SUPREME COURT NO. 98740-8

NO. 81044-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM THOMPSON,

Petitioner.

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

The Honorable Jeffrey P. Bassett, Judge

PETITION FOR REVIEW

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WASHINGTON CASES

RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner William Thompson, the appellant below, asks this Court to grant review pursuant to RAP 13.4 of the Court of Appeals' unpublished decision in State v. Thompson, ___ Wn. App. ___, ___ P.3d ___, 2020 WL 3052994 (No. 81044-8-I, filed June 8, 2020).[1]

B. ISSUE PRESENTED FOR REVIEW

Thompson was convicted of four counts of first degree incest. Each count contained identical charging language and an identical charging period. The jury instructions did not state that a separate act was required for each count. Is review appropriate under RAP 13.4(b)(3) where the Court of Appeals decision concluding there was no double jeopardy violation violates Thompson's right to be free from double jeopardy and implicates issues of constitutional significance?

C. STATEMENT OF THE CASE

1. Charges and Evidence at Trial.

A jury convicted William Thompson of four counts of first degree incest and one count of second degree rape of a child for incidents alleged to have occurred against M.T. between February 1, 2011 and February 6,

[1] A copy of the opinion is attached as an appendix.

2012. CP 47-53; 3RP[2] 3-4. The jury further found each offense was committed against a family member, was part of an ongoing pattern of sexual abuse, and that Thompson abused a position of trust. CP 47-53.

Shortly before her scheduled high school graduation, Thompson's daughter, M.T. announced that she was leaving the house and moving in with her mother. The prior understanding was that M.T. would reside with the Thompson's until after they graduated. 3RP 787-89, 839-40. M.T. moved out of the house one week after her 18th birthday, telling people that she needed a change of pace. 3RP 652-53, 666, 731. M.T. believed the house rules were too strict and that she did not have any privacy. 3RP 699-700. In the months before she moved out, none of M.T.'s family members noticed that she was behaving oddly or avoiding contact with Thompson. 3RP 787, 796-97, 835-36, 848-49, 863, 886-87.

Around the same time, she moved out of Thompson's house, M.T. went to her school counselor and disclosed for the first time that Thompson had engaged in sexual contact with her for several years. 3RP 653-55, 661-62, 814-15. The counselor contacted police in response to M.T.'s allegations. 3RP 607-08, 662. As part of their investigation, police obtained a warrant that allowed M.T. to record a telephone conversation between her and Thompson, without Thompson's consent. 3RP 662, 608-

[2] The index to the citations to the record is found in the Brief of Appellant (BOA) at 3, n. 1.

11. During the conversation, M.T. indirectly confronted Thompson about the alleged incidents. Thompson repeatedly denied knowing what M.T. was talking about, but apologized for being a bad father to M.T. He also made statements about taking his own life. 3RP 621, 982.

At trial, M.T. could not provide any specific details about Thompson's anatomy, even though Thompson shaved his pubic hair and had "two very large scars" on his testicles from a reverse vasectomy. 3RP 725, 784-85. M.T. nonetheless testified about multiple alleged incidents that occurred in the days before her 13th birthday until she was 16 or 17-years-old. 3RP 630, 637-38, 640-41, 647-48, 65-51, 672, 674-75, 724, 743, 758-59.

M.T. testified that the first alleged incident occurred five days before her 13th birthday. No one else was home at the time. Thompson called M.T. downstairs and told her that he was going to do "some things" to her but she could not tell anyone, or her family would be harmed. 3RP 631, 638-39, 644-45. Thompson grabbed M.T.'s breast underneath her shirt, took off her underwear, and put his finger inside her vagina. 3RP 632-33. He then put his penis inside her vagina. 3RP 634-36.

During a different incident, Thompson told M.T. to take a shower with him. 3RP 637-38. M.T. could not recall when exactly the incident

happened but testified that Thompson put his penis inside her vagina in the shower. 3RP 637-40, 723-24.

M.T. also testified that Thompson engaged in oral sex with her twice. 3RP 640. During one incident, Thompson woke M.T. up while everyone continued to sleep. M.T. got on her hands and knees and licked Thompson's penis. 3RP 642-44. During another incident, M.T. got on top of Thompson and put his penis inside her mouth while he licked her vagina. 3RP 640-41.

M.T. testified that multiple other incidents happened during the same period of time. As M.T. explained,

> Sometimes it would be like once a week, sometimes it would go a couple months where nothing would happen and then it would start again. There were sometimes where it would happen a couple times a week. It didn't have any kind of regular schedule. It just happened, I guess.

3RP 647, 722-24. The other incidents included vaginal and anal penetration. 3RP 648, 672, 724. M.T. never told Thompson to stop and never told anyone else about the incidents because she was scared that she or someone else would be hurt. 3RP 648-52, 724, 756-57.

The incidents stopped entirely around the time M.T. turned 16 or 17-years-old. Thompson told M.T. that the incidents would stop without explaining why. 3RP 650-51, 726, 743. Although M.T. had told people she was moving out of Thompson's for a change of pace, she testified that

she decided to leave because she was having anxiety attacks and difficulty sleeping. 3RP 652, 749.

M.T. acknowledged that she wrote Thompson several letters during the time frame of the incidents expressing her love for Thompson. 3RP 663-64, 684, 741-42, 758, 797. M.T. acknowledged that she continued to be close to Thompson even after the alleged incidents. 3RP 664. Although Thompson never hit M.T. or anyone else, she took his threats about harming other people seriously because of the tone of his voice. 3RP 744-45.

