Supreme Court No. 90538-0
(COA No. 69451-1-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY KINZLE,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Jeffrey Kinzle, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Kinzle seeks review of the Court of Appeals decision dated June 16, 2014, a copy of which is attached hereto as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

Although the role of the jury is to decide whether the prosecution met its burden of proof, it misleads the jury to encourage it to search for the truth and instruct it that there is a duty to return a verdict of guilty if it finds the elements have been proved beyond a reasonable doubt, because there is no such duty under the state and federal constitutions. Over Mr. Kinzle's objection, the court instructed the jury that it could find the State met its burden of proof if it had an abiding "belief in the truth of the charge" and that it has a "duty to convict" if there is evidence meeting the State's burden of proof. When it is not the jury's job to determine the truth, and there is no constitutional provision requiring a guilty verdict under any

circumstances, did the court misinform the jury of its deliberative role under the federal constitution and the more protective jury trial rights guaranteed by the state constitution?

D. STATEMENT OF THE CASE

Jeffrey Kinzle was convicted of two counts of child molestation in the first degree based on allegations he improperly touched two sisters, N.R. and R.R. The Court of Appeals reversed the count pertaining to N.R. based on a violation of Mr. Kinzle's right of confrontation.

At the close of the evidence, the court instructed the jury that the State's burden of proof means that the jurors have "an abiding belief in the truth of the charge." CP 280 (Instruction 2); 9/14/12RP 11. Mr. Kinzle objected. 9/14/12RP 11.

Mr. Kinzle also objected to the portion of the to-convict instructions that directed the jury that it must find Mr. Kinzle guilty. 9/14/12RP 11-12. The instructions stated, "If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty." CP 286, 287 (Instructions 8, 9). Mr. Kinzle explained that the jury has

no constitutional "duty to convict" and the instruction misstates the law, in violation of Mr. Kinzle's right to a fair trial by jury. 9/14/12RP 12.

The Court of Appeals found these instructions were proper with little analysis, resting on its decision in State v. Moore, 179 Wn.App. 464, 318 P.3d 296 (2014), rev. denied, 180 Wn.2d 1019 (2014). Slip op. at 9-10.

The facts are further set forth in the Court of Appeals opinion, pages 1-4, and Appellant's Opening Brief, pages 4-6, which are incorporated by reference herein.

E. ARGUMENT

1. **Because a juror's role is not to search for the truth, the jury instruction explaining the proof required to convict as having "an abiding belief in the truth of the charge" misstates the law and confuses the jury**

The presumption of innocence may be diluted or even "washed away" by confusing jury instructions. State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). It is the court's obligation to vigilantly protect the presumption of innocence. Id.

A jury's role is not to search for the truth. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); see also State v. Berube, 171 Wn.App. 103, 120, 286 P.3d 402 (2012) ("truth is not the jury's job.

And arguing that the jury should search for truth and not for reasonable doubt both misstates the jury's duty and sweeps aside the State's burden"). Instead, the job of the jury "is to determine whether the State has proved the charged offenses beyond a reasonable doubt." Emery, 174 Wn.2d at 760.

"[A] jury instruction misstating the reasonable doubt standard is subject to automatic reversal without any showing of prejudice. Id. at 757 (quoting Sullivan v. Louisiana, 508 U.S. 275, 281–82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)).

Over Mr. Kinzle's objection, the court instructed the jury that proof beyond a reasonable doubt means that, after considering the evidence, the jurors had "an abiding belief in the truth of the charge." CP 280 (Instruction 2); 9/14/12RP 11.

By equating proof beyond a reasonable doubt with a "belief in the truth" of the charge, the court confused the critical role of the jury. The "belief in the truth" language encourages the jury to undertake an impermissible search for the truth and invites the error identified in Emery.

In Bennett, this Court found the reasonable doubt instruction derived from State v. Castle, 86 Wn.App. 48, 53, 935 P.2d 656 (1997),

was "problematic" as it was inaccurate and misleading. 161 Wn.2d at 317-18. Exercising its "inherent supervisory powers," the Supreme Court directed trial courts to use WPIC 4.01 in all future cases. Id. at 318.

The pattern instruction reads:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. [If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt].

11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01, at 85 (3rd ed. 2008) ("WPIC").

The Bennett Court did not comment on the bracketed "belief in the truth" language. However, recent cases show the problematic nature of such language. In Emery, the prosecution told the jury that "your verdict should speak the truth," and "the truth of the matter is, the truth

of these charges, are that" the defendants are guilty. 174 Wn.2d at 751. These remarks misstated the jury's role, but because they were not part of the court's instructions, and the evidence was overwhelming, the error was harmless. Id. at 764 n.14.

In Pirtle, the court looked at whether the phrase "abiding belief" diminished the pattern instruction defining reasonable doubt. 127 Wn.2d at 657-58. The court concluded that the last sentence of the pattern instruction regarding abiding belief "was unnecessary but was not an error." Id. at 658. The Pirtle Court did not address whether the words after "abiding belief" encouraged the jury to view its role as a search for the truth aspect. Id. at 657-58.

Pirtle did not endorse the last sentence of the pattern instruction, finding it unnecessary but not erroneous. Yet Emery demonstrates the danger of injecting a search for the truth into the definition of the State's burden of proof. This language invites the jury to be confused about its role and serves as a platform for improper arguments about the jury's role in looking for the truth, as explained in Emery. 174 Wn.2d at 760.

Mr. Kinzle objected to the addition of this last sentence in the court's instruction defining the prosecution's burden of proof and sought an instruction without this improper language. 9/14/12RP 11.

Improperly instructing the jury on the meaning of proof beyond a reasonable doubt is structural error. Sullivan, 508 U.S. at 281-82. Furthermore, this Court has a supervisory role in ensuring the jury's instructions fairly and accurately convey the law. Bennett, 161 Wn.2d at 318. This Court should grant review and hold that directing the jury to treat proof beyond a reasonable doubt as the equivalent of having an "abiding belief in the truth of the charge," misstates the prosecution's burden of proof, confuses the jury's role, and denies an accused person his right to a fair trial by jury as protected by the state and federal constitutions. U.S. amends. 6, 14; Const. art. I, §§ 21, 22.

2. **The "duty to convict" instruction is contrary to the jury's constitutional role and undermines the verdict**

Washington's constitution more strongly protects the right of a jury to decide the case and reach a verdict than most other states or the federal constitution, even though the federal constitution treats the jury trial right as fundamental. Duncan v. Louisiana, 391 U.S. 145, 156, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). The "inviolate" jury trial right in

article I, section 21 means it must receive "the highest protection." Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989); see also State v. Strasburg, 60 Wash. 106, 110 P. 1020 (1910).

This inviolate right is further enforced by other constitutional protections, such as a prohibition on the court conveying to the jury its own impressions of the evidence. Const. art. IV, § 16 ("Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."). Even a witness may not invade the province of the jury. State v. Black, 109 Wn.2d 336, 350, 745 P.2d 12 (1987).

In State v. Meggyesy, 90 Wn.App. 693, 701, 958 P.2d 319, rev. denied, 136 Wn.2d 1028 (1998), abrogated on other grounds by State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005), the court rejected a challenge to a similar instruction. However, Meggyesy inadequately analyzed the state constitutional principles at issue.

The question is "whether the unique characteristics of the state constitutional provision and its prior interpretations actually compel a particular result" under the circumstances of the case. State v. Pugh, 167 Wn.2d 825, 835, 225 P.3d 892 (2009). The Court "examine[s] the constitutional text, the historical treatment of the interest at stake as

disclosed by relevant case law and statutes, and the current implications of recognizing or not recognizing an interest." Id.

Under the common law, juries were instructed in way allowing them to acquit even where the prosecution proved guilt beyond a reasonable doubt. Leonard v. Territory, 2 Wash. Terr. 381, 7 P. 872 (Wash. Terr. 1885). In Leonard, the trial court instructed the jurors that they "should" convict and "may find [the defendant] guilty" if the prosecution proved its case, but that they "must" acquit in the absence of such proof. Leonard, 2 Wash. Terr. at 398-99. Leonard shows that, at the time the Constitution was adopted, courts instructed juries using the permissive "may" as opposed to the current practice of requiring the jury to make a finding of guilt. Id.

An accused person's guilt has always been the sole province of the jury. State v. Kitchen, 46 Wn.App. 232, 238, 730 P.2d 103 (1986), aff'd, 110 Wn.2d 403, 736 P.2d 105 (1988) ("In a jury trial the determination of guilt or innocence is solely within the province of the jury under proper instructions."); see also State v. Holmes, 68 Wash. 7, 13, 122 P. 345 (1912) (trial court may not, either directly or indirectly, direct a verdict of guilty in a criminal case). This rule applies even where the jury ignores applicable law. See, e.g., Hartigan v.

Washington Territory, 1 Wash. Terr. 447, 449 (1874) (holding "the jury may find a general verdict compounded of law and fact, and if it is for the defendant, and is plainly contrary to the law, either from mistake or a willful disregard of the law, there is no remedy.").[1]

The jury's power to acquit is substantial. The court has no ability to review a jury verdict of acquittal, no authority to direct a guilty verdict, and no authority to coerce a jury in its decision, consequently, there can be no "duty to return a verdict of guilty."

Under Washington law, juries have the ability to deliver a verdict of acquittal that is against the evidence. Hartigan, 1 Wash. Terr. at 449. A judge cannot direct a verdict for the State because this would ignore "the jury's prerogative to acquit against the evidence, sometimes referred to as the jury's pardon or veto power." State v. Primrose, 32 Wn.App. 1, 4, 645 P.2d 714 (1982); see also State v. Salazar, 59 Wn.App. 202, 211, 796 P.2d 773 (1990) (relying on jury's "constitutional prerogative to acquit" as basis for upholding admission of evidence). An instruction telling jurors that they *may not* acquit if the

[1] This is likewise true in the federal system. See, e.g., United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969) ("We recognize, as appellants urge, the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge and contrary to the

elements have been established affirmatively misstates the law, and deceives the jury as to its own power, which fails to make the correct legal standard manifestly apparent to the average juror. See State v. Kyllo, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

Although a court may not affirmatively tell a jury that it may disregard the law, it also may not instruct the jury that it *must* return a verdict of guilty if it finds certain facts to be proved.

In contrast, the "to-convict" instruction at issue here does not reflect the well-established legal asymmetry that precludes a court from directing the jury to convict a person. It is not a correct statement of the law and provides a level of coercion, not supported by law, for the jury to return a guilty verdict. Such coercion is prohibited by the right to a jury trial. Leonard, 2 Wash. Terr. at 398-99.

"The right to a fair and impartial jury trial demands that a judge not bring to bear coercive pressure upon the deliberations of a criminal jury." State v. Boogard, 90 Wn.2d 733, 733-37, 585 P.2d 789 (1978). The judge may not pressure the jury into making a decision. If there is no ability to review a verdict of acquittal, no authority to direct a

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evidence.").

verdict of guilty, and no authority to coerce a jury in its decision, there can be no "duty to return a verdict of guilty."

Meggyesy does not analyze the issue presented here. In Meggyesy, Division One held the federal and state constitutions did not "preclude" this language and so it affirmed. Meggyesy, 90 Wn.App. at 696. The Court characterized the alternative language proposed by the appellants—"you *may* return a verdict of guilty"—as "an instruction notifying the jury of its power to acquit against the evidence." 90 Wn.App. at 699. The Court concluded there was no legal authority requiring the trial court to instruct a jury that it had the power to acquit against the evidence.

Meggyesy's analysis addressed a different aspect of the issue than is presented here. "Duty" is the challenged language here. By focusing on the proposed remedy, Meggyesy side-stepped the underlying issue raised by the appellants: the instructions violated their right to trial by jury because the "duty to return a verdict of guilty" language required the juries to convict if they found that the State proved all of the elements of the charged crimes.

Meggyesy acknowledged the Supreme Court has never considered this issue. 90 Wn.App. at 698. It recognized that the jury has

the power to acquit against the evidence: "This is an inherent feature of the use of general verdicts. But the power to acquit does not require any instruction telling the jury that it may do so." Id. at 700 (citations omitted). It also relied in part upon federal cases in which the approved "to-convict" instructions did *not* instruct the jury it had a "duty to return a verdict of guilty" if it found every element proven. Id. at 698-99 nn. 5, 6, 7. These concepts support Mr. Kinzle's request that the court strike the "duty to convict" language in the instructions.

Unlike the appellant in Meggyesy., Mr. Kinzle does not ask the court to approve an instruction that affirmatively notifies the jury of its power to acquit. Instead, he argues that jurors should not be affirmatively misled. This question was not addressed in Meggyesy; thus the holding of Meggyesy should not govern here.

