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The slip opinion that begins on the next page is for a published opinion, and it has since been revised for publication in the printed official reports. The official text of the court's opinion is found in the advance sheets and the bound volumes of the official reports. Also, an electronic version (intended to mirror the language found in the official reports) of the revised opinion can be found, free of charge, at this website: https://www.lexisnexis.com/clients/wareports.

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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. ANDREY CHUPRINOV, Appellant.	No. 85145-4-I DIVISION ONE PUBLISHED IN PART

CHUNG, J. — Andrey Chuprinov appeals his convictions for sex offenses committed against his half-sister. During an interview by law enforcement, Chuprinov admitted to having sexual intercourse with his half-sister but remained silent in response to several of the questions. During trial, the State elicited testimony from the officers about Chuprinov's failure to respond and encouraged the jury to consider the reasons he might not have wanted to answer the questions. It was constitutional error for the State to comment on Chuprinov's silence, and that error was not harmless as to two of the convictions. Accordingly, we reverse the convictions for rape of a child in the first degree and rape of a child in the second degree. We also reverse the special verdict on whether the victim was under the age of 14 at the time of the offense of incest in the first degree. We affirm the convictions for rape of a child in the third degree and incest in the first degree.

Additionally, the State concedes the judgment and sentence includes errors, including a term of community custody in excess of the statutory maximum, an improper community custody condition, and imposition of a $500 victim penalty assessment. Therefore, we reverse and remand to the trial court to vacate the convictions of rape of a child in the first degree and rape of a child in the second degree and the special verdict and enter a new judgment and sentence consistent with this opinion.

FACTS

Around 1:30 a.m. on July 7, 2020, a Mount Vernon police officer found 15-year-old M.S. in the parking lot of a grocery store. When the officer offered M.S. a ride home, "she became quite emotional" and "said she did not want to go home because she was being raped by her stepbrother." She told the officer the assaults had been happening for eight years. The officer transported M.S. to the police department for an interview.

When two officers interviewed M.S., they had "a very open conversation" and M.S. was very "matter of fact." The interview lasted one hour and 22 minutes, and M.S. described multiple sexual assaults that had occurred from the time she was eight years old until the present, with the most recent occurring a few days earlier.

M.S. referred to Chuprinov alternately as her stepbrother or half-brother. M.S. is the oldest of six children of Sergey Chuprinov and his second wife Tat'yana. Appellant Andrey is one of three children from Sergey and his first wife,

Tat'yana's sister. The two families were close and saw each other frequently. At the time of M.S.'s allegations, Chuprinov lived with M.S. and her family.

Police served a search warrant on the residence and transported Chuprinov to the police station for interviews. Chuprinov agreed to speak with law enforcement and admitted to having sex with M.S. When asked how many times he had sex with M.S., Chuprinov initially said 10, but then decreased the number to four times. He claimed the sex acts had started a few months before. Chuprinov also described some of the acts and where they took place in the residence.

The State charged Chuprinov with four counts: rape of a child in the first degree, rape of a child in the second degree, rape of a child in the third degree, and incest in the first degree.[1] Chuprinov argued to the jury that M.S.'s accounts of the abuse had numerous inconsistencies and were not credible. Chuprinov did not testify at trial. In closing arguments, Chuprinov's counsel acknowledged that Chuprinov had admitted to having sex with M.S. when she was 15 years old, as charged in count III, rape of a child in the third degree. A jury convicted Chuprinov as charged on all four counts.

After the verdict, Chuprinov moved for arrest of judgment under CrR 7.4(a), alleging insufficient evidence for two of the counts, rape of a child in the first degree and incest in the first degree. The trial court denied the motion as to both counts. The trial court then imposed sentences at the high end of the

[1] Chuprinov was also charged with failure to register as a sex offender. This count was severed and then dismissed without prejudice after conviction and sentencing on the four counts at issue in this case.

standard range: 300 months for rape of a child in the first degree (count I), an indeterminate sentence with a minimum of 280 months for rape of a child in the second degree (count II), 60 months on rape of a child in the third degree (count III), and 102 months for incest in the first degree (count IV). Chuprinov appeals.

DISCUSSION

Chuprinov challenges his convictions based on an alleged violation of his right to silence, prosecutorial misconduct, improper opinion testimony, ineffective assistance of counsel, and sufficiency of the evidence to prove the count of incest. He also raises several errors with respect to his judgment and sentence. We address each in turn.

I. Comment on Right to Remain Silent

During direct examination by the State, the detective sergeant who interviewed Chuprinov made several statements related to Chuprinov's reluctance to answer questions:

> Q: Did he confirm or would he tell you when this all started?
> A: I believe he said that it was a few months. When we tried to get specific details he would only say that the last occurrence was about a month prior to that, but it had been -- it had been recent.
> Q: And then he wouldn't answer further questions about that?
> A: Correct.
>
> . . . .
>
> Q: Was he asked about whether or not any of the sex was forceful with her?
> A: Yes. He didn't answer.
> Q: What do you mean "he didn't answer"?
> A: He just sat quietly.
> Q: How long did he sit there quietly?
> A: Difficult to say. Throughout the interview there were times it was a minute or two and probably other times up to four to five minutes. But towards the end of the interview when he became increasingly

> quiet, then that was ultimately when we terminated the interview or just ended the interview.
> Q: He kind of just stopped being willing to speak?
> A: Yes.
>
> . . . .
>
> Q: When there were yes-or-no answers, did you or Detective Jones try and follow up and get more detail?
> A: Yes.
> Q: Was that successful?
> A: Not really.
> Q: And you said the interview concluded. Tell us more about that, how it concluded?
> A: Well, just at the end of the interview when we, you know, were kind of just not getting anywhere, we were asking questions and getting non answers -- or I'm sorry—him just being quiet. It just got to the point where it was like I believe I said something to the effect of I'm just trying to get your side of this, but if you're not going to talk, then we might as well just finish things up.
> Q: And there was no concern expressed from him about that?
> A: No.

At trial, Chuprinov did not object to these questions or testimony about his interview.

Then, during closing argument, the State repeatedly raised, and emphasized, Chuprinov's reluctance to answer questions:

> And as soon as law enforcement started asking him whether or not it was forceful, then he stopped talking. And you heard that it wasn't like he was willing to share a lot of details even prior to that point. It had not been a super free-flowing conversation that occurred at the police station.
>
> Now, in your instructions, same with what we talked about the credibility of the witnesses, you are allowed discuss and debate over why someone might get very tight-lipped all of a sudden with the police after he admitted having sex with her, after he admitted positions, after he admitted how many times it had been going on. Was there a realization that: Maybe I'm not helping myself here by talking to these detectives, right. The detectives are allowed to share that information with you. And you are allowed to use the fact that he is the one in trouble and he is the one charged with crimes in discussing and debating why he stopped talking to law enforcement in that interview room.

. . . .

> You are allowed to talk about the reasons why the defendant might not have wanted to be so detailed with law enforcement. You are allowed to talk about the reasons why he didn't want to answer questions, why there were questions that they asked him that he wouldn't answer, and you are allowed to think about that in the context, even as Detective Sergeant Don explained, that people who are in trouble tend to minimize and want to minimize what is actually going on because then they think they're going to be in more trouble.

Chuprinov did not object at trial to these statements by the prosecutor.

On appeal, Chuprinov contends the State improperly commented on his exercise of his right to remain silent and used his silence as substantive evidence of guilt in violation of his constitutional right to be free from self-incrimination. We agree.

A. Right to Remain Silent

Although Chuprinov did not object below, "[a] direct comment on silence . . . is always a constitutional error." State v. Holmes, 122 Wn. App. 438, 445, 93 P.3d 212 (2004). Thus, Chuprinov's challenge to improper comments on his exercise of the right to silence raises manifest constitutional error reviewable for the first time on appeal under RAP 2.5(a)(3). State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002); State v. Curtis, 110 Wn. App. 6, 11, 37 P.3d 1274 (2002).

Constitutional questions are issues of law which we review de novo. State v. McCuistion, 174 Wn.2d 369, 387, 275 P.3d 1092 (2012). The Washington state and federal constitutions provide criminal defendants with the right against self-incrimination. State v. Easter, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996).

Miranda[2] protects this right upon arrest and requires the accused to be advised that they can remain silent. Easter, 130 Wn.2d at 236. Miranda warnings also "constitute an 'implicit assurance' to the defendant that silence in the face of the State's accusations carries no penalty." Easter, 130 Wn.2d at 236 (quoting Brecht v. Abrahamson, 507 U.S. 619, 628, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)).

During trial, the State may not elicit comments from witnesses or make closing arguments relating to or inferring guilt from a defendant's silence. Easter, 130 Wn.2d at 236. "A comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). As this court has summarized, there are four ways to unconstitutionally comment on a defendant's silence:

> Several principles are apparent. First, it is constitutional error for a police witness to testify that a defendant refused to speak to him or her. Similarly, it is constitutional error for the State to purposefully elicit testimony as to the defendant's silence. It is constitutional error also for the State to inject the defendant's silence into its closing argument. And, more generally, it is constitutional error for the State to rely on the defendant's silence as substantive evidence of guilt.

Romero, 113 Wn. App. at 790 (internal citations omitted). These uses of a defendant's silence are fundamentally unfair and violate due process. Easter, 130 Wn.2d at 236.

Here, the State unconstitutionally commented on Chuprinov's silence in all four ways. The State elicited evidence about Chuprinov's silence from the

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

detective sergeant who conducted the interview, asking, "What do you mean 'he didn't answer'?" and "he kind of just stopped being willing to speak?" In response, the detective sergeant testified about Chuprinov's refusal to speak to him at certain times. The State then relied heavily on this testimony for closing argument, mentioning Chuprinov's silence and encouraging the jury to consider that silence when deliberating, with statements such as: "you are allowed discuss and debate over why someone might get very tight-lipped all of a sudden with the police," "you are allowed to use the fact that he is the one in trouble and he is the one charged with crimes in discussing and debating why he stopped talking to law enforcement in that interview room," and "you are allowed to talk about the reasons why he didn't want to answer questions, why there were questions that they asked him that he wouldn't answer." The State linked Chuprinov's silence with his guilt and instructed the jury it could do the same.

The State contends that Chuprinov never invoked his right to silence, pointing to the trial court's finding after the CrR 3.5 hearing that Chuprinov "knowingly, voluntarily, and intelligently waived his rights" and was willing to answer questions.[3] However, "[e]ven when the State may use a defendant's statements at trial, the suspect may exercise the right to silence in response to any question and the State cannot use that partial silence against him at trial." State v. Fuller, 169 Wn. App. 797, 815, 282 P.3d 126 (2012). See also State v. Burke, 163 Wn.2d 204, 220, 181 P.3d 1 (2008) ("[T]he issue before us is not the

[3] This finding is unchallenged and a verity on appeal. State v. Piatnitsky, 170 Wn. App. 195, 221, 282 P.3d 1184 (2012).

admissibility of Burke's subsequent statements, but whether the State improperly commented on what Burke did not say so as to burden his right of silence.").

In support of its claim that the finding from the CrR 3.5 hearing allowed for the comments on silence, the State compares this case to State v. Curtiss, where law enforcement testified that during the defendant's police interrogation, she did not react to or deny accusations that she asked her brother to commit murder and was present for the crime. 161 Wn. App. 673, 691-92, 250 P.3d 496 (2011). This court allowed the testimony, reasoning that "[b]ecause Curtiss did not invoke her right to remain silent during questioning . . . testimony regarding her lack of a response to certain interview questions was not improper." Id. at 692. However, in Curtiss, the trial court had entered a specific finding of fact that "[a]t no time throughout the interview with [Curtiss,] including the exchange that occurred after the recorder had been turned off, did [Curtiss] invoke her right to remain silent." Id. at 692 (alternations in original). By contrast, here, the trial court did not find that Chuprinov had never invoked his right to remain silent. Rather, the court merely determined, for the purpose of admitting his statements, that Chuprinov initially waived his Miranda rights and willingly answered questions.

