

64422-0

64422-0

NO. 64422-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

MOHAMMED KONE,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE BRUCE HELLER

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**BRIEF OF RESPONDENT**

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STATE OF WASHINGTON  
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**A. ISSUES PRESENTED**

1. The defendant faced two separate trials, each case involving the rape or attempted rape of a different homeless woman. A week before one of the trials (cause number 09-1-02489-4), the prosecutor moved to dismiss the case without prejudice because he did not believe he could procure the victim's presence at trial. The defendant argued dismissal should have been with prejudice (the case was later refiled) because, he asserts, the prosecutor should have done more to locate the homeless victim. Should this Court agree the trial court did not abuse its discretion in dismissing the case without prejudice?

2. After the defense impeached victim Anita Coppola with a statement she made to responding police officers that was inconsistent with her trial testimony, the court allowed the State to elicit testimony about a subsequent statement made by Coppola that was consistent with her trial testimony. Did the trial court abuse its discretion by allowing the prosecutor to elicit this testimony?

3. The defendant was convicted of attempted rape and indecent liberties arising from the same facts. The trial court declined to enter judgment on the indecent liberties charge,

imposing sentence only on the attempted rape count. Did the trial court properly comply with the dictates of the Supreme Court in dealing with this potential double jeopardy issue?

4. At the time of the defendant's conviction and sentence, statutory authority provided that the Department of Corrections could impose other conditions separate from the "crime related" conditions of sentence permissibly imposed by the court. Is the defendant incorrect that the trial court exceeded its authority when the court indicated that the Department of Corrections could order the defendant to undergo substance abuse and mental health treatment?

5. As a condition of sentence the court prohibited the defendant from having internet access without prior approval. The State concedes that this condition of community custody is not "crime related" and therefore the condition should be struck from the defendant's judgment and sentence.

6. As a condition of community custody, the court ordered the defendant to pay the costs of counseling for the victims of his crimes. Because there are no such costs, is the issue of whether this is a permissible condition of community custody moot?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

This appeal involves three separate King County Superior Court cause numbers: 09-1-02489-4, 09-1-03352-4 and 09-1-02912-8. As will be explained, cause numbers 09-1-02489-4 and 09-1-03352-4 are the same case. Cause number 09-1-02489-4 was filed on February 25, 2009, and involves victim Arlene Barg. CP 442-45. When Barg could not be found for trial, the case was dismissed without prejudice. CP 456. Barg was subsequently located and the case was refiled under cause number 09-1-03352-4. CP 192-96. Under this cause number the defendant was charged with attempted rape in the second degree (count II) and indecent liberties (count III). CP 57-58.

Cause number 09-1-02912-8 involves a separate victim, Anita Coppola. CP 1-6. Under this cause number, the defendant was charged with rape in the second degree (later listed as count I). Id. This case was filed on March 31, 2009. Id. When victim Barg was located and charges refiled under 09-1-03352-4, the two cases were joined from trial--the court joining the cases on July 28, 2009. 6RP 21-27.

A jury convicted the defendant as charged. CP 88-90. Separate judgment and sentences were entered for each case. Under 09-1-02912-8, the case involving Coppola (count I), the defendant received a standard range minimum term sentence of 119 months. CP 112. Under 09-1-03352-4, the defendant received a standard range minimum term sentence of 89 months on count II, the attempted rape in the second degree conviction. CP 198-208. To avoid issues of double jeopardy, the court did not sentence or reduce to judgment count III, the indecent liberties conviction. 20RP 27.

## **2. SUBSTANTIVE FACTS: VICTIM ANITA COPPOLA<sup>1</sup>**

Kathleen France lives next door to the defendant in the West Hill area of Kent. 10RP<sup>2</sup> 16-17, 24. At approximately 2:30 in the

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<sup>1</sup> While the cases were tried together, for clarity, the State will separate the facts out by victim.

<sup>2</sup> The verbatim report of proceedings is cited as follows: 1RP--4/24/09; 2RP--5/1; 3RP--5/29, 6/5, 6/11, 6/25, 6/26 & 11/25 (out of order); 4RP 6/10 (upon review, this volume is identical to the hearing listed in 3RP as 6/11, therefore it is referenced here to be consistent with the defense brief but will not be referenced again--records indicate the correct date is 6/11); 5RP--7/20; 6RP--7/28; 7RP--8/6; 8RP--8/24; 9RP--8/25; 10RP--8/26; 11RP--8/26; 12RP--8/27; 13RP--8/31; 14RP--9/1 (morning); 15RP--9/1 (afternoon); 16RP--9/2; 17RP--9/2 (defense closing and rebuttal); 18RP--9/3; 19RP--10/6; 20RP--10/9; and 21RP--10/21/09. The State filed a supplement statement of arrangements adding an additional volume to the volumes submitted by the defendant. This volume is cited as 22RP--6/4/09.

morning on June 26, 2007, France was awakened by the sound of a woman screaming "help, help, help, rape, rape, rape." 10RP 19, 41. She also heard a male, in an angry voice, yelling, but she could not make out his words. 10RP 19-21.

