IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. WILLIAM GLEN SMITH, Appellant.	No. 38868-5-II ORDER DENYING MOTION TO PUBLISH; ORDER AMENDING OPINION

The State and a third party, the Washington Association of Prosecuting Attorneys, independently move to publish this court's opinion issued on January 4, 2011. The court has reviewed the motions. Now, therefore, it is hereby

ORDERED that both motions to publish are denied. It is further

ORDERED that the opinion is amended as follows:

1. All references to Angel Crowl or Ms. Crowl are deleted. Those references are replaced with A.C.

2. All references to Patricia Smith or Ms. Patricia Smith are deleted. Those references are replaced with P.S.

3. All references to Pauline Johnson-Junkert or Ms. Johnson-Junkert are deleted. Those references are replaced with P.J.

DATED this _____ day of _____, 2011.

Chief Judge

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. WILLIAM GLEN SMITH, Appellant.	No. 38868-5-II UNPUBLISHED OPINION

Sweeney, J. — This appeal follows convictions for four counts of third degree rape, and a single count of second degree perjury. The defendant purported to enter into "contracts" with the victim under the terms of which she was required to give him sexual favors in exchange for some financial support and other services. The victim has learning disabilities. The court conducted a number of sidebar conferences on the admissibility of evidence and other ministerial matters. We conclude that these sidebar conferences on these legal and ministerial matters did not implicate anyone's right to a public trial. We also conclude that the defendant was effectively represented, and that the evidence of perjury was sufficient to support the conviction. We do conclude that the court erred by prohibiting the defendant from contacting people who he was not accused of sexually assaulting or was acquitted of sexually assaulting. The remaining conditions of his sentence were proper. We therefore affirm his convictions but reverse and remand for the

sentencing court to remove some of the prohibitions.

FACTS

William Smith entered into a number of "contracts" with women under the terms of which they had to provide him with sex, and he would provide them with financial assistance, housing, clothing, and other such benefits. 2A Report of Proceedings (RP) at 168-72; Ex. 5. One of these women was his niece, Angel Crowl. She first moved into Mr. Smith's home and then eventually into a trailer behind his home. Ms. Crowl's sister, Patricia Smith, had lived in the trailer behind Mr. Smith's house but moved out shortly after Ms. Crowl moved in.

Ms. Crowl has learning disabilities. Mr. Smith presented her with what purported to be a contract. He agreed to provide her with clothing, help with her child, and help with her divorce. In exchange, Ms. Crowl was to provide Mr. Smith with sexual service for 10 years, forego the right to refuse sex, and waive the right to claim that Mr. Smith committed a crime. Mr. Smith had similar "contracts" with Ms. Patricia Smith and with Ms. Crowl's god-sister, Pauline Johnson-Junkert. Mr. Smith included a $10,000 (payment for Ms. Crowl's father's funeral) liquidated damages clause; that is he purported to require Ms. Crowl to pay him if, at any time during the 10 years, she "tells [Mr. Smith] to stop, Quit [sic], or not allow [Mr. Smith] access." 2A RP at 168-72; Ex. 5.

Mr. Smith and Ms. Crowl signed the "contract." He bought lingerie and had Ms. Crowl pose for him. He touched Ms. Crowl's breasts. She told him to stop. Mr. Smith responded that she could not refuse because of the contract. He told her she was bound by the contract and threatened to sue her for the $10,000 if she refused his advances. Mr. Smith began to have sexual

intercourse with Ms. Crowl. She resisted these overtures, at first, and responded with "no." 2A RP at 173. Mr. Smith ignored her protests and threatened enforcement of the contract. Mr. Smith had nonconsensual intercourse with Ms. Crowl several more times before she eventually acquiesced. She acquiesced because he ignored her requests that he stop. Mr. Smith eventually impregnated Ms. Crowl.

At the end of February 2008, Ms. Crowl told police that Mr. Smith had raped her. A medical examination confirmed that she was pregnant and that Mr. Smith was the father.

Cowlitz County Sheriff deputies searched Mr. Smith's home under warrant. And Mr. Smith agreed to go to the sheriff's office to answer questions. He denied that he had sex with Ms. Crowl and he denied that he contracted with her for sex.

Mr. Smith agreed to give a written statement to Detective Joseph Reiss. He denied any sexual relationship with Ms. Crowl and denied any "contract" purporting to allow him to have sex with her. Ex. 34. He signed this statement and certified,

> under penalty of perjury under the laws of the State of Washington that I have read the forgoing statement or it has been read to me and I know the contents of the statement, and that the foregoing statement is true and correct. (RCW 9A.72.085).

