No. 104091-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JASON DOMINGUEZ,

Petitioner.

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# ANSWER TO PETITION FOR REVIEW

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## I. INTRODUCTION

The defendant was charged with rape of a child in the second degree, rape of a child in the third degree, and communicating with a child for immoral purposes as a result of his conduct toward H.S. over electronic communications and in person. He was convicted as charged.

On appeal, Dominguez alleged he was entitled to reversal of his convictions on five grounds. He further argued several of his community custody conditions were unconstitutional. The Court of Appeals affirmed his convictions and remanded for revision of two community custody conditions. *State v. Dominguez*, 2025 WL 896078, No. 83516-5-I (March 24, 2025).

## II. STATEMENT OF THE CASE

The State agrees with the facts as laid out in the Court of Appeals' opinion. Additional facts are included

regarding the evidence admitted as "lustful disposition" evidence.

At trial, the court admitted several types of messages between H.S. and the defendant. In the fall of 2018, H.S.'s mother found Facebook messages between H.S. and the defendant on a shared electronic device. RP 656. She took photographs of some of the messages with her phone. RP 656–57; State's Exhibits 2–16. She did not confront H.S. about them, only asking generally if anything inappropriate was happening with the defendant, which H.S. denied. RP 657–58.

The photographs showed that, on September 22, 2017,[1] before H.S. and the defendant had engaged in intercourse, the defendant sent H.S. a GIF[2] depicting two women and a man having sex. State's Exhibit 2; RP 443–

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[1] Some of the messages show timestamps and others do not. This message includes a timestamp.

[2] A GIF is a short clip of a moving image. The image is still in the State's exhibit.

44. H.S. responded, "Wtf" with a crying laughing emoji. *Id.* The defendant wrote, "I typed in red fox in the gif and that popped up" and then, "But yeah will you do that for me." *Id.* H.S. responded, "Umm no," and the defendant said, "Why no." H.S. responded, "Because that's gross" with another crying laughing emoji. *Id.* The defendant responded, "It is not." Exhibit 4; RP 445. H.S. responded, "Yeah it is, dude, I'm only 13." *Id.* The conversation ended.

In a later conversation, after H.S. had moved out of Gold Bar, the defendant asked H.S. what she was doing and she said, "Laying down." Exhibit 5; RP 448. The defendant responded, "Without me?" and H.S. replied, "I miss falling asleep on you on the couch while you're playing your game." *Id.* The defendant responded, "Me too." *Id.*

In another conversation, the defendant said he missed H.S. and said, "Aww, I miss your hugs." State's Exhibit 6; RP 449–50. H.S. was upset because she was

not able to attend Disney on Ice with the defendant and his family. *Id.* The defendant said, "I wish you could[.] Just so I could hold you. You home?" and H.S. responded that she was home and she missed the defendant. *Id.* The defendant wrote, "I need to hold you and kiss you." State's Exhibit 7; RP 450.

H.S. testified she and the defendant said they loved and missed each other often. RP 451. In one exchange, the defendant said, "We all miss you, Mine is a little more." State's Exhibit 8; RP 452. The defendant also said, "Just come back and be mine." *Id.*

H.S. visited Gold Bar while she lived in Oroville and would stay in the defendant's house during visits. RP 453. H.S. realized the sexual aspects of her relationship with the defendant were wrong or might be wrong once she moved away to Oroville, but did not end things with the defendant to avoid hurting his family. RP 474.

When discussing whether the defendant would drive to H.S. in Oroville, H.S. said, "You don't have to come. That's a long way to come just to stay for a day." State's Exhibit 9; RP 452–54. The defendant responded, "You're worth it though." *Id.* at 454.

In an exchange about H.S.'s boyfriend, the defendant said, "All while I pull you away and make out with you." State's Exhibit 13; RP 475. H.S. responded, "Umm, not around him" and the defendant replied, "I know, I wouldn't. You know that." *Id.* H.S. then said, "I'm still not trying to fuck either," and the defendant said, "Wasn't even bringing that up." *Id.*

H.S. explained at trial that she was attempting to tell the defendant she did not want to continue to have sex. RP 475–76. The conversation concluded with the defendant telling H.S., "Just know I love and miss you" and H.S. responding, "I love and miss you too." State's Exhibit 13; RP 476.

In another exchange, the defendant asked H.S., "But when were you pregnant" and H.S. said, "Never." State's Exhibit 16; RP 477. The defendant said, "Okay. I'm confused" and H.S. asked, "Why?". *Id.* The defendant responded, "By the way, you look beautiful." *Id.* H.S. said, "It's not mine. And thanks. I'm 100 percent not pregnant, I promise." *Id.* The defendant then said, "I was going to ask if it's mine." *Id.* H.S. responded, "Nah." *Id.* at 478.

The State also offered into evidence all of the Facebook messages on H.S.'s phone, which started in February 2019 and ended in October 2019. State's Exhibit 33. H.S. explained she had deleted all of the messages before February 2019 because she did not want anyone to find them. RP 501. She further explained she "thought it was wrong," how the defendant spoke to her. RP 502. H.S. deleted other messages because she did not want people to see the defendant "being sexual towards [her]." RP 558.

These undeleted messages contain numerous conversations between H.S. and the defendant, generally regarding what they were doing that day and discussing H.S.'s struggles on her sport's team and with her boyfriend. State's Exhibit 33. The defendant and H.S. repeatedly told each other they missed one another and some iteration of "I love you." State's Exhibit 33 at, *e.g.*, at 4, 10, 11, 37, 115, 134, 139, 140, 142, 155, 159, 162, 163, 168, 174. When H.S. expressed she could not sleep and then that she needed to get up, the defendant said, "I'm sorry love. Wish I could hold you." *Id.* at 4.

H.S. told the defendant she missed "having a father figure around to take care of me. One that actually cares about me." State's Exhibit 33 at 113. The defendant responded, in part, "I'm always here for you. I'll never not be." *Id.* at 112.

The messages also show a record of video chats. State's Exhibit 33 at, *e.g.*, 142, 193, 222, 223, 225. H.S.

testified the defendant asked to see her breasts or take off her shirt "a couple times" during these chats. RP 559–60.

In another conversation, the defendant asked H.S., "So what are you wearing other than that sweater?" and H.S. said, "Basketball shorts and one of [her boyfriend's] shirts." RP 470; State's Exhibit 11. The defendant said, "Sexy" and H.S. said, "I guess." *Id.* The defendant said, "Lol. You're sexy." *Id.* H.S. testified the defendant commented on her body "pretty often" and said, "a lot of the same thing." RP 470.

The State also relied on text messages extracted from H.S.'s phone. State's Exhibit 29. In a lengthy exchange on August 11, 2019, the two repeatedly said they loved and missed each other. State's Exhibit 29 at 54–55 ln. 365–389; RP 553–57. H.S. then said she was not going to speak to her boyfriend that night because she was going to sleep. State's Exhibit 29 at 55, ln. 393. The defendant responded, "Wish I could be inside you right now." *Id.* at ln.

394. H.S. explained at trial that she took the defendant's text to mean he wanted to have sex with her. RP 557.

The defendant sent H.S. one or two photographs of his erect penis through Snapchat, which were automatically deleted after H.S. viewed them. RP 597.

In motions in limine, the State moved to admit all of the "defendant's Facebook text messages and sexual misconduct towards H.S. to show lustful disposition and that communication was for immoral purposes." 9/27/21 RP 16; CP 233–42. Defense counsel stated he had no objection, and the court admitted the messages and conduct. 9/27/21 RP 16. Defense counsel requested and the court granted a limiting instruction on the evidence:

> Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of Facebook messages, Snapchat messages, text messages and the defendant's alleged past sexual behavior towards H.S., and may be considered by you only for the purpose of showing the defendant's lustful disposition toward H.S. Any discussion of the evidence during your deliberations must be consistent

> with this limitation. This limitation applies only to Counts 1, the allegation of Rape of a Child in the Second Degree, and Counts 2, the allegation of Rape of a Child in the Third Degree, and does not apply to Count 3, Communicating with a Minor for Immoral Purposes.

CP 112.

**A. DOMINGUEZ FAILS TO DEMONSTRATE THE COURT OF APPEALS' HOLDING THAT HE WAIVED ARGUMENT ON AN EVIDENTIARY RULING IS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DETERMINED BY THE SUPREME COURT.**

Dominguez challenges the Court of Appeals' application of RAP 2.5 as "harsh." Petition for Review (PFR) at 22. He argues the Court of Appeals "treated this waiver rule as mandatory instead of discretionary" despite the Court including in its opinion the correct statement of law: "the appellate court may refuse to review an error not raised before the trial court." *Dominguez*, 2025 WL 896078 at *7.

Dominguez does not explain why this issue is a matter of substantial public interest. This is a routine

discretionary application of RAP 2.5. The Court of Appeals determined, based on the circumstances, that it would not address the merits of an argument where defense counsel at trial failed to object to the admission of evidence. The court did not indicate it lacked discretion or misunderstood the law. On the contrary, Dominguez makes no challenge to the case law on which the Court of Appeals relied, all of which supports its decision.

Procedural rules may indeed be "harsh." However, the public has an interest in the criminal justice system not allowing litigation of issues on appeal. *See State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988) (holding RAP 2.5 "reflects a policy of encouraging the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.").

As explained in the State's Brief of Respondent in the Court of Appeals, the lack of objection in this case meant the reasons for admission of the evidence were explained briefly and summarily. Contrary to other cases involving lustful disposition evidence in which a trial court performs a lengthy analysis and rules evidence is admissible for multiple purposes, the trial court in this case only identified one purpose for admission: lustful disposition. The defendant now asks an appellate court to find prejudice from the jury instruction that defense counsel proposed regarding lustful disposition, as well as admission of evidence counsel agreed was admissible.

The Court of Appeals did not treat the rule as mandatory, indicating instead that, because the change in law was not constitutional, the Court "decline[d] to review" Dominguez's claim. This exercise of discretion is consistent with this Court's holdings in *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007) and *State v.*

*A.M.*, 194 Wn.2d 33, 39, 448 P.3d 35 (2019), both of which the Court of Appeals cited. Dominguez fails to acknowledge the Court of Appeals' *reasoning* for declining to review the merits of his claim, instead arguing that his circumstances warranted review. PFR at 23–24.

In short, the Court of Appeals acknowledged its discretion, applied case law appropriately, and exercised its discretion properly. Dominguez's belief that the Court of Appeals should have exercised its discretion differently is not grounds for review.

Furthermore, if the Court of Appeals had reached the merits, there would still be no grounds for reversal.

### B. THE ERRONEOUS ADMISSION WAS HARMLESS, AS THE EVIDENCE WAS ADMISSIBLE TO SHOW THE UNEQUAL POWER DYNAMICS AND MANIPULATION BETWEEN THE DEFENDANT AND THE VICTIM.

#### 1. While the term "lustful disposition" is now improper, that label encompasses proper purposes for admissibility under ER 404(b).

