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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. OSCAR MARTINEZ ZAVALA, Appellant.	)	No. 80817-6-I DIVISION ONE UNPUBLISHED OPINION

MANN, C.J. — Oscar Martinez Zavala appeals his judgment and sentence for child molestation in the first degree. Martinez argues that (1) the trial court erred in failing to dismiss a biased juror, (2) community custody condition 3 is not narrowly tailored to address visitation with Martinez's minor sons, (3) community custody conditions 7B (avoiding parks with children), and 7D (avoiding relationships with families), are unconstitutionally vague, and (4) that the court erred in requiring him to pay the cost of postrelease supervision as a condition to his community custody. We agree that condition 7D is impermissibly vague and that the trial court erred in requiring Martinez to pay the cost of postrelease supervision as a condition to his community custody. As such, we remand to modify community custody condition 7D consistent with this opinion, and to strike the cost of community custody supervision. We otherwise affirm.

FACTS

A. Background

Martinez met Janet[1] in early 2014. Martinez had a teenage son. Janet had two daughters, including Y.I. Martinez became Janet's cohabitating partner, sharing in parenting responsibilities for the children. Martinez and Janet had a son in April of 2018. Martinez referred to Y.I. as his daughter and Janet as his wife.

Y.I. testified that Martinez touched her inappropriately on three occasions between June 1, 2016 and August 31, 2018. Y.I. would have been from 9 to 11 years old. On October 8, 2018, after learning of these incidents, Janet and her children moved in with her sister, Yesenia. On October 13, 2018, Yesenia's husband called 911 and reported the interactions between Martinez and Y.I. After an investigation, the State charged Martinez with three counts of child molestation in the first degree, RCW 9A.44.083.

B. Procedure

On September 9, 2019, jury selection began. During a supplemental voir dire period, defense counsel introduced a hypothetical using a character named "Ben" who presumed that if the State charged a person with a crime that the person was guilty. The exchange went as follows:

> [DEFENSE COUNSEL]: If the judge told you that Ms. Sebens has to prove her case on all three counts beyond a reasonable doubt for each count, and we don't have to do anything, we can sit here, be asleep, we don't have to do a single thing. If Ms. Sebens hasn't proven her case beyond a reasonable doubt but there is some evidence that says yeah he might have done it, what do you think you would do?

[1] This opinion refers to Y.I.'s mother as "Janet" to help preserve the anonymity of Y.I., the minor victim in this case.

> While you are thinking I'm going to tell you about my friend Ben. My friend Ben will never be on one of my juries. He thinks just because somebody is charged with a crime he thinks law enforcement did their job. If the State brought a charge they did their job, and they are probably guilty. He tells me this, and we talk about cases. Yeah, you don't want me on your jury. If they've gotten this far then he's probably guilty. I'm not naïve. I know most people feel that way.
>
> What we want to make sure of is that people can follow the instructions that the Court gives. We want to make sure that if you are Ben then this isn't the right place for you. This isn't a case for you. But if you still feel that way but you think you can follow the Court's instructions, I can follow the law, I can make the State prove their case beyond a reasonable doubt before I say guilty, then this is the case for you. Hearing that, does anyone think they might be like Ben; that they might say, yeah, we're here. Law enforcement investigated—
>
> Thank you for being honest. Juror Number 21, do you think that might be you? I'm still friends with Ben. Ben is a great person.
>
> [JUROR 21]: Yes.
>
> [PROSECUTION COUNSEL]: Can I request that we focus on the numbers that we were going to focus on? I understand like her, we need to follow up but—
>
> [THE COURT]: I'll let her respond.
>
> Counsel, let's go through the numbers we talked about. This isn't open ended.
>
> You may respond.
>
> [JUROR 21]: That's about all I have. To some extent, yes. I think if the State thinks that there's enough evidence to bring charges there's definitely something to it. Does that mean for sure? No, but yeah that's where I'm at.

No one inquired further.

The jury convicted Martinez on one count of child molestation in the first degree, and acquitted him on two counts of the same. The court sentenced Martinez to 58 months to life in prison, with lifetime community custody.

Martinez appeals.

ANALYSIS

A. Juror Bias

Martinez argues that the trial court failed in its duty to excuse juror 21 for bias[2], and that trial counsel was ineffective for not moving that the juror be excused. We disagree.

"The right to trial by an impartial jury is guaranteed by the Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington Constitution." State v. Gonzalez, 111 Wn. App. 276, 277, 45 P.3d 205 (2002). When a juror with actual bias is seated, this constitutional right is violated. "The presence of a biased juror cannot be harmless; the error requires a new trial without a showing of prejudice." State v. Irby, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015); RAP 2.5(a)(3).

A trial judge has an independent obligation to excuse a juror, regardless of inaction by counsel or the defendant. Irby, 187 Wn. App. at 193. "When a trial court is confronted with a biased juror . . . the judge must, either sua sponte or upon a motion, dismiss the prospective juror for cause." State v. Guevara Diaz, 11 Wn. App. 2d 843, 856, 456 P.3d 869 (2020). A trial court need not excuse a juror with preconceived ideas as long as the juror can set those ideas aside in order to decide the case on the evidence presented at trial and law provided by the court. RCW 4.44.190; State v. Phillips, 6 Wn. App. 2d 651, 662, 431 P.3d 1056 (2018) (citing State v. Rupe, 108 Wn.2d 734, 748, 743 P.2d 210 (1987)). Thus, the question presented to the trial court

[2] While Martinez did not raise this issue below, he may raise it on appeal per RAP 2.5(a)(3). "If the record demonstrates the actual bias of a juror, seating the biased juror was by definition a manifest error." State v. Guevara Diaz, 11 Wn. App. 2d 843, 856, 456 P.3d 869 (2020).

is "whether a juror with preconceived ideas can set them aside." State v. Noltie, 116 Wn.2d 831, 839, 809 P.2d 190 (1991).

The trial court is in the best position to determine a juror's ability to be fair and impartial. Therefore, we review a trial court's decision not to dismiss a juror for manifest abuse of discretion. Guevara Diaz, 11 Wn. App. 2d at 856. A trial court abuses its discretion when it is exercised on untenable grounds or for untenable reasons. Guevara Diaz, 11 Wn. App. 2d at 856. The trial court's broad discretion during the voir dire is nonetheless "subject to essential demands of fairness." Guevara Diaz, 11 Wn. App. 2d at 856.

For relief, an appellant needs to demonstrate the juror had "actual bias" and "more than a mere possibility that the juror was prejudiced." State v. Grenning, 142 Wn. App. 518, 540, 174 P.3d 706 (2010). "Actual bias is 'the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging.'" Irby, 187 Wn. App. at 193 (quoting RCW 4.44.190). Actual bias is not demonstrated when a juror's answers are at all equivocal. State v. Lawler, 194 Wn. App. 275, 374 P.3d 278 (2016). Rather, where a juror unequivocally admits to a bias in favor of police witnesses and indicates that the bias will likely affect deliberations, actual bias is demonstrated. State v. Gonzales, 111 Wn. App. 276, 281, 45 P.3d 205 (2002).

Here, because juror 21's statements were equivocal, the trial court's decision not to dismiss her did not arise to a manifest abuse of discretion. The juror did not indicate that she wanted to say that Martinez was guilty, nor did she indicate that she would be

unable to base her decision on the evidence presented at trial and the law provided by the court. When faced with the "Ben" hypothetical, juror 21 indicated that if charges were brought there was "something to it" but she was not "for sure."[3] When analyzing juror 21's statement, the trial court explained:

> Well, my recollection is what she said is that it's a concern like maybe for everybody coming in on a case like this, the importance of it, and the concerns of the charges. But I thought the last thing she said is she thought she could be fair and follow the instructions of the Court.

The trial court did not perceive juror 21 to have actual bias and did not abuse its discretion in doing so.

B. Community Custody Conditions

Martinez challenges three community custody conditions. A defendant may challenge conditions of community custody "for the first time on appeal where the challenge involves a legal question that can be resolved on the existing record, preenforcement." State v. Wallmuller, 194 Wn.2d 234, 238, 449 P.3d 619 (2019). We review de novo whether the trial court had statutory authority to impose community custody conditions. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). If the condition is statutorily authorized, we review the imposition of crime-related prohibitions for the abuse of discretion. Armendariz, 160 Wn.2d at 110. "A trial court necessarily abuses its discretion if it imposes an unconstitutional community custody condition, and we review constitutional questions de novo." Wallmuller, 194 Wn.2d at 238. Conditions that do not reasonably relate to the circumstances of the crime, the risk

[3] Further indication of the lack of actual bias from juror 21 is the jury's ultimate unanimous finding of Martinez's guilt on one of the three counts of child molestation in the first degree.

of re-offense, or public safety are unlawful, unless those conditions are explicitly permitted by statute. State v. Jones, 118 Wn. App. 119, 204, 76 P.2d 258 (2003).

1. Contact with Minor Children

Martinez first challenges community custody condition 3 which requires that he:

> [r]efrain from direct and/or indirect contact . . . with minor-aged children without the supervision of an adult who is knowledgeable of your offense and only with approval of your Community Corrections Officer and Sexual Deviancy Treatment Provider.

Martinez contends that this condition fails to address contact with his two biological sons. We disagree.[4]

The right to "care, custody, and companionship" of one's children, or the right to parent, is a fundamental right. State v. Warren, 165 Wn.2d 17, 34, 195 P.3d 940 (2008). A sentencing court may not prohibit contact between a defendant and his children as a matter of routine practice. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 377-82, 229 P.3d 686 (2010). This right, however, is not absolute, and is subject to limitations reasonably necessary to meet the compelling need of the State to prevent harm to children. City of Sumner v. Walsh, 148 Wn.2d 490, 526, 61 P.3d 1111 (2003). For example, less restrictive alternatives such as indirect contact or supervised contact may not be prohibited unless barring all contact is shown to be necessary to achieve a compelling State interest. Warren, 165 Wn.2d at 32. Martinez was in a parental role to Y.I. when he sexually assaulted her. The sentencing court acted within its discretion to limit Martinez's contact with his children during community custody as a result. Further, the court did not impose a complete prohibition on Martinez's contact with his children.

[4] Martinez argues also that his trial counsel was ineffective in failing to object to condition 3. Because we review Martinez's assignment of error and find no error in the condition, his counsel was not ineffective in failing to object.

The court tailored condition 3 to allow contact with the supervision of an adult, as well as the approval of Martinez's community corrections officer and sexual deviancy treatment provider.[5] Condition 3 is appropriately tailored and reasonably necessary to meet the compelling need of the State to prevent harm to children.

2. Avoid Parks Used for Youth Activities

Martinez next challenges condition 7B that requires he:

> [s]tay out of areas where children's activities regularly occur or are occurring as follows: parks used for youth activities; schools (except post-secondary schools), daycare facilities, playgrounds, wading pools, swimming pools being used for youth activities, play areas (indoor or outdoor), sports fields being used for youth sports, arcades, or any area where more than 50% of the individuals there are youth. 'Youth' is defined as an individual under 16 years of age.

Martinez contends that the phrase "parks used for youth activities" in condition 7B is unconstitutionally vague. We disagree.

Under the due process principles of the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution, "[a] legal prohibition, such as a community custody condition, is unconstitutionally vague if (1) it does not sufficiently define the proscribed conduct so an ordinary person can understand the prohibition or (2) it does not provide sufficiently ascertainable standards to protect against arbitrary enforcement." State v. Padilla, 190 Wn.2d 672, 677, 416 P.3d 712 (2018). "'[A] . . . condition is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would

[5] Martinez argues that the requirement that he obtain approval from his community corrections officer and sexual deviation treatment provider results in a de facto prohibition of contact because he will not have a community custody officer or sexual deviancy provider until his release to community custody. Martinez ignores that the conditions of community custody are not effective until his release to community custody.

be classified as prohibited conduct.'" Padilla, 190 Wn.2d at 677 (quoting State v. Sanchez Valencia, 169 Wn.2d 782, 793, 239 P.3d 1059 (2010)). Instead, "'the Fourteenth Amendment and article I, section 3 of the state constitution require that citizens have fair warning of proscribed conduct.'" Sanchez Valencia, 169 Wn.2d at 791 (quoting State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008)). The standard is satisfied where "ordinary people can understand what is and is not allowed, and are protected against arbitrary enforcement." Sanchez Valencia, 169 Wn.2d at 791.

Condition 7B is analogous to the condition in Wallmuller, 194 Wn.2d at 238-39. In Wallmuller, our Supreme Court held that the condition "the defendant shall not loiter in nor frequent places where children congregate such as parks, video arcades, campgrounds, and shopping malls" was not unconstitutionally vague. Wallmuller, 194 Wn.2d at 241, 244-45. In doing so, the court reversed the Court of Appeals' interpretation that "congregate" suffered from unconstitutional vagueness, and that the commonsense reading of the prohibition would lend to an ordinary person understanding the scope of the prohibited conduct. Wallmuller, 194 Wn.2d at 245.

