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67262-2

No. 67262-2-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CLIFFORD LAND,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Clifford's Land's conviction for child molestation in the third degree in Count 10 violates double jeopardy. U.S. Const. amend. V, XIV; Const. art. I, § 9.

2. Instructions 9, 30 and 31 erroneously fail to specify that convictions for Counts 9 and 10 must be based upon separate and distinct conduct.

3. The trial court exceeded its statutory authority by imposing an indefinite term of community custody.

4. The trial court violated the separate of powers doctrine by imposing an indefinite term of community custody.

5. The trial court erred by ordering Mr. Land to pay for the victims' counseling and medical costs as a condition of community custody when no restitution was ordered. (Special Condition 3)

6 The condition of community custody prohibiting Mr. Land from possessing, accessing or viewing "pornographic materials, as defined by the sex offender therapist and/or Community Corrections Officer" is unconstitutionally vague and an improper designation of sentencing authority to the CCO. (Special Condition 7).

7. The condition of community custody ordering Mr. Land not to “possess sexual stimulus material for your particular deviancy as defined by a Community Corrections Officer and therapist except as provided for therapeutic purposes” is unconstitutionally vague and an improper delegation of authority to the CCO.

8. The condition of community custody ordering Mr. Land not to possess drug paraphernalia as a condition of community custody is not crime-related and is unconstitutionally vague.

9. The condition of community custody forbidding Mr. Land from possessing any item “designated or used to entertain, attract or lure children” is not crime-related and is unconstitutionally vague.

10. The trial court erred by ordering Mr. Land to undergo plethysmograph testing at the direction of his supervising community custody officer in violation of his constitutional right to be free from government intrusion into his body.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A jury’s verdict for one crime must rest upon its unanimous determination that the State proved a single act beyond a reasonable doubt and that the act is separate and distinct from the act used to find the defendant guilty in another count for the

same behavior. Mr. Land's jury was never instructed that its verdict for third degree child molestation of SH must rest on unanimous agreement as to a single act separate and distinct from the act used to convict Mr. Land of third degree rape of child involving SH. Was Mr. Land's constitutional right to be free from double jeopardy violated where SH did not distinguish between various acts of sexual misconduct in her testimony, Mr. Land attacked her credibility, and the parties did not explain the need for separate and distinct acts to convict of both charges? (Assignments of Error 1, 2)

2. The Sentencing Reform Act (SRA) requires the trial court to impose a determinate sentence and that sentence cannot exceed the statutory maximum term. The trial court imposed terms of 116 and 60 months confinement followed by community custody of 36 months "as capped by the statutory maximum." Where RCW 9.94A701(9) requires the sentencing court, not the DOC, to reduce the term of community custody when the terms of confinement and community custody exceed the statutory maximum term, does the sentence violate the SRA or the separation of powers doctrine? (Assignments of Error 3, 4).

3. The SRA requires the sentencing court to set restitution if appropriate. No restitution was requested and the trial court did not

set restitution, but nonetheless ordered Mr. Land to pay the victim's medical and counseling costs as a condition of community custody. Did the court improperly delegate its authority to the Department of Corrections by ordering Mr. Land to pay the victim's medical and counseling costs as a condition of community custody without determining any restitution should be imposed? Is the condition of community custody ordering Mr. Land to pay the medical and counseling costs authorized by the SRA? (Assignment of Error 5)

4. Due process requires that conditions of community custody must be definite enough that ordinary people can understand what conduct is and is not prohibited. The trial court ordered Mr. Land not to possess, access or view "pornographic materials" as defined by his community corrections officer or his therapist. Is the condition of community custody forbidding Mr. Land from possession or viewing "pornographic materials" unconstitutionally overbroad or an improper delegation of the court's sentencing authority to the community corrections officer? (Assignment of Error 6)

5. Mr. Land was ordered not to "possess sexual stimulus materials for your particular deviancy as defined by a Community Corrections Officer and therapist except as provided for therapeutic

purposes.” Where there was no evidence or determination of Mr. Land’s “particular deviancy,” is the community custody condition unconstitutionally vague or an improper delegation of sentencing authority to the community corrections officer? (Assignment of Error 7)

6. The SRA authorizes the trial court to impose “crime-related” prohibitions as conditions of community custody. The trial court ordered Mr. Land not to possess “drug paraphernalia” as a condition of community custody. In the absence of evidence Mr. Land used illegal drugs or that illegal drugs contributed to his offenses, does the condition fail to meet the requirement that a condition of community custody crime-related? Is the condition unconstitutionally vague? (Assignment of Error 8)

7. There is no evidence that Mr. Land used items to lure children, but the trial court entered a condition of community custody forbidding Mr. Land from possessing “any item designated or used to entertain, attract or lure children.” Does the condition of community custody violate the SRA because it is not crime-related or is it unconstitutionally overbroad? (Assignment of Error 9)

8. The due process clauses of the federal and state constitutions protect fundamental rights, such as the right to be free

from government intrusion in one's body. Qualified professionals may utilize penile plethysmograph testing in the diagnosis and treatment of sexual deviancy, but the test should not be used to monitor conditions of community custody. Does the condition of community custody requiring Mr. Land to submit to plethysmograph examinations as required by his community corrections officer violate his constitutional right to be free from bodily intrusions? (Assignment of Error 10).

C. STATEMENT OF THE CASE

Clifford Land was a single parent, raising his teenage son Azzareya (Azy) and daughter RL and working for a gutter-cleaning business. RP 205-06, 298-99, 332, 336.¹ Mr. Land had a good relationship with his children, and the children were also very close to each other. RP 65, 333-34, 338, 348-49. He was affectionate with his children and hugged and tickled them. RP 344-45.

Mr. Land's ex-wife lost custody due to a drug problem when RL was only three years old. RP 11-13, 63-64. She had very little contact with her children until 2010, when she was in telephone

¹ The verbatim report of proceedings of the jury trial on February 14, 15, 16, and 18, 2011, are in four volumes marked Volumes I-IV, but not bound individually. These volumes are referred to as RP. The sentencing hearing on June 2, 2011 is referred to by date.

contact with her daughter but not her son. RP 13-15, 82-83, 337.

RL wanted to move to her mother's home in Minnesota. RP 62.

RL enjoyed overnight visits with her girlfriends, and a number of them spent the night at her house, including CG and SH. RP 22-23, 94. CG reported to her mother that Mr. Land touched her breast while she was spending the night with RL. RP 110-11, 155. As a result of the police investigation, the Skagit County Prosecutor's Office charged Mr. Land by third amended information with ten offenses involving sexual contact with CG, RL, and SH. CP 102-05. The jury returned guilty verdicts for four counts addressed below.

1. CG – child molestation in the second degree (Count 1).

RL met CG when RL was dating CG's older brother, and the two girls became friends in 2010. RP 106-07, 121-23. CG spent the night at the Land home two or three times. RP 125, 125-26, 159-60. One time RL picked out clothing for both girls at Wal-Mart and a clothing store in the mall, and Mr. Land paid for the clothing. RP 161-62.

CG testified that one night she, RL, and Mr. Land were in RL's bedroom talking about how old CG was when RL left the room

to briefly use the bathroom.² RP 165-66. According to CG, Mr. Land said he did not believe CG was 12 because of the size of her breasts, put his hand under her shirt, and played with one of her breasts for five to ten seconds until she yelled stop. RP 150-51.

