

No. 41939-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA ANTHONY WARREN,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Ronald E. Culpepper, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The prosecutor committed constitutionally offensive, flagrant, prejudicial and ill-intentioned misconduct which this Court has now repeatedly condemned. Further, the prosecution cannot meet the heavy burden of proving the constitutional error harmless beyond a reasonable doubt.
2. Appellant Joshua Warren was deprived of his state and federal due process rights to present a defense and to meaningful confrontation and cross-examination.
3. The sentencing court acted outside its statutory authority and violated Warren's constitutional due process and First Amendment rights in imposing several conditions of community custody.
4. Warren assigns error to condition 13 of Appendix H to the judgment and sentence, which provides:

You shall not possess or consume any mind or mood altering substances, to include alcohol, or any controlled substances without a valid prescription from a licensed physician.

CP 102.

5. Warren assigns error to condition 24 of Appendix H to the judgment and sentence, which provides:

You shall not have access to the internet unless the computer has child blocks in place and active, unless otherwise approved by the Court.

CP 103.

6. Warren assigns error to condition 25 of Appendix H to the judgment and sentence, which provides:

Participate in DOC's Moral Recognition Therapy (MRT) per CCO's discretion, and also successfully complete an Anger Management treatment program.

CP 103.

7. Warren assigns error to condition 26 of Appendix H to the judgment and sentence, which provides:

Obtain both a Substance Abuse Evaluation and

a Mental Health Evaluation, and comply with any/all treatment recommendations.

8. Warren assigns error to condition 27 of Appendix H to the judgment and sentence, which provides:

Do not patronize prostitutes or establishments that promote the commercialization of sex.

CP 103.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Many courts, including this one in State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2010), have recognized that it is misconduct for a prosecutor to compare the certainty required to find that the state has proven its case beyond a reasonable doubt with the certainty jurors need to make even important everyday decisions, because that comparison minimizes the prosecutor’s constitutionally mandated burden of proof.

In State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010), review denied, 171 Wn.2d 1013 (2011), this Court further held, applying Anderson, that it was flagrant, ill-intentioned and prejudicial misconduct for a prosecutor to use a “puzzle analogy” which compared the degree of certainty jurors would need in order to know what picture was depicted on a puzzle with the certainty they would need to believe the state had proved guilt beyond a reasonable doubt.

Did the prosecutor commit flagrant, prejudicial and constitutionally offensive misconduct in misstating and minimizing his burden of proof by using exactly the same “puzzle analogy” that this Court disapproved of as misconduct and improper in Johnson?

Further, was the prosecutor’s misconduct in this case especially prejudicial and ill-intentioned where the prosecutor here made the improper argument more than a month after this Court specifically condemned it in Johnson and the Johnson and Anderson decisions all involved the very same prosecutor’s office?

Given that the evidence against Warren was slim and credibility was crucial, can the prosecution meet the heavy burden of proving the misconduct harmless beyond a

reasonable doubt?

2. The evidence against Mr. Warren was extremely thin and the only real question before the jury was the credibility of the victim's accusations. Were Warren's rights to present a defense and to meaningful confrontation and cross-examination violated when the trial court excluded evidence which was directly relevant to the credibility of the victim's claims and precluded Warren from cross-examining her about some of those claims?
3. The sentencing court is limited to imposing only those conditions of community custody which are statutorily authorized. Did the lower court err in imposing multiple conditions which were not authorized under any of the relevant statutes?

Further, were Warren's due process and First Amendment rights violated by imposition of conditions which were not sufficiently specific and definite as to prevent arbitrary enforcement and apprise Warren of what was prohibited and which limited his First Amendment rights?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Joshua A. Warren was charged by information with second-degree rape of a child. CP 1; RCW 9A.44.076.

Pretrial proceedings and trial proceedings were held before the Honorable Ronald E. Culpepper on July 23, August 19, September 3, October 11, December 2, 9 and 30, 2010, January 3-5, 11-12, 2011, after which the jury found Warren guilty as charged. CP 79.¹

On March 25, 2011, Judge Culpepper ordered Warren to serve a

¹The verbatim report of proceedings consists of five volumes, which will be referred to as follows:

The chronologically paginated volume containing the motion proceedings of July 23, September 3, October 11, December 2, 9 and 30, 2010, as "1RP;"
the volume with the motion proceeding of August 19, 2010, as "2RP;"
the two volumes containing the trial proceedings of January 3-5, 10-12, 2011, as "TRP;"
the sentencing proceedings of March 25, 2011, as "SRP."

low-end standard-range minimum term indeterminate sentence. SRP 8.

Warren appealed, and this pleading follows. See CP 113.

2. Testimony at trial

According to S, who was 13 years old at the time, on August 21, 2009, in the late hours of the night, she was raped by a family friend. TRP 175-76. Her mom, Stephanie Lower, testified that she and S were living with Nikia Braun and had gone to the house of Crystal Braun, a relative, for “like a barbecue type thing,” after which S and Lower had walked back to the apartment together. TRP 154-58, 160-61. Once there, Lower said, S asked if she could go back to the party with another person and Lower let them go. TRP 160-61. Lower did not remember exactly when S came home but thought it was around midnight. TRP 161. S had Nikia’s baby with her and S was in the living room trying to get the baby to go to sleep when Lower went to bed at 1 a.m. TRP 161.

Lower read a little before falling asleep and was awakened sometime later when S came into the room and started shaking her. TRP 163. Lower said S was crying and said, “[m]ommy, wake up; I have to tell you something.” TRP 163. Lower said S was “in hysterics” and claimed that she had just been raped. TRP 163-65.

Lower let S tell her “version” and then got S calmed down, taking S to the room and getting her to go to sleep. TRP 164. Lower herself was trying to decide if she was going to get a gun and shoot the person S had accused or call the police, ultimately deciding to call the police a few hours later, about 5 in the morning. TRP 164-65.

While she was waiting for the police to arrive, Lower would later

testify, she went to open or close a window and kneeled on the couch to do so, noticing there was something “wet.” TRP 165. She said the afghan on the couch had a “wet spot” so she picked it up and later gave it to police. TRP 166, 168-69.

When police arrived, they spoke with Lower, then told her to go wake up S so they could talk to her. TRP 169. After that, the officers told Lower that she had to take S to the hospital for a “sexual assault exam.” TRP 169. Because Lower did not have a car to drive there, the officers called an ambulance to transport them. TRP 169. At the hospital, S did not want to be seen by the male doctor who was there, saying both that it hurt when the doctor did it but less when nurses tried, and that she did not want any guys to be around her. TRP 170, 192.

S testified that the person who raped her was Joshua Warren, someone she had known most of her life, who had lived with them at one point and who was a friend of her brother’s. TRP 175-76.

When the baby fell asleep, S said, she started “texting” people and called Warren on the house phone to find out what he was doing. TRP 179-80. S said Warren had been drinking earlier at the party and “acting like a fool” but “like, wasn’t too drunk,” so she called him to chat and he asked if she wanted him to come over. TRP 180-81. When she said, “I don’t know,” he said, “[y]ou need to say yes or no,” so she responded, “[y]eah, I guess.” TRP 180, 182.

S said that, usually, when they had these kinds of conversations, Warren would arrive “fast,” but this time it took a long time and she had

fallen asleep on the couch by the time he got there. TRP 182. She heard him come in but thought it was probably her mother, so she went back to sleep. TRP 183. According to S, Warren came over to her, pulled her over to another couch, started “fingering” her, moved her shorts over and tried to have sex with her, and kept saying “relax” and pushing her down even though she was saying he should stop because it hurt. TRP 183.

S admitted there was no real light in the room but maintained there was enough light for her to see who it was. TRP 187.

S said he pulled down his shorts and got on top of her, then put “it” inside of her a couple of times before she finally pushed him off because it hurt. TRP 187. He was not wearing a condom at the time. TRP 188. She said she went into the bathroom and then back into the living room, where he was putting on his pants, and he said “I’ll be back tomorrow,” then left. TRP 188.

S claimed that the blue and white blanket on the floor was what he “did it on” but also said that he “did it on” the couch and that the blanket was not on the couch but on the floor. TRP 185. S then said it was on the couch. TRP 186.

