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NO. 64422-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

REC'D
OCT 20 2010
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

MOHAMMED KONE,

Appellant.

2010 OCT 20 PM 4:03


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

The Honorable Bruce E. Heller, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's CrR 8.3(b) motion to dismiss.

2. The trial court erred in admitting the complaining witness's out of court statements under the rule of completeness.

3. Appellant's conviction for indecent liberties violates the constitutional prohibition against double jeopardy.

4. The trial court erred in prohibiting unapproved Internet use as a condition of community custody.

5. The trial court erred in imposing substance abuse and evaluation as condition of community custody.

6. The trial court erred in imposing mental health evaluation and treatment as a condition of community custody.

7. The trial court erred in imposing payment of counseling costs as a condition of community custody.

Issues Pertaining To Assignments Of Error

1. Did the court err in failing to grant appellant's CrR 8.3(b) motion to dismiss where governmental mismanagement caused the State to seek dismissal without prejudice, thereby subverting appellant's right to a speedy trial?

2. The trial court admitted the complaining witness's out of court statements that were consistent with her trial testimony under the "rule of completeness," even though they did not form a part of the admitted inconsistent statement and were in fact made to others at different times. Did the court wrongly admit evidence of these consistent statements?

3. Appellant was charged and convicted of both attempted second degree rape and indecent liberties with forcible compulsion for the same act against the same person. Do appellant's convictions violate double jeopardy, requiring vacature of the indecent liberties conviction?

4. As a condition of community custody, the court prohibited unapproved Internet use. Must this condition be stricken because Internet use was not directly related to the circumstances of the offenses?

5. As a condition of community custody, the court required substance abuse evaluation and treatment if recommended by the sexual deviancy therapist or community corrections officer. Must this condition be stricken because substance abuse was not reasonably related to the circumstances of the offenses?

6. As a condition of community custody, the court required mental health evaluation and treatment if recommended by the sexual deviancy therapist or community corrections officer. Must this condition be

stricken because the court did not follow statutorily required procedures before imposing this condition?

7. As a condition of community custody, the court required appellant to pay counseling costs for the victim and her family. Must this condition be stricken because no such costs were imposed as part of restitution?

B. STATEMENT OF THE CASE

1. Procedural History

The State charged Mohammed Kone by amended information with second degree rape against Arlene Barg under cause number 09-1-02489-4. 1RP¹ 1. The court granted the State's subsequent motion to dismiss without prejudice under CrR 8.3(a) with leave for the defense to file a motion to dismiss with prejudice. 2RP 2, 4-5, 10-11. The State re-filed under 09-1-3352-4, charging Kone with attempted second degree rape and indecent liberties by forcible compulsion against Barg. CP 192-96; 3RP 3. The State also charged Kone with second degree rape against Anita Coppola

¹ The verbatim report of proceedings is referenced as follows: 1RP - 4/24/09; 2RP - 5/1/09; 3RP - consecutively paginated volume consisting of 5/29/09, 6/5/09, 6/11/09, 6/25/09, 6/26/09, 11/25/09; 4RP - 6/10/09; 5RP - 7/20/09; 6RP - 7/28/09; 7RP - 8/6/09; 8RP - 8/24/09; 9RP - 8/25/09; 10RP - 8/26/09; 11RP - 8/26/09 (opening statements); 12RP - 8/27/09; 13RP - 8/31/09; 14RP - 9/1/09 (morning); 15RP - 9/1/09 (afternoon); 16RP - 9/2/09 (morning); 17RP - 9/2/09 (afternoon); 18RP - 9/3/09; 19RP - 10/6/09; 20RP - 10/9/09; 21RP - 10/21/09.

under 09-1-02912-8. CP 1. The trial court denied Kone's motion to dismiss both cases under CrR 8.3(b). 6RP 13-17; CP 247-66.

The two cases were tried in the same trial and the jury returned guilty verdicts on all counts. CP 88-90. The court imposed an indeterminate sentence of 199 months to life for the Coppola offense and 89 months to life for the attempted second degree rape against Barg. CP 112, 198, 202. The court did not sentence Kone for the indecent liberties conviction; neither did it vacate that conviction. CP 198, 202; 20RP 27; 21RP 42. This appeal follows. CP 92-103, 104-07, 120-33, 209-21.

2. Trial - Coppola Portion

On the night of June 25, 2007, Anita Coppola had been drinking beer behind the QFC. 12RP 51-52, 133. She was homeless. 12RP 49. Coppola went to a bus stop and saw Kone. 12RP 135-36. The two conversed. 12RP 51, 53, 61. Coppola agreed with Kone's invitation to drink beer and they left on the bus together. 12RP 53-54.

After getting off the bus, they walked to West Fenwick Park, where they drank beer and wine. 12RP 56-60. They flirted and had a good time. 12RP 60-61, 137-38, 179. They were joking around as they went to Kone's apartment. 12RP 63, 91. They drank more beer there. 12RP 75. Coppola consumed a total of six beers. 12RP 140-41.

Coppola testified Kone started aggressively touching her breast and vaginal area. 12RP 75. He told her to take her pants off. 12RP 75. She said no. 12RP 75. She ended up with her pants off, but did not remember who removed them. 12RP 76.

According to Coppola, Kone started hitting her buttocks with a paddle. 12RP 76. She told him to stop. 12RP 76. He digitally penetrated her vagina and anus. 12RP 76-77. She did not know if there was penile penetration. 12RP 77-78. She tried to escape though the bathroom window but Kone was standing outside. 12RP 80. He returned inside and digitally penetrated her; he may or may not have paddled her again. 12RP 80, 82. She went to the bathroom a second time, escaped out the window and ran to the neighbors screaming. 12RP 80-81.

A neighbor called 911 after hearing a woman shouting help and rape. 10RP 18-20, 25. Another neighbor called 911 after a woman knocked on his door yelling for help. 10RP 32-34. Kent police officer Kevin Bateman responded to the scene. 10RP 39, 41. He encountered Coppola in the neighbor's house with no pants on, crying hysterically. 10RP 49. Coppola said "Mo" beat her with a paddle, attacked her and initially prevented her from trying to escape through a window. 10RP 49-51. Police saw a window open with its screen lying on the ground. 10RP 53, 63-64. Coppola had abrasions and cuts on her arm and legs. 10RP 59.

Coppola went to the hospital, where she said she had been sexually assaulted by means of vaginal and anal penetration (one time each). 12RP 24, 29-30; 13RP 33-34. She did not report digital penetration. 12RP 42. There was no vaginal discharge, bruising or tearing. 13RP 36, 38. She said Kone whipped her with a paddle or belt on her buttocks and there were bruises in that area. 13RP 34, 36. Coppola left without notifying staff and without being discharged. 12RP 43-44.

Detective Kathy Hold met Coppola the next day. 10RP 78. While Holt drove her through West Fenwick Park in an effort to retrace her steps from the previous night, Coppola identified a man standing nearby as the one who attacked her. 10RP 82-83. Holt arrested Kone and spoke with him two hours later. 10RP 87, 124-25.

Kone told Holt he had left work and was waiting to catch a bus when he met Coppola. 10RP 90-91, 127. They talked and decided to drink some beer together. 10RP 91. Coppola made sexual advances and said she wanted to have sex. 10RP 92, 129-30. They engaged in vaginal and anal sex in the park. 10RP 92. They drank alcohol. 10RP 93. Coppola told him she had been drinking all day. 10RP 93.

They returned to his apartment. 10RP 131-32. They continued drinking. 10RP 93. He digitally penetrated her anus at her request. 10RP

102. In the park, Coppola had asked him if he had a paddle. 10RP 95. She requested the spanking because it got her off. 10RP 100-01.