Ngoc Thach lives on the other side of the defendant's house. At the same time France heard a female screaming, a very scared Anita Coppola ran to Thach's door seeking refuge. 10RP 31-33. Coppola had no shoes on and no pants on. 10RP 49. She begged for help, blurting out, "don't let him in, don't let him in." 10RP 35. She quickly explained that a man she had met had assaulted her. 10RP 37.

Officers responded to the 911 calls within three minutes. 10RP 40-41, 45. "Crying hysterically," Coppola told the officers that she had been next door with a man named "Mo" who beat her with a paddle and prevented her from escaping. 10RP 49. She said that she met Mo at a bus stop near the QFC in Des Moines, that she agreed to go back to his house to drink a few beers, and that when they arrived at his house, he attacked her without warning. 10RP 49-51. She explained that she had tried to escape out the bathroom window once, but Mo stopped her. 10RP 51. She said she was later able to escape through the same window and that

she then climbed over the fence and ran into the neighbor's yard. 10RP 51. She described Mo as a 25 to 30 year old black male with a Jamaican or West African accent. 10RP 52. Coppola had abrasions and cuts on her elbows and legs. 10RP 59.

Officers went next door, found the bathroom window open with the screen lying on the ground. 10RP 53. Officers knocked, pounded on the door, and even yelled through the open window, but they got no response. 10RP 53. A male relative of the defendant was also enlisted to help. 10RP 55. He too knocked and yelled for the defendant to open the door but got no response. 10RP 55. He then took a spare key and unlocked the door, but the deadbolt was locked from the inside. 10RP 55. The defendant would later claim that he was sleeping while this was occurring. 10RP 94-95.

At approximately 3:50 in the morning, Officer Kevin Bateman tried to take a recorded statement from Coppola. During the interview, Coppola lapsed into crying fits and exhibited wild mood swings. Only a partial statement was taken because Coppola was too emotionally upset to continue. 10RP 62-63.

Detective Kathy Holt was assigned the case the same day. 10RP 76. She was able to contact Coppola at her pastor's house

later in the afternoon. 10RP 76-77. Detective Holt and Coppola tried to drive the path from the point Coppola met the defendant to when she got to his house. 10RP 80. When they pulled into Fenwick Park, a place Coppola had said they had stopped, the defendant happened to be standing in the parking lot. 10RP 81-82. Upon seeing the defendant, Coppola "almost jumped out of her seat" and then covered down in fright. 10RP 83.

The defendant was placed under arrest and interviewed--post Miranda. 10RP 84, 87-88. The defendant said that he met Coppola at a bus stop in Des Moines and that the two agreed to go drink some beer together. 10RP 91. He said that after they bought some beer and Cisco, they went to his house but saw that his uncle's car was there and that they decided to go to a park instead. 10RP 91.

The defendant claimed that while at the park Coppola became sexual towards him and wanted him to perform both vaginal and anal intercourse on her. 10RP 92. He told Detective Holt that he complied with Coppola's request. 10RP 130-31. The defendant said that the two of them then went back to his house. 10RP 93.

Detective Holt then began asking the defendant direct questions about what happened during the course of the evening. When asked about the bathroom window screen, the defendant said he had no idea why Coppola would have taken the screen off the window, although he later admitted that Coppola had left by going out the window, but he didn't know why she did that. 10RP 94. He said that he then just went to sleep. 10RP 94. When asked about Coppola having tried previously to escape through the bathroom window, the defendant confessed that he recalled he had been outside the window earlier. 10RP 99.

The defendant never mentioned paddling or assaulting Coppola so Detective Holt asked him about the allegations made by Coppola. 10RP 95. The defendant claimed that while at the park, Coppola had asked him if he had a paddle and had asked him to hurt her. 10RP 95. Police found a paddle in the defendant's house--along with Coppola's backpack, pants and one shoe. 10RP 96, 99. The defendant claimed the paddle belonged to a friend who happened to have left it at his house. 10RP 96. He admitted using it on Coppola because "it got her off." 10RP 100. He also admitted to digitally penetrating Coppola's anus, again because she asked him to. 10RP 102.

After responding officers did an initial interview of Coppola, she was transported to the hospital. 12RP 24. Coppola told hospital personnel that she was vaginally and anally raped, and that she had tried to escape through a bathroom window. 12RP 30, 33-34; 13RP 33-34. She also informed doctors that she had been beaten with a paddle. 13RP 34. Doctors confirmed that she had bruising all over her buttocks, upper thighs, and lower back.<sup>3</sup> 13RP 34, 36. Lab results determined the presence of sperm. 13RP 39.

Coppola testified that at the time of the incident, she was homeless and that she had met the defendant at a bus stop by the QFC in Des Moines. 12RP 49-51. She was drinking a high alcohol content beer and the defendant asked her if she wanted to get some more beer and go to a park. 12RP 51-53. Coppola agreed. Id. The two then hopped on a bus, bought some beer and Cisco and went to Fenwick Park near the defendant's home. 12RP 54-56, 58. They stopped by the defendant's house first, but did not go inside because the defendant saw that his uncle was home. 12RP 56-57.

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<sup>3</sup> Photographs were admitted showing the severity of the injuries Coppola sustained. 12RP 95. Over time, the bruises and welts turned completely black and purple. 12RP 95-96.

At the park, the two drank and talked, with the defendant being "verbally" intimate but not "physically" intimate. 12RP 60. Later, the defendant said it would be more comfortable at his place, so the two returned to his house, with the defendant carrying Coppola's backpack. 12RP 62-63.

