No. 100210-6
COA No. 533901-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BYRON SPEAR

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Erik D. Price, Judge
Cause No. 18-1-01421-34

ANSWER TO PETITION FOR REVIEW

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2. Whether review of the Court of Appeals' decision finding that the trial court did not abuse its discretion by answering a jury question by referring the jury back to the jury instructions is appropriate under RAP 13.4 where trial court's instructions clearly informed the jury that they needed to be unanimous.

3. Whether this Court should accept review of the Court of Appeals' decision finding that Spear and his counsel affirmatively acknowledged the inclusion of his out-of-state convictions where both Spear and counsel signed a statement of criminal history with a score sheet attached which included his out-of-state convictions in the offender score.

4. Whether review of the Court of Appeals' decision finding that the condition of community custody authorizing reasonable searches to monitor compliance with community custody was authorized by statute and required further factual development for review is appropriate under RAP 13.4.

B. STATEMENT OF THE CASE.

The Petitioner, Byron Spear was charged with three counts of rape of a child in the first degree and two counts of child molestation in the first degree, with each count separate and distinct from all others. CP 3-4. The matter proceeded to a jury trial. RP 1.[1] During his opening remarks to the venire, prior to jury selection, the trial court informed the panel that the information alleged that each count was a separate and distinct act from all other counts. RP 31-32.

During trial, victim A.R.S. testified that Spear is her uncle and previously lived in the same house as her in

[1] The report of proceedings of the jury trial appears in four volumes, sequentially paginated, which will collectively be referred to herein as RP.

Washington. RP 274-275. While Spear resided with A.R.S., he provided childcare for A.R.S.'s mother. RP 308. During that time, A.R.S. indicated that Spear "did something he wasn't supposed to." RP 277. This began when she was eight years old. RP 277. A.R.S. indicated Spear told her to take her underwear off and he touched her vagina. RP 278. She stated he started licking her "on [her] vagina" with his tongue. RP 279. A.R.S. testified that Spear licked her vagina, "at least" five times but not more than ten times. RP 280.

A.R.S. also indicated that Spear told her to rub his penis and described "sperm" coming out of it. RP 281-282. A.R.S. indicated that happened one time when she was about to turn nine. RP 282. She said he put the sperm on his shirt. RP 282. A.R.S. described Spear touching her vagina with his finger, stating that it made a noise like "when you poke slime." RP 283. She testified that his finger stayed on top of her vagina. RP 284. She stated he also used a vibrating tool on her vagina during the same incident. RP 284. She specifically noted that

was a different time than the first time he licked her vagina. RP 284.

When asked if her vagina ever hurt, A.R.S. testified that it would when he would put his finger on top too hard. RP 285. She said that, in addition to his finger, Spear put his penis on top of her vagina. RP 285. She said that he would rub his penis up and down against her vagina, but it did not go in the hole. RP 286. A.R.S. said that it hurt when he did this. RP 286.

When her mother asked her whether she had been sexually abused by Spear, A.R.S. initially stated no, but then disclosed the events as they were packing to move from Lacey, Washington. RP 314-315. A.R.S.'s mother testified that she was stationed at Joint Base Lewis-McCord and moved to Lacey in September of 2016, when A.R.S. was eight years old. RP 306-307. The family had a hard time finding daycare because it was so expensive in the area. RP 307-308. Spear agreed to move in to provide childcare and lived in their residence from October 2016 until May or June of 2017. RP 308-309, 311-312.

G.F., who was a victim of Spear in a separate case that occurred in the State of Idaho, testified regarding communications that she had with Spear regarding sex. RP 387, EX 1, EX 2.[2] G.F. indicated that Spear talked about his niece during that conversation. RP 387. When asked if Spear told her that the things the nine-year old niece was doing were sexual, G.F. said, "yes." RP 388. Though reluctantly, G.F. testified regarding a statement that Spear performed oral sex on his niece. RP 389, 392.

Spear testified on his behalf. RP 459. Spear acknowledged that he resided with A.R.S. and his sister from October 2016 until May of 2017. RP 461, 472. He indicated that the allegations made by A.R.S. made his stomach sick and shocked him. RP 468. He denied that he had every directed her to take off her underwear or touched her inappropriately. RP

[2] Two exhibits were entered during the sentencing hearing held on April 10, 2019 and are referred to herein as EX 1 and EX 2. The report of proceedings from the sentencing hearing is herein referred to as 2 RP. The exhibits were admitted at 2 RP 7.

