No. 38523-0-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JEREMY DAVID OWNBY,

Appellant.

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

The Honorable Judge Maryann C. Moreno

APPELLANT'S OPENING BRIEF

Jill S. Reuter, WSBA #38374
Eastern Washington Appellate Law
PO Box 8302
Spokane, WA 99203
Phone: (509) 242-3910
admin@ewalaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court

Washington Courts of Appeal

Washington Statutes

Washington Court Rules

Federal Authorities

A. SUMMARY OF THE ARGUMENT

The State charged Mr. Ownby with two counts of first degree rape of a child and two counts of first degree child molestation of H.L.B., the daughter of his former girlfriend Terry Bernard. The case proceeded to a jury trial, and the trial resulted in a hung jury. Following a second jury trial, the jury found Mr. Ownby guilty as charged.

Mr. Ownby now appeals, arguing he was denied his Sixth Amendment right to effective assistance of counsel, where defense counsel failed to object to testimony and to the State's prosecutorial misconduct during rebuttal closing argument regarding his sexual relationship with Terry Bernard. Mr. Ownby also argues the State committed misconduct in its rebuttal closing argument that was prejudicial and incurable, by arguing facts not in evidence (that he was responsible for an abuse allegation against H.L.B.'s brother N.B.) and by appealing to the passion and prejudice of the jury (by arguing

his sexual relationship with Terry Bernard translates to a proclivity to engage in sexual contact with a child).

Mr. Ownby also challenges three conditions of community custody imposed by the trial court.

B. ASSIGNMENTS OF ERROR

1. Mr. Ownby was denied his Sixth Amendment right to effective assistance of counsel, where defense counsel failed to object to testimony and to the State's prosecutorial misconduct during rebuttal closing argument regarding Mr. Ownby's sexual relationship with Terry Bernard.

2. Mr. Ownby was denied his Sixth Amendment right to effective assistance of counsel, where defense counsel failed to object to a condition of community custody requiring Mr. Ownby to complete a substance abuse evaluation and complete all recommendations for further evaluation, treatment, and/or monitoring.

3. The State committed misconduct in its rebuttal closing argument that was prejudicial and incurable by arguing facts not in evidence and by appealing to the passion and prejudice of the jury.

4. The trial court erred by imposing a community custody condition requiring Mr. Ownby to pay supervision fees as determined by DOC.

5. The trial court erred by imposing a community custody condition prohibiting Mr. Ownby from

engaging in a romantic relationship without permission from his SOTP therapist or his CCO.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether Mr. Ownby was denied his Sixth Amendment right to effective assistance of counsel.

a. Whether Mr. Ownby was denied his Sixth Amendment right to effective assistance of counsel, where defense counsel failed to object to testimony and to the State's prosecutorial misconduct during rebuttal closing argument regarding Mr. Ownby's sexual relationship with Terry Bernard.

b. Whether Mr. Ownby was denied his Sixth Amendment right to effective assistance of counsel, where defense counsel failed to object to a condition of community custody requiring Mr. Ownby to complete a substance abuse evaluation and complete all recommendations for further evaluation, treatment, and/or monitoring.

Issue 2: Whether the State committed misconduct in its rebuttal closing argument that was prejudicial and incurable by arguing facts not in evidence and by appealing to the passion and prejudice of the jury.

Issue 3: Whether the trial court erred in imposing two conditions of community custody.

a. Whether the trial court erred by imposing a community custody condition requiring Mr. Ownby to pay supervision fees as determined by DOC.

b. Whether the trial court erred by imposing a community custody condition prohibiting Mr. Ownby from engaging in a romantic relationship without permission from his SOTP therapist or his CCO.

D. STATEMENT OF THE CASE

Terry Bernard and Michael Bernard married and had two children, a daughter H.L.B. and a son N.B. (RP[1] 361, 379, 507-508). The two later separated and divorced. (RP 361-362, 379, 406, 507). After they separated, they agreed to split custody of H.L.B. and N.B., with the children residing with each parent every-other-week. (RP 362-363, 406, 484-485, 494-495, 509, 527, 563). Mr. Bernard later remarried, to Lisa Bernard[2]. (RP 482, 507).

---

[1] The report of proceedings consists of seven volumes, transcribed by six different court reporters. Both the first and second jury trial are included in the report of proceedings. References to "RP" herein refer to the two consecutively paginated volumes reported by Terri Cochran, which contain the second jury trial and the sentencing hearing. Reference to volumes transcribed by a court reporter other than Ms. Cochran are referred to herein by listing the court reporter's last name, followed by "RP.")

[2] Because Terry Bernard and Lisa Bernard have the same surname, Terry Bernard is referred to herein as "Ms. Bernard"

Ms. Bernard met Jeremy David Ownby after she and Mr. Bernard separated. (RP 364-365, 509-510, 560-561). In December 2017, Mr. Ownby moved in with Ms. Bernard. (RP 365-366, 404, 406-407, 485-486, 510-511, 561). During this time, Ms. Bernard worked long hours. (RP 368, 408). If H.L.B. and N.B. were with them for the week, they were at home with Mr. Ownby while Ms. Bernard was at work. (RP 368-369, 408-409, 566, 572). H.L.B. initially looked at Mr. Ownby as another father-figure. (RP 398, 407, 448-449, 454-455, 563-565, 571).

During the winter in 2019, H.L.B. and N.B. ran away from Ms. Bernard and Mr. Ownby's residence. (RP 375-377, 390-391, 394, 431-432, 450-451, 486, 511-512, 568-569). They ran to a neighbor's house, and the police were called. (RP 432-433, 512). The police took them back to Ms. Bernard and Mr. Ownby's residence. (RP 433, 512). After this incident,

---

and Lisa Bernard is referred to herein as "Lisa." No disrespect is intended.

Mr. Bernard obtained temporary full-time custody of the children, and Ms. Bernard had visitation with the children. (RP 375-377, 386-387, 406, 433, 486-487, 494, 509, 511-513, 527-530).

After H.L.B. was living with Mr. Bernard for several months, she told Lisa's brother, M.H., a teenager at the time, that Mr. Ownby had touched her inappropriately. (RP 403-404, 433-437, 456-458, 460-467, 469-471, 483, 487, 513).

H.L.B. then told Lisa and Mr. Bernard that Mr. Ownby had touched her inappropriately. (RP 435-436, 438, 465-466, 470-471, 487-492, 494-495, 513-516). Lisa recorded the conversation she had with H.L.B., before she knew what H.L.B. was going to tell her. (CP 287-204; RP 439, 449, 465, 471, 488-492, 496, 555; Pl.'s Ex. 11). Lisa and Mr. Bernard then reported the incident to CPS (Child Protective Services). (RP 492, 496-497, 514-515, 521, 530-532, 534).