Ex. 34.

Detective Reiss then presented Mr. Smith with copies of the contracts for sex. Mr. Smith denied they were contracts for sex. Detective Reiss also told Mr. Smith that Ms. Crowl was pregnant and that DNA (deoxyribonucleic acid) tests would follow. Mr. Smith responded that he was not involved and that he had nothing to worry about because he had had a vasectomy.

Detective Reiss accompanied Mr. Smith outside for a cigarette break. Detective Reiss told Mr. Smith that he had recovered other evidence and explained that the DNA would be present despite the vasectomy. Detective Reiss then urged Mr. Smith to admit that he had consensual sex with Ms. Crowl. Mr. Smith admitted that he had consensual sex with her. Detective Reiss arrested him.

Mr. Smith had similar "contracts" with Ms. Patricia Smith and with Ms. Johnson-Junkert. 2A RP at 209-17; 2A RP at 231, 233-35; Exs. 6, 45. Mr. Smith had both Ms. Patricia Smith and Ms. Johnson-Junkert model revealing clothing; he also grabbed their breasts on separate occasions.

The State charged Mr. Smith with 10 counts of third degree rape against Ms. Crowl and one count of fourth degree assault with sexual motivation against Ms. Johnson-Junkert. The State later amended the information to charge incest. The court dismissed the incest charges on a *Knapstad*[1] motion. The State again amended its information to charge Mr. Smith with 10 counts of third degree rape of Ms. Crowl, one count of fourth degree assault with sexual motivation against both Ms. Patricia Smith and Ms. Johnson-Junkert, and one count of second degree perjury. The court allowed the second amended information but severed the assault charge against Ms. Patricia Smith.

The case proceeded to trial. The judge and counsel held a number of sidebar conferences on ministerial and evidentiary issues in a hallway adjacent to the courtroom. Apparently, due to the courtroom's configuration, sidebar conferences are difficult to conduct at the judge's bench

[1] *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

without the jury overhearing.[2] These sidebars were recorded and are part of the record here.

Mr. Smith called Lois Lindfeldt and made an offer to show that she would testify that Ms. Crowl admitted that Mr. Smith did not rape her. But Mr. Smith had not asked Ms. Crowl about any such statement to Ms. Lindfeldt. The judge then refused to admit Ms. Lindfeldt's testimony as substantive evidence because he concluded that it was hearsay. And the judge concluded that Mr. Smith had not laid the necessary foundation to admit Ms. Lindfeldt's testimony as evidence of a prior inconsistent statement because he had not asked Ms. Crowl about the statement when she testified. The judge refused to allow the testimony but offered to allow Mr. Smith to recall Ms. Crowl. Mr. Smith did not recall Ms. Crowl.

The jury found Mr. Smith guilty of four counts of third degree rape and second degree perjury, all related to Ms. Crowl. The jury found him not guilty of the other six counts of third degree rape and fourth degree assault.

The court sentenced Mr. Smith and included a term of community custody with these conditions:

> Submit to, and at your expense, a polygraph examination . . . as directed by Corrections Officer or treatment provider.
> . . . .
> Have no unsupervised contact with male/female/any children under the age of eighteen . . . .

[2] The State represented during oral argument that the practical configuration of the courtroom required the judge to conduct sidebars in the hallway outside to avoid the jury overhearing the conference. The practical configuration of the courtroom prompted the judge and attorneys to go outside because they could not record a conversation at the bench without the jury overhearing. It was a matter of convenience. Rather than having the jury exit the courtroom, the judge and attorneys would step outside to discuss the evidentiary and legal matters that arose during trial. Microphones were setup outside specifically for this purpose. Oral argument (June 28, 2010), at 1:41 through 3:15.

> The defendant shall not live or stay in the residence where (minor child/females) are present unless granted specific permission by your community corrections officer or the court.

Clerk's Papers (CP) at 123. The court also ordered that Mr. Smith have no contact with Ms. Crowl, Ms. Patricia Smith, and Ms. Johnson-Junkert. He appeals the convictions and the sentence.

