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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 29662-8-III
Respondent,	)	
v.	)	
JACK MARLIN AXTMAN,	)	UNPUBLISHED OPINION
Appellant.	)	

Sweeney, J. — The defendant here challenges a number of the conditions the sentencing court imposed as conditions of his community custody. He contends the conditions are not related to his crimes. We conclude they are with one exception. We remand to delete references to "substance abuse" other than alcohol and affirm the decision to impose the remaining conditions of community custody.

FACTS

The facts here are undisputed. A jury found Jack Marlin Axtman guilty of first degree rape of a child and first degree child molestation. The court then sentenced Mr.

Axtman to concurrent terms of 140 months to life in prison on the rape conviction and 70 months to life in prison on the child molestation conviction. Community custody for life is mandatory. RCW 9.94A.507(5).

The court imposed several conditions on Mr. Axtman as part of the community custody portion of his sentence, including that he (1) not own, use or possess firearms or ammunition; (2) not consume or possess any alcohol; (3) not frequent places where alcohol is the chief commodity being sold; (4) undergo an evaluation for substance abuse; and (5) complete substance abuse treatment/alcohol abuse treatment with a qualified provider, including attendance at support groups such as Alcoholics Anonymous.

Mr. Axtman appeals the imposition of several of the conditions on the ground that the conditions are not crime related.

DISCUSSION

We review conditions of community custody for abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). The sentencing court must base these conditions on tenable grounds or tenable reasons. *State v. Teems*, 89 Wn. App. 385, 388, 948 P.2d 1336 (1997). A defendant may raise objections to community custody conditions for the first time on appeal. *State v. Jones*, 118 Wn. App. 199, 204 n.9, 76 P.3d 258 (2003).

The court may impose and enforce crime-related prohibitions and affirmative conditions as a part of any sentence. RCW

9.94A.505(8). Conditions of community custody may include "crime-related treatment or counseling services," participation in "rehabilitative programs," and compliance with "crime-related prohibitions." RCW 9.94A.703(3)(c), (d), (f). A "crime-related prohibition" is defined 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).

1. *Prohibition related to firearms and ammunition.*

Mr. Axtman first contends that while a court may prohibit a convicted felon from possessing a firearm, it may not prohibit possession of ammunition unless the prohibition directly relates to the underlying offense. He argues his offenses had nothing to do with ammunition. He misreads the statute.

"No offender sentenced to a term of community custody under the supervision of the department may own, use, or possess firearms or *ammunition.*" Former RCW 9.94A.706 (2008) (emphasis added).

Here, the court ordered that Mr. Axtman "not own, use, or possess a firearm or ammunition." Clerk's Papers (CP) at 68, 76. The court's prohibition against possession of ammunition tracks precisely with the statutory language and, of course, the prohibition need not be crime related.

2. *Prohibition related to alcohol.*

Mr. Axtman next contends that while

a court may prohibit an offender from consuming alcohol, it may not prohibit visits to places that sell alcohol unless the condition relates to his offenses. He argues that there is no evidence that bars were the source of his alcohol. And he urges that there are other reasons to go to bars than to drink alcohol.

A court may require that an offender not consume alcohol. RCW 9.94A.703(3)(e). A court may impose further restrictions on alcohol use or consumption if the community custody condition bears a reasonable relation to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community. RCW 9.94A.703(3)(d); *Jones*, 118 Wn. App. at 207-08.

In *Jones*, the defendant pleaded guilty to first degree burglary and "other crimes," and the court imposed a prison sentence and conditions of community custody relating to alcohol consumption and treatment. 118 Wn. App. at 202-03. There nothing suggested that alcohol contributed to the defendant's offenses. *Id.* at 207-08. On appeal, the court found that the trial court had authority to prohibit alcohol consumption but that it could not order the defendant to participate in alcohol counseling because the counseling was not related to the crime. *Id.* at 206-08.

Here, alcohol did contribute to Mr. Axtman's offenses. So the court ordered Mr. Axtman not to "consume or possess alcohol" and not to "frequent places where alcohol is the chief commodity of sale such as bars, taverns or lounges." CP at 68. We conclude that the court reasonably ordered Mr.

Axtman not to frequent places that sell alcohol. The temptation is obvious. It is true, as Mr. Axtman suggests, that there may be reasons to go to a bar other than to drink alcohol. But it was also reasonable for the sentencing judge to assume that the primary reason people go to a bar is to drink alcohol. And alcohol contributed to Mr. Axtman's criminal conduct. Avoiding places that serve alcohol then removes the potential for violating the condition of community custody that he not drink alcohol.

3. *Substance abuse evaluation and treatment.*

Mr. Axtman contends that while a court may order an offender to participate in crime-related treatment, the treatment must address an issue that contributed to the offense. He argues that there is no support for general substance abuse treatment because he has never had any form of drug dependency. His problem is alcohol abuse.

A court may order an offender to participate in crime-related treatment. RCW 9.94A.703(3)(c). Court-ordered substance abuse evaluations and treatment must address an issue that contributed to the offense. RCW 9.94A.607; *see also Jones*, 118 Wn. App. at 207-08.

Here, the court required that Mr. Axtman "complete a substance abuse assessment for alcohol, follow any recommended treatment, including any support groups such as AA [Alcoholics Anonymous], and obey all laws." Report of Proceedings (RP) at 553. But the court also added an appendix to the judgment and sentence that requires that he "complete substance abuse

treatment/alcohol abuse treatment with a qualified provider including that [he] attend non-clinical support groups such as AA." CP at 68, App. H(b)(20).

Mr. Axtman takes issue with the all encompassing "substance abuse treatment" language found in the appendix to the judgment and sentence. The State contends that the court was only referring to alcohol treatment but concedes that the court's use of a back-slash ("/") may be confusing. The State would join in an order correcting the reference to substance abuse. We then remand to correct the judgment and sentence to delete suggestions that he be treated for "substance abuse" since the court's findings address only alcohol abuse.

STATEMENT OF ADDITIONAL GROUNDS

In his Statement of Additional Grounds (SAG), Mr. Axtman raises claims of prosecutorial misconduct. He contends that the prosecution over emphasized during both opening and closing statements that he had admitted guilt. He also contends that the court showed bias in allowing the prosecution to change the dates of charges to add another year.

Prosecutorial misconduct is grounds for reversal if the prosecutor's conduct was both improper and prejudicial. *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011). We evaluate a prosecutor's conduct by examining it in the full trial context,

including the evidence presented, the total argument, the issues in the case, the evidence addressed in argument, and the jury instructions. *Id.*

The comments Mr. Axtman objects to are:

> [T]wo plainclothes detectives . . . interview Mr. Axtman in his yard at his picnic table during the day. They talk for roughly an hour. And Mr. Axtman's open, you know, he tells them – he tells them about his living arrangements with Connie, that they used to be close but now they're more just roommates. He tells them about his medical problems, his ex-wife, his mom's recent death. Then he starts telling them about [sexual incidents with the victim]. Subsequently he says he felt ashamed, and that he'd been drinking a bit during that time frame, and that he'd never do it again. *But at that point, obviously, he had admitted the crime.*

RP at 238-39 (emphasis added).

Mr. Axtman contends that by making these comments, the prosecutor prejudiced his case because he did not actually admit guilt. The prosecutor's comments related information found in the police report. And the officers who prepared that report testified to as much. It was then up to the jury to decide whether Mr. Axtman said those things or not. Credibility determinations are for the jury. Further, the jury was instructed that statements of the lawyers are not evidence and that the jury must disregard any remark, statement, or argument that is not supported by the evidence or the law as stated in the court's instructions.

With regard to Mr. Axtman's contention that the court improperly allowed the prosecution to change the dates of charges to add another year, he again fails to show any prejudice. The court allowed the State to

amend the information after the victim testified to being seven years old during the abuse. It had the authority to do that. *State v. Phillips*, 98 Wn. App. 936, 940-41, 991 P.2d 1195 (2000) (throughout pretrial period up until State rests its case, State may amend information to correct any defect). Mr. Axtman was not prejudiced by the court's allowing the amendment. His argument fails.

We remand to allow the court to delete references in the conditions of community custody that Mr. Axtman undergo "substance abuse" treatment other than treatment for alcohol abuse. We otherwise affirm the convictions and the sentence.

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

Sweeney, J.

WE CONCUR:

Siddoway, A.C.J.

Kulik, J.