IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DERON A. PARKS, Appellant.	No. 41534-8-II UNPUBLISHED OPINION

Penoyar, J. — Deron Parks appeals his second degree rape and furnishing liquor to minors convictions, arguing that he received ineffective assistance of counsel and that the trial court violated his right to an impartial jury when it permitted improper opinion testimony. He also challenges a condition of his community custody. Parks finally submits a statement of additional grounds (SAG).[1] We hold that he did not receive ineffective assistance, that his improper opinion testimony claim is not preserved, that his community custody argument is not ripe, and that the arguments in his SAG lack merit. We affirm.

Facts

As pertinent here, the State charged Parks with second degree rape and furnishing liquor to minors resulting from an encounter with minor CT. The jury found Parks guilty of both counts. Parks appeals.

[1] RAP 10.10.

ANAYLSIS

I. Ineffective Assistance of Counsel

Parks first contends that he received ineffective assistance of counsel when his counsel failed to object to certain testimony. We disagree.

The federal and state constitutions guarantee effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22. An appellant claiming ineffective assistance of counsel must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To prove deficient performance, the defendant must show that counsel's performance "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. "There is a strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *Kyllo*, 166 Wn.2d at 863. To satisfy the prejudice prong, the defendant must show that the outcome of the proceedings would have differed but for counsel's deficient performance. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011), *adhered to in part on remand*, ___ Wn. App. ___, 278 P.3d 225 (2012). "[T]he proper standard for attorney performance is that of reasonably effective assistance." *Strickland*, 466 U.S. at 687.

A. Testimony Relating to Witness's Opinion on Guilt

Parks first argues that he received ineffective assistance when counsel failed to object to the following testimony by Detective Barry Folsom:

> (1) that he was a Clark County Sherriff's officer assigned to work with the "Children's Justice Center," (2) that for the past 10 years he had been assigned to investigate cases of "physical and sexual abuse of children," (3) that [he] had been assigned to the Deron Parks case after Officer Aldridge had performed "extensive"

> interviews of the "victim" [CT].

Appellant's Br. at 15.

No witness may express an opinion that the defendant is guilty. *State v. Madison*, 53 Wn. App. 754, 760, 770 P.2d 662 (1989). Witnesses also may not express an opinion as to the truth of a child's statement to the witness, hence, indirectly opining that the defendant is guilty. *Madison*, 53 Wn. App. at 760. Such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). The general rule is that witnesses are to state facts and not to express inferences or opinions. *Madison*, 53 Wn. App. at 760.

The following exchange occurred during direct examination of Folsom:

> [State:] Can you describe your current position?
> [Folsom:] I'm currently assigned as a detective at the Children's Justice Center.
> [State:] So, what do you do?
> [Folsom:] I am assigned to investigate allegations of physical and sexual abuse of children.
> [State:] That would be anybody under eighteen?
> [Folsom:] Anybody under eighteen. Yes, sir.
> [State:] How long have you been a detective at the Children's Justice Center?
> [Folsom:] About ten years.

Report of Proceedings (RP) at 47-48. The State continued to question Folsom:

> [State:] Okay. When you got the case, what had been done?
> [Folsom:] Officer Aldridge had conducted a fairly detailed investigation already. She had interviewed some people. She had interviewed a victim and some witnesses. And then, it was assigned for me to make some further contacts.
> [State:] When you said "victim", were you referring to [CT]?
> [Folsom:] I was.

RP at 48-49.

Parks contends the testimony was improper opinion evidence. Parks argues that this case can be contrasted with a case where the parties agree that the alleged victim received an injury but disagree as to the identity of the perpetrator. Parks alleges that here, where the fact of the crime is in question, the use of the term victim is prejudicial. Parks finally argues that "[t]his error is grossly exacerbated in a rape case in which the witness is a police officer specially trained and with extensive experience investigating the very type of case before the jury." Appellant's Br. at 16. But Parks fails to point to any authority supporting his assertion that use of the phrase victim is inherently prejudicial, nor does he point to any motion in limine to avoid such a reference at trial. Parks apparently argues that referring to CT as a victim is the same as referring to Parks as guilty. This assertion is tenuous, at best.

Parks cites two cases to support his contention. Neither is relevant here. In the first case Parks cites, *State v. Carlin*, a police officer testified that a tracking dog had followed the defendant's "fresh guilt scent." 40 Wn. App. 698, 700, 700 P.2d 323 (1985), *overruled on other grounds by City of Seattle v. Heatley*, 70 Wn. App. 573, 854 P.2d 658 (1993). But, as explicitly stated by a later court in *Heatley*:

> [T]he court in *Carlin* did not expressly decide that the "fresh guilt scent" testimony actually constituted an opinion on the defendant's guilt. *See Carlin*, 40 Wn. App. at 703 (testimony "arguably" was an improper opinion). Instead, the court held that even if the testimony was error, it was harmless beyond a reasonable doubt. *Carlin*, 40 Wn. App. at 705.

70 Wn. App. at 583-84. *Carlin* is not helpful to Parks.

In *Warren v. Hart*, a civil case resulting from a car accident, the appellant argued that the trial court erred by permitting a witness to testify that the responding officer did not issue a citation to either party. 71 Wn.2d 512, 514, 429 P.2d 873 (1967). The court agreed but refused

to grant a new trial on this basis because the appellant had injected the issue with prior testimony and the respondent was entitled to counter the "unfavorable implications arising from appellant's presentation."[2] *Warren*, 71 Wn.2d at 516. As it relates to the case at hand, *Warren* shows only that an officer's improper opinion testimony can be prejudicial. It does not assist Parks in proving that Folsom's use of the word victim was improper.

More analogous to the facts at hand is the case the State cites, *State v. Alger*, 31 Wn. App. 244, 640 P.2d 44 (1982). In *Alger*, a statutory rape case, the trial court read the following stipulation to jury: "'There has been a stipulation . . . that [Alger] . . . has never been married to the victim.'" 31 Wn. App. at 246, 248-49. The court noted that, "[i]n the context of a criminal trial, the trial court's use of the term 'victim' has ordinarily been held not to convey to the jury the court's personal opinion of the case." *Alger*, 31 Wn. App. at 249. As such, the court held that "the one reference to 'the victim' by the trial judge, did not, under the facts and circumstances of this case, prejudice the defendant's right to a fair trial by constituting an impermissible comment on the evidence." *Alger*, 31 Wn. App. at 249. If one reference by the trial court itself was not improper, a reference by a witness, even a sophisticated police officer, cannot be improper. Because the comments were not improper, counsel was not deficient in failing to object to the comments.

Even if we agreed with Parks that the testimony was improper, it does not necessarily follow that it was deficient for counsel not to object. Parks's counsel's failure to object here could have been tactical. Here, the use of the word victim was limited. Like in the case *In re*

[2] The court ultimately granted a new trial on other grounds not relevant here. *Warren*, 71 Wn.2d at 518-19.

Personal Restraint of Davis, "defense counsel's decision not to object can be characterized as legitimate trial strategy or tactics. Counsel may not have wanted to risk emphasizing the testimony with an objection." 152 Wn.2d 647, 714, 101 P.3d 1 (2004); *see also State v. Donald*, 68 Wn. App. 543, 551, 844 P.2d 447 (1993) (no ineffective assistance for failure to further cross-examine witness where further questioning "could have bolstered the doctor's opinion"). Because counsel's conduct can be characterized as tactical, there can be no deficient performance.

Because we hold that Parks's counsel's performance was not deficient, we need not consider whether Parks was prejudiced by Folsom's testimony. Parks did not receive ineffective assistance of counsel on this basis.

B. Testimony Relating to Investigation

Parks next contends that he received ineffective assistance of counsel when counsel failed to object to testimony that Folsom was unsuccessful when he tried to locate Parks as part of his investigation.[3]

The following exchange occurred during the State's examination of Folsom:

> [State:] Okay. And, Detective Folsom, did you ever have contact with Deron Parks?
> [Folsom:] No.
> [State:] Did you try to locate him?
> [Folsom:] I did.
> [State:] And, did you try to contact him?
> [Folsom:] I did.