After he left, S picked up a phone and started texting her cousin and her niece. TRP 188. Her niece asked if he used a condom and she also threatened to “tell” on them to Lower unless S told her mom herself. TRP 188. Because of that, S went into the room where her mom was sleeping, woke her up and told her. TRP 188.

Lakewood Police Department officer Austin Lee went with another officer to the apartment at about 5:50 a.m. that morning, talking to S and

her mother. TRP 209-17. Lee said S was not “volunteering lots of information” and had to be asked a lot to get to say things. TRP 217. Lee was directed by the other officer to take a white and blue blanket into evidence. TRP 217-21. The blanket was a knitted “kind of” “handmade type of blanket,” an “afghan type.” TRP226.

Two areas of the blanket tested positive for the presence of semen. TRP 243-46. They were cut out of the blanket and sent for DNA testing to a private lab, along with a swab that was taken from Warren’s cheek and the “sexual assault kit” done on S at the hospital. TRP 249-50. One of the stains had “epithelial cells” i.e., skin cells which were a mixture of at least two people, with Warren a possible contributor but S excluded as a contributor. TRP 302. That stain also had some sperm “fractions” which matched Warren’s DNA, as did the other stain. TRP 302-305.

The forensic expert who examined the stains admitted that, when there is a sexual act, it would be expected that not only semen from a man but also mucus from a woman would be deposited. TRP 306. The blanket was not tested, however, for S’s mucus. TRP 306.

The expert also conceded that, if two people had sex on a blanket, it was likely there would be epithelial cells from both of them. TRP 307. No such cells were found from S on the blanket. TRP 306-309.

The mix of epithelial cells on the blanket could have come from Warren having sex on the blanket with someone other than S, at some point in the past, as could the semen. TRP 309. The state’s expert conceded that, while DNA degrades over time, it was not possible to know whether the skin or semen showing DNA found on the blanket was a week, month, year

or longer old. TRP 309.

S's mom, Lower, admitted that, earlier the day of the alleged incident, she had washed that very blanket in the washing machine at the complex. TRP 332. She did not put it in the dryer because it was a knit blanket. TRP 333. Instead, she had only "hung it out on the little balcony thing to dry." TRP 333.

The state's expert who conducted the DNA testing on the blanket admitted that washing a blanket which had semen on it would not, in fact, necessarily remove all the DNA or semen; instead such stains could survive a washing. TRP 309. Indeed, she refused to speculate to the contrary even when invited to do so. TRP 312.

Lower testified about Warren staying with them when he had trouble with his mother, saying it was likely he had a key to the apartment and it was not unusual for him to be there. TRP 149-59.

S testified that, when she went to the hospital, she had seminal fluid "[f]rom Josh" inside of her. TRP 196. The swabs taken in the medical exam, however, had no semen. TRP 308. This was true of the external and internal vaginal swabs. TRP 308. Anal and oral swabs were also negative for semen. TRP 308.

S also testified that, as a result of what she claimed Warren did, she was bleeding. TRP 196. There was no evidence admitted of any blood found on her underwear, or on her vaginal area, or on the blanket. TRP 1-360.

Lakewood Police Department Detective Brent Eggleston called Warren on the phone and spoke to him about the allegations. TRP 260.

Warren said that he knew about them and was worried he was going to be arrested for something he did not do. TRP 260. Warren agreed to an interview and, several days later, spoke to Eggleston at the police department. TRP 261. Eggleston reported that Warren denied having sex with S and said he had gone to Nikia Braun's apartment, where S lived, about 8 or 9 for a "little party," spent about 20-30 minutes there, then left to go to Crystal's home. TRP 264-65. He left and went somewhere else about 11 p.m., staying there the rest of the night. TRP 267.

Eggleston said that, at some point, Warren suggested he had heard someone else might have raped S. TRP 269. Warren thought the accusations against him might be in retaliation for his involvement with someone named "Nakisha Babbs." TRP 274.

S did not originally remember being interviewed by a forensic interviewer at the Child Advocacy Center but ultimately recalled the experience. TRP 192. She was not asked about it by the prosecution in direct examination. TRP 174-92.

The interview, which was recorded, was not played for the jury at trial, nor did the prosecution ask to do so. TRP 1-360. Detective Eggleston, who watched the entire interview through one-way glass, was not asked about it by the prosecutor at trial. TRP 255-71.

Nikia Braun² testified that there was a party at the apartment for her daughter, starting about 2 p.m., but "everybody didn't show up there" for the party. TRP 316-19.

²Because Nikia Braun and Crystal Braun share the same last name, they will be referred to by their first names, with no disrespect intended.

After the party had been going on for awhile, Nikia and her daughter went to the home of Nikia's aunt, Crystal, where people showed up and stayed for awhile. TRP 316-19. Nikia remembered Warren being there and saw S stop by with a friend, too. TRP 319. Nikia also saw S drinking out of a can of fortified alcohol. TRP 320.

After awhile, Nikia said, everyone who was at Crystal's came back to Nikia's apartment, essentially moving the party from one place to the other. TRP 316-19. Lower, however, said the party was only at Crystal's and not back at Nikia's that night. TRP 172.

Nikia said that, when she returned to her apartment at about 1 a.m., Lower was on the front porch and declared "your cousin [Warren] raped my daughter." TRP 320-21.

Lower testified that, when S told her what had happened, S was hysterical and crying and only calmed down after a "little bit," after which Lower took her into the room and got her to sleep. TRP 164. Nikia, however, said S was sitting on the sofa, not crying and not "hysterical" when Nikia arrived home. TRP 321. Nikia returned home at about 1 a.m. and officers did not receive notification and then respond to the apartment until about 5:50 a.m. TRP 215, 321.

Nikia had taken over the lease of the apartment from Damien Warren, Joshua Warren's brother, who had also been living there. TRP 316-19.

Damien Warren, Joshua Warren's brother, said he was with his brother at the party at Crystal's and that after that party they all went back to Nikia's, after which they went to a garage for a party, where they stayed

the night. TRP 325-28.

S maintained she never talked to Damien Warren after these events. TRP 192. She also denied having left a message on his phone. TRP 193. Indeed, she said, “I wouldn’t have any reason to call him.” TRP 193. Damien Warren, however, said that S called him on the phone about the incident. TRP 328.

S testified that she did not have a boyfriend at the time of the event. TRP 193. She also said that, while she knew Matthew Holt, she did not have any kind of relationship with him. TRP 195-96. She denied leaving any messages for him or talking to him about her claims that Warren had raped her. TRP 196. Holt, in contrast, said he not only knew S but was a friend of hers. TRP 347. He also testified that he had, “[o]n multiple occasions,” had conversations with S about the alleged incident. TRP 348.

D. ARGUMENT

1. REVERSAL IS REQUIRED BECAUSE THE PROSECUTOR COMMITTED CONSTITUTIONALLY OFFENSIVE, FLAGRANT, ILL-INTENTIONED AND PREJUDICIAL MISCONDUCT AND CANNOT SHOW THE ERRORS “HARMLESS” IN THIS CLOSE CASE

In our criminal justice system, prosecutors are not treated like other attorneys. See, Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960). Instead, they enjoy a special status as “quasi-judicial” officers. Id. As such, they are expected to shoulder responsibilities which other attorneys do not bear. Id. More specifically, prosecutors are required to act in ways which ensure fairness in a criminal proceeding even at the expense of “losing” a

conviction. Id.; see State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

In this case, the prosecutor failed in that duty, violating Mr. Warren's due process rights by not only misstating and minimizing the prosecutor's constitutional burden of proof beyond a reasonable doubt but doing so even after this Court publicly condemned the very same misconduct, thus violating fundamental principles of fairness and depriving Warren of a fair trial. Further, because the prosecution cannot meet its extremely high burden of proving these constitutional errors harmless beyond a reasonable doubt, reversal and remand for a new trial is required.

a. Relevant facts

In closing argument, the prosecutor started by referring to an analogy that "a criminal trial is much like a jigsaw puzzle" in which some witnesses "will have pieces of the puzzle" while some will not." TRP 362. The prosecutor told jurors that evidence and exhibits admitted were "pieces of the puzzle of what actually happened on August 22, 2009," then said that both the prosecution and the defense were now going to tell the jurors what they think from their "own clients' perspective each of the pieces of the puzzle you received over the course of this trial means[.]" TRP 362-63.

