Supreme Court No. _____
Court of Appeals No. 57466-7-II

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

ZACHARY GILILUNG,

Petitioner.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court

Washington Supreme Court

Washington Court of Appeals

Constitutional Provisions

Statutes

Rules

A. IDENTITY OF PETITIONER AND DECISION BELOW

Zachary Gililung, the petitioner, requests this Court to grant review of the Court of Appeals' decision, partly published, terminating review.[1]

B. ISSUES FOR WHICH REVIEW SHOULD BE GRANTED

1. Whether the trial court erred in refusing to instruct the jury on entrapment where law enforcement baited Mr. Gililung to purchase sex from a fictional 23-year-old prostitute, but later switched this fictional prostitute's age to 16, and taunted Mr. Gililung after he expressed discomfort and said he would not meet her?

2. Whether trial counsel was constitutionally ineffective for withdrawing the request for an entrapment instruction on the charge of attempted commercial sexual abuse of a minor but seeking it on the charge of communicating with a minor for

[1] The decision was issued July 30, 2024. Mr. Gililung's motion to reconsider was denied on August 27, 2024.

immoral purposes where both charges were based on law enforcement inducing Mr. Gililung to agree to pay a fictional 16-year old for sex?

3. Whether the prosecution proved harmless beyond a reasonable doubt the constitutional error at trial in eliciting evidence that Mr. Gililung exercised his right under article I, section 7 of the Washington Constitution to refuse consent to the search of his car?

4. Whether a total sentence of 66.75 months is illegal where it is based on two *concurrent* sentences for offenses that both carry a statutory maximum of 60 months?

5. Whether in requiring Mr. Gililung to submit to drug and alcohol testing as a condition of community custody is unlawful where there was no evidence of drug or alcohol use by

Mr. Gililung? (This Court has granted review of this issue in *State v. Nelson*, 102942-0).[2]

C. STATEMENT OF THE CASE

Zachary Gililung, a man in his early 30s, sought out a possible sexual encounter with a female prostitute who listed her age online as 23. RP 399-03; CP 128; Ex. 2.

But this was no prostitute. It was Detective Jake Klein of the Washington State Patrol. Using a photo of a female police officer from Idaho who was at least 21 at the time of the photo, he created the false advertisement on the adult website. RP 219, 237, 340-41, 355, 366. Rather than seek out actual victimized children, Detective Klein and law enforcement officers pretended to be prostitutes and "children" with the "goal" "to find people who want to sexually exploit children and bring those people to justice." RP 312.

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2 https://www.courts.wa.gov/appellate_trial_courts/supreme/issues/casesNotSetAndCurrentTerm.pdf

After Mr. Gililung inquired as to a price for one of the advertised services, Detective Klein stated by text message that "she" was actually 16 years old. Ex. 1; RP 347. Mr. Gililung expressed confusion. Ex. 1; RP 347. Detective Klein invited Mr. Gililung to call "her." RP 347, 427.

Mr. Gililung called. RP 427. The voice he heard belonged to a 29-year-old female detective. RP 219, 237, 427. They discussed how the ad said "she" was 23, not 16. RP 405, 428. Mr. Gililung said he was not okay with this. RP 405, 428. But she continued to pressure him, stating something to the effect, "how can I make you more comfortable? We can continue to chat. Maybe you'll become more comfortable." RP 405, 428.

After further text exchanges about payment (cash only) and location (a hotel), Mr. Gililung sent a message stating he would not be coming to meet her. Ex. 1; RP 354, 435-36. Detective Klein testified that in response to Mr. Gililung saying he was not coming, "I always try to keep going," even when

people say no, and that he acted like a sex worker who values time by texting, "Wow. Fuck off. Bye." RP 349, 355, 384-85. Mr. Gililung felt disrespected. RP 408, 442, 444. Triggered, he changed his mind and decided to waste this person's time and go to the hotel. RP 408, 445-46.

At the hotel parking lot, more text messages were exchanged. Ex. 1; RP 444-45. But Mr. Gililung ultimately decided to leave. RP 413. Shortly thereafter, a police officer stopped and arrested him. RP 412-13.

Following Mr. Gililung's arrest, officers obtained a search warrant for his car. RP 362. As the prosecution elicited from Detective Klein at trial, police got a warrant for the vehicle "because [Mr. Gililung] didn't consent to a search of it." RP 362.

Officers found a cell phone in the driver's side pocket door and $100 in the console. RP 363. The female detective who briefly spoke to Mr. Gililung as the fictitious prostitute in

the unrecorded call testified she discussed having vaginal sex with no condom for $100. RP 227, 344.

The prosecution ultimately charged Mr. Gililung with attempted commercial sexual abuse of a minor and communication of a minor for immoral purposes. CP 48-49. Although the age of consent in Washington is 16, these two offenses apply to anyone under the age of 18. *See* chapter 9A.44 RCW; RCW 9.68A.011(5), .90, .100. In other words, Mr. Gililung could have legally had consensual sex with the imagined "child" but this became a crime because the police pretending to be this 16-year-old insisted on money.

Mr. Gililung testified at trial. He requested the jury be instructed on entrapment, but the court denied his requests. CP 58-66, 68-71; RP 476-77.

Mr. Gililung was convicted as charged. 8/24/22 RP 25.

Articulating that the court "would be surprised if Mr. Gililung were to pose a risk to the community moving forward," the court sentenced Mr. Gililung to a total low-end

range sentence of 30.75 months of confinement. CP 178. The court imposed 36 months of community custody on both convictions even though the statutory maximum on the two offenses is five years and community custody should be reduced where it exceeds the statutory maximum. CP 179.

Notwithstanding the lack of evidence and connection to the convicted offenses, the court imposed a condition requiring Mr. Gililung submit to drug and alcohol testing upon request through urinalysis or breath analysis. CP 144.

On appeal, the Court of Appeals held (1) the evidence was insufficient to justify entrapment instructions, (2) trial counsel was not ineffective in withdrawing the request for an entrapment instruction on the charge of attempted commercial sexual abuse of a minor, (3) any improper comment by Detective Klein commenting on Mr. Gililung's exercise of his constitutional privacy rights was harmless beyond a reasonable doubt; (4) Mr. Gililung's sentence was lawful even if his total sentence on the concurrent offenses extended beyond the

statutory maximum for those offenses; and (5) the trial court could require drug and alcohol testing even though there was no evidence drugs or alcohol were related to the offenses. The Court published its holding on the fourth issue, which expressly disagrees with unpublished decisions to the contrary.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Review should be granted because the decision holding that the evidence was insufficient to support instructing the jury on entrapment conflicts with this Court's recent decision in *Arbogast*.

Entrapment is established if the "criminal design originated in the mind of law enforcement officials, or any person acting under their direction," and the "actor was lured or induced to commit a crime which the actor had not otherwise intended to commit." RCW 9A.16.070(1). The defense has the burden of proving entrapment by a preponderance of the evidence. *State v. Arbogast*, 199 Wn.2d 356, 366, 506 P.3d 1238 (2022).

As this Court recently held amongst "confusion about the burden of production" to obtain an entrapment instruction, the burden is merely "'some evidence'" to support he required elements. *Id.* at 367-68. The evidence is viewed in the light most favorable to the defendant. *Id.* at 360.

Notwithstanding this Court's attempt in *Arbogast* to clear up the confusion, the Court of Appeals continues to misapply the test, denying defendants their constitutional right to have a jury, rather than a court, decide the issue of entrapment. *See Mathews v. United States*, 485 U.S. 58, 63, 108 S. Ct. 883, 99 L. Ed. 2d 54 (1988) (the "question of entrapment is generally one for the jury, rather than for the court"), cited by *Arbogast*, 199 Wn.2d at 371 & n.4.

In this case, the Court of Appeals held there was not "some evidence" in support of either prong of entrapment. Slip op. at 16-19. But on predisposition, there was no evidence that Mr. Gililung had previously sought to pay for sex with a 16-year-old (let alone anyone under 18). Mr. Gililung was on a

website designed for adults with an advertisement from a person stating she was 23 years old and with a photograph of person who was at least 21 years old. Law enforcement baited Mr. Gililung with an advertisement about an adult and later switched it to a 16-year-old. And most critically, *Mr. Gililung testified that he did not want to have sex with a minor*. RP 460.

Rather than accept this as prima facie evidence on predisposition, the Court of Appeals ignored this evidence in favor of other evidence, such as evidence indicating that Mr. Gililung "withdrew $100 from an ATM" after the fictional prostitute said she was "just 16." Slip op. at 17. *But Mr. Gililung testified he did not stop at an ATM*. RP 436-37. Effectively, the court weighed the evidence. But it not the "court's job to weigh the evidence. *Arbogast*, 199 Wn.2d at 506.

The appellate court similarly weighed the evidence on inducement. The court reasoned that attempts by law enforcement to reassure Mr. Gililung that he should come and

the testimony that Detective Klein continued to try to lure Mr. Gililung, even after Mr. Gililung stated he would not come, did not constitute inducement. Slip op. at 17-18. In finding this, the court ignored Mr. Gililung's testimony that that the provocation by law enforcement, telling him to "fuk off," worked. Ex. 1; RP 408, 444.

When a team of trained police officers lie and manipulate a person into taking steps toward paying a fictional 16-year-old for sex, the defense of entrapment must be available for the defendant and the jury where there is "some evidence" in support. Otherwise, the right to a jury trial means very little in these types of case. Because confusion about entrapment continues to be perpetuated by the Court of Appeals, as illustrated by this case, this Court should grant review. RAP 13.4(b)(1), (4).

The Court should also grant review on the related issue of ineffective assistance of trial counsel. Trial counsel withdrew the request for an entrapment instruction on the charge of

attempting commercial sexual abuse of a minor. Counsel did this apparently on the misunderstanding that Mr. Gililung's testimony denying particular elements of that offense meant that entrapment was unavailable. This is incorrect because "even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment." *Mathews*, 485 U.S. at 62, cited by *Arbogast*, 199 Wn.2d at 371 & n.4. This was deficient performance. Br. of App. at 29-31.

The Court of Appeals resolved this issue based on its holding that entrapment was not legally available based on the evidence. Slip op. at 18-19. As explained, this is incorrect. For the same reasons, review should be granted on this related issue. RAP 13.4(b)(1), (4).

2. The Court should grant review to decide whether a comment on the defendant's exercise of their constitutional right to refuse consent to a search under article I, section 7 is manifest constitutional error and under what circumstances this error requires reversal.

