Supreme Court No. 101976-9
(COA No. 83039-2-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JESSE REEDY,

Petitioner.

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

PETITION FOR REVIEW

TIFFINIE MA
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101

(206) 587-2711
tiffinie@washapp.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER AND DECISION BELOW

Jesse Reedy asks this Court to review the opinion of the Court of Appeals in *State v. Reedy*, No. 83039-2-I (issued on April 10, 2023). A copy of the opinion is attached as Appendix A.

B. ISSUE PRESENTED FOR REVIEW

The Double Jeopardy Clauses of the Fifth Amendment and article I, section 9 prohibit the imposition of multiple convictions for the same offense. Where the State charges identical offenses during the same time period, the court must make manifestly clear to the jury that it must unanimously find and base each count on a separate and distinct act. Where the court did not instruct the jury that it needed to find separate and distinct acts for each of the two molestation counts, do Mr. Reedy's multiple convictions for the same offenses violate double jeopardy?

C. STATEMENT OF THE CASE

The State charged Jesse Reedy with one count of rape of a child in the first degree and two counts of child molestation in the first degree for sexual acts with his daughter, P.J.R., occurring during the identical time period "between the 7th day of October, 2019, through December 10th, 2019[.]" CP 40-41. The State declined in the Information to specify any particular date or act for any of the counts.

Holly DuClose testified that, in response to her questioning, her eight year old daughter P.J.R. disclosed her father, Mr. Reedy, had touched her vagina and put his fingers inside on five occasions. RP 525.[1] P.J.R. was not specific as to the dates of the touching. Ms. DuClose contacted the Monroe Police and reported what P.J.R. had told her. RP 527.

P.J.R. repeated these claims during interviews with Monroe Police Officer Paul Henderson, forensic nurse

[1] Mr. Reedy and Ms. DuClose are not married.

examiner, Paula Newman-Skomski, and Child Interviewers Heidi Scott and Gina Coslett. RP 618, 651-52. The disclosures to these individuals were similarly unspecific regarding dates and time.

Mr. Reedy was charged with one count of first degree child rape and two counts of first degree child molestation. CP 40-41. At the conclusion of testimony, the court read to the jury identical to-convict instructions for each count of child molestation and a similar instruction for the child rape that was identical but added the element of penetration. CP 87-89 (Instruction Nos. 11-13), 93-94 (Instruction Nos. 17-18). In addition, the court told the jury all three counts pertained to conduct occurring during the identical time period: "between the 7th day of October, 2019, through December 10th, 2019[.]" CP 100, 103-04 (Instruction Nos. 9, 12-13).

The court also instructed the jury that it had to reach a unanimous verdict and that the jurors must unanimously agree as to which act had been proven. CP 93, 99 (Instructions 2, 8).

The court also instructed the jury a separate crime was charged in each count. CP 98 (Instruction 7). The court did not instruct the jury that an act forming the basis for one count could not also form the basis for another count or that each count must be based upon an act separate and distinct from the other acts. The jury convicted Mr. Reedy of the three counts as charged. CP 96-100.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The Court of Appeals incorrectly found the State made it manifestly apparent that each charge related to separate and distinct act. The State's failed election in closing resulted in a violation of Mr. Reedy's right to be free from double jeopardy.

The Fifth Amendment to the United States Constitution and article I, section 9 of the Washington Constitution protect a defendant against multiple punishments for the same offense. *North Caroline v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed.2d 865 (1989); *State v. Mutch*, 171 Wn.2d 646, 661, 254 P.3d 803

(2011); *State v. Noltie*, 116 Wn.2d 831, 848, 809 P.2d 190 (1991).

Where the State charges multiple counts of the same offense or multiple offenses potentially based on the same act, the State must prove a different act forms the basis of each count. *Mutch*, 171 Wn.2d at 661-64; *State v. Borsheim*, 140 Wn.App. 357, 366-71, 165 P.3d 417 (2007). Jury instructions that relieve the State of its obligation to prove each offense was based on a separate and distinct act and that expose a defendant to multiple punishments for the same offense are inadequate and may violate a defendant's right against double jeopardy. *Mutch*, 171 Wn.2d at 662-65; *Borsheim*, 140 Wn.App. at 366-67.

To prevent a double jeopardy violation where the State charges multiple identical offenses, "the trial court must instruct the jury that they are to find separate and distinct acts for each count." *Borsheim*, 140 Wn.App. at 367; *Mutch*, 171 Wn.2d at 662-63 (recognizing instructions must clearly inform jury each

crime requires proof of a different act). Only where the jury unanimously agrees that at least one separate act constitutes each charged offense is a double jeopardy violation avoided. *Noltie*, 116 Wn.2d at 842-43.

The Washington Supreme Court has held that where the defendant is charged with multiple counts of the same offense, and the to-convict instructions are "nearly identical," the jury instructions are flawed if they do not include an instruction stating that "each count must be based on a separate and distinct criminal act." *Mutch*, 171 Wn.2d at 662. This flaw cannot be remedied by an instruction that each count charges a separate crime because that instruction "still fails to 'inform[ ] the jury that each "crime" require[s] proof of a different act.'" *Id.* at 663, *quoting Borsheim*, 140 Wn.App. at 367. And the flaw cannot be remedied by an instruction that the jury must reach a unanimous verdict, unless the instruction specifically states that the jury "'must unanimously agree that at least one particular act has been proved beyond a reasonable doubt *for each*

count.'" *Borsheim*, 140 Wn.App. at 369, *quoting State v. Ellis*, 71 Wn.App. 400, 402, 859 P.2d 632 (1993); *see also Mutch*, 171 Wn.2d at 663.

Appellate courts apply a "rigorous" and "strict[]" review when considering a double jeopardy challenge. *Mutch*, 171 Wn.2d at 664. In the absence of a proper instruction informing the jury it must find separate and distinct acts for each count, reversal is required unless it is "manifestly apparent" that the jury based the conviction for each count on a separate act. *Id.*

Here, the Court of Appeals agreed the court's instructions did not inform the jury it must find a separate and distinct act for each count. Slip Op. at 9-10. Thus, the record must show it was manifestly apparent that a separate and distinct act predicated each child molestation count. Contrary to the Court of Appeals opinion, this is not the "rare circumstance" where the record is sufficient to overcome deficient jury instructions that failed to take into account double jeopardy concerns. *Mutch*, 171 Wn.2d at 665.