At one point Kone heard a noise in the bathroom and asked what was going on; Coppola said she did stupid stuff when she drank. 10RP 93. He did not know why the screen was off the window. 10RP 93-94. Coppola later went to the bathroom a second time and left through the window. 10RP 94. He said he did not know why she left. 10RP 97.

On the stand, Coppola was adamant Kone did not rape her at the park. 12RP 91-92. Officer Bateman took Coppola's taped statement shortly after the incident. 10RP 61-62; 12RP 90. Coppola told Bateman that Kone digitally penetrated her at the park. 12RP 92-93, 155. On the stand, she said this was an untrue statement: "I believe I was confused at the time also because anything that happened happened at the house." 12RP 93; 12RP 153-56. She told Bateman that Kone had his hand down her pants and made her hand touch his penis at the park. 12RP 157. This was untrue. 12RP 157. She told Bateman that Kone smacked her behind at the park. 12RP 157, 161-62. This was untrue. 12RP 157, 162-63. She told Bateman that Kone forced her to take pants off in the park. 12RP 153. This was untrue. 12RP 153.

Coppola may have told Bateman that Kone suggested she bend over a garbage can. 12RP 91. On the stand, she said she felt confused

that night and probably meant she bent over something at his house. 12RP 91. When asked on the stand if she recalled telling Bateman that Kone tried to pull down her pants at the park, Coppola replied "If I said it, I probably exaggerated it because he really -- I wouldn't have gone to his house had he done something like that." 12RP 92. Coppola was very mad at Kone that night and felt vindictive. 12RP 92. She exaggerated because she felt vindictive: "I wanted him dead, yes, he did something very bad." 12RP 152-53.

Coppola told Bateman that Kone did not have the ability to obtain an erection. 12RP 147. Asked to explain on the stand, Coppola said "I was pretty traumatized. This is like less than an hour after the incident. So I don't take this one to heart at all, this whole statement, to be honest." 12RP 147.

Coppola told Bateman that Kone forced her back to the house. 12RP 156, 183, 190-91. This was untrue. 12RP 156, 164, 191. She attempted to explain her untrue statements by saying they were made right after the incident and she was still traumatized and confused. 12RP 153, 156, 163. Over defense objection, the court admitted Coppola's other out of court statements regarding the event, which the State used to bolster its case that Coppola had been telling the truth all along consistent with her trial testimony. 12RP 117-21, 172-73; 13RP 6-13, 20-25.

3. Trial - Barg Portion

Arlene Barg had been convicted for a crime of dishonesty. 14RP 90; 15RP 10. She presented confused and conflicting testimony about what day the February 2009 event at issue occurred. 14RP 86-89, 97-105. She said she was hanging out with a friend on Pacific Highway. 14RP 33. Barg was homeless. 14RP 30. Barg had been drinking and described herself as "buzzed." 14RP 35, 86, 100-02. Kone walked by and said "hi." 14RP 107. About a half hour later, Barg walked over to where she knew another friend liked to sit behind a dumpster and drink beer. 14RP 37-39. Kone was already there. 14RP 40. Kone shared a beer with Barg at her invitation. 14RP 40-41, 109. Over the course of evening, she had as many as three high alcohol content beers that she shared with others. 14RP 109-10. She described herself as not "really that drunk." 14RP 40.

Barg said she wanted to smoke pot and asked Kone if he had any. 14RP 43, 108, 110. Kone asked Barg if she wanted to go to his apartment, smoke some pot, wash her clothes and stay the night. 14RP 41-42, 111. Barg agreed. 14RP 112. Kone's friend drove them to Fenwick Park. 14RP 45-47. Toward the end of the ride, Kone seemed angry, hit Barg a on the shoulder, and called her a bitch. 14RP 48-49, 52-53. Kone's friend dropped them off near the park. 14RP 51-52. Kone said they could walk

through the park to get to his place. 14RP 54. They sat at a picnic table. 14RP 55. It was after midnight. 14RP 62.

Barg vaguely remembered Kone touched her breasts over her clothing, but could not remember where this may have occurred. 14RP 92-94; 15RP 5, 9, 17. It may have happened when they first arrived at the park and sat at the picnic table. 14RP 92-93. At trial, Barg said she would have had sex with Kone if he had asked her nicely. 15RP 15.

At some point, Kone accused Barg of taking his wallet. 14RP 116-17. Kone called her a bitch and criticized her for taking his friend's cigarettes. 14RP 57. Barg told him she did not have to deal with this and walked away. 14RP 57-58. Kone hit her in the butt with his hand. 14RP 58-60. He then tried to pull her pants down, but Barg held them up. 14RP 59-60. He told her to bend over so he could look at her butt. 14RP 59.

Barg ran off and sat down on a bench. 14RP 62. She started "freaking out" and pulled on her hair. 14RP 62. She had hurt herself before on other occasions. 15RP 14. She thought acting crazy might dissuade Kone from raping her. 14RP 63, 65-66.

Barg then rolled down a hill. 14RP 64-65. Kone kicked her and slapped her in the mouth either before or after she rolled down the hill. 14RP 65, 70, 72; 15RP 20. After rolling down the hill, she pulled out nine dollars and told Kone to take it. 14PP 67, 72. Barg then sat on a

sidewalk. 14RP 67. Kone told her to stop yelling. 14RP 77. Barg hit herself in the head and acted crazy. 14RP 77. Kone walked away. 14RP 78-79.

Barg ran out to the road. 14RP 79-81. A motorist stopped and Barg said someone tried to rape or murder her. 14RP 81-82. A neighbor across the street from the park called 911 after hearing screams for help. 13RP 42-43. The neighbor saw a woman run into the road, screaming help and "I have been raped." 13RP 47. Another neighbor heard a woman screaming "help me," "this man is beating me" and "he robbed me." 13RP 123, 128.

Police encountered Barg in the road. 13RP 66. She was screaming, crying and hysterical. 13RP 66, 82. There was blood around her mouth and near her eye. 13RP 66, 76-77, 82. Barg told them she had been assaulted or raped and said, "that's him," referring to Kone, who walking down the street. 13RP 49, 53, 68, 82-83; 14RP 83.

Kone complied with an officer's order to stop. 13RP 70-71. Kone said the grass stains on his pants leg were from playing soccer earlier. 13RP 71, 95. He denied knowing Barg and denied assaulting her. 13RP 71. There were 13 one-dollar bills crumpled up in his jacket pocket. 13RP 97. There was blood on his pants. 15RP 38-40. Barg's DNA was later recovered from the pants. 15RP 54. Police took photos of various

bruises on Barg's body and a mouth injury. 14RP 91-92. Barg had been head butted by a man named Duncan the same day she encountered Kone, which caused her mouth to bleed. 14RP 86-89, 92, 99-100.

Barg gave a number of false statements about what happened. She told police that she was just walking in the park when an unknown assailant came out of the woods, punched her and pulled her to the ground. 14RP 83; 15RP 12-13. That was a deliberate lie. 14RP 84; 15RP 26. She repeated this lie to a detective and at the hospital. 13RP 113, 116-17, 119; 15RP 18, 23-24, 27, 29-30. Barg also told police Kone had threatened her if she did not give him sex. 15RP 13. This was untrue. 15RP 13. Kone did not say anything about wanting sex. 15RP 21. Barg told police Kone robbed her. 15RP 10-11. This was untrue. 14RP 84-85; 15RP 11.