Law enforcement received a case referral from CPS. (RP 539, 546, 552-553). Law enforcement set up a forensic interview of H.L.B. (RP 540-541).

Over a year after Mr. Bernard obtained custody of H.L.B., H.L.B. told Ms. Bernard Mr. Ownby had touched her inappropriately. (RP 378).

The State charged Mr. Ownby with two counts of first degree rape of a child and two counts of first degree child molestation, of H.L.B. (CP 120-121).[3]

The case proceeded to a jury trial in March 2021. (CP 156-162; Gipson RP 5-201; Weeks RP 5-116; Blocker RP 3-7). The jury was unable to reach a verdict, and the trial court declared a hung jury. (CP 153, 156-162; Blocker RP 3-7).

The case proceeded to a second jury trial in August 2021. (RP 7-648). Witnesses testified consistent with the facts stated

[3] The State also alleged an aggravating factor on each count, which the jury found. (CP 120-121, 267-270; RP 645-646). However, because the trial court did not impose an exceptional sentence, the aggravating factor is not at issue here. (CP 346-363; RP 660, 666-671).

above. (RP 360-578). In addition, Ms. Bernard testified that while Mr. Ownby was living with her, he was in charge of discipline of the children. (RP 370-371). She described his discipline as follows:

> Ah, a lot of time-outs. At first he was -- when we first got together, he was spanking the children. And then he didn't -- he stopped spanking the children because it wasn't really working with [N.B.]. But then it started going into a lot of time-outs, constantly grounded . . . .

(RP 371).

She testified Mr. Ownby disciplined N.B. more than H.L.B., and that "[N.B.] was constantly in trouble." (RP 370-372).

The State questioned Ms. Bernard about her sexual relationship with Mr. Ownby. (RP 372-375). The following questioning occurred, with some objections by defense counsel:

> [The State:] I want to ask you about some more personal things. Were you and Mr. Ownby in a sexual relationship?
> [Ms. Bernard:] Yes, ma'am.
> [The State:] And can you explain kind of the nature of your sexual relationship?
> [Ms. Bernard:] It was rough.
> [The State:] What do you mean by that?

[Ms. Bernard:] I –
[Defense counsel:] I object to this, your Honor.
[Trial court:] What's the relevance?
[Defense counsel:] Yeah.
[The State:] Your Honor, the relevance of her relationship would indicate the opportunity and motive behind the child rape.
[Trial court:] Okay. You're going to have to lay a foundation for that, so I'll sustain the objection.
[The State:] Ms. Bernard, how often did you and Mr. Ownby have sex?
Ms. Bernard:] A lot.
[The State:] And were you always wanting to have sex with Mr. Ownby?
[Ms. Bernard:] No.
[The State:] Did you ever try to tell him no?
[Ms. Bernard:] Yes.
[The State:] What happened when you told him no?
[Ms. Bernard:] He would get angry and he would say things.
[The State:] What types of things would he say?
[Ms. Bernard:] One time when we were in the bath -- bathtub, we were taking a bath together. And I wasn't feeling good, hypoglycemic. And I was feeling nauseous because I needed to eat, and the hot heat from the tub was making it worse. He wanted to. I didn't want to. And he got angry, and he said that he could drown me if he wanted to.
[Defense counsel:] Objection, your Honor.
[Trial court:] And I'm going to sustain the objection and –
[Defense counsel:] Ask to strike.
[Trial court:] -- instruct the jury to disregard the last answer.

> [The State:] Ms. Bernard, did you ever give in to Mr. Ownby when he wanted to have sex?
> [Ms. Bernard:] Yes.
> [The State:] And when you were working with these long shifts, were you available for that sexual relationship with Mr. Ownby?
> [Ms. Bernard:] No.

(RP 372-373).

Ms. Bernard testified that after Mr. Bernard obtained custody of the children, and she had visitation, H.L.B. recorded what went on at one of their visits, without her knowledge. (RP 387-388, 498, 555). Ms. Bernard testified she asked H.L.B. whether Mr. Ownby had mistreated her in a sexual way, and "[H.L.B.] didn't deny it. She told me no." (RP 387, 396-398). Ms. Bernard testified "[H.L.B.] was afraid to tell me what was wrong, and she wouldn't tell me." (RP 387-388).

H.L.B. testified as to how Mr. Ownby disciplined her and N.B. (RP 407-408). H.L.B. characterized the discipline as "abuse." (RP 407-408, 446-448, 454-456). She testified N.B. "was always . . . going back to [Mr. Bernard's] house with bruises on him." (RP 407).

H.L.B. testified she was touched inappropriately by Mr. Ownby, starting after he moved in with Ms. Bernard. (RP 409). She testified to five separate instances of sexual touching and oral contact involving the genitals of both her and Mr. Ownby. (RP 409-421, 427-431). H.L.B. testified the incidents stopped happening when she and N.B. were placed with Mr. Bernard, and doing visitation with Ms. Bernard. (RP 431).

H.L.B. testified she would much prefer to live with Mr. Bernard. (RP 437-438). She testified she considers Ms. Bernard to be a negative person and she yells too much. (RP 438). She testified that after she was living with Mr. Bernard, she did not want to go back and live with Ms. Bernard. (RP 441).

H.L.B. acknowledged she recorded a conversation she had with Ms. Bernard during one of their visits. (RP 439, 498). She testified that during the conversation, she did not say anything to Ms. Bernard about being touched inappropriately. (RP 440). She testified:

> [Defense counsel:] During the conversation with your mom, didn't you tell your mom that Jeremy Ownby did not touch you improperly?
> [H.L.B.:] Yes.

(RP 439).

M.H. testified as follows regarding when H.L.B. told him Mr. Ownby had touched her inappropriately:

> [M.H.:] Okay. So she came in and she seemed really upset. And she usually tells me everything, and she didn't tell me. And so I had to kind of force it out of her to tell me what was bothering her.
> . . . .
> [The State:] So you said that you kind of had to get it out of her. How were you talking to her in order to kind of figure out what was going on?
> [M.H.:] I gave her some options, because the way she was acting was pretty serious. So I thought of some kind of bad things that would make her act like that.
> . . . .
> [The State:] You said you kind of were trying to ask her certain things. What types of things were you asking her about?
> [M.H.:] I asked her if she was raped, if she was molested, and I can't remember the other thing that I asked her. But when I said "molested," she shook her head yeah and she started crying.

(RP 460-462).

M.H. acknowledged he was the person who initially brought up the subject of molestation to H.L.B. (RP 469).