Mr. Reedy's two child molestation convictions cannot withstand this rigorous level of scrutiny. This is not a case where P.J.R. identified a specific number of assaults that matched up to the number of counts. *State v. Hayes*, 81 Wn. App. 425, 438-39, 914 P.2d 788 (1996) (The defendant was charged with four counts of rape and the victim testified to being raped on at least four occasions.). Nor did the prosecutor clarify that the jury had to find more than one separate act of molestation in order to justify two convictions. *See Noltie*, 116 Wn.2d at 849 (The prosecutor explained two counts of statutory rape by stating, "[Y]ou have to find he did it twice in order to convict him of the second one. Okay?") (internal quotation marks omitted).

The Court of Appeals relied on *State v. Peña Fuentes*, finding the State's evidence and arguments were similar to the ones in that case. Slip Op. at 10-11. *Peña Fuentes* is distinguishable, however. In that case, the defendant was convicted of one count of first degree rape of a child and two

counts of first degree child molestation. 179 Wn.2d 808, 823, 318 P.3d 257 (2014). Although the jury instructions were deficient, the Supreme Court held it was "manifestly apparent that the convictions were based on separate acts because the prosecution made a point to clearly distinguish between the acts that would constitute rape of a child and those that would constitute child molestation, focusing on the *clear election* by the State in its closing argument:

> In the prosecutor's closing argument, he addressed count I (child rape) and identified the two specific acts that occurred at the condo that supported a child rape conviction. The prosecutor then addressed counts III and IV, which involved child molestation that occurred during the same time period as count I. The prosecutor clearly used "rape" and "child molestation" to describe separate and distinct acts. He divided Peña Fuentes's behaviors into two categories—the acts involving penetration, which constituted rape, and the other inappropriate acts, which constituted molestation. And again, the defendant did not challenge the number of acts or whether the acts overlapped; he challenged only J.B.'s believability. The jury ultimately believed J.B.'s testimony regarding the various acts that occurred at the condo.

Id. at 825.

In Mr. Reedy's matter, the prosecutor failed to make such an explicit election. The Court of Appeals focused on the prosecutor's identification of three incidents by specific names, but in doing so ignored the qualified election, which the prosecutor then rendered meaningless in her subsequent rebuttal:

> So you don't need to know or agree as to what the date was in order to find Mr. Reedy guilty of these three counts. You just must believe beyond a reasonable doubt that three separate incidents occurred during the date range that [P.J.R.] described.
> …
> And that applies to how I've described and labeled the various counts. I've described them as the magnet count, the workout count, the Devon count. **But you folks are tasked with ultimately deciding what three acts you believe or do not believe constitute the crimes the defendant is accused of. You can make any combination of the type of penetration or the type of touching.** You can determine in your own conversations when these occurred based on the date details that [P.J.R.] provided. But you don't have to all agree on a date. You don't have to say this must have happened on October 20th. This must have happened on November 2nd. I submit to you you

> probably won't be able to do that with the evidence that you have. But the date isn't what matters. It's the consensus that you reach beyond the details that establish and constitute the three separate offenses.

RP 760, 792 (emphasis added).

The failure of the jury instructions to require the offenses be based upon separate and distinct acts coupled with the prosecutor's failure to specifically elect the acts that correspond to separate counts violated double jeopardy.

Because the record as a whole fails to show that it was manifestly apparent to the jury the counts must be based upon separate and distinct acts, Mr. Reedy's right to be free from double jeopardy was violated. One of the sexual molestation convictions should be dismissed. *Mutch*, 171 Wn.2d at 662-66; *Borsheim*, 140 Wn.App. at 366-71.

E. CONCLUSION

Based on the foregoing, Mr. Reedy respectfully requests that review be granted. RAP 13.4(b).

This petition complies with RAP 18.17 and contains 1909 words as calculated by Microsoft Word.

DATED this 10th day of May 2023.

Respectfully submitted,

/s Tiffinie B. Ma

Tiffinie B. Ma (51420)
Attorney for Appellant
Washington Appellate Project (91052)
1511 Third Ave, Ste 610
Seattle, WA 98101
Telephone: (206) 587-2711
Fax: (206) 587-2711

APPENDIX A

FILED
4/10/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JESSE REEDY, Appellant, v. STATE OF WASHINGTON, Respondent.	No. 83039-2-I DIVISION ONE OPINION PUBLISHED IN PART

DÍAZ, J. — Appellant Jesse Reedy appeals his conviction of one count of child rape and two counts of child molestation, claiming that the jury was not informed that each conviction must be based on separate and distinct incidents and, thus, his double jeopardy rights were violated. Reedy requests vacatur of one of the child molestation convictions and re-sentencing of the other, as well as remand on some of his community custody conditions. We disagree with his double jeopardy claim because the State made that requirement "manifestly apparent" to the jury and, therefore, we affirm his conviction. However, we agree that some of his conditions of community custody are improper and remand this matter for re-sentencing.

I. FACTS

The unpublished part of this opinion bases the citations and pin cites on the Westlaw online version of the cited material.

A. Pre-arrest

In 2019, PJR, who was eight years old at the time, lived with her biological parents, Holly Duclose (Duclose) and Reedy, in Monroe, WA. The two parents cohabitated for co-parenting purposes, but their relationship was no longer romantic. At that time in 2019, Reedy carried out caregiving tasks for PJR while PJR's mother was undergoing treatment for a medical condition.

PJR has been diagnosed with an autism spectrum disorder. Additionally, Reedy claims he also received an autism diagnosis and other mental health diagnoses.

In August 2019, Duclose began to notice Reedy and PJR spending more time in PJR's room with the door closed, which was not typical for their household. Duclose also observed that Reedy began to buy PJR more gifts costing hundreds of dollars, which he had not done before. PJR told Duclose "I have a secret," but would not tell her what it was.

On December 10, 2019, Duclose asked her daughter again to disclose the secret to her, and PJR said, "Dad doesn't want me to tell." After Duclose asked "has Daddy been touching you?" PJR answered in the affirmative and pointed to her breasts and vagina. At this point, Duclose took PJR to their neighbor's apartment. Duclose's neighbor called the police. Upon the neighbor telling Reedy she would call Child Protective Services, Reedy tried to destroy his laptop and threw it in a dumpster.

Upon arriving at the apartment, the police detective, Paul Henderson (Henderson), asked PJR what happened and she stated Reedy had "pulled her

pants down" and "touched" her "privates." In this interview, and subsequent interviews, PJR disclosed that Reedy had touched her five times, approximately between October 7, 2019 and December 10, 2019. PJR described two specific incidents an indeterminate amount of time apart, but both taking place separately. One incident occurred when Reedy wanted to show her a magnet. The second incident she described occurred after Reedy worked out.

B. Arrest and Pre-trial

On December 10, Reedy was arrested and transported to the Monroe Police Department. Detective Henderson interviewed Reedy that day. Reedy admitted to watching child pornography and bestiality, but not on the computer he tried to destroy. He also admitted he created his own three-dimensional anime child pornography to "satiate his desire to experience his . . . 'deviant side.'" In the interview, he denied sexual contact with PJR, but claimed that she "lick[ed] her lips," and asked him to "sleep with her in a sexual manner." Reedy contends he did nothing "intentionally sexual" with her and that "all [he] did was tickle her once in a while."

Reedy was incarcerated in the Snohomish County jail and the court ordered a competency evaluation, which—as both parties agreed—found him competent to stand trial. He was arraigned on January 15, 2020, at which time he was charged with rape of child in the first degree.

On April 14, 2020, the court ordered a second evaluation of Reedy's competency because he had "devolved significantly" over those weeks. Reedy was found not competent and was provided restoration services. During this time,

his evaluator concluded that Reedy "appear[ed] to have a major mental illness." By January 15, 2021, he was found competent once more. His trial date was reset to March 5, 2021. The trial was then continued to June 25, 2021.

Between these events, in April 2021, PJR disclosed another incident where Reedy and his friend, "Devon" convinced her to stay in a closet, pulled down her pants and "looked at [her] privates." On June 25, 2021, the State filed an amended information to include two counts of child molestation.[1]

During the pre-trial child hearsay hearing, when PJR was testifying, Reedy interjected, "I didn't do it. Tell the truth."

C. Trial

At trial, Detective Henderson testified that PJR told him that Reedy touched her "like five times" over the previously described general time period. PJR testified that Reedy had touched her at least once. At the end of PJR's own testimony, as she left the stand, Reedy stated out of turn, "I love my daughter." PJR's mother testified consistent with PJR, and discussed the events leading up to Reedy's arrest.

After both parties rested, the jury was instructed, in instruction no. 2, that the State had the burden of proving each element of each crime (one count of rape of a child in the first degree and two counts of child molestation in the first degree) beyond a reasonable doubt. In instruction no. 7, the jury was instructed that, "A separate crime is charged in each count. You must decide each count separately.

[1] The prosecution and defense were unable to locate or identify "Devon," including determining his last name or any other significant information about him.

Your verdict on one count should not control your verdict on any other count." Jury instruction no. 8 (a Petrich instruction) further informed the jury that, because a separate crime was charged in each count, the jury must decide each separately:

> In Counts 1, 2, and 3, in alleging that the defendant committed Rape of Child in the First Degree and Child Molestation in the First Degree, the State relies upon evidence regarding a single act constituting each alleged crime. To convict the Defendant as to each count, you must unanimously agree that this specific act was proved.

Finally, in instructions nos. 9, 12, and 13, the court instructed the jury as to the elements of each crime alleged.

In closing argument, the State described the three different charges. The State differentiated the three charges by explaining the first charge was rape of a child in the first degree, and explained the elements of that charge. The State next discussed instructions nos. 12 and 13 which defined child molestation.

The State further explained that there must be a separate factual basis for each charge, and that there were three "distinct" events that occurred in the roughly two-month period between when PJR turned eight years old in October 2019 and Reedy's arrest in December 2019, stating:

> So you don't need to know or agree as to what the date was in order to find Mr. Reedy guilty of these three counts. You just must believe beyond a reasonable doubt *that three separate incidents occurred* during the date range that [PJR] described.

(emphasis added).

The State further described three "distinct" incidents of abuse corresponding with the three charges against Reedy: 1) the "magnet count," 2) the "work out count," and 3) the "Devon count." As to the first, the State stated, "the first incident of rape of child . . . I'm going to refer to as the magnet incident. She

describes that before this sexual abuse occurred, Mr. Reedy was showing her a magnet . . . [t]hat's one distinct incident."

The State then described the two counts of child molestation. The State described the second count as a different time Reedy touched PJR after Reedy "had been working out . . . in that charge, he's charged merely with child molestation in the first degree for the sexual contact." Then finally, the State described the third count, as "the Devon incidents," when Reedy and his friend, Devon, engaged in sexual contact with PJR.

The jury found Reedy guilty as charged on all three counts.

D. Sentencing

The court sentenced Reedy within the standard range for each of the three separate counts, to be run concurrently. The court also imposed conditions of community custody upon Reedy's release. In condition 2, uncontested in the sentencing hearing, the court mandated that Reedy would have a lifetime no-contact order protecting PJR, which his counsel indicated he would "abide by [] scrupulously." In conditions 21-24, the court restricted Reedy's access to a computer, the internet, and various activities on the internet. And finally, in condition 12, the court required Reedy to "submit" to searches of his home by his Community Corrections Officer (CCO).

Reedy appealed his conviction and conditions of community custody.[2]

[2] On September 3, 2021, the State filed a notice of cross-appeal "of the Judgment & Sentence entered on the 24th day of August, 2021." The State, however, after review of the record noted in their brief that "no counter-assignments of error should be raised" and motioned to withdraw their cross-appeal. The motion to withdraw the State's cross-appeal is granted.

II. ANALYSIS

A. Double Jeopardy

We conclude that Reedy's double jeopardy rights were not violated because the State made it manifestly apparent which specific acts were tied to which counts of child molestation, and informed the jury that, to convict, each act must be distinct and proven beyond a reasonable doubt.

1. Law

"The constitutional guaranty against double jeopardy protects a defendant . . . against multiple punishments for the same offense." State v. Noltie, 116 Wn.2d 831, 848, 809 P.2d 190 (1991) (citing State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983)); see U.S. CONST. amend. V; WASH. CONST. art. I, § 9. However, "[i]f one crime is over before another charged crime is committed, and *different* evidence is used to prove the second crime, then the two crimes are not the 'same offense' and a perpetrator may be punished separately for each crime without violating a defendant's double jeopardy rights." Id. (citing In re Pers. Restraint of Fletcher, 113 Wn.2d 42, 49, 776 P.2d 114 (1989)) (emphasis added).

A so-called "separate and distinct" jury instruction is one where the court informs the jury that each crime requires proof of a different act. State v. Mutch, 171 Wn.2d 646, 663, 254 P.3d 803 (2011) (citing State v. Borsheim, 140 Wn. App. 357, 367, 165 P.3d 417 (2007)). In other words, a separate and distinct instruction informs the jury that, to convict, "one particular act has [to be] proved beyond a reasonable doubt *for each count*." Id. (quoting State v. Ellis, 71 Wn. App. 400, 402, 859 P.2d 632 (1993)). Where jury instructions are "lacking for their failure to

include a 'separate and distinct' instruction . . ." they may be flawed. Id. at 663. "However, flawed jury instructions that permit a jury to convict a defendant of multiple counts based on a single act do not necessarily mean that the defendant received multiple punishments for the same offense; it simply means that the defendant *potentially* received multiple punishments for the same offense." Id.[3]

Our Supreme Court has "disapproved" of courts of appeals looking only at the jury instructions and conducting no further inquiry into the record. Id. at 663-664 (citing Noltie, 116 Wn.2d at 848-49). Our Supreme Court "has established that in reviewing allegations of double jeopardy, an appellate court may review the entire record to establish what was before the court." Id. at 664 (internal quotations omitted). "Considering the evidence, arguments, and instructions, if it is not clear that it was *manifestly apparent* to the jury that the State [was] not seeking to impose multiple punishments for the same offense and that each count was based on a separate act, there is a double jeopardy violation." Id. at 664 (quoting State v. Berg, 147 Wn. App. 923, 198 P.3d 529 (2008)) (internal quotations omitted). Such a review must be rigorous and strict. Id.

Several cases have addressed whether the record satisfied the "manifestly

[3] In its response, the State conflates this requirement with the requirement for unanimity declared in State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984), abrogated on other grounds, where, in cases involving multiple counts of similar acts, "any one of which could constitute the crime charged, the jury must be *unanimous* as to which act or incident constitutes the crime." Noltie, 116 Wn.2d at 842-43 (emphasis added). In short, Petrich is concerned with unanimity and how to ensure it; the claims here are concerned with whether a convicting jury found a different act formed the basis for different, though similar, counts. As will be discussed further, a Petrich instruction by itself does not absolve the failure to show a jury convicted similar counts based upon separate and distinct acts. Borsheim, 140 Wn. App. at 369.

apparent" test. State v. Sanford, 15 Wn. App. 2d 748, 754, 477 P.3d 72 (2020) (surveying cases). Two cases are instructive. In Mutch itself, our Supreme Court found that it was "manifestly apparent that the jury found [the defendant] guilty of five separate acts of rape" because the victim testified to five separate acts, and the State discussed five different incidents in its closing arguments. Mutch, 171 Wn.2d at 665. In State v. Land, the court concluded it was "manifestly apparent the state was not seeking to impose multiple punishments for the same offense" because the prosecution expressly distinguished an incident of child rape from one of child molestation. State v. Land,172 Wn. App. 593, 603, 295 P.3d 782 (2013).

"A double jeopardy claim is of constitutional proportions and may be raised for the first time on appeal." Mutch, 171 Wn.2d at 661 (citing State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006)). Double jeopardy challenges are reviewed de novo. Id. at 661-62.

2. Application of Law to Facts

In this case, the trial court's jury instructions did not contain a "separate and distinct" instruction, as defined above. As in Mutch, none of the instructions here, including instruction no. 8, "expressly stated that the jury must find that each charged count represents an act distinct from all other charged counts." Mutch, 171 Wn.2d at 662 (considering an instruction identical to instruction no. 7 herein). Moreover, as in Borsheim, the unanimity instruction alone also does not protect against a double jeopardy violation, unless the jury is instructed that it must unanimously agree that at least one particular act has been proved beyond a reasonable doubt for each count. Borsheim, 140 Wn. App. at 369 (citing Ellis, 71

Wn. App. at 402)(considering an instruction similar to instruction no. 8 herein). "The unanimity instruction given in this case . . . did not contain the 'for each count' language. Thus, although it adequately instructed the jury with regard to the concern for jury unanimity, it did not adequately instruct the jury with regard to the concern of double jeopardy." Id.

Our inquiry does not end with a deficient jury instruction, however. This court considers the arguments and the evidence "to establish what was before the court." Mutch, 171 Wn.2d at 664. Here, the State's closing argument described three separate incidents occurring within the same few months, using the same nomenclature as its witnesses: the "magnet count," the "work out count," and the "Devon count." The State described each incident as "distinct" multiple times and specifically stated that it must have been proven "beyond a reasonable doubt that three separate incidents occurred during the date range that [PJR] described . . . . And there are three specific incidents that I think you can correlate to both - all three counts."

Additionally, the State distinguished between (a) the incident and charge of child rape and (b) the two incidents and charges of child molestation as different types of sexual contact**,** again explaining that they could have occurred at any time within a specific two-month period in 2019.

The State's arguments and evidence are similar to that of the prosecution in State v. Peña Fuentes, 179 Wn.2d 808, 825-826, 318 P.3d 257 (2014). In Peña Fuentes, as here, the jury convicted Peña Fuentes of first-degree rape of a child and two counts of first-degree child molestation for conduct spanning a period of

approximately 35 months. Peña Fuentes, 179 Wn.2d at 823. At least one of the instructions stating the elements of the crime "did not include an instruction that the conduct must have occurred on an occasion separate and distinct from" the other crimes. Id. Nonetheless, our Supreme Court found that it was "manifestly apparent that the convictions were based on separate acts because the prosecution made a point to clearly distinguish between the acts that would constitute rape of a child and those that would constitute child molestation," by detailing each sequentially, reciting different alleged conduct, and using consistent nomenclature "to describe separate and distinct acts." Id. at 825. "Because of the clarity in the prosecutor's closing argument," our Supreme Court concluded that it was "'manifestly apparent' that the jury convicted Peña Fuentes based on separate and distinct acts." Id. at 826.