C. ARGUMENT

1. THE TRIAL COURT SHOULD HAVE DISMISSED THE BARG CASE WITH PREJUDICE UNDER CrR 8.3 BECAUSE GOVERNMENTAL MISMANAGEMENT UNDERMINED KONE'S RIGHT TO A SPEEDY TRIAL.

The State sought and received a dismissal without prejudice in the Barg case to avoid the speedy trial deadline. The State's asserted reason for dismissal — the unavailability of Barg — was insufficient to justify dismissal without prejudice because the State failed to make appropriate

efforts to locate her and secure her presence for trial. The court therefore erred in failing to dismiss the case with prejudice under CrR 8.3(b).

a. Circumstances Surrounding The State's Motion For Dismissal Without Prejudice.

The incident involving Barg took place on February 21, 2009. CP 317. On February 23, the case was assigned to Detective Ford. CP 318. Ford learned Barg was homeless and usually resided in San Francisco. CP 318. Barg had come up to Washington about a month earlier to reunite with a former romantic partner, who was also transient. CP 318, 393, 395. She did not have a place to stay in Washington. CP 393, 395.² Following the incident, the only contact information for Barg was a phone number and address for a niece in California. CP 309. Ford was unable to contact her through her family or by any other means. CP 310, 318, 392-93.

On February 25, the State filed charges in connection with the Barg case under 09-1-02489-4. CP 319. Federal Way officers located Barg two days later after they noticed her "walking in their jurisdiction."³ CP 310,

² At trial, the prosecutor elicited Barg's testimony that she stayed with her ex-boyfriend in vacant house and various other locations while in Washington, including camping in Covington and in a tent in the woods. 14RP 31-32

³ The Federal Way police located Barg on February 27 after flyers had been posted. 15RP 34-35. As part of a later motion for a preservation deposition, the prosecutor represented these officers recognized Barg while she was walking in their jurisdiction. CP 310.

318, 389. On February 27, Ford interviewed Barg. 6RP 11; CP 318. Barg did not leave a cell phone or a permanent address. CP 319. Instead, she gave Ford phone numbers and addresses of family members that she called upon occasion. CP 319. She also agreed to periodically call Ford to keep in contact should her testimony be required. CP 319.

On March 19, Barg told Ford she was moving to an apartment in Tacoma on April 1. 6RP 11-12; CP 285. Ford "informed her to call me with the exact and [sic] address and contact number when she gets one." CP 285.

On March 24, the court scheduled an omnibus hearing for April 24. CP 249. The trial date was scheduled for May 7. CP 249. Speedy trial was set to expire on May 9, 2009 (a Saturday). CP 249.

At the April 24 omnibus hearing, the defense was still waiting to receive discovery. 1RP 3-4, 8-10. Kone was uninterested in continuing his trial date. 1RP 8. When asked if the State could go forward without the victim, the prosecutor responded "I believe we have the victim." 1RP 5. The judge asked "Oh, you do have the victim?" 1RP 5. The prosecutor responded "Yes, yes." 1RP 5. The defense requested an interview with Barg. CP 322. Between April 24 and 30, the State attempted to reach Barg. 6RP 12; CP 323. The State left messages with her family in California, but did not receive any communication from Barg. 6RP 12; CP 323.

On May 1, the State moved to dismiss the Barg case without prejudice based on Barg's unavailability. 2RP 1, 5. The prosecutor stated they would be ready to prosecute the case if "we had" Barg. 2RP 7. The prosecutor told the court "homeless witnesses are exceedingly difficult to get into court because of what they're going through as far as their living arrangements." 2RP 8. The State disavowed it needed more time to provide discovery or conduct investigation. 2RP 7.

Defense counsel objected to a dismissal without prejudice, noting the State had mismanaged its case and had ample time to make a motion based on unavailability before the case was up against the speedy trial deadline. 2RP 2, 4-5. The State maintained the defense would not be prejudiced if its motion for dismissal without prejudice were granted because the defense could always move to dismiss the case with prejudice if it were re-filed. 2RP 10. Defense counsel objected to preserve the issue. 2RP 10-11. The court granted the motion to dismiss without prejudice. 2RP 11.

On May 5, a family member informed the State that he had spoken to Barg and told her to call the prosecutor. 6RP 12; CP 323. This family member gave Barg's contact information to the prosecutor. 6RP 12; CP 323. The prosecutor called and left a message for Barg. 6RP12; CP 323. Two days later, Barg called the prosecutor and left a message indicating she would try to call again. 6RP 12; CP 323. She did not in fact call back until

May 20. 6RP 12; CP 324. The prosecutor learned Barg had travelled to Portland to visit family and then hitchhiked to San Francisco. CP 319, 323. Barg did not inform Detective Ford of her move and otherwise had not provided updated contact information. CP 319, 323. The State arranged for her to be transported to Washington on May 27. 6RP 12-13; CP 324.

On May 28, 2009, the State re-filed the matter under 09-1-3352-4. CP 192-96; 3RP 3. At a subsequent hearing, the prosecutor acknowledged Barg "has been homeless most of all of her life. She has extreme difficulties -- I think one the -- the primary reason she's homeless, frankly, is she has extreme difficulties meeting the simple logistical necessities of life that enable all of us to have a home, a job, to wind up participating in society the way that people present currently in the courtroom." [sic] 3RP 34.⁴

The defense moved to dismiss both cases based on governmental misconduct under CrR 8.3(b), arguing the State failed to make reasonable efforts to locate Barg in a prompt manner and failed to timely provide discovery. CP 247-66.⁵ Detective Ford's report showed the State made no contact with the detective in an effort to locate Barg until after the April 24

⁴ Barg later testified she had been homeless off and on since 1978. 14RP 30-31.

⁵ The defense also moved to dismiss based on the doctrine of "outrage" and failure to preserve evidence. CP 247-66. The trial court denied the motion on these grounds. 6RP 17-21. This brief does not assign error to those rulings.

omnibus hearing. CP 260-61. The State learned Barg had moved to California after the April 24 omnibus hearing. CP 255. Before the omnibus hearing, there were insufficient efforts to contact Barg, despite police reports showing Barg had a California address, had family in Oregon, and was transient in Washington. CP 256. The State ultimately realized they would not have a material witness in time for trial because they failed to make reasonable efforts at an earlier date. CP 261-62. The defense argued the State's mismanagement eliminated Kone's right to a speedy trial, citing State v. Michielli, 132 Wn.2d 229, 937 P.2d 587 (1997). CP 253, 257, 261-62.

In response, the State contended dismissal without prejudice was appropriate to avoid the speedy trial deadline, citing State v. Bible, 77 Wn. App. 470, 892 P.2d 116 (1995). CP 327.

The court denied the defense motion. 6RP 13. The court found it may have been possible for the State to contact Barg sooner, but there was no evidence that the State would have been able to find her earlier if it had initiated the search process more quickly. 6RP 13.

b. The Dismissal Without Prejudice State's Undermined Kone's Right To A Speedy Trial.

To prevail under CrR 8.3(b), a defendant must show arbitrary action or governmental misconduct. Michielli, 132 Wn.2d at 239. "Governmental misconduct, however, 'need not be of an evil or dishonest nature; *simple*

mismanagement is sufficient." Id. at 239-40 (quoting State v. Blackwell, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993)). As set forth below, the facts of this case demonstrate governmental mismanagement.

The second element a defendant must show before a trial court can dismiss charges under CrR 8.3(b) is prejudice affecting the defendant's right to a fair trial. Michielli, 132 Wn.2d at 240. Such prejudice includes the right to a speedy trial. Id. (citing State v. Price, 94 Wn.2d 810, 814, 620 P.2d 994 (1980)). In this case, governmental mismanagement caused the State to seek dismissal without prejudice to avoid the speedy trial deadline. The unjustified dismissal without prejudice violated Kone's right to a speedy trial.

