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Court of Appeals
Division I
State of Washington
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Supreme Court No. 98426-3
Court of Appeals No. 79094-3-I

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

KEVIN LEE,

Petitioner.

PETITION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Kevin Lee, the appellant in the Court of Appeals, asks this Court to grant review of the published decision by the Court of Appeals terminating review.[1]

B. ISSUES PRESENTED FOR REVIEW

1. Article I, section 22 of the Washington Constitution expressly provides that the accused have the right to testify. The decision to testify belongs exclusively to the accused, not the accused's lawyer. Waiver of an express constitutional right cannot be implied. There must be a knowing, intelligent, and voluntary waiver. For there to be an effective waiver, does article I, section 22 require on-the-record inquiry into whether the accused is waiving their right to testify?

2. Criminal defendants have a right to a unanimous jury verdict. When there is evidence of multiple acts that may prove a criminal charge, the jury should be instructed that it must unanimously agree as to the act constituting the crime. There was evidence of multiple acts of rape and assault. Was Mr. Lee deprived of his right to jury unanimity when the

[1] A copy of the decision along with the order granting the State's motion to publish and denying Mr. Lee's motion for reconsideration are attached in the appendix.

court did not provide the jury unanimity instructions on the charged crimes of rape and assault?

3. Double jeopardy forbids convictions for the "same offense." Rape by forcible compulsion and assault may constitute the same offense if the forcible compulsion component is based on assault. Although not making an election, the prosecutor identified one of the charged assaults as being the force used to perpetrate the rape. Should the assault conviction be reversed on double jeopardy grounds because it is not manifestly apparent that the rape and assault are based on separate acts?

C. STATEMENT OF THE CASE

A complete recitation of the facts is set out in Mr. Lee's opening brief. Br. of App. at 5-11.

To summarize, the prosecution alleged that Mr. Lee assaulted and raped his girlfriend, Khara Hosein, whom he had on and off again relationship. CP 12-13; RP 248-49.

The case proceeded to trial on one count of second degree rape, two counts of second degree assault by strangulation, and one count of felony harassment. CP 12-13.

Before the defense rested its case, the court did not inquire whether Mr. Lee would be testifying. RP 392. Mr. Lee's lawyer did not call Mr. Lee to testify.

The jury found Mr. Lee guilty of second degree rape and second degree assault. RP 489. The jury was unable to agree on the second charge of assault and the charge of felony harassment. RP 489.

On appeal, Mr. Lee argued the record did not show that he knowingly, intelligently, and voluntarily waived his right testify, as guaranteed under article I, section 22 of the Washington Constitution. Br. of App. at 12-23. He also argued that the assault and rape convictions should be reversed because there was evidence of multiple acts that could constitute these crimes, but the jury had not been provided unanimity instructions. Br. of App. at 23-30. As to the assault conviction, he argued that conviction should be reversed on double jeopardy grounds because the record showed it may have been based on the same act relied upon to prove the forcible compulsion element of rape. Br. of App. at 30-37.

After hearing oral argument, the Court of Appeals issued an unpublished opinion rejected these arguments and affirming. The prosecution filed a motion to publish. Mr. Lee filed a motion to reconsider. The Court of Appeals granted the prosecution's motion to publish and denied Mr. Lee's motion to reconsider. Mr. Lee seeks this Court's review.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Review should be granted to decide whether the express right to testify afforded to criminal defendants under article I, section 22 of the Washington Constitution requires a trial court to obtain an on-the-record waiver of this right from a defendant at trial.

Criminal defendants have an express state constitutional right to testify in their own behalf. State v. Robinson, 138 Wn.2d 753, 758, 982 P.2d 590 (1999). The Washington Constitution provides that "In criminal prosecutions the accused shall have the right . . . to testify in his own behalf . . ." Const. art. I, § 22.

This is unlike the federal constitutional right to testify, which is not explicit and has been implied from the Fourteenth Amendment's due process clause, the compulsory process clause of the Sixth Amendment, and as a corollary to the Fifth Amendment's privilege against self-incrimination. Rock v. Arkansas, 483 U.S. 44, 49, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987); State v. Thomas, 128 Wn.2d 553, 556-57, 910 P.2d 475 (1996).

The right to testify is fundamental and personal to the defendant. Robinson, 138 Wn.2d at 758. Defense counsel cannot abrogate the right. Id. Like the decision "whether to plead guilty," "waive the right to a jury trial," and to "forgo an appeal," the decision to "testify in one's own

behalf" is "reserved for the client," not the lawyer. McCoy v. Louisiana, 138 S. Ct. 1500, 1508, 200 L. Ed. 2d 821 (2018).

As with the state constitutional right to appeal, also expressly set out in article I, section 22, the right to testify "is to be accorded the highest respect" by Washington courts. State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d 579 (1978). "[T]here exists no presumption in favor of waiver of constitutional rights." Id. Rather, for a defendant to give up this express right, the record must show that the defendant knowingly, intelligently, and voluntarily relinquished the right. Id. To effectuate the right to testify, a colloquy with the defendant in open court, conducted by defense counsel or the court, is necessary to ensure that the defendant does not wish to exercise this right and that the decision to not testify is made by defendants themselves, rather than by the defendant's lawyer. Many jurisdictions in sister states have so concluded. State v. Weed, 263 Wis. 2d 434, 463-64, 666 N.W.2d 485 (2003); Momon v. State, 18 S.W.3d 152, 161-62 (Tenn. 2000); Tachibana v. State, 79 Hawai'i 226, 235-36, 900 P.2d 1293 (1995).[2]

[2] Accord Sanchez v. State, 841 P.2d 85, 89 (Wyo. 1992); LaVigne v. State, 812 P.2d 217, 222 (Alaska 1991); State v. Orr, 304 S.C. 185, 403 S.E.2d 623, 624-25 (1991) (overruled on other grounds by Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718, 725 (2001)); State v. Neuman, 179 W. Va. 580, 584-85, 371 S.E.2d 77, 81-82 (1988); People v. Curtis, 681 P.2d 504, 514-15 (Colo. 1984).

To be sure, this Court held that the federal constitution does not require an on the record colloquy with defendants to ensure true waivers of the right to testify. State v. Thomas, 128 Wn.2d 553, 557, 910 P.2d 475 (1996). This Court, however, has not addressed whether the Washington Constitution, which expressly provides that defendants have a constitutional right to testify, demands a different result. Id. at 562.

This Court should grant review and resolve the unanswered question. This is indisputably a significant question of law under the Washington Constitution. RAP 13.4(b)(3). And because the issue is present in *every* criminal trial in Washington, it is also undoubtably an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(4).

The Court of Appeals recognized this was an important issue. Oral argument was heard on the issue. After the Court of Appeals issued an unpublished opinion, the prosecution moved to publish the opinion. The Court of Appeals granted the motion, publishing the case.

While recognizing the issue was important, the Court of Appeals reached the wrong conclusion, holding that no on-the-record colloquy with a defendant was necessary and that waiver may be inferred from the fact that the defense attorney did not call their client to testify. Slip op. at 5. The Court of Appeals based this conclusion, in part, based on statements

made by this Court in State v. Robinson, 138 Wn.2d 753, 982 P.2d 590 (1999). Slip op. at 7-10. But the state constitutional issue was not presented in that case. That case concerned a defendant's post-verdict claim that his attorney had prevented him from testifying at trial and the remedy upon showing such a violation. Robinson, 138 Wn.2d at 755-56. Because Robinson did not discuss the legal theory relied upon by Mr. Lee, it does not control. In re Pers. Restraint of Stockwell, 179 Wn.2d 588, 600, 316 P.3d 1007 (2014); State v. Granath, 200 Wn. App. 26, 35, 401 P.3d 405 (2017), affirmed, 190 Wn.2d 548, 415 P.3d 1179 (2018). The Court of Appeals erred in reasoning otherwise, further meriting review. RAP 13.4(b)(1), (2).

On the merits, Mr. Lee provided detailed analysis of article I, section 22, including briefing of the non-exclusive factors used to evaluate state constitutional claims set out in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). Br. of App. at 13-23. He cited to this Court's decision in State v. Martin, 171 Wn.2d 521, 252 P.3d 872 (2011), which held that the bundle of rights in article I, section 22 warrant independent interpretation from the analogous rights set out in the Sixth Amendment. Martin, 171 Wn.2d at 533. In Martin, this Court reasoned that "the Court of Appeals erred in minimizing the significant textual differences between article I, section 22 and the Sixth Amendment." Id. at 530; see also State v. Silva,

107 Wn. App. 605, 618, 27 P.3d 663 (2001) (explicit right to self-representation in article I, section 22 means "great significance in determining what is required to effectuate those rights.").

The Court of Appeals reasoned that Mr. Lee did not provide a complete analysis on why article I, section 22 of the Washington Constitution requires his proposed rule. Slip op. at 10 n.4. The court stated that Mr. Lee's briefing explained why article I, section 22 should be interpreted independently of the federal constitution, it did not provide an explanation on why an on-the-record colloquy is required. To the contrary, Mr. Lee's briefing explained that a colloquy is necessary not simply for all the policy reasons stated by other courts that have adopted the requirement, but because this Court has held that the explicit state constitutional rights in article I, section 22 must be accorded the highest respect and should be interpreted independently of Sixth Amendment. Sweet, 90 Wn.2d at 286; Martin, 171 Wn.2d at 530. At oral argument, counsel for Mr. Lee reiterated this position and cited the Sweet case. Still, the Court of Appeals did not acknowledge this Court's opinion in Sweet or Martin.

In short, because the right to testify is explicit in article I, section 22 and belongs to the defendant personally, the right should not be deemed waived based on defense counsel's conduct of not calling their

client. As with the waiver of the right to counsel or trial by proof beyond a reasonable doubt, an on-the-record colloquy on the waiver of the right to testify will ensure that this fundamental right is honored. See Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969) (guilty plea); City of Bellevue v. Acrey, 103 Wn.2d 203, 210-11, 691 P.2d 957 (1984) (waiver of right to counsel). Defendants may not be aware of their right to testify or that the choice to testify is their own, not defense counsel's. Further, it will help avoid post-conviction disputes between defendants and former counsel, as this Court's opinion in Robinson shows to be a problem.

In rejecting Mr. Lee's argument, the Court of Appeals relied on its previous opinion in State v. Russ, 93 Wn. App. 241, 969 P.2d 106 (1999). Slip op. at 9-11. In Russ, the Court of Appeals concluded that article I, section 22 did not require an on-the-record colloquy with a defendant to ensure a knowing, intelligent, and voluntary waiver of the right to testify. 93 Wn. App. at 245-47. In support, the Russ court gave four reasons. First, the right to testify stands in tension with the right to remain silent, and that a colloquy by a judge might improperly influence a defendant's choice on which right to exercise. Russ, 93 Wn. App. at 246. Second, the timing of a colloquy is problematic in that it must happen before the defendant rests. Id. Third, a colloquy by the judge may inappropriately intrude into the

attorney-client relationship. Id. And fourth, although the failure by a defendant to take the stand may not always represent an effective waiver, it usually will. Id.

These reasons do not withstand scrutiny and are outweighed by other considerations. As to the first and third objections, defendants also have other constitutional rights that stand in tension—such as the right to counsel and self-representation—but waiver inquiries are still required and are not thought to cause a problem. Tachibana, 79 Hawai'i at 235-36; Weed, 263 Wis. 2d at 463-64; see CrR 3.5(b) (requiring court to make inquiry into whether defendant wishes to testify at pretrial hearing regarding admissibility of statements). Moreover, as Tennessee has recognized, the inquiry can be done by defense counsel with minimal involvement by the court. Momon, 18 S.W.3d at 162. Concerning the supposed awkwardness of the procedure, courts regularly hold hearings outside the presence of juries and having a hearing before the defense formally rests is not unduly burdensome.[3] Finally, even assuming the procedure proves unnecessary in most instances, it will prove necessary in some circumstances. It may make the difference between a guilty and not

[3] In fact, some Washington trial courts conduct an inquiry with the defendant on whether he or she wishes to testify. See State v. Barnett, 104 Wn. App. 191, 197, 16 P.3d 74 (2001).

guilty verdict. And regardless, it is inappropriate to assume waiver of a state constitutional right through silence or inaction. Sweet, 90 Wn.2d at 286-87.

In support of its decision, the Court of Appeals noted a defendant in a capital case has a constitutional right to present relevant evidence in mitigation at sentencing and this right is waived by the conduct of not presenting the evidence. Slip op. at 11 n.5; State v. Woods, 143 Wn.2d 561, 608, 23 P.2d 1046 (2001). Because that right can be waived by defense counsel not presenting mitigating evidence without a colloquy with the defendant, the Court of Appeals reasons the same should be for the right to testify. See slip op. at 11 n.5. But this only acknowledges that most decisions regarding evidence are entrusted *to counsel*. Defendants also have a constitutional right to present relevant evidence in their defense at trial and to cross-examine witnesses. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 103835 L. Ed. 2d 297 (1973); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). But like the right to present mitigating evidence, the allocation of the exercise of these rights are placed with defense counsel. Taylor v. Illinois, 484 U.S. 400, 418, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). This is different than the right to testify, which belongs *personally to defendants*, not their lawyers. McCoy, 138 S. Ct. at 1508. For this reason, that a defendant may waive their right to

present mitigating evidence through the conduct of not presenting that evidence does not justify the same waiver by conduct rule for the right to testify.

The right to testify in our state constitution is explicit and fundamental. It is not a second-class right. This Court should grant review and reverse the Court of Appeals.

2. Review should be granted because the Court of Appeals' decision holding that no unanimity instruction was required on the charges of assault and rape is in conflict with precedent.

In cases where there is evidence of multiple distinct acts which could constitute a charged offense, the jury must be provided a unanimity instruction telling the jurors they must be unanimous as to the act constituting the crime, or the prosecution must make clear election during closing argument on the act it contends constitutes the crime. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). For an election to be clear, "the State must not only discuss the acts on which it is relying, it must in some way disclaim its intention to rely on other acts." State v. Carson, 184 Wn.2d 207, 228 n.15, 357 P.3d 1064 (2015) (emphasis added).

In this case, because there were multiple acts that could constitute the charged crimes of second degree assault by strangulation, a unanimity instruction was required on the charged counts of assault and rape.

Viewed in the light most favorable to the prosecution, the evidence showed at least three separate assaults by strangulation, any of which could have formed the basis for count two. See State v. Hanson, 59 Wn. App. 651, 656-57, 800 P.2d 1124 (1990). Ms. Hosein testified that Mr. Lee, in separate acts, choked her on the couch in the living room of her apartment and, later on, in the kitchen. RP 253-54, 258. The couch incident lasted anywhere from 5 to 15 minutes, while the kitchen incident lasted between 5 to 10 minutes. RP 254, 258, 303-04. Ms. Hosein testified to another act of strangulation in the bedroom. RP 260. During closing argument, the prosecutor did not elect any particular act for either of the charged assaults. E.g., RP 450 ("He strangled her on multiple occasions in the living area, in the kitchen and in the bedroom committing assault in the second degree by strangulation.").

Still, the Court of Appeals reasoned no unanimity instruction was required. The Court of Appeals reasoned there had been an election by the prosecutor. Slip op. at 13-14. The record does not support the Court of Appeals analysis. There was no clear election because the prosecution did not disclaim its intention to rely on other acts. Carson, 184 Wn.2d at 228 n.15. The Court also incorrectly treated the case as if the evidence showed only two acts of assault, one in the living room and kitchen, and a second in the bedroom. Slip op. at 14 n.8. The evidence showed that the assaults

in living room and kitchen were distinct. Kitchen, 110 Wn.2d at 411; Hanson, 59 Wn. App. 651, 656-57.

Because the Court of Appeals decision is contrary to precedent, review is warranted. RAP 13.4(b)(1), (2).

The Court of Appeals also erred in concluding that no unanimity instruction was necessary on the charge of rape. This Court has held that the unit of prosecution for rape is the act of "sexual intercourse," which is complete upon any penetration of the vagina or anus, however slight. State v. Tili, 139 Wn.2d 107, 114-15, 985 P.2d 365 (1999). For this reason, this Court in Tili affirmed the defendant's three convictions for rape based on his (1) penile penetration of the victim's vagina; (2) digital penetration of the victim's vagina; and (3) digital penetration of the victim's anus. Id. at 119. That the acts occurred in a two-minute period did not mean there was only one unit of prosecution for rape. Id. at 111, 117-18.

Here, viewing the evidence in the light most favorable to the prosecution, the evidence showed three to five units of rape. Ms. Hosein testified that Mr. Lee digitally penetrated her vagina and anus, possibly before he removed his clothes and after he attempted to have penile intercourse. RP 262-63. A nurse examiner testified that Ms. Hosein told her that Mr. Lee had digitally penetrated her vagina and anus. RP 289. And, although her testimony on this point conflicted with testimony by

others, Ms. Hosein testified that Mr. Lee briefly penetrated her vagina with his penis. RP 262, 289.

During closing argument, the prosecutor cited the foregoing evidence in support of the rape charge. RP 430, 432. The prosecutor did not make an election as to which act the prosecution was relying on. Accordingly, the Court of Appeals should have held it was error to not instruct the jury that it must be unanimous as to the act constituting second degree rape as charged in count two. See Hanson, 59 Wn. App. at 659.

Instead, the Court of Appeals reasoned that Mr. Lee's argument "fails" because Tili concerned a double jeopardy question. Slip. op at 16. The Court of Appeals reasoned that prosecutors have discretion to "aggregate" multiple rapes into a single charge and that when they do, no unanimity instruction is required. Slip. op at 16.

The Court of Appeals cited no authority in support of its position. The position taken by the Court of Appeals is in conflict with its decision in State v. Furseth, 156 Wn. App. 516, 520, 233 P.3d 902 (2010). There, the Court of Appeals recognized "the prosecution for a single count of rape based on evidence of multiple, separate acts, 'each of which is capable of satisfying the material facts required to prove' the charged crime, constitutes a multiple acts case." Furseth, 156 Wn. App. at 520 (quoting State v. Bobenhouse, 166 Wn.2d 881, 894, 214 P.3d 907 (2009)

(citing Kitchen, 110 Wn.2d at 405-06)). Indeed, in Furseth, the Court of Appeals relied on the unit of prosecution analysis from double jeopardy cases in analyzing the unanimity issue in that case. There, the court reasoned that when there is an alleged unanimity violation, "[t]he unit of prosecution analysis is pertinent . . . because the analysis . . . concerns 'what act or course of conduct" the legislature has proscribed.'" Furseth, 156 Wn. App. at 520 (quoting State v. Sutherby, 165 Wn.2d 870, 879, 204 P.3d 916 (2009)).

Under the foregoing authority, it follows that where there is evidence of multiple acts of rape, any of which could constitute a charged act of rape, the jury must receive a unanimity instruction or the prosecution must make a clear election on the act it is relying upon.

Here, there was evidence of three to five separate units of rape. Br. of App. at 28. Thus, a unanimity instruction or clear election was required. Because there was neither, there is constitutional error. Bobenhouse, 166 Wn.2d at 893.

The Court of Appeals' decision to hold otherwise conflicts with precedent, including its opinions in Furseth, Hansen, and this Court's opinions in Tili and Kitchen. RAP 13.4(b)(1), (2). Review should be granted to resolve the conflict. The issue is also one of substantial public interest. RAP 13.4(b)(4).

3. Review should be granted because the Court of Appeals' decision holding that Mr. Lee failed to show a double jeopardy violation is in conflict with this Court's precedent.

The constitutional prohibition against double jeopardy forbids imposition of multiple punishments for the same offense. U.S. Const. amend. V; Const. art. I, § 9; State v. Mutch, 171 Wn.2d 646, 661, 254 P.3d 803 (2011).

Jury instructions which permit the jury to convict a defendant of two crimes that are the same offense create the possibility of a double jeopardy violation. State v. Borsheim, 140 Wn. App. 357, 366-67, 165 P.3d 417 (2007); Mutch, 171 Wn.2d at 663. This can occur when a defendant is charged with multiple counts of the same crime. See, e.g., Borsheim, 140 Wn. App. at 362, 370 (defendant's four convictions for rape of a child violated double jeopardy because jury instructions permitted jury to base each conviction on a single act). It may also occur when the defendant is convicted of two different crimes if the two crimes are the same in fact and in law. State v. Villanueva-Gonzalez, 180 Wn.2d 975, 978, 985-86, 329 P.3d 78 (2014) (convictions for second degree assault and fourth degree assault violated double jeopardy); State v. Land, 172 Wn. App. 593, 600, 295 P.3d 782 (2013) (convictions of molestation and rape potentially exposed defendant to a double jeopardy violation).

The convictions for second degree rape and second degree assault by strangulation in this case potentially violate the prohibition against double jeopardy. As charged and proved, the assault conviction may be the same in law and in fact as the "forcible compulsion" element in the rape conviction. See Br. of App. at 33-34. Because it is not manifestly apparent that the assault conviction and the rape convictions are based on different acts, the convictions may violate double jeopardy. Mutch, 171 Wn.2d at 661.

In conflict with precedent, the Court of Appeals rejected this argument. The court reasoned that unless a defendant affirmatively establishes that the two acts actually constitute the same offense, no double jeopardy violation is shown. Slip op. at 19. In other words, ambiguity is resolved in the prosecution's favor, not the defense.

This is incorrect. The rule of lenity demands that ambiguity in the jury's verdicts be read in Mr. Lee's favor. State v. Kier, 164 Wn.2d 798, 811-14, 194 P.3d 212 (2008). It also conflicts with this Court's decision in Mutch. Under Mutch, the test is "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 664 (cleaned up). If the jury instructions create an erroneous risk of a

double jeopardy violation, the Court reviews whether the error is harmless beyond a reasonable doubt. Id. at 664-665 & n.6.

Here, the instructions created a "risk of error." The instructions did not require that the "forcible compulsion" component of the rape be based on an act that was separate and distinct from the act of strangulation constituting the second degree assault. This instructional error is manifest constitutional error because it created the potential for a double jeopardy violation. "[W]here a jury instruction permits a jury to convict a defendant of multiple offenses based on a single offense, [the appellate court] presume[s] a double jeopardy violation unless [the Court] [is] convinced beyond a reasonable doubt that the error did not affect the result." Mutch, 171 Wn.2d at 665 n.6.

The prosecution cannot meet its burden to prove this error harmless beyond a reasonable doubt. The prosecutor identified the strangulation in the bedroom as one of acts of the assault that the jury could convict upon. The conviction for assault may be based on that act, which would be the same act that the forcible compulsion element in the rape conviction may be based upon. Accordingly, there is a possible double jeopardy violation, meaning reversal of the assault conviction is required because it is the offense with the lesser sentence. State v. Martin, 149 Wn. App. 689, 701 and n.49, 205 P.3d 931 (2009).

Because the Court of Appeals' decision conflicts with precedent, specifically this Court's decision in Mutch, review should be granted. RAP 13.4(b)(1), (2). The issue is also one of substantial public interest. RAP 13.4(b)(4).

E. CONCLUSION

Mr. Lee respectfully asks that this Court grant his petition for discretionary review.

Respectfully submitted his 16th day of April, 2020.

/s Richard W. Lechich
Richard W. Lechich – WSBA #43296
Washington Appellate Project (#91052)
Attorney for Petitioner

Appendix

FILED
3/17/2020
Court of Appeals
Division I
State of Washington

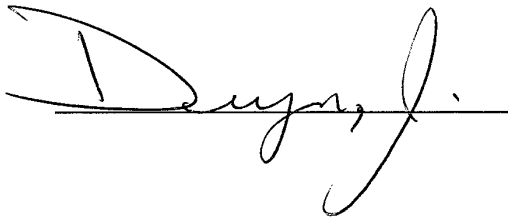
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KEVIN MICHAEL LEE, II, Appellant.	DIVISION ONE No. 79094-3-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:



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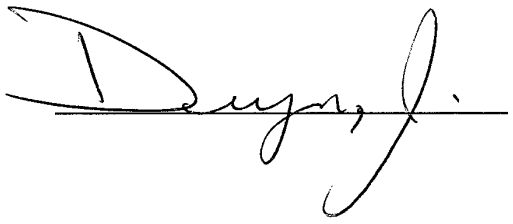
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KEVIN MICHAEL LEE, II, Appellant.	DIVISION ONE No. 79094-3-I ORDER GRANTING MOTION TO PUBLISH OPINION

The respondent, State of Washington, having filed a motion to publish opinion, and the hearing panel having reconsidered its prior determination and finding that the opinion will be of precedential value; now, therefore, it is hereby:

ORDERED that the unpublished opinion filed February 18, 2020, shall be published and printed in the Washington Appellate Reports.

FOR THE COURT:



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2/18/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KEVIN MICHAEL LEE, II, Appellant.	DIVISION ONE No. 79094-3-I UNPUBLISHED OPINION FILED: February 18, 2020

DWYER, J. — Kevin Lee appeals from his convictions for rape in the second degree and assault in the second degree. He raises numerous claims of error, asserting (1) that the trial court improperly presumed Lee's waiver of his right to testify from his conduct, (2) that the trial court failed to give a required unanimity instruction regarding both his rape and assault charges, (3) that his convictions violate the constitutional prohibition against double jeopardy, (4) that several of the conditions of community custody imposed on him at sentencing are insufficiently crime-related and are thus impermissibly overbroad, and (5) that the community custody condition requiring him to pay Department of Corrections (DOC) supervision fees should not have been imposed and should be stricken. We affirm Lee's convictions, but remand for the sentencing court to strike the community custody condition requiring Lee to pay DOC supervision fees.

I

In August 2016, Kevin Lee began an on-and-off dating relationship with K.H., a 24-year-old woman who lived in Seattle. At 10:30 p.m. on the night of

April 2, 2017, K.H. was alone in her apartment when Lee called and asked if he could come over.[1] K.H. gave Lee permission to come over to her apartment, but informed him that she could not go out because she had to go to work the next morning.

Approximately 45 minutes later, Lee arrived at K.H.'s apartment. He appeared heavily intoxicated and began "ordering [K.H.] around," telling her to get ready to go out. K.H. told Lee that she had to go to work the next morning and did not want to go out. In response to her refusal, Lee pinned K.H. down on the living room couch and began strangling her. K.H. managed to get up and walk into her kitchen, but Lee followed her and continued to strangle her in the kitchen, threatening to "rip the airways out of [K.H.'s] throat." K.H. believed that Lee was about to murder her.

While strangling K.H. in the kitchen, Lee threw her back out of the kitchen onto the living room couch.[2] Lee continued to repeatedly put pressure on K.H.'s throat until she was having difficulty breathing, then would release the pressure without removing his hands from her throat. Throughout, Lee repeatedly told K.H. that she was "acting like a brat" for not wanting to go out. He also repeatedly pretended to punch K.H., stopping his fist just before making contact with her face.

Hoping that Lee might pass out from intoxication if given the opportunity, K.H. suggested that they go to bed and sleep. K.H. got up to move to the

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[1] K.H. lived with a roommate, but the roommate was at work on the night of April 2, 2017.

[2] K.H. testified at trial that the living room couch in her apartment at the time was located only three to five feet away from the kitchen.

bedroom, but Lee chased after her, saying "[y]ou're really gonna get it now." When they got into bed, Lee told K.H. that he wanted to have sex. K.H. told him that she did not want to have sex with him, but Lee refused to accept this answer and began touching her neck and pulling down on her pajama pants. K.H. continued to tell Lee that she did not want to have sex with him, but Lee ignored her.

Lee then proceeded to straddle K.H. and began strangling her. He moved one arm down across K.H.'s collarbone to pin her down and then used his other hand to remove her pajama pants. After removing her clothes, Lee began touching K.H.'s vagina and anus. He then removed his own pants and underwear, penetrated K.H. with his penis, and attempted to have sexual intercourse with her. However, he was not able to maintain an erection and after approximately five minutes he gave up and instead digitally penetrated K.H.'s vagina and anus.

K.H. physically resisted, but Lee only stopped after a couple of minutes. He then got off of K.H. and went to sleep. After K.H. felt sure that Lee was unconscious, she got out of bed, dressed, grabbed her car keys, and ran out of the apartment to her car. She called her roommate, met him at a local gas station, and he agreed to go tell Lee to leave the apartment. After Lee left, K.H.'s roommate escorted her back to her apartment. The next morning she reported the incident to local law enforcement.

The State subsequently charged Lee with one count of second degree rape (count 1), two counts of second degree assault (counts 2 and 3), and one

count of felony harassment (count 4). Each count was also alleged to be a crime of domestic violence.

At trial, after the State rested its case, the defense immediately rested. Lee did not testify, and the trial judge did not conduct any colloquy with Lee regarding his right to testify.

During closing arguments, when discussing the assault charges, the prosecutor explained to the jury where one assault ended and the next began:

> Now, there are two counts of assault in the second degree that are charged. . . . [T]hese are for separate and distinct acts, which is to say that one of the counts of assault in the second degree is for the strangulation events that occurred in the living area. And one of the strangulation counts is specifically for . . . the strangulation that occurred in the bedroom . . . that was the precursor to the rape.

During jury deliberations, the jury submitted multiple questions pertaining to the assault charges:

> Two related questions:
> a) How is "separate and distinct" defined in the law?
> b) Why are there two different counts of assault in the second degree?
> . . . .
> To clarify, is count II the assault that allegedly occurred in the living room? And is count III the assault that allegedly occurred in the bedroom?

The court responded to each question by referring the jurors back to their instructions.

Following deliberations, the jury, unable to reach verdicts on counts 3 and 4, reached guilty verdicts on counts 1 and 2. Lee's subsequent motion for a new trial was denied and the court imposed a sentence within the standard range. At sentencing, when the court asked if Lee had anything he wished to say to the

court as it considered his sentence, Lee read a letter he had written out loud for the court, requesting a retrial and asserting that his counsel was ineffective. The court then sentenced Lee to a standard range sentence of 95 months for the rape conviction and 13 months for the assault conviction, to run concurrently.

The court also ordered lifetime community custody and imposed several conditions on Lee for after he is released from prison. Specifically, the court required Lee to "[i]nform the supervising [community corrections officer] and sexual deviancy treatment provider of any dating relationship. Disclose sex offender status prior to any sexual contact. Sexual contact in a relationship is prohibited until the treatment provider approves of such." The court also required Lee to enter and complete a MRT[3] program, which it described as cognitive behavioral therapy treatment. The court also required Lee to pay supervision fees determined by DOC.

Lee appeals.

II

Lee first contends that his conviction must be reversed because, in violation of both the Washington and United States Constitutions, the trial court did not conduct a formal colloquy to determine whether he knowingly, intelligently, and voluntarily waived his right to testify. Lee does not contend that he was unaware of his right to testify, that he wanted to testify, or that he was prevented from testifying. Instead, he contends that the trial court's failure to conduct a colloquy alone merits reversal. We disagree.

[3] MRT appears to stand for moral reconation therapy.

The United States Constitution guarantees criminal defendants the right to testify in their own defense. Rock v. Arkansas, 483 U.S. 44, 51, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). The Rock Court recognized three different sources for this right: (1) the Fourteenth Amendment's right to due process of law, which includes the right to testify, (2) the Compulsory Process Clause of the Sixth Amendment, which sets forth a defendant's right to call relevant witnesses to testify, and (3) the corollary to the Fifth Amendment's guarantee against compelled testimony. 483 U.S. at 51-52.

Criminal defendants are also granted an explicit right to testify under Washington's constitution. State v. Robinson, 138 Wn.2d 753, 758, 982 P.2d 590 (1999). Our constitution provides that "[i]n criminal prosecutions the accused shall have the right . . . to testify in his own behalf." CONST. art. I, § 22.

"The right to testify in one's own behalf has been characterized as a personal right of 'fundamental' dimensions." State v. Thomas, 128 Wn.2d 553, 558, 910 P.2d 475 (1996) (citing Rock, 483 U.S. at 52). "In general, the waiver of a fundamental constitutional right must be made knowingly, voluntarily, and intelligently." Thomas, 128 Wn.2d at 558. Lee asserts that to meet this waiver standard, the trial court must engage in a formal colloquy to inform a defendant of the constitutional right to testify in one's own behalf as set forth in both the United States and Washington Constitutions.

Extensive Federal Circuit Court precedent, however, has maintained that a trial judge need not conduct a formal colloquy to inquire whether a defendant understands the right to testify under the United States Constitution. See, e.g.,

Brown v. Artuz, 124 F.3d 73, 79 (2d Cir. 1997); United States v. McMeans, 927 F.2d 162, 163 (4th Cir. 1991); United States v. Thompson, 944 F.2d 1331, 1345 (7th Cir. 1991); United States v. Bernloehr, 833 F.2d 749, 751-52 (8th Cir. 1987); United States v. Wagner, 834 F.2d 1474, 1483 (9th Cir. 1987); United States v. Systems Architects, Inc., 757 F.2d 373, 375 (1st Cir. 1985); United States v. Janoe, 720 F.2d 1156, 1161 (10th Cir. 1983). Furthermore, our Supreme Court has explicitly held that, as regards the right to testify under the United States Constitution, "a trial judge is not required to advise a defendant of the right to testify in order for a waiver of the right to be valid." Thomas, 128 Wn.2d at 557. The court explained that a judge "may assume a knowing waiver of the right from the defendant's conduct. The conduct of not taking the stand may be interpreted as a valid waiver of the right to testify." Thomas, 128 Wn.2d at 559. Thus, it is plain that a formal colloquy is not required to protect the federal right to testify.

While our Supreme Court has never explicitly held that the right to testify under the Washington Constitution may be waived in the absence of a formal colloquy, it plainly indicated its acceptance of waiver by conduct in Robinson. Therein, the court considered both the state and federal right to testify and explained that:

> On the federal level, the defendant's right to testify is implicitly grounded in the Fifth, Sixth, and Fourteenth Amendments. In Washington, a criminal defendant's right to testify is explicitly protected under our state constitution. This right is fundamental, and cannot be abrogated by defense counsel or by the court. Only the defendant has the authority to decide whether or not to testify. The waiver of the right to testify must be made knowingly, voluntarily, and intelligently, but the trial court need not obtain an on the record waiver by the defendant.

Robinson, 138 Wn.2d at 758-59 (citations omitted) (citing Rock, 483 U.S. at 51-52; Thomas, 128 Wn.2d at 558-59).

That the Supreme Court, in Robinson, referred to "the" right to testify and did not distinguish between the federal and state rights strongly supports a conclusion that, in the court's view, a valid waiver of both may be achieved without the need for an on the record waiver by the defendant.

Similarly, in State v. Russ, we ruled that no formal colloquy is required to have a valid waiver of the right to testify on one's own behalf under the Washington Constitution. 93 Wn. App. 241, 247, 969 P.2d 106 (1998). Therein, this court presumed (without deciding) that the Washington Constitution offered greater protection of the right to testify than does the United States Constitution, but concluded that a formal colloquy was, nevertheless, not required to achieve a valid waiver of the right. Russ, 93 Wn. App. at 245, 247. To reach its holding, the Russ court relied heavily on the analysis presented by our Supreme Court in Thomas, asserting that the primary concerns raised therein were equally applicable to the analysis of the right under the Washington Constitution. 93 Wn. App. at 245-47.

The Russ court gave two main reasons for its conclusion that a colloquy was not required to achieve a valid waiver of the right to testify under the Washington Constitution. The Russ court first explained that, as noted in Thomas, a colloquy with a judge regarding the right to testify "may unduly influence a defendant's decision *not* to testify." 93 Wn. App. at 245 (citing Thomas, 128 Wn.2d at 560). "This is because a defendant's right to testify in her

own behalf is 'in tension with [the] constitutional right to remain silent.'" Russ, 93 Wn. App. at 245-46 (alteration in original) (quoting State v. Robinson, 89 Wn. App. 530, 535, 953 P.2d 97 (1997), rev'd on other grounds, 138 Wn.2d 753, 982 P.2d 590 (1999)). The court concluded that, as a result, "it will generally be inappropriate for a judge to influence a defendant's choice between these two rights. A colloquy that focuses on the right to testify may unduly influence a defendant's exercise of the right not to do so." Russ, 93 Wn. App. at 246. The Russ court next noted that "the Thomas court deemed it 'ill-advised to have judges intrude into the attorney-client relationship or disrupt trial strategy with a poorly timed interjection.'" Russ, 93 Wn. App. at 246 (quoting Thomas, 128 Wn.2d at 560). The Russ court agreed that "there could be tactical reasons, unknown to the judge, that would make it inappropriate for the judge to insert herself into the relationship between client and counsel." 93 Wn. App. at 246. Additionally, relying on foreign authority, the Russ court noted both that it would be difficult for trial judges to properly time when to conduct a colloquy about the right to testify, and that only in rare circumstances would a defendant's failure to take the stand be insufficient to establish an effective waiver of the right to testify. 93 Wn. App. at 246-47.

Lee contends that we should not follow Russ or Robinson and should instead hold that a waiver of the state right to testify is valid only when the trial judge conducts an on the record colloquy with the defendant concerning the right prior to the waiver. Citing to foreign authority, Lee asserts that we should disregard the concerns raised in Russ and in Thomas regarding the tension

between the right to testify and the right to not testify because the right to counsel and the right to self-representation also stand in tension with each other, but on the record inquiries are required to establish a waiver of the right to counsel. Such an argument, relying on foreign authority, does not persuade us to rule against the apparent view of our Supreme Court, as expressed in Robinson, that the right to testify may be waived through a defendant's conduct.[4]

Furthermore, such a comparison is inapt. "Trial courts must 'indulge in every reasonable presumption against a defendant's waiver of his or her right to counsel' before granting a defendant's request to waive the right to assistance of counsel and proceed pro se." State v. Curry, 191 Wn.2d 475, 486, 423 P.3d 179 (2018) (internal quotation marks omitted) (quoting State v. Madsen, 168 Wn.2d

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[4] Additionally, Lee fails to provide the required analysis to support his position that the right to testify as guaranteed under the Washington Constitution requires a formal colloquy.

In State v. Gunwall, our Supreme Court set forth standards for determining when and how the Washington Constitution provides different protections than the United States Constitution for rights protected under both constitutions. 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986). The Gunwall court set forth six nonexclusive criteria as relevant to the analysis: (1) the textual language of the Washington Constitution, (2) significant differences in the text of parallel provisions of the United States and Washington Constitutions, (3) Washington and common law history, (4) preexisting state law, (5) differences in structure between the Washington and United States Constitutions, and (6) whether the matter is of particular state interest or local concern. 106 Wn.2d at 61-62. The Gunwall court further noted that litigants requesting a court to consider whether the Washington Constitution provides greater protection of a right than the United States Constitution must provide thorough briefing so that the court's decision "will be made for well founded legal reasons and not by merely substituting our notion of justice for that of duly elected legislative bodies or the United States Supreme Court." 106 Wn.2d at 62-63.

Lee's briefing attempts, but fails, to provide a complete Gunwall analysis. While it analyzes each of the six criteria set forth in Gunwall, it does so only in the context of determining whether the right to testify under the Washington Constitution requires independent interpretation from the right to testify under the United States Constitution. Br. of Appellant, at 15-18 ("In sum, the nonexclusive Gunwall criteria supports independent interpretation of article I, section 22's guarantee of the right to testify."). That is only half the required analysis. Absent from Lee's Gunwall analysis is any explanation as to why, if we agreed that independent interpretation is warranted, we must conclude that a colloquy is required. When pressed at oral argument to expand on his briefing's analysis, Lee did not offer any further explanation. Such "'naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.'" Gunwall, 106 Wn.2d at 62 (quoting In re Rosier, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986)).

496, 504, 229 P.3d 714 (2010)). But no such presumption exists regarding the right to testify or to decline to testify.[5] Thus, the Russ (and Thomas) court's concerns remain; a colloquy risks improperly influencing a defendant's selection between the right to testify and the right to not testify and interferes with the attorney-client relationship. The trial court did not err by presuming a waiver of Lee's right to testify from his conduct.

III

Lee next contends that the trial court erred by failing to instruct the jury that its verdict must be unanimous as to the acts constituting the charged offenses of assault and rape. This is so, Lee asserts, because there were multiple alleged acts of assault and rape and the State did not make an election as to the specific acts on which it relied for each charge. According to Lee, this permitted the jury, in the absence of a unanimity instruction, to reach a guilty verdict without unanimous agreement as to the specific acts constituting the charged offenses.

To protect a criminal defendant's right to be convicted only if found guilty

[5] A better comparison is to the right to present relevant mitigating evidence for the purposes of sentencing in capital cases. "A capital defendant has a statutory and constitutional right to present relevant evidence in mitigation for the purposes of sentencing." State v. Woods, 143 Wn.2d 561, 608, 23 P.3d 1046 (2001) (citing Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978)). "The defendant is not, however, under any legal obligation to present such evidence." Woods, 143 Wn.2d at 608-09 (citing State v. Sagastegui, 135 Wn.2d 67, 88, 954 P.2d 1311 (1998)). As with other constitutional rights, a defendant may waive the right to present mitigating evidence so long as the waiver is made knowingly, voluntarily, and intelligently. Woods, 143 Wn.2d at 609. The Woods court noted that "the decision of whether or not to present mitigating evidence, like other decisions that must be made in the course of a trial, is one that is influenced by trial strategy. Thus, the responsibility for informing the defendant of this right and discussing the merits and demerits of the decision resides with defense counsel." 143 Wn.2d at 609. The court concluded that "a trial court need not conduct a 'colloquy' to ensure that a capital defendant's decision to waive the right to present mitigating evidence is a voluntary, intelligent, and knowing choice." Woods, 143 Wn.2d at 609.

beyond a reasonable doubt, the jury must be unanimous as to the act constituting the crime charged. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), overruled on other grounds by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988). "When the prosecution presents evidence of multiple acts of like misconduct, any one of which could form the basis of a count charged, either the State must elect which of such acts is relied upon for a conviction or the court must instruct the jury to agree on a specific criminal act." State v. Coleman, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). An election by the State need not be formally pled or incorporated into the information. State v. Carson, 184 Wn.2d 207, 227, 357 P.3d 1064 (2015). As long as the election clearly identifies the particular acts on which charges are based, verbally telling the jury of the election during closing argument is sufficient. Carson, 184 Wn.2d at 227. Whether or not a unanimity instruction was required in a particular case is a question of law reviewed de novo.[6] State v. Boyd, 137 Wn. App. 910, 922, 155 P.3d 188 (2007).

However, no election or unanimity instruction is required when the evidence presented indicates that a defendant's actions constitute a "'continuing course of conduct.'" State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989) (quoting Petrich, 101 Wn.2d at 571). We use common sense to determine whether criminal conduct constitutes one continuing course of conduct or several distinct acts. Handran, 113 Wn.2d at 17. We evaluate whether the evidence shows conduct occurring at one place or at many places, within a brief or long

[6] Failure to provide a required unanimity instruction affects a defendant's constitutional right to a jury trial, and may be raised for the first time on appeal. RAP 2.5(a)(3); State v. Hanson, 59 Wn. App. 651, 659, 800 P.2d 1124 (1990) (citing State v. Camarillo, 115 Wn.2d 60, 64, 794 P.2d 850 (1990); Kitchen, 110 Wn.2d at 409).

period of time,[7] to one or multiple different victims, and whether the conduct was intended to achieve a single or multiple different objectives. See, e.g., State v. Crane, 116 Wn.2d 315, 330, 804 P.2d 10 (1991) ("We believe the appropriate analysis is to apply the 'continuous conduct' exception to the time between 3 and 5 p.m. on May 15 (the most logical period of time when the fatal injuries were inflicted)."), abrogated on other grounds by In re Pers. Restraint of Andress, 174 Wn.2d 602, 56 P.3d 981 (2002); Handran, 113 Wn.2d at 17 ("[W]here the evidence involves conduct at different times and places, then the evidence tends to show 'several distinct acts.'"); State v. Love, 80 Wn. App. 357, 361, 908 P.2d 395 (1996) (differing victims and objectives show distinct acts, not a continuous course of conduct). "Washington courts have found a continuing course of conduct in cases where multiple acts of assault were committed with a single purpose against one victim in a short period of time." State v. Monoghan, 166 Wn. App. 521, 537, 270 P.3d 616 (2012) (citing Love, 80 Wn. App. at 361-62); see also State v. Villanueva-Gonzalez, 180 Wn.2d 975, 984, 329 P.3d 78 (2014) (holding that assault is treated as a course of conduct crime).

A

Lee asserts that the prosecutor did not make an election as to the acts constituting the assaults charged in count 2 and count 3. But this assertion is plainly rebutted by the record.

During closing argument, the prosecutor stated:

Now, there are two counts of assault in the second degree that are

[7] While there is no exact definition of that which constitutes a brief or short period of time, our Supreme Court has used the term to describe a period of two hours during which various acts of assault occurred. State v. Crane, 116 Wn.2d 315, 330, 804 P.2d 10 (1991).

> charged. . . . [T]hese are for separate and distinct acts, which is to say that one of the counts of assault in the second degree is for the strangulation events that occurred in the living area. And one of the strangulation counts is specifically for . . . the strangulation that occurred in the bedroom . . . that was the precursor to the rape.

While the prosecutor did not specify which strangling events applied to count 2 and which to count 3, it is clear that the strangling in the living area formed the basis for one charge and that the strangling in the bedroom formed the basis for the other.[8]

Lee further asserts that the jury showed that it did not understand that each count of assault was supported by separate and distinct acts through the questions it asked the judge regarding the assault charges, specifically the following:

> Two related questions:
> a) How is "separate and distinct" defined in the law?
> b) Why are there two different counts of assault in the second degree?
> . . . .
> To clarify, is count II the assault that allegedly occurred in the living room? And is count III the assault that allegedly occurred in the bedroom?

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[8] Although the parties do not present any analysis, they appear to disagree as to whether the strangling that occurred in the kitchen is a separate and distinct act from the strangling that occurred in the living room or whether they are both part of a continuous course of conduct. The prosecutor treated the strangling in the living room and in the kitchen as continuous conduct when making an election to the jury separating the strangling in the living area from the strangling in the bedroom. Lee asserts that the strangling in the kitchen is distinct from the strangling in the living room and that the prosecutor was required to make an election regarding the strangling in the kitchen and the living room. We disagree.

The record establishes that Lee first strangled K.H. on the couch in the living room, then immediately pursued her and continued to strangle her when she moved to the kitchen, which was only a few feet away from the couch in the living room. Then he continued to strangle her when they moved out of the kitchen back to the living room couch. While he was strangling K.H., Lee kept telling her that she should go out with him. All of this occurred within less than half an hour. Essentially, Lee perpetrated multiple assaults against K.H. in a short period of time in an effort to convince K.H. to go out with him. Therefore, the prosecutor was permitted to treat the strangling in the living room and in the kitchen as a continuous course of conduct and no election between the strangling acts in the kitchen and the strangling acts in the living room was necessary.

Lee avers that these questions establish that the jury did not understand that each count of assault was premised on different conduct and that it needed to reach a unanimous agreement as to which acts were connected to each charge. But that is not a logical reading of the jury's questions. Instead, it is plain that the jury was confused about which specific acts applied to each count of assault, not whether the same acts could be considered for both charges and not whether the jurors must all agree on the conduct covered by each charge. The confusion as to which acts were supporting count 2 as opposed to count 3 shows that the jury understood that the jurors must evaluate each charge based on separate acts. The jury simply sought to clarify which acts were intended to be charged in count 2 and which charged in count 3. The jury's confusion on this point does not require reversal because whether or not the jury correctly matched the prosecutor's election—which, given that the question accurately states the election made by the prosecutor, appears likely—the jury plainly did not indicate any confusion regarding its obligations.

B

Lee also asserts that the trial court should have provided a unanimity instruction as to the rape charge because the evidence showed multiple separate and distinct acts of penetration and the prosecutor did not make an election. This assertion fails because Lee's various acts of forced sexual contact constituted a single continuous course of conduct.

To support his assertion, Lee relies primarily on State v. Tili, 139 Wn.2d 107, 985 P.2d 365 (1999). Therein, the defendant, Tili, illegally entered an

apartment and digitally penetrated his victim before raping her with his penis. Tili, 139 Wn.2d at 111. He was convicted on three counts of rape based on different penetrative acts that occurred during the same incident. Tili, 139 Wn.2d at 112. On appeal, Tili asserted his convictions violated the constitutional prohibition against double jeopardy, but the court concluded that because Tili's separate penetrations of the victim were separate units of prosecution, his various convictions did not violate double jeopardy. Tili, 139 Wn.2d at 119. Herein, Lee asserts that this means that the prosecutor was required to make an election between the different instances of Lee penetrating K.H. because each penetration could constitute a separate unit of prosecution.

Lee's argument fails because Tili addresses the issue of double jeopardy when a defendant faces the maximum number of convictions that may be premised on a series of penetrative acts each of which could individually constitute rape. The opinion did not require prosecutors to always bring the maximum number of possible charges and, thus, does not address the situation herein in which multiple penetrative acts are aggregated into one charge. Merely because the State could have charged Lee with more than one count of rape does not necessarily mean that a unanimity instruction or an election is required when the State declines to do so.

Herein, Lee's acts of sexual penetration involved the same victim, K.H., occurred in one place, K.H.'s bed, occurred within a brief period of time, less than 10 minutes, and occurred for the single purpose of Lee's sexual gratification. Lee's acts were plainly a continuing course of conduct, and no election or

unanimity instruction was required.

IV

Lee next asserts that his convictions for rape and assault violate the constitutional prohibition against double jeopardy. We disagree.

We review whether multiple punishments constitute double jeopardy de novo. State v. Daniels, 160 Wn.2d 256, 261, 156 P.3d 905 (2007) (citing State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006)). "[T]o prevail in a double jeopardy challenge, a defendant must not only show the existence of two 'punishments'" but "must also affirmatively establish he or she has been punished twice for the same offense." State v. Clark, 124 Wn.2d 90, 101, 875 P.2d 613 (1994), overruled on other grounds by State v. Catlett, 133 Wn.2d 355, 945 P.2d 700 (1997); see also State v. Ridgley, 70 Wn.2d 555, 557, 424 P.2d 632 (1967).

The Fifth Amendment to the United States Constitution and article I, section 9 of the Washington Constitution prohibit multiple punishments for the same offense. State v. Gocken, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995). More than one punishment for a criminal act that violates more than one criminal statute, however, does not necessarily constitute multiple punishments for the same offense. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). "Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense." State v. Nysta, 168 Wn. App. 30, 44, 275 P.3d 1162 (2012) (citing State v. Freeman, 153

Wn.2d 765, 771, 108 P.3d 753 (2005)). When the legislative intent is not clear,[9] we apply the Blockburger[10] test. Freeman, 153 Wn.2d at 776.

Under the Blockburger test, "if the crimes, as charged and proved, are the same in law and in fact, they may not be punished separately absent clear legislative intent to the contrary." Freeman, 153 Wn.2d at 777 (citing Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)). "If each offense requires proof of an element not required in the other, where proof of one does not necessarily prove the other, the offenses are not the same and multiple convictions are permitted." State v. Louis, 155 Wn.2d 563, 569, 120 P.3d 936 (2005). We must consider "the elements of the crimes as charged and proved, not merely as the level of an abstract articulation of the elements." Freeman, 153 Wn.2d at 777. Thus, our inquiry requires determining "whether the *evidence required* to support the conviction for [one offense] would have been sufficient to warrant a conviction upon the other." Nysta, 168 Wn. App. at 47.

Herein, Lee contends that his convictions for rape in the second degree and assault in the second degree *may* be the same "in fact" because assault by strangulation could have been viewed by the jury as proof of the forcible compulsion required to convict him of rape.[11] Lee further contends that this

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[9] The statutes setting forth the pertinent crimes herein—rape in the second degree and assault in the second degree—do not explicitly authorize cumulative punishment when a defendant commits both offenses against the same victim. RCW 9A.36.021; RCW 9A.44.050.

[10] Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

[11] Lee concedes that the abstract elements of rape in the second degree by forcible compulsion and assault in the second degree by strangulation are different "in law." Indeed, to prove the charge of rape in the second degree filed herein, the State had to prove that Lee "engage[d] in sexual intercourse with another person . . . [b]y forcible compulsion." RCW 9A. 44.050(1)(a). In comparison, to prove the charge of assault in the second degree filed herein, the State had to prove that Lee "[a]ssault[ed] another by strangulation or suffocation." RCW 9A.36.021(1)(g). Proof of sexual intercourse was not needed to convict Lee of assault in the

possibility is sufficient to require vacating his assault conviction. Essentially, Lee asserts that unless the State can affirmatively establish that the jury did not base its verdict on the rape charge on Lee's acts of strangulation, the risk of double jeopardy requires vacating his assault conviction.

Lee is wrong. It is his burden to affirmatively establish that he faces multiple punishments for the same offense. Clark, 124 Wn.2d at 101.

As the State notes in its briefing, Lee cannot so establish double jeopardy herein. The record contains evidence of other acts that could satisfy the forcible compulsion requirement set forth in the statutory definition of rape in the second degree. Forcible compulsion is defined as "physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped." RCW 9A.44.010(6). In addition to strangling K.H., Lee verbally threatened her such that she was in fear for her life and used his forearm to pin her down by her collarbone while he forcibly removed her clothing. Any of these actions could have independently established forcible compulsion.[12] Thus, Lee has failed to prove a double

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second degree. Similarly, proof of strangulation was not required to prove that Lee used forcible compulsion to engage in sexual intercourse. See RCW 9A.44.010(6) (defining forcible compulsion as "physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped").

[12] Lee's argument is identical to one we previously rejected in Nysta. Therein, we explained that

> Nysta appears to assume that a double jeopardy violation occurs whenever the evidence *available* to prove one conviction is sufficient to support the other conviction. That assumption is incorrect. Blockburger and [In re] Orange[, 152 Wn.2d 795, 100 P.3d 291 (2004)] use the terms "necessary" and "required" when stating the test. . . . In this case, it cannot be said that the evidence *required* to support the conviction for second degree rape was sufficient to convict Nysta of felony harassment.

jeopardy violation.[13]

V

Lee next contends that several conditions of community custody imposed by the trial court are insufficiently crime-related and should therefore be stricken or modified. Lee also asserts that he should not have been required to pay DOC supervision fees.

A

Lee challenges three conditions of community custody: (1) that he is required to disclose his offender status prior to any sexual contact, (2) that he is prohibited from having "sexual contact in a relationship" until a treatment provider approves, and (3) that he is required to complete a MRT program to receive cognitive behavioral therapy. According to Lee, these conditions are not crime-related and are therefore overbroad and unnecessary. We disagree.

We review community custody conditions for an abuse of discretion. State v. Hai Minh Nguyen, 191 Wn.2d 671, 678, 425 P.3d 847 (2018) (citing State v. Bahl, 164 Wn.2d 739, 753, 193 P.3d 678 (2008)). A court abuses its discretion if

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> The death threat was *available* to support second degree rape, but it was not *required*.

Nysta, 168 Wn. App. at 49.