DISCUSSION

Public Trial

Mr. Smith first argues that the court's sidebars violated his right to a public trial. The court held a number of sidebar conferences on questions of law, all of which related to the admissibility of, the relevancy of, or the general propriety of evidence,[3] or pertained to general ministerial matters, like when to take a recess.[4] They were traditional lawyer-to-judge and judge-to-lawyer discussions about how the case should proceed when in front of the jury and why. And what these sidebars fairly show is a competent, experienced defense lawyer doing his best to

[3] The court held 12 sidebar conferences that dealt with the general propriety of evidence: (1) clarify the court's earlier ruling on admitting evidence that Mr. Smith groped Ms. Patricia Smith's breast; (2) the relevancy of Ms. Patricia Smith's relationship with Ms. Crowl; (3) objections to opinions of Ms. Crowl's competency and the proper foundation for any such opinion; (4) the proper foundation for admitting an inconsistent statement to impeach Ms. Crowl; (5) the admissibility of opinion testimony on handwriting; (6) whether some of Mr. Smith's comments were hearsay (after some colloquy in the hallway, the court decided to excuse the jury, take the afternoon recess and then take up the conference in the courtroom); (7) the relevancy of a photograph of Ms. Crowl; (8) admissibility of Mr. Smith's written statement to police; (9) admissibility of victim's statements to her physician; (10) relevancy of sexual photographs of Ms. Crowl; (11) the admissibility of two receipts for lingerie; and (12) the permissible extent of cross-examination of Mr. Smith.

[4] The court held one sidebar conference that pertained to general ministerial housekeeping matters: Whether to take a recess before or after redirect–length of redirect, giving the witness a break, when the witness will be done, taking a break in the proceedings.

thwart the State's efforts to admit damaging evidence against his client and to expand opportunities to admit evidence that tended to favor his theory of the case. Of course, no one objected on any grounds to these sidebars. In fact, either or both counsel specifically asked or agreed to take up these matters outside the jury's presence.

Mr. Smith now argues, however, that the trial court violated his right to a public trial by addressing these evidentiary and other ministerial questions in a hallway outside of the courtroom without first considering those factors necessary to close the courtroom. *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). He relies on our recent case of *State v. Heath.*[5]

In *Heath*, the court asked counsel to meet in chambers to argue some remaining pretrial motions. 150 Wn. App. at 124. And the court invited a juror to an in-chambers interview. *Id.* at 125. In *Heath*, we relied on *State v. Erickson*[6] for the proposition that "'[b]ecause the decision to remove individual questioning of prospective jurors outside the courtroom has more than an inadvertent or trivial impact on the proceedings, . . . it acts as a closure for purposes of *Bone-Club*.'" *Heath*, 150 Wn. App. at 128 (quoting *Erickson*, 146 Wn. App. at 209). We held that the judge closed the courtroom, without explicitly ordering so, when it invited a juror to an in-chambers interview. *Id.* at 128-29.

Whether these sidebars violate Mr. Smith's right to a public trial is a question of law that we will review de novo. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

The Sixth Amendment to the United States Constitution and article I, section 22 of the

[5] 150 Wn. App. 121, 206 P.3d 712 (2009).

[6] 146 Wn. App. 200, 209, 189 P.3d 245 (2008).

Washington Constitution each guarantee criminal defendants the right to a public trial. *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). And article I, section 10 of the Washington Constitution requires that "justice in all cases shall be administered openly." It provides the public and the press a right to open and accessible court proceedings. *Easterling*, 157 Wn.2d at 174. The right to a public trial ensures the defendant a fair trial, reminds the officers of the court of the importance of their functions, encourages witnesses to come forward, and discourages perjury. *Brightman*, 155 Wn.2d at 514.

We have held that the right to a public trial applies to evidentiary phases of the trial as well as other "'*adversary proceedings*,'" including suppression hearings, voir dire, and the jury selections process. *State v. Sadler*, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008) (quoting *State v. Rivera*, 108 Wn. App. 645, 652-53, 32 P.3d 292 (2001)). But that right does not extend to purely ministerial and procedural matters: "A defendant does not . . . have a right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts." *Id.* We again affirmed that proposition in *State v. Sublett.*[7]

In *Sublett*, the court conducted an in-chambers conference with counsel to address a jury question about an instruction. 156 Wn. App. at 178. We concluded that the jury question was a purely legal issue that did not require the resolution of disputed facts; we held that the defendant's right to a public trial was not therefore violated. *Id.* at 182. We further held that the trial court did not violate the defendant's right to be present because the in-chambers conference held in response to a jury question was not a critical stage of the proceedings. *Id.* at 182-83.

[7] 156 Wn. App. 160, 181, 231 P.3d 231 (2010).

