IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 38580-9-III

On review from the Superior Court of Asotin County, no. 18-1-00087-02

STATE OF WASHINGTON, Respondent,

v.

ROBERT ALEXANDER CLARK, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Robert Clark spent three years in jail awaiting his trial. Under the circumstances present here, including the State's decision to incarcerate him in remote facilities that impeded his attorney's ability to meet with him to prepare for trial and the child accuser's loss of memory in the interim, the protracted delays violated his constitutional right to a speedy trial.

On the merits of the case, because the act alleged to constitute child molestation was not corroborated, it was error to admit child hearsay statements concerning that act when the accuser was found to be unavailable due to her loss of memory. Additionally, the trial court lacked authority to order Mr. Clark to pay the child accuser's counseling costs as a condition of community custody when it did not impose any counseling costs as restitution.

Mr. Clark requests that the court reverse and dismiss his convictions for the speedy trial violation; or, alternatively, to

remand them for retrial without inadmissible child hearsay. In the event the court affirms the conviction, Mr. Clark requests that the court strike the community custody condition requiring payment of counseling costs.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The three-year delay in bringing Mr. Clark to trial violated his constitutional right to a speedy trial under the Sixth Amendment to the U.S. Constitution and article I, section 22 of the Washington Constitution.

ASSIGNMENT OF ERROR NO. 2: The trial court abused its discretion in admitting the accuser's uncorroborated statements describing an act of molestation under the child hearsay rule, RCW 9A.44.120(1)(c)(2), when it found she was unavailable at trial due to a lack of memory.

ASSIGNMENT OF ERROR NO. 3: The trial court erred in imposing a condition of community custody requiring Mr.

Clark to pay counseling costs of M.W. when it did not impose any counseling costs as restitution.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether the State's decision to incarcerate Mr. Clark pretrial at remote locations, impeding his ability to confer with his attorneys, contributed to the delay of 40 months in bringing him to trial.

ISSUE NO. 2: Whether the child accuser's loss of memory between the child hearsay hearing in September 2020 and the time of trial in September 2021 prejudiced Mr. Clark's ability to defend the case.

ISSUE NO. 3: Whether sufficient evidence necessitated an inference that Mr. Clark committed acts of sexual intercourse and sexual conduct with M.W.

ISSUE NO. 4: Whether the failure to follow statutory procedures to impose restitution precludes the community custody condition to pay counseling costs.

IV. STATEMENT OF THE CASE

A. The pretrial proceedings and the time for trial.

The case arose when the State charged Robert Clark with first degree rape of a child and first degree child molestation alleged to have occurred on May 29, 2018.[1] CP 36-37. Mr. Clark was arrested immediately and appeared in court for the first time the following day. I RP 7. He was arraigned and pleaded not guilty on June 18, 2018. I RP 16-17.

After his arraignment, his attorney repeatedly requested continuances and his trial date was initially set for December 20, 2018. I RP 24, 26, 27, 29, 32. However, at a pretrial

[1] The State also charged a second count of first degree child molestation alleged to have occurred some time the year before. CP 38. The trial court acquitted Mr. Clark of this charge. CP 104. Because the third count is not at issue in this appeal, it will not be addressed further in this brief.

hearing on December 3, his attorney again requested a continuance and the trial date was reset to January 17, 2019. I RP 34, 37. At the next hearing, held on December 17, Mr. Clark first inquired on the record why his attorney was not allowed in to see him. The trial court told him he should not discuss the matter on the record in open court. I RP 39.

After DNA results were received, the court replaced Mr. Clark's attorney at his request and struck the trial date. I RP 41-42. Approximately a month later, the new attorney had not received discovery from the former attorney. I RP 44-45. The case was continued five more times without a trial date so the defense could obtain a DNA expert. I RP 45, 47, 48, 49, 51.

On May 20, 2019, while continuing the case again, the trial court was advised that Mr. Clark had been transferred to Walla Walla County.[2] I RP 53, 55. As his attorney continued to

[2] According to Google Maps, the distance between Asotin County and Walla Walla County is 129 miles and the estimated driving time is 2 hours and 42 minutes one-way.

request continuances to address DNA testing, Mr. Clark was transferred to the Washington State Penitentiary. I RP 57-58. The State subsequently informed the court that Mr. Clark's transfer was due to security issues that Asotin County could not handle. I RP 67.