Here, condition 7B is even more specific than the condition in Wallmuller. Condition 7B provides a detailed list of areas where Martinez is prohibited. Any indeterminate area is further narrowed to "where more than 50% of the individuals there are youth." "Youth" is additionally defined as "an individual under 16 years of age." A commonsense reading of this prohibition would allow an ordinary person to understand the prohibited conduct. Thus, condition 7B is not unconstitutionally vague.

3. Relationships with Families

Martinez next challenges condition 7D that requires

> [n]o dating or forming relationships with families who have minor children as directed by the Community Corrections Officer and Sexual Deviancy Treatment Provider.

Martinez contends that the phrase "forming relationships with families" in condition 7D is vague because it could be read, for example, to prohibit Martinez from forming a contractual relationship with a family for a construction project if the family has minor children. The State concedes that the phrase "forming relationships with families" is vague and should be stricken.

We agree and remand to the trial court to modify condition 7D as follows: "Do not engage in any dating relationships[6] with any individuals who have minor children unless first approved by the Community Corrections Officer and the Sexual Deviancy Treatment Provider (if the defendant is engaged in sexual deviancy treatment)."

C. Ineffective Assistance of Counsel

Martinez argues that because his trial counsel failed to challenge juror 21 for cause he received ineffective assistance of counsel. We disagree.

A claim of ineffective assistance of counsel presents a mixed question of fact and law that we review de novo. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). To prevail on a claim of ineffective assistance of counsel, a party has the burden of establishing that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defendant's case. State v. Linville, 191 Wn.2d 513, 524, 423 P.3d 842 (2018). If a defendant fails to satisfy either prong, we need not inquire further. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). When reviewing an ineffective assistance of counsel claim, there is a strong presumption that

[6] "Dating relationship" is statutorily defined in RCW 26.50.010(2) and was held by State v. Nguyen, 191 Wn.2d 671, 682, 425 P.3d 847 (2018), to withstand a challenge of constitutional vagueness.

counsel's representation was effective and competent. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

To establish deficient performance, the defendant must show that trial counsel's performance fell below an objective standard of reasonableness. In re Pers. Restraint of Davis, 152 Wn.2d 647, 672, 101 P.3d 1 (2004). Trial strategy and tactics cannot form the basis of a finding of deficient performance. State v. Cienfuegos, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001). Prejudice can be shown only if there is a reasonable probability that, absent counsel's unprofessional errors, the result of the proceeding would have been different. Davis, 152 Wn.2d at 672-73.

To establish ineffective assistance of counsel based on trial counsel's performance during voir dire, a defendant must generally demonstrate the absence of a legitimate strategic or tactical reason for counsel's performance. Davis, 152 Wn.2d at 709. The failure of trial counsel to challenge a juror is not deficient performance if there is a legitimate tactical or strategic decision not to do so. State v. Alires, 92 Wn. App. 931, 939, 966 P.2d 935 (1998).

Martinez fails to establish that juror 21 would have been excused had they been challenged for cause. The juror's remarks identified by Martinez as evidence of bias are merely equivocal and do not establish any probability that the juror had any actual bias against him. See Noltie, 116 Wn.2d at 839.

Further, legitimate strategy exists for Martinez's counsel to avoid challenging juror 21. Excessive questioning or failed challenges can cause antagonism towards Martinez. Because trial counsel's performance during voir dire could be characterized

as legitimate trial strategy and thus not deficient, this performance cannot form the basis for ineffective assistance of counsel.

D. Community Custody Supervision Fees

Martinez argues that the trial court erred in requiring him to pay the cost of his supervision during community custody. We agree.

"Conditions of community custody may be challenged for the first time on appeal and, where the challenge involves a legal question that can be resolved on the existing record, preenforcement." Wallmuller, 194 Wn.2d at 238. Discretionary legal financial obligations, including supervision fees, may not be imposed on a person who is indigent. State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2008); RCW 10.101.010. Here, the trial court found Martinez indigent under RCW 10.101.010(3). Because the trial court found Martinez indigent at the time of sentencing, we remand to the trial court to strike the postrelease supervision cost from the sentence and judgment.

Remanded to modify condition 7D in appendix F consistent with this opinion, and to strike the cost of community custody supervision. Affirmed in all other respects.

Mann, C.J.

WE CONCUR:

Brennan, J.

Chun, J.