CG testified that she told RL what Mr. Land did and that RL then revealed that Mr. Land had tried to rape her when she was younger. RP 152, 166-67, 170-71. RL, however, testified CG did not tell her anything. RP 29. CG remained at the Land home until the next morning when she asked her mother to pick her up. RP 152-53. The next month, after watching a movie with her mother and brother about incest, CG told her mother what had happened. Her mother contacted the police the next day. RP 155, 100-01.

Skagit Police Detective Sergeant Mark Shipman contacted Mr. Land, who came to the police station to be interviewed on August 12, 2010, along with RL and her friend SH, who was staying temporarily with the Lands. RP 88, 200-02. Mr. Land told the detective that he could not remember touching CG inappropriately. RP 207-08.

2. RL – child molestation in the third degree (Count 7).

While her father was interviewed by Detective Shipman, another

² CG also testified that Mr. Land entered the room after RL went to the bathroom. RP 129, 149.

police detective interviewed RL; SH was also present. RP 77, 202, 259. RL said she did not think anything happened to CG and denied she had been abused by her father. RP 32-33, 77.

Because Mr. Land had been arrested, RL and her brother were placed with close family friends Mari and Jim Kramer. RP 50, 84, 175. In August, Mrs. Kramer attended RL's interview with Detective Shipman and social worker Marisol Chipina of the Child Protective Services. RP 182-83, 211. RL told them she said she did not think CG's allegations were true and that her father had never molested her. RP 85, 177-78, 211.

Mrs. Kramer, however, encouraged RL to talk to her, and in September RL told Mrs. Kramer that she had been sexually abused by her father. RP 50, 52-53. RL called Detective Shipman and arranged to meet with him that day, leading to additional criminal charges against Mr. Land. RP 54, 212-14.

At trial, RL said her father rubbed her breasts or vagina and penetrated her vagina with his finger or penis several times a week beginning when she was 8 or 9 years old. RP 56-59. She added that he attempted to anally rape her and put his penis in her mouth about three times. RP 59-60. SH also testified that she saw Mr. Land touch RL's "breasts and lower half" both over and under her

clothing. RP 253-54. A forensic nurse examiner conducted a gynecological examination of RL that did not disclose any results that would corroborate the allegations of sexual abuse. RP 137, 141.

3. SH – one count of rape of child in the third degree and one count of child molestation in the third degree (Counts 9 and 10). RL and SH often spent the night at each other's houses, and in August 2010 SH stayed at the Lands' home for about two weeks. RP 224, 226, 290-92.

When she was first interviewed by the police, SH said that Mr. Land never touched her and she never saw him touch RL. RP 267. SH later learned that RL had changed her story and was accusing Mr. Land; SH was upset because she thought RL was lying. RP 263-64. Later, however, SH talked to her CPS social worker and accused Mr. Land of sexual abuse in interviews with the police and prosecutor. RP 240, 243-45, 278. She told one interviewer she had been pressured by her parents to talk. RP 283.

At trial SH stated that Mr. Land touched "my breasts and my lower part" both over and under her clothing on more than one occasion. RP 251-52. Mr. Land kissed her on the cheek, lips and a couple of times on her "lower half." RP 252. He also put his finger

inside her vaginal area, including a couple of times when he applied a cream to a vaginal rash. RP 252-53.

4. RL's brother Azzy. RL's brother Azzy is two years older than RL. RP 338. The Lands had a two-bedroom home, and Azzy slept on the living room couch. He liked to play games with his friends, but was usually home as usually home by 10:00 pm. RP 93-94, 334-36.

Azzy testified he never saw his father do anything sexual with RL or her friends. RP 334, 340, 346, 348. Although Azzy and RL were close and discussed their sexual experiences with each other, RL never told Azzy that her father sexually assaulted her. RP 65, 93, 343-44.

5. Verdicts and Sentencing. After a jury trial before the Honorable Dave Needy, the jury convicted Mr. Land of four offenses: child molestation in the second degree, two counts of child molestation in the third degree, and one count of rape of a child in the third degree. CP 92, 98, 100-01. The jury was unable to return a unanimous verdict as to the remaining counts, and Mr. Land was found not guilty of those six counts at a second trial. CP 93-97, 131, SuppCP ____ (verdict forms, sub. nos. 112-17, 5/18/11).

Based upon an offender score of 9, the court sentenced Mr. Land to a term of 116 months for Count I and 60 months for each of the remaining counts, to run concurrently, followed by a term of 36 months community supervision “as capped by the statutory maximum.” CP 130-31; 6/2/11RP 9-11, 15. The court also imposed numerous special conditions of community custody. SuppCP ____ (Judgment and Sentence (Felony), Appendix F, Additional Conditions of Sentence, sub. no. 131, 6/2/11).³ This appeal follows.

D. ARGUMENT

1. THE TRIAL COURT’S FAILURE TO INSURE THAT CONVICTIONS FOR CHILD MOLESTATION IN THE THIRD DEGREE AND RAPE OF A CHILD IN THE THIRD DEGREE, COUNTS 9 AND 10, WERE BASED UPON SEPARATE ACTS VIOLATED LAND’S CONSTITUTIONAL RIGHT TO BE FREE FROM DOUBLE JEOPARDY

Mr. Land was convicted of one count of rape of a child in the third degree and one count of child molestation in the third degree in Counts 9 and 10, which involved the same victim during the same time period. The jury was given a standard unanimity instruction, but was never informed that it could not base its convictions for the two offenses upon the same act. The evidence

³ A copy of the special sentencing conditions is attached as Appendix B.

presented at trial, the arguments of counsel, and the jury instructions did not make it manifestly apparent to the jury that it could not base convictions for both rape of a child in the third degree and third degree child molestation of SH upon the same conduct. Mr. Land's constitutional right to double jeopardy was thus violated.

a. The failure to properly instruct the jury may result in convictions that violate the constitutional protection against double jeopardy. The double jeopardy clause of the federal constitution provides that no individual shall "be twice put in jeopardy of life or limb" for the same offense, and the Washington Constitution provides that no individual shall "be twice put in jeopardy for the same offense."⁴ U.S. Const. amends. V, XIV; Const. art. I, § 9. Washington gives its constitutional provision against double jeopardy the same interpretation that the United States Supreme Court gives to the Fifth Amendment. In re Personal Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). The double jeopardy clause protects against multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717, 726, 89

⁴ The Fifth Amendment's double jeopardy protection is applicable to the States through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 787, 23 L.Ed.2d 707, 89 S.Ct. 2056 (1969).

S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled on other grounds by Alabama v. Smith, 490 U.S. 794, 104 L.Ed.2d 865, 109 S.Ct. 2201 (1989); State v. Mutch, 171 Wn.2d 646, 254 P.3d 803 (2011). A conviction and sentence violate double jeopardy if, under the “same evidence” test, the two crimes are the same in law and in fact. Orange, 152 Wn.2d at 815-16. Double jeopardy is a constitutional issue that may be raised for the first time on appeal. Mutch, 171 Wn.2d at 661; State v. Watkins, 136 Wn.App. 240, 244-45, 148 P.3d 1112 (2006), rev. denied, 161 Wn.2d 1028 (2007), cert. denied, 552 U.S. 1282 (2008).

In addition, due process requires the State prove every element of a crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22; Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The right to a unanimous jury verdict demands that the jury verdict reflect a unanimous finding of the act or acts underlying the charged offense. See, Apprendi, 530 U.S. at 498 (Scalia, J., concurring) (charges must be proved “beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens”); Blakely v. Washington, 542 U.S. 296, 301, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (longstanding tenet of criminal justice jurisprudence is “the

'truth of every accusation' against a defendant should afterwards be 'confirmed by the unanimous suffrage of twelve of his equals and neighbors.'" (quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)). Washington's constitution "provides greater protection for jury trials than the federal constitution," and the court may impose punishment only as authorized by the jury verdict. State v. Williams-Walker, 167 Wn.2d 887, 895-96, 900, 225 P.3d 913 (2010); Const. art. I, §§ 21, 22.

In order to protect against multiple convictions from violating double jeopardy, the jury must unanimously agree that at least one separate act constitutes a particular charged offense. State v. Noltie, 116 Wn.2d 831, 842-43, 809 P.2d 190 (1991); State v. Borsheim, 140 Wn.App. 357, 367, 165 P.3d 417 (2007). "[I]n sexual abuse cases where multiple counts are alleged to have occurred within the same charging period, the trial court instruct the jury that that are to find "separate and distinct acts" for each count.'" Borsheim, 140 Wn.App. at 367 (quoting State v. Hayes, 81 Wn.App. 425, 431, 914 P.2d 788 (1996), in turn quoting Noltie, 116 Wn.2d at 848-49). Where the jury is not instructed that it must find each count represents a separate and distinct act from all other counts, double jeopardy may be violated. Mutch, 171 Wn.2d at

662-63; State v. Carter, 156 Wn.App. 561, 568, 234 P.3d 275 (2010) (reversing three counts of rape in same charging period due to lack of “separate and distinct” jury finding; State v. Berg, 147 Wn.App. 923, 934-37, 198 P.3d 529 (2008) (same holding for two counts of rape); Borsheim, 140 Wn.App. at 370-71 (same holding for multiple counts of rape of a child in same charging period but only one “to convict” instruction); State v. Holland, 77 Wn.App. 420, 425, 891 P.2d 49, rev. denied, 127 Wn.2d 1008 (1995) (reversing convictions for two counts of child molestation where it was impossible to conclude that all twelve jurors agreed on same act to support convictions on each count).

b. The jury was not instructed that its verdict for Count 9 must be based upon unanimous agreement of a specific act separate and distinct from the act relied upon for Count 10. The jury instructions in Mr. Land’s case were similar to those found lacking in Mutch, Carter, and Berg. Mr. Land’s jury was instructed that “a separate crime is charged in each count” and each count should be decided “separately.”⁵ CP 66 (Instruction 8). The jury was also given a standard unanimity instruction that did not include language informing the jury that the acts supporting one count had

⁵ Redacted copies of Instructions 8, 9, 30 and 31 are attached as an appendix.

to be separate and distinct from the acts relied upon for a different count. CP 67 (Instruction 9). The “to convict” instructions for the crimes involving SH, Counts 9 and 10, were nearly identical. They covered the same time period and differed only in that Count 9 required sexual intercourse and Count 10 required sexual contact. CP 88-89. Neither “to convict” instruction informed the jury that it was required to base Counts 9 and 10 on separate and distinct acts. CP 88-89. Jury instructions that do not include this requirement are “flawed” and do not protect the defendant from double jeopardy. Mutch, 171 Wn.2d at 662-63; Carter, 156 Wn.App. at 654-65, 567-68; Berg, 147 Wn.App. at 935.

c. SH’s testimony and counsel’s arguments did not protect against a double jeopardy violation by distinguishing between various acts that could be the basis for child molestation or rape of a child convictions. The State charged Mr. Land with rape of a child and child molestation against SH, one of Mr. Land’s daughter’s close friends. The charging period for both charges was December 31, 2008, to August 12, 2010. CP 88-89. During this period of time, SH spent numerous nights with her friend RL at the Land home, and SH lived with the Lands in August 2010. RP 224-26.

SH testified that Mr. Land touched her on her breasts and “lower part,” sometimes under and sometimes over her clothing and sometimes kissed her as he did so. RP 251-53. She added that he put his finger inside her vagina several times. RP 253. She said these actions normally occurred in RL’s bedroom. RP 251. The closest SH came to describing a particular incident was to testify that when she had a rash on her private area, Mr. Land applied a rash cream for her. RP 252-53, 286. She was not sure if this was sexual or fatherly. RP 282.

In closing argument, neither the prosecutor nor Mr. Land’s attorney explained that the jury had to find separate and distinct acts for the two counts concerning SH. RP 404-07, 415-16. In fact, the prosecutor’s rebuttal closing argument assumed that is not the case:

So you have a count pertaining to a time frame. This does require you that in order to do so you must unanimously agree as to which act has been proved. In other words, you must agree that in that time frame an act of child molestation or rape has occurred that applied both to [RL] and as to S[H]. We don’t have to prove all of the acts. We don’t have to prove every date. We just have to prove in that time frame an act.

RP 416. Concerning the charges involving SH, the prosecutor argued that “there were these acts of sexual contact by the

defendant of grouping [sic] her.” RP 379. The prosecutor tried to distinguish the act of intercourse from sexual contact by arguing intercourse only occurred when Mr. Land applied rash cream, but SH testified that Mr. Land put his fingers in her vagina on other occasions. RP 253, 367, 379. Moreover, even if the prosecutor tried to focus on a single act to support the rape of a child conviction, the jury was instructed not to rely upon the parties’ arguments, and argument alone cannot provide the basis of the jury’s general verdict. CP 58; State v. Kier, 164 Wn.2d 798, 813-14, 194 P.3d 212 (2008).

Rape of a child can involve some form of penetration, no matter how slight, but can also include “any act of sexual contact” that involves touching sexual organs with one’s mouth. RCW 9A.44.010(1); RCW 9A.44.079; CP 73. Child molestation is broadly defined to include “any touching” of sexual or intimate parts of another person’s body. CP 69, 73; RCW 9A.44.010(2); RCW 9A.44.089. Child molestation thus includes the same acts that could constitute rape, although the two offenses have different elements. See, State v. French, 157 Wn.2d 593, 610, 141 P.3d 54 (2006). SH told the jury that Mr. Land touched her many times. Some of the touching SH described, such as her assertion that Mr.

Land kissed her “on the lower half,” could have constituted either child molestation or rape of a child. RP 252. Yet the jury was never instructed that they had to unanimously agree upon separate and distinct acts to support verdicts in Counts 9 and 10.

d. Mr. Land’s conviction for child molestation in the third degree, Count 10, must be dismissed because the conviction violates double jeopardy. A double jeopardy violation results in the dismissal of any conviction that violates the constitution. See State v. Womac, 160 Wn.2d 643, 660, 160 P.3d 40 (2007); Orange, 152 Wn.2d at 820, 822. When the trial court fails to instruct the jury that separate convictions for sexual offenses against the same victim during the same time period must be based upon separate and distinct acts, however, the reviewing court cannot definitely determine if double jeopardy was violated in the absence of special verdict forms to address the issue. Mutch, 171 Wn.2d at 663-644. The Mutch Court therefore rejected automatic dismissal of the convictions that “potentially” violate double jeopardy. Id.

The Mutch Court, however, did not establish the standard of review for double jeopardy claims arising from inadequate jury instructions. Holding that the appellate court must carefully review the entire record, the court suggested two possible standards of

review: (1) rigorous review of the entire record to determine if the jury instructions effected a double jeopardy error, or (2) review of the erroneous jury instructions for harmlessness. Id. at 664-65. Utilizing either standard of review leads to the conclusion that Mr. Land's conviction for third degree child molestation of SH must be dismissed.

i. *A rigorous review of the entire record demonstrates it was not "manifestly apparent" to the jury that its verdicts on Counts 9 and 10 had to be based upon separate and distinct acts.*

A review of the jury instructions, testimony, and argument does not demonstrate that the jury necessarily based Counts 9 and 10 upon separate conduct. First, nothing in the jury instructions or closing argument told the jury that convictions for Counts 9 and 10 had to be based upon separate and distinct acts. This Court has found the same instructions were not sufficient to protect against double jeopardy. Carter, 156 Wn.App. at 564-65, 568; Berg, 147 Wn.App. at 934-35; accord Borsheim, 140 Wn.App. at 366 (similar instructions but only one "to convict").

Second, the testimony at trial did not cure the problem. SH briefly testified as to touching that occurred "a lot more than one time" over the course of the almost 20-month period without

identifying any particular incident. Mr. Land did not testify, and he made no statements concerning any sexual contact with SH. This is a far cry from Mutch, where the victim described five different acts of rape occurring within less than 24 hours, the defendant was charged with five counts of rape, and he admitted to multiple sexual acts with the victim. Mutch, 171 Wn.2d at 651, 665. Children younger than SH are able to describe distinct acts of sexual assault, but SH did not do so here. See State v. Wallmuller, ___ Wn.App. ___, 2011 WL 5535358 at * 1, 4 (No. 40186-0-III, 11/15/11) (in prosecution for several counts of rape of a child in the first degree, victim described three separate acts); State v. Corbett, 158 Wn.App. 576, 583-85, 242 P.3d 52 (2010) (victim in prosecution for four counts of first degree rape of a child described distinct incidents).

Third, the argument of counsel did not address the need for the jury to unanimously agree upon separate and distinct acts to support Counts 9 and 10. In Mutch the prosecutor discussed all five separate rape incidents. Mutch, 171 Wn.2d at 665. The prosecutor in Mr. Land's case did not specifically distinguish between any acts of child molestation and child rape. While he mentioned the rash incident as an example of when sexual

intercourse occurred, his argument was inconsistent with SH's testimony and thus did not cure the double jeopardy problem. In Corbett, Division Two found no double jeopardy violation where "the entire trial focused on evidence and distinguishing characteristics of four separate and distinct instances of abuse" and the parties even referred to different incidents with descriptive identifying names. Corbett, 158 Wn.App. at 592. Here there was no such attempt to distinguish among the many claimed instances of rape and molestation claimed by SH.

Additionally, in Mutch the defense did not question the complainant's credibility or argue there was insufficient evidence as to the number of rapes. Mutch, 171 Wn.2d at 665. In contrast, Mr. Land's attorney attacked SH's credibility in cross-examination and closing argument, focusing on her prior statements denying Mr. Land sexually abused her, her statement that her parents pressured her to say he did, and other inconsistencies between her prior statements and her testimony. RP 261-65, 269, 279-80, 283, 284, 401-03.

A rigorous review of the entire record thus shows that Mr. Land's case is not the "rare circumstance" where, despite

inadequate jury instructions, it is “manifestly apparent” that the jury verdict was based upon separate acts. Mutch, 171 Wn.2d at 665.

ii. *The State cannot demonstrate the erroneous jury instructions were harmless beyond a reasonable doubt.* Jury instructions “must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror.” Borsheim, 140 Wn.App. at 366 (quoting Watkins, 136 Wn.App. at 241, in turn quoting State v. LaFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996)). An erroneous jury instruction given on behalf of the prevailing party is presumed to be prejudicial unless the prevailing party clearly demonstrates the error was harmless. State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977). When erroneous jury instructions impact the accused’s constitutional rights, the State must demonstrate the error was harmless beyond a reasonable doubt.⁶ State v. Bashaw, 169 Wn.2d 133, 147, 234 P.3d 195 (2010) (instruction incorrectly required unanimity to answer special verdict form in negative); State v. Kitchen, 110 Wn.2d 403, 405-06, 756 P.2d 105 (1988) (jury instructions did not insure unanimity); State v. McCullum, 98 Wn.2d

⁶ Automatic reversal is required, however, when instructions relieve the State of its burden of proving every element of the crime beyond a reasonable doubt. Sullivan v. Louisiana, 508 U.S. 275, 278-82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

484, 497-98, 656 P.2d 1064 (1993) (instructions shifted burden of proving self-defense); State v. Weaville, 162 Wn.App. 801, 815, 256 P.3d 426 (2011) (instruction incorrectly defined “penetration” in prosecution for rape).

The Washington Supreme Court recently addressed instructions that told the jury it had to be unanimous to answer a special verdict form either “yes” or “no,” when unanimity was not required for a “no” answer. Bashaw, 169 Wn.2d at 147. Even though the trial court polled the jury and learned their “yes” answer to the special verdict form was unanimous, the Bashaw Court found the error was not harmless. Id. at 147-48.

We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore conclude beyond a reasonable doubt that the jury error was harmless.

Id. at 148; accord, State v. Campbell, 163 Wn.App. 394, 403-06, 260 P.3d 235 (2011).

A review of all of the instructions given in this case, including the unanimity instruction and the “to convict” instructions, show that Mr. Land’s jury was never informed that guilty verdicts on Counts 9 and 10 could not be based upon the same conduct. A review of the

evidence shows that there was no clear delineation of separate instances of sexual contact or sexual intercourse with SH.

An instructional error is harmless only if it is “trivial, or formal, or merely academic, was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” Wanrow, 88 Wn.2d at 237. This is not the rare case where the failure to inform the jury of the separate and distinct acts requirement was trivial or academic. As in Bashaw, this Court cannot know how the jury would have deliberated if it had been properly instructed as to the requirement of separate and distinct acts and, as a result, cannot conclude beyond a reasonable doubt that the error was harmless. Mr. Land’s conviction for child molestation in the third degree, Count 10, must be dismissed. Carter, 156 Wn.App. at 568; Borsheim, 140 Wn.App. at 377-78.

2. THE SENTENCING COURT EXCEEDED ITS
STATUTORY AUTHORITY AND VIOLATED THE
SEPARATION OF POWERS DOCTRINE BY NOT
IMPOSING A DETERMINATE TERM OF
COMMUNITY CUSTODY

The trial court must sentence a felony offender consistent with the Sentencing Reform Act (SRA). In Mr. Land’s case, the court was required to impose a definite period of confinement and a definite term of community custody that did not exceed the statutory

maximum term. The trial court erred because, instead of setting a term of community custody, it ordered Mr. Land be on community custody for the longer of (1) the period of early release or (2) 36 months “as capped by the statutory maximum.” CP 131-32.

a. The superior court may not impose a sentence that exceeds the statutory maximum term. The superior court’s power to sentence a felony offender derives solely from the SRA. RCW 9.94A.505(1); In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007) (court has sentencing authority only as provided by Legislature). The defendant may challenge a sentence that does not comply with the SRA for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999).

RCW 9.94A.505 provides that the court “shall” impose a sentence “as provided in the following sections and as applicable to the case.” RCW 9.94A.505(2)(a). In Mr. Land’s case, the court was required to impose a sentence within the standard range established in RCW 9.94A.510 and a term of community custody as set forth in RCW 9.94A.701 and .702. RCW 9.94A.505(2)(a)(i), (ii). Moreover, the sentence imposed cannot exceed the statutory maximum term.

Except as provided under RCW 9.94A.750(4) and 9.94A.753(4), a court may not impose a sentence providing for a term of confinement or community custody that exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.

RCW 9.94A.505(5).⁷

b. Mr. Land's sentence exceeded the statutory maximum term. Child molestation in the second degree is a Class B felony, and the statutory maximum term is 10 years. RCW 9A.44.086(2); RCW 9A.20.021(1)(b); CP 130. Mr. Land's other offenses, third degree child molestation and third degree rape of a child, are Class C felonies with 5-year maximum terms. RCW 9A.44.079(2); RCW 9A.44.089(2); RCW 9A.20.021(1)(c); CP 130. Thus, the trial court could not impose a sentence that exceeded 10 years for Count 1 or 5 years for Counts 7, 9 and 10, even though Mr. Land's standard range for each of the Class C felonies exceeded 60 months.⁸

The trial court gave Mr. Land a 116 month term of incarceration for Count 1 and 60-month terms for Counts 7, 9, and 10, with all sentences running concurrently. CP 131. In addition, the court ordered community custody for each count as follows:

⁷ RCW 9.94A.750 and .753 address restitution.

⁸ With an offender score of 9, Mr. Land's standard sentence range for Count 1 was 87 to 116 months, CP 130, and his standard sentence range for Count 9 was 77 to 102 months, and his standard sentence range for Counts 7 and 10 was 72 to 96 months RCW 9.94A.510, .515.

(A) The defendant shall be on community custody for the longer of:

(1) the period of early release. RCW 9.94A.728(1)(2); or

(2) the period imposed by the court, as follows:

Count(s) 1, 7, 9, 10 36 months Sex Offenses *as capped by the statutory maximum.

CP 131-32.

Washington courts have addressed the necessity of setting a term of community custody that does not exceed the maximum term. See State v. Franklin, 172 Wn.2d 831, 263 P.3d 585 (2011) (addressing retroactivity of 2009 amendments to SRA); In re Personal Restraint of Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009) (addressing former RCW 9.94A.715); State v. Winkler, 159 Wn.App. 323, 327, 331, 245 P.3d 249 (2011) (relying upon former RCW 9.94A.729(5)(a)).

As currently written, however, RCW 9.94A.701 requires the sentencing court to set a reduced term of community custody so that the combination of the standard term of confinement and the term of community custody does not exceeds the statutory maximum term:

The term of community custody specified by this section shall be reduced by the court whenever an

offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

RCW 9.94A.701(9) (emphasis added). Additionally RCW 9.94A.729(5), which required sex offenders be transferred to community custody in lieu of earned early release, was recently amended in 2011 and no longer applies to felony sex offenders. Laws of 2011, 1st sp.s. ch. 40, § 4.

c. The indefinite term of community supervision is an improper designation of sentencing authority to the Department of Corrections. The separation of powers doctrine is derived from the federal Constitution's distribution of government authority into three separate branches and the Washington constitution's division of political power among the people, legislature, executive, and judiciary. Const. art. I, § 1; Const. art. II, § 1; Const. art. III, § 2; Const. art. IV, § 1; State v. Moreno, 147 Wn.2d 500, 505, 58 P.3d 265 (2002). Each branch of government may exercise only the power it is given and may not encroach upon the fundamental functions of the other branches. Moreno, 147 Wn.2d at 505.

The fixing of punishments for criminal offenses is a legislative function. State v. Ammons, 105 Wn.2d 175, 179-80, 713

P.2d 719, 718 P.2d 796, cert. denied, 479 U.S. 930 (1986). For felony offenses, the judicial branch's authority is set by the SRA. While the SRA grants power to the DOC to supervise offenders, the courts are required to set the sentence.

The trial court was required to set a determinate term of imprisonment and community custody that did not exceed the statutory maximum term for Mr. Land's offenses. By not doing do, the trial court improperly delegated to DOC the setting of Mr. Land's actual term of community custody and making sure it did not exceed the statutory maximum term. The trial court thus violated the separation of powers doctrine.

d. Mr. Land's term of community custody must be vacated.

A "determinate sentence" is a sentence that states "with exactitude the number of actual years, months, or days" of both confinement and community custody, whether or not the offender is eligible for earned early release. RCW 9.94A.030(18). The trial court here failed to set a definite term of community custody in violation of the SRA. Mr. Land's case must be remanded for the court to set "with exactitude" the length of his community custody.

3. THE CONDITION OF COMMUNITY CUSTODY
REQUIRING MR. LAND TO PAY THE COSTS OF
CRIME-RELATED COUNSELING AND MEDICAL
TREATMENT IS NOT AUTHORIZED BY THE SRA

As discussed above, the trial court may impose punishment only as authorized by the SRA. RCW 9.94A.505(1); Leach, 161 Wn.2d at 184. The SRA requires the trial court to determine and order restitution, which may include reimbursing a victim for medical or counseling costs. The sentencing court did not order Mr. Land to pay restitution, but nonetheless required him to pay the victims' unspecified counseling and medical costs. This condition of community custody is invalid.

The SRA requires the sentencing court to order restitution. RCW 9.94A.753(5); RCW 9.94A.505(7). The court may order an offender to pay restitution to compensate the crime victims for medical treatment or counseling reasonably related to the offense. RCW 9.94A.753(3). Here, however, the State did not request restitution at the sentencing hearing, and the court did not order restitution. CP 113-14, 133; 6/21/11RP 11-12, 14-18. Instead, the Judgment and Sentence states that restitution was not requested. CP 133.

The statutes authorizing the sentencing court to impose community custody requirements do not authorize the court to order the offender to pay the costs of a crime victim's counseling and medical treatment as a condition of community custody. RCW 9.94A.703 sets forth mandatory, waivable, and discretionary conditions of community custody, and restitution for medical or counseling expenses is not included in any of these categories.

Additionally, requiring Mr. Land to pay counseling and medical costs as a condition of community custody essentially delegates the court's duty to determine restitution to the Department of Corrections (DOC). It is the function of the judiciary to determine guilt and impose sentence. State v. Sansone, 127 Wn.App. 630, 642, 111 P.3d 1251 (2005). The imposition of restitution is part of an SRA sentence, and the SRA makes it clear that the court is responsible for determining restitution. RCW 9.94A.505; RCW 9.94A.753. The court may not delegate its authority to set the amount of restitution to another agency. State v. Forbes, 43 Wn.App. 793, 800, 719 P.2d 941 (1986) (court could not order the defendant to pay restitution "in the amount set by King County Prosecutor's Office VAU.").

This Court addressed a condition of community placement that forbade the defendant from possessing or viewing pornography without approval of his probation officer and found the condition unconstitutionally vague in Sansone. Because the community placement condition gave the probation officer the discretion to define “pornography,” it was an improper delegation of sentencing authority. Sansone, 127 Wn.App. at 641-43.

Mr. Land’s counsel did not object to this condition of community custody, but he may raise it for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744-45, 193 P.3d 678 (2008); State v Julian, 102 Wn.App. 296, 9 P.3d 851 (2000), rev. denied, 143 Wn.2d 1003 (2001). Determining the restitution an offender is required to pay is function of the sentencing court, not an administrative detail that may be delegated to DOC. This Court must strike the condition of community custody requiring Mr. Land to pay the victims’ unspecified costs of counseling and medical treatment.