Back at the defendant's home, the defendant became more aggressive, telling Coppola that he wanted to have sex with her. 12RP 75. Coppola told the defendant that wasn't going to happen. 12RP 75. That didn't stop the defendant. Instead, he grabbed her breast and vaginal area and told her to take off her pants. 12RP 75. He then vaginally and anally digitally penetrated Coppola. 12RP 75, 77. He also pulled out a paddle and struck Coppola multiple times with it, with Coppola screaming for him to stop. 12RP 75. Coppola could not remember if the defendant actually penetrated her with his penis. 12RP 127.

At one point, Coppola tried to escape through a bathroom window, however, the defendant ran outside and pushed her back inside. 12RP 80. The defendant then beat Coppola with the paddle again, calling her a "bad girl." 12RP 80, 82. Coppola said that if she complied with the defendant's demands, he would call her a "good girl." 12RP 82.

Later, Coppola was able to get into the bathroom again. 12RP 81. This time she locked the door and very quickly climbed out the window. 12RP 81. She then ran screaming to the neighbors, without any pants or shoes on, with the defendant yelling and running after her. 12RP 81, 84. Coppola saw the defendant return to his house once she reached the neighbor's front door. 12RP 84.

When Coppola testified, she admitted that at one point when she was being interviewed by Officer Bateman--one of the responding officers, she lied about what had happened. 12RP 92, 152-53. She told Officer Bateman that the defendant had forced her to commit sex acts at the park when, in fact, all the sex acts had occurred at the defendant's house. 12RP 152-55. She also admitted that she lied when she told Officer Bateman that the defendant forced her to go back to his house. 12RP 156. Coppola said that when she made these statement, she did so out of anger and vindictiveness and that at the time, she "wanted him dead," for what he had done to her. 12RP 92, 153.

Detective Holt testified that when she interviewed Coppola, she said nothing about any sex acts having occurred at Fenwick Park. 13RP 21. When specifically asked, Coppola told Detective

Holt that nothing sexual happened at the park and that she voluntarily went back to his house. 13RP 22-23.

**3. SUBSTANTIVE FACTS: VICTIM ARLENE BARG**

Christina Barton lives across the street from Fenwick Park. 13RP 41-42. At approximately 1:30 in the morning on February 21, 2009, Barton heard "gut-wrenching" "blood-curdling" screams of "help, help, in Jesus' name, help me, I have been raped." 13RP 43, 47, 80, 122-23. Barton looked out to see a woman run out into the middle of the street attempting to get someone to stop. 13RP 47. Just then officers drove down the street and observed Arlene Barg, bloodied face, cut eye, disheveled and screaming hysterically in the middle of the roadway. 13RP 65-66, 75-76, 82. There was only one other person around at that hour--the defendant, who was walking down the street away from Barg and the officers. 13RP 68. Barg pointed to the defendant and told officers that he had assaulted her. 13RP 68.

Officer Thomas Clark yelled for the defendant to stop, but the defendant continued to walk away. 13RP 69. Officer Clark gave chase and eventually the defendant complied with the officer's demand that he stop. 13RP 70. Officer Clark noticed that the

defendant had grass stains on his pant legs and he asked the defendant about them. 13RP 71. Despite the early morning hour, the defendant professed that he got the grass stains earlier while playing soccer in Federal Way. 13RP 71. When Officer Clark explained that Barg said she had been assaulted by him, the defendant claimed he did not know her or assault her. 13RP 71. Forensic testing revealed that the stains on the defendant's pants included blood stains; blood that was DNA typed and matched Arlene Barg. 15RP 45, 48, 50-51.

Officers recovered Barg's backpack from a bench in the park where she said she had left it upon being attacked. 13RP 73, 84-85. Officers also found a clump of hair, confirming Barg's story that she pulled out some of her hair in an attempt to get the defendant to think she was crazy and leave her alone. 13RP 73, 84-85; 14RP 78. Officers were able to take a short recorded statement from Barg before medical personnel arrived to treat her.<sup>4</sup> 13RP 87-88.

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<sup>4</sup> Transported to the hospital, doctors documented that Barg had bruising on her right buttocks, swelling on her left leg, and a laceration under her left eye. 13RP 113. She told medical personnel that the defendant had hit her, kicked her, and attempted to rape her. 13RP 113-14, 119.

After officers were able to get a statement from Barg, they placed the defendant under arrest. 13RP 96. When informed he was being placed under arrest, the defendant just laughed. 13RP 96. In a search of his person, officers found 13 one-dollar bills crumpled up in the defendant's jacket pocket. 13RP 97. Barg would later testify that she had handed over some money to the defendant in an attempt to get him to leave her alone. 14RP 67.

Like Anita Coppola, Arlene Barg is homeless. 14RP 30. Barg testified that earlier that evening in Federal Way, she had run into another homeless person, her friend Janelle. 14RP 33-34. Janelle was extremely intoxicated and Barg was looking after her until Janelle's boyfriend arrived. 14RP 34. Barg then spotted the defendant walking through the alley checking out Janelle. 14RP 36. Barg told the defendant not to bother Janelle, that she was pretty wasted. 14RP 36. The defendant kept on walking. Id.

