IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	)	No. 66405-1-I
v.	)	DIVISION ONE
PAUL KIM, Appellant.	)	UNPUBLISHED OPINION
	)	FILED: May 29, 2012

Spearman, A.C.J. — Paul Kim appeals his convictions for six counts of rape of a child in the first degree and three counts of child molestation in the first degree for acts of sexual abuse against his three children. He claims the trial court committed reversible error by admitting into evidence his statements to a detective and testimony from one victim about abuse that took place outside of the charging period.[1] He also appeals four conditions of community custody, which require him to: (1) pay costs of crime-related counseling and medical treatment for the victims; (2) not possess or control "sexual stimulus material for your particular deviancy" as determined by his community corrections officer (CCO); (3) stay out of "drug areas" as defined by his CCO, and (4) participate in plethysmograph testing as

[1] In a statement of additional grounds, Kim seeks relief based on several assertions that are duplicative of other claims on appeal, involve matters outside of the record, or fail to state grounds for relief.

directed by his CCO. We hold that neither evidentiary decision was reversible error. We accept the State's concessions that the first two conditions of community custody are invalid and we further hold that the third condition is invalid because drugs were not involved in Kim's crimes. Finally, we hold that the fourth condition is valid because it is imposed in conjunction with the order directing Kim to participate in sexual deviancy treatment. Therefore we remand with instructions to strike three of the four community custody conditions, and otherwise affirm.

FACTS

Paul Kim was born in South Korea and immigrated to Alaska as a young adult. At some point Kim married, and he and his wife moved to the Seattle area, where he worked at a mortgage bank and later at the Snohomish County Recreational Center. The couple had three children: daughter V.K. (D.O.B. 4/17/89), son M.K. (D.O.B. 9/29/91), and daughter M.Y.K. (D.O.B. 7/15/99). The Kims lived in an apartment in Edmonds for about three years beginning in 1995. From there they moved to an apartment in Mountlake Terrace, where they lived for three or four years. They then purchased a house in Lynnwood and later bought a house in Mukilteo. Various family members lived with them for much of this time.

When V.K. was six years old, Kim began sexually abusing her. The first time, Kim came into V.K.'s room and touched her under her clothes, then took off her clothes and had penile-vaginal intercourse with her. Kim had intercourse with V.K. on at least 25 occasions during the time V.K. was six to eleven years old. On one occasion, Kim came home drunk and forced V.K. to orally copulate him. On

another occasion, V.K. was sleeping next to her brother M.K. when Kim had sexual intercourse with her. V.K. tried to push Kim away, but Kim responded negatively. Kim stopped having sexual intercourse with V.K. after she turned 12, but continued to fondle her. V.K. tried to push Kim away and to avoid him. When V.K. was in the ninth grade Kim stopped fondling her.

Around the time Kim stopped having intercourse with V.K. he began abusing his son M.K. The first time was when M.K. was nine years old. The family was sleeping in the same room. Kim grabbed M.K.'s hand and forced him to fondle his mother's breast and vagina. Soon Kim made M.K. suck on his mother's breast and had M.K. kiss his mother and lick her vagina. This kind of contact occurred, on average, two to three times per week. About eight months to one year after the first incident, Kim made M.K. have sexual intercourse with his mother while Kim watched. Sometimes when M.K. had intercourse with his mother, Kim fondled her or she gave Kim oral sex. After M.K. had sexual intercourse with his mother, Kim had intercourse with her, making M.K. watch. When M.K. was 12 years old he asked his father if he could stop having sex with his mother. Kim refused. The sexual activity between M.K. and his mother continued until 2009, when M.K. was 17. Around that time, M.K. and Kim fought about whether the sex should continue. On June 1, 2009, M.K. ran away and went to his cousin's home. He told two cousins, an aunt, and a school counselor what happened. Until then M.K. had never told anyone what had been going on between him and his parents.

Kim also molested M.Y.K. beginning when she was about five years old.

M.Y.K. was sleeping in bed with her parents when she woke up to her father fondling her vagina. Kim fondled M.Y.K. four times. Once M.Y.K. got Kim to stop by moving to the other side of her mother. On another occasion she left the room and went to V.K.'s room.

Following M.K.'s disclosures, Child Protective Services sent a referral to the Mukilteo Police Department on June 3, 2009. Officers interviewed M.K. on June 4 and interviewed V.K. and Kim's wife on June 9. Also on June 9, Detective Lance Smith went to Kim's house attempting to contact him. There was no answer, so Smith left a message on Kim's cell phone. Kim called Smith back and agreed to meet Smith at the police station that day. When Kim arrived, Smith said he wanted to talk about the allegations. Though Smith intended to arrest Kim that day, he did not mention this to Kim. Smith escorted Kim to an interview room and closed the door. Kim was given Miranda[2] warnings and was presented a form under which, by signing, he agreed to waive his rights. Kim asked whether he would be arrested for refusing to sign the form. After being told he would not be, he signed the form. The interview lasted one to two hours. Kim denied having sexual contact or intercourse with either M.K. or V.K. but, when asked, could not explain why either child would say such activity had happened. He said he drank alcohol most nights and sometimes apologized the morning after drinking because he did not remember what had happened the previous night. Kim was arrested when the interview was over.

[2] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Kim was charged by amended information with (1) three counts of rape of a child in the first degree based on acts against V.K., (2) three counts of rape of a child in the first degree based on acts against M.K., and (3) three counts of child molestation in the first degree based on acts against M.Y.K.

Prior to trial, the court conducted a CrR 3.5 hearing to determine the admissibility of Kim's statements to Detective Smith. The court ruled the statements admissible, concluding that Kim had not been in custody and in any event had been advised of his constitutional rights and made a knowing, intelligent, and voluntary waiver of those rights.

All three of Kim's children testified about the acts of sexual abuse.[3] M.K. testified that the last time the abuse occurred was when he ran away from home on June 1, 2009. Consistent with the trial court's CrR 3.5 ruling, Smith testified about Kim's statements to him. Kim testified, denying the allegations of sexual abuse. Several family members testified that they did not observe any signs of sexual abuse. The jury convicted Kim on all counts.

DISCUSSION

On appeal, Kim claims reversible error in the admission of (1) his statements to Smith and (2) M.K.'s testimony about abuse that took place after the charging period. He also appeals four conditions of community custody.

Kim's Statements to Police

[3] V.K. was 21 years old at the time of trial, M.K. was 18, and M.Y.K. was 11. Kim's wife was charged separately and did not testify at Kim's trial.

We first address Kim's claim that his statements to Detective Smith were admitted in violation of his constitutional privilege against self-incrimination.[4] We review the trial court's decision after a CrR 3.5 hearing to determine whether substantial evidence supports the trial court's findings of fact, and whether those findings support the conclusions of law. State v. Broadaway, 133 Wn.2d 118, 130-31, 942 P.2d 363 (1997). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. State v. Halstien, 122 Wn.2d 109, 129, 857 P.2d 270 (1993). Unchallenged findings are verities on appeal. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). We review conclusions of law de novo. State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

Here, the trial court concluded that Kim was not in custody and, in any event, was advised of his constitutional rights and made a knowing, intelligent, and voluntary waiver of those rights. The court found that Kim's question to Smith whether he would be arrested if he refused to sign the waiver form supported the conclusion that Kim understood his right to refuse. The court also found that while Kim's first language was Korean, he spoke English fluently and his language skills did not hinder his ability to understand his rights.

The threshold issue is whether the trial court erred in concluding Kim was not in custody.[5] A suspect is in custody once his "'freedom of action is curtailed to

[4] The federal and state constitutions protect an individual's privilege against self-incrimination. U.S. Const. amends. V, XIV; Wash. Const. art. I § 9.
[5] A person who is not in custody and does not assert his right to remain silent is considered to have acted voluntarily if he chooses to respond to questions which could reasonably be expected to elicit

a ‘degree associated with formal arrest.’” Berkemer v. McCarty, 468 U.S. 420, 440, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) (quoting California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983)); see also State v. Harris, 106 Wn.2d 784, 789-90, 725 P.2d 975 (1986) (adopting Berkemer test, which modified previous “probable cause to arrest” standard). Whether a defendant is in custody is a mixed question of fact and law. State v. Solomon, 114 Wn. App. 781, 787, 60 P.3d 1215 (2002). The factual question concerns the circumstances surrounding the interrogation. Id. The legal question is whether a reasonable person would have felt he was not at liberty to terminate the interrogation and leave. Id. at 788. Courts employ an objective test to resolve that question. Id.

Kim contends he was in custody because Smith was armed and questioned him in a small room at a police station; Smith advised Kim of his Miranda rights before the interrogation; and Smith deceived him by telling him he would not be arrested if he did not sign the waiver form because he later testified at the CrR 3.5 hearing that he did intend to arrest Kim that day.

We hold the record supports the trial court’s conclusion that Kim was not in custody. Kim voluntarily came to the police station after arranging the meeting with Smith. He was not restrained or told he was under arrest, and there was no evidence Smith used his firearm to indicate Kim was not free to leave. A suspect is

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incriminating evidence. State v. Sargent, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988) (citing Minnesota v. Murphy, 465 U.S. 420, 429, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984)). The presumption of voluntariness dissipates once the person is taken into custody. Id. (citing Murphy, 465 U.S. at 429).

not seized simply because the officer who questions him is visibly armed. State v. Smith, 154 Wn. App. 695, 700, 226 P.3d 195, rev. denied, 169 Wn.2d 1013, 236 P.3d 207 (2010). The location of questioning is also not determinative.[6] Moreover, Smith told Kim he would not be arrested if he did not sign the waiver form, confirming that he was not under arrest at that time and was free to leave. As for Smith's testimony that he intended to arrest Kim, there was no evidence he said this to Kim. An officer's unspoken plan to arrest a suspect has no bearing on whether the suspect was in custody at the time of questioning; the inquiry is how a reasonable person in his position would have understood the situation. Berkemer, 468 U.S. at 442. Finally, Kim cites no authority for the proposition that the advisement of constitutional rights automatically establishes a custodial setting.

Furthermore, we agree with the trial court that, even if Kim was in custody, he was advised of his Miranda rights and knowingly and intelligently waived them.[7]

[6] A defendant may not be in custody even if an interrogation occurs in a police station. See Oregon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977) (defendant not in custody where police left note at his apartment asking him to call after he was identified as a suspect in a burglary; defendant called back and arranged to meet officer at the state patrol office; defendant was taken into a closed room at the station and told he was not under arrest but was a suspect in the burglary). In contrast, a defendant can be in custody when questioning takes place in the defendant's home. See State v. Dennis, 16 Wn. App. 417, 421-22, 558 P.2d 297 (1976) (defendants in custody in own home even though they were not placed under arrest and officer told them they were free to leave at any time, where atmosphere was "dominated by the officer's unwelcome presence," officer insisted on remaining in a position where he could monitor and restrict defendants' freedom of movement within their home, and officer informed defendants a search warrant had been obtained and was en route to the apartment in order to be served).

[7] Prior to custodial questioning, officers must provide a basic advisement of an individual's constitutional privilege against self-incrimination. Miranda, 384 U.S. at 467. The suspect must be unequivocally advised of his right to remain silent, that anything he says may be used against him in court, that he has the right to have an attorney present if he chooses to make a statement, and that an attorney will be appointed for him if he cannot afford one. Id. at 479.

To have custodial statements admitted into evidence the State must show that the defendant knowingly, voluntarily, and intelligently waived his rights by a preponderance of the evidence. State v. Athan, 160 Wn.2d 354, 380, 158 P.3d 27 (2007); State v. Sargent, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988). Courts review the totality of the circumstances—including the defendant's background, experience, and conduct—to ascertain if waiver was in fact knowing and voluntarily. North Carolina v. Butler, 441 U.S. 369, 374, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979); Miranda, 384 U.S. at 475-57.