The "time for trial" rules in CrR 3.3 protect a defendant's right to speedy trial by establishing standard time limits and requiring dismissal with prejudice if the speedy trial period lapses. State v. Kenyon, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009). Avoidance of the speedy trial rule is an inappropriate reason for dismissal without prejudice. State v. Edwards, 94 Wn.2d 208, 214, 616 P.2d 620 (1980). "Running of the speedy trial period should not be avoidable by obtaining a dismissal without prejudice before its expiration when that is the sole reason for the dismissal." Bible, 77 Wn. App. at 472. A "sufficient" reason" must exist apart from the running of the speedy trial period to justify a dismissal without prejudice under CrR 8.3(a). Id. at 472-73.

What constitutes a sufficient reason necessarily turns on the particular facts of each case. Here, the State's reason was insufficient because its mismanagement of the case caused it to seek dismissal to avoid the speedy trial deadline. The State failed to exercise due diligence in attempting to secure Barg's availability for trial in a timely manner.

Governmental mismanagement is not a proper ground to avoid speedy trial requirements. State v. Allen, 36 Wn. App. 582, 587, 676 P.2d 501 (1983). For example, the unavailability of a material state witness does not justify continuance under CrR 3.3 unless there is a valid reason for the unavailability. State v. Day, 51 Wn. App. 544, 549, 754 P.2d 1021 (1988).

The State must make timely use of the legal mechanisms available to compel the witness' presence in court to obtain a continuance under the speedy trial rule. State v. Nguyen, 68 Wn. App. 906, 915, 847 P.2d 936, review denied, 122 Wn.2d 1008, 859 P.2d 603 (1993). Due diligence must be exercised to secure the attendance of a witness. State v. Toliver, 6 Wn. App. 531, 533, 494 P.2d 514 (1972). Due diligence "includes the issuance of a subpoena and the taking of necessary steps to enforce attendance." Toliver, 6 Wn. App. at 533 (quoting State v. Fortson, 75 Wn.2d 57, 59, 448 P.2d 505 (1968)). "A violation of a defendant's right to a speedy trial caused by the State's failure to exercise due diligence cannot

be excused simply because the defendant cannot show prejudice." State v. Adamski, 111 Wn.2d 574, 579, 761 P.2d 621 (1988).

Here, the State knew Barg was chronically homeless. That fact, in and of itself, put the State on notice that her availability for trial was in jeopardy. The prosecutor made no attempt to locate her until after the April 24 omnibus hearing, when the speedy trial deadline was looming. At that hearing, the prosecutor inaccurately told the court that Barg was available. 1RP 5. Nothing in the record shows the State notified Barg that it had charged Kone with a crime before she left the area.

Barg's March 19 contact with Detective Ford did not relieve the State of doing something to ensure her availability. On that day, Barg told Ford she was moving to an apartment in Tacoma on April 1. 6RP 11-12; CP 285. Ford "informed her to call me with the exact and [sic] address and contact number when she gets one." CP 285. At the latest, then, the State should have expected Barg to update her contact information by April 1 — her purported move-in date. When Barg failed to follow up with Ford by notifying him of the Tacoma address, the State should have been alert to the danger that Barg had gone missing and needed to make use of family member contacts well before the April 24th omnibus hearing. Had the State done so, Barg may very well have been located in a timely manner, given

that this same method was used to contact Barg within two weeks when used following the April 24 hearing. 6RP12; CP 323.

The State also failed to exercise due diligence in securing Barg's presence through a subpoena at a time when it knew of potential availability problems due to her homelessness. Barg did not have a permanent address. CP 319. She was not a local transient. Barg came from California and had only been in Washington for a short time. CP 318. Her itinerancy as a homeless person was already known. It could come as no surprise to anyone that she ended up going elsewhere when left to her own devices. The State should have subpoenaed Barg to secure her timely attendance at trial. The prosecutor should have done so when Federal Way police located Barg after she initially disappeared following Kone's arrest. CP 310, 318, 389, 392-93. At that point, State knew Barg's homelessness made her difficult to find.

The trial court's decision on a CrR 8.3(b) motion is reviewed for abuse of discretion. Michielli, 132 Wn.2d at 240. The trial court ruled it may have been possible for the State to contact Barg sooner, but there was no concrete evidence that such efforts would have been successful. 6RP 13. That is not the correct legal standard for addressing the claim. A court abuses its discretion when it applies the wrong legal standard. State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009).

The correct standard is whether the State mismanaged its case by failing to make appropriate efforts to secure a material witness's availability within the speedy trial deadline. Michielli, 132 Wn.2d at 239-40; Adamski, 111 Wn.2d at 579; Nguyen, 68 Wn. App. at 915. Kone did not need to show Barg would have been found had the State not mismanaged its case. He need only show mismanagement, which in turn prejudiced his speedy trial right.

The Court of Appeals in Bible found the State's failure to obtain material witnesses constituted a "legitimate" reason for dismissal without prejudice. Bible, 77 Wn. App. at 473. Bible is distinguishable. In that case, the prosecutor was unable to locate the State's primary witnesses, who had moved out of state before being notified of the charges against Bible. Id. at 471. The State had been trying to contact those witnesses since arraignment. Id. at 471 n.2. The prosecutor filed a motion to dismiss without prejudice 14 days before the expiration of the speedy trial date because those efforts failed. Id. at 471.

The witnesses in Bible left before the prosecutor had an obligation to preserve their testimony at trial. Kone's case is different. The prosecutor here understood her obligation as early as February 25, 2009, when the State originally filed charges against Kone. CP 319. From the inception of this case, the prosecutor knew or should have known there

was a real threat Barg would not be available for trial because Barg was homeless. Despite this awareness, the prosecutor did not take timely steps to locate Barg or secure her appearance or testimony at trial.

The Bible court rejected the defense argument that dismissal without prejudice was inappropriate in that case because the State had not subpoenaed the State's witnesses. Bible, 77 Wn. App. at 473. The Bible Court said Adamski was inapplicable because it was interpreting a juvenile criminal rule that required the State to exercise "due diligence" before a continuance could be granted. Bible, 77 Wn. App. at 473.

The Bible court's analysis exalts form over substance. The juvenile court rule is to be interpreted consistently with its adult court counterpart. State v. Mack, 89 Wn.2d 788, 791-93, 576 P.2d 44 (1978). There is no good reason to claim the phrase "necessary for the administration of justice" under CrR 3.3(f)(2) does not include a due diligence requirement. Such an interpretation is inconsistent with the strong policy of prompt disposition of criminal charges implemented by CrR 3.3. The Court "has consistently interpreted CrR 3.3 so as to resolve ambiguities in a manner which supports the purpose of the rule in providing a prompt trial for the defendant once prosecution is initiated." Edwards, 94 Wn.2d at 216.

Equally important, the Bible court overlooked the Adamski court's analysis that lack of due diligence defeats the "due administration of justice"

rationale for a continuance. Adamski, 111 Wn.2d at 579-80. In Adamski, the majority forcefully rejected the dissent's contention that a continuance was proper under a "due administration justice" rationale: "This interpretation would thoroughly emasculate the speedy trial rule and the protection it provides to juvenile defendants. If 'due administration of justice' can be invoked at any time to grant a continuance, even when the prosecution fails to exercise due diligence in procuring its witnesses, there is little point in having the speedy trial rule at all." Adamski, 111 Wn.2d at 580.

