

83617-5

NO. 37089-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

TYRONE D. FORD,

Appellant.

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STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

FILED  
COURT OF APPEALS  
DIVISION II

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

The Honorable John Wulle, Judge

APPELLANT'S OPENING BRIEF

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P.A. 7-7-08

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- **TAKE ANTABUSE IF DIRECTED TO DO SO BY A COMMUNITY CORRECTIONS OFFICER;**
- **NO POSSESSION OF PARAPHERNALIA FOR THE USE OR INGESTION OF LEGALLY PRESCRIBED OR ILLEGAL CONTROLLED SUBSTANCES; AND**
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**A. ASSIGNMENTS OF ERROR**

- 1. TRIAL COURT ERRED WHEN IT TOLD THE JURY THAT IT HAD TO REACH A VERDICT ON SECOND DEGREE RAPE OF A CHILD.**
- 2. THE TRIAL COURT ERRED WHEN, WITH THE JURY PRESENT, IT REMANDED TYRONE FORD INTO CUSTODY.**
- 3. THE TRIAL COURT ERRED WHEN IT ENTERED THE FOLLOWING CONDITIONS OF COMMUNITY CUSTODY:**
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  - NO BEING IN PLACES WHERE ALCOHOLIC BEVERAGES ARE THE PRIMARY SALE ITEM;**
  - TAKE ANTABUSE IF DIRECTED TO DO SO BY A COMMUNITY CORRECTIONS OFFICER;**
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- 5. THE TRIAL COURT ERRED WHEN IT DENIED TYRONE FORD COUNSEL ON A PRE-SENTENCING MOTION TO WITHDRAW HIS GUILTY PLEA. WHILE THE COURT DID APPOINT COUNSEL TO REPRESENT MR. FORD, THE COUNSEL WAS SO INADEQUATE AS TO FALL**

**BELOW THE MOST BASIC CONSTITUTIONAL  
REQUIREMENT OF AN ADEQUATE COUNSEL.**

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

- 1. A TRIAL COURT SHALL NOT COERCE A JURY INTO REACHING A VERDICT. DESPITE WRITTEN INSTRUCTIONS THAT IT DID NOT NEED TO RETURN A VERDICT ON BOTH COUNTS, WHEN THE JURY RETURNED WITH A VERDICT ON A SINGLE COUNT, THE COURT INSISTED THAT THE JURY REACH A UNANIMOUS VERDICT ON THE REMAINING COUNT. WAS THIS INAPPROPRIATE COERCION?**
  
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- 3. CONDITIONS OF COMMUNITY CUSTODY CAN ONLY BE IMPOSED WHEN THEY ARE EITHER AUTHORIZED BY STATUTE OR ARE CRIME-RELATED.**

**A. THERE WAS NO EVIDENCE THAT TYRONE FORD'S OFFENSES WERE ALCOHOL-RELATED. ALTHOUGH MR. FORD CAN BE PROHIBITED FROM CONSUMING ALCOHOL WHILE ON COMMUNITY CUSTODY, THERE IS NO SIMILAR PROHIBITION AGAINST POSSESSION OF ALCOHOL OR BEING IN PLACES WHERE ALCOHOL IS SOLD. AS MR. FORD'S OFFENSES WERE NOT ALCOHOL-RELATED, DID THE TRIAL COURT EXCEED ITS AUTHORITY WHEN IT**

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**B. ARE EITHER OF THESE TERMS  
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## C. STATEMENT OF THE CASE

### (a) Trial testimony.

Thirteen year-old L.A.K.<sup>1</sup> met 22 year-old Tyrone Ford<sup>2</sup> in late spring 2006. 3ARP.<sup>3</sup> 3ARP 118, 134, 3BRP 333. They were neighbors. 3ARP 123. They lived a block and a half from each other. 3ARP 123, 3BRP 239. L.A.K. lived with her mother, Teresa Horine. 3ARP 117-18. Mr. Ford lived with his long-term girlfriend, Lisa Castro, and their infant daughter. 3BRP 238.

Shortly after L.A.K. and Mr. Ford met, L.A.K. went to stay with her aunt in Washougal for about a month. 3ARP 138. L.A.K. was back at home August 8. 3ARP 137. After L.A.K. returned, she and Mr. Ford talked to each other over the phone with some

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<sup>1</sup> The initials of the victim are used in the brief for her privacy. In the verbatim record, L.A.K is referred to by name. Her date of birth is 09/10/92. 3ARP 118.

<sup>2</sup> DOB 03/09/84

<sup>3</sup> There are multiple volumes of verbatim as follows:

"1RP" -- March 16, 2007 -- omnibus hearing

"2RP" -- August 27, 2007 -- trial

"3ARP" -- August 28, 2007 -- trial

"3BRP" -- August 28, 2007 -- trial

"4RP" -- August 29, 2007 -- trial including verdict

"5RP" -- October 31, 2007 -- post-trial motion for new counsel

"6RP" -- November 27, 2007 -- sentencing hearing

"7RP" -- November 30, 2007 -- continued sentencing hearing

"8/27/07 RP" -- August 27, 2007 -- voir dire and opening statement

(ordered in a  
supplemental statement of arrangements)

frequency. 3BRP 305-13. L.A.K.<sup>4</sup> called Mr. Ford. Id. Mr. Ford<sup>5</sup> called L.A.K. Id.

L.A.K. testified that sometime between August 8 and before her 14<sup>th</sup> birthday on September 10, she went to Mr. Ford's home. After smoking weed<sup>6</sup> together, L.A.K. and Mr. Ford had consensual sex outside on the side of Mr. Ford's home. 3ARP 137-39.

L.A.K. further testified that she had a second, non-consensual, sexual encounter with Mr. Ford during the early morning hours of September 17. L.A.K.'s family and friends celebrated her 14<sup>th</sup> birthday on September 16. 3ARP 131. During an early morning call with L.A.K., Mr. Ford invited L.A.K. over to get her birthday present. 3ARP 134, 140. L.A.K. left her home and walked alone to Mr. Ford's home. 3ARP 140. When she arrived, Mr. Ford asked L.A.K. if she wanted to go into the bedroom. 3ARP 140. She said, "No". 3ARP 140. Mr. Ford picked L.A.K. up and was carrying her to his bedroom when he tripped and fell behind a couch. 3ARP 140-45. Mr. Ford grabbed L.A.K.'s arms and held them over her head while removing his pants and her clothing. Id. Despite L.A.K.'s loudly yelling, "No," repeatedly, Mr. Ford had sex

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<sup>4</sup> L.A.K.'s phone number is 892-0863. 3ARP 165.

<sup>5</sup> Mr. Ford's phone number is 213-4867. 3BRP 254.

