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53390-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BYRON SPEAR,

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION

“Do all 3 counts have to be a different act?” “Do we have to be unanimous on all counts?” The jury asked two clear questions about how to consider the generalized testimony it heard about multiple acts and multiple incidents in light of the identical legal instructions it received for identical multiple counts. The jury never got a responsive answer. Instead, each time the court told the jury to reread the instructions.

The jury heard testimony from three witnesses about multiple acts occurring during the same ten months. But the jury never heard any evidence distinguishing the acts or events from each other. And the court never told the jury it must rely on separate and distinct acts for each count, even when the jury asked if the acts had to be different. In addition, in response to its question about unanimity, the court did not tell the jury its verdict had to be unanimous. After twice requesting answers and receiving none, the jurors gave up asking for clarification.

The jury’s notes demonstrate the jury neither relied on separate and distinct acts in arriving at its verdict nor understood it must be unanimous in its verdict. The court’s incomplete and confusing instructions and its failure to answer the jury’s questions permitted the jury to convict Byron Spear multiple times based on the same act and without unanimity. This Court must reverse the convictions.

B. ASSIGNMENTS OF ERROR

1. The court erred in imposing multiple convictions for the same offenses without a jury finding of separate and distinct conduct for each count.

2. The court erred in failing to make the unanimity requirement manifestly clear to the jurors, in declining to answer the jury's question about unanimity, and in entering the judgment and sentence where the jury's note indicates its verdict did not reflect a unanimous finding of guilt beyond a reasonable doubt on each count.

3. The court erred and exceeded its sentencing authority when it included in Mr. Spear's criminal history two out-of-state prior convictions where the State failed to prove by a preponderance of the evidence the convictions were comparable to Washington felonies.

4. The court erred and exceeded its sentencing authority in imposing "crime related prohibition 10," restricting Mr. Spear's internet access.

5. The court erred and exceeded its sentencing authority in imposing "affirmative conduct requirement 7," requiring Mr. Spear submit to testing and searches, as conditions of community custody.

6. The court erred in ordering Mr. Spear to pay supervision fees as a term of community custody ("crime related prohibition 5").

7. The court erred in failing to assess Mr. Spear's mental health when it imposed legal financial obligations (LFOs).

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. The Fifth Amendment and article I, section 9 prohibit the imposition of multiple convictions for the same offense. Where the State charges identical offenses during the same time period, the court must make manifestly clear to the jury it must unanimously find and base each count on a separate and distinct act. Where the court did not instruct the jury it needed to find separate and distinct acts for each of the five counts, and where the jury's note demonstrates it did not know it needed to find separate and distinct acts, do Mr. Spear's multiple convictions for the same offenses violate double jeopardy?

2. The Sixth Amendment and article I, sections 21 and 22 require all facts essential to a verdict be proven to a unanimous jury beyond a reasonable doubt, and the court is obligated to make this requirement manifestly apparent to the jury. Here, the jury's question to the court demonstrates it did not understand the unanimity requirement. When the jury asked the court if its verdict needed to be unanimous, did the court's failure to give Mr. Spear's proposed response that the verdict must be unanimous but instead instructing them to reread their instructions deprive Mr. Spear of his right to a unanimous verdict?

3. The Sixth and Fourteenth Amendments, article I, sections 3 and 22, and the Sentencing Reform Act (SRA) prohibit courts from including out-of-state convictions in a defendant's offender score where the State fails to prove the convictions are comparable to a Washington felony. Here, the court included in Mr. Spear's offender score two Idaho prior convictions that are not comparable to Washington felonies. Did the court err in including the noncomparable Idaho prior convictions in Mr. Spear's offender score?

4. Sentencing courts may not impose discretionary community custody conditions unless they are directly related to the crime of conviction. In addition, conditions that infringe on First Amendment free speech rights are unconstitutionally overbroad and are prohibited. Here, the court imposed the condition that Mr. Spear "not have access to the internet or e-mail by electronic devices without Community Corrections Officer or Treatment Provider approval." Where Mr. Spear's crimes of conviction did not involve the internet, should this Court find this condition is not crime related and is unconstitutionally overbroad and strike it?

5. The court also imposed the condition that, to verify compliance with the prohibition against the possession of illegal or controlled substances without a prescription, Mr. Spear must "submit to testing and

reasonable searches of your person, residence, and vehicle.” Where Mr. Spear’s crimes of conviction did not involve controlled substances, should this Court find the suspicionless testing and warrantless searches are not permitted by the statute and also violate Mr. Spear’s right to privacy under the Fourth Amendment and article I, section 7?

6. Before imposing discretionary fees, the court must analyze the defendant’s ability to pay. RCW 9.94A.703 provides a court may waive community custody supervision fees. Here, the court found Mr. Spear was indigent and lacked the ability to pay, but nonetheless ordered he pay supervision fees. Must this Court strike the discretionary fee from Mr. Spear’s judgment and sentence?

7. RCW 9.94A.777 requires a sentencing court to determine whether a person who suffers from a mental health condition has the ability to pay LFOs that can otherwise be waived. The record before the sentencing court clearly established Mr. Spear suffers from several mental health conditions. Must this Court strike the DNA collection fee where the court failed to make an inquiry into whether Mr. Spear’s mental health conditions rendered him unable to pay?

D. STATEMENT OF THE CASE

The State charged Byron Spear with three counts of rape of a child in the first degree and two counts of child molestation in the first degree

for sexual acts with his niece occurring during the identical time period: “between October 1, 2016 and July 31, 2017.” CP 3-4. The State declined to specify any particular date or act for any of the counts.

Mr. Spear’s niece, A.R.S., testified Mr. Spear performed oral sex on her between five to ten times during that time period. RP 280. In addition, A.R.S. testified to at least four other acts of sexual contact during the identical time period. RP 278-86. The State did not elicit information concerning specific dates or events to distinguish one incident from any of the other incidents.

In addition to A.R.S., the State presented G.M.F., who testified Mr. Spear described an incident to her in which his niece touched him sexually. RP 387-88. G.M.F. also told police Mr. Spear told her he had oral sex with A.R.S., although she admitted he did not actually tell her that. RP 388-89, 390-91. Finally, the State presented Heather McLeod, a nurse who examined A.R.S. and found no evidence of physical trauma. RP 344, 359. Ms. McLeod testified A.R.S. described to her multiple incidents of oral sex and sexual touching with Mr. Spear. RP 342. None of the witnesses offered any dates or details distinguishing the incidents from one another.

Mr. Spear testified and denied ever having sexual intercourse or any sexual contact with A.R.S. RP 469, 488. He also denied having told G.M.F. that he did. RP 470, 488-89.

