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NO. 69601-7-I

IN THE COURT OF APPEALS
OFTHE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON

Respondent

v.

MATTHEW A. HAMPTON,

Appellant

BRIEF OF RESPONDENT

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I. ISSUES

1. Was there evidence from which a jury could conclude that there was a reasonable doubt as to whether the defendant committed second degree rape but there was evidence from which the jury could find the defendant guilty of third degree rape, so that an instruction on third degree rape was properly given?

2. If the trial court erred in instructing the jury on third degree rape does double jeopardy bar retrial on the third degree rape charge?

3. Did the trial court abuse its discretion when it granted the defendant's motion to substitute counsel but denied the defendant's motion to continue the trial to accommodate new counsel?

4. Did the trial court properly impose a condition of community custody prohibiting the defendant from possessing or consuming a controlled substance unless pursuant to a lawful prescription?

5. Was a condition of community custody requiring the defendant to participate in offense related counseling programs, including those sponsored by the Department of Corrections, at the direction of his Community Corrections Officer unconstitutionally vague?

II. STATEMENT OF THE CASE

A. THE RAPE.

On January 1, 2011 A.B. met the defendant, Matthew Hampton, through the defendant's son, Chase[1]. A.B. went to Chase Hampton's home to celebrate New Year's Eve on December 31, 2010. The defendant was living at that home along with Chase's mother, Denise Hampton. A.B. saw the defendant several times after that. 1 RP 41-47.[2]

On January 7, 2011 A.B. was again at the Hampton's house around 10 p.m. She, Chance, her sister and another friend were in the garage playing pool. The defendant and Mrs. Hampton were also home. A.B., Chance, A.B.'s sister and friend were all drinking alcohol. At one point A.B. went to the bathroom in the house and got sick. About that time Chance took A.B.'s sister and the friend home. A.B. declined the offer to take her home because she felt too sick to go. 1 RP 50-61, 149-156.

While Chance was taking the others home A.B. went downstairs and talked to the defendant for a few minutes. She then

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[1] Because Chase Hampton and the defendant share the same last name Chase will be referred to by his first name. No disrespect is intended.

[2] The report of proceedings consists of four volumes. Trial call is referred to by the date of that hearing, 8-31-12. The trial is referred to by the volume number designated on the cover of each transcript, i.e. volume I and II.

went back upstairs to Chance's bedroom where she waited for him to return. When he returned they went back to the garage, and invited the defendant to join them. Chance and the defendant played pool and smoked marijuana, while A.B. sat in a chair, and eventually fell asleep. 1 RP 62-65, 128, 157-159.

While A.B. slept Denise Hampton came into the garage and asked Chance if he was working that day. Chance said that he did not know and kept playing pool with his dad. Eventually the defendant urged Chance to check his schedule, so Chance left to go to his place of employment to do that. Before he left, Chance tried to wake A.B. up to let her know where he was going. When A.B. did not wake up Chance started to write her a note. He stopped when the defendant told Chance that the defendant would let A.B. know where Chance was if she woke up. The defendant told Chance that Chance needed to go, so Chance left at that point. 1 RP 160-165.

While Chance was gone A.B. was awakened as her pant leg was being jerked off. As she was regaining consciousness she realized that the defendant was leaning over her trying to kiss her

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Jury selection was also transcribed but will not be referred to as it does not pertain to any of the issues raised by the defendant.

neck. She then felt him put his finger into her vagina. A.B. said "no" and tried unsuccessfully to push the defendant off her. The defendant told A.B. that "I thought you wanted me." At that point A.B. was fully awake. A.B. then called out for Chance. Eventually the defendant removed his finger from A.B.'s vagina and left. 1 RP 65-71.

A.B. pulled her pant leg back on and went upstairs to Chance's room to wait for him. A.B. tried calling Chance. She called twice, but did not get a hold of him. After the second try Chance called A.B. Chance was just leaving his place of employment when A.B. called him. A.B. sounded like she was crying and was upset. After talking to Chance, A.B. left the house and waited for him in the driveway. When Chance got home he found A.B. there. She was crying and speechless. 1 RP 71-76, 169-170.