Under the Washington Constitution, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7. This provision "'clearly recognizes an individual's right to privacy with *no* express limitations.'" *State v. Ferrier*, 136 Wn.2d 103, 110, 960 P.2d 927 (1998) (quoting *State v. Simpson*, 95 Wn.2d 170, 178, 622 P.2d 1199 (1980)) (emphasis in the original). Absent a warrant or exception to the warrant requirement, a search or invasion into a private affair is unlawful. *State v. Villela*, 194 Wn.2d 451, 458, 450 P.3d 170 (2019) Consent is an exception, but one has the right to refuse consent. *Ferrier*, 136 Wn.2d at 116; *State v. Gauthier*, 174 Wn. App. 257, 263, 298 P.3d 126 (2013).

Following his arrest, Mr. Gililung declined to consent to a search of his car, as was his constitutional right. During trial, Detective Jake Klein, a law enforcement officer with over a

decade of experience in Washington and the primary witness against Mr. Gililung, testified the police towed Mr. Gililung's car to a police department "for a search warrant *because he didn't consent to a search of it."* RP 362.

This was a direct comment on Mr. Gililung's exercise of his constitutional rights. *Gauthier*, 174 Wn. App. at 263; *State v. Holmes*, 122 Wn. App. 438, 445, 93 P.3d 212 (2004). When a jury learns that a person has exercised their right to privacy by refusing consent to a search, a jury may readily infer guilt on the notion people consent to searches unless there is something to hide. *Gauthier*, 174 Wn. App. at 265; *United States v. Prescott*, 581 F.2d 1343, 1352 (9th Cir. 1978).

The Detective's comment strongly suggested that Mr. Gililung knew he was guilty of soliciting sex from a minor and that he wanted to prevent law enforcement from discovering evidence of this in his truck. Indeed, the prosecution emphasized that law enforcement found $100 in cash in the

console of the truck, the same amount supposedly agreed to for the fictitious prostitute's services. RP 503, 537-38, 540.

Moreover, the amount of currency, *five crisp $20 bills*, tended to show Mr. Gililung had stopped an ATM (because that is what an ATM dispenses) to get the requested amount. RP 288; Exs. 15, 20. Mr. Gililung, however, testified he had not stopped at an ATM and that the money was to buy a blanket or clothing for his father. RP 417, 436-37, 459, 462. Recognizing its persuasive power, the prosecutor emphasized the evidence of $100 in Mr. Gililung's car during closing argument to the jury to support its case and discredit Mr. Gililung's testimony. RP 503, 537-38, 540. That Mr. Gililung refused to consent to a search could be viewed as an attempt to hide this evidence.

Mr. Gililung argued this was manifest constitutional error and that it was not harmless beyond a reasonable doubt. RAP 2.5(a)(3); *Gauthier*, 174 Wn. App. at 267; *State v. Romero*, 113 Wn. App. 779, 786, 793, 54 P.3d 1255 (2002). The prosecution has the burden of proving a constitutional error harmless

beyond a reasonable doubt, requiring proof the error did not contribute to the verdict. *State v. A.M.*, 194 Wn.2d 33, 41-42, 448 P.3d 35 (2019).

Still, the Court of Appeals held the error is harmless. The Court reasoned that because the Detective's comment was "isolated" and not highlighted by the prosecution for the jury, the error was harmless. Slip op. at 21-22.

This is a misapplication of the harmless beyond a reasonable doubt test. When constitutional error is established, prejudice is presumed, so it must be presumed the jury used this evidence against Mr. Gililung. *State v. Curtis*, 110 Wn. App. 6, 15, 37 P.3d 1274 (2002).

"To overcome the presumption of prejudice, the State must persuade this court that the untainted evidence overwhelmingly supports a guilty verdict." *Id.* "Otherwise, what may or may not have influenced the jury remains a mystery beyond the capacity of three appellate judges." *Id.*

The Court of Appeals emphasized that the prosecution did not cite to the evidence of Mr. Gililung's refusal to consent to the search of his car. But this is not enough. *See State v. Palmer*, 24 Wn. App. 2d 1, 19, 518 P.3d 252 (2022) ("Alone, [a comment on the exercise of a constitutional right] may warrant reversal and a new trial.").

The right to refuse consent to a search means very little if the invocation of this right can be commented on by the State's primary law enforcement witness. Thus, this issue involves a significant constitutional question and matter of substantial public interest that should be decided by this Court. RAP 13.4(b)(3), (4); *see also A.M.*, 194 Wn.2d at 36, 38 (granting review and reversing Court of Appeals determination that any Fifth Amendment violation was harmless and did not qualify for review under RAP 2.5(a)(3)). Also, the harmless error analysis conflicts with precedent, further meriting review. RAP 13.4(b)(1), (2); *see State v. Romero-Ochoa*, 193 Wn.2d 341,

344, 440 P.3d 994 (2019) (granting request for review solely on issue of whether State proved a constitutional error harmless).

3. Review should be granted to resolve a split in decisions concerning whether a total sentence on multiple offenses that exceeds the statutory maximum for those offenses is unlawful where the sentences are ordered to be served *concurrently*.

In general, "a court may not impose a sentence providing for a term of confinement or community custody that exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW." RCW 9.94A.505(5). The Legislature has further instructed that a "term of community custody" "shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021." RCW 9.94A.701(10).

Accordingly, trial courts must impose sentences that do not exceed the statutory maximum. They must ensure that terms of community custody do not push the total sentence beyond

the statutory maximum. *State v. Boyd*, 174 Wn.2d 470, 473, 275 P.3d 321 (2012).

The court imposed a sentence of 30.75 months of confinement on count 2 and a sentence of 16 months of confinement on count 3, both concurrent, for a total term of confinement of 30.75 months. CP 178.

On both counts, however, the trial court ordered 36 months of community custody. CP 179.

30.75 months of total confinement plus 36 months of community custody equals a total sentence of 66.75 months. This in excess of statutory maximum of five years, or 60 months.[3]

[3] The judgment and sentence contains a notation that the "combined term of confinement and community custody for any particular offense cannot exceed the statutory maximum. RCW 994A.701." CP 179. This notation does not remedy the error because the Sentencing Reform Act requires the trial court to reduce the term of community custody to avoid a sentence in excess of the statutory maximum. *Boyd*, 174 Wn.2d at 471, 473.

This was error on both counts 2 and 3. To be sure, the sentence of confinement on count 3 is 16 months and 36 additional months of community custody is less than the statutory maximum of 60 months. But this is a *concurrent sentence*. Based on count 2, Mr. Gililung was ordered to serve a total sentence of confinement of 30.75 months. Adding on 36 months of community custody to this sentence is unlawful because the punishment exceeds the statutory maximum of five years. *State v. Nord*, noted at 7 Wn. App. 2d 1021, 2019 WL 296071 at *3-4 (2019), *review denied*, 200 Wn.2d 1014, 519 P.3d 589 (2022) (2-year term of confinement and 12-month community custody term exceeded 5-year statutory maximum for offense because this sentence was concurrent to a greater sentence of 10-years on another count); *In re Pers. Restraint of Johnson*, noted at 1 Wn. App. 2d 1036, 2017 WL 6018077 at *1 (2017) (unpublished).

The Court of Appeals agreed with Mr. Gililung that sentence on count 2 was unlawful. The Court, however,

disagreeing with *Nord* and *Johnson*, held the sentence was lawful on count 3. Slip op. at 6 & n.3. The Court's holding on this issue was published. Slip op. at 1-7.

The court reasoned that each sentence must be viewed in isolation and that because the sentence on count 3 did not exceed the statutory maximum of 60 months when so viewed, it was not illegal:

> Here, the trial court imposed 16 months of total confinement and 36 months of community custody on Gililung's communication with a minor count. *When looking only at that single count*, the sentence imposed on the communication count does not exceed the statutory maximum of 5 years because it amounts to only 52 months (16 plus 36). Thus, we hold that the trial court's sentence on this count did not exceed the statutory maximum

Slip op. at 6 (emphasis added).

The problem with this analysis is that it ignores the concurrent nature of the sentence. The trial court ordered that the sentence on count 3 be served concurrent to count 2. As the Court of Appeals has previously acknowledged, this matters. *Nord*, noted at 7 Wn. App. 2d 1021, 2019 WL 296071 at *3-4;

Johnson, noted at 1 Wn. App. 2d 1036, 2017 WL 6018077 at *1 (2017) (unpublished); *State v. Williams*, noted at 22 Wn. App. 2d 1023, 2022 WL 2115256 at *3 (2022) (unpublished).

The Court of Appeals' holding effectively makes part of the sentence on count 3 consecutive rather than concurrent. Absent an exceptional sentence by the trial court, this is unlawful. RCW 9.94A.589(1)(a), (3); *see State v. Smith*, 142 Wn. App. 122, 128, 173 P.3d 973 (2007) ("under RCW 9.94.589(3), a sentence must either be concurrent with another sentence or consecutive to it"). Indeed, if Mr. Gililung's terms of community custody were consecutive, this would be illegal because it exceeds 24 months. RCW 9.94A.589(5); *State v. Buck*, 2 Wn.3d 806, 809-10, 544 P.3d 506 (2024).

Mr. Gililung's interpretation is consistent with principles of statutory interpretation. In determining legislative intent, the court considers the text, the context of the statute, related provisions, amendments, and the statutory scheme as a whole. *State v. Conover*, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015).

The purpose of reading related provisions together is "to achieve a harmonious and unified statutory scheme that maintains the integrity of the respective statutes." *State v. Chapman*, 140 Wn.2d 436, 448, 998 P.2d 282 (2000). The rule of lenity requires courts in criminal cases to strictly construe a statute against the State in favor of the defendant if there are two reasonable constructions. *State v. Parent*, 164 Wn. App. 210, 213, 267 P.3d 358 (2011).

In ruling against Mr. Gililung, the Court of Appeals emphasized that RCW 9.94A.505(5)'s language used the singular in barring sentences beyond the statutory maximum by using the phrase: "for the crime." Slip op. at 6. But the singular generally includes the plural and vice versa. *State v. Marjama*, 14 Wn. App. 2d 803, 807-08, 473 P.3d 1246 (2020) (word "children" in Sentencing Reform Act included a single child). Moreover, other Court of Appeals decisions interpreting similar language in other sentencing provisions, have reasoned this is not dispositive. *Parent*, 164 Wn. App. at 213 (under rule of

lenity, language stating "the maximum term of sentence" referred to the one "sentence" at the end of the case—regardless of the number of counts); *State v. Rice*, 180 Wn. App. 308, 314-15, 320 P.3d 723 (2014) (under rule of lenity, "phrase 'the maximum term of sentence' refers to the one overall sentence within a single case, regardless of the number of counts that the defendant is convicted of in that case").

Mr. Gililung's interpretation best harmonizes the statutes. Moreover, statutes should be interpreted to avoid unlikely, absurd, or strained results. *State v. McDougal*, 120 Wn.2d 334, 350, 841 P.2d 1232 (1992). The Court of Appeals' myopic interpretation results in anomalies, as a hypothetical illustrates.

Imagine the two convictions resulted in concurrent sentences of confinement of five years, which is the statutory maximum on both offenses. One must concede that imposing 36 months of community custody on both counts would be illegal because it exceeds the statutory maximum.

Now imagine another person who is convicted of *the same offenses* and receives a sentence of five years' confinement on one count and two years' confinement on the other count. Under the Court of Appeals' reading, even though that person received *a lesser sentence of confinement*, it is okay to impose *three additional years of punishment* in the form of community custody and serve an eight year sentence. But it would be illegal for the person who received a greater sentence of confinement on the lesser count, who only serves a sentence of five years.

This does not make sense because it results in the person the sentencing believed to be more culpable being punished less. This unlikely result should be avoided absent plain statutory language commanding it.

At the least, the rule of lenity required the Court to adopt Mr. Gililung's interpretation. *Rice*, 180 Wn. App. at 314-15; *Parent*, 164 Wn. App. at 213.

The Court should grant review to resolve the conflict in the caselaw. RAP 13.4(b)(2). Review is also warranted as matter of substantial public interest. RAP 13.4(b)(4). Courts frequently impose concurrent sentences on multiple offenses. Many of those convictions have terms of community custody and maximum sentences. This issue will recur.

4. As in this Court's recent grant of review in *Nelson*, this Court should grant review to resolve the conflict in the precedent on whether a trial court may order urinalysis and breath analysis as condition of community custody in the absence of any evidence that drugs or alcohol were related to the crime.

The court imposed, as a condition of community custody, that Mr. Gililung "[b]e available for and submit to urinalysis and/or breath[]analysis upon the request of the [Community Corrections Officer] and/or the chemical dependency treatment provider." CP 144. This condition is not crime-related. RCW 9.94A.703(3)(f);RCW 9.94A.030(10). As the presentence report states, there was no evidence that drugs or alcohol contributed to the offenses. CP 216. If affirmative conduct, it is

not reasonably related to the offense, the risk of re-offense, or the safety of the community. RCW 9.94A.703(3)(d).

Still, the Court of Appeals refused to order the provision stricken on the basis that this this condition "did not need to be crime related—it is a permissible condition to enforce a prohibition on consumption of drugs and alcohol." Slip op. at 36.

This reasoning conflicts with precedent. *State v. Jones*, 118 Wn. App. 199, 208, 76 P.3d 258 (2003) (holding "that alcohol counseling 'reasonably relates' to the offender's risk of reoffending, and to the safety of the community, only if the evidence shows that alcohol contributed to the offense.").

Moreover, a court ordering a person to submit their urine or breath into a machine upon command of a supervising government agent in order to monitor drug and alcohol use violates due process unless there is *reliable evidence* showing a drug or alcohol problem. *In re Dependency of W.W.S.*, 14 Wn. App. 2d 342, 366, 469 P.3d 1190 (2020).

Due to a split in decisions, this Court recently granted review on this issue in a case where a panel of Division Three reached the same conclusion as in Mr. Gililung's case. *State v. Nelson*, noted at 29 Wn. App. 2d 1048 (2024) (unpublished), *review granted in part*, 551 P.3d 441 (2024). As framed by the Court's commissioner: "Whether in sentencing a defendant to a special sex offender sentencing alterative, the superior court properly imposed as community custody conditions that the defendant submit to random breathalyzer and urinalysis tests to monitor his compliance with a condition that he not consume drugs or alcohol, even though the use of drugs and alcohol were not related to the defendant's crimes."[4]

As in *Nelson*, this Court should grant review. The Court may stay consideration of this petition until a decision in *Nelson*.

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4 https://www.courts.wa.gov/appellate_trial_courts/supreme/issues/casesNotSetAndCurrentTerm.pdf

E. CONCLUSION

For the foregoing reasons, the Court should grant Mr. Gililung's petition for review the issues presented.

This document contains 4,615 words and complies with RAP 18.17.

Respectfully submitted this 25th day of September, 2024.

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Appendix

Filed
Washington State
Court of Appeals
Division Two

August 27, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ZACHARY GILILUNG, Appellant.	No. 57466-7-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant moves for reconsideration of the opinion filed July 30, 2024, in the above entitled matter. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj: LEE, VELJACIC, PRICE

FOR THE COURT:

PRICE, J.

Filed
Washington State
Court of Appeals
Division Two

July 30, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent/Cross Appellant, v. ZACHARY EPHREM GILILUNG, Appellant/Cross Respondent.	No. 57466-7-II PUBISHED IN PART OPINION

PRICE, J. — Following an undercover operation by law enforcement, Zachary E. Gililung was charged with, and convicted of, one count of attempted commercial sexual abuse of a minor and one count of communication with a minor for immoral purposes.

Gililung appeals. He contends that his terms of community custody must be reduced because his sentence exceeds the statutory maximum.

Gililung also argues that he was entitled to an entrapment instruction and that a comment by a law enforcement officer about a search of his truck amounted to manifest constitutional error and was not harmless. In addition, Gililung argues that he is entitled to a new sentencing hearing because his two offenses amounted to the same criminal conduct and that the trial court should have considered an exceptional downward sentence because of a statutory mitigator. Finally, Gililung challenges the trial court's imposition of numerous community custody conditions.

In the published portion of this opinion, we hold that RCW 9.94A.505(5) relating to statutory maximums should be applied to each count individually. Accordingly, Gililung's

community custody term on his communication with a minor for immoral purposes count did not exceed the statutory maximum. However, because Gililung's community custody term on the attempted commercial sexual abuse of a minor count exceeds the statutory maximum, we remand to the trial court to reduce this community custody term to 29.25 months.

In the unpublished portion of this opinion, we hold that community custody condition 5 is not crime related and remand for the trial court to strike the condition from Gililung's judgment and sentence. We also remand Gililung's community custody condition 8 (the consent to home visits condition) for the trial court to clarify that authority to search Gililung's home requires reasonable suspicion of a violation and a connection of the home to the suspected violation. Otherwise, we reject Gililung's arguments and affirm his convictions.[1]

FACTS

On December 19, 2019, Gililung was arrested during an undercover operation run by the Washington State Patrol Missing and Exploited Children Task Force (MECTF). MECTF performs proactive operations designed to identify people who are looking to commit sexual abuse crimes against children.

The State ultimately charged Gililung with attempted commercial sexual abuse of a minor (count II) and communication with a minor for immoral purposes (count III). The case proceeded to a jury trial. The jury found Gililung guilty on both counts.

[1] The State cross-appeals, arguing that the trial court erred in giving one of its jury instructions. Because we affirm Gililung's convictions, we do not address this cross appeal. *State v. Kelly*, 19 Wn. App. 2d 434, 447, 496 P.3d 1222 (2021) (declining to address the State's cross appeal where defendant's conviction was affirmed), *review denied*, 119 Wn.2d 1002 (2022).

The trial court sentenced Gililung to standard range sentences of 30.75 months of confinement on the attempted commercial sexual abuse of a minor count and 16 months of confinement on the communication with a minor for immoral purposes count, to run concurrently. The trial court imposed 36 months of community custody on both counts.

Gililung appeals these terms of community custody.

ANALYSIS

STATUTORY MAXIMUM

Gililung argues the trial court erred at sentencing by imposing terms of community custody on both counts that, when combined with the total sentence of confinement, exceed the statutory maximum of five years. Gililung requests that the terms of community custody on both counts be reduced so that the overall statutory maximum is not exceeded.

The State responds that we should remand for correction of the community custody term for only one count—the attempted commercial sexual abuse of a minor count—but that there is no error pertaining to the community custody term on the communication with a minor for immoral purposes count. We agree with the State.

A. LEGAL PRINCIPLES

Statutory interpretation is a question of law that we review de novo. *Lakeside Indus., Inc. v. Dep't of Revenue*, 1 Wn.3d 150, 155, 524 P.3d 639 (2023). The goal of statutory interpretation is to carry out the legislature's intent. *Leishman v. Ogden Murphy Wallace, PLLC*, 196 Wn.2d 898, 904, 479 P.3d 688 (2021). We must give effect to the plain meaning of a statute as an expression of legislative intent where possible. *Id.* If the plain language of the statute is unambiguous, our inquiry is over. *Id.*

A court may not impose a sentence providing for a term of total confinement or community custody that exceeds the statutory maximum for the crime. RCW 9.94A.505(5). When an offender's standard range term of total confinement combines with the term of community custody to exceed the statutory maximum for the crime, the term of community custody must be reduced. *See* RCW 9.94A.701(10); *State v. Boyd*, 174 Wn.2d 470, 473, 275 P.3d 321 (2012). The remedy is to remand to the trial court to either amend the community custody term or to resentence consistent with the statute. *Boyd*, 174 Wn.2d at 473.

In this case, both counts are class C felonies. RCW 9.68A.090(2); RCW 9.68A.100; RCW 9A.28.020(3)(c). The statutory maximum for a class C felony is five years. RCW 9A.20.021(1)(c).

B. APPLICATION

1. Attempted commercial sexual abuse of a minor, count II

Gililung first argues that the trial court's sentence on the attempted commercial sexual abuse of a minor count exceeded the statutory maximum because the 30.75 months imposed plus the 36 months of community custody exceeds 5 years.

The State concedes that the community custody term on the attempted commercial sexual abuse of a minor count exceeds the maximum of 5 years. We accept the State's concession. For this count, the 30.75 months of total confinement plus 36 months of community custody equals 66.75 months, which clearly exceeds 60 months. On remand, the community custody term for this count must be reduced to 29.25 months.

2. Communication with a minor for immoral purposes, count III

Gililung argues that his communication with a minor count exceeds the statutory maximum as well. For this count, Gililung received 16 months in total confinement and 36 months of community custody. Gililung acknowledges that totaling these months, by itself, does not exceed 60 months, but he argues that the confinement term for this count must be viewed together with the longer confinement term for the other count. Because this shorter 16-month sentence is running concurrently with the longer 30.75-month sentence on his other count, Gililung contends this community custody term would not start until he is released on the longer count. Viewed this way, he asserts his 36-month term for community custody on his shorter sentence must also be shortened to 29.25 months.

To support his position, Gililung relies on Division One's unpublished decision in *State v. Nord*.[2] In *Nord*, the defendant was resentenced on remand to 10 years of total confinement for unlawful delivery and 2 years of total confinement for unlawful possession to run concurrently, plus 1 year of community custody for each conviction. No. 77435-2-I, slip op. at 2-3. Because the statutory maximum for the unlawful possession count was 5 years, *Nord* held that the defendant's sentence was unlawful because the 10-year total term of confinement and the 1-year

[2] No. 77435-2-I (Wash. Ct. App. Jan. 22, 2019) (unpublished), https://www.courts.wa.gov/opinions/pdf/774352.pdf.

Gililung also cites (with an *accord* signal) to our unpublished decision, *In re Pers. Restraint of Johnson*. No. 50461-8-II (Wash. Ct. App. Dec 5. 2017) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2050461-8-II%20Unpublished%20Opinion.pdf. Because *Johnson* utilizes a similar rationale, with a similar result, as *Nord*, we do not separately discuss it.

community custody condition exceeded the 5-year maximum sentence for unlawful possession. *Id.* at 9 (holding that by the time the defendant had completed serving his 10-year sentence for unlawful delivery, the 5-year maximum for the possession count would have expired).

The State asks us to reject *Nord*'s reasoning, suggesting it is cursory and flawed. The State argues that under the plain language of RCW 9.94A.505(5), the relevant unit of analysis is a single count. We agree with the State.

RCW 9.94A.505(5) states,

> Except as provided under RCW 9.94A.750(4) and 9.94A.753(4), a court may not impose a sentence providing for a term of confinement or community custody that exceeds the statutory maximum *for the crime* as provided in chapter 9A.20 RCW.

(Emphasis added.)

Under the plain language of this provision, the State's position that the relevant unit of analysis is a single count is more persuasive. The language of RCW 9.94A.505(5) suggests that the appropriate unit of analysis is a *single* count, not all counts included in a judgment and sentence, because it says "for the crime."

Here, the trial court imposed 16 months of total confinement and 36 months of community custody on Gililung's communication with a minor count. When looking only at that single count, the sentence imposed on the communication count does not exceed the statutory maximum of 5 years because it amounts to only 52 months (16 plus 36). Thus, we hold that the trial court's sentence on this count did not exceed the statutory maximum.[3]

[3] In so holding, we decline to follow *Nord* (and *Johnson*). We agree with the State that *Nord*'s analysis was flawed, and in any event, decisions of other panels are not binding on any other division or panel. *Sound Inpatient Physicians, Inc. v. City of Tacoma*, 21 Wn. App. 2d 590, 600, 507 P.3d 886, *review denied*, 200 Wn.2d 1003 (2022).

CONCLUSION

We hold that RCW 9.94A.505(5) relating to statutory maximums should be applied to each count individually. Accordingly, Gililung's community custody term on his communication with a minor for immoral purposes count did not exceed the statutory maximum. However, because Gililung's community custody term on the attempted commercial sexual abuse of a minor count exceeds the statutory maximum, we remand to the trial court to reduce this community custody term to 29.25 months.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

ADDITIONAL FACTS

I. EVIDENCE AT TRIAL

When Gililung's two counts went to trial, the State introduced testimony and evidence explaining the undercover operation and the operation's initial involvement with Gililung. On December 18, 2019, Detective Jake Klein (who was assigned to MECTF) posted an advertisement on a website that is used for prostitution. The advertisement included a photo of a young, undercover female detective modified with a Snapchat filter and listed an age of 23 with the phrase, "Younger than you think." 4 Verbatim Rep. of Proc. (VRP) at 338.

Gililung responded to the advertisement by text message. Detective Klein, responding in the persona of the female in the advertisement, stated three times that "she" was "16 years old." 4 VRP at 352. The detective also stated that "she" was "discreet" and would not "say sh[*]t to anyone." 4 VRP at 347. Eventually, Gililung requested a phone call with the persona.

Detective Anna Standiford spoke to Gililung on the phone. Gililung asked the detective whether she was really 16, and the detective responded she was. Gililung expressed concern about the operation being a setup and stated that he "didn't want to get arrested." 3 VRP at 226. Detective Standiford asked Gililung what she could do to make him comfortable and he said, "He didn't know." 3 VRP at 226. Still, Gililung told Detective Standiford that he was looking for 20 minutes of "full service" (meaning sex without a condom). 3 VRP at 227. The detective said the meet up would cost $100.

After the phone call ended, Gililung continued texting with Detective Klein. Gililung asked if the detective would "be willing to meet outside at [his] car" or "send a nude [photograph]." 4 VRP at 348. The detective declined both requests.

Shortly thereafter, Gililung texted that he would come to where "she" was. Detective Klein provided Gililung with an address of the hotel where officers were located. When the detective texted that "she" only took cash payment, Gililung responded that he was going to stop at the ATM on the way to the hotel.

At some point, Gililung appeared to change his mind and texted that he was not coming to the hotel after all because he was "too sketched out." 4 VRP at 349. Detective Klein responded, "Wow. F[*]ck off. Bye." 4 VRP at 349. At trial, the State asked the detective if the operation was finished at this point, and the detective responded, "I always try to keep going, but my command staff always cuts me off." 4 VRP at 355. The detective later explained that he was attempting to end the text conversation in the way that a trafficking victim would if they were upset for having their time wasted.

Because Gililung said he was not going to show up at the hotel, the MECTF team decided to close down the operation for the night. The arrest team (including Detective Standiford) exited the hotel to head back to the police station. But as Detective Standiford was leaving, she noticed a male sitting in a nearby truck.

Several minutes later, Gililung reinitiated contact with Detective Klein and said that he would in fact come to the hotel. The detective asked Gililung to send a photo of himself and a description of his truck. The text conversation ended shortly thereafter.

The State then asked Detective Klein a general question about what happened next. Detective Klein responded that Gililung attempted to drive away from the parking lot but was stopped by law enforcement and placed into custody. The detective also noted that law enforcement needed a search warrant for Gililung's truck, stating,

> Once he was placed into custody, he was taken and offered an interview, and his vehicle was towed to DuPont [Police Department] for a search warrant because he *didn't consent* to a search of it.

4 VRP at 362 (emphasis added). Gililung did not object to the detective's testimony.

Gililung's truck was searched, and law enforcement found Gililung's phone located in the door pocket and $100 in cash located in the cup holder. The search of the phone did not yield any notable evidence.

Gililung testified in his own defense. Gililung testified that during his phone call with Detective Standiford, he told her he was "not okay" with her being 16 years old. 4 VRP at 428. But Gililung claimed that he did not believe she was actually 16. Gililung also said that he had not made-up his mind about a sexual encounter and was simply looking "to talk to someone or be with someone." 4 VRP at 421. Additionally, Gililung testified that he did not remember

discussing any money, price, or acts during the phone call with Detective Standiford. As for the $100 found in his truck, Gililung explained that the purpose of the money was to buy a blanket for his sick father.

Gililung further testified that when Detective Klein texted him "Wow. F[*]ck off. Bye," it challenged his "manhood" and caused him to change his mind and go to the hotel. 4 VRP at 349, 408. But Gililung claimed that, before he was arrested, he had decided not to go through with it, after he received a phone call about his sick father.

II. ENTRAPMENT JURY INSTRUCTION REQUEST AND CLOSING ARGUMENTS

The case proceeded to jury instructions. Before trial, Gililung said he would request an entrapment instruction on both of the charged counts—attempted commercial sexual abuse of a minor and communication with a minor for immoral purposes. However, after the completion of testimony, Gililung stated that he was requesting an entrapment instruction *only* on the communication with a minor count. Gililung withdrew his request for an entrapment instruction on the attempted commercial sexual abuse of a minor count, stating,

> Then I had proposed an instruction regarding entrapment that I had also briefed. At the time, initially, I had proposed instructions for entrapment regarding Count II, but based on testimony, I have withdrawn that, and I had only proposed an instruction for Count III . . . .

5 VRP at 474.

The trial court rejected Gililung's proposed entrapment instruction for the communication with a minor for immoral purposes count, reasoning in part that there was no evidence of inducement. The trial court stated,

> The [c]ourt does not believe that that would rise to entrapment for several reasons: One, in the *State* [*v.*] *Arbogast*[4] opinion, it has a discussion of inducement. . . .
>
> . . . .
>
> Here we don't have anything of that nature. There is no similar inducement. There is really nothing here that goes above and beyond essentially making the crime available.

5 VRP at 476-77.

The parties then gave their closing arguments. The State argued that Gililung's story that the $100 found in his truck was to buy a blanket for his father was unreasonable. The State pointed out that Gililung texted that he was going to an ATM, the cash was found sitting in the truck's cup holder, and the $100 was the same amount that Gililung agreed to for the meet up. The State argued that if Gililung really needed to buy a blanket for his sick father, he could have used a debit or credit card.

III. SENTENCING AND APPEAL

The jury found Gililung guilty on both counts. At sentencing, Gililung requested an exceptional downward sentence based on the initiator or provoker mitigating factor under RCW 9.94A.535(1)(a). He contended that without law enforcement posing as the fictitious victim, Gililung would not have responded to the advertisement. Gililung did not argue the offenses were based on the same criminal conduct.

The trial court concluded that there was no victim involved in the case within the meaning of RCW 9.94A.535(1)(a). In reaching its conclusion, the trial court compared the definitions of victim and victim of commercial sexual abuse under the Sentencing Reform Act of 1981 (SRA),

[4] 199 Wn.2d 356, 506 P.3d 1238 (2022).

chapter 9.94A RCW, and determined that neither of those definitions fit the circumstances of the case, stating,

> RCW 9.94A.535(1)(a), which is the statute cited by [defense counsel], allows the [c]ourt to impose an exceptional sentence below the standard range when, to a significant degree, the victim was an initiator, willing participant, aggressor or provoker of the incident.
>
> From there, to determine who the victim was or if there is a victim, one has to turn to [RCW] 9.94A.030, the definitions, and "victim" is specifically defined in the [SRA]. Paragraph 54, "Victim means any person who has sustained emotional, psychological, physical or financial injury to person or property as a direct result of the crime charged." That doesn't seem to fit.
>
> The statute goes on to say in Paragraph 56, "Victim of sex trafficking, prostitution or commercial sexual abuse of a minor means a person who has been forced or coerced to perform a sexual act." We don't have that either.

6 VRP at 10-11. The trial court concluded,

> I think under the definitions of "victim" as set forth in the [SRA], *there is no victim*, and so you can't have a victim here who is an initiator, willing participant, aggressor or provoker. I think, as a matter of law, an exceptional sentence is not available as a result.

6 VRP at 11 (emphasis added).

The trial court imposed numerous community custody conditions, including the following:

> 3. Not possess or consume controlled substances except pursuant to lawfully issued prescriptions[.]
>
> . . . .
>
> 5. Inform the supervising CCO and sexual deviancy treatment provider of any dating relationship. Disclose sex offender status prior to any sexual contact. Sexual contact in a relationship is prohibited until the treatment provider approves of such.
>
> . . . .

> 8. Consent to [Department of Corrections (DOC)] home visits to monitor compliance with supervision. Home visits include access for the purposes of visual inspection of all areas of [the] residence in which the offender lives or has exclusive/joint control/access."
>
> 9. Do not enter sex-related businesses, which means: x-rated movies, adult bookstores, strip clubs, and any location where the primary source of business is related to sexually explicit material.
>
> 10. You must not possess or access sexually explicit materials that are intended for sexual gratification. This means, but is not limited to, material which shows genitalia, bodily excretory behavior that appears to be sexual in nature, physical stimulation of unclothed genitals, masturbation, sodomy (i.e., bestiality, or oral or anal intercourse), flagellation or torture in the context of a sexual relationship, or emphasizing the depiction of human genitals, unless given prior approval by your sexual deviancy provider. Works of art or of anthropological significance are not considered sexually explicit material.
>
> 11. Do not use or consume alcohol and/or Marijuana.
>
> 12. Be available for and submit to urinalysis and/or breath[]analysis upon the request of the [community corrections officer (CCO)] and/or the chemical dependency treatment provider.
>
> . . . .
>
> 17. [] Have no direct and/or indirect contact with minors, except for biological children.
>
> 18. [] Do not hold any position of authority or trust involving minors, except for biological children.
>
> 19. [] Stay out of areas where children's activities regularly occur or are occurring. This means parks used for youth activities, schools, daycare facilities, playgrounds, shopping malls, fast food restaurants (to include the drive-thrus), wading pools, swimming pools being used for youth activities, play areas (indoor or outdoor), sports fields being used for youth sports, arcades, and any specific location identified in advance by DOC or CCO.

Clerk's Papers at (CP) at 143-44.

Gililung appeals.

ANALYSIS

Gililung appeals, making the following arguments: (1) he should have received an entrapment jury instruction, (2) Detective Klein's comment about Gililung not consenting to a

search of his truck amounted to manifest constitutional error and was not harmless, (3) he received ineffective assistance of counsel because his attorney did not challenge his convictions as being the same criminal conduct, (4) the trial court erred in refusing to consider his request for an exceptional downward sentence, and (5) the trial court erred by imposing several of his community custody conditions.[5]

Each argument will be addressed in turn.

I. ENTRAPMENT JURY INSTRUCTION

On appeal, Gililung asserts he should have received an entrapment jury instruction on both counts. However, because defense counsel requested the instruction below on only one count and not the other, Gililung's arguments on appeal are slightly different with respect to each count. Gililung claims the trial court erred by failing to give the entrapment instruction on his communication with a minor for immoral purposes count—the count for which Gililung's counsel requested the instruction below.

But because defense counsel withdrew the request for the entrapment instruction for the attempted commercial sexual abuse of a minor count, Gililung argues either the error was still preserved because the trial court overtly addressed that count in its decision or, if not, Gililung argues he received ineffective assistance of counsel when defense counsel withdrew his request.

[5] Gililung also challenges the crime victim penalty assessment (VPA) and discretionary supervision fees contained in his judgment and sentence. However, after Gililung filed his briefing in this appeal, the superior court entered an order that waived all legal financial obligations because Gililung is indigent. Accordingly, Gililung's VPA and supervision fees arguments are moot and we do not further address them.

Despite the slightly different theories between the two counts, Gililung's arguments with respect to both are rooted in his contention that there was *some* evidence of the elements of the defense (particularly inducement) sufficient to entitle him to the entrapment instructions. We address this contention first in the context of Gililung's argument for his communication with a minor for immoral purposes count.

A. LEGAL PRINCIPLES

If the trial court's refusal to provide a requested jury instruction is based on a ruling of law, we review the trial court's refusal de novo. *State v. Arbogast*, 199 Wn.2d 356, 365, 506 P.3d 1238 (2022). However, if the refusal to give an instruction is based on factual reasons, we review the decision for an abuse of discretion. *Id.*

Washington's entrapment statute provides:

> (1) In any prosecution for a crime, it is a defense that:
>
> (a) The criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and
>
> (b) The actor was lured or induced to commit a crime which the actor had not otherwise intended to commit.
>
> (2) The defense of entrapment is not established by a showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime.

RCW 9A.16.070.

Defendants have the burden to prove entrapment by a preponderance of the evidence. *Arbogast*, 199 Wn.2d at 366. However, the burden of production for a defendant to be entitled to the instruction is the lesser standard of "some evidence" of the required elements. *Id.* at 370. Thus, to be entitled to an entrapment instruction, the defendant must make a prima facie showing

that the crime originated in the mind of law enforcement and the defendant was induced to commit a crime that they were not predisposed to commit. *Id.* at 360. If the evidence offered, when considered in the light most favorable to the defendant, is sufficient to permit a reasonable juror to find entrapment by a preponderance of the evidence, then the defendant has made a prima facie showing. *Id*.

Evidence of inducement may be based on "persuasion, fraudulent representations, threats, coercion, harassment, promises of reward, pleas based on need, and sympathy or friendship." *Id.* at 375. But merely providing the defendant with the opportunity to commit the offense is insufficient to establish inducement. *Id.* "There must be opportunity 'plus' something else, such as excessive pressure placed on the defendant." *Id.* at 377 (quoting *United States v. Poehlman*, 217 F.3d 692, 701 (9th Cir. 2000)).

B. ENTRAPMENT INSTRUCTION FOR COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES

For his communication with a minor for immoral purposes count, Gililung argues the trial court abused its discretion in refusing to instruct the jury on the defense of entrapment because there was *some* evidence of the elements of the defense. First, he notes the advertisement initially said that the person was 23 years old and only later did "she" say "she" was 16 years old. According to Gililung, this, combined with his own testimony that he did not want to have sex with a minor, was some evidence that he was not predisposed to the crime. Second, Gililung argues that he was induced because although the person disclosed that "she" was 16, "she" said that "she" was "discreet," and "she" essentially promised "she" would not say anything to anyone. Third, Gililung argues that additional evidence of inducement comes from when he said he was not comfortable with someone who was 16, and the person asked what "she" could do to make

him comfortable. Fourth, Gililung contends that he was induced by being intentionally lured back through a taunt when Detective Klein's texted, " 'Wow. F[*]ck off. Bye.' " Br. of Appellant at 26 (quoting 4 VRP at 349).

We disagree that Gililung has shown he was entitled to an entrapment instruction.

Gililung's initial argument that there was some evidence that he was not predisposed to commit the crime because law enforcement changed the age of the purported victim is unpersuasive given that law enforcement repeatedly clarified that the female was just 16 years old. Indeed, after being told multiple times the person was just 16, Gililung continued communicating with the person, apparently withdrew $100 from an ATM, and drove to the hotel where the detective stated the minor would be—all showing that Gililung was predisposed to commit the crimes against a minor.

Similarly unpersuasive is Gililung's argument that there was some evidence of inducement because he was essentially induced by promises of discretion from law enforcement. Rather than showing inducement, these statements are more fairly characterized as affording Gililung an opportunity to commit the crimes by suggesting that he would not be caught. Likewise, Gililung fails to explain how Detective Standiford's question about what "she" could do to "reassure him" amounted to inducement, especially when the detective did not make any promises following the question. 3 VRP at 226.

Finally, Gililung's arguments about the text message which read, "Wow. F[*]ck off. Bye" are utterly unpersuasive. Gililung contends that this text, coupled with the detective's testimony that he " 'always tr[ies] to keep going' " during the operation, shows that law enforcement was trying to lure him back and, accordingly, is some evidence of inducement. Br.

of Appellant at 26 (quoting 4 VRP at 355). But the detective also testified that even if he typically wants to "keep going," his "command staff always cuts [him] off." 4 VRP at 355. And, here, when Gililung texted that he was not coming, the MECTF decided to close down the operation for the evening. Consequently, Detective Klein ended the conversation in what he was believed to be the voice of a trafficked sex worker who was frustrated with her time being wasted. There is no support for Gililung's contention that the text could be reasonably construed as an intentional taunt designed to lure him back to the hotel.

Thus, even when viewed in the light most favorable to Gililung, none of the evidence that Gililung sets forth is sufficient to permit a reasonable juror to find entrapment by a preponderance of the evidence; the facts cited by Gililung cannot be reasonably considered some evidence of "opportunity 'plus' something else, such as excessive pressure placed on the defendant." *Arbogast*, 199 Wn.2d at 377 (quoting *Poehlman*, 217 F.3d at 701). Thus, we hold that the trial court did not abuse its discretion in refusing to instruct the jury on entrapment with respect to the communication with a minor for immoral purposes count.

C. ENTRAPMENT INSTRUCTION FOR ATTEMPTED COMMERCIAL SEXUAL ABUSE OF A MINOR

As noted above, Gililung makes a slightly different argument with respect to his count for attempted commercial sexual abuse of a minor. With this count, because Gililung's counsel withdrew his request for the entrapment instruction below, Gililung is forced to argue the issue was preserved anyway. But, if not, he argues he received ineffective assistance of counsel.

However, Gililung's basic argument for this count is the same as for the communication with a minor count discussed above—that there was some evidence of the elements of the defense, particularly inducement. Indeed, Gililung makes no distinction on appeal between these two

counts and cites the same evidence to support his arguments on both. Thus, for the same reasons Gililung cannot show the trial court erred by refusing the entrapment instruction on the communication with a minor count, he cannot show error or, in the alternative, ineffective assistance of counsel on the attempted commercial sexual abuse of a minor count. *See State v. Brown*, 159 Wn. App. 366, 371, 245 P.3d 776, *review denied*, 171 Wn.2d 1025 (2011) (counsel has no duty to pursue strategies that reasonably appear unlikely to succeed). Therefore, Gililung's argument for receiving an entrapment instruction for his attempted commercial sexual abuse of a minor count also fails.