Regarding reasonable doubt, the prosecutor declared that there was "a doubt in virtually every case," unless the jurors were in the living room at the time of the incident, but that was not "the standard." TRP 392. Instead, he said, it was "a doubt which must be supported by reason after considering all the evidence taken together, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." TRP

392.

The prosecutor then moved into a “puzzle” analogy, apparently projecting a depiction of puzzle pieces at the same time he declared:

The beginning of this trial I told you the defendant was guilty of rape of a child in the second degree and right now I’m going to tell you that this is a picture of the city of Seattle. At the beginning of this trial when I told you the defendant was guilty of rape of a child in the second degree, you had about as much evidence to support my claim that this is a picture of the city of Seattle as you do right now. But over the course of this trial you begin to hear witnesses.

TRP 393. Now that jurors had heard from those witnesses, the prosecutor declared,

[i]s there still a doubt? Yes. **Is there still a doubt that this is a picture of the city of Seattle?** I suppose there is. **A big piece of the puzzle is missing, but you can look at the evidence you do have.** You have the Space Needle. You have Mount Rainier. You have a fraction of the Key Arena and the Seattle Center. **And the question I’ll pose to you is this: You may not have every piece of the puzzle, but based on the pieces you have, can you find beyond a reasonable doubt that this is a picture of the city of Seattle. Would you be reasonable in reaching that conclusion?**

The defendant has been proven beyond a reasonable doubt that on August 22nd, 2009, he had sexual intercourse with [S].

TRP 393 (emphasis added).

- b. The use of the puzzle analogy was flagrant, prejudicial, ill-intentioned and constitutionally offensive misconduct which compels reversal

The prosecutor committed flagrant, prejudicial, ill-intentioned and constitutionally offensive misconduct in comparing the degree of certainty jurors would need in order to decide what picture was depicted on a puzzle with the certainty they needed in order to believe the state had proven Warren’s guilt beyond a reasonable doubt.

Indeed, there can be no question that these arguments were misconduct because, at the time they were made, this Court had already so held.

Beginning with Anderson, *supra*, this Court specifically declared that it was improper and misconduct for a prosecutor to compare the standard of proof beyond a reasonable doubt to the degree of certainty people used when making everyday decisions. 153 Wn. App. at 431-32. In that case, this Court declared:

The prosecutor's comments discussing the reasonable doubt standard in the context of everyday decision making were also improper because they minimized the importance of the reasonable doubt standard and of the jury's role in determining whether the State has met its burden. **By comparing the certainty required to convict with the certainty people often require when they make everyday decisions - both important decisions and relatively minor ones - the prosecutor trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing its case against [the defendant].**

153 Wn. App. at 431 (emphasis added).

Shortly after Anderson was decided, this Court reiterated its holding and reasoning in a case which is essentially on point with this one. In Johnson, *supra*, the prosecutor projected an image of pieces of a puzzle and used it as an analogy for deciding the case, telling jurors, "[y]ou start putting together a puzzle and putting together a few pieces, and you get one part solved," and add another piece so you can see "[i]t has to be a city that has Mount Rainier in the background." Johnson, 158 Wn. App. at 682. The prosecutor then told jurors, "[y]ou add a third piece of the puzzle, and at this point, even being able to see only half, you can be assured beyond a reasonable doubt that this is going to be a picture of Tacoma." Id.

On appeal, this Court held that Anderson controlled, declaring:

the prosecutor's arguments discussing the reasonable doubt standard in the context of making an affirmative decision based on a partially completed puzzle trivialized the State's burden, focused on the degree of certainty the jurors needed to act, and implied that the jury had a duty to convict without a reason not to.

Johnson, 158 Wn. App. at 684-85. Even though defense counsel failed to object below, this Court reversed, finding that the misconduct was so flagrant and ill-intentioned, the prejudice was incurable and thus compelled reversal. 158 Wn. App. at 685.

Indeed, the Court found that such reversal was required even though the arguments were made by the trial prosecutor in Johnson before Anderson had been decided. Johnson, 158 Wn. App. at 686. This Court noted that, in State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996), it had been held that misconduct was flagrant, prejudicial and ill-intentioned in part because it was made after a published decision condemning it. Johnson, 158 Wn. App. at 685. This Court nevertheless held that the misconduct, including the use of the "puzzle analogy," was so serious a misstatement of the constitutional burden of proof and so prejudicial that reversal could still be predicated on its making even though there was no previous published decision finding the argument improper. Id.

The decisions in Anderson and Johnson brought our state in line with the many courts which have condemned comparing the unique decision-making which occurs in a criminal case with decision-making jurors engage in outside the courtroom every day, making decisions on even extremely important personal matters. For example, more than 40 years ago, a federal court recognized the distinction, noting that a prudent person

acting even in “an important business or family matter would certainly gravely weigh that decision but still would not “necessarily be convinced beyond a reasonable doubt that he had made the right judgment. Scurry v. United States, 347 F.2d 468, 470 (U.S. App. D.C. 1965), cert. denied sub nom Scurry v. Sard, 389 U.S. 883 (1967). The duty a juror has to determine a defendant’s guilt is “awesome,” a Massachusetts court declared, so that comparing that duty to making even important decisions “understated and tended to trivialize” it. Commonwealth v. Ferreira, 364 N.E. 2d 1264, 1272 (Mass. 1977).

Put another way, the court stated, comparisons with even the certainty jurors have when they make important decisions is improper and a misstatement of the constitutional burden because such comparisons, “far from emphasizing the seriousness of the decision” before the jury, “detracted both from the seriousness of the decision” and the state’s burden of proof. Ferreira, 365 N.Ed. 2d at 1273. Further, the arguments misstated the jurors’ task because, the Court declared, “the degree of certainty required to convict is unique to the criminal law.” Id. Indeed, the Court declared:

We do not think that people customarily make private decisions according to this standard nor may it even be possible to do so. Indeed, we suspect that were this standard mandatory in private affairs the result would be massive inertia. Individuals may often have the luxury of undoing private mistakes; a verdict of guilty is frequently irrevocable.

Ferreira, 364 N.E. 2d at 1273 (quotation omitted) (emphasis added).

Personal decisions usually involve “balancing of the advantages and disadvantages and the decision is reached upon mere tip of the balance” - a

far cry from the high standard of proof beyond a reasonable doubt. State v. Francis, 151 Vt. 296, 304, 561 A.2d 392 (1989).

Even though Johnson involved the same prosecutor's office as in Anderson and as in this case, and even though Johnson specifically condemned the puzzle analogy as flagrant, prejudicial and ill-intentioned misconduct affecting the defendant's important constitutional rights, the prosecutor in this case specifically made the **very same argument** this Court had disavowed.

Indeed, he did not even make a comparison to an important personal decision, like deciding whether to have a baby or get a divorce. Instead, he made a comparison to the completely trivial question of deciding what picture is portrayed on a puzzle. Here, just as in Johnson, the prosecutor's arguments discussed the reasonable doubt standard as if it were the same as making an affirmative decision about what picture was portrayed on a partially completed puzzle. And here, just as in Johnson, those argument trivialized and misstated the prosecutor's constitutionally mandated burden of proof.

There is no question that, under Anderson and Johnson, the prosecutor's arguments in this case were misconduct which misstated and minimized the prosecutor's constitutionally mandated burden of proof, inviting the jury to convict on far less proof than actually required. It is Warren's position that this misconduct so misled the jury as to deprive Warren of his due process rights to be free from conviction upon anything less than proof beyond a reasonable doubt. As a result, the constitutional harmless error standard applies, and the state cannot meet the heavy burden

of proving this constitutional error “harmless” beyond a reasonable doubt. State v. Romero, 113 Wn. App. 779, 54 P.3d 1255 (2002), is instructive. In that case, the defendant, Romero, was charged with unlawful possession of a firearm which had reportedly been shot at a mobile home in the middle of the night. 113 Wn. App. at 783. An officer using a flashlight had responded to the scene and saw Romero coming around the front of the mobile home with his right hand behind his back. Id. The officer repeatedly ordered Romero to show his hands but Romero refused, instead running around the home and later being found inside. Id. At trial, an officer said that Romero and his family “did not respond to our questions” during the arrest and that Romero was “somewhat uncooperative” when arrested. 113 Wn. App. at 785. The officer also said that, when read his rights, Romero chose “not to waive, would not talk to” police. 113 Wn. App. 785.