B. PRE-TRIAL AND TRIAL PROCEDURE.

On April 18, 2012 the defendant was charged with one count of indecent liberties. 1 CP 98. On June 15, 2012 the court entered an omnibus order confirming the trial date as July 13. The order reflected that the State had given the defendant notice that if he did not accept the State's plea offer that the State would amend to one

count of second degree under the "unable to consent prong." The defendant waived arraignment on an amended information until trial. 3 CP 101-02.

On July 13, 2012 the trial court approved an agreed trial continuance, setting the trial date on August 31, 2012. 2 CP 99. On August 31 the defendant sought to have Ms. Goykman substituted for his assigned attorney Mr. Wackerman. Ms. Goykman made a motion to substitute for Mr. Wackerman which was conditioned on the court granting a motion to continue the trial to enable her to prepare for trial. 1 CP 95; 8-31-12 RP 2-3.

The State objected to the motion to continue to accommodate a substitution of counsel on the basis that one of its witnesses, the defendant's son, had interfered with the prosecution by attempting to get A.B. to drop charges. 1 CP 92. At trial the prosecutor further elaborated that he was opposing the continuance because he feared the case would be jeopardized "if he has any more time to get inside the victim's head and try to talk her out of it." 8-31-12 RP 6.

The court said it would allow the motion to substitute counsel, but wanted argument on the motion to continue. 8-31-12 RP 2. Ms. Goykman explained that the defendant approached her

about representing him earlier when he had no funds to hire her, but now his family was willing to pay for her representation. She also explained that she had told the defendant that Mr. Wackerman was a good attorney who would represent him well at trial. The difficulty was the defendant did not think that he had a good relationship with Mr. Wackerman, and would prefer Ms. Goykman to represent him. Mr. Wackerman stated that he was ready to go to trial if the court set the matter over to Wednesday morning in order to interview the defendant's son who was listed as a State's witness.[3] 8-31-12 RP 4-5.

The trial court denied the motion to continue conditioned on the State making the defendant's son available for a defense interview. The court noted that Mr. Wackerman was a highly qualified criminal defense attorney. It reasoned that the defendant's preference to have someone else represent him would not impair Mr. Wackerman's ability to represent the defendant zealously and capably. The court had not been given any reason to grant the continuance other than someone recently decided to provide the defendant funds to hire another attorney. Given these

[3] August 31, 2012 was a Friday. The following Monday was Labor Day, a legal holiday.

facts, and the victim's position, the court found no compelling record to grant a continuance that was made on the day of trial. 8-31-12 RP 7-8.

Trial commenced the following Wednesday. A.B. and Chance testified to the facts set out above. The defendant denied raping A.B. 2 RP 218-219.

After the evidence was presented the State sought an instruction on the lesser degree crime of third degree rape. The defendant objected to the instruction. The court noted the objection and gave the third degree rape instruction. 2 RP 240-245, 250-251; 1 CP 75.

The jury found the defendant not guilty of second degree rape and guilty of third degree rape. 1 CP 60, 61

III. ARGUMENT

A. AN INSTRUCTION ON THIRD DEGREE RAPE WAS JUSTIFIED UNDER THE FACTS OF THE CASE.

The defendant assigned error to the trial court's decision to instruct the jury on third degree rape as an inferior degree crime at the State's request. Specifically, he argues that the evidence did not support the instruction.

A defendant who is charged with a crime that is divided into degrees may be convicted of a lesser degree of that crime. RCW

10.61.010. A jury instruction on an inferior degree of an offense is proper when (1) the statutes for both the charged and proposed offenses proscribe a single offense, (2) the information charges an offenses that is divided into degrees and the proposed offense in an inferior degree of the charged offense, and (3) there is evidence that the defendant committed only the inferior degree offense. State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000).

