Supreme Court No. _____
COA No. 83516-5-I

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

JASON DOMINGUEZ,
Petitioner.

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

PETITION FOR REVIEW

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A. INTRODUCTION

In *State v. Waits*, 200 Wn.2d 507, 520 P.3d 49 (2022), this Court held that the State bears the burden of recreating a missing record. Here, the juror questionnaires from Jason Dominguez's trial are missing. These questionnaires were extensive and critical to the laborious process of selecting the jury. The State has never indicated it can recreate these questionnaires, yet the Court of Appeals determined the record is sufficiently complete without them. The Court of Appeals' decision contravenes Mr. Dominguez's constitutional right to a record of sufficient completeness, conflicts with *Waits*, and warrants this Court's review.

The Court of Appeals also denied Mr. Dominguez the benefit of this Court's decision in *State v. Crossguns*, 199 Wn.2d 282, 505 P.3d 529 (2022). This Court should take review to correct the Court of Appeals' harsh application of waiver in cases where there has been an intervening change in the law following appeal.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Jason Dominguez, the petitioner, asks this Court to review the amended opinion of the Court of Appeals in *State v. Dominguez*, No. 86857-8-I (filed March 24, 2025), pursuant to RAP 13.4(b).

C. ISSUES PRESENTED FOR REVIEW

1. The right to appeal includes the right to a record of sufficient completeness to permit effective appellate review. U.S. Const. amends. VI, XIV; Const. art. I, § 3, 22; *Draper v. Washington*, 372 U.S. 487, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963). Here, appellate counsel is unable to identify and fully litigate issues on appeal, as the juror questionnaires used to select the jury are missing or otherwise destroyed and cannot be recreated. Due to these missing questionnaires, counsel is unable to determine if Mr. Dominguez was convicted by a fair and impartial jury. The State has never indicated it can recreate the questionnaires, and the Court of Appeals excused this

failure by holding the record sufficiently complete without them. This Court should take review pursuant to RAP 13.4(b)(1) and (3), to determine whether Mr. Dominguez's constitutional right to an appellate record of sufficient completeness is violated by the missing juror questionnaires.

2. The trial court permitted the State to admit evidence for the purpose of establishing Mr. Dominguez's "lustful disposition" towards the complainant with regards to Count I and Count II. The jury was also instructed it could only consider this evidence for "lustful disposition." After Mr. Dominguez filed his appeal, this Court held in *State v. Crossguns*, 199 Wn.2d 282, 505 P.3d 529 (2022) that "lustful disposition" is not a proper basis to admit evidence. The Court of Appeals held Mr. Dominguez had waived any objection to the lustful disposition evidence under RAP 2.5(a) because he did not object below, in accordance with the law in effect at the time. This Court should take review pursuant to RAP 13.4(b)(4) to clarify that RAP 2.5(a) is a discretionary rule that

does not bar review when there is an intervening change in the law following appeal.

3. Pursuant to article I, section 22, the State may not amend the information after resting, unless the amendment is to a lesser degree or a lesser included offense. The State may also not amend the information after it has "functionally," but not formally, rested, *i.e.*, after it has presented all the evidence for its case-in-chief. The State is also prohibited from amending the information if it would prejudice the defense. Here, the court permitted the State to amend the information after it had "functionally" rested, having presented all of its evidence. Further, the State amended the information at the close of trial in order to preclude the defense from asking for a lesser degree instruction on Count I, which formed the basis of the defense trial strategy. Because the State's amendment prejudiced Mr. Dominguez's constitutional rights to notice, review is warranted pursuant to RAP 13.4(b)(3).

4. Article IV, section 16 forbids a court from commenting on the evidence. Here, the jury instructions used the complainant's initials rather than her name, implying she was a "victim" that needed anonymity and protection. This necessarily implied Mr. Dominguez was guilty of a crime against her. This Court should take review pursuant to RAP 13.4(b)(3) to clarify that the trial court's use of the complainants' initials in the jury instructions was a comment on the evidence.

5. Prosecutorial misconduct violates a defendant's constitutional right to a fair trial and requires reversal if it is prejudicial and cannot be cured by instruction. U.S. Const. amends. VI, XIV; Const. art. I § 22; *Greer v. Miller*, 483 U.S. 756, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987). It is misconduct for the prosecutor to misstate the law in closing argument. The law requires juries to decide each count separately and prohibits drawing propensity inferences. Here, Mr. Dominguez conceded that he had communicated with a minor for immoral purposes

(Count III), but had not committed rape of a child (Counts I and II). In rebuttal, the prosecutor argued the jury should convict on Counts I and II *because* Mr. Dominguez had conceded guilt on Count III. This Court should take review pursuant to RAP 13.4(b)(3) to clarify that this was prejudicial misconduct.

6. The Constitution protects against compelled speech and self-incrimination. U.S. Const. amends. I, V, XIV; *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977); *United States v. Washington*, 431 U.S. 181, 97 S. Ct. 1814, 52 L. Ed.2d 238 (1977) . Here, Condition 8 of Mr. Dominguez's sentence orders him to submit to polygraph examinations to ensure his compliance with conditions of community custody. This Court should take review pursuant to RAP 13.4(b)(3) to clarify that this condition is unconstitutional.

7. The state and federal constitutions protect the privacy of one's own person. U.S. Const. amend. IV; Const. art. I, § 7; *Bell v. Wolfish*, 441 U.S. 520, 545, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). Here, Condition 9 orders Mr. Dominguez to

submit to plethysmograph testing, which measures sexual attraction by placing a pressure-sensitive device around the penis. This Court should take review pursuant to RAP 13.4(b)(3) to hold this condition violates Mr. Dominguez's privacy rights.

8. Under the Washington Constitution, people on community custody may not have their homes or property searched absent reasonable cause of a violation and a nexus between the place to be searched and the violation. Const. art. I, § 7. Here, Conditions 12 and 21 require Mr. Dominguez to submit to searches of his home, computer, and phone without any cause or suspicion. This Court should take review pursuant to RAP 13.4(b)(3) to hold this condition violates Mr. Dominguez's privacy rights.

9. Due process of law requires fair warning of proscribed conduct, the First Amendment protects the free exercise of religion. U.S. Const. amend. I, XIV; *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983) . Here,

Condition 16 requires Mr. Dominguez to stay out of "areas where children's activities regularly occur or are occurring," including "parks used for youth activities," restaurants, church services, and any other location identified by the Department of Corrections. This Court should take review pursuant to RAP 13.4(b)(3) to hold this condition is unconstitutionally vague and interferes with Mr. Dominguez's religious exercise.

10. The rights to marry and engage in sexually intimate activity are constitutionally protected, as is the right to freedom of speech. U.S. Const. I, XIV; *Obergefell v. Hodges*, 576 U.S. 644, 671, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015); *Lawrence v. Texas*, 539 U.S. 558, 578, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003); *303 Creative LLC v. Elenis*, 600 U.S. 570, 586, 143 S. Ct. 2298, 216 L. Ed. 2d 1131 (2023) . Here, Condition 17 requires Mr. Dominguez to not date, to disclose his sex offender status prior to sexual contact, and to avoid sexual contact until it is approved by a treatment provider. This Court

should take review pursuant to RAP 13.4(b)(3) and hold that this condition is unconstitutional and not crime-related.

11. Parents have a fundamental constitutional right to the care, custody, and companionship of their children. U.S. Const. amend. XIV; *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71. L. Ed. 599 (1982). Sentencing courts may not restrict this right unless reasonably necessary to prevent harm to the children. Here, Condition 18 prohibits Mr. Dominguez from remaining overnight in a residence where minor children live or are spending the night, thus prohibiting him from living with his own children. There is no evidence Mr. Dominguez presents a threat of harm to his own children, and thus this Court should take review pursuant to RAP 13.4(b)(3) and hold this condition is unconstitutional.

D. STATEMENT OF THE CASE

In 2019, Mr. Dominguez's daughter's friend, Hailey, accused Mr. Dominguez of several incidences of rape, allegedly

beginning when she was 13 or 14 years old. CP 222; RP[1] 758-61. Mr. Dominguez was charged with Second Degree Rape of a Child, Third Degree Rape of a Child, and Communication with a Minor for Immoral Purposes. CP 172.

A jury convicted Mr. Dominguez convicted on all counts. CP 102–104. The court sentenced him to a life sentence, with the possibility for release after 170 months. CP 34. The sentencing court also imposed numerous community custody conditions. CP 36–38, 47–49.

On appeal, the Court of Appeals affirmed Mr. Dominguez's convictions. Op. at 1. The Court also largely affirmed the sentence, but remanded for the trial court to

[1] The report of proceedings contains several volumes. The transcripts for May 22, 2020, October 14, 2020, September 27, 2021, and September 30, 2021 are each individually paginated and are referred to as "[DATE] RP." The transcripts for September 28–29, 2021, October 1, 4–6, 2021, and December 16, 2021 are consecutively paginated and are referred to as "RP."

replace overbroad language on two of the sentencing convictions and to strike $600 in legal financial obligations. *Id.*

E. ARGUMENT

1. Review is warranted to determine if the missing jury questionnaires violate Mr. Dominguez's constitutional right to an appellate record of sufficient completeness.

Article I, section 21 guarantees the right to appeal a criminal conviction. A person "is constitutionally entitled to a record of sufficient completeness to permit effective appellate review of his or her claims." *State v. Tilton*, 149 Wn.2d 775, 781, 72 P.3d 73 (2003); *Draper v. Washington*, 372 U.S. 487, 499, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963). This constitutional right is rooted in the guarantees of due process, effective assistance of counsel, and the right to appeal. *State v. Waits*, 200 Wn. 2d 507, 518, 520 P.3d 49 (2022); U.S. Const. amends. VI, XIV; Const. art. I, § 3, 22.

Where appellate counsel did not represent the defendant at trial, the record on appeal must be sufficiently complete for

appellate counsel to "determine satisfactorily what errors to assign for the purpose of obtaining an adequate review on appeal." *Larson*, 62 Wn.2d at 67. Reversal is required when the record on appeal is inadequate for counsel to identify and fully litigate issues on appeal. *Id.* Where a portion of the record is missing, the prosecutor bears the burden of showing any alternative or incomplete record is is sufficiently complete to meet the constitutional standard. *Waits*, 200 Wn.2d at 518, 522.

Here, appellate counsel is unable to identify and fully litigate issues on appeal as the juror questionnaires used to select the jury are missing or otherwise destroyed, and cannot be recreated. Specifically, due to these missing questionnaires, counsel is unable to determine if Mr. Dominguez was convicted by a fair and impartial jury. *See State v. Guevara Diaz*, 11 Wn. App. 2d 843, 854–61, 456 P.3d 869 (2020) (constitutional right to a fair and impartial jury violated where one juror stated on a questionnaire that she could not be fair but was not questioned about this answer and sat on the jury). The State has not met its

burden to recreate or show that the record is sufficiently complete.

This Court should take review pursuant to RAP 13.4(b)(1) and (3), to determine whether Mr. Dominguez's constitutional right to an appellate record of sufficient completeness is violated by the missing juror questionnaires.

a. The jury was painstakingly selected, but the jurors' questionnaires went missing following Mr. Dominguez's appeal.

Due to Mr. Dominguez's work as a correctional officer and position in the community, his case garnered significant media attention.[2] Because of the nature of the charges and the media coverage of the case, the parties spent a significant period of time—nearly four days—selecting a jury.

Prior to voir dire, the parties submitted an agreed questionnaire to prospective jurors. 9/27/2021 RP 3–7, 31–32.

[2] *See, e.g.,* Kierra Elfalan & Eric Wilkinson, "Former Gold Bar Elementary PTA president accused of child rape," KING 5 (Oct. 10, 2019).

While the final questionnaire is not in the record, it appears the trial court used the State's proposed questionnaire, adding one additional question proposed by the defense, some ministerial changes, and a cautionary instruction. *Id.* at 3–7; CP 271; (State's proposed questionnaire); CP 191–92 (defense proposed questionnaire).

In addition to the typical hardship questions, the questionnaire asked prospective jurors if they or any of their close friends or family members had ever been victims of "sexual assault or abuse." CP 271. The questionnaire also inquired if the jurors, members of their family, or close friends had "ever been accused of, investigated for, or charged with a sexual assault or sexually motivated offense." *Id.* The questionnaire also asked if any of the jurors had seen, heard, or read anything about the case, either through media or word of mouth. CP 191; 9/27/2021 RP 3–7. The questionnaire included the following two questions:

> 7. Do you feel you can be fair and impartial sitting as a juror in a case that involves accusations of sexual assault? Yes ___ No___ If no, briefly state why: _____
>
> 9. Is there anything that is not covered in this questionnaire that you feel we should know about you or your life experiences that may affect your ability to be a fair and impartial juror in this case? Yes ___ No ___ If yes, please explain: _____

CP 271.

The court and parties relied on the answers provided in the questionnaires to screen prospective jurors for bias, and brought several prospective jurors into the courtroom for individual questioning based on their answers to the questionnaire. 9/27/2021 RP 61–62; RP 48–52, 159–62, 316–19. A significant number of prospective jurors were excused after indicating they could not be fair and impartial. For example, in the first panel of 16 prospective jurors, four were excused for cause. *See, e.g.,* 9/27/2021 RP 74–77 (Juror No. 52), 90–95 (Juror No. 9), 95–101 (Juror No. 12), 108–17 (Juror No. 15).

Despite best efforts, the record indicates that the court and the parties routinely missed prospective jurors' answers to certain questions on the questionnaire. RP 51, 159–60. The court also occasionally skipped over questionnaires or misread a juror's number. RP 48, 161–62.

A jury of 12 jurors and two alternates was ultimately empaneled, although one of the jurors refused to participate in the trial and was replaced by an alternate. 9/30/2022 RP 96–97, 124–32; RP 369. Following trial, the jury convicted Mr. Dominguez on all counts. 102–104.

Undersigned counsel was appointed to represent Mr. Dominguez in his appeal. In the course of reviewing the record, counsel determined she needed to review the completed juror questionnaires in order to determine whether Mr. Dominguez had a fair and impartial jury as required by the Sixth Amendment and article I, section 22 of the Washington constitution. *See Guevara Diaz*, 11 Wn. App. 2d at 854–61.

However, the record does not indicate that the questionnaires were ever filed with the trial court.