This Court held "that 'lustful disposition,' properly understood, is not a distinct purpose for admitting

evidence, but a label used to refer to permissible ER 404(b) purposes in the specific context of sex crimes." *State v. Crossguns*, 199 Wn.2d 282, 294, 505 P.3d 529 (2022). "Sometimes, evidence that might have been erroneously admitted under the 'lustful disposition' label is nevertheless admissible because it is necessary to demonstrate the dynamics between the offender and their victim or victims." *Id.*[3]

In that case, the Court found the trial court's reference to "lustful disposition" was harmless because the evidence was properly admitted for a purpose other than showing the defendant's lustful disposition toward the victim, his daughter. *Id.* at 295. The Court in *Crossguns* explained the basis for admitting evidence of this nature:

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[3] This is further clarified in the dissent, which argues, "The majority's theory of the proper purpose for which the challenged evidence was admitted is simply the lustful disposition doctrine by another name." *Crossguns*, 199 Wn.2d at 311(dissent).

> Evidence of such manipulation shows the planning and intent involved in building a relationship with the child victim in order to obtain the access and opportunity to commit the acts of sexual assault, as we see in this case, which stands in contradiction with the idea that "lust" is an overwhelming motivator and almost impervious to planning. Therefore, evidence of prior sexual misconduct may be relevant and admissible in cases such as this that involve sexual abuse in the context of a relationship with unequal power dynamics.

*Crossguns*, 199 Wn.2d at 295.

The Court also explained that the trial court properly admitted the evidence to show the victim's state of mind for her delayed disclosure. *Id.* at 296.

The dynamics in *Crossguns* are present here. The defendant, over time, introduced the idea of sex into his relationship with H.S. and then continued to send sexual messages to normalize their sexual relationship so that H.S. would not report his behavior as inappropriate. RP 846–47. Indeed, H.S. denied their relationship was inappropriate when asked by her mother and did not report the defendant's conduct until directly confronted by police.

The defense theory was based in large part on this denial and delayed disclosure. *See* RP 869.

Just as in *Crossguns*, the evidence of these messages and conduct demonstrated the defendant's planning and preparation, showed his intent, and was relevant to explaining the victim's delayed disclosure. *See Crossguns* 199 Wn.2d at 296. As the Court explained in that case, "despite the broad language this court has occasionally used to describe 'lustful disposition' evidence, the underlying analysis in *Thorne* and other cases reveals that 'lustful disposition' is more akin to a permissible showing of intent, motive, opportunity, common scheme or plan, preparation, and absence of accident or mistake." *Id.* at 293, *citing State v. Thorne*, 43 Wn.2d 47, 54, 260 P.2d 331 (1953). The term "lustful disposition" "is often incorrectly used to admit evidence of behavior that is prominent in crimes of sexual abuse, such as grooming, victim identification, and planning, **which has nothing to**

**do with general sexual attraction**." *Crossguns*, 199 Wn.2d at 290 (emphasis added). In other words, while a trial court may use the term improperly, the court does not admit the evidence improperly when it demonstrates grooming and planning, as in this case.

*Crossguns* and subsequent cases demonstrate that the label "lustful disposition," while improper, encompasses proper purposes for admitting evidence. Where there is an unequal power dynamic, grooming and manipulation, and sexual abuse, evidence previously admitted under the label "lustful disposition" may nonetheless be admissible for other valid purposes.

**2. The State's argument regarding the evidence admitted under the label of lustful disposition demonstrates it was used only for permissible purposes.**

The State's reliance on the messages and conduct to prove the defendant engaged in a lengthy, intricate, and thought-out plan "stands in contradiction with the idea that

'lust' is an overwhelming motivator and almost impervious to planning." *Crossguns*, 199 Wn.2d at 295.

For example, some messages the State relied on showed the defendant told H.S. he loved her and missed her and that he wanted physical contact with her, such as holding her, lying with her, and kissing her. Exhibit 5; RP 448; State's Exhibit 7; RP 50. The State used these messages to show the defendant weaved in what may have been, under other circumstances, appropriate fatherly messages with messages that normalized the physical relationship he had fostered: "And at the beginning of this trial, I told you this case was about normalizing sexual exploitation." RP 846.

The State also used messages to show that Dominguez slowly escalated the sexual nature of his messages and physical interactions with her. RP 438, 853–54 ("And throughout all these various subtle moves, this is where the Defendant slowly makes [H.S.] a cooperating

participant in these sexual acts and sexual behaviors. And in turn, you will see the consequence of that is that it lowered her guard. It lowered the chance of her disclosing this relationship to anyone."). He introduced the idea of sex between the two and, when she resisted the idea, he denied there was anything wrong with it. RP 443–45, RP 856 (referring to the pornographic text: "And he tries to normalize it."). The defendant treated their sexual relationship as normal and convinced H.S. of this distorted view, as she testified the rapes were "just the new normal" for her. RP 382, 488, 846–47. The State argued the messages and testimony about the defendant's conduct, including touching H.S.'s breasts and thigh, demonstrated the defendant's planning and intent in building a relationship with H.S. to "obtain the access and opportunity to commit the acts of sexual assault." *Crossguns*, 199 Wn.2d at 295; see RP 846–48, 853–54.

The dynamics in this case are particularly troubling, as the defendant chose to victimize a child whose own parents were somewhat absent from her life. RP 422; RP 608. While in *Crossguns* the abuser was the victim's father, the defendant in this case used H.S.'s vulnerability to his advantage, stepping into the role of H.S.'s father in providing her emotional support and isolating her. After years of the abuse, H.S. testified she "didn't feel like [she] could do anything to stop it." RP 488.

It is further apparent from the record that the State did *not* rely on the defendant's propensity to commit sexual acts or his overwhelming sexual desire for H.S.:

> But the Defendant knew that and [H.S.] was the perfect target for him. She was easily assessable, readily available, and all too trusting of him. And the Defendant knew exactly what he was doing as he played this role of a father figure to [H.S.] and he collected in the form of sexual communications and sexual intercourse for a span of two years.

RP 846.

These acts of planned manipulation stand contrary to the idea of a lustful man who cannot help but sexually assault a woman.

In rebuttal argument, the State argued the message from the defendant stating, "I was going to ask if it's mine," showed the defendant was sexually attracted to H.S. and this was borne out by his behavior, specifically that he made physical contact with H.S. commonplace so that he could have sex with H.S. in his home without anyone finding out. RP 894. The State then argued H.S. was conditioned to love the defendant, "to protect him, to not cause any harm to his family." RP 894. Again, this was an argument about the drawn out, thoughtful planning and the unequal power dynamics between H.S. and the defendant.

Thus, the State's theory of the case was not based on the defendant's overwhelming lust nor his propensity to engage in sexual conduct. As evidenced by its opening statement and closing argument, the State relied on the

same argument as was held proper in *Crossguns*: the defendant's actions toward H.S. were part of a scheme to manipulate and condition her to accept his sexual advances and not report his behavior. This was a proper purpose for admitting the evidence in *Crossguns* and was a proper purpose in this case. Thus, even if the Court of Appeals had reached the merits of Dominguez's arguments, the court would not have reversed his convictions.

**3. A four-step ER 404(b) analysis demonstrates the evidence was admissible for other purposes.**

To admit evidence of misconduct, a trial court must "(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect." *State v. Sage*, 1 Wn. App. 2d 685, 699, 407 P.3d 359 (2017).

Here, most of the misconduct was in the form of messages, which were taken from the phones of the victim and her mother. Other evidence was proven by H.S.'s testimony and was corroborated by the messages in part. For example, the escalating physical touching was corroborated by the messages the defendant sent about lying with H.S. and kissing her. State's Exhibit 7; RP 50. The misconduct was proven by a preponderance of the evidence.

The purpose, step (2), is explained above. The relevance of the evidence, step (3), is related to the purpose. The defendant denied any sexual contact occurred, arguing it was all a fantasy. RP 869. The State relied on the ER 404(b) evidence to prove the victim was truthful in her testimony, to explain her late disclosure to police, and to demonstrate how the defendant created the opportunities he had to rape her. The State's theory of the case as to whether there was intercourse depended on the

grooming process that was proven by the messages and conduct.

Finally, while the evidence was prejudicial, the cases cited above demonstrate several examples of trial courts determining the probative value of the prior bad acts outweighed their prejudicial effect. *E.g., Crossguns*, and *Sage*. Here, as explained, many of the messages were not inherently prejudicial, as they may have been appropriate for a father figure to send to his daughter. However, many of the messages demonstrated the defendant's intent to have sex with H.S. and foster a relationship in which she would not report his behavior and would, in fact, take steps to protect him, such as deleting his texts to her. These messages and the defendant's conduct were highly probative of the defendant's planning and intent and of the reasons for H.S.'s response. *Crossguns*, 199 Wn.2d at 295–96.

Therefore, Dominguez has not presented this Court with reason to review the matter under RAP 13.4.

**C. THE COURT OF APPEALS' RULING AS TO THE LOST JUROR QUESTIONNAIRES DOES NOT WARRANT REVIEW.**

Dominguez argues the loss of the juror questionnaires violated his constitutional right to a complete record on appeal. PFR at 11. The Court of Appeals held the record was sufficiently complete to protect Dominguez's constitutional rights. *Dominguez*, 2025 WL 896078 at *6. The Court of Appeals further held Dominguez "provides only speculation that the missing questionnaires remove the opportunity for appellate counsel to review." *Id.* at *6.

In his Petition, Dominguez restates the arguments he made in the Court of Appeals without addressing that court's analysis of the case law he cites. For example, the Court of Appeals addressed the primary case Dominguez relies upon, *State v. Guevara Diaz*, 11 Wn. App. 2d 843,

456 P.3d 869 (2020). In *Guevara Diaz*, there was affirmative evidence of bias of several jurors from the questionnaires and the trial court denied defense counsel's request to interview jurors individually who indicated in the questionnaire that they could not "be fair." *Id.* at 847–48. Further, "nothing occurred during voir dire to provide any assurance of her impartiality." *Id.* at 861.

Dominguez contends "In *Guevara Diaz*, the courts and the parties apparently overlooked on juror's answer that she could not be fair and impartial, and erroneously permitted her to sit on the jury." PFR at 21. This is incorrect. "Defense counsel asked the court to allow him to question outside the presence of other potential jurors all 13 jurors who said that they could not be fair to both sides." *Guevara Diaz*, 11 Wn. App. 2d at 847. Defense counsel and the court actually noted the answer about bias but did not follow up with one of the jurors during voir dire. Further, the record did not indicate the juror ever answered the group

questions asking about bias, but "None of the group-directed questions required the jurors to state affirmatively that they could be fair to the defense." *Id.* at 858. This is in contrast to the phrasing of and recorded response to the trial court's and defense counsel's questions to the Dominguez venire. Those questions asked if anyone felt they could not be fair and impartial and the record showed "no response" to each of those questions. *Dominguez*, 2025 WL 896078 at *4.

The Court of Appeals explained that, unlike in *Guevara Diaz*, the record here demonstrated the trial court and parties thoroughly examined each juror's questionnaire during voir dire and responded to every potential issue of bias. *Dominguez*, 2025 WL 896078 at *4. The court and parties considered the jurors and their questionnaires in batches of 15 and the court asked the parties if any jurors needed to be questioned individually. *Id.* The court did not deny either party's requests to

question a juror individually. *Id.* at *6. Finally, either the court or defense counsel asked each batch of jurors if they could not be fair or impartial and no jurors responded. *Id.* at *4.

The Court of Appeals held the differences in this case from *Guevara Diaz* limit the importance of the lost questionnaires, leaving Dominguez to speculate that they contained any information that might be a basis for an appeal. *See id.* at *8–13. The record showed the trial court and the parties were thorough in reviewing the questionnaires and quick to address any issues in overlooked answers or in possible questions of bias. *Id.*

Dominguez also relies on this Court's opinion in *State v. Waits*, 200 Wn.2d 507, 520 P.3d 49 (2022). PFR at 12. That case addressed a transcript with about 1,500 "inaudible" notations over a two-day trial. *Waits*, 200 Wn.2d at 511. Dominguez asserts the record in his case prevents appellate counsel from assessing if there were biased

jurors on the panel. PFR at 21. He contends, citing *Waits*, that the State failed to meet its burden to recreate the missing record. *Id.* The Court of Appeals correctly held the transcript of voir dire was sufficient in this case because of the specific procedure the court used, as detailed in the opinion. Dominguez does not address the clear differences between missing pieces of the transcript and missing juror questionnaires where the transcript of voir dire is complete.

Relatedly, Dominguez relies on *State v. Slert* in arguing juror questionnaires are a substantive part of the record. PFR at 21. Dominguez does not acknowledge that, in *Slert*, part of voir dire was done in chambers off the record and four jurors were dismissed during that time. *See Slert*, 181 Wn.2d 598, 602, 334 P.3d 1088 (2014). Thus, the only record of the reason the court struck the jurors was the questionnaires. The Court contrasted that case with *State v. Beskurt*, 176 Wn.2d 441, 293 P.3d 1159 (2013).

*Slert*, 181 Wn.2d at 610 (Wiggins, J., concurring), 613 (Stephens, J., dissenting).

As the State argued in the Court of Appeals, *Beskurt* held juror questionnaires are not necessary parts of the record. Instead, this Court characterized juror questionnaires as a "screening tool." *Beskurt*, 176 Wn.2d at 447. The Court held, "This facilitated the process by helping the attorneys identify which venire members would be questioned individually in open court and what questions to ask, if any. . . . At most, the questionnaires provided the attorneys and court with a framework for that questioning." *Id.*

While the Court of Appeals held it did not need to determine if the questionnaires were a substantive part of the record, this Court's precedent as to that issue further demonstrates this issue is not one that merits review. In addition to the reasons the Court of Appeals found supported affirming the convictions, the questionnaires

also were not part of the substantive record that was required to be reconstructed under the Washington Constitution.

**D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE STATE'S MOTION TO AMEND.**

The defendant argues the trial court erred in granting the State's motion to amend the information during trial because the State had functionally rested when the court granted the motion. PFR at 25. The defendant further argues he was prejudiced by the amendment because he could only argue he was not guilty of rape in the second degree rather than arguing he was guilty of two counts of rape in the third degree. PFR 30–31.

The Court of Appeals held (1) there was not per se prejudice because the State had not rested; (2) Dominguez failed to demonstrate the requisite prejudice because four witnesses remained to be questioned when the State moved to amend, allowing him to cross-examine those

witnesses and highlight inconsistencies in the evidence regarding H.S.'s age. *Dominguez*, 2025 WL 896078 at *10.

Dominguez does not address the Court of Appeals' holding that it would not apply the rule from *State v. Gehrke*, 193 Wn.2d 1, 434 P.3d 522 (2019). *Dominguez*, 2025 WL 896078 at *10. That rule states that, where the State has functionally rested, there is per se prejudice from amendments to the information. *Gehrke*, 193 Wn.2d at 11. However, because that was a plurality opinion, the Court of Appeals previously held it was not binding. *State v. Martinez Platero*, 17 Wn. App. 2d 716, 721, 487 P.3d 910 (2021). Dominguez provides no argument as to why the Court of Appeals was wrong or why this Court must decide the issue. Moreover, the State had not functionally rested.

**1. The State had Not Functionally Rested Prior to Moving to Amend the Information.**

The State called four witnesses after moving to amend the information. RP 768, 776, 788, 792. While the court did not rule on the amendment until after those

witnesses testified, the motion came mid-trial, putting the defense on notice of the State's intent to limit the date range of Count 1 to April 14, 2018, the day before H.S.'s fourteenth birthday.

One of those witnesses was put on specifically to establish the State's timeline of events, L.D. His testimony established the approximate age of H.S. when she started spending nights at the defendant's house. RP 774.

The defendant provides no similar examples of cases where the State moved to amend and the court took the motion under consideration until the State had called all of its witnesses. However, in the cases on which the defendant relies to prove per se prejudice, the State *moved* to amend after the State rested its case in chief: *Gehrke*, 193 Wn.2d 1 and *State v. Pelkey*, 109 Wn.2d 484, 486, 745 P.2d 854 (1987).

Furthermore, even where the State moves to amend an information after resting, there is not per se prejudice

where the amendment does not affect the charge. *State v. Brooks*, 195 Wn.2d 91, 98, 455 P.3d 1151 (2020). In *Brooks*, the State moved to amend the date range of a charge after resting and this Court held the amendment was not per se a violation of the defendant's constitutional right to demand the nature and cause of the accusation against him. *Id.* The Court explained that, because the date range of the charged offense was not an element of the crime, the rule announced in *Pelkey* did not apply. *Id.* at 99. The Court took care to distinguish between amendments to "a different crime" and other kinds of amendments. *Id.*

The *Brooks* Court noted the same reasoning was applied in *State v. DeBolt*, 61 Wn. App. 58, 61, 808 P.2d 794 (1991). In that case, the State moved to amend the date range of the charged offense, as here, and the court held, "Therefore, amendment of the date is a matter of form rather than substance, and should be allowed absent an

alibi defense or a showing of other substantial prejudice to the defendant." *Id.* at 61–62.