By instructing the jury it had a duty to return a verdict of guilty based merely on finding certain facts, the court took away from the jury its constitutional authority to apply the law to the facts to reach its general verdict. The instruction creating a "duty" to return a verdict of guilty was an incorrect statement of law. The error violated Mr. Kinzle's state and federal constitutional right to a jury trial.

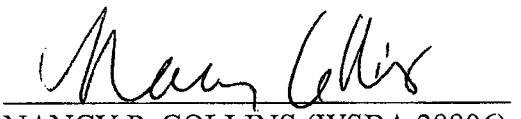
This Court should grant review and find that directing the jury to treat proof beyond a reasonable doubt as the equivalent of having an "abiding belief in the truth of the charge" and mandating a "duty" to convict a person misstates the prosecution's burden of proof, confuses the jury's role, and denies an accused person his right to a fair trial by jury as protected by the state and federal constitutions. U.S. amends. 6, 14; Const. art. I, §§ 21, 22.

F. CONCLUSION

Based on the foregoing, Petitioner Jeffrey Kinzle respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 16th day of July 2014.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JEFFREY M. KINZLE, Appellant.	)	No. 69451-1-I
	)	DIVISION ONE
	)	PUBLISHED OPINION
	)	FILED: June 16, 2014

BECKER, J. — A jury found Jeffrey Kinzle guilty of two counts of first degree child molestation involving two sisters. When the younger girl testified at trial, the prosecutor avoided asking her direct questions about the incident and her previous statements. As a result, she was not subject to full and effective cross-examination. We hold that the admission of the younger girl's out-of-court statements to prove that she was molested violated Kinzle's right to confront witnesses. The conviction for that count must be reversed.

FACTS

On March 17, 2011, Kinzle stayed at the apartment of a friend who lived with his girl friend, ES, and their two daughters, eight-year-old R and four-year-old N. ES returned to the apartment after Kinzle had gone to bed. She found the girls sitting under a small table in her bedroom. The girls were crying. They told their mother that Kinzle "rubbed some stuff" on their private parts. ES found

prescription eye cream in the girls' bedroom. The cream had been stored in the bathroom medicine cabinet. ES called the police and then took the girls to the hospital. Paula Newman Skomski, a forensic nurse examiner employed by the hospital, interviewed and examined both girls.

On March 21, 2011, at the request of a police detective, the girls were interviewed by Razi Leptich, a child interview specialist. The interview was recorded. In response to questions, N, the four-year-old, told Leptich that her "dad's friend" "Jeff" put "eye cream" on her "butt" and "pee-pee." Laboratory testing revealed traces of eye cream on R's underwear and on swabs from both girls' perineal areas.

The State charged Kinzle with two counts of first degree child molestation. At a pretrial hearing on September 10, 2012, the court determined that both R and N were competent to testify and ruled that certain out-of-court statements made by each child were admissible under Washington's statutory exception to the hearsay rule, RCW 9A.44.120.

Kinzle's jury trial occurred September 12-14, 2012. At trial, the prosecutor asked the older girl, R, whether any of her dad's friends were in the courtroom. She identified Kinzle. He asked if she remembered the last time she saw Kinzle at her house. When she said it had been a year, the prosecutor asked, "Is there a particular reason that you don't see him anymore?" R testified, "When he was over, he put stuff on a private part." When the prosecutor asked what she meant by "stuff" and "private part," R testified, consistent with her previous statements, that Kinzle rubbed "lotion" on her "butt and pee-pee." It is undisputed that

Kinzle's right to confront R was not violated and that the State sufficiently proved count 1.

During direct examination of N, who by this time was six years old, the prosecutor did not ask any direct questions about Kinzle. The prosecutor asked N about school, about the difference between the truth and lies, and what she does for fun. Then he began asking about her dad's friends. N denied knowing the names of her dad's friends or seeing them at her home or in court. The prosecutor asked, "Never seen anybody in here before?" N identified the prosecutor and a "lady in the back." The prosecutor went on to ask N whether she "ever talked to any police," or "ever talked to any doctors." N answered that she talked to doctors "When I get shots for school."

The prosecutor asked N whether she had any shots this year. She said, "Uh-uh." The prosecutor said, "Lucky you."

At this point, without being asked another question, N volunteered, "My sister told them." The prosecutor did not ask N to explain what she meant by that statement.

Instead, the prosecutor asked questions about peripheral details. He asked N to describe her house and the furniture in her parents' room, to name her favorite toy, and to say where she slept and with whom. He asked where the family kept medicines, whether she had eye lotion, and whether she'd ever been scared or had bad dreams. At no point during direct examination did he ask her if she recognized Kinzle or if she remembered telling any of the interviewers that "Jeff" had put eye cream on her private parts.

On cross-examination, defense counsel asked N who she lived with, whether her parents argued, and whether she remembered telling a doctor during a pretrial interview that her parents argued quite a bit. N testified that she never heard her parents argue and she denied any memory of speaking to the doctor about her parents.

On redirect, the prosecutor showed N a picture of her parents' room showing a small table and asked whether she ever hid underneath it. N said she only hid under it during hide-and-seek with her sister.

When N left the witness stand, she had not testified that Kinzle molested her. The State relied on her out-of-court statements to Skomski and Leptich to prove count 2.

The jury found Kinzle guilty on both counts. Kinzle appeals the conviction for count 2, the count involving N.

DISCUSSION

Kinzle contends that the admission of the testimony concerning the out-of-court statements made by N violated his constitutional right to confront adverse witnesses. We agree. N was not subject to a full and effective cross-examination because while N was on the witness stand, the prosecutor did not question her directly about the alleged incident of molestation and her prior statements about it.

The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions "the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. See State v. Price, 158

Wn.2d 630, 639 n.4, 146 P.3d 1183 (2006). We review de novo whether admission of N's hearsay statements violated Kinzle's confrontation right. Price, 158 Wn.2d at 638-39.

The right to confrontation is not violated by admitting a declarant's hearsay statements if the declarant testifies as a witness and is subject to "'full and effective cross-examination.'" Price, 158 Wn.2d at 640, quoting California v. Green, 399 U.S. 149, 158, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970). Full and effective cross-examination is possible only if the State asks the witness during direct examination about the incident and his or her prior statements about the incident. Green, 399 U.S. at 164; Price, 158 Wn.2d at 650.

Price is one of several cases in which Washington courts have considered whether a child victim testified adequately for constitutional confrontation purposes to support admission of prior out-of-court statements otherwise properly admissible under the rules of evidence. Price, 158 Wn.2d at 642-50; State v. Rohrich, 132 Wn.2d 472, 939 P.2d 697 (1997); State v. Clark, 139 Wn.2d 152, 985 P.2d 377 (1999); In re Pers. Restraint of Grasso, 151 Wn.2d 1, 9, 84 P.3d 859 (2004).

In Rohrich, the State called the alleged victim of rape and child molestation to testify and asked her only innocuous background questions about her school, her birthday, and her cat's name. Rohrich, 132 Wn.2d at 474. The defendant's conviction was reversed. "The State's failure to adequately draw out testimony from the child witness before admitting the child's hearsay puts the defendant in a 'constitutionally impermissible Catch-22' of calling the child for

direct or waiving his confrontation rights." Rohrich, 132 Wn.2d at 478, quoting Lowery v. Collins, 996 F.2d 770, 771-72 (5th Cir. 1993).

In contrast, in Clark there was no confrontation violation because the prosecutor directly asked E., the recanting victim, about the alleged acts. Though she denied the acts occurred and said her previous statements were lies, the defendant had a full opportunity to cross-examine her concerning her accusation because the State had elicited her testimony on the subject on direct examination:

> In Rohrich the state avoided questioning the child witness about the alleged acts, thus directly preventing the defendant from cross-examining her. However in the present case there was no such evasion: The state asked E. about the alleged acts and she answered by denying they occurred. The state also asked E. about her prior hearsay statements which she acknowledged making but claimed were lies. Far from being placed in a constitutionally impermissible Catch-22 of calling the child for direct or waiving his confrontation rights, Clark had a full opportunity to cross-examine E. about the alleged acts and about her hearsay statements.

Clark, 139 Wn.2d at 161.