The court read to the jury identical to convict instructions for each count of rape of a child and each count of child molestation. CP 87-89 (Instruction Nos. 11-13), 93-94 (Instruction Nos. 17-18). In addition, the court told the jury all five counts charged conduct occurring during the identical time period: “on or between October 1, 2016 and July 31, 2017.” CP 87-89, 93-94 (Instruction Nos. 11-13, 17-18).

The court instructed the jury that it had to reach a unanimous verdict and that the jurors must unanimously agree as to which act has been proven. CP 78, 83, 91 (Instruction 2, 7, 15). The court also instructed the jury a separate crime was charged in each count. CP 79 (Instruction 3). The court did not instruct the jury that an act forming the basis for one count could not also form the basis for another count.

After it began deliberations, the jury twice requested clarification from the court on the law. First, the jury asked:

Upon reading instruction 7. **Do we have to be unanimous on all counts?** If we do not have a unanimous vote how is it reported on the verdict form?

CP 74 (emphasis added). Instruction No. 7 read:

The State alleges that the defendant committed acts of Rape of a Child in the First Degree on multiple occasions. To convict the defendant on any count of Rape of a Child in the First Degree, one particular act of Rape of a Child in the First Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Rape of a Child in the First Degree.

CP 83.¹ Defense counsel suggested the court address the first question directly. “[S]ince there appears to be perhaps confusion about the law, I think it’s appropriate for the Court to answer the question. I do think it would be appropriate to make sure the jury understands that any verdict must be unanimous.” RP 559. When the court expressed concern that such an instruction could be construed as informing they jury it had to reach a verdict, in violation of CrR 6.15(f)(ii), defense counsel suggested a simpler, more direct answer to the jury’s question: “In order to reach a verdict on any count, that verdict must be unanimous.” RP 560.

The court rejected the defense’s request to answer the jury’s question directly and inform it any verdict had to be unanimous. Instead, the court followed the State’s suggestion and responded, “Please reread your instructions.” CP 74.

¹ The court gave a corresponding instruction for the two child molestation counts in Instruction No. 15. CP 91.

The jury sent a second note, again seeking guidance from the court on the law.

Do all 3 counts need to be a different act or can they be multiple occurrences [sic] of the same type of act.

CP 101 (emphasis added). The court did not tell the jury that each count had to be based on separate and distinct acts. Instead, the court repeated its previous instruction, “Please re-read the instructions.” CP 101.

The jury did not ask any more questions. The jury convicted Mr. Spear of all counts as charged. CP 96-100.

The court sentenced Mr. Spear to 318 months to life on each of counts one through three and 198 months to life on counts four and five. CP 112-13. The court ordered all sentences to run concurrently to each other. 4/10/19 RP 19.

E. ARGUMENT

- 1. The jury convicted Mr. Spear of multiple offenses without being instructed each count must be based on a separate and distinct act, relieving the State of its burden of proof and violating the prohibition against double jeopardy.**
 - a. Where the prosecution charges a defendant with multiple counts of the same offense, the court must unambiguously tell the jury the prosecution is required to prove separate and distinct acts for each count charged.

The Fifth Amendment and article I, section 9, prohibit multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S.

711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989); *State v. Noltie*, 116 Wn.2d 831, 848, 809 P.2d 190 (1991).

Where the state charges a defendant with multiple counts of the same offense or multiple offenses potentially based on the same act, the state must prove to the jury a different act forms the basis of each count. *State v. Mutch*, 171 Wn.2d 646, 661-64, 254 P.3d 803 (2011); *State v. Borsheim*, 140 Wn. App. 357, 366-71, 165 P.3d 417 (2007). Jury instructions that relieve the state of its obligation to prove each offense was based on a separate and distinct act and that expose a defendant to multiple punishments for the same offense are inadequate and may violate a defendant's right against double jeopardy. *Mutch*, 171 Wn.2d at 662-65; *Borsheim*, 140 Wn. App. at 366-67.

Where the prosecution charges a defendant with multiple identical offenses alleged to have occurred during the same time period, "the trial court must instruct the jury that they are to find separate and distinct acts for each count." *Borsheim*, 140 Wn. App. at 367 (internal quotations omitted); *Mutch*, 171 Wn.2d at 662-63 (recognizing instructions must clearly inform jury each crime requires proof of a different act). Only where the jury unanimously agrees that at least one separate act constitutes each charged offense is a double jeopardy violation avoided. *Noltie*, 116

Wn.2d at 842-43. Where a court fails to instruct the jury that it must find a separate and distinct act for each count, the instructions are inadequate may violate the constitutional prohibition against double jeopardy. *Mutch*, 171 Wn.2d at 663; *Borsheim*, 140 Wn. App. at 366-71.

In *Borsheim*, the court considered a case where the state charged the defendant with four counts of rape of a child occurring during the same time period. 140 Wn. App. at 364. The court noted that although the instructions properly informed the jury it must find a particular act for each count, the instructions did not inform the jury that the particular act must be different for every count. *Id.* at 365. The court held:

Here, language conveying the need to base each conviction on a different act was neither contained in the unanimity instruction . . . nor was it set out in any other instruction . . . Therefore, the jury instructions failed to make manifestly apparent to the jury that each of the four counts must be based on a different underlying act. In other words, the instructions allowed the jury to unanimously find that one act of sexual intercourse had been proved beyond a reasonable doubt, and to base all four convictions on that single act.

Id. at 370. The court concluded the instructional error exposed the defendant to multiple punishments for a single offense, violated his right to be free from double jeopardy, and required the offending convictions to be reversed and vacated. *Id.* at 370-71.

Appellate courts apply a “rigorous” and “strict[]” review when considering a double jeopardy challenge. *Mutch*, 171 Wn.2d at 664. In the absence of a proper instruction informing the jury it must find separate and distinct acts for each count, reversal is required unless it is “manifestly apparent” that the jury based the conviction for each count on a separate act. *Id.* A defendant may raise a double jeopardy challenge for the first time on appeal. *State v. Adel*, 136 Wn.2d 629, 631-32, 965 P.2d 1072 (1998); RAP 2.5(a)(3).

- b. The instructions failed to explain to the jury the prosecution must prove separate and distinct acts for each count.

The jury instructions here were similar to the instructions this Court held were inadequate in *Borsheim*. The State charged Mr. Spear with three counts of rape with the same complaining witness for the same charging period. CP 3-4. The State also charged Mr. Spear with two counts of child molestation with the same complaining witness for the same charging period. CP 3-4. Nowhere in the jury instructions did the court inform the jury the State must prove beyond a reasonable doubt each of the five counts rested on a separate and distinct act. CP 75-95. Because the charging periods and offense were identical, the jury may have convicted Mr. Spear of five offenses based on a single act of oral sex in violation of double jeopardy.

