

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

LEOVIGILDO LEAL-LEON,

Appellant.

No. 42054-6-II

UNPUBLISHED OPINION

Penoyar, J. — Leovigildo Leal-Leon appeals his first degree and second degree child molestation convictions, asserting that his defense counsel was ineffective for failing to object to hearsay testimony at trial. Leal-Leon also appeals his sentence, asserting that the trial court did not have statutory authority to impose several of his community custody conditions. Additionally, Leal-Leon raises a number of issues in his statement of additional grounds for review (SAG). Because Leal-Leon’s defense counsel provided effective assistance, and his SAG arguments lack merit, we affirm his convictions. But, because the trial court lacked statutory authority to impose several of Leal-Leon’s community custody conditions, we remand for a correction of his sentence consistent with this opinion.

Facts

The State charged Leal-Leon by second amended information with one count of first degree child molestation, one count of second degree child molestation, and one count of first degree child rape. After his first trial ended in a mistrial, a second jury trial began on March 15, 2011.

Before trial, Leal-Leon's defense counsel moved to prohibit the State from introducing any child hearsay statements. The State agreed that it would not present any child hearsay apart from the testimony of Lisa Wahl, a pediatric sexual assault clinic nurse who evaluated the child victim, MD.<sup>1</sup> Leal-Leon's defense counsel responded, "And I'll reserve my objection. I believe I made an objection to that[ in Leal-Leon's previous trial], and the Court overruled my objection. So I'll make those when I—when I hear something objectionable." 3 Report of Proceedings (RP) at 110.

At trial, 13-year-old MD testified that Leal-Leon, the boyfriend of her older sister, began sexually abusing her when she was 11 years old. MD stated that Leal-Leon touched her inappropriately on her breasts and vagina "a lot when my sister wasn't looking, or when she was gone." 3 RP at 146. She also testified that Leal-Leon had sexual intercourse with her. MD said that these incidents occurred during her summer break between fourth and fifth grade, while she was staying at her sister's home on the Skokomish Indian Reservation in Mason County, Washington.

MD also testified about an incident that occurred during a sleepover on her 12th birthday, after her sister moved to a new home in Shelton, Washington. MD stated that she was sleeping on the kitchen floor next to two of her friends when she woke up to Leal-Leon touching her on the back of her legs and on her buttocks. After MD woke up, she started screaming and her older sister confronted Leal-Leon.

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<sup>1</sup> We use initials to identify the minor victim under this court's General Order 2011-1, which states in part, "[I]n all opinions, orders and rulings in sex crime cases, this Court shall use initials or pseudonyms in place of the names of all witnesses known to have been under the age of 18 at the time of any event in the case."

The State called Wahl to testify about her examination of MD at the St. Peter's Hospital Pediatric Sexual Assault Clinic in Olympia, Washington. Wahl testified that children are referred to her clinic from law enforcement, Child Protective Services, or other clinicians that become aware of potential sexual abuse. Wahl further testified about the procedure for evaluating a child that is a suspected sexual abuse victim:

[W]e collect a medical history, which is the child's viewpoint of their health. And in a head-to-toe fashion I ask them about how they're doing. If the child is younger, we establish some terminology around genitalia which is frequently labeled lots of different words. And I don't want to be misunderstanding what they're talking to me about.

....

Then I identify through this process any concerns that I may have in the back of my mind from my medical training as to potential exposures. That would be on multiple levels, viruses, bacteria, pregnancy, depending if it's a girl or a boy. And then that also helps me to understand what this child's concerns are and so I can possibly through our physical examination reassure them, or help them find some medical process towards curing what they have that is bothering them.

3 RP at 206-07. The State asked Wahl about her evaluation of MD:

[The State]: . . . [C]an you please describe the process that you went through with [MD]?

[Wahl]: Sure. So we go to the greeting area, myself, my nurse, and our social worker. We all introduce ourselves, explain what we're going to do. We always explain what happens before it happens so there's no surprises. [MD] came with myself and my registered nurse into our history room. And we took a subjective history, talked with [MD] for awhile. And then we proceeded on to the examination room and I did a partial examination.

[State]: Now on the subjective medical history—

[Wahl]: Uh huh.

[State]: —did she tell you about why she was there and what had been going on?

[Wahl]: Yes, she told me.

[State]: And what was that?

[Wahl]: She was stating that she had been touched on her body numerous times over a period of years.

[State]: Did she say more? Did—did she go into any more detail?

[Wahl]: Yes, she did.

[State]: Would you please explain that?

