

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 65431-4-1
Respondent,)	
)	DIVISION ONE
v.)	
)	
CHARLES BOOME,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: <u>November 14, 2011</u>
_____)	

SPEARMAN, J. – A jury rejected Charles Boome’s claim of a consensual sexual encounter and found him guilty as charged of first degree burglary and first degree rape. We conclude that prosecutorial misconduct did not deny Boome a fair trial and that the allegations in his statement of additional grounds for review are without merit. We agree, however, that the sentencing court lacked statutory authority to impose certain conditions of community custody. We therefore remand to permit the sentencing court to strike the invalid conditions and otherwise affirm Boome’s convictions.

FACTS

On the evening of April 26, 2007, 22-year-old E.H., a student at Western Washington University in Bellingham, walked from her apartment to a nearby bar. At the bar, E.H. met several friends, including her roommate Jordan Melin and another friend, TJ Acena, who was visiting her from out of town. After about an hour, E.H.

No. 65431-4-1/2

and her friends went to another bar. She recalled drinking at least four cocktails and fell asleep at some point during the evening. E.H. acknowledged that she was drunk.

At about 1:00 a.m., E.H. left the bar and walked back to her apartment. E.H. thought that she walked alone, but acknowledged she was so tired and drunk that she might have left with one of her friends. E.H. did not recall meeting anyone along the way to her apartment. After entering her apartment, E.H. went to the bathroom and then went to bed.

The next thing that E.H. remembered was waking up and discovering a man on top of her having sexual intercourse with her. The man, who had long stringy hair, held E.H. down with his forearm. When he was done, the man left the room. E.H. lay in bed for a time, confused about what had happened. When she did not hear anyone leave the apartment, she removed the blunt end of a pool cue that she kept under her pillow and went out into the living room, where the man was standing.

As E.H. pushed him out the door, the man did not struggle but grabbed her breast and asked when he could see her again. After shutting the door and locking it, E.H. went back to sleep. E.H. identified Boome as her attacker.

E.H. awakened at about 3:00 a.m., when she heard Acena pounding on the door. E.H. let him in and then went back to sleep, without telling him what had happened. When she got up at 5:00 a.m. or 6:00 a.m. and went to the bathroom, the bathroom was unusually chilly. E.H. noticed that the upper part of the bathroom window was open and that there was a footprint in the bathtub under the window.

No. 65431-4-1/3

After talking to a friend later in the day, E.H. went to the hospital and reported the rape. The sexual assault nurse took DNA samples that matched Boome's profile.

Jordan Melin testified that he was "positive" that he had walked E.H. home from the bar. He did not encounter anyone on the way and did not notice anyone following them. Melin used his key to open the front door of the apartment and went in with E.H. After locking both the front and rear doors, Melin went to bed. Melin testified that he is a heavy sleeper and did not hear anything during the night.

When he got up at about 8:00 a.m. to shower before class, Melin noticed that the bathroom window was open, something that had never happened before. Melin saw dirt and footprints all over the bathtub. He assumed that Acena, who was asleep on the sofa, had forgotten the key and had to break in through the bathroom window. Melin left through the rear door and was surprised to find it unlocked. Outside, he saw what appeared to be a wooden nightstand underneath the bathroom window. Thinking that Acena had used it to get in, Melin moved the nightstand and shut the window.

Troy Bach, E.H.'s landlord, who was working at the apartment on the morning of April 27, 2007, noticed that a wooden table or bookcase had been moved from the carport to the bathroom window. Because the double-hung bathroom windows were reversed, Bach assumed that the tenants had locked themselves out and had tried to get in through the windows.

Boome testified that he encountered E.H. during the early morning hours of

No. 65431-4-1/4

April 27 as she was walking home and asked her for some money or food. Boome was panhandling and homeless at the time. According to Boome, E.H. invited him into her apartment for some food.

While Boome waited in the living room, E.H. went into her bedroom and came out wearing just her panties and a tank top. After going to the bathroom, E.H. came out and “posed around” for a few minutes and then went into her bedroom. After waiting a few minutes, Boome understood E.H.’s actions to be an invitation and went into the bedroom. He claimed that E.H. removed her clothing and that he then had consensual intercourse with her for about one and one-half hours.

At the end of the encounter, E.H. told Boome he had to leave and went into the bathroom. Boome dressed and waited in the living room. When E.H. came out, Boome hugged her, felt her breasts, and asked if he could see her again. E.H. said no and led Boome out the back door. Boome denied holding E.H. down during the encounter and denied that she had pushed him out using the pool cue.

Boome maintained that he was “surprised” to learn that he had been charged with raping E.H. and that he did not learn of the charges until September 2009, while he was in custody in Snohomish County on an unrelated matter. He explained that it was not unusual for young women to pick him up while he was panhandling and invite him home for a sexual encounter. Boome believed that young women were attracted to his long hair.

The jury found Boome guilty as charged of one count of first degree rape and one count of first degree burglary. The court imposed an indeterminate sentence of

No. 65431-4-1/5

216 months to life.

DECISION

Boome contends that the deputy prosecutor committed misconduct during cross-examination when he attempted to impeach Boome's assertion that he was "surprised" about the rape charge. He argues that the deputy prosecutor improperly suggested the existence of prejudicial facts but then failed to submit any evidence to establish those facts. A defendant claiming prosecutorial misconduct bears the burden of demonstrating "that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial." State v. Miles, 139 Wn. App. 879, 886, 162 P.3d 1169 (2007). Prejudice occurs only if there is "a substantial likelihood the instances of misconduct affected the jury's verdict." State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).

During direct examination, Boome asserted that he was "surprised" about the rape charge and learned about it only in September 2009 while he was in Snohomish County Jail on an unrelated matter. During cross examination, Boome admitted that he was hiding under a bed when he was arrested on September 3, 2009, but asserted that he was being arrested on the unrelated matter. The deputy prosecutor also asked Boome about whether he had any shoes at the time of the arrest and whether he knew that law enforcement officials had broadcast the rape allegations on television and had been questioning his family about his whereabouts.

Defense counsel objected to the questions about Boome's location at the time

No. 65431-4-1/6

of his arrest on the basis of relevancy and lack of foundation and suggested that the deputy prosecutor was “testifying.” The trial court overruled the relevancy objection and noted that Boome had admitted he was hiding under the bed when police officers arrived at his girlfriend’s house to arrest him.¹

A prosecutor who asks questions implying the existence of a prejudicial fact must be prepared to prove that fact and may not use impeachment “as a guise for submitting to the jury substantive evidence that is otherwise unavailable.” State v. Babich, 68 Wn. App. 438, 444, 842 P.2d 1053 (1993) (quoting United States v. Silverstein, 737 F.2d 864, 868 (10th Cir. 1984)). References to extrinsic evidence that is never introduced may violate a defendant’s right to confrontation. State v. Miles, 139 Wn. App. at 886. “Deciding if the questions are inappropriate requires examining whether the focus of the questioning is to impart evidence within the prosecutor’s personal knowledge without the prosecutor formally testifying.” Id. at 887 (quoting State v. Lopez, 95 Wn. App. 842, 855, 980 P.2d 224 (1999)).

As the trial court noted, because Boome admitted that he was hiding under the bed when arrested, the deputy prosecutor did not need to present extrinsic evidence to support this question. And when asked whether he had shoes at the time of his arrest, Boome responded that he was homeless and at his girlfriend’s home to pick up clothes and take a shower. Contrary to Boome’s contention on appeal, the response supports an inference that he was not wearing shoes.

But Boome denied seeing television reports that police were searching for him

¹ Defense counsel later moved for a mistrial on the basis of a discovery violation arising from the State’s failure to provide information about the circumstances of Boome’s arrest. Boome has not raised this issue on appeal.

No. 65431-4-1/7

or knowing that police had been interviewing family members in an effort to locate him. Although the State presented rebuttal testimony from a detective that police had publicized the arrest warrant on television, there was no evidence tending to show that Boome had any access to those television broadcasts or that police had, in fact, contacted Boome's family in an effort to locate him. To the extent that the deputy prosecutor's cross examination suggested personal knowledge or the existence of additional extrinsic evidence demonstrating Boome's awareness, the questions were improper. See Miles, 139 Wn. App. at 887.

We conclude, however, that any misconduct was not prejudicial. The questions about Boome's "surprise" were a relatively minor part of his cross examination, and Boome acknowledged at least some of the details about his arrest, including the fact that he was hiding under the bed. Moreover, the State presented strong direct and indirect evidence contradicting Boome's account of his encounter with E.H. When the misconduct is viewed in light of all of the evidence, there is no reasonable likelihood that it affected the jury's assessment of Boome's credibility.

Boome next contends that the sentencing court erred in imposing community custody conditions that prohibited all contact with minors, including his own children,² and imposed other restrictions involving minors and that required him to obtain chemical dependency and psychiatric evaluations and comply with any recommended treatments. The State concedes that the court lacked authority to impose these conditions.

² Following an objection, the sentencing court amended the judgment and sentence to specify that Boome's children could visit him while he is incarcerated under Department of Corrections (DOC) supervision.

Because Boome was a non-persistent offender under former RCW 9.94A.712(1)((a)(i) (2009), the sentencing court was required to impose a term of community custody and the community conditions specified in former RCW 9.94A.700(4)(2009). The court also had discretion to order Boome “to comply with any crime-related prohibitions” under former RCW 9.94A.700(5)(2003) and to order him “to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community. . . .” Former RCW 9.94A.712(6)(a)(i).

Generally, conditions that do not reasonably relate to the circumstances of the crime are unlawful unless specifically permitted by statute. See State v. Jones, 118 Wn. App. 199, 204, 76 P.3d 258 (2003). A crime-related prohibition means a court order “that directly relates to the circumstances of the crime for which the offender has been convicted. . . .” Former RCW 9.94A.030(13)(2009). Whether the court imposed the conditions with the requisite statutory authority is a question of law that we review de novo. See State v. Armendariz, 160 Wn.2d 106, 110 156 P.3d 201 (2007).

Nothing in the record indicates a connection between the circumstances of Boome’s offenses and the restrictions on contact with minors. See State v. Riles, 135 Wn.2d 326, 350, 957 P.2d 655 (1998) (not reasonable to order sex offender not to have contact with class of individuals who share no relationship to the offender’s crime); see also State v. O’Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (conditions imposing prohibitions must generally be crime-related). Nor was there

No. 65431-4-I/9

any evidence that Boome was under the influence of drugs or alcohol at the time of the crimes. Because they were not crime-related, the sentencing court lacked authority to impose conditions restricting Boome's contact with minors and ordering him to obtain a chemical dependency evaluation.

The court may order an offender sentenced to community placement to undergo a mental status evaluation and mental health treatment if the court finds that "reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025 and that this condition is likely to have influenced the offense." Former RCW 9.94A.505(9)(2008). Because the sentencing court did not make the requisite statutory findings, it lacked the authority to impose this condition. See Jones, 118 Wn. App. at 209.

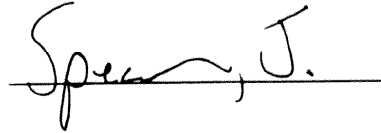
We accept the State's concession of error and remand with instructions to strike the invalid conditions. Our decision does not in any way preclude the DOC or the Indeterminate Sentence Review Board from exercising statutory authority to impose community custody conditions.

In his statement of additional grounds for review, Boome challenges the credibility of several of the State's witnesses and various items of evidence. But this court must defer to the trier of fact on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. See State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Some of Boome's allegations appear to involve matters outside of the record and therefore cannot be considered on appeal. See State v. McFarland, 127 Wn.2d 322, 337-38, 899 P.2d 1251 (1995). Boome's

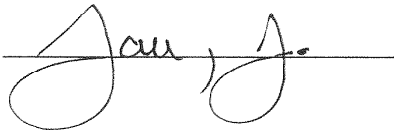
No. 65431-4-1/10

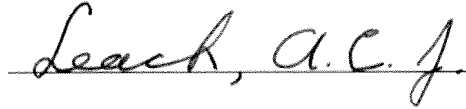
remaining allegations are too conclusory to permit appellate review. See RAP 10.10(c) (appellate court will not consider statement of additional grounds for review unless it informs the court of the nature and occurrence of alleged errors).

We affirm Boome's conviction, and remand only to permit the sentencing court to strike the invalid community custody conditions.

Handwritten signature of Sperry, J. written over a horizontal line.

WE CONCUR:

Handwritten signature of Jan, J. written over a horizontal line.

Handwritten signature of Leach, A.C. J. written over a horizontal line.