<sup>6</sup> "Weed" is slang for marijuana.

with L.A.K. Id. After the act was complete, he threw a soda can at her and told her to get out. 3ARP 154. L.A.K. walked home.

The first person L.A.K. told about the sexual contacts was her best friend, Rachel Gray. 2RP 75, 3ARP 155. There were two versions of how the conversation happened. L.A.K. testified that she told Rachel about the sexual contacts over the phone. 3ARP 155. Rachel testified that she and L.A.K. were lying in L.A.K.'s bed when L.A.K. told her what happened. 2RP 82-83. L.A.K. told Rachel to tell her mother, Teresa Horine, about the sexual encounters. 2RP 87. Rachel did tell L.A.K.'s mother. Id. L.A.K. ran away in November 2006. 2RP 36-37. When she was picked up as a runaway, L.A.K. told the police about the sexual encounters. 2RP 39.

At trial, Mr. Ford testified that neither sexual encounter occurred. 3B 286. Lisa Castro, Mr. Ford's girlfriend, testified that she was always home in the late evening and early morning hours caring for their infant daughter. 3BRP 241-49. Had L.A.K. been in the living room screaming "no" she would have heard it. 3BRP 244. Mr. Ford did acknowledge talking to L.A.K over the phone with some frequency. 3BRP 305.

**(b) Procedural History.<sup>7</sup>**

**(i) The Information and Amended Information.**

Mr. Ford was tried to a jury on August 27, 28, and 29, 2007. 2RP, 3ARP, 3BRP, 8/27/07 RP. The original information charged Mr. Ford with one count of second degree rape of a child (count I)<sup>8</sup> and one count of third degree rape of a child<sup>9</sup> (count II). CP 1. The different degrees reflected that L.A.K. was 13 years-old during the first encounter and 14 years-old during the second encounter. CP 1; 3ARP 118. The information was amended over Mr. Ford's objection after L.A.K. testified to conform the incident dates to her testimony. 3ARP 175-77.

**(ii) Jury Instructions.**

Without objection, even though there were only two separately charged sexual encounters testified to as specific

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<sup>7</sup> More procedural history than necessary is provided in Appellant's Brief. This is done on the assumption that Mr. Ford will file a statement of additional grounds for review (SAG) on issues addressed in the procedural history.

<sup>8</sup> RCW 9A.44.076, Rape of a child in the second degree . (1) A person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim. (2) Rape of a child in the second degree is a class A felony.

<sup>9</sup> RCW 9A.079, Rape of a child in the third degree. (1) A person is guilty of rape of a child in the third degree when the person has sexual intercourse with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim. (2) Rape of a child in the third degree is a class C felony.

separate incidents, the court's instructions to the jury included a *Petrich*<sup>10</sup> instruction. CP 34 (instruction 12)

**(iii) Deliberations.**

The jury retired to deliberate on August 28, at 7:48 p.m. (See supplemental designation of clerk's papers, sub. number 45, clerk's trial minutes). The jury returned with a verdict on August 29 at 2:01 p.m. 6RP 433. The jury had filled out the verdict form on count II, third degree rape of a child, with the word "guilty" and left the verdict form on count I, second degree rape of a child, blank. 4RP 390. After talking to counsel in an unrecorded sidebar, Judge Wulle announced that it was sending the jury back to the jury room because the verdict was completely blank and, "[I]t must be filled in." 4RP 390.

Before the jury returned to deliberated for a second time – and in the jury's presence - the court announced that Mr. Ford was "remanded into custody at this time." 4RP 390. Shortly thereafter,

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<sup>10</sup> *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984). In *Petrich*, the court held that in cases in which the evidence indicates that several distinct criminal acts have been committed, but the defendant is charged with only one count of criminal conduct, the constitutional requirement of jury unanimity is assured by either: (1) requiring the prosecution to elect the act upon which it will rely for conviction; or (2) instructing the jury that all 12 jurors must agree that the same criminal act has been proved beyond a reasonable doubt.

the jury returned with a guilty verdict on count I. 4RP 391-92; CP 36, 37. The jury was polled and said that it had reached a unanimous verdict. 4RP RP 392.

**(iv) Counsel's Failure to Bring Mr. Ford's Motion for a New Trial.**

Prior to sentencing, Mr. Ford sent a letter to the trial court complaining about the services of his trial attorney, Thomas Ladouceur. CP 40. Mr. Ford asked the court for new counsel and an opportunity to motion for a new trial. CP 40. At the next hearing, the court granted Mr. Ford's request and appointed attorney George Brintnall to represent him even though Mr. Brintnall astutely<sup>11</sup> expressed a concern about the appointment because he was not good at post-trial motions. 5RP 398-99.

Rather than bring a motion for a new trial on behalf of Mr. Ford, attorney Brintnall sent a letter to the court explaining that he wasn't bringing the motion for a new trial because he did not have any credible evidence to support Mr. Ford's claim that he was told

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<sup>11</sup> See Issue 5

of a plea offer that he would have taken only after the trial. CP 42-44. After all, the trial attorney, Mr. Ladouceur told attorney Brintnall that he had told Mr. Ford about the offer prior to trial. CP 42-44.

At sentencing, attorney Brintnall explained his refusal to bring the motion for a new trial based on the lack of communicating the plea offer even though Mr. Ford insisted that he bring the motion. 6RP 430-32. In attorney Brintnall's opinion, who to believe on the issue, Mr. Ladouceur or Mr. Ford, was "a factual issue he's – he's gonna have to address at the Court of Appeals." 6RP 431. Accordingly, Mr. Ford's motion for a new trial based on ineffective assistance of counsel was never brought. The trial court never made a factual finding on who to believe, Mr. Ladouceur or Mr. Ford.

The notion of the motion was raised again at a continued sentencing hearing. Attorney Brintnall again told the trial court that the claim of ineffective assistance of counsel needed to be heard by the Court of Appeals. 7RP 460-61.

**(v) Sentencing.**

Mr. Ford had no prior adult felonies and only one prior juvenile felony<sup>12</sup> convictions. CP 46, 62. On count I, because second degree rape of a child is subject to RCW 9.94A.712<sup>13</sup>, the court imposed a minimum sentence of 160 months, and a maximum sentence of life. CP 45, 47, 50. On count II, Mr. Ford received a concurrent 34-month sentence. CP 50. The court also imposed life-time community custody on count I. CP 50-51. On count II, the court imposed 26-34 months of community custody but noted on the judgment and sentence that the combined total of time in custody and community custody could not exceed the 60-month statutory maximum for rape of a child in the third degree. CP 51.

The court also imposed certain conditions of community custody to include:

- No possession of alcohol;
- A prohibition against being in places where alcoholic beverages are the primary sale item;

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<sup>12</sup> For possession of stolen property in the first degree, CP 62

<sup>13</sup> RCW 9.94A.712 Sentencing of non-persistent offenders. (1) An offender who is not a persistent offender shall be sentenced under this section if the offender: (a) Is convicted of: (i) Rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion; . . . (3)(a) Upon a finding that the offender is subject to sentencing under this section, the court shall impose a sentence to a maximum term and a minimum term. (b) The maximum term shall consist of the statutory maximum sentence for the offense.

- No possession of paraphernalia for the use or ingestion of legal or illegal controlled substances;
- Take Antabuse if told to do so by a community corrections officer.
- A prohibition against possessing, using, or owning deadly weapons as defined by a community correction officer;

CP 51-54, 61. Mr. Ford objected to the alcohol related conditions as not being crime related. 6RP 450.

Finally, the court signed a life-time no contact order without distinguishing which count it was imposing the order on. CP 49, 66-67.

#### **D. ARGUMENT**

##### **1. THE TRIAL COURT IMPROPERLY COERCED THE JURY INTO RETURNING A VERDICT BY GIVING THE JURY AN INACCURATE ORAL INSTRUCTION THAT IT MUST AGREE ON A VERDICT.**

The trial court coerced the jury into returning a verdict on one of the two charges. Although the written jury instructions told the jury that they need not reach a unanimous verdict, the court orally told jurors just the opposite before sending them back for

further deliberation. In so doing, the trial court violated CrR 6.15 (f) (2) by telling the jury that they must be in agreement to return a

verdict. And in so doing, the trial court denied Tyrone Ford a fair trial.

CrR 6.15 (f) (2) states: "After jury deliberations have begun, the court shall not instruct the jury in such a way as to suggest the need for agreement, or the length of time a jury will be required to deliberate." Here, after the jury had deliberated for hours and returned a verdict on only the second of two counts, the court gave the jury exactly the type of instruction prohibited by CrR 6.15(f)(2) when it told the jury that the verdict form on count 1 "must be filled in." 4RP 390. Although Mr. Ford did not object to the court's oral instruction at the time, he is objecting to it on appeal.

Alleged error can be raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a); *State v. Walsh*, 143 Wn.3d 1, 7, 17 P.3d 591 (2001); *State v. Toliás*, 135 Wn2d 133, 140, 954 P.2d 907 (1998); *McFarland*, 127 Wn.2d, 322, 332-34, 899 P.2d 1251 (1995). Here, Mr. Ford's constitutional right to a jury trial was implicated by the trial court's inaccurate oral instructions given while the jury was deliberating. The error is a manifest error because Mr. Ford was actually prejudiced by the court's misstatement of the law. *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999) (to determine whether the

constitutional error is manifest, the appellate court previews the merits of the claim to see if it has a "likelihood of succeeding"); *McFarland*, 127 Wn.2d at 334 (Without an affirmative showing of actual prejudice, the asserted error is not 'manifest' and thus is not reviewable under RAP 2.5(a)(3)).

**(i) As instructed, the jury's verdict on a single count was an appropriate verdict.**

The jury instructions taken, as they must, as a whole, instructed the jury that it could return a verdict on a single count if it was not unanimous on the other count. Each juror was told that he or she had to decide the case for him or herself. CP 24 (instruction 2). Only if the jury was unanimous, could it return a verdict of guilty or not guilty. CP 29, 31, 35 (instructions 7, 9, and 13). Moreover, the jury did not need to be unanimous on the two acts alleged as specified by instruction 12.

Instruction 12

There are allegations that the defendant committed acts of Rape of a Child in the Second Degree and Rape of a Child in the Third Degree on Separate occasions. To convict the defendant, one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt. You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.

CP 34. Accordingly, it was perfectly appropriate for the jury to find guilty on count II while being divided as to count I and unable to fill out the verdict form with "guilty" or "not guilty". As instructed, "guilty" on the verdict form for count II and nothing written on the verdict form for count I was an appropriately returned verdict.

**(ii) The court erred when it told the jury it must be in agreement on count I.**

After the jury had reached its verdict, it was escorted into the courtroom. 4RP 389. The court asked the presiding juror to rise. The court asked the presiding juror if the jury had reached a unanimous verdict, and the presiding juror said, "Yes." 4RP 390. The two verdict forms were passed to the judge. The following then occurred:

THE COURT: We, the jury, find the defendant, Tyrone Ford, guilty of the crime of Rape of a Child in the Third Degree as charged in Count Two.

(Pause; reviewing documents.) Gentlemen, sidebar.

(Bench conference; not recorded)

THE COURT: I'm sending the jury back to the jury room. Verdict form No. 1 is completely blank. *It must be filled in.*

Please go with Dorothy.

The defendant is remanded into custody at this time.

(Jurors exit courtroom.)

4RP 390.

The court did not even consider the possibility that the jury might be hung on count I. The court did not conduct any inquiry of the jury as to whether they were deadlocked or whether further deliberations would be worthwhile. The court simply instructed the jury that they were required to be unanimous (i.e., that they were required to return a verdict) and sent them back very abruptly. It is the court's responsibility to comply with CrR 6.15 (f) (2) and not to coerce the jury into reaching a verdict.

The court erred in giving this instruction and sending the jury back to the jury room for the following reasons. First, this instruction clearly conflicted with the previous instruction of the court, the basic concluding instruction, which correctly instructed the jury that *if* they return a verdict, such a verdict must be unanimous. CP 35. There is, of course, no requirement that a jury return a verdict. By telling the jury, "It's supposed to be 12-0 on everything," the court misstated the law and told the jury it was *required* to return a verdict. The court made no room for the possibility that the jury was deadlocked on this question.

Second, this instruction violated the clear wording of CrR 6.15 (f) (2), which prohibits the court from instructing the jury, after it has begun its deliberations, from instructing the jury in way which suggests the need for agreement. The Supreme Court has admonished that “[t]he purpose of this rule is to prevent judicial interference in the deliberative process. We have previously held that the jury should not be pressured by the judge into making a decision.” *State v. Boogaard*, 90 Wn.2d 733, 736, 585 P.2d 789 (1978). When this rule is violated, a jury may be coerced into returning a verdict and the defendant denied a fair trial. Such was the case here.

The judge must have been on notice that the jury was having difficulty reaching an agreement on both verdicts. After all, the jury had been sent to deliberate at 7:47 p.m.<sup>14</sup> and did not return a verdict until the next day at 2:01 p.m. 6RP 433. As such, the court knew that the jury's lack of a guilty or not guilty for count I was not simply the product of confusion on how to fill out the form. The court openly speculated that anything was possible - either the jury had forgotten to fill out the verdict form, or they were deadlocked, or they reached a not guilty verdict. 4RP 390-91. The potential for

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<sup>14</sup> See supplemental designation of clerk's papers, sub number 45, clerk's trial minutes.

coercion is far more likely when the minority is very small. As the *Boogaard* court observed:

We have heretofore recognized that the right of jury trial embodies the right to have each juror reach his verdict uninfluenced by factors outside the evidence, the court's proper instructions, and the arguments of counsel; and that an instruction which suggests that a juror who disagrees with the majority should abandon his conscientiously held opinion for the sake of reaching a verdict invades that right, however subtly the suggestion may be expressed.

*Boogaard* at 736. In this case, there very likely was a minority number of holdouts for not guilty. By 2:09 p.m., the jury was back with a verdict on count 1. 6RP 434. When one puts himself in the shoes of the holdout juror or jurors in this case, the coercion is clear: he or she attempted to answer "not guilty" and was told by the judge, unequivocally, that it must "be 12-0 on everything." What can a holdout juror do in the face of an instruction by the judge that the jury must reach a 12-0 decision? A juror would indisputably have felt that he or she had no choice but to change his or her answer.

**(iii) The scales were tipped when the court remanded Mr. Ford into custody after the jury returned its verdict only on count II.**

The third reason the trial court erred in sending the jury to reach an all or nothing verdict was that it occurred just after the

court inexplicitly remanded Mr. Ford into custody in the jurors' presence.

Every criminal defendant is entitled to a fair trial by an impartial jury. United States Constitution Sixth Amendment and Fourteenth Amendment, Section 1; Washington Constitution Article I, Sections 21 and 22. The right to a fair trial includes the right to the presumption of innocence. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). This constitutionally guaranteed presumption is the bedrock foundation in every criminal trial. *Morissette v. United States*, 342 U.S. 246, 275, 72 S. Ct. 240, 96 L. Ed. 288 (1952). It is the duty of the court to give effect to the presumption by being alert to any factor that could "undermine the fairness of the fact-finding process." *State v. Williams*, 425 US. At 503. This court must determine whether the court's oral instruction affected Mr. Ford's due process right to a fair trial. *State v. Latham*, 100 Wn.2d 59, 66, 667 P.2d 56 (1983) (citing *Smith v. Phillips*, 455 U.S. 209, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1983)). Allegations of violations of the right to an impartial jury and the presumption of innocence are reviewed de novo *State v. Johnson*, 125 Wn. App. 443, 457, 105 P.3d 85 (2005).

After deliberating for hours, and reaching a guilty verdict only on count II, the court suddenly decided that Mr. Ford had to be placed in custody then and there. The jury heard the court's sudden pronouncement. The jury wasn't told why the court was taking that action. A logical inference for the jurors is that the court is agreeing with their single verdict and deciding that the only safe way to continue is with the defendant held in custody. After all, the sudden need to incarcerate Mr. Ford must mean that he is a dangerous man and the jury's verdict had established that. With one verdict form yet to be filled out, with the court's insistence that the verdict be 12 or nothing, and with the court's tacit assurance to the jurors that Mr. Ford needs to be separated from society, it is no wonder that the jury returned with a unanimous guilty verdict on count I in a few short minutes. Whether a particular practice had a negative effect on the judgment of the jurors receives close judicial scrutiny. *State v. Johnson*, 125 Wn. App. 443, 457, 105 P.3d 85 (2005). The likely effects are evaluated based on reason, principle and common human experience. *Williams*, 425 U.S. at 504. Reason, principle, and common human experience tell us that the jury could not have been other than affected by Mr. Ford's sudden incarceration.

**2. COMMUNITY CUSTODY CONDITIONS THAT ARE NOT CRIME-RELATED, OR ARE TOO VAGUE TO BE ENFORCED, MUST BE STRICKEN FROM MR. FORD'S JUDGMENT AND SENTENCE.**

As part of Mr. Ford's sentence, the court imposed community custody and conditions of community custody. Although alcohol was not a factor in Mr. Ford's crimes, the court imposed alcohol-related conditions. Also, the court imposed conditions related to use and possession of drug paraphernalia and deadly weapons that is too vague to be enforced. As such, these conditions should be stricken from Mr. Ford's judgment and sentence.

Community custody must be imposed for sex offense convictions. RCW 9.94A.712, .715. Both RCW 9.94A.712 and .715 specify that unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4) and (5) as follows:

- (4) (a) The offender shall report to and be available for contact with the assigned community corrections officer as directed;
- (b) The offender shall work at department-approved education, employment, or community restitution, or any combination thereof;
- (c) The offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions;

(d) The offender shall pay supervision fees as determined by the department; and

(e) The residence location and living arrangements shall be subject to the prior approval of the department during the period of community placement.

(5)(a) The offender shall remain within, or outside of, a specified geographical boundary;

(b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;

(c) The offender shall participate in crime-related treatment or counseling services;

(d) The offender shall not consume alcohol; or

(e) The offender shall comply with any crime-related prohibitions.

In addition, the court can also order a defendant to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the defendant's risk of re-offending, or the safety of the community, and to prohibit the defendant from living in a community protection zone. RCW 9.94A.712(6)(a)(i)(ii). Several of these conditions are reiterated in RCW 9.94A.720(b).

No causal link need be established between the condition imposed and the crime committed so long as the condition relates

to the circumstances of the crime. *State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). 'Circumstances' is defined as 'an accompanying or accessory fact.' Black's Law Dictionary 259 (8<sup>th</sup> ed. 2004).

At sentencing, the court imposed certain reasonable and authorized conditions of community custody on Mr. Ford. However, the court also imposed the following objectionable conditions that are neither authorized by statute nor crime-related.

**(i) No possession of alcohol or cannot be in a place where alcoholic beverages are the primary sale item.<sup>15</sup>**

There was no mention of alcohol at Mr. Ford's trial or sentencing. Yet, the trial court held, as a condition of his community custody, that he could neither possess alcohol or be in a place, such as a bar, where alcohol is the primary sale item.<sup>16</sup> Mr. Ford did object to these alcohol-related conditions at sentencing. 6RP 443. Had Mr. Ford not objected to them, objections to community custody conditions can still be raised for the first time on appeal. *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003); *State v. Julian*, 102 Wn. App. 296, 304, 9 P.3d 851 (2000),

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<sup>15</sup> See Additional Conditions of Sentence, CP 61.

<sup>16</sup> Mr. Ford is aware that the court can – and did in his case – order that he not consume alcohol while on supervision. See RCW 9.94A.700(5)(d).

*review denied*, 143 Wn.2d 1003 (2001) (“sentences imposed without statutory authority can be addressed for the first time on appeal”). Imposition of crime-related prohibitions are reviewed for an abuse of discretion and will only be reversed if the decision is manifestly unreasonable or based on untenable grounds. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

Here, there is no evidence that alcohol possession or consumption contributed to Mr. Ford’s crimes. Judge Wulle articulated that he felt justified in imposing the no alcohol prohibition because he learned when he was an assistant attorney general that people who use “intoxicating substances, if they can’t use one, they use another.” 6RP 450. Judge Wulle’s conclusion is manifestly unreasonable. If an alcohol drinker doesn’t have a glass of wine at the ready, it does not follow that the drinker will use marijuana, cocaine, or heroin if it is offered as a substitute “intoxicating substance.” As such, the condition that Mr. Ford not possess alcohol or be in a place where it is a primary sale item is erroneous and should be stricken. The trial court abused its discretion when imposing those two conditions.

**(ii) Take Antabuse if directed to do so by a community corrections officer.<sup>17</sup>**

Antabuse can only be prescribed by a physician. A community corrections officer, unless he or she is also a physician, should not be ordering anyone to take a substance that must be prescribed by and controlled by a physician.

**(iii) No possession of paraphernalia for the use or ingestion of prescribed controlled substances.<sup>18</sup>**

Per RCW 9.94A.700(4)(c), the limitation on possession or consumption of controlled substances while on community custody is that the substance must be possessed or consumed pursuant to a lawfully issued prescription. The fixing of legal punishments for criminal offenses is a legislative function. *State v. Ammons*, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986). A trial court may only impose a sentence which is authorized by statute. *State v. Barnett*, 139 Wn.2d 462, 987 P.2d 626 (1999); *In re Personal Restraint Petition of Carle*, 93 Wn.2d 31, 604 P.2d 1293 (1980). Here, the trial court exceeded its legal authority when it imposed a community custody condition beyond the statutory authority.

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<sup>17</sup> See Additional Conditions of Sentence, CP 61.

<sup>18</sup> See community custody conditions at CP 52.

Many prescription medications are controlled substances. Under the trial court's order, and to augment the argument in section (iv) below, Mr. Ford can apparently use lawfully prescribed medication if it is a controlled substance. But the manner in which he ingests the medication is oddly limited to no use of "paraphernalia" to do so. For example, under the court's conditions, Mr. Ford would be prohibited from using an inhaler to control asthma, or syringes to medicate for diabetes. Such limitations could endanger Mr. Ford's health. Accordingly, on remand, this condition should at the very least be modified to allow possession and use of paraphernalia for the ingestion and processing of lawfully prescribed controlled substances.

**(iv) No possession or use of paraphernalia that can be used for the ingestion or processing of controlled substances.<sup>19</sup>**

Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, "a statute is void for vagueness if its terms are 'so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.'" *State v. Worrell*, 111 Wn.2d 537, 540, 761 P.2d 56 (1988) (quoting *Myrick v. Board of Pierce Cy. Comm'rs*, 102 Wn.2d

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<sup>19</sup> See community custody conditions CP 52.

698, 707, 677 P.2d 140 (1984)). This rule applies equally to conditions of community custody which have the effect of a criminal statute in that their violation can result in a new term of incarceration. *State v. Simpson*, 136 Wn. App. 812, 150 P.3d 1167 (2007).

As the Washington Supreme Court explained in *State v. Aver*, 109 Wn.2d 303, 306, 745 P.2d 479 (1987), the test for vagueness rests on two key requirements: adequate notice to citizens and adequate standards to prevent arbitrary enforcement. In addition, there are two types of vagueness challenges: (1) facial challenges, and (2) challenges as applied in a particular case. In *Aver*, the court explained the former challenge as follows:

In a constitutional challenge a statute is presumed constitutional unless its unconstitutionality appears beyond a reasonable doubt. *Seattle v. Shepherd*, 93 Wash.2d 861, 865, 613 P.2d 1158 (1980); *Maciolek*, 101 Wash.2d at 263, 676 P.2d 996. In a facial challenge, as here, we look to the face of the enactment to determine whether any conviction based thereon could be upheld. *Shepherd*, 93 Wash.2d at 865, 613 P.2d 1158. A statute is not facially vague if it is susceptible to a constitutional interpretation. *State v. Miller*, 103 Wash.2d 792, 794, 698 P.2d 554 (1985). The burden of proving impermissible vagueness is on the party challenging the statute's constitutionality. *Shepherd*, 93 Wash.2d at 865, 613 P.2d 1158. Impossible standards of specificity are not required. *Hi-Starr, Inc. v. Liquor Control Bd.*, 106 Wash.2d 455, 465, 722 P.2d 808 (1986).

*Aver*, 109 Wn.2d at 306-07.

Under our facts, the following community custody condition the court imposed in this case violates due process because it is void for vagueness.

Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, police scanners, and hand held electronic scheduling or data storage devices.

CP 52.

In this provision the phrase "any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances" is hopelessly vague. Literally, any item from a toothpick up to a dump truck could qualify under this phrase. The following gives a few examples. Any type of telephone can and are used to facilitate the transfer of drugs. Is Mr. Ford prohibited from using any type of telephone? Any type of motor vehicle can be used for the transfer of drugs. Is the Mr. Ford prohibited from using motor vehicles? Blenders can be used to pulverize pseudoephedrine tablets as the first step in manufacturing methamphetamine. Is Mr. Ford prohibited from using a blender? Matches are often used as a source of phosphorous in the

manufacture of methamphetamine. Is Mr. Ford prohibited from using or possessing matches? Cigarette paper is sometimes used to smoke marijuana. Is Mr. Ford prohibited from possessing cigarette paper? Baggies are often used to contain controlled substances. Is Mr. Ford now forced to only use waxed paper to wrap his sandwiches? Except waxed paper can also be used to make bindles, as can glossy pages out of magazines. Perhaps Mr. Ford will be in violation if he possesses waxed paper or magazines with glossy pages. The list is endless and the reason it is endless is because the phrase "any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances" is so vague as to leave Mr. Ford open to violation at the whim of his probation officer. Consequently, this condition is void and violates the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

**(v) No possession, use of, or control of any deadly weapon as defined by a community corrections officer.<sup>20</sup>**

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<sup>20</sup> See community custody conditions at CP 53.

While RCW 9.41.040 does make it illegal for Mr. Ford, as a convicted felon, to possess, use, or own a firearm, there is no law in Washington prohibiting him from possessing, using, or owning any deadly weapon. Because the deadly weapon prohibition exceeds the court's authority, it should be stricken.