Undersigned counsel reached out to trial defense counsel, Eli Jacobsen, and the appellate prosecutor, Matthew Pittman, regarding the questionnaires. Wolfe Affidavit[3] at ¶ 2–3. Mr. Jacobsen indicated he did not have the questionnaires. *Id.* at ¶ 2. Mr. Pittman in turn reached out to the trial prosecutor, Martina Wong, who also did not know what happened to the questionnaires. *Id.* at ¶ 3–4. The Snohomish County clerk and the law clerk to the trial court judge also indicated that they did not have copies of the questionnaires. *Id.* at ¶ 4–5. Given the diligent inquiry of both undersigned counsel and Mr. Pittman, the questionnaires should at this time be presumed missing, destroyed, or otherwise unavailable for the purposes of appeal.

[3] This affidavit was originally filed with Mr. Dominguez's October 14, 2022 motion to reverse his convictions due to an inadequate record on appeal.

b. The record is inadequate to determine if Mr. Dominguez was convicted by a fair and impartial jury.

"The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution both guarantee a criminal defendant the right to trial by an impartial jury." *Guevara Diaz*, 11 Wn. App. 2d at 854–55. To protect this right, both parties may challenge a juror who demonstrates "actual bias" for cause. *Id.* at 855. A juror demonstrates "actual bias" when they exhibit "a state of mind . . . 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." *Id.* (quoting RCW 4.44.170(2)). "If the court has only a statement of partiality without a subsequent assurance of impartiality, a court should 'always' presume juror bias." *Id.* (citations and quotation marks omitted).

It is the court's obligation to excuse a juror when there are grounds for a challenge for cause, even if neither party

challenges that juror. *Id.* "The presence of a biased juror can never be harmless; the error requires a new trial without a showing of prejudice." *State v. Irby*, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015). Accordingly, "if the record demonstrates the actual bias of a juror, seating the biased juror was by definition a manifest error" that can be raised for the first time on appeal. *Id.*; *see also* RAP 2.5(a).

Guevara Diaz was a rape case in which the prospective jurors were given a questionnaire to gauge their ability to be fair and impartial. *Guevara Diaz*, 11 Wn. App. 2d at 845–46. Juror 23 answered "no" to the question, "Can you be fair to both sides in a case involving allegations of sexual assault or sexual abuse?" *Id.* at 846. Juror 23 also indicated on the questionnaire that she was the victim of sexual assault or sexual abuse and that someone close to her had also been the victim of sexual assault or sexual abuse. *Id.* at 846–47. The court permitted individual questioning of other prospective jurors who indicated they could not be fair and impartial, and several

were excused for cause. *Id.* at 848. However, Juror 23 was not questioned by the court or the parties about her bias. *Id.* at 850. Juror 23 was ultimately seated on the jury, which returned a guilty verdict. *Id.* at 850.

The Court of Appeals held that "[i]n a case of potential juror bias identified during voir dire and not rehabilitated by counsel," a trial judge is obligated to "excuse any juror who is unfit and unable to perform the duties of a juror." *Id.* at 856 (citation and quotation marks omitted). Accordingly, the Court of Appeals determined the trial court should have *sua sponte* questioned Juror 23 individually about her questionnaire answers. *Id.* Because the seating of Juror 23 violated the defendant's constitutional right to a fair and impartial jury, this Court reversed the conviction and remanded for a new trial. *Id.* at 860–61.

Like *Guevara Diaz*, the instant case concerns rape charges. Similarly, the parties here employed a detailed questionnaire, including several questions identical to the

questionnaire in *Guevara Diaz*, to inquire into individual jurors' ability to be fair and impartial. In *Guevara Diaz*, the courts and the parties apparently overlooked one juror's answer that she could not be fair and impartial, and erroneously permitted her to sit on the jury. Here, by contrast, the juror questionnaires are missing or were otherwise destroyed,[4] preventing appellate counsel from assessing whether Mr. Dominguez was convicted by a fair and impartial jury. The State has not met its burden under *Waits* to demonstrate that the record is sufficiently complete. The incomplete record violates Mr. Dominguez's constitutional rights to appeal, to effective assistance of counsel, to a fair jury, and to due process of law. *Tilton*, 149

[4] In *State v. Slert*, a majority of this Court confirmed that juror questionnaires that inquire as to a juror's bias must be considered a substantive part of voir dire itself, as opposed to merely administrative. *Slert*, 181 Wn.2d 598, 613, 334 P.3d 1088 (2014) (Stephens, J., dissenting); *id.* at 610 (Wiggins, J., concurring) (acknowledging the dissent's point that "the questions were not used merely as a framework for questioning; they were used to evaluate jurors' fitness to serve and to excuse jurors for cause.").

Wn.2d at 781; *Thomas*, 70 Wn. App. at 298–99. Review is therefore warranted. RAP 13.4(b)(1), (3).

2. Review is warranted because the trial court improperly admitted "lustful disposition" evidence in violation of *Crossguns*, and the Court of Appeals' harsh application of discretionary waiver rules against Mr. Dominguez does not promote justice.

In accordance with the law in place at the time, the trial court allowed the State to admit evidence for the purpose of establishing Mr. Dominguez's "lustful disposition" towards Hailey with regards to Count I (Rape of a Child in the Second Degree) and Count II (Rape of a Child in the Third Degree). Based on the court's ruling, the parties agreed on a limiting instruction, informing the jury it could only consider this evidence for "lustful disposition" on these counts. However, after Mr. Dominguez filed his appeal, this Court held "lustful disposition" is not a proper basis to admit other-acts evidence. *State v. Crossguns*, 199 Wn.2d 282, 285, 505 P.3d 529 (2022).

Accordingly, Mr. Dominguez requested the Court of Appeals reverse his convictions pursuant to *Crossguns*.

However, the Court of Appeals held Mr. Dominguez waived any right to challenge the "lustful disposition" evidence pursuant to RAP 2.5(a), which states that "[t]he appellate court *may* refuse to review any claim of error which was not raised in the trial court." Op. at 14–15 (emphasis added). In doing so, the Court treated this waiver rule as mandatory instead of discretionary, with unnecessarily harsh results. *See also* RAP 1.2(a) (stating that the RAPs should "be liberally interpreted to promote justice and facilitate the decision of cases on the merits.")

Although defense counsel did not explicitly object to the admission of this evidence, the error should not be deemed waived. Defense counsel acted in accordance in the precedent in effect at the time of the trial. It was not until *after* trial that *Crossguns* abrogated that precedent.

As the U.S. Supreme Court has recognized, courts should not penalize litigants for failing to object to "near-uniform precedent," which would "result in counsel's inevitably making a long and virtually useless list of objections to rulings that were plainly supported by existing precedent." *See Johnson v. United States*, 520 U.S. 461, 468, 1117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997). Notably, the petitioner in *Crossguns* argued for the exclusion of the evidence in question on *propensity* grounds, not on the grounds that "lustful disposition" was an improper purpose for the admission of the evidence. *Crossguns*, 199 Wn.2d at 532. Mr. Dominguez should receive the same benefit of this Court's precedent as did the *Crossguns* petitioner. Review is warranted as a matter of substantial public interest. RAP 13.4(b)(4).

3. The court allowed the State to amend the information at the close of trial, prejudicing Mr. Dominguez's defense and requiring this Court's review.

At the beginning of trial, defense indicated an intent to request a lesser degree instruction of Third Degree Rape of a Child on Count I (Second Degree Rape of a Child). CP 172 (first amended information); RP 758. Second Degree Rape of a Child requires proof that the victim was at least 12 years old but less than 14 years old, RCW 9A.44.076, whereas Third Degree Rape of a Child requires proof that the victim was at least 14 years old but less than 16 years old. RCW 9A.44.079. As defense counsel pointed out, there was conflicting evidence about when the first rape supposedly occurred, and thus whether Hailey was 13 or 14 years old at the time. RP 758–61.

Third Degree Rape of a Child carries a significantly lower penalty than Second Degree Rape of a Child. Second Degree is a Class A felony and requires a life sentence with a lifetime of parole following release. RCW 9A.44.073; RCW

9.94A.507. Third Degree, by contrast, is a Class C felony limiting imprisonment to a maximum of five years and no more than three years of community custody. RCW 9.94A.701; RCW 9A.44.079.

Despite being on notice from the outset of the defense's intent to request a lesser degree instruction on Count I, the State did not object until the end of trial, during a discussion on the jury instructions. RP 747; CP 148–52. In response, the court pointed out that the State had charged Count I as occurring "on or about" dates when Hailey was 13 years old, and thus it was permissible for the defense to argue Hailey was in fact 14 when the first alleged rape occurred. RP 745. In response, the prosecutor indicated she could amend the information to remove the "on or about" language. *Id.* at 747.

Defense objected, arguing that "this amendment is purely designed to limit my ability to request a lesser included instruction" and was thus prejudicial. *Id.* at 753. As defense explained, "[t]his has been our strategy and an accompanying

theory that we've been planning on for the pendency of the case." *Id.* The court, too, acknowledged the prejudice of a late amendment, stating "the Defense has made a choice to even go to trial on the theory they're going to be able to argue—give the jury a choice to the lesser on Count I. And clearly that's been their theory." RP 76–64. The court then tabled the issue, indicating it needed to hear additional argument. RP 765.

The following day, the State presented its last four witnesses. RP 768–94. The court and the parties then revisited the issue of the lesser degree instruction as well as the proposed informational amendment. RP 794. The State indicated it was proposing amendments to all three counts, including removing the "on or about" language from Counts I and II and changing the date range on Counts I and III. RP 797–98. After extensive argument by the parties, RP 798–810, the court allowed the State to amend Counts I (Rape of a Child in the Second Degree) and II (Rape of a Child in the Third Degree) to replace the "on or about" language with the phrase "on a specific date

between," and to also expand[5] the charging period on Count I. RP 822–23; CP 126 (Third Amended Information). Defense counsel maintained its objection to the amendment of Count I, but did not contest the amendment to Count II. RP 820. Based on the amendment, the court then denied defense counsel's request for a lesser degree instruction on Count I. RP 823.

Immediately after the court's ruling, the State rested. RP 825, 832.

a. Prior to the amendment of the information, Mr. Dominguez was entitled to a lesser degree instruction.

"When a crime has been proven against a person, and there exists a reasonable doubt as to which of two or more

[5] The court described the charging period as being "narrowed." RP 823. However, a review of the amended informations demonstrates that the date range was both "expanded" by one year and "narrowed" by the "specific date" language. *Compare* CP 126 with CP 172. Regardless, for reasons that are unclear, the jury was instructed on the originally charged date range. CP 116. Accordingly, Mr. Dominguez does not challenge the amendment expanding the date range, only the removal of the "on or about" language and insertion of the "on a specific date between" language.

degrees he or she is guilty, he or she shall be convicted only of the lowest degree." RCW 9A.04.100(2). Further, "[u]pon indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto." RCW 10.61.003.

> A court may instruct on a lesser degree offense when:
>
> (1) the statutes for both the charged offense and the proposed inferior degree offense proscribe but one offense; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.

State v. Fernandez-Medina, 141 Wn.2d 448, 453, 6 P.3d 1150 (2000) (citation and quotation marks omitted). "Unlike a lesser *included* offense, a lesser *degree* offense may have an element that is not an element of the greater offense." *State v. Coryell*, 197 Wn.2d 397, 411, 483 P.3d 98 (2021) (quoting WPIC 4.11) (emphasis in the original).

Here, Rape of a Child in the Third Degree is a lesser degree of Rape of a Child in the Second Degree, as all three prongs of the "lesser degree" test are satisfied.

Both crimes proscribe "but one offense," *i.e.*, both statutes criminalize the same conduct: the rape of a minor under the age of consent. *See State v. Johnson*, 536 P.3d 1162, 1168 (2023); *compare* RCW 9A.44.076 *with* RCW 9A.44.079. Further, both crimes impose strict liability. *See Johnson*, 536 P.3d at 1169 (considering mens rea in the lesser degree analysis). Accordingly, the first prong of the "lesser degree" test is satisfied.

Further, the information charges Rape of a Child in the Second Degree, which is divided into three separate degrees, including Rape of a Child in the Third Degree. Thus the second prong of the "lesser degree" test is met.

Finally, there was evidence that Mr. Dominguez only committed the lesser offense of Rape of a Child in the Third Degree. As defense pointed out, there was conflicting evidence

about *when* the first alleged rape occurred, and thus whether Hailey was 13 years old (which would conform with the elements of Second Degree) or 14 years old (which would conform with the elements of Third Degree) at the time. Accordingly, the third prong of the lesser degree test is met, and Mr. Dominguez was therefore entitled to a Third Degree Rape of a Child instruction. A court's failure to give a warranted lesser degree instruction requires reversal of the conviction. *Coryell*, 197 Wn.2d at 419.

Again, Mr. Dominguez disclosed his intent to request this instruction at the outset of trial. He then framed his defense around the theory that he was only guilty of the lesser degree on Count I. However, to preclude the defense from receiving this instruction, the State belatedly sought to amend the information, and was granted the opportunity to do so immediately prior to resting. As explained below, this was prejudicial to Mr. Dominguez's defense and warrants reversal of Count I.

b. The State functionally rested before moving to amend the information, resulting in per se prejudice and requiring reversal of Count I.

"A criminal charge may not be amended after the State has rested its case in chief unless the amendment is to a lesser degree of the same charge or a lesser included offense." *State v. Pelkey*, 109 Wn.2d 484, 490, 745 P.2d 854 (1987). "Anything else is a violation of the defendant's article 1, section 22 right to demand the nature and cause of the accusation against him." *Id.* at 491. A violation of this right is per se prejudicial, as the defendant has no real opportunity to modify their strategy before the information is amended. *State v. Gehrke*, 193 Wn.2d 1, 9 & n.4, 434 P.3d 522 (2019).

In *State v. Gehrke*, the lead opinion further held that "when the State explicitly states that it will rest its case after moving to amend, it has *functionally rested its case in chief*." *Id.* at 11 (emphasis in the original). Accordingly, four justices voted to extend *Pelkey*'s per se prejudice rule to circumstances

where the State has "functionally rested" before moving to amend. *Id.*

Here, the State functionally rested its case in chief before the information was amended. It had called its last witness, and rested immediately after the court permitted the information to be amended. Pursuant to *Gehrke*, this Court should hold that this was *Pelkey* error and thus per se prejudicial. *But see State v. Martinez Platero*, 17 Wn. App. 2d 716, 487 P.3d 910 (2021) (declining to follow the lead opinion in *Gehrke* because it only garnered a plurality of justices). Accordingly, this Court should reverse Count I.

