IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. STEVEN GUY WELTY, Appellant.	No. 41634-4-II UNPUBLISHED OPINION

Van Deren, J. — Steven Welty appeals his convictions on six counts of first degree rape of a child, six counts of first degree child molestation, and six counts of first degree incest. He argues: (1) the trial court erroneously admitted evidence of his previous sexual abuse of children under RCW 10.58.090 because the statute violates numerous constitutional protections; (2) the trial court abused its discretion in admitting such evidence under ER 404(b); (3) the trial court exceeded its statutory authority by imposing community custody conditions prohibiting Welty from possessing alcohol or possessing and using "drugs" of any kind; and (4) the community custody condition prohibiting Welty from using or possessing "drugs" is unconstitutionally vague. In his statement of additional grounds for review (SAG), Welty raises numerous meritless claims. We hold that the trial court properly admitted the prior bad acts evidence as evidence of a common scheme or plan under ER 404(b), reject Welty's SAG arguments, accept the State's

concessions regarding the community custody conditions, and remand with instructions to strike the alcohol possession prohibition and to clarify the possession and drug usage prohibition.

FACTS

Every year from the time she was 4 until she was 11, EG[1] and her older brother visited Welty, their grandfather, during their spring and winter vacations. According to EG, Welty first sexually abused her when she was 4. Around 5:30 or 6:00 am, after Welty's wife left for work, Welty took EG out of the guest room in which she and her brother slept and into his bedroom. Once there, Welty placed her in his bed, removed her pants, touched her chest area and vagina with his hands and his mouth, kissed her with his tongue, and performed oral sex on her. EG tried to scoot away, but Welty grabbed her legs and told her that he loved her and that she should not tell anyone.

Each subsequent year, during every visit, Welty sexually abused EG in the same manner. During each incident, Welty always performed oral sex on EG. Additionally, when EG was 7 years old, Welty grabbed her hands, put them down his pants, and made her touch his penis. When EG was 11, Welty stopped abusing her after he approached her and she told him that she was sleeping and he should stop and go away.

Initially, EG did not disclose Welty's sexual abuse to anyone because she felt she had done something wrong. When she was in sixth grade, EG disclosed the abuse to her brother because she needed to tell someone, but was afraid to tell her parents. According to EG's brother, she told him through tears that Welty was a "bad man" and that, during visits with Welty and while

[1] We refer to EG, a minor and a victim of sexual abuse, by her initials in order to protect her privacy.

EG's brother slept, Welty would take her into his bedroom and touch her. Report of Proceedings (RP) (Oct. 5, 2010) at 345. EG told her brother not to share her disclosure with their parents.

At age 14, EG felt strong enough to disclose Welty's sexual abuse to her mother, AG.[2] Before her disclosure, EG was unaware that Welty had also sexually abused AG as a child. According to AG, Welty first began abusing her when she was 3. She recalled getting into bed with Welty, where he encouraged her to touch his erect penis.

Around age 4 or 5, after her parents divorced, Welty picked up AG for visitation. During the drive, Welty pulled over to the side of the highway; performed oral sex on AG while in his car; and told AG that it was their "special time," that he loved her, and that she should not tell anyone. RP (Oct. 4, 2010) at 45. AG disclosed Welty's conduct to her mother. AG recalled that "there was a phone call made, but nothing really happened." RP (Oct. 4, 2010) at 45. When AG next saw Welty, he scolded her for disclosing what he did and told her that she would not get to see him again and that it was supposed to be their secret.

Subsequently, AG visited Welty during summers and at Christmas. RP (Oct. 4, 2010) at 45. During these visits, Welty would "quite often" abuse AG by performing oral sex on her, having her touch him, kissing her with his tongue, or having her climb on top of him and "rub on him." RP (Oct. 4, 2010) at 46, 48. Welty performed oral sex on her during every incident of abuse, which continued until AG was 13.[3]

[2] We refer to AG, a victim of sexual abuse, by her initials to protect her privacy.