In Price, the defendant was charged with molesting a child who had reported the abuse to her mother and a police detective. Price, 158 Wn.2d at 633-34. At trial, in response to the prosecutor's questions, the child identified the defendant, who she called "Chucky," but testified that she forgot what he did to her and forgot what she told her mother and the detective about him. Price, 158 Wn.2d at 635-36. Specifically, the prosecutor asked, "Besides hugs, did Chucky ever touch you anywhere?" Price, 158 Wn.2d at 635. The child's response was "Me forgot again." Price, 158 Wn.2d at 636. The State proved the crime with the child's previous out-of-court statements. Despite the child's professed inability to

recall the earlier events and her earlier statements, the court concluded that the admission of the child's out-of-court statements did not violate Price's right of confrontation. Price, 158 Wn.2d at 650. The court held that "when a witness is asked questions about the events at issue and about his or her prior statements, but answers that he or she is unable to remember the charged events or the prior statements, this provides the defendant sufficient opportunity for cross-examination to satisfy the confrontation clause." Price, 158 Wn.2d at 650. The Price court noted that in Rohrich, "the witness was on the stand, but the prosecutor did not ask *any* questions relating to the alleged events or the prior statements." Price 158 Wn.2d at 647-48. But unlike the circumstances in Rohrich, there was no effort in Price to shield the child from responding to the questions. Price, 158 Wn.2d at 648.

When a prosecutor shields the child from difficult questions, the examination "does not provide for adequate testimony under the confrontation clause." Grasso, 151 Wn.2d at 16. In that case, the prosecutor instructed the child witness that she could answer direct examination questions with "'I don't want to talk about it.'" Grasso, 151 Wn.2d at 9. The petitioner in Grasso was denied relief only because the child witness—R.G., the petitioner's daughter—did not answer all direct questions with the supplied phrase. The prosecutor asked her "whether anyone had ever touched her privates in a way she did not like," "whether she was telling the truth when she told the doctor about her dad," and what happened during her meetings with a child interviewer and a nurse. Grasso, 151 Wn.2d at 9. R.G. affirmed that she told the truth and answered, "I

can't remember" to the other questions. The Grasso plurality held that R.G.'s answer, "I can't remember," when asked about the charged events and her meetings with the interviewer and the nurse, was "a constitutionally acceptable response." Grasso, 151 Wn.2d at 17. The direct examination "made the jury sufficiently aware of R.G.'s hearsay statements . . . such that nothing prevented defense counsel from cross-examining R.G. about the truth of these statements or her lack of memory of the details." Grasso, 151 Wn.2d at 18.

Here, the prosecutor did not directly ask N whether Kinzle or anyone else touched her private parts. He did not ask whether she ever told interviewers that Kinzle or anyone else touched her private parts. The prosecutor's questions were indirect (whether she knew the names of her dad's friends or saw any of them in court) and innocuous (where lotions were stored and how furniture was arranged).

The State contends the record shows N's inability to recall the incident or remember making her prior statements. That is not so. N had no difficulty describing where the lotion was stored and how the furniture was arranged. It is impossible to infer that she did not recall Kinzle putting lotion on her private parts or making a prior statement that he did because she was not asked. The prosecutor shielded N from having to answer those difficult questions. There is no meaningful distinction between the situation here and that presented in Rohrich.

It is clear under Price and Grasso that a witness who says "I don't remember" when directly questioned about the alleged criminal act or prior

statements concerning it has said enough to satisfy the confrontation clause's preference for live testimony. In that circumstance, the defendant will have a "full and fair opportunity to expose the memory lapse through cross-examination, thereby calling attention to the reasons for giving scant weight to the witness's testimony." Price, 158 Wn.2d at 649. The jurors then have the opportunity to evaluate whether they believe the child forgot or whether she was evading for some other reason. Price, 158 Wn.2d at 649. But when a witness is not directly questioned about the alleged criminal act or prior statement, the cross-examiner has nothing to confront.

That is what happened here. Kinzle was caught in a "constitutionally impermissible Catch-22 of calling the child for direct or waiving his confrontation rights." Clark, 139 Wn.2d at 161. The conviction involving N must therefore be reversed.

JURY INSTRUCTIONS

Kinzle challenges the reasonable doubt instruction given at his trial. The court used WPIC 4.01 with the following optional language: "If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01, at 18 (3d ed. Supp. 2011). The Supreme Court has approved this instruction. State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). We reject Kinzle's argument that the optional language impermissibly suggests that the jury's job is to "search" for the truth.

The phrase "abiding belief in the truth of the charge" merely elaborates on what it means to be "satisfied beyond a reasonable doubt."

Kinzle also assigns error to the instruction that stated, "If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty." Kinzle argues that the instruction misstates the jury's role and impermissibly directs a guilty verdict. This court recently rejected these arguments in State v. Moore, __ Wn. App. __, 318 P.3d 296 (2014), review denied, No. 90051-5 (Wash. June 4, 2014). We adhere to that decision.

CONDITIONS OF COMMUNITY CUSTODY

Kinzle challenges four conditions of community custody included in his sentence.

Condition 7 orders Kinzle to refrain from possessing sexually explicit material or frequenting establishments selling sexually explicit materials. The State concedes that this condition must be stricken because no evidence suggested that such materials were related to or contributed to his crime. See State v. O'Cain, 144 Wn. App. 772, 184 P.3d 1262 (2008). We agree and accept the concession.

Condition 10 orders Kinzle not to "date women nor form relationships with families who have minor children, as directed by the supervising Community Corrections Officer." Kinzle argues that this condition is overbroad, vague, and unnecessary. We disagree. The sentencing court has discretion to order an offender to refrain from "direct or indirect contact with the victim of the crime or a

specified class of individuals." RCW 9.94A.703(3)(b). Because Kinzle's crime involved children with whom he came into contact through a social relationship with their parents, condition 10 is reasonably crime-related and necessary to protect the public. See, e.g., State v. Autrey, 136 Wn. App. 460, 468, 150 P.3d 580 (2006) (condition requiring prior approval of adult sexual conduct was reasonably related to sex crimes involving children "because potential romantic partners may be responsible for the safety of live-in or visiting minors").

Condition 13 required Kinzle to hold employment "only in a position where you always receive direct supervision." Kinzle claims the condition is unconstitutionally vague and overbroad because it requires "impossible" "around-the-clock monitoring during work." But Kinzle fails to argue or establish that his challenge to this condition is ripe for review. See State v. Bahl, 164 Wn.2d 739, 751, 193 P.3d 678 (2008); State v. Valencia, 169 Wn.2d 782, 789, 239 P.3d 1059 (2010).

There were also conditions pertaining to alcohol and polygraph testing. The court had authority to prohibit Kinzle from consuming alcohol regardless of whether alcohol was related to the crime. RCW 9.94A.703(3)(e). And a trial court has authority to impose polygraph testing to monitor compliance with community custody conditions. State v. Riles, 135 Wn.2d 326, 340, 957 P.2d 655 (1998), abrogated on other grounds by Valencia, 169 Wn.2d 782. But Kinzle was also required to participate in a chemical dependency evaluation. Kinzle claims the court erred in imposing this condition without first finding that he has a chemical dependency that contributed to the offense. We agree. RCW

9.94A.607(1); State v. Warnock, 174 Wn. App. 608, 612, 299 P.3d 1173 (2013). Evidence at trial suggested that Kinzle was drinking alcohol shortly before the charged incidents. But here, as in Warnock, there is no evidence that a substance other than alcohol contributed to Kinzle's offense. We remand with directions to amend the judgment and sentence to impose evaluation and recommended treatment only for alcohol. Warnock, 174 Wn. App. at 614.

STATEMENT OF ADDITIONAL GROUNDS

Pursuant to RAP 10.10, Kinzle raises several additional grounds for review. He alleges conflicts of interest with two appointed attorneys, malicious prosecution, continuances without his agreement, deprivation of information appropriate to his mental disabilities, and contaminated evidence. Because these allegations rest on matters that are outside the record, they cannot be considered on direct appeal. State v. McFarland, 127 Wn.2d 322, 337-38, 899 P.2d 1251 (1995).

Kinzle challenges the admission of testimony by Skomski and Leptich. His arguments appear to be directed to the weight of the testimony rather than its admissibility.

Kinzle's attempt to raise an Eighth Amendment challenge to his sentence will not be considered because it is so devoid of meaningful argument on a complex constitutional issue that "it does not inform the court of the nature and occurrence of alleged errors." RAP 10.10(c).

Kinzle challenges additional conditions of community custody as not being related to his crime. Condition 12 requires him to notify his employer of the

conviction; condition 19 requires him to maintain full time employment; and condition 29 requires approval of living arrangements. These conditions are authorized by statute "as part of any term of community custody" and need not be crime-related. RCW 9.94A.703(2)(b); RCW 9.94A.703(2)(e).

Kinzle challenges the imposition of two fees required by statute. His challenge is meritless because these fees are mandatory irrespective of the defendant's ability to pay.

Kinzle's conviction for child molestation involving N is reversed. His judgment and sentence is remanded for correction of the conditions of community custody consistent with this opinion.

Becker, J.

WE CONCUR:

Verellen, ACJ

Dwyer, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 69451-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: July 16, 2014