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No. 69601-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent/Cross-Appellant,

v.

MATTHEW HAMPTON,

Appellant/Cross-Respondent.

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

BRIEF OF APPELLANT/CROSS-RESPONDENT

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A. SUMMARY OF ARGUMENT

After filing an amended information, the State proceeded against Matthew Hampton at trial on one count of second degree rape. Because the evidence only supported a conviction of second degree rape or acquittal, the trial court erred in granting the State's motion for an additional jury instruction on third degree rape. The jury found Mr. Hampton not guilty of second degree rape and guilty of third degree rape. The court's error therefore requires reversal of the conviction and remand for dismissal. In the alternative, Mr. Hampton's conviction should be reversed and remanded for a new trial because the court abused its discretion in denying Mr. Hampton's motion for a continuance so that Mr. Hampton could be represented by counsel of his choice.

Finally, two of the community custody conditions imposed by the court should be stricken, as conditions 5 and 8 are not crime-related and condition 8 is impermissibly vague and subject to arbitrary enforcement.

B. ASSIGNMENTS OF ERROR

1. The trial court erred by granting the State's request to instruct the jury on third degree rape.

2. The trial court erred by denying Mr. Hampton's request for a continuance so that he could be represented by counsel of his choice.

3. Two of the conditions of community custody imposed by the trial court were not authorized by statute and violated Mr. Hampton's Fourteenth Amendment rights.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A court may not give a third degree rape instruction when the jury would have to disbelieve both the defendant's testimony and the alleged victim's testimony in order to convict the defendant of rape in the third degree. Here, the evidence supported only a conviction on second degree rape or acquittal, but the jury found Mr. Hampton guilty of third degree rape. Is Mr. Hampton entitled to a reversal of his conviction with instructions to dismiss?

2. The Sixth Amendment guarantees the accused the right to counsel, and a defendant who does not require court-appointed counsel is entitled to choose who will represent him. Mr. Hampton was dissatisfied with his court-appointed attorney and retained counsel shortly before trial. He requested a continuance so that his private counsel could adequately prepare for trial. The case had been

continued once upon agreement of the parties, the case was not lengthy, and neither the State nor the court identified any specific scheduling issues. The trial court incorrectly balanced the timing of Mr. Hampton's request with his right to adequate defense rather than his right to choice of retained counsel. Was Mr. Hampton's constitutional right to retain new counsel of his own choice violated when the court denied his motion to continue using the incorrect legal standard?

3. Under the Sentencing Reform Act (SRA), the trial court may impose prohibitions on an offender as discretionary conditions of community custody only if the prohibitions are crime-related. In the absence of evidence of the crime-related nature of these conditions, the court prohibited Mr. Hampton from possessing or consuming controlled substances and required him to participate in counseling programs as directed by the community corrections officer. Are these conditions insufficiently crime-related and, as to the second condition, written in such overbroad and ambiguous language as to deny Mr. Hampton his right to fair notice of required conduct and subject him to unduly arbitrary enforcement?

D. STATEMENT OF THE CASE

Matthew Hampton became acquainted with the alleged victim, A.B., after she briefly dated his son, Chance.[1] 9/6/12 RP 44-45. The night of the alleged incident, A.B. was at the Hamptons' home spending time with Chance, her sister, and another friend. 9/6/12 RP 48. The four of them played pool in the Hamptons' garage. Id. Although A.B. was underage, she drank three or four beers that evening, and later had some wine. 9/6/12 RP 55-56. After drinking the wine, A.B. felt sick and vomited in the bathroom. 9/6/12 RP 56, 58.

While A.B. was in the bathroom, Chance drove A.B.'s sister and the friend home. 9/6/12 RP 60. A.B. chose to stay because she felt that she was "too sick to get up." 9/6/12 RP 61. After A.B. vomited, she sat on the couch in the living room and talked with Mr. Hampton. 9/6/12 RP 106. Chance returned to the house and began playing pool with Mr. Hampton. 9/6/12 RP 63. While they played, A.B. fell asleep in a "love seat chair" in the garage. 9/6/12 RP 64.

At some point, Chance's mother stopped by the garage and asked Chance if he was working in the morning, which he did not know. 9/6/12 RP 160. Chance had difficulty remembering to write

[1] For purposes of clarity, Mr. Hampton's son Chance is referred to by his first name. No disrespect is intended.

down his schedule, and frequently snuck into his place of employment (a 24-hour QFC supermarket) to double check when he was scheduled to work. 9/6/12 RP 160. Because Chance often started work at seven o'clock in the morning, and it was already five or six o'clock in the morning, Mr. Hampton urged Chance to check the schedule after they finished their game of pool. 9/6/12 RP 161.

Chance was unable to wake A.B. before he left for QFC. 9/6/12 RP 163. A.B. testified that while Chance was gone, she woke up in the garage in the pitch black with Mr. Hampton over her. 9/6/12 RP 66. As she was waking up, she realized that Mr. Hampton had one finger inside of her vagina. 9/6/12 RP 67. She testified that she initially felt a jerking sensation as Mr. Hampton pulled her pants down, and then immediately felt his fingers inside her body. 9/6/12 RP 68. Because she was just waking up, she did not have a conscious thought until she heard Mr. Hampton's voice, which was after he inserted his fingers into her body. 9/6/12 RP 66, 70. She described being in shock, and being able to say "no" and "stop" only after penetration. 9/6/12 RP 70.

Mr. Hampton testified that this never happened. 9/7/12 RP 220. He testified that he remained in the garage shooting pool while Chance left to check his schedule. 9/7/12 RP 218. After Chance left, A.B.

woke up and moved toward Mr. Hampton. Id. She touched his left hip and started moving her hand inward. Id. Mr. Hampton stopped her by grabbing her arm and sitting her back down in the chair. Id. He scolded her, asking her what Chance would think of her actions, and she began to cry. Id.

Shortly after, A.B. called Chance, who arrived home and picked up A.B. 9/6/12 RP 74, 78. A.B. did not report the alleged incident to the police until one month later. 9/6/12 RP 89. The State originally charged Mr. Hampton with one count of indecent liberties, but on the day of trial the State amended the charge to rape in the second degree. CP 83, 98; 9/5/12 RP 35. The State proceeded against Mr. Hampton solely on a charge of second degree rape, alleging that sexual intercourse occurred when A.B. was incapable of consent by reason of being physically helpless or mentally incapacitated. CP 70, 83.

Prior to trial, Mr. Hampton moved to substitute his appointed counsel with private counsel and requested a continuance to allow retained counsel time to prepare. 8/31/12 RP 2. The motion to substitute was conditioned upon the court's allowance of the motion to continue, as retained counsel could not effectively represent Mr. Hampton without additional time to prepare for trial. Id. Although the

case was less than four months old, and no specific scheduling issues were raised, the trial court denied Mr. Hampton's motion based on a finding that Mr. Hampton's appointed counsel was capable of zealously representing Mr. Hampton's interests. 8/31/12 RP 7-8.

At the close of evidence, the State moved for a jury instruction on rape in the third degree. 9/7/12 RP 240. Mr. Hampton objected, but the court ruled in the State's favor and instructed the jury on both rape in the second degree and rape in the third degree. 9/7/12 RP 252. The jury found Mr. Hampton not guilty of second degree rape, and guilty of third degree rape. CP 60, 61.

At sentencing, the trial court imposed a number of community custody conditions. CP 42. Mr. Hampton objected to two of these conditions. One prohibited the possession or consumption of controlled substances and the second required participation in counseling programs as determined by the community corrections officer. CP 42 (conditions 5 and 8). Mr. Hampton argued these conditions were not crime-related and the counseling requirement was subject to arbitrary enforcement by the community corrections officer. 11/6/12 RP 330, 331. The trial court rejected these arguments.

Mr. Hampton appeals.

E. ARGUMENT

1. The trial court erred in instructing the jury on the offense of rape in the third degree.

a. In order to instruct the jury on the offense of third degree rape, the State was required to show that the evidence supports an inference that Mr. Hampton committed third degree rape *instead* of second degree rape.

After filing an amended information at the start of trial, the State proceeded against Mr. Hampton solely on the charge of rape in the second degree, alleging that sexual intercourse occurred when A.B. was incapable of consent by reason of being physically helpless or mentally incapacitated. 9/5/12 RP 35; CP 70, 83. After the close of evidence, the State moved for an additional jury instruction on rape in the third degree. 9/7/12 RP 240.

Rape in the third degree is not a lesser included offense of rape in the second degree because each element of third degree rape is not necessarily an element of second degree rape. State v. Ieremia, 78 Wn. App. 746, 752, 899 P.2d 16 (1995). Third degree rape requires that the alleged victim not be married to the perpetrator and that the alleged victim clearly express a lack of consent by words or conduct. Id. These elements are not required in order to prove a charge of second degree rape. In this case, to succeed on a charge of second degree rape,

the State was required to prove that the sexual intercourse occurred when A.B. was incapable of consent by reason of being physically helpless or mentally incapacitated. CP 70, 83.

In order to instruct on an inferior degree offense, the evidence must support an inference that only the inferior degree crime was committed. State v. Wright, 152 Wn. App. 64, 71, 214 P.3d 968 (2009). Interpreted too literally, this test would be redundant and unnecessary, as all jury instructions must be supported by sufficient evidence. State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000) (citing State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986)). This test therefore requires a factual showing more particularized than that required for other jury instructions. Fernandez-Medina, 141 Wn.2d at 455. It is not enough that the jury might simply disbelieve the State's evidence supporting the charged crime. Ieremia, 78 Wn. App. at 755; Fernandez-Medina, at 141 Wn.2d at 456. "The evidence must support an inference that the defendant committed the lesser offense *instead of* the greater one." Ieremia, 78 Wn. App. at 755 (emphasis original) (citing State v. Bergeson, 64 Wn. App. 366, 369, 824 P.2d 515 (1992)). As discussed below, the evidence in this case

did not support a theory that Mr. Hampton committed third degree rape, but did not commit second degree rape.

On appeal, a trial court's decision to issue a jury instruction based on a ruling of law is reviewed de novo. Wright, 152 Wn. App. at 70.

b. The alleged victim consistently testified that she was incapable of expressing her unwillingness to engage in sexual intercourse at the time of penetration.

At trial, the State alleged Mr. Hampton was guilty of second degree rape because he engaged in sexual intercourse with A.B. when A.B. was incapable of consent by reason of being physically helpless or mentally incapacitated. CP 70, 83. The state of sleep is universally understood as unconsciousness or a physical inability to communicate unwillingness to engage in an act. State v. Puapuaga, 54 Wn. App. 857, 861, 776 P.2d 170 (1989).

A.B. testified that she was drinking the night of the alleged incident, and eventually went into the bathroom to vomit. 9/6/12 RP 58. At some point after returning from the bathroom, she testified that she laid down on a chair in the garage and "fell asleep right away." 9/6/12 RP 65. She stated that she started to wake up when Mr. Hampton "jerked" her pants off, but that after removing one pant leg,

Mr. Hampton immediately put his fingers inside of her body. 9/6/12 RP 67-68. She testified that "[h]e had one finger inside of me… I was just waking up." 9/6/12 RP 67.

When the State asked additional clarifying questions, A.B. said that Mr. Hampton's fingers were already inside of her by the time she said "no" or "stop" because she was just waking up. 9/6/12 RP 70. It was only after his fingers were inside her body, and she heard Mr. Hampton's voice, that she became fully awake. 9/6/12 RP 66, 69-70. Prior to that she did not have any conscious thoughts because she was "just waking up." 9/6/12 RP 70.

A.B.'s testimony remained consistent under cross-examination. She testified that she was aware that Mr. Hampton inserted his fingers into her body but that she was just waking up. 9/6/12 RP 118. When questioned about the specific sequence of events, she testified that she was unsure because she was "waking up and [she] was shocked, confused." 9/6/12 RP 123-24.

c. The trial court erred in instructing the jury on third degree rape and the conviction must be reversed.

A trial court is not permitted to instruct on an inferior degree offense unless the evidence supports "an inference that *only* the lesser crime was committed." Wright, 152 Wn. App. at 71 (emphasis

original). In Wright, this Court found the trial court erred in giving the third degree rape instruction where the defendant contended the intercourse was consensual and the alleged victim testified it was forced. Id. at 71-72. While the Court acknowledged there was some testimony suggesting the defendant did not use force, it determined that overall her testimony consistently reflected rape by forcible compulsion. Id. at 73-74; see also State v. Charles, 126 Wn.2d 353, 355-56, 894 P.2d 558 (1995) (trial court properly refused to instruct on crime of third degree rape where victim testified sex was forced and defendant testified it was consensual); Ieremia, 78 Wn. App. at 755-56 (defendants not entitled to third degree rape instruction when evidence supported either use of force or consensual sex).

A third degree rape instruction is not permitted when the jury would have to disbelieve both the defendant's testimony and the alleged victim's testimony in order to convict the defendant of rape in the third degree. Wright, 152 Wn. App. at 72 (citing Charles, 126 Wn.2d at 356). This is exactly what the jury was asked to do here.

A.B. testified that she was just waking up when Mr. Hampton had one finger inside of her. 9/6/12 RP 67. By the time she had a conscious thought or was able to articulate the words "no" or "stop,"

his fingers had already penetrated her vagina. 9/6/12 RP 70. The State did not introduce affirmative evidence that Mr. Hampton was guilty of only third degree rape. Mr. Hampton, in contrast, testified that the sexual assault never occurred. 9/7/12 RP 220. Therefore, in order to find Mr. Hampton guilty of third degree rape, the jury would have to disbelieve A.B.'s testimony and Mr. Hampton's testimony. Under these circumstances, a trial court is not permitted to give an instruction to the jury on rape in the third degree. Wright, 152 Wn. App. at 72-72; Charles, 126 Wn.2d at 356; Ieremia, 78 Wn. App. at 755-756.

Because the court erred in instructing the jury on third degree rape, Mr. Hampton's conviction must be reversed. Retrial is not appropriate because the jury found Mr. Hampton not guilty of second degree rape. CP 61; see also Wright, 152 Wn. App. at 74 (double jeopardy did not bar retrial only because jury was unable to reach a verdict on charge of second degree rape).

2. Mr. Hampton was unreasonably denied his constitutional right to his counsel of choice at trial.

a. The Sixth Amendment guarantees criminal defendants the right to be represented by the counsel of their choice if they can afford it.

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy

the right… to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. An element of this right is the defendant's right to choose who will represent him. United States v. Gonzalez-Lopez, 548 U.S. 140, 144, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) (internal citations omitted). "[T]he Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." Id. (quoting Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624-25, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989)).

"Lawyers are not fungible, and often the most important decision a defendant makes in shaping his defense is his selection of an attorney." United States v. Gonzalez-Lopez, 399 F.3d 924, 928 (8th Cir. 2005), aff'd, 548 U.S. 140 (2006). Thus, "defendants are free to employ counsel of their own choice and the courts are afforded little leeway in interfering with that choice." Id. at 928 (quoting United States v. Lewis, 759 F.2d 1316, 1326 (8th Cir.), cert. denied, 474 U.S. 994 (1985)). The right to choice of counsel is derived from the right of the defendant to determine the defense to be utilized. Gonzalez-Lopez, 399 F.3d at 928 (quoting United States v. Mendoza-Salgado, 964 F.2d

993, 1014 (10th Cir. 1992)). Thus, the defendant must be given a reasonable opportunity to employ counsel of his own choice. A violation of the right to counsel of choice is a structural error not subject to a harmless error analysis. Gonzalez-Lopez, 548 U.S. at 150.

The right to counsel of choice is not without limits, however, as a defendant may not exercise the right in manner that obstructs the administration of justice. Gonzalez-Lopez, 548 U.S. at 144; Wheat v. United States, 486 U.S. 153, 159, 163-64, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988); Morris v. Slappy, 461 U.S. 1, 11-12, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983). The trial court thus has some discretion in granting a continuance for purposes of substitution of counsel and must strike a balance between the defendant's right to be represented by counsel of his own choice and the court's interest in the "orderly administration of justice." Gonzalez-Lopez, 399 F.3d at 939 (quoting Urquhart v. Lockhart, 726 F.2d 1316, 1319 (8th Cir. 1984)); accord State v. Aguirre, 168 Wn.2d 350, 365, 229 P.3d 669 (2010).

b. Mr. Hampton asked for a reasonable continuance so that he could be represented by counsel of his choice.

Mr. Hampton was arraigned on a charge of indecent liberties on May 9, 2012.[2] CP 98; Supp CP __ (Criminal Minute Entry, 5/9/12, sub no. 10). The court thereafter assigned counsel for Mr. Hampton. See 8/31/12 RP 3. In July, the parties agreed to continue the trial date. Supp CP __ (Criminal Minute Entry, 7/13/12, sub no. 15).

Shortly before the trial call on August 31, 2012, Mr. Hampton hired private counsel, Anna Goykhman. 8/31/12 RP 3. Ms. Goykhman appeared in court and filed a motion to substitute and continue the trial date, explaining that she needed additional time to adequately prepare the case. 8/31/12 RP 2; CP 93. While the court initially agreed to allow the substitution of counsel, the motion to substitute was conditioned on the trial court's granting of the motion to continue, as Ms. Goykhman did not feel that she could effectively represent Mr. Hampton otherwise. 8/31/12 RP 2-3.

Both appointed counsel, Donald Wackerman, and retained counsel, Ms. Goykhman, explained to the court that Mr. Hampton was not satisfied with his relationship with Mr. Wackerman. Mr.

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[2] The State filed an amended information at the start of trial, charging Mr. Hampton with second degree rape. CP 83; 9/5/12 RP 35.

Wackerman expressed to the court that he had "not had the best relationship" with Mr. Hampton and that Mr. Hampton indicated early on in the case that he was interested in retaining private counsel. 8/31/12 RP 4. Similarly, Ms. Goykhman informed the court that Mr. Hampton felt "very strongly" that he did not have a good relationship with Mr. Wackerman and that Mr. Hampton would prefer to have his counsel of choice, which he now had the funds to pay for. 8/31/12 RP 3.

While Ms. Goykhman requested some additional time to prepare for trial, the court never inquired as to how much time she would need, or established that the additional time would be unreasonable. 8/31/12 RP 3. Although the State objected to the continuance, and indicated that the alleged victim was opposed, it acknowledged "nobody is really going to have a whole lot of complaint about that whatever you decide." 8/31/12 RP 7. Ms. Goykhman objected to this equivocation and argued that, given what was at stake, the court should "end in favor of Mr. Hampton's request to have a lawyer of his own choosing." Id.

In response, the trial court found:

> I guess I'm not so persuaded. I know Mr. Wackerman is a very capable attorney. It wouldn't be the first time he's represented someone who may not have always been happy with Mr.

> Wackerman. I think that happens for most of the defense attorneys that they occasionally have a client who would rather have a different attorney appointed. I don't think that would in any way impair his ability to represent his client zealously and capably, and I don't think there's any question that Mr. Wackerman is a highly qualified criminal defense attorney.

8/31/12 RP 7-8.

The trial court went on to find it was "not really being given much reason other than apparently some source decided to provide the funds today when it was still a serious case." 8/31/12 RP 8. It also stated that "for the same reasons that I'm being urged to continue on behalf of the defendant would apply also to the victim." 8/31/12 RP 8. When denying Mr. Hampton's motion for a continuance, the court noted, paradoxically, "frankly, we have a lot of cases that are even older." 8/31/12 RP 8.

c. The denial of Mr. Hampton's motion to continue violated his Sixth Amendment right to be defended by retained counsel of his choice.

A defendant has the constitutional right to fire his court-appointed attorney and hire a new attorney for any reason unless the substitution would cause significant delay or inefficiency. Gonzalez-Lopez, 548 U.S. at 144, United States v. Rivera-Corona, 618 F.3d 976 (9th Cir. 2010). In considering a defendant's motion for a continuance

in order to be represented by counsel of choice, the trial court must balance the defendant's right to retain counsel with the public's interest in the administration of justice. Gonzalez-Lopez, 548 U.S. at 144; Wheat, 486 U.S. at 163-64; Slappy, 461 U.S. at 11-12. Whether there is a conflict between the defendant and his current counsel is only relevant if the court is required to balance the defendant's reason for requesting new counsel against the scheduling demands of the court. Rivera-Corona, 618 F.3d at 980.

Here, the trial court did not apply the correct test in determining whether to grant Mr. Hampton's request because the court never identified the right at issue. The Sixth Amendment right to counsel of choice "commands, not that a trial be fair, but that a particular guarantee of fairness be provided – to wit, that the accused be defended by the counsel he believes to be best." Gonzalez-Lopez, 548 U.S. at 146. Instead of viewing the issue as whether Mr. Hampton was entitled to counsel of choice, however, the trial court considered whether he had a "capable attorney" and whether Mr. Hampton's difficulties with Mr. Wackerman would impair Mr. Wackerman's "ability to represent his client zealously and capably." 8/31/12 RP 7. The court's failure to appreciate the importance of Mr. Hampton's Sixth Amendment right in

this balance is further demonstrated by its comment that "for the same reasons that I'm being urged to continue on behalf of the defendant would apply also to the victim." 8/31/12 RP 8. While alleged victims have been granted certain rights, the defendant's Sixth Amendment right to his counsel of choice is separate from those rights of the alleged victim. See RCW 7.69.030.

A trial court abuses its discretion if the decision is based on "untenable grounds or for untenable reasons." State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based upon untenable grounds or reasons if it rests on facts not supported by the record or "was reached by applying the wrong legal standard." Id. The trial court here failed to identify the correct constitutional right at issue and applied the wrong balancing test. It therefore abused its discretion in denying Mr. Hampton's request for a continuance in order to be represented by counsel of his choice.

The trial court's consideration of the factors weighing against Mr. Hampton's constitutional right to choice of counsel was also in error. In reviewing continuances to permit a defendant to be represented by retained counsel of choice, Washington courts have looked to (1) the number of continuances previously granted and

whether they were requested by the defense, (2) whether the defendant's dissatisfaction with his current counsel is legitimate even though counsel was still providing competent representation, and (3) whether substitute counsel has been retained and how soon she could be prepared to go to trial.[3] State v. Price, 126 Wn. App. 617, 632, 109 P.3d 27, rev. denied, 155 Wn.2d 1018 (2005); State v. Roth, 75 Wn. App. 808, 881 P.2d 268, rev. denied, 126 Wn.2d 1016 (1995). The review of these factors shows that the court's insistence on a particular trial date was not justified in this case.

i. Prior continuances and rescheduling of trial date.

This is not a case that had been continued many times as a result of the defense. Instead, this case had been continued only one time, upon agreement of both parties. Supp CP __ (Criminal Minute Entry, 7/13/12, sub no. 15). Later, when the State amended the information on the day of trial to significantly raise the severity of the charges against which he had to defend, Mr. Hampton did not request a trial continuance. 9/5/12 RP 35.

Additionally, this case was tried in only three days and involved only five witnesses, including the defendant. The court found no

[3] A separate consideration, whether the denial will result in material prejudice to the defendant's case, is no longer valid under Gonzalez-Lopez.

specific scheduling issues that prohibited continuing a case that was less than four months old.

ii. Dissatisfaction with appointed counsel.

The trial court found that Mr. Hampton's dissatisfaction with court-appointed counsel did not show that Mr. Wackerman was incapable or could not zealously represent Mr. Hampton's interests. 8/31/12 RP 7. However, Mr. Hampton does not need to show he was denied effective counsel or his right to a fair trial, but only that he was denied his choice of counsel. Gonzalez-Lopez, 548 U.S. at 146.

There are a number of intangible benefits of having one's counsel of choice. Different attorneys will pursue different strategies at trial, develop a different theory of the case, select a jury differently, and present the case differently. Gonzalez-Lopez, 548 U.S. at 150. It is impossible to know how counsel rejected by the trial court would have handled the case differently, or would have handled it the same but with the benefit of a more jury-pleasing courtroom style or longstanding relationship of trust with the prosecutor. Id. at 151. Such significant considerations must be balanced against the minor inconvenience of a brief delay of trial in this case. This factor thus

weighed in favor of a continuance and not, as the trial court found, against it.

iii. Whether substitute counsel was retained and when she could be prepared to try the case.

Mr. Hampton's chosen counsel, Ms. Goykhman, appeared in court with Mr. Hampton in order to request a continuance. 8/31/12 RP 2. This was not a case in which the defendant was requesting more time in order to secure private counsel, or a case in which it was unclear whether the defendant had the means to hire a private attorney. See Price, 125 Wn. App. at 629, 633 (defendant requested a continuance to hire private counsel after the trial began, and it was unclear whether he could afford private counsel). Ms. Goykhman was retained, appeared before the court, and expressed an ability and willingness to begin preparing for trial. Although she requested a continuance, the trial court never inquired into how long of a continuance she would need or established that any delay would be burdensome. Under these circumstances, the fact that Mr. Hampton needed a brief continuance does not outweigh his constitutional right to choice of counsel.

Thus, the trial court abused its discretion in denying Mr. Hamton's request for a continuance in order to be represented by

counsel of his own choice. It also abused its discretion by applying the incorrect balancing test. The case had only been continued once, on agreement of both parties, and did not pose any specific scheduling problem for the court or the State. The denial of Mr. Hampton's request for a continuance thus violated his constitutional right to counsel of choice.

d. Mr. Hampton's conviction must be reversed.

The violation of a defendant's Sixth Amendment right to choice of counsel is a structural error that is not subject to the constitutional harmless error analysis. Gonzalez-Lopez, 548 U.S. at 150-51. Because Mr. Hampton's constitutional right to retain counsel of his choice was violated, his conviction must be reversed and remanded for a new trial.

3. Unduly vague or impermissible community custody conditions must be stricken.

a. Community custody conditions must be both constitutionally legitimate and authorized by statute.

Limitations on fundamental constitutional rights during community custody must be "reasonably necessary to accomplish the essential needs of the state and the public order." State v. Riles, 135 Wn.2d 326, 350, 957 P.2d 655 (1998). Additionally, a condition of community custody must be sufficiently definite that ordinary people

understand what conduct is illegal and the condition must provide ascertainable standards to protect against arbitrary enforcement. U.S. Const. amend. XIV; Const. art. I, § 3; State v. Bahl, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008).

Two of the community custody conditions ordered by the trial court, both of which Mr. Hampton objected to, are unauthorized and unlawful. 11/6/12 RP 329-30, 331. Community custody conditions must be authorized by statute or crime-related. RCW 9.94A.505(8); RCW 9.94A.703; see In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). A "crime-related prohibition" is "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). The burden is on the State to demonstrate the condition of community supervision is statutorily authorized. See State v. McCorkle, 137 Wn.2d 490, 495-96, 973 P.2d 461 (1999) (SRA clearly places mandatory burden on State to prove nature and existence of out-of-state conviction necessary to establish offender score and standard sentence range); State v. Ford, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999) (accord); United States v. Weber, 451 F.3d 552, 558-59 (9th Cir. 2006) (placing burden on government to demonstrate

discretionary supervised release condition is appropriate in a given case).

b. The court imposed unauthorized conditions of community custody.

i. Condition 5

Mr. Hampton was ordered to refrain from possessing or consuming controlled substances without a legally issued prescription. CP 42 (condition 5). Yet Mr. Hampton was not accused of possessing controlled substances and there was no finding that this is a crime-related prohibition. The court lacks authority to order non-crime-related prohibitions. RCW 9.94A.703(3)(f).

