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No. 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

The Honorable Erik D. Price, Judge
Cause No. 18-1-01421-34

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether it was manifestly apparent that the State was relying on separate and distinct acts for each count when the information so indicated, the trial court's opening remarks to the venire so indicated, each offense had its own to convict instruction, and the prosecutor's closing argument clearly indicated that the jury needed to find separate and distinct acts.

2. Whether the trial court properly instructed the jury on the requirement of a unanimous verdict when the instructions included two unanimity instructions and directed that the jurors must agree before reaching a verdict.

3. Whether Spear affirmatively acknowledged the inclusion of his convictions in his offender score where both he and his attorney signed a statement that included his Idaho convictions and listed Washington statutes that the Idaho convictions were comparable to, agreed with the offender score calculation and the standard ranges, and the facts presented at trial and at sentencing clearly demonstrated that the Idaho convictions were factually comparable to the Washington statutes.

4. Whether a trial court abuses its discretion by imposing an agreed community custody condition restricting internet access

unless approved by a community corrections officer when the victim of a separate offense, that involved the internet, testified at trial that Spear communicated with her via the internet about the current offenses.

5. Whether a trial court abuses its discretion by imposing a condition that allows the Department of Corrections to monitor other conditions of community custody and whether such a condition violates a probationer's right to privacy.

6. Whether community custody supervision assessments are costs under the definition of RCW 10.01.160(2), where the definition specifically refers to pretrial supervision.

7. Whether RCW 9.94A.777 requires a trial court to inquire into whether a mental health disorder prevents the defendant from participating in gainful employment prior to imposing a DNA fee when neither defense counsel nor Spear mentioned the RCW during sentencing and the defense offered no concrete evidence that a mental health disorder would infringe upon Spear's ability to pay.

B. STATEMENT OF THE CASE.

The appellant, Byron Spear was charged with three counts of rape of a child in the first degree and two counts of child

molestation in the first degree, with each count separate and distinct from all others. CP 3-4. The matter proceeded to a jury trial. RP 1.[1] During his opening remarks to the venire, prior to jury selection, the trial court informed the panel that the information alleged that each count was a separate and distinct act from all other counts. RP 31-32.

During trial, victim A.R.S. testified that Spear is her uncle and previously lived in the same house as her in Washington. RP 274-275. While Spear resided with A.R.S., he provided child care for A.R.S.'s mother. RP 308. During that time, A.R.S. indicated that Spear "did something he wasn't supposed to." RP 277. This began when she was eight years old. RP 277. A.R.S. indicated that Spear told her to take her underwear off and touched her vagina. RP 278. She stated that he started licking her "on [her] vagina" with his tongue. RP 279. A.R.S. testified that Spear licked her vagina, "at least" five times but not more than ten times. RP 280.

A.R.S. also indicated that Spear told her to rub his penis and described "sperm" coming out of it. RP 281-282. A.R.S. indicated that happened one time when she was about to turn nine. RP 282.

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[1] The report of proceedings of the jury trial appears in four volumes, sequentially paginated, which will collectively be referred to herein as RP.

She said that he put the sperm on his shirt. RP 282. A.R.S. described Spear touching her vagina with his finger, stating that it made a noise like “when you poke slime.” RP 283. She testified that his finger stayed on top of her vagina. RP 284. She stated that he also used a vibrating tool on her vagina during the same incident. RP 284. She specifically noted that was a different time than the first time he licked her vagina. RP 284.

When asked if her vagina ever hurt, A.R.S. testified that it would when he would put his finger on top too hard. RP 285. She said that, in addition to his finger, Spear put his penis on top of her vagina. RP 285. She said that he would rub his penis up and down against her vagina, but it did not go in the hole. RP 286. A.R.S. said that it hurt when he did this. RP 286.

When her mother asked her whether she had been sexually abused by Spear, A.R.S. initially stated no, but then disclosed the events as they were packing to move from Lacey, Washington. RP 314-315. A.R.S.’s mother testified that she was stationed at Joint Base Lewis-McCord and moved to Lacey in September of 2016, when A.R.S. was eight years old. RP 306-307. The family had a hard time finding daycare because it was so expensive in the area. RP 307-308. Spear agreed to move in to provide childcare and

lived in their residence from October 2016 until May or June of 2017. RP 308-309, 311-312.

G.F., who was a victim of Spear in a separate case that occurred in the State of Idaho, testified regarding communications that she had with Spear regarding sex. RP 387, EX 1, EX 2.[2] G.F. indicated that Spear talked about his niece during that conversation. RP 387. When asked if Spear told her that the things the nine-year old niece was doing were sexual, G.F. said, "yes." RP 388. Though reluctantly, G.F. testified regarding a statement that Spear performed oral sex on his niece. RP 389, 392.

Spear testified on his behalf. RP 459. Spear acknowledged that he resided with A.R.S. and his sister from October 2016 until May of 2017. RP 461, 472. He indicated that the allegations made by A.R.S. made his stomach sick and shocked him. RP 468. He denied that he had every directed her to take off her underwear or touched her inappropriately. RP 469. He indicated that he has never had a "vibrating device" and stated that he had been unable to produce sperm for five or six years but had never seen a doctor

[2] Two exhibits were entered during the sentencing hearing held on April 10, 2019 and are referred to herein as EX 1 and EX 2. The report of proceedings from the sentencing hearing is herein referred to as 2 RP. The exhibits were admitted at 2 RP 7.

about it. RP 469-470. He stated that he knew G.F. but did not remember having the conversation that she had testified about. RP 470.

The defense did not take any exceptions or make any objections to the final jury instructions of the trial court. RP 493. The jury was instructed, “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.” RP 501-502, CP 79. For each count of rape of a child in the first degree, the trial court gave separate “to convict” instructions, alleging the same charging period. RP 505-509, CP 87-89. The trial court further gave an unanimity instruction with regard to the charges of rape of a child in the first degree, which stated

> 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 has been proved. You need not unanimously agree that the defendant committed all the acts of rape of a child in the first degree.

RP 503-504, CP 78.

The trial court also instructed the jury with two separate instructions for the two counts of child molestation in the first degree, each alleged to have occurred during the same charged time period. RP 508-510. CP 93-94. The trial court also gave a similar unanimity instruction in regard to the charges of child molestation. RP 508, CP 91. The concluding instruction from the trial court informed the jury that "each or you must agree for you to return a verdict." RP 511-512, CP 95.

During the State's closing argument, the prosecutor discussed the multiple acts that the State was relying upon to support the charges. 523-524. The prosecutor stated, "She explained a variety of things that the defendant had done to her, not just one, not just one time." RP 517-518. When discussing "sexual intercourse," the prosecutor stated "oral sex counts as sexual intercourse. [A.R.S.] said it happened between five and ten times that she remembers." RP 527.

The prosecutor discussed the "to convict" instructions for rape of a child in the first degree, stating:

> Each of the to convict instructions for the first three counts where exactly the same. You have to find a separate instances or separate incidents for each one. You have to be unanimous in that each one has a separate time, but they all look the same.

RP 528. The prosecutor described ways in which the jury could find three "different" acts occurred arguing:

> You can use that the defendant licked [A.R.S.] on three different occasions, licked her vagina. You can use that he licked her vagina and put his finger on her vagina. You can use that he licked her vagina, put his finger in her vagina, and that his penis penetrated her vagina, however, slight, even though it was going up and down, but you have to be unanimous as to which three happened. All 12 people have to agrees (sic) on each count, and each count has to be a separate act.

RP 529.

The prosecutor focused the jury on the acts of the defendant about A.R.S.'s vagina and touching her vagina with the vibrator while discussing the counts of child molestation in the first degree. RP 529-530. Defense counsel argued that Spear was not guilty of any of the charged offenses during his closing argument. RP 543.

During deliberations, the jury submitted three questions. The first question asked, "We are requesting 12 copies of the report of Heather McCleod." RP 554. With the agreement of the parties, the trial court responded, "The jury has all of the exhibits admitted at trial. No exhibits were admitted." RP 556-557.

Next, 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 forms?" RP 558, CP 74. After the trial court expressed concern that CrR 6.15(f)(2) prohibits the trial court from instructing in a way that suggests the need for agreement, the trial court directed the jury to reread the instructions. RP 559-562.

Finally, the jury asked, "Do all three counts need to be a different act or can they be multiple occurrences of the same type of act?" RP 570, CP 101. Both the State and defense agreed with the trial court's inclination to direct the jury, "Please reread your instructions." RP 570-571. The jury ultimately found Spear guilty on all five charged counts. RP 574-75; CP 96-100.

Spear was sentenced on April 10, 2019. 2 RP 1. The prosecutor submitted a Prosecutor's Statement of Criminal History listing two Idaho convictions, "Lewd Contact with a Minor Under 16 (comparable to Child Molestation in the Third Degree—RCW 9A.44.089);" and "Enticing a Child through Internet, Video, Image, or other Communication Device (comparable to Communicating with a Minor for Immoral Purposes through electronic means—RCW 9.68A.090(2)." CP 102. Both Spear and his counsel signed the document which stated, "The defendant and the defendant's attorney hereby stipulate that the above is a correct statement of

the defendant's criminal history relevant to the determination of the defendant's offender score in the above-entitled case." CP 102. Attached to the statement were score sheets indicating that the offender score for each count was 9+[3], counting each Idaho offense and the four other current offenses. CP 102-107.

During the hearing, the prosecutor handed up Exhibits 1 and 2, stating, "In an abundance of caution, I actually ordered the certified documents with regard to the Defendant's convictions from Idaho. I'm asking the court to admit Exhibits 1 and 2, which are certified copies." 2 RP 7. The exhibits were admitted without objection. 2 RP 7. During the defense recommendation, defense counsel indicated that the defense had no objections to the proposed community custody conditions and stated, "We also have no dispute about the standard ranges. There, frankly, is no dispute. They are what they are." 2 RP 12.

The trial court imposed a term of confinement of 318 months to life on counts 1, 2, and 3, and a term of confinement of 198 months to life on counts 4 and 5. 2 RP 19; CP 108-123. This appeal follows.

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[3] The math indicates an offender score of 18 on each offense.

C. ARGUMENT.

1. The proceedings made it manifestly apparent that the State was not attempting to convict Spear on multiple counts based on a single act.

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 that a different act forms the basis of each count. State v. Mutch, 171 Wn.2d 646, 661-64, 254 P.3d 803 (2011). In Mutch, the defendant argued that vague jury instructions allowed the possibility that the jury erroneously convicted him of all five counts based on only a single criminal act. Id. at 662. The "to convict" instructions in Mutch's case for each rape count were nearly identical and there was not an instruction requiring that there be a separate and distinct act. Id. at 663.

Our State Supreme Court noted that:

> . . . flawed jury instructions that permit a jury to convict a defendant of multiple counts based on a single act do not necessarily mean that the defendant received multiple punishments for the same offense; it simply means that the defendant potentially received multiple punishments for the same offense.

Id.

When reviewing a double jeopardy allegation, "an appellate court may review the entire record to establish what was before the Court." State v. Noltie, 116 Wn.2d 831, 848, 809 P.2d 190 (1991).

> Considering the evidence, arguments, and instructions, if it is not clear that it was manifestly apparent to the jury that the State was not seeking to impose multiple punishments for the same offense, and that each count was based on a separate act, there is a double jeopardy violation.

Mutch, 171 Wn.2d at 646. After considering the entire record, the Mutch Court found that it was "manifestly apparent to the jury that each count represented a separate act." Id. at 665-666. The Court stated there is no double jeopardy violation when the information, instruction, testimony, and argument clearly demonstrate that the State was not seeking to impose multiple punishments for the same offense. Id. at 664.

In State v. Land, 172 Wn. App. 593, 601-602, 295 P.3d 782 (2013), Division I of this Court considered a similar argument. In that case, there were multiple counts of rape of a child and child molestation. After discussing the facts, the Court stated, "In addition, the prosecutor's argument dispelled the possibility" that the jury would find the acts that formed the child molestation as proof of rape. Id. at 602. The Court noted:

> As in Mutch, there should have been an instruction informing the jury that each count had to be based on a separate and distinct act, but the absence of such an instruction did not violate Land's right to be free of doubly jeopardy.

Id. at 603.

Our State Supreme Court applied the same standard in State v. Pena Fuentes, 179 Wn.2d 808, 826, 318 P.3d 257 (2014), stating, "because of the clarity in the prosecutor's closing argument, we believe it is 'manifestly apparent' that the jury convicted Pena Fuentes based on separate and distinct acts." In State v. Sage, 1 Wn. App.2d 685, 407 P.3d 359 (2017), Division I applied the Mutch test and found:

> in view of the prosecutor's election of separate and distinct events in closing, and the victim's supporting testimony, the unanimity instructions given, together with separate to convict instructions and the separate consideration instruction, we conclude it was manifestly apparent to the jury that the State was not seeking multiple convictions based on a single act.

Id. at 698.

In State v. Daniels, 183 Wn. App. 109, 120, 332 P.3d 1143 (2014), this court applied the same test and found "in light of the State's differentiation between the two crimes with separate supporting acts … it was manifestly apparent that the jury convicted Daniels based on factually separate and distinct acts."

As in all of the cases above, the record in this case makes it manifestly apparent that the jury convicted Spears on factually separate and distinct acts. While the closing instructions to the jury did not included an instruction on separate and distinct acts, several other factors informed the jury that the actions must be based on separate acts. First, the information charged each offense, separate and distinct from all other counts. CP 3-4. During his opening remarks to the venire, prior to jury selection, the trial court informed the panel that the information alleged that each count was a separate and distinct act from all other counts. RP 31-32.

The trial court gave individual "to convict" instructions, each of which contained the element "that *this* act occurred in the State of Washington." RP 505-509, CP 87-89, RP 508-510, CP 93-94 (emphasis added). This fact is one of several ways that this case is distinguishable from State v. Borsheim, 140 Wn. App. 357, 165 P.3d 417 (2017), which Spear relies upon. In that case, the trial court provided a single to convict instruction that read, "To convict

the defendant of the crime of Rape of a Child in the First Degree, as charged in counts 1, 2, 3, and 4 …" Id. at 364.[4]

The trial court also gave separate unanimity instructions for rape of a child and child molestation, and a "separate consideration" instruction. RP 503-504, CP 78, RP 508, CP 91, RP 501-502, CP 79. Importantly, the prosecutor in this case made it abundantly clear that each count was based on a separate and distinct act during her closing argument. She stated:

> Each of the to convict instructions for the first three counts where exactly the same. You have to find a separate instances or separate incidents for each one. You have to be unanimous in that each one has a separate time, but they all look the same.

RP 528. The prosecutor described ways in which the jury could find three "different" acts occurred arguing:

> You can use that the defendant licked [A.R.S.] on three different occasions, licked her vagina. You can use that he licked her vagina and put his finger on her vagina. You can use that he licked her vagina, put his finger in her vagina, and that his penis penetrated her vagina, however, slight, even though it was going up and down, but you have to be unanimous as to which three happened. All 12 people have to agrees (sic) on each count, and each count has to be a separate act.

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[4] Borsheim was decided prior to Mutch and the Court considered only the jury instructions instead of the entire record. 140 Wn. App. at 370.

RP 529. It was manifestly apparent from the State's closing argument that the prosecutor was not seeking to convict on more than one count based on a single act.

The jury's question, "Do all three counts need to be a different act or can they be multiple occurrences of the same type of act," does not indicate that the jury was confused about the need for separate and distinct acts for each count. CP 101. The question gave two options, multiple occurrences of the same type of act, or different acts. The question does not imply that the jury was asking if they convict for multiple offenses based on a single act. It demonstrated that they were considering the multiple different types of acts that Spear committed against A.R.S. and the five to ten incidents of oral sex that he committed. When viewed in the context of the entire record, it is clear that the jury did not convict Spear of multiple offenses based on a single act. There was no double jeopardy violation.

2. The trial court properly instructed the jury regarding the need for unanimous verdicts.

The trial court properly instructed the jury of the need to reach a unanimous verdict on each count. RP 503-504, CP 78, RP 508, CP 91. It was proper for the instructions to include that the

"jury need not unanimously agree that the defendant committed all of the acts of rape of a child or child molestation because A.R.S. testified to between five to ten acts of oral sex. RP 503-504, CP 78, RP 508, CP 91, RP 280. Additionally, Instruction 19 indicated,

"Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision." CP 97.

The instructions made the requirement of unanimity clear. Spear does not argue that any of the instructions regarding unanimity were legally incorrect. Brief of Appellant at 22. He instead argues that the jury's question demonstrated that the jury was confused regarding unanimity. The question read "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 forms?" RP 558, CP 74.

Contrary to Spears argument, the question does not indicate that the jury was confused as to whether or not they needed to be unanimous to reach a verdict. The clear implication in the question is that the jury had reached a unanimous decision on some of the charges, but not all at that point. The second part of the question, "if we do not have a unanimous vote, how is it reported on the verdict

forms?" indicates that they were aware that they needed to be unanimous in order to write either guilty or not guilty. Their question asked what they were supposed to do if they were not unanimous.

The trial court was justifiably concerned about how to draft a response. CrR 6.15(f)(2) directs that the "court shall not instruct the jury in such a way to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate." The trial court crafted his answer to the jury's question with that in mind. RP 559-562. Spear's attorney suggested that the answer inform the jury that any verdict must be unanimous. RP 559-560. Instructions 7, 15 and 19, already made that clear. RP 503-504, CP 78, RP 508, CP 91, CP 97.

Unlike the cases cited to by Spear where the trial court should have provided a clearer answer, the trial court here could not provide a clear answer to the jury's question without the potential for violating CrR 6.15(f)(2). The response directing the jury to reread the instructions was correct. The instructions regarding a unanimous verdict were clear and the trial court could not provide further clarity. Even if the trial court had given the answer proposed by defense counsel, it would have merely mimicked the existing instructions. The instructions regarding unanimity were clear.

Even if this Court were to find that the trial court somehow erred regarding the instructions on unanimity, any error was harmless. In State v. Bobenhouse, 166 Wn.2d 881, 894-895, 214 P.3d 907 (2009), our State Supreme Court found that the failure to give an unanimity instruction in a multiple acts case was harmless because Bobenhouse offered only a general denial of the allegations and the jury had no evidence on which it could rationally discriminate between the incidents. The Court stated, "if the jury in Bobenhouse's case believed that one incident happened, it must have believed that each of the incidents happened." Id. at 895.

Here, Spear offered only a general denial to all of the allegations. The jury's question indicated, at the time of the question, that they were unsure of what to do if they did not reach agreement on a particular count. The trial court's instructions clearly answered that they needed to be unanimous in order to return a verdict. They did so on all counts. CP 96-100. Additionally, the trial court polled the jury and they all agreed that that the verdicts were their verdict and the verdict of the court. RP 575-577. There is no question that the verdicts were unanimous.

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3. Spear affirmatively acknowledged the inclusion of his out-of-state convictions and even if he hadn't, they were factually comparable to Washington State crimes.

RCW 9.94A.525 sets forth the process for calculating an offender score. Generally speaking, each prior felony conviction that has not washed out counts as one point. RCW 9.94A.525(1) and (2). Out-of-state convictions are to be classified according to the comparable Washington offense. RCW 9.94A.525(3). If a defendant affirmatively acknowledges his criminal history, the State is not required to produce the evidence to support it. State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009).

> Although the State generally bears the burden of proving the existence and comparability of a defendant's prior out-of-state and/or federal convictions, we have stated a defendant's *affirmative acknowledgment* that his prior out-of-state and/or federal convictions are properly included in his offender score satisfies SRA requirements.

State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004), citing to State v. Catling, 137 Wn.2d 472, 483 n.5, 973 P.2d 452 (1999). Mere failure to object to the State's summary of criminal history does not constitute an acknowledgment, even if the defendant agrees with the State's standard range calculation. Mendoza, 165 Wn.2d. at 928.

A defendant cannot, however, waive a challenge to a miscalculated offender score. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). He can waive factual errors, or errors involving the trial court's discretion, but he cannot waive a legal error. Id. In this case, Spear affirmatively acknowledged the factual comparability of his Idaho convictions. There was no error.

When a Washington court conducts a comparability analysis, it uses a two-part test. It first determines whether the elements of the foreign offense are "substantially similar" to the elements of the Washington offense. If so, the inquiry ceases. If the elements are broader than the Washington statute, then the court must determine if the conduct underlying the foreign conviction would have violated the Washington statute. State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007).

Here, Spear argues that the State failed to prove that his conviction for lewd conduct with a minor under the age of 16 is legally comparable to a Washington State offense because it does not include an age element or the requirement that the defendant not be married to the victim. Brief of Appellant at 31. While the Idaho statute may not be legally comparable to all of the elements of child molestation in the third degree, Spear stipulated that it was

factually comparable by affirmatively agreeing to its inclusion in the offender score. Idaho Code § 1508; RCW 9A.44.089.

Even if Spear and his counsel had not affirmatively acknowledged the factual comparability of the Idaho conviction, the facts before the trial court clearly supported the factual comparability. The victim of the Idaho offense was G.F., who testified at trial. EX 1, EX 2. It was abundantly clear that she was not married to Spear. RP 387, 470. Moreover, it was clear from both the exhibits and the testimony at trial that the necessary age difference for RCW 9A.44.089 existed between Spear and G.F. EX 2, RP 386, 430. G.F. indicated that she was 16 at the time of her testimony and Detective Jimmy Williams testified that Spear's date of birth is September 17, 1988. RP 386, 430. Spear was clearly more than 48 months older than G.F. at the time of the acts underlying his Idaho conviction for lewd contact. RCW 9A.44.089. The conviction was factually comparable to the Washington offense.

Spear's likewise affirmatively acknowledged that his conviction for enticing a child through the use of the internet or other communication device, pursuant to Idaho Code § 18-1509A was factual comparable to the Washington State offense of

communication with a minor for immoral purposes through an electronic communication. Spear now argues that the Idaho statute is not legally comparable because it does not include a no marriage requirement and because the comparable statute in Washington would be a gross misdemeanor if he did not have a prior felony sex offense. Brief of Appellant at 34-35.

Even if Spear had not affirmatively acknowledged the inclusion of the Idaho offense in his offender score, for the same reasons above, the facts before the trial court made it abundantly clear that Spear was not married to G.F. at the time of the offense. RP 487, 470. The presentence investigation report also did not indicate that Spear had been married and Spear reported that he did not have a girlfriend. CP 138. Spear's argument that the comparable Washington offense would be a gross misdemeanor is incorrect. Communication with a minor for immoral purposes is a Class C felony if it is accomplished through electronic means. RCW 9.68A.090(2). The Idaho offense was factually comparable to the Washington offense.

Spear and his counsel affirmatively acknowledged that the Idaho offenses were properly included in his offender score. CP 102, 2 RP 12. As such, neither the State nor the trial court were

required to do more to satisfy the SRA. State v. Ross, 152 Wn.2d at 230. Even if Spear had not made such an affirmative acknowledgment, the State presented sufficient evidence to demonstrate that his Idaho convictions were factually comparable to Washington statutes and were properly included in his offender score. There was no error in calculating Spear's offender score.

If this Court were to find that the facts before the sentencing court were, for any reason, insufficient to support the inclusion of Spear's Idaho offenses in the offender score, the proper remedy would be to remand for resentencing with the opportunity for the State to prove comparability. State v. Thiefault, 160 Wn.2d 409, 420, 158 P.3d 580 (2007). For all of the reasons above, however, such a resentencing hearing is not necessary.

4. The trial court did not abuse its discretion by including related conditions of community custody and imposing a monitoring condition.

The Sentencing Reform Act (SRA) identifies certain community custody conditions as mandatory, some as waivable, and others as discretionary. RCW 0.94A.703. Crime-related prohibitions are discretionary. RCW 9.94A.703(f). "The imposition of crime-related prohibitions is generally reviewed for abuse of discretion." State v. Armendariz,160 Wn.2d 106, 110, 156 P.3d 201

(2007); citing State v. Anciri, 107 Wn. App. 650, 653, 27 P.3d 1245 (1999). A crime related prohibition is an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted. RCW 9.94A.030(10); Armendariz, 160 Wn.2d at 111-112. A trial court does not abuse its discretion by imposing a crime related condition if there is a reasonable relationship between the crime of conviction and the community custody condition. State v. Hai Minh Nguyen, 191 Wn.2d 671, 684, 425 P.3d 847 (2018). The trial court may rely on a presentence investigation report in imposing a sentencing condition as part of community custody.

a. The prohibition related to internet access was crime-related.

Spear argues that the trial court erred by including a condition that Spear "not have access to the internet or email by electronic devices without community corrections officer or treatment provider approval." CP 122. In support of his argument, Spear correctly notes that the purpose of a crime-related condition is 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). The condition imposed by the trial court in this case is specifically designed to protect the public.

While the trial court and the parties sanitized the information for the jury, the trial court was clearly aware that the facts that formed the basis for the charges in this case were initially brought to light due to the Idaho investigation. RP 17. The investigation in this case began with the Idaho investigation that included a charge of enticing via the internet. Additionally, G.F., the minor victim of Spear's Idaho case, testified that Spear had talked to her "about sex" via Snapchat and that the conversation discussed his niece, the victim in this case, A.R.S. RP 387. The Idaho convictions were listed in the agreed statement of criminal history and in the presentence investigation report. CP 102, 138.

With all of this information, the prosecutor and defense agreed that the condition was appropriate during the sentencing hearing. 2 RP 9,12. There was a sufficient nexus to the crimes committed given that the facts showed that Spear communicated with another minor regarding the abuse of the victim in this case. The trial court did not abuse its discretion by adopting the agreed conditions of the parties. 2 RP 19. The condition clearly serves the purpose of protecting the community.

b. The condition requiring Spear to submit to testing and searches to monitor compliance is authorized by law.

The condition that Spear assigns error to specifically states, "To verify compliance, submit to testing and reasonable searches of your person, residence and vehicle." CP 123. A sentencing court can require an offender to perform "affirmative acts necessary to monitor compliance" with the community custody conditions. RCW 9.94A.030(10); In re Pers. Restraint of Brettel, 6 Wn. App.2d 161, 173, 430 P.3d 677 (2018).

Spear relies on State v. Jones, 118 Wn. App. 199, 76 P.3d 258 (2003), for the proposition that the trial court could not impose such a monitoring condition because no drug use was involved in Spear's offenses. Jones did not address whether the trial court properly imposed affirmative acts necessary to monitor compliance, rather, the decision considered whether a trial court could impose alcohol counseling as a crime related treatment or counseling service pursuant to former RCW 9.94A.700(5)(c). Id. at 207.

Unlike the situation in Jones, the condition at issue in this case merely requires affirmative actions necessary for the Department of Corrections to monitor the lawful conditions that were imposed by the trial court. Regardless of whether or not they

are crime related, a trial court is authorized to prohibit possessing or consuming controlled substances without a lawful prescription and possessing or consuming alcohol. RCW 9.94A.703(2)(c) and (3)(e). In addition to the prohibitions regarding drugs and alcohol, Spear was ordered to complete a sexual deviancy evaluation and follow all recommended treatment and to abide by several other conditions. CP 122-123. The condition at issue here simply allows the Department to monitor compliance with all of those conditions. If there was no way to monitor compliance with the conditions of community custody, the authority to impose such requirements is meaningless. State v. Riles, 135 Wn.2d 326, 341, 957 P.2d 655 (1998).

As part of his argument, Spears argues that the monitoring condition mandating testing violates his privacy interests under the Fourth Amendment and article 1, section 7. State v. Olsen, 189 Wn.2d 118, 399 P.3d 1141 (2017), relied upon by Spears, states that "probationers do not enjoy constitutional privacy protection to the same degree as other citizens." Id. at 124. In that case, our Supreme Court recognized that there is a privacy interest in urine testing, but UA's of DUI probationers do not violate article 1, section 7 because the "judgment and sentence constitutes sufficient

authority of law" to require them. Id. at 126-127. Much like the judgment and sentence in Olsen, the judgment and sentence in this case constitutes sufficient authority of law authorizing the monitoring provisions at issue.

The search and testing provision is limited to reasonable searches. The trial court was well within the law in authorizing the monitoring conditions. Even without the trial court adopting the condition, the legislature has provided that,

> if there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property.

RCW 9.94A.631(1). The condition of community custody at issue in this case was clearly well within the trial court's authority and does not violate Spear's right to privacy.

5. The community custody condition restricting internet usage does not violate the First Amendment.

Spear argues that the condition requiring that he "not have access to the internet or email by electronic devices without community corrections officer or treatment provider approval," is an unconstitutionally overbroad infringement on free speech. A community custody restriction implicating First Amendment rights

demands a greater degree of specificity and must be reasonably necessary to accomplish the essential needs of the state and public order. State v. Riley, 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993); State v. Padilla, 190 Wn.2d 672, 678, 416 P.3d 712 (2018).

In support of his argument, Spear cites to the United States Supreme Court decision Packingham v. North Carolina, U.S. 137 S.Ct. 1730, 1736, 198 L.Ed. 273 (2017). In that case, the court found that a blanket restriction prohibiting sex offenders from accessing social network websites impermissibly infringed upon the First Amendment. Id. at 1737. Recently, this Court distinguished the situation in Packingham, finding a community custody condition that prohibited the "use or access of the World Wide Web unless specifically authorized by CCO through approved filters" was "reasonably necessary to accomplish the needs of the State." State v. Johnson, 2020 Wash.App.Lexis 180, at 14.[5]

In State v. Hammerquist, 2018 Wash.App. LEXIS 1039,[6] Division I of this Court held that a provision preventing the probationer from possessing or maintaining access to a computer,

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[5] Unpublished decision offered for whatever persuasive value the Court deems appropriate pursuant to GR 14.1.

[6] Unpublished decision offered for whatever persuasive value the Court deems appropriate pursuant to GR 14.1.

unless specifically authorized by his CCO, “might be read to limit Hammerquist’s exercise of his First Amendment rights,” and remanded for the sentencing court to clarify the limitations. Id. at 2.

Here, the community custody condition is not a blanket prohibition of internet access, but rather requires Spear to gain the approval of his CCO prior to accessing the internet. The condition is reasonably tailored to the State’s purpose of protecting the community. The language is distinguishable from that in the statute at issue in Packingham. If this Court believes that the language “might” be interpreted in a way that infringes upon Spear’s First Amendment rights, the State requests that the Court remand for additional clarification as was included in Johnson.

6. Community custody supervision fees are not costs pursuant to RCW 10.01.160, therefore, the trial court did not err in ordering that Spear pay community custody supervision fees.

RCW 10.01.160 states that the trial court shall not order a defendant to pay costs if a defendant is indigent as defined in RCW 10.101.010(3)(a) through (c). RCW 9.94A.760(1) states that the trial court cannot order costs as described in RCW 10.01.160 if the defendant is indigent. This Court has found that community supervision fees are discretionary legal financial obligations,

(LFOs). State v. Lundstrom, 6 Wn. App.2d 388, 396 n. 3, 429 P.3d 1116 (2018), *review denied*, 193 Wn.2d 1007 (2019). However, that fact does not make community supervision assessments "costs."

The community custody supervision assessment is imposed under RCW 9.94A.703(2)(d), which states, "Unless waived by the court, as part of any term of community custody, the court shall order an offender to pay supervision fees as determined by the DOC." RCW 10.01.160(2) states "Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision." A community custody supervision assessment is not included in the definition of costs. A trial court is not required to conduct an inquiry into the ability to pay prior to assessing the community custody supervision assessment because it is not a cost pursuant to RCW 10.01.160(2). State v. Abarca, 2019 Wn. App. LEXIS 2890, at 28,[7] *citing*, State v. Clark, 191 Wn. App. 369, 374-75, 362 P.3d 309 (2015).

In Abarca, this Court declined to accept a concession from the State to strike a community custody supervision assessment.

[7] This is an unpublished decision, not offered as precedential authority but to be given whatever persuasive value this Court deems appropriate. GR 14.1.

Id. at 28. This Court reached a similar conclusion in the unpublished decision of State v. Estravillo, 2019 Wn. App. LEXIS 2617, at 11-14.[8] Division I seems to have taken a different approach in its unpublished decisions on this issue. *See*, State v. Reamer, 2019 Wn. App. LEXIS 2008, at 13; State v. Lilly, 2019 Wn. App. LEXIS 2907, at 2.[9] Given that the community supervision assessment is clearly not contemplated by the definition of costs in RCW 10.01.160(2), this Court's approach is correct and should be followed.

The State further notes that the inclusion of the community supervision assessment in the judgment and sentence does not mean that an offender's financial status will not be taken into account. RCW 9.94A.780(1) allows the Department of Corrections to exempt or defer a person from offender supervision intake fees for several reasons including inability to obtain employment and undue hardship. State statutes take indigency into account when it comes to community supervision fees. The trial court did not err by

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[8] This is an unpublished decision, not offered as precedential authority but to be given whatever persuasive value this Court deems appropriate. GR 14.1.

[9] These are also unpublished decisions, not offered as precedential authority but to be given whatever persuasive value this Court deems appropriate. GR 14.1.

including the provision that Spear shall pay supervision fees as determined by DOC.

7. Spear waived the right to raise whether a mental health disorder prohibited the Court from imposing the DNA fee because he failed to raise it at the trial court.

Under RAP 2.5(a), the court may refuse to review any claim of error that was not raised in the trial court. Spear now argues that the trial court failed to consider whether Spear had a mental health condition that made him unable to pay legal financial obligations pursuant to RCW 9.94A.777(1). However, the issue was never raised in the trial court during the sentencing hearing. *See generally,* 2 RP.

When a defendant presents evidence at sentencing that he suffers from mental health disorders, a trial court must determine whether a defendant who suffers from a mental health condition has the ability to pay the obligations. State v. Houck, 9 Wn. App.2d 636, 652, 446 P.3d 646 (2019); *citing*, State v. Tedder, 194 Wn. App.753, 756-757, 378 P.3d 246 (2016). In Houck, the defendant pointed out his mental health disorders at sentencing. 9 Wn. App.2d at 652. In Tedder, there was evidence that the defendant

had numerous involuntary hospitalizations and treatment in mental health court. 194 Wn. App. at 756-757.

In State v. Perez, 2018 Wash.App. LEXIS 1886,[10] Division III of this Court declined to address this issue because it was unpreserved in the record and there was nothing in the record to show that the defendant suffered from a diagnosed mental health disorder. Id. at 7-8. In State v. Catling, 2 Wn. App.2d 819, 827, 413 P.3d 27 (2017); *affirmed in part and reversed in part*, 193 Wn.2d 252, 438 P.3d 1174 (2019), Division III of this Court found that, despite a passing comment from the defendant's mother that he had been diagnosed with a mental health disorder, the trial court was not required to inquire further where neither Catling nor his counsel invoked RCW 9.94A.777.

Here, Spear cites to vague references included in the Defendant's Trial Brief indicating that he was deemed disabled by the Veteran's Administration, diagnosed with depression, bipolar disorder, anxiety disorder, and post-traumatic stress disorder. CP 50. Spear also cites to statements from Spear to the presentence investigation writer, included in the presentence investigation report

[10] Unpublished opinion offered for whatever persuasive value the Court deems appropriate pursuant to GR 14.1.

regarding Spear's mental health. CP 138. Despite those references, neither Spear nor his counsel mentioned RCW 9.94A.777 during the sentencing hearing and he did not offer any evidence that he had a mental health disorder that prohibited him from participating in gainful employment. 2 RP; RCW 9.94A.777(2). The presentence investigation report indicates that Spear reported a "medical disability" from the military but did not specify the nature of the medical disability. CP 138. The report also indicated that Spear worked as a care provider. CP 138. As in Catling, the trial court was not required to further inquire about the unraised issue and this Court should not consider it now for the first time on appeal.

D. CONCLUSION.

The record reviewed in its entirety made it manifestly apparent that the State was not seeking to convict on multiple counts based on a single act. There was no violation of the prohibition against double jeopardy. The trial court properly instructed the jury regarding the need for unanimous verdicts and even if the instructions were somehow erroneous, it is clear that any error was harmless because the jury returned unanimous verdicts. Spear affirmatively acknowledged that his Idaho

convictions were properly included in his offender score. Neither the prosecutor nor the court were required to further inquire; however, the record was still abundantly clear that the Idaho offenses were factually comparable to Washington offenses.

The trial court did not abuse its discretion by imposing an internet restriction as a crime related prohibition based on the subjective facts of the case. That condition is not a blanket prohibition of internet access and does not infringe upon Spear's First Amendment rights. If this Court finds that the condition might be interpreted in such a way, the Court should remand for clarification consistent with State v. Johnson. The monitoring condition of community custody is authorized and supported by law. It does not infringe upon Spear's right to privacy. Community custody fees are not costs and as such the trial court was not required to further inquire into Spear's ability to pay them. Finally, the trial court was not required to inquire as to whether a mental health disorder would infringe upon Spear's ability to earn an income when the issue was not raised during sentencing and the only discussion of mental health issues came from Spears statements.

The State respectfully request that this Court affirm the convictions and sentence in all regards.

Respectfully submitted this 2nd day of April, 2020.

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DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

April 2, 2020
Date

Signature

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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