4. CONDITIONS OF COMMUNITY CUSTODY FORBIDDING MR. LAND FROM ACCESSING OR POSSESSING (1) PORNOGRAPHY AS DEFINED BY HIS CCO OR (2) SEXUAL STIMULUS MATERIALS FOR AN UNDETERMINED SEXUAL DEVIANCY ARE UNCONSTITUTIONALLY VAGUE AND INCLUDE AN IMPROPER DELEGATION OF AUTHORITY TO MR. LAND'S COMMUNITY CORRECTIONS OFFICER

The due process clauses of the federal and state constitutions require that citizens be provided with fair warning of what conduct is illegal. U.S. Const. amend. XIV; Const. art. I, § 3; State v. Valencia, 169 Wn.2d 782, 239 P.2d 1059 (2010); Bahl, 164 Wn.2d at 752. As a result, a condition of community custody must be sufficiently definite that ordinary people understand what conduct is illegal and the condition must provide ascertainable standards to protect against arbitrary enforcement. Bahl. at 752-53. A condition which leaves too much to the discretion of an individual community corrections officer is unconstitutionally vague. Valencia, 169 Wn.2d at 795.

Additionally, even offenders on community custody retain a constitutional right to free expression. See Procnier v. Martinez, 416 U.S. 396, 408-09, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974) (inmates retain First Amendment right of free expression through use of the mail), rev'd in part on other grounds, Thornburgh v.

Abbott, 490 U.S. 401 (1984). When a condition of community custody addresses material protected by the First Amendment, a vague standard may have a chilling effect on the exercise of First Amendment rights. Bahl, 164 Wn.2d at 752. An even stricter standard of definiteness therefore applies when a community custody condition prohibits access to material protected by the First Amendment. Id.

a. The sentencing court improperly ordered Mr. Land not to possess, access or view pornography as defined by his CCO or therapist. The sentencing court entered a special condition of community custody forbidding Mr. Land from possessing or viewing pornographic materials and giving Mr. Land's community corrections officer (CCO) or his therapist the authority to define what is pornographic. Special Condition 7. The condition reads:

Do not possess, access, or view pornographic material, as defined by the sex offender therapist and/or Community Corrections Officer. Do not frequent establishments whose primary business pertains to sexually explicit or erotic materials.

Id.

Adult pornography is constitutionally protected speech.

Bahl, 164 Wn.2d at 757. And the term "pornography" is unconstitutionally vague. Id. at 757-58; Sansone, 127 Wn.App. at

639. Thus, a condition of community placement prohibiting an offender from “possess[ing] or access[ing] pornographic materials, as directed by the supervising Community Corrections Officer” is unconstitutionally vague. Bahl, 164 Wn.2d at 754, 758; accord Sansone, 127 Wn.App. at 634, 639-41.

In addition, the trial court improperly delegated the determination of what materials were pornographic and therefore a violation of Mr. Land’s community custody to his community corrections officer or his therapist. As this Court held in Sansone, the trial court cannot give the community corrections office the power to make this kind of determination. 127 Wn.App. at 641-43. “The definition of pornography was not an administrative detail that could be properly delegated to the CCO.” Id. at 642.

b. The condition of community custody prohibiting Mr. Land from possessing or controlling “sexual stimulus material for your particular deviancy” as determined by his CCO and therapist is unconstitutionally vague. The trial court also ordered Mr. Land not to possess “sexual stimulus material for your particular deviancy as defined by the supervising Community Corrections Officer and therapist except as provided for therapeutic purposes.” Special Condition 8. This term of community custody is unconstitutionally

vague. Bahl, 164 Wn.2d at 761. Bahl argued an identical condition of community custody was vague because the term “sexual stimulus” did not provide him with notice of what those items could be and because the condition gave the community corrections officer unfettered authority to define what “sexual stimulus materials” he could not possess. Id. The Court, however, found the condition was unconstitutionally vague because Bahl’s “deviancy” had not been identified. Id.

The condition cannot identify materials that might be sexually stimulating for a deviancy when no deviancy has been diagnosed, and this record does not show that any deviancy has yet been identified. Accordingly, the condition is utterly lacking in any notice of what behavior would violate it.

We conclude this condition is unconstitutionally vague.

Id.

The same is true in Mr. Land’s case, as there was no sexual deviancy evaluation before the court or any evidence Mr. Land had ever undergone one. The condition does not provide Mr. Land with any notice of what it forbids and is therefore unconstitutionally vague.

c. The conditions of community custody must be stricken.

The conditions of community custody forbidding Mr. Land from

accessing or possessing materials that his CCO or therapist believes are pornographic or from possessing sexual stimulus materials for an unknown sexual deviancy are unconstitutionally vague. The conditions must be stricken. Valencia, 169 Wn.2d at 795; Bahl, 164 Wn.2d at 761-62.

5. THE CONDITIONS OF COMMUNITY CUSTODY PROHIBITING MR. LAND FROM POSSESSING DRUG PARAPHERNALIA OR MATERIALS THAT COULD BE USED TO LURE CHILDREN ARE UNCONSTITUTIONALLY VAGUE AND NOT CRIME-RELATED OR REASONABLY RELATED TO HIS REHABILITATION

There was no evidence presented at trial or sentencing that demonstrated that drug use contributed to Mr. Land's involvement in his offenses or that he was a drug addict. There was also no evidence that he lured children with particular items. The trial court nonetheless ordered that Mr. Land not to possess drug paraphernalia or "any item designated or used to entertain, attract or lure children." Special Conditions 14, 9. These conditions are vague and are not authorized by the SRA because they are not crime-related.

RCW 9.94A.703 sets forth the conditions of community custody that may be imposed by the court. Among the discretionary conditions is "comply with any crime-related

prohibitions.” RCW 9.94A.703(3)(f). A “crime-related prohibition” must be directly related to the circumstances of the crime for which the offender is being sentenced. RCW 9.94A.030(10). The statute reads:

“Crime-related prohibition” means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

Id. (emphasis added).

Logically, the burden is on the State to demonstrate the condition of community supervision is statutorily authorized. See State v. McCorkle, 137 Wn.2d 490, 495-96, 973 P.2d 461 (1999) (SRA clearly places mandatory burden on State to prove nature and existence of out-of-state conviction necessary to establish offender score and standard sentence range); Ford, 137 Wn.2d at 480-81 (accord); United States v. Weber, 451 F.3d 552, 558-59 (9th Cir. 2006) (placing burden on government to demonstrate discretionary supervised release condition is appropriate in a given case).

a. The condition of community supervision prohibiting Mr. Land from possessing drug paraphernalia is not crime-related and is unconstitutionally vague. The SRA requires the court to prohibit an offender from possessing controlled substances without a prescription, but the same is not true for drug paraphernalia. RCW 9.94A.703(2)(c). Mr. Lang's crime is not related to drugs or substance abuse, and the condition that he not possess drug paraphernalia is thus not crime-related or reasonably related to his offense, risk of re-offending, or protection of the public.

In addition, a similar condition of community custody was found to be unconstitutionally vague by the Supreme Court in Valencia. Valencia was ordered not to possess or use "paraphernalia that can be used for the ingestion or processing of controlled substances" or used in the sale or transfer of controlled substances. Valencia, 169 Wn.2d at 785. The condition was so broad that it prohibited the possession of any "paraphernalia." Id. at 794. Pointing out that sandwich bags, paper, and other common place items could be viewed as drug paraphernalia by some community corrections officers but not others, the court held the condition was void for vagueness. Id. at 794-95. While not as broad as the condition addressed in Valencia, the condition

forbidding Mr. Lang from possessing drug paraphernalia could also apply to a multitude of items at the discretion of his community corrections officer and it therefore unconstitutionally vague.

b. The condition of community supervision prohibiting Mr. Land from possessing any item designated or used to entertain, attract or lure children is not crime-related and is unconstitutionally vague. The trial court ordered Mr. Land not to “possess any item designated or used to entertain, attract or lure children.” Special Condition 9. The victims in this case were Mr. Land’s daughter and two of her friends. There is no evidence that he used any items to entertain or attract the victims or any other children. This condition of community custody is not crime-related.

The condition of community custody is also over-broad. It contains no requirement that Mr. Land actually use or intent to use an item to attract a child. It is so broadly written that everyday items like ice cream, car keys, or a cell phone fit within its purview. Thus, like the sweeping condition in Valencia, the condition forbidding Mr. Land from possessing any item that could entertain, attract or lure a child is unconstitutionally overbroad.

c. The conditions of community custody must be stricken.
The special community custody conditions forbidding Mr. Land from

possessing drug paraphernalia or any item that could attract a child are not crime-related. They are also constitutionally over-broad. This Court must vacate the two conditions of community custody. Valencia, 169 Wn.2d at 795; State v. Riles, 135 Wn.2d 326, 353, 957 P.2d 655 (1998) (striking condition of community placement not reasonably related to offense and thus not authorized by SRA).

6. THE CONDITION OF COMMUNITY CUSTODY
REQUIRING MR. LAND TO UNDERGO
PLETHYSMOGRAPH TESTING AS DIRECTED BY
HIS COMMUNITY CORRECTIONS OFFICER
VIOLATES MR. LAND'S CONSTITUTIONAL RIGHT
TO BE FREE FROM BODILY INTRUSIONS

The trial court ordered Mr. Land to undergo plethysmograph examinations as required by his community corrections officer. Special Condition 23. Penile plethysmograph testing is used in the diagnosis and treatment of sexual offenses; it is not a monitoring tool to be used by a community corrections officer. Given the invasive nature of the test, the requirement of plethysmograph testing at the discretion of a CCO rather than a qualified treatment provider violates Mr. Land's constitutional right to be free from bodily intrusions.

a. Mr. Land has a fundamental privacy interest in freedom from government intrusions into his body and private thoughts. The

due process clauses of the state and federal constitutions include a substantive component providing heightened protection against government interference with certain fundamental rights and liberty interests.⁹ Troxell v. Granville, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). The right to privacy protects the right to non-disclosure of intimate information. Butler v. Kato, 137 Wn.App. 515, 527, 154 P.3d 259 (2007) (citing O'Hartigan v. State Dep't of Personnel, 118 Wn.2d 111, 117, 821 P.2d 44 (1991)); Jason R. Odeshoo, "Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders," 14 Temp. Pol. & Civ. Rts. L. Rev. 1 (2004). Additionally, both the Fourth and Fourteenth Amendments protect a citizen from bodily invasion. Sell v. United States, 539 U.S. 166, 177-78, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003); Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed.2d 183 (1952); In re Marriage of Parker, 91 Wn.App. 219, 224, 957 P.3d 256 (1998).

The Fourteenth Amendment does not permit any infringement upon fundamental liberty interests unless the

⁹ In addition to the due process protection found at Article 1, section 3, Article 1, section 7 of the Washington constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." The enumeration of certain rights in the state constitution "shall not be construed to deny others retained by the people." Wash. Const. art. 1, § 30.

infringement is narrowly tailored to serve a compelling state interest. Washington v. Glucksberg, 521 U.S. 702, 721, 117 S.Ct. 2258, 117 S.Ct. 2302, 138 L.Ed.2d 772 (1997). People convicted of crimes retain certain fundamental liberty interests. Turner v. Safley, 482 U.S. 78, 84, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987); Weber, 451 F.3d at 570-71 (Noonan, J., concurring) (“[A] prisoner should not be compelled to stimulate himself sexually in order for the government to get a sense of his current proclivities. There is a line at which the government must stop. Penile plethysmography testing crosses it.”).

b. Penile plethysmograph testing implicates the constitutional right to freedom from bodily restraint. The freedom from bodily restraint is at the core of the interests protected by the Due Process Clause. Parker, 91 Wn.App. at 222-23. Courts have noted that penile plethysmograph testing implicates this liberty interest and that the reliability of this testing is questionable. In re Marriage of Ricketts, 111 Wn.App. 168, 43 P.3d 1258 (2002) (recognizing liberty interest); Parker, 91 Wn.App. at 226 (test violated father’s constitutional interests in privacy, noting no showing of reliability of penile plethysmograph testing or absence of less intrusive measures); Weber, 451 F.3d at 562, 564 (explaining

that plethysmograph testing is not a “run of the mill” medical procedure and studies have shown its results may be unreliable); Coleman v. Dretke, 395 F.3d 216, 223 (5th Cir. 2004) (concluding the “highly invasive nature” of the test implicates significant liberty interests), cert. denied, 546 U.S. 938 (2005); Harrington v. Almy, 977 F.2d 37, 44 (1st Cir. 1992) (stating there has been “no showing” regarding the test’s reliability or that other less intrusive means are not available for obtaining the information); see United States v. Powers, 59 F.3d 1460, 1471 (4th Cir. 1995) (holding trial court did not abuse its discretion by refusing to admit plethysmograph test results as evidence because test fails to satisfy “scientific validity” prong of Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993)), cert. denied, 516 U.S. 1077 (1996); see Odeshoo, 14 Temp. Pol. & Civ. Rts. L. Rev. at 43.

The Ninth Circuit Court’s opinion in Weber is instructive. Weber pled guilty to possession of child pornography, and the district court ordered special conditions of supervised release that included participation in mental health counseling and/or a sexual offender treatment program. Weber, 451 F.3d at 555. The court further ordered Weber to comply with all conditions of his treatment program, including submission to risk assessment evaluations, and

physiological testing, including but not limited to polygraph, plethysmograph and Abel testing. Id. Weber objected only to the requirement that he undergo plethysmograph testing. Id.

Under the federal statute governing supervised release after a prison term, the district court has wide discretion to impose special conditions of supervised release, even conditions that infringe upon fundamental rights. Weber, 451 F.3d at 557. Conditions of supervision, however, must be rationally related to the “goal of deterrence, protection of the public, or rehabilitation of the offender.” Id. at 558 (quoting United States v. T.M., 330 F.3d 1235, 1240 (9th Cr. 2003), citing 18 U.S.C. §§ 3553(a), 3583(d)). Special conditions may involve “no greater deprivation of liberty than is necessary for the purposes of supervised release.” Id. (quoting T.M., 330 F.3d at 1240, in turn quoting 18 U.S.C. § 3583(d)(2)).

The Weber Court reviewed psychological studies both critical and supportive of plethysmographic testing of sex offenders. Although the court concluded that it could not categorically rule out plethysmograph testing for all offenders, it noted problems with the test. Weber, 451 F.3d at 566. The American Psychiatric Association, for example, has expressed reservations concerning

the reliability and validity of plethysmograph testing. Id. at 564 (citing Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders: DSM-IV-R 567 (4th ed. 2000)).

The Court went on to point out that the relevant question is whether plethysmograph testing will promote the goals of rehabilitation and deterrence in an individual case, because supervised release conditions must be “‘reasonably related’ to ‘the nature and circumstances of the offense and the history and character of the defendant.’” Weber, 451 F.3d at 566 (quoting 18 U.S.C. § 3583(d)(1), 3553(a)(1)). “Only a finding that plethysmograph testing is likely given the defendant’s characteristics and criminal background to reap its intended benefits can justify the intrusion into a defendant’s significant liberty interest in his own bodily integrity.” Id. at 567. Even then, the district court must consider if other less invasive alternatives are open, as there are several alternatives available in the treatment of sexual offenders. Id. at 567-68. The Court therefore remanded Weber’s case for an evidentiary hearing. Id. at 570.

c. Mr. Land's constitutional right to freedom from bodily intrusion is violated by the requirement that he submit to penile plethysmograph testing at the pleasure of his community corrections officer. Plethysmograph testing may be useful in the diagnosis and treatment of sex offenses, and therefore may be required as part of court-ordered sexual deviancy therapy but not to monitor a defendant while on community custody. Riles, 135 Wn.2d at 343-46. “[P]lethysmograph testing does not serve a monitoring purpose . . . It is instead a treatment device that can be imposed as part of crime-related treatment or counseling.” Id. at 345.

Here, the court required Mr. Land to submit to such testing as directed by his community corrections officer rather than at the direction of his sexual deviancy treatment provider. Special Condition 23. The testing was ordered in the same sentence as the requirement that Mr. Land comply with urinalysis, breathalyzer and polygraph testing, which are utilized by DOC to monitor compliance. Riles, 135 Wn.2d at 342-43.

The danger is that the testing is not connected to Mr. Land's sexual deviancy diagnosis or treatment, but can be ordered by the CCO for any reason, including monitoring Mr. Land's compliance

with community custody conditions. The community custody condition thus violates Mr. Land's constitutional right to be free from bodily intrusions. This Court should strike the requirement that Mr. Land submit to plethysmograph testing as required by his CCO. Riles, 135 Wn.2d at 353.

E. CONCLUSION

Mr. Land's conviction for child molestation in the third degree, Count 10, must be dismissed because it violates in light of the lack of a jury instruction explaining Counts 9 and 10 had to be based upon separate and distinct acts.

Mr. Land's case must also be remanded for resentencing because the trial court improperly failed to set a specific term of community custody. In addition, several conditions of community custody must be stricken.

Respectfully submitted this 5th day of January 2012.


Elaine L. Winters – WSBA # 7780
Washington Appellate Project
Attorneys for Appellant

APPENDIX A

Jury Instructions 8, 9, 30, 31

(Redacted)

INSTRUCTION NO. 8

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

INSTRUCTION NO. 9

The State alleges that the defendant committed acts of child molestation, rape and incest on multiple occasions. To convict the defendant on any count of child molestation, rape or incest, one particular act of child molestation, rape or incest must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of child molestation, rape or incest .

INSTRUCTION NO. 30

To convict the defendant of the crime of rape of a child in the third degree as charged in count 9, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about December 31, 2008, to August 12, 2010, the defendant had sexual intercourse with S█████ H█████;
- (2) That S█████ H█████ was at least fourteen years old but was less than sixteen years old at the time of the sexual intercourse and was not married to or in a state registered domestic partnership with the defendant;
- (3) That S█████ H█████ was at least forty-eight months younger than the defendant; and
- (4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

~~03C~~
INSTRUCTION NO. 31

To convict the defendant of the crime of child molestation in the third degree as charged in count 10, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about December 31, 2008, to August 12, 2010, the defendant had sexual contact with S [REDACTED] H [REDACTED];

(2) That S [REDACTED] H [REDACTED] was at least fourteen years old but less than sixteen years old at the time of the sexual contact and was not married to or in a state registered domestic partnership with the defendant;

(3) That S [REDACTED] H [REDACTED] was at least forty-eight months younger than the defendant; and

(4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX B

**Judgment and Sentence (Felony)
Appendix F
Additional Conditions of Sentence**

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SKAGIT**

STATE OF WASHINGTON)	Cause No.:10-1-00650-7
)	
)	
)	
Plaintiff)	JUDGEMENT AND SENTENCE (FELONY)
v.)	APPENDIX F
Clifford C. Land)	ADDITIONAL CONDITIONS OF SENTENCE
)	
Defendant)	
)	
DOC No.347496)	

3

-
1. Have no direct or indirect contact with any victims .
 2. Obey all laws.
 3. Pay the costs of crime-related counseling and medical treatment required by for all victims.
 4. Do not initiate or prolong contact with minor children without the presence of an adult who is knowledgeable of the offense and has been approved, in advance, by a Community Corrections Officer.
 5. Do not seek employment or volunteer positions, which place you in contact with or control over minor children, unless approved in advance by a Community Corrections Officer.
 6. Do not enter areas where minor children are known to congregate, to include but not limited to camp grounds, parks, playgrounds, schools, pools, beaches, unless approved in advanced by a supervising Community Corrections Officer.

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7. Do not possess, access, or view pornographic materials, as defined by the sex offender therapist and/or Community Corrections Officer. Do not frequent establishments whose primary business pertains to sexually explicit or erotic material.
8. Do not possess sexual stimulus material for your particular deviancy as defined by a Community Corrections Officer and therapist except as provided for therapeutic purposes.
9. Do not possess any item designated or used to entertain, attract or lure children.
10. Do not date women or form relationships with families who have minor children, unless receiving prior approval from a Community Corrections Officer.
11. Do not remain overnight in a residence where minor children live or are spending the night, unless approved in advance by a Community Corrections Officer.
12. Do not hold employment without first notifying your employer of this conviction.
13. Do not possess or consume controlled substances unless you have a lawfully issued prescription.
14. Do not possess drug paraphernalia.
15. Do not access the Internet or subscribe to any internet service provider, by modem, LAN, DSL or any other avenue (to include but not limited to, satellite dishes, PDAs, electronic games, web televisions, internet appliances and cellular/digital telephones, or i-pads/i-pods). And you shall not be allowed to use another's persons' internet or use the internet through any venue until approved in advance by the Community Corrections Officer. Any electronic device, cell phone or computer to which you have access is subject to search.
16. Do not use computer chat rooms.
17. Do not use a false identity at any time.
18. Do not access or have an account to any social networking site.

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19. You must subject to searches or inspections of any computer equipment to which you have regular access.

20. You may not possess or maintain access to a computer, unless specifically authorized by a Community Corrections Officer. You may not possess any computer parts or peripherals, including but not limited to hard drives, storage devices, digital cameras, web cams, wireless video devices or receivers, CD/DVD burners, or any device to store or reproduce digital media or images.

21. Obtain a sexual deviancy evaluation within 30 days of release from confinement. Make reasonable progress in and successfully complete treatment. Follow all conditions outlined in your treatment contract. Do not change therapists without advanced permission of the sentencing Court and Community Corrections Officer.

22. Participate in offense related counseling programs, to include Department of Corrections sponsored offender groups, as directed by a Community Corrections Officer.

23. Participate in urinalysis, breathalyzer, polygraph and plethysmograph examinations as directed by your Community Corrections Officer.

24. Your residence, living arrangements and employment must be approved in advance by a Community Corrections Officer.

6-2-11
DATE

Dave Needy
JUDGE, COUNTY SUPERIOR COURT

RD/CCO/09-130af
3/1/11

04/01/2011
Page 3 of 3

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 67262-2-1
v.)	
)	
CLIFFORD LAND,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF JANUARY, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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STAFFORD CREEK CORRECTIONS CENTER
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ABERDEEN, WA 98520 | (X)
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SIGNED IN SEATTLE, WASHINGTON THIS 5TH DAY OF JANUARY, 2012.

X _____
[Handwritten Signature]

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