The court instructed the jury:

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

CP 79 (Instruction No. 3). The court also instructed the jury:

The State alleges that the defendant committed acts of Rape of a Child in the First Degree on multiple occasions. To convict the defendant on any count of Rape of a Child in the First Degree, one particular act of Rape of a Child in the First Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Rape of a Child in the First Degree.

CP 83 (Instruction No. 7). The court gave an identical instruction for the child molestation charges. CP 91 (Instruction No. 15). Finally, the court instructed the jury:

To convict the defendant of the crime of Rape of a Child in the First Degree, as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or between October 1, 2016 and July 31, 2017, the defendant had sexual intercourse with [A.R.S.];

(2) That [A.R.S.] was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;

(3) That [A.R.S.] was at least twenty-four months younger than the defendant; and

(4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 87 (Instruction No. 11).² The court read identical instructions for counts two and three. CP 88-89 (Instruction Nos. 12-13). Similarly, the court read two identical instructions with the elements of child molestation in the first degree. CP 93-94 (Instruction Nos. 17-18).

Read collectively, the instructions informed the jury it must consider each count separately and must unanimously find a particular act was proven, but the instructions did not inform the jury the particular act had to be different for each count. Neither a unanimity instruction nor an instruction to decide each count separately cures a double jeopardy violation. *Borsheim*, 140 Wn. App. at 364-66 (finding double jeopardy violation where court gave instructions on both unanimity and to consider each count separately but gave no separate and distinct acts instruction); *see also Mutch*, 171 Wn.2d at 662-63 (recognizing instructions “were lacking for their failure to include a ‘separate and distinct’ instruction” but finding record viewed in its entirety established no double jeopardy violation occurred).

² At trial, the court used A.R.S.’s full name in the jury instructions. Mr. Spear uses her initials here to comply with this Division’s General Order 2011-1.

Nowhere in the instructions did the court inform the jury it had to base each count on a separate and distinct act. Nowhere in the instructions did the court inform the jury the act it relied on for count one could not be the act it relied on for counts two through five. Nowhere in the instructions did the court inform the jury that proof of any one incident cannot support a finding of guilt on more than one count. Because the instructions did not include language explaining the underlying conduct must be different for each count, the instructions were incomplete and inadequate to avoid a double jeopardy violation.

- c. The court failed to address the jury's question about whether it had to find separate and distinct acts.

The jury instructions were incomplete and failed to inform the jury the state had to prove a separate and distinct act for each count. After the court instructed the jury, the jury inquired about this very thing. The jury asked,

Do all 3 counts need to be a different act or can they be multiple occurrences [sic] of the same type of act.

CP 101. Rather than directly address the jury's question and explain to the jury that each count must be based on a separate and distinct act, the court referred the jury to the incomplete instructions already given. The court merely responded, "Please re-read the instructions." CP 101. However, as explained above, the instructions did not answer the jury's question.

The instructions did not explain to the jury that each count needed to be based on a separate and distinct act.

The juror's note demonstrates they were confused about what it meant to consider five counts all charging acts for the identical time range. The note shows the jury did not understand that the five counts must be based on different factual acts. The court's response to the jury to refer to the instructions did nothing to clarify the jury's confusion because the instructions did not contain a separate and distinct instruction and did not directly address the juror's question. And when the jury sought guidance from the court, it did not receive it.

- d. The incomplete and confusing instructions and the court's failure to answer the jury's question denied the jury the ability to base each count on a separate and distinct act and relieved the State of its burden of proof.

Where the court fails to instruct the jury it must find a separate and distinct act for each count, double jeopardy may be violated. *Mutch*, 171 Wn.2d at 664-65; *Borsheim*, 140 Wn. App. at 366-67. The offending convictions must be reversed unless it is "manifestly apparent" the jury based the conviction for each count on a separate and distinct act. *Mutch*, 171 Wn.2d at 665. Here, the jury's note asking for clarification on this issue demonstrates the jury did not understand it needed to base conviction for each count on a separate and distinct act.

Where jury instructions are deficient and the jury is not informed that it must find a separate and distinct act for each count, it is the “rare circumstance” in which a reviewing court can nonetheless find beyond a reasonable doubt no double jeopardy violation occurred. *Mutch*, 171 Wn.2d at 665. For example, in *Mutch*, the court found the instructional error harmless because the defendant admitted all of the separate acts forming the basis for the five different charges but argued to the jury the acts were consensual. 171 Wn.2d at 665-66. Because the defendant admitted to all of the separate and distinct acts, the court’s failure to instruct the jury it must find separate and distinct acts was harmless. *Id.*

Mr. Spear’s case does not present a similarly “rare circumstance.” Mr. Spear denied all of the charges. RP 469-70, 488. He contested the complainant’s claims, argued the lack of corroborating evidence, and urged the jury to scrutinize A.R.S.’s account for inconsistencies. RP 265-66, 532-43. He also questioned her recall as to the relevant dates and locations and whether A.R.S. was exposed to inappropriate sexual information from other sources. RP 277, 355-57, 413, 535, 538-41.

Nor is this a case where A.R.S. tied her recounting of specific acts to different dates or locations or where the prosecutor elected specific acts for each count. *Cf. State v. Sage*, 1 Wn. App. 2d 685, 694-98, 407 P.3d 359 (2017) (finding instructional error but holding it was harmless where

prosecutor specifically identified different incident for each count and victim described incidents by different dates and locations). In addition, the jury heard evidence of more acts than counts charged. This is not a case where the witness testified to “the exact number” of acts as the number of counts with which the defendant was charged. *See, e.g., Mutch*, 171 Wn.2d at 665.

The jury instructions were incomplete and inadequate. The instructions relieved the State of its burden to prove separate and distinct acts for each count. The State cannot prove beyond a reasonable doubt that it is manifestly apparent the jury relied on separate and distinct acts for each count. The instructions exposed Mr. Spear to multiple punishments for the same offense, in violation of his right to be free from double jeopardy.

- e. This Court must reverse Mr. Spear’s convictions and remand for a new trial or strike the four duplicative convictions.

The usual remedy for a double jeopardy violation is for the court to vacate the potentially redundant convictions and to resentence the defendant on the remaining conviction. *Mutch*, 171 Wn.2d at 664. However, in this case, the record also demonstrates the jury did not understand its duty to arrive at a unanimous verdict. *See* Section E.2 *infra*. Because of the jury’s confusion over unanimity, the State cannot

demonstrate that the jury unanimously found even one act. Therefore, this Court should reverse all the convictions and remand for a new trial.

Alternatively, the convictions on counts two through five should be reversed and vacated and count one should be remanded for resentencing. *Borsheim*, 140 Wn. App. at 371 (holding where “the unanimity instruction ensured that the jury unanimously agreed as to the commission of at least one act” one count is affirmed and the remaining counts must be reversed and ordered vacated). All four counts must be reversed, not simply two of the rape counts and one of the child molestation counts, because here the jury could have based all five counts on one single act.

“[W]here the only evidence of sexual intercourse supporting a count of child rape is evidence of sexual contact involving one person’s sex organs and the mouth or anus of the other person, that single act of sexual intercourse, if done for sexual gratification, is both the offense of molestation and the offense of rape.” *State v. Land*, 172 Wn. App. 593, 600, 295 P.3d 782 (2013). In those circumstances, incomplete jury instructions risk that the jury relied on an act of oral or anal sex not only as an act of sexual intercourse (an element of rape) but also as an act of sexual contact (an element of child molestation). This violates double jeopardy and requires the reversal of the both the multiple rape and child molestation counts. *Land*, 172 Wn. App. at 600 (reviewing erroneous

instructions but finding no double jeopardy violation because testimony established penetration); *see also State v. Gonzalez*, 1 Wn. App. 2d 809, 815, 408 P.3d 376 (2017) (finding potential for double jeopardy because of failure to give separate and distinct acts instruction).

Here, the rape offenses were based on oral sexual intercourse, not on penetration. Therefore, the failure to instruct the jury that each conviction had to be based on a separate and distinct act created the possibility that the jury convicted Mr. Spear not only of the three rape counts based on the same act of oral sex, but also of the two child molestation counts based on the same act of oral sex. In other words, the jury could have convicted Mr. Spear of three counts of rape and two counts of child molestation based on the same act of oral sex. This violates double jeopardy. In such cases, the court, may not impose separate punishments on both the rape and molestation convictions. *Gonzalez*, 1 Wn. App. 2d at 815; *Land*, 172 Wn. App. at 600. Therefore, the double jeopardy violation here requires vacating all four convictions, not simply all but one rape and all but one child molestation conviction.

2. The court failed in its duty to make the unanimity requirement manifestly apparent to the jury and erred in failing to answer the jury’s question, denying Mr. Spear his right to a unanimous verdict.

- a. Due process requires that jury instructions be clear and correctly state the relevant law.

Due process demands that jury instructions, read as a whole, correctly state the relevant law. *State v. Kylo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009); *State v. Smith*, 174 Wn. App. 359, 366, 298 P.3d 785 (2013). Where the instructions read as a whole fail to inform the jury of the correct applicable law or mislead they jury, the instructions fail to satisfy the constitutional demands of a fair trial. *State v. O’Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009).

To satisfy constitutional concerns, the jury instructions, read as a whole, must reflect a correct statement of the law and ““must make the relevant legal standard manifestly apparent to the average juror.”” *Kylo*, 166 Wn.2d at 864 (quoting *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997)). The court has an independent duty to make the relevant legal instructions “manifestly apparent.” *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996) (*abrogated on other grounds by O’Hara*, 167 Wn.2d 91). Where jury instructions may be read to permit an erroneous interpretation of the law, they are fatally flawed. *Id.* at 902.

Jury instructions that relieve the State of its burden to prove each element of the offense beyond a reasonable doubt to a unanimous jury violate due process. U.S. Const. amend. XIV; Const. art. I, § 3. Where jury instructions fail to accurately and completely convey the necessary legal standard to the jury, an error of constitutional magnitude occurs, and prejudice is presumed. *LeFaber*, 128 Wn.2d at 900; *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977). A defendant may raise this challenge for the first time on appeal. RAP 2.5(a)(3); *State v. Stein*, 144 Wn.2d 236, 240-41, 27 P.3d 184 (2001).

- b. The contradictory and confusing instructions failed to unambiguously inform the jury it must reach a unanimous verdict on each count, and the court erred in declining to answer the jury's question on unanimity.

The court read the jury three identical to convict instructions for rape of a child and two identical instructions for child molestation. CP 87-89, 93-94 (Instruction Nos. 11-13, 17-18). In addition, the court instructed the jury that it needed to be unanimous. CP 78, 83, 91 (Instruction Nos. 2, 7, 15). The court also instructed the jury it “need not unanimously agree that the defendant committed all the acts” of rape of a child or child molestation. CP 83, 91 (Instruction Nos. 7, 15).

No jury instruction, standing alone, was erroneous. However, the instructions, when read as a whole, confused the jury. The instructions

failed to make manifestly apparent to the jury that it could only convict on any count when all jurors unanimously agreed the prosecution had proven guilty beyond a reasonable doubt on that count and all jurors unanimously agreed on the act that formed the basis of that count.

The jury's confusion is reflected in its jury note.

Upon reading instruction 7. Do we have to be unanimous on all counts? If we do not have a unanimous vote how is it reported on the verdict form?

CP 74. Mr. Spear argued, “[S]ince there appears to be perhaps confusion about the law, I think it’s appropriate for the Court to answer the question. I do think it would be appropriate to make sure the jury understands that any verdict must be unanimous.” RP 559. In response to the note, Mr. Spear asked the court to tell the jury, “In order to reach a verdict on any count, that verdict must be unanimous.” RP 560. The court instead followed the State’s suggestion and told the jury to “Please reread your instructions.”³ CP 74.

Where instructions are not clear and a deliberating jury seeks clarification, “[t]he judge should respond to the question in open court or in writing (if the question relates to a point of law, the answer should be written).” Comment to 11A Washington Practice: Pattern Jury

³ The court gave the same response to the jury’s second note inquiring whether it could rely on the same act as the basis of more than one count. CP 101.

Instructions: Criminal 151.00 (4th ed. 2016). In addition, Recommendation 38 of the Report of the Washington State Jury Commission provides, “Trial judges should make every effort to respond fully and fairly to questions from deliberating jurors. Judges should not merely refer them to the instructions without further comment.”

Washington State Jury Commission Recommendation 38.

Recommendation 38 also encourages judges to respond in a way “to ensure juror comprehension.” *Id.*

Here, the juror’s question clearly demonstrates the jury did not understand the court’s instructions on unanimity. Mr. Spear’s attorney suggested a direct answer, consistent with the law and the instructions, that would inform the jury that any verdict must be unanimous. RP 559-60. The proposed answer was a correct statement of the law and would serve to clarify the ambiguity and confusion in the jury instructions and make the unanimity requirement abundantly clear. But the court declined to give the instruction and instead did exactly what the Jury Commission recommends judges not do. It simply told the jury to reread the same instructions the jury had already informed the court it did not understand. The jury asked the court for guidance but never received it.