We follow that reasoning here and hold that the sidebar conferences Mr. Smith now complains of did not violate his right to a public trial because they involved purely ministerial and procedural matters. "Whether a chambers hearing is held in chambers or in a closed courtroom is immaterial. The defendant's right to a public trial is not implicated in either situation. Accordingly, the trial court was not required to engage in balancing the merits of closing the courtroom on the record." *Rivera*, 108 Wn. App. at 653. And a defendant "'does not have a right to be present during in-chambers or bench conferences between the court and counsel on legal matters.'" *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 433, 114 P.3d 607 (2005) (quoting *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994)). Nor need a defendant be present "'when presence would be useless, or the benefit but a shadow.'" *State v. Rice*, 110 Wn.2d 577, 616, 757 P.2d 889 (1988) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 106-07, 54 S. Ct. 330, 78 L. Ed. 674 (1934)).

It also follows that if a defendant has no constitutional right to be present during an in-chambers or sidebar conference on purely ministerial and procedural matters, neither does the public. "'[T]he public-trial guarantee [is] one created for the benefit of the defendant.'" *Presley v. Georgia*, __ U.S. __, 130 S. Ct. 721, 724 (2010) (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 380, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979)); *see also Waller v. Georgia*, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (stating the same); *State v. Momah*, 167 Wn.2d 140, 148, 217 P.3d 321 (2009) (stating the same), *cert. denied*, 79 U.S.L.W. 3196 (2010).

We hold that the trial judge's decision here to conduct these sidebars has a long tradition and did not implicate Mr. Smith's right to a public trial.

Ineffective Assistance of Counsel

Mr. Smith next argues that his defense counsel was not effective because he failed to cross-examine Ms. Crowl about a statement he claims she made that Mr. Smith had not raped her. He argues that this failure precluded him from later calling Ms. Lindfeldt to testify that Ms. Crowl made the statement.

Mr. Smith must show (1) deficient performance and (2) resulting prejudice. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance requires a showing that counsel's performance fell below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice requires a showing that but for the deficient performance, the outcome of the trial would have been different. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). Sitting as we do, on a court of review, we are very deferential to the lawyer who actually tried this case and so begin our analysis with a strong presumption that he provided effective assistance below. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Cross-examination is a matter of judgment, strategy, and timing, and so we are reluctant to conclude that counsel was ineffective so long as counsel's performance falls within the broad range of reasonable representation. *State v. Johnston*, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007). In fact, "even a lame cross-examination will seldom, if ever, amount to a Sixth Amendment violation." *Pirtle*, 136 Wn.2d at 489. But more to the point, there are many different ways for competent counsel to try the same case; none of them is wrong.

We conclude that defense counsel here effectively cross-examined Ms. Crowl. On cross-examination, defense counsel elicited a concession from Ms. Crowl that Mr. Smith never used force and never assaulted her. Counsel also confronted her with a previous rape complaint that she had made against an ex-husband.

This record also suggests that the decision not to recall Ms. Crowl may well have been a thoughtful tactic. Ms. Lindfeldt testified, as part of an offer of proof, that she had been friends with Mr. Smith for 25 to 30 years. During her testimony, Ms. Lindfeldt essentially explained that Ms. Crowl blurted out the alleged admission in an unrelated conversation. When asked if she could explain why Ms. Crowl blurted out that Mr. Smith did not rape her, Ms. Lindfeldt could not provide an explanation other than, "No. Because everybody—I was shocked." 3 RP at 496.

The court invited defense counsel to recall Ms. Crowl. He declined to do so. We are unable to conclude that not recalling Ms. Crowl to set up impeachment by Ms. Lindfeldt was a failure of his counsel rather than good trial tactics. Nor can we conclude that the failure caused any undo prejudice to Mr. Smith, given the evidence of these contracts for sex, Mr. Smith's assertion of those contracts, and the sanctions he intended to extract from the victim of this "contract."

Sufficiency of Perjury Evidence

Mr. Smith next contends that the evidence is insufficient to support a conviction for second degree perjury because he adequately retracted his false statement, which is a defense under RCW 9A.72.60.

The essential facts underlying this assignment of error are not disputed. Mr. Smith swore

that he did not have sex with Ms. Crowl. But, later, when Detective Reiss confronted him with the physical proof (DNA) that did he have sex with her and when Detective Reiss encouraged him to admit a consensual relationship, Mr. Smith admitted he had had sex with her. The question then is whether we should hold, as a matter of law, that he has met the requirements of the statutory defense. That is a question of law that we will review de novo. *See State v. Fry,* 168 Wn.2d 1, 11, 228 P.3d 1 (2010) (applying de novo review to deciding whether a trial court erred in disallowing defendant's affirmative defense).

RCW 9A.72.060 states in relevant part:

> No person shall be convicted of perjury or false swearing if he retracts his false statement in the course of the same proceeding in which it was made, if in fact he does so before it becomes manifest that the falsification is or will be exposed and before the falsification substantially affects the proceeding.

