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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. BILLY CLYDE MILLER, Appellant.	No. 84870-4-I DIVISION ONE OPINION PUBLISHED IN PART

HAZELRIGG, A.C.J. — Billy Clyde Miller appeals from his conviction on four counts of rape of a child in the first degree after a joint jury trial with co-defendant Naomi Marie Elaster. Miller avers that his right to a fair trial was violated when the trial court did not excuse a juror who came forward with information about a witness the juror had obtained outside the courtroom and the judge erred on a number of evidentiary rulings. He further challenges certain community custody conditions imposed at sentencing. The State concedes that the victim penalty assessment and the DNA collection fee should be stricken from Miller's judgment and sentence based on his indigency. We remand to strike the legal financial obligations, but otherwise affirm.

FACTS

Billy Miller and Naomi Elaster were accused of sexual assault by Elaster's daughter, A.M.O., in June 2019. In August of that year, Miller and Elaster were charged as co-defendants based on those allegations. The State presented two

counts of rape of a child in the first degree (ROC1) against Miller, one of which carried a special allegation of domestic violence (DV), and two counts of ROC1 against Elaster, both with DV allegations. Nearly two years later, the State filed a first amended information that accused both Miller and Elaster of four counts of ROC1, removed the DV allegation against Miller and added it to each of the counts as to Elaster. In August 2022, shortly before trial, the State filed a second amended information that separately charged Miller with four counts of ROC1 and Elaster with one count of child molestation in the first degree and three counts of ROC1. All of Elaster's charges carried DV allegations.

Miller and Elaster were tried jointly and engaged in extensive pretrial litigation on the admissibility of certain evidence. The jury convicted them both as charged. Miller was sentenced to an indeterminate sentence of 276 months to life in prison, followed by community custody.

Miller timely appealed.

ANALYSIS

Miller's co-defendant, Elaster, also appealed her convictions, No. 84970-1-I, and the two appeals were administratively linked at this court. This opinion adopts the reasoning and outcome set out in the opinion from Elaster's case for certain shared assignments of error in the unpublished portion of this opinion.

I. Admission of Multiple Acts of Abuse

Miller assigns error to the admission of what he characterizes as uncharged acts of abuse he was alleged to have committed, along with his co-defendant

Elaster, that purportedly occurred within the charging period. He contends the acts amount to propensity evidence under ER 404(b).

We review the evidentiary decisions of the trial court for abuse of discretion. *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012). The State offered the challenged evidence under ER 401, 403, and 404(b). Miller asserts the trial court admitted it under ER 404(b) and solely challenges the admissibility ruling on that basis. ER 404(b) governs the admission of evidence of other acts and reads as follows:

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

Courts must engage in a four-step analysis when considering the admission of other act evidence; the judge must

> (1) find by a preponderance of the evidence that the misconduct occurred; (2) identify, as a matter of law, the purpose of the evidence; (3) conclude that the evidence is relevant to prove an element of the crime charged; and . . . (4) weigh the probative value against the prejudicial effect.

State v. Williams, 156 Wn. App. 482, 490, 234 P.3d 1174 (2010). The trial court's analysis must be conducted on the record. *State v. Sublett*, 156 Wn. App. 160, 195, 231 P.3d 231 (2010), *aff'd*, 176 Wn.2d 58, 292 P.3d 715 (2012).

Miller challenges the admission of three categories of evidence. He points to testimonial evidence that

> Elaster "molested and raped" A.M.O. several times before involving Mr. Miller; Ms. Elaster invited strangers into the home who would molest A.M.O.; and Ms. Elaster and Mr. Miller would abuse A.M.O.

> together, involving her in sexual acts, making her watch them engage in sexual acts, and raping and molesting her together.

He then asserts that admission of each of these three classes of evidence "was error because the majority of this evidence was not related to the crimes charged." Thus, according to Miller, the evidence must satisfy ER 404(b) analysis.

Two of the three categories of testimonial evidence to which Miller assigns error "because the majority of this evidence was not related to the crimes charged" were not admitted for use against him, but rather as evidence of the charged crimes against his co-defendant, Elaster. Evidence that Elaster molested and raped A.M.O. several times before involving Miller and had invited others to participate in the abuse of A.M.O. was evidence that the State used to prove the charges against Elaster. He points to nothing in the record that suggests the trial court admitted it for use against him, under ER 404(b) or any other basis. A.M.O. expressly testified that her mother abused her before Miller became involved and allowed other men to abuse her on various occasions. While those accusations may not have been admissible for use against *him*, they were certainly relevant to the allegations against his co-defendant, Elaster. Admission of this particular evidence was the consequence of a joint trial with his co-defendant and Miller does not assign error to that aspect of trial.