Again, the case was continued six more times between June 3, 2019 and November 4, 2019 to address DNA issues. I RP 57, 61, 64, 66, 69, 71, 73, 74, 76, 77, 79, 84, 88. On November 4, 2019, defense counsel argued that CrR 3.4 required Mr. Clark's presence to reset the trial date and also stated that he was unable to confer with Mr. Clark due to him being held pretrial in Walla Walla. I RP 88-89. The trial court assumed that there were good reasons for Mr. Clark to be incarcerated in the Washington State Penitentiary pending trial, but agreed to conduct further proceedings by video conference so that Mr. Clark could appear. I RP 90-91. At the next hearing, Mr. Clark received a trial setting for February 27, 2020. I RP 95-96.

On February 3, 2020, defense counsel moved to strike the trial date because the defense DNA expert was retiring and the case could not proceed without an expert. I RP 101-02. The trial date was reset to April 23, 2020. I RP 103. The following month, as the COVID-19 pandemic erupted, the Washington Supreme Court entered its first emergency order authorizing suspension of court rules and modification of court operations to address the public health emergency.[3] Within weeks, the Supreme Court suspended criminal jury trials until after April 24, 2020.[4] It extended the suspension of criminal jury trials several times in subsequent orders, eventually allowing trials to resume beginning July 6, 2020.[5]

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[3] *In the Matter of the Response by Washington State Courts to the Public Health Emergency in Washington State*, Order No. 25700-B-602 (filed March 4, 2020).

[4] *In the Matter of the Response by Washington State Courts to the Public Health Emergency in Washington State*, Order no. 25700-B-607 (filed March 20, 2020), at p. 3.

[5] *In the Matter of the Response by Washington State Courts to the Public Health Emergency in Washington State*, Revised and Extended Order Regarding Court Operations no. 25700-B-615 (filed April 13, 2020), at p. 5 (suspending trials until after May

Mr. Clark continued to have difficulty conferring with his attorney due to his incarceration in Walla Walla. I RP 106, 109. At a July 13, 2020 hearing, he obtained a trial setting for November 5, 2020. I RP 115, 118. At the end of October, his attorney encountered personal family difficulties and a new attorney was appointed; the trial date was stricken again. I RP 196-98. The new attorney again continued the trial setting multiple times to obtain expert review and trial was eventually set for March 25, 2021. I RP 203, 205, 208, 209, 210.

Beginning on January 25, 2021, Mr. Clark began expressing concerns about his speedy trial rights. I RP 211, 242, 246. In April 2021, the new attorney moved to withdraw

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4, 2020); *In the Matter of the Response by Washington State Courts to the Public Health Emergency in Washington State*, Second Revised and Extended Order Regarding Court Operations no. 25700-B-615 (filed April 29, 2020), at p. 5 (suspending trials until after July 6, 2020); *In the Matter of the Response by Washington State Courts to the Public Health Emergency in Washington State*, Order re: Modification of Jury Trial Proceedings no. 25700-B-631 (filed June 18, 2020), at p. 2 (allowing jury trials to recommence beginning July 6, 2020 subject to public health protections.

due to a breakdown in communication, and Clark informed the court that being held in Nez Perce County[6] made it almost impossible to be able to talk to her. I RP 219, 222. The court granted the motion, appointed a new attorney, and struck the trial dates.

At the two subsequent hearings, the new attorney was not ready to proceed and the trial date was not reset until a hearing on June 6, 2021. I RP 230-31, 232, 233. At the next hearing on July 12, 2021, his attorney indicated she was unprepared to proceed and asked to strike the August trial dates. I RP 238. Mr. Clark requested to speak confidentially to his attorney but

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[6] The record does not establish when exactly Mr. Clark was moved to Nez Perce County, Idaho, but at the January 21, 2021 hearing, the State represented that he assaulted another inmate and created a conflict. I RP 215. This was a similar explanation for Mr. Clark's relocation to the Washington State Penitentiary earlier in the case, which the State attributed to Asotin County's inability to manage "security issues." Mr. Clark's new attorney was based in Walla Walla, which is 130 miles and a driving distance of approximately two and one-half hours one-way from Nez Perce County according to Google Maps. I RP 226.

the teleconferencing equipment did not permit this to occur.[7] I RP 241, 243. Mr. Clark stated that he was concerned about his speedy trial rights. I RP 242. His attorney stated that they had discussed how to preserve the speedy trial issue. *Id.*

At the next hearing, Mr. Clark reiterated his speedy trial concerns, noting that he had been in custody for three years and had requested that his attorney brief the speedy trial issue. I RP 246-47. Accordingly, counsel stated she was not ready to proceed because the speedy trial issue had not been preserved; however, she later stated she could be ready for the current trial setting if Mr. Clark wanted. I RP 246-47, 250. However, the State asked to continue the trial due of the unavailability of a witness. I RP 248. The court granted the continuance due to witness unavailability. I RP 252. Finally, on September 16,

[7] Under CrR 3.4(f)(2), video conference proceedings "must provide for confidential communications between attorney and client."

2021, three years and four months after his arrest, Mr. Clark was brought to trial. I RP 259.

B. The child hearsay hearing and unavailability findings.

In September 2020, the trial court held a hearing on the admissibility of the statements of the child accuser, M.W. I RP 122. At the time, M.W. was 7 years old, but she did not testify at the hearing. I RP 130.

At the hearing, M.W.'s mother testified that Mr. Clark had been a friend of her ex-husband and a close family friend that her children called "Uncle Robert" for several years. I RP 129-131. In May 2018, she was living in a trailer with her two children when, one evening, Mr. Clark was outside cleaning his vehicle with the children while she was preparing dinner. I RP 131, 135-36. When she looked outside and didn't see M.W., she began calling for her. When M.W. didn't come, she went outside to look for her. Walking around the corner, she saw Mr. Clark walking away from his truck with his pants down

around his ankles and in a state of arousal. I RP 136-37. Mr. Clark told M.W.'s mother that he was taking a pee. I RP 138. M.W.'s mother found M.W. in the back seat of his truck, bent over on her knees and naked from the waist down. I RP 138-39. She picked M.W. up and took her inside the home, then took her to the hospital later that evening. I RP 139, 142.

Her mother testified about the statements M.W. made on the date of the incident and M.W.'s general capacities as a four-year-old preschooler at the time. I RP 129, 139-41, 145-49, 278. A detective also testified to statements M.W. made a few days later during a forensic interview. I RP 155, 160, 163-67. The trial court entered an oral finding that the *Ryan* factors were satisfied and admitted the statements. I RP 189-92. Further, it found that M.W.'s statements were corroborated by her mother's observations of her daughter's state and Mr. Clark's erect penis. I RP 192. The judge subsequently retired and could not be located, and no written findings and conclusions were filed at the time. I RP 261-62.

During trial, defense counsel objected to M.W.'s hearsay statements because there was no order delineating what was admissible. I RP 286-88. The trial court stated that it was bothered by the lack of written findings and specificity in the earlier judge's ruling and entered a finding that M.W. was unavailable for purposes of the child hearsay statute due to her lack of memory. I RP 445-46, 451. It also found that there was adequate corroboration to satisfy the statute's requirements to admit her statements but did not elaborate. I RP 452.

After trial, the trial court signed findings of fact and conclusions of law supporting its ruling admitting the child hearsay statements.

C. Trial and sentencing.

M.W. was called as a witness at trial but testified to a lack of memory of anything besides Robert's truck. I RP 326, 328-30. Accordingly, the accusations were presented through her child hearsay statements. First, her mother testified that

M.W. told her "I let Uncle Robert touch my butt because he loves me." M.W. pointed generally to her privates to show her mother. I RP 289.

Second, a detective testified to several statements M.W. made in a forensic interview. In the interview, M.W. stated that Mr. Clark pulled her pants down and touched her bottom with his hands and his private. I RP 365-66. She described Mr. Clark's private as sticking out when he touched her privates and her bottom with it; she said that it had gone inside of her and it hurt and made her sad. I RP 366. M.W. held her hands about eight inches apart to demonstrate its size and said that he took her hands and put them on his[8] private part. I RP 366. And she reported that he told her he loved her; tried to kiss her lip and

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[8] The Verbatim Report of Proceedings reports that M.W. said Mr. Clark placed her hands on "her" privates, but this is understood to be either a scrivener's error or a malapropism. The probable cause affidavit clearly indicates the allegation was that Mr. Clark places M.W.'s hands on his erect penis, and the State also relied on this understanding in its closing argument. CP 10-11; II RP 550.

kissed her foot; and she told him no and he had said yes." I RP 367. However, M.W. would often repeat the last thing the questioner said and endorse the first thing she said. I RP 400. When asked when it happened with Robert, she said "tomorrow last time." I RP 401. And she also said Robert was carrying her backwards and laying her on the ground and she was screaming "no," but her mother did not corroborate this. I RP 405-06.