II. THE DETECTIVE'S COMMENT ABOUT CONSENTING TO SEARCH

Gililung next isolates a comment from a detective's testimony that Gililung did not "consent to a search" of his truck. Br. of Appellant at 34. At the time of the testimony, defense counsel did not object, but Gililung argues the comment amounted to manifest constitutional error and was not harmless. The State concedes that the detective's comment was error, but contends that it was not manifest and, in any event, it was harmless. We agree with the State that any error was harmless.

A. LEGAL PRINCIPLES

We may decline to review claims of error that the defendant did not raise in the trial court unless the claimed error is a "manifest error affecting a constitutional right." RAP 2.5(a)(3). This exception "does not permit *all* asserted constitutional claims to be raised for the first time on appeal." *State v. Kirkman*, 159 Wn.2d 918, 934, 155 P.3d 125 (2007). Rather, "[w]e look to the asserted claim and assess whether, if correct, it implicates a constitutional interest as compared to another form of trial error." *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

After determining whether the alleged error is of constitutional magnitude, we look to whether the error is manifest. *Id.* at 99. An error is manifest under RAP 2.5(a) if the appellant can show actual prejudice, demonstrated by a " 'plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.' " *Id.* (alteration in original) (internal quotation marks omitted) (quoting *Kirkman*, 159 Wn.2d at 935). Permitting review of all unpreserved errors that implicate constitutional rights, " 'undermines the trial process, generates unnecessary appeals,' " and wastes judicial resources. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (quoting *State v. Lynn*, 67 Wn. App. 339, 344, 835 P.2d 251 (1992)).

Even if a claim raises a manifest constitutional error, it may still be subject to harmless error analysis. *Kirkman*, 159 Wn.2d at 927. "An error is harmless and not grounds for reversal if the appellate court is assured beyond a reasonable doubt that the jury would have reached the same verdict without the error." *State v. Romero-Ochoa*, 193 Wn.2d 341, 347, 440 P.3d 994 (2019).

"Washington citizens enjoy the right to refuse consent to a warrantless search without penalty; comments during trial on the exercise of that right violate the Fourth Amendment and article I, section 7." *State v. Mecham*, 186 Wn.2d 128, 150, 380 P.3d 414 (2016). A comment on the exercise of that constitutional right is not admissible evidence of the defendant's guilt. *State v. Gauthier*, 174 Wn. App. 257, 267, 298 P.3d 126 (2013).

B. APPLICATION

Here, although defense counsel did not object to the detective's comment that a warrant was used to search the truck because Gililung did not consent to a search, Gililung contends the

comment was manifest constitutional error because it directly implicated Gililung's exercise of his constitutional right to not consent to a warrantless search. Gililung further argues that the error was not harmless because the detective's comment suggested that Gililung knew that he was guilty and that he wanted to prevent the discovery of evidence of his guilt from his truck. Gililung contends that when the State argued in closing that the $100 found in Gililung's truck was the same amount that Gililung agreed to in soliciting sex from a minor, the jury may have inferred that Gililung wanted to hide that evidence.

To support his argument, Gililung relies on *Gauthier*. There, the State specifically asked the defendant a question about his refusal to consent to provide a DNA sample. *Gauthier*, 174 Wn. App. at 262. And in rebuttal closing argument, the State repeatedly undermined the defendant's credibility by referencing his refusal to consent to the DNA test, telling the jury that the defendant's refusal to consent was consistent with someone who is guilty. *Id.* at 271. From these inflammatory statements in closing, the *Gauthier* court held that the error was not harmless because it could not say beyond a reasonable doubt that the jury would reach the same result absent the error. *Id.*

Assuming the detective's comment amounted to manifest constitutional error, the error was harmless beyond a reasonable doubt. It is true the State mentioned the $100 found in the truck as matching the amount discussed for the transaction in closing argument. But with an abundance of evidence unrelated to the search of the truck, including the text messages, Detective Standiford's testimony about the phone call, and Gililung's presence at the hotel, we are convinced beyond a reasonable doubt that the jury would have reached the same result absent the isolated comment by the detective, which was unflagged for the jury by any objection and never

mentioned again by the State.[6] Thus, we are persuaded beyond a reasonable doubt that any error was harmless. Gililung's argument about the detective's comment fails.

III. INEFFECTIVE ASSISTANCE OF COUNSEL REGARDING SAME CRIMINAL CONDUCT

Gililung next argues that he received ineffective assistance of counsel at sentencing because his attorney did not challenge his two convictions as being the same criminal conduct. Gililung argues that his two convictions involved the same criminal intent, occurred at the same time and place, and concerned the same victim. As a result, Gililung requests a remand for a new sentencing hearing. We disagree.

A. LEGAL PRINCIPLES

To show ineffective assistance of counsel, the defendant must demonstrate (1) that their counsel's performance was deficient and (2) that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 35, 296 P.3d 872 (2013). Failure to establish either prong is fatal to the claim. *Strickland*, 466 U.S. at 700.

To show prejudice—the second prong of the *Strickland* test—the defendant must demonstrate a reasonable probability that the outcome of the proceeding would have been different if counsel had not performed deficiently. *See State v. Bertrand*, ___ Wn.3d ___, 546 P.3d 1020, 1028 (2024).

[6] *Gauthier* compels no different conclusion. Unlike in *Gauthier*, the detective's comment cannot be said to have been intentionally elicited by the State's general question. Moreover, the comment was not referenced by the State in closing argument and certainly was not used by the State as substantive evidence of Gililung's guilt.

For purposes of calculating a defendant's offender score, the SRA provides that multiple offenses that encompass the same criminal conduct are counted as one offense. RCW 9.94A.525(5)(a)(i). Two or more crimes have the same criminal conduct if they "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a); *State v. Valencia*, 2 Wn. App. 2d 121, 125, 416 P.3d 1275, *review denied*, 190 Wn.2d 1020 (2018). If one of the elements is not met, the crimes are not the same criminal conduct. *Valencia*, 2 Wn. App. 2d at 125.

The relevant inquiry for the criminal intent prong of the same criminal conduct analysis is to what extent, viewed objectively, the defendant's criminal intent changed from one crime to the next. *State v. Johnson*, 12 Wn. App. 2d 201, 211, 460 P.3d 1091 (2020), *aff'd*, 197 Wn.2d 740, 487 P.3d 893 (2021). The starting point for determining the objective criminal intent is to look at the statutory definitions of the crimes. *State v. Westwood*, 2 Wn.3d 157, 167-68, 534 P.3d 1162 (2023).

Generally, these statutory authorities are narrowly construed to "disallow most claims that multiple offenses constitute the same criminal act." *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). The defendant bears the burden of establishing the offenses are the same criminal conduct. *State v. Graciano*, 176 Wn.2d 531, 541, 295 P.3d 219 (2013).

A defendant is guilty of commercial sexual abuse of a minor when he (a) pays a fee to a minor as compensation for a minor having engaged with sexual conduct with the defendant, (b) pays or agrees to pay a fee to a minor pursuant to an understanding that in return the minor will engage in sexual conduct with the defendant, or (c) solicits, offers, or requests to engage in sexual conduct with a minor in return for a fee. *See* RCW 9.68A.100(1). To prove attempted commercial

sexual abuse of a minor, the State must prove that the defendant intended that criminal result and took a substantial step toward accomplishing it. RCW 9A.28.020(1).

As relevant here, a defendant is guilty of felony communication with a minor for immoral purposes if the defendant communicates with someone the defendant believed to be a minor for immoral purposes, including the purchase or sale of commercial sexual acts, through the sending of an electronic communication. RCW 9.68A.090.[7]

B. APPLICATION

Gililung argues that his counsel was ineffective for failing to challenge his convictions on the basis that they were the same criminal conduct. He contends his counsel was deficient because there was a sound basis for the argument, and he contends he was prejudiced because the trial court would have agreed and found the two offenses to be the same criminal conduct.

According to Gililung, his two crimes have the same criminal intent and the offenses occurred at the same time and place. Gililung essentially argues he committed both offenses by doing exactly the same things—agreeing to meet with the victim, agreeing to pay for sex through text messages and phone calls, and driving to the hotel. And Gililung argues the criminal intent was the same for both crimes because his singular intent was to secure sex from the fictitious minor in exchange for payment.

We have previously analyzed this question in a similar case involving a law enforcement undercover operation. *Johnson*, 12 Wn. App. 2d at 205. In *Johnson*, like Gililung, the defendant

[7] The statute is designed to prohibit communication with children " 'for the predatory purpose of promoting their exposure to and involvement in sexual misconduct.' " *State v. Hosier*, 157 Wn.2d 1, 9, 133 P.3d 936 (2006) (quoting *State v. McNallie*, 120 Wn.2d 925, 933, 846 P.2d 1358 (1993)).

argued that his convictions for attempted commercial sexual abuse of a minor and communication with a minor for immoral purposes were the same criminal conduct (Johnson was also convicted of a third crime, attempted second degree rape of a child). *Id.* at 209-210. We analyzed the criminal intents of each crime and rejected Johnson's argument, stating:

> The intent for second degree rape of a child is the intent to have sexual intercourse, whereas the intent for commercial sexual abuse of a minor is the intent to exchange something of value for sexual conduct. Further, the intent required for communication with a minor for immoral purposes requires a different intent than the other two crimes: the intent to communicate with a minor with a predatory purpose of sexualizing the minor. Accordingly, we hold that these three crimes require different criminal intent.

Id. at 213 (citations omitted).

Gililung argues *Johnson* was wrongly decided and encourages us to not "perpetuate" its error. Br. of Appellant at 42. But we see no error. Starting with the language of the statutes, as instructed by our Supreme Court in *Westwood*, we agree with *Johnson* that the attempted commercial sexual abuse of a minor and communication with a minor for immoral purposes statutes have different criminal intents.[8] *Westwood*, 2 Wn.3d at 167-68; *Johnson* 12 Wn. App. 2d at 213; *see also State v. Stott*, 29 Wn. App. 2d 55, 74-75, 542 P.3d 1018 (2023) (commenting that *Johnson* correctly applied the same criminal conduct analysis with respect to attempted commercial sexual abuse of a minor, communication with a minor for immoral purposes, and attempted second degree child rape), *review denied*, 3 Wn.3d 1002 (2024).