M.H. testified he asked H.L.B. to use her hand and show him where she was touched. (RP 462). He testified "[s]he pointed - - she like scanned her chest and then her . . . butt and her genitals." (RP 462-463).

Lisa testified she recorded the conversation she had with H.L.B. "for safety reasons. I wanted our own record of it. . . . You never know if anyone's going to try to change what she has to say." (RP 488). When asked about her conversation with H.L.B., Lisa testified:

> [The State:] Was she able to use kind of the adult words that we would use to talk about it?
> [Lisa Bernard:] No.
> [The State:] What types of words was she using?
> [Lisa Bernard:] She would more -- more likely use hand signals and pointing.
> . . . .
> [The State:] When you were talking to her, you said before that she kind of used her hands. What parts of the body was she pointing –
> . . . .

> [Lisa Bernard:] She was like waving her hands from like her chest all the way down her body (indicating).
> [The State:] And so you're using an open hand, and you're kind of moving it -[Lisa Bernard:] Yeah.
> [The State:] -- across your chest?
> [Lisa Bernard:] Yeah.
> [The State:] And did she ever tell you what parts that Jeremy used?
> [Lisa Bernard:] No. She just said everywhere.
> [The State:] Okay. Did she tell you what parts he used on her?
> [Lisa Bernard:] No.

(RP 488-489).

Mr. Bernard testified nothing caused him to prevent H.L.B. and N.B. from going back to spend their custody week with Ms. Bernard and Mr. Ownby. (RP 518-519).

The State admitted into evidence, and played for the jury, a portion of the recorded conversation between Lisa and H.L.B., over defense objection. (CP 287-294; RP 472-480, 489- 491; Pl.'s Ex. 11). The trial court gave a limiting instruction, instructing the jury the recording "may be considered by you only for the purpose of evaluating the

demeanor of [H.L.B.]. You may not consider it for any other purpose." (CP 239-240; RP 489-490).

Jessica Hertlein, a CPS FAR (Family Assessment Response) social worker, testified her agency received a FAR intake in February 2019 alleging physical abuse allegations of N.B. by Mr. Ownby. (RP 525-526). She testified N.B. did have a mark on his head, but no findings were made as to the allegation:

> [Defense counsel:] Yes. And did anything come of that, though?
> [Ms. Herlein:] As far as findings?
> [Defense counsel:] Yes.
> [Ms. Herlein:] So no, because with FAR we don't assign findings, and because it's screened in as FAR, there was -- we're not allowed to assign findings to that. So although there was a bruise and there was concerns, there was no finding.

(RP 533).

Ms. Hertlein further testified:

> [Defense counsel:] Okay. Are you familiar with what the exact size or nature of the mark was personally?
> [Ms. Hertlein:] I do not, no.

> [Defense counsel:] Okay. Do you know if any medical analysis was done on that?
> [Ms. Hertlein:] Um, we sent it to our medical professional, Teresa Forshag, to review.
> [Defense counsel:] Okay. Did you ever see any reports or anything come out of that?
> [Ms. Hertlein:] There was a report saying that it was consistent with a high-force blow.
> [Defense counsel:] And did anything come as to who inflicted it?
> [Ms. Hertlein:] It was reported that Mr. Ownby did.
> [Defense counsel:] Did any legal proceedings come out of that?
> [Ms. Hertlein:] No.

(RP 533-534).

Ms. Hertlein also testified her agency received an intake in March 2019 alleging neglect, wherein H.L.B. and N.B. reported feeling unsafe in Ms. Bernard's home. (RP 527-528). She also testified there was the incident when H.L.B. and N.B. ran away. (RP 527-528). She testified that following a family team decision meeting, the children were placed with Mr. Bernard, and Ms. Bernard would have visitation. (RP 528-529).

Ms. Hertlein testified the March 2019 neglect allegation was unfounded, meaning "there wasn't substantial evidence to support a founded finding." (RP 533, 535).

Kevin Richey of the Spokane County Sheriff's Office testified he observed the forensic interview of H.L.B. (RP 537, 542). He testified:

> [The State:] Was she able to communicate with the interviewer?
> [Chief Richey:] Yes.
> [The State:] Did she have trouble talking about sexual things?
> [Chief Richey:] Yes.
> [The State:] Was she able to name body parts?
> . . . .
> [Chief Richey:] . . . . I don't -- I don't -- yeah, she didn't mention specific body parts. She would say "that place" or -- or that type of stuff. She wouldn't -- and she would point.

(RP 542).

Mr. Ownby testified in his own defense. (RP 558-578). He denied engaging in any sexual contact with H.L.B. (RP 567-568).

Mr. Ownby denied punishing Ms. Bernard for not having sex. (RP 567).

Mr. Ownby testified he considers himself to be a strict parent. (RP 563-564, 573-574). He testified as follows regarding N.B.:

> [Defense counsel:] Did you ever punish [N.B.]?
> [Mr. Ownby:] At first I did spank [N.B.] like maybe two times lightly, no more than two times at once. After that I realized it wasn't working. . . .
> [Mr. Ownby:] Um, yes, I have punished him.
> . . . .
> [Defense counsel:] Now, was there any other physical punishment?
> [Mr. Ownby:] No, sir, there was not.
> [Defense counsel:] Did you ever bruise [N.B.]?
> [Mr. Ownby:] No. That time the CPS earlier this morning was talking about was when -- the time that [Ms. Bernard] was giving her a son a bath. We have a corner jetted tub that's pretty high with tile surrounding it. [Ms. Bernard] needed to grab a towel. She told [N.B.] to stay put, and he thought he was a big boy and he could get out of the tub himself. He slipped and scraped his back across the tile when he got out, on his lower back.
> [Defense counsel:] Had that been the end of that situation?
> [Mr. Ownby:] We went to CPS, like she said earlier today. We had a team meeting. And I believe around early July is when me and [Ms. Bernard] both -- because me and [Ms. Bernard]

> both was accused of abuse. [N.B.] said it was me who did it; and then her daughter, [H.L.B.], said that she's the one, [Ms. Bernard's] the one, that bruised him. And we were both cleared of the accusations.

(RP 569-570).