The State may assert that it indicated an intent to amend the information before functionally resting. However, the court declined to rule on any amendment to the information, as the issue had not been fully argued. RP 762. Accordingly, the information was not in fact amended until *after* the State functionally rested. Thus Mr. Dominguez had no opportunity

to modify his trial strategy—and thus suffered per se prejudice under *Pelkey*. Reversal of Count I is required.

c. In the alternative, reversal of Count I is required because the late amendment was prejudicial to Mr. Dominguez's defense.

Where the *Pelkey* rule of per se prejudice does not apply, reversal is still required if an amendment to the information is prejudicial to the substantial rights of the defendant. *State v. Brooks*, 195 Wn.2d 91, 98, 455 P.3d 1151 (2020). "Where the information alleges that an offense allegedly occurred 'on or about' a certain date, the defendant is deemed to be on notice that the charge is not limited to a specific date." *Id.* at 100 (citation and quotation marks omitted). In *Brooks*, this Court held that a defendant was not prejudiced by an expansion of the date range of the alleged crime because the information included this "on or about" language. *Id.* at 103.

This case presents the inverse set of facts. Here, as in *Brooks*, Mr. Dominguez was "on notice" that Count I was *not* limited to a specific date due to the same "on or about"

language. CP 126. In line with this notice, Mr. Dominguez framed his defense strategy around the theory that the evidence proved the crime occurred at a *later* date than the dates listed in the information, *i.e.,* that Hailey was *older* than 14 when the first rape occurred. Accordingly, Mr. Dominguez planned from the outset to ask for a lesser degree instruction of Third Degree Rape of a Child on Count I.

However, unlike in *Brooks*, the State intentionally thwarted this defense strategy by amending the information on Count I to remove the "on or about" language and replace it with a "specific date" range that corresponded with Hailey being under 14 years old. CP 126. The "to convict" instruction on Count I reflected this same language. CP 116. As the State hoped, the court denied Mr. Dominguez's request for a lesser degree instruction as a result, reasoning that the amendment and to-convict instruction precluded the jury from convicting on the lesser degree offense. RP 822–23. This was prejudicial, as it

undermined Mr. Dominguez's entire defense strategy. This Court should accept review pursuant to RAP 13.4(b)(3).

4. The trial court's use of the complaining witness' initials in the to-convict instructions violated the constitutional prohibition on judicial comments on the evidence and warrants this Court's review.

A trial court may not comment on the evidence. Const. art. IV, § 16. More specifically, a court may not "'convey[] to the jury [the court's] personal attitudes toward the merits of the case' or instruct[] a jury that 'matters of fact have been established as a matter of law.'" *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (quoting *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). A comment on the evidence is "presumed prejudicial." *Id.* at 725.

A to-convict instruction that suggests to the jury the defendant's guilt has been proved is a comment on the evidence. *See State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136 (2006). In *Jackman*, the charges required proof the victims were minors. *Id.* at 740 & n.3. The to-convict instructions

included each victim's birthdate, implying to the jury that the fact of the victims' minority was already established. *Id.* at 740–41 & n.3, 744. Accordingly, the Supreme Court held the instructions were comments on the evidence and remanded for a new trial. *Id.* at 744, 751.

As in *Jackman*, the to-convict instructions in this case conveyed to the jury Mr. Dominguez was guilty of an offense against Hailey, the complaining witness. Throughout the trial, the parties, witnesses, and court freely referred to the complaining witness by her name. Nevertheless, when the time came to instruct the jury, the trial court used her initials, H.S., rather than her name, in the to-convict instructions. CP 116, 119, 121.

This grant of anonymity conveyed to the jury the court believed the complaining witness was a crime victim who needed protection. By this implication, the trial court commented on the evidence. *Jackman*, 156 Wn.2d at 744. Review is therefore warranted by this Court. RAP 13.4(b)(3).

5. The prosecutor committed prejudicial misconduct by encouraging the jury to convict on one count based on Mr. Dominguez's concession on another count, requiring this Court's review.

The right to a fair trial is protected by the Sixth and Fourteenth amendments as well as article I, section 22 of the state constitution. *Greer v. Miller*, 483 U.S. 756, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987); *In re Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012) (citations omitted); *see also* U.S. Const. amend. VI, XIV; Const. art. I, § 22. "Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial." *Glasmann*, 175 Wn.2d at 703–704 (citing *State v. Davenport,* 100 Wn.2d 757, 762, 675 P.2d 1213 (1984)). Prosecutorial misconduct requires reversal if it is prejudicial, *i.e.*, if there is a substantial likelihood it impacted the jury's verdict. *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011); *also State v. Lindsay*, 180 Wn.2d 423, 440, 326 P.3d 125 (2014). Even if not objected to, misconduct requires reversal if the remarks were "so flagrant and ill intentioned that

an instruction could not have cured the resulting prejudice." *Lindsay*, 180 Wn.2d at 430. It is misconduct for a prosecutor to misstate the law in closing argument. *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008).

Here, the jury was instructed that it "must decide each count separately" and that "[y]our verdict on one count should not control your verdict on the other count." CP 115. This Washington Pattern Jury Instruction (WPIC) is given in cases in which there are multiple counts against a single defendant. See WPIC 3.01. This instruction guards against the risks of prejudice, including that "the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged," as well that "the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find." *State v. Standifer*, 48 Wn. App. 121, 126, 737 P.2d 1308 (1987) (citation and quotation marks omitted).

In closing, Mr. Dominguez conceded guilt on the communication charge but contested the rape charges. RP 870. While acknowledging the sexual messages Mr. Dominguez sent were "inappropriate," the defense pointed out that Hailey routinely indicated that she was "not interested" and deflected these comments, indicating that nothing sexual ever occurred in reality. *Id.* at 877–78. In the alternative, defense counsel argued that the State had not proven Hailey was under the age of 14 when the first rape occurred, and thus the jury should acquit on the charge of Rape of Child in the Second Degree. *Id.* at 891.

In rebuttal, the prosecutor critiqued this argument:

> That doesn't 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.

Id. at 899.

Setting aside the problematic connotations of this analogy,[6] it was a misstatement of law and contradicted the jury instructions. Effectively, the prosecutor invited the jury to convict Mr. Dominguez on the rape counts because he had conceded guilt on the communication count. More specifically, the prosecutor asked the jury to conclude that *because* Mr. Dominguez had "opened a candy wrapper" by sending Hailey sexual messages, he *must have* also raped her, *i.e.,* eaten the "candy."

The lure of such a propensity argument is strong. Empirical surveys bear this out, showing that juries hold such arguments "weightily against the defendant." Thomas J. Leach, "How do Jurors Reach to 'Propensity' Evidence?—A Report on a Survey," 27 Am. J. Trial Advoc. 559, 572 (2004). That is

[6] These types of analogies are popular in abstinence-only education programs, in which instructors compare young girls who have sex outside of marriage to unwrapped and half-eaten candy. *See* Raga Justin, Houston Chronicle, "Dirty Skittles and broken Butterfingers: How abstinence is taught in Texas Schools" (Sept. 25, 2019).

why ER 404(b) forbids the prosecution from using one crime to prove propensity to commit another, and why WPIC 3.01 forbids the jury from drawing the same inference.

Although the jury did receive WPIC 3.01, this instruction standing alone was insufficient to cure the prejudicial effect of the prosecutor's rebuttal. As explained, juries are particularly susceptible to such propensity arguments. *See Standifer*, 48 Wn. App. at 126; Leach, *supra*. And this rebuttal argument was the last thing the jury heard before it deliberated. "[C]omments at the end of a prosecutor's rebuttal closing are more likely to cause prejudice." *Lindsay*, 180 Wn.2d at 443. Accordingly, there is a substantial likelihood this argument impacted the verdicts. *Id.* at 444.

For these reasons, this Court should accept review hold the prosecutor's misstatement of the law was flagrant and ill-intentioned as well as prejudicial against Mr. Dominguez. RAP 13.4(b)(3).

6. This Court should accept review of the community custody conditions that are unconstitutional or unrelated to Mr. Dominguez's crime of conviction.

a. Community custody conditions must be constitutional and related to the crime of conviction.

A sentencing court cannot impose an unconstitutional condition of community custody. *State v. Bahl,* 164 Wn.2d 739, 753, 193 P.3d 678 (2008); *see also State v. Nguyen*, 191 Wn.2d 671, 678, 425 P.3d 847 (2018). Similarly, a court cannot impose a condition of community custody that is unauthorized by law. *See State v. Land,* 172 Wn. App. 593, 605, 295 P.3d 782 (2013); *accord State v. Geyer*, 19 Wn. App. 2d 321, 325, 469 P.3d 322 (2021).

A trial court is authorized to impose discretionary community custody conditions as part of a sentence. RCW 9.94A.703(3). In addition to listing several discretionary conditions, the statute permits a court to impose "crime-related prohibitions." RCW 9.94A.703(3)(f). A "crime-related" prohibition "means an order of a court prohibiting conduct that

directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10).

Challenges to community custody conditions are ripe on direct appeal, as they typically cannot be raised once a sentence is final. *See State v. Hubbard*, 1 Wn.3d 439, 452, 527 P.3d 1152 (2023) ("[A]bsent a carefully written condition or grant of express statutory authority by the legislature, there is no avenue for relief [from a condition of community custody] once a sentence becomes final.")

Here, the trial court imposed many conditions of community custody that were either not crime related, or unconstitutional, or both. This Court's review of these conditions is warranted pursuant to RAP 13.4(b)(3) and RAP 13.4(b)(4).

b. Condition 8, which requires Mr. Dominguez to submit to polygraphs, must be stricken as unconstitutional.

Condition 8 requires Mr. Dominguez to "[p]articipate in polygraph examinations as directed by the supervising [CCO],

to ensure conditions of community custody." CP 26. This condition could compel Mr. Dominguez's speech and right to not self-incriminate in violation of his First and Fifth Amendment rights. U.S. Const. amend. I, V, XIV; *see Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977) (freedom of speech includes the right to refrain from speaking); *United States v. Washington*, 431 U.S. 181, 97 S. Ct. 1814, 52 L. Ed.2d 238 (1977) (self-incriminating testimony may not be compelled). Conditions that implicate First Amendment rights must be narrowly tailored to serve a compelling state interest. *State v. K.H.H.*, 185 Wn.2d 745, 748, 374 P.3d 1141 (2016). Here, there are other mechanisms by which Mr. Dominguez's CCO can measure his compliance with community custody conditions, and so the condition offends the First Amendment. The condition also compels Mr. Dominguez to give self-incriminating testimony in violation of the Fifth Amendment. Accordingly, it must be stricken as unconstitutional.

c. Condition 9, which requires Mr. Dominguez to submit to plethysmographs, must be stricken as unconstitutional.

Condition 9 requires Mr. Dominguez to "[s]ubmit to plethysmograph testing, as directed by a certified sexual deviancy treatment provider." CP 26. Plethysmograph testing "involves placing a pressure-sensitive device around a man's penis, presenting him with an array of sexually stimulating images, and determining his level of sexual attraction by measuring minute changes in his erectile responses." *See United States v. Weber*, 451 F.3d 552, 554 (9th Cir. 2006) (citations omitted). Accordingly, plethysmograph testing "not only encompasses a physical intrusion but a mental one, involving not only a measure of the subject's genitalia but probing of his innermost thoughts as well." *Id.* at 562–63.

Despite his conviction, Mr. Dominguez retains a privacy interest in the integrity of his own person pursuant to article I, section 7 and the Fourth Amendment. Const. art. I, § 7; U.S. Const. amend. IV; *see, e.g.*, *Bell v. Wolfish*, 441 U.S. 520, 545,

99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). This condition infringes on Mr. Dominguez's constitutional right to privacy in both his body and mind and must be stricken.

In the alternative, this condition must at a minimum be clarified to limit the purpose of the testing to treatment only, not for monitoring conditions of community custody. *See State v. Peters*, 10 Wn. App. 2d 574, 595, 455 P.3d 14 (2019); *State v. Johnson*, 184 Wn. App. 777, 781, 340 P.3d 230 (2014).

d. The conditions requiring that Mr. Dominguez consent to random, suspicionless searches of his home, computer and phone are unconstitutionally overbroad and must be stricken.

People on probation or community custody do not forfeit their constitutional right to not have their private affairs disturbed without authority of law. Const. art. I, § 7; *State v. Cornwell*, 190 Wn.2d 296, 303, 412 P.3d 1265 (2018). An officer may not search the home or personal effects of a person on community custody without a warrant unless the officer has reasonable cause to believe the supervised person has violated a

condition or requirement of the sentence. *Id.* at 304. There must also be a nexus between the property sought to be searched and the alleged probation violation. *Id.* at 306.

The community custody condition set out in Conditions 12 and 21 in the judgment and sentence does not comply with article I, section 7. Condition 12 states Mr. Dominguez must "consent to DOC home visits to monitor your compliance with supervision," including a "visual inspection of all areas of the residence in which you live or have exclusive or joint control and/or access." CP 27. Condition 21 says Mr. Dominguez's community custody officer "is permitted to make random searches of any computer, phone, or computer-related device to which the defendant has access." CP 28.

As this Court has recognized, conditions mandating suspicionless searches are overbroad and unconstitutional. *State v. Franck*, No. 51994-1-II, noted at 12 Wn. App. 2d 1008, 2020 WL 554555 *10-11 (2020) (unpublished); *State v. Daniels*, No. 54094-1-II, noted at 18 Wn. App. 2d 1052, 2021 WL 3361672

at *6-7 (2021) (unpublished).[7] Accordingly, this Court should order the unconstitutional condition stricken.

e. Condition 16, which excludes Mr. Dominguez from various places, is unconstitutionally vague and infringes on his right to free exercise of religion.

Condition 16 instructs Mr. Dominguez to "[s]tay out of areas where children's activities regularly occur or are occurring." CP 27. The condition specifies that these areas include:

> parks used for youth activities, schools, daycare facilities, playgrounds, wading pools, swimming pools being used for youth activities, play areas (indoor and outdoor), sports fields being used for youth sports, arcades, church services, restaurants, and any specific location identified in advance by DOC or CCO . . . girl scout activities.

CP 27 (emphasis added). This condition is both unconstitutionally vague in violation of due process and also infringes on Mr. Dominguez's First Amendment right to the free exercise of religion. U.S. Const. amend. I, XIV.

[7] Cited for persuasive value pursuant to GR 14.1.

Due process of law requires that citizens have fair warning of proscribed conduct. *Bahl*, 164 Wn.2d at 752. condition is unconstitutionally vague if it (1) "does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed," or (2) "does not provide ascertainable standards of guilt to protect against arbitrary enforcement." *Id.* at 752–53 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)).

Here, the condition does not provide sufficient definiteness in several respects. While most of the listed locations are clearly "child-centered" and thus understandably prohibited (*i.e.*, schools, daycares, playgrounds, wading pools, play areas, and arcades), restaurants are not. CP 27. Accordingly, this condition would require Mr. Dominguez to assess, in advance, whether a particular restaurant "regularly" hosts children's activities. It would also require him to determine what constitutes a "children's activity" in the

restaurant context. Are children having dinner with their parents a "children's activity"? How often would this need to happen in any particular restaurant to be considered a "regular occurrence"? Does this condition prelude him for entering any restaurant that is not 21 and over?

The prohibition on visiting "parks used for youth activities" is similarly vague. While the prohibitions on swimming pools and sports fields clearly specifies Mr. Dominguez is only excluded while these locations are in the process of "*being used* for youth activities" or "youth sports," the park prohibition contains no such specificity. Again, this would require Mr. Dominguez to guess, in advance, if children's activities "regularly occur" at a specific park, even if the park is not in the process of "being used" for children's activities while he is present.

This Court previously recognized that giving a CCO discretion in setting the forbidden locations "would leave the condition vulnerable to arbitrary enforcement" in violation of

the second prong of the vagueness analysis. *See State v. Irwin,* 191 Wn. App. 644, 655, 364 P.3d 830 (2015). Here, the provision that allows DOC or a CCO (Community Custody Officer) to specify where Mr. Dominguez may go is similarly flawed and must be stricken.

Additionally, the condition's categorical prohibition on church services is clear violation of Mr. Dominguez's First Amendment rights. *See* U.S. Const. amend. I ("Congress shall make no law . . . prohibiting the free exercise" of religion). The govermnent may not restrict an individual's exercise of conduct pursuant to a religious belief absent a compelling interest and a "nexus of necessity" with the asserted state interest. *State v. Meacham*, 93 Wn.2d 735, 798, 612 P.2d 795 (1980). Further, if the interest can be served "by measures less drastic than restriction of First Amendment rights, the state must utilize such other measures." *Id.* Because a categorical prohibition on church services is not the least restrictive measure, the

condition must be considered unconstitutional under the First Amendment.

Because Condition 16 is unconstitutional on both due process and First Amendment grounds, this Court should remand for resentencing with instructions to reform or strike the condition.

f. Condition 17 unconstitutionally restricts sexual contact and must be stricken or reformed.

Condition 17 compels Mr. Dominguez to speak and restricts his ability to engage in sexual contact:

> Do not date women nor form relationships with families who have minor children, as directed by the supervising Community Corrections Officer. Disclose sex offender status prior to any sexual contact. Sexual contact in a relationship is prohibited until the treatment provider approves of such.

CP 27.

Mr. Dominguez has both a constitutional right to marry and a constitutional right to engage in sexually intimate activity with another person within the home. *Obergefell v. Hodges*,

576 U.S. 644, 671, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015); *Lawrence v. Texas*, 539 U.S. 558, 578, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003). He also has constitutional right to freedom of speech, which includes the right not to speak the State's message. *303 Creative LLC v. Elenis*, 600 U.S. 570, 586, 143 S. Ct. 2298, 216 L. Ed. 2d 1131 (2023); *State v. K.H.-H.*, 185 Wn.2d 745, 749, 374 P.3d 1141 (2016).

Condition 17 is not crime-related and infringes on these constitutional rights. The crimes did not stem from a dating relationship, where Mr. Dominguez gained access to a child by dating a parent. Thus, prohibiting Mr. Dominguez from dating entirely is not crime related and infringes on his right to engage in sexually intimate activity.

As for compelling Mr. Dominguez to tell others he is a sex offender, this is not crime-related and unconstitutionally compels Mr. Dominguez to speak the State's message without justification. Again, the crimes did not involve an adult.

Restricting sexual contact also infringes on Mr. Dominguez's constitutional rights to intimacy and marriage.

For these reasons, the condition should be stricken. *State v. Mecham*, noted at 12 Wn. App. 2d 1033, 2020 WL 998774 at *6-8 (2020) (unpublished) (striking requirements on disclosure of sex offender status and forbidding sexual contact in a relationship until approved).

g. Condition 18 prohibits Mr. Dominguez from living with his minor children and thus unconstitutionally restricts his right to parent.

Condition 18 prohibits Mr. Dominguez from remaining "overnight in a residence where minor children live or are spending the night." CP 27. As defense counsel pointed out at sentencing, this provision interfered with Mr. Dominguez's constitutional right to parent his own children. RP 928. However, the sentencing court declined to change the provision, but did not explain reasoning. RP 929.

Parents have a fundamental constitutional right to the care, custody, and companionship of their children. *State v. Warren*, 165 Wn.2d 17, 32 195, P.3d 940 (2008). This right may be restricted only to the extent "reasonably necessary to prevent harm to the children." *State v. Ancira*, 107 Wn. App. 650, 654, 27 P.3d 1246 (2001). The record must support a finding that a restriction on the right to parent is reasonably necessary for the child's protection. *State v. DeLeon*, 11 Wn. App. 2d 837, 841, 456 P.3d 405 (2020). When a court does not consider the constitutional implications of a condition, remand is required. *State v. Martinez Platero*, 17 Wn. App. 2d 716, 725, 487 P.3d 910 (2021).

Here, there is a possibility Mr. Dominguez will be released from prison when his youngest daughter is still a minor. RP 922. And, as defense counsel pointed out, there is no evidence that Mr. Dominguez is a danger to his own children. *Id.* Prohibiting Mr. Dominguez from living with his minor child unconstitutionally burdens Mr. Dominguez's right

to parent. Accordingly, remand is appropriate. *See State v. Escobar*, 20 Wn. App. 2d 1047, 2022 WL 152398 at *6 & n.3 (Jan. 18, 2022) (unpublished) (remanding for consideration of whether the provision prohibiting staying overnight in residences where children live was unconstitutional as applied to defendant's son) (cited pursuant to GR 14.1).

F. CONCLUSION

For the reasons stated above, this Court should accept review.

G. CERTIFICATE OF COMPLIANCE

In compliance with RAP 18.17(b), counsel certifies that this brief contains 9,453 words (word count by Microsoft Word). A motion to file an overlength brief is filed simultaneously with this brief.

DATED this 23rd day of April, 2025.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JASON DOMINGUEZ, Appellant, v. STATE OF WASHINGTON, Respondent.	No. 83516-5-I DIVISION ONE UNPUBLISHED OPINION

CHUNG, J. — Jason Dominguez was convicted of one count of rape of a child in the second degree, one count of rape of a child in the third degree, and one count of communicating with a minor for immoral purposes, all involving H.S., the minor friend of his daughter. He seeks reversal of all three convictions on several bases. He claims missing juror questionnaires deprive him of an appellate record of sufficient completeness and, thus, violate his constitutional right to appeal. He further claims the trial court erred by admitting evidence to show his "lustful disposition" for the victim, allowing the State to amend the information, and including H.S.'s initials in the to-convict instructions. He also challenges statements by the prosecutor as misconduct and a variety of community custody conditions imposed on him. We affirm his convictions. However, we remand to the trial court to replace overbroad language on conditions 21 and 24 and to strike the victim penalty assessment (VPA) and DNA collection fee.

FACTS

Dominguez and H.S. first met while living in Gold Bar, Washington, when H.S. was 11 years old. She was initially introduced to Dominguez and his family because she was in the same Girl Scout troop as Dominguez's daughter.

In 2016 and 2017, when H.S. was aged 11 to 13, H.S. spent increasingly more time with the Dominguez family. During this period, H.S. would spend the night at the Dominguez house three times a month. The family took H.S. to the zoo, the aquarium, and "just different things that [her family] didn't have the money to do." H.S. considered Dominguez to be a "second father."

In mid-2017, H.S.'s mother moved approximately five hours away to Oroville, Washington, but permitted H.S. to stay in Gold Bar with her mother's friend. H.S. then moved to Oroville to join her family, but returned to Gold Bar for visits, which included staying with the Dominguez family.

H.S. first received a cell phone when she was 12, and Dominguez began contacting her shortly thereafter. From 2016 to 2019, the two would talk on the phone and would use Facebook Messenger and Snapchat to communicate. They also used Facebook Messenger to video chat.

In 2019, H.S. accused Dominguez of several incidences of rape, allegedly beginning when she was 13 or 14 years old. In October 2021, a jury convicted Dominguez as charged with rape of a child in the second degree, rape of a child in the third degree, and communication with a minor for immoral purposes. The court sentenced him to a life sentence, with the possibility of release after 170

months. The sentencing court also imposed numerous community custody conditions, the VPA, and a DNA collection fee. Dominguez filed a timely appeal.

In October 2022, Dominguez filed a motion in this court to reverse his convictions and remand for a new trial due to an inadequate record on appeal, specifically, juror questionnaires. His counsel provided a declaration stating the steps she had taken to locate the questionnaires, attesting that Dominguez's trial counsel, the trial prosecutor, Snohomish County clerk, and the trial judge's law clerk all indicated they did not have copies of the completed juror questionnaires. A commissioner of this court denied the motion without prejudice, allowing Dominguez to include argument regarding the adequacy of the record in his merits brief. A panel of this court denied Dominguez's motion to modify.

DISCUSSION

Dominguez challenges his convictions as well as his judgment and sentence on multiple grounds. First, he asserts that because the completed juror questionnaires are missing, he is deprived of a complete record sufficient for review, and thus reversal of all his convictions is required. Second, he argues the court impermissibly allowed evidence into trial solely for the purpose of showing his "lustful disposition," which is no longer a permissible basis for admitting propensity evidence after the Washington Supreme Court's decision in State v. Crossguns, 199 Wn.2d 282, 505 P.3d 529 (2022). Third, he contends the court erred by allowing the State to amend the information after completing its case-in-chief. He additionally argues the use of the victim's initials, rather than her full name, on the jury instructions constituted an improper comment on the evidence.

Finally, he argues the State engaged in prosecutorial misconduct during its closing arguments and challenges various community custody conditions.

I. Juror Questionnaires

Dominguez argues that because the completed juror questionnaires are missing, the appellate record lacks sufficient completeness. He asserts that as a result, his appellate counsel is unable to determine whether the jury was fair and impartial, he cannot identify and fully litigate issues on appeal, and reversal for a new trial is required. In particular, Dominguez claims jury selection was important given his position in the community and the media attention his case received.

Article I, section 22 of the Washington Constitution guarantees the right to appeal a criminal conviction. State v. Waits, 200 Wn.2d 507, 513, 520 P.3d 49 (2022). To pursue an effective appeal, a criminal defendant is "constitutionally entitled to a 'record of sufficient completeness.' " State v. Tilton, 149 Wn.2d 775, 781, 72 P.3d 735 (2003) (quoting State v. Thomas, 70 Wn. App. 296, 298, 852 P.2d 1130 (1993)). However, "[a] 'record of sufficient completeness' does not translate automatically into a complete verbatim transcript." Id. at 781 (quoting Mayer v. City of Chicago, 404 U.S. 189, 194, 92 S. Ct. 410, 30 L. Ed. 2d 372 (1971)). Indeed, "alternative methods are acceptable, provided they permit effective appellate review." Waits, 200 Wn.2d at 513. "Effective review allows counsel to determine which issues to raise on appeal and provides the relevant, equivalent report of the trial record where the alleged issues occurred." Id. "Effective review on appeal also allows for other methods of reporting trial proceedings in instances when a trial court record is deficient or missing." Id. at

513-14. Other methods include " '[a] statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes, or a bystander's bill of exceptions might all be adequate substitutes, equally as good as a transcript.' " Id. at 514 (quoting State v. Jackson, 87 Wn.2d 562, 565, 554 P.2d 1347 (1976)). RAP 9.3[1] and RAP 9.4[2] set out possible alternative methods to prepare records of trial proceedings.

Although the "RAPs anticipate that parties will work together to recreate a lost or missing record," the "State bears the burden of reconstructing the record in a criminal appeal." Waits, 200 Wn.2d at 519-20 n.7. Additionally, "[t]he burden of showing that alternatives will suffice for an effective appeal rests with the State." Id. at 514. However, "[a] new trial will seldom be required when a report of

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[1] RAP 9.3 sets out the parameters for narrative reports:

> The party seeking review may prepare a narrative report of proceedings. A party preparing a narrative report must exercise the party's best efforts to include a fair and accurate statement of the occurrences in and evidence introduced in the trial court material to the issues on review. A narrative report should be in the same form as a verbatim report . . . . If any party prepares a verbatim report of proceedings, that report will be used as the report of proceedings for the review. A narrative report of proceedings may be prepared if the court reporter's notes or the electronic recording of the proceeding being reviewed is lost or damaged.

[2] RAP 9.4 controls agreed reports of proceedings and states:

> The parties may prepare and sign an agreed report of proceedings setting forth only so many of the facts averred and proved or sought to be proved as are essential to the decision of the issues presented for review. The agreed report of proceedings must include only matters which were actually before the trial court. An agreed report of proceedings should be in the same form as a verbatim report, as provided in rule 9.2(e) and (f). An agreed report of proceedings may be prepared if the court reporter's notes or the electronic recording of the proceeding being reviewed is lost or damaged.

This rule is meant "to allow excerpts from the verbatim report, a narrative report, or some combination of each." Waits, 200 Wn.2d at 515. Additionally, "[t]he agreed report must be submitted to the trial judge under RAP 9.5(b). Id.

proceedings is not recorded or is lost." Tilton, 149 Wn.2d at 785. "In most cases an adequate narrative can be constructed by the attorneys, witnesses, jurors, court attaches or anyone present during the trial." Id. However, when such efforts "are unable to produce a record which satisfactorily recounts the events material to the issues on appeal, the appellate court must order a new trial." Id. at 783.

This court has identified the following factors to consider when reviewing a reconstructed record: (1) whether all or only part of the trial record is missing or reconstructed, (2) the importance of the missing portion to review the issues raised on appeal, (3) the adequacy of the reconstructed record to permit appellate review, and (4) the degree of resultant prejudice from the missing or reconstructed record, if any, to the defendant. State v. Classen, 143 Wn. App. 45, 57, 176 P.3d 582 (2008) (reviewing cases involving sufficiency of reconstructed records and summarizing that "[r]ead together, the pertinent holdings largely depend on [these] factors").