[3] AG confronted Welty about the abuse when she was 24 years old and pregnant with EG. She wanted to ensure that EG was protected from Welty and to "mend" her relationship with Welty so that EG might have a healthy relationship with him. RP (Oct. 4, 2010) at 47. According to AG, she allowed Welty to have contact with AG because Welty had "give[n] [his] life over to God," was a "pastor of a church . . . and [was] supposed to be a completely different person," and she was supposed to forgive him. RP (Oct. 4, 2010) at 48.

EG also did not know until after her disclosure that Welty had abused his younger sister, RP,[4] when they were children. According to RP, she slept in a bedroom with her brothers as a child. Because she did not have a bed of her own, she alternated sharing beds with her brothers. Between the ages of 6 and 10, RP frequently would awaken during the middle of the night with Welty licking her "bottom," clitoris, and vaginal opening. RP (Oct. 4, 2010) at 25.

AG contacted law enforcement. After obtaining court authorization, on July 26, 2010, law enforcement recorded three telephone conversations between AG and Welty. During the first call, AG confronted Welty with EG's disclosures. When Welty denied sexually abusing EG, AG questioned his sincerity because EG's descriptions of the abuse were almost identical to his abuse of AG.

During the second call, Welty stated:

> I didn't mean for anything to happen . . . it became a playful time, and it just happened to just come into play, and I don't know why. And I have apologized to [EG] over and over again . . . whatever you decide to do, you know, you gotta do it. That means if I spend the next 10, 15 years in jail, that's what I gotta do. If my family has to know about it, then that's what I gotta do. And I will certainly seek help. . . .
> I was loving her, and it went too far. . . .
> [EG] used to come in and jump in bed with me . . . . pinching my boob, she was also pinching my titties. You know, she even does it now. And so, you know, it became blowing on my belly and, and blowing on her belly and . . . all of a sudden it just went too far.

Ex. 11 at 2-3. He further stated:

> I'm telling you right now that I have done a detestable thing, it is the, it is wrong and I know it, and if I could, if I could just end my life right now and just end it and take care of it, so that I, so that it doesn't have to be out there no more, you know, I would. . . .
> I have always expressed my love in a, in a weird way. And you know that. I never hurt you, I never, I never intended on hurting you. I love you, I've loved you forever. And it's, I'm not saying it's right, but it's something that has caused me

[4] We refer to RP, a victim of sexual abuse, by her initials to protect her privacy.

to want to share a love and with [EG] I have no idea why it came about.

Ex. 11 at 4-5.

When pressed for details, Welty admitted coaxing EG out of her bedroom and into his bedroom; blowing on EG's belly; and touching her "bottom" "a couple of times"; but he denied ever performing oral sex on her. Ex. 11 at 5. He also stated he did not remember whether he had ever forced EG to touch his penis.

During the third call, Welty admitted that he forced EG to "touch [him]," that he performed oral sex on her, and that he touched EG "down there" with his fingers, but he was unsure whether he had ever kissed her with his tongue. Ex. 12 at 2. He also denied breaking her hymen, stating that he did not touch "that part," but "just kissed it." Ex. 12 at 3. But he also claimed that he could not remember all the details because he had tried to put the incidents out of his mind, to forget them, and to "pray [them] away." Ex. 12 at 2-3.

Also pursuant to court authorization, on August 3, 2010, law enforcement recorded a telephone conversation between EG and Welty. When EG asked Welty why he had sexually abused her, he claimed that he did not know why, that "[i]t just got out of hand," and that he had sought psychiatric help. Ex. 13 at 3.

The State charged Welty with six counts of first degree rape of a child, six counts of first degree child molestation, and six counts of first degree incest. After his arrest, Welty made a recorded telephone conversation from jail to his wife, Debbie Welty. He stated:

> [God] was givin me some scriptures today in Daniel um how Daniel became you know with indignant towards the uh the king and and Shadrack was shackin the bed with a whore, when he had an eye at _____ and I and uh had an eye. They chose not to serve man, but they chose to serve God and they were delivered out of the depths of their filth, you know. So, with all of that, I really do have faith and God is gonna do what he's gonna do.

Ex. 14 at 3. When Debbie[5] confronted Welty about "defil[ing] [their] house, [their] bed, [and their] marriage," Welty replied, "I never wanted to let you down. It wasn't me that let you down, it was the sin in me that let you down." Ex. 14 at 5. When Debbie asked whether Welty was going to go to trial and force EG to testify despite Welty's admissions during the previously recorded telephone conversations, he stated that he did not think EG would go through with testifying and that he did not say "much" during those conversations. Ex. 14 at 6.

At a bench trial, the State introduced photographs of EG, AG, and RP at similar ages as children and during the years in which Welty sexually abused each of them to demonstrate their physical similarity. When the State moved to admit AG's and RP's testimony about Welty's sexual abuse, the trial court admitted their testimony under RCW 10.58.090. But the trial court also found their testimony admissible under ER 404(b) as evidence of a common scheme or plan, ruling that the testimony's probative value outweighed its prejudicial effect and stating:

> [T]he similarity in the testimony at least on the modus operandi, and the nature, sex, relationship, age, [and] appearance of the alleged victims is beyond remarkable. It—the testimony speaks of acts which are so very similar in all of those respects as to give it some corroborative effect with regard to the testimony of [EG].

RP (Oct. 5, 2010) at 59-60. The trial court also admitted the recordings and transcripts of Welty's telephone conversations with AG, EG, and Debbie; AG and EG; identified the recordings and transcripts of these calls as fair and accurate; and a Clallam County corrections officer verified the calls' authenticity.

The trial court found Welty guilty as charged, generally basing its oral findings on (1) EG's credibility, (2) Welty's lack of denial when confronted with the accusations against him, and

[5] For clarity, we refer to Debbie Welty by her first name. We mean no disrespect.

(3) the absence of motive for EG, AG, and RP to lie. RP (Oct. 6, 2010) at 7-8. The trial court also orally found, although further corroboration of EG's testimony was not essential to its verdict, that AG's and RP's testimony overwhelmingly supported the verdict. On November 16, 2011, the trial court sentenced Welty to 318 months' confinement. The trial court imposed community custody conditions ordering Welty to "abstain from the possession or use of drugs unless prescribed by a medical professional" and to "abstain from the possession or use of alcohol." Clerk's Papers (CP) at 11, 20.

After Welty appealed his conviction, the trial court scheduled a hearing to enter written findings of fact and conclusions of law. At the September 9 hearing, Welty indicated that he no longer wished for his trial counsel to represent him, and the trial court granted him two continuances, finally holding the hearing on October 21.

At the October 21 hearing, the trial court stated that while waiting for Welty to appear by telephone, it had notified the State that it was adding a finding of fact to the State's proposed findings and the trial court then read its additional finding to the parties. Defense counsel indicated that he had not yet withdrawn, although he would gladly do so at that time.

Welty, on his own behalf, stated that he wanted to "make a motion over the phone to vacate the judg[]ment and sentence and remand it back to trial under cumulative . . . errors," claiming that he now had a conflict of interest with defense counsel, that he had not received notice of the hearing, and that he had not received a copy of the findings and conclusions with the trial court's additional finding. RP (Oct. 21, 2011) at 4. The trial court attempted to explain to Welty that he had to file a motion to vacate the judgment and sentence in writing and that it was merely adding a finding to the State's proposed findings, and the trial court rejected Welty's

request for another attorney. Welty appeals.

ANALYSIS

I. Admission of Prior Bad Acts Evidence

Welty argues that the trial court improperly admitted AG's and RP's testimony regarding Welty's sexual abuse under RCW 10.58.090 and ER 404(b). Our Supreme Court recently held that RCW 10.58.090 was unconstitutional because it violated the separation of powers doctrine. *State v. Gresham*, 173 Wn.2d 405, 432, 269 P.3d 207 (2012). Accordingly, we turn to whether the trial court properly admitted the testimony under ER 404(b).

We review the admission or exclusion of evidence under ER 404(b) for abuse of discretion. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009).

ER 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Evidence of a person's prior misconduct is admissible when the party seeking to admit the evidence (1) demonstrates by a preponderance of the evidence that the misconduct occurred, (2) identifies the purpose for the evidence's admission, and (3) establishes the evidence's relevance to proving an element of the charged crime, and the trial court (4) weighs the evidence's probative value against its prejudicial effect. *Gresham*, 173 Wn.2d at 421.

Welty argues that Welty's modus operandi and the nature of the sex acts Welty performed

on EG, AG, and RP were not "unusual or complex"; the lapse of time between Welty's abusive behavior involving each of them mitigates against admission of the earlier acts; and the existence of slight differences in the details of Welty's abuse does not support admission of the earlier acts. Br. of Appellant at 15.

Evidence of prior misconduct is admissible to show a common scheme or plan under ER 404(b) where (1) "'several crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan'" and (2) "'an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes.'" *Gresham*, 173 Wn.2d at 422 (quoting *State v. Lough*, 125 Wn.2d 847, 855, 889 P.2d 487 (1995)). Welty's case falls within the second type, a single plan followed in perpetrating separate but very similar crimes.

Evidence of the second type of common scheme or plan is admissible if the prior misconduct and the charged crime demonstrate "'such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which' the two are simply 'individual manifestations.'" *Gresham*, 173 Wn.2d at 422 (quoting *Lough*, 125 Wn.2d at 860). "Mere 'similarity in results' is insufficient." *Gresham*, 173 Wn.2d at 422 (quoting *Lough*, 125 Wn.2d at 860). "[W]hile the prior act and charged crime must be markedly and substantially similar, the commonality need not be 'a unique method of committing the crime.'" *Gresham*, 173 Wn.2d at 422 (quoting *DeVincentis*, 150 Wn.2d at 21).

In *Gresham*, our Supreme Court upheld the admission of prior acts of child molestation to show a common scheme or plan when in each instance, "Scherner took a trip with young girls and at night, while the other adults were asleep, approached those girls and fondled their genitals." 173 Wn.2d at 422. The court reasoned that slight differences in details between the prior bad acts

and the charged crimes, such as the presence or absence of oral sex and the fact that only some of the prior acts occurred in Scherner's home, did not outweigh the fact that "the remaining details share[d] such a common occurrence of fact with the molestation of [the victim of the charged crime]." *Gresham*, 173 Wn.2d at 423. Accordingly, our Supreme Court held that the trial court did not abuse its discretion "in determining that [Scherner's prior bad acts] were merely individual manifestations of a common plan." *Gresham*, 173 Wn.2d at 423.

And in *State v. Sexsmith*, 138 Wn. App. 497, 505, 157 P.3d 901 (2007), Division Three of this court affirmed the admission of evidence of prior acts of child molestation by Sexsmith to show a common scheme or plan under ER 404(b). There, Sexsmith was in a position of authority over both victims, the victims were about the same age when Sexsmith molested them, and Sexsmith isolated the victims when he molested them. *Sexsmith*, 138 Wn. App. at 505. He forced both victims "to take nude photographs, to watch pornography, and to fondle him." *Sexsmith*, 138 Wn. App. at 505.

This case is largely analogous to *Sexsmith*. Here, Welty was a close family member to all three victims; the victims were of similar ages and physical appearance; Welty generally acted to isolate them from other individuals while they were away from their home or sleeping; Welty always performed oral sex on the victims; and, on separate occasions, Welty encouraged or forced AG and EG to touch his penis.

Welty argues that performing oral sex on victims in his bedroom is not sufficiently unique to constitute evidence of a common plan or scheme, but our Supreme Court explicitly rejected this proposition in *Gresham*, holding that the proper analysis turns on the similarity of the crimes, not on distinctiveness. *See* 173 Wn.2d at 422-23. The *Gresham* court also rejected the argument

that slight differences in the details of the charged crimes and the previous misconduct defeat a showing that the remaining details share a commonality. 173 Wn.2d at 422-23. Both *Gresham* and *Sexsmith* illustrate that prior acts that are broadly similar to the current offense are admissible to show a common scheme or plan. 173 Wn.2d at 422-23; 138 Wn. App. at 505.

Finally, Welty also argues that the passage of time between his abuse of RP, AG, and EG weighs against admission of RP's and AG's testimony but, "when similar acts have been performed repeatedly over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan." *Lough*, 125 Wn.2d at 860; *see also DeVincentis*, 150 Wn.2d at 19-21 (holding that evidence of prior misconduct was relevant to show that defendant had previously victimized another girl in a markedly similar way under similar circumstances despite the intervening 15 years between the two sexual abuse incidents). We hold that the trial court did not abuse its discretion in admitting RP's and AG's testimony about Welty's sexual abuse as evidence of a common plan or scheme under ER 404(b). His claim fails.

Even if we concluded that the trial court abused its discretion in admitting this evidence, any error was harmless. We review the erroneous admission of evidence under ER 404(b) under the non-constitutional harmless error standard. *Gresham*, 173 Wn.2d at 425. Under this standard, an error is harmless "'unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" *Gresham*, 173 Wn.2d at 425 (internal quotation marks omitted) (quoting *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). Here, Welty admitted during his telephone conversations with AG that he performed oral sex on EG, touched her chest and vagina with his hands, touched EG's "bottom," and forced her to touch his penis. Ex. 11 at 5. With this evidence before the court, the exclusion of AG and

RP's testimony would not, within reasonable probabilities, have affected the trial's outcome. His claims fail.

II. Community Custody Conditions

Welty also challenges the trial court's imposition of community custody conditions ordering Welty to "abstain from the possession or use of drugs unless prescribed by a medical professional" and to "abstain from the possession or use of alcohol." CP at 11, 20. Based on our review of the record, we accept the State's concessions that the trial court improperly imposed both conditions and remand with instructions to strike the first instruction and to clarify the second.

III. Statement of Additional Grounds for Review

In his SAG, Welty raises numerous claims. We address them in turn, finding each without merit.

A. Speedy Trial

Welty argues that the trial court violated his constitutional right to a speedy trial by holding his trial on October 4, 2010, 61 days after his arrest on August 5. We review an alleged violation of the constitutional right to a speedy trial de novo. *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009).

First, we observe that the constitutional speedy trial right does not mandate trial within 60 days. *State v. Torres*, 111 Wn. App. 323, 330, 44 P.3d 903 (2002). CrR 3.3(b)(1)(i) provides the 60-day limit for bringing defendants to trial. But CrR 3.3(d)(3) requires a party who objects to a trial date set outside of the timely trial period to move the court within 10 days of the trial setting for a new trial date within the speedy trial time. Failure to so move loses the right to object to the date the trial actually commences if not within the time limits of the rule. CrR 3.3(d)(3). Welty failed to file a motion objecting to the trial setting and is, thus, precluded from

raising this issue for the first time on appeal under CrR 3.3.

But even assuming without deciding that the trial court did not try Welty within the constitutional speedy trial time, i.e., outside a reasonable time, "[a] defendant invoking his constitutional right to a speedy trial must show actual and inexcusable prejudice, [not] rely upon any presumption of prejudice by mere lapse of time." *State v. Valentine*, 20 Wn. App. 511, 514, 580 P.2d 1119 (1978) (emphasis omitted). Welty fails to allege any prejudice, and his claim grounded on constitutional grounds fails.

B. *Brady*[6] Violations

Welty first claims that the State violated *Brady* when it did not arrange for medical examinations of EG so that he had the examination results at trial. But the State has no duty to independently search for possible exculpatory evidence. *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 399, 972 P.2d 1250 (1999). Welty's claim fails.

Welty also claims that the State violated *Brady* by allegedly failing to provide appellate counsel with transcripts of Welty's recorded telephone conversations with EG and Debbie. But these transcripts are part of the record on appeal and, thus, we presume appellate counsel had access to them. The record does not support Welty's claims, which fail.

Welty finally argues that the State violated *Brady* by allegedly editing the recordings and transcripts of his telephone conversations with AG, EG, and Debbie. But the record indicates that AG, EG, and a Clallam County corrections officer testified that the recordings and transcripts were fair and accurate. Welty's *Brady* claims fail.

C. Sufficiency of Information

[6] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

Welty next argues that the information alleging a range of dates for each crime charged was constitutionally insufficient. We distinguish between charging documents that are constitutionally insufficient—i.e., documents that fail to allege sufficient facts supporting each element of the crime charged—and those that are merely vague. *State v. Leach*, 113 Wn.2d 679, 686, 782 P.2d 552 (1989). A charging document that states each statutory element of a crime but is vague as to some other significant matter, may be corrected under a bill of particulars. *Leach*, 113 Wn.2d at 687. A defendant may not challenge a charging document for vagueness on appeal if he or she failed to request a bill of particulars at trial. *Leach*, 113 Wn.2d at 687.

Here, the information states a range of dates on which each charged offense allegedly occurred. The record does not reflect that Welty sought greater specificity through a bill of particulars before trial and, thus, he may not raise this issue for the first time on appeal.

D. Ineffective Assistance of Counsel

Welty also argues that his counsel was ineffective because his counsel (1) did not retain a private investigator, a medical expert to check for physical injuries to EG, or a psychiatrist to examine Welty and EG; (2) allegedly failed to interview any witnesses or to call any defense witnesses; (3) allegedly failed to challenge the admissibility of AG's and RP's testimony and allegedly failed to offer "'real'" and "'substantial'" arguments at trial; (4) repeatedly urged Welty to accept a plea bargain; and (5) violated his duty of loyalty to Welty through these alleged errors. SAG at 4.

We review claims of ineffective assistance of counsel de novo. *State v. McFarland*, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). To prevail on an ineffective assistance of counsel claim, the defendant must show that defense counsel's objectively deficient performance

prejudiced him. *McFarland*, 127 Wn.2d at 334–35. We strongly presume that counsel is effective and the defendant must show no legitimate strategic or tactical reason supporting defense counsel's actions. *McFarland*, 127 Wn.2d at 336.

To demonstrate prejudice, the defendant must show a reasonable probability exists that absent trial counsel's inadequate performance, the proceeding would have resulted in a different outcome. *McFarland*, 127 Wn.2d at 335. A failure to demonstrate either deficient performance or prejudice defeats an ineffective assistance claim. *See McFarland*, 127 Wn.2d at 334–35; *see also Strickland v. Washington*, 466 U.S. 668, 700, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

First, assuming without deciding that defense counsel's performance was objectively deficient, Welty demonstrates neither what a private investigator and psychiatrist would have contributed to his defense nor that a medical expert would have testified in his favor. Additionally, Welty's own statements in the recorded telephone conversations heavily weigh against a conclusion that had defense counsel called experts, a reasonable probability of a different outcome existed. Accordingly, Welty fails to demonstrate prejudice and his claim fails.

Second, to the extent that defense counsel's alleged failure to interview any witnesses relies on matters outside the record, we will not address it on direct appeal. *McFarland*, 127 Wn.2d at 335. Welty also fails to identify specific witnesses whom defense counsel could have called or what beneficial testimony they would have provided. His claim fails.

Third, Welty grossly misrepresents the record; defense counsel challenged the admissibility of AG's and RP's testimony about Welty's prior misconduct under both RCW 10.58.090 and ER 404(b). Further, he fails to establish what "real" or "substantial" defenses his counsel failed to raise. He fails to show a factual basis for these claims and they fail.

Fourth, any plea bargain or discussions with defense counsel about a plea are matters outside the record. Regardless, given the overwhelming evidence against Welty, he fails to demonstrate that defense counsel's recommendation to him to accept a plea bargain constituted objectively deficient performance. Further, Welty fails to explain how merely recommending that he accept a plea prejudiced him at trial, during which defense counsel argued against the admissibility of AG's and RP's testimony, as well as cross-examined all witnesses about the reliability of their testimony. This claim also fails.

Finally, Welty claims that cumulative errors by defense counsel demonstrate a violation of defense counsel's duty of loyalty to him and, thus, ineffective assistance of counsel. But Welty fails to demonstrate any errors and this claim also fails.

E. Presentencing Investigation Report

Welty next argues that the State violated 18 USC section 3552(d) in conducting Welty's presentencing investigation report. But he cites only to an inapplicable federal statute, as opposed to a Washington statute. His claim thus stated fails in fact and law.

F. Right to Counsel

Welty contends that the trial court violated his constitutional right to counsel during the October 21, 2011 hearing on entry of the trial court's written findings of fact and conclusions of law. But the right to counsel attaches during critical stages of the trial proceedings. *State v. Everybodytalksabout*, 161 Wn.2d 702, 708, 166 P.3d 693 (2007). Generally, "presentation of findings and conclusions that formalize the court's decision, announced in the defendant's presence and based on proceedings at which he or she was present, is not a critical stage of the proceedings." *State v. Corbin*, 79 Wn. App. 446, 449-450, 903 P.2d 999 (1995). Moreover,

Welty had counsel at this hearing. His claim fails.

G. Notice of Hearing for Entry of Findings and Conclusions

Welty argues that the trial court violated his due process right to notice when it allegedly failed to provide him with notice of the October 21 hearing for entry of its written findings and conclusions. But the record reflects that Welty's defense counsel had not withdrawn by the October 21 hearing and that his counsel had notice of the hearing. The record also reflects that the trial court waited for Welty to join the hearing by the telephone before it proceeded at this hearing. His claim fails.

H. Copy of Proposed Findings and Conclusions

Welty argues that the trial court violated his due process rights by failing to provide a copy of the proposed findings and conclusions that included the finding added by the trial court at the October 21 hearing. But Welty misapprehends the nature of the October 21 hearing. At that hearing, the State provided its proposed findings memorializing the trial court's findings but the trial court had not yet finalized, formalized, and entered its actual findings, including the additional finding the trial court felt necessary to encapsulate its oral rulings. The additional finding did not exist until the October 21 hearing. Accordingly, the State had no duty to provide Welty with prior notice of a finding that was made at the hearing. His claim fails.

I. Failure To Enter Findings and Conclusions Following Bench Trial

Welty argues that the trial court's failure to enter written findings of fact and conclusions of law immediately following his bench trial requires reversal of his convictions. CrR 6.1(d) requires entry of written findings of fact and conclusions of law after a bench trial. But the trial court may enter late findings and conclusions "'even while an appeal is pending' if the defendant is

not prejudiced by the belated entry of findings." *State v. Cannon*, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996) (quoting *State v. McGary*, 37 Wn. App. 856, 861, 683 P.2d 1125 (1984)). The appellant bears the burden of demonstrating prejudice, and we will not infer prejudice from delay alone. *State v. Head*, 136 Wn.2d 619, 625, 964 P.2d 1187 (1998).

Welty claims that he was prejudiced in that the trial court judge forgot or was confused about the facts of his trial at entry of the written findings and conclusions, but the record does not support his claims. He does not demonstrate prejudice from the late entry of the findings and conclusions and his claims fail.

J. Right To Present a Defense

Welty contends that the trial court violated his constitutional right to present a defense when (1) at the September 9 through October 21 hearings, it denied him the right to speak and, (2) at the October 21 hearing, it refused to consider his oral motions to appoint new counsel and to vacate his judgment and sentence.

First, Welty again misrepresents the record. The trial court allowed Welty ample opportunity to speak at all the hearings, interrupting and cutting him off only when it became apparent that Welty misunderstood the proceedings' nature. Second, as we state above, defense counsel represented Welty at these hearings, and the trial court was not compelled to allow his defense counsel to withdraw and to appoint new counsel at entry of the findings and conclusions.. Finally, the trial court need not have ruled on Welty's oral "motions" to vacate his judgment and sentence, as CrR 7.8(c)(1) requires motions for vacation to be supported by affidavits, and Welty was advised to file a written motion to vacate the judgment and sentence at the October 21 hearing. His claims fail.

K. Findings and Conclusions Supported by Record

Welty argues that the record does not support the trial court's written findings of fact and conclusions of law. But, although the trial court entered written findings and conclusions in this case, Welty failed to designate them as part of the record on appeal. Parties bear the burden of perfecting the record for appellate review. *See* RAP 9.2(b). Accordingly, in the absence of these findings in the record, we are unable to review them. Welty's claim fails.

L. Additional Finding of Fact at October 21 Hearing

Welty contends that the trial court violated "CrR 52.5(c)(c)" when it made a finding of fact in addition to the State's proposed findings at the October 21 hearing. Suppl. SAG at 17. But no such rule of criminal procedure exists. Because Welty does not present a legally-cognizable claim, it fails.

M. Sufficiency of Affidavit and Warrant

Welty raises numerous challenges to the sufficiency of the supporting affidavit and warrant authorizing recording of his telephone conversations with AG and EG. He also argues that due to the insufficiency of these documents, the trial court erred in admitting the recordings and transcripts of the conversations at trial. But Welty failed to include these documents as part of the record on appeal. Because he bore the burden of perfecting the record, and the record is insufficient for our review, they fail. RAP 9.2(b).

N. Ex Parte Contact

Welty argues that the trial court engaged in impermissible ex parte contact when it informed the State of its addition to the State's proposed findings while waiting for Welty to appear telephonically at the October 21 hearing. Ex parte communications are communications to or from a judge "'[d]one or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested.'" *State v. Watson*, 155 Wn.2d 574, 579, 122 P.3d 903 (2005) (quoting Black's Law Dictionary 616 (8th ed. 2004)).

Here, the record reflects that defense counsel was present at the hearing when the trial court informed the State of its intended additional finding, and the trial court conveyed the same information to Welty once he appeared. The record does not support the allegation of ex parte

contacts and Welty's claim fails.

O. Judicial Misconduct

Welty finally raises numerous claims of judicial misconduct based on alleged trial court violations of the Code of Judicial Conduct (CJC). Specifically, he alleges that the trial court violated provisions of the CJC when it (1) denied him a right to counsel and the right to present a defense, (2) "made misstatements of occurrences/events" in the trial court's written findings and conclusions, (3) misstated the law when it did not allow Welty to bring a motion to vacate at the October 21 hearing, (4) demonstrated a personal bias toward Welty through "blatent [sic] disregard" of Welty's constitutional rights, (5) signed the written findings and conclusions without allowing Welty to "argue" them, (6) allegedly lied during the October 21 hearing regarding defense counsel's role during the hearing, and (7) engaged in ex parte communication with the State during the October 21 hearing. Suppl. SAG at 30.

As we state above, the trial court did not deny Welty his right to counsel or right to present a defense. Second, Welty essentially restates his challenge to the record supporting the trial court's findings and conclusions which are not part of the record on appeal and are not subject to our review. Third, the trial court did not misstate the law when it refused to hear Welty's oral motion to vacate. Fourth, the record reflects only the trial court's disagreement with and rejection of Welty's meritless and procedurally-inappropriate claims, not personal bias toward Welty or disregard for his constitutional rights. Fifth, the trial court noted Welty's objections to the proposed findings and conclusions, only interrupting and silencing Welty when it became apparent that he misunderstood the October 21 hearing's nature, purpose, and scope. Sixth, the record does not support Welty's claim that the trial court lied about defense counsel's role during

the hearing. Finally, the trial court did not engage in ex parte communications. Welty's claims fail.

We affirm Welty's convictions, reject Welty's SAG arguments, accept the State's concessions regarding the community custody conditions, and remand with instructions to strike the alcohol possession prohibition and to clarify the possession and usage of "drugs" prohibition.

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.

Van Deren, J.

We concur:

Quinn-Brintnall, J.

Penoyar, J.