Supreme Court No. 98186-8
Court of Appeals No. 78597-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SERGIO MONROY,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Sergio Monroy requests this Court grant review pursuant to RAP 13.4(b) of the decision of the Court of Appeals, Division One, in *State v. Sergio Monroy*, No. 78597-4, filed January 21, 2020. A copy of the opinion is attached in an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Mr. Monroy was entitled to cross-examine the complaining witness as to all relevant evidence, subject only to the State's showing that the evidence was so prejudicial as to disrupt the fairness of the fact-finding process. Should this Court accept review where the court committed repeated evidentiary errors, and violated Mr. Monroy's right to confrontation and right to present a defense, when it refused to allow Mr. Monroy to question the complaining witness about her alcohol history and her attempt to hide this history during the investigation?

2. Where the individual was not advised of his Miranda rights, any statements he makes during a custodial interrogation are inadmissible against him at trial. An interrogation is custodial when a reasonable person would not have felt free to terminate the encounter and leave. Mr. Monroy was called into an office by a superior at work and directed to speak with detectives in a small room. The detectives confronted him with the serious allegation against him and asked him for an alibi and DNA sample.

Should this Court accept review where the trial court admitted the statements made by Mr. Monroy to the police at trial, but the totality of the circumstances show a reasonable person in Mr. Monroy's circumstances would not have felt at liberty to refuse to answer the detectives' questions or terminate the interrogation?

3. Where the State alleges multiple acts constitute the charged crime, the right to a unanimous jury requires the trial court to instruct the jurors they must agree on the specific criminal act committed. Should this Court accept review where the State argued vaginal or anal penetration constituted the crime, the trial court failed to inform the jurors they must agree on the specific act committed, and a rational juror could have a reasonable doubt as to whether Mr. Monroy and the complaining witness engaged in anal sex?

4. The State must prove every essential element of the crime beyond a reasonable doubt. To prove Mr. Monroy committed second degree rape, the State was required to show the complaining witness was mentally incapacitated at the time they engaged in sexual intercourse. Should this Court accept review where the State proved only that the complaining witness did not recall consenting, but not that she was incapable of consent at the time of the act?

5. Should this Court grant review because the information fails to state an essential element?

C. STATEMENT OF THE CASE

Heather Bielecki regularly went out drinking with her friend, Serenity Larson. RP 838, 850. One Friday night, Ms. Bielecki suggested they go to a bar Ms. Bielecki had visited earlier in the week. RP 840-41. At the bar, Ms. Bielecki had one or two beers. RP 842, 875. She and Ms. Larson then decided to attend a party at an apartment complex nearby. RP 841, 878. At the party, Ms. Bielecki had additional drinks but drove herself and Ms. Larson back to the bar after the party ended, around nine-thirty or ten o'clock that night. RP 846, 849, 1101.

Ms. Bielecki ordered another beer at the bar, but the bartender took it away from her when she realized Ms. Bielecki was intoxicated. RP 888. The bartender gave Ms. Bielecki water instead. RP 888.

At the bar, Ms. Bielecki was flirting with a man named Terrence Stephens. RP 995. Mr. Stephens noticed Ms. Bielecki seemed intoxicated after returning from the party. RP 994. She asked him for a kiss, and he complied by kissing her cheek. RP 995, 998.

Ms. Bielecki refused to leave with Ms. Larson, who called a car service around twelve-thirty or twelve forty-five that night. RP 854. Shortly before she left, Ms. Larson ordered shots for herself and Ms.

Bielecki, and the bartender agreed to pour a half-ounce of alcohol for Ms. Bielecki because the effects of the earlier consumed alcohol seemed to be wearing off. RP 880, 852, 893.

When the bartender noticed Ms. Larson had left, and Ms. Bielecki refused the bartender's offer to call her a cab, the bartender asked Mr. Stephens to help Ms. Bielecki get home safely. RP 881-82. Mr. Stephens tried to assist Ms. Bielecki, but Ms. Bielecki wanted him to go home with her. RP 999. When he refused, she tried to trick him by tossing her keys in the car and pretending to lose them. RP 999. When he still refused, she called him an "asshole" and drove away. RP 1000.

Mr. Stephens notified the bartender Ms. Bielecki had left but was not concerned enough about her driving to call 911. RP 1032, 1035.

What happened after that is not entirely known. Ms. Bielecki damaged her car on the way home but parked properly on the street near her apartment building. RP 1125, 1146. The next morning, she recalled someone asking her to go somewhere after she got out of the car and remembered Sergio Monroy on top of her. RP 1109-10. She believed they had vaginal and anal sex but could only specifically recall a memory of Mr. Monroy "thrusting." RP 1113. She had no memory of returning to her apartment but she was dressed her in her usual pajamas when she woke up. RP 1150.

Ms. Bielecki knew Mr. Monroy because he worked in maintenance at her apartment building. RP 1114. He had stopped by her apartment earlier in the week to fix her microwave, and then helped her fix her car. RP 1130. Another maintenance worker had also observed Ms. Bielecki talking to Mr. Monroy near Ms. Bielecki' s motorcycle. RP 1148, 1174.

Ms. Bielecki claimed to have no other memories of interacting with Mr. Monroy the night she came home from the bar. She also claimed to have no memory of asking Mr. Stephens to kiss her or wanting Mr. Stephens to come home with her. RP 1007, 1140.

Ms. Bielecki deliberated whether to contact the police about her encounter with Mr. Monroy and, after conducting research online, went to the hospital to have forensic evidence taken. RP 1123, 1127. She identified Mr. Monroy for the police, and they arrived at the apartment complex, his place of work, to confront him about the allegations. RP 950, 957.

English is not Mr. Monroy's first language. RP 4 (Spanish interpretation for Mr. Monroy during CrR 3.5 hearing). Faced with two detectives accusing him of rape, Mr. Monroy denied he had sex with Ms. Bielecki. RP 34. When they asked him to provide a deoxyribonucleic acid (DNA) sample, he agreed. RP 35. At no point did the detectives advise Mr. Monroy he had the right to refuse to answer their questions.

A forensic scientist determined it was likely Mr. Monroy's DNA was on a vaginal swab taken from Ms. Bielecki. RP 1061. No evidence of spermatozoa was found on Ms. Bielecki's anal swabs and no further DNA analysis was performed on those swabs. RP 1056.

Mr. Monroy was tried twice. At the first trial, the jury could not agree on a verdict. CP 11. At the second trial, the jury convicted Mr. Monroy of second degree rape. CP 83. The trial court sentenced Mr. Monroy to an indeterminate sentence of 90 months to life. CP 87. The Court of Appeals affirmed. Slip Op. at 2.

D. ARGUMENT IN FAVOR OF GRANTING REVIEW

1. This Court should grant review because the trial court violated Mr. Monroy's right to confrontation and his right to present a defense when it prevented Mr. Monroy from cross examining the complaining witness about her alcohol history, and her attempt to hide this history.

The Confrontation Clause guarantees the right to physical confrontation but, even more importantly, it guarantees the right to conduct a meaningful cross-examination of witnesses, allowing a defendant to test a witness's "perception, memory, and credibility." *State v. Darden*, 145 Wn.2d 612, 620, 41 P.2d 1189 (2002); U.S. Const. amend. VI; Const. art. I, § 22. A defendant also has the constitutional "right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony." *State v. Jones*, 168 Wn.2d

713, 720, 230 P.3d 576 (2010); *see also Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006); U.S. Const. VI, XIV; Const. art. I §§ 3, 22. At its essence, this is a defendant's "right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (2010).

Of course, only relevant evidence is admissible. *Jones*, 168 Wn.2d at 720; *see also Washington v. Texas*, 388 U.S. 14, 16, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). But evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the act more probable or less probable than it would be without the evidence." ER 401.

Under a constitutional analysis, exclusion of relevant evidence is only permitted if the State shows "the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." *Darden*, 145 Wn.2d at 622. Any attempt to limit meaningful cross-examination must be justified by a compelling State interest, which must then be balanced against the defendant's need for the evidence. *Darden*, 145 Wn.2d at 622; *State v. Hudlow*, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983); *State v. McDaniel*, 83 Wn. App. 179, 187, 920 P.2d 1218 (1996). "[T]he more essential the witness is to the prosecution's case, the more latitude the

defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters." *Darden*, 145 Wn.2d at 619.

a. Evidence of the complaining witness's alcohol history and her attempt to conceal that history was relevant and addressed fundamental elements of her testimony.

Prior to trial, Mr. Monroy moved to cross examine Ms. Bielecki about her past history of alcohol use and the fact she had asked the forensic nurse examiner not to document her alcohol history. CP 28; RP 614. In an offer of proof, defense counsel explained Ms. Bielecki had a "long history of alcohol" use and, in the defense interview, had described both blacking out regularly and experiencing a "brown out" during which Mr. Bielecki recalled hearing certain things but not recalling everything. RP 614. Ms. Bielecki had researched the forensic nurse's role before arriving at the hospital and specifically asked the nurse not to document her past alcohol use. RP 614.

Defense counsel explained this information was highly relevant to Ms. Bielecki's credibility, as it showed she had attempted to manipulate the evidence provided to the forensic nurse. RP 614-15. Defense counsel further explained this evidence was relevant because it would allow the jury to better assess Ms. Bielecki's tolerance for alcohol and her past experiences with blacking or "browning" out. RP 615.

The trial court found Ms. Bielecki's use of alcohol outside the evening in question, or her tolerance for alcohol, irrelevant. RP 616. The court did not specifically address Ms. Bielecki's attempt to manipulate the evidence documented by the forensic nurse. This ruling was manifestly unreasonable. *See Darden*, 45 Wn.2d at 619 (this Court reviews a trial court's limitation of the scope of cross examination for an abuse of discretion).

The evidence was relevant for the reasons stated by Mr. Monroy. The State's entire case turned on whether the jury accepted Ms. Bielecki's assertion that she was too intoxicated to consent to sexual intercourse that night. The Court of Appeals found Ms. Bielecki's attempt to manipulate what evidence the forensic nurse documented was properly excluded because the evidence did not show she had lied to the medical staff, police, or defense. Slip Op. at 10. But this does not change the fact that Ms. Bielecki attempted to hide this information. Her attempt to conceal her alcohol history undermined her credibility, which was essential to the jury's verdict.

In addition, because Ms. Bielecki's level of intoxication was highly contested at trial, her regular use of alcohol was relevant to her tolerance for alcohol on the evening in question. The Court of Appeals found this evidence was properly excluded because the defense offered no

expert witness on the impact of regular alcohol use on an individual's tolerance for it. Slip Op. at 9. But given that Ms. Bielecki claimed she could not recall the events in question and that she had regularly experienced blacking or "browning" out after drinking alcohol in the past, expert testimony was not required to demonstrate relevance. Ms. Bielecki's testimony as to how much she typically drank before blacking out satisfied this low threshold.

The State does not have a compelling interest excluding evidence that the complaining witness has engaged in dishonest behavior. *McDaniel*, 83 Wn. App. at 186-87; *see also State v. Lee*, 188 Wn.2d 473, 495-96, 396 P.3d 316 (2017) (explaining trial court properly allowed defendant to cross examine the complaining witness about her unrelated false allegation while finding the court properly did not allow cross examination about the fact the false allegation was rape). Rather than disrupt the fairness of the fact finding process, this evidence would have furthered the fairness of the process by providing the jury with useful information with which to evaluate Ms. Bielecki's credibility. The trial court's decision violated Mr. Monroy's right to confrontation and his right to present a defense and this Court should accept review.

b. During trial, the State opened the door to the evidence.

In addition, even if the court's initial ruling had been correct, the court was wrong to continue to exclude the evidence after the State "opened the door" to this evidence. *See State v. Berg*, 147 Wn. App. 923, 939, 198 P.3d 529 (2008). After persuading the judge to exclude evidence about Ms. Bielecki's alcohol history and her attempt to conceal it from the authorities, the State elicited testimony from Ms. Bielecki's friend, Ms. Larson, that she and Ms. Bielecki had gone out drinking together "lots of times" and, as a result, Ms. Larson knew from these experiences how Ms. Bielecki appeared when she was drunk. RP 850-51. This permitted the State to rely on Ms. Bielecki's history of alcohol use to bolster Ms. Larson's credibility while also preventing Mr. Monroy from showing how that same history of alcohol use, and Ms. Bielecki's attempt to hide it, undermined Ms. Bielecki's credibility. This Court should accept review

2. This Court should grant review because suppression of Mr. Monroy's statements was required because the detectives did not advise Mr. Monroy of his *Miranda* rights before interrogating him.

No individual may "be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; Const. art. I, § 9. To protect a defendant's Fifth Amendment right against self-incrimination, a suspect must be informed of his right to remain silent and the right to the

presence of counsel during any custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S. Ct. 1602 (1966); *State v. Richmond*, 65 Wn. App. 541, 544, 828 P.2d 1180 (1992); U.S. Const. amend. V; Const. art. I, § 9.

"*Miranda* warnings must be given when a suspect endures (1) custodial (2) interrogation (3) by an agent of the State." *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004) (citing *State v. Sargent*, 111 Wn.2d 641, 647, 762 P.2d 1127 (1988)). Here, the trial court wrongly concluded Mr. Monroy's statements to detectives were admissible at trial because Mr. Monroy "was not in custody to a degree associated with a formal arrest." CP 15 (Conclusion of Law 3(a)).

A person is "in custody" for *Miranda* purposes if a reasonable person would not have felt free to terminate the interrogation and leave. *State v. Rosas-Miranda*, 176 Wn. App. 773, 779, 309 P.3d 728 (2013); *United States v. Craighead*, 539 F.3d 1073, 1082 (9th Cir. 2008). Where the individual would not wish to "leave" the location of the interrogation, because he is at home or, as in Mr. Monroy's case, at his place of employment, the determination of whether the interrogation was custodial "is necessarily fact intensive." *Craighead*, 539 F.3d at 1084 (quoting *United States v. Griffin*, 7 F.3d 1512, 1518 (10th Cir. 1993)).

The Court must perform a "totality of the circumstances" analysis which includes (1) the number of law enforcement personnel present and whether they were armed; (2) whether the individual was restrained by force or threats; (3) whether the individual was isolated from others; and (4) whether the individual was informed he was free to leave or terminate the interview. *Craighead*, 539 F.3d at 1082-88. Courts also consider additional factors, such as the language used to summon the individual, the extent to which the individual is confronted with the allegations made against him, the individual's physical surroundings, the duration of the detention, and the degree of pressure applied to the individual. *United States v. Kim*, 202 F.3d 969, 974 (9th Cir. 2002).

Consideration of these factors demonstrates that under the totality of the circumstances, Mr. Monroy was in custody at the time of the interrogation. Mr. Monroy was called to speak to the detectives by a supervisor. RP 29. The two detectives outnumbered Mr. Monroy and displayed their badges, revealing their firearms to Mr. Monroy in the process. RP 23, 30. Mr. Monroy was directed to his superior's office and the door was closed so that he was isolated from others yet still on display behind glass for his co-workers. RP 23, 30-31. The office where the detectives conducted the interrogation was small, approximately ten feet by ten feet in size. RP 18.

The detectives directly confronted Mr. Monroy about the very serious allegation of rape made against him. RP 21, 32. When he denied having sex with Ms. Bielecki they asked him to provide an alibi and a DNA sample, both of which he gave them. RP 35, 36.

The detectives testified they were able to have a polite, easy conversation with Mr. Monroy and did not believe he had difficulty answering his questions. RP 21, 35-36. But English is not Mr. Monroy's native language, and he was provided an interpreter for the motion hearing. RP 4. The officers did not testify that they made any efforts to verify he understood what he was being asked, and one detective only told him he was not under "arrest." RP 39. At no point did they explain to Mr. Monroy that he was free to leave or terminate the interview if he wished. RP 24, 39.

In *State v. France*, the Court of Appeals has found that where an officer confronts an individual with specific allegations, and asks specific questions designed to elicit an admission to an element of the alleged crime, *Miranda* warnings are required. 121 Wn. App. 394, 400, 88 P.3d 1003 (2004). Here, the Court of Appeals distinguished *France* because in *France*, the detectives told the suspect he was not free to leave until they cleared things up. Slip Op. at 12. But that is not the only factor to be considered.

Just as in *France*, the detectives received information Mr. Monroy had committed the crime of rape and directly confronted him about the allegation, asking questions designed to elicit an incriminating response. RP 16. The officers then went to Mr. Monroy's place of employment, had him called into an office by his supervisor, and confronted him about the allegation made against him. They did not tell him he was free to go. Under the totality of the circumstances, a reasonable person would not have believed he was free to terminate the questioning and leave. The detectives were required to advise Mr. Monroy of his *Miranda* rights and this Court should accept review.

3. This Court should accept review because Mr. Monroy's right to a unanimous jury was denied when the trial court failed to instruct the jurors they must agree on one specific criminal act.

a. Where the State fails to elect a specific act, the trial court must give a unanimity instruction to protect the individual's right to a jury trial and unanimous verdict.

Criminal defendants in Washington are guaranteed the right to a unanimous jury. *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). When a defendant is charged with only one count of criminal conduct, but the evidence at trial indicates multiple distinct criminal acts may have been committed, additional measures must be taken to ensure this right is protected. *State v. Petrich*, 101 Wn.2d 566, 572, 693 P.2d 173

(1984). The State must elect which of the acts it relies upon for a conviction or the court must instruct the jury to agree on a specific criminal act. *Coleman*, 159 Wn.2d at 511.

When the State chooses not to elect a specific act, a trial court's failure to give the jury a unanimity instruction violates the defendant's state constitutional right to a unanimous jury verdict and United States constitutional right to a jury trial. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); Const. art. I, § 22; U.S. Const. amend. VI.

b. The trial court's failure to instruct the jury on unanimity violated Mr. Monroy's right to a jury trial and a unanimous jury.

The State charged Mr. Monroy of one count of second degree rape, but alleged he committed two separate acts: one act of vaginal rape and one act of anal rape. CP 1; RP 1190. The court did not instruct the jury it needed to agree on the specific act committed.

The trial court's omission violated Mr. Monroy's constitutional right to a jury trial and jury unanimity. This Court has repeatedly held that where multiple sex acts are alleged, the State must elect a specific act or the trial court must instruct the jury it must agree on a specific criminal act. *Kitchen*, 110 Wn.2d at 412; *Coleman*, 159 Wn.2d at 515. This is true even where the alleged sex acts occurred during the same encounter, but

constituted separate acts of penetration. *See State v. Bobenhouse*, 166 Wn.2d 881, 214 P.3d 907 (2009).

In *Bobenhouse*, the State argued one count of rape was proven both by the defendant forcing his son to perform oral sex on him and by the defendant digitally penetrating his son's anus during the same sexual encounter. *Id*. at 894. Although this Court found the error harmless under the facts of that case, it determined a *Petrich* instruction was required because the State alleged two separate acts satisfied the crime of rape. *Id*. 894-95.

The Court of Appeals found this case distinguishable from *Bobenhouse* because the acts alleged by the State in *Bobenhouse* spanned years. Slip Op. at 14-15. However, in *Bobenhouse* this Court found a *Petrich* instruction was required because the State argued one count of rape was proven by oral sex and the digital penetration during the *same* sexual encounter. *Bobenhouse*, 166 Wn.2d at 894-95. Similarly, here the prosecutor argued to the jury they knew "sexual intercourse occurred" because Ms. Bielecki testified she was both "vaginally and anally penetrated." RP 1190. Because the State argued two separate acts constituted an element of the crime of rape, the trial court was required to instruct the jurors they must agree the same act had been proved by the State. *Petrich*, 101 Wn.2d at 572; *State v. Hanson*, 59 Wn. App. 651, 659,

800 P.2d 1124 (1990) (although defendant failed to object to lack of *Petrich* instruction, the issue may be raised for the first time on appeal under RAP 2.5(a)(3)).

The Court of Appeals also found that any error would be harmless because Ms. Bielecki testified Mr. Monroy penetrated her both vaginally and anally and "the rape exam results were consistent with this testimony." Slip Op. at 15. As Mr. Monroy explained in his opening brief, this is incorrect. *See* Op. Br. at 36.

The State's proof as to each alleged act of sexual intercourse was not the same. Although Ms. Bielecki believed they had engaged in both vaginal and anal sex, she claimed her only memory was "thrusting." RP 1113. Ms. Bielecki said she knew she was being penetrated but she "couldn't feel really anything" and was "assuming it could be, you know, either area." RP 1113. She could tell this person was "inside" but not "where it was happening at the time." RP 1113. She claimed the following day she could feel "soreness" in "both areas." RP 1120.

Because Ms. Bielecki testified she could not recall the specific sex act that had occurred, the jury was required to rely on the forensic evidence. The forensic nurse performed a full physical exam and found no injuries, including to Ms. Bielecki's rectum. RP 940. The DNA evidence

showed the presence of spermatozoa on the vaginal and perineal swabs but not the anal swabs. RP 1055-56.

Thus, the only evidence presented by the State that Mr. Monroy and Ms. Bielecki engaged in anal sexual intercourse was Ms. Bielecki's assumption that Mr. Monroy could have been penetrating either area, and her claim, generally, that she experienced soreness in these areas the next day. A *Petrich* instruction was required and the trial court's failure to give this instruction was not harmless. This Court should accept review.

4. This Court should accept review because the State failed to prove the complaining witness was incapable of consent at the time she had sex with Mr. Monroy.

Due process requires the State to prove every essential element of a crime beyond a reasonable doubt. *State v. Chapin*, 118 Wn.2d 681, 691, 826 P.2d 194 (1992) (admissible evidence insufficient to support conviction for second degree rape); U.S. Const. amend. XIV; Const. art I, § 3. The State failed to prove Ms. Bielecki was mentally incapacitated at the time she had sex with Mr. Monroy. *See* Op. Br. at 9-15. Her lapse in memory does not prove rape. *See State v. Vasquez*, 178 Wn.2d 1, 18, 309 P.3d 318 (2013) (vacating convictions because equivocal evidence, or evidence based on speculation, did not allow a rational juror to find the defendant guilty beyond a reasonable doubt). This Court should accept review.

5. Review should be accepted because the information failed to state an essential element.

As explained in Mr. Monroy's Statement of Additional Grounds for Review, the information failed to state an essential element in violation of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). *See also Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); U.S. Const. amends. V, VI, XIV. This Court should grant review.

E. CONCLUSION

For all of the reasons stated, this Court should grant review.

DATED this 19th day of February, 2020.

Respectfully submitted,

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APPENDIX

COURT OF APPEALS, DIVISION ONE OPINION

January 21, 2020

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State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. SERGIO STUARDO MONROY, Appellant.	No. 78597-4-I DIVISION ONE UNPUBLISHED OPINION FILED: January 21, 2020

SMITH, J. — Sergio Monroy appeals his conviction for rape in the second degree of 34-year-old H.B., a resident at the apartment complex where Monroy worked as a maintenance man. He contends the State failed to prove H.B. was incapable of consent because of mental incapacity. Given overwhelming evidence of H.B.'s intoxication, sufficient evidence supports the conviction. We also reject Monroy's claims that the trial court erred by preventing him from cross-examining H.B. about her alcohol history, by admitting statements he made prior to receiving Miranda[1] warnings, and by failing to give a unanimity instruction. And we reject Monroy's argument in his statement of additional grounds that the court erred in imposing an indeterminate sentence with a maximum term of life. However, we agree that the sentencing court exceeded its

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

authority by ordering Monroy to submit to urinalysis and breath analysis monitoring as a condition of community custody. Accordingly, we affirm Monroy's conviction but remand to the trial court with instructions to strike the challenged condition.

FACTS

On the evening of January 22, 2016, H.B. invited her friend Serenity Larson to go out for a drink at the Seven Star, a bar located in the downtown area of Mercer Island. H.B. and Larson were neighbors at an apartment complex on Mercer Island, and they often went out drinking together. They arrived at the Seven Star around 6:30 or 7:00 p.m. There, a man named Terrence Stephens invited H.B. and Larson to attend a "hat party" at a nearby apartment complex. After having one drink each, H.B. and Larson went home to pick up hats, then H.B. drove them to the party.

The hat party featured a buffet table with bottles of alcohol and mixers so guests could make their own drinks. Over a period of a couple hours, H.B. poured herself "quite a few" drinks consisting of approximately 75 percent whiskey and 25 percent ginger ale. She recalled "drinking the whole time we were there." When the party started winding down, a group of people including H.B. and Larson returned to the Seven Star. H.B. testified that she was "definitely" feeling "pretty buzzed" by then but decided she was able to drive.

H.B. and Larson arrived at the Seven Star around 10:00 or 11:00 p.m. Larson testified that H.B. started drinking beer when they arrived. Larson soon noticed that H.B. was becoming "loud," "obnoxious," "a little clumsy," and "towards me kind of not nice," behaviors that to her indicated H.B. was "getting drunk." Shortly before leaving,

Larson ordered shots for herself and H.B. The bartender agreed to pour a shot for Larson and a watered down shot for H.B. Larson "knew [H.B.] couldn't drive," so she called an Uber and asked H.B. to leave with her. H.B. refused to leave, so Larson left alone around 12:30 a.m.

Stephens socialized with H.B. at the hat party and at the bar. Stephens testified that H.B. began to display signs of intoxication at the bar, such as "erratic communication," having "glossy eyes," and being "a little wobbly." He also recalled that H.B. continued drinking at the bar. Stephens said H.B. became flirtatious and asked him for a kiss. Eventually, H.B. became "very loud" and "confrontational with the bartender." The bartender encouraged H.B. to call a cab, but H.B. refused. Stephens asked H.B. if she needed someone to call her a cab, but H.B. got in her car and asked Stephens to come with her. Stephens declined, and H.B. got angry and drove away.

H.B. recalled drinking beer at the bar but could not say how many "[be]cause that's pretty much where I started to not really remember the night." She did not recall asking Stephens for a kiss or Larson leaving the bar. She did recall getting into her car and driving away despite Stephens telling her not to.

The next thing H.B. remembered was hearing a male voice tell her to "get out of my car and go somewhere else." She testified that she "wasn't seeing anything. It was like I was blacked out, but I could still hear things a little bit." Next, she found herself lying on her side on hard ground with her legs pushed up and a man on top of her, penetrating her. H.B. did not know the man's name but recognized him as a maintenance man at her apartment complex. She testified that she was unable to

speak or move while the attack was happening. She did not know where she was, but she could see a bright amber-colored fluorescent light shining through a window behind the man. Detectives later discovered such a light outside the apartment complex maintenance room a few hundred yards from where H.B. left her car.

H.B. next remembered waking up in the bedroom of her apartment, wearing pajama bottoms and the shirt she had on the night before. Her vagina and anus were sore. H.B. felt "shameful" and did not know what to do. She spent the day watching movies with Larson but did not reveal what had happened. The next day, H.B. went to the street where she usually parked her car and discovered that the front end was smashed and a tire was deflated. She then made the decision to go to Harborview Medical Center for a rape exam. There, H.B. told the medical social worker and the sexual assault nurse that she went out drinking and had only "spotty" memories or "vague recollections" of what happened when she got back to her apartment complex, including being on the ground while the maintenance man vaginally and anally penetrated her.

Mercer Island Police Detectives Joe Morris and David Canter went to H.B.'s apartment complex seeking to interview the individual H.B. identified as the maintenance man who had repaired her microwave a few days prior. The manager at the leasing office told them the person who repaired H.B.'s microwave was Monroy. The detectives asked the manager to have Monroy come to the leasing office so they could speak with him. When asked his whereabouts during the relevant time period, Monroy claimed that he got off work at 8:30 or 9:00 p.m., drove straight home, and

returned to work the next morning. He confirmed that he knew who H.B. was but denied ever having sex with her. The detectives asked Monroy for permission to collect a DNA (deoxyribonucleic acid) sample to rule him out as a suspect, and Monroy agreed to provide one.

The rape exam results showed the presence of spermatozoa on the vaginal and perineal swabs. DNA testing of these swabs showed a mixed sample, with the female profile matching H.B. and the male profile matching Monroy. The anal swabs tested positive for a protein called P30, a substance present in elevated levels in semen.

The State charged Monroy with rape in the second degree, pursuant to RCW 9A.44.050(1)(b). The first trial ended with the jury unable to reach a verdict. Upon retrial, the jury convicted Monroy as charged. The trial court imposed a midrange indeterminate standard sentence of 90 months to life. Monroy appealed.

ANALYSIS

Sufficiency of the Evidence

Monroy asserts that the State failed to present sufficient evidence that H.B. was incapable of consenting to sexual intercourse due to mental incapacity. We disagree.

A challenge to the sufficiency of the evidence admits the truth of the State's evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. State v. Townsend, 147 Wn.2d 666, 679, 57 P.3d 255 (2002). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most

strongly against the defendant." Salinas, 119 Wn.2d at 201. "Circumstantial evidence is as reliable as direct evidence." State v. Jackson, 145 Wn. App. 814, 818, 187 P.3d 321 (2008).

The State charged Monroy with violating RCW 9A.44.050(1)(b), which provides that a person is guilty of rape in the second degree "when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person [w]hen the victim is incapable of consent by reason of being . . . mentally incapacitated." "Mental incapacity" refers to a "condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause." RCW 9A.44.010(4).

Monroy asserts the evidence did not show H.B. was mentally incapacitated like the victim in State v. Al-Hamdani, 109 Wn. App. 599, 608, 36 P.3d 1103 (2001). There, the victim testified she consumed at least 10 drinks, and two experts respectively testified she had an estimated blood alcohol level of .1375 and .21 at the time of the sexual assault. Al-Hamdani, 109 Wn. App. at 609. In addition, the victim and a witness testified that she was "stumbling, vomiting, and passing in and out of consciousness" prior to the incident. Al-Hamdani, 109 Wn. App. at 609.

Here, although H.B.'s blood alcohol level at the time of the sexual assault is not known, the evidence is sufficient to support a finding that H.B. was mentally incapacitated due to intoxication. Larson and Stephens testified that H.B. exhibited visible signs of intoxication at the bar and was in no condition to drive. H.B. testified

that she began losing her memories of the evening while at the bar. She described being in a near blackout state while Monroy penetrated her, unable to move or speak. Moreover, she had no memory of crashing her car while driving home.

Monroy contends the evidence showed H.B. was sobering up by the time she left the Seven Star. He relies substantially on the bartender's testimony that H.B. only consumed part of a beer before it was replaced with water and that H.B. seemed less intoxicated when the bartender served her a watered down shot at the end of the night. But the bartender also testified that H.B. was "showing signs of intoxication" and indicated that H.B. should not have been driving. To the extent the bartender's testimony conflicted with that of Larson, Stephens, and H.B., we "must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). Viewing the evidence and the inferences in the light most favorable to the State, sufficient evidence supports the conviction of rape in the second degree.

Cross-Examination

Monroy asserts that the trial court erred in denying his motion to cross-examine H.B. regarding her past history of alcohol use and about the fact that H.B. asked the nurse during her rape examination not to document her past history of alcohol use. He contends that evidence of H.B.'s past alcohol use is relevant to her tolerance to alcohol on the evening in question and that H.B.'s attempt to limit evidence documented by the nurse is relevant to her credibility.

"We review a cross-examination scope limitation for a manifest abuse of discretion." State v. Lile, 188 Wn.2d 766, 782, 398 P.3d 1052 (2017). An abuse of discretion exists "[w]hen a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons." State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

Both the federal and state constitutions protect a defendant's right to confront an adverse witness. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. "The primary and most important component is the right to conduct a meaningful cross-examination of adverse witnesses." State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). "But this right is not absolute." Lile, 188 Wn.2d at 782. "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

We apply a three-part test to determine whether a trial court violated a defendant's right to confront a witness by limiting the scope of cross-examination:

> "First, the evidence must be of at least minimal relevance. Second, if relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. Finally, the State's interest to exclude prejudicial evidence must be balanced against the defendant's need for the information sought, and only if the State's interest outweighs the defendant's need can otherwise relevant information be withheld."

State v. Lee, 188 Wn.2d 473, 488, 396 P.3d 316 (2017) (quoting Darden, 145 Wn.2d at 622). Evidence is relevant if it tends "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. If no other evidence rule applies, relevant evidence is admissible unless "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403. Evidence that is not relevant is not admissible. ER 402.

Monroy asserts that he should have been able to cross-examine H.B. regarding her prior use of alcohol—including her previous blackouts—because it was relevant to her tolerance level for alcohol. Presumably, Monroy sought to argue that H.B.'s drinking history showed she had a high tolerance for alcohol and was therefore unlikely to have blacked out on the night in question. But Monroy offered no factual support, such as expert testimony, in support of this inference. It is not possible for the finder of fact to determine what inferences may be reasonably drawn from H.B.'s alcohol history. "[T]he existence of a fact cannot rest upon guess, speculation, or conjecture." State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). The trial court properly determined that any minimal relevance was outweighed by the prejudice of introducing evidence of H.B.'s alcohol use and blackouts on occasions prior to the night in question.

Nor did the trial court abuse its discretion in preventing Monroy from cross-examining H.B. about asking the forensic nurse not to document her prior history of alcohol use in her medical records. ER 608(b) allows a witness' credibility to be

attacked by specific instances of conduct if the instances are probative of the witness' truthfulness or untruthfulness. There is no evidence that H.B. lied or failed to disclose any facts about her use of alcohol to the medical professionals at Harborview, to the police, or to the defense during the defense interview. H.B.'s request is not probative of her character for truthfulness or her credibility regarding the night in question.

Monroy further asserts that the trial court erred by ruling that the State did not "open the door" to allow him to cross-examine H.B. regarding her alcohol history or to cross-examine the forensic nurse regarding H.B.'s request not to document her alcohol history. We review a trial court's decision to allow cross-examination under the "open door" rule for abuse of discretion. State v. Ortega, 134 Wn. App. 617, 626, 142 P.3d 175 (2006).

Under the "open door" rule, if one party raises a material issue, the opposing party is generally permitted to "explain, clarify, or contradict the evidence." State v. Berg, 147 Wn. App. 923, 939, 198 P.3d 529 (2008). "[I]t is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced." State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). The rule "is intended to preserve fairness" by preventing the introduction of one-sided testimony that the opposing party has no opportunity to rebut. State v. Avendano-Lopez, 79 Wn. App. 706, 714, 904 P.2d 324 (1995).

Here, to provide a basis for Larson's belief that H.B. was intoxicated on the night in question, the State elicited testimony from Larson that she knew how H.B. behaved when she was drunk because she had gone out drinking with H.B. "[l]ots of times." Monroy asserts that the trial court's refusal to apply the open door doctrine here permitted the State to rely on H.B.'s history of alcohol use to bolster Larson's credibility while preventing Monroy from showing how H.B.'s alcohol history undermined H.B.'s credibility. But Monroy has not shown how cross-examining H.B. regarding her alcohol history—including usage of which Larson was not a part—would explain, clarify, or contradict Larson's testimony regarding the basis for her belief that H.B. was intoxicated on the night in question or the forensic nurse's testimony that H.B. asked her not to document her alcohol history. The trial court did not err in ruling that these were separate issues and denying Monroy's request to cross-examine H.B. regarding her alcohol history.

Noncustodial Interrogation

Monroy asserts that the trial court erred in denying his CrR 3.5 motion to suppress inculpatory statements he made to Detective Morris and Detective Canter at the apartment complex because they were elicited during a pre-Miranda custodial interrogation. We disagree.

"Police must give Miranda warnings when a suspect is subject to interrogation while in the coercive environment of police custody." State v. Rosas-Miranda, 176 Wn. App. 773, 779, 309 P.3d 728 (2013). "Without Miranda warnings, a suspect's statements during custodial interrogation are presumed involuntary." State v. Heritage,

152 Wn.2d 210, 214, 95 P.3d 345 (2004). We determine whether an interrogation is custodial using an objective standard, which is "whether a reasonable person in the individual's position would believe he or she was in police custody to a degree associated with formal arrest." State v. Lorenz, 152 Wn.2d 22, 36-37, 93 P.3d 133 (2004). "The critical inquiry, however, is not the psychological state of the defendant, but simply whether his freedom of movement was restricted." State v. Sargent, 111 Wn.2d 641, 649, 762 P.2d 1127 (1988). We review a trial court's ruling after a CrR 3.5 suppression hearing to determine whether substantial evidence supports the trial court's findings of fact and whether those findings, in turn, support the trial court's conclusions of law. State v. Russell, 180 Wn.2d 860, 866, 330 P.3d 151 (2014).

Monroy likens his situation to that of the defendant in State v. France, 129 Wn. App. 907, 120 P.3d 654 (2005). That case is distinguishable. In France, officers detained a man suspected of violating a no-contact order and told him he was not free to leave until the matter was resolved. France, 129 Wn. App. at 908-09. Because the duration of the stop was open-ended, the court held that the questioning constituted custodial interrogation. France, 129 Wn. App. at 909-11.

Here, Detective Cantor testified that he did not expressly tell Monroy that he was not in custody. However, unlike the defendant in France, there is no indication that Monroy's freedom to leave was conditional. Both detectives specifically advised Monroy that he was not under arrest. They did not place him in handcuffs or restrict his movement. Detective Morris testified that the general tone of the conversation was "cordial" and that he did not believe Monroy was a suspect at that time. Although

English is not Monroy's first language, the detectives testified that they had no difficulty conversing with him in English. Monroy did not ask to leave, did not ask detectives to stop questioning him, and did not ask for an attorney at any time during the interview. Under the totality of the circumstances, the trial court did not err in concluding that Monroy was not in custody to a degree associated with formal arrest.

Unanimity Instruction

Monroy asserts that the trial court violated his constitutional right to a unanimous jury verdict when it failed to give a unanimity instruction. He contends that such an instruction was required because the State presented evidence that he penetrated H.B. vaginally and anally but failed to specify which alleged act of penetration constituted the "sexual intercourse" element of the crime of rape in the second degree.[2]

To convict a defendant on a criminal charge, the jury must unanimously decide that the defendant committed the criminal act. State v. Coleman, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). When the State presents evidence of multiple acts that could constitute the crime charged, the jury must unanimously agree on which act constituted the crime. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). To ensure jury unanimity, the State must either elect the act on which it relies, or the court must instruct the jury to unanimously agree on a specific criminal act. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). "Failure to do so can be constitutional error because of 'the possibility that some jurors may have relied on one act or incident and some

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[2] The court instructed the jury that "sexual intercourse" is defined as "any penetration of the vagina or anus."

another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction.'" State v. Rodriguez, 187 Wn. App. 922, 936, 352 P.3d 200 (2015) (quoting Kitchen, 110 Wn.2d at 411).

However, the Petrich rule does not apply where the evidence shows a "continuing course of conduct." Petrich, 101 Wn.2d at 571. Where the evidence shows the defendant engaged in a series of actions intended to achieve the same objective, the acts are characterized as a continuing course of conduct rather than several distinct acts. State v. Fiallo-Lopez, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995). In contrast, evidence that the charged conduct occurred at different times and places tends to show that several distinct acts occurred. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). We evaluate the facts in a commonsense manner to determine whether the criminal conduct meets this standard. Petrich, 101 Wn.2d at 571.

Monroy cites State v. Bobenhouse, 166 Wn.2d 881, 214 P.3d 907 (2009), for the proposition that a unanimity instruction is required where separate acts of penetration are alleged to have occurred during the same encounter. This argument misreads Bobenhouse. The unanimity issue in Bobenhouse involved a single count of rape of a child based on allegations that between June 2002 and November 2004, Bobenhouse forced his son to regularly perform fellatio on him and that he inserted his finger in his son's anus on at least one occasion. Bobenhouse, 166 Wn.2d at 886. The court was unable to determine from the record whether the State charged Bobenhouse based on one act or multiple acts. Bobenhouse, 166 Wn.2d at 894. Therefore, the court held that "[t]o the extent this case falls under the 'multiple acts' line of cases, a Petrich instruction

was required." Bobenhouse, 166 Wn.2d at 894. The court concluded that the error, if any, was harmless because the evidence presented was sufficient to establish that each incident occurred. Bobenhouse, 166 Wn.2d at 894-95.

Here, in contrast, the State's evidence plainly indicated that Monroy's acts of penetration occurred within a short period of time at a single location against the same victim while she was mentally incapacitated due to intoxication. A commonsense evaluation of this evidence indicates that Monroy's acts of vaginal and anal penetration of H.B. were part of a continuing course of conduct to have sexual intercourse with H.B. while she was incapable of consent. Bobenhouse does not control.

Moreover, the record shows substantial evidence of vaginal and anal penetration. H.B. testified that Monroy penetrated her vaginally and anally and that she awoke in the morning with soreness in both areas. And the rape exam results were consistent with this testimony. Even if we were to analyze this case as a multiple acts case, failure to give a unanimity instruction would be harmless because a rational trier of fact could have found each incident proved beyond a reasonable doubt. Handran, 113 Wn.2d at 17-18 (citing Petrich, 101 Wn.2d at 573).

Community Custody Condition

Monroy challenges a community custody condition imposed as part of his sentence.[3] He contends that special condition 12, requiring him to "[b]e available for

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[3] Monroy did not object to this condition at sentencing, but "a defendant may challenge an erroneously imposed sentence for the first time on appeal." State v. Munoz-Rivera, 190 Wn. App. 870, 890, 361 P.3d 182 (2015).

and submit to urinalysis and/or breathanalysis upon the request of the CCO and/or the chemical dependency treatment provider," is not crime related and violates his constitutional privacy interests.

We review de novo whether the trial court had statutory authorization to impose a community custody condition. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). If the trial court acted within its statutory authority, we review its decision for abuse of discretion. State v. Johnson, 180 Wn. App. 318, 326, 327 P.3d 704 (2014).

The Sentencing Reform Act of 1981, chapter 9.94A RCW, authorizes the trial court to impose "crime-related prohibitions and affirmative conditions" as part of a sentence. RCW 9.94A.505(9). 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). Additional conditions may be imposed to monitor or ensure compliance with crime-related sentencing conditions. RCW 9.94A.030(10) ("affirmative acts necessary to monitor compliance with the order of a court may be required by [DOC]"). "Any condition imposed in excess of this statutory grant of power is void." Johnson, 180 Wn. App. at 325.

Here, the court imposed standard condition 3, requiring Monroy to refrain from possessing or consuming controlled substances except where lawfully prescribed. This condition is required unless the court waives it, regardless of the offense committed. See RCW 9.94A.703(2)(c). The court also exercised its discretion to impose special condition 11, prohibiting Monroy from consuming alcohol. See RCW 9.94A.703(3)(e); State v. Jones, 118 Wn. App. 199, 206-07, 76 P.3d 258 (2003) (Courts are authorized

to prohibit the consumption of alcohol regardless of whether alcohol contributed to the offense.). Monroy does not challenge the imposition of either of these conditions. He challenges only the imposition of special condition 12 to monitor his drug and alcohol use.

Monroy asserts that special condition 12 is not crime related and violates his privacy interests under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington State Constitution. He relies primarily on State v. Olsen, 189 Wn.2d 118, 399 P.3d 1141 (2017). In Olsen, the Washington Supreme Court held that random urinalysis, under certain circumstances, is constitutionally permissible for probationers convicted of driving under the influence (DUI). 189 Wn.2d at 134. In so holding, the court reasoned that although random drug testing implicates a probationer's privacy interests, the intrusion is lawful where it is narrowly tailored to meet a compelling state interest. Olsen, 189 Wn.2d at 127-28. The Olsen court thus upheld the monitoring condition because random urinalysis is narrowly tailored to meet the State's compelling interest in supervising probationers convicted of DUI. 189 Wn.2d at 128.

Monroy contends that unlike the probationer in Olsen, he was not charged with a drug- or alcohol-related offense. Therefore, the court could not require him to submit to suspicionless testing simply to monitor compliance with other conditions that were not crime related. We agree.

A trial court has authority to impose monitoring conditions, such as polygraph testing, to monitor compliance with sentencing conditions. State v. Riles, 135 Wn.2d

326, 342-43, 957 P.2d 655 (1998), abrogated on other grounds by State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010). In general, conditions that do not reasonably relate to the circumstances of the crime are unlawful unless specifically authorized by statute. Jones, 118 Wn. App. at 205. A condition is not crime related if there is no evidence linking the prohibited conduct to the offense. State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008). Here, unlike the probationer in Olsen, the State did not show and the court did not find that Monroy abused drugs or alcohol or that such use contributed to the crime for which he was convicted. Because special condition 12 is not crime related, we cannot say that it was narrowly tailored or reasonably necessary to achieve a compelling state interest. Accordingly, it must be stricken.

Statement of Additional Grounds

In a statement of additional grounds for review, Monroy asserts that the trial court committed constitutional error by sentencing him to a maximum term of life pursuant to RCW 9.94A.507. He appears to contend that this statute does not authorize life imprisonment as a maximum term of confinement and that the State failed to provide notice of intent to seek a sentence outside the standard range. Monroy is mistaken.

RCW 9.94A.507 governs the sentencing of certain nonpersistent sex offenders, including those who commit second degree rape. Offenders subject to RCW 9.94A.507 are sentenced to indeterminate sentences within the mandatory minimum sentence and the statutory maximum sentence for the crime. RCW 9.94A.507(3)(a)-(b). The maximum sentence is the statutory maximum sentence for the offense. RCW 9.94A.507(3)(b). When imposing a minimum term, the court may impose either a

standard range sentence or a sentence outside the standard range pursuant to RCW 9.94A.535 if the offender is eligible. RCW 9.94A.507(3)(c)(i).

Here, based on an offender score of zero, the court sentenced Monroy pursuant to RCW 9.94A.507 to an indeterminate sentence with a minimum sentence of 90 months' confinement (the middle of the standard range) and a maximum sentence of life in prison. The statutory maximum sentence for rape in the second degree, a class A felony, is life imprisonment. RCW 9A.20.021(1)(a); RCW 9A.44.050(2). Cases cited by Monroy regarding determinate sentences or indeterminate minimum sentences have no bearing in this situation. Monroy's sentence was proper.

We affirm Monroy's conviction but remand to the trial court with instructions to strike special condition 12.

WE CONCUR:

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 document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 78597-4-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:

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