A while later, while talking with another homeless friend, Mike, the defendant approached Barg. 14RP 40. "Being friendly," Barg asked the defendant if he wanted to share some beer. 14RP 40. At some point, the defendant suggested they go to his home to smoke some pot. 14RP 41. The defendant called a friend

of his to give them a ride--an Asian male driving a white suburban.

14RP 45.

When they were in the vehicle being driven towards the defendant's house, the defendant started calling Barg a bitch and hitting her. 14RP 48. Barg did not understand why. Id. The Asian male dropped the two off at Fenwick Park. 14RP 47. When Barg got out, she took the Asian male's cigarettes. 14RP 53. This made the defendant angry. Id.

The two started to walk through the park towards the defendant's house when they sat down at a picnic table to have a cigarette. 14RP 54-55. The defendant again started calling Barg names, at which point Barg had had enough. 14RP 57. Barg got up, said she couldn't deal with this and told the defendant to have a good night. 14RP 57. When Barg started to walk away, the defendant slapped her on the butt and called her a bitch. 14RP 58-59. He then tried to pull her pants down and told Barg to bend over. 14RP 59. The defendant said he wanted to have sex with Barg. 14RP 61. The defendant also grabbed her breasts. 14RP 92-93.

Barg was able to break free from the defendant and run towards the parking lot. 14RP 62. However, Barg is disabled with

leg problems and cannot run very far. 14RP 43. Barg stopped and the defendant caught up with her. 14RP 62. Barg then started pulling her hair out because she was freaking out and stating that on other occasions when persons had tried to rape her, she acted crazy and this worked. 14RP 62-63. It did not work with the defendant. 14RP 64.

Barg then tried to walk away from the defendant again but he followed her. 14RP 64, 67. She then pulled out a number of one-dollar bills and gave them to the defendant, begging him to leave her alone. 14RP 67. At one point, Barg tried rolling down a hill--a "crazy idea," after which the defendant began kicking and hitting her. 14RP 64-65. Finally, Barg began yelling and ran out into the road trying to flag someone down. 14RP 78-80. That's when the police showed up. 14RP 81.

Barg told the officers that the defendant tried to rape her. 14RP 82. However, she also told the officers that she was just walking through the park when the defendant came out of the woods and attacked her. 14RP 83. She testified that she lied about this because she didn't want to be ignored and labeled as "a drug addict or something." 14RP 84; 15RP 14. Barg believed she

told this same lie to Detective Tim Ford who interviewed her a few days after the incident. 15RP 17-18.

Detective Ford would later testify that Barg did not tell him that the defendant came out of the woods. 15RP 36. Rather, Barg told Detective Ford she met the defendant in Federal Way. 15RP 36. This interview was conducted on February 27<sup>th</sup>. 15RP 35.

The defendant did not testify or put on any witnesses. Additional facts are contained in the sections they pertain.

**C. ARGUMENT**

**1. WHEN THE PROSECUTOR COULD NOT PROCURE THE HOMELESS VICTIM'S PRESENCE AT TRIAL, THE COURT PROPERLY DISMISSED THE CASE *WITHOUT PREJUDICE*.**

A week before trial on case number 09-1-02489-4, the prosecutor informed the court that he would not be able to procure the homeless victim's presence for trial (Arlene Barg). At the State's request, the court dismissed the case without prejudice. The defendant claims that the court should have dismissed the case with prejudice because he believes the prosecutor just did not do enough to obtain Barg's presence. This claim is without merit.

The trial court acted within its discretion and the defendant has failed to prove that no reasonable person would have so ruled.

**a. Facts Related To The Dismissal Of Case Number 09-1-02489-4.**

The defendant attempted to rape Arlene Barg on or about February 21, 2009. CP 317, 442-45. At the time of this incident, Barg was both transient and homeless.<sup>5</sup> CP 318-19. Barg usually stayed in the San Francisco area, but a month prior to this incident she had come up to Washington to try and rekindle a romantic relationship with another homeless person, Daniel Sullivan. CP 318, 393. The address Barg gave to responding police officers was for a mail stop for homeless persons in Santa Rosa, California. CP 383-84, 391. The contact phone number Barg gave responding police officers was for a niece in California. CP 391-92.

Detective Tim Ford was assigned the case on February 23, 2009. CP 318, 392. Charges were filed against the defendant on February 25, 2009, under cause number 09-1-02489-4. CP 319, 442-45. Discovery was sent to the Office of Public Defense on February 26, 2009. CP 319. Robbery was the initial charge filed

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<sup>5</sup> Barg would testify at trial that she had been homeless for over 30 years, since she was just 17-years-old. 14RP 30-31.

because the police had not yet obtained enough details about the incident to support a charge of attempted rape. CP 392.

Federal Way Police Officers located Barg on February 27, 2009, and Detective Ford took a recorded statement from her that same day. CP 318, 395. In her statement, provided in discovery, Barg admitted she was homeless, had no cell phone, no permanent address, that she camped in the woods at times, and that she had family in Oregon and California. CP 319, 395. Barg gave the detective contact numbers and agreed to check in periodically. CP 319. The contact numbers Detective Ford obtained included Barg's niece in California (Buffy Cadd), her brother in Oregon (Bryan Barg) and a friend of Daniel Sullivan's, a person named "Tommie." CP 392-93.

The defendant was arraigned on March 10, 2009. CP 319, 449. At that time, his case setting hearing was set for March 24, 2009. CP 449. On March 19, 2009, Barg checked in with Detective Ford and said she was going to find an apartment in the Tacoma area and would give the detective her address when this occurred. CP 319. This did not occur. CP 319. Instead, Barg returned to California, although this was unknown to the State. CP 319. On March 20, 2009, the State sent an e-mail to defense

counsel stating that attempted rape charges may be pursued against the defendant. CP 319.

On March 24, 2009, case setting was set over one day until the 25th. CP 450. At the hearing on March 25, 2009, an omnibus hearing date was set for April 24, 2009, a trial date was set for May 7, 2009, with an expiration date of May 9, 2009. CP 451-52.

On April 24, 2009, an omnibus hearing was held. 1RP. The prosecutor stated that he believed Barg would be present for trial. 1RP 5. He also noted that the State would be moving to have this case (09-1-02489-4) joined for trial with another of the defendant's cases (09-1-02912-8), the case involving Anita Coppola. 1RP 6; CP 322. A hearing was set for May 1, 2009 to argue about whether the court would grant the State's motion to join the two cases. CP 453.

Also at the omnibus hearing, defense counsel noted that she did not know if she would be ready for trial on May 7, although she added that the defendant did not want a continuance. 1RP 5, 8. She further stated that she would be out of town from May 15 until Memorial Day (May 25) and that if the case got put on standby for more than a single day, the case could not be tried before her

vacation.<sup>6</sup> 1RP 5. In addition, the defense indicated that they needed to interview the victim, with the prosecutor stating that he would help to set this up. 1RP 6, 9.

At the conclusion of this hearing, the prosecutor began attempts to contact Barg. CP 323. Through contacts, the prosecutor learned that Barg had recently hitchhiked to San Francisco and that she had been given a prepaid cell phone by her brother (Bryan) when she visited him in Oregon. CP 282, 323.

Calls to the cell phone by the prosecutor went unanswered. CP 323. The prosecutor put money on the phone's account in case the account was out of minutes. CP 282. It was later learned that Barg had lost the phone shortly after receiving it. CP 323.

The prosecutor also left messages with all family contacts Barg had provided--with instructions that Barg was to call the prosecutor or detective immediately. CP 323. However, by May 1, 2009, the State had not received any response from Barg and no

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<sup>6</sup> In a subsequent e-mail sent to the prosecutor on May 6, 2009, defense counsel indicated that she had another case set for trial that was getting bumped along day-to-day on the trial calendar. CP 301. She added that she would be available for defense interviews after the court day on Monday and Tuesday (the 11<sup>th</sup> and 12<sup>th</sup>) but that she would be absent on Wednesday (the 13<sup>th</sup>). CP 301.

family member knew her location or any other way to reach her.

CP 323.

On May 1, 2009, the State informed the court that Barg could not be located and that the State did not believe they would be able to obtain her presence at trial. 2RP 1; CP 323. The State moved to dismiss the case without prejudice to refiling the case in the event Barg could be located. 2RP 1-2; CP 323. The State added that if Barg were present, the State was ready to proceed to trial, that no additional time was needed for the case to be ready. 2RP 7. The defendant did not object to the motion to dismiss except that he wanted the dismissal to be with prejudice. 2RP 1-2. The court agreed to dismiss the case without prejudice, with the understanding that if Barg was found and the case refiled, the defense could make a motion to dismiss at that time. 2RP 11. The court signed a written order of dismissal. CP 456. The dismissal occurred eight days prior to the defendant's expiration date. CP 451-52. The case was not joined with the defendant's other case.

The State was able to reestablish regular contact with Barg on May 20, 2009. CP 323-24. It was learned that Barg had also lost her means of identification and therefore she could not travel

by plane or train. Id. With further efforts by the prosecutor, Barg arrived in Seattle, by bus, on May 27, 2009. CP 324. The case was refiled against the defendant the next day, May 28, 2009. CP 192-96. The case was refiled under cause number 09-1-03352-4. Id. On July 28, 2009, the court heard the defendant's motion that the original case should have been dismissed with prejudice back in May. The court denied the defendant's motion finding no mismanagement on the part of the State. 6RP 11-13.

**b. The Court Did Not Abuse Its Discretion In Dismissing The Case Without Prejudice.**

The defendant argued below, and argues on appeal, that the court should have dismissed the case with prejudice under CrR 8.3 for prosecutorial mismanagement. In pertinent part, CrR 8.3 provides that:

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

CrR 8.3(b).

Dismissal under CrR 8.3 "should be used only as a last resort." City of Seattle v. Holifield, \_\_\_ Wn.2d \_\_\_, 240 P.3d 1162, 1165 (2010). Before dismissing a case outright, a trial judge must take ameliorative action before ordering the "extraordinary remedy of dismissal." Holifield, 240 P.3d at 1165. In other words, the extreme measure of dismissal is at the "outer bounds of the court's discretion and power." Holifield, at 1166.

Before a court can entertain a motion to dismiss under CrR 8.3, a defendant must prove two things. First, a defendant must show arbitrary action or government misconduct. State v. Puapuaga, 164 Wn.2d 515, 520-21, 192 P.3d 360 (2008). Second, a defendant must show prejudice affecting his right to a fair trial. Id.

A trial court's decision to dismiss a charge under CrR 8.3 is reviewable under the manifest abuse of discretion standard. Id. Thus, along with the burden a defendant faces at the trial court level, a defendant appealing a trial court's decision must prove that "no reasonable person would have taken the position adopted by the trial court." State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982). It is not enough that reasonable minds might disagree with the trial court's ruling, that is not the standard. State v. Willis, 151 Wn.2d 255, 264, 87 P.3d 1164 (2004).

While the defendant cites to the speedy trial rules, he cannot dispute that his speedy trial rights under CrR 3.3 were not violated.<sup>7</sup> Even assuming his trial would have commenced as scheduled, with no extension of the speedy trial period--an assumption not supported by the record<sup>8</sup>--there was over a week of speedy trial left when his case was dismissed without prejudice. CP 451-52.

The defendant also cannot dispute that the State dismissed the case because the State could not locate Barg.<sup>9</sup> The record is quite clear that Barg was homeless and transient and that the State

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<sup>7</sup> In citing to the speedy trial rule, the defendant appears to conflate two different concepts--citing cases involving motions to continue under the old CrR 3.3 rule (since amended), and cases involving CrR 8.3. The State never moved to continue the defendant's case and his case was not continued. Additionally, the speedy trial rule fully contemplates the possibility of a dismissal without prejudice and the refiling of the same case. CrR (e)(4). This would add an additional 30 days to the expiration date and exclude the time period between dismissal and refiling. CrR (b)(5) and (e)(4).

<sup>8</sup> On April 24, defense counsel informed the court that it was unlikely she would be ready to proceed to trial on May 7 as scheduled. 1RP 5, 8. She also informed the court that if the case were held over even a single day--a common occurrence--the case could not commence and be completed prior to her scheduled two week vacation on May 15. 1RP 5. A continuance, even over a defendant's objection, constitutes appropriate excludable delay under CrR 3.3 for a defense attorney's vacation and/or for trial preparation. See State v. Selam, 97 Wn. App. 140, 142-43, 982 P.2d 679 (1999), rev. denied, 140 Wn.2d 1013 (2000); State v. Flinn, 154 Wn.2d 193, 201, 110 P.3d 748 (2005); State v. Eaves, 39 Wn. App. 16, 20-21, 691 P.2d 245 (1984). Under CrR 3.3(b)(5), any excluded period would add an additional 30 days to the expiration date. It would be pure speculation to assume the defendant's trial date and expiration date would have remained the same if Barg had been located prior to the dismissal of the case.

<sup>9</sup> It is axiomatic that every dismissal has the result of stopping the speedy trial clock from continuing to run. However, the prosecutor stated here that the State was ready to proceed to trial as scheduled but for the absence of Barg. 2RP 7.

had been unable to, by May 1, ensure that she would be present for trial.

What the defendant's argument boils down to is his assertion that he believes the prosecutor should have done more to procure Barg's presence at trial, and that the failure to do more constituted such gross mismanagement that his case should have been dismissed with prejudice. This argument simply does not withstand scrutiny. A trial attorney can always do more, prepare more, interview more witnesses, search for more evidence, or make greater efforts to locate a witness or witnesses. But what the defendant must prove is that the prosecutor's efforts here were so lacking in reasonableness as to be deemed "truly egregious," as required under the law before the extraordinary remedy of dismissal is made available. State v. Wilson, 149 Wn.2d 1, 9, 65 P.3d 657 (2003).

There is no question that Arlene Barg was chronically, if not perpetually, homeless. This was known to all parties early on. Her homelessness appears to extend over the three-state area of Washington, Oregon and California. To account for this, the State took the reasonable and practical step of obtaining contact information wherein Barg could be reached--through her family--

when, and if, she was needed for trial. The evidence does not show that there was any other method or way of realistically contacting or reaching her. The State used this method, the only known contact method, in an attempt to locate Barg. The fact that Barg did not call back, the fact that she lost her phone, the fact that she had no permanent phone or residence where she could be reached, were all things not in the prosecutor's control.

In addition, the defense argument that the prosecutor should have attempted to contact Barg earlier and taken other steps is simply a personal judgment--taken in the context of hindsight--and an opinion not based on the circumstances of the case or reasonable trial practice. For example, the defendant asserts that when Barg was found by Federal Way Police Officers a few days after the rape, the State should have issued her a subpoena. This makes no sense. There was no trial date at that point, i.e., no date to have ordered Barg to appear. A trial date was not set for another month (and this date would have been suspect with less than ten percent of cases actually going to trial and the chaotic schedules of

public defender and prosecutor--seldom do trials commence on the first trial date set<sup>10</sup>).

Further, if the prosecutor had had actual contact with Barg at an earlier date, this would not have changed the situation or ensured her presence at trial. The prosecutor's office does not provide jobs or housing (other than maybe a temporary hotel stay during trial), does not make a habit of holding rape victims in custody pending trial (nor would any court likely allow this to happen), and does not provide mental health, drug or alcohol treatment. In short, even if the prosecutor would have had contact with Barg a month or two months prior to the scheduled trial date, the situation would have been the same--the exact trial date would have been uncertain and Barg would still be homeless, transient, and contact would still be dependent on the same limited contact sources and Barg's ability and willingness to respond and comply.

Moreover, up until the omnibus hearing--a hearing that is intended to resolve case issues, determine discovery concerns and

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<sup>10</sup> The defendant's other case (09-1-02912-8) provides a classic example. The defendant's initial chosen trial date was June 10, 2009. CP \_\_\_\_, sub # 9 (09-1-02912-8). However, he continued his trial four times, with trial finally commencing two and a half months later on August 24, 2009. CP \_\_\_\_, sub # 15, 24, 28, 30 (09-1-02912-8).

allow the parties to engage in plea negotiations (see CrR 4.5), it was perfectly reasonable for the prosecutor to wait to contact Barg. It is at this point that reason exists to contact a victim or witness becomes real, e.g., the case appears actually headed to trial, notification of a disposition or possible disposition of the case, or the victim or witness may be needed for an interview.

The fact that the defendant may have wanted the prosecutor to do more does not suffice to prove that the prosecutor's actions that did not meet his expectations were truly egregious. The prosecutor's actions here were reasonable and the defendant has not shown that no reasonable judge would not have ruled as the trial court did here, finding that there was no gross mismanagement.

As for the second prong of the test the defendant must meet, he can show no prejudice to his right to a fair trial. To obtain a dismissal under CrR 8.3 a defendant must prove by a preponderance prejudice affecting his right to a fair trial. State v. Rohrich, 149 Wn.2d 647, 655, 71 P.3d 638 (2003). This requires a showing by the defendant of "actual prejudice," not "speculative prejudice." Rohrich, 149 Wn.2d at 657 (the mere fact that the State delayed filing charges for 18 months was insufficient to warrant

dismissal under CrR 8.3); see also State v. Norby, 122 Wn.2d 258, 264, 858 P.2d 210 (1993) ("a mere allegation that witnesses are unavailable or that memories have dimmed is insufficient"). Dismissal under CrR 8.3 must be "in the furtherance of justice." State v. Korum, 157 Wn.2d 614, 638-39, 141 P.3d 13 (2006).

The defendant does not allege that witnesses' memories faded or that evidence was lost; rather, he appears to rely solely on speculation that his case would have gone out to trial on May 7, as scheduled, and that because it did not, and the case was later refiled, this is per se prejudice under CrR 3.3. This argument fails for multiple reasons. The defendant's CrR 3.3 rights were not violated, nor was his motion raised under that rule. And his assertion that his case would have gone out to trial on May 7 is pure speculation.<sup>11</sup> He has made no showing that his right to a fair trial was prejudiced or that dismissal with prejudice was necessary in the interests of justice.

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<sup>11</sup> While one can imagine a case wherein a dismissal by the State was intended to circumvent the speedy trial rule and prejudice could be shown, this is not such a case. For example, if the State, on the morning of trial, dismissed a case because the prosecutor was unprepared, a defendant could show prejudice because it was clear the case was going to trial on that date. Here, it was pure speculation.

**c. The Defendant's Misguided Discovery Claim.**

In a few paragraphs the defendant also asserts the court erred in its CrR 8.3 ruling because of the State's late compliance with discovery obligations. This claim has no merit for a number of reasons.

First, the defendant fails to identify what discovery he claims he was entitled and he fails to prove that he did not receive it in a timely manner. He does no more than assert there were discovery violations. However, matters not of record will not be considered by the court on appeal. State v. Rienks, 46 Wn. App. 537, 544, 731 P.2d 1116 (1987). "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." Palmer v. Jensen, 81 Wn. App. 148, 153, 913 P.2d 413 (1996). Bare allegations unsupported by persuasive reasoning cannot sustain a defendant's burden. State v. Brune, 45 Wn. App. 354, 363, 725 P.2d 454 (1986), rev. denied, 110 Wn.2d 1002 (1988)..

Second, what the record does show is that at one point, defense counsel sought eleven items from the State. CP 322.

However, all but two of the items pertained to the defendant's other case involving Anita Coppola--a case that did not go to trial until August 24, 2009, and a case that at the time of the CrR 8.3 dismissal order (May 1) had an expiration date of June 12 (later extended by the defendant). See CP \_\_\_\_, sub # 9 (09-1-02912-8).

Third, the record shows that all of the items requested were provided to the defense not later than April 27. CP 322; 1RP 9-10. Further, many of the items provided are items that are provided as a courtesy, not as a requirement under the rules of discovery. For example, the State had already provided the defendant a transcript of Barg's interview in compliance with CrR 4.7. Still, the State routinely will make and provide--as it did here--a copy of a DVD, CD or other medium if requested by the defense. This is not a requirement under CrR 4.7.

Fourth and finally, the defendant can show no prejudice or that other remedies for the "alleged" discovery violations were not available. In short, the defendant has failed to prove that the trial court abused its discretion in ruling on the CrR 8.3 motion.

**2. THE COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE STATE TO ELICIT TESTIMONY ABOUT A SUBSEQUENT STATEMENT MADE BY VICTIM ANITA COPPOLA.**

The defendant contends that the trial court made an evidentiary error. Specifically, after the defense impeached victim Anita Coppola with a statement she made to responding police officers that was inconsistent with her trial testimony, the court allowed the State to elicit testimony about a subsequent statement made by Coppola. The defendant claims this ruling was incorrect. The defendant's claim has no merit. The trial court did not abuse its discretion.