The reason there must be evidence the defendant committed only the inferior crime is to ensure that there is evidence to support giving the instruction. Id. at 455. A lesser degree instruction is appropriate when the evidence would permit the jury to rationally find the defendant guilty of the lesser offense and acquit him of the greater offense. State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997). The evidence must affirmatively establish the theory of the case maintained by the proponent of the instruction. Fernandez-Medina, 141 Wn.2d at 456. When there is a challenge to the sufficiency of the evidence to support a lesser degree offense, the reviewing court will view the supporting evidence in the light most favorable to the party that requested the instruction. Id.

Here the defendant was charged with second degree rape under the theory that "A.B. was incapable of consent by reason of being physically helpless and mentally incapacitated." 1CP 83, RCW 9A.44.050(1)(b). "'Physically helpless' means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to act." RCW 9A.44.010(5), 1 CP 73. "'Mental incapacity' is that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause." RCW 9A.44.010(4), 1 CP 73. Physically helpless and mental incapacity are not alternative means of committing the offense, but rather are ways in which the victim is incapable of giving consent to sexual intercourse. State v. Al-Hamdani, 109 Wn. App. 599, 601, 36 P.3d 1103 (2001), review denied, 148 Wn.2d 0104 (2003).

A victim who cannot move but who can orally communicate her lack of consent is not physically helpless within the meaning of that term in the second degree rape statute. State v. Bucknell, 144 Wn. App. 524, 530, 183 P.3d 1078 (2008). In Bucknell the Court found a victim who was paralyzed from the chest down, but who

could understand what was happening and could communicate her lack of consent was not "physically helpless." Id. The Court remanded for entry of judgment on the lesser degree crime of third degree rape because there was no evidence the victim had freely agreed to have sexual intercourse with the defendant. Id.

A person is mentally incapacitated within the meaning of the second degree rape statute if the victim "had a condition which prevented him or her from meaningfully understanding the nature or consequences of sexual intercourse." State v. Ortega- Martinez, 124 Wn.2d 702, 711, 881 P.2d 231 (1994). A meaningful understanding includes more than just an understanding of the mechanics of a sexual act. It may include an understanding of the effect that sexual intercourse has on relationships between the victim and defendant and the victim and other partners, the possibility of pregnancy and disease, as well as what is socially acceptable sexual contact and what sexual behavior constitutes a social taboo. Id. at 712-713.

In Ortega- Martinez the evidence showed the victim had an I.Q of 40. Her mental age was comparable to a 5 or 6 year old child. She could learn some things, but would be unable to apply what she had learned in one situation to another. At trial she

demonstrated an inability to understand the connection between sperm and disease. Her testimony was often unresponsive to the questions asked. Id. at 714-716. Taking this evidence in the light most favorable to the State the Court found there was sufficient evidence that the victim had a mental incapacity at the time of the offense which prevented her from understanding the nature and consequences of the act of sexual intercourse. Id. at 716-717.

The elements of third degree rape are that the defendant had sexual intercourse with the victim, the victim was not married to the defendant, and that the victim did not consent to sexual intercourse with the defendant and that lack of consent was clearly expressed by words or conduct. RCW 9A.44.060(1)(a), 1 CP 75. "'Consent' means at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact." RCW 9A.44.010(7).

Here the evidence showed that A.B. was asleep before the rape occurred. She was awakened when her pants were partially pulled off. She described her condition as just waking up when she felt the defendant put his finger inside her. She then clarified that she was awake when he spoke to her, but just waking up

immediately before that. She did not have any conscious thought about what was happening because she was just waking up. She said "no" and tried to push the defendant off of her when his finger was inside of her. She also called out for Chance, but the defendant did not immediately remove his finger from her vagina. 1 RP 67-71, 117-118.