To retract a sworn statement under RCW 9A.72.060, Mr. Smith had to (1) retract the statement in the course of the same proceeding in which it was made and (2) retract the statement before it became manifest that his falsification is or will be exposed and before his falsification substantially affected the proceeding. Jury instruction 16 mirrored RCW 9A.72.060; accordingly, to convict Mr. Smith, the jury had to necessarily find that he did not meet the statute's requirements for this defense.

The State showed here that Mr. Smith signed, under penalty of perjury, a written statement that he did not have a sexual relationship with Ms. Crowl. After he signed that statement, he continued to deny that he had sex with her or that he had contracted with her to have sex. Later, Detective Reiss told him that DNA tests would show that Mr. Smith had sex

with Ms. Crowl and presented him with copies of his contracts.

Even if we were to assume that the interview inside was the same proceeding as the interview during the cigarette break outside, sufficient evidence remains that Mr. Smith failed to retract his statement before it became manifest that his falsification is or would have been exposed. RCW 9A.72.060. Mr. Smith retracted his statement only after Detective Reiss confronted him with copies of the contracts and with the likelihood that DNA evidence would prove that he had sex with Ms. Crowl. This is sufficient to support a jury conclusion that Mr. Smith did not retract his statement to satisfy the requirements of RCW 9A.72.060.

Community Custody

Mr. Smith next challenges three of his community custody conditions: (1) that he submit to a polygraph examination as his corrections officer or treatment provider directed; (2) that he have no unsupervised contact with any children under the age of 18; and (3) that he not live or stay in the residence where minor females are present unless he receives prior permission from his community corrections officer or the court. A defendant may raise preenforcement challenges to sentencing conditions for the first time on appeal. *State v. Sanchez Valencia*, ___ Wn.2d ____, 239 P.3d 1059 (2010).

Ripeness

The State first argues the issue is not ripe for review. In *Sanchez Valencia*, our Supreme Court held that a defendant's challenge to a community custody condition prohibiting the possession or use of paraphernalia that could be used to inject or process controlled substances was ripe for review. *Sanchez Valencia*, 239 P.3d at ¶ 12. It overturned *State v. Motter*,[8] a case

on which the State relies, so we decline to consider that portion of its argument. *Sanchez Valencia*, 239 P.3d at ¶ 12.

But the State also cites *State v. Massey*,[9] which our Supreme Court cited favorably in *Sanchez Valencia*. In *Massey*, the defendant pleaded guilty to delivering cocaine and later tried to challenge a community custody condition that required him to "submit to testing and searches of [his] person, residence and vehicle by the Community Corrections Officer to monitor compliance." 81 Wn. App. at 199. Massey argued that the court's order was flawed because it did not state that the searches must be based on a reasonable suspicion. *Id.* at 199-200. Division One of this court held that Massey's challenge was "premature until he is subjected to a search that he deems unreasonable." *Id.* at 200.

This case is distinguishable from *Massey*. Here, the claim meets the test for review of a preenforcement community custody condition. *State v. Bahl*, 164 Wn.2d 739, 751, 193 P.3d 678 (2008). A claim is mature when (1) the issues raised are primarily legal, (2) the issues do not require further factual development, and (3) the challenged action is final. *Id.* In addition, the reviewing court must also consider "'the hardship to the parties of withholding court consideration.'" *Id.* (quoting *First United Methodist Church v. Hearing Exam'r*, 129 Wn.2d 238, 255, 916 P.2d 374 (1996)).

The issues here are questions of law, not fact. Mr. Smith challenges the polygraph conditions in his sentence. He contends that they fail to limit the scope of any polygraph test. He

[8] 139 Wn. App. 797, 162 P.3d 1190 (2007).

[9] 81 Wn. App. 198, 200, 913 P.2d 424 (1996).

also challenges the prohibition against contacting minors because his victims were adults. Upon release from confinement, these conditions will immediately subject him to polygraphs and restrict him from contacting minors. And the conditions are final because he has been sentenced. No further factual development is necessary then for us to pass on the propriety these conditions.

Validity of Conditions

We review a sentencing court's application of the community custody provisions of the "Sentencing Reform Act"[10] de novo. *Motter*, 139 Wn. App. at 801. We review findings of fact that underlie the imposition of community custody for substantial evidence. *Id.*

The legislature has plenary power to set criminal punishments and penalties. *State v. Pillatos*, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007); *see State v. Thorne*, 129 Wn.2d 736, 776, 921 P.2d 514 (1996). Here, Mr. Smith agrees that the sentencing court had authority to impose community custody.

Polygraph Examinations

Mr. Smith argues that the condition requiring him to undergo polygraph tests violated his constitutional right to remain silent because the condition did not state the purpose or limit the scope of the tests. He agrees that polygraph tests are allowed under RCW 9.94A.700(5)(c) as a "crime related treatment or counseling services," but he maintains that a court must limit the subject matter.

The sentence here obligated Mr. Smith to "[s]ubmit to, and at your expense, a polygraph examination . . . as directed by Corrections Officer or treatment provider," CP at 123, and further

[10] Ch. 9.94A RCW.

"[s]ubmit to polygraphs at own expense for the purpose of monitoring conditions." CP at 127.

We consider Mr. Smith's sentence as a whole to determine whether the scope of polygraph testing was limited to monitoring his compliance with community placement only and not a prohibited fishing expedition. *State v. Combs*, 102 Wn. App. 949, 952-53, 10 P.3d 1101 (2000); *see also State v. Riles*, 86 Wn. App. 10, 16-17, 936 P.2d 11 (1997), *aff'd*, 135 Wn.2d 326, 957 P.2d 655 (1998).

Mr. Smith's sentence limits the scope of his polygraph testing; it requires that Mr. Smith "[s]ubmit to polygraphs at own expense *for the purpose of monitoring conditions*." CP at 127 (emphasis added). Mr. Smith argues that the sentencing court erred in failing to include a correct limitation in the judgment and sentence itself, as opposed to its appendices. But the plain language of his judgment and sentence incorporates Appendix F:

> Other conditions may be imposed by the court or DOC [(Department of Corrections)] during community custody or are set forth here: *As outlined by DOC in Appendix F*, if any, and additional conditions listed below: Submit to, and at your expense, a polygraph examination . . . as directed by Corrections Officer or treatment provider.

CP at 123 (emphasis added).

Contact with Minors

Mr. Smith contends that the sentencing court had no authority to prohibit contact with minors because he was not convicted of offenses against minors. Community custody conditions must be related to the crimes committed. *Riles*, 135 Wn.2d 326. He says these are unrelated.

In *Riles*, defendant Gholston was convicted of first degree rape of a 19-year-old victim. 135 Wn.2d at 336. The sentencing court, nonetheless, imposed a condition that he could not have

any contact with minor children without the prior approval of his community corrections officer and mental health treatment counselor. *Id.* at 337. The court held that former RCW 9.94A.120(9)(c) (1998),[11] when read in context, only gave a sentencing court authority to prohibit an offender from having contact with a class that had some relationship to the crime. *Id.* at 350. The court deleted the prohibition. *Id.*

Former RCW 9.94A.120(9)(c)(ii) mirrors RCW 9.94A.700(5)(b): "The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals."

Here, Mr. Smith cannot have unsupervised contact with minors, nor can he live or stay in a residence where minors are present without prior permission. Mr. Smith was convicted of sexually assaulting only adults. But Ms. Crowl has learning disabilities. She has only completed the eighth grade. She has trouble reading and writing. She receives Supplemental Security Income because of her disabilities. And she had only been able to keep a job at Taco Bell for

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[11] Former RCW 9.94A.120(9)(c) stated,

> (c) As a part of any sentence imposed under (a) or (b) of this subsection, the court may also order any of the following special conditions:
>
> (i) The offender shall remain within, or outside of, a specified geographical boundary;
>
> (ii) *The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals*;
>
> (iii) The offender shall participate in crime-related treatment or counseling services;
>
> (iv) The offender shall not consume alcohol;
>
> (v) The offender shall comply with any crime-related prohibitions; or
>
> (vi) For an offender convicted of a felony sex offense against a minor victim after June 6, 1996, the offender shall comply with any terms and conditions of community placement imposed by the department of corrections relating to contact between the sex offender and a minor victim or a child of similar age or circumstance as a previous victim.

(Emphasis added).

three months. 2A RP at 161-62. Ms. Crowl, like a minor child, was vulnerable. We then conclude that the court's prohibition against contact with minor children was proper.

Sentencing – Sexual Assault Protection Order

Mr. Smith next contends that the trial court erred by prohibiting him from contacting Ms. Patricia Smith or Ms. Johnson-Junkert. He argues that the court did not have authority to prohibit this contact because he was acquitted of assaulting Ms. Johnson-Junkert and he was never charged with committing a crime against Ms. Patricia Smith.

The question presented is one of statutory interpretation, and that is a question of law that we will review de novo. *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001).

A sentencing court may issue a protection order prohibiting contact by the defendant with his victim, when the court sentences a sex offender. RCW 7.90.150(6)(a). Here, the court prohibited Mr. Smith from contacting Ms. Crowl, Ms. Johnson-Junkert, and Ms. Patricia Smith. He was convicted of third degree rape against Ms. Crowl, which is a sex offense. RCW 9.94A.030(45)(a)(i); RCW 9A.44.060. And so the sentencing court properly prohibited Mr. Smith from contacting Ms. Crowl.

But Mr. Smith was not convicted of and, in the case of Ms. Patricia Smith, was not even charged with a sex offense against her. RCW 7.90.150(2)(b) permits the victim of the alleged sexual offense to file an independent action for a protection order. And the court may continue any existing protection order for 14 days. RCW 7.90.150(2)(b); RCW 7.90.050 The court must then hold a hearing on the victim's independent action. RCW 7.90.150(2)(b), .050. So the court only had authority to enter a protection order and continue it for 14 days from the date the victim

filed an independent action for an order. RCW 7.90.150(2)(b), .050.

Here, the court prohibited Mr. Smith from contacting Ms. Johnson-Junkert and Ms. Patricia Smith for five years. And the court checked the "Post Conviction Sexual Assault Protection Order" box, which indicates that the court intended the protection order to function as though Mr. Smith had been convicted of a sex offense against them. CP at 13. A court may issue a protection order in this context for a period of two years following expiration of Mr. Smith's sentence and community custody. RCW 7.90.150(6)(a), (c). The court then erred in entering post-conviction protection orders prohibiting contact with Ms. Johnson-Junkert and Ms. Patricia Smith. And we reverse that portion of the sentence.

Statement of Additional Grounds

Pro se Mr. Smith makes a number of assignments of error.

Sentence

Mr. Smith argues that his sentence exceeds the statutory maximum punishment for third degree rape. He contends that the sentencing court exceeded the statutory maximum when it imposed 60 months' confinement plus 36 to 48 months of community custody.

We review a sentencing court's application of the community custody provisions of the Sentencing Reform Act de novo. *Motter*, 139 Wn. App. at 801.

The trial court sentenced Mr. Smith to a maximum term of 60 months' confinement and community custody for 36 to 48 months or "for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer." CP at 121. The court also noted on Mr. Smith's judgment and sentence that the "combination of community custody and total

confinement [is] not to exceed 60 months." CP at 121. Third degree rape is a class C felony. RCW 9A.44.060(2). The statutory maximum is 60 months. RCW 9A.20.021(1)(c). Further, a sentence for this crime must include community custody for three years. Former RCW 9.94A.710 (2006). The community custody range for third degree rape here was 36 to 48 months.

Generally, "a court may not impose a sentence providing for a term of confinement or community . . . custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW." RCW 9.94A.505(5). But "a trial court may sentence a defendant to the statutory maximum, including community custody." *State v. Torngren*, 147 Wn. App. 556, 566, 196 P.3d 742 (2008). "The sentence is valid when the judgment and sentence 'set[s] forth the statutory maximum and clearly indicate[s] that the term of community [custody] does not extend the total sentence beyond that maximum.'" *Torngren*, 147 Wn. App. at 566 (alterations in original) (quoting *State v. Hibdon*, 140 Wn. App. 534, 538, 166 P.3d 826 (2007)).

Here, Mr. Smith's judgment and sentence provides that his total combined term of confinement and community custody must not exceed 60 months. Thus, Mr. Smith's term of community custody does not extend the total sentence beyond the maximum.

Confrontation Clause Violation

Mr. Smith next argues that the trial court violated his right to confrontation when it excluded a declaration that Ms. Crowl made in an unrelated case and excluded other rape allegations that Ms. Crowl made against other men.

The confrontation clause of the Sixth Amendment guarantees the right to impeach prosecution witnesses with evidence of bias. *State v. Johnson*, 90 Wn. App. 54, 69, 950 P.2d 981

(1998). The scope of permissible inquiry is, however, left to the court's broad discretion. *State v. Wills*, 3 Wn. App. 643, 645, 476 P.2d 711 (1970); *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990). The court must ensure that the danger of unfair prejudice does not substantially outweigh the probative value of evidence. ER 403.

Ms. Crowl had been involved in a child custody dispute. And she filed a declaration in that proceeding that: "[Kim Jones] said that [Smith] had raped me. It wasn't [Smith], it was another relative." 1 RP at 120. Ms. Jones is the paternal grandmother of Ms. Crowl's child. The apparent purpose of Ms. Jones's assertion was to undermine Ms. Crowl's living situation with Mr. Smith. And the apparent purpose of Ms. Crowl's statement was to put her living situation in the best possible light to improve the prospects of getting custody of her child.