[Wahl]: She described to me that her boyfriend's—her sister's boyfriend had, over a period of time, been essentially molesting her. That she described touching over clothing on her breasts, her thighs or buttocks, her vaginal area. And this would happen when she was at her sister's house. When she'd be asleep she'd wake up to being touched. She was—said this happened several times.

3 RP at 211-12.

The jury returned verdicts finding Leal-Leon guilty of first degree and second degree child molestation and finding Leal-Leon not guilty of first degree child rape. Leal-Leon timely appeals his convictions and sentence.

#### analysis

##### I. Ineffective Assistance of Counsel

Leal-Leon asserts that his defense counsel was ineffective for failing to object to Wahl's testimony about MD's statements to her regarding Leal-Leon's sexual abuse. Because defense counsel's decision not to object to Wahl's testimony may have been a legitimate trial strategy to indirectly attack MD's credibility through the cross-examination of Wahl, we disagree.

We review ineffective assistance of counsel claims de novo. *State v. Binh Thach*, 126 Wn. App. 297, 319, 106 P.3d 782 (2005). To prevail on an ineffective assistance of counsel claim, Leal-Leon must show both that (1) counsel’s performance was deficient and (2) the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Brockob*, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006). Performance is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice results if the outcome of the trial would have been different had defense counsel not rendered deficient performance. *McFarland*, 127 Wn.2d at 337. We strongly presume that counsel is effective and the defendant must show the absence of any legitimate strategic or tactical reason supporting defense counsel’s actions. *McFarland*, 127 Wn.2d at 337. To rebut this presumption, Leal-Leon bears the heavy burden of “establishing the absence of any ‘conceivable legitimate tactic explaining counsel’s performance.’” *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

Leal-Leon and the State argue that Leal-Leon's ineffective assistance of counsel claim turns on whether the trial court could have admitted Wahl's testimony regarding MD's statements under ER 803(a)(4),<sup>2</sup> the medical diagnosis or treatment hearsay exception.<sup>3</sup> But we need not decide whether Wahl's hearsay testimony would have been admissible under ER 803(a)(4), because even assuming that the testimony was inadmissible hearsay, Leal-Leon cannot show the absence of any legitimate trial strategy supporting his defense counsel's decision to not object to the testimony.

Here, defense counsel was aware that the State intended to present Wahl's testimony about MD's statements to her concerning Leal-Leon's alleged sexual abuse. At a pretrial hearing, defense counsel informed the trial court that he would wait to hear Wahl's testimony before deciding whether to object to it. When the State elicited Wahl's hearsay testimony at trial, defense counsel did not object. Then, during his cross-examination of Wahl, defense counsel

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<sup>2</sup> ER 803(a)(4) provides:

The following are not excluded by the hearsay rule even though the declarant is available as a witness:

. . . .

*Statements for Purposes of Medical Diagnosis or Treatment.* Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

<sup>3</sup> The State also argues that any error in admitting the hearsay testimony, had defense counsel objected to it, would have been harmless beyond a reasonable doubt. The State thus contends that Leal-Leon cannot show prejudice supporting his ineffective assistance of counsel claim. We need not reach this argument because, as discussed below, we hold that defense counsel's decision to not object to Wahl's testimony was a legitimate trial strategy.

questioned MD's inability to provide precise dates when Leal-Leon had molested her, as well as MD's failure to mention that Leal-Leon had sexual intercourse with her. Defense counsel also suggested through his cross-examination of Wahl, that the presence of MD's mother during her examination may have pressured MD into making the sexual abuse allegations. Thus, defense counsel's decision not to object to Wahl's hearsay testimony may have been a legitimate strategy to allow him to attack MD's credibility through his cross-examination of Wahl. In this way counsel could present the defense theory of the case, that MD's sexual abuse allegations lacked credibility, without having to directly assail MD's credibility during her testimony, an approach that the jury would have likely looked on unfavorably. Because Leal-Leon cannot meet his burden of "establishing the absence of any 'conceivable legitimate tactic explaining counsel's performance,'" his ineffective assistance of counsel claim fails. *Grier*, 171 Wn.2d at 42 (quoting *Reichenbach*, 153 Wn.2d at 130). Accordingly, we affirm his first degree and second degree child molestation convictions.

II. Community Custody Conditions

Next, Leal-Leon contends that the trial court lacked statutory authority to impose the following community custody conditions:

- (10) The defendant shall not go into bars, taverns, lounges, or other places whose primary business in [sic] the sale of liquor;
- (11) The defendant shall not use or access the internet (including via cellular devices) or any other computer modem without the presence of a responsible adult who is aware of the conviction, and the activity has been approved by the Community Corrections Officer and the sexual offender's treatment therapist in advance;  
.....
- (26) The defendant shall not purchase, possess, or view any pornographic materials.  
.....
- (28) The defendant shall have a chemical dependency evaluation within 30

- days of release from custody, provide a copy of the evaluation to the assigned CCO and successfully participate in and complete all recommended treatment, sign all releases necessary to ensure the CCO can consult with the treatment provider to monitor progress and compliance.
- (29) The defendant shall not purchase, possess or consume alcohol.<sup>[4]</sup>

Clerk's Papers (CP) at 19-20.

The State concedes that the trial court lacked authority to impose the community custody conditions that Leal-Leon challenges in this appeal. We accept the State's concession and remand for resentencing consistent with this opinion.

An "illegal or erroneous sentence may be challenged for the first time on appeal." *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)). A trial court may only impose a sentence that is authorized by statute. *State v. Barnett*, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). We review de novo whether a trial court exceeded its statutory authority in imposing a community custody condition. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

In addition to statutorily mandated community custody conditions, Washington sentencing statutes provide a trial court with discretion to impose crime-related prohibitions. *See* RCW 9.94A.703(3)(f), former RCW 9.94A.700(5)(e) (2003).<sup>5</sup> A "[c]rime-related prohibition" is

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<sup>4</sup> Leal-Leon challenges this final community custody condition only insofar as it prohibits the purchase and possession of alcohol, conceding that the trial court had statutory authority to prohibit his consumption of alcohol under RCW 9.94B.050(5)(d). Accordingly, we address only the portion of the community custody condition that prohibits Leal-Leon from purchasing and possessing alcohol.

<sup>5</sup> Former RCW 9.94A.700 has been recodified as RCW 9.94B.050 pursuant to Laws of 2008, chapter 231, section 56.



defined in relevant part as “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). Because none of Leal-Leon’s challenged community custody conditions are statutorily mandated, the conditions must prohibit conduct directly related to the circumstances of convictions to be valid as crime-related prohibitions.

Here, as the State concedes, there is no evidence that alcohol contributed to Leal-Leon’s offenses. Therefore, the trial court lacked statutory authority to prohibit Leal-Leon from entering “bars, taverns, lounges, or other places whose primary business i[s] the sale of liquor,” and lacked statutory authority to prohibit Leal-Leon from purchasing and possessing alcohol. CP at 19. Similarly, as the State also concedes, there is no evidence in the record that Leal-Leon’s access to the internet or chemical dependency contributed to his offenses. Therefore, the trial court lacked statutory authority to restrict Leal-Leon’s access to the internet and lacked statutory authority to order Leal-Leon to participate in a chemical dependency evaluation. Accordingly, we remand Leal-Leon’s sentence to the trial court to remove these community custody conditions.

Finally, Leal-Leon argues that the trial court’s community custody condition prohibiting him from purchasing, possessing, or viewing pornographic material must be stricken as unconstitutionally vague, citing *Bahl*, 164 Wn.2d 739. The State concedes that the trial court’s

community custody condition prohibiting Leal-Leon from purchasing, possessing, or viewing pornographic material is unconstitutionally vague. Following *Bahl*, we accept the State's concession and remand to the trial court to remove the pornography prohibition as it is currently written. 164 Wn.2d at 757-58.

### III. SAG

Leal-Leon raises a number of issues in his SAG that ask us to re-weigh the evidence and reevaluate the credibility of witnesses.<sup>6</sup> But we “must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970, *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Accordingly, those SAG arguments are not subject to our review. Leal-Leon's remaining SAG arguments are also not properly before us because they either refer to matters outside the record<sup>7</sup> or are inadequate to inform us “of the nature and occurrence of alleged errors” under RAP 10.10(c). Accordingly, we do not address Leal-Leon's SAG arguments.

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<sup>6</sup> For example, Leal-Leon claims that many of MD's statements at trial were not true.

<sup>7</sup> For example, Leal-Leon raises issues regarding sexual abuse allegations that were not the subject of this trial. He also requests us to investigate his alibi claim that he was working in Oregon at the time of the offenses.

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We affirm Leal-Leon's first and second degree child molestation convictions but remand to the trial court for a correction of Leal-Leon's sentence consistent with this opinion.

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:

Quinn-Brintnall, J.

Worswick, C.J.