Kim claims he did not understand the nature of the rights he waived because of his lack of English sophistication. He points out that Smith provided the Miranda warnings only in English and did not offer to provide an interpreter even though the department employed a Korean-speaking officer. He contends the circumstances here were similar to those in United States v. Garibay, 143 F.3d 534 (9th Cir. 1998).

We conclude substantial evidence supports the trial court's finding that Kim's proficiency with the English language did not hinder his ability to understand the rights he waived. Unchallenged findings of facts establish that Kim's entire contact with Smith was in English. Kim and Smith spoke on the phone, and Kim arrived at the time and place he had discussed meeting with Smith. Kim acknowledged that he understood each right after Smith read it to him. Kim asked whether he would be arrested if he did not sign the waiver form. He signed after Smith said he would not be arrested for refusing to sign. Smith testified that no

threats or promises were made to Kim before he waived his rights. Kim answered some questions at the CrR 3.5 hearing in English.

Garibay is factually distinguishable. Garibay's primary language was Spanish; he had poor verbal comprehension skills and was borderline retarded; and he understood only a few things in English. Garibay, 143 F.3d at 537-39. Testimony that Garibay told an officer he understood English was undermined by testimony from his former coach that when under stress or interacting with persons in authority, he claimed to understand English when he did not. Here, there was affirmative evidence that Kim could understand and speak English, and there was no evidence that he lacked intelligence. Having concluded that Kim's statements to Smith were not admitted in error, we do not conduct a harmless error analysis.

ER 404(b) Evidence

Kim next claims the admission of M.K.'s testimony about sexual abuse that took place after the charging period was not admissible under ER 404(b), was not relevant, and was outweighed by its prejudicial effect even if it was relevant.[8] The

[8] This claim involves the following testimony. During his direct examination, M.K. stated that he ran away from home on June 1, 2009 because he was being forced by his father to have sex with his mother. He testified that this went on until he ran away. Later M.K. testified that he had intercourse with his mother "until last year, June 1st." Kim did not object on either occasion. Later still M.K. was asked if he remembered the last time he had sex with his mother. M.K. answered that it was the day he ran away, June 1, 2009. Kim objected, arguing that the testimony involved conduct beyond the charging dates and was not relevant. The prosecutor argued the testimony was admissible as res gestae to explain how the police became involved. The court overruled the objection. The prosecutor asked if M.K. recalled the last instance of sexual activity with his mother, without giving details. M.K. testified that it happened three or four weeks before June 1, 2009, as well as three months before that date. The prosecutor asked about the argument that M.K. had had with Kim and how that related to the last sexual contact with his mother. M.K. testified that the argument took place the third-to-last time he had sex with his mother and was partly about wanting to stop the sex. Kim again objected, arguing that the testimony went beyond why M.K. went to the police. The prosecutor again argued res gestae. The court overruled the objection. The prosecutor asked M.K. what prompted him to run away, and M.K. said it was the culmination of the last three incidents. When the prosecutor asked for a time frame

State argues the testimony was admissible as res gestae evidence, was relevant to M.K.'s credibility, and was not outweighed by any prejudicial effect. We review the trial court's interpretation of ER 404(b) de novo as a matter of law. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). If the trial court has identified a proper purpose to admit the evidence, we review its ruling for abuse of discretion. Id. Discretion is abused if the trial court's decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. State v. Alexander, 125 Wn.2d 717, 732, 888 P.2d 1169 (1995).

ER 404(b) addresses other misconduct evidence, providing that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of the 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.

Other misconduct is also admissible as res gestae evidence to "complete the story of the crime on trial by placing it in the context of nearby and nearly contemporaneous happenings." State v. Brown, 132 Wn.2d 529, 576, n.106, 940 P.2d 546 (1997). "Where another offense constitutes a 'link in the chain' of an unbroken sequence of events surrounding the charged offense, evidence of that offense is admissible 'in order that a complete picture be depicted for the jury.'" Id. at 571. When determining whether evidence is admissible under ER 404(b), the

between the last incident and the day he ran away, Kim objected, arguing that the uncharged acts were offered to malign him. The prosecutor argued the evidence was relevant to show why the sexual abuse did not stop sooner, and why it stopped when it did. The objection was overruled. M.K. testified that he did not run away before June 1 because he did not know where to go, but by June 1 it did not matter anymore because he was sick and tired of it.

trial court must (1) find the alleged misconduct occurred by a preponderance of the evidence; (2) identify the purpose for admission; (3) determine whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value against its prejudicial effect. State v. Wilson, 144 Wn. App. 166, 177, 181 P.3d 887 (2008).

Here, the testimony at issue concerned 2009 acts, while the charged acts involving M.K. were alleged to have occurred between September 29, 2001 and September 28, 2003. The State contends evidence that Kim made M.K. have sexual contact with his mother in 2009 explained the argument M.K. had with Kim, which was the catalyst for M.K. running away and reporting to police.

We hold the evidence was not admissible to show res gestae because such evidence is "restricted to proving the immediate context within which a charged crime took place."[9] Brown, 132 Wn.2d at 576. Here, the prosecutor's identified purpose for the evidence was to show when the abuse ended and how the police became involved some five to six years after the crimes alleged in the charging period. These facts are not closely related to any material facts involved in proving the charged crimes and do not prove the immediate context or story within which the charged crimes took place.

[9] In Brown, the court held that evidence that the defendant raped and assaulted one woman was admissible in his trial for raping and killing the victim in the charged crime where the acts were committed within two days of each other and in a similar manner. Geographical distance and the passage of two days did not defeat the "immediacy of context" requirement for res gestae evidence given the facts in that case. Id. at 572-76. In State v. Elmore, 139 Wn.2d 250, 285-88, 985 P.2d 289 (1999), the defendant's molestation of the murder victim nine years prior was admissible because the defendant and victim discussed the molestation the day of the murder and the defendant killed the victim to prevent her from disclosing the abuse.

Nonetheless, the error was harmless. Erroneous admission of ER 404(b) evidence is grounds for reversal only if, within reasonable probability, it materially affected the outcome of the case. State v. Everybodytalksabout, 145 Wn.2d 456, 468, 39 P.3d 294 (2002). The error is harmless if "the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (quoting, Nghiem v. Seattle, 73 Wn. App. 405, 413, 869 P.2d 1086 (1994).

Here, before the testimony at issue took place, M.K. testified two times without objection that he was forced to have sexual intercourse with his mother until June 1, 2009, the day he ran away from home. Therefore, evidence was already in front of the jury that the sexual contact continued until 2009. Furthermore, M.K. was instructed by the prosecutor not to go into detail about the incidents, and he did not. Kim contends the evidence harmed him because the case came down to whether the jury believed him or the children. But Kim does not explain how the credibility of his testimony was affected by the improper testimony. Even after hearing M.K.'s testimony that the alleged abuse continued until 2009, the jury could still have chosen to believe Kim's account over that of his children. The evidence cannot be said to have materially affected the outcome of the case within reasonable probabilities.

Conditions of Community Custody

Next we address Kim's challenge to four conditions of community custody, which were imposed by the sentencing court as set forth in Appendix F to the

judgment and sentence.[10] "We review a sentencing court's application of the community custody provisions of the Sentencing Reform Act of 1981, chapter 9.94A RCW, de novo." State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007). "A trial court may impose only a sentence which is authorized by statute." State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999) (citing In re Personal Restraint of Carle, 93 Wn.2d 31, 604 P.2d 1293 (1980).

Kim challenges conditions 2, 8, 14, and 19 to the extent it relates to plethysmograph testing. These conditions state:

> 2. Pay the costs of crime-related counseling and medical treatment required by V.K. (DOB: 04/17/1989); M.Y.K. (DOB: 09/29/1991) and M.K. (DOB: 07/15/1999).
>
> . . . .
>
> 8. Do not possess or control sexual stimulus material for your particular deviancy as defined by the supervising Community Corrections Officer and therapist except as provided for therapeutic purposes.
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> . . . .
>
> 14. Stay out of drug areas, as defined in writing by the supervising Community Corrections Officer.
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> . . . .
>
> 19. Participate in . . . plethysmograph examinations as directed by the supervising Community Corrections Officer.

The State concedes conditions 2 and 8 are invalid and should be stricken. We accept the concessions, and address conditions 14 and 19 in turn.

a. Condition 14 – "Drug Areas"

Kim contends the sentencing court lacked authority to impose condition 14

[10] Kim was sentenced to a determinate sentence on counts 1 through 3 followed by a period of 36 months community custody. He was sentenced, pursuant to RCW 9.94A.507, to an indeterminate sentence on counts 4 through 8. That sentence included community custody for the maximum term of each count, which was life.

because it is not crime-related or reasonably related to his rehabilitation. The State concedes the condition is not crime-related but argues it is authorized under RCW 9.94A.700(5)(a) (2003), which permits a court to impose the special condition that an offender "remain within, or outside of, a specified geographical boundary." The State cites State v. White, 76 Wn. App. 801, 811, 888 P.2d 169 (1995), in support. Nonetheless, at oral argument before this court, the State again acknowledged the condition is not crime-related and indicated it was amenable to striking the condition.

Condition 14 was imposed as a discretionary condition pursuant to the sentencing court's authority under former RCW 9.94A.700(5)(2003), which provides:

> (5) As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions:
>
> (a) The offender shall remain within, or outside of, a specified geographical boundary;
>
> (b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;
>
> (c) The offender shall participate in crime-related treatment or counseling services;
>
> (d) The offender shall not consume alcohol; or
>
> (e) The offender shall comply with any crime-related prohibitions.

At issue is whether, on the facts of this case, condition 14 is authorized under subsection (a). We hold it is not. Though there appears to be no case law squarely on point, we reach this result under analogous case law from our supreme court suggesting there should be some relation between a defendant's

crime and special conditions ordered as part of community placement. In State v. Riles, 135 Wn.2d 326, 957 P.2d 655 (1998), petitioner Gholston was convicted of raping a 19-year-old woman. As a condition of community placement, he was ordered not to have contact with any minor-age children. The court struck down the condition, first explaining:

> Although there is no express requirement under RCW 9.94A.120(9)(c) that the special conditions be crime-related, a reading of its subsections indicates that five of the six conditions are in fact crime-related.[[11]] Only subsection four (iv), which states the "offender shall not consume alcohol," is not inherently crime-related. RCW 9.94A.120(9)(c)(ii) gives courts authority to order offenders to have no contact with victims or a "specified class of individuals." The "specified class of individuals" seems in context to require some relationship to the crime. It would be logical for a sex offender who victimizes a child to be prohibited from contact with that child, as well as from contact with other children. It is not reasonable, though, to order even a sex offender not to have contact with a class of individuals who share no relationship to the offender's crime.

[11] The six special conditions were:

> (i) The offender shall remain within, or outside of, a specified geographical boundary;
> (ii) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;
> (iii) The offender shall participate in crime-related treatment or counseling services;
> (iv) The offender shall not consume alcohol;
> (v) The offender shall comply with any crime-related prohibitions; or
> (vi) For an offender convicted of a felony sex offense against a minor victim after June 6, 1996, the offender shall comply with any terms and conditions of community placement imposed by the department of corrections relating to contact between the sex offender and a minor victim or a child of similar age or circumstance as a previous victim.

Riles, 135 Wn.2d at 335 (citing former RCW 9.94A.120(9)(c)).

Id. at 349-50 (internal footnotes omitted). The court observed that although a defendant's constitutional rights during community placement are subject to certain infringements authorized by the Sentencing Reform Act, "the defendant's freedom of association may be restricted only to the extent it is reasonably necessary to accomplish the essential needs of the state and the public order." Id. at 350. Because there had been no showing that children were at risk and required special protection, and because the restraint on his freedom of association bore no reasonable relationship to the state's essential needs and public order, the condition was not justified under the facts in Gholston's case. Id.

We find the reasoning of Riles to apply here. The special conditions set forth under RCW 9.94A.700(5) and former RCW 9.94A.120(9)(c) (1999) are identical except that the latter contains an additional condition related to felony sex offenses against minor victims. And, as in Riles, condition 14 implicates a fundamental liberty interest, Kim's right to travel.[12] Therefore, there must be some showing by the State that the condition is reasonably necessary to accomplish the essential needs of the state and the public order. The State concedes the condition was not crime-related and offers no reason justifying the condition that is specific to Kim, only asserting that the condition is authorized generally by former RCW 9.94A.700(5)(a).

White is distinguishable. There, although a "stay out of drug area"

[12] The freedom to travel is a First Amendment protected liberty interest. Spence v. Kaminski, 103 Wn. App. 325, 336, 12 P.3d 1030, (2000) (citing State ex rel. Public Disclosure Comm'n v. 119 Vote No! Committee, 135 Wn.2d 618, 647, 957 P.2d 691 (1998) (Talmadge, J., concurring)).

community placement order was upheld under the "geographical boundary" subsection of former RCW 9.94A.120(8)(1999), the defendant was convicted of a drug crime, cocaine with intent to deliver, and there was a relation between the crime of conviction and the order.

b. Condition 19 – Plethysmograph Testing

Kim claims condition 19 violates his constitutional right to be free from bodily intrusions. He contends plethysmograph testing can only be ordered at the direction of a sexual deviancy treatment provider, because a CCO could impermissibly order testing for reasons not related to treatment. The State responds that plethysmograph testing may be ordered to monitor an offender's compliance with sex offender treatment. It asserts that condition 19 should not be read in isolation, as it was accompanied by condition 16, which states:

> 16. Participate in a sexual deviancy treatment with a certified provider and make progress in any recommended courts of treatment. Follow all conditions outlined in your treatment contract. Do not change therapists without advanced permission of the Indeterminate Sentence Review Board and/or Community Corrections Officer.

Therefore, reading conditions 16 and 19 together, it is clear that the CCO's authority to direct plethysmograph testing is limited to the context of sexual deviancy treatment. Both parties cite Riles in support of their positions.

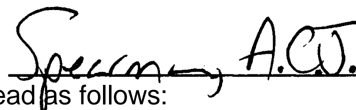
In Riles, the court recognized the usefulness of plethysmograph testing in the diagnosis and treatment of sex offenses and held that requiring this testing as part of a defendant's sexual deviancy treatment is a valid condition that a court is

authorized to impose. Riles, 135 Wn.2d at 343-45. However, the court struck a condition requiring plethysmograph testing where an offender was not also ordered to undergo sexual deviancy treatment or therapy. It explained:

> It is not permissible for a court to order plethysmograph testing without also imposing crime-related treatment which reasonably would rely upon plethysmograph testing as a physiological assessment measure. Unlike polygraph testing, plethysmograph testing does not serve a monitoring purpose. . . . Plethysmograph testing serves no purpose in monitoring compliance with ordinary community placement conditions.

Id. at 345. The conditions approved by the Riles court are nearly identical to those at issue in this case. There, as here, the defendant was ordered to participate in sexual deviancy treatment and to submit to plethysmograph testing at the direction of the CCO.[13] Accordingly, we conclude that condition 19 is permissible so long as the CCO's direction to submit to plethysmograph testing occurs only for treatment purposes and in conjunction with Kim's sexual deviancy treatment.

We remand with directions to strike community custody conditions 2, 8, and 14. We otherwise affirm.



[13] The text of the conditions upheld in Riles read as follows:

> (1) Within thirty days of release from confinement, enter into and make reasonable progress in mental health counseling, and/or sexual deviancy therapy, with a therapist approved by your Community Corrections Officer.
> . . . .
> (4) Submit to polygraph and plethysmograph testing upon the request of your therapist and/or Community Corrections Officer, at your own expense.

Riles, 135 Wn.2d at 337.

WE CONCUR: