

FILED  
Court of Appeals  
Division III  
State of Washington  
3/12/2018 3:30 PM

NO. 35294-3-III

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

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STATE OF WASHINGTON,

Respondent,

v.

JOHNNY TALBERT, JR.,

Appellant.

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

The Honorable Alexander Ekstrom, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated Talbert's constitutional right to present a defense when it excluded a transcript of Talbert's police interrogation offered by defense. To the extent the trial court's reasoning can be viewed as a factual finding that the State did not imply a charge of recent fabrication or argue the transcript was a prior inconsistent statement, the court's finding is in error.

2. The trial court violated principles of double jeopardy when it failed to instruct the jury that separate and distinct acts must be unanimously found in order to convict Talbert of counts II and III.

3. The sentencing court's community custody conditions are overbroad, vague, and violate Talbert's constitutional rights.

Issues pertaining to assignments of error.

1. Where the State impeached Talbert's trial testimony by reference to a transcript of his interrogation by law enforcement, implied his prior statements were not consistent, and argued he had recently fabricated his testimony, did the trial court violate Talbert's right to present a defense by excluding the transcript of the full interrogation? If so, does the exclusion of this evidence require reversal and remand for a new trial?

2. Did the jury instructions fail to provide adequate protection against a double jeopardy violation on counts II and III? If so, does the context of the trial fail to show beyond a reasonable doubt that the jury did not convict Talbert of counts II and III in violation of double jeopardy principles, thus requiring count II or III to be vacated?

3. Are the community custody conditions 8), 9), 10), and 15) unconstitutionally void for vagueness and overbreadth? If so, is the preenforcement challenge to these conditions ripe for review?

B. STATEMENT OF FACTS

i. Charges & Allegations

The Benton County Prosecutor's Office charged Johnny Talbert Jr. with one count of first degree child rape and two counts of first degree child molestation and alleged the aggravating factor of abuse of position of trust on all three counts. CP 7.

The State alleged Talbert had engaged in sexual acts with J.Q., the seven-year-old daughter of his girlfriend, and that J.Q. and her mother lived with Talbert at the time of the offenses. CP 7-8; 1RP 527, 529-30.<sup>1</sup>

ii. Trial Testimony

At trial, the State presented testimony from the alleged victim and her mother, an elementary school counselor, the child interviewer, a nurse,

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<sup>1</sup> This brief refers to the verbatim transcripts of proceedings as follows: 1RP (2/13/17, 2/15/17-2/17/17); 2RP (5/9/17).

and two detectives, as well as an expert in child interviewing techniques. The State presented a recording of J.Q.'s forensic interview and diagrams of a child's and adult's bodies referenced during the interview. 1RP 191, 193-210. The State also offered several photographs of the home where the incidents allegedly took place. E.g. 1RP 152-59.

The defense presented the testimony Talbert and of its own expert on child interviewing techniques, and also recalled one of the State's detectives for rebuttal testimony.

Nancy Dabney, J.Q.'s elementary school counselor, testified to the following. On November 20, 2015, after being informed by another child that J.Q. had disclosed an incident of sexual abuse, Dabney called J.Q. to her office and spoke to her for 45 minutes to an hour. 1RP 123, 127-28. Dabney testified J.Q. had never been to her office before, her office was near the principal's office, and that she called over the intercom for J.Q. to be brought to her. 1RP 129-31. Dabney conceded she had no training or experience in child forensic interviewing techniques. 1RP 136-37.

During the conversation, J.Q. became upset and according to Dabney, J.Q. stated, "'My dad' or 'stepdad licked my pussy.'" 1RP 124. Dabney could not recall whether J.Q. had used the word "dad" or "stepdad." 1RP 124. In response to further questioning, J.Q. verbally disclosed the name "John Talbert" but did not include a name in her

written statement. 1RP 125, 138-39. On cross-examination, Dabney admitted that in a previous interview, she had answered that she did not recall whether J.Q. had provided a name or not. Dabney asked J.Q. when this occurred, but J.Q. had a difficult time discussing it. 1RP 125. Dabney testified that through further questioning “we figured out it was some time the previous school year when she was in the second grade,” and through further questioning, narrowed the timeframe to September 2014 to June 2015. 1RP 125, 138. Dabney then reported to Child Protective Services (C.P.S.). 1RP 128.

C.P.S. contacted the Benton County Sheriff’s Office, who assigned Detective Lee Cantu to the case. 1RP 143-44. Detective Cantu arranged for Muri Murstig, a child forensic interviewer employed by Benton County, to interview J.Q. at school. 1RP 145-46, 181. The State played a recording of J.Q.’s interview to the jury. 1RP 193-210; Exh. 17.<sup>2</sup>

During the child forensic interview, J.Q. made various statements regarding incidents of sexual contact between herself and Talbert, including rubbing and penetration of her vagina by Talbert’s tongue, fingers, and penis. Exh. 17, 19, 22, 38, 41-42. She also described herself using her hand to “yank[ ]” and “stretch” Talbert’s penis. Exh. 17, 45. She

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<sup>2</sup> By stipulation of the parties, the recording was not transcribed by the court reporter, and a transcript of the interview was marked for the record as Exhibit 17 for reference on appeal. 1RP 192 (citing Exh. 17).

also testified that Talbert showed her a pornographic video of three girls performing oral sex on three other girls. Exh. 17, p. 35.

During her interview, J.Q. provided graphic descriptions of various sexual acts. For example, she described making Talbert's penis "grow," and "clear" and "white stuff" coming out. Exh. 17, p. 13-14, 30. She also described "shaking," feeling "weird," "different" and cold, and described a "thorn" near the top of her vagina. Exh. 17, pp. 17-19, 20, 41, 44. She stated that in one instance, Talbert put his penis inside her, but it hurt when it went "super deep" and so he stopped and rubbed himself on the outside of her vagina instead. Exh. 17, p. 39.

During the interview, J.Q. displayed ambiguity regarding the identities of Talbert and her former step-father, Michael Talmage. J.Q. referred to John Talbert as "Popeye," "papa," "my dad," and "my step-dad." Exh. 17, p. 7. She explained "Michael" was her "old dad" and she did not see him anymore. Exh. 17, p. 7. At two points in the interview, J.Q. became confused between Talbert and Michael. Exh. 17, pp. 7, 32. Both times, Murstig corrected J.Q. to emphasize they were discussing Talbert, not Michael. Exh. 17, pp. 7, 32. For example, when discussing when the alleged abused occurred, J.Q. stated, "Yeah, sometimes um ... my mom's gone, my ... my dad, my step-dad Michael, he like ... [.]" Exh. 17, p. 31. Murstig interrupted stating, "You said your step-dad

Michael.” Exh. 17, p. 31. J.Q. then altered her statement to say, “Oh, not Michael uh... John ... John Talbert.” Exh. 17, pp. 31-32.

J.Q.’s interview also displayed ambiguity in the number, location, and dates of the incident(s). At various points, she stated that only one incident of sexual contact occurred. E.g. Exh. 17, pp. 15, 22. When specifically asked if the licking occurred more than once, J.Q. stated ““I get confused a bunch.” Exh. 17, p. 16. However, she described incidents of abuse or pornography viewing occurring in the kitchen, the master bedroom upstairs, and the T.V. room downstairs. Exh. 17, pp. 32-33 (kitchen), 20, 22, 27, 46 (bedroom), 35 (viewing pornography “downstairs”). She also stated, “I get confused a lot.” Exh. 17, p. 27.

In discussion locations, J.Q. described the red house on Fig Street where they moved 10 days prior, and the house on Ida where they lived before. Exh. 17, pp. 14-15, 24, 46. She initially stated only one incident of abuse occurred in the Ida house, but then stated conclusively that the abuse occurred only at the red house on Fig Street. Exh. 17, pp. 25-26.

After the interview Detective Cantu called J.Q.’s mother, Michelle Talmage, and asked her to bring herself, Talbert, and J.Q. to the Sheriff’s Office. 1RP 150. Upon their arrival, the parties were separated and Talbert and Talmage were each interviewed. 1RP 151, 171.

Detective Smith later searched a hard drive connected to the T.V. in Talbert's home, and testified that he uncovered a pornographic video matching the description provided by J.Q. in her interview. 1RP 385.

Several days later, J.Q. was examined by a nurse practitioner, Teresa Forshag. 1RP 273. Forshag testified that J.Q. showed no physical indications of sexual abuse, but 90% of abused female children showed no physical signs, so this result was inconclusive. 1RP 273-74.

Talmage testified to the following. She and Talbert had met several years prior, but broke up shortly before her marriage to Michael Talmage. 1RP 328-29. She and Michael Talmage later separated, and in September 2014 she and Talbert rekindled their relationship. 1RP 329. Michael Talmage had a goatee. 1RP 374. She did not agree that Talbert never had any facial hair during the time they were together. 1RP 373.

In February 2015, she and her two daughters, J.Q. and J.S., moved in together to the house on Ida. 1RP 333. J.Q. is known to be developmentally delayed. 1RP 348. J.S. later went to live with her grandmother. 1RP 334. Then in in September 2015, Talbert, Talmage, and J.Q. moved to the house on Fig Street. 1RP 335.

Talbert wanted her to stay home to spend time with her daughters while he provided financial support. 1RP 345. They shared a bank account and both signed the lease on the Fig Street house. 1RP 335-36,

368. During this time, she attempted to start a Mary Kay business and started a small computer repair business. 1RP 360-61. Talmage insisted that although Talbert provided the primary financial support through his day labor work, he did not provide the primary financial support for starting her computer businesses. 1RP 360-61.

She testified she was “shocked” to learn the allegations. 1RP 349-50. Things then became difficult as she had to financially support herself and J.Q. RP 374. She used the money in the joint bank account to pay for basic expenses and there was not enough left to pay rent. RP 378. She received some financial assistance from an aid organization, got a job, and moved into a trailer where she and J.Q. now live. RP 374-74, 378.

Talmage did not agree that two weeks prior to the allegations, she and Talbert had argued, that Talbert was frustrated that she was not bringing in money, or that Talbert had told her she had to get a job or move out of the house. 1RP 374.

Talbert testified as follows on his own behalf. When he was informed of the allegations against him, he felt like he had been hit by a truck. 1RP 465. Cantu also described that on hearing the allegations, Talbert “appeared dumbfounded.” 1RP 495. Talbert was then interrogated for over an hour. 1RP 172.

He never had any sexual contact with J.Q., never asked her to engage in sexual acts, never showed her pornography, and consistently told the detectives this during his interrogation. 1RP 465-66, 467-68.

Both he and Talmage maintained their own pornography collections on the hard drive of their computer, but they mainly watched her collection because it was newer. 1RP 459-60. Talbert was not aware of the children ever watching pornography. 1RP 460.

Talbert became aware of Talmage's financial difficulties and invited her and her two daughters to move into his house on Ida. 1RP 455-56. They moved to Fig Street because he was unable to keep up expenses on Ida and the rent was cheaper on Fig Street. 1RP 456-57. Talmage brought two pickup truck-loads and one car-load worth of household items for herself and her children. 1RP 458. However, the majority of the furnishings and household items were his. 1RP 457-58.

During this time, Talmage did not have a "real job." 1RP 457. Talbert financially supported her efforts to start a Mary Kay business and a computer business, but both "petered out." 1RP 457. When they moved to Fig Street, there was a financial strain in their relationship given Talmage's lack of work. 1RP 461. Talbert wanted her to contribute financially, either by getting a job or getting her computer business going. 1RP 461. Approximately two weeks before his incarceration, they argued

and he told Talmage, “Either you get a job or you’re gonna have to get out.” 1RP 462.

During cross-examination, the State used a transcript of Talbert’s interrogation to impeach his testimony. 1RP 469. Specifically, the State questioned Talbert as follows:

Q. And throughout that interview you were asked multiple times, ‘Isn't it true? You know, why would she make this up? Isn't that true?’

A. I don't remember. If you're saying it is, it is.

...

Q. I don’t want to put words in your mouth. So, let’s go through how many times you were asked that question. I ask that you turn to page 13 of the document in front of you. “Okay. Why would Jasmine say that you do?” “That I do what?” Detective Cantu asks you, “So, you lick her pussy, and that you do that with your wife or girlfriend. Why would she say something like that?” And you say, “I don't know.”

A. I don’t -

Q. Isn’t that true?

A. Yeah. I don't know why she'd say that.

Q. You didn’t say, “Oh. It’s because I'm kickin’ her mom out in two weeks;” isn’t that true?

A. No, I didn’t say it then.

1RP 476-77 (emphasis added).

The prosecutor then said, “Okay. Well let’s see if you said it at a different time” and proceeded to point out another instance on page 14 of

the transcript of the interrogation where Talbert responded that he did not know why J.Q. would make false accusations against him. 1RP 478.

The prosecutor again stated “You didn’t tell Detective Cantu at that time ‘Oh, maybe it’s because I’m gonna kick her mom out.’” 1RP 478. Talbert responded that he said “I have no idea” because at the time, he did not have any idea why the accusation was being made, that he was “overwhelmed” with “being charged with a disgusting crime” and so “the last thing I’m thinkin’ about was kickin’ someone out.” 1RP 478-79. The State then asserted, “But you’ve had 15 months to think about it since then, haven’t you Mr. Talbert.” 1RP 479 (emphasis added).

The State then referred to pages 18 and 37 of the interrogation transcript, where Talbert again responded that he did not know why J.Q. would make these allegations, and later offered the possibility that J.Q. might be motivated by thinking, “It’s going to help get rid of her mom or something. I have no idea. I have -- I don’t know.” 1RP 479-82.

On re-direct, defense counsel sought to play the entire recording of Talbert’s interrogation as a prior consistent statement and to rebut the State’s allegation of recent fabrication, and it would be unfair to defense to exclude the entirety of the transcript. 1RP 486, 487, 488. The State objected, saying her impeachment method did not open the door to the entire recording. 1RP 486-87.

The court denied the defense motion to play the entire recording, reasoning the State “did not imply a fabrication that can be disproved by consistent statement... in that recorded statement.” 1RP 490-91 (citing ER 801(d)(1)(ii)).

Both parties called expert witnesses to evaluate whether Murstig had used proper interview techniques during J.Q.’s forensic interview.

The State called Laura Merchant, the Assistant Director at the Harborview sexual assault center, who testified that she had been involved in the development of Washington’s child forensic interview protocols for the past 16-18 years. 1RP 231, 234. Merchant testified that although Murstig had used direct questions at some points, this was in line with the “gentle persistence” permitted by the protocols and was not undue leading. 1RP 249. Murstig spent too much time clarifying dates with J.Q. because children are “notoriously bad” at recalling these details. 1RP 251-53. She concluded that Murstig “generally” followed the protocols. 1RP 251.

The defense called Daniel Reisberg, a cognitive psychologist and professor at Reid College, who testified that he conducted scientific research on the best ways on the mechanisms of memory and reporting. 1RP 283. He conducted training for actors within the justice system in order to “make the science as useful as possible.” 1RP 285. Reisberg testified that while Murstig’s interview had both good and bad points, she

had generally asked too many yes/no questions, offered her own interpretation of the child's responses, introduced new ideas, such as asking "Did he put his hands on you[,]?" and asked "confrontational" questions in order to point out ambiguities, which allowed J.Q. to modify her statements so as to reduce inconsistencies. 1RP 290-300.

The risk of these poor interviewing techniques was that direct yes/no questions could "feed information to the child," introduction of new ideas and interpretations from the interviewer meant that the information was not flowing from the child, and confrontational questions could lead to alterations in testimony, making the child's statement appear more consistent than it actually was. 1RP 291-301. Reisberg stated that such "coaching" could "absolutely" be "inadvertent." 1RP 300. Moreover, the risk of such techniques was that it could pollute the testimony, such that a child who is either attempting to tell the truth or attempting to lie could end up with "distorted report." 1RP 312-13.

J.Q. testified at trial to many of the same incidents described in her forensic interview, including external touching and penetration of her vagina by Talbert's fingers, tongue and penis. 1RP 398 (finger, tongue and private part to touch her vagina), 404 (penetration with finger), 407 (penetration with penis), 408-09 ("stretch" his penis), 410 (penetration with tongue), 412 (video of six girls performing oral sex). However, she

also testified for the first time that Talbert had touched her vagina with a purple vibrator, and had showed her more than five videos, rather than just one. 1RP 432-33 (videos), 440 (vibrator). J.Q. mentioned the vibrator for the first time after the attorneys and court had conducted a side bar to discuss the potential admissibility of questions regarding whether J.Q.'s mother had showed her a vibrator. 1RP 437, 440.

J.Q. testified that the sexual contact occurred in the living room, kitchen, bedroom, and basement of the house on Fig Street. 1RP 417-18 (living room), 418 (kitchen), 419 (bedroom), 421 (basement/"man cave"). She also testified at trial that Talbert was the person involved, and unlike the forensic interview, did not confuse him with her former step-father, Michael Talmage. 1RP 397, 429.

iii. Jury Instructions

The jury was provided with general instructions to apply the law from the court's instructions, and not to rely on attorney remarks as the source of law. CP 15, 17 (No. 1). The instructions also stated all instructions are important, the order of instructions is of no significance, and that lawyers may discuss specific instructions during argument, but the jury was to "consider the instructions as a whole." CP 18 (No. 1). The

instructions properly define child rape and molestation and define the key terms “sexual intercourse” and “sexual contact.”<sup>3</sup>

Several instructions were relevant to unanimity, including the following. Jurors were instructed on their generally “duty to ... deliberate in an effort to reach a unanimous verdict.” CP 19 (No. 2). Instruction No. 4 provides in relevant part, “A separate crime is charged in each count. You must decide each count separately. ... .” CP 21.

The jury was instructed that although the State had alleged multiple acts of child rape, they must unanimously agree to a specific act to support the child rape conviction. CP 29 (No. 12).

Jurors were also instructed as follows:

The State alleges that the defendant committed acts of Child Molestation in the First Degree on multiple occasions. To convict the defendant on any count of Child Molestation in the First Degree, one particular act of Child Molestation in the First Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need no unanimously agree that the defendant committed all the acts of child Molestation in the First Degree.

If you unanimously agree that the defendant committed a particular act of Rape of a Child in the First Degree as charged in Count I, you may not use that act as the particular act that constitutes Child Molestation as charged in Counts II and III.

CP 30 (No. 13) (emphasis added).

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<sup>3</sup> CP 24 (No. 7) (defining “Rape of a child”), 25 (No. 8) (defining “Sexual intercourse”), 27 (No. 10) (defining “Child molestation”); 28 (defining “Sexual contact”).

The “to convict” instruction for count I, first degree child rape, informed the jury they must find all four elements beyond a reasonable doubt, including (1) the defendant had sexual intercourse with J.Q. between 11/1/14 and 11/25/14, (2) J.Q. was under 12 years old at the time, (3) J.Q. was at least 24 months younger than the defendant, and (4) the act occurred in Washington. CP 31. This “to convict” instruction contained no additional language addressing unanimity.

The “to convict” instruction for first degree child molestation as charged in count II similarly informs the jury of the four elements of child molestation but contained no additional language addressing unanimity. CP 32 (No. 15).<sup>4</sup>

The language of the “to convict” instruction for first degree child molestation as charged in count III merely replaces “count II” with “count III” and is otherwise identical to the instruction for count II. Compare CP 32 (No. 15) with CP 33 (No. 16).

The instructions required the jury to unanimously agree to the existence of the alleged aggravating circumstances—here, that the defendant used a position of trust to facilitate the crime—in order to answer “yes” on any of the special verdict forms. CP 41 (No. 22).

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<sup>4</sup> The instruction also contains the same time-frame alleged in count I: 11/1/14-11/25/14. CP 32 (No. 15).

iv. Closing Arguments

In closing, the State argued the evidence showed J.Q.'s statements in court and in the forensic interview were credible and showed multiple acts of child rape and molestation, including that Talbert had touched and penetrated J.Q.'s vagina with his fingers, tongue, penis and a vibrator. 1RP 528-29, 544. The State did not make any elections of specific acts to support each count. However, the State did argue that if the jurors found the rape was supported by oral sex, then the jury could not also use oral sex as a basis for convicting of molestation. 1RP 529.

The State also argued J.Q.'s testimony was corroborated by the video found on the hard drive matching her description. 1RP 547. The State argued the normal physical exam did not prove an absence of abuse where 90% of abused female children showed no physical evidence of penetration. 1RP 532-33. The State also argued the State's expert had validated the results of the forensic interview and the defense expert was unqualified and unprepared to offer a critique. 1RP 534-36. Finally, the State argued J.Q.'s ability to describe sex acts in graphic detail arose from her personal experiences and corroborated her allegations. 1RP 536-44.

The defense closing argument emphasized the lack of corroborating evidence; there was no D.N.A., no video, no medical history corroborating abuse, and no evidence as a result of the physical exam.

1RP 567-68. The only evidence of the alleged crimes were the statements of J.Q. 1RP 553. Expert testimony, the inconsistencies in J.Q.'s statements, and the difference between J.Q.'s initial allegations and her trial testimony all showed J.Q. had been influenced, even if inadvertently, by the poor interviewing techniques of her school counselor and Murstig. 1RP 553-54, 562-64, 565-67. J.Q.'s statements were consistent with a child describing pornography she had watched, and J.Q. could easily have accessed such pornography herself using the hard drive and T.V. 1RP 560. Although this showed bad parenting, it should not result in a rape or molestation conviction. 1RP 560.

v. Deliberation & Verdict

After some deliberation, the jury submitted the following written questions to the court:

- Why are there two separate molestation counts?
- How is the jury supposed to distinguish between counts with apparently identical charges?

CP 48. The court responded by writing only, "Please refer to your jury instructions." CP 48.

The jury found Talbert guilty of all three counts, including one count of first degree child rape (count I) and two counts of first degree child molestation (counts II & III). CP 49-51. The jury also returned

three special verdict forms, finding Talbert had used a position of trust to facilitate commission of all three counts. CP 52-54.

vi. Sentence & Appeal

The court sentenced Talbert to an indeterminate life sentence on all three counts with the following mandatory minimum sentences: 240 months on count I, and 180 months on each of counts II and II, all to run concurrently. CP 75. The court reasoned that although the mandatory minimum confinement durations represented 24, 50, and 50 months beyond the top of the standard range, these exceptional sentences were warranted on the basis of the jury's special verdicts and the information considered at sentencing. 2RP 21-22; see also CP 75.

The court also imposed several community custody conditions, including the following:

- ...
- 8) Do not possess or view material that includes images of nude women, men and/or children;
- 9) Do not possess or view material that includes images of children wearing only undergarments and/or swimsuits;
- 10) Do not attend X-rated movies, peep shows, or adult book stores;
- ...
- 15) Inform the Community Corrections Officers of any romantic relationships to verify there are no minor aged children involved;
- ...

CP 81-83.

Talbert timely appeals. CP 93.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED TALBERT'S RIGHT TO PRESENT A DEFENSE.

At trial, Talbert testified that two weeks before J.Q.'s initial disclosure of allegations, Talbert and J.Q.'s mother had argued. 1RP 461. During the argument he told J.Q.'s mother that she needed to contribute financially or leave the house. 1RP 462. On cross-examination, the State impeached Talbert's testimony by reading selected statements from the written transcript of his interrogation by detectives to argue he had recently fabricated his testimony. 1RP 476-77, 482. Defense counsel sought to admit the entire interrogation transcript at trial, as a prior consistent statement to rebut a charge of recent fabrication. 1RP 486, 487, 488. The trial court ruled the transcript was inadmissible. 1RP 491.

By excluding this transcript, the trial court deprived Talbert of his constitutional right to present a defense. If admitted, the evidence would have created a reasonable doubt where there was none before, and so requires reversal.

The Sixth Amendment and article I, section 22 grant an accused two separate but related rights: (1) the right to present testimony in one's defense and (2) the right to confront and cross-examine adverse witnesses. U.S. CONST., Amend. VI; WASH. CONST., art. I, §22; State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983) (citing Washington v. Texas, 388

U.S. 14, 23, 87 S. Ct. 1920, 1925, 18 L. Ed. 2d 1019 (1967); Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). Taken together, these rights constitute the right to present a defense. State v. Duarte Vela, 200 Wn. App. 306, 317, 402 P.3d 281 (2017) (citing State v. Jones, 168 Wn.2d 713, 720-21, 230 P.3d 576 (2010)).

These rights are not absolute. State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). Evidence “must be of at least minimal relevance.” Id. at 622. “[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” Id. The State’s interest in excluding prejudicial evidence must also “be balanced against the defendant’s need for the information sought,” and relevant information can be withheld only “if the State’s interest outweighs the defendant’s need.” Id. Where evidence has “*high* probative value ‘it appears no state interest can be compelling enough to preclude its introduction.’” Jones, 168 Wn.2d at 720 (emphasis in original) (quoting Hudlow, 99 Wn.2d at 16).

Generally, a trial court’s decision to admit or exclude evidence is reviewed for abuse of discretion. Diaz v. State, 175 Wn.2d 457, 462, 285

P.3d 873 (2012).<sup>5</sup> However, a violation of the constitutional right to present a defense is reviewed *de novo*. Jones, 168 Wn.2d at 719.

Here, the trial court denied Talbert the opportunity to present his prior statement and his own related testimony, which would have shown the jury that during the interrogation, he was overwhelmed by the charges and consistently denied any improper contact with J.Q.

Although the court made no written ruling, the court reasoned that the State “did not imply a fabrication that can be disproved by consistent statement... in that recorded statement.” 1RP 490-91 (citing ER 801(d)(1)(ii)). This oral decision appears to be based on the following grounds. (i) The State did not imply a charge of recent fabrication. (ii) Talbert’s prior statement was not probative of his defense or of a rebuttal of any claim of recent fabrication. (iii) The appropriate legal standard was provided by the rules of evidence, specifically ER 801(d)(1)(ii), and did not require admissibility. Each of these grounds is in error.

- i. The State’s argument was a charge of recent fabrication.

The trial court’s reasoning suggests that the State’s impeachment did not imply Talbert had recently fabricated his testimony that he and

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<sup>5</sup> Discretion is abused when it is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Untenable reasons include errors of law. Noble v. Safe Harbor Family Preservation Trust, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009).

J.Q.'s mother, Talmage, had fought over finances and he had told her she could no longer live there unless she began contributing financially. See 1RP 490-91. This is in error. The State's cross-examination was plainly designed to support an argument of recent fabrication.

The State repeatedly read segments from the interrogation transcript in which detectives asked Talbert why J.Q. would say these things, and Talbert said he did not know. 1RP 476-77, 478, 479-82. The State repeatedly pointed out that Talbert had not told detectives during the interrogation that he had argued with Talmage and told her she had to get a job or leave. For example, the State said, "You didn't say, "Oh. It's because I'm kickin' her mom out in two weeks;" isn't that true?" 1RP 476-77. The State also said, "You didn't tell Detective Cantu at that time 'Oh, maybe it's because I'm gonna kick her mom out.'" 1RP 478. This cross-examination was specifically designed to argue to the jury that Talbert's statements to detectives were not consistent with his trial testimony, and to assert a claim of recent fabrication. The State made this intention even more clear by commenting, "But you've had 15 months to think about it since then, haven't you Mr. Talbert." 1RP 479.

The record makes plain that the State's intention was to argue Talbert's prior statement was inconsistent with his trial testimony, and to argue that Talbert had recently fabricated his trial testimony. To the

extent the trial court's ruling can be seen as finding otherwise, it is an obvious error and must be stricken for lack of "substantial evidence" in the record. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994).<sup>6</sup>

- ii. The testimony was highly probative of Talbert's defense of general denial.

The trial court appears to have concluded that Talbert's statement to detectives had minimal probative value and was not relevant to his claim of general denial or to any rebuttal of the State's claim of recent fabrication. See 1RP 490-91. This conclusion was in error.

As defense counsel argued at trial, the transcript was necessary as a prior consistent statement, to rebut the State's allegation of recent fabrication, and to ensure basic fairness to the defense. 1RP 486, 487, 488. Without the full transcript, and the ability to testify with direct reference to its contents, the jury would be left with only Talbert's trial testimony and the State's argument that his prior statements were inconsistent. With the full transcript, the defense offer of proof made clear that the jury would be able to determine for itself whether the statements were consistent, appeared credible, and were the words of a person in shock over the allegations. Thus, the full transcript was highly probative of his claim of general denial, his consistency in maintaining this claim,

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<sup>6</sup> "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." Hill, 123 Wn.2d at 647.

and his explanation that he was too overwhelmed during the interrogation to think about his financial and housing situation with Talmage.

Thus, the trial court's conclusion that the transcript was not probative of or relevant to Talbert's defense, his claim of consistency, or his rebuttal of the State's charge of recent fabrication, was in error.

iii. The court excluded the evidence under an improper legal standard.

The trial court reasoned that the rules of evidence provided the proper legal standard to evaluate Talbert's request to play the entire transcript, and that these rules did not required admissibility. See IRP 490-91 (citing ER 801(d)(1)(ii)). This reasoning is in error.

Washington courts have repeatedly held that where the right to present a defense is implicated, the proper legal standard is not provided by the rules of evidence, but rather is as follows. Evidence "must be of at least minimal relevance." Darden, 145 Wn.2d at 622. "[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." Id. The State's interest in excluding prejudicial evidence must also "be balanced against the defendant's need for the information sought," and relevant information can be withheld only "if the State's interest outweighs the defendant's need." Id. Where evidence has "*high* probative value 'it appears no state

interest can be compelling enough to preclude its introduction.” Jones, 168 Wn.2d at 720 (emphasis in original) (quoting Hudlow, 99 Wn.2d at 16).

Here, as discussed above, the evidence was of high probative value to the defense and so cannot be excluded even on the basis of any prejudice to the State. Moreover, the State failed to identify any prejudice that might result from playing the entire transcript – or from playing the portions that would support Talbert’s claims. Thus, even if the court were to engage in balancing under this test, which the defense does not concede should occur, admissibility of the transcript is still required.

iv. Jurisprudence requires admissibility of the interrogation transcript.

The analysis discussed above is supported by the case of Jones, 168 Wn.2d at 717-18, 721. In Jones, the Washington State Supreme Court emphasized that the right to present a defense involves more than merely permitting a defendant to say, ‘I didn’t do it,’ or ‘It wasn’t me.’ Rather, this right necessarily involves a defendant’s right to present the entire context of the circumstances for review by the jury.

In Jones, the right to present testimony regarding an alleged victim’s actions and motivations just prior to the alleged incident were

pitted against the State's concern that the testimony was an attack on the alleged victim's character. See id. at 717-18, 721.

Jones was accused of raping K.D. Id. at 717. The trial court prohibited Jones both from offering his own testimony and from cross-examining witnesses about K.D.'s participation in a consensual all-night sex party beginning earlier that evening. Id. at 719-20. Specifically, Jones sought to testify "that during a nine-hour alcohol- and cocaine-fueled sex party [K.D. and another woman] danced for money and engaged in consensual sexual intercourse" with Jones and two other men they met at a truck stop. Id. at 717. The trial court found that discussion of the sex party was offered for the purpose of attacking the alleged victim's credibility and was barred by the rape shield statute. Id. at 717-18. The trial court asserted that Jones was not, however, precluded from testifying generally that K.D. had consented to sex with him. Id. at 721.

The Washington State Supreme Court was unconvinced by this reasoning, and reversed, noting, "The trial court's formulation would have allowed testimony of consent, but devoid of any context about how the consent happened or the actual events," and thus, "effectively barred Jones from presenting his defense." Id. at 721 (emphasis added). Remand for retrial was the appropriate remedy. Id. at 721.

Here, as discussed above, the State failed to identify any prejudice that would result from admission of the transcript. Even if it had, the level of prejudice would not have risen to the all-night drug-fueled sex party discussed in Jones. The case of Jones illustrates that even where such serious prejudice is identified, balancing is wholly inappropriate where the context of the proffered evidence is highly probative of the defendant's general claim. Here, the transcript was highly probative and provided the jury with much-needed context in which to evaluate his claim that he was overwhelmed with the allegations and was consistently denying any wrongdoing, and he had not made inconsistent statements or recently fabricated his trial testimony. Thus, according to the analysis of Jones, the trial court's ruling was in error and requires reversal and remand for a retrial. Id. at 721.

v. The trial court's evidentiary ruling require reversal.

The erroneous exclusion of evidence relevant to Talbert's claim of general denial violates his constitutional right to a defense if "the omitted evidence evaluated in the context of the entire record, creates a reasonable doubt that did not otherwise exist." Duarte Vela, 200 Wn. App. at 326, 402 P.3d 281 (2017) (citing United States v. Blackwell, 459 F.3d 739, 753 (6th Cir.2006)).

Here, Talbert's convictions depend almost exclusively on the testimony and statements of J.Q. There were no other witnesses, no D.N.A., no medical history, and no corroborating evidence from the physical examination. J.Q.'s credibility was generally undermined by her young age and developmental delays. 1RP 348. Her credibility was specifically undermined by her inconsistencies and ambiguities on the most relevant factual issues. For example, she repeatedly stated she was confused, testified at various points to one instance of sexual contact and then to multiple instances, and notably mixed up Talbert with her previous step-father, Michael Talmage, at two points in the forensic interview. E.g. Exh. 17, pp.7, 17, 25-27, 32.

The only physical piece of evidence arguably corroborating her testimony was the pornographic video described in her interview and discovered by Detective Smith on the hard drive. 1RP 385. However, this was inconclusive at best. Both Talmage and Talbert testified they each maintained their own pornography collections on the hard drive. 1RP 347, 459-60. Detective Smith testified that the hard drive was connected to the T.V. and was easily accessible by anyone, including J.Q. 1RP 385. Thus, the video was also consistent with Talbert's claim of general denial, with the theory that J.Q. was describing pornography that she had seen when

Talbert was not present, and that Talmage had a motive to encourage a false accusation by J.Q.

Given the context of Talbert’s trial, and the State’s failure to provide overwhelming evidence, the omitted interrogation transcript “creates a reasonable doubt that did not otherwise exist” and so requires reversal and remand for a new trial. Duarte Vela, 200 Wn. App. at 326.

## 2. THE TRIAL COURT’S JURY INSTRUCTIONS VIOLATED DOUBLE JEOPARDY.

The trial court was required to provide clear instructions to the jury that it could not convict Talbert of multiple counts based on a single act. The instructions failed to do so and subjected Talbert to double jeopardy. One of Talbert’s two convictions 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). Double jeopardy claims are 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)). To adequately protect against a double jeopardy violation, instructions must make “manifestly apparent to the jury that each count represented a separate act.” Mutch, 171 Wn.2d at 665-66. Vague jury instructions that do not convey this requirement are flawed because they create the risk of multiple punishments for a single act and so create the risk of a double jeopardy violation. Id.

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.

Where a double jeopardy violation is found, the conviction(s) must be vacated. Borsheim, 140 Wn. App. at 371. However, since Borsheim, the Washington State Supreme Court has clarified that the mere possibility of a double jeopardy violation does not require automatic reversal. See Mutch, 171 Wn.2d at 665; State v. Land, 172 Wn. App. 593, 603, 295 P.3d 782 (2013). The reviewing court must consider the insufficient instructions “in light of the full record.” Mutch, 171 Wn.2d at 665. Reversal is required unless the Court is “convinced beyond a reasonable doubt” that the flawed

instructions did not actually effect a double jeopardy error. Id. at 665; Borsheim, 140 Wn. App. at 371 (reversal required). Stated another way, the context of the trial as a whole must convince the reviewing court beyond a reasonable doubt that the jury relied on separate and distinct acts to convict for each count. Id. at 665. The jury instructions in Talbert’s case were flawed and do not satisfy this standard. Thus, one of his two counts of child molestation must be vacated.

- i. The jury instructions failed to adequately protect Talbert from two child molestation convictions based on a single act.

Here, both counts of first degree child molestation (counts II & III) were alleged to have occurred within the same charging period: 11/1/14-11/25/14. See CP 32 (No. 15), 33 (No. 16); see also CP 8 (same charging period in Information). The jury instructions with respect these two counts did not provide adequate protection against a double-jeopardy violation.

The jury was instructed that the State had alleged multiple acts of child molestation, and in order “[t]o convict the defendant on any count of Child Molestation in the First Degree, one particular act of Child Molestation in the First Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved.” CP 30 (No. 13) (emphasis added). This instruction requires general unanimity, but just as the general “separate crime instruction” discussed

above, this instruction does not require a separate and distinct act for each count, and so fails to protect against a double jeopardy violation. See Mutch, 171 Wn.2d at 663.

Moreover, no other instruction informed the jury that each of the two counts of child molestation in the first degree must be supported by separate and distinct acts. For example, the jury was instructed “[a] separate crime is charged in each count. You must decide each count separately. ... .” CP 21. However, the Washington State Supreme Court has characterized this instruction as a general “separate crime instruction,” and held it is insufficient to protect against a double jeopardy violation because “it still fails to ‘inform[ ] the jury that each “crime” required proof of a different act.’” CP 21 (No. 4); Mutch, 171 Wn.2d at 663 (quoting Borsheim, 140 Wn. App. at 367 (citing State v. Berg, 147 Wn. App. 923, 953, 198 P.3d 529 (2008))).

Thus, the instructions left open the possibility that the jurors would unanimously agree to one act of child molestation, and would rely on that one act to support both counts II and III. Where none of the instructions conveyed that the jury must find separate and distinct acts to support each of counts II and III, the instructions failed to protect against a double jeopardy violation. Borsheim, 140 Wn. App. at 364, 366-67.

This analysis is supported by jurisprudence. 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 violation. Id. at 663.

In Land the court similarly found the instructions inadequate where they failed to inform the jury they must find “separate and distinct” acts to support each count, where both counts involved sex offenses during the same charging period. Land, 172 Wn. App. at 602. This allowed for the possibility that the child rape and molestation convictions could have been based on one act in violation of double jeopardy. Id. at 601-02 (considering rape and molestation charges could be based on allegations of oral sex).

Like the defendants in Mutch and Land, Talbert was charged with multiple sex offenses within the same charging period, yet the instructions failed to inform the jury that separate and distinct act were required to convict for each child molestation count. The instructions similarly failed to protect against a double jeopardy violation and so were flawed.

- ii. The record fails to show beyond a reasonable doubt the jury relied on separate and distinct acts to support each count of child molestation.

Where a double jeopardy violation is found, the appellate court must vacate the offending conviction. Borsheim, 140 Wn. App. at 371. However, flawed jury instructions do not always ripen into an actual double jeopardy violation. If after reviewing the record as a whole, the court is persuaded beyond a reasonable doubt that despite flawed instructions it is “manifestly apparent” the jury based each conviction on a separate and distinct act, then the convictions may stand. Mutch, 171 Wn.2d at 665; see also Land, 172 Wn. App. at 601-03 (citing Mutch, 171 Wn.2d at 663-65).

In Mutch, the Court found the jury instructions were flawed. 171 Wn.2d at 663. However, the Court held that 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. The Court was “convinced beyond a reasonable doubt, based on the entire record, that the jury instructions did not actually effect a double jeopardy violation.” Id.

First, the victim, J.L., testified to precisely the same number of rape episodes (five) as there were counts charged and to convict instructions. Id. at 651. Second, the defense essentially conceded these interactions; Mutch admitted to a detective that he engaged in multiple sex acts with J.L., his

defense was that of consent rather than denial, and the defense did not contest the number of episodes in closing argument. Id. Third, during closing argument the prosecutor discussed each of the five alleged acts individually and both parties emphasized that jurors must unanimously agree to a separate and distinct act to support each count. Id. at 665.

Given this context, the Court concluded that all indications were that the jury was not confused and had relied on five specific instances of sexual contact to support the five rapes charged. Id. at 665-66. Rather, “it was manifestly apparent to the jury that each count represented a separate act.” Id. at 665-66. Despite the deficient jury instructions, the Mutch Court was convinced beyond a reasonable doubt that an actual double jeopardy violation did not occur. Id. at 666.

The context of Talbert’s trial is distinct from that of Mutch in all relevant respects. First, J.Q. statements were riddled with ambiguities regarding the number of incidents of alleged sexual contact or intercourse. During her forensic interview, she alleged both that sexual contact occurred only once, and that sexual contact occurred multiple times. E.g. Exh. 17, pp. 15, 22. When specifically asked if the licking occurred more than once, J.Q. stated, “I get confused a bunch.” Exh. 17, p. 16. Thus, there was no clear match between the number of precise incidents testified to and the number of counts charged as there was in Mutch.

Second, Talbert's defense was not consent but rather complete denial. Talbert consistently maintained that no incidents of sexual contact had occurred, in his statements to detectives, his in-court testimony, and closing argument. 1RP 465-66, 467-68; see also 1RP 553-68. Thus, unlike in Mutch, the existence and number of instances of sexual contact was not agreed by both parties.

Third, the closing arguments of the parties did not clarify to the jury how they were to match the alleged conduct to the counts charged. The prosecutor in Talbert's case made no clear argument regarding the number of acts, or even which acts supported which counts. Unlike the closing arguments in Mutch, here, neither party specifically addressed the need to base each child molestation count on a separate and distinct act.

In keeping with the Mutch Court's analysis, the Court of Appeals in Land found the failure to instruct on the separate and distinct acts requirement allowed for the possibility in theory that the counts of child rape and child molestation could have been based on the same conduct, i.e. allegations of oral sex, in violation of double jeopardy. Land, 172 Wn. App. at 601-02. However, after evaluating the context of the trial, the Land Court concluded it was "manifestly apparent" the jury had not convicted Land of both rape and child molestation on the basis of one act. Id. at 603.

The Land Court considered the following factors. First, the testimony of the victim, S.H., alleged that Land had kissed and touched her breasts and “lower part” both under and over her clothing. Id. at 601. This “vague” testimony did not include any clear allegation that Land’s mouth had come into contact with her genitals, and so could support the molestation count, but not the rape count. Id. The only evidence of rape was S.H.’s testimony that Land had penetrated her vagina with his finger. Id. at 602. Second, the prosecutor’s use of this testimony in closing made a clear election of the finger penetration to support the rape count, and of the touching of her breast and her vagina up until the point of penetration to support the molestation. Id. Third, the charging language and “to-convict” instructions of the two counts were not identical; the rape instruction and charge used the language “sexual intercourse” whereas the molestation instruction and charges stated “sexual contact.” Id. at 602-03.

The Land Court reasoned, that taken together, it was “manifestly apparent” to the jury that the rape and molestation counts were not based on the same alleged act of oral sex, and no other act could, as a matter of law, support both different crimes. Id. at 603. Thus, there was no double jeopardy violation in fact. Id.

The context of Talbert’s trial is distinct from Land in all important respects. First, an examination of J.Q.’s testimony does not remove

ambiguity. In Land, the double jeopardy violation involved rape and molestation, which could only even theoretically violate double jeopardy if the jury relied on oral sex to support both counts. See Land, 172 Wn. App. at 600-03. Thus, where the allegation of oral sex was not, as a matter of law, sufficient to support the rape, not even a theoretical risk of a double jeopardy violation remained. Id.

In contrast, the double jeopardy violation in Talbert's case involves two counts of the identical crime. Even if Talbert's jury relied on an allegation of oral sex to support the rape conviction under count I, and that allegation is excluded from the calculation, a wide range of allegations remained for consideration of the child molestations charges – including the touching of her vagina by Talbert's penis or fingers or the vibrator, or her touching of Talbert's penis with her hands. Given the large degree of ambiguity in J.Q.'s testimony, and the arguments that some of the allegations had been improperly suggested by flawed interview techniques, the jury could have rejected much of the testimony, but unanimously agreed on one act and used it to support both child molestation convictions. Thus, unlike the testimony in Land, J.Q.'s testimony did not provide the much-needed clarity to the jury regarding how to distinguish between counts II and III.

Second, as discussed above, the prosecutor did not make any clear election in closing argument or delineate counts II and III from one another in any other way, and so the closing argument is unlike that in Land.

Third, unlike the charging document and “to-convict” instructions in Land, the information and “to-convict” instructions for counts II and III were essentially identical. CP 8 (Information); Compare CP 32 (No. 15) with CP 33 (No. 16). Thus, these documents did not provide clarity to the jury regarding how to differentiate between the counts.

The most conclusive evidence in the record against finding that the jury properly delineated counts II and III comes from the jury itself. After some deliberation, the jury asked the court “Why are there two separate molestation counts?” and “How is the jury supposed to distinguish between counts with apparently identical charges?” CP 48. This shows that this jury was in fact confused regarding what was required to convict Talbert of count II versus count III. The court provided no additional clarification, responding only with, “Please refer to your jury instructions.” CP 48. Thus, the jury was left to wrestle with its confusion alone. Given this documented confusion, it is not possible to conclude either that the instructions made the legal standard “manifestly apparent” or that it is “manifestly apparent” from the record that the jury convicted Talbert of counts II and III on the basis of

two separate and distinct acts. Borsheim, 140 Wn. App. at 366; Mutch, 171 Wn.2d at 665-66.

For the reasons discussed above, the context of Talbert’s trial—including J.Q.’s ambiguous testimony, Talbert’s defense of complete denial, and the lack of clarity in the closing arguments of the parties—does not dispel the risk of a double jeopardy violation. Most telling, the jury’s written questions shows that in fact, the instructions and context of the trial left the jury confused regarding the proper basis to differentiate between counts II and III. Yet the court provided no additional guidance. How the jury resolved this confusion is anyone’s guess. In light of this record, this Court cannot conclude “beyond a reasonable doubt” that the jury relied on separate and distinct acts to convict Talbert of counts II and III. Mutch, 171 Wn.2d at 665. One of these counts must be vacated. Borsheim, 140 Wn. App. at 371.

### 3. THE TRIAL COURT’S COMMUNITY CUSTODY CONDITIONS ARE VOID FOR VAGUENESS AND OVERBREADTH.

The trial court imposed several community custody conditions, including the following:

- ...
- 8) Do not possess or view material that includes images of nude women, men and/or children;
- 9) Do not possess or view material that includes images of children wearing only undergarments and/or swimsuits;

10) Do not attend X-rated movies, peep shows, or adult book stores;

...

15) Inform the Community Corrections Officers of any romantic relationships to verify there are no minor aged children involved;

...

CP 81-83.

Each of these conditions are vague and overbroad. In addition, Condition 15) improperly requires pre-approval by a community corrections officer. All of the conditions potentially subject Talbert to arbitrary enforcements. As discussed in detail below, these conditions violate Talbert's constitutional rights and must be stricken from his judgment and sentence.

- i. Community custody conditions 8)-10) and 15) are unconstitutional.

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). Under the due process clauses of the Fourteenth Amendment and article I, section 3, the State must provide citizens fair warning of prohibited conduct. Id. at 752. This due process vagueness 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 prohibition with sufficient definiteness such that ordinary people can understand what

conduct is prohibited; or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53. Where a prohibition fails either prong, it is unconstitutionally vague. Id. at 753.

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 unconstitutionally vague conditions is manifestly unreasonable, requiring reversal. Id. at 791-92.

In State v. Irwin, 191 Wn. App. 644, 649, 364 P.3d 830 (2015), Division One considered a condition which read, “Do not frequent areas where minor children are known to congregate, as defined by the supervising” community corrections officer. The Irwin Court struck this condition as unconstitutionally vague and remanded for resentencing. Id. at 655.

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. (quoting Bahl, 164 Wn.2d at 753). The court acknowledged that it “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. This was not sufficient because it would still “leave the condition vulnerable to arbitrary enforcement,” thereby failing 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 at issue in Irwin. 135 Wn.2d 326, 349, 957 P.2d 655 (1998), abrogated by Sanchez Valencia, 169 Wn.2d 782. However, the Riles Court’s analysis presumed the condition was constitutional, a presumption that the Sanchez Valencia court later expressly repudiated. 169 Wn.2d at 792-93.

Thus, the Irwin court concluded Riles did not control and instead relied primarily on the Washington Supreme Court’s more recent decision in Bahl. There, the court held a condition unconstitutionally vague where it prohibited Bahl from possessing or accessing pornographic material “as directed by the supervising Community Corrections Officer.” Bahl, 164 Wn.2d at 743. “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.

As in Bahl and Irwin, the conditions 8), 9), 10) and 15) prohibiting Talbert from viewing materials showing nudity, showing children in underwear or bathing suits, attending adult book stores, and informing community corrections of “any romantic relationships” fails to provide sufficient definiteness. The conditions do not tell Talbert where he can and cannot go and what he can and cannot view. Some locations and images, such as those enumerated in the conditions are more or less obvious, such as viewing X-rated movies and peep shows.

However, other locations and images are not obvious. For example, many courthouse works of art depict justice in the form of a female figure with a bare breast. The label on a bottle of Coppertone sunscreen in the grocery store depicts a child on the beach wearing a bathing suit; the traditional image shows the child topless with a dog pulling the swimsuit off. Travel commercials portray families, including children, at the beach wearing swimsuits. Art museums, scientific diagrams, and other non-X-rated movies depict the human form in nude. Church artwork often depicts the infant Jesus in swaddling clothes and the breast of the Virgin Mary while breastfeeding. It is likely that during everyday life, Talbert will encounter such images without any advance warning. The term “adult book stores” is also overly vague and might be interpreted to apply to any number of book stores. Finally, the definition

of a “romantic relationship” may vary from person to person. Talbert will be left wondering, does a friendship with no sexual contact count? Does a one-night sexual encounter require pre-authorization?

Regardless of the court’s attempt to provide some examples in the list, each of these conditions fails to provide sufficient guidance for Talbert to know whether and how to avoid locations, persons, and images. Because no ordinary person would know what conduct is prohibited, the conditions fail the first prong of the vagueness test.

“In addition, when a statute or other legal standard, such as a condition of community placement, concerns material protected under the First Amendment, a vague standard can cause a chilling effect on the exercise of sensitive First Amendment freedoms.” Bahl, 164 Wn.2d at 753 (citing Grayned v. City of Rockford, 408 U.S. 104, 109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)). Vagueness concerns “are more acute when a law implicates First Amendment rights and a heightened level of clarity and precision is demanded of criminal statutes because their consequences are more severe.” Id. (quoting United States v. Williams, 444 F.3d 1286, 1306 (11th Cir. 2006), rev’d on other grounds, 553 U.S. 285, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008)).

The conditions prohibiting Talbert from viewing nudity or children in underwear implicates the First Amendment. Indeed, the conditions

might very well subject Talbert to exclusion from many houses of worship given the likelihood of the presence of religious artwork described above. Similarly, the condition requiring advance permission for “romantic relationships” also chills his freedom of association. Because the conditions have the very real effect of precluding Talbert’s free exercise of religion and assembly, to be valid they must meet a more definite, clearer standard. The vague community custody conditions cannot satisfy the first prong of Bahl’s vagueness analysis. This court should strike the conditions and remand for resentencing.

The conditions also fail the vagueness test’s second prong. Both Bahl and Sanchez Valencia involved delegation to a community corrections officer to define the parameters of a condition. Sanchez Valencia, 169 Wn.2d at 794; Bahl, 164 Wn.2d at 758. The Sanchez Valencia court determined that where a condition leaves so much discretion to an individual corrections officer, it suffers from unconstitutional vagueness. 169 Wn.2d at 795.

Here, the community custody conditions 8)-10) do not delegate the parameters of the condition to anyone. See CP 81-83. As such, there are no ascertainable standards of guilt to protect against arbitrary enforcement; nor is there any mechanism for obtaining such ascertainable standards from a corrections officer. Cf. Bahl, 164 Wn.2d at 752-53.

Condition 15) on romantic relationships is subject to preapproval by a community custody officer. CP 85. Because Talbert would be required to seek approval of his community custody officer before even interacting with anyone in a manner someone may construe as attempting to form a romantic relationship, the court's imposition of the condition "virtually acknowledges that on its face" the condition "does not provide ascertainable standards for enforcement." Bahl, 164 Wn.2d at 758.

The community custody conditions discussed above are unconstitutional because they fail to provide reasonable notice as to what conduct is prohibited and expose Talbert to arbitrary enforcement. This court should hold that the conditions are void for vagueness and overbreadth and strike them from Talbert's judgment and sentence.

ii. This preenforcement claim is ripe for review.

Appellate courts routinely consider preenforcement challenges to sentencing conditions. Sanchez Valencia, 169 Wn.2d at 787. Such challenges are 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).

Here, the issue is primarily legal—do the conditions discussed above violate due process vagueness standards? See 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 (condition prohibiting perusal of pornography was ripe for vagueness review).

This question is not fact-dependent. A written condition 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.”).

The challenged conditions are final because Talbert has been sentenced to abide by them. 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 charged Talbert with violating the conditions, this preenforcement challenge to the conditions is ripe for review. See Irwin, 191 Wn. App. at 651-52. Talbert respectfully asks that this Court strike the conditions from his judgment and sentence.

#### D. CONCLUSION

The trial court’s ruling to exclude Talbert’s interrogation transcript violated his right to present a defense. The court’s jury instructions violated principles of double jeopardy. The court’s community custody conditions are void for vagueness and overbreadth.

Talbert respectfully requests that this Court reverse his convictions and remand for a re-trial on the basis of the evidentiary ruling and flawed jury instructions. In the alternative, Talbert respectfully requests that this Court strike the offending community custody conditions.

DATED this 12th day of March, 2018.

Respectfully submitted,

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**March 12, 2018 - 3:30 PM**

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**Appellate Court Case Number:** 35294-3  
**Appellate Court Case Title:** State of Washington v. Johnny Narvin Talbert, Jr.  
**Superior Court Case Number:** 15-1-01359-2

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