Courts may reverse convictions and remand for new trials where the court fails to clarify confusing instructions. For example, in *LeFaber*,

the court considered a self-defense instruction. 128 Wn.2d at 898. The court found the instruction could have been read to require proof of actual imminent danger, whereas self-defense is available when a defendant reasonably believes he is in imminent danger. *Id.* at 898-99. “Although a juror could read instruction 20 to arrive at the proper law, the offending sentence lacks any grammatical signal compelling that interpretation over the alternative, conflicting, and erroneous reading.” *Id.* at 902-03. Because the instructions failed to make the correct law on self defense manifestly clear to the jury, the court reversed the conviction and remanded for a new trial.

In *State v. Backemeyer*, the court again considered a self defense instruction. 5 Wn. App. 2d 841, 428 P.3d 366 (2018), *reviewed denied*, 192 Wn.2d 1025 (2019). In that case, during deliberations, the jury sent out two questions regarding whether the defendant’s potentially illegal act of possessing marijuana in the bar negated his right to be in the bar and his right to use self-defense. *Id.* at 846-47. The defendant agreed to the court’s decision to respond, “Please read your instructions.” *Id.* at 847.

The court reversed and remanded for a new trial, holding the defendant “was denied effective assistance of counsel when the jury’s questions to the court made it manifest that the jury did not understand the law of self-defense and counsels’ agreed response did not provide the jury

any clarity.” *Backemeyer*, 5 Wn. App. 2d at 848. The court stated that if counsel had requested a tailored instruction rather than the “generic response,” it saw “no reason why, if asked, the trial court would have refused such a request.” *Id.* at 849. “When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy.” *Id.* at 849-50 (quoting *Bollenbach v. United States*, 326 U.S. 607, 612-13, 66 S. Ct. 402, 90 L. Ed. 350 (1946)).

Finally, *State v. Campbell*, 163 Wn. App. 394, 260 P.3d 235 (2011) is also instructive.⁴ There, the trial court failed to instruct the jury regarding how it could properly answer “no” on a special verdict form. *Id.* at 397. During deliberations, the jury requested clarification on this issue, but, over defense counsel’s objection, the trial court merely referred the jury to the existing instructions. *Id.* at 398-99. The appellate court held “the trial court abused its discretion in determining not to further instruct the jury.” *Id.* at 397.

The court explained, “In order for jury instructions to be sufficient, they must be ‘readily understood and not misleading to the ordinary mind.’” *Campbell*, 163 Wn. App. at 400 (quoting *State v. Dana*, 73

⁴ The court reversed *Campbell* on reconsideration because the underlying law at issue changed (i.e. the law regarding jury unanimity and sentence enhancements). The court’s discussion of the duty to make jury instructions manifestly clear remains good law.

Wn.2d 533, 537, 439 P.3d 403 (1968)). Moreover, “even if the ambiguity of the instructions given was not apparent at the time they were issued, the jury’s question identified their deficiency.” *Id.* at 402. “[W]here a jury’s question to the court indicates an erroneous understanding of the applicable law, it is incumbent upon the trial court to issue a corrective instruction.” *Id.*

c. This Court should reverse Mr. Spear’s convictions and remand for a new trial.

Here, the jury asked the court point blank if their verdict had to be unanimous on all counts. The correct answer was yes. The court failed to answer the jury’s question.

The jury’s confusion over the need for unanimity is demonstrated in its note. The court failed in its duty to make the constitutional requirement of unanimity manifestly clear to the jury. The court’s failure to answer the jury’s questions and inform the jury that its verdict needed to be unanimous on every count violated Mr. Spear’s right to a unanimous jury verdict. The confusing jury instructions, general verdict forms, and jury’s question demonstrate the jury convicted Mr. Spear without understanding it needed to be unanimous in its verdict. This Court should reverse Mr. Spear’s convictions and remand for a new trial.

3. The court erred in calculating Mr. Spear's offender score, requiring resentencing.

The court sentenced Mr. Spear based on a presumptive sentencing range calculated with an offender score of nine-plus. In calculating that offender score, the court included two Idaho prior convictions. Because the State failed to prove either offense was comparable to a Washington felony, the court erred in including these convictions in Mr. Spear's offender score, and this Court should remand for resentencing without these offense.

- a. The court may not include prior convictions in a defendant's offender score unless the State proves the prior convictions are comparable to a Washington felony.

The SRA requires courts to sentence defendants within a presumptive range based on the seriousness level of the crime of conviction and the defendant's offender score. RCW 9.94A.505, 9.94A.510, 9.94A.515, 9.94A.520; *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). A defendant's offender score is based on his number of prior qualifying convictions within a certain time frame. RCW 9.94A.525; *Ford*, 137 Wn.2d at 479.

The prosecution bears the burden of proving a defendant's criminal history. *State v. Cate*, ___ Wn.2d ___, 453 P.3d 990, 992 (2019); *State v. Hunley*, 175 Wn.2d 901, 915, 287 P.3d 584 (2012); *Ford*, 137 Wn.2d at

479-80. Due process requires the State to prove a defendant's offender score by a preponderance of the evidence. U.S. Const. amend. XIV; Const. art. I, § 3; *Cate*, 453 P.3d at 992. This includes proving the existence, validity, and comparability of prior convictions by a preponderance of the evidence. RCW 9.94A.500(1), RCW 9.94A.525 (2), (3); *Hunley*, 175 Wn.2d at 909-10.

A defendant's failure to object to a prosecutor's summary of his criminal history does not satisfy the State's burden of proof. *Cate*, 453 P.3d at 992. Nor does a defense request for a particular sentence within the same range used by the State constitute an affirmative acknowledgment of an offender score. *Id.* A court may include out-of-state prior convictions in a defendant's offender score only where the State proves they are comparable to a qualifying Washington offense. RCW 9.94A.500(1), 9.94A.525(3); *In re Personal Restraint Petition of Lavery*, 154 Wn.2d 249, 254-56, 111 P.3d 837 (2005); *State v. Thomas*, 135 Wn. App. 474, 483-87, 144 P.3d 1178 (2006).

Appellate courts review the calculation of a defendant's offender score de novo. *State v. Bergstrom*, 162 Wn.2d 87, 92, 169 P.3d 816 (2007). Appellate courts also review the classification of an out-of-state conviction de novo. *State v. Marquette*, 6 Wn. App. 2d 700, 703, 431 P.3d

1040 (2018), *review denied*, 193 Wn.2d 1007 (2019); *State v. Jackson*, 129 Wn. App. 95, 106, 117 P.3d 1182 (2005).