This case is also distinguishable from State v. Clark, 143 Wn.2d 731, 765, 24 P.3d 1006 (2001), which the State cites for the proposition that "[w]hen a defendant does not remain silent and instead talks to police, the state may comment on what he does *not* say." But in Clark, the defendant voluntarily spoke with detectives and then changed his story the next day. Id. at 765. The court noted that Clark spoke with the police and developed conflicting accounts of why

he did not meet with detectives as instructed, which was "not apparently a matter of pre-arrest silence." Id. at 765.

Regardless of a prior waiver and agreement to speak to law enforcement, after Miranda warnings, a person "may invoke the right to silence in response to *any* question posed by law enforcement." Fuller, 169 Wn. App. at 814. "No special set of words is necessary to invoke the right. In fact, an accused's silence in the face of police questioning is quite expressive as to the person's intent to invoke the right." Easter, 130 Wn.2d at 239 (internal citations omitted). The right includes partial silence, where the suspect answers some questions while refusing to answer others. Fuller, 169 Wn. App. 814-15. The State may not elicit testimony or comment on partial silence to infer guilt. Id. at 816.

For example, in Fuller, the State summarized the defendant's police interview during its opening statement, stating that he "doesn't really admit or deny the murder, other than his initial claim that he was home that night." 169 Wn. App. at 805. The State also noted that when law enforcement commented while interviewing Fuller that surveillance video showed him wearing a cap similar to one found at the murder scene, the defendant did not deny this. Id. On appeal, Fuller argued that the State's references during its opening to the fact that he did not deny the allegations were improper comments on his partial silence. Id. at 814. This court agreed, concluding "Fuller invoked his right to partial silence in not responding to some . . . questions or statements during the custodial interrogation. Thus, the State could not elicit testimony or comment on Fuller's partial silence to infer his guilt." Id. at 816.

The State attempts to distinguish Fuller, claiming, "Here, unlike in Fuller, Chuprinov *did* engage in conversation regarding the substance of the criminal activity that he was accused of and never invoked his right to silence." But the right to silence is not the "all or nothing proposition" urged by the State. See Hurd v. Terhune, 619 F.3d 1080, 1087 (9th Cir. 2010) ("[T]he right to silence is not an all or nothing proposition."). A defendant may invoke partial silence, choosing to respond to some questions but not answer others "without taking the risk that his silence may be used against him at trial." Fuller, 169 Wn. App. 814-15 (quoting Hurd, 619 F.3d at 1087). This partial silence is equally protected.

The Fuller court also reasoned that because Fuller did not testify, "the State's use of testimony about his refusal to deny [the detective's] statements during custodial interrogation could not, therefore, impeach his testimony." Id. at 818. In Fuller, the State failed to identify any defense theory that the State could attack by using the defendant's constitutionally protected silence, and, therefore, the court declined "to allow the State to 'impeach' a nontestifying defendant about his or her postarrest partial silence." Id. at 819. Like Fuller, Chuprinov did not testify, so the State could not "impeach" him with his silence.

State v. Young, 89 Wn.2d 613, 574 P.2d 1171 (1978), cited by the State, is also distinguishable. There, the defendant made spontaneous statements, shouted information to a third party, and asked questions that were not in response to any questions by law enforcement. Id. at 619. The State's closing argument asked the jury whether they heard any testimony from the arresting officers that defendant denied the crime. Id. at 620. The court held that "the

defendant chose to not remain silent. The prosecutor was entitled to argue the failure of the defendant to disclaim responsibility after he voluntarily waived his right to remain silent and when his questions and comments showed knowledge of the crime." Id. at 621. Thus, in Young, the State did not directly comment on a defendant's choice to remain silent in response to questions or use the fact of silence itself. In this case, the State *did* point out Chuprinov's lack of response to questions—i.e., his silence. And unlike Young, Chuprinov did not make spontaneous statements that were not in response to any question. Young is inapposite.

Here, Chuprinov invoked his right to remain silent by remaining silent in response to certain questions from law enforcement. The State's references to Chuprinov's failure to answer certain questions were the epitome of the kind of improper use of a defendant's silence that violates the " 'implicit assurance' to the defendant that silence in the face of the State's accusations carries no penalty." Easter, 130 Wn.2d at 236. Therefore, the State's comments on Chuprinov's exercise of his right to silence constitutes constitutional error.

B. Constitutional Harmless Error Analysis

We review a comment on silence under the constitutional harmless error standard. Id. at 242. Constitutional errors are presumed prejudicial. Fuller, 169 Wn. App. at 813. The State bears the burden of showing that this constitutional error was harmless. Easter, 130 Wn.2d at 242. "We find a constitutional error harmless only if convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error and where the untainted evidence

is so overwhelming it necessarily leads to a finding of guilt."[4] Id. (internal citations omitted). If the State cannot prove harmlessness, the remedy is a new trial. Id.

Chuprinov admitted to between four and ten instances of sexual intercourse with M.S. The police officer testified about the timeline Chuprinov provided during his interview on July 7, 2020:

> Q: Did he confirm or would he tell you when this all started?
>
> A: I believe he said that it was a few months. When we tried to get specific details he would only say that the last occurrence was about a month prior to that, but it had been -- it had been recent.

