

NO. 44265-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

SEAN STOLL,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

The federal and state constitutions prohibit the government from placing an individual in jeopardy more than once for the same offense. Sean Stoll was tried for two counts of the same offense against a single individual over the same charging period. Over Mr. Stoll's objection, the to-convict instructions were identical and the court's instructions to the jury failed to make manifest that each count had to be based upon separate and distinct acts. One of Mr. Stoll's resulting convictions should be reversed.

This Court should also remedy an additional instructional error that diluted the State's burden of proof and several improper sentencing findings and conditions.

B. ASSIGNMENTS OF ERROR

1. Mr. Stoll was deprived of his Fifth Amendment right to be free from double jeopardy because the jury instructions did not make clear that a separate and distinct act was required for each count.

2. Instruction 3 misstated the definition of proof beyond a reasonable doubt and diluted the State's burden of proof.

3. The sentencing court erred in imposing discretionary costs and fees.

4. In the absence of substantial evidence, the sentencing court erred in finding Mr. Stoll has the likely ability to pay the legal financial obligations imposed.

5. The sentencing court erred by ordering Mr. Stoll to pay for the victim and her family's unspecified counseling and therapy costs as a condition of community custody.

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

7. The sentencing court erred by including community custody conditions related to alcohol prohibitions, in excess of its authority under the Sentencing Reform Act (SRA).

8. The sentencing court erred by including a condition of community custody restricting Mr. Stoll's access to the internet, in excess of the court's authority under the SRA.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The federal and state constitutions prohibit multiple convictions for the same act. Where multiple counts of the same crime are alleged to have occurred over the same period, the court's

instructions should make clear to the jury that a guilty verdict on each offense must be predicated on separate and distinct acts. If no such instruction is provided, a double jeopardy violation occurs if the record does not make the separate and distinct act requirement manifestly clear to an average juror or if the instructional error was not harmless beyond a reasonable doubt. Should one of Mr. Stoll's convictions be vacated where the jury was not instructed as to the separate and distinct act requirement, the requirement was not otherwise made manifestly apparent, and the error was not harmless beyond a reasonable doubt?

2. The jury's role is to decide whether the prosecution met its burden of proof, not to search for the truth. The court instructed the jury that it could find the State met its burden of proof if it had an "abiding belief in the truth of the charge." When it is not the jury's job to determine the truth, did the court misstate and dilute the burden of proof in violation of due process by focusing the jury on whether it believed the charge was true?

3. Courts may not impose discretionary costs on defendants unless they have a present or likely future ability to pay. A finding of ability to pay must be supported by the evidence. Though the trial court found Mr. Stoll indigent and no evidence of his ability to pay

discretionary costs was presented, the court entered a generic finding that he had the present or future ability to pay and imposed discretionary costs and fees. Did the sentencing court err in ordering Mr. Stoll to pay discretionary fees and costs?

4. A sentencing court's authority is limited by the SRA. The SRA does not authorize a court to order payment of counseling and therapy costs as a condition of community custody. Did the court err and improperly delegate its authority to the Department of Corrections (DOC) by ordering Mr. Stoll to pay the victim and her family's therapy and counseling costs as a condition of community custody?

5. 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. Stoll to submit to plethysmograph examinations as required by his community corrections officer violate his constitutional right to be free from bodily intrusions?

6. Sentencing courts may only impose community custody conditions specifically authorized by RCW 9.94A.703, which includes conditions that are crime-related. Did the sentencing court exceed its authority by imposing conditions restricting Mr. Stoll's ability to enter places where alcohol is sold; requiring submission to urinalysis and breathalyzer testing; and prohibiting the possession and purchase of alcohol where the conditions are neither specifically authorized nor crime-related?

7. Did the sentencing court err by imposing a condition of community custody restricting Mr. Stoll's access to the internet where the condition is neither specifically authorized nor crime-related?

D. STATEMENT OF THE CASE

1. Background.

Between 2006 and 2008, Leigh Ann Riker watched the children of her friend Delaney Johnson and his fiancée Christine Windley at the home of Delaney's mother (the children's grandmother), Diana Johnson. 9/27/12 RP 222-24, 243, 245-47, 392-93; 10/2/12 RP 453-54, 457-58.¹ Leigh Ann slept on a couch in Diana's living room.² 9/27/12

¹ The three consecutively paginated volumes of trial are referred to by the first date referenced on each volume, e.g., "9/21/12 RP." The Supplemental

RP 224, 243, 247, 307; 10/2/12 RP 453-54. The room was filled with people on those nights. 9/27/12 RP 224-25, 237-39, 256-61, 284, 305-06. Delaney's oldest daughter, S.R.J., and his son C. slept on a twin bed in the same room. 9/27/12 RP 224, 247. Christine and Delaney's youngest child, J., often slept in his playpen in the living room. 9/27/12 RP 225, 268; *see* 9/27/12 RP 284.

Leigh Ann's adult son, Sean Stoll, lived in Diana's house periodically. 9/27/12 RP 224; 10/2/12 RP 453-54. The Johnson family had known Leigh Ann and Mr. Stoll for 15 years. 9/27/12 RP 225, 265. When Mr. Stoll stayed the night, he slept in a sleeping bag on the floor in the same living room in which his mother and the three children slept. 9/27/12 RP 224-25, 249; 10/2/12 RP 454-55. Diana, the grandmother, slept nearby in her bedroom. 9/27/12 RP 247. Delaney and Christine also slept nearby in a second bedroom. 9/27/12 RP 247. Diana's other son and Delaney's brother, Vance, slept in his van in the driveway, but regularly came inside to use the bathroom or to get

Verbatim Report of Proceedings of February 27, 2009 and March 5, 2009 is referred to as "Supp. RP."

² The Johnsons are referred to by their first names to avoid confusion. For consistency, Leigh Ann Riker and Christine Windley are also referred to by their first names. No disrespect is intended.

something to eat. 9/27/12 RP 239, 245-47, 392-93, 403-04; 10/2/12 RP 456-57.

To add to the crowd, Diana's eight-year-old grandson T. sometimes stayed at the house. 9/27/12 RP 254; *see* Supp. RP 71-74. S.R.J. and he exhibited "some kind of sexual playing, acting out." 9/27/12 RP 254.

2. The charges.

Long after Mr. Stoll ceased living in Diana's home, S.R.J. one day told her family that Mr. Stoll had touched her inappropriately. In particular, S.R.J. told her father that "a while before, [or] a few months before" Mr. Stoll "put his finger in her rear." 9/27/12 RP 226-27. S.R.J. told Diana, "that [during the night] Sean had asked her to get down on the floor with him. And that he had put his finger up her rectum and had told her that it would help her do – she was in cheerleading – and he said that it would help her do the splits better 'cause she was practicing all the time doing the splits." 9/27/12 RP 250. Without supplying a date or even timeframe, S.R.J. told Christine that Mr. Stoll had put his finger down her butt crack. 9/27/12 RP 307, 315. In a subsequent interview, S.R.J. was surprisingly specific, stating Mr. Stoll woke her up at 4:37 a.m. on April 24 two years before and

used his “sack” (private part) to touch her “sack.” Exhibit 4, pp.8-10, 13-14; 10/2/12 RP 432-35.

The State charged Mr. Stoll with a single count of rape of child in the first degree. CP 76. Eventually, the State amended the information to charge two counts of rape of a child in the first degree, both as to S.R.J. and both for the same April 24, 2006 to March 31, 2007 time period. CP 72-73 (second amended information); CP 45-46 (third amended information); 9/21/12 RP 1-3 (noting only change in third amended information was addition of “separate and distinct act” language in count two).

3. The trials.

Mr. Stoll was initially tried in 2009, but the jury could not reach a verdict. *See* CP __ (Sub # 42).³ The results of a subsequent trial were overturned on appeal. CP 47-54.

In September 2012, the State tried Mr. Stoll a third time for the same charges. By this time, S.R.J. was 13 years old. 9/27/12 RP 225, 266. Her trial testimony differed markedly from her prior disclosures. S.R.J. testified she first told others in 2008 or 2009. 9/27/12 RP 270-72. She further testified she told Delaney that Mr. Stoll “had sex with

³ A supplemental designation of clerk’s papers has been filed for documents cited by subfolder number.

her,” although Delaney testified she told him only that Mr. Stoll had touched her in the rear. 9/27/12 RP 226-27, 273. S.R.J. said she told Diana the same thing, that he put both his penis and his finger in her vagina and butt, although Diana also testified that S.R.J. told her only that she had been touched in her butt. 9/27/12 RP 250, 273-74; *see* 9/27/12 RP 321-22 (similar contradiction with disclosure to Christine). S.R.J. testified Mr. Stoll woke her up in the early morning when everyone else in the living room and the neighboring bedrooms was asleep, told her to get on the floor, pulled her nightgown up and her underwear down and stuck his penis in her. 9/27/12 RP 275-78, 295-96. When it was over, she testified she replaced her clothes and went back to bed. 9/27/12 RP 277. S.R.J. acknowledged she had originally told people Mr. Stoll had only put his finger in her rectum and not that he had sex with her; she admitted her testimony had changed. 9/27/12 RP 282-83.

At this trial, S.R.J. alleged it happened more than once for a couple weeks. 9/27/12 RP 276; *see* 10/2/12 RP 415 (testimony that S.R.J. told witness abuse had happened everyday for about one week). But she admitted she has previously testified that it only happened once. 9/27/12 RP 292-93; *see* Exhibits 7 and 8 (prior testimony).

Moreover, she could not recall when it had happened, except to say it was a long time ago and a long time passed before she told her family. 9/27/12 RP 281-82, 294. She admitted her memory had been fading. 9/27/12 RP 282.

The other witnesses could not provide more specific information about when the alleged abuse occurred. Delaney testified he could not recall when S.R.J. told him about her allegation. 9/27/12 RP 234.

Whenever that disclosure came, S.R.J. told Delaney the incident had happened “a while before, a few months before.” 9/27/12 RP 226-27.

Diana also could not recall when the disclosure occurred except to say “it was much later, yes, than when it [allegedly] happened.” 9/27/12 RP 252-53; *see* 9/27/12 RP 253-54 (can best approximate conversation occurring at end of 2008 or beginning 2009). Diana could not say when it was alleged to have occurred. 9/27/12 RP 253. In fact, Diana could not even tell the jury when Mr. Stoll had stayed at the house. 9/27/12 RP 262.

The family also testified that S.R.J. had some problems with telling the truth. 9/27/12 RP 240-42.

Mr. Stoll requested the jury be instructed that the two counts be based on separate and distinct acts, so as not to prejudice his right to be

free from double jeopardy. 10/2/12 RP 462-74. The court refused to provide the instruction, ruling that a standard unanimity instruction was sufficient. 10/2/12 RP 471-74. In closing, the State simply argued that sexual intercourse happened at least twice, without specifying the occasions. 10/2/12 RP 486 (“She testified it happened on more – more than one occasion. So it happened at least twice.”). The jury convicted Mr. Stoll of both counts. CP 24-25. He now appeals those convictions and the resulting judgment and sentence. CP 5, 7-23.

E. ARGUMENT

1. The jury instructions violated Mr. Stoll’s Fifth Amendment right to be free from double jeopardy because they allowed the jury to convict him of multiple counts for the same act.

Mr. Stoll was convicted of two counts of rape of a child in the first degree, which counts involved the same victim during the same time period. The jury was provided a unanimity instruction, but was never informed that it must base its convictions for the two offenses upon separate and distinct acts. The evidence 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 counts upon a single act. Thus, Mr. Stoll’s constitutional right to double jeopardy was 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. U.S. Const. amend. V; *see* U.S. Const. amend. XIV.⁴ Similarly, article I, section 9 of our state constitution states, “No person shall be ... twice put in jeopardy for the same offense.” 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 Pers. 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 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, 254 P.3d 803 (2011).

A defendant’s right to be free from double jeopardy is violated if he is convicted of offenses that are identical both in fact and in law.

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, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

State v. Freeman, 153 Wn.2d 765, 777, 108 P.3d 753 (2005). The double jeopardy clause bars multiple convictions arising out of the same act even if concurrent sentences have been imposed. *State v. Calle*, 125 Wn.2d 769, 775, 888 P.2d 155 (1995).

The prohibition against double jeopardy must be paid special attention where the charges include multiple acts against a single victim over a single charging period. Because of the constitutional right to be free from double jeopardy, a court's instructions must clearly inform the jury that each crime requires proof of a different act. *Mutch*, 171 Wn.2d at 663 (citing *State v. Borsheim*, 140 Wn. App. 357, 367, 165 P.3d 417 (2007)). Where multiple counts are alleged, the jury must be provided "sufficiently distinctive 'to convict' instructions or an instruction that each count must be based on a separate and distinct criminal act." *Id.* at 662 (citing *State v. Carter*, 156 Wn. App. 561, 567, 234 P.3d 275 (2010); *State v. Berg*, 147 Wn. App. 923, 934-35, 198 P.3d 529 (2008)).

To prevent such multiple convictions from violating double jeopardy, the jury must unanimously agree that at least one separate act constitutes each charged offense. *State v. Noltie*, 116 Wn.2d 831, 842-43, 809 P.2d 190 (1991); *Borsheim*, 140 Wn. App. at 367. "[I]n sexual

abuse cases where multiple counts are alleged to have occurred within the same charging period, 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 (quoting *State v. Hayes*, 81 Wn. App. 425, 431, 914 P.2d 788 (1996); *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; *Carter*, 156 Wn. App. at 568 (reversing three counts of rape in same charging period due to lack of “separate and distinct” jury finding); *Berg*, 147 Wn. App. at 934-37 (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, *review 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).

In the absence of proper jury instructions, reversal is required unless it was “manifestly apparent” that the conviction for each count was based on a separate act. *Mutch*, 171 Wn.2d at 664. Review is

“rigorous” and it will be “a rare circumstance” where the appellate court should affirm despite deficient jury instructions. *Id.* at 664-665.

Here, Mr. Stoll proposed that the “separate and distinct act” language be included in the to-convict instructions. 10/2/12 RP 470-72. The trial court denied his request. 10/2/12 RP 471-74. It purported to resolve the potential double jeopardy issue by moving the unanimity instruction to follow the to-convict instructions. *Id.* As set forth below, the omission of the separate and distinct acts language was not resolved by the revised order.

This Court reviews challenges to jury instructions de novo. *Berg*, 147 Wn. App. at 931.

- b. The court’s instructions to the jury failed to require that a separate and distinct act form the basis for each count .

The jury instructions here were similar to those found lacking in *Mutch*, *Carter*, and *Borsheim*. Mr. Stoll was charged with two counts of rape of S.R.J. in the first degree, which was alleged to have occurred over a single charging period. CP 40-41 (to-convict instructions), 45-46 (third amended information). Thus, absent clear jury instructions the jury may have convicted Mr. Stoll of two offenses based on a single act. Here, a jury instruction provided:

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 the other count.

CP 37 (instruction # 7). The same instruction was provided to the juries in *Mutch, Carter* and *Borsheim*. *Mutch*, 171 Wn.2d at 662-63; *Carter*, 156 Wn. App. at 564-65 & n.4; *Borsheim*, 140 Wn. App. at 364.

The court's instructions also included a unanimity instruction, which failed to preclude consideration of the same act for each count:

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

CP 42 (instruction # 12). This is the instruction the court moved after the to-convict instructions upon defendant's request for separate and distinct acts language. 10/2/12 RP 472-74. While this instruction arguably protects against a non-unanimous verdict, it does not provide direction that each offense must be based on separate and distinct acts. *See Borsheim*, 140 Wn. App. at 366 & n.2 (describing distinction between unanimity requirement and prohibition against double

jeopardy). Again, a similar instruction was provided to the juries in *Mutch, Carter and Borsheim*. *Mutch*, 171 Wn.2d at 663; *Carter*, 156 Wn. App. at 564 & n.3; *Borsheim*, 140 Wn. App. at 364.

The court's instructions failed to include the separate and distinct acts language Mr. Stoll requested and as is advised by the Washington pattern instructions. 10/2/12 RP 470-74; WPIC 44.21 Note on Use (referencing WPIC 4.25) & Comment; WPIC 4.25 Comment.

Consequently, the to-convict instructions provided to the jury did not instruct that each offense must be based on separate and distinct acts. Rather, the to-convict instructions contained identical charging periods and victim, and listed the elements of each offense. CP 40-41. Thus the instruction on count one and count two each stated that, to convict, the jury must find "(1) That on or about the period between April 24, 2006, and March 31, 2007, the defendant had sexual intercourse with S.R.J." CP 40-41. The remaining elements, pertaining to age and venue, were also identical. *Id.* These to-convict instructions were comparable to those provided in *Mutch, Carter, and Borsheim*. *Mutch*, 171 Wn.2d at 662; *Carter*, 156 Wn. App. at 564 & n.2; *Borsheim*, 140 Wn. App. at 364-65. Like in those cases, Mr. Stoll's

jury was never instructed that it was required to use separate and distinct acts to convict him of each offense. *See* CP 1065-85.

In *Borsheim*, the defendant was convicted of four counts of rape of a child in the first degree. 140 Wn. App. at 362. Like here, the jury instructions in *Borsheim* included a unanimity instruction and an instruction that each count must be decided separately. *Id.* at 364 (instructions stated that to convict, “one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt” and a “separate crime is charged in each count. You must decide each count separately.”). Also like in this case, the *Borsheim* to-convict instructions did not specify that each count needed to be decided on separate and distinct acts. *Id.* This Court found that “multiple acts of sexual abuse were alleged to have occurred within the same charging period.” *Borsheim*, 140 Wn. App. at 367. Accordingly, “an instruction that the jury must find ‘separate and distinct’ acts for convictions on each count was required.” *Id.* No instruction standing alone or read together “made the need for a finding of ‘separate and distinct acts’ manifestly apparent to the average juror.” *Id.* at 368; *accord id.* at 370.

The court reversed three of the convictions as violating the prohibition against double jeopardy. *Id.* at 370-71.

In *Carter*, the complainant testified she was raped 40 to 50 times over a certain time period and Carter was charged with four counts of rape of a child. 156 Wn. App. at 562. The court gave a unanimity instruction but no instruction on the requirement of separate and distinct acts. Following *Berg*, this Court held that the instructions “exposed Carter to the possibility of multiple convictions for the same criminal act. Thus, we remand with instructions to dismiss three of the four child rape counts.” *Id.* at 568.

As set forth, the same omission occurred in Mr. Stoll’s case—no instruction informed the jury that a separate and distinct act must be found for each count. The instructions were deficient.

c. The deficient jury instructions caused a double jeopardy violation here.

In *Mutch*, the Court did not establish the standard of review for double jeopardy claims arising from inadequate jury instructions. The Court suggested two possible standards of review: (1) rigorous review of the entire record to determine whether absent a proper jury instruction it is clear that it was manifestly apparent to the jury that the State was not seeking to impose multiple punishments for the same

offense, or (2) presuming a double jeopardy violation unless the State convinces the court beyond a reasonable doubt that the instructional error did not affect the result. *Mutch*, 171 Wn.2d at 664-65 & n.6.

Utilizing either standard of review leads to the conclusion that one of Mr. Stoll's convictions must be dismissed.

A review of the record fails to reveal a clear requirement or finding of at least two separate and distinct acts. Rather, the evidence was ambiguous regarding the timing of the alleged incident and the number of occurrences. S.R.J. revealed to her family only a single act of misconduct, limited to Mr. Stoll having contact with her butt crack. 9/27/12 RP 226-27, 250, 307, 315. Only one of these witnesses testified S.R.J. disclosed rectal penetration, again only on a single occasion. 9/27/12 RP 250. At trial, S.R.J. testified to sexual penetration that occurred more than once. 9/27/12 RP 273-78, 295-96. She had told two other witnesses it happened almost every night for more than a week, or more than once for over a week. 10/2/12 RP 415. But at trial S.R.J. admitted she had previously testified it had happened only once. 9/27/12 RP 292-93; Exhibits 7, 8. Thus the evidence on the number and types of contact varied. Furthermore, in its closing

argument, the State merely told the jury it had happened more than once, hence at least twice. 10/2/12 RP 486.

This record is quite different from that reviewed by the *Mutch* court, which ultimately found no violation. There, the information charged five counts of rape based on allegations that constituted five separate units of prosecution, the victim specifically testified to five different episodes of rape, a detective testified the defendant admitted engaging in multiple sexual acts with the victim, the State discussed all five episodes in closing argument, and the defense did not argue or cross-examine on the insufficiency of evidence for each count but argued instead that the victim consented and was not credible. *Mutch*, 171 Wn.2d at 665. On the contrary, here, Mr. Stoll's cross-examination focused on the distinctions among S.R.J.'s disclosures and the prosecutor's argument did not distinguish the occurrences. Further, the to-convict instructions for each count were identical.

Consequently, reviewing the record here in total, it is far from clear that it would have been manifestly apparent to an average juror that separate and distinct acts of sexual intercourse had to form the basis of a guilty verdict on each count (and, separately, that each act

had to be agreed upon unanimously). This is not the “rare circumstance” presented in *Mutch*.

For similar reasons the State also cannot show beyond a reasonable doubt that the lack of a “separate and distinct act” instruction did not affect the verdict under the alternative standard. Based on the inconsistent and limited evidence, a prior jury could not convict Mr. Stoll beyond a reasonable doubt. CP __ (Sub #42). Moreover, after the second trial this court found admission of prejudicial evidence not harmless because “(1) [t]he State’s case was supported only by young SRJ’s own testimony, whose dates were contradictory, and others’ accusations that Stoll had the opportunity to commit the offenses; (2) there were no other eyewitnesses or physical evidence; (3) SRJ’s father testified that she had a reputation for untruthfulness.” CP 53-54. The State’s case suffered from the same infirmities in the instant trial. The instructional error was not harmless beyond a reasonable doubt because the evidence was far from clear that Mr. Stoll perpetrated two separate and distinct acts of penetration.

d. One of Mr. Stoll’s convictions must be dismissed because the two violate his right to be free from double jeopardy.

Under either of the standards proposed in *Mutch*, Mr. Stoll’s right to be free from double jeopardy was violated. 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. Thus the remedy for submitting various allegations to the jury that could constitute the basis for a charge and failing to insist that the jury unanimously agree to an act separate and distinct from the act underlying another count is reversal with an order to vacate one of the convictions. *Berg*, 147 Wn. App. at 935; *Borsheim*, 140 Wn. App. at 371. One of Mr. Stoll's two convictions must be reversed and vacated due to the double jeopardy violation. *See Womac*, 160 Wn.2d at 657.

2. The court's instruction equating the reasonable doubt standard with an abiding belief diluted the State's burden in violation of Mr. Stoll's due process right to a fair trial.

"The jury's job is not to determine the truth of what happened; a jury therefore does not 'speak the truth' or 'declare the truth.'" *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) (emphasis added) (quoting *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009)); *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402, 411 (2012); *State v. McCreven*, 170 Wn. App. 444, 472-73, 284 P.3d 793, 807-08 (2012). "[A] jury's job is to determine whether the State has proved

the charged offenses beyond a reasonable doubt.” *Emery*, 174 Wn.2d at 760.

Confusing jury instructions raise a due process concern because they may wash away or dilute the presumption of innocence. *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). The court bears the obligation to vigilantly protect the presumption of innocence. *Id.* “[A] jury instruction misstating the reasonable doubt standard is subject to automatic reversal without any showing of prejudice.” *Emery*, 174 Wn.2d at 757 (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)).

The trial court instructed the jury that proof beyond a reasonable doubt means that, after considering the evidence, the jurors had “an abiding belief in the truth of the charge.” CP 33 (instruction # 3); 10/2/12 RP 478. By equating proof beyond a reasonable doubt with a “belief in the truth” of the charge, the court confused the critical role of the jury. The “belief in the truth” language encourages the jury to undertake an impermissible search for the truth and invites the error identified in *Emery*, 174 Wn.2d at 741. Because the error is of constitutional dimension and affected Mr. Stoll’s rights at trial by

lowering the State's burden of proof, it may be raised for the first time on appeal. RAP 2.5(a)(3).

In *Bennett*, the Supreme Court found the reasonable doubt instruction derived from *State v. Castle*, 86 Wn. App. 48, 53, 935 P.2d 656 (1997), to be "problematic" because it was inaccurate and misleading. 161 Wn.2d at 317-18. Exercising its "inherent supervisory powers," the Supreme Court directed trial courts to use WPIC 4.01 in future cases. *Id.* at 318. WPIC 4.01 includes the "belief in the truth" language only as a potential option by including it in brackets.

The pattern instruction reads:

[The] [Each] defendant has entered a plea of not guilty. That plea puts in issue every element of [the] [each] crime charged. The [State] [City] [County] is the plaintiff and has the burden of proving each element of [the] [each] crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists [as to these elements].

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. *[If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable*

doubt.]

WPIC 4.01.

The *Bennett* Court did not comment on the bracketed “belief in the truth” language. Notably, this bracketed language was not a mandatory part of the pattern instruction the Court approved. Recent cases demonstrate the problematic nature of such language. In *Emery*, the prosecution told the jury that “your verdict should speak the truth,” and “the truth of the matter is, the truth of these charges, are that” the defendants are guilty. 174 Wn.2d at 751. Our Supreme Court clearly held these remarks misstated the jury’s role. *Id.* at 764. However, the error was harmless because the “belief in the truth” theme was not part of the court’s instructions and because the evidence was overwhelming. *Id.* at 764 n.14.

The Supreme Court reviewed the “belief in the truth” language almost twenty years ago in *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). However, in *Pirtle* the issue before the court was whether the phrase “abiding belief” differed from proof beyond a reasonable doubt. 127 Wn.2d at 657-58. Thus the court did not consider the issue raised here: whether the “belief in the truth” phrase minimizes the State’s burden and suggests to the jury that they should

decide the case based on what they think is true rather than whether the State proved its case beyond a reasonable doubt. Without addressing this issue, the court found the “[a]ddition of the last sentence [regarding having an abiding belief in the truth] was unnecessary but was not an error.” *Id.* at 658.

Emery demonstrates the danger of injecting a search for the truth into the definition of the State’s burden of proof. Improperly instructing the jury on the meaning of proof beyond a reasonable doubt is structural error. *Sullivan*, 508 U.S. at 281-82. This Court should find that directing the jury to treat proof beyond a reasonable doubt as the equivalent of having an “abiding belief in the truth of the charge,” misstates the prosecution’s burden of proof, confuses the jury’s role, and denies an accused person his right to a fair trial by jury as protected by the state and federal constitutions. U.S. amends. VI, XIV; Const. art. I, §§ 21, 22.

3. The court’s finding that Mr. Stoll had the ability to pay discretionary fees and costs is without support and should be vacated along with the imposed legal financial obligations.

If the convictions are affirmed, this Court should strike the erroneous imposition of discretionary fees because the evidence did not show Mr. Stoll has or likely will have the ability to pay.

A sentencing court can only impose discretionary costs and fees if the evidence clearly supports a finding that the defendant has the ability to pay or likely will have the future ability to pay. Courts may not require a defendant to reimburse the state for costs unless the defendant has or will have the means to do so. *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3). The court must consider the financial resources of the defendant before imposing discretionary costs. *Curry*, 118 Wn.2d at 915-16. This requirement is both constitutional and statutory. *Id.* Though fees and costs may not be collected immediately, the court must have substantial evidence at the time it enters the finding. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)).

Findings as to a defendant's ability to pay are reviewed under the clearly erroneous standard. *State v. Bertrand*, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011); *State v. Baldwin*, 63 Wn. App. 303, 818 P.2d 1116 (1991).

The sentencing court erred in imposing discretionary costs and fees upon Mr. Stoll without specifically finding he had the ability to pay. The sentencing court imposed discretionary fees totaling

\$1,640.78, and reserved on the amount owing for Mr. Stoll's court-appointed attorney. CP 12-13 (imposing court costs of \$200 criminal filing fee, \$129.78 witness costs, \$1,061 Sheriff service fee, and \$250 jury demand fee; reserving on the amount in "Fees for court appointed attorney"); RCW 9.94A.760; RCW 10.01.160; RCW 43.43.690.⁵

The State presented no evidence at sentencing that Mr. Stoll had the present or likely future ability to pay these discretionary financial obligations. Further, at sentencing the court did not discuss Mr. Stoll's ability to pay \$1,640.78 in costs. 10/2/12 RP 532-33. On the contrary, the court actually found Mr. Stoll indigent for appeal. Yet the judgment and sentence contains boilerplate language stating:

The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160). The court makes the following specific findings:

[X] The defendant has the ability or likely future ability to pay the legal financial obligations imposed here.
RCW 9.94A.753.

CP 10.

⁵ The remaining fees were mandatory and are not disputed here. CP 12-13 (listing \$500 victim assessment fee and \$100 DNA collection fee); *see, e.g., Curry*, 118 Wn.2d at 917 (victim assessment mandatory); *State v. Thompson*, 153 Wn. App. 325, 336, 223 P.3d 1165 (2009) (DNA laboratory fee mandatory).

It was improper for the court (1) to find Mr. Stoll had an ability to pay where there was no support in the record and (2) to impose \$1,640.78 in discretionary costs and fees where Mr. Stoll lacks the present and likely future ability to pay. Substantial evidence does not support the court's boilerplate finding. The court did not take Mr. Stoll's financial status into account; instead, the court imposed the costs and fees, without any specific evidence that he had the present or future ability to pay.

This Court has affirmed the imposition of discretionary costs only where the record contains specific evidence of the defendant's ability to pay. For example, in *Richardson*, this Court affirmed the imposition of costs because the defendant stated at sentencing that he was employed. *State v. Richardson*, 105 Wn. App. 19, 23, 19 P.3d 431 (2001). In *Baldwin*, this Court affirmed the imposition of costs because a presentence report "establishe[d] a factual basis for the defendant's future ability to pay." *Baldwin*, 63 Wn. App. at 311.

Unlike the defendant in *Richardson*, the record does not indicate Mr. Stoll was employed. Further, unlike in *Baldwin*, the State did not submit evidence establishing a factual basis for Mr. Stoll's future ability to pay. To the contrary, the totality of the evidence showed he

was indigent at the time of sentencing and likely to remain so for the foreseeable future. Thus, the court's finding that Mr. Stoll had the ability to pay was clearly erroneous. This Court should strike the discretionary costs imposed. In the alternative, the Court should strike the ability to pay finding.

4. The community custody condition requiring Mr. Stoll to pay counseling and therapy for the victim and her family should be stricken because it is not authorized by the SRA.

The trial court may impose punishment only as authorized by the SRA. RCW 9.94A.505(1); *In re Postsentence Review of Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). The SRA requires the trial court to determine and order restitution, which may include reimbursing a victim for medical or counseling costs. However, the sentencing court did not order Mr. Stoll to pay restitution for S.R.J. or her family's counseling and therapy costs, nor was there a showing such costs were incurred. *See* 10/2/12 RP 531 (Stoll agrees to pay \$342 in restitution); CP __ (Sub #98 (restitution order from prior trial for \$342 to victim's father for time off from work)); CP 13 (restitution to be set at a later time). Nonetheless, as a condition of community custody, the court required Mr. Stoll to pay the victim and her family's

unspecified counseling and medical costs. CP 21 (condition 19). This condition of community custody is invalid.

Mr. Stoll'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).

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 crime victims for medical treatment or counseling reasonably related to the offense. RCW 9.94A.753(3). On the other hand, 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. Restitution for therapy or counseling expenses is not included in any of these categories. *See* RCW 9.94A.703.

Additionally, requiring Mr. Stoll to pay counseling and therapy 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.

In *State v. Land*, Division One struck a similar condition of community custody under *Bahl*, 164 Wn.2d at 744-45. 172 Wn. App. 593, 604, 295 P.3d 782 (2013). The same result is compelled here.

Determining the restitution an offender is required to pay is a function of the sentencing court, not an administrative detail that may be delegated to DOC. This Court should strike the condition of community custody requiring Mr. Stoll to pay the victim and her family's unspecified costs of counseling and therapy treatment.

5. The community custody condition requiring Mr. Stoll to undergo periodic plethysmograph testing at the direction of his community corrections officer violates his constitutional right to be free from bodily intrusions.

The trial court also ordered Mr. Stoll to undergo plethysmograph examinations as required by his community corrections officer to measure treatment progress and compliance with conditions of community custody. CP 21 (condition 18). 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. Stoll's

constitutional right to be free from bodily intrusions. *Land*, 172 Wn. App. at 605-06 (striking condition requiring plethysmograph testing at direction of CCO).⁶

- a. Mr. Stoll 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. *Troxel 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

⁶ Mr. Stoll does not challenge that part of the condition requiring he submit to polygraph testing. See CP 21 (condition 18); *State v. Riles*, 135 Wn.2d 326, 957 P.2d 655 (1998); *State v. Combs*, 102 Wn. App. 949, 952-53, 10 P.3d 1101 (2000).

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 infringement is narrowly tailored to serve a compelling state interest. *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S. Ct. 2258, 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).

“[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.” *United States v. Weber*, 451 F.3d 552, 570-71 (9th Cir. 2006) (Noonan, J., concurring).

- 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).

In *Land*, this Court found “[p]lethysmograph testing is extremely intrusive.” 172 Wn. App. at 605. It accordingly struck a provision of community custody similar to that imposed here because it violated the defendant’s constitutional right to be free from bodily intrusion. *Id.* at 605-06.

Likewise, 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 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; 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. Stoll'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. Stoll to submit to such testing as directed by his community corrections officer rather than at the direction of his sexual deviancy treatment provider. CP 21 (condition 18). The danger is that the testing can be ordered by the CCO for any reason, including monitoring Mr. Stoll's compliance with community custody conditions. The community custody condition thus violates Mr. Stoll's constitutional right to be free from bodily intrusions. This Court should strike the requirement that Mr. Stoll submit to plethysmograph testing as required by his CCO. *Riles*, 135 Wn.2d at 353; *Land*, 172 Wn. App. at 605-06.

6. The community custody conditions prohibiting Mr. Stoll from entering places where liquor is sold, prohibiting him from possessing and purchasing alcohol, and requiring drug and alcohol testing should be stricken as not crime-related.

As discussed, the sentencing court may impose punishment only as authorized by the SRA. Here, the court imposed conditions of community custody restricting Mr. Stoll from “go[ing] into bars, taverns, lounges, or other places whose primary business in the sale of liquor” and from “purchas[ing], possess[ing], or consum[ing] alcohol.” CP 20-21 (conditions 10, 30). The court also imposed a condition requiring Mr. Stoll “to submit to urinalysis and/or breathalyzer testing at the request of the CCO or treatment provider to verify compliance.” CP 20 (condition 12). But there was no evidence or allegation that alcohol or drugs contributed to Mr. Stoll’s offenses in any way.

RCW 9.94A.703(3)(e) permits the sentencing court to order an offender not to consume alcohol. *See State v. Jones*, 118 Wn. App. 199, 206-07, 76 P.3d 258 (2003) (interpreting statute to permit the court to order offender to abstain from alcohol even when there was no evidence alcohol contributed to offense). The same is not true, however, for an order forbidding the defendant from entering an establishment where alcohol is the primary commodity offered for sale.

This condition is not listed in RCW 9.94A.703 and thus must fall within the provision permitting the court to impose “crime-related prohibitions.” RCW 9.94A.703(3)(f). A “crime-related prohibition” is “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10).

In *Jones*, this Court found a requirement that a defendant participate in alcohol counseling was not crime-related. Jones pled guilty to first degree burglary and other crimes, there was no evidence that alcohol contributed to his crimes, and the court made no finding that it did. *Jones*, 118 Wn. App. at 202-03. While upholding the court’s requirement that Jones abstain from the use of alcohol, this Court found the sentencing court lacked statutory authority to require him to participate in alcohol counseling because the record did not show alcohol contributed to his offenses. *Id.* at 206-08.

Similarly, before the SRA permitted the sentencing court to require any felony offender to abstain from the use of alcohol, this Court vacated such requirements where there was no evidence alcohol contributed to the offense. *Julian*, 102 Wn. App. at 304-05 (no evidence alcohol related to first degree child molestation); *State v.*

Parramore, 53 Wn. App. 527, 531, 768 P.2d 530 (1989) (striking condition of community supervision condition forbidding the defendant from consuming alcohol because the condition was not related to the crime of delivery of marijuana).

The logic of these cases requires this Court to vacate the conditions that Mr. Stoll not enter places where alcohol is the primary item for sale, submit to urinalysis and breathalyzer testing, and refrain from possessing and purchasing alcohol. There is no evidence Mr. Stoll had an alcohol or substance abuse problem or that alcohol contributed in any way to the rape of a child offenses. These community custody conditions are thus not authorized by the SRA and should be stricken. *Jones*, 118 Wn. App. at 212.

7. The community custody condition restricting Mr. Stoll's access to the internet should be stricken as not crime-related.

As discussed, if a sentencing condition is not listed in RCW 9.94A.703 it must fall within the provision permitting the court to impose "crime-related prohibitions" to be authorized under the SRA. RCW 9.94A.703(3)(f). In addition to the conditions challenged above, the sentencing court imposed a condition restricting Mr. Stoll's access to the internet. CP 20 (condition 11). Condition 11 provides:

The defendant shall not use or access the internet (including via cellular devices) or any other computer modem without the presence of a responsible adult who is aware of the conviction, and the activity has been approved by the Community Corrections Officer and the sexual offender's treatment therapist in advance[.]

CP 20.

Mr. Stoll's convictions bear no relation to his use of the internet.

His access to the internet did not contribute to his offenses. The sentencing court lacked authority to impose this condition under the SRA.

Division One of this Court struck a similar condition of community custody in *State v. O'Cain*, 144 Wn. App. 772, 774-76, 184 P.3d 1262 (2008). Like here, O'Cain's conviction for rape bore no relation to his access to the internet. *Id.* at 775. The trial court made no finding that the condition was crime-related. "Because the prohibition in this case is not crime-related, [the Court held] it must be stricken." *Id.* The same result is compelled here.

In sum, like the alcohol-prohibitions discussed above, the condition restricting Mr. Stoll's access to the internet or any other computer modem should be stricken as not crime-related.

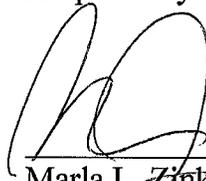
F. CONCLUSION

Mr. Stoll's right not to be twice placed in jeopardy for the same act was violated by the court's failure to instruct the jury that separate and distinct acts had to form the basis for each conviction. One of Mr. Stoll's convictions should be dismissed.

Further, this Court should remand with direction to strike numerous provisions of the sentence as set forth above, including the imposition of legal financial obligations and several conditions of community custody that are unauthorized and not crime-related.

DATED this 16th day of May, 2013.

Respectfully submitted,



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Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 44265-5-II
)	
SEAN STOLL,)	
)	
Appellant.)	

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