There was no evidence that A.B. did not have a meaningful understanding of the nature or consequences of sexual intercourse. The evidence did show that A.B. was still somewhat groggy at the time that the rape occurred. Whether or not she was so groggy that she was incapable of consent was a factual issue for the jury to decide. Taking the evidence in a light most favorable to the State who proposed the lesser degree instruction, a rational trier of fact could conclude that there was a reasonable doubt as to whether she was so groggy that she was unable to communicate her lack of consent. The evidence did show that shortly after the defendant put his finger in her vagina, A.B. did clearly communicate her lack of consent by saying "no", trying to push the defendant away, and calling out for the defendant's son. Thus the trial court did not err when it instructed the jury on the lesser degree offense of third degree rape.

The defendant argues that the instruction was improper; he compares the facts of this case to cases in which the victim testified to forced sexual intercourse and the defendant testified that no sexual intercourse occurred, or the sexual intercourse was consensual. BOA at 10-13. Those cases differ from the facts presented here because the evidence clearly established an either – or choice for the jury.

In Wright the victim testified she was pulled into a bedroom where she was held down on a bed while she was sexually assaulted. She was not able to get off the bed until her assailants got off of her. State v. Wright, 152 Wn. App. 64, 67-68, 214 P.3d 968 (2009), review denied, 168 Wn.2d 1017 (2010). The defendant denied having sexual intercourse with the victim. Id. Under these facts the Court found it was error to give a third degree rape instruction where neither the victim nor the defendant's evidence supported an unforced nonconsensual rape. Id. at 72.

In Charles the victim testified that the defendant forced her into some bushes whereupon he overcame her resistance, took off her clothing and had sexual intercourse with her before she was eventually able to run away. State v. Charles, 126 Wn.2d 353, 354, 894 P.2d 558 (1995). The defendant testified that she consented to

sex with him in exchange for money. Id at 355. The Court found a third degree rape instruction was properly refused because under these facts the defendant was either guilty of second degree rape or not guilty of the crime. Since there was no evidence that intercourse was unforced and nonconsensual the defendant was not entitled to that instruction. Id. at 356.

Unlike either Wright or Charles the jury could believe everything A.B. testified to, and still conclude there was a reasonable doubt about her capacity to consent to the sexual act. The evaluation of that evidence depended on how the jury viewed the degree of grogginess A.B. experienced at the time the defendant raped her. While it could have concluded that she was too groggy to be able to communicate her non-consent, it could just as easily conclude she was not that groggy, and she was capable of consenting or not consenting when the defendant raped her. Since the evidence did not present a clear cut either-or choice as the evidence in Wright and Charles did, the third degree rape instruction was properly given.

Finally the defendant states that if the conviction for third degree rape is reversed, retrial is not the remedy because the jury explicitly found him not guilty of second degree rape. BOA at 13.

He relies on the Court's reasoning in Wright wherein the Court held retrial was appropriate because the jury had not acquitted the defendant of second degree rape and therefore double jeopardy had not attached. Wright, 152 Wn. App. at 74.

The Court of Appeals decision in Wright is not on point here, because, while the jury explicitly acquitted the defendant of second degree rape, it also found the defendant guilty of third degree rape. In that situation, if the court erroneously instructed the jury on third degree rape, double jeopardy does not bar retrial on the third degree rape charge. State v. Wright, 165 Wn.2d 783, 203 P.3d 1027 (2009). In that case the Court considered the remedy when the defendants had been charged with second degree murder under the alternative theories of intentional murder and felony murder predicated on second degree assault. After the Court's decisions in Andress[4] and Hinton[5] the convictions for second degree murder predicated on second degree assault were no longer valid. The Court reasoned that retrial on the intentional murder alternative was not barred by double jeopardy because the defendant had not been acquitted of that charge, and the reason for

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[4] In re Andress, 147 Wn.2d 602, 56 P.3d 981 (2002).
[5] In re Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004).

reversing the conviction was not based on insufficiency of the evidence. Id. at 792, 796.

Here the challenge to the defendant's conviction for third degree rape is based on instructional error, not on the sufficiency of the evidence for that lesser degree crime. Under that circumstance, should this Court conclude the jury should not have been instructed on third degree rape, the remedy is to remand for retrial on third degree rape.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THE MOTION TO CONTINUE THE TRIAL DATE.

The defendant argues the trial court unreasonably denied him his right to counsel of his choice. Because the trial court did not err in balancing the interests of the parties, and the record reflected a tenable basis to deny the motion for a continuance that Ms. Goykman made as a pre-condition to substitute as counsel, the trial acted within its discretion when it denied the continuance motion.

The defendant has a Sixth Amendment right to be represented by competent counsel. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 700 (1963), Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The defendant does not have an absolute Sixth Amendment right to counsel of his choice. State v. DeWeese, 117 Wn.2d 369, 674-76, 816 P.2d 1 (1991). "[T]he essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." Wheat v. United States, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988).

The decision whether to grant a continuance in order for the defendant to obtain substitute counsel is reviewed for an abuse of discretion. State v. Roth, 75 Wn App. 808, 826, 881 P.2d 268 (1994), review denied, 126 Wn.2d 1016 (1995). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or for untenable reasons. In re Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 13672 (1997). When the defendant argues that he had a conflict with his current counsel and his motion to continue in order to obtain substitute counsel was erroneously denied, the reviewing court will consider (1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion. In re Stenson, 142 Wn.2d 710, 723-724, 16 P.3d 1 (2001).

An irreconcilable conflict justifying substitution of counsel occurred when the conflict between the defendant and counsel was so great that the defendant would not communicate with his attorney in any manner. Brown v. Craven, 424 F.2d 1166, 1169-1170 (9th Cir. 1970). A similar conflict exists where counsel addressed his client by using racial epitaphs and threatened to render substandard performance if the client chose to go to trial rather than accept the plea offer. Frazer v. United States, 18 F.3d 778 (9th Cir. 1994). In contrast friction between counsel the client that resulted from a dispute over trial strategy was not so severe as to result in a deprivation of counsel in Stenson, 142 Wn.2d at 729-730.

Here the record demonstrates only that the defendant had a generalized dissatisfaction with his relationship with Mr. Wackerman. That dissatisfaction did not impair the ability of attorney or client to communicate with one another. Nor did it result in Mr. Wackerman abandoning his duty to prepare for trial. The record demonstrates that Mr. Wackerman had prepared for trial, and was continuing to prepare even on the trial date. To the extent there was any conflict with the defendant and Mr. Wackerman, it was certainly reconcilable.

A court does not make an adequate inquiry when it fails to hold a hearing on the reasons for the request to substitute counsel. State v. Lopez, 79 Wn. App. 755, 767, 904 P.2d 1179 (1995) disapproved on other grounds, State v. Adel, 136 Wn.2d 629, 965 P.2d 1072 (1998). Here the court permitted both Ms. Goykman and Mr. Wackerman to address the reasons for the substitution and request for continuance. The court conducted an adequate inquiry.

Finally, the motion was untimely. When considering the timing of the motion to substitute counsel the court has analogized it to the right to self-representation. State v. Chase, 59 Wn. App. 501, 506, 799 P.2d 272 (1990). "If the request is made shortly before or as the trial is to begin, the existence of the right depends on the facts with a measure of discretion in the trial court. In the absence of substantial reasons a late request should generally be denied, especially if the grant of such a request may result in delay of the trial." Id. quoting, State v. Garcia, 92 Wn.2d 647, 655-56, 600 P.2d 1010 (1979).

Here the motion was made on the date the case was set for trial. The defendant's generalized dissatisfaction with appointed counsel was not a substantial reason to grant a continuance to permit a new attorney to prepare to represent him. The Court has

recognized that the victim's interests play some role in the decision to continue a case in order to accommodate a request for substitute counsel. Morris v. Slappy, 461 U.S. 1, 14-15, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983). The State's interest in maintaining the integrity of its evidence also bears on that question. State v. Early, 70 Wn. App. 452, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994). Thus where the a State's witnesses' cooperation was tenuous, and the defendant's current counsel was prepared and ready to try the case, the Court found the trial court did not abuse its discretion when it denied a request to continue the trial so that the defendant could retain new counsel. Id.

Here there was evidence that the complaining witness was being pressured to not cooperate with the prosecution, thereby jeopardizing the State's case. Mr. Wackerman was prepared to try the case and the witnesses were available for trial. Weighing the defendant's and the State's competing interests, the trial court did not abuse its discretion when it denied the defendant's late request for a continuance to permit Ms. Goykman to substitute in as his attorney.

The defendant asserts that the trial court used the wrong test when assessing whether sufficient grounds had been asserted to

justify the continuance to substitute counsel. BOA at 19-20. He claims it was error for the court to consider the victim's position in the case, instead of focusing on his right to counsel of choice. This argument should fail because courts have recognized that these factors may appropriately be considered when deciding a motion to continue the trial to secure new counsel. Slappy 461 U.S. at 14, Early, 70 Wn. App. at 458.

The defendant relies on a four part test set out in Price as a framework which he argues demonstrates that the trial court abused its discretion. State v. Price, 126 Wn. App. 617, 632, 109 P.3d 27, review denied, 155 Wn.2d 1018 (2005). Price relied on State v. Roth 75 Wn. App. 808, 824, 881 P.2d 268 (1994), review denied, 126 Wn.2d 1016 (1994). Roth predated Stenson, wherein the Supreme Court adopted the test articulated by the federal court in United States v. Moore, 159 F.3d 1154, 1158, n. 3 (9th Cir. 1998). Stenson, 142 Wn.2d at 724 (permitting the defendant to raise the issue in a personal restraint petition that had previously been litigated on direct review because the change in the law was good cause under RAP 16.4(d) to revisit the issue). As shown, using the test adopted by the Supreme Court in Stenson, the trial court did not abuse its discretion. However, even under the test set out in

Price the trial court did not abuse its discretion when it denied the motion to continue.

The first Price factor is whether the trial court had granted previous continuances at the defendant's request. Price 126 Wn. App. at 632. The defendant points out that there had only been one prior continuance, and that he did not request a continuance when the State amended the information on the day of trial. As the court noted however the case had been set beyond its original time for trial calculation. 8-31-12 RP 8. The defense did not request a continuance when the Information was amended because the defense had been put on notice for over two months that the Information would be amended to a specific charge under a specific theory. The defense specifically waived arraignment on that new charge until the trial date. 3 CP 102-103.

The second Price factor is whether the defendant had some legitimate dissatisfaction with counsel. Price, 126 Wn. App. at 632. General complaints that the defendant was unable to communicate with counsel, and that counsel was not effectively representing the defendant, along with specific complaints about counsel's conduct in representing the defendant, were not a sufficient reason to demonstrate an abuse of discretion by the trial court when it denied

a motion to continue to obtain new counsel in Price. Id. at 633-34. Similarly here, the defendant's general complaint about his "relationship" with Mr. Wackerman is insufficient to show that he had a legitimate dissatisfaction with counsel sufficient to warrant a continuance to obtain Ms. Goykman's services.

The third Price factor is whether available counsel is prepared to go to trial. Price, 126 Wn. App. at 632. Ms. Goykman was not prepared to go to trial. The defendant faults the trial court for not asking Ms. Goykman how much time would be needed to prepare for trial. Since there were other factors bearing on whether to grant a continuance at all, the length of a requested continuance was not the determining factor in this inquiry.

Even if the defendant had requested a short continuance that would not be a basis to find the trial court abused its discretion. In Early the defendant came to court on the day of trial and asked for a 30 day continuance to allow new counsel to prepare. Early, 70 Wn. App. at 456. The Court found no abuse of discretion in denying the short continuance since the request was made late, appointed counsel was ready to try the case, and a continuance could prejudice the State's case. Id. at 458. These factors were all present in this case.

The defendant does not discuss the fourth Price factor, "whether the denial of the motion is likely to result in identifiable prejudice to the defendant's case of a material or substantial nature." Price, 126 Wn. App. at 632. Instead he argues a violation of right to counsel of choice is a structural error that is not subject to harmless error analysis, citing United States v. Gonzalez-Lopez, 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006). BOA at 15, 24. This misstates the court's holding in that case. The court held that it is an erroneous denial of right to counsel that constitutes a structural error not subject to harmless error analysis. Id. at 150-152.

In Gonzalez-Lopez the Government conceded that the trial court erroneously denied the defendant his right to counsel of choice. The only issue was whether the error was subject to harmless error analysis. The Court was careful to state that its decision there did nothing to disturb its prior rulings that limit the right to counsel of choice. Id. at 151. Relevant to this case the court reaffirmed that the trial court had "wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar." Id at 152, citing Slappy, 461 U.S. at 11-12.

Under the analysis employed in Price the defendant bears the burden to establish prejudice. Price, 126 Wn. App. at 634. In the absence of that showing the defendant has failed to support a claim that the trial court abused its discretion when it denied a motion to continue trial so that the defendant could have counsel of his choice represent him. Because the defendant has not even addressed the prejudice prong here, the defendant has not shown the trial court abused its discretion when it denied the motion to continue the trial.

C. THE CHALLENGED COMMUNITY CUSTODY CONDITIONS WERE PERMITTED BY THE SENTENCING REFORM ACT. THEY WERE NOT UNCONSTITUTIONALLY VAGUE.

At sentencing the court ordered the defendant to serve 12 months of community custody. It further ordered several conditions of community custody including:

> 5. Do not possess or consume controlled substance unless you have a legally issued prescription
>
> 8. Participate in offense related counseling programs, to include Department of Corrections sponsored offender groups, as directed by the supervising Community Corrections Officer.

1 CP 42; 2 RP 333.

The defendant argues condition 5 is not crime related. He argues condition 8 is unconstitutionally vague. For those reasons he asks the Court to strike those conditions. BOA at 26-28.

1. The Trial Court Had Discretion To Prohibit Possession Or Consumption Of Controlled Substances Even If It Was Not Crime Related. There Was Evidence To Support The Condition As A Crime Related Condition.

The court may only impose a sentence that is authorized by statute. In re Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). The court was required to order the defendant to refrain from possessing or consuming controlled substances except pursuant to a lawfully issued prescription unless the court specifically waived that condition. RCW 9.94A.703(2)(c). Because the court did not waive the condition, it was properly imposed.

The defendant argues the condition was not authorized because it was not "crime related." RCW 9.94A.703(3)(f) does permit the court to impose a condition that the defendant comply with any crime related prohibitions. That condition is completely separate from the condition that the defendant refrains from possessing or consuming controlled substances except pursuant to a lawfully issued prescription. The crime related prohibition is listed under a subsection entitled "Discretionary conditions"

whereas the controlled substances condition is listed under a subsection entitled "Waivable conditions." Where the legislature uses different word in a statute relating to similar subject matter it intends different meanings. State v. Flores, 164 Wn.2d 1, 14, 186 P.3d 1083 (2008). If the court had meant the controlled substances condition to be "crime related" it would have used same terminology in RCW 9.94A.703(2)(c) that it used in RCW 9.94A.703(3)(f).

Even if there was a requirement that the condition be crime related, that requirement would be met here. A crime 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." RCW 9.94A.030(10). There does not need to be a causal link between the prohibition imposed and the crime committed so long as the condition relates to the circumstances of the crime. State v. Acrey 135 Wn. App. 938, 846, 146 P.3d 1215 (2006).

In Acrey this Court upheld a condition that the defendant not work for or without pay as a caretaker for any elderly or disabled person, except her mother. Id. The defendant had been convicted of stealing more than $200,000 from the victim. The victim was an elderly, disabled man from whom the defendant had gained his

trust. Since gaining the trust of a dependent person was part of her criminal operation, and that could be done as a caretaker for dependent persons, the condition was crime related. Id. at 947.