Here, we are not asked to review the sufficiency of a reconstructed record; there is a complete verbatim report of proceedings, including voir dire.[3] Nevertheless, Dominguez argues he has a constitutional right under article I, section 22 of the Washington Constitution to the questionnaires themselves for a record of sufficient completeness to allow effective appellate review.

[3] In dicta, the court in Waits noted it could be difficult to reconstruct an adequate record of jury voir dire, pointing to a case in which it recently had heard oral argument involving GR 37 and whether race was a basis for a peremptory strike. 200 Wn.2d at 522 n.8 (citing State v. Tesfasilasye, 200 Wn.2d 345, 518 P.3d 193 (2000)). The Waits court stated, "Review of [that] case involved a granular examination of juror statements for which a transcript was critically important. It is hard to imagine that a narrative or agreed report would be sufficient to allow such a case to come before appellant review." Id.

Though derived from cases involving review of reconstructed records for sufficient completeness, the Classen factors are helpful to consider here as well, as the same question is at the core: whether the record allows for effective review, that is, whether the record "allows counsel to determine which issues to raise on appeal and provides the relevant, equivalent report of the trial record where the alleged issues occurred." Waits, 200 Wn.2d at 513.

Thus, as to the first Classen factor, whether all or only part of the record is missing or reconstructed, here, only the completed juror questionnaires are missing. The questionnaires were not filed with the trial court as part of the record, [4] but there is a complete record of the voir dire proceedings. In addition, the appellate record contains the form juror questionnaire proposed by the State.[5] Along with standard hardship questions, the questionnaire asked prospective jurors if they or any of their close friends or family members had ever been victims of "sexual assault or abuse." It also inquired if the jurors, members of their family, or close friends had "ever been accused of, investigated for, or charged with a sexual assault or sexually motivated offense." The questionnaire

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[4] The State suggests that unlike the transcript of the voir dire, the completed juror questionnaires were not required to be a part of the record. In support, the State points to State v. Beskurt, a case involving the right to a public trial, in which the Washington Supreme Court held that the questionnaires are not part of the record subject to public disclosure under GR 31(a), which addresses access to court records. 176 Wn.2d 441, 448, 293 P.3d 1159 (2013). The court explained that that a questionnaire is used to assist in jury selection, but "[n]othing suggests the questionnaires substituted for actual oral voir dire. Rather, the answers provided during oral questioning prompted, if at all, the attorneys' for cause challenges, and the trial judge's decisions on those challenges all occurred in open court." Id. at 447. In dicta, the Beskurt court also stated, "We doubt the completed questionnaires in this case qualify as court or trial records." Id. at 448 n.8. However, to address Dominguez's claims, we need not resolve the issue of whether completed juror questionnaires are required to be part of the official record.

[5] The parties submitted an agreed questionnaire to prospective jurors. While the final questionnaire is not in the record, the trial court appears to have utilized the State's proposed questionnaire, adding an additional question proposed by Dominguez, some ministerial changes, and a cautionary instruction.

also asked if any of the jurors had seen, heard, or read anything about the case, either through media or word of mouth.

As to the second factor, the importance of the missing portion to review the issues raised on appeal, Dominguez emphasizes the significance of juror questionnaires in determining whether there was a fair and impartial jury, pointing to State v. Guevara Diaz, 11 Wn. App. 2d 843, 456 P.3d 869 (2020). In Guevara Diaz, despite answering "no" to the question, "Can you be fair to both sides in a case involving allegations of sexual assault or sexual abuse?", a juror sat on the jury that convicted the defendant. Id. at 846. Although defense counsel requested to interview this prospective juror outside the presence of other jurors during voir dire, the court refused the request. Id. The court held this juror showed actual bias through her response on the questionnaire, and thus violated the defendant's right to a fair and impartial trial. Id. It reasoned the trial court was obligated to oversee the juror selection process, and it failed to do so when "nothing occurred during voir dire to provide any assurance of her impartiality." Id. at 861. See also State v. Irby, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015) (the court has an independent obligation to safeguard the process and prevent biased jurors from being seated). Here, even though there is a complete record of the voir dire questioning, Dominguez claims without the completed questionnaires, he cannot determine whether any prospective jurors responded in a way that showed actual bias, as did the juror in Guevara Diaz, but were not subjected to follow-up questioning to provide an assurance of impartiality.

The report of proceedings shows the following voir dire process. First, the venire was divided into 4 batches of 15, and as to each, the court asked counsel if there were any jurors who needed to be questioned individually. The parties and the court considered the jurors sequentially, discussing whether the questionnaires raised any issues regarding either potential hardship or bias. Based on their questionnaire responses, multiple jurors on the panel were individually questioned about their ability to be fair and impartial.[6]

After identifying jurors for individual questioning and engaging in individual voir dire, the court again attempted to identify anyone in each group who might require individual questioning. For instance, the court asked the first group of 15, jurors 1 through 15, about their ability to be fair and impartial: "Again, we did talk to a number of jurors individually regarding issues on your questionnaire, but are there any of you who feel you cannot be a fair and impartial juror in this case for any reason that we have not already discussed with you? . . . The record shows no response."[7] Dominguez asked similar questions to the second, third, and fourth groups of jurors, and again, for each group, the record shows no juror responded that they could not be fair and impartial.[8]

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[6] Juror 8 confirmed he could be fair and impartial despite family law enforcement connections. Juror 11 confirmed they could not convict someone if there was any reasonable doubt in their mind. Juror 37 disagreed with the sentiment that if someone reached the trial stage of a charge, they must have done something wrong. Juror 38 emphasized their ability to keep track of their own biases and follow the law as directed. The parties and the court affirmed on the record that jurors 42, 47, and 48 did not have anything on their forms that required further questioning.

[7] But see Guevara Diaz, 11 Wn. App. 2d at 859 & n.45 ("Several courts have pointed out that silence and even answers during group voir dire 'cannot substitute for individual questioning.' ").

[8] Dominguez's counsel asked the second panel if, after "[h]earing a bit more, can anyone think of any reason why they would not be able to be fair and impartial to my client? . . . Anything we haven't covered . . . ? Okay. Thank you very much." He asked the third panel the following question: "And I have a catch-all for everyone here, all right? I just want you to think. You've

On appeal, Dominguez highlights examples in which the trial court and parties occasionally skipped over questionnaires or misread a juror's number and overlooked the hardship answers of some jurors. However, as to each of the jurors Dominguez claims were initially not identified for potential individual questioning, the trial court or one of the parties eventually identified them and then discussed whether individual questioning was needed.

For juror 28, the trial court noted a hardship, and Dominguez also noted individual questioning was needed because they replied that a close family member or friend was assaulted. Similarly, while the trial court initially missed juror 33, Dominguez immediately highlighted that that juror's close family member or friend was assaulted. Likewise, though the court missed juror 38, the State pointed out individual questioning was needed. And though the court initially skipped over juror 44, it immediately realized its error, said it saw no need for individual questioning, and Dominguez agreed.[9]

Dominguez also identifies two instances when neither the court nor either party caught a missed juror response. First, the court noted that juror 2 inquired as to why they were not questioned about their hardship. But the court subsequently did ask the group whether anyone felt they might have a hardship, juror 2 again identified himself, and the court questioned him about his concerns and ultimately excused him. Second, the court also noted that neither party had

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heard more about this case. Can anyone think of any reasons why they feel like they would not be able to be fair to my client, Jason Dominguez, who's in the Defendant's chair? . . . Okay. Thank you very much." Similarly, he asked the fourth panel, "Can anyone think of any reason that they feel that they would not be able to be fair to my client, Jason Dominguez if you were selected as a juror for a case like this? Okay. Thank you very much."

[9] After discussing juror 45, the court stated, "I skipped over 44. Sorry. I didn't see anything on that one."

asked juror 35 about their potential hardship and that "we may want to ask about that when we bring in the whole group." Subsequently, the State followed up and questioned juror 35 about their hardship. Thus, while Dominguez focuses on the fact that the need to question some jurors was initially overlooked, the record shows that not only did the court or a party identify each such instance, but also each time, follow-up questioning did occur later.

Dominguez also notes that the court jumped from juror 17 to 20 when assessing who needed to be individually questioned. But here too, the fuller record reveals that in context, the gap does not indicate that there were any oversights. This portion of voir dire began with the discussion of the process:

> THE COURT: . . . I thought we could go over who you want to individually question in the next group. . . . Have you had a chance to look at those? Do you have those in front of you?
>
> [DEFENSE COUNSEL]: Yes, your Honor. Give me just a moment.
>
> THE COURT: All right. If we could go to the top. I think we can go through them just sort of as we go here. I'm going to have my law clerk advise Juror No. 2 that we are excusing him for hardship.
>
> All right. The first one I saw with any issue was No. 17 has a family member who was sexually abused. No one has checked the box. It seems to be getting missed, but maybe they really don't care. I don't know. But had a member of their family or close friend sexually abused. So, I'm just pointing out each one that might have an issue.
>
> Do either one of you want to interview this person individually?
>
> [DEFENSE COUNSEL]: Yes, your Honor.
>
> THE COURT: All right. Any objection, Counsel?
>
> [STATE]: No, your Honor.
>
> THE COURT: 20 said that both themselves and others that they know had been sexually abused. Do you

> wish to interview that person individually?
>
> [DEFENSE COUNSEL]: Yes, your Honor.
>
> [STATE]: No objection.
>
> THE COURT: We'll do 20. 20 has indicated a hardship and has indicated a member of the family is sexually abused.
>
> [STATE]: I'm sorry. Are you –
>
> THE COURT: 21, excuse me.
>
> [STATE]: Thank you.
>
> [DEFENSE COUNSEL]: And Defense would request individual voir dire as well.
>
> THE COURT: All right. I'll do 21. So we're doing 17, 20, 21.

As this context shows, the court did not overlook jurors 18 and 19, but rather, no one identified any need to question them. Indeed, though not mentioned by Dominguez, the court also skipped from juror 2 to juror 17, explaining, "The first one I saw with any issue was No. 17 . . . . I'm just pointing out each one that might have an issue." Thereafter, each juror from this group that the court or a party discussed had either a potential hardship or bias and, thus, was identified for further questioning. Moreover, the record shows that the parties did not hesitate to interject to clarify which juror was being discussed, as did the State, or to request individual voir dire, as did Dominguez. Thus, overall, the existing report of the voir dire proceedings shows that the parties and the court worked together to ensure that they identified anyone whose responses to the questionnaire warranted follow-up questioning, whether for hardship or bias.

Finally, under factor four, prejudice, the likelihood of prejudice is low. Dominguez points to nothing in the voir dire record that suggests the missing information would support a claim of actual juror bias.[10] While Dominguez does have different counsel on appeal, he is unable to establish that the record is lacking in sufficient completeness to allow appellate counsel to identify issues for appeal. Instead, he provides only speculation that the missing questionnaires remove the opportunity for appellate counsel to review. Additionally, unlike in Tilton and Waits, in which significant portions of the proceedings were not contemporaneously recorded and had to be reconstructed, here, there is a complete verbatim report of the voir dire process. Accordingly, because the existing record is sufficient for appellate review, Dominguez's claim under article I, section 22, fails.

II. Admission of Evidence to Show "Lustful Disposition"

At trial, the State moved to admit evidence of Dominguez's Facebook, Snapchat, and text messages, as well as past sexual behavior towards H.S. for the purpose of establishing Dominguez's "lustful disposition" toward her. Defense counsel did not contest the State's motion, and the trial court admitted the evidence without conducting an analysis under ER 404(b). Based on the court's ruling, the parties agreed on a limiting instruction informing the jury that it could consider this evidence "only for the purpose of showing the defendant's 'lustful disposition,' " and that the limitation applied only to the two counts for rape of a child, not the third count of communicating with a minor for immoral purposes.

[10] Jurors 1, 8, 11, 13, 18, 19, 23, 29, 37, 38, 42, 47, and 48 were seated.

Shortly after Dominguez filed his appeal, the Washington Supreme Court held "lustful disposition" is not a proper basis to admit other-acts evidence. Crossguns, 199 Wn.2d at 285.[11] Dominguez argues the decision in Crossguns mandates a conclusion of error, as the court admitted the evidence only to show his "lustful disposition" and explicitly instructed the jury to consider the evidence for that purpose.

The State argues that Dominguez waived the issue as he failed to object below and does not establish manifest error affecting a constitutional right under RAP 2.5(a). We agree with the State.

Under RAP 2.5(a), the appellate court may refuse to review an error not raised before the trial court. "Appellate courts will not approve a party's failure to object at trial that could identify error which the trial court might correct (through striking the testimony and/or curative jury instruction)." State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). As an exception, the party may raise a manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3). For this exception to apply, the appellant must identify a constitutional error and show how the error actually affected their rights at trial. Id. at 926-27. The appellant must make a plausible showing that the asserted error had practical and identifiable consequences in the trial. State v. A.M., 194 Wn.2d 33, 38, 448 P.3d 35 (2019).

[11] In Crossguns, the court held that use of the term "lustful disposition" "wrongly suggests that evidence of collateral offenses relating to a specific victim may be admitted for the purpose of showing that the defendant has a propensity for committing sexual misconduct. Therefore, we now reject the 'lustful disposition' label and hold that 'lustful disposition' is not a distinct or proper purpose for admitting evidence." 199 Wn.2d at 285.

Dominguez failed to lodge any objection at trial to the admission of the propensity evidence which the State sought to admit for the purpose of establishing "lustful disposition." Dominguez argues that despite his failure to object, he did not waive any claimed error because he "acted in accordance [with] precedent in effect at the time of the trial," and his trial concluded before the Crossguns decision was issued. He argues that in these circumstances, he did not need to preserve the error. However, despite citing authorities that involve constitutional error,[12] Dominguez does not provide argument explaining how in his case, the claimed error affects a constitutional right.

Nor does the change in law on the use of "lustful disposition" evidence allow Dominguez to bypass the requirements of RAP 2.5(a). "[I]n a narrow class of cases. . . . principles of issue preservation do not apply where the following four conditions are met: (1) a court issues a new controlling constitutional interpretation material to the defendant's case, (2) that interpretation overrules an existing controlling interpretation, (3) the new interpretation applies retroactively to the defendant, and (4) the defendant's trial was completed prior to the new interpretation." State v. Robinson, 171 Wn.2d 292, 305, 253 P.3d 84 (2011). Dominguez fails to explain how Crossguns satisfies the threshold condition of establishing a "new controlling *constitutional* interpretation." (Emphasis added).

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[12] See Johnson v. United States, 520 U.S. 461, 468, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997) (applying federal waiver rule to allow appeal of issue that involved a judge incorrectly determining a fact instead of submitting it to the jury); State v. Harris, 154 Wn. App. 87, 98, 224 P.3d 830 (2010) (holding defendant's failure to file pre-trial motion to suppress did not waive claim as the U.S. Supreme Court announced a new rule of constitutional procedure); State v. Rodriguez, 65 Wn. App. 409, 417, 828 P.2d 636 (1992) (holding defendant did not waive a seizure issue when Washington's Supreme Court determined art. I, section 7 of Washington Constitution was more protective than federal standards).

This is not one of the "narrow class of cases" to which the Robinson exception to RAP 2.5(a) applies.

Thus, while it is understandable that Dominguez did not object below to the admission of propensity evidence to show "lustful disposition," because at that time this was a proper purpose, he does not establish that the error affects a constitutional right as required under RAP 2.5(a). Therefore, we decline to review his claim that the trial court erred by allowing propensity evidence.

III. Amended Charges

Dominguez challenges the amendment of charges by the State after it changed the time frame in count I from "on a specific date between or about [a date] through on or about [a date]" to remove the "or about" language—i.e., to read "on a specific date between [a date] and [a date]."[13] He claims because this amendment happened after the State "functionally rested," it violated his rights under article I, section 22 of the Washington Constitution. We disagree.

The initial information charged Dominguez with three counts, including one count of rape of a child in the second degree (count I) and one count of rape of a child in the third degree (count II). The original language in the information for count I stated "on a specific date between or about the 15th day of April, 2017 through on or about the 14th day of April, 2018," the defendant had sexual intercourse with H.S. Based on H.S.'s birthdate, during this period she would have been age 13. Count II contained the same "on or about" language modifying the beginning and end of the date range.

[13] Although the State amended similar language in both counts I and II, Dominguez maintained his objection only to count I.

Rape of a child in the second degree requires proof that the victim was at least 12 years old but less than 14 years old, RCW 9A.44.076, whereas rape of a child in the third degree requires proof that the victim was at least 14 years old but less than 16 years old. RCW 9A.44.079. At the beginning of trial, Dominguez argued that because there was conflicting evidence about whether H.S. was 13 or 14 years old at the time of the first charged incident, the "on or about" language in the charge left room for the defendant to argue H.S. was 14 at that time, which would prove a lesser degree crime of rape in the third degree.[14] Thus, Dominguez argued for a lesser degree instruction, as the lesser degree crime carried a lower penalty.

Later, during a discussion on jury instructions, the State objected to a lesser degree instruction on count I. The court noted that the "on or about" language in the charge allowed Dominguez to argue the victim was age 14. The State then suggested it could amend the information to remove the "on or about" language, but made no motion at that time. Dominguez objected, arguing that it had been his theory during the trial that H.S. was 14. The trial court postponed ruling, determining it needed to hear further argument first.

The next day, the State presented its last four witnesses. After it did so, the trial court and parties revisited the issue of the lesser degree instruction as well as the State's proposed amendment to the charges. Following extensive argument by the parties, the court allowed the State to amend counts I and II to

[14] Rape of a child in the second degree is a Class A felony and requires a life sentence with a lifetime of parole following release. RCW 9A.44.076; RCW 9.94A.507. Rape of a child in the third degree is a Class C felony with a maximum penalty of five years in prison and no more than three years of community custody. RCW 9.94A.701; RCW 9A.44.079.

remove the "on or about" language, so that the charges instead alleged acts "on a specific date between [a date] and [a date]." Dominguez maintained his objection to the change to count I.[15] Based on the amendment, the court denied Dominguez's request for a lesser degree instruction on count I. Immediately after the court's ruling on the amended charges, the State rested.

This court reviews a trial court's ruling on a proposed amendment to an information for abuse of discretion. State v. Brooks, 195 Wn.2d 91, 96, 455 P.3d 1151 (2020). The court abuses its discretion if its decision is manifestly unreasonable or based on untenable reasons. Id. at 97.

Article 1, section 22 of the Washington Constitution provides defendants the right "to demand the nature and cause of the accusation against him." "Pursuant to this right, '[t]he accused . . . has a constitutional right to be apprised of the nature and cause of the accusation against him.' " State v. Gehrke, 193 Wn.2d 1, 6, 434 P.3d 522 (2019) (plurality opinion) (quoting State v. Ackles, 8 Wn. 462, 464-65, 36 P. 597 (1894)). Therefore, the State must allege in the charging document all essential elements of a crime to inform a defendant of the charges against them and to allow for preparation of a defense. Brooks, 195 Wn.2d at 97.

"A criminal charge may not be amended after the State has rested its case-in-chief unless the amendment is to a lesser degree of the same charge or a lesser included offense." State v. Pelkey, 109 Wn.2d 484, 491, 745 P.2d 854 (1987). "Anything else is a violation of the defendant's article I, section 22 right to

[15] Also, the amended information erroneously expanded the date range by a year. However, the jury instructions used the original date range.

demand the nature and cause of the accusation against him or her." Id. Under "the Pelkey rule," any amendment from one crime to a different crime after the State has rested is per se prejudicial. State v. Martinez Platero, 17 Wn. App. 2d 716, 721, 487 P.3d 910 (2021) (citing State v. Vangerpen, 125 Wn.2d 782, 791, 888 P.2d 1177 (1995)).

" 'Where the Pelkey rule does not apply, the defendant has the burden of demonstrating prejudice under CrR 2.1(d).' " Brooks, 195 Wn.2d at 98 (quoting State v. Ziegler, 138 Wn. App. 804, 809, 158 P.3d 647 (2007)). CrR 2.1(d) states that "[t]he court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced." CrR 2.1(d) "necessarily operates within the confines of article I, section 22." Pelkey, 109 Wn.2d at 490 (referring to former CrR 2.1(e), now CrR 2.1(d)).

Dominguez first argues that the Pelkey rule applies here and the amended charges were per se prejudicial because the State had "functionally rested," citing Gehrke. In Gehrke, "[a]fter the State called its last witness but before it had formally rested, the prosecutor moved to amend the information" to add a manslaughter charge to the charge of murder in the second degree. 193 Wn.2d at 5. "The State made clear that it intended to rest even if the amendment was not allowed." Id. Defense counsel objected, but the trial court granted the motion to amend, reasoning the defense strategy was "essentially the same" as the defense to the prior charge. Id. This court affirmed, but the Washington Supreme Court reversed. The lead opinion, signed by four justices, held that the Pelkey

rule "is not concerned with whether the State has *formally* rested," but "a trial court cannot allow the 'State to amend the information . . . *after the State has completed presentation of its case in chief.*' " Id. at 9 (quoting Pelkey, 109 Wn.2d at 487). Thus, the lead opinion in Gehrke reasoned, "when the State explicitly states that it will rest its case after moving to amend, it has *functionally rested its case in* chief," and after completing its case in chief, "it may no longer amend," and the Pelkey rule of per se prejudice applied. 193 Wn.2d at 11. Three justices dissented, holding Pelkey outlined a bright line rule so there was no per se prejudice when the State had not formally rested. Id. at 22 (González, J., dissenting). And two justices agreed with the dissent that the Pelkey per se prejudice rule did not apply, but concurred with the lead opinion in result because Gehrke had demonstrated actual prejudice. Id. at 20 (Fairhurst, C.J., concurring).

This court subsequently declined to follow the plurality decision in Gehrke. Martinez Platero, 17 Wn. App. 2d at 723 ("A plurality has little precedential value and is not binding.") (quoting State v. Johnson, 173 Wn.2d 895, 904, 270 P.3d 591)(2012)). Applying the Pelkey "bright line rule," we held that there was no per se prejudice when the State finished examining its witnesses, but before formally resting, moved to amend three counts of rape in the first degree to child molestation in the first degree. Martinez Platero, 17 Wn. App. 2d at 720.

We agree with the reasoning in Martinez Platero that because the "functionally rested" language was supported only by four justices, it is not binding, and, further, "Pelkey remains good law and draws a bright line that per se prejudice does not occur where the State amends the charges to something

other than a lesser degree or lesser included offense before the State formally rests." 17 Wn. App. 2d at 723. Thus, here, there is no per se prejudice because the State amended the charges before it formally rested.

In the alternative, Dominguez argues reversal is still required, as the amendment to the information was prejudicial to his substantial rights. In determining prejudice under CrR 2.1(d), this court considers factors such as whether a defendant's ability to defend themselves is jeopardized and whether the amended charge arose out of the same factual scenario. State v. Hakimi, 124 Wn. App. 15, 28, 98 P.3d 809 (2004). Here, Dominguez fails to demonstrate the requisite prejudice from the amendment. First, although the State initially did not make a formal motion to amend, it unequivocally stated it intended to amend the day before it presented its last four witnesses and formally rested. At that point, Dominguez still had an opportunity to cross-examine the four remaining witnesses and to highlight any inconsistencies in the evidence regarding H.S.'s age.

Moreover, an amendment to the time period of a charge does not ordinarily show prejudice if the crime charged remains the same. Brooks, 195 Wn.2d at 99. In Brooks, the defendant was charged with rape of a child in the third degree and child molestation in the third degree. Id. at 95. Both counts included "on or about" language. Id. The court held the defendant was not prejudiced by an expansion of the date range of the alleged crime. Id. at 103. It reasoned:

> "Cases involving amendment of the charging date in an information have held that the date is usually not a material element of the

> crime. 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 99 (quoting State v. DeBolt, 61 Wn. App. 58, 61-62, 808 P.2d 794 (1991)). It further reasoned the defendant was on sufficient notice the "charge was alleged flexibly as to the timing of that incident." Id. at 100.

Contrasting Brooks, Dominguez claims the narrowing, as opposed to expansion of the dates in the charges is significant and warrants reversal of count I. He claims he was not on sufficient notice of the charges brought against him because he relied on these flexible dates when forming his trial strategy, which included efforts to cast doubt as to whether H.S. was 13 or 14 years old when the first rape occurred so to establish evidentiary support for a lesser degree instruction. However, Dominguez fails show how he was misled or surprised by the amendment and thus prejudiced, as the charge in count I ultimately remained the same, arose from the same set of facts, and no new charges were added.

Because Dominguez has not shown that his substantial rights were prejudiced by the State's amendment of the time period for count I, the court did not err in allowing the State to amend the charges. Because we determine that no prejudice resulted from the amendment, we need not address whether Dominguez was initially permitted to request the lesser included instruction.

IV. Comment on the Evidence

Dominguez argues the trial court impermissibly commented on the evidence because the to-convict instructions included the victim's initials, rather

than her name. Dominguez requests this court reject its previous decision in State v. Mansour, which held the use of initials to identify the victim of child molestation in the to-convict instruction did not deprive the defendant of due process or his right to a fair and impartial jury. 14 Wn. App. 2d 323, 470 P.3d 543 (2020). We decline to do so.

The court reviews whether a jury instruction amounts to a judicial comment on the evidence de novo and in the context of the instructions as a whole. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Article IV, section 16 of the Washington Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." This section intends to prohibit a judge "from 'conveying to the jury his or her personal attitudes toward the merits of the case' or instructing a jury that 'matters of fact have been established as a matter of law.' " Levy, 156 Wn.2d at 721 (quoting State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)).

To determine whether a trial court's statements amount to a comment on the evidence, the court analyzes "the facts and circumstances of the case." State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970). The primary concern animating the analysis is whether the description of a fact in a jury instruction "conveys the idea that the fact has been accepted by the court as true." Levy, 156 Wn.2d at 726. The court assumes a comment on the evidence is prejudicial, and the State bears the burden of showing no prejudice occurred. Id. at 723.

In Mansour, we held the use of initials in the to-convict jury instructions did not constitute a comment on the evidence. 14 Wn. App. 2d at 326. There, the

court reasoned the name of the alleged victim of child molestation is not a factual issue requiring resolution. Id. at 329. Thus, utilizing initials on a to-convict instruction does not impermissibly convey to the jury that "matters of fact ha[ve] been established as a matter of law." Id. at 329-30. The court also reasoned it is unlikely a jury would presume the party is a victim "—or believe the court considered her one—merely because the court chose to use [the victim's] initials." Id. at 330.

Dominguez also attempts to analogize to State v. Jackman, in which the to-convict instructions included the victims' birthdates as well as their initials. 156 Wn.2d 736, 740-41, 132 P.3d 136 (2006). Though our Supreme Court held the instructions were judicial comments on the evidence, the reason was not the inclusion of the victims' initials, but their birthdates. Id. at 744. Because the charges required proof that the victims were minors, by including their birthdates, the instructions "conveyed the impression that those dates had been proved to be true." Id. But here, unlike the victims' ages in Jackman, H.S.'s name was not an element of the charged crime.

Dominguez additionally relies on federal cases that involved using a pseudonym to bolster his argument that the grant of anonymity conveyed to the jury that the court believed the complaining witness was a crime victim who needed protection. Doe v. Cabrera, 307 F.R.D. 1, 10 (D.D.C. 2014) (a jury may perceive a grant of anonymity as "a subliminal comment on the harm the alleged encounter with the defendant has caused"); James v. Jacobson, 6 F.3d 233, 240-41 (4th Cir. 1993); Doe v. Advanced Textile Corp., 214 F.3d 1058, 1068 (9th Cir.

2000); Doe v. Rose, No. CV-15-07503-MWF-JCx, 2016 WL 9150620 (C.D. Cal. Sept. 22, 2016). The court in Mansour did not find Cabrera and Rose persuasive because those cases concerned maintaining anonymity throughout the entire trial, so the risk of "subliminal comment on the harm" through concealing an identity was more pronounced. 14 Wn. App. 2d at 330. In Mansour, "[b]y contrast, [the victim] was referred to by her full name throughout trial; her identity was not concealed." Id.

We hold that using H.S.'s initials in the to-convict instructions was not an impermissible judicial comment on the evidence. As in Mansour, the initials were not a fact to be proven, and so inclusion of them on the jury instruction did not indicate to the jury a relevant fact was established by law. Nor did the use of initials impermissibly indicate to the jury that H.S. needed to be protected. H.S.'s full name was used at trial, she testified at trial, and no steps were taken to conceal her identity. Thus, any risk that the use of initials indicated harm to H.S. was significantly reduced.