The local hospital advised that M.W. be taken to Spokane, where she had a full sexual assault examination. I RP 292-93. There, when asked by an examining nurse if she had pain, she said "Robert" and "My bottom hurts," pointing to her vagina. I RP 456-57. Another nurse prepared a sexual assault kit, collecting M.W.'s clothing, various swabs, and performing a physical examination. I RP 466-68, 470, 472. She did not observe any injuries on M.W. I RP 473. The following morning, M.W. received an external physical examination that found no abnormality to her genitalia besides some vulvar

redness, which the nurse advised was typically a wiping issue. I RP 480-81, 484, 489. Although she testified that 90% of examinations in confirmed cases of sexual assault are normal, she advised that the hymen tissue is very sensitive in a prepubescent child that can cause pain if touched. I RP 485, 486.

The State submitted M.W.'s sexual assault kit for forensic examination. The swabs tested negative for seminal fluid and saliva. II RP 509, 528. Two areas of M.W.'s underwear tested presumptively positive for saliva. II RP 512. One of the areas produced a mixed sample consistent with a mixture of Mr. Clark and M.W. II RP 516, 519. Although the swabs did not test positive for biological material, a small amount of DNA from between 7 and 10 cells was recovered. II RP 528, 543. Y-STR testing that isolates the male "Y" chromosome found a male profile on the vaginal swab from which Mr. Clark was excluded. II RP 535, 540. The anal swab

revealed a mixture of two males, one of which matched Mr. Clark to a probability of 1:47. II RP 540.

The night of the incident, a patrol officer contacted Mr. Clark at his home. I RP 421. On inquiry, he told the officer nothing had happened and he left after they told him to. When asked if M.W.'s mother had seen him with his pants down and an erection, he repeated that he was peeing. I RP 421. After saying that the kids were in the back of the truck and nothing had happened, he was arrested. I RP 422. The detective also interviewed Mr. Clark at the jail, where he told her that the kids were playing and throwing rocks in the truck and got inside it, which they did all the time. I RP 389.

In closing, the State argued that Mr. Clark placing M.W.'s hands on his penis constituted the crime of first degree child molestation and that Mr. Clark penetrated M.W.'s vagina, causing pain to her hymen, constituting first degree rape of a

child. II RP 550, 554. The trial court convicted Mr. Clark of both counts. II RP 570, 571.

At sentencing, the trial court entered findings of fact and conclusions of law supporting its verdict. II RP 577; CP 99-105. Based on a score of "6," it imposed a mid-range sentence of 200 months to life with lifetime community custody. CP 114, 117. It imposed a condition requiring that he pay any fees generated from counseling for M.W., but did not order any such fees imposed as restitution. CP 115, 125.

Mr. Clark now appeals and has been found indigent for that purpose. CP 128, 145.

V. ARGUMENT

A. The pretrial delay of over three years, culminating in M.W.'s loss of memory of the events in question, violated Mr. Clark's constitutional right to a speedy trial.

Under the Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington State

Constitution, defendants have the right "to a speedy and public trial." In determining whether a defendant's constitutional speedy trial rights have been violated, the court balances four factors—length of delay, prejudice to the defendant, reason for the delay, and whether the defendant has demanded a speedy trial. *See Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). The speedy trial protections under both the state and federal constitutions are co-extensive; the state constitution does not afford a defendant greater speedy trial rights. *State v. Iniguez*, 167 Wn.2d 273, 290, 217 P.3d 768 (2009).

The reviewing court evaluates constitutional speedy trial claims *de novo*. *State v. Shemesh*, 187 Wn.2d 136, 144, 347 P.3d 1096, *review denied*, 184 Wn.2d 1007 (2015) If a court determines that a defendant's constitutional right to a speedy trial has been violated, then dismissal of the charges against the accused is "the only possible remedy." *Strunk v. U.S.*, 412 U.S. 434, 93 S. Ct. 2260, 37 L. Ed. 2d 56 (1973).

In determining whether a defendant's right to speedy trial has been violated, the Washington Supreme Court has taken a two-step approach. *Iniguez*, 167 Wn.2d at 291. First, the court determines whether the pretrial delay was presumptively prejudicial. *Id.* Once the delay has been found to be presumptively prejudicial, the court engages in the *Barker* four-factor balancing inquiry. *Barker*, 407 U.S. at 530; *Iniguez*, 167 Wn.2d at 291. Whether delay is presumptively prejudicial is necessarily a fact-specific inquiry dependent on the circumstances of each case. *Iniguez*, 167 Wn.2d at 291. The court looks at several factors, including the passage of time, the complexity of the charges, and whether the case relies on eyewitness testimony. *Id.* However, "the right is not quantified, does not depend on whether the defendant makes a specific request, and does not arise pursuant to some inflexible rule." *State v. Ollivier*, 178 Wn.2d 813, 826-27, 312 P.3d 1 (2013). And in considering the case, the reviewing court

weighs the conduct of both the prosecution and the defendant. *Id.* at 827 (*quoting Barker*, 407 U.S. at 529, 530).

The delay of approximately 40 months between charging Mr. Clark in May 2018 and bringing him to trial in September 2021 is sufficient to show the delay was presumptively prejudicial. Delays of one year have been generally found to be presumptively prejudicial, and a 23-month delay was sufficient to warrant *Barker* evaluation in *Ollivier*. *See* 178 Wn.2d at 828.

Applying the *Barker* factors here, while much of the delay is attributable to the need for defense investigations, the State's decision to incarcerate Mr. Clark at remote locations far from his attorneys substantially contributed to his counsels' inability to confer with him. In one instance, the housing arrangements appear to have significantly affected the attorney-client relationship to the point that counsel was disqualified and replaced, necessitating yet another round of continuances for

the new attorney to get up to speed. Moreover, the trial court's failure to provide teleconferencing facilities permitting confidential attorney-client discussions violated CrR 3.4(f)(2) and further impeded the ability to have meaningful discussions with his attorney.

Nor were the issues in the case sufficiently complex to warrant the length of the delay in this case. The initial delay in producing the results of DNA testing is attributable to the State; and while some defense investigation of those results is certainly necessary and appropriate, much of the expert review appeared to be duplicative and no defense expert was ultimately proffered at trial. Finally, this was not a circumstance where the State continued to produce voluminous discovery as the case proceeded, necessitating additional time for review; the record reflects no additional DNA testing or similar discovery being produced after late 2019, still approximately two years before Mr. Clark was ultimately tried. *See Ollivier*, 178 Wn.2d at 830-31 (discussing disproportionality of delay to complexity

of issues and need to investigate and defend against new discovery).

Turning to the purpose for the delay, the second *Barker* factor requires the court to evaluate the blameworthiness of both parties in causing the delays. *Ollivier*, 178 Wn.2d at 831. While the State's pretrial incarceration arrangements were likely not deliberate efforts to delay the trial, the fact that they frustrated attorney-client communications was sufficiently known to be brought up in open court in November 2019 and yet persisted during the case, contributing to the disqualification of another attorney later in the case. This factor should weigh against the State, if to a lesser extent. *See id.* at 832.

The third factor is the defendant's effort to assert his speedy trial rights. *Shemesh*, 187 Wn. App. at 146. Mr. Clark began expressing concerns about his speedy trial rights in January 2021 and repeated them several times, but was still not brought to trial until eight months after he first brought it up.

Because the record reflects that Mr. Clark did seek to assert his rights, this factor should also weigh in his favor.

Lastly, the fourth *Barker* factor is prejudice to the defendant. *Ollivier*, 178 Wn.2d at 840. "The most important of the three interests is protection against impairment of the defense because if the defendant cannot adequately prepare his case, 'the fairness of the entire system is skewed.'" *Id.* at 845 (*quoting Barker*, 407 U.S. at 532). While prejudice can consist of oppressive pretrial incarceration alone, which is certainly present in this case where he was incarcerated at a great distance from his attorneys and place of residence in a high-risk environment during a global pandemic, for Mr. Clark, the risk of "dimming memories" is not merely abstract; it actually occurred, as by the time of trial, M.W. no longer had a memory of events sufficient to subject her to meaningful cross-examination. Notably, at the time of the child hearsay hearing in September 2020, her mother indicated that M.W. had recently discussed the events with her, indicating that her