In the present case, the State described each incident sequentially, as "separate," and used consistent identifying nomenclature. The State further explained which count corresponded with each incident. Moreover, the State further advised the jury that, to convict, it must be convinced beyond a reasonable doubt that three separate incidents occurred. The State, thus, remedied the lack of any similar jury instruction. Finally, as in Peña Fuentes, Reedy did not challenge the number of acts or whether they overlapped, but focused his defense on the credibility of the victim. Peña Fuentes, 179 Wn.2d at 825-26.

For these reasons, we conclude that the State made it manifestly apparent to the jury that each separate charge related to a separate, distinct incident, and

therefore, Reedy's double jeopardy rights were not violated.

B. Lifetime No-Contact Order

Reedy argues that the imposition of a lifetime no-contact order barring contact with PJR should be remanded to the superior court for an examination, on the record, of less restrictive alternatives, because it violates his fundamental right to parent. Without expressing any opinion as to whether a lifetime no-contact order with PJR ultimately may be appropriate, we agree.

1. Law

"[F]or an objection to a community custody condition to be entitled to review for the first time on appeal, (1) it must be manifest constitutional error or a sentencing condition that . . . is 'illegal or erroneous' as a matter of law, and (2) it must be ripe." State v. Peters, 10 Wn. App. 2d 574, 583, 455 P.3d 141 (2019) (quoting State v. Blazina, 182 Wn.2d 827, 833, 344 P.3d 680 (2015)). The State has not argued that this condition is not ripe, and such a response will not be considered.

A sentencing court may impose conditions that restrict a defendant's fundamental constitutional rights, provided those conditions are imposed "sensitively." State v. Bahl, 164 Wn.2d 739, 757, 193 P.3d 678 (2008) (citing State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993)). Limitations on constitutionally-protected conduct must be "narrowly tailored and directly related to the goals of protecting the public and promoting the defendant's rehabilitation." Bahl, 164 Wn.2d at 757.

Parents have a fundamental constitutional right "to the care, custody, and

companionship of their children." State v. DeLeon, 11 Wn. App. 2d 837, 841, 456 P.3d 405 (2020) (citing State v. Warren, 165 Wn.2d 17, 34, 195 P.3d 940 (2008)). As such, a sentencing condition that infringes on this fundamental constitutional right may only be upheld if the condition is reasonably necessary to accomplish the essential needs of the State and public order and, again, must be "sensitively imposed." Warren, 165 Wn.2d at 32.

More specifically, courts may limit the fundamental right to parent when "reasonably necessary" to protect a child's physical or mental health. DeLeon, 11 Wn. App. 2d at 841 (citing State v. Howard, 182 Wn. App. 91, 101, 328 P.3d 969 (2014)). Before restricting a defendant's contact with his biological children, however, this court has held that a sentencing court must expressly, i.e., on the record, (a) consider the constitutional right to parent, (b) explain why the no-contact provision is necessary, and (c) explore whether any viable less restrictive alternatives exist. Id. at 841-42; State v. Martinez Platero, 17 Wn. App. 2d 716, 725, 487 P.3d 910 (2021).

In cases where a sentencing court gave an indeterminate or lengthy timeline for a no-contact order with a defendant's child, particularly those cases that did not involve a defendant's direct sexual abuse of a child, the reviewing courts of this state often have looked skeptically at the no-contact order. For example, in In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374-75, 229 P.3d 686 (2010), our Supreme Court remanded a lifetime no-contact order with a child whom the defendant kidnapped (but did not sexually abuse). Rainey, 168 Wn.2d at 381-82. Further, in State v. Ancira, this court concluded that the State failed to demonstrate

a five-year no-contact order between a defendant and his child was reasonably necessary to prevent the child from witnessing domestic violence against the defendant's spouse, when weighed against the constitutional right to parent his child. State v. Ancira, 107 Wn. App. 650, 654, 27 P.3d 1246 (2001). Additionally, this court remanded for clarification a no-contact order covering all of a defendant's children, when a defendant abused their step-child, but not their biological children. Martinez Platero, 17 Wn. App. 2d at 725.

Not all reviewing courts seemingly have required the sentencing court to articulate the reasons for a lengthy no-contact order on the record. See, e.g., Howard, 182 Wn. App. at 101 ("Reviewing courts must analyze the scope and duration of no-contact orders in light of the facts in the record.") (citing Rainey, 168 Wn.2d at 378-82); see also, e.g., State v. Sweidan, No. 36060-1-III, slip op. (unpublished portion) at 57-58 (Wash. Ct. App. Apr. 21, 2020), https://www.courts.wa.gov/opinions/pdf/360601_pub.pdf.[4] ("the trial court [must] articulate the reasons for the reasonable necessity for a no-contact order *or* the record must demonstrate the necessity") (emphasis added).

While we do not rule out the possibility that the facts in a particular case may obviate the need for a trial court, on the record, to consider the constitutional right to parent, to articulate the need for a lengthy no-contact provision, and/or to

[4] "Washington appellate courts should not, unless necessary for a reasoned decision, cite or discuss unpublished opinions in their opinions." GR 14.1(c). "However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate." GR 14.1(a).

explore whether any viable less restrictive alternatives exist, we conclude that the record in the present case requires us to remand this matter to the trial court to articulate each such consideration on the record.

2. Application of Law to Facts

Here, Reedy did not object to the lifetime no-contact order at sentencing. On the contrary, his counsel volunteered that Reedy would abide by the condition "scrupulously."[5] Therefore, this court should consider only whether the imposition of a lifetime no-contact order is manifest constitutional error, in light of Reedy's fundamental right to parent his child.

On the record before us, we are unable, without becoming fact-finders ourselves, to consider whether the no-contact order was imposed "sensitively" or whether it was "narrowly tailored" to meet the safety needs of the community and PJR. Bahl, 164 Wn.2d at 757 (citing Riley, 121 Wn.2d at 37-38). Again, a condition infringing upon the right to parent one's child can only be upheld if the condition is reasonably necessary to accomplish the essential needs of the State and public order. Warren, 165 Wn.2d 17 at 32. On the record in this case, the State's interest is protecting PJR from further abuse is abundantly clear.[6] The outstanding factual

[5] We decline to address whether Reedy invited error by so volunteering because the State did not fully brief this issue. State v. Elliott, 114 Wn.2d 6, 15, 785 P.2d 440 (1990) ("[t]his court will not consider claims insufficiently argued by the parties.") (citing State v. Wethered, 110 Wn.2d 466, 472, 755 P.2d 797 (1988)).