[13] Lee appears to assert that our Supreme Court agreed, in State v. Mutch, 171 Wn.2d 646, 254 P.3d 803 (2011), that a defendant need only establish that there was a possibility of a double jeopardy violation to establish reversible error. Mutch does not so hold. Therein, the court considered whether five convictions for rape violated the prohibition against double jeopardy. Mutch, 171 Wn.2d at 662. The defendant, Mutch, asserted that because the to-convict instructions did not include any language informing the jury that each count of rape must be based on a separate and distinct criminal act, the convictions potentially could have violated the prohibition against double jeopardy. Mutch, 171 Wn.2d at 662. The court concluded that the possibility was not enough, and that Mutch had not established that a double jeopardy violation had actually occurred. Mutch, 171 Wn.2d at 663, 666. Similarly, herein, Lee has not even asserted that a double jeopardy violation definitely occurred, let alone affirmatively established that a violation occurred.

a condition is either unconstitutional or manifestly unreasonable. Hai Minh Nguyen, 191 Wn.2d at 678 (citing Bahl, 164 Wn.2d at 753).

Conditions of community custody are set forth as part of the Sentencing Reform Act of 1981[14] (SRA), and include conditions that are mandatory, conditions that are presumptively imposed but are waivable, and conditions that are wholly discretionary. RCW 9.94A.703(1)-(3). A court is authorized to impose discretionary community custody conditions as part of a sentence. RCW 9.94A.703(3). As part of that authority, a court may order offenders to "[p]articipate in crime-related treatment or counseling services[,] . . . [p]articipate 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[,] . . . [and] [c]omply with any crime-related prohibitions." RCW 9.94A.703(3)(c), (d), (f).

A community custody condition is not impermissibly overbroad if it is crime-related. State v. McKee, 141 Wn. App. 22, 37, 167 P.3d 575 (2007); State v. Bahl, 137 Wn. App. 709, 714, 159 P.3d 416 (2007), overruled on other grounds, 164 Wn.2d 739, 193 P.3d 678 (2008). A crime-related prohibition must relate "to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). Thus, there must be some evidence in the record connecting the community custody condition to the crime. State v. Irwin, 191 Wn. App. 644, 656-57, 364 P.3d 830 (2015).

Lee first contends that requiring him to disclose his sex offender status

[14] Ch. 9.94A RCW.

prior to any sexual contact violates his right to refrain from speaking. Lee is correct that it is generally true that individuals have "both the right to speak freely and the right to refrain from speaking at all." Wooley v. Maynard, 430 U.S. 705, 714, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977); see also State v. K.H.-H., 185 Wn.2d 745, 748-49, 374 P.3d 1141 (2016). This right not to speak is protected both by the First Amendment to the United States Constitution and by article I, section 5 of the Washington Constitution. However, "[a]n offender's usual constitutional rights during community placement are subject to SRA-authorized infringements." State v. Hearn, 131 Wn. App. 601, 607, 128 P.3d 139 (2006) (citing State v. Riles, 135 Wn.2d 326, 347, 957 P.2d 655 (1998)). Therefore, because the SRA authorizes crime-related conditions, the condition placed on Lee does not violate his right not to speak if the required utterance is crime-related.

Lee does not present any argument to explain why requiring him to inform sexual partners of his status is not crime-related.[15] Lee was convicted of assaulting and raping a romantic partner. Requiring him to forewarn future partners, so that they can make an informed decision regarding their personal safety in relation to their association with Lee, is plainly crime-related.

[15] Instead, Lee asserts that the condition is unnecessary. This is so, he asserts, because he will only be permitted to re-enter the community once the Indeterminate Sentence Review Board (ISRB) determines that he is safe. However, the ISRB is required to release Lee upon the completion of his sentence "unless the board determines by a preponderance of the evidence that . . . it is more likely than not that the offender will commit sex offenses if released." RCW 9.95.420(3)(a). The ISRB does not guarantee that released offenders are "safe." Lee also asserts that the condition is unnecessary because individuals can look up Lee in the sex offender registry. This defies common sense. Speculation that individuals might check the sex offender registry is plainly insufficient to negate the requirement that Lee inform potential partners of his status.

Second, Lee asserts that the condition requiring him to obtain approval from his treatment provider prior to having sexual contact in a relationship is overbroad and, thus, not crime-related. He also asserts, relying on Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), that the condition denies him his constitutional right to sexual intimacy.

As with his argument regarding his right not to speak, Lee disregards his status as a parolee with reduced rights. Lawrence did not analyze the reduced rights of a parolee, and as already noted, a parolee's constitutional rights are subject to SRA-authorized infringements. Hearn, 131 Wn. App. at 607. Furthermore, the requirement is plainly crime-related. Lee was convicted of raping and assaulting a person in the context of a romantic dating relationship. Requiring approval from his treatment provider before having sexual contact with future romantic partners is crime-related and, thus, not overbroad.

Third, Lee asserts that the condition requiring him to enter and complete a MRT program for cognitive behavioral therapy treatment is not crime-related. MRT is a form of cognitive behavioral therapy treatment that seeks to improve moral reasoning. WASHINGTON GENDER & JUSTICE COMMISSION, Domestic Violence Perpetrator Treatment: A Proposal for an Integrated System Response (ISR): Report to the Washington State Legislature, 54, https://www.courts.wa.gov/content/publicUpload/GJCOM/DV_Perpetrator_Treatment_Sec7.pdf (June 2018). To support his assertion, Lee cites to State v. Vasquez, 95 Wn. App. 12, 15, 972 P.2d 109 (1998), wherein this court struck a condition requiring completion of a MRT program.

In Vasquez, the defendant was convicted of assault in the second degree. In the presentencing report, the assigned community corrections officer made comments that indicated that completion of a MRT program was recommended because the officer thought it would generally improve Vasquez's ability to make good decisions. Vasquez, 95 Wn. App. at 16. Vasquez asserted that this was insufficient evidence to establish that the condition was crime-related, and the State did not respond. The Vasquez court concluded that, given these comments, and without any other argument or evidence in the record showing that the condition was crime-related, there was insufficient evidence to impose the condition. 95 Wn. App. at 16-17.

Herein, Lee asserts that, as in Vasquez, nothing in the record supports the condition requiring him to complete a MRT program. In response, the State contends that evidence of Lee's crime of rape is sufficient to establish that completion of a MRT program is crime-related. This is so, the State asserts, because Lee's rape of K.H. showed a total lack of empathy, prioritizing Lee's desire for sex over K.H.'s safety and personal autonomy. According to the State, undergoing completion of a MRT program is therefore crime-related because it will impart to Lee a more sophisticated moral understanding, reducing the chance he will demonstrate such a total lack of empathy in the future.

We agree with the State: the requirement that Lee complete a MRT program is sufficiently crime-related. Unlike in Vasquez, Lee does not identify anything in the record to indicate that the condition was imposed to "generally" improve his ability to make good decisions. Evidence of Lee's rape of K.H.

indeed does show a total lack of empathy, prioritizing his desire for sexual gratification over her safety and her control over her own body. A program designed to improve Lee's moral understanding is therefore crime-related.[16]

B

Finally, Lee requests that we strike the requirement that he pay DOC supervision fees as a condition of his community custody. This matter is governed by our recent decision in State v. Dillon. No. 78592-3-I, slip op. at 17 (Wash. Ct. App. Feb. 3, 2020), http://www.courts.wa.gov/opinions/pdf/785923.pdf. In accordance with Dillon, we remand for the sentencing court to strike the community custody DOC supervision fee requirement.

Affirmed in part, reversed in part, and remanded.

WE CONCUR:

[16] In a statement of additional grounds (SAG), Lee appears to assert that he was improperly denied a request for new counsel. This is not so. Lee's SAG appears to refer to the conclusion of his sentencing hearing. Immediately prior to deciding Lee's sentence, the sentencing judge asked Lee if there was anything he wished to say to the court before he was sentenced. Lee read a letter he had written in which he asserted that his lawyer was ineffective because she kept urging him to take a plea deal and mishandled his case. Lee did not assert that he had ever asked for new counsel, nor did he ask for new counsel at the time he read the letter. Even if he had requested new counsel for trial, such a request made immediately prior to sentencing would have been untimely.

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