The same reasoning applies in this case. The State did not amend the charge, only the date range of the charged conduct. Thus, the *Pelkey* rule does not apply and the defendant must demonstrate the amendment prejudiced him. *Brooks*, 195 Wn.2d at 98; CrR 2.1(d).

**2. The Defendant did not Demonstrate Prejudice, as his Defense Theory Remained the Same Following the Amendment.**

The Court of Appeals also held Dominguez failed to demonstrate prejudice. *Dominguez*, 2025 WL 896078 at *10. Again, Dominguez fails to address the court's reasoning: when the State informed the court and defense that it intended to amend the information, four witnesses remained to be questioned.

"This court reviews a decision to grant a motion to amend the information for abuse of discretion." *Brooks*, 195 Wn.2d at 96. "The defendant has the burden of

showing specific prejudice to a substantial right." *State v. James*, 108 Wn.2d 483, 486, 739 P.2d 699 (1987).

The defendant's strategy from the beginning of trial was to argue the evidence about when the first rape occurred was unclear. Counsel put forth that argument in opening, used cross-examination of witnesses to cast doubt on the State's theory of the timeline of events, and argued in closing that the victim was unsure of when the first rape occurred. In closing, counsel argued,

> So in addition to all the reasons to doubt her accusation that Jason had sex with her at all, I'll note here there are specific reasons to doubt the Rape of a Child Second Degree allegation, okay? Because she has not been able to allege any kind of date with any specificity, she has not been able to give you any clear details on when this first happened, and if something were to have happened after she had turned 14 on April [], 2018, then that would not be Rape of a Child Second Degree.

RP 890–91.

The defendant contends he was prejudiced by the amendment, but he fails to explain how his strategy would

have changed at any point during the trial had he known the dates of the charged conduct would be limited.

In a case analyzing the prejudice to defendants from charging document deficiencies, the Court held, "Both Brown's and Kosewicz's defenses suggest that they were not prejudiced by a lack of notice because both defenses centered on them not being accomplices, not on whether they intended bodily harm versus extreme mental distress." *State v. Kosewicz*, 174 Wn.2d 683, 696, 278 P.3d 184 (2012). In that case, the question of prejudice was about whether the defense *theory* changed when they learned of the State's proposed theory of guilt. The Court held that, because their theory stayed the same—they were not accomplices—they were not prejudiced. *Id.*

Here, a similar situation arose. The defendant offered the court no alternative theory of the case that he would have relied on had he known the State would limit the period in the information to date on which the victim was

under 14 years old. The defendant's theory remained the same: H.S. did not remember with any specificity when the first rape occurred. Therefore, the jury had reasonable doubt about the date and could not find the defendant guilty of second degree rape of a child.

The trial court did not abuse its discretion in granting the State's motion to amend the information. The motion merely changed the dates of the offense, and the defendant has not demonstrated he was prejudiced by the amendment.

**E. USING THE VICTIM'S INITIALS WAS NOT A COMMENT ON THE EVIDENCE.**

The defendant argues the trial court commented on the evidence by using the victim's initials in the "to convict" instructions. PFR at 36. The Court of Appeals held it would not reject its previous decision in *State v. Mansour*, 14 Wn. App. 2d 323, 470 P.3d 543 (2020). *Dominguez*, 2025 WL 896078 at *11.

An appellate court reviews a challenged jury instruction de novo, within the context of the jury instructions as a whole. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1081 (2006). Article IV, section 16 of the Washington Constitution provides that "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." This constitutional provision prohibits judges from conveying to the jury their personal attitudes regarding the case "or instructing a jury that 'matters of fact have been established as a matter of law.'" *State v. Jackman*, 156 Wn.2d 736, 743–44, 132 P.3d 136 (2006) (quoting *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)).

A victim's initials are not a contested factual issue. Nor are they elements of the crime. *See* RCW 9A.44.086; *Mansour*, 14 Wn. App. 2d at 329–30; *State v. Levy*, 156 Wn.2d 709, 722, 132 P.3d 1076 (2006).

H.S.'s full name was used at trial, but her initials were used in the "to convict" instruction. *E.g.*, RP 400, CP 116. This was not a comment on the evidence and does not warrant further review.

**F. THE PROSECUTOR'S COMMENTS WERE NOT PROPENSITY ARGUMENTS, BUT PROPER ARGUMENT THAT THE DEFENDANT WAS GUILTY OF ALL THE CHARGED COUNTS.**

The defendant argues the prosecutor, by using an analogy about opening a candy wrapper, asked the jury to conclude that because the defendant was guilty of immoral communications with a minor, he was also guilty of rape. PFR at 38. The Court of Appeals held the prosecutor's comment was not so flagrant and ill-intentioned that any prejudice was incurable. *Dominguez*, 2025 WL 896078 at *13.

The defendant has not demonstrated the prosecutor's comment was improper nor that prejudice resulting therefrom was so marked and enduring that corrective instructions or admonitions could not neutralize

its effect. The analogy came in the context of argument about credibility. RP 896–99. In response to defense counsel's argument that H.S. concocted the stories about the rapes, the prosecutor contended H.S. had no motive to make up that the defendant raped her. RP 896–97.