Several people testified in Thompson's defense at trial. Thompson's wife, Elisabeth, explained that she and Thompson always shared a bed during their marriage. Elisabeth was a light sleeper and only ever heard Thompson get up during the night to use the bathroom. 3RP 781-82, 807-08. Elisabeth explained that she never suspected any inappropriate contact between Thompson and M.T. 3RP 806. In fact, M.T. never seemed withdrawn and made active efforts to spend time alone with Thompson in the months before she moved out. 3RP 787, 791-92. Thompson's other children also denied observing any unusual behavior between Thompson and M.T. 3RP 835-36, 848-49, 863, 867, 886-87, 890.

Mike Best was the music and arts teacher at the Thompson's church. Thompson often brought his family to church. 3RP 818-20. Best observed the relationship between Thompson and M.T. to be perfectly normal. As Best explained, M.T. was typically shy around other people but "super warm with her dad." 3RP 821-22. Best was a mandatory reporter and would not have hesitated to report any behavior that gave him concern. 3RP 822.

2. Jury Instructions and Closing Argument.

The jury was provided with general instructions to apply the law from the court's instructions, and not to rely on attorney remarks as the source of law. CP 56-58 (instruction 1). The instructions also stated all instructions are important, the order of instructions is of no significance, and that lawyers may discuss specific instructions during argument, but the jury was to "consider the instructions as a whole." CP 56-58 (instruction 1).

For count two, first degree incest, the "to-convict" instruction read:

> To convict the Defendant of the crime of incest in the first degree as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or between February 1, 2011 and February 7, 2012, the defendant engaged in sexual intercourse with [M.T.];

> (2) That [M.T.] was related to the defendant as a daughter;
>
> (3) That at the time the defendant knew the person with whom he was having sexual intercourse was so related to him; and
>
> (4) That any of these acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 70 (instruction 13).

The language of the "to convict" instruction for first degree incest as charged counts III through V, merely replaces "count II" with the respective count and is otherwise identical to the instruction for count II. CP 71-73 (instructions 14-16). The "to convict" instructions contained no additional language addressing unanimity, and contained the same time-frame alleged in count II.

Several instructions were relevant to unanimity, including the following. Instruction No. 4 provides in relevant part, "A separate crime is charged in each count. You must decide each count separately. … ." CP 63. The jury was also instructed that although the State had alleged

multiple acts of first degree incest, they must unanimously agree to a specific act to support each respective conviction. CP 75-78 (instructions 18-21).

Jurors were instructed as follows:

> In alleging that the defendant committed incest in the First Degree as charged in Count II, the State relies upon evidence regarding a single act constituting the alleged crime. To convict the defendant, you must unanimously agree that this specific act was proved.

CP 75 (instruction 18).[3] No other instruction informed the jury that each of the four counts of incest must be supported by separate and distinct acts.

During closing argument, the prosecutor attempted to further define what specific acts it was relying on for each charged count. As the prosecutor stated,

> We've charged the defendant with a large time -- basically a large time gap. Five years. The time frame that Mona says she was raped. But during those time frames, we've charged him with five specific counts. And I'll go over them right now, so that when you're deliberating you don't forget which ones are which.
>
> The first count, Rape of a Child in the Second Degree, and the second count, Incest in the First Degree, those two counts go together. Those counts are for the first time that Mona was raped when she was 12.
>
> The third count, Incest in the First Degree. That count is for the time that he raped her in the shower.

[3] Instructions 19-21 merely replaces "count II" with the respective count and is otherwise identical to the instruction quoted above. CP 76-78 (instructions 19-21).

> The fourth count of Incest in the First Degree is for the time that she was down on all fours forced to give her dad oral sex.
>
> And the next count of Incest in the First Degree is for the time that she was forced to give him oral sex for the first time. When he described to her what 69 was for the first time. And she ended up throwing up after he shoved his penis in her mouth.
>
> So to recap: Count I and Count II are the taking the virginity instance; Count III is for the shower; Count IV is for when she was down on all fours in her bedroom; And Count V is for the first time that he made her have oral sex.

3RP 956-57.

3. Court of Appeals.

On appeal, Thompson argued in part that the jury instructions inadequately clarified for the jury that it could not convict him of multiple counts based on a single act, and therefore Thompson was subjected to double jeopardy.

In an unpublished decision, the Court of Appeals properly recognized that the jury was not instructed that each count required proof of a separate and distinct act. Op. at 6. The Court nonetheless concluded that the lack of adequate jury instructions did not violate Thompson's right to be free of double jeopardy because the evidence, prosecutor's closing argument, and remaining instructions created clear distinctions between the three identically charged counts. Op. at 6-7.

Thompson now asks this Court to accept review, reverse the Court of Appeals, and dismiss three of his convictions that violate double jeopardy.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THE COURT OF APPEALS DECISION THAT THOMPSON'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY WAS NOT VIOLATED IMPLICATES IMPORTANT CONSTITUTIONAL ISSUES.

The right to be free from double jeopardy "is the constitutional guarantee protecting a defendant against multiple punishments for the same offense." State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007) (citing U.S. CONST., Amend. V; WASH. CONST., art. I, § 9). Double jeopardy claims are reviewed de novo and may be raised for the first time on appeal. State v. Mutch, 171 Wn.2d 646, 661-62, 254 P.3d 803 (2011).

Jury instructions "'must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror.'" Borsheim, 140 Wn. App. at 366 (quoting State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006)). To adequately protect against a double jeopardy violation, instructions must make "manifestly apparent to the jury that each count represented a separate act." Mutch, 171 Wn.2d at 665-66. Vague jury instructions that do not convey this requirement are

flawed because they create the risk of multiple punishments for a single act and so create the risk of a double jeopardy violation. Id.