V. Prosecutorial Misconduct

Dominguez argues the prosecutor engaged in prejudicial misconduct in closing argument necessitating reversal. We disagree.

In closing, Dominguez conceded guilt on the communication charge but contested the rape charges. While acknowledging the messages were inappropriate, Dominguez noted H.S. routinely rejected the advances, arguing nothing sexual occurred in reality. In the alternative, Dominguez argued the State did not prove H.S. was under the age of 14 when the first rape occurred, and

thus the jury should acquit on the charge of rape of child in the second degree. In rebuttal, the prosecutor challenged this argument:

> 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.

Dominguez contends this commentary was prejudicial misconduct and a misstatement of the law because it invited the jury to convict him on the rape counts based on his concession of guilt on the communication count. The State counters that the analogy was not a call for the jurors to rely on propensity evidence, and even if there was prosecutorial misconduct, it was not so prejudicial that it could not be cured by the accompanying jury instruction.

"Allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard." State v. Lindsay, 180 Wn.2d 423, 430, 326 P.3d 125 (2014) (quoting State v. Brett, 126 Wn.2d 136, 174-75, 892 P.2d 29 (1995)). The defendant bears the burden of showing the comments were improper and prejudicial. Lindsay, 180 Wn.2d at 430 (citing State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008)). "[I]f the defendant fails to object or request a curative instruction at trial, the issue of misconduct is waived unless the conduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." Lindsay, 180 Wn.2d at 430 (citing State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997)). When applying this standard, courts should " 'focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.' " Lindsay, 180

Wn.2d at 444 n.2 (quoting State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012)).

As Dominguez did not object to the prosecutor's comment contemporaneously or ask for a curative instruction, he must show the conduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. "In the context of closing arguments, the prosecuting attorney has 'wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (quoting State v. Gregory, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006), overruled on other grounds by State v. W.R., 181 Wn.2d 757, 336 P.3d 1134 (2014)). A prosecutor may also argue that evidence does not support the defense theory. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). But comments on the presumption of innocence are improper if a prosecutor misstates the law in closing argument. Warren, 165 Wn.2d at 27-28 (prosecutor's statements on three separate occasions during closing argument that the defendant did not enjoy the benefit of any reasonable doubt were improper). Nevertheless, "[s]ome improper prosecutorial remarks can touch on a constitutional right but still be curable by a proper instruction." State v. Smith, 144 Wn.2d 665, 679, 30 P.3d 1245 (2001); see also Warren, 165 Wn.2d at 28 (improper statements that defendant did not enjoy benefit of any reasonable doubt were not prejudicial as the trial court provided a thorough curative instruction).

Here, the prosecutor's comments suggested that, because Dominguez admitted that he engaged in improper and inappropriate conversations, there was a heightened likelihood he carried through with escalating the situation at other times as well. Dominguez particularly emphasizes this was the last argument the jury heard before it deliberated, citing a study that indicate such propensity arguments affect defendants negatively.[16] However, the State drew the comparison only once before reaffirming that H.S. did not have an ulterior motive in testifying about the abuse.

Moreover, "[t]he prejudicial effect of a prosecutor's improper comments is not determined by looking at the comments in isolation but by placing the remarks 'in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.' " State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). Here, in context, the prosecutor's rebuttal argument was in response to perceived inconsistencies in the defense counsel's closing arguments, which conceded that certain facts in evidence and testimony from H.S. were true but argued the accusation of rape was a fabrication. Furthermore, the jury was instructed, "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on the other count." We presume the jury is able to follow instructions. Smith, 144 Wn.2d at 679 ("Some improper prosecutorial remarks can touch on a constitutional right but still be curable by a proper instruction.").

[16] Thomas J. Leach, How do Jurors React to 'Propensity' Evidence?—A Report on a Survey, 27 Am. J. Trial Advoc. 559, 572 (2004).

We hold that the prosecutor's comments in closing were not so flagrant and ill intentioned that any prejudice was incurable. Thus, the prosecutor's argument based on Dominguez's admitting he engaged in the conduct charged in count III did not constitute reversible error.

VI. Community Custody Conditions

Dominguez challenges eight of the community custody conditions imposed by the trial court. He argues that each of the challenged conditions is either unconstitutional, unauthorized by law, or not crime-related.

Under RCW 9.94A.703, some conditions are mandatory, some conditions must be either imposed or explicitly waived, and some conditions are within the court's discretion to impose. A court is also permitted to impose "any crime-related prohibitions." RCW 9.94A.703(3)(f). A crime-related condition must be reasonably related to the crime of conviction. State v. Nguyen, 191 Wn.2d 671, 684, 425 P.3d 847 (2018).

On appeal, community custody conditions are reviewed for an abuse of discretion and will be struck when manifestly unreasonable. Id. at 678. A manifestly unreasonable condition is unconstitutional. State v. Bahl, 164 Wn.2d 739, 753, 193 P.3d 678 (2008). Additionally, a trial court cannot impose a community custody condition absent legislative authorization. State v. Warnock, 174 Wn. App. 608, 612, 299 P.3d 1173 (2013).

A. Polygraph Testing (Condition 8)

Condition 8 mandates Dominguez to "[p]articipate in polygraph examinations as directed by the supervising Community Corrections Officer, to

ensure conditions of community custody." Dominguez contends that condition 8 is not narrowly tailored to protect his right to refrain from speaking in violation of the First Amendment[17] and violates his Fifth Amendment right against self-incrimination by compelling him to speak.

Community custody conditions that "implicate free speech rights must be narrowly tailored to serve an important government interest and must be reasonably necessary to achieving that interest." State v. K.H.-H., 185 Wn.2d 745, 751, 374 P.3d 1141 (2016). A condition requiring a defendant to submit to polygraph testing is constitutional as a tool to monitor compliance with conditions of community custody and to monitor progress with treatment. State v. Combs, 102 Wn. App. 949, 952, 10 P.3d 1101 (2000). However, polygraph testing may not be used to "discover evidence of other crimes, past or present." Id. at 953 (holding that condition cannot allow for "fishing expeditions" to unearth evidence of other crimes and should have limited polygraph testing only for monitoring progress and compliance with community custody conditions).

Here, condition 8 permits testing only to monitor compliance with other conditions. The State cites to State v. Olsen, in which a urinalysis testing condition was held to be narrowly tailored to monitor compliance with a condition prohibiting the defendant from possessing or consuming alcohol or drugs. 189 Wn.2d 118, 130, 399 P.3d 1141 (2017). The State argues that here, similarly, because it has a compelling interest in protecting the public and promoting and

[17] The First Amendment protects both the right to speak and the right not to speak. See Wooley v. Maynard, 430 U.S. 705, 714, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977) (plurality opinion).

monitoring the rehabilitation of the defendant, and condition 8 allows testing to monitor compliance with other conditions, it is constitutional. We agree. Because condition 8 limits administration of polygraphs to the purpose of ensuring compliance with community custody conditions, it is narrowly tailored to serve a compelling interest and is constitutional.

B. Plethysmograph Testing (Condition 9)

Condition 9 requires Dominguez to "[s]ubmit to plethysmograph testing, as directed by a certified sexual deviancy treatment provider."[18] Dominguez argues that condition 9 impedes his right to privacy in his body and mind and should be stricken or limited to clarify that its intended purpose is to monitor community custody conditions.

In general, a person has a right to privacy under the U.S. and Washington Constitutions. U.S. CONST. amend. IV; WASH. CONST. art. I, § 7.[19] While people do not "forfeit all constitutional protections by reason of their conviction," Bell v. Wolfish, 441 U.S. 520, 545, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979), a person in community custody has a reduced expectation of privacy. Olsen, 189 Wn.2d at 124-25 (explaining that probationers have a lesser expectation of privacy because they have been sentenced to confinement but serve time outside of prison); In re Det. of Herrick, 198 Wn. App. 439, 445, 393 P.3d 879 (2017)

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[18] Plethysmograph testing " 'involves placing a pressure-sensitive device around a man's penis, presenting him with an array of sexually stimulating images, and determining his level of sexual attraction by measuring minute changes in his erectile responses.' " United States v. Weber, 451 F.3d 552, 554 (9th Cir. 2006) (quoting Jason R. Odeshoo, Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders, 14 TEMP. POL. & CIV. RTS. L. REV. 1, 2 (2004)).

[19] Washington provides greater privacy protection than that of the Fourth Amendment by explicitly guaranteeing a person may not be disturbed in their private affairs. See State v. Meneese, 174 Wn.2d 937, 946, 282 P.3d 83 (2012).

(explaining that persons convicted of sex offenses have a reduced privacy interest).

Plethysmograph testing is very intrusive and can be ordered only to provide crime-related "deviancy" treatment, but cannot be used by a community custody officer (CCO) to monitor compliance. State v. Land, 172 Wn. App. 593, 604-05, 295 P.3d 782 (2013) (finding that plethysmograph testing condition was inappropriate because it permitted a CCO to conduct the testing at their discretion). A court imposing plethysmograph testing as a condition of community custody "must make an individualized determination that the testing is necessary." Herrick,198 Wn. App. at 447.

Dominguez cites U.S. v. Weber, 451 F.3d 552, 562-63 (9th Cir. 2006), to argue that the plethysmograph testing is a physical and mental violation of his constitutional right to privacy because it "involv[es] not only a measure of the subject's genitalia but probing of his innermost thoughts as well." . He further argues that the condition must be explained to restrict testing for treatment purposes only.

We agree that plethysmograph testing intrudes upon Dominguez's right to privacy. However, here, the condition is constitutionally permissible because it limits such testing in two ways: only a "sexual deviancy treatment provider" may request plethysmograph testing, and such a request must be for treatment purposes. This provision is constitutionally compliant because under Land, such language sufficiently indicates that the testing is for treatment and not to monitor compliance. 172 Wn. App. at 605.

C. Home Inspection and Random Device Searches (Conditions 12 & 21)

Condition 12 requires Dominguez to "consent to DOC home visits to monitor your compliance with supervision. Home visits include access for purposes of visual inspection of all areas of the residence in which you live." Condition 21 permits a CCO "to make random searches of any computer, phone, or computer-related device to which the defendant has access to monitor compliance with this [] condition." Dominguez contends that these two conditions are unconstitutionally overbroad and should be stricken.

All persons have a federally protected right to privacy under both the federal and Washington constitutions. U.S. CONST. amend. IV; WASH. CONST. art. 1, § 7. However, a person under community supervision has a reduced expectation of privacy and can be searched by a CCO when they have reasonable suspicion. State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009). Further, a probationer may be subjected to warrantless searches of their property "where there is a nexus between the property searched and the alleged probation violation." State v. Cornwell, 190 Wn.2d 296, 306, 412 P.3d 1265 (2018).

The State asserts that Dominguez's challenge to conditions 12 and 21 is not yet ripe for review because the State has not yet tried to enforce them. On appeal, a defendant can challenge a community custody condition only when it is ripe, meaning " 'the issues raised are primarily legal, do not require further factual development, and the challenged action is final.' " Bahl, 164 Wn.2d at 751 (quoting First United Methodist Church v. Hr'g Exam'r for the Seattle Landmarks

Pres. Bd., 129 Wn.2d 238, 255-56, 916 P.2d 374 (1996)). A reviewing court must also evaluate any hardship the parties may endure if the court declines to consider the claim because it is not ripe. State v. Valencia, 169 Wn.2d 782, 789, 239 P.3d 1059 (2010) (explaining that a condition subjecting a defendant to a search is ripe when "the State attempts to enforce [it] because [its] validity depends on the particular circumstances of the attempted enforcement.").

In support of its argument, the State cites State v. Cates, 183 Wn.2d 531, 535, 354 P.3d 832 (2015). Cates involved a condition similar to the conditions at issue here that required the defendant to consent to home visits to monitor compliance and allowing a CCO to visually inspect all areas of the defendant's residence. Id. at 533. The court explained that there was a need for additional factual development because "[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,' " which would require the State to try to enforce the condition by "requesting and conducting a home visit after [the defendant's] release[]." 183 Wn.2d at 535 (quoting Valencia, 169 Wn.2d at 789).

Here, as in Cates, there is additional factual development that is required, meaning the State must attempt to enforce the home inspection and random device inspection conditions. 183 Wn.2d at 535; see also State v. Holmes, 31 Wn. App. 2d 269, 292-93, 548 P.3d 570 (2024) (following Cates and holding

condition allowing home search was not ripe).[20] Therefore, we hold that Dominguez's claims regarding conditions 12 and 21 are not ripe for review.

D. Prohibition on Proximity to Children's Activities (Condition 16)

Condition 16 states that Dominguez must "[s]tay out of areas where children's activities regularly occur or are occurring. This includes parks used for youth activities, schools, daycare facilities, playgrounds . . . church services, restaurants, and any specific location identified in advance by DOC or CCO." Dominguez asserts that condition 16 is unconstitutionally vague in violation of his due process rights and violates his First Amendment right to free exercise of religion.

Both the federal and the state constitutions guarantee all people due process of law. U.S. CONST. amend. XIV, WASH. CONST. art. I, § 3. Due process mandates that all "citizens have fair warning of proscribed conduct." Bahl, 164 Wn.2d at 752. A statute is said to be unconstitutionally vague when a reasonable person would not understand what conduct is proscribed or if it does not have ascertainable standards to safeguard against arbitrary enforcement. State v. Wallmuller, 194 Wn.2d 234, 238-39, 449 P.3d 619 (2019).

First, Dominguez contends that condition 16 is unconstitutionally vague because it fails to explain with "sufficient definiteness" what it means for a location to be one where "children's activities regularly occur." He claims that

[20] While we do not reach the merits based on Cates, we note that Division II of this court has held that comparable conditions were overbroad and unconstitutional. State v. Franck, No. 51994-1-II, slip op. at 21-23 (Wash. Ct. App. Feb. 4, 2020) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2051994-1-II%20 Unpublished%20Opinion.pdf; State v. Daniels, No. 54094-1-II, slip op. at 12-13 (Wash. Ct. App. Aug. 3, 2021) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2054094-1-II%20Unpublished%20Opinion.pdf.

condition 16 expressly listed "restaurants" and "parks used for youth activities" as places that he is not permitted to go, but that he is forced to determine when something is a children's activity and when it regularly occurs,[21] and, therefore, the condition is too vague to tell him what conduct is proscribed.