On cross-examination, Mr. Ownby testified as follows regarding N.B.:

> [The State:] You also indicated to [defense counsel] that [N.B.] scraped his back when he fell out of the bathtub, correct?
> [Mr. Ownby:] Yes.
> [The State:] And you heard Ms. Hertlein testify that the bruising CPS was concerned about was a bruise on the head, correct?
> [Mr. Ownby:] Um, she said that but that is incorrect.
> [The State:] Mr. Ownby, did Ms. Hertlein testify that the CPS investigator –
> [Mr. Ownby:] That's -- was her words, yes.
> [The State:] And that CPS found that it was part -- a result of a high-force blow, correct?
> [Mr. Ownby:] Possibly because of maybe falling out of the tub.
> [The State:] Sir -- again, Mr. Ownby, did Ms. Hertlein testify that the bruise was caused by a high-force blow?
> [Mr. Ownby:] That's what she said.
> [The State:] Thank you. [Defense counsel] asked you if you've been cleared of the accusations for physical abuse; is that correct?

[Mr. Ownby:] Yes, I was.

(RP 576-577).

In its rebuttal closing argument, the State argued:

> You heard the witnesses tell you that tensions started when [Mr.] Ownby moved in, when [Mr.] Ownby was there watching the children, that's when things went south, because that man was physically abusing and sexually abusing the kids. That's why the tensions were there. That's why things went south.
> . . . .
> [Defense counsel] also says there's no -- there's no evidence of grooming. And grooming, you heard at first [H.L.B.] liked Mr. Ownby, she called him Daddy, she snuggled with him on the couch, she watched movies with him, and she got more and more comfortable with him until he started raping her. There was a progression. It wasn't just automatic, we go from zero to 60. And on the other side of that coin we hear from Terry Bernard, who indicates that Mr. Ownby constantly wanted sex, was particularly needy, demanding it of her over and over again when she didn't want it. And she was unavailable to have sex with Mr. Ownby regularly. Because of the work that she did, because of working overnight and being exhausted all the time, she was unavailable. And so [Mr.] Ownby had to get it somewhere, and he chose [H.L.B.] to fill that need for him.
> . . . .
> We know that CPS had already been involved. We know that the children had run away. We know

> that [N.B.] had bruises on him. To be very clear, the bruises were not part of a -- it was part of a FAR, is what they called it, an F-A-R investigation. And that does not result in a finding, founded or unfounded. What they did determine is the bruises were the result of a high-force blow and that the accusation was against Mr. Ownby. So they're not just unfounded findings about nothing. This is a CPS investigation into physical abuse that turns into more.
> . . . .
> The defendant is presumed innocent but he is not presumed credible. His statements must be weighed in the same way as everyone else's. What he was willing to say on the stand, what he fought with the state about, what he stated to [defense counsel] after hearing testimony from CPS, he couldn't admit on the stand that he'd heard it and that he understood what that testimony was instead choosing to argue, "Well, it was -- it was a bathtub." Well, we know that's not what happened.

(RP 633-636, 641).

Defense counsel did not object the State's rebuttal closing argument. (RP 632-644).

The second jury found Mr. Ownby guilty as charged. (CP 263-266; 346-363; RP 645).

At sentencing, the trial court imposed $600 in legal financial obligations, comprised of a $500 victim assessment and a $100 DNA collection fee. (CP 355; RP 668). The trial court stated "I'm waiving the filing fee based on indigency." (CP 355; RP 668, 670). Mr. Ownby has no previous felony convictions, and one previous misdemeanor conviction for attempted forgery. (CP 342-343, 349).

Mr. Ownby's sentence includes a term of community custody, with the following conditions, among others:

> (7) Pay supervision fees as determined by DOC;
> . . . .
> (5) Pay supervision fees as determined by the Department of Corrections;
> . . . .
> (12) That you complete a substance abuse evaluation and complete all recommendations for further evaluation, treatment, and/or monitoring;
> . . . .
> (17) That you do not engage in a romantic or dating or sexual relationship without permission from your STOP therapist and your CCO.

(CP 353, 365).

The Judgment and Sentence includes the following finding: "[t]he defendant is indigent as defined in RCW 10.101.010(3)(a)-(c) because the defendant . . . receives an annual income, after taxes, or 125 percent or less of the current federal poverty level." (CP 350).

Mr. Ownby appealed. (CP 370-371). An order of indigency was entered for purposes of appeal. (CP 376-377).

E. ARGUMENT

Issue 1: Whether Mr. Ownby was denied his Sixth Amendment right to effective assistance of counsel.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a)(3). The claim is reviewed de

novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

> (1) [D]efense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Prejudice can also be established by showing that "'counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *State v. Hicks*, 163 Wn.2d 477, 488, 181 P.3d 831 (2008) (quoting *Strickland*, 466 U.S at 687).

Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

a. Whether Mr. Ownby was denied his Sixth Amendment right to effective assistance of counsel, where defense counsel failed to object to testimony and to the State's prosecutorial misconduct during rebuttal closing argument regarding Mr. Ownby's sexual relationship with Terry Bernard.

Mr. Ownby was denied his Sixth Amendment right to effective assistance of counsel, where defense counsel failed to object to testimony and to the State's prosecutorial misconduct during rebuttal closing argument regarding Mr. Ownby's sexual relationship with Terry Bernard. The evidence was irrelevant, inadmissible under ER 404(b), and prejudicial. Mr. Ownby's convictions should be reversed and the case remanded for a new trial.

To prove that the failure to object to the admission of evidence constituted ineffective assistance of counsel, a defendant must show "that the failure to object fell below

prevailing professional norms, that the objection would have been sustained, . . . that the result of the trial would have been different if the evidence had not been admitted[,]"and that the decision was not tactical. *State v. Sexsmith*, 138 Wn. App. 497, 509, 157 P.3d 901 (2007). Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *Grier*, 171 Wn.2d at 33, 246 P.3d 1260 (2011). However, "strategy must be based on reasoned decision-making[.]" *In re Pers. Restraint of Hubert*, 138 Wn. App. 924, 928, 158 P.3d 1282 (2007).

Ms. Bernard testified about her sexual relationship with Mr. Ownby. (RP 372-375). Without objection from defense counsel, Ms. Bernard testified she and Mr. Ownby had sex a lot; she was not always wanting to have sex with Mr. Ownby; there were occasions when she tried to tell him no, and he would get angry and say things; there were occasions where she would give in when he wanted to have sex; and when she was

working long shifts, she was not available for the sexual relationship with Mr. Ownby. (RP 372-373).

Also without objection from defense counsel, the State argued the following in its rebuttal closing argument:

> . . . [W]e hear from Terry Bernard, who indicates that Mr. Ownby constantly wanted sex, was particularly needy, demanding it of her over and over again when she didn't want it. And she was unavailable to have sex with Mr. Ownby regularly. Because of the work that she did, because of working overnight and being exhausted all the time, she was unavailable. *And so [Mr.] Ownby had to get it somewhere, and he chose [H.L.B.] to fill that need for him*.

(RP 634-635) (emphasis added).