Even so, the court took care to instruct the jurors that they had to "separately decide each count charged against each defendant" and each charged act needed to be grounded in a separate incident. It also instructed the jury that its verdict "on one count as to one defendant should not control [its] verdict on any other count *or as to the other defendant*." (Emphasis added.) In closing argument, the State

recounted the first time Elaster brought another man into her bedroom in order to participate in the abuse of A.M.O., presenting it to the jury as one of the three incidents that would support the charge of child molestation against Elaster. The State was careful to ask the jury to link specific acts to which A.M.O. had testified to the specific charges of each defendant. There is simply nothing in the record to suggest that the State improperly attempted to use the evidence of Elaster's crimes to secure a conviction against Miller.

The final category of evidence Miller challenges on this basis includes evidence Elaster and Miller "would abuse A.M.O. together, involving her in sexual acts, making her watch them engage in sexual acts, and raping and molesting her together." A.M.O.'s testimony regarding the acts by Elaster and Miller is the heart of the State's case against Miller and her description of the abuse was highly relevant.

But testimony about these acts was not admitted as evidence of "other crimes, wrongs, or acts." Instead, they were acts within the charging period that could support any of the four charged counts of rape of a child in the first degree.[1] Accordingly, the trial court did not err in failing to conduct ER 404(b) analysis on the record. Notably, Miller fails to explain how the trial court *could* have conducted the four-step ER 404(b) analysis, given the factual context here, as the first step is for the proponent to prove by a preponderance of the evidence that the act occurred. *See Williams*, 156 Wn. App. at 490. The entire purpose of the trial was for the State to prove, by more than a mere preponderance, that Miller committed

[1] Consistent with *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984), the trial court instructed the jury that they must "unanimously agree as to which act has been proved."

four distinct acts of ROC1 within the charging period. More critically, the State only used the evidence of various acts of abuse by Miller to satisfy its burden to prove the elements of the charged crimes beyond a reasonable doubt and not for any other improper purpose.

At oral argument, Miller averred that ER 404(b) must apply here to prevent the State from using broad charging periods to circumvent the rule. According to Miller, the State could strategically include other acts within a charging period to avoid application of an ER 404(b) analysis. But in briefing, Miller describes A.M.O.'s allegations as claims that he "raped her with his mouth, hands, tongue, and penis on many occasions." His own characterization of the evidence he deems "uncharged acts" acknowledges that it consisted of conduct that could satisfy the elements of the charged crimes, both because of the nature of the acts and fact that they occurred within the charging period.[2]

Critically, Miller's "policy" argument ignores the potential consequences of his proffered interpretation of the rule. If the State were to individually charge each incident in a pattern of sexual assaults, rather than selecting only those incidents for which it has the best evidence and is most likely to secure a conviction, the accused would face new obstacles at various stage of the proceedings. For example, a pretrial release determination based on an information containing seventeen counts of child molestation as opposed to three, even where evidence

[2] We acknowledge that our analysis would necessarily be different if A.M.O.'s testimony included other acts of sexual abuse that could *not* constitute the charged crimes. For example, if the court had permitted her to testify about conduct by Miller that could only amount to child molestation, but not rape of a child. Because we are tasked with deciding the assignment of error as framed in briefing based on the record from the trial court, we decline to provide an advisory holding about other possible scenarios not presently before us.

of the larger number was weaker, could reasonably result in outright denial of release on personal recognizance, a higher bail amount, or more restrictive and costly pretrial release conditions. Similarly, exposure at sentencing would increase significantly as offender scores could be dramatically impacted by such a charging practice should the State prevail on more counts. Further, the risk at trial could shift as juries may struggle to uphold the presumption of innocence when tasked with deciding a case with more counts.

The trial court did not err in its ruling to admit evidence of acts committed during the charging period that a jury could conclude satisfied the elements of the charged crimes.

The panel has determined that the remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with the rules governing unpublished opinions. *See* RCW 2.06.040.

II. Claim of Juror Bias

For this assignment of error, we expressly adopt and incorporate herein the reasoning and conclusion set out in Part I of the linked case, *State v. Elaster*, No. 84970-1-I.

III. Right To Present a Defense

Miller's co-defendant, Elaster, presented a nearly identical assignment of error; the only distinction was slightly different framing of the importance of the excluded evidence. The defense sought to introduce evidence that A.M.O. had made allegations against other people in addition to Miller and Elaster and that

other children with whom A.M.O. resided also made allegations of abuse against others. Miller specifically avers that it was essential to the shared defense theory that Sharon Spears, who resided with and cared for A.M.O. for several years before and after the abuse occurred, "was unusually preoccupied with potential sexual abuse" and the truth or falsity of allegations made by A.M.O. "was not particularly important" to Spears.

With this particular presentation of the issue in mind, for this assignment of error, we expressly adopt and incorporate herein the reasoning and conclusion set out in Part II of the linked case, *State v. Elaster*, No. 84970-1-I.