The prohibition against possessing, using, or owning a deadly weapon is also unconstitutionally vague as applied. See argument above under (2)(iv). The due process vagueness doctrine serves two important purposes: first, to provide citizens with fair warning of what conduct they must avoid; and second, to protect them from arbitrary, ad hoc, or discriminatory law enforcement. *State v. Sansone*, 127 Wn. App. 630, 638-39, 111 P.3d 1251 (2005); *State v. Halstien*, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). However, a statute or condition is presumed to be constitutional unless the party challenging it proves that it is unconstitutional beyond a reasonable doubt. *Sansone*, 127 Wn. App. at 639. The constitution does not require impossible standards of specificity or mathematical certainty because some degree of vagueness is inherent in the use of our language. *State v. Riles*, 135 Wn. 2d 326, 348, 957 P.2d 655 (1998).

*Sansone* is illustrative. *Sansone* had a condition of community placement prohibiting him from possessing or perusing pornographic material unless given prior permission from his sexual deviancy treatment provider or community corrections officer. During an office visit, the community corrections officer saw that *Sansone* was in possession of photographs she felt were inappropriate so she filed a probation violation. The court found that *Sansone* had willfully violated his community placement condition. On appeal, *Sansone* challenged the sentencing as being unconstitutionally vague in violation of his due process rights. The court agreed that the term "pornographic" was unconstitutionally vague especially as *Sansone* had to show the material to the probation officer just to get a determination if the material was pornographic.

Mr. Ford is prohibited from possessing, using, or owning deadly weapons. "Deadly weapon" is defined by statute at RCW 9.94A.602:

For purposes of this section, a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy club, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any

other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

This definition does not make the term "deadly weapon" any less vague as it applies to Mr. Ford possessing, using, or owning deadly weapons. Can he possess, use, or own a kitchen knife, a tire iron, an ice pick, a screwdriver, or any other common household item? Or is he only in violation if he uses any of the above items in a manner likely to produce death? An ordinary person cannot tell what conduct is prohibited, thus, leaving the way for arbitrary enforcement. The possessing, using, or owning deadly weapons prohibition condition is simply too vague and must be stricken

**3. THIS COURT'S REFUSAL TO ADDRESS THE VAGUENESS ARGUMENTS AS ABOVE UNDER (2)(iv) AND (2)(v) AS NOT RIPE WILL VIOLATE MR. FORD'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, AS WELL AS MR. FORD'S RIGHT TO EFFECTIVE APPELLATE REVIEW UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22.**

In a recent decision this court ruled that constitutional arguments such as these are not ripe for decision given the fact that the State had not sought to sanction the defendant for violation of any of the conditions Mr. Ford herein claims are improper. See

*State v. Motter*, 139 Wn. App. 797, 162 P.3d 1190 (2007). In *Motter*, a defendant convicted of first degree burglary appealed his sentence, arguing that the trial court imposed a number of community custody conditions that violated certain constitutional rights and which were not authorized by the legislature. One of these conditions prohibited the defendant from possessing “drug paraphernalia” which the court said included such items as cell phones and data recording devices. This court refused to address this condition on the basis that the issue was not ripe for decision.

This court held:

Moreover, *Motter*’s challenge is not ripe. In *State v. Massey*, 81 Wn. App. 198, 200, 913 P.2d 424 (1996), the defendant challenged a condition that he submit to searches. This court held that the judicial review was premature until the defendant had been subjected to a search he thought unreasonable. And in *State v. Langland*, 42 Wn. App. 287, 292-93, 711 P.2d 1039 (1985), we held that the question of a law’s constitutionality is not ripe for review unless the challenger was harmed by the law’s alleged error. Here, *Motter* claims that the court order could prohibit his possession of innocuous items. But *Motter* has not been harmed by this potential for error and this issue therefore is not ripe for our review. It is not reasonable to require a trial court to list every item that may possibly be misused to ingest or process controlled substances, items ranging from pop cans to coffee filters. Thus, we can review *Motter*’s challenge only in context of an allegedly harmful application of this community custody condition. This argument is not properly before this court and we will not address it.

*Motter*, 139 Wn. App. at 804.

This decision, while appropriate at the time of *Massey* and *Langland*, is inappropriate now, and that by applying it in *Motter* and applying it under our facts, this court violates Mr. Ford's right to procedural due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment by denying Mr. Ford appellate review as guaranteed under Washington Constitution, Article 1, § 22. The following presents this argument.

A criminal defendant does not have a federal constitutional due process right to either post-conviction motions or to appeal. *Rheuark v. Shaw*, 628 F.2d 297, 302 (5th Cir. 1980), *cert. denied*, 450 U.S. 931, 101 S.Ct. 1392, 67 L.Ed.2d 365 (1981). However, once the State acts to create those rights by constitution, statute or court rule, the protections afforded under the due process clauses found in Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, have full effect. *In re Frampton*, 45 Wn.App. 554, 726 P.2d 486 (1986). For example, once the State creates the right to appeal a criminal conviction, in order to comport with due process, the State has the duty to provide all portions of the record necessary to prosecute the appeal

at State expense. *State v. Rutherford*, 63 Wn.2d 949, 389 P.2d 895 (1964). The State also has the duty to provide appointed counsel to indigent appellants. *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210 (1987).

In Washington a criminal defendant has the right to one appeal in a criminal case under both RAP 2.2 and Washington Constitution, Article 1, § 22. *State v. French*, 157 Wn.2d 593, 141 P.3d 54 (2006). Thus, this right includes the protections of procedural due process. At a minimum, procedural due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment requires notice and the opportunity to be heard before a competent tribunal. *In re Messmer*, 52 Wn.2d 510, 326 P.2d 1004 (1958). In the *Messmer* decision, the Washington State Supreme Court provided the following definition for procedural due process:

We have decided that the elements of the constitutional guaranty of due process in its procedural aspect are notice and an opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case; also to have the assistance of counsel, if desired, and a reasonable time for preparation for trial.

*In re Messmer*, 52 Wn.2d at 514 (quoting *In re Petrie*, 40 Wn.2d 809, 812, 246 P.2d 465 (1952)).

In *Massey* and *Langland* the defendant's procedural due process right "to be heard or defend before a competent tribunal" was not violated even though the court found the defendant's constitutional challenge to certain probation conditions was not ripe. The reason is that in these cases the defendants had the right to contest the constitutionality of those conditions before the court in the future if the Department of Corrections were to seek to sanction the defendant for failure to comply with conditions the defendant felt were unconstitutional. The problem with the decision in *Motter*, and the problem in this case is that probation violation claims are no longer adjudicated in court. Rather, they are adjudicated before a Department of Corrections hearing officer who only has the authority to determine (1) what the conditions were, (2) whether or not DOC has factually proven a violation of those conditions, and (3) what the appropriate sanction should be if the violation was proven.

Under WAC 137-104-050 the Department of Corrections has adopted procedures whereby defendants accused of community custody violations are tried before a DOC hearing officer on the

claims of violation, not before a court. The first two sections of this code section provide as follows:

(1) Offenders accused of violating any of the conditions or requirements of community custody will be entitled to a hearing, prior to the imposition of sanctions by the department.

(2) The hearing shall be conducted by a hearing officer in the department's hearing unit, and shall be considered as an offender disciplinary proceeding and shall not be subject to chapter 34.05 RCW, the Administrative Procedure Act.

WAC 137-104-050.

There is no provision under this administrative code, nor under any of the other sections of WAC 137-104 to allow the defendant to challenge the constitutionality of community custody conditions that the court has imposed. In addition, while this administrative code section does grant the right to appeal, it does not grant the defendant the right at the appellate level to challenge the constitutionality of the community custody conditions imposed by the court. This section, WAC 137-104-080, states as follows:

(1) The offender may appeal the decision of the hearing officer within seven calendar days to the appeals panel. The request for review should be submitted in writing and list specific concerns.

(2) The sanction shall be reversed or modified if a majority of the panel finds that the sanction was not reasonably related to the: (a) Crime of conviction; (b) Violation committed; (c) Offender's risk of reoffending; or (d) Safety of the community.

(3) The appeals panel will also examine evidence presented at the hearing and reverse any finding of a violation based solely on unconfirmed or unconfirmable allegations.

WAC 137-104-080.

Under WAC 137-104-080 and the procedures by which community custody violations are no longer adjudicated in court, the effect of the decision in *Motter* is to deny a defendant procedural due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment by refusing to hear constitutional challenges to community custody provisions at the direct appeal level (not ripe), and then refuse to hear constitutional challenges at the violation level under WAC 137-104 (no authority to hear the claim). Thus, to comport with minimum due process, this court should find that the defendant's constitutional challenges to community custody conditions may be heard as part of a direct appeal from the imposition of the sentence.

**4. THE LIFETIME NO CONTACT ORDER IMPROPERLY EXCEEDED THE STATUTORY MAXIMUM OF FIVE YEARS ON MR. FORD'S THIRD DEGREE RAPE OF A CHILD CONVICTION.**

As a condition of Mr. Ford's sentence, the trial court imposed a lifetime harassment no-contact order with L.A.K. CP 66-67. While a lifetime condition of sentence may be appropriate for class

A felonies with a statutory maximum of life, no contact orders cannot exceed the statutory maximum for the underlying offense. *State v. Armendariz*, 160 Wn.2d 106, 119-20, 156 P.3d 201 (2007). Mr. Ford was convicted of second degree rape of a child, a class A felony, and third degree rape of a child, a class C felony. RCW 9A.44.076, .079. The no contact order failed to specify which charge or charges it applied to. CP 66-67. Without this distinction, the order seemingly applies to all of the charges even though it is error to enter it on the third degree child rape. Mr. Ford's case must be remanded for clarification of his judgment and sentence. *State v. Taylor*, 111 Wn. App. 519, 527, 45 P.3d 1112 (2002), *review denied*, 148 Wn.2d 1005 (2003).

**5. THE COMPLETE AND UTTER FAILURE BY COUNSEL TO PURSUE TYRONE FORD'S MOTION FOR A NEW TRIAL DEPRIVED MR. FORD OF HIS RIGHT TO COUNSEL.**

After Mr. Ford was convicted by a jury, the court appointed attorney George Brintnall to pursue a motion for a new trial on behalf of Mr. Ford. But attorney Brintnall did nothing toward filing the motion. Instead, he simply wallowed in indecisiveness because to bring the motion under Mr. Ford's theory, he would have had to challenge the veracity of a fellow attorney. Unable or unwilling to

do this, attorney Brintnall erroneously argued that it was this Court's duty to make that credibility call. It is not within this Court's purview to make that call. But this court can, and should, find that attorney Brintnall's erroneous conclusion absolutely denied Mr. Ford constitutionally guaranteed counsel under the lowest standard possible.

While an ineffective assistance of counsel claim usually requires a showing of prejudice, *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed 2d 674 (1984), the Supreme Court has "carved out certain exceptions to the general *Strickland* rule, and hold that in limited situations the defendant need not show prejudice, as required under *Strickland*." *Young v. Runnels*, 435 F.3d 1038, 1042 (9<sup>th</sup> Cir. 2006), citing *Cronic*, 466 U.S. 648, 654-55, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). Under *Cronic*, Mr. Ford need not show any actual prejudice to obtain relief because attorney Brintnall was essentially effectively totally absent and prevented by his own limitations from assisting Mr. Ford during a critical stage of the proceeding. *Cronic*, 466 U.S. at 659. n. 25. A defendant has a constitutional right to appointed counsel at all critical stages of a criminal prosecution. *State ex rel. Juckett v. Evergreen Dist. Court*, 100 Wn.2d 824, 828, 675 P.2d 599 (1984).

A stage is critical if it presents a possibility of prejudice to the defendant. *Garrison v. Rhay*, 75 Wn. 2d 98, 102, 449 P.2d 92 (1968).

After his conviction, and before sentencing, Mr. Ford made a written motion to the court for new counsel to assist him with a motion for a new trial. See CrR 7.5. In his letter to the court, Mr. Ford did not specify his basis for a new trial. Nonetheless, at a hearing on the motion, the court relieved trial counsel, Thomas Ladouceur, and appointed attorney George Brintnall to represent Mr. Ford on his post-trial motion.

But attorney Brintnall did not bring a motion for a new trial on behalf of Mr. Ford. Instead, attorney Brintnall submitted a letter to the court specifying the actions he had taken on Mr. Ford's motion (but not on his behalf). Specifically, Mr. Brintnall wrote:

Another recent case has also stated that a failure to inform a client about an offer of plea bargain would amount to "ineffective assistance." However, in this matter, my investigation has an impasse. The defendant informed me that he was only told about a substantially beneficial plea offer after trial. Mr. Ladouceur, on the other hand, states that the offer in question had been received and communicated to the defendant at the final readiness hearing on the Thursday before trial, but that the defendant had rejected that offer, which would have been consistent with his continuous contention all through trial that he had not had any sexual contact with the accuser. Without further information of a credible nature, I cannot make a

determination on the defendant's claim in this regard. Therefore, I do not feel that I can in good conscience bring an ineffective assistance claim as part of a motion for a new trial at this time. Again, appellate counsel may be able to develop this claim further, if new evidence presents itself.

CP 42.

The issue of attorney Brintnall's failure to raise Mr. Ford's claim came up again at sentencing. 6RP 431. Brintnall reiterated to the court that Mr. Ford wanted to raise a claim of ineffective assistance of counsel on a motion for a new trial because the plea offer was not presented to him by Mr. Ladouceur until after the trial. 6RP 413, 435. Brintnall acknowledged that there was a legitimate factual issue that needed to be explored but erroneously concluded that it was the duty of the Court of Appeals to explore those type of issues. 6RP 431.

I – arguably an ineffective assistance argument could be made at that juncture, but I don't – I didn't see Mr. Ladouceur's – again, viewing the transcript, the court file, and talking to both my client and Mr. Ladouceur, I – I didn't see Mr. Ladouceur's, you know, job dropping below the standard, and *I can't make a determination on these factual issues*, frankly.

So I can't – I can't in good conscience bring that before the Court and say, yes, it's a given, you know, give him that information.

6RP 436.

And attorney Brintnall went on at a continued sentencing hearing.

And my – in discussion just before we came out here, my – my client was discussing it, since that – you brought that up, was discussing if it – that he was – his understanding was the Court appointed me to investigate and proceed on or not proceed on an ineffective assistance of counsel claim.

My understanding from the Court was I was – I was to determine whether or not there were grounds for a motion for a new trial.

As I told him, this pretty much would blunt my inquiries, at least for a while, and that he needs to bring the ineffective assistance of counsel at the Court of Appeals level on appeal and not, you know, there's – he's maintaining that, you know, because he was not told about the offer prior to the trial that that's ineffective assistance of counsel, and I said yes – and I've agreed with him that yes, there is a case on that, in fact, and you, in – in play.

However, I don't have anything other than what – you know, I have his statement, but we have a statement from Mr. Ladouceur that directly contradicts it. And I don't know where to go from here as far as the possibility of – of – of, you know pursuing the ineffective assistance of counsel –

7RP 460-61

The court pointed out the fallacy of attorney Brintnall's thinking but attorney Brintnall did not take the hint.

THE COURT: But what Mr. Brintnall is trying to convey is that oftentimes attorneys who are representing a particular issue are being asked to do something from recollection from multiple cases. And they try to speak the truth, but sometimes they make mistakes.

That's why we have evidentiary hearings, to find out what is and what is not.

7RP 466.

A motion for a new trial can be based on a claim of ineffective assistance of counsel. CrR 7.5(a) (8) (a trial court may grant a new trial if a defendant's substantial right to a fair trial was materially affected). In turn, a claim of ineffective assistance of counsel can be premised on trial counsel's failure to communicate a plea offer to a defendant. See *State v. James*, 48 Wn. App. 353, 362, 739 P.2d 1161 (1987); See also *Personal Restraint Petition of McCready*, 100 Wn. App. 259, 996 P.2d 658 (2000) (defendant granted new trial because trial attorney misrepresented implications of a plea offer). Defense counsel is under an ethical duty to discuss plea negotiations with his client under the Rules of Professional Conduct (RPC) 1.4 (See Comment 2, A lawyer who receives a proffered plea bargain in a criminal case must promptly inform the client of its substance).

In writing his letter to the court and taking no action on Mr. Ford's behalf, attorney Brintnall completely failed in his duty to act as an advocate for Mr. Ford. RPC 1.3 requires an attorney to act

with reasonable diligence in representing a client.<sup>21</sup> As the trial court pointed out, the purpose of evidentiary hearings is to determine the truth. Attorney Brintnall was under no obligation to determine if it was Mr. Ladouceur who was telling the truth or if it was Mr. Ford who was telling the truth. That was up to the court to decide. It was simply up to attorney Brintnall to bring the issue before the court and let Mr. Ford have his say. And because attorney Brintnall completely and utterly failed in his obligation to Mr. Ford, attorney Brintnall was effectively totally absent and prevented by his own limitations from assisting Mr. Ford during what would have been a critical stage of the proceeding.

#### **E. CONCLUSION**

Because the trial court coerced the jury into reaching a verdict, Mr. Ford is entitled to a new trial.

Because the trial court included erroneous and vague conditions of community custody in his sentence, Mr. Ford is entitled to have them stricken from his judgment and sentence.

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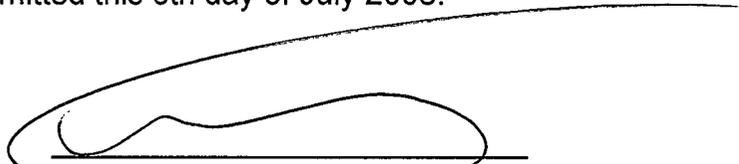
<sup>21</sup> Comment 1 to RPC 1.3: A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with diligence in advocacy upon the client's behalf.

Moreover, this court should find that the vagueness challenges are ripe for review.

Because the lifetime anti-harassment order exceeded the statutory maximum five year sentence on third-degree rape of a child, Mr. Ford is entitled to remand for clarification of the order.

And because attorney Brintnall completely failed in his duty to act as an advocate for Mr. Ford on his desired motion for a new trial, Mr. Ford is entitled to remand for a hearing on his motion and effective assistance of counsel.

Respectfully submitted this 6th day of July 2008.



LISA E. TABBUT/MSBA #21344  
Attorney for Appellant

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SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

STATE OF WASHINGTON,

Respondent,

vs.

TYRONE D. FORD,

Appellant.

) Court of Appeals No. 37089-1-II

) CERTIFICATE OF MAILING

That on the 7<sup>th</sup> day of July 2008, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Appellant's Brief and Certificate of Mailing (PA only) addressed to the following parties:

Michael C. Kinnie  
Clark County Prosecuting Attorney  
P.O. Box 5000  
Vancouver, WA 98666-5000

and

Tyrone D. Ford/DOC#310040  
Monroe Correctional Complex  
P.O. Box 777  
Monroe, WA 98272-0777

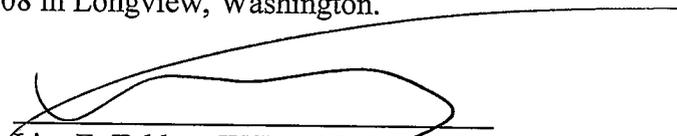
LISA E. TABBUT

ATTORNEY AT LAW

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I certify under penalty of perjury pursuant to the laws of the State of Washington  
that the foregoing is true and correct.

Dated this 7th day of July 2008 in Longview, Washington.

  
Lisa E. Tabbut, WSBA No. 21344  
Attorney for Appellant