An objection to Ms. Bernard's testimony about her sexual relationship with Mr. Ownby would have been sustained. *See Sexsmith*, 138 Wn. App. at 509. In order to convict Mr. Ownby of first degree rape of a child, the State had to prove that he had sexual intercourse with H.L.B., who was less than 12 years old and not married to Mr. Ownby, and that H.L.B. was at least 24 months younger than Mr. Ownby. (CP

251-252); *see also* RCW 9A.44.073(1). In order to convict Mr. Ownby of first degree child molestation, the State had to prove that he had sexual contact with H.L.B., who was less than 12 years old and not married to Mr. Ownby, and that H.L.B. was at least 36 months younger than Mr. Ownby. (CP 256-257); *see also* RCW 9A.44.083(1).

The evidence of the nature of the sexual relationship between two adults in a dating relationship, Ms. Bernard and Mr. Ownby, does not make it more probable that Mr. Ownby would have sexual intercourse or sexual contact with an individual under the age of 12. *See* ER 401 (defining relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

The evidence should have been excluded because "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

. . .” ER 403. The evidence was highly prejudicial; it portrayed Mr. Ownby as an adult who pursues sex at all costs, and it assumes that his adult behavior with another adult translates to a proclivity to engage in sexual contact with a child under the age of 12. (RP 372-373, 634-635).

Evidence of prior sexual misconduct is inherently prejudicial. *See State v. Harris*, 36 Wn. App. 746, 752, 677 P.2d 202 (1984); *State v. Ramirez*, 46 Wn. App. 223, 227, 730 P.2d 98 (1986) (stating “in sex cases . . . the prejudice potential of prior acts is at its highest.”); *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982) (stating “[a] careful and methodical consideration of relevance, and an intelligent weighing of potential prejudice against probative value is particularly important in sex cases, where the prejudice potential of prior acts is at its highest.”).

Evidence of prior misconduct is not admissible to show a defendant had a propensity to engage in such conduct, but it may be admissible for other purposes, “such as proof of motive,

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b).

Washington law does allow admission of "evidence of collateral misconduct relating to a specific victim for appropriate purposes under ER 404(b), including 'proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.'" *State v. Crossguns*, 505 P.3d 529, 533-34 (Wash. 2022). In *Crossguns*, a prosecution for second degree rape of a child and second degree child molestation, our Supreme Court upheld the admission of evidence of uncharged sexual misconduct by the defendant against the same victim, on ER 404(b) grounds. *Id.* at 536; *cf. State v. Slocum*, 183 Wn. App. 438, 448-57, 333 P.3d 541 (2014) (in a prosecution for child molestation and rape of a child, the trial court erred in admitting two prior acts of molestation under ER 404(b)).

Here, however, the other acts presented by the State involve a sexual relationship with another adult, in a dating

relationship, Ms. Bernard, rather than collateral misconduct relating to the alleged victim, H.L.B. The evidence of Mr. Ownby and Ms. Bernard's sexual relationship is not relevant to the crimes charged here, and it was not admissible for any permissible purpose under ER 404(b). *See, e.g., State v. Coe*, 101 Wn.2d 772, 778, 684 P.2d 668 (1984) (in a rape prosecution, finding the trial court abused its discretion in admitting evidence of the defendant's sexual relationship with a former girlfriend, and stating "we question the relevancy of an individual's behavior in a consensual sexual relationship to demonstrate modus operandi with respect to a violent nonconsensual sexual act.").

In addition, defense counsel's failure to object to the State's prosecutorial misconduct during rebuttal closing argument regarding Mr. Ownby's sexual relationship with Terry Bernard also constituted deficient performance. (RP 634-635).

A prosecutor's arguments calculated to appeal to the

jurors' passion and prejudice and encourage them to render a verdict on facts not in evidence are improper. *State v. Belgarde,* 110 Wn.2d 504, 507, 755 P.2d 174 (1988); *see also State v. Dhaliwal,* 150 Wn.2d 559, 577, 79 P.3d 432 (2003) (counsel may not "make prejudicial statements that are not sustained by the record."). "[B]ald appeals to passion and prejudice constitute misconduct." *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *Belgarde,* 110 Wn.2d at 507–08). "[T]he prosecutor's duty is to ensure a verdict free of prejudice and based on reason." *State v. Claflin*, 38 Wn. App. 847, 849-50, 690 P.2d 1186 (1984) (internal citations omitted) (citing *State v. Huson,* 73 Wn.2d 660, 662, 440 P.2d 192 (1968)).

Here, the prosecutor used an inflammatory argument which appealed to the passions and prejudices of the jury, rather than the evidence presented at trial: the prosecutor argued that because the defendant's adult sexual partner was sometimes at

work and therefore unavailable for sex, he instead engaged in sexual contact with a child. (RP 634-635).

Defense counsel's deficient performance, in both failing to object to the challenged testimony (RP 372-373) and to the State's prosecutorial misconduct during rebuttal closing argument (RP 634-635) prejudiced Mr. Ownby. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26). There is a reasonable probability that absent this error the results of the trial would have been different. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26); *see also Sexsmith*, 138 Wn. App. at 509.

Defense counsel allowed evidence of the sexual relationship between Mr. Ownby and Ms. Bernard to come in at trial, and the State emphasized this evidence during its rebuttal closing argument, specifically arguing the evidence supports a finding that Mr. Ownby committed the charged crimes. (RP 372-373, 634-635). Without this evidence, the result of the trial would have been different. The evidence that Mr. Ownby

committed the charged acts against H.L.B. was not overwhelming.

H.L.B. testified to five separate instances of sexual touching and oral contact involving the genitals of both her and Mr. Ownby. (RP 409-421, 427-431). However, in H.L.B.'s initial conversation with M.H., when asked to show where she was touched, H.L.B. pointed to two other areas of her body, her chest and her butt. (RP 462-463). In her conversation with Lisa, H.L.B. also motioned to her chest. (RP 488-489). In H.L.B.'s initial conversation with M.H., it was M.H. who initially brought up the subject of molestation. (RP 460-462, 469). During H.L.B.'s forensic interview, she did not mention specific body parts. (RP 542).

And, during a visit with Ms. Bernard, H.L.B. told Ms. Bernard that Mr. Ownby did not touch her improperly. (RP 387-388, 396-398, 439-440). Mr. Ownby denied engaging any sexual contact with H.L.B. (RP 567-568).

The case came down to whether the jury believed H.L.B.'s testimony or Mr. Ownby's testimony. The evidence was not overwhelming, and there were inconsistencies between H.L.B.'s assertions prior to trial and at trial.

In addition, had defense counsel objected to the State's rebuttal closing argument, the trial court could have issued curative instructions and stopped the State's inflammatory argument. (CP 634-635). Instead, defense counsel's failure to object implied to the jury that nothing was wrong with the comment.

Mr. Ownby has met the two-prong test for ineffective assistance of counsel. Defense counsel's failure to object to testimony and to the State's prosecutorial misconduct during rebuttal closing argument regarding Mr. Ownby's sexual relationship with Ms. Bernard constituted deficient performance and Mr. Ownby was prejudiced by that deficient performance. His convictions should be reversed and the case remanded for a new trial.

b. Whether Mr. Ownby was denied his Sixth Amendment right to effective assistance of counsel, where defense counsel failed to object to a condition of community custody requiring Mr. Ownby to complete a substance abuse evaluation and complete all recommendations for further evaluation, treatment, and/or monitoring.

Mr. Ownby was denied his Sixth Amendment right to effective assistance of counsel, where defense counsel failed to object to a condition of community custody requiring Mr. Ownby to complete a substance abuse evaluation and complete all recommendations for further evaluation, treatment, and/or monitoring, because there is no evidence that any substances contributed to Mr. Ownby's offenses. This condition should be stricken from his judgment and sentence.

A trial court may impose a sentence only if it is authorized by statute. *In re Postsentence Review of Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). Whether a community custody condition is crime-related is reviewed for an abuse of discretion. *State v. Autrey*, 136 Wn. App. 460, 466, 150 P.3d 580 (2006) (citing *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d

1365 (1993)). Where the trial court lacked authority to impose a community custody condition, the appropriate remedy is to remand to strike the condition. *See, e.g., State v. O'Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

The trial court may order an offender to do the following, as part of a term of community custody:

> (c) Participate in crime-related treatment or counseling services;
>
> (d) 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;
>
> . . . .or
>
> (f) [c]omply with any crime-related prohibitions.

RCW 9.94A.703(3)(c), (d), (f). The Court of Appeals "has struck crime-related community custody conditions when there is 'no evidence' in the record that the circumstances of the crime related to the community custody condition." *State v. Irwin*, 191 Wn. App. 644, 656–57, 364 P.3d 830 (2015).

In *State v. Warnock*, the court found the trial court erred by ordering the defendant to obtain a chemical dependency

evaluation and treatment as a community custody condition, where there was no evidence that any substance except alcohol contributed to the defendant's offense, and no finding made pursuant to RCW 9.94A.607(1). *State v. Warnock*, 174 Wn. App. 608, 611-14, 299 P.3d 1173 (2013). The court held "[b]ecause there is no evidence and finding that anything other than alcohol contributed to [the defendant's] offense, we remand with directions to amend the judgment and sentence to impose only alcohol evaluation and recommended treatment." *Id*. at 614.

In *State v. Jones*, the court found the trial court erred by ordering the defendant to participate in alcohol counseling as a condition of community custody, because there was no evidence that alcohol contributed to his crimes or that the alcohol counseling requirement was crime-related. *State v. Jones*, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003). The court further found that "alcohol counseling 'reasonably relates' to the offender's risk of reoffending and to the safety of the

community, only if the evidence shows that alcohol contributed to the offense." *Id*. at 208.

Here, there is no evidence in the record that any substances contributed to Mr. Ownby's offenses, or that the requirement to complete a substance abuse evaluation and complete all recommendations for further evaluation, treatment, and/or monitoring was crime-related. (RP 360-578). No evidence of drug or alcohol use by Mr. Ownby on the date range in question was admitted into evidence. (RP 360-578).

Therefore, Mr. Ownby was denied his Sixth Amendment right to effective assistance of counsel, where defense counsel failed to object to a condition of community custody requiring Mr. Ownby to complete a substance abuse evaluation and complete all recommendations for further evaluation, treatment, and/or monitoring, because there is no evidence that any substances contributed to Mr. Ownby's offenses.

The challenged community custody condition was not crime-related. *See Warnock*, 174 Wn. App. at 611-614; *Jones*,

118 Wn. App. at 207-08; *see also State v. Munoz-Rivera*, 190 Wn. App. 870, 893, 361 P.3d 182 (2015) (holding that where there was no evidence that any substances other than alcohol contributed to the defendant's offenses, the community custody condition imposing a substance abuse evaluation and treatment must be limited to alcohol only). In addition, completing a substance abuse evaluation and all recommendations for further evaluation, treatment, and/or monitoring does not "reasonably relate" to Mr. Ownby's risk of reoffending or the safety of the community, because there is no evidence that substance abuse contributed to the offenses. *Jones*, 118 Wn. App. at 208; *see also* RCW 9.94A.703(3)(d).

Accordingly, defense counsel should have objected to the challenged community custody condition.

Defense counsel's deficient performance prejudiced Mr. Ownby. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26) (stating the two-part test for ineffective assistance of counsel). There is a reasonable probability that

had defense counsel objected, the result of the proceeding would have been different: the trial court would not have imposed the challenged condition of community custody.

Mr. Ownby has met the two-prong test for ineffective assistance of counsel. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26). Defense counsel's failure to object to the condition of community custody requiring Mr. Ownby to complete a substance abuse evaluation and complete all recommendations for further evaluation, treatment, and/or monitoring, constituted deficient performance and Mr. Ownby was prejudiced by this failure. This condition should be stricken from his judgment and sentence.

Issue 2: Whether the State committed misconduct in its rebuttal closing argument that was prejudicial and incurable by arguing facts not in evidence and by appealing to the passion and prejudice of the jury.

The State committed misconduct in its rebuttal closing argument that was prejudicial and incurable by arguing facts not in evidence and by appealing to the passion and prejudice of

the jury. Specifically, the State committed misconduct by arguing that Mr. Ownby was responsible for the abuse allegation against N.B., and by arguing that because Mr. Ownby's adult sexual partner was sometimes at work and therefore unavailable for sex, he instead engaged in sexual contact with a child. Mr. Ownby's convictions should be reversed and the case remanded for a new trial.

"To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (internal quotation marks omitted) (*quoting State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)); *see also State v. Emery*, 174 Wn.2d 741, 759, 278 P.3d 653 (2012) (when raising prosecutorial misconduct, the appellant "must first show that the prosecutor's statements are improper."); *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994) (stating "[a]llegedly improper arguments

should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given.").

If the defendant fails to properly object to the misconduct, "a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice it engendered." *State v. O'Donnell*, 142 Wn. App. 314, 328, 174 P.3d 1205 (2007) (internal quotation marks omitted) (*quoting State v. Munguia*, 107 Wn. App. 328, 336, 26 P.3d 1017 (2001)). "Under this heightened standard, the defendant must show that (1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455). "Reviewing 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." *Id*. at 762.

