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Court of Appeals  
Division I  
State of Washington

NO. 74549-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

ANDREW TROTMAN,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE ROGER S. ROGOFF

---

**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. An irregularity in a trial proceeding is grounds for a mistrial only when nothing short of a mistrial will ensure a fair trial, and juries are presumed to follow a trial court's curative instructions. In Trotman's trial for entering a teenage girl's home and raping her while she lay unconscious in bed, the defense moved for a mistrial after the victim testified that Trotman "just got out of jail," without any further elaboration, and the jury was firmly admonished not to consider that statement in any way. Did the trial court reasonably conclude that a mistrial was not required?

2. Evidence of flight is admissible as circumstantial evidence of guilt if the jury could infer that the defendant's behavior was flight indicative of consciousness of guilt. In Trotman's trial, police testified that, when they informed Trotman that he was under arrest for rape and burglary, he ignored them and tried to flee. Did the trial court act within its discretion by allowing this testimony? Was any error harmless?

3. Community-custody conditions prohibiting behavior must be crime-related, meaning there must be some connection between the crime and the condition. Are Trotman's community-custody prohibitions on entering sex-related businesses and possessing

and using sexually explicit material reasonably related to his crime of plying a 17-year-old girl with whiskey and then climbing through her bedroom window to rape her while she was unconscious?

4. A community custody condition is not unconstitutionally vague if it provides ordinary people fair warning of proscribed conduct and has standards that are definite enough to protect against arbitrary enforcement. One of Trotman's community-custody conditions requires him to notify his community-corrections officer and sexual-deviancy treatment provider of "any dating relationship." Is this condition not unconstitutionally vague?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

Andrew Jason Trotman was charged by amended information with five counts, all alleged to have occurred in King County, Washington, on or about March 29, 2015: (1) rape in the second degree of 17-year-old A.M.C., where she was incapable of consenting to sexual intercourse by reason of being mentally incapacitated and physically helpless; (2) assault in the fourth degree with sexual motivation of 17-year-old B.E.; (3, 4) two counts of supplying liquor to a minor; and (5) burglary in the first degree of the building where A.M.C. was assaulted. CP 32-33. A jury found

Trotman guilty of counts one through four, but acquitted him of count five (burglary) and deadlocked on the issue of sexual motivation as to count two (assault of B.E.). CP 85-90; RP 542-45.<sup>1</sup> The trial court declared a mistrial as to that special sexual-motivation allegation. RP 544.

The trial court imposed a standard-range indeterminate sentence totaling 280 months to life. CP 102. Trotman timely appealed. CP 91.

## **2. SUBSTANTIVE FACTS**

In March 2015, A.M.C. was a 17-year-old high-school student who lived with her mother in a ground-floor apartment in a complex in Federal Way. RP 390-91, 438. She took community-college classes through the Running Start program. RP 391-92. She wanted to become a nurse, and maybe a doctor. RP 392. Meanwhile, she spent much of her free time with two close girlfriends whom she had known since junior high school, including B.E., who was also 17. RP 299-302, 393-94.

For several months, A.M.C. had been dating a 20-year-old man whose father was 38-year-old Andrew Trotman. RP 395-96. A.M.C.'s boyfriend visited her often, and frequently stayed the

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<sup>1</sup> The State adopts appellant's numbering of the verbatim report of proceedings. See Brief of Appellant (BOA) at 3 fn. 1.

night. RP 429. Trotman also came around often to pick up his son, and sometimes came inside, but A.M.C. did not know Trotman very well, and felt unsure of him, so she preferred that he stayed outside. RP 398, 402.

On March 28, 2015, a Saturday, A.M.C. and her friend B.E. spent the day together at A.M.C.'s apartment, and B.E. was planning to sleep over. RP 403, 425. As midnight approached, A.M.C.'s boyfriend called to invite the girls out. RP 404. A.M.C. did not want to go out because it was already so late, but B.E. wanted to go, so A.M.C. agreed. Id.

When A.M.C.'s boyfriend arrived, she was unpleasantly surprised to find Trotman with him in the car. RP 405, 408. Trotman and his son had a very large bottle of Fireball, a cinnamon-flavored, sweetened whiskey. RP 409. With Trotman behind the wheel, the foursome drove aimlessly around South King County, passing the Fireball. RP 316, 409-11. Trotman and his son kept encouraging the girls to drink more and more. Id. Both girls noticed that Trotman was not drinking as much as everyone else, and may even have been pretending to drink. Id.