To determine comparability, the court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington offenses. *Lavery*, 154 Wn.2d at 255. Only where the elements are comparable may a court count the out-of-state conviction towards a defendant's offender score. *Id.* at 254-58. If the out-of-state offense is broader than the Washington offense or is missing elements included in the Washington offense, it is not comparable. RCW 9.94A.525(3); *Descamps v. United States*, 570 U.S. 254, 276-78, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013); *Lavery*, 154 Wn.2d at 258. In other words, if a defendant could be convicted under the out-of-state statute without being found guilty under the relevant Washington felony statute, the offenses are not comparable, and courts may not include out-of-state convictions for such offenses in a defendant's offender score.

Courts may not consider facts in documents related to out-of-state convictions unless those facts are proven beyond a reasonable doubt, or those facts are admitted by the defendant *and* are tethered to the essential elements of the crime in the out-of-state offense. *Descamps*, 570 U.S. at 276-78; *Lavery*, 154 Wn.2d at 257-58; *State v. Davis*, 3 Wn. App. 2d 763, 781-82, 418 P.3d 199 (2018). This restriction constrains courts to

consider only specific documents and also to consider only facts directly related to elements of the offense. *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998).

“[T]he elements of the charged crime must remain the cornerstone of the comparison. Facts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven.” *Morley*, 134 Wn.2d at 606. “[F]acts in a charging document that are untethered to the elements of a crime are outside the proper scope of what courts may consider.” *Davis*, 3 Wn. App. 2d at 782. Therefore, courts may not assume facts unrelated to elements were proven or admitted even where those facts are contained within the indictment or other documents. *Descamps*, 570 U.S. at 277-78; *Thomas*, 135 Wn. App. at 486; U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22.

- b. The State failed to prove Mr. Spear’s Idaho conviction for lewd conduct with a minor under sixteen is comparable to a Washington felony.

The court found Mr. Spear’s 2018 Idaho conviction for lewd conduct with a minor under sixteen was comparable to Washington’s child molestation in the third degree and included it in Mr. Spear’s offender score. CP 110. However, the Idaho statute contains no marriage or age element, unlike the Washington statute. The Idaho statute provides:

Any person who shall commit any lewd or lascivious act or acts upon or with the body or any part or member thereof of a minor child under the age of sixteen (16) years, including but not limited to, genital-genital contact, oral-genital contact, anal-genital contact, oral-anal contact, manual-anal contact, or manual-genital contact, whether between persons of the same or opposite sex, or who shall involve such minor child in any act of bestiality or sado-masochism as defined in section 18-1507, Idaho Code, when any of such acts are done with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person, such minor child, or third party, shall be guilty of a felony and shall be imprisoned in the state prison for a term of not more than life.

Idaho Code § 18-1508.

The Washington statute to which the court found this conviction compared provides:

A person is guilty of child molestation in the third degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim.

RCW 9A.44.089(1).

The Idaho statute is broader than the Washington statute and is not comparable. The Washington statute requires the State prove as an essential element of the offense the perpetrator is not married to the victim. The Idaho statute has no such requirement. In addition, the Washington statute requires the State prove as an essential element of the

offense the perpetrator is at least forty-eight months older than the victim. The Idaho statute has no such requirement.

It is possible one could be guilty of the Idaho offense but not be guilty of the Washington offense. Because the Idaho statute criminalizes conduct broader than that criminalized by the Washington statute, the two statutes are not comparable. The court erred in finding the statutes comparable and in including this prior conviction in Mr. Spear's offender score.

- c. The State failed to prove Mr. Spear's Idaho conviction for enticing a child through the internet or other communication device is comparable to a Washington felony.

The court found Mr. Spear's 2018 Idaho conviction for enticing a child through use of the internet or other communication device was comparable to Washington's communicating with a minor for immoral purposes through electronic means and included it in Mr. Spear's offender score. CP 110. However, the Idaho statute contains no marriage requirement, unlike the Washington statute. The Idaho statute provides:

A person aged eighteen (18) years or older shall be guilty of a felony if such person knowingly uses the internet or any device that provides transmission of messages, signals, facsimiles, video images or other communication to solicit, seduce, lure, persuade or entice by words or actions, or both, a person under the age of sixteen (16) years or a person the defendant believes to be under the age of sixteen (16) years to engage in any sexual act with or against the

person where such act would be a violation of chapter 15, 61 or 66, title 18, Idaho Code.

Idaho Code § 18-1509A(1).

The Washington statute to which the court found this conviction compared provides:

(1) Except as provided in subsection (2) of this section, a person who communicates with a minor for immoral purposes, or a person who communicates with someone the person believes to be a minor for immoral purposes, is guilty of a gross misdemeanor.

(2) A person who communicates with a minor for immoral purposes is guilty of a class C felony punishable according to chapter 9A.20 RCW if the person has previously been convicted under this section or of a felony sexual offense under chapter 9.68A, 9A.44, or 9A.64 RCW or of any other felony sexual offense in this or any other state or if the person communicates with a minor or with someone the person believes to be a minor for immoral purposes, including the purchase or sale of commercial sex acts and sex trafficking, through the sending of an electronic communication.

RCW 9.68A.090. In addition, RCW 9.68A.005 provides, “This chapter does not apply to lawful conduct between spouses.”

The Idaho statute is broader than the Washington statute and is not comparable. First, as with the child molestation statute, the Washington statute does not criminalize conduct where the perpetrator is married to the minor. RCW 9.68A.005. The Idaho statute has no such requirement.

Second, as is relevant here, Washington’s offense is a felony only where the person has previously been convicted of a felony sex offense.

RCW 9.68A.090(2). Otherwise, it is a gross misdemeanor. Here, at the time of Mr. Spear's Idaho conviction for enticing a child, he had not been previously convicted of a felony sex offense. And, as explained above, Idaho Code §18-1508, of which Mr. Spear was convicted simultaneously with this offense, is not comparable to a Washington felony sex offense. Therefore, even if it did constitute a prior conviction, it does not qualify under the statute as a conviction which would enhance this offense from a gross misdemeanor to a felony.

The Idaho statute criminalizes conduct broader than that criminalized by the Washington statute. In addition, the Washington statute to which it is potentially comparable classifies the conduct as a gross misdemeanor, not a felony. The court erred in finding the Idaho statute comparable to a Washington felony and in including this prior conviction in Mr. Spear's offender score.

- d. The court erred in including the two Idaho convictions in Mr. Spear's offender score, and resentencing is required.

Courts may not impose sentences in excess of a sentence authorized by law. *In re Personal Restraint Petition of Schorr*, 191 Wn.2d 315, 322-23, 422 P.3d 451 (2018); *In re Personal Restraint Petition of Goodwin*, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002); *In re Personal Restraint Petition of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). "A

sentencing court acts without statutory authority under the [SRA] when it imposes a sentence based on a miscalculated offender score.” *In re Personal Restraint Petition of Johnson*, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997).