The same holds true in the adult speedy trial context. There is little point in having an adult speedy trial rule at all if the prosecution is able to delay trial by failing to exercise due diligence. That is the salient point, which Bible failed to grasp. The State must act with due diligence to locate a material witness and secure his or her presence for trial within the speedy trial deadline in order to justifiably invoke witness unavailability as the reason for delay. To hold otherwise would allow mere idleness or negligence to subvert the speedy trial right.

Bible is an outlier case on the due diligence question. "Both general standards of jurisprudence and more than seventy five years of Washington case law dictate that a continuance is improper when the moving party has failed to exercise due diligence in issuing subpoenas for

necessary witnesses." Kirkland v. Ellis, 82 Wn. App. 819, 830, 920 P.2d 206 (1996) (citing Adamski, 111 Wn.2d at 579).

- c. The Court's Incorrect Ruling Regarding the Justifiability of the Dismissal Without Prejudice Tainted Its Ruling That The Defense Suffered No Prejudice From Late Discovery.

The defense additionally argued the State's late compliance with discovery obligations forced Kone to choose between his right to a speedy trial and effective assistance of counsel. CP 260-62. For purposes of demonstrating governmental misconduct under CrR 8.3(b), a defendant's showing of prejudice affecting the right to a fair trial includes the right to speedy trial and the right to counsel who has had a sufficient opportunity to prepare for trial. Michielli, 132 Wn.2d at 240. The State cannot force a defendant to choose between these rights. State v. Brooks, 149 Wn. App. 373, 387, 203 P.3d 397 (2009). When the State causes a series of delays in the discovery process, inexcusably fails to provide substantial amounts of discovery, or fails to disclose discovery materials until shortly before a crucial stage in the litigation process, it may prejudice one or both of these rights. Price, 94 Wn.2d at 814; Brooks, 149 Wn. App. at 387-88.

The court here resolved the discovery aspect of Kone's CrR 8.3(b) argument by positing the justifiable dismissal without prejudice ultimately gave the defense enough time to prepare for trial. 6RP 13-14, 16-17. For

this reason, the court did not rule on the issue of whether the defense would have been prejudiced had the case not been dismissed without prejudice. 6RP 16-17. For the reasons argued above, the court's threshold ruling regarding dismissal without prejudice was wrong. Its subsequent resolution of the discovery violation argument under CrR 8.3(b) therefore rests on a false premise. This Court should reverse the denial of Kone's CrR 8.3(b) motion and dismiss the Barg case with prejudice.

2. THE COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING CONSISTENT OUT OF COURT STATEMENTS MADE BY THE COMPLAINING WITNESS.

The trial court wrongly admitted evidence of Coppola's out of court statements that were consistent with her trial testimony under the rule of completeness. Reversal of the Coppola rape conviction is required.

a. The Court Admitted Coppola's Out Of Court Statements Over Defense Objection.

In an effort to preemptively counter the defense's planned impeachment, the State on direct examination impeached Coppola using her prior inconsistent statements to Officer Bateman regarding what happened at the park. 12RP 90-93. The defense also impeached Coppola with these statements. 12RP 147, 152-57, 161-64.

To ameliorate the damaging effects of the impeachment evidence, the State wanted to elicit Coppola's consistent statements made to

Detective Holt on June 27 at 12:20 p.m. and to Holt and the prosecutor during a joint interview on June 28, relying on either ER 801(d)(1)(ii)⁶ or the rule of completeness.⁷ CP 433-38; 12RP 67-73, 105-16, 165-71.

The defense objected that ER 801(d)(1)(ii) was inapplicable to this situation because its requirements could not be met. 12RP 117-121. The defense further argued the rule of completeness was inapplicable because it is meant to cover completion of the remainder of a conversation, rather than the admission of separate statements. 12RP 172-73; 13RP 6.

The court ruled the consistent statements were inadmissible under ER 801(d)(1)(ii). 12RP 172; 13RP 9-11. The court, however, also ruled the prior consistent statements were admissible under the rule of completeness. 13RP 11-13. The court thought the jury would be left with the false impression that Coppola maintained a different version of events since the time of the incident up to when she took the witness stand if it did not hear about the prior consistent statements. 13RP 12. Armed with

⁶ ER 801(d)(1)(ii) provides: "Statements Which Are Not Hearsay. A statement is not hearsay if -- (1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is . . . (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive[.]"

⁷ The joint interview took place on June 28, 2007 at 10:10 a.m. CP 433. Coppola spoke to Bateman at about 3:50 a.m. on June 27. 12RP 108-09, 116.

this ruling, the State elicited testimony from Detective Holt that Coppola gave statements consistent with Coppola's trial testimony. 13RP 20-25.

b. The Consistent Statements Were Inadmissible Under ER 801(d)(1)(ii).

The trial court correctly ruled ER 801(d)(1)(ii) did not justify admission of Coppola's consistent statements. ER 801(d)(1)(ii) allows admission of a witness's out-of-court statements to rehabilitate testimony that has been impugned by a suggestion of recent fabrication. State v. Bargas, 52 Wn. App. 700, 702, 763 P.2d 470 (1988). "The State, as proponent of admission of the prior consistent statement, must demonstrate that it was made before the time that the supposed motive to falsify arose." State v. Osborn, 59 Wn. App. 1, 5, 795 P.2d 1174 (1990).

In other words, an out of court statement consistent with the complaining witness's trial testimony is inadmissible if such statement was made *after* the alleged motive to fabricate arose. State v. Harper, 35 Wn. App. 855, 857-58, 670 P.2d 296 (1983) (victim's report of abuse to a caseworker was not relevant as a "prior" statement because it was made *after* the abuse had been reported to the police).

Here, the motive to fabricate arose from the inception of the events at issue. Coppola testified she felt angry and vindictive based on what had happened to her. 12RP 92, 152-53. The challenged out of court

statements that were consistent with her trial testimony were made afterwards. Coppola's out-of-court statements that were consistent with her trial testimony are not "prior" statements in the sense required by the rule. They were, in fact, "subsequent" statements consistent with her trial testimony and therefore inadmissible under 801(d)(1)(ii).

"Prior out-of-court statements consistent with the declarant's testimony are not admissible simply to reinforce or bolster the testimony." Osborn, 59 Wn. App. at 4 (citing State v. Purdom, 106 Wn.2d 745, 750, 725 P.2d 622 (1986)). But that is precisely what happened here. The State wanted the jury to hear evidence of Coppola's consistent statements to show Coppola was believable.

"Evidence which merely shows that the witness said the same thing on other occasions when his motive was the same does not have much probative force for the simple reason that mere repetition does not imply veracity." Purdom, 106 Wn.2d at 750 (quoting Harper, 35 Wn. App. at 858)). Such statements are irrelevant to credibility or any other issue. Harper, 35 Wn. App. at 857-58; Bargas, 52 Wn. App. at 702.

c. The Rule Of Completeness Did Not Justify Admission Of The Consistent Statements.

The trial court's decisions regarding admission of evidence are reviewed for abuse of discretion. State v. Larry, 108 Wn. App. 894, 910,

34 P.3d 241 (2001). Failure to adhere to the requirements of an evidentiary rule can be considered an abuse of discretion. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

A common law rule of completeness exists for oral statements: "Where one party has introduced part of a conversation the opposing party is entitled to introduce the balance thereof in order to explain, modify or rebut the evidence already introduced insofar as it relates to the same subject matter and is relevant to the issue involved." State v. West, 70 Wn.2d 751, 754, 424 P.2d 1014 (1967).