[8] For his legal argument, including his request that we reject *Johnson*, Gililung heavily relies on a Division Three case, *State v. Westwood*, 20 Wn. App. 2d 582, 500 P.3d 182 (2021). However, after Gililung filed his initial briefing, *Westwood* was reversed. *State v. Westwood*, 2 Wn.3d 157, 159, 534 P.3d 1162 (2023). Although Gililung filed several additional briefs since, he has not addressed how the Supreme Court's reversal impacts his reliance on Division Three's decision.

Accordingly, an argument for same criminal conduct by defense counsel would have failed. As a result, we hold that Gililung's counsel did not provide ineffective assistance of counsel for failing to argue that the two offenses amounted to the same criminal conduct because Gililung cannot show prejudice.

IV. EXCEPTIONAL DOWNWARD SENTENCE

Gililung argues that the trial court erred in refusing to consider his request for an exceptional downward sentence based on the mitigating factor that the victim was an initiator or provoker. We disagree.

A. LEGAL PRINCIPLES

A decision to impose a standard range sentence is generally not reviewable. RCW 9.94A.585(1). However, "this rule does not preclude a defendant from challenging on appeal the underlying legal determinations by which the sentencing court reaches its decision . . . ." *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017).

A sentence will only be reversed if there is " 'a clear abuse of discretion or misapplication of the law.' " *State v. Delbosque*, 195 Wn.2d 106, 116, 456 P.3d 806 (2020) (internal quotation marks omitted) (quoting *State v. Blair*, 191 Wn.2d 155, 159, 421 P.3d 937 (2018)). A trial court abuses its discretion if it categorically refuses to impose a particular sentence or denies a sentencing request on an impermissible basis. *State v. Osman*, 157 Wn.2d 474, 482, 139 P.3d 334 (2006); *see State v. O'Dell*, 183 Wn.2d 680, 697, 358 P.3d 359 (2015) (court abuses its discretion if it incorrectly believes it is prohibited from exercising discretion).

Although no defendant is entitled to an exceptional sentence, every defendant is entitled to ask the court to consider such a sentence. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d

1183 (2005). The trial court may impose an exceptional sentence under certain circumstances set forth in the SRA.

An exceptional sentence may be warranted when certain mitigating circumstances are present. A trial court "may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence." RCW 9.94A.535(1). Relevant here, one potential mitigating factor is when, "To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident." RCW 9.94A.535(1)(a).

The SRA defines "victim" as "any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged. RCW 9.94A.030(54). Furthermore, the SRA defines "victim of . . . commercial sexual abuse of a minor" as "a person who has been forced or coerced to perform a commercial sex act . . . ." RCW 9.94A.030(56).

B. APPLICATION

Gililung argues that resentencing is necessary because the trial court misinterpreted the SRA when it denied his request for an exceptional downward sentence. Gililung contends that the trial court erred when it reasoned that the initiator or provoker mitigating factor was legally unavailable when there was only a fictitious victim. According to Gililung, the initiator or provoker mitigating factor under RCW 9.94A.535(1)(a) should still be available to him.

We see no error in the trial court's rejection of the applicability of the initiator or provoker mitigating factor under RCW 9.94A.535(1)(a). We are unpersuaded that there was a victim, fictitious or otherwise. Indeed, the only persons involved were Detectives Klein and Standiford.

The SRA defines "victim" in this context as "any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged," RCW 9.94A.030(54), or "a person who has been forced or coerced to perform a commercial sex act." RCW 9.94A.030(56). Clearly these detectives do not fit either definition.

Moreover, even if the either detective could be deemed a victim, neither could be considered an "initiator or provoker" "*[t]o a significant degree*" as required by the mitigating factor. RCW 9.94A.535(1)(a). Although law enforcement posted the advertisement, Gililung was the one who initiated contact with Detective Klein and reinitiated contact with the detective after a break in the communication.

Thus, it follows that there was no legal basis for the initiator or provoker mitigating factor under RCW 9.94A.535(1)(a). Accordingly, the trial court did not abuse its discretion when it refused to grant Gililung's request for an exceptional sentence based on RCW 9.94A.535(1)(a).

V. COMMUNITY CUSTODY CONDITIONS

The trial court has discretion to require an offender to comply with any crime-related prohibitions. RCW 9.94A.703(3)(f). 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). There must be a basis for connecting the condition to the crime. *State v. Geyer*, 19 Wn. App. 2d 321, 331, 496 P.3d 322 (2021).

We review de novo the sentencing court's *statutory* authority to impose a particular community custody condition. *State v. Houck*, 9 Wn. App. 2d 636, 646, 446 P.3d 646 (2019), *review denied*, 194 Wn.2d 1024 (2020). Otherwise, we review community custody conditions for an abuse of discretion. *State v. Wallmuller*, 194 Wn.2d 234, 238, 449 P.3d 619 (2019). With

respect to whether a community custody condition is crime related, a trial court does not abuse its discretion if there is a reasonable relationship between the crime of conviction and the condition. *State v. Nguyen*, 191 Wn.2d 671, 683-84, 425 P.3d 847 (2018).

Imposing an unconstitutional condition necessarily is an abuse of discretion. *Wallmuller*, 194 Wn.2d at 238. But a community custody condition that limits a fundamental right is permissible, provided it is imposed sensitively. *State v. Bahl*, 164 Wn.2d 739, 757, 193 P.3d 678 (2008). Indeed, a convicted defendant's "First Amendment right 'may be restricted if reasonably necessary to accomplish the essential needs of the state and public order.' " *Id.* (internal quotation marks omitted) (quoting *State v. Riley*, 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993)).

The remedy to correct an unauthorized community custody condition is to remand to the sentencing court with instruction to strike the condition. *State v. O'Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (striking condition that prohibited defendant's Internet use after finding "no evidence that [the defendant] accessed the Internet before the rape or that Internet use contributed in any way to the crime"). With these principles in mind, we now review the challenged conditions.

A. CONDITION 5: DATING RELATIONSHIPS

Gililung makes both statutory and constitutional challenges to condition 5, which reads as follows:

> 5. Inform the supervising CCO and sexual deviancy treatment provider of any dating relationship. Disclose sex offender status prior to any sexual contact. Sexual contact in a relationship is prohibited until the treatment provider approves of such.

CP at 143.[9] As for his statutory challenge, Gililung argues that this condition is not crime related because his offenses did not involve adults; instead, his crimes concerned only a fictitious 16 year old. We agree with Gililung that the condition is not crime related.[10]

Condition 5 applies broadly to all relationships with no limitations to those relationships that may involve minors. Condition 5 requires Gililung to inform his supervising CCO and sexual deviancy treatment provider of *any* dating relationship and to disclose sex offender status prior to sexual contact with *anyone*, not just contact with an adult who may have minors in their care or custody. And for *any* relationship, not just relationships with adults who may have minors in their care or custody, Gililung's sexual contact is restricted until his treatment provider approves. But Gililung's crimes were both narrowly focused on a minor; an adult relationship was not involved. Accordingly, condition 5 bears no reasonable relationship to Gililung's crimes, making it not crime related. *See Nguyen*, 191 Wn.2d at 684. Condition 5 must be stricken. *See O'Cain*, 144 Wn. App. at 775.

B. CONDITION 8: CONSENT TO HOME VISITS

Gililung makes a constitutional challenge to condition 8, which reads as follows:

> 8. Consent to DOC home visits to monitor compliance with supervision. Home visits include access for the purposes of visual inspection of all areas of [the] residence in which the offender lives or has exclusive/joint control/access.

[9] Gililung mistakenly refers to this condition as "condition 4" in his opening brief. Br. of Appellant at 58. However, he block-quoted condition 5 in its entirety in his opening brief and argued that the specific features of condition 5 were not crime related. As a result, it is clear he is challenging condition 5, not condition 4.

[10] Because we agree that condition 5 is not crime related, we do not address Gililung's constitutional arguments about the condition. *See State v. McEnroe*, 179 Wn.2d 32, 35, 309 P.3d 428 (2013) (declining to address constitutional error where the court resolved the case on nonconstitutional grounds).

CP at 143.

Gililung contends that condition 8 is overbroad and violates his constitutional right not to have his private affairs disturbed without authority of law.

Initially, the State did not object to a remand to the trial court to clarify that the DOC's authority to search a probationer's home requires reasonable suspicion of a violation and a connection of the property to the violation. However, the State withdrew its concession. Now, the State claims that Gililung's challenge to this condition is not ripe for review, citing *State v. Cates*, 183 Wn.2d 531, 354 P.3d 832 (2015).

We disagree with the State.

1. Ripeness

A preenforcement challenge to a community custody condition is ripe for review if " 'the issues raised are primarily legal, do not require further factual development, and the challenged action is final.' " *Cates*, 183 Wn.2d at 534 (internal quotation marks omitted) (quoting *State v. Sanchez Valencia*, 169 Wn.2d 782, 786, 239 P.3d 1059 (2010)). "[W]e must consider the hardship to the [defendant] if we refused to review [the] challenge on direct appeal." *Sanchez Valencia*, 169 Wn.2d at 789.

In *Cates*, the defendant was convicted of two counts of first degree rape of a child and two counts of first degree child molestation. 183 Wn.2d at 533. On appeal, the defendant challenged a condition of community custody, which read, "You must consent to [DOC] home visits to monitor your compliance with supervision. Home visits include access for the purposes of visual

inspection of all areas of the residence in which you live or have exclusive/joint control/access, to also include computers which you have access to." *Id.* (internal quotation marks omitted).

Our Supreme Court declined to decide the merits of the case because it determined the issue was not ripe. *Id.* at 536. The court reasoned that "[t]he condition as written [did] not authorize any searches . . . ." *Id.* at 535. In addition, the court decided that the risk of hardship to the defendant was insufficient. *Id.* at 535-36. Distinguishing other cases involving conditions that imposed requirements on defendants immediately upon release from prison, the *Cates* court emphasized that complying with the particular condition did not require the defendant to do, or refrain from doing, anything upon his release *until* the State actually conducted a home visit. *Id.* at 536. Accordingly, the court concluded that the defendant would not suffer hardship if it declined to review the merits of the defendant's argument. *Id.*

Gililung asserts that the condition is ripe based on our unpublished decision in *State v. Franck*, No. 51994-1-II (Wash. Ct. App. Feb. 4, 2020) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2051994-1-II%20Unpublished%20Opinion.pdf. In *Franck*, a case in which the defendant argued that an identical community custody condition was overbroad, we held that the issue was ripe for review. No. 51994-1-II, slip op. at 20. Differentiating *Cates*, we reasoned that further factual development was not required because it was a legal issue regarding Franck's constitutional rights. *Id.* Moreover, we explained that the issue was final because the condition was set forth in Franck's judgment and sentence. *Id.* And finally, we concluded that failure to consider the issue on direct appeal would create a hardship because the condition would be imposed immediately upon Franck being released from prison. *Id.*

We are persuaded by *Franck* and conclude for the same reasons that the issue is ripe for review. The issue requires no factual development and failure to consider it would create a hardship on Gililung.

2. Constitutionality

Article I, section 7 states that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST. art. I, § 7. Under article I, section 7, a search warrant is typically needed to conduct a search. *See State v. Morse*, 156 Wn.2d 1, 15, 123 P.3d 832 (2005). Warrantless searches are generally unreasonable, subject to a few exceptions. *See State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). Nonetheless, defendants on community custody are not entitled to the complete protection of article I, section 7 because they are individuals sentenced to confinement but are serving their time outside of prison walls. *State v. Cornwell*, 190 Wn.2d 296, 301, 412 P.3d 1265 (2018).

In the context of a community custody violation, our Supreme Court held in *Cornwell* that article I, section 7 of the Washington Constitution requires a nexus between the property searched and the suspected probation violation. *Id.* at 297. In addition, the court observed that "a CCO must have 'reasonable cause to believe' a probation violation has occurred before conducting a search at the expense of the individual's privacy." *Id.* at 304 (quoting RCW 9.94A.631(1)). And any search must diminish an individual's privacy interest only " 'to the extent necessary for the State to monitor compliance with the particular probation condition that gave rise to the search." *Id.*

Here condition 8 is overly broad because none of the safeguards set forth in *Cornwell* are included in the language of the condition. Instead, the condition gives community custody

officers an unrestricted right to search Gililung's residence. Therefore, we remand to the trial court to clarify that DOC's authority to search Gililung's home requires reasonable suspicion of a violation and a connection of the home to the suspected violation.

C. CONDITIONS 9 AND 10: SEX-RELATED BUSINESSES AND SEXUALLY EXPLICIT MATERIALS

Gililung next challenges conditions 9 and 10, which read as follows:

> 9. Do not enter sex-related businesses, which means: x-rated movies, adult bookstores, strip clubs, and any location where the primary source of business is related to sexually explicit material.
>
> 10. You must not possess or access sexually explicit materials that are intended for sexual gratification. This means, but is not limited to, material which shows genitalia, bodily excretory behavior that appears to be sexual in nature, physical stimulation of unclothed genitals, masturbation, sodomy (i.e., bestiality, or oral or anal intercourse), flagellation or torture in the context of a sexual relationship, or emphasizing the depiction of human genitals, unless given prior approval by your sexual deviancy provider. Works of art or of anthropological significance are not considered sexually explicit material.

CP at 143-44.

Gililung argues these conditions are not crime related and violate his constitutional rights. We disagree.

1. Conditions 9 and 10 are crime related

Gililung argues that conditions 9 and 10 are not crime related because his offenses had nothing to do with legal sex-related businesses or sexually explicit materials.

Our Supreme Court has previously considered both of these conditions and concluded they were generally crime related to sex offenses. *See Nguyen,* 191 Wn.2d at 683-87. According to *Nguyen*, the prohibitions on sexually explicit materials and frequenting sex-related businesses relate to the "inability to control [ ] sexual urges . . . ." *Id.* at 687. As the court explained, "It is

both logical and reasonable to conclude that a convicted person who cannot suppress sexual urges should be prohibited from accessing 'sexually explicit materials,' the only purpose of which is to invoke sexual stimulation." *Id.* at 686. Eliminating access to both sexually explicit materials and sex-related businesses attempts to "prohibit conduct that might cause the convict to reoffend." *Id.* at 687. As in *Nguyen*, because Gililung's crimes are related to his "inability to control [ ] sexual urges," his argument that these two conditions are not crime-related fails.

2. Gililung's challenge to the constitutionality of conditions 9 and 10 fails

Gililung next argues that conditions 9 and 10 violate his constitutional rights because (1) sexually explicit materials are protected by the First Amendment, and (2) the State may not outlaw the possession of obscene materials in the home. We disagree.

"A trial court's imposition of an unconstitutional condition is manifestly unreasonable." *Id.* at 678. However, as noted above, limitations upon fundamental rights are permissible, provided they are imposed sensitively and reasonably necessary to accomplish the essential needs of the state and public order. *Bahl*, 164 Wn.2d at 757.

Here, considering *Nguyen*'s conclusions about the connection of controlling sexual urges and sexually explicit materials, we conclude that the imposition of conditions 9 and 10 are reasonably necessary to accomplish the essential needs of the State to prevent Gililung from reoffending. Accordingly, we hold that the trial court did not abuse its discretion in prohibiting Gililung from entering sex-related businesses and possessing or accessing sexually explicit material.

D. CONDITION 12: BREATH AND URINE TESTING

Gililung next challenges condition 12, which reads as follows:

> 12. Be available for and submit to urinalysis and/or breath[]analysis upon the request of the CCO and/or the chemical dependency treatment provider.

CP at 144. Gililung argues that this condition must be stricken because it is not crime related.[11]

We disagree. The challenged condition did not need to be crime related—it is a permissible condition to enforce a prohibition on consumption of drugs and alcohol.

The trial court is permitted to prohibit the use of drugs or alcohol regardless of their connection to the crime. RCW 9.94A.703(2)(c), (3)(e); *see also State v. Jones*, 118 Wn. App. 199, 206-07, 76 P.3d 258 (2003) (trial court is permitted to prohibit consumption of alcohol regardless of connection to the crime); *In re Pers. Restraint of Brettell*, 6 Wn. App. 2d 161, 173, 430 P.3d 677 (2018) (trial court may require defendant not to possess or consume controlled substances unless they have a valid prescription because it is a waivable, and not a discretionary, condition). Here, the trial court imposed these prohibitions on Gililung—prohibitions he does not challenge on appeal. CP at 143-44 (Condition 3: Do "[n]ot possess or consume controlled substances except pursuant to lawfully issued prescriptions" and condition 11: "Do not use or consume alcohol and/or Marijuana.")

Once these prohibitions are ordered, the trial court has the authority to impose testing to enforce compliance with them. *See State v. Olsen*, 189 Wn.2d 118, 135, 399 P.3d 1141 (2017); *see also State v. Vant*, 145 Wn. App. 592, 603-04, 186 P.3d 1149 (2008) (holding that the sentencing court has authority to impose random urinalysis and breath analysis to monitor compliance with valid conditions). This includes imposing breath and urine testing. *See Olsen*,

[11] The State argues that there was no breath or urine testing condition in Gililung's judgment and sentence. The State is incorrect. The copies of Gililung's judgment and sentence in our record both contain the breath and urine testing condition of community custody.

189 Wn.2d at 134 (observing "random [urinalysis testing] may be permissible in order to monitor compliance with valid probation conditions").

Because, under *Olsen*, the trial court had authority to impose the breath and urine testing condition in order to enforce prohibitions on drugs and alcohol regardless of its connection to the crime, we affirm the imposition of condition 12.

E. CONDITIONS 17, 18, AND 19 RESTRICTIONS ON CONTACT AND MOVEMENT

Gililung next challenges conditions 17, 18, and 19, which read as follows:

> 17. [] Have no direct and/or indirect contact with minors, except for biological children.
>
> 18. [] Do not hold any position of authority or trust involving minors, except for biological children.
>
> 19. [] Stay out of areas where children's activities regularly occur or are occurring. This means parks used for youth activities, schools, daycare facilities, playgrounds, shopping malls, fast food restaurants (to include the drive-thrus), wading pools, swimming pools being used for youth activities, play areas (indoor or outdoor), sports fields being used for youth sports, arcades, and any specific location identified in advance by DOC or CCO.

CP at 144. Gililung appears to argue that condition 17, 18, and 19 are overbroad because they restrict his constitutional right to travel and associate.[12] We disagree.

The First Amendment protects the freedom of association. U.S. CONST. amend. I; *State v. Moultrie*, 143 Wn. App. 387, 399, 177 P.3d 776, *review denied*, 164 Wn.2d 1035 (2008). But while on community custody, an offender's constitutional rights are subject to infringement as authorized by the SRA. *Id.* at 396. This includes the restrictions on contact with specific classes

[12] Gililung does not appear to challenge these conditions on vagueness grounds.

of individuals. RCW 9.94A.703(3)(b). As discussed above, the court may restrict an offender's constitutional rights as a condition of sentencing if the restriction is reasonably necessary to accomplish essential needs of the state and public order and is sensitively imposed. *Bahl*, 164 Wn.2d at 757.

We conclude that these three conditions are permissible restrictions on Gililung's rights. Given Gililung's crimes, all three conditions are reasonably necessary to accomplish essential needs of the state and public order—that is, protecting minors. And all three are sensitively imposed. Indeed, conditions 17 and 18 do not prohibit all contact with minors, Gililung's biological children are excluded. *See State v. Martinez Platero*, 17 Wn. App. 2d 716, 725, 487 P.3d 910 (remanding for trial court to consider defendant's relationship with biological children where condition restricted contact with biological children), *review denied*, 198 Wn.2d 1019 (2021). And condition 19 narrowly targets only those areas where minors are known to congregate. *Cf. Wallmuller*, 194 Wn.2d at 245 (holding condition restricting defendant from entering areas frequented by children was not unconstitutionally vague because it put an ordinary person on notice that they must avoid places where one can expect to encounter children).[13]

CONCLUSION

In this unpublished portion, we hold that community custody condition 5 is not crime related and strike the condition from Gililung's judgment and sentence. We also remand Gililung's community custody condition 8 (the consent to home visits) for the trial court to clarify

[13] To the extent Gililung also argues these conditions are not crime related, we similarly reject that argument. As stated above, Gililung's crimes involved a person who stated "she" was 16 years old. Therefore, these conditions, all focused on protecting minors, are reasonably related to his offenses.

that the authority to search Gililung's home requires reasonable suspicion of a violation and a connection of the home to the suspected violation. Otherwise, we reject Gililung's arguments and affirm his convictions.

PRICE, J.

We concur:

VELJACIC, A.C.J.

LEE, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 57466-7-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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