Our Supreme Court has held that a condition barring the defendant from "loiter[ing] in []or frequent[ing] places where children congregate such as parks, video arcades, campgrounds, and shopping malls," was a "nonexclusive list of 'places where children congregate' " and did not violate due process. Wallmuller, 194 Wn.2d at 237, 245.

Here, like the condition in Wallmuller, condition 16 contains a nonexclusive list that includes places where children may congregate. To safeguard from arbitrary enforcement, the initial sentence of the condition acts as a modifier of the list that follows and instructs Dominguez where he cannot go. See State v. Barragan, No. 80365-4-I, slip op. at 22 (Wash. Ct. App. Nov. 30, 2020) (unpublished), https://www.courts.wa.gov/opinions/pdf/803654.pdf.[22] Therefore, condition 16 is not unconstitutionally vague because the list of places with the modifying clause sufficiently apprises him of the proscribed conduct.

Dominguez also claims condition 16 functions as a categorical ban on his ability to attend church services, and because there are other less drastic

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[21] Dominguez also argues that the condition gives his CCO discretion in "setting forbidden locations," which could permit arbitrary enforcement in violation of the vagueness standard.

[22] Though unpublished opinions have no precedential value, we may consider them when "necessary for a reasoned decision." GR 14.1(c). Here, we adopt the reasoning as stated in Barragan, relying on Wallmuller, concluding that the same condition as in this case was not unconstitutionally vague because the first part of the sentence modifies the entire list of places and, thus, sufficiently instructed the defendant as to the locations from which he was prohibited. Barragan, No. 80365-4-I, slip op. at 22.

measures that the court could have imposed, condition 16 violates his First Amendment right and should be stricken. We disagree.

The First Amendment protects a person's right to freely exercise their religion. U.S. CONST. amend. I. However, a state may "restrict an individual's exercise of conduct under a religious belief" when it "ha[s] a compelling interest and the restrictive statute [] ha[s] a 'nexus of necessity' with the asserted state interest." State v. Meacham, 93 Wn.2d 735, 740, 612 P.2d 795 (1980) (quoting State v. Lotze, 92 Wn.2d 52, 57, 593 P.2d 811 (1979) (Abrogated on other grounds by Collier v. City of Tacoma, 121 Wn.2d 737, 854 P.2d 1046 (1993). A constraint on a person's ability to practice their religion must be the least restrictive measure possible. Backlund v. Bd. of Comm'rs of King County Hosp. Dist. 2, 106 Wn.2d 632, 641, 724 P.2d 981 (1986).

Here, the State has a compelling interest in protecting the public and promoting his rehabilitation. A prohibition on going to places where children may be regularly present, including church services, is narrowly tailored to serve that interest. Despite the condition, he is free to practice his religion, including, for example, through remote church services, self-study, or in adult communities. Despite claiming that there are less restrictive measures that the court could have imposed, Dominguez provides no specifics as to what those would be. His claim that condition 16 violates his First Amendment rights is unavailing.[23]

[23] The State also argues that Dominguez failed to meet his burden of demonstrating that the condition coercively impacts his ability to practice his religion, citing Barragan, No. 80365-4-I, slip op. at 23. As noted above, Barragan involved a condition similar to condition 16 in this case, and the defendant there "[did] not argue or point to any evidence that the condition has a coercive effect on his practice of religion." Id. However, Barragan provides no useful guidance on this issue because the court concluded that "the question of whether this condition unconstitutionally burdens Barragan's freedom of religion is not squarely before us." Id.

E. Prohibition on Dating and Disclosure of Sex Offender Status (Condition 17)

Condition 17 mandates Dominguez "not date women nor form relationships with families who have minor children, as directed by the supervising [CCO]." Further, condition 17 states that "[s]exual contact in a relationship is prohibited until the treatment provider/CCO approves of such" and requires him to "[d]isclose sex offender status prior to any sexual contact." However, it provides an exception for Dominguez to have sexual contact with his wife absent approval. Dominguez asserts that condition 17 unconstitutionally compels him to speak by forcing him to disclose his status as a sex offender to people with whom he may have sexual contact. He further contends that condition 17 violates his right to marry and to sexual intimacy by prohibiting him from dating absent approval.

A community custody condition barring a defendant from dating or forming relationships with families with minor children is not overbroad or unconstitutionally vague when it is reasonably related to the crime and is necessary to protect the public. State v. Kinzle, 181 Wn. App. 774, 785, 326 P.3d 870 (2014). RCW 9.94A.030(10) defines a crime-related prohibition as one that directly relates to the circumstances of the crime for which the offender has been convicted. There need only be "some basis" of nexus between the crime and the condition. State v. Irwin, 191 Wn. App. 644, 657, 364 P.3d 830 (2015); see also Nguyen, 191 Wn.2d at 684 (explaining there must be a reasonable relationship between the crime of conviction and the condition).

Here, although Dominguez's conviction did not arise from a dating relationship, he was convicted of sexual offenses involving a minor. In Kinzle, the court held that a prohibition on dating women and forming relationships with persons who have minor children was valid because the defendant connected with the minor-victim through a social relationship. 181 Wn. App. at 785. Also, in State v. Autrey, the court approved of a similar prohibition limiting the defendant's ability to date, reasoning it was reasonably related to his crime because "potential romantic partners may be responsible for the safety of live-in or visiting minors." 136 Wn. App. 460, 468, 150 P.3d 580 (2006). Thus, Kinzle and Autrey support the imposition of the condition here because Dominguez's crime was a sexual offense involving a minor, and potential romantic partners may be responsible for minors.

Second, Dominguez argues that condition 17 is not crime-related and compels him to speak in violation of his First Amendment right because it requires him to tell potential sexual partners about his status as a sex offender. But in In re Personal Restraint of Sickels, the court held that a similar condition requiring disclosure of sex offender status was necessary to protect potential sexual partners "by providing them with knowledge of the potential risk [the defendant] presents to minors." 14 Wn. App. 2d 51, 61, 469 P.3d 322 (2020). Similarly, requiring Dominguez to disclose his status as a sex offender is crime-related because his interactions with H.S. were initiated through H.S.'s friendship with Dominguez's daughter and connection with H.S.'s mother through parent organizations. Disclosing his sex offender status protects the public from the risk

he poses to minors. Condition 17 is crime-related and does not violate Dominguez's constitutional rights.

F. Prohibition on Staying in a Residence with a Minor (Condition 18)

Condition 18 prohibits Dominguez from "remain[ing] overnight in a residence where minor children live or are spending the night." Dominguez argues that condition 18 impedes his fundamental right to parent his children because he may be released while his youngest daughter is a minor and the condition prevents him from staying overnight in the same place as a minor.

A crime-related condition impacting person's "fundamental right to the care, custody, and companionship of one's children" is subject to more careful review. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). Such a condition must be "sensitively imposed" and "narrowly drawn" as to ensure that it is "reasonably necessary to accomplish the essential needs of the State and public order." Warren, 165 Wn.2d at 32, 34. This means there must not be a reasonable alternative means to achieve the State's interest. Id. at 34-35. However, this right can be restricted by a community custody condition if the record supports that it is "reasonably necessary to prevent harm to the children." State v. Ancira, 107 Wn. App. 650, 654, 27 P.3d 1246 (2001) (holding the condition prohibiting the defendant from contacting his children was not reasonably necessary to prevent them from witnessing domestic violence).

Dominguez relies on an unpublished decision, State v. Escobar, in which the trial court had initially failed to consider the impact it would have on the defendant's right to parent his son, so we remanded for the trial court to consider

a condition prohibiting contact with minors. No. 82135-1-I, slip op. at 12-13 (Wash. Ct. App. Jan. 18, 2022) (unpublished), https://www.courts.wa.gov/opinions/pdf/821351.pdf. Dominguez argues that there is no evidence that his own children are in danger, so a prohibition that would prevent him from living with his minor daughter is not reasonably necessary to prevent harm to her.

In response, the State argues that Dominguez has not demonstrated that he is in fact restricted from communicating with his daughter or making parenting decisions for her.[24] The State further argues that condition 18 is necessary to prevent harm to Dominguez's minor daughter given that he was convicted of "rap[ing] a teenage girl with whom he had a close emotional relationship, akin to that of a father and daughter."

Here, Dominguez informed the court of the possibility of release while his youngest daughter was still a minor. Thus, even if Dominguez will be barred from living under the same roof as her while she is still a minor, the court was made aware of this possibility and considered it, unlike in Escobar, where the record reflected no consideration of the defendant's son. Because the State has a compelling interest in protecting Dominguez's minor daughter given his conviction for rape of a teenage girl with whom he had a close relationship, the condition does not unconstitutionally burden his right to parent.

[24] The State also argues that Dominguez has not sufficiently demonstrated that condition 18 will impede his right to parent because he has not shown that his daughter will be a minor upon his release from 170 months of incarceration. Because the precise date of release is unknown, this is not a basis on which to reject Dominguez's claim.

G. Restrictions on Use of Internet and Computer (Conditions 21 and 24)

Condition 21 bars Dominguez from "access[ing] the Internet on any computer, phone, or computer-related device with access to the Internet or on-line computer service except as necessary for employment purposes [] in any location, unless such access is approved in advance by the supervising [CCO] and your treatment provider." Similarly, condition 24 provides that Dominguez "may not possess or maintain access to a computer, unless specifically authorized . . . [and] may not possess any computer parts . . . including but not limited to hard drives, storage devices, digital cameras, web cams, wireless video devices, [etc.]." Dominguez contends that these restrictions are overbroad because they prohibit constitutionally protected conduct and are not crime-related.

As previously discussed, a crime-related condition is valid when there is some nexus, i.e., a reasonable relation, between it and the crime of conviction. Irwin, 191 Wn. App. at 657. A condition that restricts a defendant's access to the internet is valid if it is "narrowly tailored to the dangers posed by the specific defendant." State v. Johnson, 197 Wn.2d 740, 745-46, 487 P.3d 893 (2021) (holding that an internet condition permitted the defendant to use the internet only with the use of approved filters was not overly broad). Dominguez asserts that although he communicated with H.S. through internet applications there is no evidence that his crimes stemmed from the internet or computers. He further argues that condition 24 is not crime-related because nothing in the record suggests that he used any computer or related devices to perpetrate his crimes

and that this type of condition is more apt for "individuals convicted of possessing or creating child pornography." But Dominguez used internet applications (Snapchat and Facebook) to contact H.S. and send her sexually explicit messages. Dominguez also sent H.S. pornography and asked her to replicate such acts and "sent photographs of his own erect penis to H.S. and asked her to remove her clothes during video chats to expose her breasts." Conditions 21 and 24 are crime-related given that Dominguez's use of technology to commit in the crimes of conviction.

As to his overbreadth argument, Dominguez relies on In re Personal Restraint of Sickels, in which the court accepted the State's concession that a condition similar to condition 21 here was overbroad because it limited internet use only to employment purposes. 14 Wn. App. 2d at 72-74. Here, the State agrees that condition 21 is overbroad and proposes narrower language that would allow Dominguez to use the internet with the appropriate protections that reads, "Do not use or access the World Wide Web unless specifically authorized by your community custody officer through approved filters."[25] We accept the State's concession that condition 21 is overbroad and remand to the trial court to consider the State's proposed language to narrow the condition.

As to condition 24, in other cases considering the same condition, we have previously held that it is overbroad. See State v. Hammerguist, No. 75949-3-I (Wash. Ct. App. Apr. 30 2018) (unpublished), http://www.courts.wa.gov/opinions/pdf/759493.PDF; State v. Smith, No. 79454-0-

[25] The State's proposed language is based on language that was held not to be overly broad in Johnson, 197 Wn.2d at 744, 746-47.

I (Wash. Ct. App. June 22, 2020) (unpublished), https://www.courts.wa.gov/opinions/pdf/794540.pdf.[26] We adopt the reasoning in these opinions and provide the same direction to the trial court on remand:

> In view of the potential impact on recognized free speech rights, the scope and meaning of any limitation on the use of computers must be clarified on remand. Specifically, the sentencing court should clarify (i) the distinction between merely using a computer and possessing or maintaining access to a computer; (ii) what standards apply to the CCO in determining what access to computers is allowed; and (iii) given the ubiquitous presence of computers in our society, if, and why, [the condition] impacts any use or possession of items that include computers with no capacity to store or download images.

Hammerquist, No. 75949-3-I, slip op. at 9-10.[27]

VII. VPA and DNA Collection Fee

Dominguez asserts that this court should strike the VPA and DNA collection fee because he is indigent and recent amendments to the statute bar courts from imposing such fees on indigent defendants. The State agrees that the VPA and DNA collection fee should be stricken. In 2023, legislature amended RCW 7.68.035 to prohibit courts from imposing the VPA when the defendant is indigent pursuant to RCW 10.01.160(3). The 2023 amendment to RCW 7.68.035 took effect on July 1, 2023. LAWS OF 2023, ch. 449, § 1. Further, the legislature wholly eliminated the DNA collection fee. LAWS OF 2023, ch. 449, § 4. The 2023 amendments apply to matters pending on direct appeal. State v. Ellis, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023). Thus, we remand to strike the VPA and

[26] We may cite to unpublished opinions if necessary for a reasoned opinion. GR 14.1(c).

[27] We note that in another recent case, the State conceded that this same condition was overbroad. See State v. Reedy, No. 83039-2-I, slip op. (unpublished portion) at 22 (Wash. Ct. App. April 10, 2023), https://www.courts.wa.gov/opinions/pdf/830392.pdf.

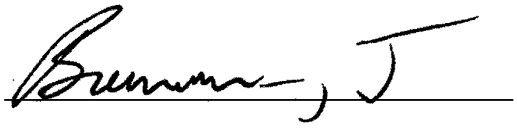
DNA collection fee from Dominguez's judgment and sentence.

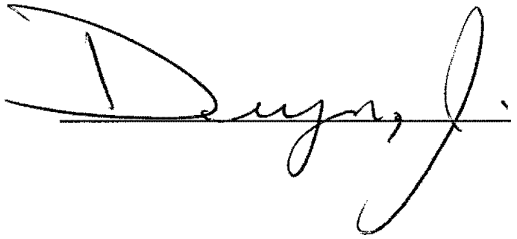
CONCLUSION

We affirm the convictions for rape of a child in the second degree (count I), rape of a child in the third degree (count II), and communication with a minor for immoral purposes (count III). We additionally affirm the community custody conditions, but remand to replace overbroad language on conditions 21 and 24 and to strike the VPA and the DNA collection fee.

Chung, J.

WE CONCUR:





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