Here the prohibition against possessing controlled substances without a prescription was related to the circumstances of the crime. A.B. testified that the defendant and Chase were smoking marijuana before the rape occurred. 1 RP 62, 128. Marijuana is a controlled substance. RCW 69.50.010(d), RCW 69.50.204(c)(22). Marijuana is listed under the subsection entitled "hallucinogenic substances." A.B. testified that the defendant told her that he thought that she wanted him. 1 RP 66. It is reasonable to conclude the defendant's marijuana consumption had something to do with his misperception that A.B. wanted to have sex with him. It was therefore related to the circumstances of the crime, and appropriately imposed under RCW 9.94A.703(3)(f) as well as RCW 9.94A.703(2)(c).

2. The Condition That the Defendant Participate In Offense Related Counseling Is Not Unconstitutionally Vague.

The Due Process clauses of the Fourteenth Amendment and Washington constitution, article I, §3 require that citizens be afforded fair warning of proscribed conduct. Spokane v. Douglass,

115 Wn.2d 171, 178, 795 P.2d 693 (1990). That guarantee applies to sentencing conditions. State v. Bahl, 164 Wn.2d 739, 753, 193 P.3d 678 (2008). A sentencing condition is vague if it "(1)...does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed or (2) ...does not provide ascertainable standards of guilt to protect against arbitrary enforcement." Id. quoting, Douglass, 115 Wn.2d at 178. If either requirement is not satisfied the condition is unconstitutionally vague. Id.

"The Constitution does not require impossible standards of specificity." Acrey, 135 Wn App. at 947. Challenged terms are not considered in a vacuum when determining whether they are unconstitutionally vague. Bahl, 164 Wn.2d at 754. "If persons of ordinary intelligence can understand what the [condition] proscribes, notwithstanding some possible areas of disagreement, the [condition] is sufficiently definite." Douglass, 115 Wn.2d at 179.

In a drug delivery case the court imposed a condition of community custody that he not possess or use any paraphernalia that could be used to ingest or process controlled substances, or that could be used to facilitate the sale or transfer of controlled substances. State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059

(2010). The Court found the condition was unconstitutionally vague because it did not limit the term paraphernalia to "drug paraphernalia." The Court reasoned that because paraphernalia encompassed a broad range of everyday items it did not protect against arbitrary enforcement. Id. at 794-95.

Unlike the condition at issue in Valencia the condition that the defendant participates in counseling programs is modified by the phrase "crime related". The crime committed here was a sex offense. There was also evidence the defendant was committing the crime of possession of a controlled substance and delivery of a controlled substance when he shared the marijuana pipe with his son. The condition was sufficiently definite that persons of ordinary intelligence would understand that as modified the condition requires the defendant to participate in sex offender counseling or drug counseling.

The defendant points to condition 7, requiring the defendant to participate in a sexual deviancy evaluation and recommended treatment, and condition 9, requiring the defendant to participate in a substance abuse evaluation and recommended treatment to argue that condition 8 was unconstitutionally vague. He argues that the condition allows the community corrections officer to

improperly imposing counseling requirements that the court had found were not crime related. BOA at 28.

Appendix 4.2 to the judgment and sentence, setting forth the community custody conditions ordered by the court, makes it clear what the court considered crime related; sexual deviancy counseling and substance abuse counseling. A condition requiring a mental health evaluation and counseling was specifically crossed off. 1 CP 42. While there may be some area of disagreement, the document as written makes it clear to a person of ordinary intelligence what kind of counseling a community corrections officer may require as a condition of this sentence.

IV. CONCLUSION

For the foregoing reasons the State asks the Court to affirm the defendant's conviction for third degree rape. Further the State asks the Court to find the challenged community custody conditions were permitted by the Sentencing Reform Act, and are not

unconstitutionally vague.

Respectfully submitted on November 12, 2013.

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