The remedy for an erroneously calculated offender score is remand for resentencing. *Lavery*, 154 Wn.2d at 261-62; *Hunley*, 175 Wn.2d at 916 (remanding for resentencing because “The judgment and sentence should reflect [the defendant’s] accurate offender score”). This Court should remand Mr. Spear’s case for resentencing without the inclusion of these noncomparable offense.

4. The community custody conditions restricting Mr. Spear’s internet access and requiring he submit to testing and searches are unauthorized by the statute and are unconstitutional.

- a. A court may only impose conditions of community custody authorized by statute and permitted by the constitution.

RCW 9.94A.507 authorizes the court to sentence Mr. Spear to a lifetime of community custody and to impose conditions of community custody. RCW 9.94A.505(9), 9.94A.507(5), 9.94A.703. Permissible conditions of community custody are those identified by statute (either as mandatory or waivable) and those within a court’s discretion if they are

“crime-related prohibitions.”⁵ RCW 9.94A.703(1)(mandatory conditions), .703(2)(waivable conditions), .703(3)(discretionary conditions).

“[C]rime-related prohibition[s]” are conditions that “directly relate[] to the circumstances of the crime for which the offender has been convicted.”

RCW 9.94A.030(10), 9.94A.703(3)(f); *see also* RCW 9.94A.505(9) (authorizing courts to “impose and enforce crime-related prohibitions and affirmative conditions”).

Crime-related conditions must serve at least one of the purposes of the SRA, namely to protect the public or offer the individual an opportunity for self-improvement. *State v. Letourneau*, 100 Wn. App. 424, 431, 997 P.2d 436 (2000). For this statutory requirement to have any meaning, some factual basis must exist for finding the conduct proscribed is related to the crime of conviction. *State v. Parramore*, 53 Wn. App. 527, 531, 769 P.2d 530 (1989).

A court’s authority to impose a community custody condition is reviewed de novo. *State v. Johnson*, 180 Wn. App. 318, 325, 327 P.3d 704 (2014). “Any condition imposed in excess of this statutory grant of power is void.” *Id.* Only where this Court determines the trial court acted

⁵ The statute also provides for “special conditions” of community custody. RCW 9.94A.703(4). None of those conditions were ordered by the court, and they are not at issue here.

within its statutory authority does the Court review the trial court's decision for an abuse of discretion. *Id.* at 326.

A community custody condition must not only be statutorily authorized but must also comply with constitutional restraints. Community custody conditions do not enjoy a presumption of constitutionality. *State v. Sanchez Valencia*, 169 Wn.2d 782, 792-93, 239 P.3d 1059 (2010).

- b. The condition restricting Mr. Spear's internet and email access is not crime related and is unconstitutionally overbroad.

As a condition of community custody, the court ordered Mr. Spear “not have access to the internet or e-mail by electronic devices without Community Corrections Officer or Treatment Provider approval.” CP 122 (“crime related prohibition 10”). None of Mr. Spear's five convictions involved the internet, email, or electronic devices. Therefore, this condition is not a related to Mr. Spear's crimes, and the court exceeded its statutory authority in imposing the restriction.

In *Johnson*, this Court reversed a condition of community custody prohibiting the defendant from accessing computers and the internet without the permission of the court. 180 Wn. App. at 330. The court noted that such a prohibition is statutorily authorized only where it is crime-related and that “a sentencing court may not prohibit a defendant

from using the Internet if his or her crime lacks a nexus to Internet use.”
Id. Because the sentencing court made no findings that the defendant’s offenses involved the internet, the court held the sentencing court exceeded its sentencing authority under the statute and remanded for the condition to be struck. *Id.* at 331.

In *State v. O’Cain*, this Court reversed a condition of community custody prohibiting the defendant from “access[ing] the Internet without the prior approval of your supervising Community Corrections Officer and sex offender treatment provider.” 144 Wn. App. 772, 774, 184 P.3d 1262 (2008). The court held that such a condition was only statutorily permissible where it was crime-related and, since the defendant’s convictions did not involve the use of the internet, the prohibition was not crime-related. *Id.* at 775. The court remanded for the sentencing court to strike the internet prohibition from the defendant’s conditions of community custody supervision. *Id.*

In addition, the condition restricting Mr. Spear’s ability to access and communicate by the internet, email, and electronic devices violates Mr. Spear’s right to free speech. A condition is impermissibly overbroad when it prohibits constitutionally protected conduct. *See State v. Halstien*, 122 Wn.2d 109, 121-22, 857 P.2d 270 (1993). Conditions prohibiting free

speech activities protected by the First Amendment and article I, section 5 are unconstitutionally overbroad. *Id.*

Defendants serving community custody sentences enjoy the right to access and transmit materials protected by the First Amendment. *State v. Bahl*, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008). The First Amendment “embraces the right to distribute literature, and necessarily protects the right to receive it.” *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 143, 63 S. Ct. 862, 87 L. Ed. 1313 (1943). It protects material disseminated over the internet as well as by the means of communication devices used prior to the high-tech era. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997). Thus, restrictions upon access to the Internet necessarily curtail First Amendment rights. *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004).

The United States Supreme Court has recognized the importance of the internet in “the Cyber Age” and found unwarranted restrictions on internet access and social media violates the First Amendment. *Packingham v. North Carolina*, ___ U.S. ___, 137 S. Ct. 1730, 1736, 198 L. Ed. 2d 273 (2017). In *Packingham*, the defendant, a registered sex offender, was convicted under a statute which barred registered sex offenders from “access[ing] a commercial social networking Web site

where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages.” 137 S.

Ct. 1733. The Supreme Court noted:

[T]he statute here enacts a prohibition unprecedented in the scope of First Amendment speech it burdens. Social media allows users to gain access to information and communicate with one another about it on any subject that might come to mind. By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to “become a town crier with a voice that resonates farther than it could from any soapbox.”

Id. at 1737 (quoting *Reno*, 521 U.S. at 870). The Court noted, “[T]o foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights,” and held the statute violated the First Amendment.

The community custody condition restricting Mr. Spear’s right to use the internet is overbroad in that it impermissibly infringes on a core First Amendment and article I, section 5 right. *Packingham*, 137 S. Ct. at 1737. In addition, it is not crime related and is unauthorized by the statute. This Court should strike this condition of community custody.

- c. The condition requiring Mr. Spear to submit to testing and searches is not crime-related and violates Mr. Spear's right to privacy.