Here, first, without objection from defense counsel, the State argued the following in its rebuttal closing argument:

> The defendant is presumed innocent but he is not presumed credible. His statements must be weighed in the same way as everyone else's. What he was willing to say on the stand, what he fought with the state about, what he stated to [defense counsel] after hearing testimony from CPS, he couldn't admit on the stand that he'd heard it and that he understood what that testimony was instead choosing to argue, "Well, it was -- it was a bathtub." *Well, we know that's not what happened.*

(RP 641) (emphasis added).

It is improper for the State to argue facts that are not in evidence. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704–05, 286 P.3d 673 (2012). The State is allowed to draw reasonable inferences from the evidence. *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997).

Prejudicial error occurs when it is clear the prosecutor is expressing a personal view rather than arguing an inference

from the evidence. *State v. McKenzie*, 157 Wn.2d 44, 54, 134 Wn.2d 221 (2006); *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995).

Ms. Hertlein testified N.B. had a mark on his head, but no findings were made as to the allegation. (RP 533). She testified no legal proceedings came out of this allegation. (RP 533-534). Mr. Ownby testified he was cleared of the accusation regarding N.B. (RP 569-570, 566-567).

Despite this testimony, the State argued facts not in evidence, by arguing that Mr. Ownby was the responsible for the abuse allegation, stating: "[w]ell, we know that's not what happened." (RP 641); *see also Glasmann*, 175 Wn.2d at 704-05. Where there was no evidence presented at trial that Mr. Ownby was responsible for hurting N.B., this was not a reasonable inference from the evidence. *See Stenson*, 132 Wn.2d at 727.

The State argued a personal opinion, that Mr. Ownby was responsible for the allegation regarding N.B. *See McKenzie*,

157 Wn.2d at 54; *Brett*, 126 Wn.2d at 175. Further, evidence of physical abuse is not admissible to show a defendant's propensity to commit sexual abuse. *See Fisher*, 165 Wn.2d at 744-51.

Second, without objection from defense counsel, the State argued the following in its rebuttal closing argument:

> . . . [W]e hear from Terry Bernard, who indicates that Mr. Ownby constantly wanted sex, was particularly needy, demanding it of her over and over again when she didn't want it. And she was unavailable to have sex with Mr. Ownby regularly. Because of the work that she did, because of working overnight and being exhausted all the time, she was unavailable. *And so [Mr.] Ownby had to get it somewhere, and he chose [H.L.B.] to fill that need for him*.

(RP 634-635) (emphasis added).

A prosecutor's arguments calculated to appeal to the jurors' passion and prejudice and encourage them to render a verdict on facts not in evidence are improper. *Belgarde,* 110 Wn.2d at 507; *see also Dhaliwal,* 150 Wn.2d at 577 (counsel may not "make prejudicial statements that are not sustained by

the record."). "[B]ald appeals to passion and prejudice constitute misconduct." *Fisher*, 165 Wn.2d at 747 (citing *Belgarde,* 110 Wn.2d at 507–08). "[T]he prosecutor's duty is to ensure a verdict free of prejudice and based on reason." *Claflin*, 38 Wn. App. at 849-50 (internal citations omitted) (citing *Huson*, 73 Wn.2d at 662).

Here, the prosecutor used an inflammatory argument which appealed to the passions and prejudices of the jury, rather than the evidence presented at trial: the prosecutor argued that because the defendant's adult sexual partner was sometimes at work and therefore unavailable for sex, he instead engaged in sexual contact with a child. (RP 634-635). This was misconduct. The argument makes the inflammatory suggestion that Mr. Ownby's adult behavior with another adult translates to a proclivity to engage in sexual contact with a child.

While defense counsel did not object to both of prosecutor's improper statements, no curative instruction would have neutralized the comments the prosecutor made to the jury.

(RP 634-635, 641). The key issue at trial for the jury was whether to believe H.L.B. or Mr. Ownby. Under these circumstances, the prejudice from arguing Mr. Ownby was responsible for physical injury to N.B. and that Mr. Ownby engaged in sexual contact with a child because his adult partner was at work could not be cured by an instruction.

As argued above, the evidence was not overwhelming, and there were inconsistencies between H.L.B.'s assertions prior to trial, and at trial. H.L.B. testified to five separate instances of sexual touching and oral contact involving the genitals of both her and Mr. Ownby. (RP 409-421, 427-431). However, in H.L.B.'s initial conversation with M.H., when asked to show where she was touched, H.L.B. pointed to two other areas of her body, her chest and her butt. (RP 462-463). In her conversation with Lisa, H.L.B. also motioned to her chest. (RP 488-489). Also in H.L.B.'s initial conversation with M.H., it was M.H. who initially brought up the subject of molestation. (RP 460-462, 469). During H.L.B.'s forensic

interview, she did not mention specific body parts. (RP 542). And, during a visit with Ms. Bernard, H.L.B. told Ms. Bernard that Mr. Ownby did not touch her improperly. (RP 387-388, 396-398, 439-440). Mr. Ownby denied engaging any sexual contact with H.L.B. (RP 567-568).

The State committed misconduct in its closing arguments that was prejudicial and incurable, by arguing that Mr. Ownby was responsible for the physical abuse allegation against N.B., and by arguing that because Mr. Ownby's adult sexual partner was sometimes at work and therefore unavailable for sex, he instead engaged in sexual contact with a child. This Court should reverse Mr. Ownby's convictions and remand the case for a new trial.

Issue 3: Whether the trial court erred in imposing two conditions of community custody.

Mr. Ownby challenges two conditions of community custody for the first time on appeal. (CP 353, 365). Sentencing errors may be raised for the first time on appeal. *See State v.*

Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (stating that "'[i]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.'") (*quoting State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)). Each challenged condition is addressed below.

a. Whether the trial court erred by imposing a community custody condition requiring Mr. Ownby to pay supervision fees as determined by DOC.

The trial court erred in imposing a condition of community custody requiring Mr. Ownby to pay supervision fees as determined by DOC, because this fee is a discretionary legal financial obligation (LFO), and the trial court found Mr. Ownby indigent and only imposed mandatory LFOs. (CP 350, 355, 376-377; RP 668, 770). This condition should be stricken from his judgment and sentence.

The community custody supervision fee is a discretionary LFO, because it can be waived by the sentencing court. *State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018);

see also RCW 9.94A.703(2)(d) (allowing the sentencing court to impose, or to waive, a condition of community custody requiring an offender to "[p]ay supervision fees as determined by the department[.]"). "[T]he imposition of LFOs on indigent defendants can create a significant hardship." *State v. Spaulding*, 15 Wn. App. 2d 536, 537, 476 P.3d 205 (2020).