Although the prosecutor did not exploit this declaration in closing, the Romero Court held that the constitutional error could not be deemed “harmless.” Id. And it reached this conclusion even after concluding, in another part of its decision, that the evidence admitted at trial was ample to support a challenge to the sufficiency of the evidence to convict. Id.

The Romero decision thus highlights the distinction between the forgiving “sufficiency” standard of review and the constitutional harmless error standard, which compels reversal unless and until the prosecution can prove, beyond a reasonable doubt, that no reasonable jury would have *failed* to convict absent the error. See State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). Even in a case

like Romero where the Court might find sufficiency in light of the forgiving standard for that review, constitutional harmless error standards will not necessarily be met. Instead, the prosecution is required to prove, beyond a reasonable doubt, that the evidence of guilt is so overwhelming that every reasonable jury hearing the evidence would still have necessarily convicted even without the error. See, State v. Keene, 86 Wn. App. 589, 594, 938 P.2d 839 (1997). The Court considers only the untainted evidence in trying to determine whether there was “overwhelming evidence” sufficient to render the constitutional error harmless. Id.

There was not such “overwhelming evidence” here. Put bluntly, there are simply too many holes in the case against Mr. Warren for the prosecution to meet its burden. S’s claims about the night of the incident were seriously put in question by the testimony of other witnesses - not only on innocuous facts but in fact in fact very significant ways. For example, while she admitted knowing Holt, she denied having any relationship with him. TRP 193-96. She also claimed that she had never discussed the alleged incident with Holt at all. TRP 193-96. But Holt testified that he had been friends with S for many years and recounted having had conversations with her on “multiple occasions” about the alleged rape. TRP 348.

S also maintained that she did not ever call Damien Warren, Joshua Warren’s brother, or talked to him about her claims. TRP 192-93. In fact, she said, she would have no reason to do so. TRP 192-93. But Damien testified to the contrary, although as noted *infra* the court did not allow counsel to inquire about whether S had previously told Damien she had lied

in making the claims. TRP 328.

Most significant, however, were the holes in the claims S made about the alleged rape itself. S was absolutely clear that not only did Warren rape her, that rape caused her to bleed. TRP 196. But there was no evidence admitted of any blood found in the rape kit or on the blanket, even in the spots where the semen of unidentified age matching Warren's was found. TRP 1-360.

And again, there was *no* DNA from S on the blanket, neither from blood or in the mix of Warren and another that was on one spot. TRP 308-312. Nor would the state's expert declare that DNA could not survive a washing of the blanket, which Lowers admitted she had done earlier in the day and which would easily have explained the wetness Lowers perceived and thought was the result of the alleged rape. Further, there was absolutely no testimony that the two spots where Warren's DNA were found were what Lowers touched that was wet, rather than just the blanket itself having residual dampness from the wash.

Probably most crucial, S was positive that there was semen from Warren inside her as a result of what she said occurred. TRP 196. And if what she claimed had actually occurred and he had unprotected sex with her, there *would* likely have been at least a trace of semen somewhere in her genital areas. But all of the inner and outer vaginal swabs in the "rape kit," and all of the oral and anal swabs, too, had not a single trace of semen, let alone semen from Mr. Warren. TRP 308.

It is also telling that, although S was interviewed at the Child Advocacy Center by a forensic interviewer about the allegations, the

prosecution never even attempted to introduce the videotape of that interview at trial. TRP 1-360. Nor did the prosecutor ask Detective Eggleston about the interview or what was disclosed or alleged by S at that time. See TRP 256-71.

Given the facts and evidence in the case, it is entirely likely that a juror could well have had a reasonable doubt about guilt, had the jurors not been so tainted by the misconduct the prosecutor's burden of proof so far below the actual, constitutional standard. Under cases like Romero, because there is conflicting evidence and credibility questions, it is not possible to say that "no reasonable jury would *fail* to convict." Romero, 113 Wn. App. at 786. Because the prosecution cannot prove this error harmless beyond a reasonable doubt, reversal is required.

Indeed, reversal would be required even if the constitutional harmless error standard did not apply. Where there is no objection below, reversal is required for misconduct where it is so flagrant, prejudicial and ill-intentioned that it could not have been cured by instruction. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). As this Court held in Johnson, this type of argument is so prejudicial that it may compel reversal. Johnson, 158 Wn. App. at 684-85. The question is whether there is conflicting evidence and/or credibility is crucial. See, e.g., State v. Emery/Olson, 161 Wn. App. 172, 195, 253 P.3d 314, review granted, 172 Wn.2d 1014 (2011).

Here, those standards are met. This was not a case where the prosecution had lots of consistent evidence pointing to the inescapable conclusion that the defendant had committed a crime. This was a case

where there was no supporting medical evidence - no signs of trauma, no semen on the inner or outer vaginal swabs despite claims of penetration, no blood despite allegations that it had been shed, etc. - and serious problems with the credibility of the victim. And thus this was a case where the proper definition of proof beyond a reasonable doubt was especially important, to ensure a just verdict, properly rendered by a jury which understood the constitutional burden the prosecution had to bear. Clearly, given the lack of strong evidence in this case, a reasonable jury could well have been affected by the prosecutor's improper arguments. And a reasonable juror could well have decided the case based upon far less than proof beyond a reasonable doubt, because of the prosecutor's flagrant misstatements.

And indeed, the jurors' questions show that they were confused about their role and duties and the definition of reasonable doubt. After deliberating on the afternoon of January 11th and morning of the 12th, the jurors sent out a question indicating they were having difficulty agreeing, asking, "[d]o we all need to agree on the verdict?" TRP 396. After they were referred back to the relevant instruction, deliberations continued but, a little later, jurors again indicated their difficulty in deciding the case - on the very question of the definition of reasonable doubt. TRP 398.

This time, the question was, "can we get clarification on [what], quote, an abiding belief in the truth of the charge, unquote, means?" TRP 399-400. The court told jurors it was unable to answer their questions and they needed to continue deliberating. TRP 400. Shortly thereafter, the jurors returned with a verdict of guilty. TRP 404. These questions indicate

that the jurors were, at the very least, confused about their duty and role and the very crucial question of the proper definition of proof beyond a reasonable doubt - all specifically impacted by the misconduct the prosecutor had committed.

Further, there is another reason the argument was flagrant and ill-intentioned, as well as prejudicial. In Fleming, *supra*, the Court found that certain arguments met those standards in large part because the prosecutor made them even after they had been condemned in a published case. 83 Wn. App. at 214. And in Johnson, this Court held that the puzzle analogy was so flagrant, prejudicial and ill-intentioned that it compelled reversal even though at the time the prosecutor made the improper argument, Anderson had not yet been decided. Johnson, 158 Wn. App. at 684-85.

Here, not only had Anderson been decided before the prosecutor had made the arguments - so had Johnson. Thus, there was binding, precedential caselaw from this Court directed specifically at the very same prosecutor's office, holding the arguments made here improper. There can thus be no question that the prosecutor was or should have been aware of this Court's decision in Johnson condemning comparing deciding a criminal case with figuring out the picture on a jigsaw puzzle. Yet he made those arguments anyway.

As the Court said in Fleming, "trained and experienced prosecutors do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels those tactics are necessary to sway the jury in a close case." 83 Wn. App. at 215-16. Further, as the Fleming Court noted, defendants in rape cases are entitled to constitutional

rights just the same as other defendants. Id.

The prosecutor committed constitutionally offensive misconduct and the prosecution cannot meet the heavy burden of proving it harmless. Even if the misconduct was subject to the more forgiving standard of reversal being required if misconduct was so flagrant, ill-intentioned and prejudicial that it could not have been cured by instruction, reversal is still required, because the misconduct meets those standards. This Court should so hold.