The prosecutor argued the defense theory of the case did not make sense, as it conceded certain facts in evidence and testimony from H.S., but argued other testimony was fiction, a lie told to police because of external pressures. RP 897. The prosecutor then addressed the specific defense theory that the jury *should* find the defendant guilty of communicating with a minor for immoral purposes, but not guilty of rape or, if guilty of rape, then only guilty of third degree rape of a child based on H.S.'s age.

The prosecutor argued, "That doesn't make any sense. Think about it. That's like saying a kid definitely opened a candy wrapper, but don't find that he ate the

candy. But then if you do find that he ate the candy, he only ate half of it." RP 899. The prosecutor continued her line of reasoning, arguing it was reasonable "that [H.S.] came here with nothing to gain." RP 899. Defense counsel did not object to the prosecutor's argument. RP 899.

Washington courts "have consistently held that unless prosecutorial conduct is flagrant and ill-intentioned, and the prejudice resulting therefrom so marked and enduring that corrective instructions or admonitions could not neutralize its effect, any objection to such conduct is waived by failure to make an adequate timely objection and request a curative instruction." *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990); *see also State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

"It is not misconduct, however, for a prosecutor to argue that the evidence does not support the defense theory. Moreover, the prosecutor, as an advocate, is entitled to make a fair response to the arguments of

defense counsel." *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994) (citations omitted).

The prosecutor's argument was not related to the defendant's propensity to commit crimes, but to H.S.'s credibility and to the defendant's theory of innocence. The prosecutor used an analogy to argue that the defense theory, that H.S. was telling the truth about some things but lying about other things, including when the first rape occurred, did not make sense. This was not misconduct nor was it prejudicial. It was proper argument rebutting the defendant's attack on the victim's credibility. It was also in line with the court's instruction that the jurors were the sole judges of the credibility of each witness and that they could consider "the reasonableness of the witness's statements in the context of all of the other evidence." CP 107.

Additionally, the trial court instructed the jury that its verdict on one count should not affect its verdict on other counts. CP 115. The jury is presumed to follow its

instructions. *Id.* at 665–66. The prosecutor did not misstate the law. Even if a juror interpreted the prosecutor's argument as contradictory to the court's instructions, the defendant has not overcome the presumption that the jury followed its instructions.

Moreover, had the defendant objected and had the court granted the objection, the court could have admonished the jury to follow its instructions or to disregard the prosecutor's statements. *Emery*, 174 Wn.2d at 760–61. The alleged misconduct was an analogy, not a direct comment. Even if a possible interpretation was improper, instruction to disregard the analogy would have cured any prejudice. Thus, the defendant has not demonstrated he is entitled to relief.

## G. COMMUNITY CUSTODY CONDITIONS

The defendant challenges several of his community custody conditions. Each is addressed in turn.

"This court reviews sentencing conditions for abuse of discretion." *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008).

**1. Condition 8, Requiring the Defendant to Submit to Polygraphs, is Constitutional.**

The defendant challenges the community custody condition that requires him to submit to polygraphs to monitor his compliance with his other conditions. PFR at 44. The Court of Appeals held that, because condition was limited to monitoring compliance with other conditions, it was constitutional. *Dominguez*, 2025 WL 896078 at *14.

"Polygraph testing may be utilized to monitor compliance with the requirement of making reasonable progress in treatment or with other special conditions of community supervision." *State v. Combs*, 102 Wn. App. 949, 952, 10 P.3d 1101 (2000). The Washington Supreme Court cited *Combs* favorably in holding, "We have approved of monitoring tools used to enforce a valid parole or probation conditions." *State v. Olsen*, 189 Wn.2d 118,

130, 399 P.3d 1141 (2017). *Olsen* involved a challenge under Article I, Section 7. *Id.* However, the analysis was similar in that the Court considered whether the government had a compelling state interest and whether the condition was narrowly tailored.

In that case, the Court addressed whether suspicionless urinalysis testing during the probation term violated a defendant's constitutional rights. *Id.* at 122. The Court held that, because the condition was narrowly tailored to monitor compliance with a validly imposed probation condition," the trial court acted with the authority of law. *Id.* at 126. The Court further held the State had a compelling state interest in promoting the defendant's rehabilitation and protecting the public. *Id.* at 126.

The same State interest is present in the instant case and the condition was narrowly tailored to serve that interest, as it limited testing to monitoring compliance with the conditions of probation.

**2. Condition 9, Requiring the Defendant to Submit to Plethysmographs When Ordered by a Certified Sexual Deviancy Treatment Provider, is Constitutional.**

The defendant argues Condition 9 is unconstitutional. PFR at 46. While plethysmograph testing may not be ordered at the discretion of a community corrections officer, "The testing can properly be ordered incident to crime-related treatment by a qualified provider." *State v. Land*, 172 Wn. App. 593, 605, 295 P.3d 782 (2013). This condition was limited to testing ordered by a qualified provider, as required. The Court of Appeals held that, because of this limitation, it is constitutional. *Dominguez*, 2025 WL 896078 at *15.

**3. Condition 12, Allowing DOC Home Visits, Is Not Ripe for Review.**

The defendant also contends condition 12 is unconstitutional. PFR at 47. While he further argues condition 21 is unconstitutional, the Court of Appeals remanded the case to the Superior Court for clarification of

condition 21. Dominguez makes no effort to address the Court of Appeal's holding.

As the Court of Appeals held, the defendant's challenge is not yet ripe for review. *Dominguez*, 2025 WL 896078 at *16. The community custody term regarding searches of the home was examined by this Court in *State v. Cates*, 183 Wn.2d 531, 534-36, 354 P.3d 531 (2015). There, the Court held that as written, the home visit condition did not authorize any searches, and the inspections were limited to monitor the defendant's compliance with supervision. *Id.* at 535. It further reasoned that "[s]ome future misapplication of the community custody condition might violate article I, section 7, but that "depends on the particular circumstances of the attempted enforcement." *Id.* (quoting *State* v. *Valencia*, 169 Wn.2d 782, 789, 239 P.3d 1059 (2010)). The court held that the State must attempt to enforce the provision before review would be appropriate. *Cates*, 183 Wn.2d at 535.