IV. Community Custody Conditions

Miller, like his co-defendant, challenges two community custody conditions imposed by the trial court and set out in appendix H to his judgment and sentence (J&S) as one of several "special conditions" for sex offenses: condition 5, which restricts dating relationships and requires him to disclose his status as a sex offender to potential intimate partners, and condition 8, which requires he consent to random searches by the Department of Corrections (DOC). Miller also separately challenges condition 10, which requires him to submit to urinalysis and breath analysis upon the request of the DOC community corrections officer (CCO) and/or chemical dependency provider, as improper because it is not crime related. The State responds that condition 5 is crime-related and not unconstitutional, condition 8 is not yet ripe for review, and condition 10 was within the court discretion and did not need to be crime related.

A. Condition 5

Miller presents the same challenges to condition 5 as his co-defendant, that it is not crime-related and violates his right to free speech, but also separately contends that this condition is an unconstitutional restriction on his right to marry and to engage in intimate relations. The right to marry and the right to engage in intimate relations are fundamental constitutional rights and state interference is subject to strict scrutiny. *State v. Warren*, 165 Wn.2d 17, 34, 195 P.3d 940 (2008); *Loving v. Virginia,* 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967). When a community custody condition burdens a fundamental right, we consider whether the condition is "reasonably necessary to accomplish the essential needs of the State and public order . . . conditions that interfere with fundamental rights must be sensitively imposed." *Warren*, 165 Wn.2d at 32 (citation omitted). The State has a compelling interest in the protection of minors. *State v. Geyer*, 19 Wn. App. 2d 321, 328, 496 P.3d 322 (2021).

In making this determination, courts have used a crime-relatedness analysis combined with an assessment of the state's interest to determine the validity of similar custody conditions. *See, e.g., State v. Kinzle*, 181 Wn. App. 774, 785, 326 P.3d 870 (2014); *State v. Peters*, 10 Wn. App. 2d 574, 591, 455 P.3d 141 (2021). In *Kinzle*, the court upheld the imposition of a similar community custody condition, reasoning that "[b]ecause Kinzle's crime involved children with whom he came into contact through a social relationship with their parents, condition 10 is reasonably crime-related and necessary to protect the public." *Id.* at 785. By considering the relatedness of the crime to the condition, together with the State's

interest in protecting children, we conclude that this condition is necessary because Miller's potential future partners may have children of their own, be in a position of authority over children, or unknowingly enable Miller's access to children in the absence of a condition that compels Miller to divulge information regarding his offense.

As to the first part of Miller's challenge to this community custody condition, we expressly adopt and incorporate the reasoning and conclusion expressed in Part IV, Section A of the linked case, *State v. Elaster*, No. 84970-1-I. We further follow the established precedent analyzed herein and reject Miller's additional challenge to condition 5.

B. Condition 8

For this assignment of error, we expressly adopt and incorporate herein the reasoning and conclusion set out in Part IV, Section B of the linked case, *State v. Elaster*, No. 84970-1-I.

C. Condition 10

Miller challenges the trial court's imposition of community custody condition 10 and expressly cites RCW 9.94A.703 and .704. Condition 10 reads, "Defendant shall . . . [b]e available for and submit to urinalysis and/or breathanalysis upon request of the CCO and/or chemical dependency treatment provider." In briefing, Miller avers that this condition is not crime-related as required by the governing statute and the court erred when it imposed it, therefore, it must be stricken.

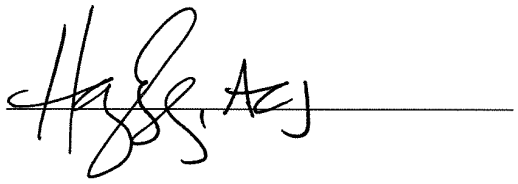
Under RCW 9.94A.703(3)(f), "the court may order an offender to . . . [c]omply with any crime-related prohibitions." A crime-related prohibition is a court ordered prohibition "that directly relates to the crime for which the offender has been convicted." RCW 9.94A.030(10). However, RCW 9.94A.703(2)(c) expressly dictates that "[u]nless waived by the court, as part of any term of community custody, the court *shall* order an offender to . . . [r]efrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions." The plain language of the statute indicates that the condition will be imposed unless the trial court specifically declines to do so, without requiring a nexus to the crime of conviction. RCW 9.94A.703(2)(c). Because this condition of community custody is expressly authorized by statute, its imposition was not an abuse of discretion. DOC must be empowered to monitor this condition once imposed; requiring compliance with requests for urinalysis or breath testing is the most logical means of doing so. Further, subsection (4) of RCW 9.94A.704, one of the statute sections cited on appendix H of Miller's J&S, expressly states that once a person is placed under DOC supervision, it "may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws." The trial court did not abuse its discretion when it imposed conditions authorized by statute.

V. Legal Financial Obligations

Pursuant to amendments to RCW 7.68.035 that became effective in 2023, the court will not impose the victim penalty assessment or DNA collection fee, which were previously mandatory, where it has found that the defendant is

indigent. The State properly concedes that in light of the court's indigency finding at sentencing, this court should remand for the trial court to strike these legal financial obligations from Miller's J&S.

Affirmed in part, reversed in part, and remanded for the trial court to strike the legal financial obligations.



WE CONCUR: