NO. 46855-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DWAYNE MARCUM,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Superior Court No. 12-1-00249-4

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the Court should review the trial court's denial of the motion to withdraw the guilty plea when Mr. Marcum did not assign error to the ruling and did not provide any argument or citation to authority regarding how the court abused its discretion?
2. Whether the Court should review whether there was a factual basis for the guilty plea when Mr. Marcum did not preserve the issue for appeal or establish an exception under RAP 2.5 (a)?
3. Whether there was a factual basis for Mr. Marcum's guilty plea when the certification of probable cause filed in support of the supplemental motion for probable cause for the filing of the original information provides detailed facts supporting the charges in the original information.
4. Whether the Court had authority to impose the condition that Mr. Marcum obtain a substance abuse evaluation and fully comply with treatment when the record shows evidence that drug use contributed to the offense?
5. Whether the court erred by imposing the community custody condition prohibiting possession or consumption of any drug unless prescribed by a physician?
6. Whether the court erred when imposing discretionary legal financial

obligations without an individualized finding of current or future ability to pay?

7. Whether the guilty plea to Counts 1 and 2 violates double jeopardy?
8. Whether "Additional Ground 2" is reviewable when Mr. Marcum's complaint is not supported by the record, argument, or authority.

II. STATEMENT OF THE CASE

The State filed a motion for determination of probable cause on July 24, 2012, but no information. CP 93. On July 27, 2012, the State filed a supplemental motion for determination of probable cause and the original information. CP 100, 104. The trial court signed the order finding probable cause on July 27, 2012. CP 103. The information filed July 27, 2012, included charges of Count 1, Rape of a Child in the First Degree (as a incident that occurred at a time separate and distinct from that in Count 2); Count 2, Child Molestation in the First Degree; Count 3, Sexual Exploitation of a Minor; and Count 4, Possessing Depiction of Minor Engaged in Sexually Explicit Conduct in the First Degree. CP 100.

The State filed Detective Kori Malone's Certification of Probable Cause in support of the charges of the original information. (CP 104–107). Det. Malone interviewed Mr. Marcum about property found in the woods associated with Mr. Marcum. CP 105. Det. Malone showed Mr. Marcum a photo of a flashdrive and digital camera. CP 105. Mr. Marcum admitted that

the flash drive was his and that he had possessed it for several years. CP 105. He also stated that he kept trying to get rid of it and it kept reappearing with his belongings. CP 106. Mr. Marcum told Det. Malone that the photos on the flash drive show Mr. Marcum molesting a child and that the pictures were of his face with his mouth against the vagina of a child. CP 105.

Det. Malone states that she personally viewed the video and pictures on the flash drive she discussed with Mr. Marcum and confirmed what Mr. Marcum told her would be on the flash drive. CP 106.

Det. Malone provided descriptions of the contents of a video which formed the basis for the charge of Rape of a Child, photos which formed the basis for the charge of Child Molestation and Sexual Exploitation of a Minor, and more photos where Mr. Marcum was not identified which formed the basis for the charges of Possessing Depiction of Minor Engaged in Sexually Explicit Conduct. CP 106–07.

Det. Malone identified Mr. Marcum's face in the photographs which formed the basis for Child Molestation charges. CP 106. The videos show a tattoo identified as the same as Marcum's tattoo on his left arm. CP 106. Det. Malone also states that the child or children in the video and photos were about 2 to 3 years old. CP 106–107. The video and photos were taken from same camera. CP 106.

Det. Malone described the video as showing Mr. Marcum licking the

vagina and anus of a female of about 2 years of age. CP 106. Det. Malone also described two photos matching the description Mr. Marcum gave to Det. Malone showing Mr. Marcum licking the vagina and anus of a female child of approximately 2 to 3 years of age. CP 106. The video was likely created on Mar. 13, 2011 at about 4:11 p.m. CP 106. The photos were created on Mar. 7, 2011 at about 8:56 p.m. CP 106. In the photo showing the Child Molestation, Mr. Marcum was wearing a different T-shirt than the one he was wearing in the video of the Rape of a Child. CP 106.

Det. Malone also described photographs on the flash drive showing an adult male having sexual contact and intercourse with a female child approximately 2 to 3 years old. CP 107. The background in the photos is the same as described in the still photo from the video where Mr. Marcum was identified by his tattoo. CP 106, 107.

On Oct. 19, 2012, the State filed an amended information which clarified Counts 1–4 and added Counts 5–14, all of which were charges for Possessing Depiction of Minor Engaged in Sexually Explicit Conduct in the First Degree.

About a year later, on Oct. 17, 2013, Mr. Marcum entered a plea of guilty to Counts 1–10. CP 53, RP 9–10. Counts 11–14 were dismissed per the plea agreement. CP11. Prior to taking the plea of guilty, the trial court specifically discussed the charges of the amended information with Mr.

Marcum. RP 8–10.

The court also inquired of Mr. Marcum if he had any questions about the statement of defendant on plea of guilty. RP 6. Mr. Marcum indicated that he did not and that he reviewed it with his attorney. RP 6. Mr. Marcum indicated that he understood the rights he was giving up (RP 7), that he understood his standard sentence range and offender score (RP 7), the state's sentencing recommendation including the dismissal of Counts 11–14 of the amended information (RP 8), and that the judge is not bound by the recommendation (RP 8).

Mr. Marcum pleaded guilty one-by-one to Counts 1–3 and then guilty to Counts 4–10. RP 9–10. Mr. Marcum indicated that no threats were made to get him to plead guilty and the court found that Mr. Marcum entered his plea of guilty in a knowing, voluntary, and intelligent manner. RP 10.

Mr. Marcum's statement in the Statement of Defendant on Plea of Guilty states, "I have reviewed the evidence in this case with my attorney and discussed it fully with him. I believe there is a substantial likelihood of my being convicted should this matter go to trial and I am entering this plea to take advantage of the State's plea offer." RP 60. Then there is an unchecked box in the same section and the statement continues, "Instead of making a statement, I agree that the court may review the police reports and/or statement of probable cause supplied by the prosecution to establish a factual

basis for the plea." RP 60.

The court mentioned that the plea was essentially an Alford type plea and that "the Court has read the probable cause statement and does find that it establishes a factual basis for [the] plea." RP 10. The defendant had no objection to the trial court's finding of a factual basis for the plea based upon the statement of probable cause.

In the statement of plea of guilty, section g (CP 56) includes the following language of the agreed recommendation (RP 63): "The prosecuting attorney will make the following recommendations to the judge: . . . community custody with crime related prohibitions and affirmative obligations for purposes of assuring compliance with such prohibitions." CP 56.

On Oct.29, 2014, at sentencing, the trial court stated that it had read the file thoroughly and the Presentence Investigation Report (PSI) (CP 76–92) a number of times. RP 69. The sentencing court adapted the recommendations from the PSI. RP 72. Condition 10 from the PSI states, "You shall abstain from the possession or use of drugs and drug paraphernalia unless prescribed by a medical professional, and shall provide copies of all prescriptions to community Corrections Officer within seventy-two (72) hours. CP 22. Condition 11 states, "You shall obtain a chemical dependency evaluation and enter into, comply with and successfully complete

any treatment program recommended therefrom." CP 22.

In the PSI, Mr. Marcum claimed that he was using methamphetamine continuously at the time at issue. CP 76. Mr. Marcum also stated that he only lived at the victim's house a few weeks and that he was "so fucked up on drugs, (he) didn't remember" victimizing [the victim]." CP 79, 82. Mr. Marcum stated "he was taking handfuls of drugs at the time, using pills, marijuana, meth, whatever he could find . . . ." CP 79.

The PSI also includes statements from Mr. Marcum indicating that he has had a long history with dealing and using drugs. CP 82–84. Mr. Marcum stated that "he has used alcohol, methamphetamine, cocaine, hallucinogens (peyote, LSD, mescaline and mushrooms), inhalants, marijuana, abused tranquilizers/sedatives, abused prescription drugs, PCP, MDMA, Ecstasy, bath salts, and Spice." CP 84. Mr. Marcum reported that Ecstasy promoted hypersexualization in him. CP 84. "At the time of the offense, Marcum states he was using methamphetamine, intravenous bath salts and alcohol." CP 84. In the Certification of Probable Cause, Mr. Marcum stated to Det. Malone that "he could tell he was very "high" when the photos were taken." RP 105.