In response, the prosecution may attempt to rely on the decision of one panel of this Court in State v. Curtiss, 161 Wn. App. 673, 250 P.3d 496, review denied, 172 Wn.2d 1012 (2011), disapproved of in part by State v. Walker, ___ Wn. App. ___, 265 P.3d 191 (2011). Curtiss was decided on May 6, 2011, after the trial in this case and, like this case, Anderson and Johnson, involved the Pierce County prosecutor's office.

In Curtiss, the prosecutor argued that reasonable doubt was not "magic," told jurors to imagine a "giant jigsaw puzzle of the Tacoma Dome," and declared "[t]here will come a time when you're putting that puzzle together, and even with pieces missing, you'll be able to say, with some certainty, beyond a reasonable doubt what that puzzle is: The Tacoma Dome." 161 Wn. App. at 700. A panel of this Court said the argument, "[i]n context," was "an analogy to describe the relationship between circumstantial evidence, direct evidence, and the beyond-a-reasonable-doubt burden of proof." Id.

The Court did not, however, provide any of that context, by quoting the other arguments which must somehow have referred to circumstantial

and direct evidence in some way, as the language the Court quoted did not. Id. But such argument must have existed because otherwise Curtiss was in direct conflict with Johnson, decided before it - yet Curtiss did not even mention Johnson. See Curtiss, 161 Wn. App. at 673-705.

Further, it is the general rule that closing arguments are not examined in isolation but rather in the context in which they are made. See State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Apparently, in Curtiss, the meaning of the puzzle analogy was somehow clarified or amended by argument in context, changing it into a permissible comment on direct/circumstantial evidence. But here, as in Johnson, the meaning of the puzzle analogy was clear - jurors were told that they could find Warren guilty simply based upon the same degree of certainty that the state had proven its case that jurors would need in deciding completely trivial everyday things, like what picture is depicted on a puzzle.

Notably, the decision in Curtiss has been recently faulted by another panel of judges on this Court for failing to follow Anderson in another of its holdings on prosecutorial misconduct. See Walker, 265 P.3d at 196-97. Thus, Curtiss should be deemed inapplicable on this issue, and the clear holding of Johnson should control.

The misconduct in this case was flagrant, prejudicial and, given its timing, clearly ill-intentioned. Further, it invited the jurors to convict based upon far less than the constitutionally mandated burden of proof, in violation of Warren's due process rights. The prosecution cannot prove this constitutional error harmless, given how thin its case against Warren. Reversal and remand for a new trial is required.

2. WARREN'S DUE PROCESS RIGHTS TO PRESENT A DEFENSE AND HIS RIGHTS TO CONFRONT AND CROSS-EXAMINE HIS ACCUSER WERE VIOLATED

Reversal is also required because the trial court violated Mr.

Warren's state and federal due process rights to present a defense, as well as his rights to confrontation and cross-examination in limiting Warren's questioning of his accuser. Both the state and federal constitutions guarantee the defendant in a criminal case the right to present a defense. State v. Strizheus, 163 Wn. App. 820, 829, 262 P.3d 100 (2011). Further, the right to meaningfully confront and cross-examine the state's witnesses is fundamental to ensuring not only a fair trial but also, again, the right to defend against the state's case. See State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002); Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). Those rights were all violated by the trial court's exclusion of evidence directly relevant to the defense and the accuser's credibility, and again the prosecution cannot prove these errors harmless beyond a reasonable doubt.

a. Relevant facts

Before trial, the prosecutor moved for "enforcement" of the "rape shield statute," RCW 9A.44.020, regarding direct and cross-examination of the victim and also "any other witnesses who may be asked to testify as to any prior sexual activity on the part of the victim." TRP 6. A little later, when the court asked defense counsel if there were going to be any questions about the alleged victim's "prior sexual history," counsel responded, "[o]nly as rebuttal not to victimize her, but only as to her truth and veracity." TRP 16.

Later, before trial, the issue came up again and counsel said he did not intend to violate the rape shield law but intended to elicit evidence that S had said during the medical reports and in pretrial interviews that she was a virgin and lost her virginity that night, not only from statements S made to the medical personnel and counsel but in her mother's statement to officers. TRP 148. He argued that this evidence was not "prior sexual activity" or sexual activity at all but rather a "fact that pertains to her claim[s] at the time of the event. TRP 148.

In response, the prosecutor argued that asking if someone was a virgin would introduce testimony of "prior sexual activity" and that it was excluded under the "rape shield" law, RCW 9A.44.020. TRP 149. The prosecutor also argued that it was not "relevant" to whether she was a rape victim. TRP 149. The court asked why it was relevant and counsel responded:

It's crucial to the defense, Your Honor, because her DNA was not on that blanket. Her blood was not on that blanket. Nothing from her was on that blanket. The swabs taken of her, vaginal, anal, and oral, showed no DNA from him, my client. But if she were a virgin and she does refer to bleeding in the medical records at the hospital, why is there no blood on the blanket? So it's crucial.

TRP 150. The court concluded that "whether she's a virgin or not would be prohibited by the rape shield statute," although the court said counsel could refer to "evidence or lack of it." TRP 150.

Later, after S had testified, the court asked if there was likely to be any future issue about "RCW 9A.44.020" or S's "history or anything else?" TRP 198. The prosecutor said it would only be likely to come up "during the defense's presentation of their evidence," after which the court said

something about how the procedure for the evidence was that there had to be “pretrial motion in writing, et cetera, which I have not seen.” TRP 198. Defense counsel said, “that’s correct, Your Honor,” again reiterating that he was not asking to go “prior sexual activity” but just that she was claiming the “absence of prior sexual activity.” TRP 199.

At that point, the court said the rape shield law protected against admission of evidence of “the victim’s past sexual behavior including but not limited to marital behavior, divorce history, or general reputation for promiscuity, non-chastity, contrary to community standards.” TRP 199. Counsel agreed, again pointing out that he was only trying to elicit that S had told police that she was a virgin, saying Warren had “popped her cherry,” which was about the incident that night and not “prior sexual history” and which would cast doubt on her claims because she would then have been bleeding and yet no blood was found, either in the rape kit procedure or on anything in the apartment, including the blanket. TRP 199. Counsel again reiterated to the court that he had not briefed the issue as if the rape shield law governed because it only governed prior sexual history, rather than testimony regarding the incident in question. TRP 199.

At trial, counsel was not allowed to ask S if she had left a message on Damien Warren’s phone saying that she had lied about the incident. TRP 193.

- b. These rulings of the court violated Warren’s rights to present a defense, to confrontation and to cross-examination

_____ The court erred and violated Warren’s rights to present a defense, to confrontation and to meaningful cross-examination when it excluded this

evidence and precluded counsel from asking S or others about what she said happened that night and not allowing questioning of S and Damien Warren about the message he said he got from S admitting to having lied to police about the allegations she was making against Joshua Warren.

Due process mandates that a defendant in a criminal trial is given “the right to a fair opportunity to defend against the State’s accusations.” Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). Put another way, the defendant is entitled to introduce evidence which is material, relevant and necessary to his or her defense. Darden, 145 Wn.2d at 662.

As a threshold matter, although this Court ordinarily reviews issues of exclusion of evidence for abuse of discretion, where there is an issue of a potential violation of the right to present a defense, review is de novo. State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

Evidence which is relevant to a defendant’s defense cannot be excluded even if there is an evidentiary rule or statute which would ordinarily preclude its admission, unless the prosecution can meet standards which depend upon the degree of relevance of the specific evidence. Jones, 168 Wn.2d at 719. The reasoning is that the defendant’s interest in present such evidence is strong and “the integrity of the truthfinding process” and the right to a fair trial are also at stake. See State v. Hudlow, 99 Wn.2d 1, 14, 659 P.2d 514 (1983), limited on other grounds by Darden, supra.

In the face of such a heavy weight of constitutional interests on the part of the defendant, the Supreme Court has created a matrix, most recently articulated in Jones, for determining when evidence must be

admitted at the defense request even in the face of a rule or statute excluding it. See Jones, 168 Wn.2d at 720.

First, the right to present evidence is “not absolute, of course,” and evidence that the defendant seeks to introduce “must be of at least minimal relevance.” Jones, 168 Wn.2d at 720, quoting, Darden, 145 Wn.2d at 622; see also, State v. Gregory, 158 Wn.2d 759, 786 n. 6, 147 P.3d 1201 (2006). If evidence meets only that minimal relevance standard, the burden shifts to the prosecution “to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” Jones, 168 Wn.2d at 720, quoting, Darden, 145 Wn.2d at 622. Only if the prosecution can meet that burden can even minimally relevant evidence be excluded without violating the defendant’s constitutional rights to present a defense and to a fair trial. Jones, 168 Wn.2d at 720.

Evidence which is of *more* than minimal relevance is subjected to what appears to be essentially a sliding scale of increasing burden which the prosecution must overcome in order to justify exclusion. In all cases, even if the evidence is only of minimal relevance, the Supreme Court also cautions courts to balance the interests with the balance tipped heavily against the State and exclusion of the evidence:

The State’s interest in excluding [even] prejudicial evidence must also ‘be balanced against the defendant’s need for the information sought,’ and relevant information can be withheld only ‘if the State’s interest outweighs the defendant’s need.’ **We must remember that ‘the integrity of the truthfinding process and [a] defendant’s right to a fair trial’ are important considerations.**

Jones, 168 Wn.2d at 720 (citations omitted; emphasis added).

As a result, when evidence is of high probative value, the Supreme

court has flatly stated that there is **no** state interest that can justify its exclusion and excluding such evidence is a violation of the Sixth Amendment and Article I, § 22. Id.; see also, Hudlow, 99 Wn.2d at 16.

In this case, the evidence was of such high probative value. The threshold for “relevance” is, in fact, “low,” and evidence is relevant if it has “**any** tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401 (emphasis added); Darden, 145 Wn.2d at 621.

Here, it almost goes without saying that evidence that S had told the defendant’s brother that she had lied to police about the allegations she was making against the defendant would have a tendency to cast serious doubt on her credibility. Further, the evidence that S was claiming to have been a virgin - and thus likely to have bled - would have impeached her claims regarding the incident still further because there was no such blood found anywhere.

None of this evidence was properly excluded under the rape shield law. As the Supreme Court recently discussed, the “rape shield” statute was designed to prevent introduction of irrelevant evidence of a woman’s past sexual conduct in a rape case, overturning years of practice wherein that past was deemed “relevant” to her “character and ability to relate the truth.” Jones, 168 Wn.2d at 723, quoting, Hudlow, 99 Wn.2d at 8-9. It is not intended to bar evidence of “conduct on the night of the alleged rape.” Jones, 168 Wn.2d at 723. Instead, it provides that evidence of “**past** sexual behavior” is “inadmissible to prove the victim’s consent.” RCW

9A.44.020(2) (emphasis added).

Here, the excluded evidence was not of “past” sexual behavior. It was evidence 1) of what S said had occurred that night (i.e. he “popped her cherry” because she was a virgin, and 2) of what she said *after* the incident. The rape shield statute did not apply.

Further, even if the rape shield statute had applied, the exclusion of the evidence was still in violation of Warren’s constitutional rights to present a defense. Jones, supra, is directly on point. In that case, the defendant was accused of rape and his defense was that the accuser had actually consented and participated in an “all-night drug-induced sex party” with others, as well as himself, which is why there was DNA and other evidence indicating sexual contact had occurred. 168 Wn.2d at 720. The trial court excluded testimony and evidence of the party on the theory that it was offered “for the purpose of attacking the victim’s credibility” and was therefore barred by the “rape shield” statute. 168 Wn.2d at 718.

On appeal, Jones repeated objections he had made at trial, arguing that the exclusion of the evidence and questioning violated his rights to confrontation and to present a defense. 168 Wn.2d at 717-18.

The Supreme Court agreed. Applying de novo review to the claim of denial of the right to present a defense, the Court found that such denial had occurred in the refusal to allow the defendant to testify or cross-examine witness about the events on the night of the alleged sexual encounter. 168 Wn.2d at 719-20. First, the Court held, there was a difference between “evidence of the general promiscuity of a rape victim and evidence that, if excluded, would deprive defendants of the ability to

testify to their versions of the incident.” 168 Wn.2d at 720-21. The excluded evidence in Jones’ case was of high probative value to the defense, and, as a result, “no State interest can possibly be compelling enough to preclude” the introduction of such evidence. 168 Wn.2d at 721.

Further, the Court declared, even if the rape shield statute had applied, it could not have been used to justify exclusion of the evidence. Id. Evidence of only minimal relevance may be excluded without a violation of the right to present a defense if the state’s interest in excluding that evidence was “compelling in nature,” the Court noted. 168 Wn.2d at 723. And evidence of high probative value cannot be excluded, because no state interest would be compelling enough to exclude it. Id.

Notably, in Jones, as here, the prosecuting attorney also committed serious constitutionally offensive misconduct, there arguing that the jury should find guilt based in part on Jones’ failure to contact police to “clear up any misunderstanding here” making people think he might be guilty and on his refusal to give a DNA sample until police got a court order. 168 Wn.2d at 718-19.

Again, the prosecution cannot satisfy the heavy burden of proving the constitutional error of excluding the evidence harmless beyond a reasonable doubt. In determining whether the exclusion of evidence in violation of a defendant’s rights to present a defense or to meaningful cross-examination, this Court does not engage in credibility determinations but instead must take the evidence as true, evaluating its exclusion on that basis. State v. Maupin, 128 Wn.2d 918, 930, 913 P.3d 808 (1996).

Here, as noted, *infra*, there is more than a reasonable possibility that

the exclusion of the evidence affected the jury's verdict. The excluded evidence went directly to the credibility of the claims against S. Had the jury heard that she had told Warren's brother she had lied to police about being raped that could well have affected their evaluation of her credibility on the stand, where she said she had never talked to him. Further, if the jury had heard the evidence that she was saying she was a virgin and that was why there was blood, that would have supported the defense challenges to the credibility of the claims, given that no blood was found.

_____ The excluded evidence was relevant, material and necessary to the defense, and should not have been excluded. In excluding the evidence and preventing full cross-examination of S, the trial court erred and violated Warren's rights to present a defense and to meaningful confrontation and cross-examination. These errors were not harmless. This Court should so hold and should reverse.

_____ 3. THE SENTENCING COURT ERRED, ACTED WITHOUT STATUTORY AUTHORITY AND VIOLATED WARREN'S DUE PROCESS AND FIRST AMENDMENT RIGHTS IN IMPOSING IMPROPER CONDITIONS OF COMMUNITY CUSTODY

Under the Sentencing Reform Act (SRA), a sentencing court does not have unfettered discretion to order any sentence or sentencing condition it desires. See In re Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980); see State v. Kolsenik, 146 Wn. App. 790, 192 P.3d 937 (2008), review denied, 165 Wn.2d 1050 (2009). Even if reversal and remand for a new trial were not mandated by the serious constitutional errors described *infra*, Warren would nevertheless be entitled to relief from several of the conditions of community custody imposed by the sentencing court, because those

conditions were either not statutorily authorized or unconstitutionally vague or overbroad.

At the outset, these issues are properly before this Court. It is now well-settled that a defendant may raise the issue of a sentence having been imposed without statutory authority for the first time on appeal. See State v. Jones, 118 Wn. App. 199, 204, 76 P.3d 258 (2003). Further where, as here, the issues raised are primarily legal, do not require further factual development, are based on a final action and burdens the defendant without further action by the state, those issues are ripe for this Court’s review. See State v. Sanchez-Valencia, 169 Wn.2d 782, 787, 239 P.3d 1059 (2010) (reversing this Court’s decision that a pre-enforcement challenge to a condition of community custody was “premature”).

On review, this Court should strike the following conditions of community custody from Appendix H to the Judgment and Sentence:

- 1) condition 13 (prohibiting possession of controlled substances except based upon a physician’s prescription);
- 2) condition 24 (prohibiting access to the internet “unless the computer has child blocks in place and active, unless otherwise approved by the Court”);
- 3) condition 25 (requiring Warren to “[p]articipate in DOC’s Moral Recognition Therapy (MRT) per CCO’s discretion, and also successfully complete an Anger Management treatment program”);
- 4) condition 26 (requiring Warren to “[o]btain both a Substance Abuse Evaluation and a Mental Health Evaluation, and comply with any/all treatment recommendations”); and
- 5) condition 27 (prohibiting Warren from patronizing prostitutes or “establishments that promote the commercialization of sex”).

CP 101-103.

None of these conditions was statutorily authorized. Further, several of the conditions were unconstitutionally vague and/or overbroad, in violation of Warren's due process and First Amendment rights.

In reviewing the issue of whether the conditions were authorized by statute, it is important to start with the proper standard of review. In general, sentencing conditions are reviewed for abuse of discretion i.e., to determine whether the lower court's decision was manifestly unreasonable or the judge's decision was based on untenable grounds or made for untenable reasons. See, State v. C.D.C., 145 Wn. App. 621, 625, 186 P.3d 1166 (2008). However, by definition, a court abuses its discretion when it exceeds its sentencing authority. Id. As a result, a court will find abuse of discretion where the sentencing court has imposed a condition unauthorized by the law. See State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). And the law in this context is the sentencing statutes, because the court has no independent or inherent authority to impose conditions outside of those statutes and thus the statutes control. See Kolesnik, 146 Wn. App. at 806.

Thus, to answer the question of whether the conditions in this case were statutorily authorized, the Court must examine the relevant statutes. And this Court reviews de novo whether the Court had statutory authority to impose a particular condition. See State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

In general, conditions can be broken down into two types: those which **require** conduct and those which **prohibit** it. See, e.g., State v. O'Cain, 144 Wn. App. 772, 773, 184 P.3d 1262 (2008). The distinction is

important because affirmative conduct and prohibition conditions are treated differently, based upon the language authorizing each type, in the relevant authorization statute.

It used to be that there were several such statutes which had to be consulted when addressing the authority for conditions in sex offense cases, but it appears that the Legislature has made some strides in consolidation, at least in regard to the statutes applicable here. For example, RCW 9.94A.507, former RCW 9.94A.712,³ used to provide authority for imposing certain conditions at sentencing in cases involving claims of child rape such as this one. See, Laws of 2008, ch. 231, § 33. Now, however, the statute only provides for a mandatory condition in sex offense cases that “the court shall require the offender to comply with any conditions imposed by the board under RCW 9.95.420 through 9.95.435.” RCW 9.94A.507(6)(a).” And such conditions are not imposed at sentencing by the court but later, after an “end of sentence” review done on a defendant when they near the point of being released into the community. See, e.g., RCW 9.95.420.⁴

The deletions from RCW 9.94A.507 did not, however, have any practical effect on the authority of the sentencing court in this case, because the language deleted from the statute was added back into RCW 9.94A.703,

³RCW 9.94A.712 was recodified as RCW 9.94A.507(a)(1), in 2008. See Laws of 2008, ch. 231, § 56.

⁴The department also has the authority to recommend certain conditions after assessing an offenders “risk of reoffense” within the community and modify conditions based on those assessments. RCW 9.94A.704. It may not, however, impinge upon the conditions ordered by the court, must notify the offender, and must hold a hearing on the propriety of a condition it tries to impose. See RCW 9.94A.704.

the main statute providing conditions of community custody in all cases “[w]hen a court sentences a person to a term of community custody.” See Laws of 2009, ch. 214, § 3. As a result, RCW 9.94A.703 is now the main statute authorizing conditions of community custody in cases such as this one.

RCW 9.94A.703 provides three types of conditions: mandatory, which the court must impose; “waivable,” which are imposed by default unless waived by the court; and “discretionary,” which the court may order, if it so chooses. RCW 9.94A.703(1), (2) and (3). None of the challenged conditions in this case were authorized under any of those sections of the statute.

First, none of them are authorized as mandatory conditions. The conditions a court is required to impose under the statute include a requirement to tell DOC about court-ordered treatment, two conditions excluding an offender from a certain area or job based on the nature of their crime, and a requirement that the offender “comply with any conditions imposed by the department under RCW 9.94A.704.” RCW 9.94A.703(b).

Thus, the conditions prohibiting possession of controlled substances except based upon a physician’s prescription, prohibiting access to the internet “unless the computer has child blocks in place and active, unless otherwise approved by the Court,” requiring possible participation in MRT and successful completion of an Anger Management treatment program, requiring Warren to “[o]btain both a Substance Abuse Evaluation and a Mental Health Evaluation, and comply with any/all treatment recommendations,” and prohibiting Warren from patronizing prostitutes or

“establishments that promote the commercialization of sex” were not authorized as mandatory conditions under RCW 9.94A.703.

Nor were the challenged conditions authorized as “waivable” or “discretionary” conditions under that statute. The “waivable” conditions are:

- (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.

RCW 9.94A.703(2). The “discretionary” conditions authorize the court to 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.

(Emphasis added). Again, none of the challenged conditions were authorized explicitly by the subsections of the statute, nor were they supported through the rubric of “crime-related” prohibitions or treatment or under the “affirmative conduct” exception.

First, condition 13 was not statutorily authorized as a “crime-related” prohibition, given that there was no evidence that drugs or alcohol played a part in the crime. Further, the subsection regarding controlled

substances and the subsection governing alcohol do not support condition 13. While there is no question that RCW 9.94A.703(2)(c) allows the court to order a defendant to refrain from possessing/consuming controlled substances “except pursuant to lawfully issued prescriptions,” and RCW 9.94A.703(3)(e) authorizes the prohibition against consuming alcohol, that is not what the court did in condition 13.

Instead, in condition 13, the sentencing court went further, limiting not only controlled substances or alcohol but “any mind or mood altering substances” and controlled substances to those prescribed by a “licensed physician.” CP 101-102.

“Lawfully issued prescriptions” under RCW 9.94A.703(2)(c), however, are not limited to those issued by a “licensed physician.” Under RCW 69.41.030, prescriptions can be lawfully issued by many others, such as registered nurses, physician assistants, advanced registered nurse practitioners, optometrists, dentists and others. Obviously aware that it had authorized many different medical/dental and other health practitioners to write valid prescriptions, the Legislature chose, in RCW 9.94A.703(2)(c), to authorize a condition of community custody which reflected that diversity of medical/health practitioners who have been given such authorization. By limiting Warren to having prescriptions only from a licensed physician, the trial court improperly limited the condition as defined by the Legislature, even though prescriptions had absolutely nothing to do with the state’s case. The sentencing court did not have statutory authority to impose that condition, and this Court should so hold.

Conditions 24 and 27 were similarly without statutory authority and,

in addition, raise serious constitutional questions. Condition 24 orders Warren not to have access to the internet “unless the computer has child blocks in place and active, unless otherwise approved by the Court,” while condition 27 orders him not to “patronize” prostitutes or “establishments that promote the commercialization of sex.” CP 102-103. Neither of those conditions is specifically authorized by RCW 9.94A.703, nor are they authorized as “crime-related prohibitions.” To qualify as a “crime-related” prohibition, by definition the condition must relate to the circumstances and facts of the crime. O’Cain, 144 Wn. App. at 773.

That is, in fact, how the Legislature has defined “crime-related prohibition.” See RCW 9.94A.030(10) (“[c]rime-related prohibition’ means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.”).

Regarding the internet condition here, O’Cain is essentially on point. In O’Cain, a second-degree rape case, the defendant was accused of meeting a girl with some friends he knew, walking off with her, grabbing her and pushing her over a fence, raping her and running away. 144 Wn. App. at 773. He was ordered to “not access the Internet without the prior approval” of his CCO and sex-offender treatment provider.

On review, the Court of Appeals first rejected the theory, advanced by the prosecution, that the requirement regarding Internet access was “affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.” 144 Wn. App. at 774-75. The prosecution in O’Cain argued that “allowing O’Cain unfettered internet access to inappropriate sexual material would

increase his risk of reoffending and thus endanger the community.” Id. But the statutory provisions authorizing an order of “affirmative conduct” did not apply, the O’Cain Court held, because “the internet access condition does not involve affirmative conduct. . .[i]t is a prohibition,” and as such “must be crime-related.” 144 Wn. App. at 775.

Turning to the facts, the O’Cain Court noted that there was no evidence that O’Cain accessed the internet before the rape or that internet access or use “contributed in any way to the crime,” unlike in a case where, for example, a defendant used the internet to contact and lure a victim. 144 Wn. App. at 775. Further, the Court noted, the trial court had made no finding to the contrary. Id. Because the condition was not crime-related, the Court held, it was not statutorily authorized and had to be stricken. Id.

Here, just as in O’Cain, there was no evidence whatsoever that Internet access played any part in the crime. Further, the trial court made no findings to the contrary. Just as in O’Cain, the internet condition here was not statutorily authorized and must be stricken.

As must condition 27 regarding prostitution and patronizing places which are involved in “the commercialization of sex.” Again, there is nothing in the record indicating that this case involved, in any way, prostitution, adult “toy” shops, or any of the frankly thousands of places which might fall under the rubric of this condition. The case involved an incident which occurred inside a private apartment, not in a sex shop, not with a prostitute, nor anything similar.

Further, Warren submits that the prohibition is unconstitutionally vague, as it fails to provide ascertainable standards for enforcement and

fails to provide sufficient notice of what is prohibited. State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008), is instructive. In that case, the Court addressed, *inter alia*, a condition prohibiting the defendant from frequenting “establishments whose primary business pertains to sexually explicit or erotic material.” 164 Wn.2d at 752. The condition was not unconstitutionally vague, the Court held, because definitions of what was sexually explicit or erotic were relatively clear and thus identified the prohibition sufficiently. Id.

In contrast, here, there is no definition of what places exactly, promote the “commercialization of sex” and thus are prohibited for Warren to go. And definitions vary. For example, some define the “commercialization of sex” as “offering or receiving any form of sexual conduct in exchange for money” - thus prohibiting Warren from going to any place where there is prostitution. See, e.g., Christopher R. Murray, “Grappling with ‘Solicitation’: The Need for Statutory Reform in North Carolina after *Lawrence v. Texas*,” 14 DUKE J. GENDER L. & POLICY 681, 682 (2007). Another may define “[t]he commercialization of sex” as including “all forms of media, including movies, television shows, songs, advertising, and magazines,” used “to sell products and attract consumer interest” - thus potentially prohibiting Warren from a much wider range of places. See Takiyah Rayshawn McClain, “An Ounce of Prevention: Improving the Preventative Measures of the Trafficking Victims Protection Act,” 40 VAND. J. TRANSN’L L. 597, 603 (2007).

Most disturbing, however, are the constitutional implications of the Internet and “avoid places / commercialization of sex” conditions. The

First Amendment protects much which is sexually explicit, as well as covering communications, speech, etc. and even the forum aspect of the Internet. See, e.g., Bahl, 164 Wn.2d at 757; see also, Reno v. ACLU, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed 2d 874 (1997). Where a condition of community custody affects materials or conduct protected by the First Amendment, a “stricter standard” applies, requiring the government to show that the restriction in question is “reasonably necessary to accomplish the essential needs of the state and public order.” Bahl, 164 Wn.2d at 757.

There is no such evidence here. Because there was no evidence whatsoever that commercialization of sex or the Internet have anything to do with the crime, there can be no “essential” need of the state to restrict Warren’s access to those things. The conditions not only were not statutorily authorized, they also fail to protect and even violate Warren’s First Amendment rights to access lawful, First Amendment protected materials and the forum of the Internet.

Finally, none of the evaluation/treatment requirements of conditions 25 and 26 was authorized by statute. Condition 25 of Appendix H requires Warren to “[p]articipate in DOC’s Moral Recognition Therapy (MRT) per CCO’s discretion, and also successfully complete an Anger Management treatment program.” CP 103. Condition 26 requires him to “[o]btain both a Substance Abuse Evaluation and a Mental Health Evaluation, and comply with any/all treatment recommendations.” CP 103.

The two provisions of RCW 9.94A.703(3) which are relevant allow an order to participate in “crime-related treatment or counseling services” or “[p]articipate 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." RCW 9.94A.703(3).

But these treatment/evaluation conditions were not "crime-related." There was no evidence whatsoever that substance abuse, mental health or anger management had anything to do with this crime. Nor was there any explanation of how "MRT" therapy could be "crime-related." Where, as here, there is no evidence that substance abuse, mental health or anger management or "MRT" had anything to do with the crimes, treatment cannot be ordered as "crime related." See Jones, 118 Wn. App. at 208.

Nor could the conditions be ordered as "rehabilitative programs" or "affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community," under RCW 9.94A.703(3)(d). Jones, supra, is instructive. In Jones, the prosecution argued that there was authority to order alcohol treatment even though alcohol played no part in the crime, because of this "rehabilitative programs" statutory language. 118 Wn. App. at 208. This Court rejected that idea, noting that the statutory language allowing such "affirmative conduct" to be ordered must be harmonized with the other statutory language limiting the order of treatment and counseling to only those programs which are "crime-related:"

If we were to characterize alcohol counseling as "affirmative conduct reasonably related to the offender's risk of reoffending, or the safety of the community," with or without evidence that alcohol had had contributed to the offense, we would negate and render superfluous RCW 9.94A.700(5)(c)'s requirement that such counseling be "crime-related."

Jones, 118 Wn. App. at 208. As a result, the Court concluded, it was required to interpret the requirement that alcohol counseling “reasonably relates” to the offender’s risk of reoffending and the safety of the community only if the evidence shows that alcohol “contributed to the offense.” Id.

There was no evidence here that controlled substances, or anger management issues, or therapy needs, or mental health issues “contributed to the offense,” and those conditions thus were not authorized by those subsections of the statute.

This is not to say that the Legislature has not provided an opportunity for a court to order a mental health screening/treatment condition or a chemical dependency condition when the circumstances call for them. Under RCW 9.94A.607, if the court makes a finding that “the offender has a chemical dependency that has contributed to his or her offense,” they may be ordered to undergo chemical dependency evaluation or treatment. Under RCW 9.94B.080, “if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, **and** that this condition is likely to have influenced the offense,” the court may order a mental status evaluation and treatment. RCW 9.94B.080 (emphasis added); see Jones, 118 Wn. App. at 209-10.

But no such findings were made here, nor was the required presentence report entered to support any such findings. See State v. Brooks, 142 Wn. App. 842, 851-52, 176 P.3d 549 (2008). Thus, those statutes do not support these conditions, either.

Ultimately, the improper conditions imposed in the case reflect an

apparent effort by the court - or perhaps the prosecution - to convert the criminal proceeding into a chance to impose conditions on someone's life which it is believed might make it better, or make them more productive or even more law-abiding members of society. It is not, however, the function of the court or prosecutor in a criminal case to exceed the statutory limits set by the Legislature in order to reach a perceived social goal, however laudable.

Put simply, a sentencing court cannot simply impose conditions it feels might be good for a defendant, without regard to whether there is statutory authority to do so. See Brooks, 142 Wn. App. at 850-51. Instead, under the Sentencing Reform Act, an offender may be offered the

opportunity to improve him or herself but may not be coerced in to performing affirmative conduct. The point is not that the affirmative conduct in and of itself is ineffective or undesirable, but rather that to coerce such conduct is to take power over an individual's life in excess of what is deserved for the crime that was committed.

...

Persons may be punished for their crimes and they may be prohibited from doing things which directly related to their crimes, but they may not be coerced into doing things which are believed will rehabilitate them [without statutory authority].

State v. Parramore, 53 Wn. App. 527, 529-30, 768 P.2d 530 (1989)

(emphasis added), quoting, D. Boerner, *Sentencing in Washington*, § 4.5 (1985).

The sentencing court exceeded its statutory authority in imposing unauthorized conditions of community custody. Further, the conditions limiting Warren's rights to internet use and prohibiting him from going to certain places engaging in "commercialization of sex" were

unconstitutionally vague and overbroad, in violation of Warren's First Amendment rights. Even if this Court does not reverse and remand for a new, fair trial, it should strike the improper conditions of community custody imposed below.

E. CONCLUSION

For the reasons stated herein, this Court should grant Mr. Warren the relief to which he is entitled.

DATED this 19th day of January, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel by e-filing through this Court's system this date, and by first-class mail, postage prepaid, to Mr. Joshua Warren, DOC 333194, Stafford Creek CC, 191 Constantine Way, Aberdeen, WA. 98520.

DATED this 19th day of January, 2012.

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