The Borsheim Court held an instruction that the jury must find a "separate and distinct" act for each count is required when multiple counts of sexual abuse are alleged to have occurred within the same charging period. 140 Wn. App. at 367-68. Without this instruction, the accused is exposed to multiple punishments for the same offense, violating his right to be free from double jeopardy. Id. at 364, 366-67. The court vacated three of Borsheim's four child rape convictions for this instructional omission. Id. at 371.

Where a double jeopardy violation is found, the conviction(s) must be vacated. Borsheim, 140 Wn. App. at 371. However, since Borsheim, this Court has clarified that the mere possibility of a double jeopardy violation does not require automatic reversal. See Mutch, 171 Wn.2d at 665; State v. Land, 172 Wn. App. 593, 603, 295 P.3d 782, rev. denied, 177 Wn.2d 1016, 304 P.3d 114 (2013). The reviewing court must consider the insufficient instructions "in light of the full record." Mutch, 171 Wn.2d at 665. Reversal is required unless the Court is "convinced beyond a reasonable doubt" that the flawed instructions did not actually effect a double jeopardy error. Id. at 665; Borsheim, 140 Wn. App. at 371 (reversal required). Stated another way, the context of the trial as a whole must convince the reviewing court beyond a reasonable doubt that the jury relied on separate and distinct acts to

convict for each count. Id. at 665. The jury instructions in Thompson's case were flawed and do not satisfy this standard. Thus, three of his counts of first degree incest must be vacated.

Here, four counts of first degree incest (counts II through V) were alleged to have occurred within the same charging period: 2/1/11 - 2/6/12. See CP 47-53 (same charging period), 70-73 (instructions 13-16). The jury instructions with respect to these counts did not provide adequate protection against a double-jeopardy violation.

The jury was instructed that the State had alleged multiple acts of incest, and for each count, "the State relies upon evidence regarding a single act constituting the alleged crime. To convict the defendant, you must unanimously agree that this specific act was proved." CP 75-78 (instructions 18-21). This instruction requires general unanimity, but just as the general "separate crime instruction" discussed below, this instruction does not require a separate and distinct act for each count, and so fails to protect against a double jeopardy violation. See Mutch, 171 Wn.2d at 663.

Moreover, no other instruction informed the jury that each of the counts of incest must be supported by separate and distinct acts. For example, the jury was instructed "[a] separate crime is charged in each count. You must decide each count separately. … ." CP 63 (instruction

6). However, as this Court recognized in Mutch, this instruction is merely a general "separate crime instruction," and is insufficient to protect against a double jeopardy violation because "it still fails to 'inform[ ] the jury that each "crime" required proof of a different act.'" 171 Wn.2d at 663 (quoting Borsheim, 140 Wn. App. at 367 (citing State v. Berg, 147 Wn. App. 923, 953, 198 P.3d 529 (2008)).

Here, the instructions left open the possibility that the jurors would unanimously agree to one act of incest and would rely on that one act to support each of the four counts. Because none of the remaining instructions conveyed to the jury that they must find separate and distinct acts to support each of counts II through V, the instructions failed to protect against a double jeopardy violation. Borsheim, 140 Wn. App. at 364, 366-67.

In Mutch, the State charged five identical counts of rape, all within the same charging period. 171 Wn.2d at 662. There was sufficient evidence of five separate acts of rape, but the jury was not instructed that each count must arise from a separate and distinct act in order to convict. Id. at 662-63. The possibility that the jury convicted Mutch on all five counts based on a single criminal act created a potential double jeopardy violation. Id. at 663.

In Land the Court of Appeals similarly found the instructions inadequate where they failed to inform the jury they must find "separate and

distinct" acts to support each count, where both counts involved sex offenses during the same charging period. Land, 172 Wn. App. at 602. This allowed for the possibility that the child rape and molestation convictions could have been based on one act in violation of double jeopardy. Id. at 601-02 (considering rape and molestation charges could be based on allegations of oral sex).

Like Mutch and Land, Thompson was charged with multiple sex offenses within the same charging period, yet the instructions failed to inform the jury that separate and distinct act were required to convict for each incest count. The instructions similarly failed to protect against a double jeopardy violation and so were flawed.

Where a double jeopardy violation is found, the appellate court must vacate the offending conviction. Borsheim, 140 Wn. App. at 371. However, flawed jury instructions do not always ripen into an actual double jeopardy violation. If after reviewing the record as a whole, the court is persuaded beyond a reasonable doubt that despite flawed instructions it is "manifestly apparent" the jury based each conviction on a separate and distinct act, then the convictions may stand. Mutch, 171 Wn.2d at 665; see also Land, 172 Wn. App. at 601-03 (citing Mutch, 171 Wn.2d at 663-65).

In Mutch, this Court found the jury instructions were flawed. 171 Wn.2d at 663. However, the Court held that case "presented a rare

circumstance where, despite deficient jury instructions," it was nevertheless "manifestly apparent" jurors based each conviction on a separate and distinct act. Id. at 665. The Court was "convinced beyond a reasonable doubt, based on the entire record, that the jury instructions did not actually effect a double jeopardy violation." Id.

First, the victim, J.L., testified to precisely the same number of rape episodes (five) as there were counts charged and to convict instructions. Id. at 651. Second, the defense essentially conceded these interactions; Mutch admitted to a detective that he engaged in multiple sex acts with J.L., his defense was that of consent rather than denial, and the defense did not contest the number of episodes in closing argument. Id. Third, during closing argument the prosecutor discussed each of the five alleged acts individually and both parties emphasized that jurors must unanimously agree to a separate and distinct act to support each count. Id. at 665.