469. He indicated he has never had a "vibrating device" and stated that he had been unable to produce sperm for five or six years but had never seen a doctor about it. RP 469-470. He stated he knew G.F. but did not remember having the conversation that she had testified about. RP 470.

The defense did not take any exceptions or make any objections to the final jury instructions of the trial court. RP 493. The jury was instructed, "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." RP 501-502, CP 79. For each count of rape of a child in the first degree, the trial court gave separate "to convict" instructions, alleging the same charging period. RP 505-509, CP 87-89. The trial court further gave an unanimity instruction with regard to the charges of rape of a child in the first degree, which stated

> The State alleges that the defendant committed acts of rape of a child in the first degree on multiple occasions. To convict the defendant on

> any count of rape of a child in the first degree, one particular act of rape of a child in the first degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which has been proved. You need not unanimously agree that the defendant committed all the acts of rape of a child in the first degree.

RP 503-504, CP 78.

The trial court also instructed the jury with two separate instructions for the two counts of child molestation in the first degree, each alleged to have occurred during the same charged time period. RP 508-510. CP 93-94. The trial court also gave a similar unanimity instruction in regard to the charges of child molestation. RP 508, CP 91. The concluding instruction from the trial court informed the jury that "each of you must agree for you to return a verdict." RP 511-512, CP 95.

During the State's closing argument, the prosecutor discussed the multiple acts the State was relying upon to support the charges. 523-524. The prosecutor stated, "She explained a variety of things that the defendant had done to her, not just one, not just one time." RP 517-518. When discussing

"sexual intercourse," the prosecutor stated "oral sex counts as sexual intercourse. [A.R.S.] said it happened between five and ten times that she remembers." RP 527.

The prosecutor discussed the "to convict" instructions for rape of a child in the first degree, stating:

> Each of the to convict instructions for the first three counts where exactly the same. You have to find a separate instances or separate incidents for each one. You have to be unanimous in that each one has a separate time, but they all look the same.

RP 528. The prosecutor described ways in which the jury could find three "different" acts occurred arguing:

> You can use that the defendant licked [A.R.S.] on three different occasions, licked her vagina. You can use that he licked her vagina and put his finger on her vagina. You can use that he licked her vagina, put his finger in her vagina, and that his penis penetrated her vagina, however, slight, even though it was going up and down, but you have to be unanimous as to which three happened. All 12 people have to agrees (sic) on each count, and each count has to be a separate act.

RP 529.

The prosecutor focused the jury on the acts of the defendant about A.R.S.'s vagina and touching her vagina with the vibrator while discussing the counts of child molestation in the first degree. RP 529-530. Defense counsel argued that Spear was not guilty of any of the charged offenses during his closing argument. RP 543.

During deliberations, the jury submitted three questions. The first question asked, "We are requesting 12 copies of the report of Heather McCleod." RP 554. With the agreement of the parties, the trial court responded, "The jury has all of the exhibits admitted at trial. No exhibits were admitted." RP 556-557.

Next, the jury asked, "Upon reading Instruction 7, do we have to be unanimous on all counts? If we do not have a unanimous vote, how is it reported on the verdict forms?" RP 558, CP 74. After the trial court expressed concern that CrR 6.15(f)(2) prohibits the trial court from instructing in a way that

suggests the need for agreement, the trial court directed the jury to reread the instructions. RP 559-562.

Finally, the jury asked, "Do all three counts need to be a different act or can they be multiple occurrences of the same type of act?" RP 570, CP 101. Both the State and defense agreed with the trial court's inclination to direct the jury, "Please reread your instructions." RP 570-571. The jury ultimately found Spear guilty on all five charged counts. RP 574-75; CP 96-100.

Spear was sentenced on April 10, 2019. 2 RP 1. The prosecutor submitted a Prosecutor's Statement of Criminal History listing two Idaho convictions, "Lewd Contact with a Minor Under 16 (comparable to Child Molestation in the Third Degree—RCW 9A.44.089);" and "Enticing a Child through Internet, Video, Image, or other Communication Device (comparable to Communicating with a Minor for Immoral Purposes through electronic means—RCW 9.68A.090(2)." CP 102. Both Spear and his counsel signed the document which

stated, "The defendant and the defendant's attorney hereby stipulate that the above is a correct statement of the defendant's criminal history relevant to the determination of the defendant's offender score in the above-entitled case." CP 102. Attached to the statement were score sheets indicating that the offender score for each count was 9+[3], counting each Idaho offense and the four other current offenses. CP 102-107.

During the hearing, the prosecutor handed up Exhibits 1 and 2, stating, "In an abundance of caution, I actually ordered the certified documents with regard to the Defendant's convictions from Idaho. I'm asking the court to admit Exhibits 1 and 2, which are certified copies." 2 RP 7. The exhibits were admitted without objection. 2 RP 7. During the defense recommendation, defense counsel indicated that the defense had no objections to the proposed community custody conditions and stated, "We also have no dispute about the standard ranges. There, frankly, is no dispute. They are what they are." 2 RP 12.

[3] The math indicates an offender score of 18 on each offense.

The trial court imposed a term of confinement of 318 months to life on counts 1, 2, and 3, and a term of confinement of 198 months to life on counts 4 and 5. 2 RP 19; CP 108-123. Division II of the Court of Appeals affirmed the convictions in an unpublished decision. State v. Byron Martin Spear, No. 53390-1-II.[4] The Court of Appeals found that the jury instructions failed to inform the jury that each count must be based on a separate and distinct act, however the entire record made "it manifestly apparent to the jury that each count had to be based on a separate act," therefore Spear's right to be free from double jeopardy was not violated. Id. at 15. The Court of Appeals further held the "clear instructions informing the jury they had to be unanimous in order to reach a verdict and the fact that the jury reached a unanimous verdict shows that the jury understood the unanimity requirement." Id. at 16. Spear now seeks review of the decision of the Court of Appeals.

[4] The unpublished decision is attached to the petition for review and is herein referred to as Unpublished Decision.

C. ARGUMENT.

A petition for review will be accepted by this Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

1. The decision of the Court of Appeals follows this Court's decision in *State v. Mutch* and correctly found that the entirety of the proceedings made it manifestly apparent that the State was not attempting to convict Spear on multiple counts based on a single act.

Where the State charges a defendant with multiple counts of the same offense or multiple offenses potentially based on the same act, the State must prove to the jury that a different act forms the basis of each count. State v. Mutch, 171 Wn.2d 646, 661-64, 254 P.3d 803 (2011). In Mutch, the defendant argued

that vague jury instructions allowed the possibility that the jury erroneously convicted him of all five counts based on only a single criminal act. Id. at 662. The "to convict" instructions in Mutch's case for each rape count were nearly identical and there was not an instruction requiring that there be a separate and distinct act. Id. at 663.

This Court noted that:

> . . . flawed jury instructions that permit a jury to convict a defendant of multiple counts based on a single act do not necessarily mean that the defendant received multiple punishments for the same offense; it simply means that the defendant potentially received multiple punishments for the same offense.

Id.

When reviewing a double jeopardy allegation, "an appellate court may review the entire record to establish what was before the Court." State v. Noltie, 116 Wn.2d 831, 848, 809 P.2d 190 (1991).

> Considering the evidence, arguments, and instructions, if it is not clear that it was manifestly apparent to the jury that the State was not seeking

> to impose multiple punishments for the same offense, and that each count was based on a separate act, there is a double jeopardy violation.

Mutch, 171 Wn.2d at 646. After considering the entire record, the Mutch Court found that it was "manifestly apparent to the jury that each count represented a separate act." Id. at 665-666. The Court stated there is no double jeopardy violation when the information, instruction, testimony, and argument clearly demonstrate that the State was not seeking to impose multiple punishments for the same offense. Id. at 664.

The decision of the Court of Appeals correctly followed Mutch and reviewed the totality of the record. The record in this case makes it manifestly apparent that the jury convicted Spears on factually separate and distinct acts. While the closing instructions to the jury did not included an instruction on separate and distinct acts, several other factors informed the jury that the actions must be based on separate acts. First, the information charged each offense, separate and distinct from all other counts. CP 3-4. During his opening remarks to the venire,

prior to jury selection, the trial court informed the panel that the information alleged that each count was a separate and distinct act from all other counts. RP 31-32.

The trial court gave individual "to convict" instructions, each of which contained the element "that *this* act occurred in the State of Washington." RP 505-509, CP 87-89, RP 508-510, CP 93-94 (emphasis added). This fact is one of several ways that this case is distinguishable from State v. Borsheim, 140 Wn. App. 357, 165 P.3d 417 (2017), which Spear relies upon. In that case, the trial court provided a single to convict instruction that read, "To convict the defendant of the crime of Rape of a Child in the First Degree, as charged in counts 1, 2, 3, and 4 …" Id. at 364.[5]

The trial court also gave separate unanimity instructions for rape of a child and child molestation, and a "separate consideration" instruction. RP 503-504, CP 78, RP 508, CP 91,

[5] Borsheim was decided prior to Mutch and the Court considered only the jury instructions instead of the entire record. 140 Wn. App. at 370.

RP 501-502, CP 79. Importantly, the prosecutor in this case made it abundantly clear that each count was based on a separate and distinct act during her closing argument. She stated:

> Each of the to convict instructions for the first three counts where exactly the same. You have to find a separate instances or separate incidents for each one. You have to be unanimous in that each one has a separate time, but they all look the same.

RP 528. The prosecutor described ways in which the jury could find three "different" acts occurred arguing:

> You can use that the defendant licked [A.R.S.] on three different occasions, licked her vagina. You can use that he licked her vagina and put his finger on her vagina. You can use that he licked her vagina, put his finger in her vagina, and that his penis penetrated her vagina, however, slight, even though it was going up and down, but you have to be unanimous as to which three happened. All 12 people have to agrees (sic) on each count, and each count has to be a separate act.

RP 529. It was manifestly apparent from the State's closing argument that the prosecutor was not seeking to convict on more than one count based on a single act.

The jury's question, "Do all three counts need to be a different act or can they be multiple occurrences of the same type of act," does not indicate that the jury was confused about the need for separate and distinct acts for each count. CP 101. The question gave two options, multiple occurrences of the same type of act, or different acts. The question does not imply that the jury was asking if they convict for multiple offenses based on a single act. It demonstrated that they were considering the multiple different types of acts that Spear committed against A.R.S. and the five to ten incidents of oral sex that he committed. The Court of Appeals correctly found that the jury's question was regarding the "type of act." Unpublished Decision, at 14. When viewed in the context of the entire record, it is clear that the jury did not convict Spear of multiple offenses based on a single act. There was no double jeopardy violation. The Court of Appeals did not err in so finding.

2. The Court of Appeals correctly found that the trial court's instructions clearly informed the jury that they needed to be unanimous and the trial court did not abuse its discretion by asking the jury to reread the jury instructions in response to the jury's question.

The trial court properly instructed the jury of the need to reach a unanimous verdict on each count. RP 503-504, CP 78, RP 508, CP 91. It was proper for the instructions to include that the "jury need not unanimously agree that the defendant committed all of the acts of rape of a child or child molestation because A.R.S. testified to between five to ten acts of oral sex. RP 503-504, CP 78, RP 508, CP 91, RP 280. Additionally, Instruction 19 indicated, "Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision." CP 97.

The instructions made the requirement of unanimity clear. The jury asked, "Upon reading Instruction 7, do we have to be unanimous on all counts? If we do not have a unanimous vote, how is it reported on the verdict forms?" RP 558, CP 74.

The question does not indicate that the jury was confused as to whether or not they needed to be unanimous to reach a verdict. The clear implication in the question is that the jury had reached a unanimous decision on some of the charges, but not all at that point. The second part of the question, "if we do not have a unanimous vote, how is it reported on the verdict forms?" indicates that they were aware that they needed to be unanimous in order to write either guilty or not guilty. Their question asked what they were supposed to do if they were not unanimous.

The trial court was justifiably concerned about how to draft a response. CrR 6.15(f)(2) directs that the "court shall not instruct the jury in such a way to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate." The trial court crafted his answer to the jury's question with that in mind. RP 559-562. Spear's attorney suggested that the answer inform the jury that any verdict must be unanimous. RP 559-560.

Instructions 7, 15 and 19, already made that clear. RP 503-504, CP 78, RP 508, CP 91, CP 97.

Unlike the cases cited to by Spear where the trial court should have provided a clearer answer, the trial court here could not provide a clear answer to the jury's question without the potential for violating CrR 6.15(f)(2). The response directing the jury to reread the instructions was correct. The instructions regarding a unanimous verdict were clear and the trial court could not provide further clarity. Even if the trial court had given the answer proposed by defense counsel, it would have merely mimicked the existing instructions. The instructions regarding unanimity were clear.

The Court of Appeals correctly found that the trial court did not abuse its discretion by instructing the jury to reread the jury instructions. Unpublished Opinion, at 16. There is no reason upon which this Court should accept review of this issue.

3. The Court of Appeals correctly rejected Spear's challenge to his offender score.

RCW 9.94A.525 sets forth the process for calculating an offender score. Generally speaking, each prior felony conviction that has not washed out counts as one point. RCW 9.94A.525(1) and (2). Out-of-state convictions are to be classified according to the comparable Washington offense. RCW 9.94A.525(3). If a defendant affirmatively acknowledges his criminal history, the State is not required to produce the evidence to support it. State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009).

> Although the State generally bears the burden of proving the existence and comparability of a defendant's prior out-of-state and/or federal convictions, we have stated a defendant's *affirmative acknowledgment* that his prior out-of-state and/or federal convictions are properly included in his offender score satisfies SRA requirements.

State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004), citing to State v. Catling, 137 Wn.2d 472, 483 n.5, 973 P.2d 452 (1999). Mere failure to object to the State's summary of

criminal history does not constitute an acknowledgment, even if the defendant agrees with the State's standard range calculation. Mendoza, 165 Wn.2d. at 928.

Spear and his counsel affirmatively acknowledged that the Idaho offenses were properly included in his offender score. CP 102, 2 RP 12. As such, neither the State nor the trial court were required to do more to satisfy the SRA. State v. Ross, 152 Wn.2d at 230. Even if Spear had not made such an affirmative acknowledgment, the State presented sufficient evidence to demonstrate that his Idaho convictions were factually comparable to Washington statutes and were properly included in his offender score. There was no error in calculating Spear's offender score.

The Court of Appeals correctly found that the signed statement of criminal history, with a score sheet attached which included his Idaho convictions in the offender score was an affirmative acknowledgment of the inclusion of his out-of-state convictions. The decision is consistent with this Court's

opinion in Ross. Spear has not demonstrated that review of this issue is appropriate.

4. The Court of Appeals correctly found that the condition of community custody requiring Spear submit to testing and reasonable searches to comply with conditions is consistent with RCW 9.94A.631 and any challenge is premature until Spear is subject to testing.

The condition that Spear seeks review of specifically states, "to verify compliance, submit to testing and reasonable searches of your person, residence and vehicle." CP 123.

A sentencing court can require an offender to perform "affirmative acts necessary to monitor compliance" with the community custody conditions. RCW 9.94A.030(10); In re Pers. Restraint of Brettel, 6 Wn. App.2d 161, 173, 430 P.3d 677 (2018). The search and testing provision is limited to reasonable searches. The trial court was well within the law in authorizing the monitoring conditions. Even without the trial court adopting the condition, the legislature has provided that,

> if there is reasonable cause to believe that an offender has violated a condition or requirement of

> the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property.

RCW 9.94A.631(1). The Court of Appeals correctly found that the decision was authorized by law.

Because the condition is authorized by statute, the Court of Appeals correctly noted that review of the condition would only be appropriate with further factual development. The Court of Appeals decision is consistent with other decisions of the Court of Appeals and this Court. State v. Massey, 81 Wn. App. 198, 200-201, 913 P.2d 424 (1996), State v. Sanchez Valencia, 169 Wn.2d 782, 789, 239 P.3d 1059 (2010). In State v. Cates, 183 Wn.2d 531, 354 P.3d 832 (2015), this Court considered a similar argument stating,

> it is undisputed that the community custody condition is a final action and Cates' challenge raises primarily legal issues. We thus consider only whether further factual development is required and the risk of hardship to Cates if we decline to address the merits of his challenge at this time.

Id. at 534-535. Noting that compliance with the condition did not require Cates to do anything until the State requests and conducts a home visit, this Court found that Cates would not "suffer significant risk of hardship" if the court declined review of the merits in the absence of developed facts. Id. at 536.

The Court of Appeals decision is consistent with case law. The decision did not err by finding, "Because the condition is permitted by statute and Spear has not been subjected to a search, Spear's claim fails." Unpublished Decision, at 22.

D. CONCLUSION.

Spear has not demonstrated that review by this Court is appropriate under RAP 13.4. As such, the State respectfully requests that this Court deny Spear's Petition for Review.

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In compliance with RAP 18.17(b), counsel certifies that the word processing software calculates the number of words in this document as 4552, exclusive of words exempted by the rule.

Respectfully submitted this 11th day of October 2021.

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DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: October 11, 2021

Signature: 

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

October 11, 2021 - 2:18 PM

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