[3] Our constitutions protect the right of an accused to remain silent. Wash. Const. Art. I, § 9; U.S. Const. amend V; *State v. Burke*, 163 Wn.2d 204, 206, 181 P.3d 1 (2008) (citing *Griffin v. California*, 380 U.S. 609, 614-15, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965); *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996)). When defendants take the stand, their prearrest silence may be used to impeach their testimony, but their silence may not be used as substantive evidence of guilt. *Burke*, 163 Wn.2d at 206 (citing *State v. Clark*, 143 Wn.2d 731, 756, 24 P.3d 1006 (2001)). A mere reference to a defendant's silence may be permissible. *Burke*, 163 Wn.2d at 206.

RP at 49-50. At that point, the trial court, sua sponte, asked to speak to counsel outside of the jury's presence:

> [Court:] And, Counsel, what are we getting to here? I have had concerns that attempts to talk to an officer can lead to a comment on the right to remain silent and the case being reversed, in fact, on appeal even without [an] objection being made. So—
>
> [State:] And, I'm—I'm aware of that line of case law, Your Honor. That was pretty much the end of my questioning. I was simply showing the jury that Detective Folsom made efforts to locate and contact people and was not able to. And, that was pretty much the end of it.
>
> [Defense Counsel:] I would object as to relevance.
>
> [Court] I think we can probably just stop with what we already have in evidence.

RP at 50.

Parks argues only that counsel was deficient by failing to object to the testimony. Counsel in fact made an objection on relevance grounds. The fact that the trial court halted the line of questioning before counsel was able to make an objection does not make her delayed objection deficient. Parks makes no further argument as to deficient performance, for example that counsel failed to move to strike or to request a limiting instruction. Additionally, counsel objected on the same grounds argued by Parks on appeal, relevance. Because counsel objected and therefore did not perform deficiently, we hold that Parks did not receive ineffective assistance of counsel on this basis.

II. Testimony About Report By Victim's Mother

Parks next contends that the trial court violated his right to an impartial jury when it permitted the State to elicit testimony that the mother of the complaining witness believed her son had been raped. The State contends that because Parks did not object on these grounds at trial,

he failed to preserve this issue for appeal. We agree with the State.

During the direct testimony of Officer Sandra Aldridge, the following exchange occurred:

> [State:] What was the general nature of her report?
> . . . .
> [Defense Counsel:] Your honor, objection as to hearsay.
> [Court:] Well, I'll overrule just as to the general nature of the report.
> [Aldridge:] She was wishing to report that her minor son, [CT], had been sexually assaulted.

RP at 97.

The general rule in Washington is that a party's failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a manifest error affecting a constitutional right. RAP 2.5(a); *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011). Counsel must make timely objections to preserve errors for appeal or else they are deemed waived. *State v. Wicke*, 91 Wn.2d 638, 642, 591 P.2d 452 (1979). Also, "[a] party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial." *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985).

Parks objected below only on the grounds of hearsay. That objection does not preserve the issue on appeal, which is whether the testimony about the mother's report constituted improper opinion testimony. Although Parks asserts that the testimony violates his constitutional right to an impartial jury, he does not support that assertion with legal authority and does not make an argument as to why we should consider this issue under RAP 2.5(a). Therefore, we decline to review his claim. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (appellate court will not consider arguments unsupported by relevant authority).

III. Community Custody Conditions

Parks contends that the trial court imposed a community custody condition without authority of law. The State argues that Parks's claim is not ripe. We agree with the State.

Parks's sentencing order contained the following community custody condition:

> You must consent to allow home visits by Department of Corrections to monitor compliance with supervision. This includes search of the defendant's person, residence, automobile, or other personal property, and home visits include access for the purposes of inspection of all areas the defendant lives or has exclusive/joint control or access. RCW 9.94A.631.

Clerk's Papers at 115.

The unconstitutionality of a law is not ripe for review unless the person is harmfully affected by the part of the law alleged to be unconstitutional. *State v. Massey*, 81 Wn. App. 198, 200, 913 P.2d 424 (1996). In *Massey*, Massey challenged a similar sentencing court order that required that he submit to searches by a community corrections officer as a condition to community placement, but which did not state that searches must be based on reasonable suspicion. 81 Wn. App. at 199. The court held that Massey's claim is premature until he is subjected to a search that he deems unreasonable. *Massey*, 81 Wn. App. at 200. That case controls here and renders Parks's challenge to his community custody condition not ripe for review.

Parks relies on *State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008) and *State v. Sanchez Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010), to contend that his claim is ripe for review without Parks having been subjected to a search. But in *Sanchez Valencia*, our Supreme Court explicitly upheld the holding in *Massey*:

> The second prong of the ripeness test asks whether the issues require further factual development. Again, although the Court of Appeals treated the petitioners' claim as an as-applied challenge that required further factual development, in the context of ripeness, the question of whether the condition is unconstitutionally vague does not require further factual development. The condition at issue places an immediate restriction on the petitioners' conduct, without the necessity that the State take any action. This is in contrast to conditions imposing financial obligations or allowing for the search of a person or residence, as identified in *Bahl*, 164 Wn.2d at 749 (*challenge to sentencing condition imposing financial obligation not ripe until State takes action to collect fines*) (citing *State v. Ziegenfuss*, 118 Wn. App. 110, 113-15, 74 P.3d 1205 (2003))); *State v. Massey*, 81 Wn. App. 198, 200-01, 913 P.2d 424 (1996) (*challenge to sentencing condition subjecting defendant to search premature until search actually conducted*); *State v. Phillips*, 65 Wn. App. 239, 243-44, 828 P.2d 42 (1992) (same as *Ziegenfuss*). *Such conditions are not ripe for review until the State attempts to enforce them because their validity depends on the particular circumstances of the attempted enforcement*. With respect to a financial obligation, for example, the relevant question is whether the defendant is indigent *at the time the State attempts to sanction the defendant for failure to pay*. *See, e.g., Ziegenfuss*, 118 Wn. App. at 113-15. Thus, the factual development of the claim is essential to assessing its validity. Here, in contrast, the question is not fact dependant; either the condition as written provides constitutional notice and protection against arbitrary enforcement or it does not.

Sanchez Valencia, 169 Wn.2d at 788-89 (emphasis added, final emphasis in original). The *Sanchez Valencia* court also stated, "As noted above, Massey's vagueness challenge was properly determined to be premature because it concerned a search condition that would not burden the defendant until the State initiated a search." 169 Wn.2d at 790 (citing *Massey*, 81 Wn. App. at 200). *Bahl* and *Sanchez Valencia* are distinguishable from *Massey* and this case in that the defendants in those cases sought to bring vagueness challenges to the conditions, which can be considered before enforcement. *See Sanchez Valencia*, 169 Wn.2d at 786, 791; *Bahl*, 164 Wn.2d at 745-46, 752.

Parks's challenge to the community custody condition related to searches is not ripe. We decline to review it.

IV. Statement of Additional Grounds

Park alleges in his SAG that "[m]y rights under the U.S. Constitution 6th Amendment [were] violated due to my attorney not having my witnesses present to testify in [sic] my behalf which would of [sic] changed the outcome of the verdict." SAG at 1. Parks additionally alleges that his "[r]ights to a fair trial under U.S. Constitution 14th Amendment due process of equal [p]rotection of the law" were violated. SAG at 1. Because these arguments are not supported by credible evidence in the record, we cannot review them. *See* RAP 10.10(c) (an appellate court will not consider an argument made in a statement of additional grounds for review if it does not inform the court of the nature and occurrence of the alleged errors). If material facts exist that have not been previously presented and heard, and require vacation of the conviction, then Parks's recourse is to bring a properly supported personal restraint petition. *See* RAP 16.4.

We affirm.

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.

Penoyar, J.

We concur:

Armstrong, J.

Johanson, A.C.J.