No. 44265-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

SEAN STOLL , APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Toni A. Sheldon, Judge

No. 08-1-00438-4

BRIEF OF RESPONDENT

MICHAEL DORCY
Mason County Prosecuting Attorney

By
TIM HIGGS
Deputy Prosecuting Attorney
WSBA #25919

521 N. Fourth Street
PO Box 639
Shelton, WA 98584
PH: (360) 427-9670 ext. 417

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A. STATE'S COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The jury instructions did not violate Stoll's constitutional rights to be free from double jeopardy. The instructions were flawed because the language defining the elements of each of the two charged counts was identical and there was no instruction that each count must be based upon an act that was separate and distinct from the other count. However, Stoll's conviction on both counts should be sustained because on the facts of this case it was manifestly apparent to the jury that each count was based upon a separate and distinct act.

2. The trial court did not err by using the reasonable doubt jury instruction provided by WPIC 4.1 and including the optional "abiding belief" language.

3. Stoll alleges that there is insufficient evidence in the record to support the trial court's finding that he has the ability to pay legal financial obligations, but Stoll failed to preserve this issue with an objection in the trial court. The State avers that, on the facts of this case, Stoll should not be allowed to raise this issue for the first time on appeal.

4. As a part of the judgment and sentence the trial court as a condition of community custody entered an order requiring Stoll to pay costs, which are yet to be determined, for crime-related counseling for the victim. Because the court has no statutory authority to order the payment of crime-related victim counseling as a part of community custody, the order should be stricken from the community custody conditions, and the trial court should be ordered to enter a restitution order for the payment of costs for crime-related victim counseling under RCW 9.94A.753.

5. As a condition of community custody, the trial court ordered

that Stoll undergo plethysmograph testing at the direction of his community custody officer or his treatment provider. Plethysmograph testing is an important treatment tool, but it does not serve a monitoring purpose in regards to the conditions of community custody. Therefore, while the trial court appropriately ordered Stoll to undergo plethysmograph testing at the direction of his treatment provider, the court lacked statutory authority to order plethysmograph testing at the discretion of the community custody officer. The requirement that Stoll submit to plethysmograph testing at the direction of his community custody officer should be stricken from the conditions of community custody.

6. Among the conditions of community custody imposed by the trial court were conditions that Stoll not enter places where alcohol is sold or served, a prohibition against the possession or purchase of alcohol, and a requirement that Stoll undergo drug and alcohol testing at the request of his treatment provider or community custody officer. Because alcohol was not related to the crimes of conviction, the trial court lacked statutory authority to impose some of these conditions, which should, therefore, be stricken from the conditions of community custody.

7. As a condition of community custody, the trial court restricted Stoll's access to use of the internet. Because use of the internet was not related to Stoll's crimes of conviction, the court lacked statutory authority to impose this condition, which should, therefore, be stricken as a condition of community custody.

B. FACTS AND STATEMENT OF THE CASE

SJ was born in March of 1999. RP 225, 266-67. Until at least 2011, she lived in a house on Arcadia Road in Shelton, Washington. RP

267. Several adults and other children shared the residence. RP 224, 245, 248-49, 303-06. One of the adults was Leigh Ann Riker, who slept on a couch in the living room. RP 224, 248. Two kids, one of whom was SJ, slept in a bed in the same room as Ms. Riker. RP 224-25, 248-49, 269, 305-06. Occasionally, Mr. Riker's son, Sean Stoll, would stay over, and when he did he would sleep on the floor in a sleeping bag in the same room as Ms. Riker and the kids. RP 224, 249, 305. Stoll was born on October 25, 1980. RP 431.

While growing up, SJ was a cheerleader for about four years, until she quit at the age of nine or ten. RP 274. During a timeframe between 2006 and 2007, when SJ was a cheerleader, Stoll told her that "having sex" would help her to do the splits. RP 273. On one occasion, when SJ was sleeping on a daybed in the room she shared with Mr. Riker and other children, Stoll inserted his finger into SJ's anus. RP 274, 276. On another occasion, Stoll inserted his penis into SJ's vagina. RP 275-76. SJ was about seven years old when Stoll committed these rapes. RP 225, 266. Stoll was 25 or 26 years old when these rapes occurred. RP 431. Stoll and SJ were not married. RP 270.

In August of 2008, SJ disclosed that Stoll had touched her. RP 226. SJ disclosed that Stoll woke her in the middle of the night and told her that, because she was cheerleading, he could help her do the splits, and he put his finger in her anus. RP 226, 250. Stoll threatened to hurt SJ if she told anyone. RP 227. Later, SJ also disclosed that Stoll had penetrated her vagina with his penis, and that this occurred everyday for about a week. RP 415.

The State charged Stoll with two counts of rape of a child in the first degree. CP 72-77. The jury convicted Stoll on both counts, but the convictions were reversed on appeal because a prejudicial, prior conviction was introduced as evidence at his first trial. CP 47-54. The prior conviction was admitted into evidence under the authority of RCW 10.58.090, which was later ruled unconstitutional. CP 47-54. After remand, the State tried Stoll again, and the jury again convicted Stoll for both counts of rape of a child in the first degree. CP 24-25. This appeal followed. CP 5.

C. <u>ARGUMENT</u>

1. The jury instructions did not violate Stoll's constitutional rights to be free from double jeopardy. The instructions

> were flawed because the language defining the elements of each of the two charged counts was identical and there was no instruction that each count must be based upon an act that was separate and distinct from the other count. However, Stoll's conviction on both counts should be sustained because on the facts of this case it was manifestly apparent to the jury that each count was based upon a separate and distinct act.

The jury convicted Stoll of two counts of rape of a child in the first degree as charged in the third amended information. CP 24-25, 45-46. Count I alleged that Stoll committed acts constituting rape of a child in the first degree during a period between April 24, 2006, to March 31, 2007. CP 45. The language of count II was identical to that of count I, including the charging dates, except that count II included a statement that count II alleged an "act separate and distinct from the act alleged in count I." RP 46.

Jury Instructions No. 10 and 11 instructed the jury in regard to the elements that the State was required to prove beyond a reasonable doubt in regard to counts I and II, respectively. CP 40, 41. Instructions No. 10 and No. 11 were identical in every respect, and neither instruction contained language specifically informing the jury that each count referred to an act that was separate and distinct from the other count. *Id.* However, the

instructions as a whole correctly instructed the jury that "[a] separate crime is charged in each count" and that the jury "must decide each count separately." CP 37 (Jury Instruction No. 7).

Stoll asserts that, because instructions No. 10 and No. 11 were identical, the instructions allowed the jury to return two guilty verdicts based upon the same criminal act, which was in violation of the constitutional prohibition against double jeopardy. Appellant's Opening Brief, p. 12. A criminal defendant is constitutionally protected against multiple punishments for the same offense. U.S. Const. amend. V; Wash. Const. art. I, § 9; *State v. Calle,* 125 Wn.2d 769, 772, 888 P.2d 155 (1995). A double jeopardy violation is an error of constitutional magnitude and may be raised for the first time on appeal. *State v. Mutch,* 171 Wn.2d 646, 661, 254 P.3d 803 (2011). Review is de novo. *Id.* at 661–62.

When the State presents evidence of multiple acts that could constitute more than one of the crimes charged, the trial court should instruct the jury that each count must be based on a separate and distinct act. *State v. Mutch,* 171 Wn.2d 646, 662-666, 254 P.3d 803 (2011); *State v. Noltie,* 116 Wn.2d 831, 846, 809 P.2d 190 (1991); *State v. Carter,* 156

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Wn. App. 561, 565–67, 234 P.3d 275 (2010); *State v. Berg,* 147 Wn.App. 923, 931–35, 198 P.3d 529 (2008). Accordingly, the jury instructions in the instant case were flawed because the instructions did not include a separate and distinct acts instruction and, thus, could, at least theoretically, have permitted the jury to return both of its guilty verdicts based upon a single act. See, e.g., *Mutch* at 663. "However, flawed jury instructions that permit a jury to convict a defendant on multiple counts based on a single act do not necessarily mean that the defendant received multiple punishments for the same offense; it simply means that the defendant *potentially* received multiple punishments for the same offense." *Id.* Thus, the mere potential that jury instructions might allow two convictions for the same act does not by itself constitute a double jeopardy violation. *Id.* "'In order to violate federal and state double jeopardy standards, there must be multiple punishments for the 'same offense.''" *Mutch* at 663, quoting *Noltie,* 116 Wn.2d at 848.

Where, as here, the instructions do not inform the jury that each count must be based on a separate and distinct act, the reviewing court must determine whether the evidence, arguments, and instructions made the separate acts requirement "'manifestly apparent to the jury.'" *Mutch* at

664, quoting *Berg*, 147 Wn. App. at 931. If the separate acts requirement was not manifestly apparent to the jury, then the reviewing court must vacate the convictions that potentially violate double jeopardy. *Mutch* at 664.

The victim in the instant case revealed multiple acts of rape that occurred over a period of time. RP 276, 292-93, 415. But evidence of the details of these rapes was limited to two separate and distinct acts, which consisted of Stoll inserting his finger in the victim's anus in the one instance and inserting his penis into the victim's vagina in another instance. RP 274-78. On the facts of the instant case, each separate and distinct act of penetration constitutes a separate and distinct crime of rape of a child in the first degree. RCW 9A.44.010(1); RCW 9A.44.030. The State avers that there is virtually no possibility of the jury confusing the two acts. One act involved a finger; the other act involved a penis. One act involved insertion of an object, in this case a finger, into the anus; the other act involved the insertion of an object, in this case a penis, into the vagina. RP 274-78. The two acts are separate and distinct.

However, where a potential double jeopardy violation has occurred, the mere existence of independent evidence to support both

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convictions does not obviate the violation. Instead, a reviewing court must examine the entire record when considering a double jeopardy claim. "Considering the evidence, arguments, and instructions, if it is not clear that it was '*manifestly apparent* to the jury that the State [was] not seeking to impose multiple punishments for the same offense' and that each count was based on a separate act, there is a double jeopardy violation." *Mutch* at 664–65 (alteration in original), quoting *State v. Berg,* 147 Wn. App. 923, 931, 198 P.3d 529 (2008). But, here, there is more than merely independent evidence to support each count; here, the evidence defines acts that are each factually separate and distinct from the other act -- in one act Stoll inserted his penis into the victim's vagina, and in the other act Stoll inserted his finger into the victim's anus. It is manifestly apparent that these two sets of facts are separate and distinct.

When two counts charge similar crimes, an ordinary juror would understand that each count requires proof of a different act. *State v. Ellis,* 71 Wn. App. 400, 406, 859 P.2d 632 (1993). In the instant case, the State avers that both of Stoll's convictions for rape of a child in the first degree should be sustained, because the facts constituting each offense clearly constitute separate and distinct incidents, and any ordinary juror, when

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presented with these facts, would understand that each of the two charged counts required proof of a different act. Thus, the lack of a jury instruction that each count must be based on a separate and distinct act would not result in a double jeopardy violation, because on these facts it would be "'*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." *Mutch* at 664–65 (alteration in original), quoting *State v. Berg,* 147 Wn. App. 923, 931, 198 P.3d 529 (2008).

2. The trial court did not err by using the reasonable doubt jury instruction provided by WPIC 4.1 and including the optional "abiding belief" language.

The trial court instructed the jury on the definition of "reasonable doubt" as follows:

> 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, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 33 (Jury Instruction No. 3). Stoll contends that it was error for the court to include the "abiding belief" language in the reasonable doubt

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instruction. Appellant's Opening Brief, pp. 23-26. Jury Instruction No. 3 is a verbatim reproduction of WPIC 4.1, which is provided by the Washington Supreme Court's Committee on Jury Instructions, as follows:

> 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 Wash. Prac., Pattern Jury Instr. Crim. WPIC 4.01 (3d ed.)(brackets and italics appear in original).

Washington courts are required to use WPIC 4.01 to define reasonable doubt for the jury, and no deviation from the pattern instruction is allowed. *State v. Bennett*, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). The language used by the court in Instruction No. 3 is taken directly from 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 4.01 (3d ed.) (WPIC) and has been expressly approved in numerous appellate decisions. *See State v. Pirtle,* 127 Wn.2d 628, 904 P.2d 245 (1995); *State v. Lane,* 56 Wn. App. 286, 299–301, 786 P.2d 277 (1989) (rejecting the argument that WPIC 4.01 dilutes the State's burden of proof); *State v. Mabry,* 51 Wn. App. 24, 751 P.2d 882 (1988) (cited with

approval in *Pirtle*): *State v. Price,* 33 Wn. App. 472, 655 P.2d 1191 (1982).

3. Stoll alleges that there is insufficient evidence in the record to support the trial court's finding that he has the ability to pay legal financial obligations, but Stoll failed to preserve this issue with an objection in the trial court. The State avers that, on the facts of this case, Stoll should not be allowed to raise this issue for the first time on appeal.

The trial court ordered Stoll to pay legal financial obligations in the amount of $2,240.78. CP 12-13. These costs included the following statutorily mandated amounts: $500.00 victim assessment (RCW 7.68.035); $200 criminal filing fee (RCW 36.18.020(2)(h)); $100 DNA collection fee (RCW 43.43.7541); and, the $250.00 jury demand fee (RCW 10.46.190). CP 12-13. The court imposed the following discretionary fees: $129.78 for witness costs (RCW 10.01.160) and $1,061.00 for sheriff's service fees (RCW 10.01.160). CP 12-13. Mandatory costs must be imposed irrespective of the court's assessment of the defendant's ability to pay. See, *State v. Curry,* 118 Wn.2d 911, 917, 829 P.2d 166, 168 (1992), citing *State v. Q.D.,* 102 Wn.2d 19, 29, 685 P.2d 557 (1984). Discretionary costs, however, may only be imposed

if the defendant has the ability to pay. RCW 10.01.160(3). Additionally, "[i]n determining the amount and method of payment of cost, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." *Id.*

The judgment and sentence included boilerplate language, as follows:

> The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change.

CP 10. Following this language, a box was checked next to a specific boilerplate finding that Stoll "has the ability or likely future ability to pay the legal financial obligations imposed herein." CP 10.

Stoll did not object to the court's imposition of these legal financial obligations. RP 533-34. Stoll raises this issue for the first time on appeal. Generally, a convicted criminal defendant may not raise issues related to legal financial obligations for the first time on appeal where the alleged error was not preserved by an objection at the trial court. RAP 2.5(a); *State v. Blazina*, ___ Wn. App. ___, 301 P.3d 492 (No. 42728-1-II, May 21, 2013); *State v. Kuster*, ___ Wn. App. ___, ___ P.3d ___ (No. 30548-1-III, July 11, 2013).

4. As a part of the judgment and sentence the trial court as a condition of community custody entered an order requiring Stoll to pay costs, which are yet to be determined, for crime-related counseling for the victim. Because the court has no statutory authority to order the payment of crime-related victim counseling as a part of community custody, the order should be stricken from the community custody conditions, and the trial court should be ordered to enter a restitution order for the payment of costs for crime-related victim counseling under RCW 9.94A.753.

Stoll's crimes of conviction in the instant case occurred during the charging period of April 24, 2006, and March 31, 2007. CP 40-41, 45-46. Following conviction, the trial court ordered legal financial obligations that included a finding that the total amount of legal financial obligation initially ordered by the court on the judgment and sentence did "not include all restitution... which may be set by later order of the court." CP 12-13. The judgment and sentence did not include a RCW 9.94A.753 restitution order for the costs of crime-related counseling for the victim. *Id.* However, condition (19) of Appendix H, which contained conditions of community custody, required Stoll to "pay for all counseling services/therapy costs incurred by his/her victim and members of his/her

immediate family as a direct result of his/her assault upon him/her as ordered by the Court[.]" CP 21.

Although a trial court may order an offender to pay the victim's counseling costs under a provision of the restitution statute, RCW 9.94A.753(3) and RCW 9.94A.505(7), it does not have statutory authority to impose payment of a victim's counseling costs as a condition of community custody. *See* former RCW 9.94A.712(5), (6)(a)(i); former RCW 9.94A.700(4), (5). Accordingly, the State must concede that condition (19) of Appendix H of Stoll's judgment and sentence should be stricken.

Stoll also avers that the trial court unconstitutionally delegated judicial authority to the probation department when it granted authority to the DOC to award restitution and to determine the amount to be paid. Appellant's Opening Brief, pp. 31-34. If condition (19) were a delegation of judicial authority, the State would necessarily concede that the delegation was error. See, e.g., *State v. Summers,* 60 Wn.2d 702, 708, 375 P.2d 143 (1962); *see also State v. Forbes,* 43 Wn. App. 793, 800, 719 P.2d 941 (1986). However, the State avers that condition (19) does not delegate any authority to DOC; instead, condition (19) merely makes

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payment of restitution "as ordered by the Court" a condition of community custody. CP 21. But in this case, restitution for counseling has not been ordered by the court; thus, there currently is no order of restitution to give effect to condition (19).[1]

Because the court has no statutory authority to order the payment of crime-related victim counseling as a part of community custody, the order should be stricken from the community custody conditions, and the trial court should be ordered to enter a restitution order under RCW 9.94A.753 for the payment of costs for crime-related victim counseling.

5. As a condition of community custody, the trial court ordered that Stoll undergo plethysmograph testing at the direction of his community custody officer or his treatment provider. Plethysmograph testing is an important treatment tool, but it does not serve a monitoring purpose in regards to the conditions of community custody. Therefore, while the trial court appropriately ordered Stoll to undergo plethysmograph testing at the direction of his treatment provider, the court lacked statutory authority to order plethysmograph testing at the discretion of the community custody officer. The requirement that Stoll submit to plethysmograph testing

[1] At the sentencing hearing, the court mentioned a restitution order for $342.00 that was entered following the prior trial, and the court indicated that it was adopting this restitution order in the current case, but the written judgment and sentence does not reference this order or show an award for restitution, and it appears that the prior order referred to by the court was not an order for restitution for the costs of victim counseling. RP 531, 534; CP 85-86.

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> at the direction of his community custody officer should be stricken from the conditions of community custody.

As a part of the judgment and sentence, the court ordered Stoll to be on community custody for the period of any earned release. CP 11. In addition to the terms of community custody that were specified in the body of the judgment and sentence, Stoll was ordered to follow additional terms as contained in "Appendix H" of the judgment and sentence. CP 11-12, 19-21. At paragraph (b)(18) of Appendix H, the court ordered the following condition of community custody:

> The defendant shall undergo periodic polygraph and/or plethysmograph testing to measure treatment progress and compliance with conditions of community custody at a frequency determined by his/her treatment provider and/or his/her Community Custody Officer[.]

CP 21.

It is within the statutory authority of the court to order Stoll to perform affirmative acts that assure compliance with sentencing conditions. RCW 9.94A.505(8), .703(3)(c) & (d); *State v. Riles*, 135 Wn.2d 326, 342-46, 957 P.2d 655 (1998), abrogated on other grounds by *State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010). It is apparently undisputed in the instant case that it was appropriate for the court to order

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Stoll to undergo sex offender treatment. And it is within the authority of the court to order plethysmograph testing where it is to be used as a treatment device by the treatment provider. *Riles* at 345-46. But "plethysmograph testing does not serve a monitoring purpose." *Id.* at 345. "Plethysmograph testing serves no purpose in monitoring compliance with ordinary community placement conditions." *Id.*

The condition at issue in the instant case is similar to one that was at issue in the recent case of *State v. Land*, 172 Wn. App. 593, 295 P.3d 782 (2013), which was decided after Stoll was sentenced in the instant case. CP 7-23. The trial court in *Land* ordered the defendant to '"[p]articipate in... plethysmograph examinations as directed by your Community Corrections Officer.'" *Id.* at 605 (quoting the trial court order). On review, the Court of Appeals disapproved of the trial court condition, remanded the matter to the trial court with instructions to strike the condition, and ruled as follows:

> Plethysmograph testing is extremely intrusive. The testing can properly be ordered incident to crime-related treatment by a qualified provider. *State v. Castro,* 141 Wn. App. 485, 494, 170 P.3d 78 (2007). But it may not be viewed as a routine monitoring tool subject only to the discretion of a community corrections officer.

Id. at 605-06.

Thus, the State in the instant case must concede that while it was proper for the trial court to order Stoll to undergo plethysmograph testing as directed by his treatment provider, it was beyond the court's statutory authority to order Stoll to undergo plethysmograph testing at the unrestrained discretion of his community corrections officer. The State, therefore, asks the court to order the trial court to strike from paragraph 18 of Appendix H of the judgment and sentence the requirement that Stoll submit to plethysmograph testing at the discretion of his probation officer, and to strike the condition that he submit to plethysmograph testing as a compliance measure, but to otherwise sustain the trial court's order relating to polygraph and plethysmograph testing. CP 21.

6. Among the conditions of community custody imposed by the trial court were conditions that Stoll not enter places where alcohol is sold or served, a prohibition against the possession or purchase of alcohol, and a requirement that Stoll undergo drug and alcohol testing at the request of his treatment provider or community custody officer. Because alcohol was not related to the crimes of conviction, the trial court lacked statutory authority to impose some of these conditions, which should, therefore, be stricken from the conditions of community custody.

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The legislature has sole province to establish legal punishments; thus, community custody conditions must be authorized by statute. *State v. Kolesnik*, 146 Wn. App. 790, 806, 192 P.3d 937 (2008), *review denied*, 165 Wn.2d 1050 (2009); *State v. Jones*, 118 Wn. App. 199, 76 P.3d 258 (2003). Stoll asserts that the trial court acted in excess of its statutory authority when it ordered him to abide by the following conditions of community custody:

> (10) The defendant shall not go into bars, taverns, lounges, or other places whose primary business in [sic] the sale of liquor...
>
> (12) The defendant shall, at his/her own expense, submit to urinalysis and/or breathalyzer testing at the request of the CCO or treatment provider to verify compliance...
>
> (30) The defendant shall not purchase, possess, or consume alcohol.

CP 20-21. The State avers that parts of the community custody conditions specified above are within the trial court's authority, but the State concedes that other parts exceed the court's statutory authority, and the State requests that the errors be remedied by an order on remand directing the trial court to strike the erroneous language from the judgment and sentence.

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Irrespective of whether the use of alcohol contributed to the commission of the crime of conviction, the trial court has statutory authority to order as a condition of community custody that a convicted defendant shall "refrain from consuming alcohol." RCW 9.94A.703(3)(e); *State v. Jones*, 118 Wn. App. 199, 206-07, 76 P.3d 258 (2003).

Additionally, the sentencing court had discretionary authority to impose crime related prohibitions. RCW 9.94A.703(3)(f). But no citation to the record was located where there are facts or circumstances that show that alcohol contributed to Stoll's crime of conviction. Because there is no citation to the record to support a finding that alcohol or the purchase or possession of alcohol contributed to Stoll's criminal offense, the court lacked statutory authority to impose the condition (30), which prohibited Stoll from possessing or consuming alcohol. *State v. Jones*, 118 Wn. App. 199, 76 P.3d 258 (2003).

For the same reason, condition (10) also exceeds the statutory authority of the court. Condition (10) restricts Stoll from patronizing "bars, taverns, lounges, or other places whose primary business in [sic] the sale of liquor[.]" CP 20. But as stated above, there is no evidence that alcohol contributed to Stoll's crime of conviction. Because the condition

is not crime related, and because there is otherwise no specific statutory authority to impose the condition, condition (10) should be stricken from Stoll's judgment and sentence. *State v. Jones*, 118 Wn. App. 199, 206-07, 76 P.3d 258 (2003).

Finally, Stoll avers that the court lacked authority to impose condition (12), which requires Stoll to "submit to urinalysis and/or breathalyzer testing... to verify compliance." CP 20. But, as argued above, the trial court had authority to order that Stoll not consume alcohol. RCW 9.94A.703(3)(e). The court has authority to impose affirmative conditions in order to monitor and enforce compliance with the court's validly imposed community custody conditions. *State v. Vant*, 145 Wn. App. 592, 603-04, 186 P.3d 1149 (2008); *State v. Riles*, 135 Wn. 2d 326, 342-46, 957 P.2d 655 (1998), abrogated on other grounds by *State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010).

In summary, the State avers that because the trial court had authority to require Stoll to abstain from the use of alcohol, condition (12) is a valid compliance-monitoring or enforcement tool that is within the trial court's authority and should be sustained. However, the trial court lacked the statutory authority to prohibit Stoll from possessing or

purchasing alcohol; therefore, the words "purchase, possess, or" should be stricken from condition (30). Finally, condition (10) should be stricken in its entirety because there is no express statutory authorization for the condition and it is not otherwise crime-related on the facts of the instant case. CP 20-21; RCW 9.94A.703; *State v. Jones*, 118 Wn. App. 199, 76 P.3d 258 (2003).

7. As a condition of community custody, the trial court restricted Stoll's access to use of the internet. Because use of the internet was not related to Stoll's crimes of conviction, the court lacked statutory authority to impose this condition, which should, therefore, be stricken as a condition of community custody.

As a condition of community custody, the trial court ordered in condition (11) that Stoll not access the internet unless certain stated conditions were satisfied. CP 20. However, there is no evidence in the record to suggest that use of the internet contributed to Stoll's crime of conviction. Because there is no express statutory authorization for the sentencing court to impose restrictions on use of the internet as a condition of sentence or community custody, and because there is no evidence in the record to suggest that Stoll's crime of conviction involved use of the internet, the State concedes that condition (11) should be stricken from the

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PO Box 639
Shelton, WA 98584
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judgment and sentence. *State v. Kone*, 165 Wn. App. 420, 437, 266 P.3d 916 (2011), as amended (Dec. 27, 2011), *review denied*, 173 Wash. 2d 1034, 277 P.3d 668 (2012); *State v. O'Cain,* 144 Wn. App. 772, 774, 184 P.3d 1262 (2008).

D. CONCLUSION

Because the unique facts of this case make it manifestly apparent that Stoll's two convictions for rape of a child in the first degree are the result of two separate and distinct criminal acts, the State asks the court to find that double jeopardy was not violated in this case and to sustain the jury's convictions of Stoll for two counts of rape of a child in the first degree.

Additionally, the State asks the court to sustain prior precedent of this court and the Supreme Court by finding that the trial court did not err by using the Supreme Courts's required WPIC 4.1 reasonable doubt instruction and that the use of the "abiding belief" language did not dilute the burden of proof as alleged by Stoll.

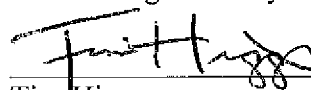
The State asks the court to deny Stoll's appeal in regard to his challenge to the payment of legal financial obligations because he did not preserve this issue for appeal by noting an objection in the trial court.

The trial court did not enter a restitution order for victim counseling pursuant to the authority of RCW 9.94A.753, and although the trial court did order restitution for an undetermined amount for victim counseling as a condition of community custody, it lacked the statutory authority to enter this order as a condition of community custody. Accordingly, the State asks the court to order the trial court to enter a restitution order for victim counseling pursuant to RCW 9.94A.703.

Finally, certain of the other conditions of community custody ordered by the trial court are not statutorily authorized. Accordingly, the State asks the court to order the trial court to strike those conditions.

DATED: July 17, 2013.

MICHAEL DORCY
Mason County
Prosecuting Attorney



Tim Higgs
Deputy Prosecuting Attorney
WSBA #25919

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

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