Both girls became drunk. RP 317-18, 413. Trotman stopped at a casino in Renton so the girls could urinate behind the

building. RP 317-19, 412-13. Shortly afterward, as Trotman continued to drive and pass the bottle to the girls, the car got a flat tire. RP 320-22, 414. When Trotman stopped the car, A.M.C. became ill from the whiskey and started vomiting outside the car. RP 322-23, 415-17.

Trotman tried to comfort A.M.C. by putting his hand on her leg and calling her "my baby." RP 419. Then Trotman started reaching over and grabbing B.E.'s leg, and asked the girl to kiss him. RP 324. When B.E. refused, Trotman pulled her to him by her hair. RP 324-26. B.E. resisted and kept telling Trotman to stop. RP 325-26. B.E. asked Trotman's son to tell Trotman to stop. RP 326. Trotman stopped. Id.

The two girls decided to call B.E.'s older sister to come get them. RP 326-27. A.M.C. felt sick, and wanted to be alone. RP 416. "I just wanted to go home and sleep in my bed," A.M.C. later testified. RP 422. "I wanted to brush my teeth and just — just go to bed." Id. B.E.'s sister arrived and drove A.M.C. home. RP 423. A.M.C. did not invite her boyfriend to come in the car with them. Id. "I was irritated; I didn't want him with me," she later testified. "I just wanted to get out of there and go home." Id. She did not invite Trotman to come along either, and later blanched at the mere

suggestion: "He's like 38," she testified. "Like why would I invite him? Like I — there's no point in like — he could figure it out — his own way home." Id.

When A.M.C. got home, B.E. went home with her older sister instead of staying the night. RP 424. A.M.C. chained her front door and went to bed, but she text-messaged her boyfriend to say the bedroom window was unlocked if he wanted to come over to sleep. RP 427-30. She went to bed. RP 430.

Around 5 a.m., A.M.C. received a string of phone calls and messages from Trotman's phone number, which A.M.C. had labeled as that of her boyfriend's "dad" in her phone-contacts list. RP 430-31. She answered a couple of the calls and said hello, but heard only noise on the other end as if someone were running and had inadvertently dialed her number. RP 531-32. She went back to sleep. RP 433.

A.M.C. woke up about 9 a.m. and noticed someone next to her in bed. RP 434. She thought it was her boyfriend. Id. She noticed her underwear and leggings were pulled down. RP 434-35. She went to the bathroom and noticed semen leaking from her vagina. RP 435-36. Her lower abdomen hurt. RP 436. She

peeked back into her bedroom. Id. It was not her boyfriend in her bed; it was Trotman. Id.

Confused, the teen went outside to see if her boyfriend was maybe asleep in his car. RP 437. His car was not there. Id. She returned to her room to find Trotman rising from bed. RP 437. He asked for the time, and whether A.M.C.'s mother was home. Id. A.M.C. said her mother was home, and asked Trotman where her boyfriend was and why Trotman was in her bedroom. RP 438. Trotman said his son was getting the car tire fixed. Id. Then he climbed out the bedroom window. Id.

A.M.C. did not know what to do. RP 439. She feared her mother would be mad at her. Id. In tears, she called her older sister, who lived in the same complex. RP 391, 439. Her sister took her to the home of B.E.'s older sister, who had given the girls the ride home the night before. RP 439. A.M.C. also called her other close girlfriend and picked her up on the way. RP 439-40. After a tearful discussion, A.M.C. agreed to go to the hospital. RP 381-82, 440-41. "I wanted to get a kit done on me, 'cause I wanted to know what happened." RP 441.

At the hospital, A.M.C. told a forensic nurse that she had no idea what had happened to her. RP 185. The nurse found

“copious amounts” of semen leaking from A.M.C.’s vagina. RP 189. The nurse found tears inside the girl’s vagina that were “consistent with forced penetration.” RP 191, 195. She took swabs and gave them to police, who later sent them to the crime lab. RP 197, 234, 265. A forensic scientist later found Trotman’s DNA in the sperm from inside the girl’s vagina.<sup>2</sup> RP 278.

A patrol officer was dispatched to the hospital to find a “nervous and distant” victim who then broke down in tears. RP 116. B.E. later described her friend as tearful and angry. RP 337, 340. Her other girlfriend testified that A.M.C. was confused, crying and sick. RP 379-82. B.E.’s older sister would testify that all the girls were crying together over what happened. A detective found A.M.C. to be sometimes stoic, sometimes emotional. RP 226. In contrast, her boyfriend was evasive and uncooperative with police. RP 230.

At trial, Trotman presented no evidence and did not testify. RP 480. In closing, his defense was that the State did not disprove that A.M.C. actually invited Trotman over for consensual sex but was too drunk to remember. RP 515-21. Trotman argued it was “equally plausible” that the sex was consensual because the

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<sup>2</sup> After the forensic scientist testified at trial, Trotman’s attorney declined to cross-examine, announcing to the jury that “we stipulate” that it was Trotman’s sperm.

17-year-old girl lived in “another world” where her mother let her stay out late, she willingly drank alcohol and had a “live-in boyfriend.” RP 515.

**C. ARGUMENT**

**1. THE TRIAL COURT EXERCISED SOUND DISCRETION IN DENYING A MISTRIAL.**

Trotman first claims that his conviction should be reversed because the trial court should have declared a mistrial when the teenage victim testified that she did not like Trotman in her home “because he just got out of jail,” without any further elaboration. Trotman’s claim is without merit because the vague and ambiguous testimony was of minimal prejudice and was easily cured by the trial court’s immediate and strenuous instruction to the jury to disregard the comment.

**a. Additional Relevant Facts.**

When the jury was first seated for Trotman’s trial, the trial court gave it this instruction: “You must not consider or discuss any evidence that I do not admit, or that I tell you to disregard.” RP 76.

A.M.C. was the State’s final witness. RP 387-455. Early in her testimony, she and the prosecutor had this exchange:

Q: Would [your boyfriend’s] dad be there every time [your boyfriend] came over?

A: No.

Q: Why would he wait in the car or the living room?

A: I just didn't want him in my house.

Q: Why didn't you want him in your house?

A: Because he just got out of jail.

RP 398.

Trotman's attorney objected and asked for a mistrial. RP 399. The prosecutor told the trial court that he had not anticipated that answer from A.M.C., but had expected her to say she "got a weird vibe from him." RP 400. The trial court said it would reserve ruling on a mistrial pending further argument. Id.

The trial court said it would, in the meantime, instruct the jury "to disregard her last statement and not consider it in any way," and then asked Trotman's attorney whether he wanted "something stronger than that." RP 401. Trotman's attorney replied, "I don't think there's anything stronger than that." Id.

When the jury returned, the trial court immediately addressed the jurors:

Everyone can be seated. Ladies and gentlemen, I sustained the objection to the last statement that was made by [A.M.C.]. 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. A.M.C. then resumed her extensive testimony, including that she did not like Trotman. RP 408.

After A.M.C. testified and the State rested, the trial court revisited the mistrial motion. RP 458-62. The State noted that the testimony was limited to “a very vague statement the defendant was at some point in jail” and “the jury can’t really infer much from that,” but nevertheless is “presumed to follow the Court’s instruction, and the Court has instructed them to disregard that statement.” RP 460.

Trotman’s attorney agreed that a mistrial would be appropriate only if nothing less would assure a fair trial, and:

*I believe that the Court did give an instruction that is sufficient. And I agree that — that — that Mr. Trotman being incarcerated — or in jail, I think as [A.M.C.] testified, that didn’t have to do with the prior — that is associated with what he’s charged with today.*

RP 461 (emphasis added). Trotman’s lawyer added that while “it’s hard to unring the bell,” considering “the presumption that [the jury will] adhere to the Court’s ruling,” Trotman would “defer to the Court,” on whether to declare a mistrial. Id.

The trial court additionally noted that it was considering that the testimony about being in jail did not come from a police official but from a teenage girl “who’s just sort of spouting off.” RP 461-62. The trial court said it would think about it over the weekend. RP 462-63.

On Monday, the trial court denied a mistrial. RP 474. The trial court said that based on the type of irregularity, combined with its curative instruction — which “can only be described as emphatic,” and “all of the jurors nodded their heads as I was saying it” — the “irregularity was not so serious that the instructions could not prevent an unfair trial for Mr. Trotman.” RP 474.

Before closing argument, the trial court instructed the jury that “if evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.” RP 482.

See WPIC 1.02.

- b. The Teenage Victim’s Vague And Ambiguous Reference To Jail Was Not So Serious As To Warrant A Mistrial.

A trial court’s denial of a motion for a mistrial is reviewed for abuse of discretion. State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012). In evaluating this claim, the reviewing court considers (1) the seriousness of the irregularity, (2) whether the irregularity involved cumulative evidence, and (3) whether the trial court instructed the jury to disregard the evidence. Id. Those factors are considered with deference to the trial court because the trial court is in the best position to discern prejudice. State v. Garcia, 177 Wn. App. 769, 777-78, 313 P.3d 422 (2013). A trial court should grant a

mistrial only if there is such prejudice that nothing short of a mistrial will ensure the defendant a fair trial. Emery, 174 Wn.2d at 765. An abuse of discretion will be found for denial of a mistrial only when no reasonable judge would have reached the same conclusion. Id. This Court presumes the jury follows the instructions of the court. State v. Osman, 192 Wn. App. 355, 379, 366 P.3d 956 (2016).

While a violation of an order in limine is considered a serious trial irregularity, not all violations of orders in limine have been held to be so serious as to deprive the defendant of a fair trial.<sup>3</sup> See State v. Thompson, 90 Wn. App. 41, 46-47, 950 P.2d 977 (1998) (remark “was sufficiently serious because it violated a motion in limine,” but “not so egregious as to deny ... a fair trial”); State v. Condon, 72 Wn. App. 638, 649-50, 865 P.2d 521 (1993): In Condon, a State’s witness twice testified that the defendant had been in jail, but the court held that while the remarks had the potential for prejudice, they were not so serious to warrant a mistrial. 72 Wn. App. at 648-50. The court noted that the reference to being in jail was ambiguous and did not necessarily indicate a propensity to commit the crime charged, nor did it necessarily mean

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<sup>3</sup> In Trotman’s case, there was no order in limine forbidding this witness to mention jail, so her testimony was not actually an irregularity based on a violation of a pretrial order. Nevertheless, the parties did not dispute that the testimony should not have been given.

that the defendant had been convicted of a crime. Id. at 649. The court also noted that the curative instruction alleviated any resulting prejudice, and that it was not a close case, as the evidence against Condon was strong. Id. at 650 n.2.

As the trial court here noted, Trotman's case is indistinguishable from Condon except that here the testimony was even more innocuous. The witness, a teenage high-school student, made one vague reference to jail without providing any other information. The mere fact that Trotman was in jail does not indicate a propensity to commit burglary and rape, and it did not even necessarily mean that he had been convicted of a crime. And here, even Trotman's own trial counsel agreed that the trial court's forceful instructions to disregard the comment "were sufficient" to alleviate any potential prejudice. As in Condon, the irregularity here was not so serious as to require a mistrial.

Trotman does not really attempt to distinguish his case from Condon. Instead, he contends that Condon is wrong and should be ignored. His attack on Condon is not tenable.

First, Condon never has been disfavored by any subsequent court, and this Court has relied upon Condon in cases like this one for 23 years, and continues to do so routinely. See State v. Wade,

186 Wn. App. 749, 775, 346 P.3d 838 (2015) (police witness's reference to a booking photo not enough for mistrial). See also State v. Hunter, No. 73252-8-I, 2016 WL 3456860 at \*2 (issued June 20, 2016) (ambiguous mention of arrest warrant did not indicate propensity to commit car theft); State v. Melendrez, No. 72210-7-I, 2015 WL 9462045 at \*8 (issued December 28, 2015) (ambiguous mention of jail by trial judge did not warrant mistrial); State v. O'Haver, No. 71669-7-I, 2014 WL 3361997 at \*5 (issued July 7, 2014) (same for vague mention of prior violence, even without curative instruction); State v. Johnson, No. 68971-1-I, 2014 WL 953492 at \*6 (issued March 10, 2014) (vague reference to previous police investigation); State v. Whittles, No. 43127-1-II, 2013 WL 4010256 at \*5 (issued August 6, 2013) (passing reference to prior police investigation).<sup>4</sup>

Still, Trotman "takes issue with some of the reasoning in Condon," essentially arguing that any mention of a defendant being in jail "in and of itself" is incurably prejudicial and merits a mistrial *per se*. BOA at 22-23. His argument entirely disregards our courts' longstanding presumption that jurors are intelligent, responsible

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<sup>4</sup> Because Condon has remained the authoritative case on this issue for 23 years, and no subsequent decision has modified, clarified or reversed it, the vast majority of cases that rely on Condon for this issue are unpublished. See RAP 12.3(d).

people who follow the curative instructions of the courts. Similarly, his argument that curative instructions merely compound the prejudice of an error not only ignores the presumption, it flips it to presume that jurors disregard curative instructions.

Trotman has offered nothing other than speculation to overcome the presumption here that his jury followed the trial court's admonitions. This is especially so because the trial judge, who was in the best position to determine prejudice, specifically observed on the record that the panelists were nodding along with his instruction. Trotman's own lawyer said the instruction was sufficient. And, after all, the jury acquitted Trotman of one of the most serious charges — strong evidence that it was not unfairly prejudiced against him.

Trotman offers "a more recent case" in State v. Sanford<sup>5</sup> for the proposition that a "jail reference in and of itself is still prejudicial." BOA at 23. But that case does not say that a reference to jail is reversible or incurable error *per se*. Sanford was not about a passing reference to jail — or even a motion for a mistrial — but about whether it was error to admit the defendant's booking photo from a police file, and if so, whether it was harmless.

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<sup>5</sup> 128 Wn. App. 280, 283, 115 P.3d 368 (2005).

128 Wn. App. 280, 285-88, 115 P.3d 368 (2005). There, the court found that the admission of the booking photo was not harmless error because the court could not say that the other evidence was overwhelming — the victim’s testimony was “ambiguous,” for example. Id. at 286-88. The court would not have bothered with such analysis if it felt a jail reference was “in and of itself” incurable or could never be harmless.

The other cases Trotman offers for out-of-context quotes are inapposite because they involved actual and specific criminal history. See State v. King, 75 Wn. App. 899, 905, 878 P.2d 466 (1994) (admitting prior felony convictions under ER 609 to impeach defendant); State v. Montgomery, 163 Wn.2d 577, 595, 183 P.3d 267 (2008) (police officer witness opining on defendant’s guilt of charged offense); State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990) (testimony of accused pimp’s former prostitute about being drugged, raped and sold for sex at age 15). Merely being in jail is not necessarily evidence of prior crimes. Condon, 72 Wn. App. at 649.

Lastly, Trotman contends that unlike Condon, his case was a close call because jurors might have believed A.M.C. actually invited Trotman into her bed for a “meet up.” BOA at 25-26. The

measure of a “close case” is not whether “a reasonable juror could question whether (the victim) was telling the truth,” as Trotman advances. That would describe practically every criminal trial. A close case is one like Sanford, with ambiguous victim testimony, or State v. Escalona, an assault-by-knife case where testimony that the defendant previously stabbed someone actually mattered because the victim’s testimony was dubious, self-conflicting and unsubstantiated; the police corroborated the defendant’s account; and no weapon was found. 49 Wn. App. 251, 252-54, 742 P.2d 190 (1987). See also Condon, 72 Wn. App. at 650 n.2 (“[f]urthermore, unlike Escalona, this was not a ‘close case’”).

Here, there was no evidence that A.M.C. was lying or that there had been a consensual predawn “meet up” between the unwelcome, disliked, 38-year-old Trotman and the young victim. With no defense testimony, Trotman’s entire defense consisted of unsupported innuendo of the victim’s loose morals and speculation about why she answered her phone. RP 515-16. Trotman’s hypothesis, that the victim was so promiscuous that she had to go to a hospital to find out whether or not she had been raped by her boyfriend’s father, was unsupported by evidence and, to say the least, unpersuasive. This was not a close case.

The victim's vague and ambiguous reference to Trotman being in jail was not so serious as to warrant a mistrial. The trial court did not abuse its discretion in denying one.

**2. THE COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING SOME EVIDENCE OF TROTMAN'S ATTEMPT TO EVADE ARREST.**

Next, Trotman contends that despite all the other evidence in his case, he did not receive a fair trial because the jury heard that he tried to avoid arrest. This argument fails because the court exercised its sound discretion in admitting relevant evidence. Any error was harmless.

**a. Additional Relevant Facts.**

After A.M.C. reported the rape to the Federal Way police, a detective issued a "law enforcement bulletin" for Trotman's arrest. RP 226-27. Trotman was found by patrol officers and arrested at a convenience store the following week. RP 352-57, 359-69.

Pretrial, the State said it intended to offer details of Trotman's arrest as evidence of consciousness of guilt. RP 24-25. The State proffered that officers on patrol recognized Trotman outside the store and approached him. RP 23. One officer told Trotman "to put his hands up and that he was under arrest for Rape First and Burglary First Degree." Id. Trotman ignored the officer's

command and got into another vehicle and sat down, but the people in the vehicle told him to get out. RP 24. So Trotman got out of the car and tried to run. Id. Officers used Tasers on him to no effect, and Trotman fought with the officers as they physically subdued him. Id.

Trotman objected, arguing that none of the evidence was relevant and all of it was prejudicial because “it would infer guilt.” RP 26. The trial court applied a four-part test from State v. Freeburg<sup>6</sup> and concluded that Trotman’s initial attempts to leave the scene after being told of the specific charges were relevant as circumstantial evidence, but physically fighting with the officers was not. RP 53-55.

The arresting officers confined their testimony to Trotman’s initial attempt to get into someone’s car and ignoring the officers and their commands to stop as he attempted to leave the area on foot. RP 351-69. Officer Brian Leslie testified that he specifically told Trotman “that he was under arrest for Rape First Degree, and Burglary First Degree.” RP 366.

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<sup>6</sup> 105 Wn. App 492, 498, 20 P.3d 984 (2001).

b. The Admitted Evidence Was Relevant  
Circumstantial Evidence Of Guilt And Was Not  
Unfairly Prejudicial.

