NO. 44265-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

SEAN STOLL,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. SUMMARY OF REPLY

The State concedes that the jury instructions erroneously failed to advise the jury that each count must be based on a separate and distinct act against the same victim over the same time period. Because on rigorous review this Court cannot find this was the rare circumstance where it was manifestly apparent that the conviction for each count was based on a separate act, one of the resulting convictions must be reversed. *State v. Mutch*, 171 Wn.2d 646, 664-65, 254 P.3d 803 (2011).

The State also concedes all but one of the alleged sentencing errors. Therefore, the Court should reverse a conviction and remand with instruction not to impose the improper sentencing conditions on the remaining conviction.

B. ARGUMENT IN REPLY

1. **This was not the rare circumstance where it was manifestly apparent to the average juror that each count was based on a separate and distinct act because the evidence, arguments and instructions did not collate around two separate and distinct acts.**

No individual shall "be twice put in jeopardy of life or limb" for the same offense. U.S. Const. amend. V; *accord* U.S. Const. amend. XIV; Const. art. I, § 9. To ensure protections against double jeopardy,

where the to-convict instructions provide multiple instances of the same offense against the same victim during the same time period, the instructions must inform the jury that each offense must be based on a separate and distinct act. *State v. Mutch*, 171 Wn.2d 646, 663, 254 P.3d 803 (2011).

If the instructions fail to inform the jury of the separate and distinct acts requirement, then reversal of the offending counts must result in all but the rarest of circumstances. *Mutch*, 171 Wn.2d at 664-65. The multiple convictions can stand only if the evidence, argument, and instructions made it manifestly apparent to the jury that each count must be based on a separate and distinct act. Only then can this Court's rigorous review ensure that the jury did not convict Mr. Stoll twice for the same act.

That rare circumstance was present in *Mutch*. In that case all the evidence and argument pointed explicitly and unambiguously to an enumerated number of separate and distinct acts that matched precisely the number of counts and to-convict instructions. The information charged five counts of rape based on allegations that constituted five separate units of prosecution. *Mutch*, 171 Wn.2d at 665. The victim specifically testified to five different episodes of rape. *Id.* A detective

testified the defendant admitted engaging in multiple sexual acts with the victim. *Id.* The State discussed all five episodes in closing argument. *Id.* Finally, the defense did not argue or cross-examine on the insufficiency of evidence for each count but argued instead that the victim consented and was not credible. *Id.* Thus all of the evidence, argument, and instruction in *Mutch* pointed to five distinct criminal acts and none of the evidence, argument, or instruction contradicted it.

This is not that case. Rather, here the evidence was ambiguous regarding the timing of the alleged incident and the number of occurrences. At trial, evidence was admitted that S.R.J. initially disclosed a single act of misconduct, limited to Mr. Stoll touching her "butt crack." 9/27/12 RP 226-27, 250, 307, 315. Only one witness testified S.R.J. disclosed rectal penetration, and again this alleged penetration occurred only on a single occasion. 9/27/12 RP 250. At trial, S.R.J. testified to sexual penetration that occurred more than once. 9/27/12 RP 273-78, 295-96. She had told two other witnesses it happened almost every night for more than a week, or more than once for over a week. 10/2/12 RP 415. But S.R.J. also admitted she had previously testified it had happened only once. 9/27/12 RP 292-93; Exhibits 7, 8. Thus the evidence on the number and types of contact

varied. *Cf.* CP 53-54 (this Court's opinion on appeal from prior trial). The State's closing argument did not clarify the evidence upon which it was relying for each count. The prosecutor merely argued, "[S.R.J.] testified it happened on more – more than one occasion. So it happened at least twice." 10/2/12 RP 486 (emphasis added). This case is far from the "rare circumstance" presented in *Mutch*.

The State isolates four pages of testimony, arguing that those four pages alone show it was manifestly apparent to the jury that two separate and distinct acts must be found. Resp. Br. at 3,8. By extremely selectively narrowing the evidence to these four pages, the State not only ignores the bulk of the trial evidence but also fails to consider the State's own argument at trial. The State did not merely argue, as it tries to on appeal, that the evidence showed one act of digital penetration and one act of penile penetration. Rather, the State argued to the jury that the evidence showed "it" happened "for a week." 10/2/12 RP 485. At trial, the State generically discussed sexual intercourse, without distinguishing two separate acts. 10/2/12 RP 485 ("He'd wake her up and have sexual intercourse with her [for a week]."); 9/27/12 RP 216 (arguing generically in opening that Stoll is "guilty of two rapes"). And the prosecutor summarily described

S.R.J.'s testimony to be that "it happened on more – more than one occasion." 10/2/12 RP 486; *see* 9/27/12 RP 214 (in opening statement, prosecutor states "this happened on at least two prior occasions"). Even to the limited extent the prosecutor specified two types of penetration, the argument was muddled by his general argument immediately thereafter that "it happened on more than one occasion." 10/2/12 RP 507.

Unsurprisingly, the evidence does not match the State's novel argument on appeal that there was orderly symmetry between two different acts of penetration and the two counts charged. As Mr. Stoll emphasized, S.R.J. "never told the same story twice;" "Everything she said is inconsistent." 10/2/12 RP 488, 489; *accord* 10/2/12 RP 491 (S.R.J. told different stories that were never the same twice), 497 ("stories aren't consistent"), 503. For example, "she said things on a videotape that were inconsistent with everything else she said to anybody else." 10/2/12 RP 488. In fact, S.R.J. disclosed only at most digital penetration to her family but disclosed only penile touching or penetration to a child interview specialist. Exhibit 4 at pp.8-10, 14; 10/2/12 RP 495, 506 (closing argument). Then at trial, S.R.J. testified that both penile and digital penetration occurred without specification

as to the alleged number of occasions on which each occurred. 9/27/12 RP 273-77.

Not only did the State fail to distinguish among incidents, but the jury could have readily found reason to doubt S.R.J.'s testimony at trial as to digital penetration because she only indicated it had occurred in response to leading questions. 9/27/12 RP 275-76 (specifying "it" occurred through penile penetration, but adding digital penetration in response to "Did he ever use his finger?"); 9/27/12 RP 277-78 (describing how "it" happened to include only penile penetration). When provided the opportunity to describe the offense, S.R.J. volunteered penile penetration. *Id.* Moreover, the jury had additional reason to doubt digital penetration occurred. As Mr. Stoll argued, S.R.J.'s disclosures to her family that Mr. Stoll "put his hand down her butt" were insufficient to constitute sexual intercourse. 10/2/12 RP 495-96; *see State v. A.M.*, 163 Wn. App. 414, 420-21, 260 P.3d 229 (2011) ("penetration of the buttocks, but not the anus," is not sexual intercourse for purposes of child rape statute).

In short, the record fails to make manifest whether the jury convicted on a single act of penile penetration, a single act of digital penetration, multiple acts of penile penetration, multiple acts of digital

penetration, or one act of penile penetration plus one act of digital penetration. One of Mr. Stoll's two convictions must be reversed and vacated due to the double jeopardy violation. *See, e.g.*, *State v. Womac*, 160 Wn.2d 643, 660, 160 P.3d 40 (2007); *State v. Berg*, 147 Wn. App. 923, 935, 198 P.3d 529 (2008).

2. The court dilute the burden and misstated the law by instructing the jury that the State has satisfied the reasonable doubt standard when the jurors have an abiding belief in the truth of the charge, denying Mr. Stoll's due process right to a fair trial.

Mr. Stoll relies on his opening brief for the argument that the State's instruction on the reasonable doubt standard deprived Mr. Stoll of a fair trial. Op. Br. at 23-27. As set forth therein, 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. VI, XIV; Const. art. I, §§ 21, 22.

3. Like in *State v. Bertrand*, this Court should consider whether the trial court improperly imposed discretionary fees and costs because it did not find, and the evidence does not support, that Mr. Stoll had the ability to pay.

In his opening brief, Mr. Stoll argued this Court should strike the discretionary costs imposed, or least the finding that Mr. Stoll had the ability to pay because it is not supported by substantial evidence. To the extent there was any evidence about Mr. Stoll's financial condition, it showed he was indigent.

In response the State does not contest that the finding is erroneous. Rather, the State only argues that the Court should not review the issue because Mr. Stoll did not lodge a specific objection below. Resp. Br. at 12-13.

"[E]stablished case law holds that illegal or erroneous sentences may be challenged for the first time on appeal." *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). "This rule applies likewise to a challenge to the sentencing court's authority to impose a sentence." *State v. Hunter*, 102 Wn. App. 630, 633, 9 P.3d 872 (2000) (reviewing challenge to imposition of financial contribution to drug fund raised for the first time on appeal). This Court has previously reviewed for the first time on appeal the error alleged here. *E.g.*, *State v. Lundy*, No.

42886–5–II, __ P.3d __, 2013 WL 4104978 (Aug. 13, 2013); *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511 (2011); *State v. Curry*, 62 Wn. App. 676, 678-79, 814 P.2d 1252 (1991); *State v. Baldwin*, 63 Wn. App. 303, 308-12, 818 P.2d 1116 (1991) (reviewing issue despite noting defendant's failure to object to request for imposition in presentence report).

Moreover, this Court always has discretion whether to apply RAP 2.5(a). *Hunter*, 102 Wn. App. at 633; *Curry*, 62 Wn. App. at 678-79 (without deciding whether review is always required, exercising discretion to review financial obligations imposed without finding of ability to pay). Barring review here would be particularly inappropriate because a challenge to the ability to pay finding and imposition of discretionary costs does not run the risk of necessitating a new trial, one of the primary bases for encouraging the efficient use of judicial resources by requiring issues be raised first during trial. *State v. Moen*, 129 Wn.2d 535, 547-48, 919 P.2d 69 (1996); *State v. Armstrong*, 91 Wn. App. 635, 637-38, 959 P.2d 1128 (1998); *see* RAP 2.5(a); *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). The error should be reviewed and the imposition of costs stricken.

4. The State concedes that the five challenged community custody conditions should be stricken.

The State concedes that the trial court improperly imposed five conditions of community custody:

1. Condition 19 requiring Mr. Stoll to pay the victim and her family's unspecified counseling and medical costs;
2. Condition 18 requiring Mr. Stoll to undergo plethysmograph examinations at the discretion of his community corrections officer to measure treatment progress and compliance with conditions of community custody;
3. Condition 10 providing "The defendant shall not go into bars, taverns, lounges, or other places whose primary business in [sic] the sale of liquor;"
4. Condition 30 prohibiting Mr. Stoll from purchasing, possessing, or consuming alcohol;
5. Condition 11 restricting Mr. Stoll's access to "the internet (including via cellular devices) or any other computer modem . . . ."

Compare Op. Br. at 31-44; CP 20-21 *with* Resp. Br. at 14-24. For the reasons set forth in the opening and response briefs this Court should

accept the State's concessions and remand with instruction to strike the conditions. Op. Br. at 31-44; Resp. Br. at 14-24.

5. The State should not be provided a second opportunity to prove restitution, as it requests without any authority in its response brief.

As to the condition requiring Mr. Stoll to pay the victim and her family's unspecified counseling and medical costs, the State concedes error but asserts without any support that in striking the condition, this Court should order the trial court "to enter a restitution order under RCW 9.94A.753 for the payment of costs for crime-related victim counseling." Resp. Br. at 16. The State's unsupported request is without merit.

The court's authority to order restitution is limited by statute. *State v. Gray*, 174 Wn.2d 920, 924, 280 P.3d 1110 (2012). Under RCW 9.94A.753(1), the amount of restitution must be determined within 180 days of sentencing. That section provides, "[w]hen restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days." RCW 9.94A.753(1). "Use of the word 'shall' creates a mandatory time limit, and the trial court may not enter an order determining restitution after the statutory period has expired." *State v. Chipman*, No. 43668-0-

II, __ Wn. App. __, 2013 WL 4824431, *2 (Sept. 10, 2013) (citing *State v. Krall*, 125 Wn.2d 146, 147-49, 881 P.2d 1040 (1994)); *accord Gray*, 174 Wn.2d at 925; *State v. Tetreault*, 99 Wn. App. 435, 437, 998 P.2d 330 (2000) (vacating restitution order entered after hearing held more than 180 days from sentencing).

Here, the trial court lacks authority to enter restitution on remand because more than 180 days have passed since the November 13, 2012 sentencing hearing. No restitution order was entered at sentencing, or within 180 days thereof. *See* CP 13 (providing that a restitution hearing shall be by the prosecutor or court); CP __ (trial court docket showing no restitution hearing).[1] Moreover, the State did not move to toll the 180-day limit. Accordingly, the only two exceptions to the 180-day limit of RCW 9.94A.753(1) do not apply. *Chipman*, 2013 WL 4824431, at *2 (noting two exceptions: first, where State requests tolling of time limit before it expires, second, for modification of a timely-entered restitution order).

If a hearing is set outside the 180-day period without a State's motion for tolling, this Court must vacate any resulting restitution order. *Tetreault*, 99 Wn. App. at 436-38; *State v. Johnson*, 96 Wn.

[1] A motion to supplement the record with a copy of the trial court docket and a supplemental designation of clerk's papers has been filed.

App. 813, 816-18, 981 P.2d 25 (1999). In *Johnson*, this Court vacated a restitution order that was entered more than 180 days after sentencing. 96 Wn. App. at 815. The trial court concluded there was good cause to extend the 180-day limit despite the State's failure to move to toll the limit prior to its expiration. *Id.* This Court held the trial court lacked the authority to grant a continuance after the expiration of the 180-day limit. *Id.* at 816-17. In so holding this Court reasoned,

> First, in view of the mandatory nature of the statute it would be illogical to allow consideration of a continuance that is raised after the time limit has expired. Second, the statute does not provide for requests for continuances made after the expiration of the time limit. Third, to permit such a practice is inconsistent with the purposes of the restitution statute described in *Krall* and would not advance finality. To accept the State's argument would be to permit an order *nunc pro tunc* without a record action within the time limits. This we cannot do. *See State v. Nicholson*, 84 Wn. App. 75, 925 P.2d 637 (1996), *review denied*, 131 Wn.2d 1025, 937 P.2d 1101 (1997). Therefore, we conclude the trial court lacked statutory authority to grant a continuance.

Id. The court went on to hold that even if good cause were sufficient for a post-time limit continuance, "[i]nadvertence or attorney oversight is not 'good cause.'" *Id.* at 817; *accord State v. Moen*, 129 Wn.2d 535, 542, 919 P.2d 69 (1996) (accepting that "statutory time mandate

prevails over victims' rights to restitution," which necessarily results in victim not receiving compensation where State delays).

> The principle that time limits exist which may bar compensation to injured persons is not a novel concept in our jurisprudence. At some point, rights will be cut off. It is inappropriate to hold a defendant accountable by imposing restitution in violation of former RCW 9.94A.142 in order to "enforce" victims' rights . . . when the State failed in its burden to comply with the statutory . . . time requirement. . . .
>
> It is also in the victim's best interest to have restitution set in a timely fashion under [former] RCW 9.94A.142, when evidence of loss is fresh and the victim's need often at its greatest. Under former RCW 9.94A.142 it was accordingly imperative that the State obtain a timely restitution order both to serve the victim's interest and to comply with the Legislature's mandate that the amount of restitution be determined within [the statutory time limit].

Moen, 129 Wn.2d at 542.

It would be entirely incongruent here to allow restitution to proceed after re-sentencing when the State had every opportunity to carry its burden at the initial sentencing and failed to do so. *Cf. State v. Griffith*, 164 Wn.2d 960, 968 & n.6, 195 P.3d 506 (2008) (where amount of timely-ordered restitution not supported by substantial evidence, remedy is to remand for new hearing on same evidence because allowing State to admit new evidence would "conflict with the statutory requirement that restitution be set within 180 days after

sentencing"). The State failed to carry its burden here despite discussion of restitution at sentencing, and the entry of a restitution order for different expenses following the second trial. 10/2/12 RP 526, 530-31; *see* CP 85-86 (restitution order entered after prior trial for $342 for four days of the victim's father's missed work); CP __ (Sub # 54 (support for restitution order)).[2]

Moreover, remand to vacate a conviction that violates double jeopardy and to strike erroneous conditions of community custody does not affect those portions of the judgment and sentence that were correct and valid at the time it was pronounced. *State v. Kilgore*, 167 Wn.2d 28, 37, 216 P.3d 393 (2009) (quoting *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 34, 604 P.2d 1293 (1980)). A reversal of one count based on the error alleged here on appeal would not affect one of Mr. Stoll's convictions. *Id.* at 40-41 ("if the trial court simply corrects the original judgment and sentence, it is the original judgment and sentence entered by the original trial court that controls the defendant's conviction and

[2] The restitution order entered after Mr. Stoll's 2009 conviction was necessarily vacated as a result of this Court's reversal of the underlying conviction. *See State v. Guidry*, 153 Wn. App. 774, 784, 223 P.3d 533 (2009); *Johnson*, 69 Wn. App. at 191 (restitution award must be based on causal connection between offense charged and proved and victim's loss); 10/2/12 RP 526 (State apparently recognizes prior restitution order no longer in effect).

term of incarceration"). Accordingly, the 180 day time limit for purposes of restitution runs from the initial sentencing date.

This Court should strike the erroneous sentencing conditions and decline the State's unsupported request to order the trial court to enter a restitution order.

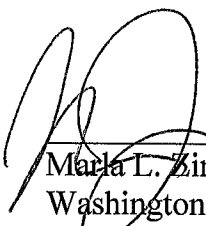
F. CONCLUSION

Mr. Stoll's right not to be twice placed in jeopardy for the same act was violated by the court's failure to instruct the jury that separate and distinct acts had to form the basis for each conviction. One of Mr. Stoll's convictions should be dismissed.

Further, this Court should remand with direction to strike numerous provisions of the sentence as set forth above, including the imposition of legal financial obligations and several conditions of community custody that are unauthorized and not crime-related.

DATED this 16th day of September, 2013.

Respectfully submitted,



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON, Respondent, v. SEAN STOLL, Appellant.	)))))))))	NO. 44265-5-II

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