memory degraded substantially over the following year before Mr. Clark's trial took place. I RP 149. This is highly prejudicial to Mr. Clark as it prevented him from exploring with her the discrepancies in her account, clarifying the acts that the stated took place with more mature language skills, and inquiring into potential explanations for the presence of unidentified male DNA in her vagina and anus as well as the presence of saliva that was not accounted for in her initial report. Indeed, the significant diminution in the memories of key prosecution witnesses of important aspects of the crime can render the actual prejudice to the defense "apparent." *See Dufield v. Perrin*, 40 F. Supp. 687, 691-92 (Dist. N.H. 1979).

Considered in total, the balancing of the *Barker* factors weighs in favor of Mr. Clark. The State's pretrial incarceration decisions factored heavily in creating the delays at issue, Mr. Clark raised his speedy trial rights to no avail, and the delays resulted in the complaining witness's loss of memory of the events at issue, depriving him of an opportunity for meaningful

cross-examination. Accordingly, the court should hold that the 40-month delay in this case violated Mr. Clark's right to a speedy trial under the Sixth Amendment and article I, section 22 of the Washington Constitution.

B. Because the State failed to present sufficient corroboration of the specific acts alleged in M.W.'s child hearsay statements, the trial court erred in admitting them under RCW 9A.44.120(1)(c)(2).

The trial court's decision to admit child hearsay statements is reviewed for abuse of discretion, which occurs when the decision is manifestly unreasonable or is based on untenable reasons or grounds. *State v. Beadle*, 173 Wn.2d 97, 112, 265 P.3d 863 (2011). Here, the trial court found that M.W. was unavailable as a witness under the evidentiary standard;[9] consequently, the statements are only admissible

[9] As discussed in *Beadle*, courts have recognized a distinction between "unavailability" for purposes of the child hearsay statute and for purposes of the Sixth Amendment's

under the statute if there is "corroborative evidence of the act." *Id.* at 112.

Each act of abuse must be separately corroborated under the statute. *State v. Jones*, 112 Wn.2d 488, 496, 772 P.2d 496 (1989). While direct evidence is preferred, it is not required; indirect evidence, such as precocious knowledge of sexual activity, the presence of semen, or psychological evidence can be sufficient. *Id.* at 495-96; *see also State v. Swan*, 114 Wn.2d 613, 790 P.2d 610 (1990); *State v. C.J.*, 148 Wn.2d 672, 698-700, 63 P.3d 765 (2003). Corroboration requires sufficient evidence to "support a logical and reasonable inference that the

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confrontation clause. 173 Wn.2d at 115. Under *State v. Price*, 158 Wn.2d 630, 146 P.3d 1183 (2006), a witness's lack of memory does not render the witness unavailable for constitutional purposes. Here, the trial court's finding of unavailability was based on under ER 804(a)(3) for purposes of the child hearsay statute. Accordingly, Mr. Clark does not allege that M.W's unavailability constituted a confrontation clause violation.

act of abuse described in the hearsay statement occurred." *Swan*, 114 Wn.2d at 622 (internal quotation marks omitted).

Here, the separate acts that must be corroborated are M.W.'s reports that Mr. Clark put his private inside her private and that Mr. Clark placed her hands on his erect penis.

i. *Lack of corroboration of vaginal penetration.*

M.W.'s physical examination was normal, with only some redness to her labia that the examining nurse testified usually indicated a wiping problem. Although DNA attributed to Mr. Clark was recovered from inside M.W.'s underwear, none of his DNA was found in her vagina; to the contrary, DNA from a different man was found in her vagina. No semen was recovered. Lastly, M.W. reported feeling pain in her general vaginal area, which the State argued could show contact with her hymen, which is typically painful to touch in a child. But M.W. did not identify her hymen or indicate it to be the source of her pain, and her pain could as easily be understood

as deriving from the labial redness that is likely unrelated to any allegation against Mr. Clark.

Even indirectly, the independent evidence does not tend to support a conclusion that Mr. Clark penetrated M.W.'s vagina with his penis. Accordingly, the hearsay statement was insufficiently corroborated and should not have been admitted due to M.W.'s unavailability.

ii. *Lack of corroboration of manual stimulation.*

There is even less evidence corroborating M.W.'s statement that Mr. Clark placed her hands on his penis. The incident was not witnessed, no transfer DNA was obtained from her hands, and M.W. did not describe any movement of her hands that would indicate precocious sexual knowledge. No evidence corroborates M.W.'s claim; for that reason, the claim should not have been admitted.

