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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CARLOS JAMIE-MCDOUGALL, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. No rational jury could have found Jamie-McDougall guilty of one of the counts of rape of a child beyond a reasonable doubt.

2. The State presented insufficient evidence to convict Jamie-McDougall of two counts of rape of a child.

3. In the alternative, the trial court violated Jamie-McDougall's Sixth and Fourteenth Amendment right to be free from double jeopardy by failing to give a "separate and distinct acts" instruction.

4. In the alternative, the trial court violated Jamie McDougall's Wash. Const. art. I, § 9 right to be free from double jeopardy by failing to give a "separate and distinct acts" instruction.

5. Jamie-McDougall was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel at sentencing.

6. Defense counsel provided ineffective assistance by unreasonably failing to raise Jamie-McDougall's youthfulness as a mitigating factor at sentencing.

7. Jamie-McDougall was prejudiced by his attorney's deficient performance.

8. The sentencing court exceeded its authority by ordering Jamie-McDougall to undergo random urinalysis and breathalyzer testing.

9. The order requiring Jamie-McDougall to undergo random urinalysis and breathalyzer testing was not crime related.

II. ISSUES PRESENTED

1. Did the State present sufficient evidence of anal rape, where it published I.J.M.'s recorded child hearsay interview to the jury, and on that recording she stated that Jamie-McDougall put his "privates" "in her booty, too," with accompanying hand gestures demonstrating that Jamie-McDougall's "privates" went inside?

2. Did Jamie-McDougall provide sufficient citation to authority and analysis of his claimed instructional error, and, if so, did the State's election of acts in closing argument nullify any potential double jeopardy violation?

3. Did defense counsel provide ineffective assistance of counsel by failing to argue for an exceptional downward sentence on the impermissible basis of age alone, particularly where there is no evidence in the record tying Jamie-McDougall's crime to impulsivity or other hallmark features of youth?

4. Did Jamie-McDougall preserve his challenge to his community custody condition requiring drug and alcohol testing, and is that condition permissible in light of his unchallenged conditions forbidding him from possessing or consuming alcohol or controlled substances?

III. STATEMENT OF THE CASE

Carlos Jamie-McDougall appeals his convictions for two counts of first degree child rape, and one count of first degree child molestation. CP 101-03.

Substantive facts.

Jamie-McDougall is the father of I.J.M. RP 88-89. I.J.M. was born in 2010. RP 96. I.J.M.'s mother was her primary caregiver, but she would sometimes spend time with Jamie-McDougall. RP 90-91.

In October or November of 2015, when I.J.M. was four-years-old, I.J.M. told her mother "sometimes my daddy jiggles my private parts," while playing with her dolls. RP 93. I.J.M.'s mother understood this statement as meaning "touches my private parts," immediately became

concerned, and asked I.J.M. further questions. RP 92-93. I.J.M. then told her dolls that "she has to keep daddy's secret," and reiterated "sometimes daddy jiggles my private parts." RP 93-94.

I.J.M.'s mother took her to the hospital and contacted law enforcement, who contacted a forensic interviewer. RP 94. She also contacted Jamie-McDougall, who flatly denied the accusation, and grew angry with I.J.M. RP 94-95.

Karen Winston conducted a forensic interview of I.J.M. RP 113, 123; Ex. 1.[1] In the interview, I.J.M. explained that she does not visit Jamie-McDougall because he did something bad by tickling or jiggling her privates. 2RP 20-21. I.J.M. also stated that Jamie-McDougall played with her privates with his hand, and also put his privates in hers "all the time." 2RP 21. She explained this happened at his house in the living room, bedroom, and kitchen. 2RP 21.

I.J.M. recounted that Jamie-McDougall sometimes took her clothes off when he touched her privates. 2RP 22. At this part of the interview, Ms. Winston asked I.J.M. to draw circles on a diagram of a young child to demonstrate the touching. 2RP 23-24; Ex. 2. I.J.M. drew the pictures to

[1] This video-recorded interview was transcribed by Kenneth Beck for the appeal; the State will refer to this transcript as 2RP for clarity. The jury did not have access to a transcript of the interview, but instead solely relied on the video recording, played for them in open court. RP 5.

clarify her statements, accompanied by statements that Jamie-McDougall touched her frontside "privates" and her backside "booty." RP 127-28; 2RP 25-26; Ex. 2. I.J.M. stated that this touching involved Jamie-McDougall's fingers and *his* private, and drew a circle around a male penis on the diagram of an adult. 2RP 25-26, 28-30; Ex. 2. I.J.M. stated that Jamie-McDougall's fingers were inside her body. 2RP 25; Ex. 2. She also explained that Jamie-McDougall's privates went inside her privates and booty, referencing the diagram. 2RP 30-31; Ex. 2. At one point, Ms. Winston asked I.J.M., "where did [Jamie-McDougall's] privates go?" 2RP 28; Ex. 1 at 0:21:32-0:21:35.[2] I.J.M. explicitly stated that Jamie-McDougall's privates went "in here" while pointing at what she termed her privates, and "in my booty too," while again making hand gestures. 2RP 28; Ex. 1 at 0:21:35-0:21:39.[3]

Procedure.

The State charged Jamie-McDougall with two counts of first degree rape of a child and one count of first degree child molestation. CP 1. Prior

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[2] To assist the reader, the elapsed time on the recording is 0:21:32-0:21:35, but the timestamp is 11:51:13-11:51:16.

[3] To assist the reader, the elapsed time on the recording is 0:21:35-0:21:39, but the timestamp is 11:51:16-11:51:21. The State dispute's Jamie-McDougall's claim in his fact section that I.J.M. never stated "where she had been touched on her buttocks or what part of Jamie-McDougall's body (if any) had touched her there." Br. at 5.

to trial, the State moved the court to introduce child hearsay, in the form of the recorded forensic interview. CP 18, 104. After a full hearing, the court permitted the State to introduce the recording. RP 18; CP 104-06.

I.J.M. testified at the trial but had difficulty discussing the details of the rapes. RP 106, 108-9. The court admitted the video-recorded forensic interview into evidence and the State published the recording to the jury. RP 122-24; Ex. 1. The court also admitted into evidence the drawings where I.J.M. had circled the body parts where Jamie-McDougall had raped her. RP 127-28; Ex. 2.

After the State rested its case-in-chief, the trial court held a brief jury instruction conference. RP 155. Neither party objected to any instruction. RP 155. The next day, the court gave the parties a copy of its proposed instructions, and again, neither party objected. RP 194, 195.

Jamie-McDougall called his mother and sisters as witnesses on his behalf. RP 164-65. They testified that I.J.M. had disclosed abuse, but opined that a different suspect, "Anthony," had raped I.J.M. RP 166-68, 174-75. He also presented testimony from his current girlfriend, Christina Smith, that he was never alone with I.J.M. when she visited him. RP 182-84. Jamie-McDougall did not testify. RP 194-95.

The jury found Jamie-McDougall guilty as charged. CP 101-3. Prior to sentencing, Jamie-McDougall motioned the court for a new trial on the

basis that he had been incapacitated from his use of controlled substances throughout the proceedings. CP 119-23. After a thorough analysis, the court denied the motion. RP 248-53.

Based on Jamie-McDougall's convictions and criminal history, his standard range indeterminate sentence was calculated as 209 to 277 months to life confinement for the charges of child rape, and 129 to 171 months to life confinement for the charge of child molestation. RP 253. The State asked for the midpoint of the standard range, to life confinement. RP 254. Defense counsel argued that because Jamie-McDougall was subject to an indeterminate sentence, the court should impose the low end of the standard range as the minimum, because:

> My thought is they're the experts, they have the tools to decide if he has been rehabilitated or not. If he has been, there doesn't really seem to serve any purpose to hold him in prison an extra few years if they've deemed him suitable for release. I think he should be out and be able to start rebuilding his life. If they determine that he has not been rehabilitated, they can keep him forever if they choose to, if that's how the assessments come out. So I'd ask the court to impose the 209-month minimum and leave it to DOC and their experts to determine if it's -- if he's okay for release.

RP 255. The court agreed with defense counsel's argument and imposed the low end of the standard range: 209 months to life for child rape, concurrent with a sentence of 150 months to life for child molestation. CP 133.

Relevant to the appeal, the court ordered the following community custody conditions:

> not to consume controlled substances except pursuant to a lawfully issued prescription (mandatory conditions);
>
> not to unlawfully possess controlled substances (mandatory conditions);
>
> no possession of consumption of controlled substance (other conditions);
>
> no possession or consumption of alcohol (other conditions);
>
> submit to UA/BA testing (other conditions).

CP 146. Jamie-McDougall timely appeals. CP 149.

IV. ARGUMENT

A. PURSUANT TO THE DEFERENTIAL STANDARD OF REVIEW, THE STATE'S EVIDENCE ESTABLISHES THAT JAMIE-MCDOUGALL ANALLY RAPED I.J.M.

Jamie-McDougall first claims that the evidence is insufficient to sustain his conviction for child rape for the allegation that he anally raped I.J.M. In this case, the State elected the acts of vaginal rape to form the basis for one count of child rape and acts of anal rape to form the basis for the second count of child rape. Jamie-McDougall contests the sufficiency of the State's evidence regarding the charged anal rape. The evidence, when viewed in the light most favorable to the State, easily rebuts this claim.

In reviewing a challenge to the sufficiency of the evidence, the test is whether, after viewing the evidence in a light most favorable to the State,

any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Circumstantial evidence carries the same weight as direct evidence. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). In a sufficiency of the evidence challenge, the court is highly deferential to the decision of the jury. *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014). In that regard, our Supreme Court has stated:

> It is the province of the jury to weigh the evidence, under proper instructions, and determine the facts. It is the province of the jury to believe, or disbelieve, any witness whose testimony it is called upon to consider. If there is substantial evidence (as distinguished from a scintilla) on both sides of an issue, what the trial court believes after hearing the testimony, and what this court believes after reading the record, is immaterial. The finding of the jury, upon substantial, conflicting evidence properly submitted to it, is final.

State v. Williams, 96 Wn.2d 215, 222, 634 P.2d 868 (1981). Similarly expressed:

> The fact that a trial or appellate court may conclude the evidence is not convincing, or may find the evidence hard to

> reconcile in some of its aspects, or may think some evidence appears to refute or negative guilt, or to cast doubt thereon, does not justify the court's setting aside the jury's verdict.

State v. Randecker, 79 Wn.2d 512, 517-18, 487 P.2d 1295 (1971).

"A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim." RCW 9A.44.073. In turn, "sexual intercourse" means both "its ordinary meaning" and includes "any penetration of the vagina or anus however slight." RCW 9A.44.010(1)(a), (b). Jamie-McDougall contends I.J.M.'s testimony did not establish anal penetration.

Jamie-McDougall provides general sufficiency caselaw in support of his analysis,[4] but no comparative authority in support of his argument. Although Jamie-McDougall does not cite the case, *State v. A.M.*, 163 Wn. App. 414, 421, 260 P.3d 229 (2011), probably provides the most support to his claim that I.J.M.'s testimony did not establish the difference between her "booty" and anus. The State submits that case is distinguishable, as *A.M.* is limited to the question of whether penetration of the buttocks, but not the anus, constitutes "sexual intercourse" under

[4] Br. at 6, 9, 10.

RCW 9A.44.010(1)(a). *Id.* at 421. There, the trial court explicitly found that the victim's testimony[5] established only a penetration of the buttocks, but not the anus, but nonetheless concluded as a matter of law that penetration of the buttocks constituted sufficient evidence of first degree child rape. *Id.* at 418. Division One of this Court reversed, distinguishing between buttocks and the anus. *Id.* at 421. By contrast, here, the jury found Jamie-McDougall guilty without specific findings as to the testimony of the individual witnesses. The real error in *A.M.* was that the finder of fact explicitly concluded penetration of the buttocks satisfied a statute which required penetration of the anus. Jamie-McDougall's much narrower contention is that four-year-old I.J.M.'s description of anal rape itself was insufficient.

When dealing with child victims, testimony recounting sexual conduct and the victim's feelings about it may evidence penetration based on reasonable inferences. *State v. Biles*, 73 Wn. App. 281, 284-85, 871 P.2d 159 (1994). As the sexual intercourse statute provides, in order to prove sexual intercourse, there must be at least a slight penetration of the victim. *State v. Bishop*, 63 Wn. App. 15, 19-20, 816 P.2d 738 (1991). In

[5] The victim in that case was several years older than I.J.M., age seven at the time of the rape, and roughly age nine at the time of trial. 163 Wn. App. at 416-17.

discussing a related concept, corroborative evidence of child hearsay, Washington courts have noted the difficulty that a young child, who likely does not understand sexual conduct, can have describing the event. *Id.* at 27-28. At least one other state has held that as a matter of public policy "we cannot expect the child victims of violent crimes to testify with the same clarity and ability as is expected of mature and capable adults. To expect such testimonial capabilities of children would be to condone, if not encourage, the searching out of children to be the victims of crimes such as the instant offense in order to evade successful prosecution." *Villalon v. State*, 791 S.W.2d 130, 134 (Tex. Crim. App. 1990)

Ultimately, this challenge is about the persuasiveness of the evidence, and the jury's weighing of conflicting testimony. I.J.M. was four-years-old at the time of the forensic interview. CP 105. Understandably, I.J.M. had difficulty describing acts of sexual intercourse with adult precision. I.J.M. referred to sexual organs as "privates" when circling that area of her body and circled the backside of her body when labelling her "booty." She did not explain if she knew the difference between an anus and buttocks in the interview.

It cannot be overemphasized that I.J.M., *with accompanying hand gestures*, described in the forensic interview that Jamie-McDougall put his

privates "in [her] booty, too." 2RP 28; Ex. 1 at 0:21:35-0:21:39[6] (despite frequent notations of inaudible in the transcript, I.J.M.'s statements to Ms. Winston are clear. Notably, the jury did not have access to the transcript and only viewed the videotaped recording. RP 123; CP 100. This was in direct response to Ms. Winston's question, "where did his privates go?" 2RP 28; Ex. 1 at 0:21:32-0:21:35.[7] Shortly later, she again explained to the best of her ability that Jamie-McDougall put his "private" in her "private" *and* "booty," referencing the anatomical diagram. 2RP 30; Ex 2. The gestures I.J.M. makes appear to demonstrate Jamie-McDougall's privates entering inside her various body parts. Jamie-McDougall relies on I.J.M.'s later statement that he did not put something in her privates, but the jury already resolved this conflicting testimony, which is not subject to review. *Thomas*, 150 Wn.2d at 874. I.J.M.'s plain statement, the hand gestures I.J.M used to clarify her statement, and the context of Ms. Winston's question permit the jury to reasonably infer penetration of the anus occurred. *Biles*, 73 Wn. App. at 284-85.

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[6] To assist the reader, the elapsed time on the recording is 0:21:35-0:21:39, but the timestamp is 11:51:16-11:51:21.

[7] To assist the reader, the elapsed time on the recording is 0:21:32-0:21:35, but the timestamp is 11:51:13-11:51:16.

The jury also heard testimony from Ms. Winston. Ms. Winston testified that part of the forensic interview process involves determining where a child victim is at "developmentally" and "linguistically." RP 116. Ms. Winston also explained that she utilized diagrams as part of a forensic interview because extremely young victims often have names for body parts that she "wouldn't recognize." RP 126-27. The jury could reasonably infer from four-year-old I.J.M.'s physical description of Jamie-McDougall's privates going inside her booty that Jamie-McDougall anally raped I.J.M.

This Court must defer to the trier of fact regarding the persuasiveness of the evidence, and how it weighed conflicting evidence. I.J.M. plainly stated that Jamie-McDougall put his privates in her booty. When viewed in the light most favorable to the State, four-year-old I.J.M.'s statement described an act with sufficient specificity to allow the jury to determine he committed child rape by penetrating I.J.M.'s anus with his penis.

B. JAMIE-MCDOUGALL PROVIDES ONLY SCANT CITATION TO AUTHORITY AND NO ANALYSIS IN SUPPORT OF HIS CLAIMED INSTRUCTIONAL ERROR.

As an alternative theory of relief to his claim of insufficient evidence, Jamie-McDougall contends that if this Court determines the State did not elect a specific act, it must reverse because the jury instructions create the potential for a double jeopardy violation. This argument fails.

1. This alleged error is inadequately argued.

RAP 10.3(a)(6) directs each party to supply, in its brief, "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." This Court does not consider conclusory arguments unsupported by citation to authority. *Joy v. Dep't of Labor & Indus.*, 170 Wn. App. 614, 629, 285 P.3d 187 (2012). Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998).

As a footnote to Jamie-McDougall's sufficiency of the evidence analysis, he submits that this Court should vacate one of his convictions for a double jeopardy violation. Br. at 10 fn. 4. This remedy is presented as an alternative argument, but it provides only bare citation to authority, lacking any analysis pursuant to that case. This Court may refuse to review issues raised in a footnote. *State v. Johnson*, 69 Wn. App. 189, 194 n.4, 847 P.2d 960 (1993). This passing treatment is insufficient to command review.

2. This alleged error is not preserved.

Generally, a defendant may assert a double jeopardy claim for the first time on appeal. *State v. Mutch*, 171 Wn.2d 646, 661, 254 P.3d 803 (2011) (citing *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136 (2006)).

However, the State disagrees that Jamie-McDougall is alleging a manifest constitutional error.

The State submits that the blanket pronouncement in *Mutch* that an appellant may challenge the lack of "separate and distinct" instruction for the first time on appeal does not remain good law. 171 Wn.2d at 661. *Mutch* did not conduct a manifest error analysis pursuant to RAP 2.5(a)(3), but instead relied on *Jackman*. *Jackman* also did not decide whether the error was manifest, but simply cited RAP 2.5. 156 Wn.2d at 746. There is no analysis in either case using RAP 2.5(a)(3) to determine whether this narrow issue is manifest. *Mutch*, 171 Wn.2d at 662; *Jackman*, 156 Wn.2d at 746. Nor has this Court engaged in a RAP 2.5(a)(3) analysis of this issue since. *See State v. Fuentes*, 179 Wn.2d 808, 824, 318 P.3d 257 (2014).

In the time since the Court decided *Jackman*, it has clarified repeatedly that constitutional issues must be manifest. *See State v. O'Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010); *State v. Kalebaugh*, 183 Wn.2d 578, 583-84, 355 P.3d 253 (2015). The absence of "separate and distinct" language in the jury instruction only presents the *possibility of* or "potential" for a double jeopardy violation,

strongly suggesting the claimed error is not manifest. *Mutch*, 171 Wn.2d at 662, 664. This Court should undertake a RAP 2.5 analysis.[8]

A party may not assert a claim on appeal that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). It is a fundamental principle of appellate jurisprudence in Washington and in the federal system that a party may not assert on appeal a claim that was not first raised at trial. *Id.* at 749. This principle is embodied in Washington under RAP 2.5. The rule is principled as it "affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal." *Strine*, 176 Wn.2d at 749.

Although RAP 2.5 permits an appellant to raise for the first time on appeal an issue that involves a manifest error affecting a constitutional right, our courts have indicated that "the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can 'identify a constitutional issue not litigated below.'" *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988).

Because there was no objection below to the unanimity instruction, the claim must be a manifest constitutional error in order to merit review

[8] Interestingly, the trial court in this case briefly discussed the competing worries from the trial court's perspective when defendants gamble on a verdict and then raise issues for the first time on appeal. RP 251-53.

for the first time on appeal. RAP 2.5(a)(3) analysis involves a two-prong inquiry: first, the alleged error must truly be of constitutional magnitude and, second, the asserted error must be manifest. *Kalebaugh*, 183 Wn.2d at 583. Double jeopardy is obviously an issue of constitutional magnitude.

Analysis of whether an issue is manifest must strike "a careful policy balance between requiring objections to be raised so trial courts can correct errors and permitting review of errors that actually resulted in serious injustices to the accused." *State v. Dunleavy*, 2 Wn. App. 2d 420, 427, 409 P.3d 1077 (2018), *review denied*, 190 Wn.2d 1027 (2018). To establish manifest error, the complaining party must show actual prejudice. *Kalebaugh*, 183 Wn.2d at 584. "To demonstrate actual prejudice, there must be a plausible showing … that the asserted error had practical and identifiable consequences in the trial of the case." *Id.* (internal quotations omitted). The "consequences should have been *reasonably obvious* to the trial court, and the facts necessary to adjudicate the claimed error must be in the record." *Dunleavy*, 2 Wn. App. 2d at 427 (internal quotations omitted) (emphasis added).

> In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review… It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been

> justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

O'Hara, 167 Wn.2d at 99-100. Manifest error is "unmistakable, evident or indisputable." *State v. Burke*, 163 Wn.2d 204, 224, 181 P.3d 1 (2008). The appellant bears the burden of demonstrating manifest error. *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011).

Jamie-McDougall proposed an instruction to the trial court, and the trial court adopted that instruction. CP 48, 59-60 (Defendant's proposed instructions), 78, 88-89 (Court's instructions).[9] Neither party objected to the court's instructions. RP 155, 195. Jamie-McDougall now complains the instructions he requested were given in error but does not claim counsel was ineffective.

Jamie-McDougall does not meet his burden to demonstrate manifest error, in part because his analysis of this issue is limited to a footnote to his sufficiency discussion. The lack of "separate and distinct" language in the

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[9] Arguably making this error invited. The invited error doctrine precludes appellate review of an alleged error affecting even a constitutional right of a defendant. *State v. Henderson*, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990). "The invited error doctrine is a strict rule that precludes a criminal defendant from seeking appellate review of an error he helped create." *State v. Carson*, 179 Wn. App. 961, 973, 320 P.3d 185 (2014), *aff'd*, 184 Wn.2d 207 (2015).

relevant instruction only creates the possibility of a double jeopardy violation, and the jury's deliberation itself is unreviewable and unknowable. The relevant instruction in this case is based on the pattern instruction. CP 89; WPIC 4.25. The instructions as a whole indicate the State was alleging the crime occurred on multiple occasions, that the jury had to find one particular act was proved beyond a reasonable doubt, and that the jury unanimously agreed as to which act was proved. CP 89. Further, the State elected which acts could support each individual charge of child rape in closing, when it argued to the jury that the incidents of vaginal rape formed the basis for the first count, and the incidents of anal rape formed the basis for the second count. RP 213-14, 220-21. Even if the trial court is cognizant of a potential violation, the court instructs the jury prior to closing argument, but the *Mutch* analysis requires the court to review the State's closing argument. 171 Wn.2d at 664. The trial court would not know the content of the State's closing argument at the instruction conference. Thus, it would not be reasonably obvious to the trial court at the stage of instructing the jury that a potential *Mutch* violation could occur, when the State's election of acts in closing argument could prevent any such violation. This alleged error does not fit within the Washington Supreme Court's description of manifest constitutional error.

3. The State's election of acts satisfies Mutch.

Without conceding that the instruction created a manifest constitutional error, the State's election of acts in closing argument satisfies *Mutch*. Jamie-McDougall acknowledges this in his brief, when he predicates his alternative theory of relief on this Court finding that the State did not elect the acts. Br. at 9-10.

Analysis of this issue is a two-step process. *Mutch*, 171 Wn.2d at 661-63. First, this Court considers whether the jury instructions given were flawed and could have allowed the jury to convict the defendant of multiple counts based on a single act. *Id*. at 661-63. Second, if the instructions are faulty, this Court examines the entire trial record, in a rigorous fashion in favor of the defendant, to determine whether there are potentially redundant convictions. *Id*. at 664. Review is de novo. *Id*. at 661-62.

The separate crime instruction used in this case is inadequate because the instruction only requires proof of separate "crimes," but does not explain that each "crime" requires proof of a different act. *Id*. To avoid a double jeopardy problem, *Mutch* explained that the separate act requirement should be explained to the jury either in a stand-alone instruction or in sufficiently distinctive to-convict instructions. *Id*. at 662.

However, the potential error can be cured if the "evidence, arguments, and instructions" made manifestly apparent to the jury that the

State was not seeking to impose multiple punishments for the same offenses. *Id.* at 664. As Jamie-McDougall acknowledged, the State specified in closing argument that it was electing an act of vaginal rape for one count and an act of anal rape for the other. Br. at 9; RP 220-21. Thus, it is clear the State was not seeking to impose multiple punishments for a single act. There is no potential double jeopardy violation.

C. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO PROPOSE AN EXCEPTIONAL DOWNWARD SENTENCE BASED ON AGE ALONE.

Jamie-McDougall claims that trial counsel was ineffective for failing to request an exceptional downward sentence based on youth, despite counsel successfully securing a low-end sentence for his convictions for two counts of first degree child rape and one count of first degree child molestation. In making this claim, Jamie-McDougall does not offer any explanation of how youthfulness contributed to his crime. Jamie-McDougall's claim fails because he has not shown he would have had a viable claim for a mitigated sentence based on youth.

An appellate court reviews claims of ineffective assistance of counsel de novo. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). To prevail on a claim of ineffective assistance, a defendant must show both (1) deficient performance and (2) resulting

prejudice. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Stenson,* 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). An appellate court's scrutiny of defense counsel's performance is highly deferential, and the court employs a strong presumption of reasonableness. *Strickland,* 466 U.S. at 689; *McFarland,* 127 Wn.2d at 335-36. To rebut this presumption, the defendant bears the burden of establishing the absence of any "conceivable legitimate tactic explaining counsel's performance." *State v. Grier,* 171 Wn.2d 17, 42, 246 P.3d 1260 (2011).

To establish prejudice, a defendant must show a reasonable probability that the outcome of the hearing would have been different absent counsel's deficient performance. *State v. Thomas,* 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Failure on either prong of the test bars a claim of ineffective assistance of counsel. *Strickland,* 466 U.S. at 697.

A defendant's youthfulness may be a mitigating factor for purposes of sentencing, where that youthfulness in fact diminishes the defendant's culpability for the crime. *State v. O'Dell*, 183 Wn.2d 680, 689, 358 P.3d 359 (2015). However, as with any other mitigating factor, youthfulness must be a "substantial and compelling factor" which justifies a sentence below the

standard range. *Id*. at 696. "[A]ge is not a per se mitigating factor" that automatically entitles youthful defendants to an exceptional sentence downward. *Id.* at 695.

A youthful offender has no presumption or entitlement to a mitigated sentence. *State v. Gregg*, 9 Wn. App. 2d 569, 578-, 444 P.3d 1219, *review granted*, 194 Wn.2d 1002 (2019). The defendant still bears the burden of establishing that mitigating circumstances exist. *Id*. at 574.

An exceptional sentence may be available to a youthful offender whose offense bears the hallmarks of youth—lack of maturity, impetuous or ill-considered actions and decisions, susceptibility to peer pressure, and transitory (rather than fixed) character traits. *Id.* at 574-75 (citing *Roper v. Simmons*, 543 U.S. 551, 569-70, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)). To receive a mitigated sentence, a defendant must demonstrate he is less culpable because of his age and immaturity. *State v. Moretti*, 193 Wn.2d 809, 824, 446 P.3d 609 (2019).

In support of his argument, Jamie-McDougall recounts the findings of juvenile brain science generally, but fails to link those findings to the facts and circumstances present in his record. His sole claim in that regard is that he was "entitled to request a mitigated sentence based on his youth and impulsivity at the time of the alleged offenses. *O'Dell*, 183 Wn.2d at 696." Br. at 15. Although Jamie-McDougall was 20 years old at the time of

his offense, there is no evidence in the record directly linking his conduct or culpability to his age, impulsivity or immaturity. Such linkage is necessary to justify a mitigated sentence. *O'Dell*, 183 Wn.2d at 694-95 (The test is whether the defendant's youth mitigated the capacity to "'appreciate the wrongfulness of [the criminal] conduct or to conform … to the requirements of the law'" (quoting *State v. Ha'mim*, 132 Wn.2d 834, 846, 940 P.2d 633 (1997)). There is no evidence in the record that Jamie-McDougall raped his daughter because of peer pressure or that the crime was impulsive. To the contrary, the State provided evidence Jamie-McDougall committed multiple acts, over a period of time. The State also demonstrated in the forensic interview that Jamie-McDougall warned I.J.M. not to inform anyone, demonstrating he sought to keep the crime confidential. This evinces planning and secrecy, not impulsivity and peer-pressure.

Furthermore, Jamie-McDougall presented an "other suspect defense," claiming I.J.M.'s mother's boyfriend was the real perpetrator. *See* RP 228. He also did not admit to the crime during allocution, and called the verdict "bullshit," in the presentencing investigation report. *See* RP 256-67; CP 111. Jamie-McDougall never took responsibility for the crime, and, in fact, argued someone else committed the crime, so it is difficult to understand how counsel could effectively argue that Jamie-McDougall's

commission of the crime was related to the hallmark features of youth. He even insinuates law enforcement refused to investigate this alleged other suspect in his appeal. Br. at 4. Jamie-McDougall's chosen defense foreclosed the opportunity to develop any record pertaining to his new theory of culpability on appeal. Regardless, counsel was not deficient failing to argue for an exceptional downward sentence for the impermissible basis of age alone.[10]

Contrary to Jamie-McDougall's argument, this is not a case like *McGill*, where the court indicated a desire to impose an exceptional sentence downward, but incorrectly believed it lacked the ability to do so. *State v. McGill*, 112 Wn. App. 95, 98-99, 47 P.3d 173 (2002). The sentencing court in that case stated it had "no option but to sentence [McGill] within the [standard] range." *Id*. at 99. Here, the court did not make any such comment during sentencing, but simply determined the low-end of the range was appropriate. Jamie-McDougall points to a mere hypothetical possibility that requesting an exceptional downward sentence, with no corroborating information in the record other than age alone, would have changed the outcome. This is insufficient.

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[10] Jamie-McDougall was born on February 5, 1994. CP 1. He was an adult, 21-years-old, at the time he committed the crimes in late 2015.

Jamie-McDougall also does not demonstrate any actual prejudice, but instead only provides his speculative assertion that the trial court might have decided to impose an exceptional downward departure based on youth had counsel asked for a departure. This is based solely on his age and the fact that, because of the nature of Jamie-McDougall's crime, his sentence was subject to the indeterminate sentence review board. Such a claim is contrary to the purpose of the SRA, which requires trial courts to impose a standard range sentence unless they find substantial and compelling reasons to depart from that range. RCW 9.94A.535.[11] The trial court reasoned that a low-end sentence within the standard range was appropriate because the indeterminate sentence review board could keep Jamie-McDougall confined up to the statutory maximum. That reasoning is applicable to every indeterminate sentence, and certainly is not a substantial and compelling

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[11] The State submits that a trial court which imposed an exceptional downward sentence on the sole basis that a defendant's term of confinement was subject to the indeterminate sentence review board would be an abuse of its discretion. Certainly, it would be contrary to the Legislature's intent that the typical offender is sentenced to a range calculated by their past criminal history and the seriousness of the crime committed. RCW 9.94A.510. The Legislature accounted for the sentencing of sex offenders when it specified that the minimum term of an indeterminate sentence must be within the standard range unless the court imposes an exceptional sentence. RCW 9.94A.507(c)(i); *see also State v. Alexander*, 125 Wn.2d 717, 725, 888 P.2d 1169 (1995) (a factor cannot support an exceptional sentence if the legislature necessarily considered that factor when establishing the standard range).

reason to depart from the standard range that the Legislature has specified for the seriousness level of the crime and the offender score of the perpetrator.

Jamie-McDougall implies that age alone is a per se mitigating factor in his case, which is counter to the Washington Supreme Court's proclamation in *O'Dell*. Jamie-McDougall fails to demonstrate prejudice.

D. JAMIE-MCDOUGALL'S CHALLENGE TO HIS COMMUNITY CUSTODY CONDITION REQUIRING HIM TO SUBMIT TO URINALYSIS AND BREATHALYZER TESTING FAILS.

Jamie-McDougall next contends that the trial court imposed, without authorization, a community custody condition requiring him submit to urinalysis or breathalyzer testing. This challenge fails for multiple reasons.

1. This challenge is not preserved.

First, Jamie-McDougall did not preserve a challenge to this condition. RAP 2.5; *see State v. Peters*, 10 Wn. App. 2d 574, 581-83, 455 P.3d 141 (2019). Some challenges to sentencing conditions must be asserted at the trial court to be eligible for review. 10 Wn. App. 2d at 581 (citing *State v. Casimiro*, 8 Wn. App. 2d 245, 249, 438 P.3d 137 (2019)). "*Blazina* made clear that the exception for illegal or erroneous sentences does not apply when the challenged sentence term, had it been objected to in the trial court, was one that depends on a case-by-case analysis." *Id*. at

582 (citing *State v. Blazina*, 182 Wn.2d 872, 834, 344 P.3d 680 (2015)). "To summarize, for an objection to a community custody condition to be entitled to review for the first time on appeal, it must (1) be manifest constitutional error or a sentencing condition that, as *Blazina* explains, is 'illegal or erroneous' as a matter of law, and (2) it must be ripe." *Id.* at 583.

Among discretionary conditions that the court is authorized to impose are orders that an offender "[c]omply with any crime-related prohibitions." RCW 9.94A.703(3)(f). "Crime-related prohibitions" are orders "prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). They can include prohibitions that address some factor of the crime that might cause the convicted person to reoffend. *State v. Nguyen*, 191 Wn.2d 671, 684-85, 425 P.3d 847 (2018). The State need not establish that the conduct being prohibited directly caused the crime of conviction or will necessarily prevent the convict from reoffending. *Id*. at 685. Review is for abuse of discretion. *State v. Padilla*, 190 Wn.2d 672, 677, 416 P.3d 712 (2018). In other words, review of whether a condition is crime-related probably always requires a case-by-case analysis. Certainly, a challenge of this nature, of whether the record provides support for drug or alcohol testing, requires an analysis of the facts of the case. Defense counsel did not object to this condition, so the issue is not preserved. RP 259-60. The State

had no reason to further develop the record. *See also* RP 251-53. This Court should decline review of this issue under *Peters*.

2. *Because the trial court appropriately ordered Jamie-McDougall not to consume alcohol or controlled substances, it appropriately ordered this monitoring condition.*

If this Court chooses to address Jamie-McDougall's unpreserved issue, it nevertheless fails on the merits. The community custody condition at issue requires that Jamie-McDougall submit to urinalysis or breathalyzer testing as a means of verifying compliance with the community custody conditions. Quite simply, trial courts are authorized to impose community custody conditions that monitor an offender's compliance with other valid conditions. *State v. Olsen*, 189 Wn.2d 118, 130, 399 P.3d 1141 (2017). Jamie-McDougall did not assign error to the court's imposition of the mandatory conditions 3 and 4, that he not consume or possess controlled substances. CP 169. Nor did he assign error to the court's imposition of the Department of Corrections-requested conditions 10 and 11, that he not possess or consume controlled substances or possess or consume alcohol. CP 169. He did not provide any argument or authority claiming those

conditions are invalid.[12] Urinalysis and breathalyzer tests obviously are tools intended to monitor compliance with prohibitions on alcohol or controlled substances. Because the court is authorized to impose conditions that monitor compliance with other valid conditions, this claim fails.

3. The record demonstrates alcohol and controlled substance use is reasonably related to the crime.

Finally, the record does provide a basis for drug and alcohol consumption monitoring because Jamie-McDougall's alcohol and drug use are crime-related. "'Directly related' includes conditions that are 'reasonably related' to the crime." *State v. Irwin*, 191 Wn. App. 644, 656, 364 P.3d 830 (2015) (quoting *State v. Kinzle*, 181 Wn. App. 774, 785, 326 P.3d 870 (2014)). A causal relationship is not required. *State v. Letourneau*, 100 Wn. App. 424, 431-32, 997 P.2d 436 (2000). In the presentence investigation report, Jamie-McDougall disclosed that he began drinking at age 12, began using marijuana at age 8, "used every drug except heroin throughout the years, with methamphetamine being his primary drug of choice." CP 114. He had prior criminal charges related to alcohol and controlled substances. CP 113. Jamie-McDougall thought his "self

[12] The court shall order an offender to refrain from possessing or consuming controlled substances, unless it chooses to waive this condition. RCW 9.94A.703(2)(c). The court also may order an offender to refrain from possessing or consuming alcohol, whether or not the prohibition is crime-related. RCW 9.94A.703(3)(e).

medication" with controlled substances and alcohol was related to depression. CP 115; RP 256-57. The trial court was free to infer that drugs or alcohol played a role in Jamie-McDougall's multiple decisions to rape his daughter, given his daily use of those substances.

Further, Jamie-McDougall admitted that he was high on drugs throughout the entire trial. CP 111, 114. Counsel filed and argued a motion for a new trial under this basis. RP 245-46; CP 119-21. The court denied that request. RP 249-53. Jamie-McDougall complains only that the trial court did not make a chemical dependency finding. Even if RCW 9.94A.703 did not mandate the related conditions, the record provides a factual basis for the court's imposition of alcohol and controlled substance restrictions as a crime-related measure.

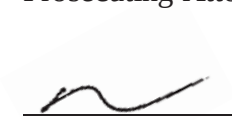
V. CONCLUSION

In the light most favorable to the State, the evidence was sufficient to establish Jamie-McDougall's conviction for child rape based on an act of anal rape. His double jeopardy contention is unpreserved, inadequately argued, and without merit. Counsel was not ineffective for failing to argue

for an exceptional sentence downward. His challenge to his community custody conditions fail. The State respectfully requests this Court affirm.

Dated this 20 day of August, 2020.

LAWRENCE H. HASKELL
Prosecuting Attorney



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

STATE OF WASHINGTON, Respondent, v. CARLOS JAIME-MCDOUGAL, Appellant.	NO. 36764-9-III CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on August 20, 2020, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Skylar Brett
skylarbrettlawoffice@gmail.com

8/20/2020	Spokane, WA	
(Date)	**(Place)**	**(Signature)**

SPOKANE COUNTY PROSECUTOR

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