No.
Court of Appeals No 84870-4-I

THE SUPREME COURT OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BILLY MILLER,

Petitioner.

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

PETITION FOR REVIEW

Gregory C. Link
Attorney for Petitioner

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711
wapofficemail@washapp.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Constitution

Washington Supreme Court

Washington Court of Appeals

United States Supreme Court

Washington Statutes

Court Rules

A. Introduction

The jury at Billy Miller's trial heard a substantial amount of other acts evidence of alleged conduct of his co-defendant, himself and other uncharged individuals. The jury was free to use that evidence in whatever manner it chose because the trial court concluded ER 404(b) did not apply to the evidence. What is more the same trial judge permitted a juror to continue serving even after they revealed to the court they had relied on extraneous evidence to reach a conclusion about a jury on their own. And the jury convicted Mr. Miller, after the same judge prevented them from hearing critical evidence Mr. Miller sought to provide them.

The Court of Appeals, in a published opinion, refused to reverse Mr. Miller's convictions. *State v. Miller*, __ Wn. App. 3d __, 562 P.3d 1281 (2025).[1] Mr. Miller now asks this Court to accept review pursuant to RAP 13.4.

[1] Mr. Miller's appeal was "linked" with the appeal of his co-defendant, Naomi Elaster. Both appellants raised several

B. Opinion Below

Contrary to this Court's long-standing precedent and the plain language of ER 404(b) the trial court allowed jurors to consider, without limitation, a substantial amount of other acts evidence. The trial court reasoned ER 404(b) did not apply to this evidence as the alleged acts occurred in the same period of the acts giving rise to the charges.

After admission of that evidence a jury convicted Mr. Miller. In a published opinion, the Court of Appeals adopted this sweeping rewriting of ER 404(b). Without citing any authority to support is unilateral revision of the rule, the Court of Appeals concludes the limitation on the use of other acts

---

similar issues. Rather than issue separate opinion addressing the claims in both Mr. Miller and Ms. Elaster's case, the Court of Appeals addressed many of Mr. Miller's claims in the unpublished opinion in Ms. Elaster's case. The court than simply adopted those portions of Ms. Elaster's opinion by reference in its opinion in Mr. Miller's case. Both opinions are included in the appendix.

evidence in ER 404(b) does not apply to other acts alleged to have occurred in the same period as the charged acts.

C. Issues Presented

1. Without qualification to when other acts are alleged to have occurred, ER 404(b) substantially limits the admission and use of such evidence at trial. And in all cases, as this Court has made clear, the rule is a categorical bar on the use of such evidence as propensity. Nonetheless, the Court of Appeals departs from the plain language of the rule, and this Court's precedent, to conclude the rule does not apply in any way to other acts alleged to have occurred during the same timeframe as the acts at the base of the charged offenses. In doing so the Court of Appeals crafts a broad exception to the rule out of whole cloth. That opinion is contrary to this Court's opinions and substantially burdens a person due process right to a fair trial.

2. The Sixth and Fourteenth Amendments guarantee a person a trial before and unbiased juror. A juror is unfit if they

learn highly prejudicial extraneous information that makes it highly unlikely they could set that information aside during their deliberations. Based on their observations of a key defense witness outside the courtroom, a juror concluded the witness had lied in their testimony. Nonetheless, the trial court permitted this biased juror to remain on the jury which convicted Mr. Miller. The Court of Appeals opinion affirming that conviction is contrary to this Court's decision and contrary to the Sixth and Fourteenth Amendments.

3. The Sixth and Fourteenth Amendments guarantee a person the right to present evidence in his defense. So long as the evidence is even minimally relevant a court may not exclude it unless the prosecution shows the evidence is so prejudicial that it would disrupt the fairness of the proceedings at trial. The trial court refused to permit Mr. Miller's to present evidence that allegations against him were manufactured and pressured by others. The court excluded evidence the children, as a result of this pressure, had made allegations against others

as well. The Court of Appeals' opinion affirming Mr. Miller's conviction is contrary to the Sixth and Fourteenth Amendments.

D. Statement of the Case[2]

When her children were young, Naomi Elaster, gave custody of her daughters A.M.O. and A.A.O., and sons Adam and Anthony Olsen to her brother Reginald Elaster[3], and his partner, Sharon Spears. 3RP 1146.[4]

Several years later Ms. Elaster and her kids reunited they moved into her boyfriend Frank's father's Kent home, while Reginald maintained legal custody. 2RP 620, 628, 994-95; 3RP

[2] Additional facts are set forth in in Mr. Miller's Brief of Appellant.

[3] Many of the parties involved in this case share last names, or their last names were never elicited on the record. For clarity, counsel will refer to everyone except Mr. Miller and Ms. Elaster by their first name.

[4] The verbatim report of proceedings in this case was prepared by four different transcribers from three different agencies. Each agency's set of transcripts restart at page 1. For clarity, this brief will cite the transcripts prepared by Connie Mianecki as "1RP," by Darlene Brownlee as "2RP," and by Lynda Standlee and Debra Price as "3RP."

166, 299. Reginald and Sharon's periodic checks with the kids revealed they were doing well. 2RP 997.

In the family initial time at the house, two different men, Frank and Curt, lived on the property in a trailer. 3RP 168,192, 194. Eventually Frank purchased another trailer and allowed Anthony to move into it when he turned 16. 3RP 201, 283-84.

Several years later, Ms. Elaster reunited with childhood friend, Mr. Miller. 3RP 1119-20, 1158. Mr. Miller, his estranged wife, Katrina Miller, and Katrina's boyfriend needed a placed to store their belongings. 3RP 195-96, 1158. Mr. Miller and Katrina were in the throes of addiction, and Ms. Elaster wanted to help them. 3RP 195-96. She and Frank invited the three to stay in their yard in temporary shelters. *Id.* But the three were sparingly allowed to use the bathroom in the house. 3RP 202.

Ms. Elaster developed an attraction to Mr. Miller, and the two began seeing each other secretly. 3RP 1160-61, 1195. When Ms. Elaster told her kids she intended to move in with

Mr. Miller and restart their family with him, the kids were not happy. 3RP 445-47.

Reginald became concerned with the kids' schooling. 2RP 634. He and Ms. Elaster decided the kids should return to live with him and Sharon. 2RP 634-35. Anthony was nearly 18, and he chose to remain in the trailer. 2RP 1001-02.

Although the kids had lived elsewhere, for five years, Sharon was surprised to find the kids behaving differently. 2RP 1012.

In particular, she found A.M.O. withdrawn and private, spending a lot of time in her room. 2RP 1012. She noticed A.M.O. hitting the younger children, which she had not done previously. *Id.*

Over the course of the next year, she repeatedly asked A.M.O. if anything was wrong with her. 2RP 1027, 1031, 1078. Sharon's pressure escalated when he discovered a story and pictures A.M.O. created involving romantic scenes and

characters inspired by "Slender Man"[5] and other media. 2RP 1013-15. Sharon expressed significant concern about its "illicit" contents. 2RP 255-56, 1030; 3RP 471-73. Neither Reginald nor Ms. Elaster shared Sharon's concerns, and Reginald found the story to be fairly age appropriate. 2RP 755-56, 1029-30.

By the end of the next school year, Sharon decided to have a conversation with all of the children about sex and inappropriate touching. 2RP 1032-34. Following this conversation, A.M.O. told Sharon privately that her mother and Mr. Miller had sexually assaulted her multiple times. 2RP 1035-36; 3RP 773-75. Sharon and Reginald called the police. 2RP 1039-40.

---

[5] "Slender Man" is a fictional supernatural horror character. The character created a moral panic when two children stabbed a friend in order to appease Slender Man. Glenn Gaslin, *The Slenderman Legend: Everything you need to know*, CBS News, Mar. 6, 2017 (available at: https://www.cbsnews.com/pictures/the-slenderman-legend-everything-you-need-to-know/).

A.M.O. later told her aunt that her brother, Anthony, had also molested her. CP 50-51. Both A.A.O. and Adam also alleged Anthony had raped and molested them. *Id.* Anthony admitted to some of these acts. *Id.*

Meanwhile, an unrelated younger girls in Sharon's care, M.R., also alleged that an unidentified "monster" used to come at night and touch her. CP 48-49. Sharon believed the child was describing sexual abuse that occurred at her parents' home. CP 46, 48-49. Sharon included them in her guardianship petition for the younger girls. *Id.*

Over the next few years, A.M.O. made an increasing number of allegations, wide-ranging in time and scope, against a number of people. A.M.O. alleged: her mother allowed 10-15 unidentified men to come to the house to touch her chest and vagina; her mother and Mr. Miller molested and raped her 10 or more times; Mr. Miller and her mother had sex in front of her five or more times; and that she had been molested by at least

four other men—Curt, Brian, Clifton Elaster (another uncle), and Frank (an unrelated friend of Anthony's). 2RP 334-35.

A.M.O. alleged her mother called out to her at night to come to her room and directed A.M.O. to undress and lie on the bed while her mother or men touched her. 3RP 692-721. A.M.O. stated she would sometimes yell or scream during these incidents. 3RP 746. However, no one else living in the crowded house heard or saw any of this. 3RP 450-51, 952-53.

A.A.O. testified she would sometimes wake to find A.M.O. gone from her bed, but she never looked to see if she was anywhere else in the house. 3RP 584, 586-87. A.A.O. also recalled once hearing her mother speaking with men in her and Frank's bedroom, but did not actually know if A.M.O. was also in the room. 3RP 533-34, 450-51. Adam, who slept in the living room within sight and earshot of the hallway and bedrooms, never saw or heard strangers coming or going from the house in the middle of the night. 3RP 950-51, 53. He also did not hear any screaming. 3RP 952-53, 955.

The State charged Mr. Miller with four counts of rape of a child in the first degree. CP 11-14. It charged Ms. Elaster with one count of child molestation in the first degree and three counts of rape of a child in the first degree. *Id*. The two were tried jointly.

At trial, the court admitted evidence of all the numerous sexual acts A.M.O. claimed she experienced or witnessed involving her mother and/or Mr. Miller. 2RP 424-28. Initially, the court doubted ER 404(b) even applied, concluding these acts were merely proof of the ultimate charged acts, even though Mr. Miller was only charged with 4 counts. *Id.* Alternatively, the court found the evidence was part of a common scheme or plan but did not explain how all of the acts, many of which did not even involve Mr. Miller or behavior rising to the level of the charged offenses, were evidence of the charged acts themselves. *Id*,

The jury convicted Mr. Miller as charged

E. Argument

1. The Court of Appeals' published opinion vastly expands the admissibility of other acts evidence contrary to the plain language of ER 404 and the Court's decades-long jurisprudence. And the Court of Appeals did so without any authority supporting its sweeping rewrite of the rule.

Evidence of other acts of the defendant offered solely to prove propensity to commit an offense is not admissible. ER 404(a). This Court has long made clear "[p]roperly understood . . . ER 404(b) is a categorical bar to the admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012); *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

Here, there is no dispute jurors were presented a substantial amount of evidence of alleged sexual acts other than the four acts the jury unanimously agreed on as the bases for the convictions.

Even though Mr. Miller only faced four charges. The trial court allowed the prosecutor to present evidence of all the

numerous sexual acts A.M.O. claimed she experienced or witnessed involving her mother and/or Mr. Miller. 2RP 424-28. Initially, the court doubted ER 404(b) even applied, concluding these acts were merely proof of the ultimate charged acts, even though Mr. Miller was only charged with four counts. *Id.*

The court reasoned these acts were not "other" acts and thus not subject to the rule at all. Alternatively, the court found the acts were evidence of a "common scheme or plan" exception to ER 404(b).

The Court of Appeals agreed with the trial court's logic that ER 404(b) does not limit the admissibility of other acts evidence alleged to occur during the charging period. Neither the trial court nor the Court of Appeals cited any authority to support that conclusion.

Both the trial court and Court of Appeals are wrong in concluding conclude this other acts evidence is categorically outside the scope of ER 404.

In *Gresham* this Court struck down a statute which sought to exclude from ER 404 evidence of a person's commission of other sex offenses in a current prosecution for a sex offense. 173 Wn.2d at 426-27 (discussing former RCW 10.58.090). The Court concluded the statute violated the Separation of Powers as it sought to allow propensity evidence which could not be admitted under ER 404(b), violating that rules categorical bar on such evidence. *Id.* at 429. But the opinion in this case ignores the rules categorical bar allowing other acts evidence to be used for whatever purpose the jury wishes, including as propensity evidence. The opinion does so by simply concluding the rule does not apply at all.

Without any citation to legal authority, the opinion concludes ER 404 does not apply to evidence of other acts alleged to have occurred during the same charging period as the

alleged crime. App. at 5. The opinion cites to no authority to support such a reading of the rule. To be sure the rule does not say that. In fact, the words "charging period" appear nowhere in the plain text of ER 404. No Washington case has ever recognized such a cabined definition of the plain term "other crimes, wrongs, or acts." In short, no existing authority has ever concluded a whole class of other acts evidence is freely admissible based solely on a prosecutor's charging decision.

Court rules are interpreted in the same fashion as statutes. *State v. Blilie*, 132 Wn.2d 484, 492, 939 P.2d 691 (1997). Plain terms are not subject to interpretation. *State v. Conover*, 183 Wn.2d. 706, 711, 355 P.3d 1093 (2015). And, the plain meaning of a word can be determined by its dictionary definition. *State v. Barnes*, 189 Wn.2d 492, 495-96, 403 P.3d 72 (2017).

ER 404(b) applies to "other crimes, wrongs, or acts. "Other" means "being the one . . . remaining or not included," or "not the same." https://www.merriam-

webster.com/dictionary/other. Acts which are not among the acts charged as a crime are "not included." Those acts are "not the same" as the acts charged. Those uncharged acts are by definition "other" acts.

In no circumstance may jurors use evidence of other acts as propensity evidence. ER 404(b); Gr*esham*, 173 Wn.2d at 420-21. Even when there are multiple charges before a jury, jurors are told their verdict on one charge cannot control their verdict on another. The court provided such an instruction in this case. CP 112 (Instruction 6). It is of little value, and makes no sense, to prevent jurors from relying on other charged acts as propensity yet freely allow them to rely on uncharged allegations occurring during the same period as propensity evidence. If evidence does not form the basis of one of the charges it is by definition an "other" act and is admissible only under the terms of ER 404.[6]

[6] The opinion notes the trial court provided a unanimity instruction as required by *State v. Petrich*, 101 Wn.2d 566, 683

Rather than point to any authority supporting its reinterpretation of the rule's plain language, the opinion faults Mr. Miller for "fail[ing] to explain how the trial court *could* have conducted the four-step ER 404(b) analysis, given the factual context here, as the first step is for the proponent to prove by a preponderance of the evidence that the act occurred." App. at 5. This is not a new rule. Nor is it sparingly applied. The trial court can go about the analysis the same way it does in every other case involving other acts evidence. It could conduct a hearing, prior to trial or otherwise outside the presence of the jury, at which the court could determine by a preponderance the alleged acts occurred. The court would then identify a proper purpose, if any, for the evidence, and how that purpose is relevant to any element of the crime. And if the court determined the evidence was admissible, it would instruct the

---

P.2d 173 (1984). App. at 5, n1. But that instruction only required jurors unanimously agree on one act for each of the four charges. The instruction does nothing to prevent them from using all the other evidence as propensity evidence.

jury on its limited use of the evidence. There is nothing unique about this case. The rule is applied in this fashion all the time.

The Opinion insists "the State only used the evidence of various acts of abuse by Miller to satisfy its burden to prove the elements of charged crimes" App. at 6. But that is no answer. First, no one told the jury they could not use the evidence of other acts as propensity or for any other purpose the jury wished. Simply saying the jury only relied on the other acts evidence as proof of the elements, does not solve the problem. It still violates ER 404(b) if the jury used the other acts evidence as propensity in determining whether the State proved the elements of the charge. And that is the likely use the jury put the evidence to, as no one told jurors they could not by way of a limiting instruction.

The trial court did not provide a limiting instruction because it concluded ER 404(b) did not even apply to these other acts. As far as the trial court was concerned, there was no

reason to think it should limit the jury's consideration of that evidence. And so the court did not.

The same is true of evidence of other acts by Ms. Elaster admitted at the joint trial. Just as with the evidence of Mr. Miller's other acts evidence the Court of Appeals assures itself the jury could not have used the evidence against Mr. Miller. App. at 4. The opinion reasons that is so because the evidence of Ms. Elaster's other acts "were not admitted for use against him." *Id.* But no one told the jury that.

And no one told the jury that, because the trial court had no reason to believe it needed to having already concluded ER 404(b) did not apply at all. The Court of Appeals agrees with the trial court's conclusion that ER 404(b) does not even apply. With that conclusion there is no reason to think the trial court made any effort to limit the jury's use of the evidence of Ms. Elaster's other acts to only the determining her guilt.

The opinion reasons that jurors were instructed their "verdict on one count as to one defendant should not control

[its] verdict on any other court or as to any other defendant." App. at 4. But that instruction speaks only of the jury's "verdict" one count. That instruction says nothing about the jury's use of evidence of each defendant's acts. Jurors were not told they could not rely on evidence of Ms. Elaster's acts as propensity in assessing the credibility of witnesses, resolving conflicts in testimony, or simply as evidence that Mr. Miller committed the four acts supporting the charges against him. That limitation was never provided because the trial court concluded ER 404(b) does not apply. Thus, there was no reason for the trial court to limit juror's us of the evidence. If ER 404(b) does not apply jurors are free use that evidence for whatever purpose jurors saw fit.

While the trial court offered an alternative basis for admission of the evidence, as proof of a common scheme or plan. As set forth in Mr. Miller's briefing to the Court of Appeals the trial court improperly admitted the evidence for that purpose. The Court of Appeals seemingly agrees, the Court

of Appeals does not address that alternative basis, resting its opinion entirely on its sweeping conclusion that ER 404(b) does not apply at all.

Under the expansive exception the Court of Appeals crafts in this published opinion the "categorical" prohibition on propensity evidence vanishes. Without pointing to any legal authority to support its conclusion the Court of Appeals concludes the rule does not really mean what its plain language says. That conclusion is irreconcilable with *Gresham*.

Applied by its plain terms, ER 404(b) can ameliorate the misuse of such highly prejudicial evidence. The Court of Appeals' wholesale allowance of prejudicial other acts evidence renders trials fundamentally unfair contrary to the Fourteenth Amendment Due Process Clause. *Andrew v. White*, __ U.S. __, 145 S. Ct. 75, 82 (2025).

The opinion's rewriting of a regularly employed rule of evidence is an issue of substantial public importance.

This Court should accept review under RAP 13.4.

2. The court violated Mr. Miller's constitutional rights to a fair and impartial jury when it allowed Juror 11 to remain on the jury despite her violation of the court's instructions and bias.

The federal and state constitution's guarantee an accused person the right to due process and to a trial before a fair and impartial jury. U.S. Const. amends. VI, XIV; Const. art. I, §§ 21, 22; *State v. Guevara Diaz*, 11 Wn. App. 2d 843, 851, 456 P.3d 869 (2020). "Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge must ever be watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *State v. Winborne*, 4 Wn. App. 2d 147, 160, 420 P.3d 707 (2018) (citing *Smith v. Phillips*, 455 U.S. 209, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)).

"An 'impartial jury' means 'an unbiased and unprejudiced jury,' and allowing bias or prejudice by even one juror to be a factor in the verdict violates a defendant's constitutional rights and undermines the public's faith in the

fairness of our judicial system." *State v. Berhe*, 193 Wn.2d 647, 658, 444 P.3d 1172 (2019) (quoting *Alexson v. Pierce County,* 186 Wash. 188, 193, 57 P.2d 318 (1936)); *see also Winborne*, 4 Wn. App. 2d at 157.

A jury must reach its verdict based only on the court's instructions and the evidence offered at trial. *Winborne*, 4 Wn. App. 2d at 160 (citing *Patton v. Yount*, 467 U.S. 1025, 1037 n.12, 104 S. Ct. 2885, 91 L. Ed. 2d 847 (1984)). A jury cannot reach its decision based on any extraneous sources of information. *Id*. "A trial by a jury where even one member is biased or prejudiced is not a constitutional trial. *State v. Parnell*, 77 Wn.2d 503, 507, 463 P.2d 134 (1969), *abrogated on other grounds by State v. Fire*, 145 Wn.2d 152, 34 P.3d 1218 (2001). "There should be no lingering doubt" whether a defendant received a fair trial. *Parnell*, 77 Wn.2d at 508.

A court's independent and ongoing obligation to ensure an impartial jury includes the obligation to dismiss unfit jurors

during trial. *State v. Berniard*, 182 Wn. App. 106, 117, 327 P.3d 1290 (2014).

Mr. Miller presented witnesses who lived in or around the Kent home during the charging period and did not observe anything of concern. A.M.O.'s alder brother, Adam, offered key testimony he never heard or saw any of the alleged events or noticed any strangers coming and going from the house. 3RP 950-55. His testimony was central to Mr. Miller's defense and showed little opportunity for the abuse A.M.O. described to happen without anyone else noticing

The morning Adam testified, Juror 11 had seen him driving in a parking lot and parking his car. 3RP 1064. When Adam later testified, he stated he did not have a driver license and did not drive anywhere. 3RP 969. The next morning, Juror 11 told the court she believed a witness had lied, and revealed what she had seen. 3RP 1060-64.