M.S. testified that her birthdate is February 18, 2005, which meant that she was 15 years old in July 2020 when she reported the abuse to the police and they spoke with Chuprinov. Additionally, Chuprinov's counsel conceded that Chuprinov was guilty of count III during closing arguments: "You heard him admit a crime, a shameful, embarrassing thing," but "you can still find [Chuprinov] not guilty of Count I, Count II, and Count IV Incest." Given this explicit acknowledgment of an admission by Chuprinov, even without the State's comments on Chuprinov's silence, any reasonable jury would find Chuprinov guilty of count III for rape of a child in the third degree beyond a reasonable doubt where M.S. "was at least fourteen years old but was less than sixteen years old at the time of the sexual intercourse." Additionally, count IV for incest in the first degree required proof of sexual intercourse between February 18, 2018 and July 7, 2020, which is established by Chuprinov's admission to police that he

[4] The State mischaracterizes the issue as prosecutorial misconduct rather than a comment on silence, and, because Chuprinov did not object to the State's argument at trial using his silence, it does not address the constitutional harmless error standard.

started having sex with M.S. a few months before his arrest in July 2020. Thus, a reasonable jury would find Chuprinov's admissions established that he had sexual intercourse with M.S. between those dates beyond a reasonable doubt, as required to prove the charge of incest in the first degree.[5]

Chuprinov argues that his admission does not prove count III or count IV because "that general admission does not specifically correspond to any particular act of intercourse described by M.S. The jury needed to unanimously find a particular act of intercourse occurred." The State did not identify in argument which particular act it relied on for each of these counts, nor did the jury instructions. However, the court issued unanimity instructions to the jury for both rape of a child in the third degree and incest in the first degree.[6] The instructions required that "one particular act" "must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved." The unanimity requirement does not change our review of whether the State's use of Chuprinov's silence was harmless as to counts III and IV; the State bears the burden of showing harmlessness, which requires establishing beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. Easter, 130 Wn.2d at 242.

[5] Chuprinov raises an additional issue as to the sufficiency of the evidence supporting the incest conviction, which we discuss below.

[6] If the State presents evidence of more than one act that could form the basis of a single count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury that it must unanimously agree to rely on a specific act. See State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988).

Chuprinov admitted to several specific acts during his police interview—including one time when he pulled down M.S.'s legging, one time when he pulled down her shorts, one time when he pulled down her underwear, and an incident involving oral sex. Because he admitted these acts by describing each act to the police, a rational jury would find beyond a reasonable doubt that he committed all of these acts. Therefore, although the State's comments on silence constituted constitutional error, the error was harmless as to counts III and IV.

As to counts I and II, Chuprinov did not admit to acts within the relevant time periods. count I alleged rape of a child in the first degree between December 3, 2009 and June 30, 2014, and count II alleged rape of a child in the second degree between February 17, 2017 and February 18, 2019.

In cases involving comments on silence, when the primary evidence is the alleged child victim's testimony, courts have held that the untainted evidence is not overwhelming and the comment was not harmless error. For example, in State v. Holmes, this court determined that although the three witnesses had provided consistent testimony concerning sexual abuse, police testimony that the defendant did not appear surprised when arrested and did not deny the allegations of sexual abuse as normally expected was not harmless error because the outcome of the trial depended on the jury's evaluation of his credibility as compared to other witnesses. 122 Wn. App. 438, 447, 93 P.3d 212 (2004). Similarly, in State v. Keene, a comment on silence was not harmless, as "the untainted evidence consisted of the child's testimony supported by only a report one year after the abuse and a second report later. This evidence is not so

overwhelming that it necessarily leads to a finding of guilt." 86 Wn. App. 589, 595, 938 P.2d 839 (1997).

Here, likewise, the State's case for the two charges related to incidents prior to age 14 was based primarily on M.S.'s testimony. M.S. testified that the first incident of sexual assault by Chuprinov occurred on the stairs of a specific apartment when she was four years old. She described another assault in the kitchen of that apartment when she was six years old. When M.S. was around nine or 10 years old, Chuprinov was not around the family and the assaults stopped. According to M.S., her family then moved into a house and Chuprinov came to live with them. When she was approximately 12 years old, Chuprinov was assaulting her almost daily, and soon after he began forcing her having sexual intercourse. When she was 13 or 14, M.S. asked her doctor for birth control because she feared becoming pregnant.

M.S. testified that she disclosed the sexual assaults to an adult, her cousin Dasha, in June 2020. Dasha confirmed that M.S. said she was on birth control and that she and Chuprinov had sex starting when she was around 13 years old. Dasha took M.S. to buy a lock for her door and told her parents about the sexual assaults. Sergey and Tat'yana both testified that Dasha had spoken with them after M.S.'s disclosure. M.S. testified that the assaults continued even after Dasha spoke with her parents. M.S. described an incident that had occurred in July 2020, when Chuprinov had wrapped a hot pink tank top around her face.[7] During trial, one of the detectives introduced a photograph of a pink tank top on

[7] Initially, M.S. testified that she did not recall the pink tank top. The State refreshed her recollection with a transcript of her police interview.

the bed in M.S.'s bedroom. While this evidence corroborated M.S.'s testimony, it relied on information M.S. reported, and thus, necessarily implicated her credibility as well as the detective's.

In defense, Chuprinov focused on inconsistencies in M.S.'s disclosures throughout the investigation. During closing, Chuprinov highlighted that M.S. made various statements about whether he had forced her to have anal or oral sex. He reiterated conflicting testimony about locations where the sex occurred:

> [S]he actually says that one time upstairs when she was 12 or 13, but her bedroom was downstairs, and we talked about that. Well, she told somebody that it only happened one time upstairs. But then she admitted on the stand that when she spoke to me, she said it was every other night and pretty constant. So did sex ever happen upstairs or was it never, was it once, or was it pretty much every night and constant?

Chuprinov's counsel also attempted to explain why he was reluctant to answer questions during his police interview and focus the jury on his cooperation and honesty:

> He was cooperative. He went to the police department with them. He wasn't under arrest. He was quiet. It took him a long time to answer questions, but he answered their questions. He denied it at first, because it's intimate, it's shameful, it's embarrassing, it's a crime. But he admitted to it. He admitted that there was intercourse when she was 15 years old. And that's cons[ist]ent with evidence.

Ultimately, Chuprinov's defense hinged on whether the jury should believe M.S.'s testimony about the years of earlier abuse.

The impermissible comments on silence weighed heavily against Chuprinov in the credibility contest at the heart of this case. The State focused the jury on Chuprinov's lack of credibility as demonstrated by his silence during questioning by law enforcement. The State used Chuprinov's silence as evidence

that he was guilty of more than merely the handful of recent encounters he admitted:

> He admitted multiple times, multiple ways in which they were having sex. And you are allowed to remember that he's the one charged with crimes here. In how that impacts his credibility, whether or not you believe that's a full account of what happened or if that's just what he was willing to provide and then stopped talking.

The State also explained to the jury that "people who are in trouble tend to minimize and want to minimize what is actually going on because then they think they're going to be in more trouble." Through these statements, the State encouraged the jury to consider Chuprinov's silence as indication that the admitted acts were only a fraction of the abuse he inflicted on M.S.

Because the outcome of the case was dependent on the jury's evaluation of credibility, we conclude the untainted evidence was not so overwhelming that a reasonable jury would convict on count I (rape of a child first degree) and count II (rape of a child second degree). The State's reliance on Chuprinov's silence as evidence of guilt was not harmless as to these two counts. As to counts I and count II, we reverse and remand for a new trial.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate reports and that the remainder shall be filed for public record pursuant to RCW 2.06.404, it is so ordered.

II. Prosecutorial Misconduct: Use of Emotion in Closing

During closing arguments, the prosecutor explained the reasonable doubt instruction. As part of that explanation, the prosecutor discussed the jury's ability to assess M.S.'s credibility:

> Instruction Number 4 tells you that a reasonable doubt is one for which a reason exists. You, as the jury, can have a reason to not think the State has proven the charge or proven a certain element that may arise from the evidence or lack of evidence. It is a doubt -- it is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. I have great news for you all. You are allowed to consider yourselves to be reasonable people. You are allowed to use your understanding as a human in the evaluation of the testimony. You are allowed to let your reaction to her testimony inform you on its authenticity, on its believability, on its reliability. We are not expecting you to be robots when you are deliberating on a case like this.
>
> Now, your emotional reaction is not evidence; so you can't say, oh, my God, I felt terrible, so he's guilty, right? But you are allowed to use how you felt about it to inform you on her credibility. Do you want me to repeat that? Your emotional reaction is not evidence. Right? Your emotions were not subject to cross examination. Your emotions, as a human being in sitting here, watching her, watching [M.S.] testify, be cross examined, inform you on whether or not her testimony was authentic, whether or not it was reliable, whether or not it seemed like she was making all of this up, do you believe her? If you, as the jury, after fully, fairly, and carefully considering that evidence believe the State has proven these charges beyond a reasonable doubt, then he's guilty of these offenses.

Chuprinov contends the prosecutor committed misconduct by appealing to the jurors' emotions. For a successful prosecutorial misconduct claim, the defendant must establish that the prosecutor's conduct was both improper and prejudicial in the context of the entire record. State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). If the statements were improper, we then determine whether the defendant was prejudiced by prosecutorial misconduct

under one of two standards of review. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). If the defendant objected at trial, he must demonstrate that any improper conduct "resulted in prejudice that had a substantial likelihood of affecting the jury's verdict." State v. Allen, 182 Wn.2d 364, 375, 341 P.3d 268 (2015). But if a defendant does not object at trial, "the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." Emery, 174 Wn.2d at 760-61.

Because Chuprinov did not object, the heightened standard applies, and he must show that (1) no curative instruction could have eliminated the prejudicial effect and (2) there was a substantial likelihood the misconduct resulted in prejudice that affected the jury verdict. Id. at 761. "Reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." Id. at 762. Prejudice is incurable when the jury's impartiality has been so undermined that a fair trial is no longer possible. Id.

"A prosecutor acts improperly by seeking a conviction based on emotion rather than reason." State v. Craven, 15 Wn. App. 2d 380, 385, 475 P.3d 1038 (2020). For example, in Craven, the prosecutor "told the jurors they would know Craven's guilt beyond a reasonable doubt by, in equal measure, recognizing it intellectually and feeling it emotionally in their hearts and viscerally in their guts," which "invited jurors to give the same weight to their rationality as to their emotions and instincts." Id. at 387-88. The prosecutor's insistence that a juror

should "feel right" and have a decision "make sense" in the heart and gut was improper. Id. at 389. "A jury should reach its verdict based on the evidence presented at trial, not on each juror's preferences or feelings in their heart or gut." Id. at 390.

Chuprinov argues the prosecutor's statements here were similar to those in Craven: "The prosecutor committed blatant misconduct in expressly telling the jury that it should judge the authenticity, reliability and believability of MS's testimony based on their emotional reaction to her testimony," which minimized the burden of proof. Indeed, the prosecutor told the jurors, "Your emotions, as a human being in sitting here, watching her, watching [M.S.] testify, be cross examined, inform you on whether or not her testimony was authentic, whether or not it was reliable." The State urged, "You are allowed to let your reaction to her testimony inform you on its authenticity, on its believability, on its reliability. We are not expecting you to be robots when you are deliberating on a case like this."

However, the prosecutor explicitly explained, with emphasis, that the jury's emotions were not evidence, stating, "[Y]our emotional reaction is not evidence . . . . But you are allowed to use how you felt about it to inform you on her credibility. Do you want me to repeat that? Your emotional reaction is not evidence." Rather, the prosecutor told the jurors they could rely on their human reaction to assess the credibility of the witnesses. Unlike in Craven, 15 Wn. App. 2d at 389, where the prosecutor "urged the jury to rely on their emotions and instincts when weighing the facts alleged," the prosecutor in this case directed the jury to consider their emotions and instinct only when assessing credibility,

stating, "Your emotions, as a human being in sitting here, watching her, watching [M.S.] testify . . . inform you on . . . whether or not it seemed like she was making all of this up, do you believe her?" The State's inquiry thus related directly to the jury's exclusive role of determining witness credibility. See State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). Moreover, the State correctly described the jury's responsibility: "If you, as the jury, after fully, fairly, and carefully considering that evidence believe the State has proven these charges beyond a reasonable doubt, then he's guilty of these offenses."

The trial court also properly instructed the jury on its duties, as follows: "As jurors you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and the law given to you, not on sympathy, prejudice, or personal preference." The instructions further directed the jurors to "decide the facts in this case based upon the evidence presented," "apply the law. . . to the facts that you decide have been proved," and "disregard any remark, statement, or argument that is not supported by the evidence or the law in [the] instructions." Jurors are presumed to follow the court's instructions absent evidence to the contrary. State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). Had Chuprinov timely objected, the trial court could have issued an additional instruction clarifying that the jury should rely only on the evidence proven at trial to reach its verdict. Thus, any improper statement by the prosecutor could have been cured by an instruction from the court and does not amount to reversible error.

III. Improper Opinion Testimony

Chuprinov claims the testimony of two police officers improperly expressed opinions on M.S.'s credibility and Chuprinov's guilt. However, he failed to preserve the issue at trial and cannot demonstrate manifest constitutional error as required for review for the first time on appeal.

Under RAP 2.5(a), the appellate court may refuse to review an error not raised before the trial court. "Appellate courts will not approve a party's failure to object at trial that could identify error which the trial court might correct (through striking the testimony and/or curative jury instruction)." Kirkman, 159 Wn.2d at 935. As an exception, the party may raise a manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3). "The defendant must demonstrate that '(1) the error is manifest, and (2) the error is truly of constitutional dimension.' " State v. Dillon, 12 Wn. App. 2d 133, 139–40, 456 P.3d 1199, review denied, 195 Wn.2d 1022, 464 P.3d 198 (2020) (quoting State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009)). This requires the defendant to identify a constitutional error and show how the error actually affected their rights at trial. Kirkman, 159 Wn.2d at 926-27. The appellant must make a plausible showing that the asserted error had practical and identifiable consequences in the trial. State v. A.M., 194 Wn.2d 33, 38, 448 P.3d 35 (2019).

"The right to have factual questions decided by the jury is crucial to the right to trial by jury." State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008). "The general rule is that no witness, lay or expert, may 'testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.' "

City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993) (quoting State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)). When determining whether a statement is an impermissible opinion on guilt, courts consider the circumstances of the case including the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact. Heatley, 70 Wn. App. at 579. Expressions of personal belief as to the guilt of defendant, intent of the accused, or veracity of witnesses are improper opinion testimony. Montgomery, 163 Wn.2d at 591.

Despite this prohibition on opinion testimony on credibility, "[a]dmission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a 'manifest' constitutional error." Kirkman, 159 Wn.2d at 936. In such cases, manifest error requires "an explicit or almost explicit witness statement." Id. Opinion testimony relating only indirectly to a victim's credibility does not rise to the level of manifest constitutional error. Id. For example, a medical expert's statement that the victim gave "a clear and consistent history of sexual touching . . . with appropriate affect" was not an opinion that rose to the level of manifest constitutional error. Id. at 930. Similarly, a detective's testimony that he gave a competency test to the young victim, determined she could distinguish between the truth and a lie, and she promised to tell the truth was not a direct opinion on credibility allowing for review as a manifest constitutional error. Id.

Here, the allegedly improper opinions on credibility arose during the testimony of two different police officers who discussed their interview with M.S.

When questioning Officer Brien Reed, the State asked, "Anything else noteworthy or different in her demeanor during the interview than what you've previously told this jury?" Reed responded:

> No. I think the best way to describe it is just very open and honest and matter of fact. I don't recall any emotion, really, as of -- it wasn't like a difficult interview, where there's a person crying, sobbing. It was very matter of fact, just talking like normal people, but very -- very candid.

Later, the State posed a similar question about M.S.'s demeanor to Detective Elizabeth Paul, who conducted the follow-up interview: "Tell the jury what her demeanor was like during her interview with you?" Paul answered, "She was very frank and very forthcoming. There were some things that were hard to talk about, the specifics regarding body parts, but she was able to explain it all to me, yeah." After another question, the State clarified, "And you said you found her very frank?" to which Paul responded "Yes."

The State's questions were focused on M.S.'s demeanor during her interviews. The questions did not seek the officers' opinions on credibility. Demeanor testimony is admissible when based on factual observations that support the witness's conclusion. State v. Rafay, 168 Wn. App. 734, 808, 285 P.3d 83 (2012). However, in this case, the officers' use of "open," "honest," and "frank," inevitably invokes credibility. The State's questions focused on demeanor, but the officer's testimony implied their opinions that M.S. was credible. While improper, these implicit, rather than explicit comments on credibility, do not rise to the level of a manifest constitutional error.

Moreover, Chuprinov cannot demonstrate the actual prejudice necessary for a manifest error as the jury was properly instructed that that jurors "are the sole judges of credibility of each witness." Kirkman, 159 Wn.2d at 937; Montgomery, 163 Wn.2d at 595-96. Any error was not properly preserved and does not amount to manifest constitutional error allowing for review under RAP 2.5(a)(3).

IV. Ineffective Assistance of Counsel

Chuprinov alleges that his attorney's failure to object to the prosecutor's reliance on emotion, the improper opinion testimony of the police officers, and the prosecutor's comments on his silence amount to ineffective assistance of counsel. As we reverse the convictions on count I and II, we consider Chuprinov's claims of ineffective assistance only with respect to counts III and IV. As to those claims, we conclude that Chuprinov fails to demonstrate the requisite prejudice.

For a successful claim of ineffective assistance of counsel, a defendant must establish both objectively deficient performance and resulting prejudice. Emery, 174 Wn.2d at 754-55. When ineffective assistance is predicated on a failure to object, the defendant must show that representation "fell below prevailing professional norms, that the proposed objection would likely have been sustained, and that the result of the trial would have been different if the evidence had not been admitted." In re Pers. Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). "Courts engage in a strong presumption counsel's representation was effective." State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Prejudice requires that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 334-35. We need not consider both deficiency and prejudice if a petitioner fails to prove one. In re Pers. Restraint of Crace, 174 Wn.2d 835, 847, 280 P.3d 1102 (2012).

Here, regardless of any failure of defense counsel to object to statements made by the prosecutor and testifying officers, Chuprinov cannot establish prejudice. The trial court properly instructed the jury that it was the sole judge of credibility and should decide the case only on the facts and law as given. Any objection would have resulted in the trial court reiterating the written instructions. Moreover, as discussed above, the evidence presented in support of counts III and IV satisfied the State's high burden of establishing that constitutional error was harmless. Given Chuprinov's admissions of sex with M.S., he can show no reasonable probability that the results of the trial would have been different had defense counsel objected to any of the alleged improper statements. Without prejudice, his claim of ineffective assistance of counsel fails.

V. Cumulative Error

The cumulative error doctrine requires reversal when the combined effect of several errors denies the defendant a fair trial. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). "The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial." Id. The defendant "bears the burden of showing the accumulated prejudice from multiple trial errors

resulted in substantial prejudice that denied him a fair trial." In re Pers. Restraint of Lui, 188 Wn.2d 525, 565, 397 P.3d 90 (2017).

Chuprinov argues the prosecutorial misconduct, improper opinion on guilt, comment on the right to silence, and ineffective assistance of counsel "carry a synergistic prejudicial effect in a case where the credibility of the alleged victim was the central issue at trial." However, to the extent any of these were error, as discussed above, they were harmless error as to counts III and IV.[8] Chuprinov does not explain how the kinds of errors he complains of in this case created a "synergistic prejudicial effect." Even if M.S. was the primary witness, and so her credibility was important, Chuprinov's own admissions provide sufficient evidence to support convictions on counts III and IV. Chuprinov cannot demonstrate that accumulated prejudice denied him a fair trial as to these charges.

VI. Sufficiency of the Evidence: Incest in the First Degree

Chuprinov alleges the State presented insufficient evidence to sustain a conviction of incest in the first degree and the trial court erred by denying his motion for arrest of judgment under CrR 7.4(a)(3) because the State did not prove that he and M.S. were biological siblings. The State argues that testimony from various witnesses establishes the biological relationship necessary to prove the incest conviction. We agree with the State.

Due process requires that the State prove every element of a crime beyond a reasonable doubt. State v. Johnson, 188 Wn.2d 742, 750, 399 P.3d 507 (2017). To determine whether sufficient evidence supports a conviction, an

[8] Because we reverse the convictions for counts I and II, we consider cumulative error only for counts III and IV.

appellate court must "view the evidence in the light most favorable to the prosecution and determine whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt." State v. Homan, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). A claim of insufficient evidence admits the truth of the State's evidence and all reasonable inferences from that evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences must be interpreted in favor of the State and most strongly against the defendant. Id. "Nevertheless, the existence of a fact cannot rest upon guess, speculation, or conjecture." State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006).

"A person is guilty of incest in the first degree if he or she engages in sexual intercourse with a person whom he or she knows to be related to him or her, either legitimately or illegitimately, as an ancestor, descendant, brother, or sister of either the whole or the half blood." RCW 9A.64.020(1)(a). Here, the "to convict" instruction provided the legal requirements to the jury:

> (1) That on or about and between February 18, 2018 and July 7, 2020, the defendant engaged in sexual intercourse with MS;
> (2) That MS was related to the defendant either legitimately or illegitimately as a brother or sister of either the whole or the half blood;
> (3) That at the time the defendant knew the person with whom he was having sexual intercourse was so related to him; and
> (4) That this act occurred in the State of Washington.

Chuprinov focuses on the lack of evidence that he and M.S. were biologically related through "the whole or half blood." He argues that evidence of a biological relationship between M.S. and Chuprinov was necessary to convict on the incest charge because "one can be considered a daughter or son without being a biological daughter or son—one can be an adopted daughter or son," or "two

siblings can be the offspring of different men and women, in which case there is no biological relationship. . . even though the de facto father identifies the children as his own." Indeed, evidence presented at trial demonstrated that M.S. also said Chuprinov was her stepbrother, with M.S. acknowledging that she sometimes referred to her half-brothers as stepbrothers.

However, uncorroborated testimony of the complaining witness in an incest case is adequate to sustain a conviction. State v. Chenoweth, 188 Wn. App. 521, 536, 354 P.3d 13 (2015); State v. Coffey, 8 Wn.2d 504, 505-06, 112 P.2d 989 (1941); State v. Davis, 20 Wn.2d 443, 446-47, 147 P.2d 940 (1944).[9] M.S. stated that Chuprinov is one of her half-brothers: "They are my dad's kids, and their mom is my aunt." She confirmed that she and Chuprinov share a father. M.S. testified that she told the police that her half-brother had been sexually abusing her. Additionally, multiple witnesses testified that the two were half-siblings through their father. For example, one witness testified that M.S. and Chuprinov were her cousins because "[t]heir dad and my mom are siblings." Sergey Chuprinov testified that Chuprinov and M.S. are his children, Andrey is his son from his first marriage, and M.S. is his eldest child with his current wife. A detective stated that at a family team decision meeting attended by himself, M.S.'s parents Tat'yana and Sergey, and Child Protective Services, the relationships of all the parties were confirmed, including that Sergey was

[9] This court recently applied Chenoweth and Davis to conclude, "There is no support for the argument that the Washington courts specifically require DNA testing or a sworn statement" to prove the biological relationship necessary for an incest conviction. State v. Ott, No. 82624-7-I, slip op. at 6, https://www.courts.wa.gov/opinions/pdf/826247.pdf (unpublished). We may cite to and accord persuasive value to unpublished opinions. GR 14.1(a).

Chuprinov's father. Another officer, Detective Sergeant Don, also testified that Chuprinov said that his father "told him to stay away from his sister." This evidence establishes a reasonable inference that Chuprinov had the requisite knowledge of and understood his relationship with M.S.

Viewing this evidence and reasonable inferences in the light most favorable to the State, any rational juror could find beyond a reasonable doubt that M.S. and Chuprinov are biological half-siblings and that Chuprinov was aware of their relationship. As noted above, Chuprinov admitted to the police that he had sexual intercourse with M.S. when she was 15 years old. Chuprinov acknowledged this fact during closing arguments, therefore establishing sexual intercourse, the other element required for incest in the first degree.

While we affirm the conviction for incest in the first degree, we must reverse the jury's special verdict on count IV. At the State's request, the court provided a special verdict form, requiring the jury to determine whether "M.S. was under the age of 14 at the time of the offense" of incest in the first degree.[10] The jury answered yes to this question. Because Chuprinov admitted having sexual intercourse with M.S. only in the months immediately preceding his arrest, when she was 15 years old, Chuprinov's admissions support the incest conviction, but not the special verdict. The special verdict necessarily relied on the tainted evidence discussed above with respect to counts I and II.

[10] Age is not an element of incest in the first degree. RCW 9A.64.020(1)(a). The State requested a special verdict with "under the age of 14" because the definition of "most serious offense" in the SRA includes "incest when committed against a child under age 14." RCW 9.94A.030(32)(g). As the State explained to the court, "it's basically a sentencing enhancement."

Therefore, we reverse counts I and II and the special verdict on count IV. We affirm the convictions for count III and IV. Upon remand, the trial court should address the following additional issues in the judgment and sentence.

VI. Community Custody Condition Prohibiting Romantic Relationships

As a condition of community custody, the trial court imposed a prohibition on certain relationships: "Do not engage in any dating, romantic, or sexual relationships with individuals who have minor children unless first approved by the Community Corrections Officer and the Sexual Deviancy Treatment Provider." Chuprinov contends the "romantic" qualifier makes the condition unconstitutionally vague. The State concedes the portion of the condition that restricts "romantic" should be struck from the judgment and sentence. Our court has agreed that the term "romantic relationships" is vague and directed the trial court to substitute the term "dating relationships." State v. Peters, 10 Wn. App. 2d 574, 590-91, 455 P.3d 141 (2019). As Chuprinov's condition already includes a prohibition on "dating relationships," on remand, the court may simply strike the word "romantic" from the condition.

VII. Victim Penalty Assessment (VPA)

The court imposed the $500 VPA as part of Chuprinov's judgment and sentence. The State concedes that the $500 VPA should be stricken from the judgment and sentence. While this case was pending on appeal, the legislature enacted RCW 7.68.035(4) which prohibits the court form imposing the VPA "if the court finds that the defendant, at the time of sentencing, is indigent." Here, the

trial court found Chuprinov indigent. Therefore, we remand for the trial court to strike the VPA.

VIII. Sentence Exceeds Statutory Maximum

Chuprinov argues, and the State concedes, that imposing 36 months of community custody for rape of child in the third degree extends his sentence beyond the statutory maximum. Rape of a child in the third degree is a class C felony with a statutory maximum of 60 months of confinement. RCW 9A.44.079(2); RCW 9A.20.021(1)(c). The offense also requires a term of 36 months of community custody. RCW 9.94A.701(1)(a). For count III, rape of a child in the third degree, the trial court imposed 60 months of incarceration with the required 36 months of community custody. The sentence amounts to 96 months, which exceeds the statutory maximum for Chuprinov's rape of a child conviction. "[W]henever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime," the court must reduce the term of community custody. RCW 9.94A.701(10).

The parties disagree about the remedy. Chuprinov requests remand to reduce the term of community custody to zero months. The State asserts the correct term is "zero months, plus all accrued earned early release time at the time of release," citing State v. Bruch, 182 Wn.2d 854, 867, 346 P.3d 724 (2015).

State v. Winkle, 159 Wn. App. 323, 245 P.3d 249 (2011), discusses the interplay between a statutory maximum, community custody, and earned early release. There, we determined, "the legislative intent is to require a sex offender

to serve community custody in lieu of earned early release," as RCW 9.94A.729(5)(a)[11] mandated the transference of a convicted sex offender to community custody rather than allowing early release. Winkle, 159 Wn. App. at 330. Bruch further explains:

> [t]he statutory framework of RCW 9.94A.729 suggests that there are two prerequisites to the DOC's ability to "transfer[ ] to community custody in lieu of earned release time," RCW 9.94A.729(5)(a): (1) being convicted of a particular crime, i.e., certain serious violent crimes or certain sex offenses, RCW 9.94A.501(4)(a), and (2) being sentenced to a fixed term of community custody by a trial court. This issue arises, as it did in Winkle, when a trial court imposes the statutory maximum term of confinement, preventing it from imposing a fixed-term of community custody under RCW 9.94A.701(1).

182 Wn.2d at 865 n.4. In such cases, imposition of a term of community custody "for the period of earned early release not to exceed the statutory maximum sentence complies with the SRA and is consistent with the clear intent that a sex offender must be transferred to community custody in lieu of earned early release." Winkle, 159 Wn. App. at 331. Bruch approved of similar language consisting of community custody for a fixed term "plus all accrued earned early release time at the time of release." 182 Wn.2d at 857. On remand, the trial court must amend Chuprinov's sentence to include language consistent with Winkle and Bruch.

[11] RCW 9.94A.729(5)(a) provides "[a] person who is eligible for earned early release as provided in this section and who will be supervised by the department pursuant to RCW 9.94A.501. . . shall be transferred to community custody in lieu of earned release time." RCW 9.94A.501 applies to those with "a current conviction for a sex offense or a serious violent offense and was sentenced to a term of community custody pursuant to RCW 9.94A.701, 9.94A.702, or 9.94A.507." RCW 9.94A.501(4)(a).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

Cheung, J.

WE CONCUR:

Baumann, J.

Mann, J.