Courts evaluate evidence of flight as “other crimes, wrongs or acts” under ER 404(b), and a trial court’s ruling under ER 404(b) is reviewed solely for abuse of discretion, which occurs only where the decision of the trial court was manifestly unreasonable or based on untenable grounds. State v. Freeburg, 105 Wn. App. 492, 497, 20 P.3d 984 (2001). An abuse of discretion occurs only when no reasonable judge would have reached the same conclusion. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

Admissibility of evidence under ER 404(b) requires a three-part analysis: (1) identify the purpose for which the evidence will be admitted; (2) the evidence must be materially relevant to that purpose; and (3) the court must balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the fact-finder. Freeburg, 105 Wn. App. at 497.

Generally, “evidence of the flight of a person, following the commission of a crime, is admissible and may be considered by the jury as a circumstance, along with other circumstances of the case, in determining guilt or innocence.” State v. Bruton, 66 Wn.2d 111, 112, 401 P.2d 340 (1965). Evidence of flight is admissible when it

creates “a reasonable and substantive inference that defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution.” Freeburg, 105 Wn. App. at 497 (quoting State v. Nichols, 5 Wn. App. 657, 660, 491 P.2d 677 (1971)). Washington law “does not define what circumstances constitute flight, so ‘evidence of resistance to arrest, concealment, assumption of a false name, and related conduct are admissible’ if the trier of fact can reasonably infer the defendant’s consciousness of guilt of the charged crime.” State v. McDaniel, 155 Wn. App. 829, 854, 230 P.3d 245 (2010) (quoting Freeburg, 105 Wn. App. at 497-98).

Here, the trial court carefully considered the State’s proffered evidence and made a measured ruling that fulfilled its obligation under ER 404(b) to consider the probative value of the evidence against the unfair prejudice it might create. RP 53-55. The trial court excluded evidence of fighting because it was too prejudicial and not as probative of guilt as the initial flight.

The trial court also specifically made a record of its analysis under Freeburg. That analysis was correct, because key to its conclusion was:

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 (sic) 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.

RP 54.

The trial court's measured ruling was based on sound judgment that Trotman's response was circumstantially relevant to the rape of the teenage victim the week before. The trial court did not abuse its discretion. Certainly another judge might have disagreed, but surely it cannot be said that no rational judge would have ruled as the trial court did here.

Trotman complains that the trial court "did not take into account what Trotman might have been thinking at the time." BOA at 32. But the record shows clearly that the trial court did, in fact, consider other possibilities, such as Trotman's apparent arrest warrant. And the possibility of other explanations is an issue of evidentiary weight that Trotman could have argued to the factfinder but did not.

Trotman also complains that because 11 days had passed, Trotman's flight was meaningless. That might be true if the officers

had not told him of the specific charges. But the officers told him he was under arrest for rape and burglary. Was Trotman possibly thinking of a different, more recent rape and burglary?

Moreover, the federal cases Trotman offers do not set a time limit for flight to be relevant, and their facts are not comparable here. In United States v. Blanco, Blanco showed his middle finger to a DEA agent and sped off on a motorcycle, but then came back 15 minutes later. 392 F.3d 382, 395-96 (9<sup>th</sup> Cir. 2004). In United States v. Howze, the defendant “was not arrested ... until four and one-half months after the crime allegedly took place,” which meant the court “*must be certain there is evidence that a defendant knows he is being sought for the specific crime charged and not some other crime or event.*” 668 F.2d 322, 324 (7th Cir. 1982) (emphasis added). That is exactly what happened here. The passage of 11 days did not vitiate the probative value of Trotman’s attempt to flee.

The trial court applied the proper tests in considering the evidence of flight and made a sound ruling that was well within its discretion. Trotman’s argument fails.

c. Any Error Was Harmless.

Nonconstitutional error in admitting ER 404(b) evidence requires reversal only if it is reasonably probable that

the error materially affected the trial's outcome. State v. Everybodytalksabout, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). The improper admission of evidence is harmless error if that evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Even if Trotman's attempted flight from arrest was improperly admitted, it was completely harmless in this case. The jury heard consistent and poignant testimony from the 17-year-old victim that she awoke to find the defendant, whom she did not like, in her bed. Her testimony was supported by numerous witnesses with no real impeachment of their credibility. Expert testimony showed the girl had injuries consistent with forced intercourse. DNA evidence confirmed the semen leaking from her body was Trotman's. The evidence in this case was overwhelming. The fact that Trotman tried to evade police when confronted with these specific crimes definitely was probative, but it was a mere aside compared to everything else pointing to his guilt.

Still, Trotman complains that the evidence of flight was significant because the prosecutor discussed it in closing argument. Evidence is not more significant, or less harmless, simply because

a prosecutor mentions it in summation. See Bourgeois, 133 Wn.2d at 406 (even if prosecution “put an additional gloss” on testimony by discussing it in closing, that is dulled by jury instruction that counsel’s arguments are not evidence).

Trotman repeats his assertion that his case was somehow a close call, by arguing that the evidence was “not overwhelming.” As previously stated, the physical evidence and the virtually unimpeached testimony of the witnesses in this case was undeniably overwhelming. Trotman’s defense — that the teen victim lacked good morals and answered her phone, so she might have invited Trotman into her bedroom for sex — was factually unsupported and wholly incredible in the face of all the actual evidence.

The evidence of Trotman’s initial attempt to evade arrest, even if erroneously admitted, was entirely harmless.

**3. THE COMMUNITY-CUSTODY CONDITIONS REGARDING SEX-RELATED BUSINESSES AND SEXUALLY EXPLICIT MATERIALS ARE VALIDLY CRIME-RELATED.**

Next, Trotman complains that when he is released from prison to community custody, he should be allowed to enter sex-related businesses such as adult bookstores and strip clubs and

possess and view sexually explicit material because these are not related to his crime of plying a 17-year-old girl with alcohol, climbing through her bedroom window and raping her as she slept. His argument fails because the conditions meet the standard of being reasonably related to his crime.

a. Additional Relevant Facts.

As part of Trotman's judgment and sentence, the trial court signed an appendix establishing conditions of community custody. CP 107-08. Under "Special Conditions" related to sex offenses, the court specified that while on community custody Trotman may 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. It also specified that Trotman may 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 9.68.011(4) unless given prior approval by your sexual deviancy(sic) provider." CP 108.

b. The Conditions Are Reasonably Related To  
The Crime Of Rape.

Trial courts may impose crime-related prohibitions while a defendant is in community custody. RCW 9.94A.505(8), .703(3)(f). A “[c]rime-related prohibition’ ... prohibit[s] conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). “Directly related” includes conditions that are “reasonably related” to the crime. State v. Irwin, 191 Wn. App. 644, 656-57, 364 P.3d 830 (2015). This court reviews a trial court’s imposition of crime-related community custody conditions for abuse of discretion. Id. A sentencing court abuses its discretion if its decision is manifestly unreasonable or if exercised on untenable grounds or for untenable reasons. State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). This court reviews the factual bases for crime-related conditions under a “substantial evidence” standard. Irwin, 191 Wn. App. at 656.

Our appellate courts will strike community custody conditions when there is “no evidence” in the record that the circumstances of the crime relates to the community custody condition. Id. at 657. On the other hand, courts will uphold crime-related community custody decisions when there is “some basis for the connection,”

and do not require the prohibited activity to be factually identical to the crime. Id. For example, in State v. Kinzle, a child molestation case, the court upheld a prohibition on dating women with minor children even though Kinzle had not molested children of women he dated. 181 Wn. App. 774, 785, 326 P.3d 870 (2014).

Trotman's crime — plying a teenage girl with alcohol then climbing into her bedroom and raping her — directly involved sexual arousal, sexual deviancy, sexual predation and the sexual objectification of young women. Keeping Trotman away from sexually explicit businesses, performances and materials that primarily involve sexual arousal and the sexual objectification of women is directly and reasonably related to his crime and addressing Trotman's sexual deviancy.

In cases where the courts have stricken community-custody conditions for having no evidence of a connection to the crime, the prohibitions were on broad activities of otherwise normal life that truly had nothing to do with the nature of the crimes. See State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (in rape case, prohibition on Internet use generally). By contrast, Trotman's conditions prohibiting him from places and materials that

sensationalize and celebrate the sexual objectification of women are absolutely connected to his status as a rapist.

This Court should affirm those community custody conditions because there is a basis for a connection between the conditions and Trotman's crime.

**4. THE COMMUNITY CUSTODY CONDITION  
REQUIRING DISCLOSURE OF DATING  
RELATIONSHIPS IS NOT VAGUE.**

The appendix to Trotman's judgment and sentence also requires Trotman to "[i]nform the supervising CCO [community corrections officer] and sexual deviancy treatment provider of any dating relationship." CP 107. Trotman challenges this condition as unconstitutionally vague. Because it is not, his argument fails.

This court reviews community custody conditions for abuse of discretion, and will reverse them only if they are "manifestly unreasonable," which an unconstitutionally vague condition is. State v. Sanchez Valencia, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010). Laws are unconstitutionally vague if they fail to (1) provide ordinary people fair warning of proscribed conduct, and (2) have standards that are definite enough to protect against arbitrary enforcement. State v. Bahl, 164 Wn.2d 739, 751, 193 P.3d 678

(2008). A community custody condition is unconstitutionally vague if it fails to do either. Id. at 753.

However, “a community custody condition is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.” Sanchez Valencia, 169 Wn.2d at 793, 239 P.3d 1059 (internal quotation marks omitted) (quoting State v. Sanchez Valencia, 148 Wn. App. 302, 321, 198 P.3d 1065 (2009)). Impossible standards of specificity are not required to avoid being unconstitutionally vague. City of Seattle v. Eze, 111 Wn.2d 22, 26-27, 759 P.2d 366 (1988) (citing Kolender v. Lawson, 461 U.S. 352, 361, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)). “Condemned to the use of words, we can never expect mathematical certainty from our language.” Grayned v. Rockford, 408 U.S. 104, 110, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). “[I]f men of ordinary intelligence can understand a penal statute, *notwithstanding some possible areas of disagreement*, it is not wanting in certainty.” State v. Maciolek, 101 Wn.2d 259, 265, 676 P.2d 996 (1984) (italics added).

For example, in Sanchez Valencia, our supreme court found a community-custody prohibition on possessing “any paraphernalia”

was unconstitutionally vague because the phrase encompassed a virtually limitless variety of commonplace items. 169 Wn.2d at 793-95. But the high court noted that the more-specific phrase “drug paraphernalia” would not have been unconstitutionally vague. Id. at 794 (explaining that the court of appeals’ mistake in affirming the condition was erroneously reading the adjective “drug” into the condition). See also id. at 795 (J.M. Johnson, J., concurring) (“[a] ban on drug paraphernalia is sufficient to inform the petitioners of what is proscribed and prevent arbitrary enforcement”).

The term “dating relationship,” along with “date” and “to date,” are common terms of ordinary understanding. “Date” has an ordinary dictionary definition in this context: “an occasion (as an evening) of social activity arranged in advance between two persons of opposite sex” and “a person of the opposite sex with whom one enjoys such an occasion of social activity.” Webster’s Third International Dictionary 576 (1993). And “to date” is similarly common: “to make a date with; to go on a date with.” Id. The term “dating relationship” also has a similarly commonsensical statutory definition: “a social relationship of a romantic nature.” RCW 26.50.010.

The term “dating relationship” is not an indecipherable phrase for ordinary people. While the term “relationship” — as with “paraphernalia” in Sanchez Valencia — is an expansive term encompassing a wide range of situations, the term “dating relationship” — as with “drug paraphernalia” — is sufficiently narrow as to provide fair warning of what Trotman must tell his CCO and treatment provider about. And it is definite enough to protect against arbitrary enforcement.

Trotman imagines a string of what-if scenarios that he worries might confuse him or a CCO, but these are devil-in-the-detail hypotheticals that are well within the area where requirements are “not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.” Sanchez Valencia, 169 Wn.2d at 793. The law does not say that a condition is vague any time it is subject to hair-splitting.

Trotman claims that a federal case, United States v. Reeves, is “instructive” on this point. 591 F.3d 77 (2d Cir. 2010). That is only true because it shows why his argument is wrong. In Reeves, the condition at issue was to notify a probation officer of any “significant romantic relationship.” Id. at 80. The court found that

the layers of adjectives left too much room for confusion about the scope of the requirement: “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. at 81 (citing Mozart, Jane Austen, and Hollywood romantic comedies of the 1980’s and 2000’s).

Here, Trotman is simply required to disclose — not refrain from — any “dating relationship,” which is a commonly understood term. There is no extra layer of subjectivity here. “[F]air warning is not to be confused with the fullest, or most pertinacious, warning imaginable.” United States v. Gallo, 20 F.3d 7, 12 (1st Cir. 1994). “Conditions of probation do not have to be cast in letters six feet high, or to describe every possible permutation, or to spell out every last, self-evident detail.” Id. While the term “dating relationship” is not mathematically precise and does not specifically address the details of every “what if,” that does not make it unconstitutionally vague. Trotman’s argument fails.

D. **CONCLUSION**

For all the foregoing reasons, the State respectfully asks this Court to affirm Trotman's judgment and sentence.

DATED this 17<sup>TH</sup> day of October, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Casey Grannis, the attorney for the appellant, at Grannisc@nwattorney.net, containing a copy of the BRIEF OF RESPONDENT in State v. Andrew Jason Trotman, Cause No. 74549-2, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 17<sup>th</sup> day of October, 2016.

W Brame

Name:

Done in Seattle, Washington