As a condition of community custody, the court ordered Mr. Spear “submit to testing and reasonable searches of [his] person, residence, and vehicle” in order for the community custody officer to verify Mr. Spear is complying with the condition not to possess illegal or controlled substances. CP 123 (“affirmative conduct requirement 7”). None of Mr. Spear’s five convictions involved alcohol, drugs, or controlled substances. Therefore, the condition requiring testing and searches to verify Mr. Spear is not possessing prohibited substances is not related to Mr. Spear’s crimes, and the court exceeded its statutory authority in imposing the condition.

The trial court was permitted to prohibit Mr. Spear from possessing controlled substances as a condition of community custody, despite the fact no evidence was presented that drugs contributed to the crime. *State v. Jones*, 118 Wn. App. 199, 206, 76 P.3d 258 (2003). However, because the State did not show, and the court did not find, that alcohol or drugs contributed to the crime, the court was not permitted to impose a special condition to monitor Mr. Spear’s drug use. *See id.* at 208. A condition designed to monitor compliance with a prohibition on

drug or alcohol use must be “crime-related.” *Id.* at 207-08; *Parramore*, 53 Wn. App. at 529.

In *Jones*, this Court struck down a community custody condition requiring the defendant to participate in alcohol counseling because the condition that the defendant refrain from consuming alcohol was not crime-related. 118 Wn. App. at 208. Just as *Jones* held the court may not impose counseling or additional conditions to support a permissible underlying condition – prohibition against drug or alcohol use – because it was not crime-related, this Court should find the additional requirements of testing and searches to support the underlying condition prohibiting possession of controlled substances is not permissible.

In addition, the condition mandating testing and searches violates Mr. Spear’s privacy interests under the Fourth Amendment and article I, section 7. *See State v. Olsen*, 189 Wn.2d 118, 127-34, 399 P.3d 1141 (2017) (holding that such testing provisions may violate constitutional privacy interests depending on whether they are narrowly tailored). Mr. Spear was not charged with a drug offense or a DUI case. Thus, the court could not, within the bounds of the right to privacy, require Mr. Spear to submit to suspicionless testing and searches simply to monitor compliance with another standard condition. The condition must also be stricken for this reason.

- d. The two conditions must be stricken from Mr. Spear's judgment and sentence.

The court exceeded its statutory authority in imposing “crime related prohibition 10” and “affirmative conduct requirement 7.” CP 122-23. In addition, the restriction on internet access violates the First Amendment and article I, section 5. The imposition of testing and searches also violates the Fourth Amendment and article I, section 7. For these reasons, this Court must strike both conditions of community custody from the judgment and sentence.

5. This Court should strike the imposition of certain legal financial obligations from Mr. Spear's judgment and sentence.

- a. The court erred in imposing discretionary community custody supervision fees where the record demonstrates Mr. Spear is indigent.

The court recognized Mr. Spear was indigent and imposed only those LFOs it believed were mandatory. CP 114; *see also* CP 124-25 (finding Mr. Spear indigent for purposes of appeal). However, the court improperly ordered Mr. Spear to “[p]ay supervision fees as determined by the Department of Corrections.” CP 122 (“crime related prohibition 5”).

RCW 9.94A.703(2)(d) provides:

Unless waived by the court . . . the court shall order an offender to . . . [p]ay supervision fees as determined by the department.

Under the plain language of the statute, the community custody supervision fee is discretionary. This Court has already held that community custody costs covered by this statute are discretionary and may only be imposed where a court determines the defendant is able to pay discretionary costs. *State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018). Consistent with the trial court's intent to waive discretionary costs, and subject to *Lundstrom*, this Court should strike this condition of community custody. *See State v. Ramirez*, 191 Wn.2d 732, 742-46, 426 P.3d 714 (2018) (ordering discretionary LFOs stricken).

- b. The court erred in imposing the DNA fee where the record establishes Mr. Spear suffers from a mental health condition and does not have the ability to pay.

RCW 9.94A.777(1) requires a sentencing court to determine whether a defendant who suffers from a mental health condition has the ability to pay any LFOs, other than restitution or the victim penalty assessment. *State v. Houck*, 9 Wn. App. 2d 636, 652, 446 P.3d 646 (2019), *review denied*, ___ P.3d ___, 2020 WL 496625 (Jan. 30, 2020); *State v. Tedder*, 194 Wn. App. 753, 756, 378 P.3d 246 (2016).

Mr. Spear suffers from a mental health condition as defined under RCW 9.94A.777(2). Mr. Spear served several years in the Army but was honorably discharged. CP 50; Supp. CP ___ (sub. 66). At the time of trial and sentencing, Mr. Spear was disabled due to several mental health

conditions, including depression, bipolar disorder, anxiety disorder, and post-traumatic stress disorder. CP 50; Supp. CP ____ (sub. 66). Mr. Spear was unable to work as a result and received \$1,175 per month in disability income from the military. RP 460; Supp. CP ____ (sub. 66).

Here, the court failed to assess whether Mr. Spear's mental health issues authorized waiver of all other legal financial obligations, except the victim penalty assessment and restitution. RCW 9.94A.777. This Court could remand to the trial court for consideration of whether Mr. Spear's remaining LFOs – specifically, the \$100 DNA fee – should be waived.⁶ *Tedder*, 194 Wn. App. at 757. However, because Mr. Spear's indigency, mental health conditions, and their impact on his ability to work are apparent on the fact of the record, this Court may also remedy the sentencing court's error by remanding with a directive that the DNA collection fee be stricken from Mr. Spear's judgment and sentence. *State v. Catling*, 193 Wn.2d 252, 259 n.5, 438 P.3d 1174 (2019) (remanding and directing court to revise judgment and sentence to eliminate prohibited nonrestitution interest on LFOs); *Ramirez*, 191 Wn.2d at 747-50 (remanding for court to amend judgment and sentence to strike prohibited discretionary LFOs).

⁶ RCW 9.94A.777 also provides a second reason to strike the discretionary community custody supervision fee.

F. CONCLUSION

The verdict does not reflect the jury was unanimous and does not demonstrate the jury relied on a separate and distinct act as the basis for each count of conviction. The court violated Mr. Spear's right to a unanimous verdict and to be free from double jeopardy. This Court must reverse Mr. Spear's convictions and remand for a new trial. In the alternative, the Court must remand for counts two through five to be vacated and for resentencing on count one.

In addition, the court erred in calculating Mr. Spear's offender score, in imposing certain conditions of community custody, and in imposing certain LFOs. Resentencing is required.

DATED this 3rd day of February, 2020.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Huber', with a long horizontal flourish extending to the right.

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 53390-1-II
v.)	
)	
BYRON SPEAR,)	
)	
Appellant.)	

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