Given this context, this Court concluded that all indications were that the jury was not confused and had relied on five specific instances of sexual contact to support the five rapes charged. Id. at 665-66. Rather, "it was manifestly apparent to the jury that each count represented a separate act." Id. at 665-66. Despite the deficient jury instructions, the Mutch Court was convinced beyond a reasonable doubt that an actual double jeopardy violation did not occur. Id. at 666.

In keeping with the Mutch Court's analysis, the Court of Appeals in Land found the failure to instruct on the separate and distinct acts requirement allowed for the possibility in theory that the counts of child rape and child molestation could have been based on the same conduct, i.e. allegations of oral sex, in violation of double jeopardy. Land, 172 Wn. App. at 601-02. However, after evaluating the context of the trial, the Land Court concluded it was "manifestly apparent" the jury had not convicted Land of both rape and child molestation on the basis of one act. Id. at 603.

The Land Court considered the following factors. First, the testimony of the victim, S.H., alleged that Land had kissed and touched her breasts and "lower part" both under and over her clothing. Id. at 601. This "vague" testimony did not include any clear allegation that Land's mouth had come into contact with her genitals, and so could support the molestation count, but not the rape count. Id. The only evidence of rape was S.H.'s testimony that Land had penetrated her vagina with his finger. Id. at 602. Second, the prosecutor's use of this testimony in closing made a clear election of the finger penetration to support the rape count, and of the touching of her breast and her vagina up until the point of penetration to support the molestation. Id. Third, the charging language and "to-convict" instructions of the two counts were not identical; the rape instruction and

charge used the language "sexual intercourse" whereas the molestation instruction and charges stated "sexual contact." Id. at 602-03.

The Land Court reasoned, that taken together, it was "manifestly apparent" to the jury that the rape and molestation counts were not based on the same alleged act of oral sex, and no other act could, as a matter of law, support both different crimes. Id. at 603. Thus, there was no double jeopardy violation in fact. Id.

The context of Thompson's trial is distinct from that of Mutch and Land in all important respects. First, M.T.'s testimony made clear there were multiple alleged incidents of oral and genital penetration beyond just the five that were charged. 3RP 630, 637-38, 640-41, 647-48, 672, 674-75, 724, 743, 758-59. Without identifying a specific time period, M.T. explained that sometimes incidents would happen as often as once a week. 3RP 647, 672, 722-23. Thus, there was no clear match between the number of precise incidents testified to and the number of counts charged as there was in Mutch.

Second, Thompson's defense was not consent but rather complete denial. Thompson consistently maintained that no incidents of sexual contact had occurred between him and M.T. Thus, unlike in Mutch, the existence and number of instances of sexual contact was not agreed by both parties.

In Land, the double jeopardy violation involved rape and molestation, which could only even theoretically violate double jeopardy if the jury relied on oral sex to support both counts. See Land, 172 Wn. App. at 600-03. Thus, where the allegation of oral sex was not, as a matter of law, sufficient to support the rape, not even a theoretical risk of a double jeopardy violation remained. Id. In contrast, the double jeopardy violation in Thompson's case involves four counts of the identical crime.

Finally, unlike the charging document and "to-convict" instructions in Land, the information and "to-convict" instructions for counts II through V were essentially identical. See CP 70-73 (instructions 13-16). Thus, these documents did not provide clarity to the jury regarding how to differentiate between the counts.

Despite Thompson's extensive citations to Mutch and Land, the Court of Appeals opinion undertakes no real analysis of the factors set forth in those cases, or explains why the significant factual distinctions identified by Thompson does not render Mutch and Land in conflict with Thompson's case. Rather, the Court of Appeals opinion resolves the double jeopardy violation by relying almost entirely on the prosecutor's election during closing argument. See Op. at 7. But counsel's closing argument is just that: argument. See CP 57 (Instruction 1 reminds jurors that "The lawyers' remarks, statements, and argument are intended to help you

understand the evidence and apply the law[,]" but that "the lawyers' statements are not evidence" and "The evidence is the testimony and the exhibits[,]" and "The law is contained in [the court's] instruction to you.").

In State v. Kier, 164 Wn.2d 798, 808, 194 P.3d 212 (2008), the state argued Kier's assault and robbery convictions did not merge because they were committed against separate victims. Noting the case before it was somewhat analogous to a multiple acts case, the court indicated it was at best unclear whether the jury believed Kier committed the crimes against the same or different victims. Id. at 811. The rule of lenity requires ambiguous jury verdicts to be resolved in the defendant's favor. Id. Therefore, because the evidence and instructions allowed the jury to consider whether a single person was the victim of both the robbery and assault, the verdicts were ambiguous and would violate double jeopardy to not merge the offenses. Id. at 814.

This Court likewise intimated as much in Mutch, when it opined it will be a "rare circumstance" where jury instructions like those here – that do not make it manifestly apparent that each count must be based on a separate and distinct act– will not result in a double jeopardy violation. Mutch, 171 Wn.2d at 665. The "rare circumstances" that existed in Mutch are absent here. Instead, the evidence presented at Thompson's

trial consisted of multiple alleged acts of sexual contact against the same complaining witness over the same course of time.

The context of Thompson's trial does not dispel the risk of a double jeopardy violation. For the reasons discussed above, the evidence and Court of Appeals opinion fall short of allowing the necessary conclusion "beyond a reasonable doubt" that the jury relied on separate and distinct acts to convict Thompson of counts II through V. Mutch, 171 Wn.2d at 665. Accordingly, three of these counts must be vacated. Borsheim, 140 Wn. App. at 371. This Court should grant review under RAP 13.4(b)(3).

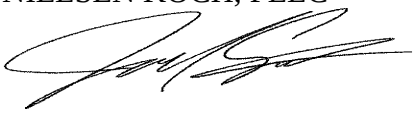
E. CONCLUSION

Because Thompson satisfies the criteria under RAP 13.4(b)(3), he respectfully asks that this Court grant review, reverse the court of Appeals, and dismiss three of his convictions for violating his right to be free from double jeopardy.

DATED this 8th day of July, 2020.

Respectfully submitted,

NIELSEN KOCH, PLLC



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APPENDIX

FILED
6/8/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. WILLIAM HOWARD THOMPSON, Appellant.	)	No. 81044-8-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, J. — William H. Thompson challenges his convictions for one count of rape of a child in the second degree and three counts of incest in the first degree via a direct appeal and two pro se post-judgment motions. The motions were transferred to this court as personal restraint petitions (PRPs) and subsequently consolidated with the appeal. In his direct appeal, Thompson claims instructional error caused double jeopardy violations and that his community custody conditions are unconstitutional. In his PRPs, Thompson argues the trial court sentenced him on an incorrectly calculated offender score, improperly relied on aggravating factors to enhance his sentence and erroneously admitted evidence of a recorded conversation. We accept the State's concession that the community custody condition prohibiting contact with the victim's family improperly restricted Thompson's contact with his wife and stepchildren, but find no merit to the remaining claims. Accordingly, we affirm the convictions and remand for the

trial court to modify the community custody condition regarding contact with certain family members.

FACTS

M.T. was born in February 1998 and is the daughter of William Thompson. M.T. began living with Thompson when she was five or six years old. At that time, Thompson and M.T.'s mother were divorced and Thompson had married Elizabeth[1] Thompson, who has three children from previous relationships. M.T. lived with Thompson and Elizabeth's family until shortly after she turned 18, when she moved out to live with her mother.

A few months after M.T. moved out, her grandmother died and she sought support from a school counselor she trusted. She told the counselor that she was struggling to focus, that she was really upset about her grandma's death and that it brought back the nightmares. When the counselor asked, "What nightmares?" she said "the nightmares of when my father used to rape me." The counselor then told her he was required by law to report this to the principal. The school called the police.

Two detectives interviewed M.T. and she described what happened to her. To corroborate her story, the detectives sought a wire intercept order to record conversations between M.T. and Thompson. M.T. then arranged to speak with Thompson while their conversation was recorded.[2]

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[1] To avoid confusion we refer to Elizabeth Thompson by her first name. No disrespect is intended.

[2] The substance of that conversation is not part of the record on appeal. Neither party designated the exhibits containing the recording and transcript of the conversation.

The State charged Thompson with one count of second degree rape of a child and four counts of first degree incest. All of the charges included special allegations of domestic violence and aggravating circumstances of ongoing pattern of sexual abuse and the defendant holding a position of trust relative to the victim. Before trial, Thompson moved to suppress evidence of the recorded conversation with M.T. The trial court denied the motion.

At trial, M.T testified that before her 13th birthday Thompson raped her for the first time. No one was home at the time. M.T. was upstairs watching television when Thompson called her down to his room and said he was going to "do some things to [her]" and that she could not tell anyone. He then proceeded to fondle her breasts, digitally penetrate her and vaginally rape her. Afterward he gave her a towel to clean up and told her to go to the bathroom.

M.T. testified to another incident where Thompson raped her in the shower. She also testified in detail to two other separate incidents where Thompson made her have oral sex with him. M.T. further testified that these were not the only incidents. She said sometimes it would happen once a week, sometimes nothing would happen for a couple months and then it would start again, and sometimes it would happen a couple times a week.

The jury was instructed that, on count 1, second degree rape of a child, the State must prove beyond a reasonable doubt "[t]hat on or between February 1, 2011 and February 6, 2012, the defendant had sexual intercourse with [M.T.]." The jury was further instructed:

In alleging that the defendant committed Rape of a Child in the

> Second Degree as charged in Count I, the State relies upon evidence regarding a single act constituting the alleged crime. To convict the defendant, you must unanimously agree that this specific act was proved.

On count 2, first degree incest, the jury was instructed the State must prove beyond a reasonable doubt "[t]hat on or between February 1, 2011 and February 7, 2012, the defendant engaged in sexual intercourse with [M.T.]" For each of the three remaining counts of first degree incest, the "to convict" instructions were identical, instructing the jury that the State must prove beyond a reasonable doubt "[t]hat on or between February 1, 2011 and February 7, 2016, the defendant engaged in sexual intercourse with [M.T.]." The jury was further instructed that for each of the four counts of first degree incest, "the State relies upon evidence regarding a single act constituting the allege crime. To convict the defendant, you must unanimously agree that this specific act was proved."

The jury found Thompson guilty as charged. The trial court sentenced him to 280 months confinement, the high end of the standard range. The trial court also imposed community custody conditions prohibiting him from contacting M.T. or her family and prohibiting him from possessing or accessing "sexually explicit material" and "sexually exploitive materials." Thompson appeals.

Thompson also filed a pro se CrR 7.8 motion in the trial court that was transferred to this court as a personal restraint petition. He later filed a pro se habeas corpus petition in the Washington Supreme Court that was transferred to this court as a personal restraint petition. Both personal restraint petitions have been consolidated with this appeal.

ANALYSIS

I. Direct Appeal

On direct appeal, Thompson claims (1) the jury instructions violated his right to be free from double jeopardy, (2) the community custody condition prohibiting contact with his wife and adult children infringes on his fundamental rights to marriage and companionship with his children, and (3) the community custody conditions prohibiting his access to and possessive of sexually exploitive and sexually explicit materials are unconstitutionally vague.

A. Double Jeopardy

Thompson claims that the jury instructions did not adequately protect him from exposure to double jeopardy on the counts of first degree incest because they did not inform the jury that each count of incest must be supported by separate and distinct acts. Thus, he contends, three counts must be vacated.

The constitutional guaranty against double jeopardy protects a defendant against multiple punishments for the same offense. State v. Mutch, 171 Wn.2d 646, 661, 254 P.3d 803 (2011). A double jeopardy claim is of constitutional proportions and may be raised for the first time on appeal. Id. We review double jeopardy claims de novo. Id.

In cases where, as here, multiple identical counts are charged during the same time period, instructions that do not inform the jury that each crime requires proof of a separate and distinct act create the potential for double jeopardy. Id. at 663. To determine whether such flawed instructions result in a double jeopardy violation, we may look to the entire trial record, including the evidence, arguments

and instructions. Id. at 664. "[I]f 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." Id. (quoting State v. Berg, 147 Wn. App. 923, 931, 198 P.3d 529 (2008) (emphasis in original).

Here, the jury was not instructed that each count required proof of a separate and distinct act. The instructions simply indicated that the State was relying on evidence of a single act constituting the alleged crime, not a separate and distinct act for each count. Accordingly, we review the trial record to determine whether it was manifestly apparent to the jury that each count was based on a separate act. Where the testimony, arguments, and jury instructions make manifestly apparent that the State was not seeking to impose multiple punishments for the same offense, there is no double jeopardy violation. State v. Land, 172 Wn. App. 593, 602-3, 295 P.3d 782 (2013).

The evidence at trial established four separate acts of first degree incest. M.T. testified to two acts of intercourse during the first time it happened, before her 13th birthday. As the jury was instructed, only one of these acts supported the second degree rape of a child charge. Therefore, the other act was a separate act to support the one incest count alleged to have occurred between February 1, 2011 and February 7, 2012. M.T. also testified to three additional separate acts of intercourse: vaginal intercourse in the shower and two separate incidents of oral sex. In closing argument, the prosecutor clarified that the State was relying on each of these acts to prove the charged offenses:

> We've charged the defendant with a large time—basically a large time gap. Five years. The time frame that [M.T.] says she was raped. But during those time frames, we've charged him with five specific counts. And I'll go over them right now, so that when you're deliberating you don't forget which ones are which.
>
> The first count, Rape of a Child in the Second Degree, and the second count, Incest in the First Degree, those two counts go together. Those counts are for the first time that [M.T.] was raped when she was 12.
>
> The third count, Incest in the First Degree. That count is for the time that he raped her in the shower.
>
> The fourth count of Incest in the First Degree is for the time that she was down on all fours forced to give [Thomas] oral sex.
>
> And the next count of Incest in the First Degree is for the time that she was forced to give him oral sex for the first time. When he described to her what 69 was for the first time. And she ended up throwing up after he shoved his penis in her mouth.
>
> So to recap: Count I and Count II are the taking the virginity instance; Count III is for the shower; Count IV is for when she was down on all fours in her bedroom; And Count V is for the first time that he made her have oral sex.

The evidence, argument and instructions create clear distinctions between the three identically charged counts of first degree incest. Further, it is clear that it was manifestly apparent to the jury that each count was based on a separate act and the State was not seeking multiple punishments for the same offense. Accordingly, the lack of an instruction informing the jury that each count had to be based on a separate and distinct act did not violate Thompson's right to be free of double jeopardy. Mutch, 171 Wn.2d at 663-65; Land, 172 Wn. App. at 602.

B. Community Custody Conditions

Generally, we review sentencing conditions for abuse of discretion. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). We will reverse a community custody condition if it is "manifestly unreasonable." State v. Valencia, 169 Wn.2d 782, 791, 239 P.3d 1059 (2010). Imposing an

unconstitutional condition is manifestly unreasonable. Id. at 791.

"The rights to marriage and to the care, custody, and companionship of one's children are fundamental constitutional rights, and state interference with those rights is subject to strict scrutiny." State v. Warren, 165 Wn.2d 17, 34, 195 P.3d 940 (2008). "'[Sentencing] [c]onditions that interfere with fundamental rights' must be 'sensitively imposed' so that they are 'reasonably necessary to accomplish the essential needs of the State and public order.'" Rainey, 168 Wn.2d at 377 (quoting Warren, 165 Wn.2d at 32). Crime-related prohibitions affecting fundamental rights must also be narrowly drawn. Warren, 165 Wn.2d at 34-35. An order prohibiting a defendant's contact with a spouse or children survives strict scrutiny only if it is reasonably necessary to achieve a compelling state interest. Id. at 34; Rainey, 168 Wn.2d at 377.

Thompson challenges the community custody provision prohibiting "contact with victim(s) or his or her family," as impermissibly interfering with his fundamental rights to marriage and the companionship of his children. He contends the State has not shown that it has a compelling interest in prohibiting him from contacting his wife and stepchildren, who are also a part of M.T.'s family. The State responds that the sentencing conditions are not reviewable because Thompson failed to object at sentencing. But the State concedes that there is no compelling interest in prohibiting Thompson's contact with his wife and stepchildren and that "the offending provision must be stricken."

We accept the State's concession but disagree with the State that the sentencing conditions are not reviewable. As the Washington Supreme Court has

recognized, "'established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.'" State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)). Accordingly, we remand for the trial court to modify the no contact provision to exclude Thompson's wife and his stepchildren.

Thompson also challenges the community custody conditions prohibiting him from possessing or accessing "sexually explicit material" and "sexually exploitive materials" as unconstitutionally vague. Specifically, he challenges the following "sex-crime related" community custody conditions:

> The Defendant Shall-
> . . . .
> Possess/access no sexually exploitive materials (as defined by Defendant's treating therapist or CCO).
> . . . .
> Possess/access no sexually explicit materials and/or information pertaining to minors via computer (i.e. internet).

The federal and state constitutions require that citizens be afforded fair warning of proscribed conduct. State v. Nguyen, 191 Wn.2d 671, 678, 425 P.3d 847 (2018) (citing U.S. CONST., amend. XIV; WASH. CONST. art. I, § 3). "A community custody condition 'is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.'" Nguyen, 191 Wn.2d at 679 (quoting City of Seattle v. Eze, 111 Wn.2d 22, 27, 759 P.2d 366 (1988)). But a community custody condition is unconstitutionally vague if it (1) does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribe and (2) does not provide ascertainable standards of guilt to

protect against arbitrary enforcement. Nguyen, 191 Wn.2d at 678-79. The requirement of sufficient definiteness "does not demand 'impossible standards of specificity or absolute agreement,'" and permits some amount of imprecision. State v. Coria, 120 Wn.2d 156, 163, 839 P.2d 890 (1992) (citing City of Spokane v. Douglas, 115 Wn.2d 171, 179, 795 P.2d 693 (1990)). "[A] stricter standard of definiteness applies if material protected by the First Amendment falls within the prohibition." Bahl, 164 Wn.2d at 753.

In State v. Nguyen, the court held that a community custody condition prohibiting a defendant from possessing or viewing "sexually explicit material" was not unconstitutionally vague, recognizing that "sexually explicit material" is defined in RCW 9.68.130(2). 191 Wn.2d at 680. That statute provides:

> "Sexually explicit material" . . . means any pictorial material displaying direct physical stimulation of unclothed genitals, masturbation, sodomy (i.e. bestiality or oral or anal intercourse), flagellation or torture in the context of a sexual relationship, or emphasizing the depiction of adult human genitals: PROVIDED HOWEVER, That works of art or of anthropological significance shall not be deemed to be within the foregoing definition.

RCW 9.68.130(2). As the court explained,

> Despite Nguyen's concerns that "[c]ountless works of art, literature, film, and music explicitly describe, depict, and relate sex and sexuality," persons of ordinary intelligence can discern "sexually explicit material" from works of art and anthropological significance.

191 Wn.2d at 680-81.

We likewise reject similar arguments made by Thompson. While Thompson points out that unlike here, the community custody condition in Nguyen referred to statutory definitions, the court did not require their inclusion in the condition to withstand a vagueness challenge. Rather, the court noted its recognition in State

v. Bahl that the statutory definition in RCW 9.68.130(2) "bolsters the conclusion that 'sexually explicit material' is not an unconstitutionally vague term." Id. at 680; see Bahl, 164 Wn.2d at 760. The condition at issue in Bahl did not contain a statutory reference. 164 Wn.2d at 743, 758.

Thompson's reliance on State v. Padilla, 190 Wn.2d 672, 416 P.3d 712 (2018), is misplaced. While he contends that its "reasoning controls here," Padilla held that a condition prohibiting "pornographic material" was unconstitutionally vague despite the inclusion of a definition, which the court found was itself vague and overbroad. Id. 674-75. Such a condition is not at issue here.

Thompson further contends the prohibition involving "sexually exploitative materials" presents problems similar to those in Padilla because it is not statutorily defined and allowing the CCO or therapist to define the prohibited materials compounds the problem as in Bahl. The State argues that the statutory definitions of sexual exploitation of minor and sexually explicit conduct, when read together, do not require a person of ordinary intelligence to guess at its meaning, citing an unpublished decision, State v. Perkins,[3] which addresses a similar vagueness challenge to an identical community custody condition.

As our courts have recognized, because of the inherent vagueness of language, one may need to resort to other statutes to clarify the meaning of a term. See Bahl, 164 Wn.2d at 756. "Such sources are considered 'presumptively available to all citizens.'" Id. at 756 (quoting State v. Watson, 160 Wn.2d 1, 8, 154 P.3d 909 (2007)). RCW 9.68A.040 provides that a person commits the crime of

[3] No. 42793-1-II, slip op. (Wash Ct. App. Dec 20, 2013) (unpublished), http://www.courts.wa.gov/opinions/pdf/D2%2042793-1-II%20%20Unpublished%20Opinion.pdf.

sexual exploitation of a minor if the person:

> (a) Compels a minor by threat or force to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance;
> (b) Aids, invites, employs, authorizes, or causes a minor to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance; or
> (c) Being a parent, legal guardian, or person having custody or control of a minor, permits the minor to engage in sexually explicit conduct, knowing that the conduct will be photographed or part of a live performance.

RCW 9.68A.011(4) defines "sexually explicit conduct" as 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;
> (c) Masturbation;
> (d) Sadomasochistic abuse;
> (e) Defecation or urination for the purpose of sexual stimulation of the viewer;
> (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.

In Perkins, the court considered these statutes in response to a vagueness challenge to the same community custody condition at issue here and concluded:

> When viewed together, these statutes do not require persons of ordinary intelligence to guess at what is meant by the condition prohibiting access to or possession of "sexually exploitative materials." It would be impossible to list every type of prohibited conduct; "[s]entencing courts must inevitably use categorical terms to frame the contours of supervised release conditions." While there may be areas of disagreement concerning the materials that fall within this condition, and while Perkins's therapist and CCO have some control over its scope, we hold that the reference to "sexually

> exploitative materials" is not so subjective as to be constitutionally suspect.

Slip op. at 9 (internal citations omitted). We adopt that reasoning here. Thompson's reliance on Bahl is misplaced. There, the court noted that the CCO's discretion made the vagueness problem "more apparent" in the condition prohibiting access to or possession of pornography, which did not provide adequate notice of the meaning of "pornography." 164 Wn.2d at 758. That condition is not at issue here.

II. Personal Restraint Petition

Thompson raises additional issues in personal restraint petitions consolidated with this appeal. Thompson first filed a CrR 7.8 motion that was transferred to this court as a PRP. He then filed a "habeas corpus" petition in the Washington Supreme Court that was also transferred to this court as a PRP. Both petitions were consolidated with this appeal and, as the State concedes, both are timely. Br. of Respondent at 6 (response to second PRP); Br. of Respondent at 24 (response to direct appeal, first PRP). Accordingly, we treat the second petition as an amendment to the first petition. See State v. Fort, 190 Wn. App. 202, 242-43, 360 P.3d 820 (2015).

A petitioner may request relief through a PRP when the petitioner is under an unlawful restraint. RAP 16.4(a)-(c). A petitioner who collaterally attacks a conviction must satisfy a higher burden than an appellant on direct review. In re Pers. Restraint of Stockwell, 179 Wn.2d 588, 596-97, 316 P.3d 1007 (2014). "A personal restraint petitioner must prove either a[ ](1) constitutional error that results

in actual and substantial prejudice or (2) nonconstitutional error that 'constitutes a fundamental defect which inherently results in a complete miscarriage of justice.'" In re Pers. Restraint of Monschke, 160 Wn. App. 479, 488, 251 P.3d 884 (2010).

Thompson challenges his sentence, claiming the trial court miscalculated his offender score, made improper findings of aggravating factors and special allegations, and subjected him to double jeopardy by sentencing him on four counts that were based on "single conduct." Thompson also challenges the trial court's admission of evidence of his recorded conversation with M.T.

Thompson demonstrates neither error nor prejudice, much less a fundamental defect resulting in a complete miscarriage of justice. The offender score was properly calculated and included the current offenses for which Thompson does not account. See RCW 9.94A.589(1)(a). Thompson's challenges to the aggravating circumstances found by special verdict are without basis. He claims the court improperly relied on these aggravating circumstances to enhance his sentence, citing the standards for imposing an exceptional sentence outside the standard range, but the court imposed a sentence within the standard range.

Thompson's double jeopardy claim is the same claim raised by counsel in the direct appeal and as discussed above, is without merit. A petitioner may not renew issues that were considered and rejected on direct appeal unless the interests of justice require relitigation of those issues. In re Pers. Restraint of Lord, 123 Wn.2d 296, 303, 868 P.2d 835 (1994); see also In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 491, 965 P.2d 593 (1998) ("A personal restraint petition is not meant to be a forum for relitigation of issues already considered on direct appeal.").

Finally, Thompson fails to show that the trial court erred by admitting evidence of the recorded conversation. As Thompson correctly states, RCW 9.73.030 prohibits the State from intercepting or recording a private conversation without prior consent of all parties to the conversation and any information obtained in violation of the statute is inadmissible in a civil or criminal proceeding. RCW 9.73.050. But RCW 9.73.090(2) provides an exception to RCW 9.73.030 and permits a law enforcement officer to intercept, record or disclose a conversation where one of the parties has given consent prior to the interception, recording or disclosure, provided the officer obtains prior written authorization from a judge or magistrate. The judicial officer "shall approve the interception, recording, or disclosure of communications with a nonconsenting party for a reasonable and specified period of time if there is probable cause to believe that the nonconsenting party has committed, is engaged in, or is about to commit a felony." RCW 9.73.090(2). To obtain judicial authorization, the law enforcement officer must submit an application to the judge or magistrate, the contents of which are specified in RCW 9.73.130. Communications or conversations authorized to be intercepted, recorded or disclosed under RCW 9.73.090(2) "shall not be inadmissible under RCW 9.73.050." RCW 9.73.090(3).

Thompson claims the trial court erred by admitting evidence of the recorded conversation because he did not consent to the recording and he did not admit to committing a crime during the recorded conversation. As discussed above, under RCW 9.73.090(2), a law enforcement officer may lawfully record a conversation so long as one of the parties to the conversation gives prior consent and the officer

obtains prior written judicial authorization. Here, M.T. gave consent. And as the trial court found, the detective's application for authorization to intercept and record the conversation complied with the requirements of RCW 9.73.130 and "clearly contained a statement of facts justifying the intercept and recording, including a statement of probable cause, detailed information concerning the offense and the need to intercept and record." Thompson does not challenge these findings. Moreover, Thompson provides no authority requiring that a defendant admit to committing a crime in the recorded conversation in order for it to be admissible. Rather, the application for authorization to intercept or record the conversation must include "[t]he details as to the particular offense that has been, is being, or is about to be committed." RCW 9.73.130(3)(b). Thompson's argument appears to go to the weight, not the admissibility, of the evidence, which is a determination for the trier of fact.

We affirm the convictions, remand for the trial court to modify the community custody condition prohibiting contact with the victim's family, and deny the personal restraint petition.

WE CONCUR:

NIELSEN KOCH P.L.L.C.

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