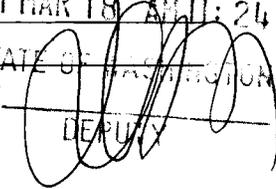


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ISAAC W. FORGEY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Lisa Worswick

No. 09-1-00233-1

RESPONDENT'S BRIEF

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court properly admitted a booking officer's testimony regarding defendant's address since it is outside the protection of *Miranda*.

2. Whether the prosecutor correctly stated that the State's burden is proof beyond a reasonable doubt, properly reminded the jury to consider the credibility of witnesses, and correctly argued the law of residence.

3. Whether defendant has failed to meet his burden of showing that defense counsel's performance was deficient and resulted in prejudice to defendant.

4. Whether defendant has failed to show that he can raise the community custody conditions of his sentence for the first time on appeal and has failed to show any improper delegation of those conditions by the sentencing court.

B. STATEMENT OF THE CASE.

1. Procedure

On January 14, 2009, the Pierce County Prosecuting Attorney's Officer charged ISAAC W. FORGEY, hereinafter "defendant", with one count of failing to register as a sex offender in Pierce County Cause No. 09-1-00233-1. CP 1-2. The information was later amended to expand the violation period to November 2, 2008 through April 7, 2010. CP 29.

Trial commenced on April 13, 2010, before the Honorable Lisa Worswick. RP 3. After hearing all the evidence, the jury returned a verdict finding defendant guilty as charged. CP 90; RP 458. The court

sentenced defendant to 12 months and one day in prison, the low end of the standard range sentence. CP 98-116; Sentencing RP 10. Defendant filed a timely notice of appeal from entry of this judgment. CP 117-134.

2. Facts

In 1991, defendant was convicted of Rape of a Child in the Third Degree and, as a result, was required to register as a sex offender. CP 3. Defendant initially registered in King County but re-registered in Pierce County when he moved. Every offender, including defendant, is provided with a packet that includes the laws regarding sex offender registration when they register in Pierce County. RP 246-247.

(a) Defendant's Registration and Address Verification Checks:

Andrea Shaw, an office assistant with the Pierce County Sheriff's Department in the Sex and Kidnap Offender Registration Unit testified that defendant first registered in Pierce County on May 19, 2008, and provided 19016 106th Street Court East in Bonney Lake ("Bonney Lake house") as his address. RP 199, 229.

Officer David Thaves, from the Bonney Lake Police Department, was in charge of the sex offender registry in November 2008. RP 129, 133. At trial, Officer Thaves testified that when he conducts verification checks and reaches someone other than the offender, he will check back later to confirm that the offender actually lives at that residence. RP 139.

He testified that if he is unable to verify that an offender lives at the registered address then he will forward the information to the prosecutor's office. *Id.*

Prior to November 2, 2008, Officer Thaves had conducted one or two address checks on defendant at the Bonney Lake house. RP 139, 141. During those prior checks, the other residents had told Officer Thaves that defendant lived there but worked for a moving company so he was not home very often. RP 140.

On November 2, 2008, around 10 p.m., Officer Thaves conducted a verification check at the Bonney Lake house and spoke with Michael Hellerud. RP 140. Mr. Hellerud told Officer Thaves that defendant did not live at that residence anymore. *Id.* Officer Thaves then referred the case to the prosecutor's office for possible charges for the violation. RP 142.

On January 26, 2009, defendant sent a letter to the Pierce County Sheriff's Department notifying them that he was moving from the Bonney Lake house to 22304 62nd Avenue East in Spanaway ("Spanaway house"). RP 225. There is no record of defendant contacting the Sex Offender Registration Unit between his initial registration on May 19, 2008 and January 26, 2009. RP 228.

Deputy Andrew Gerrero, from the Pierce County Sheriff's Department, did a verification check on defendant on February 19, 2009, at the Spanaway house. RP 265, 266. During the verification check, Mrs.

Klinger told Deputy Gerrero that defendant was asked to leave the first week of January and no longer lived there. RP 269, 271. Deputy Gerrero forwarded the information to the prosecutor's office. RP 270.

On May 29, 2009, defendant was booked into the Pierce County jail for failing to register as a sex offender. RP 288, 294. Officer Todd Klemme, a Corrections Deputy for the Pierce County Sheriff's Department, booked defendant into the Pierce County Jail. *Id.* At that time, defendant listed his address as 1213 Hillcrest Loop, Kettle Falls, Washington. RP 298, 303.

Defendant had not notified the Pierce County Sheriff's Department of his move to Kettle Falls and Ms. Shaw testified that their office found out through the Triple I FBI report that defendant had registered in Kettle Falls without notifying Pierce County. RP 228-230.

Amber Cook, a clerk for the Edmonds Municipal Court testified that the bail bond receipt for defendant was entered on June 22, 2009, and listed 1213 Hillcrest Loop Road, Kettle Falls, Washington, as his address. RP 280, 284. Ms. Cook further testified that the address was different than the address previously listed on defendant's records so she updated the address to reflect the Kettle Falls address. RP 285.

