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Court of Appeals
Division III
State of Washington

NO. 33252-7-III

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

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN MILLER,

Appellant.

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

The Honorable Vic L. VanderSchoor, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant's conviction for third degree child molestation violates double jeopardy.
2. The trial court erred in admitting ER 404(b) evidence that appellant had an extramarital affair eight years before the charged conduct.
3. The prosecutor committed misconduct in drawing the jury's attention to inadmissible ER 404(b) evidence.
4. The trial court's bias against the defense violated the appearance of fairness doctrine.
5. The trial court impermissibly commented on the evidence.
6. The trial court erred in giving a flawed reasonable doubt instruction, violating due process and the right to a jury trial.
7. The trial court erred in denying appellant's motions for a mistrial and a new trial based on juror misconduct.
8. Cumulative error deprived appellant of a fair trial.
9. The combined term of confinement and community custody exceeds the statutory maximum.
10. The community custody condition requiring appellant to "not go to place where minor children are known to congregate" is unconstitutionally vague.

11. The community custody condition requiring appellant to “not possess or peruse pornographic materials” is unconstitutionally vague.

12. The community custody conditions restricting appellant’s contact with minor children and women who have minor children interfere with his fundamental rights to marriage and to parent.

13. The trial court exceeded its statutory authority when it imposed discretionary legal financial obligations (LFOs) without making an individualized inquiry into appellant’s current and future ability to pay.

Issues Pertaining to Assignments of Error

1. Appellant was convicted of one count of third degree child rape and one count of third degree child molestation. Did inadequate jury instructions expose appellant to multiple punishments for one offense, violating double jeopardy and necessitating dismissal of the child molestation conviction?

2. Did the trial court err in admitting irrelevant and prejudicial ER 404(b) evidence that appellant had an extramarital affair eight years before the charged conduct?

3. Did the prosecutor commit misconduct in purposefully drawing the jury’s attention to prejudicial, inadmissible ER 404(b) evidence?

4. The trial court repeatedly interrupted defense counsel during his examination of witnesses, making objections on the State’s

behalf and commenting on the evidence. Does this violate the appearance of fairness doctrine?

5. Does the jury instruction defining reasonable doubt as “one for which a reason exists” misdescribe the burden of proof, undermine the presumption of innocence, and shift the burden to the accused to provide a reason for why reasonable doubt exists?

6. Did egregious juror misconduct in repeatedly reading an alternate, erroneous definition of reasonable doubt to the deliberating jury prejudice the outcome of appellant’s trial?

7. Did cumulative error deprive appellant of a fair trial?

8. Does the combined term of confinement and community custody—66 months—exceed the statutory maximum of 60 months?

9. Is the community custody condition requiring appellant to “not go to places where minor children are known to congregate” void for vagueness?

10. Is the community custody condition requiring appellant to “not possess or peruse pornographic materials” void for vagueness?

11. Do the community custody conditions restricting appellant’s contact with minor children and women who have minor children impermissibly interfere with his fundamental rights to marriage and parent?

12. Did the trial court exceed its statutory authority under RCW 10.01.160(3) when it imposed discretionary LFOs without first considering appellant's current and future ability to pay?

B. STATEMENT OF THE CASE

On January 12, 2015, the State charged Stephen Miller by amended information with two counts of third degree child rape (Counts 1 and 2) and one count of third degree child molestation (Count 3). CP 10-11. The State alleged that between February 22, 2011 and February 21, 2012, Miller had sexual intercourse and sexual contact with 15-year-old S.L., contrary to RCW 9A.44.079 and RCW 9A.44.089. CP 10-11.

Miller is married to Sherri Miller.¹ 4RP 265.² They have children of their own, as well as children from previous relationships. 4RP 266-68; 5RP 141. Miller and Sherri lived together in a bustling, "very packed house" with their children and relatives. 4RP 198, 235-36; 5RP 141. Miller was employed as a security officer at McNary Dam, a federal facility with extremely high security on the Columbia River between Washington and

¹ This brief refers to Sherri by her first name to avoid confusion.

² This brief refers to the verbatim reports of proceedings as follows: 1RP – January 12, 2015 (labeled transcript pretrial motion hearing / motions in limine); 2RP – January 13, 2015 (labeled Jury Trial Volume 1 of 2); 3RP – January 14, 2015 (labeled Volume I and II – January 14, 2015 – Pages 1-86); 4RP – January 15, 2015 (labeled Jury Trial Volume 2 of 2); 5RP – January 16, 2015 (labeled Volume II of II – January 16 & 20, 2015 – Pages 87-304); 6RP – March 27, 2015 (labeled motion for new trial and sentencing).

Oregon. 2RP 60, 100; 3RP 18-19. Miller worked at the dam from 5:00 a.m. to 2:00 p.m., Monday through Friday. 4RP 272-74; 5RP 142-49.

1. Trial Testimony

S.L. testified that in the spring of 2011, she became friends with Mariah Block, Sherri's daughter and Miller's stepdaughter. 2RP 10; 3RP 73-75. That summer, S.L. started hanging out at the Miller home and sometimes spent the night there. 3RP 74-76. S.L. became close with the Miller family. 3RP 82-83.

S.L. testified Miller started treating her differently, claiming he sent her a text message asking for provocative pictures. 3RP 83-84. S.L. said sometime in July or August 2011, Miller touched her in a way that made her uncomfortable. 3RP 122-23. S.L. was outside smoking a cigarette on the steps behind the Miller house near a large window when, she claimed, Miller started kissing her and touching her breasts. 2RP 68; 4RP 123-25. S.L. said Miller then took her pants off and had sex with her against the stairs. 4RP 125. She continued going over to the Miller house after that. 4RP 126.

S.L. said Miller sometimes drove her home in his pickup truck. 4RP 127. She testified he would stop the truck, then touch her breasts and put his fingers inside her vagina. 4RP 128. S.L. remembered this happened one time near a hotel in Richland, Washington, but otherwise did not know

where the truck was stopped. 4RP 129. Larry Esters, S.L.'s uncle whom she lived with, testified he saw Miller drop S.L. off at their home. 2RP 12.

S.L. described three other incidents of sexual intercourse and sexual contact. One time she claimed she and Miller had sex downstairs at the Miller house near a couch. 4RP 130-31. She testified another instance happened downstairs at the Miller house near a bar area, when Miller stood behind her and had sex with her until he ejaculated. 4RP 135-36. S.L. stopped going over to the Miller house in September, claiming "Sherri was really upset because she thought something was going on between me and Steve." 4RP 133-34.

The final instance she said happened the day of homecoming in October 2011. 4RP 136-37, 177. S.L. testified Miller came over to her house and asked her to put on her homecoming dress. 4RP 136-37. She claimed they then went upstairs to her bedroom, where Miller had oral sex with her by putting his mouth on her vagina, and then penetrated her vagina with his penis. 4RP 137-38.

S.L. testified Miller gave her \$100 after the homecoming incident. 4RP 138. S.L. told her older sister, who contacted Esters. 2RP 13-14; 4RP 138-39. Esters then confronted S.L., who said she received the money from Miller. 2RP 14. S.L. told Esters, however, that Miller gave her the money because their family was very poor and he felt sorry for her. 2RP 30-31.

Esters agreed he never saw Miller give S.L. the money, never confronted Miller about it, and never called the police. 2RP 16-17, 28-30. He further admitted S.L. was unruly during this time period and was not truthful with him. 2RP 26-27. Esters explained S.L. was raised to lie and manipulate, and she “had a way to manipulate people to think she was in poverty, which is not the case.” 2RP 35.

S.L. turned 16 on February 22, 2012. 3RP 73. She eventually moved in with her father, who committed suicide on February 14, 2013. 2RP 18-19. S.L. testified Miller contacted her after her father passed away. 4RP 142. S.L. said Miller picked her up in the dam security vehicle and drove her to McNary Dam, about 38 miles and 45 minutes away. 4RP 143; 5RP 206. S.L. claimed she and Miller went inside the guard shack at the dam and had sex. 4RP 144-46. S.L. testified Miller took photos of her and used a sexual device on her. 4RP 146-47.

S.L. claimed the dam incident happened when it was dark outside because Miller “was going to be getting off work soon.” 4RP 148. But Miller only worked until 2:00 p.m. each day. 4RP 272-74; 5RP 142-49. There are also large windows on three sides of the guard shack. 3RP 44; 5RP 208-09. Security supervisor Leslie Vandinter explained they keep extensive and detailed mileage logs for the dam security vehicle. 5RP 204-05. Security officers can take the vehicle offsite only for brief excursions

like getting gas or repairs. 5RP 203. Vandinter did not notice any excessive untracked mileage for the security vehicle during the time frame S.L. alleged she and Miller had sex at the dam. 5RP 205-07. He explained 76 untracked miles would certainly raise a red flag. 5RP 206.

As a result of her father's suicide, S.L. began meeting with a counselor, Brandy Frisby. 2RP 39; 4RP 149. S.L. told Frisby in July 2013 that she had sex with Miller when she was 15. 2RP 42; 4RP 149-50. Frisby made a mandatory report to child protective services and the police began investigating. 2RP 40-41, 47-48.

Officer Roy Shepherd testified he interviewed S.L. on August 12, 2013. 2RP 48. As a result of his conversation with S.L., Shepherd obtained a search warrant for Miller's home and the McNary Dam guard shack. 2RP 50-51. From Miller's home, police collected numerous media storage devices. 2RP 52-55, 66.

Sherri also showed the police where she and Miller kept a silver sexual device underneath their bed. 2RP 52-53; 3RP 7. S.L. identified the device as the one Miller used on her at the dam. 4RP 147. Sherri explained, however, that S.L. and Block found it during the summer of 2011 and chased each other around the house with it. 4RP 292-93. Detective Damon Jansen admitted there was nothing unique about this particular device, and it was never tested for DNA. 3RP 13-14.