//

III. ARGUMENT

A. THE COURT SHOULD DECLINE TO REVIEW THE DENIAL OF THE MOTION TO WITHDRAW THE GUILTY PLEA.

> We review a trial court's denial of a motion to withdraw a guilty plea for abuse of discretion. *State v. Marshall*, 144 Wash.2d 266, 280, 27 P.3d 192 (2001). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *State v. Brown*, 132 Wash.2d 529, 572, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998).

State v. Pugh, 153 Wn. App. 569, 576, 222 P.3d 821 (2009).

"[W]hen an appellant fails to raise an issue in the assignments of error, in violation of RAP 10.3(a)(3), and fails to present any argument on the issue or provide any legal citation, an appellate court will not consider the merits of that issue." *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995).

Here, Mr. Marcum appeals the trial court's denial of his motion to withdraw the guilty plea. Appellant Br. at 4. However, Mr. Marcum fails to assign error to the trial court's ruling and advances no argument or authority establishing how the trial court abused its discretion in denying the motion to withdraw the plea.

Therefore, the Court should decline to review the trial court's denial of the motion to withdraw the guilty plea.

B. THE COURT SHOULD DECLINE TO REVIEW WHETHER THERE WAS A SUFFICIENT FACTUAL BASIS FOR THE GUILTY PLEA BECAUSE THE ISSUE WAS NOT PRESERVED FOR APPEAL.

> The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: . . . (3) manifest error affecting a constitutional right.

RAP 2.5 (a).

Mr. Marcum claims that the statement of probable cause, relied upon by the court, did not establish a sufficient factual basis as required by CrR 4.2 and this rendered his plea involuntary. Mr. Marcum did not object to the court's finding of a factual basis for his plea of guilty based on the statement of probable cause and did not raise this issue in his motion to withdraw the guilty plea. RP 10–11, CP 34–43. Therefore, the issue need not be reviewed unless Mr. Marcum shows that an exception under RAP 2.5 (a) applies.

Exceptions for RAP 2.5 (a) are narrowly construed. *State v. Montgomery*, 163 Wn.2d 577, 595, 183 P.3d 267 (2008).

"An appellant must show both that (1) the error implicates a specifically identified constitutional right, and (2) the error is "manifest" in that it had "practical and identifiable consequences" . . . ." *State v. Bertrand*, 165 Wn. App. 393, 400–03, 267 P.3d 511 (2011) (citing *State v. Grimes*, 165 Wn. App. 172, 186, 267 P.3d 454 (2011)).

"CrR 4.2 is not the embodiment of a constitutionally valid plea; strict adherence to the rule is 'not a constitutionally mandated procedure.'" *Matter of Hilyard*, 39 Wn. App. 723, 727, 695 P.2d 596 (1985) (citing *In re Vensel*, 88 Wn.2d 552, 554, 564 P.2d 326 (1977)). Thus, failure to find a sufficient factual basis for a guilty plea under CrR 4.2 does not violate a specifically defined constitutional right unless it somehow renders the plea involuntary. *See Matter of Hews*, 108 Wn. 2d 579, 591–92, 741 P.2d 983 (1987).

Here, Mr. Marcum has not shown that the trial court's finding of a factual basis for the guilty plea based upon the statement of probable cause violated a specifically identified constitutional right or somehow rendered Mr. Marcum's plea involuntary.

"The determination of whether an error is "manifest" requires an appellant to show "actual prejudice," which we determine by looking at the asserted error to see if it had "practical and identifiable consequences" at trial." *State v. Knight*, 176 Wn. App. 936, 950–51, 309 P.3d 776 (2013) *review denied*, 179 Wn.2d 1021 (2014) (citing *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011).

Mr. Marcum has not established how he was prejudiced or how his plea was rendered involuntary by the court's finding of a factual basis for the plea based on the statement of probable cause. On the contrary, the record shows that the plea of guilty was entered voluntarily.

When Mr. Marcum pleaded guilty to Counts 1–10, the trial court discussed the charges of the amended information with Mr. Marcum. RP 8–10. Mr. Marcum indicated he had no questions about his guilty plea statement and he reviewed it with his attorney. RP 6.

Mr. Marcum understood the rights he was giving up (RP 7), his sentence range and offender score (RP 7), the State's sentencing recommendation (RP 8), and that the judge is not bound by the recommendation (RP 8). Mr. Marcum indicated that no threats were made to get him to plead guilty. RP 10. Mr. Marcum had no objection to the trial court's finding of a factual basis for the plea based upon the statement of probable cause.

There is no evidence from the record showing that Mr. Marcum's plea was involuntary and that he did not know the nature of the charges he was pleading guilty to. In fact, Det. Malone's Certification of Probable Cause indicated that Mr. Marcum described the conduct constituting the charges to Det. Malone. Thus he was aware of the nature of the charges and the guilty plea was voluntary. There is was no prejudice to Mr. Marcum.

Mr. Marcum did not preserve this issue for appeal because he did not object to the trial court's finding of a factual basis for the plea. Further, the alleged error is not a manifest error affecting a constitutional right. Therefore, the Court should decline to review this issue.

C. THERE WAS A SUFFICIENT FACTUAL BASIS SUPPORTING THE GUILTY PLEA.

The defendant appeals the guilty plea on the basis that it was not voluntary because the statement of probable cause relied upon by the court does not establish a factual basis for the plea. *See* Appellant Br. at 5.

"'The factual basis requirement of CrR 4.2(d) does not mean the trial court must be convinced beyond a reasonable doubt that defendant is in fact guilty;' there must only be sufficient evidence, from any reliable source, for a jury to find guilt." *State v. Zhao*, 157 Wn.2d 188, 198, 137 P.3d 835 (2006) (quoting *State v. Newton*, 87 Wn.2d 363, 370, 552 P.2d 682 (1976)).

Furthermore, the Washington Supreme Court specifically held:

> Since the factual basis requirement, both in case law and in this court's rule is founded on the concept of voluntariness, we hold that a defendant can plead guilty to amended charges for which there is no factual basis, but only if the record establishes that the defendant did so knowingly and voluntarily and that there at least exists a factual basis for the original charge, thereby establishing a factual basis for the plea as a whole.

Zhao, 157 Wn.2d at 200.

Here, the charges of the original information include Rape of a Child in the First Degree, Child Molestation in the First Degree, Sexual Exploitation of a Minor, and Possessing Depiction of Minor Engaged in Sexually Explicit Conduct in the First Degree. CP 100. Det. Kori Malone's Certification of Probable Cause (CP 105–107) filed together with the original

information, sets forth, in explicit detail, the facts depicted in a video and photos which clearly fit these charges.

Det. Malone interviewed Mr. Marcum about the flashdrive containing a video and photographs. Mr. Marcum admitted that the flashdrive contained child pornography and photos of himself molesting a child; more specifically, photos of himself with his mouth against a child's vagina. Det. Malone stated she personally viewed the videos and photos and that they confirmed what Mr. Marcum told her would be on the flash drive. CP 106.

Det. Malone identified Mr. Marcum's face in two photographs which Mr. Marcum described to Det. Malone and which formed the basis for the Child Molestation charges. CP 106. The video shows the male identified as Mr. Marcum by the tattoo on his left arm. CP 106. The video and photos were taken by the same camera. CP 106. Det. Malone also states that the children in the video and photos were about 2 to 3 years old. CP 106–107.

Rape in the First Degree requires that the defendant had sexual intercourse with a child under 12 years of age, not married to the defendant, and the defendant was more than 24 months older than the victim.. RCW 9A.44.073. RCW 9A.44.010 (1) defines sexual intercourse as follows:

> "Sexual intercourse" (a) has its ordinary meaning and occurs upon any penetration, however slight, and . . .
>
> (c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

Here the video shows Mr. Marcum licking the vagina and anus of a female of about 2 years of age. CP 106. This establishes Rape of a Child because licking a vagina is sexual contact involving a sex organ of one person and the mouth of another. *See* RCW 9A.44.010 (1)(c).

Child Molestation in the First Degree requires that the defendant have sexual contact with a person less than 12 years of age, not married to the defendant, and at least 36 months younger than the defendant. RCW 9A.44.083. "'Sexual contact' means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010 (2).

Here, two photos matched the description Mr. Marcum gave to Det. Malone showing Mr. Marcum "licking the vagina and anus of a female child" of approximately 2 to 3 years of age. CP 106. Mr. Marcum denied knowing the name of the child. CP 105. It can be inferred from such explicit and direct contact that Mr. Marcum's purpose was to gratify his sexual desires. *See State v. Wilson,* 56 Wn. App. 63, 68, 782 P.2d 224 (1989); *State v. Ramirez,* 46 Wn. App. 223, 730 P.2d 98 (1986).

Sexual Exploitation of a Minor requires that the defendant causes a person under 18 years of age to engage in sexually explicit conduct, knowing that such conduct would be photographed. RCW 9.68A.040.

> "Sexually explicit conduct" means actual or simulated:
> (a) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals;
> (b) Penetration of the vagina or rectum by any object . . .
> (f) Depiction of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer. For the purposes of this subsection (4)(f), it is not necessary that the minor know that he or she is participating in the described conduct, or any aspect of it; and
> (g) Touching of a person's clothed or unclothed genitals, pubic area, buttocks, or breast area for the purpose of sexual stimulation of the viewer.

RCW 9.68A.011 (4).

Here, the conduct supporting the charge of Child Molestation, discussed above, fits the definition of sexually explicit conduct and the incidents at issue were photographed. Mr. Marcum is identified in the photos with the female described as 2 to 3 years of age (CP 106) and he admitted the flash drive containing the photos was his. The picture was close up enough to show Mr. Marcum's tongue extended and visible. This is evidence he knew his conduct with the child would be photographed.

Finally, under RCW 9.68A.070, Possessing Depictions of Minor Engaged in Sexually Explicit Conduct in the First Degree requires that the defendant knowingly posses a visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011 (4).

The photographs on the flash drive described by Det. Malone show an adult male having sexual intercourse with a female child approximately 2 to 3

years old. CP 107. Mr. Marcum admitted to possessing the flash drive (CP 106) and that there would be child pornography on the flashdrive. CP 105. This establishes a factual basis for Possessing Depictions of Minor Engaged in Sexually Explicit Conduct.

Therefore, under *State v. Zhao*, there was a sufficient factual basis for the original charges. The Court should find the guilty plea is valid.

D. THE RECORD SHOWS EVIDENCE SUPPORTING THE COMMUNITY CUSTODY CONDITION REGARDING SUBSTANCE ABUSE TREATMENT.

> (1) Where the court finds that the offender has a chemical dependency that has contributed to his or her offense, the court may, as a condition of the sentence and subject to available resources, order the offender to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which the offender has been convicted and reasonably necessary or beneficial to the offender and the community in rehabilitating the offender.
>
> (2) This section applies to sentences which include any term *other than, or in addition to, a term of total confinement,* including suspended sentences.

RCW 9.94A.607 (emphasis added).

Here, Mr. Marcum argues that the plain language for RCW 9.94A.607 requires the court to make a specific finding before it has authority to impose chemical dependency treatment. Mr. Marcum overlooks RCW 9.94A.607 (2) which makes clear that RCW 9.94A.607 does not apply to his sentence because he was sentenced to a term of total confinement. CP 11.

> When a court sentences a person to a term of community custody, the court shall impose conditions of community custody as provided in this section. . . .
>
> (3) Discretionary conditions. As part of any term of community custody, the court may order an offender to: . . . (c) Participate in crime-related treatment or counseling services;(d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community . . . .

RCW 9.94A.703 (3).

Mr. Marcum was sentenced to community custody. Therefore, RCW 9.94A.703 (3) applies and gives the court discretion to order chemical dependency treatment if reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community.

Furthermore, the Court of Appeals Division II in *State v. Powell* held that the sentencing court could impose substance abuse treatment without an explicit finding if the record shows evidence that drug use contributed to the offense. 139 Wn. App. 808, 819, 162 P.3d 1180 (2007) *reversed on other grounds*, 166 Wn.2d 73, 206 P.3d 321 (2009) (reversing the Court of Appeals on other grounds and affirming the conviction).

Here, the record is full of references to Mr. Marcum's drug abuse issues. Mr. Marcum reported that Ecstasy promoted hypersexualization in him, and that "[a]t the time of the offense, [ ] he was using methamphetamine, intravenous bath salts and alcohol." CP 84. Mr. Marcum

also stated that he could tell he was high when the photos were taken showing Mr. Marcum molesting a child.

The record clearly demonstrates that Mr. Marcum has a substance abuse problem and that substance abuse treatment is reasonably related to the offense, Mr. Marcum's risk of reoffending, and safety to the community. Additionally, the record plainly demonstrates that Mr. Marcum's drug use contributed to the offense.

Therefore, the Court should affirm the community custody condition requiring Mr. Marcum to obtain a chemical dependency evaluation and enter into, comply with and successfully complete any recommended treatment.

E. RCW 9.94A.703 (2) REQUIRES THE COURT TO PROHIBIT THE OFFENDER FROM POSSESSING CONTROLLED SUBSTANCES.

> (2) Waivable conditions. Unless waived by the court, as part of any term of community custody, the court shall order an offender to: . . . (c) Refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions . . .

RCW 9.94A.703 (2).

RCW 9.94A.703 (2) requires the court to order the offender to refrain from possession of controlled substances without a valid prescription. Although the court may waive this condition, RCW 9.94A.703 (2) requires that the condition be imposed without regard to whether it is crime related.

However, the State concedes that a prohibition from possessing "all or

any drugs" without a prescription is broader than the statutory prohibition from possessing "controlled substances." The State concedes that the case should be remanded to clarify this condition.

F. THE DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS WERE IMPOSED WITHOUT THE INDIVIDUALIZED FINDINGS REQUIRED UNDER RCW 10.01.160.

The State concedes that the sentencing court did not make individualized findings of current or future financial ability to pay discretionary legal financial obligations.

G. THE GUILTY PLEAS TO COUNTS 1 AND 2 DO NOT VIOLATE DOUBLE JEOPARDY BECAUSE THEY ARE SEPARATE ACTS.

Mr. Marcum, in Additional Ground 1, argues that the guilty pleas to Count 1, Rape of a Child in the First Degree; and Count 2, Child Molestation in the First Degree, violate double jeopardy because the two offenses are the same because they are only one criminal act with only one victim.

> After a guilty plea the double jeopardy violation must be clear from the record presented on appeal, or else be waived. *See United States v. Broce*, 488 U.S. 563, 575–76, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989) (a guilty plea prevents a defendant from expanding the record to prove two convictions actually stem from a single conspiracy). But where a double jeopardy violation is clear from the record, a conviction violates double jeopardy even where the conviction is entered pursuant to a guilty plea.

State v. Knight, 162 Wn.2d 806, 811–12, 174 P.3d 1167 (2008).

Separate convictions and punishments for child molestation and child

rape involving the same child and same time period do not violate double jeopardy when each count is a separate and distinct act. *State v. Land*, 172 Wn. App. 593, 602–03, 295 P.3d 782, *review denied*, 177 Wn.2d 1016 (2013).

Here, the statement of probable cause (CP 106) shows that charges of Rape of a Child and Child Molestation were for separate and distinct acts. CP 65–66. The Rape of the Child was video recorded and the Child Molestation was photographed, by the same camera. The video of the Rape of a Child was likely created on Mar. 13, 2011 at about 4:11 p.m. The photos of Child Molestation were created on Mar. 7, 2011 at about 8:56 p.m. In the photo showing the Child Molestation, Mr. Marcum was wearing a different T-shirt than the one he was wearing in the video of the Rape of a Child. Thus, the evidence shows that the incidents were separate and distinct acts.

Therefore, the guilty pleas to Rape of a Child in the First Degree and Child Molestation in the First Degree do not violate double jeopardy.

H. ADDITIONAL GROUND 2 IS NOT REVIEWABLE BECAUSE IT IS NOT SUPPORTED BY THE RECORD, ARGUMENT, OR AUTHORITY.

"On direct appeal the scope of our review is limited to matters in the trial record." *State v. Johnson*, 180 Wn. App. 318, 324, 327 P.3d 704 (2014) (citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)).

Mr. Marcum does not cite to anything in the record supporting his allegations regarding his defense counsel's comments to Mr. Marcum during his arraignmet. Furthermore, Mr. Marcum does not cite to any authority regarding how such alleged conduct legally entitles him to any relief. *See McKee v. Am. Home Products, Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989); *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)

Therefore the Court should decline to consider Additional Ground 2.

IV. CONCLUSION

The Court should not review the trial court's denial of the motion to withdraw the guilty plea because Mr. Marcum did not assign error to the ruling and did not present either argument or citation to authority regarding how the court abused its discretion.

The Court should not review Mr. Marcum's claim that the sentencing court erred by finding a factual basis for the plea because the error was not preserved pursuant to RAP 2.5 (a). Additionally, Mr. Marcum did not establish that the alleged error was manifest and affected a constitutional right. Adherence to CrR 4.2 is not a constitutional right, the record shows the plea was voluntary, and Mr. Marcum has not shown any prejudice. Moreover, the guilty plea to the amended charges is valid because the certificate of probable cause filed with the original charge provides a

sufficient factual basis. *See Zhou*, 157 Wn.2d at 200.

For the foregoing reasons, Mr. Marcum's conviction should be affirmed.

Under RCW 9.94A.703 (3) and *State v. Powell*, the substance abuse treatment requirement is valid because the record shows evidence that drug use contributed to the offense. 139 Wn. App. at 819. RCW 9.94A.607 does not apply because Mr. Marcum was sentenced to term a of total confinement. Therefore, the Court should affirm the substance abuse treatment condition.

Although, RCW 9.94A.703 (2) requires the court to prohibit the possession of controlled substances without a valid prescription, the State concedes that this condition can be clarified so that it does not include over the counter drugs such as Tylenol. Furthermore, the State concedes that the court did not make individualized findings of present or future ability to pay discretionary legal financial obligations. The State concedes that the case should be remanded to the trial court to correct those sentencing errors.

Finally, the guilty pleas to Rape of a Child in the First Degree and Child Molestation in the First Degree do not violate double jeopardy because they are separate and distinct incidents. Mr. Marcum's allegations in his Additional Ground 2 is not supported by the records and is not reviewable by this court.

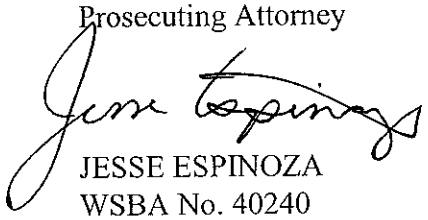
Therefore, the State requests the Court to affirm the conviction and to

remand the case to the trial court to correct the sentencing issues regarding the community custody condition and discretionary legal financial obligations.

Respectfully submitted this 15th day of July, 2015.

Respectfully submitted,

MARK B. NICHOLS
Prosecuting Attorney



JESSE ESPINOZA
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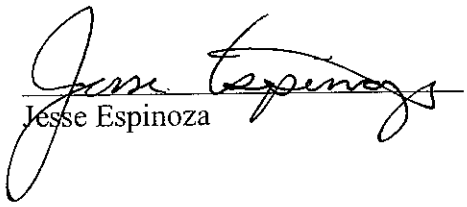
CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Lisa Tabbut on July 15, 2015.

MARK B. NICHOLS, Prosecutor



Jesse Espinoza

CLALLAM COUNTY PROSECUTOR

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