The threshold requirement of admission of any statement under the rule of completeness is relevance. Larry, 108 Wn. App. at 910. Coppola's consistent out of court statements were irrelevant because repetition of a statement does not show veracity. Harper, 35 Wn. App. at 857-58; Bargas, 52 Wn. App. at 702. The court's use of the rule of completeness cannot be used to justify admission of irrelevant evidence on this ground alone.

In addition to barring irrelevant statements, the rule of completeness is otherwise limited to the extent that the proffered portion of the statement must be used "to explain, modify or rebut the evidence already introduced insofar as it relates to the same subject matter." West, 70 Wn.2d at 754. As articulated in West, the rule of completeness applies

to situations where an isolated portion of a single conversation is admitted into evidence and the remainder of the conversation or some portion thereof is necessary to counter any misleading impression created by admission of only part of the conversation. Id. at 753-54.

Kone's case presents a different situation. The trial court allowed admission of separate statements made at a later time to others. The rule of completeness does not encompass separate statements made to others. State v. Huff, 3 Wn. App. 632, 637, 477 P.2d 22 (1970) (rule was inapplicable where the statement sought to be admitted consisted of a different conversation with a different officer on a separate occasion and no portion of the statement was placed into evidence).

The State may cite State v. Alvarado, where three statements made to police within eight days of a murder by the State's witness were admitted into evidence as recorded recollections. State v. Alvarado, 89 Wn. App. 543, 545-46, 549, 949 P.2d 831 (1998). Citing only to ER 106, the Court of Appeals stated the first statement was properly admitted under the rule of completeness because it provided a context from which defense counsel could assail the witness's credibility. Id. at 553.

Alvarado is inapposite because it did not address the other requirements for admission under the rule of completeness. Provision of "context" alone is not enough to invoke the rule. Assuming the rule of

completeness extends to covering separate statements, Larry provides the proper test for admissibility. An otherwise relevant statement must be necessary to (1) explain the admitted evidence (2) place the admitted portions in context, (3) avoid misleading the trier of fact, and (4) insure fair and impartial understanding of the evidence. Larry, 108 Wn. App. at 910.

The separate statements at issue here do not pass this test. The statement to Bateman was complete in and of itself. There was no distortion of the meaning of her statement to Bateman in the absence of the jury hearing about subsequent statements. Coppola's statement to Bateman was neither vague nor confusing such that additional explanation was required by admission of additional statements. The rule is supposed to be limited to "remaining portions of the statement which are needed to clarify or explain the portion already received." State v. Simms, 151 Wn. App. 677, 692, 214 P.3d 919 (2009) (quoting Larry, 108 Wn. App. at 910).

The State asserted the consistent statements were needed to show her inconsistent statements made to Bateman were due to trauma rather than vindictive anger. CP 434. But admission of the statement to Bateman did not mislead the trier of fact in the absence of additional statements. Coppola explained the circumstances surrounding that

statement when she testified she was traumatized and confused at the time. 12RP 91, 147, 153, 156, 163. Her testimony provided the context for her statement to Bateman.

The trial court admitted the challenged evidence on the basis that the jury, if it did not hear about the consistent out of court statements, would be left with the false impression that Coppola maintained a different version of events since the time of the incident up to when she took the witness stand. 13RP 12.

Stated another way, the trial court believed the consistent statements were needed to explain Coppola did not continue to make inconsistent statements. If that were enough to justify admission, then it is difficult to conceive of any limit on the admission of consistent out of court statements. The proponent of such evidence could always claim the jury should hear about the consistent statements to show a witness did not continue to make inconsistent ones before trial.

The underlying premise of the court's ruling is that repetition of a statement is relevant to show veracity and the jury was therefore entitled to hear repetitive statements. The premise is unfounded. Repetition does not imply veracity. Purdom, 106 Wn.2d at 750. Coppola's consistent statements, which repeated her trial testimony, were irrelevant to credibility or any other issue. Harper, 35 Wn. App. at 857-58.

Moreover, the trial court's use of the rule of completeness would swallow the rule against hearsay. The prior consistent statement requirement of ER 801(d)(1)(ii) would be routinely circumvented by such an evidentiary sleight of hand.

An evidentiary error is prejudicial if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). "A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." State v. Oswalt, 62 Wn.2d 118, 122, 381 P.2d 617 (1963) (quoting State v. Britton, 27 Wn.2d 336, 341, 178 P.2d 341 (1947)).

The error was not trivial. The trial court itself recognized this was a "very important" issue. 12RP 173. The defense was that the State had not proven Kone forcibly compelled Coppola into having sex. 17RP 9-12. Coppola claimed she was compelled. The jury's resolution of this issue necessarily turned, in substantial part, on its assessment of Coppola's credibility. The improper admission of Coppola's consistent out of court statements impermissibly bolstered her credibility.

Moreover, there were reasons to doubt Coppola's story. Coppola drank a large amount of alcohol. 10RP 93; 12RP 51-52, 58-60, 75, 133,

140-41. Intoxication may have affected her memory of the events. See Karl B. Tegland, 5A Washington Practice: Evidence Law and Practice § 607.12 (5th Ed. 2007) ("A witness's use of alcohol or other drugs at the time of the events in question is admissible to show that the witness may not remember the events accurately."); State v. Brown, 48 Wn. App. 654, 657-60, 739 P.2d 1199 (1987) (in rape prosecution, trial court erred in excluding evidence that victim admitted being high on LSD at time of incident, where evidence offered to explain why victim might not remember consenting or why she erroneously believed she was resisting).

Reversible error occurs "[w]hen the appellate court is unable to say from the record before it whether the defendant would or would not have been convicted but for the error committed in the trial court, then the error may not be deemed harmless, and the defendant's right to a fair trial requires that the verdict be set aside and that he be granted a new trial." State v. Martin, 73 Wn.2d 616, 627, 440 P.2d 429 (1968). For example, a new trial is necessary when the jury is improperly allowed to consider cumulative evidence that bolstered the credibility of a witness. Thomas v. French, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983). Reversal of the rape conviction regarding Coppola is required here for that same reason.

3. KONE'S CONVICTIONS FOR BOTH ATTEMPTED SECOND DEGREE RAPE AND INDECENT LIBERTIES VIOLATE DOUBLE JEOPARDY.

Kone was convicted of attempted second degree rape (count II) and indecent liberties by forcible compulsion (count III) based on the same act against the same person (Barg). CP 88-89. Kone's constitutional right to be free from double jeopardy requires vacature of count III.

a. The Court Tried To Avoid A Double Jeopardy Problem By Omitting Count III From The Judgment And Sentence.

In ruling on whether the evidence was sufficient on the indecent liberties by forcible compulsion count, the court found the evidence was insufficient to base conviction on the touching of the breast because there was no evidence Barg resisted that contact. 16RP 5-6. The spanking of the buttocks constituted the act that could form the basis for the indecent liberties charge. 16RP 6, 56-61, 77.

In discussing a proposed defense instruction that counts II and III were charged in the alternative, the prosecutor argued "The State's position is that they are the same criminal conduct and that they merge. And that if the jury wants to return a verdict of guilt on both, that one would either not be sentenced or would be vacated at the time of sentencing." 16RP 55.

At the October 9 sentencing hearing, the court addressed the double jeopardy issue in relation to counts II and III. 20RP 23-27.

Defense counsel moved to vacate count III on double jeopardy grounds. 20RP 23-24. The State asked the court to impose sentences on Count II without reference to Count III because both crimes constitute the same criminal conduct under RCW 9.94A.589. CP 439; 20RP 24. The State claimed imposing judgment and sentence on count II without reference to count III prevented a violation of double jeopardy. 20RP 25-26; CP 440.