From McNary Dam, police collected Miller's backpack, phone, camera, and more media storage devices. 2RP 82-87, 101. Miller readily consented to a search of these items. 2RP 82-85. Detective Dean Murstig, who executed the search warrant, informed Miller the police suspected him of having sex with S.L. 2RP 73-74, 91. Miller acknowledged he knew S.L. because she had been friends with his stepdaughter "a long time back." 2RP 79. He told Murstig it "was not how [they] were portraying it to be but didn't elaborate." 2RP 92. Miller explained S.L. had been to the guard shack before when the family took her boating there. 2RP 84. S.L. agreed this was true. 4RP 143.

Forensic testing of the seized items from Miller's home and his belongings at the dam revealed no existing or deleted sexually explicit images of S.L. 2RP 95, 102-06, 112-20.

S.L.'s version of events changed with each person she talked to. S.L. told Detective Shepherd she and Miller had sex only once inside the house, though she testified to two incidents at trial. 2RP 70-72. In a report to a different officer, S.L. did not mention the homecoming incident or the dam incident. 4RP 157. S.L. told another detective the stairs incident happened during the day, but testified at trial it happened at night. 4RP 124, 158. Likewise, S.L. made a pretrial statement under penalty of perjury in which

she did not mention the incident on the outside stairs or the homecoming incident. 4RP 161-63.

Sherri, Miller's adult daughter Jessica Miller, Miller's mother Patricia Cody, Block, Block's boyfriend Corey Valenti, and Miller all testified for the defense. Miller denied ever having sex or sexual contact with S.L. 5RP 160-63, 180-81. Sherri, Jessica, Cody, and Block explained the Miller house was constantly full of people and S.L. was never alone with Miller. 4RP 212-14, 240-45, 280-81, 299. Cody testified, "You can't be alone in that house. There were people everywhere." 4RP 261. The family also explained that in September 2011, they caught S.L. with several items she had stolen from the Miller home, including clothes, Sherri's engagement ring, and Miller's cologne. 4RP 208, 278-79, 304. S.L. was no longer welcome in their home after that. 4RP 278-29.

S.L. and Valenti dated for three years during high school. 4RP 306. When S.L. and Valenti broke up, Valenti started dating Block. 4RP 305-06; 5RP 120. Block and Valenti both testified to an incident in August 2013 when they were confronted by S.L. 4RP 307-09; 5RP 122-23. S.L. became angry and started making threats towards Block. 4RP 307; 5RP 122. Valenti told S.L. to "back off" because Block was pregnant with his baby. 5RP 122-23. In response, S.L. "screamed out that [Miller] raped her." 4RP 307. Valenti testified S.L. hated Block. 5RP 125.

2. Procedural Facts

The jury began deliberating in the afternoon on Friday, January 16. 5RP 286. After a three-day weekend, the jury continued deliberating on January 20. 5RP 288; CP 137. Around noon that day, the bailiff notified the court that juror number 2 looked up a definition of reasonable doubt on the internet before he was chosen as a juror, which he then shared with the deliberating jury that morning. 5RP 288-90. The court read the juror's definition of reasonable doubt aloud and concluded it was "totally improper." 5RP 292.

Defense counsel moved for a mistrial and the court agreed, "I don't think I can have any other option. I think I'll have to declare a mistrial. I would rather not." 5RP 290. The court explained "the jury cannot be talking about a different reasonable doubt definition than what we gave in our instructions." 5RP 291. The State agreed, but argued it could be cured by admonishing the jury to follow only the court's instructions. 5RP 291. Defense counsel opposed instructing the jury as such, worrying that it would further taint the jury. 5RP 291-92.

The court then called juror number 2 in to question him. 5RP 293. The juror admitted he Googled the definition of "beyond a reasonable doubt" the Monday before trial and then read it aloud to the deliberating jury. 5RP 294. He said he had previously served on a jury and was confused by the

concept of reasonable doubt. 5RP 295. He explained this concept “was brought up early” in deliberations and he wanted to share his definition “before we read what was in the judge’s papers to us.” 5RP 295. He agreed he read the definition to the jury before they read the court’s instructions. 5RP 296.

The court excused juror number 2 and called in the rest of the jury. 5RP 297-99. The court asked the jury, “It’s my understanding that [juror number 2] had looked up a different definition of beyond a reasonable doubt, shared that with you this morning; is that correct?” 5RP 299. An “unidentified juror” responded yes and explained juror 2 read the definition aloud twice around 10:00 or 10:30 a.m. 5RP 299. The court asked, “Do you remember it?” 5RP 299. An unidentified juror responded, “Not really.” 5RP 299. The court followed up, “Any of you remember it?” 5RP 299. Another unidentified juror said, “There was . . . maybe one, maybe two, that were different than your orders that we -- at least I understood we said that should not be considered. That your orders were different. That’s what we’re following.” 5RP 299.

The court then asked the jury, “Can you ignore from this point on what this other juror No. 2 brought in and shared with you this morning? Can you ignore that totally and make any decision you might make based solely on the evidence you’ve been presented, the exhibits you have and the

Court's instructions?" 5RP 300. An unidentified juror responded yes. 5RP 300. Finally, the court asked, "Can you certify that you'll do that?" 5RP 300. An unidentified juror said, "Absolutely." 5RP 300. The court did not individually poll or question the jurors.

The court then sent the jury back to the jury room and denied the mistrial motion. 5RP 300. The court replaced juror number 2 with the alternate and instructed the reconstituted jury to disregard its previous deliberations and start anew. 5RP 302-03.

The jury found Miller guilty of third degree child molestation and one count of third degree child rape (Counts 1 and 3), but did not return a verdict on the other rape charge (Count 2). CP 40-43. The court declared a mistrial on Count 2 and dismissed the charge without prejudice. CP 110.

After the verdict, defense counsel filed a written motion for a new trial, arguing the juror misconduct necessitated a new trial, among other reasons. CP 44-54. The trial court denied the motion. 6RP 14-15. In its written findings, the court found the transcript should read "unidentified jurors" because "[i]t is my recollection that every juror nodded their heads" when asked if they could follow the court's instructions. CP 138.

The court imposed 30 months on Count 1 and 20 months on Count 3, to run concurrently. CP 120; 6RP 27. The court also imposed \$1,487.66 in mandatory and discretionary LFOs, as well as 36 months of community

custody. CP 118-21. The court specified several conditions of community custody. CP 126-17. Miller filed a timely notice of appeal. CP 129.

C. ARGUMENT

1. INADEQUATE JURY INSTRUCTIONS VIOLATED MILLER'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY BECAUSE THEY EXPOSED HIM TO MULTIPLE PUNISHMENTS FOR THE SAME OFFENSE.

The trial court was required to clearly instruct the jury that it could not convict Miller more than once on the basis of a single act. The instructions failed to do so and subjected Miller to double jeopardy. Miller's conviction for child molestation must be vacated.

The right to be free from double jeopardy "is the constitutional guarantee protecting a defendant against multiple punishments for the same offense." State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007) (citing U.S. CONST. amend. V; WASH. CONST. art. I, § 9). A double jeopardy claim is reviewed de novo and may be raised for the first time on appeal. State v. Mutch, 171 Wn.2d 646, 661-62, 254 P.3d 803 (2011).

Jury instructions "must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror." Borsheim, 140 Wn. App. at 366 (quoting State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006)). The reviewing court considers insufficient instructions "in light of the full record" to determine if they

“actually effected a double jeopardy error.” Mutch, 171 Wn.2d at 664. Double jeopardy is violated if, after this review, it is not “manifestly apparent to the jury that each count represented a separate act.” Id. at 665-66. The jury instructions in Miller’s case do not satisfy this standard.

The Borsheim court held an instruction that the jury must find a “separate and distinct” act for each count is required when multiple counts of sexual abuse are alleged to have occurred within the same charging period. 140 Wn. App. at 367-68. Without this instruction, the accused is exposed to multiple punishments for the same offense, violating his right to be free from double jeopardy. Id. at 364, 366-67. The court vacated three of Borsheim’s four child rape convictions for this instructional omission. Id. at 371.

In Mutch, the State charged five identical counts of rape, all within the same charging period. 171 Wn.2d at 662. There was sufficient evidence of five separate acts of rape, but the jury was not instructed that each count must arise from a separate and distinct act in order to convict. Id. at 662-63. The possibility that the jury convicted Mutch on all five counts based on a single criminal act created a potential double jeopardy problem. Id. at 663.

The Mutch court held, however, that the case “presented a rare circumstance where, despite deficient jury instructions,” it was nevertheless manifestly apparent jurors based each conviction on a separate and distinct act. Id. at 665. Specifically: (1) the victim, J.L., testified to precisely the

same number of rape episodes (five) as there were counts charged and to convict instructions; (2) the defense was consent rather than denial; (3) Mutch admitted to a detective that he engaged in multiple sex acts with J.L.; and (4) during closing, the prosecutor discussed each of the five alleged acts individually and defense counsel did not challenge the number of episodes, but merely argued consent. Id. The court concluded, “[i]n light of all of this, we find it was manifestly apparent to the jury that each count represented a separate act.” Id. at 665-66. The Mutch court was convinced beyond a reasonable doubt that a double jeopardy violation did not follow from the deficient jury instructions. Id. at 666.

In State v. Land, the court considered whether it violated double jeopardy where the jury was not instructed it must find separate and distinct acts of child rape and child molestation. 172 Wn. App. 593, 598-603, 295 P.3d 782 (2013). Land was convicted of one count of child molestation and one count of child rape, both involving the same child and the same charging period. Id. at 597-98. Land argued these convictions violated double jeopardy because they might have been based on the same act of oral-genital intercourse. Id. at 598-99. The State countered that the jury did not have to find separate and distinct acts because child molestation is not the “same offense” as child rape for double jeopardy purposes. Id. at 599.

Two offenses are not the same when “there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other.” Id. (quoting State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983)). Child rape and child molestation do not have identical elements. Id. Child molestation requires proof of “sexual contact,” which means “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.” RCW 9A.44.089(1); RCW 9A.44.010(2). Child rape requires proof of “sexual intercourse,” which includes penetration, as well as “any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another.” RCW 9A.44.079(1); RCW 9A.44.010(1) (emphasis added). Miller’s jury was given instructions consistent with these statutory definitions of sexual contact and sexual intercourse. CP 25, 27.

The Land court explained that where the evidence of sexual intercourse supporting a count of child rape is evidence of penetration, “rape is not the same offense as child molestation.” 172 Wn. App. at 600. The touching of sexual parts for sexual gratification constitutes molestation until the point of actual penetration. Id. At that point, the act of penetration alone supports a separately punishable conviction for child rape. Id.

However, where the evidence of sexual intercourse is evidence of oral-genital contact, “that single act of sexual intercourse, if done for sexual

gratification, is both the offense of molestation and the offense of rape.” Id. In such a circumstance, the two offenses “are the same in fact and in law because all the elements of the rape as proved are included in molestation, and the evidence required to support the conviction for molestation also necessarily proves the rape.” Id. (emphasis in original). Because of this potential double jeopardy problem, the court considered Land’s claim that the jury instructions exposed him to multiple punishments for the same offense. Id.

Land’s jury was not instructed that the two counts involving the same child, S.H., required proof of separate and distinct acts. Id. at 601. However, S.H. did not testify Land’s mouth came in contact with her sex organs. Id. The only evidence of rape was S.H.’s testimony that Land used his finger to penetrate her vagina. Id. at 602. Consistent with this testimony, the prosecutor argued in closing that S.H.’s testimony about penetration was the “crucial element proving rape.” Id. The prosecutor also emphasized that S.H.’s testimony about sexual contact proved molestation and her testimony about penetration proved rape. Id. Given all these factors, the Land court concluded the lack of a separate and distinct instruction “did not violate Land’s right to be free from double jeopardy.” Id. at 603.

This case presents the same issue as Land: Miller was convicted of one count of child rape and one count of child molestation within the same charging period. CP 29-31; 41-43. Like Land, Miller's jury was not instructed that the count of child rape and the count of child molestation must be based on separate and distinct acts.³ CP 29-31.

Unlike Land, however, S.L. testified to oral-genital contact. Specifically, she said that on the day of homecoming, Miller came over to her house and had sex with her, first by putting his mouth on her vagina and then by penetrating her vagina with his penis. 4RP 136-38. Because oral-genital contact constitutes both rape and molestation, this creates a potential double jeopardy problem. Land, 172 Wn. App. at 600.

Considering the full record, it is not manifestly apparent that the jury based each conviction on a separate and distinct act. In contrast to Mutch, Miller's defense was denial, not consent. Miller denied ever having sexual contact or sexual intercourse with S.L.

Also unlike Mutch, S.L. did not testify to the same number of incidents as were charged. Instead she testified to four instances where Miller penetrated her vagina with his penis, one also involving oral-genital

³ Nor was the jury instructed that the two counts of child rape must be based on separate and distinct criminal acts. CP 29-30. However, the jury hung on one of the child rape counts. CP 42.

contact, and several other instances where Miller touched her breasts and penetrated her vagina with his fingers. 4RP 123-38.

In Mutch, there were five alleged incidents, five charges, and five convictions. 171 Wn.2d at 651-52. This made it apparent that “if the jury believed J.L. regarding one count, it would as to all.” Id. at 666. Not so in Miller’s case. Despite S.L. testifying to several acts of sexual intercourse, the jury returned a verdict on only one of the two counts of child rape. This suggests the jury did not believe all the acts occurred and did not find S.L. entirely credible.

Further, the jury did not specify which acts it relied on to convict for rape or molestation. See State v. Kier, 164 Wn.2d 798, 814, 194 P.3d 212 (2008) (holding a verdict is ambiguous are multiple acts were alleged but the jury does not specify which act it relied on to convict). This Court has no way of knowing or guaranteeing that the jury did not rely on the same act of oral-genital contact to convict for both rape and molestation. This case is not the “rare circumstance” where the jury plainly based each conviction on a separate and distinct act. Mutch, 171 Wn.2d at 665.

The prosecutor’s closing argument also did not protect against double jeopardy. She repeatedly emphasized the oral-genital contact, but never informed the jury that it must not rely on that act for both rape and molestation. For instance, the prosecutor argued, “[y]ou heard about lots of

acts of rape and molestation,” including “the act that occurred in homecoming.” 5RP 248. She also asserted there were three different ways Miller had sexual intercourse with S.L.: “you heard about penetration, you heard about oral sex, and you also heard about when he placed his finger in her vagina when he was driving her around.” 5RP 247 (emphasis added). Unlike the prosecutor in Land, the prosecutor in Miller’s case did nothing to distinguish sexual contact and sexual intercourse.

The State may argue the prosecutor’s election a specific act of child molestation in closing cured the double jeopardy problem: “And the child molestation is for the sexual contact, and the State’s alleging this is during when he would touch her breasts in the vehicle.” 5RP 248. But election only prevents a unanimity error, not a double jeopardy violation. See Borsheim, 140 Wn. App. at 365-66 (explaining the difference between these two rights). The jury “should not have to obtain its instruction on the law from arguments of counsel.” State v. Aumick, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995). Rather, it is the judge’s “province alone to instruct the jury on relevant legal standards.” State v. Clausing, 147 Wn.2d 620, 628, 56 P.3d 550 (2002). In Kier, the supreme court held that a prosecutor’s election of a specific act in closing was insufficient to cure a double jeopardy violation because jurors are told to rely on evidence and instructions rather than counsel’s arguments. 164 Wn.2d at 813.

The State may also point to the fact that Miller's jury received a unanimity instruction:

To convict the defendant on any count of Rape of a Child in the Third Degree or Child Molestation in the Third Degree, one particular act of Rape of a Child in the Third Degree or Child Molestation in the Third Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved.

CP 28. But, again, this did not cure the double jeopardy problem.

The trial court in Borsheim also gave a similar unanimity instruction:

There are allegations that the Defendant committed acts of rape of child on multiple occasions. To convict the Defendant, one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt. You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.

140 Wn. App. at 364 (emphasis in original). This unanimity instruction, like the one in Miller's case, did not "convey the need to base each charged count on a 'separate and distinct' underlying event." Borsheim, 140 Wn. App. at 367, 369-70. Although the instruction adequately informed jurors they had to be unanimous on the act that formed the basis for any given count, it failed to protect against double jeopardy. Id. at 367, 369.

The unanimity instruction may have actually exacerbated the double jeopardy problem. The instruction specified that to convict on any count, "one particular act of Rape of a Child in the Third Degree or Child

Molestation in the Third Degree must be proved beyond a reasonable doubt.” CP 28 (emphasis added). The jury could have taken this to mean that only one act of either rape or molestation needed to be proved for any count, whether child rape or child molestation. Again, it is not manifestly apparent from this instruction that the jury needed to find separate and distinct acts of rape and molestation.

Finally, Miller’s 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.” CP 19. The Borsheim court held this instruction is insufficient to guard against double jeopardy because it fails to adequately inform the jury that each crime requires proof of a different act. 140 Wn. App. at 367, 369-70; see also Mutch, 171 Wn.2d at 663 (agreeing with Borsheim).

Failure to instruct the jury that it needed to find separate and distinct acts of child rape and child molestation exposed Miller to multiple punishments for a single offense. This violated his right to be free from double jeopardy. This Court should reverse and remand for the trial court to vacate the child molestation conviction. Borsheim, 140 Wn. App. at 371.

2. THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT AND PREJUDICIAL PROPENSITY EVIDENCE THAT MILLER HAD AN EXTRAMARITAL AFFAIR EIGHT YEARS BEFORE THE CHARGED CONDUCT.

ER 404(b) bars admission of “[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith.” Such evidence may be admissible for other purposes “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b).

Before admitting ER 404(b) evidence, the trial court must, on the record, (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose of the evidence, (3) determine whether the evidence is relevant to prove an element of the charged crime, and (4) weigh the probative value against the prejudice. State v. Gunderson, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014). To be relevant, evidence must tend “to make the existence of any fact that is of consequence to the determination of the action more probable or less probable.” ER 401. A trial court’s decision to admit ER 404(b) evidence is reviewed for abuse of discretion. Gunderson, 181 Wn.2d at 922.

ER 404(b)’s prohibition encompasses “any evidence offered to ‘show the character of a person to prove the person acted in conformity’ with that character at the time of a crime.” State v. Foxhoven, 161 Wn.2d 168,

175, 163 P.3d 786 (2007) (emphasis in original) (quoting State v. Everybodytalksabout, 145 Wn.2d 456, 466, 39 P.3d 294 (2002)). This includes acts that are “unpopular or disgraceful,” even if not illegal. Everybodytalksabout, 145 Wn.2d at 466.

Sherri’s testimony at trial was fairly limited. On direct, she described Miller’s busy schedule and how he would have had little opportunity to be alone with S.L. 4RP 272-81. She testified S.L. stayed over at their house four or five times and was a bad influence on Block. 4RP 271-72. Finally, she explained the family found stolen items in S.L.’s backpack. 4RP 278-79.

On cross-examination, the prosecutor asked Sherri when she and Miller moved in together. 4RP 281-82. Sherri explained she had known Miller for 15 years and they moved in together eight years ago. 4RP 481. The prosecutor then asked, “did you know him when he was married to his previous wife?” and “do you remember when they separated[?]” 4RP 282. Defense counsel objected to the relevance of this questioning, to which the prosecutor claimed, “We are talking about time lines here, Judge.” 4RP 282. The court simply responded, “Go ahead.” 4RP 282.

The prosecutor then proceeded to question Sherri about how she and Miller had two children together in 2001 and 2003 while Miller was still married to and living with his ex-wife. 4RP 283-84. Specifically, the prosecutor asked: “were you guys living together when he was born?”; “did

you all have another child together?"; "were you living together when that child was born?"; "Was he still married to his other wife?"; "Was he still living with her?" 4RP 284. When Sherri was clearly uncomfortable with this questioning, the prosecutor added, "And you can look at me." 4RP 284.

The prosecutor's claim that this went to "timeline" is unfounded. The relevant charging period was February 22, 2011 to February 21, 2012, eight years after Miller's and Sherri's extramarital relationship. CP 10-11, 29-31. Sherri did not claim during direct examination that Miller was always faithful or never had an affair. See 4RP 265-81; State v. Gauthier, 174 Wn. App. 257, 267, 267, 298 P.3d 126 (2013) ("Impeachment evidence may be offered solely to show the witness is not truthful, usually in the form of prior inconsistent statements."). Absent this basis to impeach her testimony, there is no reason to introduce such evidence except for propensity. In other words: Miller was willing to cheat then, so he must be willing to cheat now.

An affair is undoubtedly an "unpopular or disgraceful" act that falls within the scope of ER 404(b)'s prohibition. Everybodytalksabout, 145 Wn.2d at 466. Evidence of marital disharmony or infidelity may be relevant "if there exists some causal relationship or natural connection between the misconduct and the criminal act with which the accused stands charged." State v. Messinger, 8 Wn. App. 829, 835, 509 P.2d 382 (1973). For

instance, infidelity is sometimes relevant to motive in murder cases. See id.; but see Lesley v. State, 606 So.2d 1084, 1090 (Miss. 1992) (excluding evidence of defendant's earlier affairs because they were too remote and were admitted to show she was an "immoral woman").

Miller's eight-year-old affair with his now-wife does not have any connection or causal relationship to the current allegations that Miller had sex with a 15 year old. This "timeline" is far too attenuated to be relevant to any permissible reason for admitting ER 404(b) evidence. Instead, the purpose of the evidence was to suggest Miller was an immoral person, willing to cheat on his wife. Had the trial court actually conducted the requisite balancing test on the record, this would have been readily apparent. See State v. Jackson, 102 Wn.2d 689, 694, 689 P.2d 76 (1984) ("We cannot overemphasize the importance of making such a record.").

Improper admission of ER 404(b) evidence requires reversal where there is a reasonably probability the outcome of the trial would have been different without the inadmissible evidence. State v. Grower, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014). "Prior misconduct is inherently prejudicial," particularly when the accused is charged with a sex crime. State v. Carleton, 82 Wn. App. 680, 686, 919 P.2d 128 (1996); State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982) (explaining the "prejudice potential of prior acts is at its highest" in sex cases).

This was a “he-said, she-said” case. It was S.L.’s word against Miller’s, with very little direct evidence and conflicting circumstantial evidence. S.L.’s testimony was riddled with inconsistencies and implausible scenarios. 2RP 70-72; 4RP 124, 157-63. Her own uncle said she was prone to lying and manipulating. 2RP 35. Evidence of Miller’s affair painted him as an immoral, dishonest person, willing to cheat on his wife. It suggested he not only had the propensity to commit the charged crimes, but also that he was not credible. This may well have been a tipping point for jurors, many of whom likely had experienced infidelity in their own families and marriages. Further, the fact that the jury hung on one of the rape counts suggests they did not find S.L. entirely credible, making Miller’s credibility all the more important.

In sex cases, where the trial “boiled down to whether the jury believed or disbelieved” the accused’s story, prejudice results from improperly admitted evidence. State v. Burke, 163 Wn.2d 204, 222, 181 P.3d 1 (2008); accord Gauthier, 174 Wn. App. at 270. Such is the case here. This Court should reverse and remand for a new trial.

3. ALTERNATIVELY, THE PROSECUTOR COMMITTED MISCONDUCT BY DRAWING THE JURY’S ATTENTION TO MILLER’S EXTRAMARITAL AFFAIR.

Prosecutors are officers of the court and have a duty to ensure that an accused person receives a fair trial. Berger v. United States, 295 U.S. 78, 88,

55 S. Ct. 629, 79 L. Ed. 1314 (1935); State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). When a prosecutor's comments are improper and there is a substantial likelihood that they affected the jury's verdict, the accused's rights to a fair trial and to be tried by an impartial jury are violated. U.S. CONST. amend. XIV; WASH. CONST. art. 1, §§ 3, 22; State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

“A prosecutor has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider.” State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). A prosecutor's reference to inadmissible ER 404(b) evidence constitutes misconduct. See, e.g., State v. Fisher, 165 Wn.2d 727, 748-49, 202 P.3d 937 (2009); State v. Stith, 71 Wn. App. 14, 22-23, 856 P.2d 415 (1993).

The prosecutor committed misconduct by purposefully drawing the jury's attention to Miller's extramarital affair for the dubious reason of “timeline.” 4RP 282. The prosecutor's intention was plain: to emphasize that Miller previously cheated on his wife and had the propensity to do so again. This was misconduct that prejudiced the outcome of Miller's trial, warranting reversal for this alternative reason.

4. THE TRIAL COURT DEMONSTRATED BIAS AGAINST THE DEFENSE BY REPEATEDLY INTERRUPTING DEFENSE COUNSEL AND COMMENTING ON THE EVIDENCE, VIOLATING THE APPEARANCE OF FAIRNESS DOCTRINE.

Our federal and state constitutions guarantee the due process right to a fair trial by an impartial judge. U.S. CONST. amends. VI, XIV; WASH. CONST. art. I, §§ 3, 21. Under the appearance of fairness doctrine, a trial is valid “only if a reasonably prudent, disinterested observer would conclude the parties obtained a fair, impartial, and neutral hearing.” State v. Gamble, 168 Wn.2d 161, 187, 225 P.3d 973 (2010). The doctrine is “directed at the evil of a biased or potentially interested judge.” State v. Post, 118 Wn.2d 596, 618-19, 826 P.2d 172, 837 P.2d 599 (1992).

Impartial means the absence of actual or apparent bias. In re Pers. Restraint Swenson, 158 Wn. App. 812, 818, 244 P.3d 959 (2010). “The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.” Post, 118 Wn.2d at 618 (quoting State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972)). The Code of Judicial Conduct (CJC) requires judges to disqualify themselves from a proceeding where their impartiality “might reasonably be questioned.” Swenson, 158 Wn. App. at 818 (quoting CJC Canon 3(D)(1)).

A new trial before a different judge is necessary where there is evidence of a judge’s actual or potential bias. Gamble, 168 Wn.2d at 187-

88; Madry, 8 Wn. App. at 70. “The appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice.” Madry, 8 Wn. App. at 70. The test for determining whether the judge’s impartiality might reasonably be questioned is an objective one, reviewed de novo. Swenson, 158 Wn. App. at 818; In re Disciplinary Proceeding Against King, 168 Wn.2d 888, 899, 232 P.3d 1095 (2010).

To avoid the appearance of bias, judges must “exercise self-restraint and preserve an atmosphere of impartiality.” Anderson v. Sheppard, 856 F.2d 741, 745 (6th Cir. 1988) (quoting Knapp v. Kinsey, 232 F.2d 458, 465-67 (6th Cir. 1956)). A judge must not “cross[] the line that separates an impartial tribunal from a zealous advocate.” State v. Dugan, 96 Wn. App. 346, 355, 979 P.2d 885 (1999). Nor should a judge “enter into the ‘fray of combat’ or assume the role of counsel.” State v. Ra, 144 Wn. App. 688, 705, 175 P.3d 609 (2008) (quoting Egede-Nissen v. Crystal Mountain, Inc., 93 Wn.2d 127, 141, 606 P.2d 1214 (1980)). When a judge’s handling of a trial suggests an alignment with one of the parties, any resulting judgment in favor of that party is rendered invalid. Anderson, 856 F.2d at 747.

In Ra, the court of appeals disapproved of the trial judge proposing theories under which the State could admit evidence of gang affiliation that would otherwise be improper under ER 404(b). 144 Wn. App. at 705.

Reversing on other grounds, the court ordered a new judge to be assigned on remand. Id. Similarly, the Egede-Nissen court recognized the cumulative effect of a trial court's "repeated interjections" may necessitate reversal. 93 Wn.2d at 141. The court explained jurors are "are quick to attend an interruption by the judge, to which they may attach an importance and a meaning in no way intended," resulting in "great prejudice." Id. at 142 (quoting State v. Jackson, 83 Wash. 514, 523, 145 P. 470 (1915)).

During Miller's trial, the court made the following interruptions of defense counsel, without any objection from the State:

- "We've established it's his statement." 2RP 34.
- "Asked and answered. How many times has she got to tell you she spoke to Detective Shepherd." 4RP 158.
- "Been asked and answered. Move on." 4RP 168.
- "Just ask the question." 4RP 169.
- "You've asked that and it's been answered. Been asked and answered." 4RP 173.
- "Just questions." 4RP 175.
- "Counsel you don't need to repeat the testimony or make comments. Just ask questions." 4RP 197.
- "She has to testify on her own. If you have to lead her, then it's not going to happen." 4RP 308.

- “Could you just ask a question, please?” 5RP 105.
- “You need to try not to lead the witness, please.” 5RP 106.
- “Against, counsel, we don’t need preparatory remarks. Just a question.” 5RP 155.
- “That’s a question? Ask a question . . . No comments. We need questions.” 5RP 165.
- “No comments, please, counsel. Just questions.” 5RP 170.
- “Just ask the question.” 5RP 209.

Further, when the State objected, the court often commented on the evidence or added reasons for sustaining the objection:

- Objection for facts not in evidence, court added, “It wasn’t a question either.” 4RP 156.
- “Sustained. It’s not an appropriate question.” 4RP 159.
- Objection for speculation and compound question, court added, “I will ask you to rephrase the question. I couldn’t understand it myself.” 4RP 181.
- Upon a sustained objection, court stated, “It’s irrelevant.” 4RP 195.
- Objection for asked and answered, court added, “Sustained and leading also.” 4RP 250.
- Relevance objection, court said, “Relevance and leading.” 4RP 292.

- The State made a hearsay objection, “You can’t say what somebody else said.” The court responded, “It’s as easy as that.” 4RP 307.
- Hearsay objection, court added, “Also, leading.” 5RP 114.
- Objection to a leading question, court added, “And has already been covered. Asked and answered.” 5RP 126.

See WASH. CONST. art. 4, § 16 (“Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.”); State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968) (explaining the purpose of barring judicial comment on the evidence “is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court’s opinion of the evidence submitted”).

The court entered the fray of combat, objecting on the State’s behalf and offering additional reasons for sustaining the State’s objections. The record shows no similar interruptions during the State’s examination of witnesses or similar advocacy on the defense’s behalf. Whether or not the court had actual bias toward the defense, the court did not appear impartial given the repeated interjections and disparagement of defense counsel. The disparagement was particularly harmful, making counsel seem inept and unprepared. The court’s actions plainly suggested alignment with the State against the defense. Where the court appeared biased against the defense, how can we expect the jury to remain unbiased and impartial?

The judge should have disqualified himself once he could no longer act impartially toward Miller. Because he did not, the resulting convictions are tainted and Miller must receive a new trial before a different judge. Madry, 8 Wn. App. at 70; Anderson, 856 F.2d at 747. Even if this Court holds the judge's bias, standing alone, does not warrant reversal, this Court should order a new judge to be assigned on remand if this Court reverses on other grounds. Ra, 144 Wn. App. at 705.

5. THE MANDATORY JURY INSTRUCTION, "A REASONABLE DOUBT IS ONE FOR WHICH A REASON EXISTS," IS UNCONSTITUTIONAL.

At Miller's trial, the court gave the standard reasonable doubt instruction, WPIC 4.01,⁴ which reads, in part:

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 20 (emphasis added); 5RP 238. This instruction is constitutionally defective for two related reasons.

First, it tells jurors they must be able to articulate a reason for having a reasonable doubt. This engrafts an additional requirement onto reasonable

⁴ 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008).

doubt, making it more difficult for jurors to acquit and easier for the prosecution to obtain convictions. Second, telling jurors a reason must exist for reasonable doubt undermines the presumption of innocence and is substantively identical to the fill-in-the-blank arguments that Washington courts have invalidated in prosecutorial misconduct cases.

In order for jury instructions to be sufficient, they must be “readily understood and not misleading to the ordinary mind.” State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). “The rules of sentence structure and punctuation are the very means by which persons of common understanding are able to ascertain the meaning of written words.” State v. Simon, 64 Wn. App. 948, 958, 831 P.2d 139 (1991), rev’d on other grounds, 120 Wn.2d 196, 840 P.2d 172 (1992). In examining how an average juror would interpret an instruction, appellate courts look to the ordinary meaning of words and rules of grammar.⁵

With these principles in mind, the flaw in WPIC 4.01 reveals itself with little difficulty. Having a reasonable doubt is not, as a matter of plain English, the same as having a reason to doubt. But WPIC 4.01 requires both

⁵ See, e.g., Sandstrom v. Montana, 442 U.S. 510, 517, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) (looking to dictionary definition of the word “presume” to determine how jury may have interpreted the instruction); State v. LeFaber, 128 Wn.2d 896, 902-03, 913 P.2d 369 (1996) (proper grammatical reading of self-defense instruction permitted the jury to find actual imminent harm was necessary, making it possible the jury applied the erroneous standard), overruled on other grounds by State v. O’Hara, 167 Wn.2d 91, 217 P.3d 756 (2009).

for a jury to return a “not guilty” verdict. Examination of the meaning of the words “reasonable” and “a reason” shows this to be true.

“Reasonable” means “being in agreement with right thinking or right judgment : not conflicting with reason : not absurd : not ridiculous . . . being or remaining within the bounds of reason . . . having the faculty of reason : RATIONAL . . . possessing good sound judgment.” WEBSTER’S THIRD NEW INT’L DICTIONARY 1892 (1993). For a doubt to be reasonable, it must be rational, logically derived, and have no conflict with reason. See Jackson v. Virginia, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) (“A ‘reasonable doubt,’ at a minimum, is one based upon ‘reason.’”); Johnson v. Louisiana, 406 U.S. 356, 360, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972) (collecting cases defining reasonable doubt as one “‘based on reason which arises from the evidence or lack of evidence’” (quoting United States v. Johnson, 343 F.2d 5, 6 n.1 (2d Cir. 1965))).

Thus, an instruction defining reasonable doubt as “a doubt based on reason” would be proper. But WPIC 4.01 does not do that. Instead, WPIC 4.01 requires “a reason” for the doubt, which is different from a doubt based on reason. “A reason” in the context of WPIC 4.01 means “an expression or statement offered as an explanation of a belief or assertion or as a justification.” WEBSTER’S, supra, at 1891. In contrast to definitions employing the term “reason” in a manner that refers to a doubt based on

reason or logic, WPIC 4.01's use of the words "a reason" indicates that reasonable doubt must be capable of explanation or justification. In other words, WPIC 4.01 requires more than just a doubt based on reason; it requires a doubt that is articulable. This is unconstitutional.

Because the State will avoid supplying a reason to doubt in its own prosecutions, WPIC 4.01 requires the defense or the jurors to supply a reason to doubt, shifting the burden and undermining the presumption of innocence. The presumption of innocence "can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve." State v. Bennett, 161 Wn.2d 303, 316, 165 P.3d 1241 (2007). The WPIC 4.01 language does that in directing jurors they must have a reason to acquit rather than a doubt based on reason.

In the context of prosecutorial misconduct, courts have consistently condemned arguments that jurors must articulate a reason for having reasonable doubt. A fill-in-the-blank argument "improperly implies that the jury must be able to articulate its reasonable doubt" and "subtly shifts the burden to the defense." State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Such arguments "misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence," because "a jury need do nothing to find a defendant not guilty." Id. at 759.

But the improper fill-in-the-blank arguments did not originate in a vacuum—they sprang directly from WPIC 4.01’s language. In State v. Anderson, for example, the prosecutor recited WPIC 4.01 before making the fill-in-the-blank argument: “A reasonable doubt is one for which a reason exists. That means, in order to find the defendant not guilty, you have to say ‘I don’t believe the defendant is guilty because,’ and then you have to fill in the blank.” 153 Wn. App. 417, 424, 220 P.3d 1273 (2009). The same occurred in State v. Johnson, where the prosecutor told jurors: “What [WPIC 4.01], says is ‘a doubt for which a reason exists.’ In order to find the defendant not guilty, you have to say, ‘I doubt the defendant is guilty and my reason is’ To be able to find a reason to doubt, you have to fill in the blank; that’s your job.” 158 Wn. App. 677, 682, 243 P.3d 936 (2010).

If telling jurors they must articulate a reason for their doubt is prosecutorial misconduct because it undermines the presumption of innocence, it makes no sense to allow the same undermining to occur through a jury instruction. The misconduct cases make clear that WPIC 4.01 is the true culprit. Its doubt “for which a reason exists” language provides a natural and seemingly irresistible basis to argue that jurors must give a reason for their reasonable doubt. If lawyers mistakenly believe WPIC 4.01 requires articulation of doubt, then how can average jurors be expected to avoid the same pitfall?

No appellate court in recent times has directly grappled with the challenged language. The Bennett court directed trial courts to give WPIC 4.01 at least “until a better instruction is approved.” 161 Wn.2d at 318. The Emery court contrasted the “proper description” of reasonable doubt as a “doubt for which a reason exists” with the improper argument that the jury must be able to articulate its reasonable doubt by filling in the blank. 174 Wn.2d at 759.

In State v. Kalebaugh, the court similarly contrasted “the correct jury instruction that a ‘reasonable doubt’ is a doubt for which a reason exists” with an improper instruction that “a reasonable doubt is ‘a doubt for which a reason can be given.’” 183 Wn.2d 578, 584, 355 P.3d 253 (2015). The court concluded the trial court’s erroneous instruction—“a doubt for which a reason can be given”—was harmless, accepting Kalebaugh’s concession at oral argument “that the judge’s remark ‘could live quite comfortably’ with the final instructions given here.” Id. at 585.

None of the appellants in Bennett, Emery, or Kalebaugh argued the language requiring “a reason” in WPIC 4.01 misstates the reasonable doubt standard. “In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised.” Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). Because WPIC 4.01 was not

challenged on appeal in those cases, the analysis in each flows from the unquestioned premise that WPIC 4.01 is correct. As such, their approval of WPIC 4.01's language does not control.

The failure to properly instruct the jury on reasonable doubt is structural error requiring reversal without resort to harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). An instruction that eases the State's burden of proof and undermines the presumption of innocence violates the right to a jury trial. Id. at 279-80. Where, as here, the "instructional error consists of a misdescription of the burden of proof, [it] vitiates all the jury's findings." Id. at 281. Failing to properly instruct jurors regarding reasonable doubt "unquestionably qualifies as 'structural error.'" Id. at 281-82. Though defense counsel did not object to the instruction, structural errors qualify as manifest constitutional errors under RAP 2.5(a)(3). State v. Paumier, 176 Wn.2d 29, 36-37, 288 P.3d 1126 (2012).

WPIC 4.01's language requires more than just a reasonable doubt to acquit; it also requires an articulable doubt. This undermines the presumption of innocence, shifts the burden of proof, and misinstructs jurors on the meaning of reasonable doubt. Instructing jurors with WPIC 4.01 is structural error and requires reversal of Miller's convictions.

6. EGREGIOUS JUROR MISCONDUCT IN READING AN ALTERNATE DEFINITION OF REASONABLE DOUBT TO THE JURY TWICE PREJUDICED THE OUTCOME OF MILLER'S TRIAL.

The Sixth Amendment and article I, section 22 of the Washington Constitution guarantee the right to a fair trial by an impartial jury, which “means a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct.” U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; State v. Tigano, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991). The U.S. Supreme Court likewise defines an impartial jury as “a jury capable and willing to decide the case solely on the evidence before it.” Smith v. Phillips, 455 U.S. 209, 217, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982).

Juror misconduct “results where a juror provides the jury with erroneous statements of law.” Adkins v. Aluminum Co. of Am., 110 Wn.2d 128, 137, 750 P.2d 1257, 756 P.2d 142 (1988). The supreme court recently recognized a juror’s “expressions of law or fact based on outside sources” constitutes misconduct “that warrants a new trial, just as surely as when an empaneled juror introduced into deliberations extrinsic facts about one of the parties.” Long v. Brusco Tug & Barge, Inc., __ Wn.2d __, __ P.3d __, 2016 WL 743926, at *4 (Feb. 25, 2016). Reading an alternate definition of reasonable doubt to the jury, as juror number 2 did here, is indisputably juror misconduct.

Juror misconduct is presumed prejudicial. State v. Boling, 131 Wn. App. 329, 333, 127 P.3d 740 (2006). The State must demonstrate “it is unreasonable to believe the misconduct could have affected the verdict.” Id. This is an objective inquiry because a subjective inquiry into the actual effect of the misconduct inheres in the verdict. State v. Briggs, 55 Wn. App. 44, 55, 776 P.2d 1347 (1989). Courts must consider the purpose for which the alternate definition was injected into the deliberations. Id. at 56. “Any doubt that the misconduct affected the verdict must be resolved against the verdict.” Briggs, 55 Wn. App. at 55. A new trial is required unless the reviewing court “is satisfied beyond a reasonable doubt that the extrinsic evidence did not contribute to the verdict.” Boling, 131 Wn. App. at 333.

In Adkins, the trial court ordered a new trial because the jury used a legal dictionary to look up the word “negligence” during deliberations. 110 Wn.2d at 131. The dictionary definition differed from the jury instructions and gave examples that could have confused or misled the jury. Id. at 138. Accordingly, the trial court did not abuse its discretion in concluding it could not reasonably say the jury was not influenced by the dictionary definition. Id. The Adkins court noted out-of-state courts have agreed “a new trial is necessary where the definition of a legal term which the jury looked up was misleading or incorrect.” Id. at 138 n.16 (citing cases).

Relatively few Washington courts have been considered the scenario of when a juror presents an alternate legal definition to the deliberating jury. Federal courts, however, have articulated five factors to guide the determination of whether juror misconduct requires a new trial:

(1) The importance of the word or phrase being defined to the resolution of the case.

(2) The extent to which the dictionary definition differs from the jury instructions or from the proper legal definition.

(3) The extent to which the jury discussed and emphasized the definition.

(4) The strength of the evidence and whether the jury had difficulty reaching a verdict prior to introduction of the dictionary definition.

(5) Any other factors that relate to a determination of prejudice.

Mayhue v. St. Francis Hosp. of Wichita, Inc., 969 F.2d 919, 924 (10th Cir. 1992); see also United States v. Lawson, 677 F.3d 629, 646 (4th Cir. 2012) (applying Mayhue factors); State v. Aguilar, 224 Ariz. 299, 230 P.3d 358, 361 (2010) (same).

Applying these factors demonstrates Miller must have a new trial. Juror number 2 transcribed and read the following note twice to the jury near the beginning of deliberations:

Proof Beyond a Reasonable Doubt

- ★ Burden of proof is placed on prosecution
- ★ Defendant is presumed innocent
- ★ If evidence is so strong that there is only a remote possibility (and no probability) of an extenuating circumstance, the guilt is then deemed to have been proven beyond a reasonable doubt.

A reasonable doubt is something you act on

[i.e.,] You're in the car heading to the beach. You've powered down the house but you doubt you turned off the oven → you then turn around and head back home to make sure it's off.

[i.e.,] You're going to a concert. You've put the tickets in your pocket but you keep on checking – you're acting on your doubt.

CP 38 (emphasis in original).

Considering the first Mayhue factor, it is difficult to think of anything more important than the concept and definition of reasonable doubt in a criminal trial. See Bennett, 161 Wn.2d at 315 (recognizing reasonable doubt and the presumption of innocence “is the bedrock upon which the criminal justice system stands”). The Colorado Supreme Court reversed where a juror consulted a dictionary to define concepts of reasonable doubt because the term “describes one of the most fundamental legal concepts in the prosecution of criminal offenders.” Alvarez v. People, 653 P.2d 1127, 1131 (Colo. 1982).

As discussed in the section above, erroneously defining reasonable doubt is structural error, Sullivan, 508 U.S. at 281-82, “affecting the framework within which the trial proceeds.” Arizona v. Fulminante, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). Where there is structural error, “a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.” State v. Wise, 176 Wn.2d 1, 14, 288 P.3d 1113 (2012) (quoting Fulminante, 499 U.S. at 310). The first factor therefore weighs heavily in Miller’s favor.

Second, the juror’s definition of reasonable doubt differed significantly from the jury instructions and the proper legal definition. The first two sentences are not objectionable; they accurately state the burden of proof and presumption of innocence. The rest of the instruction, however, is confusing and vastly different than the pattern instruction. See 5RP 292 (trial court recognizing the instruction was “totally improper”). The juror’s definition discusses possibilities and probabilities. CP 38. In Bennett, the supreme court disapproved of the so-called Castle reasonable doubt instruction, which stated “the law does not require proof that overcomes every possible doubt.” 161 Wn.2d at 309, 315-17. The Bennett court instructed trial courts to use WPIC 4.01 instead. Id. at 318.

The juror's definition is further problematic by suggesting there needs to be an "extenuating circumstance" for the accused to be found not guilty. This is troubling for several reasons. Does it require the accused to establish extenuating circumstances, impermissibly shifting the burden of proof and undermining the presumption of innocence? With a strict liability crime like child rape, how could there ever be lawful extenuating circumstances? See State v. Deer, 175 Wn.2d 725, 731, 287 P.3d 539 (2012). Must the accused be found guilty, then, unless he proves an affirmative defense? The law requires no such extenuating circumstance.

After examining several federal and state cases, the Texas Court of Appeals concluded courts were less likely to find prejudice when "a juror refers to a dictionary and encounters a 'fairly innocuous' definition that neither conflicts with the legal concepts included in the jury instructions nor contradicts any other aspect of the jury charge." Ryser v. State, 453 S.W.3d 17, 41 (Tex. App. 2014) (quoting State v. Tinius, 527 N.W.2d 414, 417 (Iowa 1994) (finding it harmless where jury used dictionary definition of the word "reasonable," because the definition was "use of reason," which did not conflict with the instructions and was consistent with the common meaning of the word)).

By contrast, courts find prejudice where the alternate definition does not "accurately or fairly reflect applicable law." Ryser, 453 S.W.3d at

41; see, e.g., Marino v. Vasquez, 812 F.2d 499, 502, 505 (9th Cir. 1987) (finding prejudice where dictionary definition of “malice” differed greatly from the jury instructions); State v. Aguilar, 224 Ariz. 299, 230 P.3d 358, 364 (2010) (finding prejudice where jury’s alternate definitions of “premeditation” and “first degree murder” were significantly different than the jury instructions). Such is the case here. Therefore, the second factor also weighs heavily in Miller’s favor.

As for the third Mayhue factor, juror number 2 read the erroneous definition to the jury twice, near the beginning of their deliberations and before they read the court’s instructions. 5RP 295-96, 299. The juror explained he did so because he was confused by the concept reasonable doubt, which had come up early in deliberations. 5RP 295. Reading the instruction twice at the outset of deliberations put undue emphasis on it and likely colored the entire discussion. This weighs in Miller’s favor.

It is not dispositive that an “unidentified juror” agreed the jury could ignore the erroneous definition. 5RP 300. The trial court did not individually poll or question the jurors to ensure each of them could disregard the alternate definition. See 5RP 299-300. The trial court also expressed a clear preference not to declare a mistrial, telling the parties, “I think I’ll have to declare a mistrial. I would rather not.” 5RP 290. Given the court’s apparent bias against the defense, see supra Argument 4, it is

no surprise the court concluded the jurors could disregard the definition. 5RP 300. Given the importance and complexity of reasonable doubt, it is highly suspect that all the jurors were actually able to disregard the erroneous definition, particularly because it gave concrete, everyday examples of reasonable doubt. At worst, then, this factor weighs neither in Miller's nor the State's favor.

Fourth, this is not a case with overwhelming evidence of Miller's guilt. It came down to S.L.'s word against Miller's, with many inconsistencies in S.L.'s version of events. Indeed, the jury could not reach a verdict on one of the two rape charges, even though S.L. described several instances of sexual intercourse. The jury had not been deliberating long when juror number 2 read the erroneous definition. But the definition may very well have confused the jury thereafter. Given the weakness of the State's case, this factor also weighs in Miller's favor.

And, fifth, other factors demonstrate prejudice. The juror's definition provided two everyday examples of when a person might experience reasonable doubt. When the reasonable doubt standard is compared to everyday decision making, "it improperly minimizes and trivializes the gravity of the standard and the jury's role." State v. Lindsay, 180 Wn.2d 423, 436, 326 P.3d 125 (2014) (quoting State v. Lindsay, 171 Wn. App. 808, 828, 288 P.3d 641 (2012)).

For instance, in State v. Anderson, the court held it improper when the prosecutor analogized reasonable doubt to everyday decisions like whether to have dental surgery, to leave one's children with a babysitter, and changing lanes on the freeway. 153 Wn. App. 417, 431, 220 P.3d 1273 (2009); see also State v. Johnson, 158 Wn. App. 677, 685, 243 P.3d 936 (2010) (comparing reasonable doubt to a partially completed puzzle “trivialized the State’s burden”). Here, reasonable doubt was compared to returning home to ensure the oven is turned off or checking one’s pockets for concert tickets. This trivialized the reasonable doubt standard.

Finally, the erroneous definition was, at best, confusing. The Bennett court explained:

We recognize that the concept of reasonable doubt seems at times difficult to define and explain. We understand the temptation to expand upon the definition of reasonable doubt, particularly where very creative defenses are raised. But every effort to improve or enhance the standard approved instruction necessarily introduces new concepts, undefined terms and shifts, perhaps ever so slightly, the emphasis of the instruction . . . Even if many variations of the definition of reasonable doubt meet minimal due process requirements, the presumption of innocence is simply too fundamental, too central to the core of the foundation of our justice system not to require adherence to a clear, simple, accepted, and uniform instruction.

161 Wn.2d at 317-18. The definition muddied the waters. It introduced undefined terms and new concepts to the deliberating jury, including

possibility, probability, extenuating circumstance, and acting on doubt. This final factor therefore also weighs in Miller's favor.

Each of the five Mayhue factors weighs in Miller's favor and demonstrates the State cannot rebut the presumption of prejudice. Juror number 2 injected an alternate and erroneous definition of reasonable doubt into Miller's trial at a key moment. "No right touches more the heart of fairness in a trial" than Miller's right to a fair trial by an impartial jury. Stockton v. Virginia, 852 F.2d 740, 743 (4th Cir. 1988). This Court should reverse and remand for a new trial.

7. CUMULATIVE ERROR DEPRIVED MILLER OF HIS RIGHT TO A FAIR TRIAL.

Where several errors standing alone do not warrant reversal, the cumulative error doctrine requires reversal when the combined effect of the errors denied the accused a fair trial. State v. Coe, 101 Wn2.d 772, 789, 684 P.2d 668 (1984). Each error described above was prejudicial. Together they are even more so. Because their cumulative effect deprived Miller of a fair trial, this Court should reverse.

8. THE COMBINED TERM OF CONFINEMENT AND COMMUNITY CUSTODY EXCEEDS THE STATUTORY MAXIMUM.

RCW 9.94A.701(9) specifies: "The term of community custody specified by this section shall be reduced by the court whenever an

offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021." (Emphasis added.) The trial court, not the Department of Corrections, is required to reduce the term of community custody to avoid a sentence in excess of the statutory maximum.⁶ State v. Boyd, 174 Wn.2d 470, 473, 275 P.3d 321 (2012).

The court sentenced Miller to 30 months confinement on count 1 and 20 months on count 3, to run concurrently. CP 120. Both counts are class C felonies, with a statutory maximum of five years (60 months). RCW 9A.44.079; RCW 9A.44.089; RCW 9A.20.021(1)(c). The court also imposed 36 months of community custody on both counts, pursuant to RCW 9.94A.701(1)(a). CP 121. This combined term of 66 months exceeds the statutory maximum of 60 months.

This Court should reverse and remand for the trial court to either amend the community custody term or resentence Miller on the convictions. Boyd, 174 Wn.2d at 473; see also Land, 172 Wn. App. at 603 (remanding for resentencing "to comply with Boyd and RCW 9.94A.701(9)").

⁶ The judgment and sentence specifies: "If the term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime, the term of community custody shall be reduced so that the defendant shall not serve more than the maximum sentence for the crime." CP 121. This notation is insufficient. Boyd, 174 Wn.2d at 472 (holding this so-called Brooks notation "no longer complies with statutory requirements").

9. THE COMMUNITY CUSTODY CONDITION PROHIBITING MILLER FROM GOING PLACES WHERE MINOR CHILDREN ARE KNOWN TO CONGREGATE IS VOID FOR VAGUENESS.

As a condition of community custody, the court ordered Miller: “Do not go to places where minor children are known to congregate unsupervised without prior approval from your therapist and your community corrections officer, and then only in the presence of a chaperone or guardian who has been approved by your therapist and your community corrections officer.” CP 127. This condition is unconstitutionally vague because it is insufficiently definite to apprise Miller of prohibited conduct and allows for arbitrary enforcement by the community corrections officer (CCO).

- a. The condition is void for vagueness because it does not provide fair notice and invites arbitrary enforcement.

An illegal or erroneous sentence may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). The due process vagueness doctrine requires the State to provide citizens fair warning of proscribed conduct. Id. at 752. The doctrine also protects against arbitrary, ad hoc, or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is unconstitutionally vague if it does not (1) define the offense with sufficient definiteness such that ordinary people can understand what conduct is

proscribed; or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53.

There is no presumption in favor of the constitutionality of a community custody condition. State v. Sanchez Valencia, 169 Wn.2d 782, 792-93, 239 P.3d 1059 (2010). Imposition of an unconstitutionally vague condition is manifestly unreasonable, requiring reversal. Id. at 791-92.

In State v. Irwin, the trial court imposed a condition like the one here: “Do not frequent areas where minor children are known to congregate, as defined by the supervising CCO.” __Wn. App.__, 364 P.3d 830, 833 (2015). The court of appeals struck the condition as being void for vagueness and remanded to the trial court for resentencing. Id. at 835-36.

The Irwin court explained, “Without some clarifying language or an illustrative list of prohibited locations . . . the condition does not give ordinary people sufficient notice to ‘understand what conduct is proscribed.’” Id. at 836 (quoting Bahl, 164 Wn.2d at 753). The court acknowledged “[i]t may be true that, once the CCO sets locations where ‘children are known to congregate’ for Irwin, Irwin will have sufficient notice of what conduct is proscribed.” Id. However, this “would leave the condition vulnerable to arbitrary enforcement,” rendering it unconstitutional under the second prong of the vagueness analysis. Id.

In State v. Riles, the Washington Supreme Court upheld the constitutionality of a community custody condition almost identical to the one in Irwin and here. 135 Wn.2d 326, 349, 957 P.2d 655 (1998), abrogated by Sanchez Valencia, 169 Wn.2d 782. However, the Riles court presumed the condition was constitutional, a standard later rejected in Sanchez Valencia, 169 Wn.2d at 792-93.

The Irwin court therefore concluded Riles did not control and instead examined the supreme court's more recent decision in Bahl. Irwin, 364 P.3d at 836. There, the court held a condition to be unconstitutionally vague where it prohibited Bahl from possessing or accessing pornographic materials, "as directed by the supervising Community Corrections Officer." Bahl, 164 Wn.2d at 743. The court explained, "The fact that the condition provides that Bahl's community corrections officer can direct what falls within the condition only makes the vagueness problem more apparent, since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement." Id. at 758.

Like in Bahl and Irwin, the condition prohibiting Miller from going places where minors are known to congregate does not provide sufficient definiteness such that Miller knows where he can and cannot go. Some locations are obvious: schools, playgrounds, or public swimming pools. But many other locations are not obvious: public parks, bowling alleys, shopping

malls, theaters, churches, hiking trails, grocery stores, and so on.⁷ A particular restaurant in a certain locale may attract children while the same restaurant in a different area may not. How is Miller to know which is prohibited and which is not? Because an ordinary person would not know what conduct is prohibited, the condition fails the first prong of the vagueness test.

The condition also fails the second prong of the vagueness test. Both Bahl and Sanchez Valencia involved delegation to the CCO to define the parameters of a condition. Bahl, 164 Wn.2d at 758; Sanchez Valencia, 169 Wn.2d at 794. The Sanchez Valencia court held that where a condition leaves so much discretion to an individual CCO, it is unconstitutionally vague. 169 Wn.2d at 795. The same is true here. A creative CCO could come up with almost any location where he or she believed minors congregated. The condition gives Miller's CCO and therapist unfettered discretion to define where minors congregate. This "virtually acknowledges that on its face" that the condition "does not provide ascertainable standards for enforcement." Bahl, 164 Wn.2d at 758.

The condition is unconstitutional because it fails to provide reasonable notice as to what conduct is prohibited and exposes Miller to

⁷ Indeed, the indefiniteness of this condition was fully recognized in State v. McCormick, where McCormick was held in violation of the same condition when he went to a food bank that happened to be in the same building as a grade school. 166 Wn.2d 689, 692-96, 213 P.3d 32 (2009).

arbitrary enforcement. It is void for vagueness and should be stricken. Irwin, 364 P.3d at 836.

b. This preenforcement claim is ripe for review.

Courts routinely entertain preenforcement challenges to sentencing conditions. Sanchez Valencia, 169 Wn.2d at 787. A preenforcement challenge to a community custody condition is ripe for review “if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.” Id. at 786 (quoting Bahl, 164 Wn.2d at 751).

The issue in Miller’s case is primarily legal: does the condition prohibiting Miller from going where children are known to congregate violate due process vagueness standards? See, e.g., Sanchez Valencia, 169 Wn.2d at 790-91 (condition prohibiting use of drug-related paraphernalia was ripe for vagueness review); Bahl, 164 Wn.2d at 752 (similar).

Second, this question is not fact-dependent. Either the condition as written provides constitutional notice and protection against arbitrary enforcement or it does not. Sanchez Valencia, 169 Wn.2d at 788-89 (“[I]n the context of ripeness, the question of whether the condition is unconstitutionally vague does not require further factual development.”).

Third, the challenged condition is final because Miller has been sentenced to abide by it. Id. at 789 (“The third prong of the ripeness test, whether the challenged action is final, is indisputably met here. The

petitioners have been sentenced under the condition at issue.”). Although the State has not yet charged Miller with violating the condition, this preenforcement claim is ripe for review. Irwin, 364 P.3d at 834-35.

10. THE COMMUNITY CUSTODY CONDITION PROHIBITING MILLER FROM POSSESSING OR PERUSING PORNOGRAPHIC MATERIALS IS VOID FOR VAGUENESS.

As a condition of community custody, the trial court also ordered Miller to “not possess or peruse pornographic materials.” CP 17. In Bahl, the trial court imposed a condition prohibiting Bahl from accessing or possessing “pornographic materials,” like here. 164 Wn.2d at 743. The Washington Supreme Court held “that the restriction on accessing or possessing pornographic materials is unconstitutionally vague,” and remanded for resentencing. Id. at 758, 762. Bahl controls. This Court should remand for the trial court to strike this condition.

11. SEVERAL COMMUNITY CUSTODY CONDITIONS INTERFERE WITH MILLER’S FUNDAMENTAL RIGHTS TO MARRIAGE AND TO PARENT.

Miller has several biological minor children and is married to a woman with minor children. In ordering Miller to comply with several community custody conditions, the trial court added a handwritten note, “contact with biological minor children is approved or step.” CP 127. This condition conflicts with several other conditions, including:

(14) Do not have contact with minor children without prior approval from your therapist and your community corrections officer.

(15) Do not reside where minor children are residing or stay the night on premises where minor children are also staying the night.

....

(17) Do not hold positions of power or authority over minor children.

(18) Do not enter into relationships with women or families who have minor children.

CP 127. To the extent these conditions interfere with Miller's relationships with his biological children, his stepchildren, and his wife, they violate his fundamental rights to marriage and to parent.

As a condition of community custody, courts may order an offender to "[r]efrain from direct or indirect contact with the victim of the crime or a specified class of individuals." RCW 9.94A.703(3)(b). Likewise, courts may impose crime-related prohibitions, including "an order of a court prohibiting contact that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10).

Individuals have fundamental rights to marriage and to the "care, custody, and management" of their children. Loving v. Virginia, 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967); Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). State interference with

these fundamental rights is subject to strict scrutiny. State v. Warren, 165 Wn.2d 17, 34, 195 P.3d 940 (2008). “[C]onditions that interfere with fundamental rights must be sensitively imposed,” with “no reasonable alternative way to achieve the State’s interest.” Id. at 32, 35.

A court may not prohibit contact between a defendant and his children as a matter of routine practice. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 377-82, 229 P.3d 686 (2010). Instead the court must consider whether prohibiting contact is reasonably necessary in scope and duration to prevent harm to the child. Id. Likewise, prohibiting contact with a spouse is appropriate only when it is “directly related to the circumstances of the crime” and “reasonably necessary” to protect the spouse. Warren, 165 Wn.2d at 35 (holding no contact with spouse reasonable where Warren sexually abused his wife’s two children and she testified against him at trial).

The conditions listed above unreasonably restrict Miller’s contact with his children as well as his wife, because she has minor children. 4RP 266. There is no basis in the record to conclude such prohibitions are crime-related, as his children and wife were not victims of the alleged crimes. And, unlike Warren, many of them testified on his behalf at trial.

At the very least, a sentence must be “definite and certain.” Grant v. Smith, 24 Wn.2d 839, 840, 167 P.2d 123 (1946). The conditions currently conflict with one another: restricting Miller’s contact with minor children

and women with minor children, while also permitting Miller's contact with his biological and stepchildren. A less than astute CCO may not be able to appropriately enforce these restrictions so that they do not interfere with Miller's fundamental rights.

This Court should remand for the trial court to clarify the conditions so they do not burden Miller's relationship with his wife and children.

12. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY IN FAILING TO CONSIDER MILLER'S CURRENT AND FUTURE ABILITY TO PAY BEFORE IMPOSING LEGAL FINANCIAL OBLIGATIONS.

The trial court imposed \$687.66 in discretionary LFOs, including a \$250 jury demand fee and \$437.66 in witness fees.⁸ CP 128; RCW 10.01.160(1), (2); State v. Lundy, 176 Wn. App. 96, 107, 308 P.3d 755 (2013). The trial court failed to make an individualized inquiry into Miller's present and future ability to pay before it imposed these discretionary LFOs, exceeding its statutory authority. In fact, the court did not even make the boilerplate ability to pay finding. CP 117.

Trial courts may order payment of LFOs as part of a sentence. RCW 9.94A.760. However, RCW 10.01.160(3) forbids imposing LFOs unless "the defendant is or will be able to pay them." In determining LFOs, courts

⁸ The court also imposed several mandatory LFOs: a \$200 criminal filing fee, \$500 victim assessment, and \$100 DNA collection. CP 118.

“shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” RCW 10.01.160(3).

In State v. Blazina, the Washington Supreme Court held RCW 10.01.160(3) requires trial courts to first consider an individual’s current and future ability to pay before imposing discretionary LFOs. 182 Wn.2d 827, 837-39, 344 P.3d 680 (2015). The “record must reflect that the trial court made an individualized inquiry into the defendant’s current and future ability to pay.” Id. at 838. If an individual qualifies as indigent, “courts should seriously question that person’s ability to pay LFOs.” Id. at 839. Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. at 834.

At sentencing, the court failed to make an individualized inquiry into Miller’s current or future ability to pay discretionary LFOs. 6RP 27. Miller qualified as indigent, reporting zero savings, real estate, or other assets. CP 220-24. The record also demonstrated Miller lost his job at the dam as a result of the charges against him. 5RP 222-23. This Court should vacate the LFO order and remand for resentencing. Blazina, 182 Wn.2d at 839.

13. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Miller to be indigent and entitled to appellate review “wholly at public expense.” CP 225-26. If Miller does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP.

RCW 10.73.160(1) states the court of appeals “may require an adult . . . to pay appellate costs.” “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny the State’s request for costs. See State v. Sinclair, __ Wn. App. __, __ P.3d __, 2016 WL 393719, at *4-7 (Jan. 27, 2016) (exercising discretion and denying State’s request for appellate costs).

As discussed above, Miller’s ability to pay must be determined before discretionary costs are imposed. The trial court made no such finding. Without a basis to determine that Miller has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

D. CONCLUSION

This Court should dismiss the child molestation conviction because it violates double jeopardy and remand for a new trial on the child rape charge. In the alternative, this Court should reverse and remand for a new trial on both counts. This Court should also order a new judge to be appointed on retrial. Finally, this Court should remand for resentencing to correct the numerous sentencing errors.

DATED this 14th day of March, 2016.

Respectfully submitted,

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State v. Stephen Miller

No. 33252-7-III

Certificate of Service

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 4th day of March, 2016, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

Benton County Prosecuting Attorney
prosecuting@co.benton.wa.us

Stephen Miller
DOC No. 380152
Airway heights Corrections Center
P.O. Box 2049
Airway Heights, WA 99001

Signed in Seattle, Washington this 4th day of March, 2016.

X  _____

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

FILED

MAY 02, 2016

Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,)
 Respondent,)
)
 vs.)
)
STEPHEN MILLER,)
 Appellant.)
_____)

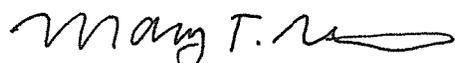
No. 33252-7-III
STATEMENT OF
ADDITIONAL AUTHORITY

Pursuant to RAP 10.8, appellant cites to the following additional authority:
State v. Duncan, __Wn.2d__, __P.3d__, 2016 WL 1696698, at *2 (Wash. Apr. 28, 2016) (recognizing “[t]he imposition and collection of LFOs have constitutional implications and are subject to constitutional limitations,” and a “constitutionally permissible system that requires defendants to pay court ordered LFOs must meet seven requirements,” including “[r]epayment may only be ordered if the defendant is or will be able to pay” and “[t]he financial resources of the defendant must be taken into account” (quoting State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992))).

DATED this 2nd day of May, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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State v. Stephen Miller

No. 33252-7-III

Certificate of Service

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 2nd day of May, 2016, I caused a true and correct copy of the **Statement of Additional Authority** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

Benton County Prosecuting Attorney
prosecuting@co.benton.wa.us

Stephen Miller
DOC No. 380152
Airway heights Corrections Center
P.O. Box 2049
Airway Heights, WA 99001

Signed in Seattle, Washington this 2nd day of May, 2016.

x  _____

NIELSEN, BROMAN & KOCH, PLLC

May 02, 2016 - 12:58 PM

Transmittal Letter

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Court of Appeals Case Number: 33252-7

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Comments:

No Comments were entered.

Proof of service is attached and an email service by agreement has been made to prosecuting@co.benton.wa.us.

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