The defense argued the court had to remove Juror 11 because of her having determined Adam's credibility based on

extraneous evidence. 3RP 1066-67, 1068. The court refused to do so because another juror had called in sick and had to be excused, using up the last available alternate. 3RP 1070-71, 1073-75.

The defense continued to object because that extraneous information was "central to defense's case" specifically Adam's credibility. 3RP 1066. The defense emphasized what Juror 11 saw went "straight to the credibility of the witness," and argued it would be "humanly impossible" for this juror to set aside the fact belief that a Adam lied on the stand. 3RP 1066, 1068.

Nevertheless, the court seemed more concerned about the lack of alternate jurors. It noted, "So if I do excuse this juror, we're in recess for at least today and for who knows how long because I don't know if we're getting Juror 9 back." 3RP 1070. Counsel for Ms. Elaster stated that the proper remedy under these circumstances would be to dismiss the juror to prevent contaminating the other jurors, but the court responded, "That's true, but for the fact we only have twelve jurors and one juror

reported in sick today, and there's no indication they're coming back." 3RP 1073-74. The court was deeply concerned about a mistrial due to insufficient jurors. 3RP 1074.

Instead of excusing Juror 11, the court merely asked her if she could set her preformed opinion aside and consider the case independent of her extraneous knowledge. 3RP 1075. The court allowed her to remain on the jury.

Here, a juror believed a defense witness – one whose credibility was critical to Mr. Miller's case – had lied on the stand and became concerned enough to notify the court. She reached that conclusion before trial had concluded, contrary to the court's instructions. And more concerning, she reached that conclusion based on information that was not presented at trial. Primarily concerned about a mistrial because no alternate jurors remained, the court allowed this juror to remain on the jury.

Just like in *Winborne*, Juror 11 had knowledge of and relied on facts she obtained outside of trial to reach conclusions regarding issues at trial. In *Winborne* it was merely possible the

juror might rely on their own observations to draw conclusion regarding the events. Here, Juror 11 left no doubt. They expressed their view to the court, based on outside facts; that a witness lied under oath. And they did so despite the court's clear instruction not to. At the outset of trial the court instructed the jury they could only consider facts presented during trial. RP 494.

The Court of Appeals concludes, because the court admonished the juror to disregard what she had done and the opinion she had formed. Brief of Respondent at 25-26. But that ignores the fact that Juror 11 had already violated the court's preliminary instruction that they could only consider evidence offered in trial. And it ignores the fact the juror had ignored that same instruction that they not reach a conclusion as to any matter until the jury as a whole deliberated.

The juror not only reached a conclusion prior to deliberation, i.e. the witness lied. The jury based that conclusion on facts outside the evidence. The opinion brushes

aside the undisputed fact that the jury had reached a conclusion. App. at 19-20. Instead, the Court focuses entirely on a small portion of that instruction which told jurors "[i]f you become aware that you or another juror has been exposed to outside information, please privately notify [the bailiff]. Don't discuss the matter with other jurors." *Id.* at 20.

The juror's compliance with that single portion of the instruction does not answer the question. The juror did what they were supposed to do. The problem is how the trial court responded and its failure to grapple with the fact the juror had reached a conclusion prior to deliberation and had done so from extraneous information. The trial court missed the point when it said the juror had done nothing wrong. RP 1069. It does not matter whether those extraneous facts were obtained purposefully or by happenstance. What matters is that the juror had formed an opinion based on those facts, and had done so in violation of the court's instructions.

Having disregarded the instruction once, there is no reason to presume they would follow the court's instruction in the future. There is no reason to believe their assurance to do so is credible in the face of their demonstrated noncompliance with the court's prior instructions.

The opinion of the Court of Appeal is contrary to this Court's opinions. The opinion denies Mr. Miller a constitutionally adequate trial by an unbiased jury. This Court should accept review. RAP 13.4.

3. The trial court violated Mr. Miller's Sixth and Fourteenth Amendment rights to present a defense when it excluded relevant evidence of other allegations of sexual abuse by children in Reginald and Sharon's foster care.

The Sixth Amendment protect the rights of criminal defendants to present a complete defense and to confront adverse witnesses. U.S. Const. amend. VI; *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35

L. Ed. 2d 297 (1973); *State v. Orn*, 197 Wn.2d 343, 347, 482 P.3d 913 (2021). The trial court denied Mr. Miller his Sixth Amendment right to present a defense when the court wrongly excluded evidence that several children in Reginald's and Sharon's care made allegations of sexual abuse against other people in addition to Ms. Elaster and Mr. Miller. Evidence of these other allegations was critical to Mr. Miller's defense, yet the court did not allow the jury to hear about them.

When a defendant offers evidence in his defense that is "of at least minimal relevance," the court may not exclude it unless the State shows "the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)). For evidence of high probative value, on the other hand, "it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. I, § 22." *State v. Duarte Vela*, 200 Wn. App. 306, 318, 402 P.3d 281 (2017) (quoting *Jones*, 168 Wn.2d at 720.

Mr. Miller's and Ms. Elaster's primary defense was that Sharon had created a home environment which encouraged, if not outright pressured, the children to make claims of sexual abuse. *See*, *e.g.*, 2RP 432, 737. Even if some of the allegations were true, Mr. Miller argued, it would not change the general theory that the children were primed to make any number of allegations due to Sharon's unusual preoccupation with sexual

misconduct. 2RP 338, 339-40, 347, 349. Nevertheless, the court excluded evidence of all the other allegations made by A.M.O. against Anthony, Curt, Brian, Clifton, and Frank (Anthony's friend), as well as any allegations made by the other children. 2RP 364-69. The court reasoned this evidence would be confusing, could open the door to collateral issues, and, due to the timing of the other allegations, would not tend to show A.M.O. was influenced by them. *Id.*; 2RP 429-30,

The court excluded this evidence because it thought the evidence would be confusing and introduce collateral issues. The court also excluded the evidence because these claims were made after A.M.O. made her allegations in the instant case, and were either true (as related to Anthony) or not demonstrably false. Under these circumstances, the court reasoned the evidence was not relevant to show A.M.O. was influenced to make false allegations or to challenge her credibility.

The court's understanding of the defense's theory of the case was simply too narrow. Mr. Miller's theory of the case was

that Sharon was unusually preoccupied with potential sexual abuse and persisted in asking the children about the issue over the course of a year. As part of the defense's theory, counsel elicited testimony that Sharon had so-called rules at home limiting bathroom sharing and asking the girls to bend at the knee to pick things up, painting a larger picture of the children's home environment and Sharon's preoccupation with inappropriate sexual behavior. 2RP 731, 781, 1117; 3RP 35, 858. Sharon's overreaction to A.M.O.'s stories and drawings added to this picture. 2RP 944, 1014. As a result of this environment, many of the children in her care ended up making allegations of sexual abuse.

Whether the allegations were true or false was not particularly important to Mr. Miller's theory; rather, he intended to show Sharon created a home environment ripe for kids to make claims of sexual abuse. Relevant to this defense was the fact and number of the allegations made while these

children were under Sharon's care, not the truthfulness of those allegations.

This evidence bore high probative value such that no state interest could be compelling enough to preclude its introduction. *Duarte Vela*, 200 Wn. App. at 318. Several of the State's witnesses testified A.M.O. was an attention-seeking child. If the jury had believed Mr. Miller's proffered evidence, it would have shown Sharon's encouragement to report sexual abuse resulted in A.M.O. making increasingly-dramatic allegations, and would have explained why A.M.O. might lie about such a serious matter. The State emphasized in closing that A.M.O. had no obvious reason to lie, making her motivations to lie highly relevant to Mr. Miller's defense.

The State did not show this highly relevant evidence was so prejudicial as to disrupt the fairness of the fact-finding process at trial. As in *Jones*, the trial court's evidentiary rulings violated the Sixth Amendment and article I, section 22.

The Court of Appeals abbreviated treatment of Mr. Miller's claim, largely as a secondary consideration in the separate opinion in Ms. Elaster's opinion, does not account for the import of this evidence in Mr. Miller's defense. The court does not recognize the weight this evidence would have had to jurors.

The Court of Appeals satisfies itself that Mr. Miller was able to cross-examine Sharon regarding this claim. App. at 23. But asking questions of the witness and having to accept her crafted answers is not of the same magnitude as presenting the jury evidence showing the truth of the claim.

The Court of Appeals did not properly analyze the deprivation of Mr. Miller's right to present a defense. This Court should accept review.

F. Conclusion

Mr. Miller was denied his right to a fair trial. The trial court erroneously admitted highly prejudicial other acts evidence. The trial court denied him his right to a fair and

impartial jury. The trial court denied him the right to present a defense. This Court should grant review and grant Mr. Miller the new and fair trial to which he is entitled.

This document complies with RAP 18.17 and contains 5967 words.

DATED this 8th day of April, 2025.

Gregory C. Link – 25228
Attorney for the Petitioner
Washington Appellate Project
greg@washapp.org

FILED
2/3/2025
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BILLY CLYDE MILLER, Appellant.	No. 84870-4-I DIVISION ONE OPINION PUBLISHED IN PART

HAZELRIGG, A.C.J. — Billy Clyde Miller appeals from his conviction on four counts of rape of a child in the first degree after a joint jury trial with co-defendant Naomi Marie Elaster. Miller avers that his right to a fair trial was violated when the trial court did not excuse a juror who came forward with information about a witness the juror had obtained outside the courtroom and the judge erred on a number of evidentiary rulings. He further challenges certain community custody conditions imposed at sentencing. The State concedes that the victim penalty assessment and the DNA collection fee should be stricken from Miller's judgment and sentence based on his indigency. We remand to strike the legal financial obligations, but otherwise affirm.

FACTS

Billy Miller and Naomi Elaster were accused of sexual assault by Elaster's daughter, A.M.O., in June 2019. In August of that year, Miller and Elaster were charged as co-defendants based on those allegations. The State presented two

counts of rape of a child in the first degree (ROC1) against Miller, one of which carried a special allegation of domestic violence (DV), and two counts of ROC1 against Elaster, both with DV allegations. Nearly two years later, the State filed a first amended information that accused both Miller and Elaster of four counts of ROC1, removed the DV allegation against Miller and added it to each of the counts as to Elaster. In August 2022, shortly before trial, the State filed a second amended information that separately charged Miller with four counts of ROC1 and Elaster with one count of child molestation in the first degree and three counts of ROC1. All of Elaster's charges carried DV allegations.

Miller and Elaster were tried jointly and engaged in extensive pretrial litigation on the admissibility of certain evidence. The jury convicted them both as charged. Miller was sentenced to an indeterminate sentence of 276 months to life in prison, followed by community custody.

Miller timely appealed.

ANALYSIS

Miller's co-defendant, Elaster, also appealed her convictions, No. 84970-1-I, and the two appeals were administratively linked at this court. This opinion adopts the reasoning and outcome set out in the opinion from Elaster's case for certain shared assignments of error in the unpublished portion of this opinion.

I. Admission of Multiple Acts of Abuse

Miller assigns error to the admission of what he characterizes as uncharged acts of abuse he was alleged to have committed, along with his co-defendant

Elaster, that purportedly occurred within the charging period. He contends the acts amount to propensity evidence under ER 404(b).

We review the evidentiary decisions of the trial court for abuse of discretion. *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012). The State offered the challenged evidence under ER 401, 403, and 404(b). Miller asserts the trial court admitted it under ER 404(b) and solely challenges the admissibility ruling on that basis. ER 404(b) governs the admission of evidence of other acts and reads as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Courts must engage in a four-step analysis when considering the admission of other act evidence; the judge must

> (1) find by a preponderance of the evidence that the misconduct occurred; (2) identify, as a matter of law, the purpose of the evidence; (3) conclude that the evidence is relevant to prove an element of the crime charged; and . . . (4) weigh the probative value against the prejudicial effect.

State v. Williams, 156 Wn. App. 482, 490, 234 P.3d 1174 (2010). The trial court's analysis must be conducted on the record. *State v. Sublett*, 156 Wn. App. 160, 195, 231 P.3d 231 (2010), *aff'd*, 176 Wn.2d 58, 292 P.3d 715 (2012).

Miller challenges the admission of three categories of evidence. He points to testimonial evidence that

> Elaster "molested and raped" A.M.O. several times before involving Mr. Miller; Ms. Elaster invited strangers into the home who would molest A.M.O.; and Ms. Elaster and Mr. Miller would abuse A.M.O.

> together, involving her in sexual acts, making her watch them engage in sexual acts, and raping and molesting her together.

He then asserts that admission of each of these three classes of evidence "was error because the majority of this evidence was not related to the crimes charged." Thus, according to Miller, the evidence must satisfy ER 404(b) analysis.

Two of the three categories of testimonial evidence to which Miller assigns error "because the majority of this evidence was not related to the crimes charged" were not admitted for use against him, but rather as evidence of the charged crimes against his co-defendant, Elaster. Evidence that Elaster molested and raped A.M.O. several times before involving Miller and had invited others to participate in the abuse of A.M.O. was evidence that the State used to prove the charges against Elaster. He points to nothing in the record that suggests the trial court admitted it for use against him, under ER 404(b) or any other basis. A.M.O. expressly testified that her mother abused her before Miller became involved and allowed other men to abuse her on various occasions. While those accusations may not have been admissible for use against *him*, they were certainly relevant to the allegations against his co-defendant, Elaster. Admission of this particular evidence was the consequence of a joint trial with his co-defendant and Miller does not assign error to that aspect of trial.

Even so, the court took care to instruct the jurors that they had to "separately decide each count charged against each defendant" and each charged act needed to be grounded in a separate incident. It also instructed the jury that its verdict "on one count as to one defendant should not control [its] verdict on any other count o*r as t*o *the* o*ther defendant*." (Emphasis added.) In closing argument, the State

recounted the first time Elaster brought another man into her bedroom in order to participate in the abuse of A.M.O., presenting it to the jury as one of the three incidents that would support the charge of child molestation against Elaster. The State was careful to ask the jury to link specific acts to which A.M.O. had testified to the specific charges of each defendant. There is simply nothing in the record to suggest that the State improperly attempted to use the evidence of Elaster's crimes to secure a conviction against Miller.

The final category of evidence Miller challenges on this basis includes evidence Elaster and Miller "would abuse A.M.O. together, involving her in sexual acts, making her watch them engage in sexual acts, and raping and molesting her together." A.M.O.'s testimony regarding the acts by Elaster and Miller is the heart of the State's case against Miller and her description of the abuse was highly relevant.

But testimony about these acts was not admitted as evidence of "other crimes, wrongs, or acts." Instead, they were acts within the charging period that could support any of the four charged counts of rape of a child in the first degree.[1] Accordingly, the trial court did not err in failing to conduct ER 404(b) analysis on the record. Notably, Miller fails to explain how the trial court *could* have conducted the four-step ER 404(b) analysis, given the factual context here, as the first step is for the proponent to prove by a preponderance of the evidence that the act occurred. *See Williams*, 156 Wn. App. at 490. The entire purpose of the trial was for the State to prove, by more than a mere preponderance, that Miller committed

[1] Consistent with *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984), the trial court instructed the jury that they must "unanimously agree as to which act has been proved."

four distinct acts of ROC1 within the charging period. More critically, the State only used the evidence of various acts of abuse by Miller to satisfy its burden to prove the elements of the charged crimes beyond a reasonable doubt and not for any other improper purpose.

At oral argument, Miller averred that ER 404(b) must apply here to prevent the State from using broad charging periods to circumvent the rule. According to Miller, the State could strategically include other acts within a charging period to avoid application of an ER 404(b) analysis. But in briefing, Miller describes A.M.O.'s allegations as claims that he "raped her with his mouth, hands, tongue, and penis on many occasions." His own characterization of the evidence he deems "uncharged acts" acknowledges that it consisted of conduct that could satisfy the elements of the charged crimes, both because of the nature of the acts and fact that they occurred within the charging period.[2]

Critically, Miller's "policy" argument ignores the potential consequences of his proffered interpretation of the rule. If the State were to individually charge each incident in a pattern of sexual assaults, rather than selecting only those incidents for which it has the best evidence and is most likely to secure a conviction, the accused would face new obstacles at various stage of the proceedings. For example, a pretrial release determination based on an information containing seventeen counts of child molestation as opposed to three, even where evidence

[2] We acknowledge that our analysis would necessarily be different if A.M.O.'s testimony included other acts of sexual abuse that could *not* constitute the charged crimes. For example, if the court had permitted her to testify about conduct by Miller that could only amount to child molestation, but not rape of a child. Because we are tasked with deciding the assignment of error as framed in briefing based on the record from the trial court, we decline to provide an advisory holding about other possible scenarios not presently before us.

of the larger number was weaker, could reasonably result in outright denial of release on personal recognizance, a higher bail amount, or more restrictive and costly pretrial release conditions. Similarly, exposure at sentencing would increase significantly as offender scores could be dramatically impacted by such a charging practice should the State prevail on more counts. Further, the risk at trial could shift as juries may struggle to uphold the presumption of innocence when tasked with deciding a case with more counts.

The trial court did not err in its ruling to admit evidence of acts committed during the charging period that a jury could conclude satisfied the elements of the charged crimes.

The panel has determined that the remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with the rules governing unpublished opinions. *See* RCW 2.06.040.

II. Claim of Juror Bias

For this assignment of error, we expressly adopt and incorporate herein the reasoning and conclusion set out in Part I of the linked case, *State v. Elaster*, No. 84970-1-I.

III. Right To Present a Defense

Miller's co-defendant, Elaster, presented a nearly identical assignment of error; the only distinction was slightly different framing of the importance of the excluded evidence. The defense sought to introduce evidence that A.M.O. had made allegations against other people in addition to Miller and Elaster and that

other children with whom A.M.O. resided also made allegations of abuse against others. Miller specifically avers that it was essential to the shared defense theory that Sharon Spears, who resided with and cared for A.M.O. for several years before and after the abuse occurred, "was unusually preoccupied with potential sexual abuse" and the truth or falsity of allegations made by A.M.O. "was not particularly important" to Spears.

With this particular presentation of the issue in mind, for this assignment of error, we expressly adopt and incorporate herein the reasoning and conclusion set out in Part II of the linked case, *State v. Elaster*, No. 84970-1-I.

IV. Community Custody Conditions

Miller, like his co-defendant, challenges two community custody conditions imposed by the trial court and set out in appendix H to his judgment and sentence (J&S) as one of several "special conditions" for sex offenses: condition 5, which restricts dating relationships and requires him to disclose his status as a sex offender to potential intimate partners, and condition 8, which requires he consent to random searches by the Department of Corrections (DOC). Miller also separately challenges condition 10, which requires him to submit to urinalysis and breath analysis upon the request of the DOC community corrections officer (CCO) and/or chemical dependency provider, as improper because it is not crime related. The State responds that condition 5 is crime-related and not unconstitutional, condition 8 is not yet ripe for review, and condition 10 was within the court discretion and did not need to be crime related.

A. Condition 5

Miller presents the same challenges to condition 5 as his co-defendant, that it is not crime-related and violates his right to free speech, but also separately contends that this condition is an unconstitutional restriction on his right to marry and to engage in intimate relations. The right to marry and the right to engage in intimate relations are fundamental constitutional rights and state interference is subject to strict scrutiny. *State v. Warren*, 165 Wn.2d 17, 34, 195 P.3d 940 (2008); *Loving v. Virginia,* 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967). When a community custody condition burdens a fundamental right, we consider whether the condition is "reasonably necessary to accomplish the essential needs of the State and public order . . . conditions that interfere with fundamental rights must be sensitively imposed." *Warren*, 165 Wn.2d at 32 (citation omitted). The State has a compelling interest in the protection of minors. *State v. Geyer*, 19 Wn. App. 2d 321, 328, 496 P.3d 322 (2021).

In making this determination, courts have used a crime-relatedness analysis combined with an assessment of the state's interest to determine the validity of similar custody conditions. *See, e.g., State v. Kinzle*, 181 Wn. App. 774, 785, 326 P.3d 870 (2014); *State v. Peters*, 10 Wn. App. 2d 574, 591, 455 P.3d 141 (2021). In *Kinzle*, the court upheld the imposition of a similar community custody condition, reasoning that "[b]ecause Kinzle's crime involved children with whom he came into contact through a social relationship with their parents, condition 10 is reasonably crime-related and necessary to protect the public." *Id.* at 785. By considering the relatedness of the crime to the condition, together with the State's

interest in protecting children, we conclude that this condition is necessary because Miller's potential future partners may have children of their own, be in a position of authority over children, or unknowingly enable Miller's access to children in the absence of a condition that compels Miller to divulge information regarding his offense.

As to the first part of Miller's challenge to this community custody condition, we expressly adopt and incorporate the reasoning and conclusion expressed in Part IV, Section A of the linked case, *State v. Elaster*, No. 84970-1-I. We further follow the established precedent analyzed herein and reject Miller's additional challenge to condition 5.

B. Condition 8

For this assignment of error, we expressly adopt and incorporate herein the reasoning and conclusion set out in Part IV, Section B of the linked case, *State v. Elaster*, No. 84970-1-I.

C. Condition 10

Miller challenges the trial court's imposition of community custody condition 10 and expressly cites RCW 9.94A.703 and .704. Condition 10 reads, "Defendant shall . . . [b]e available for and submit to urinalysis and/or breathanalysis upon request of the CCO and/or chemical dependency treatment provider." In briefing, Miller avers that this condition is not crime-related as required by the governing statute and the court erred when it imposed it, therefore, it must be stricken.

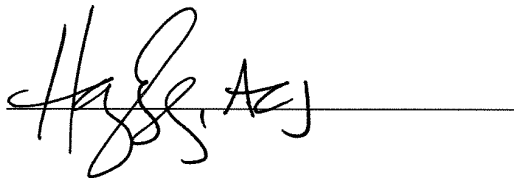
Under RCW 9.94A.703(3)(f), "the court may order an offender to . . . [c]omply with any crime-related prohibitions." A crime-related prohibition is a court ordered prohibition "that directly relates to the crime for which the offender has been convicted." RCW 9.94A.030(10). However, RCW 9.94A.703(2)(c) expressly dictates that "[u]nless waived by the court, as part of any term of community custody, the court *shall* order an offender to . . . [r]efrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions." The plain language of the statute indicates that the condition will be imposed unless the trial court specifically declines to do so, without requiring a nexus to the crime of conviction. RCW 9.94A.703(2)(c). Because this condition of community custody is expressly authorized by statute, its imposition was not an abuse of discretion. DOC must be empowered to monitor this condition once imposed; requiring compliance with requests for urinalysis or breath testing is the most logical means of doing so. Further, subsection (4) of RCW 9.94A.704, one of the statute sections cited on appendix H of Miller's J&S, expressly states that once a person is placed under DOC supervision, it "may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws." The trial court did not abuse its discretion when it imposed conditions authorized by statute.

V. Legal Financial Obligations

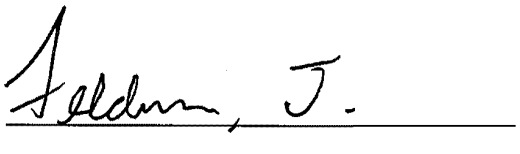
Pursuant to amendments to RCW 7.68.035 that became effective in 2023, the court will not impose the victim penalty assessment or DNA collection fee, which were previously mandatory, where it has found that the defendant is

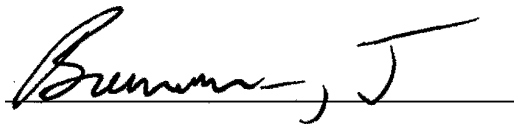
indigent. The State properly concedes that in light of the court's indigency finding at sentencing, this court should remand for the trial court to strike these legal financial obligations from Miller's J&S.

Affirmed in part, reversed in part, and remanded for the trial court to strike the legal financial obligations.



WE CONCUR:





IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

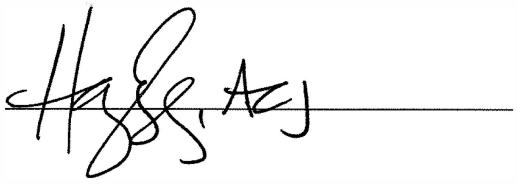
STATE OF WASHINGTON, Respondent, v. BILLY CLYDE MILLER, Appellant.	No. 84870-4-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Appellant filed a motion for reconsideration on February 21, 2025. A panel of the court called for an answer to the motion, which respondent filed on March 5, 2025. After consideration of the motion and answer the panel has determined that the motion for reconsideration should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:



2025 WL 394580
Only the Westlaw citation
is currently available.

NOTE: UNPUBLISHED OPINION,
SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 1.

STATE of Washington, Respondent,
v.
Naomi Marie ELASTER, Appellant.

No. 84970-1-I
|
Filed February 3, 2025

Honorable Brian Mcdonald, Judge.

Attorneys and Law Firms

Pllc Koch & Grannis, Attorney at Law, The Denny Building, 2200 Sixth Avenue, Suite 1250, Seattle, WA, 98121, David Bruce Koch, Nielsen Koch & Grannis, PLLC, 2200 6th Ave. Ste. 1250, Seattle, WA, 98121-1820, for Appellant.

Prosecuting Atty King County, King Co Pros/App Unit Supervisor, W554 King County Courthouse, 516 Third Avenue, Seattle, WA, 98104, Gavriel Gershon Jacobs, Attorney at Law, 516 3rd Ave. Ste. W554, Seattle, WA, 98104-2362, for Respondent.

UNPUBLISHED OPINION

Hazelrigg, A.C.J.

***1** Naomi Marie Elaster appeals from her convictions for three counts of rape of a child in the first degree and one count of child molestation in the first degree, all found to be crimes of domestic violence, after a joint jury trial with co-defendant, Billy Clyde Miller. She seeks reversal on the grounds that her constitutional right to an impartial jury was violated, the trial court denied her motion to admit certain evidence essential to her defense, and she received ineffective assistance of counsel. Elaster also challenges imposition of certain community custody conditions. We disagree and affirm. However, remand is required for the trial court to strike legal financial obligations from Elaster's judgment and sentence based on her indigency.

FACTS

Naomi Elaster is the mother of four children: Anthony,[1] A.J.O., A.M.O., and A.A.O. In 2009, she turned over physical custody of the children to her brother, Reginald Elaster, and then legal custody in 2010.[2] Reginald and his partner, Sharon Spears, cared for the children in their home for about two years, after which he allowed them to live with Elaster and her partner at the time, Frank Anderson.[3]

In June 2019, Elaster and co-defendant Billy Miller were accused of sexual assault by her daughter, A.M.O. In August of that year, Elaster and Miller were charged as co-defendants based on those allegations. The State presented two counts of rape of a child in the first degree (ROC1) with special allegations of domestic violence (DV) against Elaster and

two counts of ROC1 against Miller, one of which carried the DV allegation. Nearly two years later, the State filed a first amended information that accused both Elaster and Miller of four counts of ROC1, removed the DV allegation against Miller and included it to each of the counts as to Elaster. In August 2022, shortly before trial, the State filed a second amended information that charged Elaster with child molestation in the first degree (Count 1) and three counts of ROC1 (Counts 2-4), all of which carried the DV special allegation. The State charged Miller with four counts of ROC1.

Elaster and Miller were tried jointly and engaged in extensive pretrial litigation on the admissibility of certain evidence. The jury convicted them both as charged. It also found by special verdict that Counts 1-4 were crimes of domestic violence. The court imposed indeterminate sentences of 198 months to life in prison on Count 1 and 300 months to life in prison each on Counts 2 through 4, to be served concurrently, followed by community custody.

Elaster timely appealed. [4]

ANALYSIS

I. Claim of Juror Bias

***2** On October 6, 2022, the court swore in the jurors and instructed them on their duties, emphasizing the importance of relying solely on the evidence presented during the trial. Before the jury was called into the courtroom on November 2, juror 11 approached the bailiff with a concern regarding what the bailiff later characterized as the truthfulness of a witness' statements under oath.

> BAILIFF: When I was leading them back, she asked if she could talk to me aside from the rest of the jurors, so she waited until everyone went into the jury room. Whenever that happens, I always just warn them and say "You have to be very careful about what you tell me. If it's something related to the trial, I can't really go into anything about that. But we also have to kind of out [sic] if there's an issue." She indicated it had to do with a witness and mentioned something about being truthful under oath. And at that point, I said, "I really can't talk to you about that any further, but I will let the court know that there's a concern and an issue." And then she asked if she would have to come out individually and I said "I don't know, but I will let the court know that there's a concern."

With the parties present, the judge had juror 11 brought to the courtroom and explained that the court needed to know if anything external to the trial had occurred regarding that witness. The juror replied that it involved Elaster's son, A.J.O.:

> JUROR 11: The witness [A.J.O.] in the parking garage, I had noticed he had driven himself yesterday, driven off in a car because I was kind of parked in view where I saw him pull up. And when we came to the courtroom, when he swore in and there was a question asked on his driver's license or something, he said he wasn't driving. I'm not sure if this is an important piece of information. I just thought it, I thought that I should bring that to your attention.

COURT: Okay. So just so I'm clear—did you even know who he was when he drove up?

JUROR 11: No, I did not.

COURT: But when he took the stand, you recognized him as someone you saw driving a car?

JUROR 11: In the garage, yes, before we came back in.

COURT: Does anyone want a sidebar on this?

Following the sidebar, juror 11 was excused from the courtroom so that the parties could present argument on the matter. Counsel for each defendant separately called for juror 11 to be excused because they claimed A.J.O.'s testimony and credibility were central to the defense for each case. The court was hesitant to characterize juror 11's behavior as misconduct and proposed instead to instruct juror 11 to disregard what she had seen in the parking garage. The State agreed with the court that an instruction to disregard would be adequate. The court emphasized its conclusion that juror 11's actions did not amount to misconduct, such that a mistrial was warranted, and given the dwindling number of jurors, the court was concerned that excusing juror 11 would be "a de facto grant of mistrial." The court, however, agreed that if juror 11 indicated she would not be able to follow its instructions to disregard the extraneous information, another solution would be required. Juror 11 was called back into the courtroom and questioned by the judge.

COURT: Thank you for coming back in. Have a seat. So I want to again thank you. You did exactly, you followed my instructions, and you did exactly the right thing bringing this to our attention.

***3** I'm going to instruct you now that you have to disregard anything you saw outside the courtroom with respect to this witness and what you reported to me. You're not to consider that in evaluating the evidence in this case, evaluating any particular testimony, and you're not to discuss it with the jurors. So that's my— I'm ordering you to do that, but now I need to ask you, can you follow that instruction?

JUROR 11: Yes, Your Honor.

COURT: Okay. And so you understand this has to be not considered by you at all in making your decision in this case?

JUROR 11: Yes, Your Honor.

COURT: Alright. Thank you. I'm going to send you back.

JUROR 11: Okay.

COURT: And by the way, let me—hold on. Let me bring the juror back. I apologize. I know my bailiff already told you this and you've been very good. Obviously, you're not to discuss this with anyone.

JUROR 11: Yes, Your Honor.

COURT: Thank you.

After this instruction by the court, juror 11 was sent back with the others and the trial proceeded.

Elaster asserts that the events around juror 11's communication with the bailiff to alert the court that A.J.O. was not truthful under oath demonstrated bias and the court erred when it denied the defense motions to dismiss her. The defense contends that juror 11 witnessed events involving A.J.O. after he testified that contradicted his testimony and she was therefore aware of facts outside of trial that impacted her ability to fairly decide the case. The defense further avers that curative instructions were insufficient to cure the prejudice and we must apply structural error analysis as set out in *State v. Winborne*, 4 Wn. App. 2d 147, 420 P.3d 707 (2018). The defense reliance on *Winborne* is misplaced. The State argues that the trial court acted within its discretion because it assessed juror 11 and found that she was able to deliberate impartially. The State further contends that this error is reviewed under the harmless error standard. Based on the record and controlling law, we agree with the State as to the standard of review.

In *Winborne*, where the juror witnessed the alleged criminal behavior, Division Three of this court applied structural error analysis, not harmless error. *Id.* at 170. Structural error analysis applies when the error "impact[ed] the very trial process itself" and "prevent[ed] a criminal trial from reliably serving its function as a vehicle for determination of guilt or innocence, and no criminal punishment might be regarded as fundamentally fair." *Id.* at 171. The panel in *Winborne* also noted that Winborne would not be able to cross-examine the juror who saw the alleged criminal act if they remained on the jury, and then relied on *State v. Stentz*[5] to conclude that because Winborne was deprived of his right to confront a witness to the crimes, structural error review was warranted. *Winborne,* 4 Wn. App. 2d at 170.

We consider the trial court's decision to retain a juror under the abuse of discretion standard. To determine whether an impaneled juror has demonstrated actual bias warranting dismissal, the trial judge " 'will act as both an observer and decision maker.' " *State v. Sassen Van Elsloo*, 191 Wn.2d 798, 806-07, 425 P.3d 807 (2018) (quoting *State v. Jorden*, 103 Wn. App. 221, 229, 11 P.3d 866 (2000)). In doing so, the trial judge must evaluate the credibility of the challenged juror. *Id.* " 'A [trial] judge with some experience in observing witnesses under oath becomes more or less experienced in character analysis, in drawing conclusions from the conduct of witnesses.' " *Id.* (alteration in original) (quoting *State v. Noltie*, 116 Wn.2d 831, 839, 809 P.2d 190 (1991)). Therefore, substantial deference is granted to the trial court's determination of whether a juror is biased to an extent that justifies dismissal. *Jorden*, 103 Wn. App. at 229.

***4** A defendant has a right to a fair and impartial jury under both the federal and state constitutions. *See State v. Guevara Diaz*, 11 Wn. App. 2d 843, 851, 456 P.3d 869, 874 (2020). "This right exists throughout the entire trial process and is safeguarded in part by statutes and rules that require the trial judge to dismiss biased jurors." *Sassen Van Elsloo*, 191 Wn.2d at 807; *see also* RCW 4.44.170; RCW 2.36.110; CrR 6.5. Bias can either be implied or actual. RCW 4.44.170. Actual bias

is defined as "the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2).

While it was not cited by any of the parties on appeal, the controlling case on this question is *Sassen Van Elsloo*. There, the court held that the "dismissal of an impaneled juror for bias requires the same findings as dismissal of a potential juror for bias—proof that the juror has formed a biased opinion and, as a result, cannot try the case impartially." 191 Wn.2d at 808. The Supreme Court adopted the definition of actual bias for application to impaneled jurors: "the challenging party must prove (1) that the impaneled juror has formed or expressed a biased opinion and (2) that 'from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.' " *Id.* at 810 (quoting RCW 4.44.190). A jury is also presumed to follow the court's instructions and this presumption will prevail until it is overcome by a contrary showing. *See State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001); *State v. Keend*, 140 Wn. App. 858, 868, 166 P.3d 1268 (2007).

Here, we conclude that the trial court did not err when it declined to dismiss the impaneled juror. While Elaster contends that juror 11 "was herself witness to events" and the trial court's failure to dismiss her constitutes structural error, the "events" that juror 11 witnessed were not related to the criminal behavior before the jury. *Winborne* is not sufficiently similar, so the result should not be the same. Elaster and Miller's rights to confront adverse witnesses were not implicated the way Winborne's was. The defense attempt to stretch the application of *Winborne* fails.

Juror 11 only witnessed an incident that *could* have suggested A.J.O. was not being truthful under oath. However, careful reading of both A.J.O.'s testimony and juror 11's characterization of the event in the parking garage suggests the matter was not as straightforward as portrayed in briefing from the appellants. During the State's cross-examination of A.J.O., the following exchange occurred:

> [State]: And you don't currently have a driver's license. Is that right?
>
> [A.J.O]: I'm getting my restricted permit right now.
>
> [State]: But if you need to go somewhere, people need to give you rides. Is that right?
>
> [A.J.O]: Yeah.

While A.J.O. admitted that he was in the process of applying for a driving permit, he did not affirmatively state that he never drove himself places. The State did not directly ask A.J.O. whether he ever drove a car, irrespective of whether he had a permit. While the bailiff did assert that juror 11 had "indicated [the issue] had to do with a witness and mentioned something about being truthful under oath," juror 11 herself did not frame the issue that way when questioned by the court. After describing what she had seen, she simply said, "I'm not sure if this is an important piece of information.

I just thought it, I thought that I should bring that to your attention." The court consulted with counsel at sidebar and, after juror 11 was no longer in the courtroom, heard from the parties before recalling juror 11 for further inquiry and to give curative instructions. The judge then took further argument from the parties before ruling and ultimately noted,

> ***5** She was quite adamant —because that may not have come through—that she could disregard this information. She's followed the court's instructions. Frankly, she brought this to the court's attention. Some jurors may not have, to be honest. I'm convinced based on her demeanor and how quickly she answered that she will put this aside.

As such, the court's ruling to deny the motions of counsel for both defendants to dismiss juror 11 was based in part on this express finding that she was credible.

The defense argues that the prejudice here stems from the fact that juror 11 observed an occurrence that caused her to believe that A.J.O. was not a credible witness and the manner by which the issue was framed when alerting the bailiff is evidence of that prejudice. The State misses the crux of the defense assignment of error by focusing on the fact that a misdemeanor driving offense is not an impeachable offense, particularly where there is no conviction. But that is not what appellants assert here. Their contention is that despite the fact that the record is clear A.J.O. never stated in his testimony that he never drove a car, juror 11 interpreted or recalled that testimony in such a way that she believed that she had caught him lying under oath and felt it was a sufficiently significant issue such that she needed to alert the judge that a witness may have lied on the stand.

While this court must presume that jurors follow the instructions of the court, the defense contends that the mere fact that juror 11 notified the court rebuts that presumption. This is incorrect. Juror 11's action demonstrates that she adhered to the court's initial jury instructions that specifically directed the jurors to notify the bailiff if they were uncertain about outside information. Among the instructions provided to the jury at the start of trial, the judge expressly commanded the following with regard to outside information:

> It is your duty as a juror to decide the facts in this case based upon the evidence presented to you in this trial. Evidence is a legal term. It includes testimony of witnesses, documents, and physical objects.
>
> ....
>
> It's essential to a fair trial that everything you learn about this case comes to you in this courtroom and only this courtroom. You must not allow yourself to be exposed to outside information about this case.
>
> ....

> You need to keep your mind free of outside influences, so that your decision will be based entirely on the evidence presented during the trial, and on my instructions to you about the law.
>
> ....
>
> If you become aware that you or another juror has been exposed to outside information, please privately notify [the bailiff]. Don't discuss the matter with other jurors.

After a probing inquiry by the court, juror 11 received additional curative instructions from the judge and unequivocally stated that she could follow them. She affirmed that she would not consider her observations of A.J.O. driving the car in her assessment of the testimony, or the case broadly, and repeatedly committed to following the judge's instruction on the matter. The court found her to be credible throughout her entire examination on the issue. However, the defense asserts that the fact that juror 11 appeared to have already made a conclusion about A.J.O.'s truthfulness, based on consideration of information obtained outside the courtroom, establishes that she did not follow the court's preliminary instructions on that precise topic from the start of trial.

***6** The record, however, does not demonstrate that juror 11 failed to follow either the trial court's general jury instructions or specific curative instructions. The question then becomes whether the inquiry and rehabilitation by the court was sufficient under the circumstances, particularly in light of its finding that juror 11 was credible on this subject. Under *Sassen Van Elsloo*, the required standard dismissal of a juror is that the juror expressed or formed a biased opinion and cannot try the issue impartially. 191 Wn.2d at 808. Here, the defense has not established that juror 11 could not have disregarded her biased opinion about A.J.O.'s truthfulness and try the case impartially. In briefing, all parties argue at length about the significance of A.J.O.'s testimony and its potential effect on juror 11. Elaster and Miller imply that the court retained juror 11 primarily to avoid having to declare a mistrial due to insufficient jurors, suggesting that dismissing juror 11 was otherwise necessary. The record does show that the judge had concerns about the ability to proceed because juror 9 had been excused for a medical reason, leaving the court without any alternate jurors. However, the trial judge has discretion in deciding whether to retain or dismiss a juror and, here, did not necessarily have to decide between retaining juror 11 so that the trial could proceed and A.J.O.'s impact as an important defense witness.

In *Sassen Van Elsloo*, the court held that "[t]he importance of a witness alone is not a proper basis on which to dismiss an impaneled juror ... if the record does not indicate that the juror displayed actual bias." *Id.* at 810. A.J.O. was indeed a significant defense witness who testified that he slept in the living room and did not observe Miller entering the home during the night, or entering the bedroom with Elaster and A.M.O. where she alleged the abuse occurred. Nonetheless, Elaster and Miller do not demonstrate that juror 11 displayed actual bias that affected her views on the merits of A.J.O.'s testimony, particularly after being directly instructed to do just that. A mere

possibility of bias is not enough. *Id.* at 810. It is reasonable in light of the court's finding on her credibility to presume that juror 11's initial concern about the truthfulness of A.J.O.'s testimony did not make a difference in her determination of his credibility as a witness after the court told her plainly, "You're not to consider this in evaluating the evidence in this case, evaluating any particular testimony, and you're not to discuss it with the jurors. So that's my—I'm ordering you to do that, but now I need to ask you, can you follow that instruction?" After juror 11 responded, "Yes, Your Honor," the court continued, "Okay. And so you understand this has to be not considered by you at all in making your decision in this case?" Juror 11 again responded, "Yes, Your Honor." Further, while A.J.O. was an important defense witness, he acknowledged during his testimony that it was possible he may not have noticed people entering the house when he was asleep and another witness testified that she did enter and exit the house when A.J.O. was sleeping in the living room which suggested it was possible for Miller to have done so as well. As such, there was evidence independent of juror 11's observation of A.J.O. driving that called his credibility into question regarding his observations in the home. The trial court did not abuse its discretion when it denied the defense motions to dismiss juror 11.

II. Right To Present a Defense

Elaster assigns error to the trial court's ruling to exclude evidence that A.M.O. had made allegations against other people besides Miller and Elaster and other children with whom A.M.O. resided also made allegations of abuse against others. She specifically claims that the exclusion of this evidence violated her right to present a defense as it showed that Spears had created "an environment of constant disclosure" of purported sexual abuse. We apply a two-part analysis to determine if a defendant's right to present a defense has been violated. *State v. Jennings*, 199 Wn.2d 53, 58, 502 P.3d 1255 (2022). First, any evidentiary ruling is analyzed for abuse of discretion. *State v. Arndt*, 194 Wn.2d 784, 797-98, 453 P.3d 696 (2019). " 'A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons.' " *State v. Bartch*, 28 Wn. App. 2d 564, 590-91, 537 P.3d 1091 (2023) (quoting *State v. Lord*, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007)), *review denied*, 2 Wn.3d 1026 (2024). If the reviewing court concludes that the evidentiary ruling was not an abuse of discretion, the analysis proceeds to the second step: de novo review to determine whether the defendant's rights under the Sixth Amendment to the United States Constitution were violated. *Jennings*, 199 Wn.2d at 58; *see also* *Arndt*, 194 Wn.2d at 797-814. Here, the trial court considered proffered defense evidence under ER 403 which "allow[s] exclusion of relevant evidence if, inter alia, 'its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue or misleading the jury.' " *State v. Orn*, 197 Wn.2d 343, 353, 482 P.3d 913 (2021) (quoting ER 403).

***7** A.M.O. and her siblings had resided with their maternal uncle Reginald and Spears for a few years before the abuse at issue here occurred. Elaster's three younger children,

A.J.O, A.M.O., and A.A.O., returned to Spears' home in June 2018 after living with Elaster at Anderson's home. Spears had cared for A.M.O. and her siblings, along with her own children and others, when they were in her home. A.M.O. disclosed the abuse to Spears, who then informed Reginald.

Elaster avers that evidence of A.M.O.'s allegations of abuse against a number of other people, and Spears' concerns after a report of a "bad dream" by another child in Spears' care, was essential to the defense theory that Spears created "an environment of constant disclosure" in her home. The defense sought to introduce evidence of additional allegations of sexual abuse made by A.M.O. that named a maternal "uncle" Clifton Elaster,[6] two men who had lived on the same property as A.M.O. and Elaster, Brian Moses and Curtis Carbaugh, and "Frank,"[7] a friend of A.M.O.'s older brother, Anthony. The defense also sought to present a report from another child in Spears' care, M.R., that "a monster used to come and touch her at night" as an example of disclosure that Spears interpreted as sexual abuse. Defense counsel for both Miller and Elaster offered this evidence to "round out how this child's story grew and evolved and shed light on her state of mind while in the custody of Reginald and Spears." The defense intended to have Carbaugh and Moses testify and anticipated that they would each deny the allegations.

The trial court ruled that the evidence of these other allegations was inadmissible. First, ruling on the admission of the allegations against Clifton and the teenager Frank, the trial court said,

> To the extent when one can try to make an argument that they are admissible somehow to show the circumstances of where [A.M.O.] was living, I have to apply a 403 and say, you know, at some point there is —the probative value of this evidence where it can't even be—there is no evidence they're false is relatively low. And the injecting additional claims, I think, [t]he [c]ourts have recognized about sexual assault, alleged sexual assault on the victim. The probative value is relatively low. And the prejudice in getting into these other areas is high.

Then, ruling on the admissibility of the allegations against Carbaugh and Moses, the court emphasized that there was little probative value in having two uncharged alleged perpetrators of sexual assault come and testify that A.M.O.'s accusations against them were false, because all they could offer was testimony as to the falsity of those allegations without any corroborating evidence. The court further noted that "the probative value of this evidence is low and the prejudicial impact is relatively high, in terms of both confusing the juror, extending the trial into issues that aren't directly relevant".

In making this determination, the court referred to the reasoning set out in *State v. Lee*, 188 Wn.2d 473, 396 P.3d 316 (2017). There, our Supreme Court ruled that the trial court did not abuse its discretion when it prohibited Lee from questioning the victim about a prior accusation of rape that she later admitted was false. *Id.* at 486. Lee was allowed to cross-examine the victim about a false report she had made to police but was barred from mentioning that it was a rape allegation. *Id.* at 487. Further, the Supreme Court noted that the victim's "prior false rape accusation had minimal probative value because it did not directly relate to an issue in the case. Rather than demonstrate a specific bias or motive to lie, which would be highly probative, the evidence invited the jury to infer that [the victim] is lying because she has lied in the past." *Id.* at 488.

***8** The trial court here also referred to *State v. Demos*, 94 Wn.2d 733, 619 P.2d 968 (1980). In *Demos*, the defendant challenged the decision of the trial court to exclude "two prior rape complaints by the victim, reports which the defendant characterize[d] as arguably false." *Id.* at 733. The trial court in *Demos* grounded this ruling in the "rape shield law"[8] and its finding that "apart from the statute, the remoteness of time and the prejudicial effect of this evidence outweighed any logical connection to her credibility about the current charge." *Id.* at 736. Our Supreme Court upheld the exclusion, explaining that the "trial court did not abuse its discretion in denying admission of evidence which had no tendency to prove anything in the dispute and which would have been highly prejudicial." *Id.* at 737.

Here, the trial court was well within its discretion when it excluded evidence relating to other allegations made by A.M.O. By their own admission, the defense attorneys sought admission of this evidence as a gambit to imply that Spears created what Elaster's trial counsel characterized as "an environment of constant disclosure." The decision to exclude the other allegations was entirely reasonable because, as in *Lee* and *Demos,* these particular allegations against people other than the co-defendants would have been highly prejudicial, of minimal probative value, and risked confusing the issue; all proper grounds for exclusion under ER 403. As the case against Elaster and Miller depended heavily on testimony from the victim herself, the defense sought the admission of this evidence in order to more clearly illustrate the circumstances in which A.M.O.'s allegations arose. However, it had limited probative value for that proposition and the trial court did not err when it excluded it.

Having determined that the initial evidentiary ruling was not an abuse of discretion, we move to the second step of the *Jennings* test. We consider violations of a defendant's constitutional right to present a defense de novo. *Jennings*, 199 Wn.2d at 58; *Bartch*, 28 Wn. App. 2d at 590. Here, Elaster and Miller's rights to present a defense were not unduly burdened because they were able to develop the desired theme during their cross-examination of Spears. Elaster states that they sought to admit the evidence of other allegations to paint a picture of the Spears household environment as one that "produced accusations from A.M.O.

against a large number of men" and turned the story of another child in the home, M.R., about a "monster" into another disclosure of sexual abuse.

During defense cross-examination of Spears, counsel for Miller asked a number of questions to develop the shared defense theory that Spears was soliciting allegations from the children in her care. For example, Spears testified that after she had questioned A.M.O. about an allegedly graphic story A.M.O. had written, Spears was not satisfied with answer she received from the child. Spears also testified that she took a phone away from A.A.O. for communicating with someone "older than her age at that time." Spears testified she would routinely check in with the children to see how they were fairing; the defense's line of questioning seems intended to suggest that Spears could not leave an issue alone when she had a feeling something was wrong. Counsel also questioned Spears about the "birds and the bees" discussion she had with all the children. Defense inquired about Spears' household rule that women should bend at the knees, rather than bending over at the waist, and concluded with questions about Spears feeling that there was inappropriate stuff happening between the children. The record demonstrates that the defense had ample opportunity to develop its theme regarding Spears' alleged preoccupations. Elaster's right to present a defense was not violated.

III. Ineffective Assistance of Counsel

***9** Elaster next argues that her trial counsel rendered constitutionally ineffective assistance by failing to object to what she characterizes as the State's generic tailoring assertion when cross-examining Miller. We disagree.

The Sixth Amendment and article I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. We review ineffective assistance of counsel (IAC) claims de novo. *State v. Jones*, 183 Wn.2d 327, 338-39, 352 P.3d 776 (2015).

The United States Supreme Court set out a two-pronged test for evaluating whether a defendant had constitutionally sufficient representation in *Strickland v. Washington*. 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *see also* *State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2001). Under *Strickland*, the defendant must show both deficient performance and resulting prejudice to prevail on an ineffective assistance claim. 466 U.S. at 687. In order to prevail on an IAC claim based on failure to object as presented here, the defendant must demonstrate that the objection would have been sustained. *In re Det. of Monroe*, 198 Wn. App. 196, 205, 392 P.3d 1088 (2017). Because Elaster's IAC challenge is premised on a claim of failure to object to a generic tailoring assertion by the State, we first consider whether such an allegation was present.

A. State's Assertion of Tailoring

"The right to 'appear and defend in person,' to testify on [their] own behalf, and to confront witnesses against [them]" are guaranteed by the Sixth Amendment and article I, section 22. *State v. Berube*, 171 Wn. App. 103,

114, 286 P.3d 402 (2012) (quoting WASH. CONST. art. I, § 22). We review alleged constitutional violations de novo. *State v. Wallin*, 166 Wn. App. 364, 367, 269 P.3d 1072 (2012). A claim of "tailoring" suggests that the defendant adjusted their testimony to match the evidence they heard during trial. *State v. Carte*, 27 Wn. App. 2d 861, 871, 534 P.3d 378 (2023), *review denied*, 2 Wn.3d 1017 (2024). Tailoring arguments can be "specific" or "generic." *Id.*; *see also Berube*, 171 Wn. App. at 115-17. The tailoring arguments are "specific" if "derived from the defendant's actual testimony" and "generic" "if based solely on the defendant's presence at the proceeding and not based on the defendant's direct examination or cross-examination." *Carte*, 27 Wn. App. 2d at 871.

In *Carte*, this court noted that a majority of the U.S. Supreme Court held in *Portuondo v. Agard,* 529 U.S. 61, 73, 120 S. Ct. 1119, 146 L.Ed. 2d 47 (2000) that tailoring arguments do not violate the Sixth Amendment right to be present at trial and confront witnesses, but Justice Ginsburg dissented and argued that tailoring allegations should only be raised during cross-examination, rather than in closing arguments, in order to avoid constitutional violation. *Id.* at 871-72; *see also State v. Holmes*, 31 Wn. App. 2d 269, 289, 548 P.3d 570, *review denied*, 3 Wn.3d 1024 (2024). *Carte* further explained that, in *State v. Martin,*[9] our state Supreme Court expressly adopted Justice Ginsburg's dissent in *Portuondo* and held that a specific tailoring argument is appropriate during cross-examination, but " 'a comment in closing argument "tied only to the defendant's presence in the courtroom and not to his actual testimony" ' violates the right to be present at the trial and confront witnesses." *Carte*, 27 Wn. App. 2d at 872 (quoting *Martin*, 171 Wn.2d at 535 (quoting *Portuondo*, 529 U.S. at 77 (Ginsburg, J., dissenting))).

***10** Here, Elaster argues that her attorney was ineffective when he failed to object to the State's generic tailoring claim during its cross-examination of Miller. On appeal, Elaster cites *Carte*, but frames the issue as one of generic tailoring. Review of the actual interaction at trial, through the framework of the definitions set out in case law, demonstrates that this is incorrect. The following exchange occurred during Miller's cross-examination:

> [State]: You've had a lot of time to think about what you're going to say today, haven't you, Mr. Miller?
>
> [Miller]: Yeah. I'm telling you the truth.
>
> [State]: And you've had a lot of time to look over the police reports like you talked about earlier?
>
> [Miller]: The discovery when it was given to me, yes.
>
> [State]: And you've had a lot of time to look back at your own statements, haven't you?
>
> [Miller]: Some of them.
>
> [State]: When you were interviewed by Detective Rossmeier of the Kent Police Department, he asked you were you and [Elaster] together in a bedroom with A.M.O, and you told him no. Isn't that right?

[Miller]: I can't recall exactly what my testimony was.

[Elaster's counsel]: Which page and line?

[State]: The page number is 32, and the lines are 6 through 8. If I could have this marked.

CLERK: Exhibit 37 is marked.

[State]: Mr. Miller, I'm handing you what's been marked as State's Exhibit 37 entitled "Transcript of Billy Miller Interview." I'd ask that you look at page 32 and read to yourself lines 6 through 8.

[Miller]: May I please get my glasses?

[State]: Yes.

[Miller]: Page 32?

[State]: Yes. Lines 6 through 8. Does that refresh your memory about what Detective Rossmeier asked you and what your answer was?

[Miller]: Yes.

[State]: What did he ask you?

[Miller]: He asked me if me, [Elaster], and [A.M.O.] was ever in bed together.

[State]: Alone in a bedroom together. Is that right?

[Miller]: Yes.

[State]: And what was your answer?

[Miller]: No.

The State's tailoring argument stems from Miller's statement to the detective and directly relates to the discrepancies between that earlier narrative and his trial testimony, making it *specific* tailoring rather than generic. Miller opened the door to the State's line of questioning on tailoring when he admitted that he reviewed the police report containing his prior statement to Rossmeier. During direct examination, Miller twice volunteered that he had read the police reports during the pendency of the case:

[Stimmel, Miller's defense counsel]: Do you know—you've heard about this story that [A.M.O.] wrote, correct?

[Miller]: I've heard about it. I've never seen it.

[Stimmel]: This story that—is that the story that started this case as far as you know?

[Miller]: From what I've read in the police reports and everything, that story is what caused everything.

[State]: Your Honor, objection.

COURT: Sustained.

[Stimmel]: But you've never seen this story?

[Miller]: No.

[Stimmel]: Do you know anybody who's seen it except [A.M.O.]?

[Miller]: From what I was told in the police report and what I know from this case, there's been five people that know about this story.

> [State]: Your Honor, objection, hearsay. Move to strike.
>
> COURT: Sustained. I'll strike the last statement.

Unsolicited, Miller included in his answers during direct examination references to evidence he learned about through his review of the discovery prior to trial. The prosecutor's questioning about this, and insinuation that Miller had tailored his testimony based on the discovery he had read, is consistent with the rule articulated in *Martin* and relied upon in *Carte*. As Elaster pointed out in her opening brief, the State did not present any physical evidence in support of the charges it brought, and the jury's verdicts hinged on the credibility of both Miller and Elaster. As such, it was reasonable and fair for the prosecutor to ask questions that would help the jury to understand whether Miller was honestly recounting what happened or had tailored his testimony at trial.

B. Failure To Object

***11** Again, to demonstrate IAC based on a failure to object, a defendant must show that the objection would have been sustained in order to meet the prejudice standard under *Strickland*. *See Monroe*, 198 Wn. App. at 205; *State v. Fortun-Cebada*, 158 Wn. App. 158, 172, 241 P.3d 800 (2010). Given the facts of Miller's testimony, it was reasonable for the prosecution to ask questions designed to clarify for the jury whether Miller was truthful and the specific tailoring assertion here was proper under *Martin*. Accordingly, Elaster is unable to establish that any objection by her attorney to the State's tailoring argument against Miller would have been sustained. Elaster's trial counsel was not deficient for failing to object to a permissible claim of tailoring. Under *Strickland*, both deficient performance and prejudice must be proven, and without one, the ineffective assistance challenge fails. 466 U.S. at 687. Accordingly, Elaster does not carry her burden on her claim of IAC for failure to object.

IV. Community Custody Conditions

Next, Elaster challenges two community custody conditions imposed by the trial court and set out in appendix H to her judgment and sentence (J&S) as one of several "special conditions" for sex offenses: condition 5, which restricts dating relationships and requires her to disclose her status as a sex offender to potential intimate partners, and condition 8, which requires she consent to random searches by the Department of Corrections (DOC). The State asserts that condition 5 is crime-related and not unconstitutional and that condition 8 is not yet ripe for review. We agree with the State on both points.

A. Condition 5

Elaster contends that the requirement to disclose her sex offender status prior to any sexual contact with others is not crime-related and violates her constitutional right to free speech, which includes the right to refrain from speaking. We disagree.

Condition 5 reads as follows:

> Inform the supervising [community custody officer]

> 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.

Both Divisions One and Three of this court have held in several published opinions that an identical condition was both crime-related and constitutional. *See* *State v. Lee*, 12 Wn. App. 2d 378, 402, 460 P.3d 701 (2020); *State v. Gantt*, 29 Wn. App. 2d 427, 456-57, 540 P.3d 845, *review denied*, 3 Wn.3d 1002 (2024); *In re Pers. Restraint of Sickels*, 14 Wn. App. 2d 51, 60-61, 469 P.3d 322 (2020); *State v. Autrey*, 136 Wn. App. 460, 468, 150 P.3d 580 (2006). In *Lee*, this court noted that the "right not to speak is protected both by the First Amendment to the United States Constitution and by article I, section 5 of the Washington Constitution. However, '[a]n offender's usual constitutional rights during community placement are subject to SRA[10]-authorized infringements.' " 12 Wn. App. 2d at 401-02 (*quoting* *State v. Hearn*, 131 Wn. App. 601, 607, 128 P.3d 139 (2006)). The panel in *Sickels* concluded that only the third sentence of the challenged condition was subject to the "crime-relatedness" standard under RCW 9.94A.703(3)(f), and further held that it is reasonably related to the safety of the community and narrowly tailored to prevent future harm. 14 Wn. App. 2d at 60-61.

Elaster's freedom is restricted under community placement as it is during incarceration. *See* *State v. Ross*, 129 Wn.2d 279, 287, 916 P.2d 405 (1996). This condition has been repeatedly examined in response to similar arguments and held to be constitutional. We reject Elaster's challenges to condition 5.

B. Condition 8

Elaster also brings a preenforcement challenge to another community custody condition, but it is not yet ripe for appellate review. Condition 8 states as follows:

> ***12** 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.

Our Supreme Court considered whether a similar community custody condition was ripe for review in *State v. Cates*. 183 Wn.2d 531, 533-34, 354 P.3d 832 (2015) ("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." (Alteration in original.)). It relied on a number of cases defining an issue as ripe for review " 'if the issues raised

are primarily legal, do not require further factual development, and the challenged action is final.' " *Id.* at 534 (internal quotation marks omitted) (quoting *State v. Sanchez Valencia*, 169 Wn.2d 782, 786, 239 P.3d 1059 (2010). In rejecting Cates' challenge as not yet ripe, the court explained that "[s]ome future misapplication of the community custody condition might violate article I, section 7 [of our state constitution], but that 'depends on the particular circumstances of the attempted enforcement.' Further factual development is therefore needed—the State must attempt to enforce the condition by requesting and conducting a home visit after [the defendant] is released from total confinement." *Id.* at 535 (citation omitted) (quoting *Sanchez Valencia*, 169 Wn.2d at 789).

Elaster cites two unpublished cases, *State v. Franck*[11] and *State v. Daniels,*[12] in support of her position on this issue, but avoids *Cates* entirely. However, neither of these cases is controlling on the issue of ripeness. Further, this court recently rejected *Franck* as authority on this same sort of challenge in *Holmes.* 31 Wn. App. 2d at 293 ("*Franck* is not controlling or persuasive on the issue of ripeness."). More critically, Elaster fails to explain why this court should follow unpublished intermediate appellate opinions over controlling case law from our Supreme Court. We follow *Cates* and conclude that this condition is not ripe for review.

V. Legal Financial Obligations

Finally, Elaster asserts and the State concedes that this court should remand for the trial court to strike both the victim penalty assessment and DNA collection fee from her J&S based on its finding of indigency at sentencing and amendments to the relevant statutes that became effective while her appeal was pending. We accept the State's concession and remand for correction of the J&S to reflect the current law regarding the imposition of legal financial obligations on indigent defendants.

Affirmed in part, reversed in part, and remanded for the trial court to strike the legal financial obligations.

WE CONCUR:

Bowman, J

Feldman, J.

All Citations

Not Reported in Pac. Rptr., 2025 WL 394580

Footnotes

1 Anthony was an adult by the time of trial. However, this opinion uses initials to refer to the minor victim and witnesses.

2 Because Reginald and the defendant share the same last name, we use his first name for clarity. No disrespect is intended.

3 Reginald and Spears testified to slightly differing timeframes that overlapped at approximately two years.

4 Elaster's co-defendant Miller also appealed, No. 86870-4-I, and the two appeals were administratively linked at this court.

5 *State v. Stentz*, 30 Wash. 134, 140-41, 70 P. 241 (1902), *abrogated on other grounds by* *State v. Fire*, 145 Wn.2d 152, 34 P.3d 1218 (2001).

6 As with Reginald, we use Clifton's first name for clarity.

7 This "Frank" is a different person than Frank Anderson Jr., Elaster's former partner, and Frank Anderson Sr., the owner of the home where the charged incidents of abuse occurred.

8 RCW 9A.44.020

9 171 Wn.2d 521, 252 P.3d 872 (2011).

10 Sentencing Reform Act of 1981. Ch. 9.94A RCW.

11 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.

12 No. 54094-1-II (Wash. Ct. App. Aug. 3, 2021) (unpublished), https://www.courts.wa.gov/ opinions/pdf/D2%2054094-1-II %20Unpublished%20Opinion.pdf, *review denied*, 198 Wn.2d 1035 (2022).

End of Document

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. 84870-4-I**, 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 or residence address as listed on ACORDS:

☒ respondent Gavriel Jacobs, DPA
gavriel.jacobs@kingcounty.gov
PAOAppellateUnitMail@kingcounty.gov
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: April 8, 2025

WASHINGTON APPELLATE PROJECT

April 08, 2025 - 4:25 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	84870-4
Appellate Court Case Title:	State of Washington, Respondent v. Billy Clyde Miller, Appellant

The following documents have been uploaded:

- 848704_Motion_20250408162443D1440149_3907.pdf
  This File Contains:
  Motion 1 - Waive - Page Limitation
  The Original File Name was washapp.040825-13.pdf
- 848704_Petition_for_Review_20250408162443D1440149_4765.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp.040825-12.pdf

A copy of the uploaded files will be sent to:

- gavriel.jacobs@kingcounty.gov
- paoappellateunitmail@kingcounty.gov
- wapofficemai@washapp.org

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Gregory Charles Link - Email: greg@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20250408162443D1440149