In *State v. Dillon*, the court found the trial court erred in imposing a community custody condition requiring the defendant to pay supervision fees as determined by DOC. *State v. Dillon*, 12 Wn. App. 2d 133, 152, 456 P.3d 1199 (2020). The court found that supervision fees are discretionary LFOs. *Id*. (citing *Lundstrom*, 6 Wn. App. 2d at 396 n.3). The court found that because the record demonstrates the trial court only intended to impose mandatory LFOs, the challenged community custody condition should be stricken. *Id*.

In *State v. Bowman*, our Supreme Court followed *Dillon*. *State v. Bowman*, 198 Wn.2d 609, 629, 498 P.3d 478 (2021). The Court ordered community custody supervision fees be

stricken from the judgment and sentence, where the trial court intended to impose only mandatory LFOs. *Id*.

Here, the trial court only intended to impose mandatory LFOs. (CP 355; RP 668, 670). The trial court waived the criminal filing fee, a discretionary LFO. (CP 355; RP 668, 670); *see also State v. Ramirez*, 191 Wn.2d 732, 749, 426 P.3d 714 (2018). The trial court imposed a $500 victim assessment, which is a mandatory LFO. (CP 355; RP 668); *see also State v. Curry*, 118 Wn.2d 911, 917, 829 P.3d 166 (1992).

The trial court also imposed a $100 DNA collection fee, which is a mandatory LFO here. (CP 342-343, 349, 355; RP 668). A DNA collection fee is mandatory "unless the state has previously collected the offender's DNA as a result of a prior conviction." RCW 43.43.7541; *Ramirez*, 191 Wn.2d at 747; *State v. Catling*, 193 Wn.2d 252, 257-58, 438 P.3d 1174 (2019). Because Mr. Ownby has no previous convictions that would require collection of his DNA, the DNA collection fee is

mandatory here. *See* RCW 43.43.754; *see also* CP 342-343, 349.

Therefore, the condition of community custody requiring Mr. Ownby to pay supervision fees as determined by DOC should be stricken. *See Dillon*, 12 Wn. App. 2d at 152; *see also Bowman*, 198 Wn.2d at 629.

Because the trial court found Mr. Ownby indigent and only intended to impose mandatory LFOs, the condition of community custody requiring Mr. Ownby to pay supervision fees as determined by DOC should be stricken.

b. Whether the trial court erred by imposing a community custody condition prohibiting Mr. Ownby from engaging in a romantic relationship without permission from his SOTP therapist or his CCO.

The trial court erred in imposing a community custody condition prohibiting Mr. Ownby from engaging in a "romantic relationship" without permission from his "SOTP therapist or his CCO," because it is unconstitutionally vague. (CP 365)

"A legal prohibition, such as a community custody condition, is unconstitutionally vague if (1) it does not sufficiently define the proscribed conduct so an ordinary person can understand the prohibition or (2) it does not provide sufficiently ascertainable standards to protect against arbitrary enforcement." *State v. Padilla*, 190 Wn.2d 672, 677, 416 P.3d 712 (2018) (citing *Bahl*, 164 Wn.2d at 752-53).

In *State v. Peters*, this Court held that the term "romantic relationships" in a community custody condition challenged for the first time on appeal, is unconstitutionally vague. *State v. Peters*, 10 Wn. App. 2d 574, 591, 455 P.3d 141 (2019). The vagueness problem was solved by substituting the term "dating relationships." *Id*.

The term "romantic relationship" is unconstitutionally vague, and the language should be stricken from the challenged community custody condition. *See Peters*, 10 Wn. App. at 591.

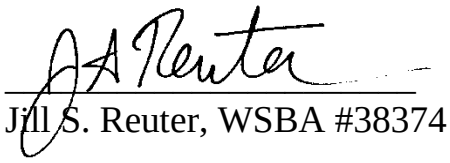
F. CONCLUSION

Mr. Ownby's convictions should be reversed and the case remanded for a new trial, because he was denied his right to effective assistance of counsel, and the State committed misconduct in its rebuttal closing argument that was prejudicial and incurable.

At a minimum, the following community custody conditions should be stricken from the judgment and sentence: the condition of community custody requiring Mr. Ownby to complete a substance abuse evaluation and complete all recommendations for further evaluation, treatment, and/or monitoring; the condition prohibiting Mr. Ownby from engaging in a "romantic relationship" without permission from his SOTP therapist or his CCO; and the condition requiring Mr. Ownby to pay supervision fees as determined by DOC.

I certify this document contains 9,352 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 5th day of May, 2022.



Jill S. Reuter, WSBA #38374

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

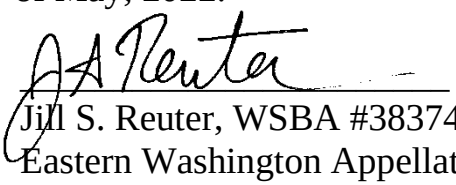
STATE OF WASHINGTON Respondent	)	COA No. 38523-0-III
vs.	)	Spokane County No. 19-1-11319-32
JEREMY DAVID OWNBY Defendant/Appellant	)	PROOF OF SERVICE

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on May 5, 2022, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Jeremy David Ownby DOC No. 429192
Airway Heights Corrections Center
PO Box 2049
Airway Heights, WA 99001

Having obtained prior permission, I also served a copy on the Respondent at scpaappeals@spokanecounty.org using the Washington State Appellate Courts' Portal.

Dated this 5th day of May, 2022.



Jill S. Reuter, WSBA #38374
Eastern Washington Appellate Law
PO Box 8302
Spokane, WA 99203
Phone: (509) 242-3910
admin@ewalaw.com

NICHOLS AND REUTER, PLLC / EASTERN WASHINGTON APPELLATE LAW

May 05, 2022 - 12:20 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	38523-0
Appellate Court Case Title:	State of Washington v. Jeremy David Ownby
Superior Court Case Number:	19-1-11319-8

The following documents have been uploaded:

- 385230_Briefs_20220505122003D3627120_2548.pdf
  This File Contains:
  Briefs - Appellants
  The Original File Name was Opening Brief filed 5.5.22.pdf

A copy of the uploaded files will be sent to:

- scpaappeals@spokanecounty.org

Comments:

Sender Name: Jill Reuter - Email: jill@ewalaw.com
Address:
PO BOX 8302
SPOKANE, WA, 99203-0302
Phone: 509-242-3910

Note: The Filing Id is 20220505122003D3627120