Because the hearsay statements were not sufficiently corroborated to warrant their admission under RCW

9A.44.120(1)(c)(ii), the trial court abused its discretion in admitting them. The convictions should be reversed and remanded for retrial.

C. The trial court lacks authority to require Mr. Clark to pay for counseling costs when restitution for counseling costs was neither requested nor imposed.

A judge's authority to impose community custody conditions is circumscribed by statute. *State v. Geyer*, 19 Wn. App. 2d 321, 325, 496 P.3d 322 (2021). Community custody conditions can be challenged for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744-45, 193 P.3d 678 (2008). The Court of Appeals considers the decision to impose particular community custody conditions for abuse of discretion, evaluating whether the condition violates the limitations of RCW 9.94A.703, which establishes mandatory, waivable, and discretionary conditions. *Geyer*, 496 P.3d at 325-26.

Here, the challenged condition requires Mr. Clark to counseling costs of M.W. The only arguably applicable authority for the condition arises from RCW 9.94.703(3)(d), which allows a court to order a defendant to

> Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community.

But interpreting this statute to encompass an order to pay all future counseling costs conflicts with the specific statutory mechanism for recouping such costs set forth in the restitution statute, RCW 9.94A.753.

Under this statute, the trial court must hold a hearing within 180 days of sentencing to determine the amount owed. RCW 9.94A.753(1). Due process protections attach to the process, requiring that the evidence supporting a restitution order be reasonably reliable and that the defendant have an opportunity to refute it. *State v. Kisor*, 68 Wn. App. 610, 620, 844 P.2d 1038, *review denied*, 121 Wn.2d 1023 (1993).

Furthermore, the restitution statute specifically contemplates the payment of counseling costs "reasonably related to the offense." RCW 9.94A.753(3). Once imposed, the Department of Corrections must supervise the defendant's compliance with the restitution order during the period of incarceration and community custody. *Id.*

By requiring Mr. Clark to pay M.W.'s counseling costs as a condition of community custody, the trial court has circumvented the limitations and protections of the restitution statute. The condition does not expressly limit Mr. Clark's obligation to counseling costs imposed as restitution, through the processes and within the time limits established by statute. Instead, it bypasses these requirements by apparently authorizing the community corrections officer to determine what constitutes a recoverable cost at any time, without necessarily affording Mr. Clark an opportunity to contest the determination.

When multiple statutory procedures apply, the more specific statute supersedes the more general one. *State v. Haggard*, 195 Wn.2d 544, 557, 461 P.3d 1159 (2020). Here, the restitution statute provides a specific mechanism to recover counseling costs caused by the offense. Consequently, to impose counseling costs, the trial court must follow the more specific restitution statute rather than the general authority to impose community custody conditions. In the absence of a restitution order specifying the costs owed, the community custody condition may not independently require Mr. Clark to pay costs recoverable as restitution.

Addressing a similar condition requiring payment of counseling and medical costs in *State v. Land*, 172 Wn. App. 593, 604, 295 P.3d 782 (2013), the Court of Appeals accepted the State's concession that the condition must be stricken when the State failed to seek restitution, restitution was not ordered, and the statutory time period for requesting restitution had passed. RCW 9.94A.753(1) requires restitution to be imposed

within 180 days of sentencing. The trial court lacks authority to impose restitution except as authorized by the statute. *State v. Chipman*, 176 Wn. App. 615, 618-19, 309 P.3d 669 (2013). Here, more than 180 days has elapsed since Mr. Clark's sentencing, so there is no authority to enter a restitution order for counseling costs.

Because no restitution was imposed and no restitution can be imposed at this time, the condition requiring payment of counseling costs exceeds the trial court's authority and must be stricken.

VI. CONCLUSION

For the foregoing reasons, Mr. Clark respectfully requests that the court REVERSE and DISMISS his convictions; or alternatively, REMAND the charges for a new trial; or alternatively, STRIKE the community custody condition requiring payment of counseling costs.

RESPECTFULLY SUBMITTED this 23 day of May, 2022.

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