The court asked what the practical effect of vacature would be. 20RP 26. The State responded the vacated conviction could be unavailable if count II were reversed on appeal. 20RP 26. Not vacating count III "merely winds up guarding against the necessity of a second trial, that is the reason for the state's request." 20RP 26-27.

In response, the court ruled, "The court will not reduce count three to judgment and, therefore, double jeopardy does not attach." 20RP 27. The prosecutor then referenced the standard range, offense level, and statutory maximum for count III to "complete the record." 20RP 27-28.

At the following October 21 sentencing hearing, Kone asked what happened to count III. 21RP 42. The court responded "Count 3 is not subject to the sentence, because it essentially arises out of the same facts of the attempted rape, so you are not sentenced on that count." 21RP 42.

b. Convictions On Both Counts Violated Double Jeopardy.

The trial court properly recognized convictions on the attempted rape and indecent liberties counts, which were based on the "same facts," would violate double jeopardy if reduced to judgment. 20RP 27, 21RP 42.

Both the Fifth Amendment of the United States Constitution and Article 1, section 9 of the Washington Constitution prohibit double jeopardy. State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005). Double jeopardy claims are questions of law reviewed de novo. State v. Hughes, 166 Wn.2d 675, 681, 212 P.3d 558 (2009).

One of the purposes of the double jeopardy clause is to prevent multiple punishments for the same offense. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense. In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004).

Double jeopardy claims are subject to sequential analysis. First, the applicable statutes are examined to determine if they expressly permit punishment for the same act or transaction. Hughes, 166 Wn.2d at 681. If the statutes do not speak to multiple punishments for the same act, the

"same evidence" test is applied. Id. at 681-82. Even if the two offenses are not identical in law and fact under the "same evidence" test, multiple convictions may not stand if the legislature clearly indicated its intent that the same conduct will not be punished under both statutes. Id. at 682-83.

The two offenses here are not identical in law, but the legislature did not intend to impose multiple punishments for attempted second degree rape and indecent liberties where conduct amounting to indecent liberties by forcible compulsion is the substantial step alleged for attempted second degree rape.

In State v. Potter, the court applied a "what in fact occurred" test to hold that the same evidence did not support convictions for both reckless endangerment and reckless driving, because if "the statutory elements are compared in light of what did in fact occur . . . proof of reckless endangerment through use of an automobile will always establish reckless driving." State v. Potter, 31 Wn. App. 883, 888, 645 P.2d 60 (1982).

Following Potter, this Court in State v. Valentine found a double jeopardy violation because the harm resulting from attempted murder and assault in the first degree was the same, "proof of attempted murder committed by assault will always establish an assault," and therefore it was "unlikely that the Legislature intended to punish the same assaultive

act as both assault and attempted murder." State v. Valentine, 108 Wn. App. 24, 28-29, 29 P.3d 42 (2001).

The same analysis compels the conclusion that Kone's convictions for both attempted rape and indecent liberties violate double jeopardy. The same conduct proved both the forcible compulsion element of indecent liberties and the substantial step aspect of attempted rape by forcible compulsion. In that circumstance, proof of attempted second degree rape by forcible compulsion will always establish indecent liberties by forcible compulsion.

Further, Kone's conduct resulted in the same harm. There is thus no meaningful way to segregate Kone's acts by time or purpose or result. Potter, 31 Wn. App. at 886; see also State v. Ticeson, 26 Wn. App. 876, 880-81, 614 P.2d 245 (1980) (second degree assault and indecent liberties convictions violated double jeopardy where touching constituting assault was part of continuing attack to forcibly molest the victim). "When the harm is the same for both offenses, as in this case, it is inconceivable the Legislature intended the conduct to be a violation of both offenses." Valentine, 108 Wn. App. at 28 (quoting State v. Read, 100 Wn. App. 776, 792, 998 P.2d 897 (2000)). Under these circumstances, it is clear the legislature did not intend to punish the same forcible sexual conduct as both indecent liberties and attempted rape.

c. The Prohibition Against Double Jeopardy Required Vacature of Count III.

The trial court sought to avoid a double jeopardy problem by not reducing the indecent liberties conviction in the judgment and sentence. That conviction needed to be vacated in order to avoid double jeopardy.

The remedy for convictions on two counts that together violate the protection against double jeopardy is to vacate the conviction on the lesser offense. State v. Weber, 127 Wn. App. 879, 885, 888, 112 P.3d 1287 (2005), aff'd, 159 Wn.2d 252, 149 P.3d 646 (2006); State v. Elmi, 138 Wn. App. 306, 321, 156 P.3d 281 (2007). Double jeopardy cannot be avoided by declining to reduce a lesser conviction to judgment and sentence. State v. Turner, __ Wn.2d __, 238 P.3d 461, 467-69 (2010).

It is a basic principle of double jeopardy that "a court has no authority to take a verdict on another charge . . . find that it violates double jeopardy . . . , not sentence the defendant . . . on it[,] and just . . . hold it in abeyance for a later time." Turner, 238 P.3d at 467 (quoting State v. Womac, 160 Wn.2d 643, 659, 160 P.3d 40 (2007)) (internal quotation marks omitted).

"The term 'punishment' encompasses more than just a defendant's sentence for purposes of double jeopardy." Turner, 238 P.3d at 463. "[E]ven a conviction alone, without an accompanying sentence, can

constitute 'punishment' sufficient to trigger double jeopardy protections." Id. The lesser conviction in and of itself violates double jeopardy because it may result in future adverse consequences and, at the very least, carries a societal stigma. Id. at 468; Womac, 160 Wn. 2d at 656-58.

"Double jeopardy prohibits courts from explicitly holding vacated lesser convictions alive for reinstatement should the more serious conviction for the same criminal conduct fail on appeal — by means of the judgment, orders, or otherwise." Turner, 238 P.3d at 469. The prosecutor, in persuading the judge not to vacate the lesser conviction, plainly sought to accord validity to that conviction by keeping it "alive" until such time as Kone's appellate remedies were exhausted. 20RP 26-27. The judge apparently accepted that explanation. 20RP 27. Kone, however, was entitled to vacation of his lesser conviction without reference to any validity attributable to that conviction. Turner, 238 P.3d at 468.

The prosecutor was concerned that the lesser conviction, if vacated, would be unavailable if conviction were the greater offense to be reversed on appeal. 20RP 25-27. The concern is unfounded. The vacated lesser conviction may be reinstated if the conviction for the greater offense is reversed. Turner, 238 P.3d at 469.

4. THE COURT WRONGLY PROHIBITED UNAPPROVED INTERNET ACCESS AS A CONDITION OF COMMUNITY CUSTODY.

The court imposed identical conditions of community custody in separate judgment and sentences under the two cause numbers. CP 108-19, 198-208. As a special condition of community custody, the court ordered "Do not access the Internet without the prior approval of your supervising Community Corrections Officer and sex offender treatment provider." CP 118, 207. This condition is invalid because it is not directly related to the circumstances of either offense.

A court may impose only a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). Whether a trial court exceeded its statutory authority under the Sentencing Reform Act by imposing an unauthorized community custody condition is an issue of law reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003). The court's decision to impose a crime-related prohibition is reviewed for abuse of discretion. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 375, 229 P.3d 686 (2010). "A court abuses its discretion if, when imposing a crime-related prohibition, it applies the wrong legal standard." Id.