[6] This court recognizes that this case presents a particularly serious series of sexual assaults, against a vulnerable victim, and that each assault was premeditated and manipulative. We further understand that Reedy attempted to coerce PJR to keep the abuse a secret from her mother and to influence her testimony in hearings and at trial. This court finally recognizes that Reedy admitted to investigators that he has an untreated "deviant side," which includes viewing or creating child pornography. For these reasons, counsel for Reedy conceded that

question, however, is to what extent or how a trial court should "sensitively" and "narrowly" tailor the conditions related to those interests, short of the de facto termination of his parental rights.

After such a record is made, this court then would be in a position, if needed, to review that record to determine the legal question of whether the trial court abused its significant discretion, as with any other crime-based prohibition, and – because there was no objection at the time – whether such abuse constituted manifest constitutional error. Rainey, 168 Wn.2d at 374-75; RCW 9.94A.030(10) ("'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 . . ."). We remand this matter for the trial court to conduct that inquiry.

A majority of the panel having determined that only the foregoing portion of this opinion (section II.B) will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

C. Other Conditions of Community Custody

The trial court imposed several conditions of community custody related to computer access and related to the CCO's authority, which Reedy challenges.

1. Condition 21: Prior Authorization for Internet Access

---

a no-contact order was reasonably necessary, and only argued against the duration imposed. Wash. Court of Appeals oral argument, State of Washington v. Jesse Joseph Reedy, No. 83039-2-I (Jan. 25, 2023), at 1 min., 35 sec. through 4 min., 5 sec., video recording by TVW, Washington State's Public Affairs Network, https://tvw.org/video/division-1-court-of-appeals-2023011357/?eventID=2023011357.

Condition 21 requires Reedy to request prior authorization from his CCO before accessing the internet at nearly any time, when mandating:

> Do not access the Internet on any computer, phone, or computer-related device with access to the Internet or on-line computer service except as necessary for employment purposes (including job searches) in any location, *unless such access is approved in advance by the supervising Community Corrections Officer and your treatment provider.* The CCO is permitted to make random searches of any computer, phone, or computer-related device to which the defendant has access to monitor computer compliance with this . . . condition.

(emphasis added).

Constitutional challenges to conditions of community custody may be raised for the first time on appeal. Bahl, 164 Wn.2d at 745. Community custody conditions are reviewed for an abuse of discretion. State v. Johnson, 197 Wn.2d 740, 744, 487 P.3d 893 (2021) (citing Bahl, 164 Wn.2d at 753). "A trial court necessarily abuses its discretion if it imposes an unconstitutional community custody condition." State v. Wallmuller, 194 Wn.2d 234, 238, 449 P.3d 619 (2019) (citing Bahl, 164 Wn.2d at 744, citing State v. Irwin, 191 Wn. App. 644, 652, 364 P.3d 830 (2015)). "Issues of statutory interpretation and constitutional law are reviewed de novo." State v. Cornwell, 190 Wn.2d 296, 300, 412 P.3d 1265 (2018) (citing State v. Evans, 177 Wn.2d 186, 191, 298 P.3d 724 (2013)).

An overbreadth challenge "goes to the question of whether [S]tate action is couched in terms so broad that it may not only prohibit unprotected behavior but may also prohibit constitutionally protected activity as well." In re Sickels, 14 Wn. App. 2d 51, 67, 469 P.3d 322 (2020) (citing Blondheim v. State, 84 Wn.2d 874, 878, 529 P.2d 1096 (1975) (citing Grayned v. City of Rockford, 408 U.S. 104, 114,

92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972))). However, the "mere fact that a community custody condition impinges on a constitutional right does not invalidate it." Id. at 69.

The United States Supreme Court has emphasized the importance of internet access, noting that "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." Packingham v. North Carolina, 582 U.S. 98, 108, 137 S. Ct. 1730, 198 L. Ed. 2d 273 (2017). But "the First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor." Id. at 107. A court may restrict a defendant's access to the internet if those restrictions are "narrowly tailored to the dangers posed by the specific defendant." Johnson, 197 Wn.2d at 745 (citing State v. Padilla, 190 Wn.2d 672, 678, 416 P.3d 712 (2018); United States v. Holena, 906 F.3d 288, 290 (3rd Cir. 2018) (citing United States v. Albertson, 645 F.3d 191, 197 (3rd Cir. 2011))).

A community custody condition is unconstitutionally vague if "(1) it does not sufficiently define the proscribed conduct so an ordinary person can understand the prohibition or (2) it does not provide sufficiently ascertainable standards to protect against arbitrary enforcement." Padilla, 190 Wn.2d at 677 (citing Bahl, 164 Wn.2d at 752-53) (citing City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990)). When considering the meaning of a community custody condition, "the terms are not considered in a 'vacuum,' rather, they are considered

in the context in which they are used." Bahl, 164 Wn.2d at 754 (citing Douglass, 115 Wn.2d at 180). "If persons of ordinary intelligence can understand what the [law] proscribes, notwithstanding some possible areas of disagreement, the [law] is sufficiently definite." Douglass, 115 Wn.2d at 179. However, a community custody condition that implicates material protected under the First Amendment is held to a stricter standard of definiteness to prevent a chilling effect on the exercise of those rights. Bahl, 164 Wn.2d at 753 (citing Grayned, 408 U.S. at 109).

Courts have held that community custody conditions which require further definition by a CCO are unconstitutionally vague. Padilla, 190 Wn.2d at 682; Irwin, 191 Wn. App. at 654. In Bahl, the condition prohibiting access or possession of pornographic materials "as directed by the supervising Community Corrections Officer," did not adequately protect against arbitrary enforcement. Bahl, 164 Wn.2d at 754. The CCO's discretion to determine the extent of the condition "only makes the vagueness problem more apparent, since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement." Id. at 758.

Finally, when a condition of community custody prohibits specific conduct, "[t]he prohibited conduct need not be identical to the crime of conviction, but there must be 'some basis for the connection.'" State v. Nguyen, 191 Wn.2d 671, 684, 425 P.3d 847 (2018) (quoting Irwin, 191 Wn. App at 657). If it is "reasonable to conclude that there is a sufficient connection between the prohibition and the crime of conviction, [the appeals court] will not disturb the sentencing court's community

custody conditions." Nguyen 191 Wn.2d at 685-86.

For example, in Johnson, the defendant was arrested in a sting operation for soliciting sex with a minor on Craigslist. Johnson, 197 Wn.2d at 746-47. The court found that restricting his internet use was not unconstitutionally overbroad or vague because: "Johnson [was] not prohibited from accessing any particular social media site. Instead, he [was] required to use the Internet only through filters approved by his community custody officer." Id.

Here, Reedy complains that the restrictions on his internet use are not crime-related, improperly impinge on his first amendment rights, and are thus overbroad.

The first argument (crime-relatedness) may be disposed of quickly because Reedy, by his words and actions, connected his crimes to his "deviant" side of viewing and creating digital child pornography. However, condition 21 suffers from an unconstitutional lack of clarity by restricting Reedy's use of the entire internet without providing enforcement guidance to the CCO and, thus, without protecting against arbitrary enforcement. There is no limitation to, and it is unclear which, websites the CCO would or could prohibit from Reedy viewing, other than those viewed for employment purposes. It is also unclear what happens if there is a disagreement between the CCO and the treatment provider about which websites or even filters are appropriate, or when and how to update those approved internet locations. Without more clarity, the condition infringes on his first amendment rights and is unconstitutionally vague.

In addition, the condition's application to all internet-related inquiries in all

internet-capable devices results in overbreadth. Under the condition's express terms, Reedy could not check on his phone when the next bus is coming without first asking his CCO and treatment provider. Such breadth does not support the valid interests in public safety or the safety of PJR. The community custody condition in this case raises the concern suggested by the Johnson dissent: "the condition here is a complete ban on Web use subject only to the permission of a corrections officer, which may be granted under unspecified conditions." Johnson, 197 Wn.2d at 756.

Therefore, we remand for the court to consider the contours of the CCO's approval and/or to incorporate a requirement for appropriate monitoring or filtering software, rather than requiring approval over every instance of desired internet access.

2. Conditions 22 and 23: Chat Rooms and False Identity

We affirm conditions of community custody 22 and 23 because they are reasonably related to preventing Reedy from further contact with children.

Condition 22 states that Reedy must not use "computer chat rooms" and condition 23 states that Reedy may not "use a false identity at any time on the computer." There was no objection to these conditions in Reedy's sentencing hearing. Nonetheless, in Reedy's appeal, his brief contests all of conditions 21-24. Reedy does not include separate arguments as to conditions 22 and 23 and, instead, argues generally that these conditions are unrelated to his convictions.

As stated above, a court does not abuse its discretion if a reasonable relationship exists between the crime of conviction and the community custody

condition. Irwin, 191 Wn. App. at 658-59. For the reasons provided above, there is a clear nexus between his self-described "deviant" interests, his internet use, and the crimes he was convicted of.

Further, unlike conditions 21 (discussed above) and 24 (discussed below), conditions 22 and 23 are narrowly tailored to specific activities that involve potential online contact with children. Although Reedy did not use online forums or a false identity to abuse his daughter, using an internet forum or false identity on the internet can run the risk of violating other conditions of release such as communicating with children unsupervised. Because there is a reasonable relationship between these activities and Reedy's conviction, we do not disturb conditions 22 and 23.

3. Condition 24: Computer Parts or Components

We accept the State's concession and agree with the parties that condition 24 should be struck as overbroad.

4. Condition 12: Home Searches

We remand the condition of community custody requiring Reedy to "submit" to searches of his home, so that the trial court may clarify the conditions required to perform such a search and avoid unconstitutional vagueness.

People released on probation have reduced expectations of privacy because they are "'serving their time outside the prison walls.'" State v. Olsen, 189 Wn.2d 118, 124-25, 399 P.3d 1141 (2017) (quoting State v. Jardinez, 184 Wn. App. 518, 523, 338 P.3d 292 (2014)). Accordingly, it is constitutionally permissible for a CCO to search an individual based only on a "well-founded or reasonable

suspicion of a probation violation," rather than a warrant supported by probable cause. State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009). The legislature has codified this exception to the warrant requirement at RCW 9.94A.631. . . . " Cornwell, 190 Wn.2d at 301-02.

An individual's privacy interest [in their home] can be reduced "only to the extent necessitated by the legitimate demands of the operation of the [community supervision] process." Id. at 303-04. When there is a "nexus" between the property searched and the suspected probation violation, reduced privacy is safeguarded by: 1) the CCO having reasonable cause to believe a violation occurred before conducting a search and 2) the parolee's privacy is only diminished to the extent necessary for the State to monitor the parolee's compliance. Cornwell, 190 Wn.2d at 304 (citing RCW 9.94A.631(1)).

In Cornwell, the court held the CCO did not have reasonable cause to search Cornwell's home for potential drug paraphernalia after Cornwell was in a car accident because there was no nexus between Cornwell's suspected probation violation and his car. Id. at 306-307.

Again, "issues of statutory interpretation and constitutional law are reviewed de novo." Cornwell, 190 Wn.2d at 300 (citing Evans, 177 Wn.2d at 191). A challenge to conditions of community custody can be ripe for review if "the issues raised are primarily legal, do not require further factual development, and the challenged action is final." State v. Cates, 183 Wn.2d 531, 534, 354 P.3d 832 (2015) (citing State v. Sanchez Valencia, 169 Wn.2d 782, 786, 239 P.3d 1059 (2010) (quoting First United Methodist Church v. Hearing Examiner for the Seattle

Landmark Preservation Board, 129 Wn.2d 238, 255-56, 916 P.2d 374 (1996)). The court must also consider "the hardship to the parties of withholding court consideration." First United Methodist Church, 129 Wn.2d at 255 (internal quotation marks omitted); Bahl, 164 Wn.2d at 751.

In Bahl, the court held that the appellant's challenge to conditions of release were ripe for review because, although he was incarcerated at the time, the conditions would take effect as soon as he was released, and a violation would result in a warrantless arrest. Id. at 751-752.

In Reedy's sentencing hearing, the court imposed condition 12, requiring Reedy to submit to home visits, with the Court stating:

> There's another one that says you must consent to DOC home visits, but I'm going to change that, because I don't care if you consent or not. You must submit to DOC home visits to monitor your compliance with supervision . . .

On the sentencing form, the court crossed out "consent" on the conditions form and wrote "submit."

Contrary to the State's arguments, Reedy's challenge is ripe for review because this purely legal issue is clear and requires no additional factual development and Reedy would be subject to such searches as soon as he was released. Bahl, 164 Wn.2d at 751-52.

Here, Reedy's conditions of community custody (allowing home searches) are more related to his offense than the contested conditions in Cornwell. The repeated sexual abuse of PJR occurred at his home and Reedy made an effort to spend more time alone with her there. Further, there is a nexus between Reedy's

living space and any potential violations of other unchallenged conditions of release, such as restricting unsupervised time with children. Because there is a nexus, the next question is how his reduced privacy should be safeguarded.

Again, reduced privacy is safeguarded by: 1) the CCO having "reasonable cause to believe" a violation occurred before conducting a search and 2) the parolee's privacy is only diminished to the extent necessary for the State to monitor the parolee's compliance. Cornwell, 190 Wn.2d at 304 (citing RCW 9.94A.631(1)). Condition 12 does not require the CCO to have a reasonable suspicion that Reedy is violating any of his conditions of release. Further, there is no explanation of what a reasonable suspicion for inspection would look like anywhere in the record.

For these reasons, we remand this condition of community custody for the trial court to consider whether to add the requirement that his CCO must have reasonable suspicion of a probation violation, and to make clear that the search will only be conducted to the extent necessary "for the [CCO] to monitor compliance with the particular probation condition that gave rise to the search," where there is such a nexus. Cornwell, 190 Wn.2d at 304.

D. Statement of Additional Grounds

In addition to his attorney's briefing on appeal, Reedy submitted a statement of additional grounds. Statements of additional grounds are permitted by RAP 10.10. The rule serves to ensure that an appellant can raise issues in their criminal appeal that may have been overlooked by their attorney. Recognizing the practical limitations many incarcerated individuals face when preparing their own legal documents, RAP 10.10(c) does not require that the statement be supported by

reference to the record or citation to authorities. However, it does require that the appellant adequately "inform the court of the nature and occurrence of alleged errors." RAP 10.10(c). It also relieves the court of any independent obligation to search the record in support of the appellant's claims, making it prudent for the appellant to support their argument through reference to facts. RAP 10.10(c).

In those sections of his statement of additional grounds for review which have not been addressed above or are not duplicative of his appellate counsel's arguments, Reedy contests the sufficiency of the evidence for his conviction (Statement of Additional Grounds (SAG) 1 and 2), and raised the issue of his competency to participate in his defense before trial (SAG 3). We address each in turn.

1. Sufficiency of Evidence

We conclude Reedy did not carry his burden to show the evidence against him was insufficient.

In determining the sufficiency of the evidence, our standard of review is "whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt." State v. Rempel, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990) (citing State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), overruled on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence. State v. Witherspoon, 180 Wn.2d 875, 883, 329 P.3d 888 (2014) (citing

State v. Green, 94 Wn.2d at 220–22). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977), overruled on other grounds).

In SAG 1, Reedy contests that the "Devon count" occurred because Devon was not at the apartment during the alleged time, instead, he was at "Job Corps." He further states that PJR lied about this incident, and therefore must have lied about the other counts because she is "known to lie." SAG 2 states that because Duclose once filed a "fraudulent" no-contact order against Reedy and later revoked it in 2016, neither her nor PJR are credible witnesses.

We view the evidence presented about the Devon count in the light most favorable to the State. Salinas, 119 Wn.2d at 201. Viewing the evidence in that light, a reasonable trier of fact could find PJR's consistent and cogent reporting of the Devon count credible. Further, Reedy did nothing more than question PJR and Duclose's credibility, which if viewed in the light we must, is not sufficient to meet his burden to show a rational jury could not have found them credible, as to PJR's demeanor on reporting. Therefore, the evidence is not insufficient as a matter of law.

2. Competency

We conclude that Reedy was competent to participate in his own defense.

In SAG 3, Reedy contends that he was unable to competently participate in his defense. Reedy explained that during the time he was incarcerated, his autism,

social anxiety, and ADHD were not treated, and this affected his ability to talk about his case with his attorney. He described part of this time as being "in a temporary state of questioning [his] reality." Reedy describes that the time he was found incompetent to stand trial and treated at Western State Hospital demonstrated his inability to participate.

Although Reedy accurately described the time period in which he received competency rehabilitation at Western State before trial, he does not address that, after such time, he was professionally evaluated and found competent to participate in his defense. It is during that period of competency that the trial was held. The basis for the claim of incompetency during this time period is unclear and this court is not required to search the record to locate the portions relevant to a litigant's arguments. Cowiche Canyon Conservancy v. Bosley,118 Wn.2d 801, 819, 828 P.2d 549 (1992). Stated otherwise, Reedy's "passing treatment of an issue or lack of reasoned argument are insufficient to merit judicial consideration." Joy v. Dep't of Labor & Indus.,170 Wn. App. 614, 629, 285 P.3d 187 (2012) (citing West v. Thurston County,168 Wn. App. 162, 187, 275 P.3d 1200 (2012)).

III. Conclusion

We affirm Reedy's conviction and remand this matter to the sentencing court to reconsider the lifetime no-contact order, as well as conditions 12, 21, and 24 consistent with this opinion.

Díaz, J.

WE CONCUR:

Mann, J.

Mya, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 83039-2-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Amanda Campbell
[Amanda.campbell@co.snohomish.wa.us]
Snohomish County Prosecutor's Office
[Diane.Kremenich@co.snohomish.wa.us]

☐ Attorney for other party

TAYLOR HALVERSON, Legal Assistant
Washington Appellate Project

Date: May 10, 2023

WASHINGTON APPELLATE PROJECT

May 10, 2023 - 4:00 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	83039-2
Appellate Court Case Title:	State of Washington, Respondent v. Jesse Joseph Reedy, Appellant
Superior Court Case Number:	19-1-02491-1

The following documents have been uploaded:

- 830392_Petition_for_Review_20230510160009D1010538_8324.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp_051023-5.pdf

A copy of the uploaded files will be sent to:

- Amanda.campbell@co.snohomish.wa.us
- Diane.Kremenich@co.snohomish.wa.us
- diane.kremenich@snoco.org
- greg@washapp.org
- kummerowtm@gmail.com
- wapofficemai@washapp.org

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Tiffinie Bie Ha Ma - Email: tiffinie@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20230510160009D1010538