A crime-related prohibition must directly relate to the circumstances of the crime for which the offender has been convicted. RCW 9.94A.030(10). There must be substantial evidence providing factual support for the prohibition. State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007), rev. denied, 163 Wn.2d 1025 (2008); State v. O'Cain, 144 Wn. App. 772, 184 P.3d 1262 (2008) (striking prohibition on internet access in rape case because it was not crime related). In Mr. Hampton's case, there was no allegation that he had used controlled substances. In addition, this is duplicative of the condition that he obey all municipal, county, state, tribal, and federal

laws. CP 42 (condition 3). The sentencing court erred when it imposed this condition and it should be stricken.

ii. Condition 8

Condition 8 requires Mr. Hampton to participate in offense related counseling programs, to include Department of Corrections sponsored offender groups, as directed by the supervising Community Corrections Officer. CP 42 (condition 8). A broadly stated condition that is subject to arbitrary enforcement is unconstitutionally vague. State v. Valencia, 169 Wn.2d 782, 791, 239 P.3d 1059 (2010). As a matter of due process, a person sentenced to community custody must be given fair warning of what conduct is required. Id. at 794.

Mr. Hampton agreed to participate in a sexual deviancy evaluation and a substance abuse evaluation, as well as any recommended treatment, and the court imposed those conditions. 11/6/12 RP 328, 330-31; CP 42 (conditions 7 and 9). The court determined that a mental health evaluation and any recommended treatment was not necessary, because any mental health issues were related to the sexual deviancy. 11/6/12 RP 333-34. Thus, any crime-related counseling was provided by the conditions requiring a sexual deviancy evaluation and substance abuse evaluation. Imposing the

additional condition requiring Mr. Hampton to participate in "offense related counseling programs… as directed by the supervising Community Corrections Officer" allowed for the community corrections officer to improperly impose additional counseling requirements that the court had not found to be crime-related.

This condition was overbroad, subject to arbitrary enforcement, and any reasonable purpose is covered by other conditions. Because the other conditions accounted for any possible crime-related counseling, it should be stricken.

c. This Court should strike the unauthorized conditions of community custody.

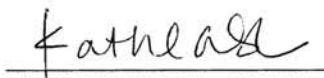
The conditions of community custody 5 and 8 are either not reasonably related to Mr. Hampton's offense of conviction, or are overbroad and unduly vague. This Court should vacate the portions of the Judgment and Sentence requiring him to comply with these unauthorized conditions of community custody. Riles, 135 Wn.2d at 353-53 (striking condition of community placement not reasonably related to offense and therefore not authorized by statute).

F. CONCLUSION

For the reasons stated above, Mr. Hampton respectfully asks this Court to reverse his conviction and remand for dismissal based on the trial court's improper instruction to the jury on rape in the third degree, or reverse his conviction and remand for a new trial based on the trial court's erroneous denial of Mr. Hampton's counsel of choice. Finally, he asks this Court to strike the impermissible sentencing conditions.

DATED this 20th day of August, 2013.

Respectfully submitted,



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Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent/Cross-appellant,	)	
	)	NO. 69601-7-I
	)	
	)	
MATTHEW HAMPTON,	)	
	)	
Appellant-Cross-respondent.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF AUGUST, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X]	MATTHEW HAMPTON C/O DENISE HAMPTON 1116 121ST PL SE EVERETT, WA 98208	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 20TH DAY OF AUGUST, 2013.

X_____

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