The court here concluded that Ms. Crowl made the claims in a different context and at a different time. And the court properly balanced the probative value against the potential for prejudice. The court was within its discretionary authority to exclude the evidence.

Ineffective Assistance of Counsel

Mr. Smith argues that his lawyer was ineffective for failing or refusing to interview and call witnesses who would rebut Ms. Crowl's testimony. He provides a list of witnesses who he claims would have testified that they did not see him have sex with Ms. Crowl, that Ms. Crowl spoke highly of Mr. Smith, or that Ms. Crowl said Mr. Smith never raped her.

Generally, lawyers do not call a witness for good reason; it is strategic. *State v. Byrd*, 30 Wn. App. 794, 799, 638 P.2d 601 (1981). So failure to call witnesses amounts to ineffective assistance only if that failure was unreasonable and resulted in prejudice or created a reasonable

probability that, had the lawyer called the witnesses, the outcome of trial would have been different. *State v. Sherwood*, 71 Wn. App. 481, 484, 860 P.2d 407 (1993).

Mr. Smith does not show how his attorney's representation fell below an objective standard of reasonableness. *McFarland*, 127 Wn.2d at 334-35. He also does not show how the results would have been different "but for" counsel's management of the case. *Id.* at 337. There is ample evidence in this record of nonconsensual sex, mental incapacity of the victim, purported contracts for sex, and abusive overreaching by Mr. Smith to support this verdict. And we are unwilling to conclude that a decision by competent counsel not to call these people as witnesses was ineffective assistance.

Double Jeopardy

Mr. Smith argues that the court's procedure placed him in jeopardy twice. It dismissed incest charges alleged in the first amended information, but then allowed the trial to proceed with the allegations in the second amended information. He is mistaken. The incest charges that the trial court dismissed were not included in the second amended information. Mr. Smith was not placed in jeopardy a second time for incest. And jeopardy would not have attached because of the dismissal following the *Knapstad* motion in any event. *State v. Freigang*, 115 Wn. App. 496, 502, 61 P.3d 343 (2002).

Fair Trial

Mr. Smith argues that he did not receive a fair trial because the judge showed bias by using outside knowledge of Ms. Crowl's family and personal situation to make a decision to exclude evidence. Due process guarantees criminal defendants a fair trial by an impartial judge.

State v. Madry, 8 Wn. App. 61, 504 P.2d 1156 (1972). Impartial means the absence of either actual or apparent bias. *See State v. Moreno*, 147 Wn.2d 500, 507, 58 P.3d 265 (2002). However, "[a]n assertion of an unconstitutional risk of bias must overcome a presumption of honesty and integrity accruing to judges." *State v. Chamberlin*, 161 Wn.2d 30, 38, 162 P.3d 389 (2007). A defendant must support a claim of judicial bias with specific evidence to overcome this presumption. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 692, 101 P.3d 1 (2004).

Here, the trial judge said that he considered things "from [his] own experience with [Crowl's] family and [his] own experiences with this type of situation in a domestic context." 1 RP at 147. Mr. Smith takes this statement out of context. After making the statement, the trial judge explained that he was considering Ms. Crowl's mental capacity, hectic life, and unsupporting family in trying to decide an evidentiary issue. Ms. Crowl's situation was relevant to the evidentiary issue because the trial judge was trying to understand the context of a statement that she had made in her child custody declaration. This one statement hardly overcomes the "presumption of honesty and integrity accruing to judges." *Chamberlin*, 161 Wn.2d at 38.

Unreasonable Search and Seizure

Mr. Smith argues that the search of his home was not supported by probable cause. He moved to suppress statements that he had made to deputies but did not move to suppress evidence seized while deputies searched his residence under warrant. As Mr. Smith failed to challenge the search warrant below, this issue is not properly before us. And the record is insufficient for us to pass on it, in any event.

Cumulative Error Doctrine

Finally, Mr. Smith argues that the cumulative error doctrine applies. Where there have been several trial errors that, standing alone may not be sufficient to justify reversal, but when combined may deny the defendant a fair trial, we may reverse and remand. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). We need not address his concern given our disposition here.

HOLDING

We affirm Mr. Smith's convictions, but reverse and remand to strike the prohibition against contact with Ms. Patricia Smith and Ms. Johnson-Junkert.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Sweeney, J.

We concur:

Penoyar, C.J.

Worswick, J.