(b) Trial testimony about defendant's living arrangements:

At trial, several witnesses testified with conflicting information about where defendant lived during the time in question.

Michael Hellerud, defendant's uncle, testified at trial that defendant moved into the Bonney Lake house with him and his wife Carla about four or five months prior to November of 2008. RP 174, 176, 177. Mr. Hellerud was present during the address verification check conducted on November 2, 2008. RP 177-178. Mr. Hellerud testified that he had been staying with his daughter for a few weeks and had only been back in the Bonney Lake house for a few days prior to the verification check. RP 179. Mr. Hellerud testified that he had not seen defendant since he had been back in the house and didn't remember what he told the officer when the officer came to do the verification check. RP 184.

Carla Hellerud, defendant's aunt, testified for the defense at trial. Mrs. Hellerud stated that defendant moved in with her at the Bonney Lake house in May 2008 and lived there until the Helleruds moved at the end of January 2009. RP 342, 365. She further testified that defendant paid \$100 per month in rent and that she gave defendant receipts for his rent payments. RP 342-343.

Benjamin Duffy, defendant's cousin, testified for the defense at trial. Mr. Duffy testified that defendant was living at the Bonney Lake house in November 2008 and that defendant continued to receive mail at that house until the end of January 2009. RP 319, 320, 333.

Helen Klinger, a long-time friend of defendant's family, testified that defendant lived at her house (the Spanaway house) in December of 2008. RP 82-83. Ms. Klinger stated that defendant lived in the Spanaway

house for about 30 days and moved out on Christmas Day in 2008. RP 85, 91. Ms. Klinger stated that when defendant moved out of her house, he moved in with her son. RP 87.

Ms. Klinger's husband, Michael Klinger, also testified that defendant lived at the Spanaway house during December 2008 and that defendant moved out sometime after Christmas. RP 122.

Defendant testified that he moved into the Bonney Lake house in May 2008, and registered his address with Pierce County at that time. RP 420. Defendant testified that he moved into the Spanaway house at the end of January 2009, and notified the Pierce County sex offender registration department of that move by letter dated January 26, 2009. RP 433, 436. Defendant testified that he was only staying at the Spanaway house a few days a week and sometimes would stay in his car in the driveway instead of going inside. RP 447. Defendant stated that he would stay with other family members the rest of the time. *Id.* Defendant did not have a key to the Spanaway house. *Id.* Defendant also testified that although he stayed at Ms. Klinger's son's home on occasion, he never lived there. RP 449.

Defendant claimed that he provided the Kettle Falls address to the booking officer at the Pierce County jail because that was the address that he was planning on moving to. RP 451. Defendant stated that he thought that the Pierce County Sheriff's Department was notified of his change of

address when he provided it to the booking officer and when the court ordered him to live at that address as a condition of his release. RP 457.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY ADMITTED THE ADDRESS DEFENDANT PROVIDED DURING BOOKING BECAUSE THAT STATEMENT FALLS UNDER THE ROUTINE BOOKING EXCEPTION TO *MIRANDA*¹.

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) applies to inculpatory statements made during custodial interrogation. It is well established that routine booking procedures do not require *Miranda* warnings. *State v. Walton*, 64 Wn. App. 410, 414, 824 P.2d 533 (1992), citing *State v. Sargent*, 111 Wn.2d 641, 651, 762 P.2d 1127 (1988). A request for routine information necessary for basic identification purposes is not interrogation even if the information revealed is incriminating. *State v. Walton*, 64 Wn. App. 410 citing *State v. McLaughlin*, 777 F.2d 388, 391 (8th Cir. 1985). “[R]outine background questions necessary for identification and to assist a judge in setting reasonable bail . . . are precisely the routine statements which are admissible, even though they ultimately prove to be incriminating.” *State v. Denney*, 152 Wn. App. 665, 218 P.3d 633 (2009), citing *Walton*, 64 Wn. App. at 414. Only if the agent should have reasonably known the

information sought was directly relevant to the offense will the request be subject to scrutiny. *Walton*, 64 Wn. App. at 414, citing *United States v. Burns*, 684 F.2d 1066, 1075-76 (2d Cir. 1982).

In *Walton*, the defendant was asked his address during routine booking into jail for possession of a controlled substance. At trial, the State introduced defendant's statements about his address which is the address where the drugs defendant was being charged with were found. *Id.* The court held that asking a suspect's address is "precisely the routine statements which are admissible, even though they ultimately prove to be incriminating." *Id.* at 414.

The present case is similar to *State v. Walton*, 64 Wn. App. 410. In the present case, defendant was asked his address during the routine booking of defendant into the Pierce County jail. It is that statement that defendant argues should have been excluded. Appellant's Brief, p. 20. However, the statement falls under the routine booking exception to *Miranda* and therefore the trial court properly admitted the statement.

At the 3.5 hearing, Corrections Officer Todd Klemme testified about the booking process at the Pierce County Jail. RP 22-29. Officer Klemme explained that the jail needs to keep records on inmates for identification purposes and therefore the following information is obtained from the inmate: name, address, date of birth, employment information,

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

medical concerns, the property the offender has with him, and the charges for which the offender is being booked. RP 22-23. It is not standard practice for the booking officer to advise an offender of his *Miranda* rights when booking him into jail or for the booking officer to ask if the police advised the offender of his *Miranda* rights. RP 27.

Officer Klemme booked defendant into jail on May 29, 2009. RP 27-28. In order to book defendant into jail, Officer Klemme followed the standard jail booking process. RP 29. Officer Klemme did not threaten or coerce defendant into providing his address and the information Officer Klemme obtained from defendant was not for the purpose of assisting in an investigation. RP 29-30.

Defendant relies on *State v. Denney*, 152 Wn. App. 665, to support his assertion that the court should have excluded his statement to the booking officer. Appellant's Brief, p. 24-27. However, the facts in *Denney* are substantially different than the facts in the present case. In *Denney*, the defendant was arrested for theft and possession of controlled substances. *Denney*, 152 Wn. App. 665. The defendant invoked *Miranda* and was subsequently booked into jail. *Id.* The investigating officer remained in the booking area during the booking process of the defendant. *Id.* The booking officer asked the defendant questions regarding her drug use and the defendant admitted that she had taken morphine that day. *Id.* at 668. The investigating officer overheard these statements and testified at trial regarding those statements. *Id.* at 669.

The court reversed the defendant's conviction, finding that "regardless of their routine nature, the questions in this case were reasonably likely to produce an incriminating response." *Id.* at 670. The court further explained that when determining if the routine booking exception applies, the court should inquire as to whether the party should have known that the question was reasonably likely to elicit an incriminating response. *Id.* at 671, (*internal citations omitted*). The court also noted that relationship between the question asked and the crime suspected is highly relevant. *Id.* at 671-672.

The present case is distinguishable from *Denney* in several important ways. First, the investigating officer was not present during the routine booking of defendant into jail. Second, the question asked of defendant regarding his address was to obtain basic identifying information necessary for booking defendant into jail. The questions asked of the defendant in *Denney* were not basic identifying questions, they were questions regarding drug use. Additionally, although Officer Klemme was aware of the charges for which defendant was being booked into jail, there is nothing in the record that establishes that Officer Klemme, a booking officer, knew that defendant's address was an element of the crime of failing to register as a sex offender, and therefore should have known that asking defendant for his address would lead to an incriminating statement.

The trial court properly admitted defendant's statement regarding his address because it was obtained during the routine booking of defendant into jail, was asked solely for identification purposes, does constitute interrogation and was necessary for booking defendant into jail.

2. THE PROSECUTOR DID NOT MISSTATE THE BURDEN OF PROOF, DID NOT COMMIT MISCONDUCT BY REMINDING THE JURY THAT CREDIBILITY OF WITNESSES SHOULD BE CONSIDERED AND DID NOT MISSTATE THE LAW.

A defendant claiming prosecutorial misconduct in argument bears the burden of demonstrating that the remarks were improper and that they prejudiced the defense. *State v. Perkins*, 97 Wn. App. 453, 457, 983 P.2d 1177 (1999), quoting *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994). To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and his or her actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985), citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952).

Allegedly improper comments are reviewed in the context of the entire argument, the issues of the case, the evidence addressed in the argument, and the instructions given. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998); *State v.*

Bryant, 89 Wn. App. 857, 950 P.2d 1004 (1998). Prejudice on the part of the prosecutor is established only where “there is a substantial likelihood the instances of misconduct affected the jury’s verdict.” *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003), quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995); accord *State v. Brown*, 132 Wn.2d at 561.

Before an appellate court reviews a claim based on prosecutorial misconduct, it should require “that [the] burden of showing essential unfairness be sustained by him who claims such injustice. . .” *Beck v. Washington*, 369 U.S. 541, 558, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962); *State v. Dhaliwal*, 150 Wn.2d at 577; *State v. Pirtle*, 127 Wn.2d at 672; *State v. Furman*, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993).

The absence of an objection by defense counsel “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006), quoting *State v. Swan*, 114 Wn.2d 613, 790 P.2d 610 (1990). Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Dhaliwal*, 150 Wn.2d at 578, quoting *Brown*, 132 Wn.2d at 561. If a curative instruction could have cured the error and the defense failed to request one, then reversal is not

required. *Dhaliwal*, 150 Wn.2d at 578, citing *Russell*, 125 Wn.2d at 85.

(a) *The prosecutor did not misstate the burden of proof.*

Defendant argues that the prosecutor committed misconduct by telling the jury that they had a duty to determine who is being truthful and that these statements minimized the burden of proof. Appellant's Brief, p. 31. However, the record does not support that assertion.

The Judge read to you in the instructions that you are the sole judges of the credibility of the witnesses in this case. It is your duty to weigh their testimony and determine credibility, *who is being truthful*. Remember in voir dire you were asked what you do when you hear different versions of an event, things that you look at or that you use to help you determine what really happened and some mentioned things like consistencies between versions, body language, eye contact, word phrasing. It is your job. Because you are the sole judges of credibility, *it is your job to use those tools that you have, your common sense tools that you've used in the past to help you determine who is being truthful, but also consider motivation*. And that is in your instruction that you can consider the motivation of the witnesses.

The officers have no motivation to be untruthful. This is just one sex offender check of the hundreds, for both Officer Thaves and Deputy Gerrero. They didn't know the defendant from any other registered sex offender. *The same holds true for Officer Klemme in the jail*. He's been doing – he's been a booking officer for 15 years. *What's his motivation? The same for Ms. Shaw and Community Officer Estep with the Pierce County Sheriff's Department*. *Again, this is the job that they do day in and day out*.

RP 511-512. Defendant challenges the italicized portions of the above quoted section, arguing that these statements minimized the burden of proof. Appellant's Brief, p. 31. Defense counsel did not object to any of

these statements. Therefore, the standard of review is whether the remarks were so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice. When taken in context, these statements are not improper and do not constitute prosecutorial misconduct.

It was not misconduct for the prosecutor to remind the jury that they are the sole judges of the credibility of witnesses and that they could consider the motivation of the witnesses in testifying. These statements are consistent with the court's instructions to the jury. *See* CP 69-89; Jury Instruction 1. Although the prosecutor pointed out that there were several inconsistencies in the witness's testimony and that witnesses have different motivations in testifying, the prosecutor did not tell the jury which witnesses were credible or state her personal belief as to which testimony was truthful. Case law holds that during closing arguments, a prosecutor may comment on a witness's veracity. *See State v. Sandoval*, 137 Wn. App. 532, 540, 154 P.3d 271 (2007), *citing State v. Perez-Cervantes*, 141 Wn. 2d 468, 475, 6 P.3d 1160 (1995); *State v. Fiallo-Lopez*, 78 Wn. App. 717, 730-731, 899 P.2d 1294 (1995).

Additionally, the jury was properly instructed that the burden of proof is proof beyond a reasonable doubt. The jury was instructed in relevant part that:

[t]he State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt.

A doubt is one for which a reason exists and may arise from evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 69-89; Jury Instruction 2. Case law holds that the jury is presumed to follow the court's instructions. *Sandoval*, 137 Wn. App. at 541, *citing State v. Swan*, 114 Wn.2d at 661-662.

When considering the closing argument in its entirety, it cannot reasonably be claimed that the prosecutor misstated or minimized the burden of proof. Defense counsel did not object to any of the statements during closing argument and defendant cannot meet his burden of showing that the prosecutor committed misconduct that was so flagrant and ill-intentioned that it resulted in prejudice to defendant.

(b) The prosecutor did not misstate the law.

Defendant argues that the prosecutor misstated the law of residence in closing argument. Appellant's Brief, p. 33. However, the record does not support that assertion.

During closing argument, the prosecutor stated that just because defendant kept a box of clothes at Carla Hellerud's house doesn't mean

that was his residence. RP 518. The prosecutor further stated “I submit to you that just because you may intend to return someplace at some point in time because you left some stuff there, that does not make it your residence. Use your common sense about what makes a place a residence, a fixed residence, and what it means not to have a fixed residence.” RP 539. Defense counsel did not object to these statements.

The prosecutor then posed the question to the jury that if you add up all the times defendant stayed elsewhere overnight, how many nights were really left for him to stay at his claimed residence. RP 540. Again, defense counsel did not object.

The argument the prosecutor made regarding defendant’s residence was consistent with the court’s instructions to the jury on the definition of residence. The jury was instructed that

A residence is a temporary or permanent dwelling place, abode, or habitation, to which one intends to return, as distinguished from a place of temporary sojourn or transient visit.

CP 69-89; Jury Instruction 10. The prosecutor’s argument about defendant’s residence fits within the definition provided to the jury in the court’s instructions. The prosecutor pointed out that defendant admitted to being away from his registered address quite often which is consistent with how the jury instruction distinguishes a residence from a place of temporary sojourn or transient visit. Additionally, the prosecutor’s

comment to “use your common sense about what makes a place a residence,” did nothing more than remind the jury that they can use their own common sense when deciding the facts of the case. The prosecutor’s statements did not misstate the law and do not amount to prosecutorial misconduct.

Case law holds that the jury is presumed to follow the court’s instructions. *Sandoval*, 137 Wn. App. at 541, citing *State v. Swan*, 114 Wn.2d at 661-662. Additionally, since defense counsel did not object, the standard of review is to determine whether the statement was so flagrant and ill intentioned that it prejudiced defendant. The record does not support that the prosecutor’s remarks prejudiced defendant in any way.

The prosecutor stated the correct burden of proof, did not commit misconduct by reminding the jury to consider the credibility of the witnesses and did not misstate the law.

3. DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING BOTH DEFICIENT PERFORMANCE AND RESULTING PREJUDICE NECESSARY TO SUCCEED ON A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

A defendant has the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution, and Article I, Section 22 of the Washington Constitution. *Strickland v. Washington*,

466 U.S. 668, 686, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney's performance was deficient, and (2) that he or she was prejudiced by the deficiency. *State v. Hendrickson*, 129 Wn.2d at 77-78.

Under the first prong, the appellate court will presume the defendant was properly represented. *Id.* Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v. McFarland*, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

In order to prevail on a claim of ineffective assistance of counsel, both prongs of the test must be met. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). If either part of the test is not satisfied, the inquiry need go no further. *State v. Hendrickson*, 129 Wn.2d at 77-78. Additionally, the reviewing court will defer to counsel's strategic decision when the decision falls within a wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489 (*internal citations omitted*). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, it cannot form a basis for a claim of ineffective assistance of counsel. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). "Rare are the situations in which the wide latitude counsel must

have in making tactical decisions will be limited to any one technique or approach.” *Harrington v. Richter*, 131 S. Ct 770, 789 (2011).

There are “countless ways to provide effective assistance [of counsel] in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.” *Harrington v. Richter*, 131 S. Ct. at 788-789. In determining whether trial counsel’s performance was deficient, the actions of counsel are examined based on the entire record. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994). Defendant must show, from the record as a whole, that defense counsel lacked a legitimate strategic reason to support his or her challenged conduct. *State v. McFarland*, 127 Wn.2d at 336.

Counsel’s choice of whether or not to object at trial is a “classic example of trial tactics.” *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002, 777 P.2d 1050 (1989). “Only in egregious circumstances, on testimony central to the State’s case, will the failure to object constitute incompetence of counsel justifying reversal.” *Id.*, (citing *Strickland v. Washington*, 466 U.S. 668, *State v. Ermert*, 94 Wn.2d 839, 621 P.2d 121 (1980)). Furthermore, in order to prevail on a claim of ineffective assistance of counsel for a failure to object at trial, defendant must show that the objection would likely have been sustained. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Defendant claims that the prosecutor committed misconduct by reminding the jury to consider the credibility of the witnesses, and that the prosecutor misstated the law of residence and that defense counsel's failure to object or request a curative instruction amounts to ineffective assistance of counsel. However, even if the court finds that the prosecutor's statements were improper, based on the entire record, defense counsel's performance was not deficient.

At trial, defense counsel cross examined every witness called by the State except Amber Cook (the court clerk). *See* RP 35-38, 91-110, 113-114, 124-128, 144-148, 164-167, 234-236, 248-252, 253, 270-274, 279, 304-309, 312-313, 314-316. Defense counsel called their own witnesses to testify on defendant's behalf and admitted evidence. *See* RP 319, 340, 383, 410. Defense counsel zealously argued against the State amending the information during trial, and won that argument. *See* RP 357-358. Defense counsel argued for proposed jury instructions and won several of those arguments. *See* RP 484-485, 486-489. Defense counsel also argued for an exceptional downward sentence. Sentencing RP 5-6².

Defense counsel's decision not to object or request a curative instruction during closing argument is a classic example of trial tactics and does not constitute ineffective assistance of counsel. Defendant bears the burden of showing that if defense counsel had objected to the allegedly

² References to the trial transcript will be cited as RP, page number. References to the Sentencing Transcript will be cited as Sentencing RP, page #.

improper comments, the objection would likely have been sustained. *See State v. Saunders*, 91 Wn. App. at 578. However, defendant cannot meet that burden in this case since the prosecutor's comments during closing argument were not improper.

The court most likely would have overruled an objection to the prosecutor reminding the jury that credibility of witnesses should be considered because the court's instructions to the jury specifically include an instruction that allows the jury to consider both the credibility of witnesses and any motivation the witnesses may have for testifying. *See* CP 69-89; Jury Instruction 1.

Additionally, the court most likely would have overruled an objection to the prosecutor's comments regarding how to determine defendant's residence, since the prosecutor's statement fell within the court's instruction to the jury on the definition of residence. *See* CP 69-89; Jury Instruction 10.

When viewing the record in its entirety, it cannot reasonably be claimed that counsel was ineffective.

4. DEFENDANT HAS FAILED TO SHOW THAT HE CAN RAISE THE COMMUNITY CUSTODY CONDITIONS OF HIS SENTENCE FOR THE FIRST TIME ON APPEAL AND HAS FAILED TO SHOW ANY IMPROPER DELEGATION OF THOSE CONDITIONS BY THE SENTENCING COURT.

Generally, issues not raised in the trial court may not be raised for the first time on appeal. RAP 2.5(a). While some issues of constitutional

magnitude may be raised for the first time on appeal, not every constitutional issue qualifies. *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). This limitation is especially important considering that criminal law is so largely “constitutionalized” that most claimed errors can be phrased in constitutional terms. See *State v. Lynn*, 67 Wn. App. 339, 342, 835 P.2d 251 (1992). RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court. *State v. McFarland*, 127 Wn.2d 322, 333, 889 P.2d 1251 (1995).

Defendant appeals the community custody conditions of his sentence, arguing that the trial court improperly delegated its authority to the community corrections officer. Appellant’s Brief, p. 42. Defendant raises these issues for the first time on appeal, as he did not object to the imposition of these conditions in the sentencing court. Defendant also mentions a vagueness argument regarding the community custody conditions. However, defendant has no assignment of error regarding that issue. Therefore, the State construes appellant’s brief as raising only a challenge as to whether there was an improper delegation of the

community custody conditions to the CCO³. This is not a claim that may be raised for the first time on appellate review.

In *State v. Smith*, the defendant argued that the sentencing court had improperly delegated its duty to define crime-related prohibitions to the Department of Corrections. *State v. Smith*, 130 Wn. App 721, 728, 123 P. 3d 896 (2005). The court found that the issue of whether the sentencing court erroneously delegated its authority was not of constitutional magnitude, but rather was statutory. *Id.* The Court noted that because the SRA in effect at the time of *Smith's* sentence allowed the DOC to impose conditions, the error violated a statutory right rather than a constitutional right. *Id.* at 729.

The present case is similar to the *Smith* case in that RCW 9.94A.704 allows the DOC to impose community custody conditions and the sentencing court used this authority to delegate certain community custody conditions to the Department of Corrections. Just as in the *Smith* case, this issue affects a statutory right, not a constitutional right.

Since defendant did not raise this issue at the sentencing court, defendant should be barred from raising this issue on appeal. However, if defendant is permitted to raise this issue for the first time on appeal, the

³ If the Court interprets the argument differently, the State respectfully requests the right to file supplemental briefing on the issue.

sentencing court's delegation of the community custody conditions to the Department of Corrections was proper because it was authorized by RCW 9.94A.703⁴ and RCW 9.94A.704⁵.

The Sentencing Reform Act authorizes a trial court to impose “crime-related prohibitions” as a condition of a sentence. RCW 9.94A.505(8); *In re Rainey*, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). Prior case law has not definitively set forth the standard of review for a trial court's imposition of crime-related prohibitions. *Id.* The courts generally review sentencing conditions for abuse of discretion. *Id.* Nevertheless, because the imposition of crime-related prohibitions is necessarily fact-specific and based upon the sentencing judge's in-person appraisal of the trial and the offender, the appropriate standard of review remains abuse of discretion. *Id.* at 374-375. A court abuses its discretion if, when imposing a crime-related prohibition, it applies the wrong legal standard. *Id.* citing *State v. Lord*, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007).

The sentencing court ordered several conditions of community custody in this case. They require defendant to: follow all directions, instructions and conditions of CCO; participate in the following crime-related treatment and counseling services: any per CCO; comply with the

⁴ RCW 9.94A.703 is attached as Appendix A.

following crime-related prohibitions: per CCO. CP 98-116. The sentencing court also informed defendant that other conditions may be imposed by the court or DOC during community custody or by the CCO. *Id.* These are the conditions that defendant argues were an improper delegation of the sentencing court's authority. Appellant's Brief, p. 42-43. However, the RCW specifically authorizes these conditions to be imposed against defendant and leaves much discretion to the Department of Corrections in modifying and monitoring community custody conditions.

RCW 9.94A.701, 9.94A.703, and 9.94A.704 govern the imposition of a sentence of community custody. RCW 9.94A.030 defines the terms used throughout the relevant statutes. Of particular importance is that "community corrections officer" is defined as "an employee of the department who is responsible for carrying out specific duties in supervision of sentenced offenders and monitoring of sentence conditions. RCW 9.94A.030(4). "Department" within the statutes means "department of corrections." RCW 9.94A.030(17).

One of the sentencing conditions defendant alleges was improperly delegated to the CCO is to "follow all directions, instructions and conditions of CCO." However, RCW 9.94A.703(1)(b) specifically requires the offender to comply with any conditions imposed by the

⁵ RCW 9.94A.704 is attached as Appendix B.

department under RCW 9.94A.704. *See* RCW 9.94A.703(1)(b). Since a community corrections officer is defined as an employee of the department, and the statute specifically requires the offender to comply with conditions imposed by the department, there was no improper delegation of authority by the court.

Another sentencing condition defendant alleges was improperly delegated to the CCO is to participate in crime-related treatment and counseling that the CCO designates. However, the RCW specifically states that a court may order an offender to participate in crime related treatment or counseling services and to comply with any crime-related prohibitions. *See* RCW 9.94A.703(3)(c), 703(3)(d), 703(3)(f).

The RCW further states that the court may require the offender to obtain prior approval from the department for the offender's residence location and living arrangements, and may require the offender to remain within, or outside of, a specified geographical boundary. *See* RCW 9.94A.703(2)(e), RCW 9.94A.703(3)(a).

In addition to these stated conditions that may be imposed on an offender, the RCW leaves much discretion to the Department in adding, modifying, and monitoring the community custody conditions of an

offender. In fact, it states that “[i]n setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function.” RCW 9.94A.704(10).

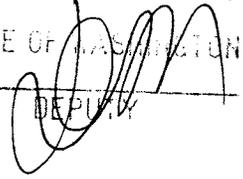
It requires the department to assess the offender’s risk of re-offense and allows the department to establish and modify additional conditions of community custody. *See* RCW 9.94A.704(2)(a). It further states that:

[i]f the offender is supervised by the department, the department shall at a minimum instruct the offender to:
(a) Report as directed to a community corrections officer;
(b) Remain within prescribed geographical boundaries.

RCW 9.94A.704(3). The only limitation the RCW imposes on the department is that “[t]he department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court-imposed conditions.” RCW 9.94A.704(6).

The sentencing court did not abuse its discretion in delegating community custody conditions to the department because that delegation was authorized by statute.

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D. CONCLUSION.

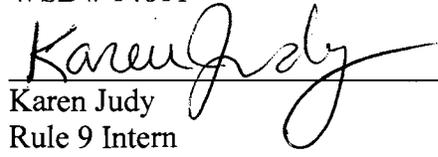
For the above reasons, the State respectfully requests the Court affirm defendant's conviction and sentence below.

DATED: March 17, 2011.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

 35453

KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811


Karen Judy
Rule 9 Intern
ID#9117677

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3/18/11 
Date Signature

APPENDIX “A”

RCW 9.94A.703

RCW 9.94A.703
Community custody — Conditions.

When a court sentences a person to a term of community custody, the court shall impose conditions of community custody as provided in this section.

(1) **Mandatory conditions.** As part of any term of community custody, the court shall:

(a) Require the offender to inform the department of court-ordered treatment upon request by the department;

(b) Require the offender to comply with any conditions imposed by the department under RCW 9.94A.704;

(c) If the offender was sentenced under RCW 9.94A.507 for an offense listed in RCW 9.94A.507(1)(a), and the victim of the offense was under eighteen years of age at the time of the offense, prohibit the offender from residing in a community protection zone;

(d) If the offender was sentenced under RCW 9A.36.120, prohibit the offender from serving in any paid or volunteer capacity where he or she has control or supervision of minors under the age of thirteen.

(2) **Waivable conditions.** Unless waived by the court, as part of any term of community custody, the court shall order an offender to:

(a) Report to and be available for contact with the assigned community corrections officer as directed;

(b) Work at department-approved education, employment, or community restitution, or any combination thereof;

(c) Refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions;

(d) Pay supervision fees as determined by the department; and

(e) Obtain prior approval of the department for the offender's residence location and living arrangements.

(3) **Discretionary conditions.** As part of any term of community custody, the court may order an offender to:

(a) Remain within, or outside of, a specified geographical boundary;

(b) Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals;

(c) Participate in crime-related treatment or counseling services;

(d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;

(e) Refrain from consuming alcohol; or

(f) Comply with any crime-related prohibitions.

(4) **Special conditions.**

(a) In sentencing an offender convicted of a crime of domestic violence, as defined in RCW 10.99.020, if the offender has a minor child, or if the victim of the offense for which the offender was convicted has a minor child, the court may order the offender to participate in a domestic violence perpetrator program approved under RCW 26.50.150.

(b)(i) In sentencing an offender convicted of an alcohol or drug-related traffic offense, the court shall require the offender to complete a diagnostic evaluation by an alcohol or drug dependency agency approved by the department of social and health services or a qualified probation department, defined under RCW 46.61.516, that has been approved by the department of social and health services. If the offense was pursuant to chapter 46.61 RCW, the report shall be forwarded to the department of licensing. If the offender is found to have an alcohol or drug problem that requires treatment, the offender shall complete treatment in a program approved by the department of social and health services under chapter 70.96A RCW. If the offender is found not to have an alcohol or drug problem that requires treatment, the offender shall complete a course in an information school approved by the department of social and health services under chapter 70.96A RCW. The offender shall pay all costs for any evaluation, education, or treatment required by this section, unless the offender is eligible for an existing program offered or approved by the department of social and health services.

(ii) For purposes of this section, "alcohol or drug-related traffic offense" means the following: Driving while under the influence as defined by RCW 46.61.502, actual physical control while under the influence as defined by RCW 46.61.504, vehicular homicide as defined by RCW 46.61.520(1)(a), vehicular assault as defined by RCW 46.61.522(1)(b), homicide by

watercraft as defined by RCW 79A.60.050, or assault by watercraft as defined by RCW 79A.60.060.

(iii) This subsection (4)(b) does not require the department of social and health services to add new treatment or assessment facilities nor affect its use of existing programs and facilities authorized by law.

[2009 c 214 § 3; 2009 c 28 § 11; 2008 c 231 § 9.]

Notes:

Reviser's note: This section was amended by 2009 c 28 § 11 and by 2009 c 214 § 3, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Short title -- 2009 c 214: "This act shall be known as the Eryk Woodruff public safety act of 2009." [2009 c 214 § 1.]

Effective date -- 2009 c 214: "This act takes effect August 1, 2009." [2009 c 214 § 4.]

Effective date -- 2009 c 28: See note following RCW 2.24.040.

Intent -- Application -- Application of repealers -- Effective date -- 2008 c 231: See notes following RCW 9.94A.701.

Severability -- 2008 c 231: See note following RCW 9.94A.500.

APPENDIX "B"

RCW 9.94A.704

RCW 9.94A.704
Community custody — Supervision by the department — Conditions.

(1) Every person who is sentenced to a period of community custody shall report to and be placed under the supervision of the department, subject to RCW 9.94A.501.

(2)(a) The department shall assess the offender's risk of reoffense and may establish and modify additional conditions of community custody based upon the risk to community safety.

(b) Within the funds available for community custody, the department shall determine conditions on the basis of risk to community safety, and shall supervise offenders during community custody on the basis of risk to community safety and conditions imposed by the court. The secretary shall adopt rules to implement the provisions of this subsection (2)(b).

(3) If the offender is supervised by the department, the department shall at a minimum instruct the offender to:

(a) Report as directed to a community corrections officer;

(b) Remain within prescribed geographical boundaries;

(c) Notify the community corrections officer of any change in the offender's address or employment;

(d) Pay the supervision fee assessment; and

(e) Disclose the fact of supervision to any mental health or chemical dependency treatment provider, as required by RCW 9.94A.722.

(4) The department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.

(5) If the offender was sentenced pursuant to a conviction for a sex offense, the department may impose electronic monitoring. Within the resources made available by the department for this purpose, the department shall carry out any electronic monitoring using the most appropriate technology given the individual circumstances of the offender. As used in this section, "electronic monitoring" means the monitoring of an offender using an electronic offender tracking system including, but not limited to, a system using radio frequency or active or passive global positioning system technology.

(6) The department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court-imposed conditions.

(7)(a) The department shall notify the offender in writing of any additional conditions or modifications.

(b) By the close of the next business day after receiving notice of a condition imposed or modified by the department, an offender may request an administrative review under rules adopted by the department. The condition shall remain in effect unless the reviewing officer finds that it is not reasonably related to the crime of conviction, the offender's risk of reoffending, or the safety of the community.

(8) The department may require offenders to pay for special services rendered including electronic monitoring, day reporting, and telephone reporting, dependent on the offender's ability to pay. The department may pay for these services for offenders who are not able to pay.

(9)(a) When a sex offender has been sentenced pursuant to RCW 9.94A.507, the department shall assess the offender's risk of recidivism and shall recommend to the board any additional or modified conditions based upon the offender's risk to community safety and may recommend affirmative conduct or electronic monitoring consistent with subsections (4) through (6) of this section.

(b) The board may impose conditions in addition to court-ordered conditions. The board must consider and may impose department-recommended conditions.

(c) By the close of the next business day, after receiving notice of a condition imposed by the board or the department, an offender may request an administrative hearing under rules adopted by the board. The condition shall remain in effect unless the hearing examiner finds that it is not reasonably related to any of the following:

(i) The crime of conviction;

(ii) The offender's risk of reoffending;

(iii) The safety of the community.

(d) If the department finds that an emergency exists requiring the immediate imposition of additional conditions in order to prevent the offender from committing a crime, the department may impose such conditions. The department may not impose conditions that are contrary to those set by the board or the court and may not contravene or decrease court-imposed or board-imposed conditions. Conditions imposed under this subsection shall take effect immediately after notice to the offender by personal service, but shall not remain in effect longer than seven working days unless approved by the board.

(10) In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function.

[2009 c 375 § 6; 2009 c 28 § 12; 2008 c 231 § 10.]

Notes:

Application -- 2009 c 375: See note following RCW 9.94A.501.

Effective date -- 2009 c 28: See note following RCW 2.24.040.

Intent -- Application -- Application of repealers -- Effective date -- 2008 c 231: See notes following RCW 9.94A.701.

Severability -- 2008 c 231: See note following RCW 9.94A.500.