not prevent arbitrary enforcement. The question is what constitutes a "dating relationship." Commonly understood, a "relationship" is "a state of affairs existing between those having relations or dealing." Webster Third New Int'l Dictionary 1916 (1993). In the context of an interaction between people, a "date" means "an appointment or engagement usu. for a specified time . . . esp: an appointment between two persons of the opposite sex for the mutual enjoyment of some form of social activity" or "an occasion (as an evening) of social activity arranged in advance between two persons of opposite sex." Id. at 576. Referring to a person, a "date" is "a person of

the opposite sex with whom one enjoys such an occasion of social activity." Id.

Such behavior conceivably covers a large range of human interaction. The condition, as written, leaves the dividing line between a non-dating relationship and a dating relationship intractably blurry. The condition requires Trotman to take affirmative action to avoid running afoul of his sentence but requires him to do so without a standard for determining when he must do so. The condition does not provide Trotman with adequate notice as to what relationships he is prohibited from forming. A reasonable person cannot describe a standard necessary to avoid arbitrary enforcement. Suppose Trotman has dinner with someone in a restaurant. Is that a date? Would that constitute a "dating relationship"? What if it was a one-time occasion? Is that enough to form a "relationship" with someone? Does meeting someone twice for enjoyable social activity turn an ordinary relationship into a dating relationship? Three times? Suppose Trotman strikes up a relationship with someone online, and then they go out to a movie together. Is that a dating relationship or something else? What if Trotman and another person often enjoy social activities together, but consider themselves "just friends." Does that nonetheless qualify as a dating relationship?

A condition that leaves so much to the imagination is unconstitutionally vague because it gives too much discretion to the CCO to determine when a violation has occurred. See State v. Sanchez Valencia, 169 Wn.2d 782, 794-95, 239 P.3d 1059 (2010) (striking down prohibition on paraphernalia: "'an inventive probation officer could envision any common place item as possible for use as drug paraphernalia,' such as sandwich bags or paper. . . . Another probation officer might not arrest for the same 'violation,' i.e. possession of a sandwich bag. A condition that leaves so much to the discretion of individual community corrections officers is unconstitutionally vague.").

Is the phrase "dating relationship" meant to be limited to a romantic relationship? If so, the vagueness problem remains. United States v. Reeves, 591 F.3d 77 (2d Cir. 2010) is instructive. Reeves held a condition of supervision requiring the defendant to notify the probation department upon entry into a "significant romantic relationship" is vague in violation of due process. Reeves, 591 F.3d at 79, 81. The court observed "people of common intelligence (or, for that matter, of high intelligence) would find it impossible to agree on the proper application of a release condition triggered by entry into a 'significant romantic relationship.'" Id. at 81. "What makes a relationship 'romantic,' let alone 'significant' in its romantic depth, can be the subject of endless debate that

varies across generations, regions, and genders." Id. The condition had "no objective baseline," as "[n]o source provides anyone-comis, probation officers, prosecutors, law enforcement officers, or Reeves himself - with guidance as to what constitutes a 'significant romantic relationship.'" Id.

The condition in Trotman's case suffers from the same kind of defect. "Subjective terms allow a 'standardless sweep' that enables state officials to 'pursue their personal predilections' in enforcing the community custody conditions." Johnson, 180 Wn. App. at 327 (quoting City of Spokane v. Douglass, 115 Wn.2d 171, 180 n.6, 795 P.2d 693

(1990) (quoting Kolender v. Lawson, 461 U.S. 352, 358, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)) (internal quotation marks omitted). Trotman's freedom during supervised release should not hinge on the accuracy of his prediction of whether a given CCO, prosecutor, or judge would conclude that a targeted relationship had been entered into without first informing the CCO or treatment provider of its existence. The condition, as written, does not provide a standard by which a reasonable person can understand what qualifies as "dating relationship" and what does not in a non-arbitrary manner.

There is no presumption ¹¹¹ favor of the constitutionality of a community custody condition. Sanchez Valencia, 169 Wn.2d at 792-93. Imposition of an unconstitutional condition is manifestly unreasonable. Id.

at 792. The condition here is unconstitutional because it fails to provide reasonable notice as to what Trotman must do and when he must do it. The condition exposes Trotman to arbitrary enforcement. As such, the condition does not meet the requirements of due process and should be stricken or modified to provide proper notice.

5. IN THE EVENT THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, ANY REQUEST FOR APPELLATE COSTS SHOULD BE DENIED.

The Court of Appeals has discretion to deny a cost bill even where the State is the substantially prevailing party. State v. Sinclair, 192 Wn. App. 380, 386, 388, 367 P.3d 612, review denied, 185 Wn.2d 1034 (2016); RCW 10.73.160(1) (the "court of appeals . . . *may* require an adult . . . to pay appellate costs."). The imposition of costs against indigent defendants raises serious concerns well documented in State v. Blazina: "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." State v. Blazina, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). The concerns expressed in Blazina are applicable to appellate costs and it is appropriate for appellate courts to be mindful of them in exercising discretion. Sinclair, 192 Wn. App. at 391.

The trial court waived all discretionary costs because Trotman did not have the ability to pay them. CP 100; RP 565. Trotman qualified for

indigent defense services on appeal. CP 94-96. He has no assets but owes an indeterminate amount of court fines. CP 133. There is a presumption of continued indigency throughout the review process. Sinclair, 192 Wn. App. at 393; RAP 15.2(f).

Further, Trotman received an indeterminate sentence of a minimum of 280 months in prison and a maximum term of life. CP 102. As a convicted felon, it will be difficult for him to find gainful employment even if he is released. As a convicted sex offender, the difficulty will be increased. Considering the circumstances, Trotman asks this Court to soundly exercise its discretion by denying any request for appellate costs. See State v. Cardenas-Flores, __Wn. App.__, __P.3d__, 2016 WL 3264358, at *10 (slip op. filed June 14, 2016) (waiving appellate costs in light of defendant's indigent status, and presumption under RAP 15.2(f) that she remains indigent "throughout the review" unless the trial court finds that her financial condition has improved).

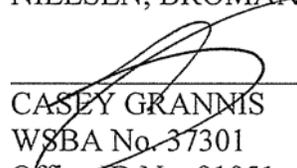
D. CONCLUSION

For the reasons stated, Trotman requests the assault and rape convictions be reversed, and the challenged community custody conditions be stricken or corrected.

DATED this 14 day of August 2016

Respectfully Submitted,

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