The same condition was imposed here and the *Cates* reasoning applies.

**4. Condition 16, Prohibiting the Defendant from Locations Where Children's Activities Regularly Occur, is Not Unconstitutionally Vague and Does Not Infringe on the Defendant's Free Exercise of Religion.**

The defendant challenges Condition 16. PFR at 49. The defendant first argues the condition is vague because not all of the listed prohibited locations are "child-centered" and so he would have to "assess" whether children's activities regularly occur or are occurring there. PFR at 50. The defendant did not object to this condition at sentencing. The Court of Appeals held the condition is not unconstitutionally vague because it included a nonexclusive list that includes places where children may congregate. *Dominguez*, 2025 WL 896078 at *17. This list and the language of the condition sufficiently apprise Dominguez of the proscribed conduct. *Id.*

The Court of Appeals further held the condition did not infringe upon Dominguez's First Amendment right to

freely exercise his religion because the State has a compelling interest in protecting the public and promoting Dominguez's rehabilitation. *Id.* The prohibition is narrowly tailored to serve that interest, as Dominguez may practice his religion in ways other than physically joining services where children may be present. *Id.* This holding does not warrant further review.

**5. Condition 17, Prohibiting the Defendant from Dating or Forming Relationships with Families who Have Minor Children and Proscribing Sexual Contact Without Prior Approval of the Treatment Provider, is Constitutional.**

The defendant challenges condition 17, arguing he has a right to marry and a right to engage in sexually intimate activity. PFR at 53. The condition allows for sexual contact with the defendant's wife. CP 48. The Court of Appeals held two cases supported imposition of the condition: *State v. Kinzle*, 181 Wn. App. 774, 785, 326 P.3d 870 (2014) and *State v. Autrey* 136 Wn. App. 460, 468, 150

P.3d 580 (2006). *Dominguez*, 2025 WL 896078 at *18. Dominguez failed to address either in his Petition.

A crime-related prohibition is "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). "'Directly related' includes conditions that are 'reasonably related' to the crime." *State v. Irwin*, 191 Wn. App. 644, 656, 364 P.3d 830 (2015) (citations omitted). The prohibited conduct need not be identical to the crime of conviction, but there must be "some basis for the connection." *Id.* at 657. A court will strike a crime-related condition if there is no evidence in the record linking the circumstance of the crime to the condition. *Id.* at 656.

As to the condition's limitations on sexual contact with persons other than the defendant's wife, while the defendant was not dating H.S.'s mother, he became a close family friend and established himself as a father

figure to H.S. Once he established that relationship, he used it to abuse the victim repeatedly. The court was rightly concerned that he may engage in similar behavior with a child of a woman he dated in the future.

As to disclosing his sex offender status prior to any sexual contact, this condition does not prohibit conduct, thus, "they must be reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." *Matter of Sickels*, 14 Wn. App. 2d 51, 60–61, 469 P.3d 322 (2020). Sickels had been convicted of second degree attempted rape of a child. *Id.* at 57. The court held this condition, requiring disclosure of sex offender status, was "reasonably related to the safety of the community. [It] protects individuals whom Mr. Sickels dates or with whom he embarks on a sexual relationship by providing them with knowledge of the potential risk he presents to minors." *Id.* at 60–61.

Similarly, this condition is related to the defendant's crime, as it protects the public from the risk the defendant may present to minors. The defendant used his connections with adults, through Girl Scouts and the Parent-Teacher Organization, as part of his way to gain the trust of H.S. It was not an abuse of discretion for the trial court to find this condition was necessary.

**6. The Defendant has Not Demonstrated that Condition 18, Prohibiting the Defendant from Living with Minor Children, Actually Affects the Defendant's Right to Parent.**

The defendant argues that, because he might be released before his daughter's 18th birthday, the trial court abused its discretion in imposing condition 18. PFR at 55–57. The Court of Appeals held the trial court considered the circumstances and took into consideration the impact of imposing this condition on Dominguez's ability to parent his children. *Dominguez*, 2025 WL 896078 at *19. Dominguez does not address why review is warranted as to this issue.

## III. CONCLUSION

The State respectfully requests that the Court deny the Petition for Review.

This brief contains 8,472 words (exclusive of appendices, title sheet, table of contents, table of authorities, certificate of service, signature blocks, and pictorial images).

Respectfully submitted on August 7, 2025.

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>JASON DOMINGUEZ,<br><br>Petitioner. | No. 104091-1<br><br>DECLARATION OF FILING AND E-SERVICE |

DECLARATION OF DOCUMENT FILING AND SERVICE

I, DIANE K. KREMENICH, STATE THAT ON THE 7th DAY OF AUGUST, 2025, I CAUSED THE ORIGINAL: STATE'S ANSWER TO PETITION FOR REVIEW TO BE FILED IN THE SUPREME COURT AND A TRUE COPY OF THE SAME TO BE SERVED IN THE FOLLOWING MANNER INDICATED BELOW:

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[X] E-SERVICE VIA PORTAL

SIGNED IN SNOHOMISH, WASHINGTON, THIS 7th DAY OF AUGUST, 2025.

DIANE K. KREMENICH
APPELLATE LEGAL ASSISTANT 3

## SNOHOMISH COUNTY PROSECUTOR'S OFFICE

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| **Appellate Court Case Number:** | 104,091-1 |
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