RCW 9.94A.703(3)(f) authorizes the court to impose crime-related prohibitions. A condition is "crime-related" only if it "directly relates to the circumstances of the crime." RCW 9.94A.030(10)

In State v. O'Cain, a condition prohibiting the defendant from accessing the Internet without prior approval from his community custody officer or treatment provider was not crime-related and therefore needed to be stricken. State v. O'Cain, 144 Wn. App. 772, 773, 184 P.3d 1262 (2008). O'Cain controls. As in O'Cain, there is no evidence in the record that the condition in this case is crime-related. Id. at 775. There is no evidence that Kone accessed the Internet before the rape or that Internet use contributed in any way to the crime. Id. This is not a case where a defendant used the Internet to contact and lure a victim into an illegal sexual encounter. Id.

Erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). This Court should strike the Internet access condition. O'Cain, 144 Wn. App. at 775.

5. THE TRIAL COURT WRONGLY ORDERED
SUBSTANCE ABUSE EVALUATION AND
TREATMENT AS A CONDITION OF COMMUNITY
CUSTODY.

As a condition of community custody under both cause numbers, the court ordered Kone to "undergo an evaluation regarding substance abuse at

your expense and follow any recommended treatment as a result of that evaluation" if "directed by your sexual deviancy treatment specialist or Community Corrections Officer." CP 117, 206. The court improperly imposed this condition.

RCW 9.94A.703(3)(c) allows the court to impose "crime-related treatment or counseling services" as a condition of community custody. RCW 9.94A.703(3)(d) allows the court to order an offender to "[p]articipate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community[.]"

But court-ordered substance abuse evaluation and treatment must address an issue that contributed to the offense. State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003) (addressing former RCW 9.94A.700 and former RCW 9.94A.715, which contained the same operative language as RCW 9.94A.703(3)(c) and (d)).

The record shows Kone drank alcohol, but there is nothing in the record to indicate he used a controlled substance. Under the Sentencing Reform Act, a substance abuse condition can be imposed only when controlled substances, as opposed to alcohol alone, contribute to the defendant's crime. Jones recognized a difference between controlled substances and alcohol in holding alcohol counseling was not statutorily

authorized when methamphetamines but not alcohol contributed to the offense. Jones, 118 Wn. App. at 202, 207-08; see also State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007) (distinguishing between "substance abuse" and "alcohol" treatment as a condition of community custody), disapproved on other grounds, State v. Valencia, __ Wn.2d __, __ P.3d __, 2010 WL 3504830 at * 4 (slip op. filed September 9, 2010).

The record under cause number 09-1-02912-8 (Coppola) shows absolutely no mention of a controlled substance. The record under cause number 09-1-03352-4 shows Barg asked if Kone had any marijuana at the bus stop, and Kone told her that he had marijuana at his apartment and she could smoke some there. 14RP 41-44, 108, 110-11; 15RP 15. But the record does not show he used marijuana that night or was under the influence of marijuana. Marijuana use did not contribute to the crime.

The broad imposition of "substance abuse" evaluation and treatment as a condition of community custody was beyond the court's power. This Court should strike the condition pertaining to substance abuse evaluation and treatment. Jones, 118 Wn. App. at 207-08, 212.

6. THE COURT ERRED IN ORDERING MENTAL HEALTH TREATMENT AS A CONDITION OF COMMUNITY CUSTODY.

The court erred when it ordered Kone, as a condition of community custody under both cause numbers, to "obtain a mental health

evaluation from a qualified provider and complete all treatment recommendations" if "directed by your sexual deviancy treatment specialist or Community Corrections Officer." CP 117, 206. The court did not comply with the requisite statutory procedures before imposing this condition.

Former RCW 9.94A.505(9)⁸ provides:

The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment must be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.

RCW 9.94A.505(9) authorizes a trial court to order an offender to submit to mental health evaluation and treatment as a condition of community custody only when the court follows specific procedures. State v. Brooks, 142 Wn. App. 842, 851, 176 P.3d 549 (2008). A court may therefore not order an offender to participate in mental health treatment as a condition of community custody "unless the court finds,

⁸ Laws of 2006 ch. 73 § 6. This was the version in effect at the time of Kone's offenses. This provision is currently codified at RCW 9.94B.080.

based on a presentence report and any applicable mental status evaluations, that the offender suffers from a mental illness which influenced the crime." Jones, 118 Wn. App. at 202; accord State v. Lopez, 142 Wn. App. 341, 353, 174 P.3d 1216 (2007); Brooks, 142 Wn. App. at 850-52.

The court, in sentencing Kone, did not make the statutorily mandated finding that Kone was a "mentally ill person" as defined by RCW 71.24.025 and that this mental illness influenced the crimes for which he was convicted. The trial court thus erred in imposing the mental health treatment condition. Jones, 118 Wn. App. at 202; Lopez, 142 Wn. App. at 353-54. This Court should strike the condition pertaining to mental health evaluation and treatment. Lopez, 142 Wn. App. at 354.

7. THE COURT ERRED IN ORDERING PAYMENT OF COUNSELING COSTS AS A CONDITION OF COMMUNITY CUSTODY.

As a condition of community custody under both cause numbers, the court ordered Kone to "pay for counseling costs for victims and their families." CP 118, 207. RCW 9.94A.703 authorized the court to impose numerous conditions on Kone's community custody. But it did not authorize the court to require Kone to pay the costs of counseling for the victim and her family as a condition of community custody.

Such costs can only be imposed as part of a restitution order under RCW 9.94A.753(3). There was no restitution imposed under cause number 09-1-03352-4. CP 441. The court did order restitution under cause number 09-1-02912-8 *after* sentencing, but no counseling costs were awarded. CP 305-06. The SRA does not authorize the court to impose restitution of the victim's counseling expenses as a condition of community custody under these circumstances.

Numerous statutory and constitutional safeguards surround the legitimate imposition of restitution. See In re Pers. Restraint of Sappenfield, 92 Wn. App. 729, 742, 964 P.2d 1204 (1998) (due process requires notice and a hearing before the court may imposed the obligation to pay restitution); State v. Kinneman, 122 Wn. App. 850, 860, 95 P.3d 1277 (2004) (State has the burden of establishing, by preponderance of evidence, causal connection between restitution requested and crime), affd, 155 Wn.2d 272, 119 P.3d 350 (2005); State v. Kisor, 68 Wn. App. 610, 620, 844 P.2d 1038 (1993) (due process requires defendant have opportunity to rebut evidence presented at restitution hearing and evidence must be reasonably reliable); State v. Martinez, 78 Wn. App. 870, 882, 899 P.2d 1302 (1995) (non-victims are not entitled to restitution); RCW 9.94A.030(41) (restitution must be for specific sum of money).

The trial court cannot circumvent those safeguards by ordering counseling costs as a condition of community custody. Allowing the court to impose such costs as a condition of community custody would render the restitution statute superfluous. See Whatcom County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) ("Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous."). The condition related to counseling costs should be stricken.

D. CONCLUSION

For the reasons stated, Kone requests that this Court reverse the convictions and dismiss the charges involving Barg with prejudice. In the event this Court declines to do so, then the erroneous community custody portions of both sentences should be reversed and count III under 09-1-3352-4 should be vacated.

DATED this 20~~11~~ day of October 2010.

Respectfully Submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

| | | |
|----------------------|---|-------------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | COA NO. 64422-0-1 |
| |) | |
| MOHAMMED KONE, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 20TH DAY OF OCTOBER, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MOHAMMED KONE
DOC NO. 334011
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF OCTOBER, 2010.

x. *Patrick Mayovsky*

2010 OCT 20 PM 4:02
CLERK OF COURT
SUPERIOR COURT
SEATTLE, WA