**a. The Facts.**

Anita Coppola made four statements to authorities after she was sexually assaulted by the defendant.<sup>12</sup> The first statement she made was to responding officers who arrived on the scene (June 26 at 2:47 a.m.) and found a half naked Coppola hysterical in

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<sup>12</sup> Coppola also gave statements to medical personnel wherein she described the defendant having sexually assaulted her both vaginally and anally, and beaten her with a paddle. See 13RP 33-35. The admission of these statements, admitted under ER 803(a)(4) as pertinent to her diagnosis and treatment, was not contested. See e.g., State v. Alvarez-Abrego, 154 Wn. App. 351, 366, 225 P.3d 396 (2010).

the middle of the street yelling for help and screaming that she had been raped. 10RP 19, 49. In this brief statement, admitted into evidence as an excited utterance, Coppola told Officer Kevin Bateman that she met the defendant at a bus stop in Des Moines, that she agreed to go back to his house for a few beers, and that at the house he kept her "like a prisoner," beat her with a paddle and that she eventually escaped out a bathroom window. 10RP 49-51. Approximately one hour later (June 26 at 3:50 a.m.), Officer Bateman was able to take a taped statement from Coppola. 10RP 61-62. He was not able to take a complete statement from Coppola because she was too emotional. 10RP 62-63. Later that same day (June 26 at 12:20 p.m.), Coppola discussed the incident with Detective Kathy Holt. 13RP 20-21. This statement was not admitted at trial. On June 28, Coppola gave a taped statement at a joint interview with Detective Kathy Holt and Prosecutor Jennifer Miller. 10RP 114-15. A few sentences from this statement were admitted at trial and are the subject of the defendant's claim.

At trial, Coppola described meeting the defendant by a QFC store in Des Moines, that he invited her to drink beer with him at a park, that the two took a bus ride to Fenwick Park where they drank beer and talked. 12RP 50, 53-56. She testified that no sexual

assault occurred at the park. 12RP 60-61, 91. It was not until the two went to the defendant's residence, she testified, that the defendant attacked her. 12RP 74-75, 77.

The defense cross-examined Coppola using the recorded statement she gave to Officer Bateman. See 12RP 147-56. In that statement, Coppola said that the defendant sexually assaulted her at the park and that he forced her to go back to his house. Id. In response to defense counsel's questions, Coppola testified that any statement that she may have made about the defendant assaulting her in the park was not true and was made because she was "mad at him...[for] what he had done." 12RP 92, 152. Coppola added that she "wanted him dead, yes, he did something very bad." 12RP 153.

The State then sought to elicit testimony regarding certain things Coppola said in the joint interview with Detective Holt and the prosecutor. The court granted the State's motion, ruling that the statements were admissible under ER 106, the rule of completeness, and rejecting the notion that the statements were admissible as prior consistent statements under ER 801(d)(1)(ii). 13RP 5-12.

The prosecutor then elicited testimony from Detective Holt that during the joint interview Coppola said that no sexual assault happened at the park and that she voluntarily went to the defendant's house. 13RP 21-23.

**b. Standard Of Review And Argument: The Court Did Not Abuse Its Discretion.**

The decision to admit evidence lies within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997). While reasonable minds might disagree with the trial court's evidentiary ruling, that is not the standard. Willis, 151 Wn.2d at 264. To prevail on appeal, the defendant would have to prove that no reasonable person would have taken the position adopted by the trial court. Robtoy, 98 Wn.2d at 42. Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001).

The admission of evidence will be upheld if it is admissible for any proper purpose, even if the basis relied upon by the trial

court was improper. State v. Mutchler, 53 Wn. App. 899, 901, 771 P.2d 1168, rev. denied, 113 Wn.2d 1002 (1989).

**c. ER 801(d)(1)(ii).**

ER 801(d)(1)(ii) provides as follows:

A [prior] statement is not hearsay if...[t]he declarant testifies at trial or hearing and is subject to cross examination concerning the statement, and the statement is...consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive."

Under this rule, the defendant correctly states that the prior statement sought to be admitted must have been made before the time that the supposed motive to falsify arose. State v. Osborn, 59 Wn. App. 1, 5, 795 P.2d 1174, rev. denied, 115 Wn.2d 1032 (1990). The defendant contends that because Coppola admitted she lied about the defendant sexually assaulting her at the park in her recorded statement to Officer Bateman, any statement she made subsequent to this statement is inadmissible under ER 801(d)(1)(ii). This is not correct because the triggering event or proposition the defendant relies is faulty.

The issue was not whether Coppola's statement to Officer Bateman about the defendant sexually assaulting her in the park

was true or false--all parties were in agreement it was false, as per her testimony. By seeking to admit the statements in question, the State was not trying to prove that the defendant sexually assaulted Coppola in the park--that this allegation was consistent with her trial testimony--it was not. Rather, the issue was whether Coppola was lying when she testified the defendant sexually assaulted her at his home. The defense was this was not true, that it was a fabrication. The defendant's focus on Coppola's admitted lie in her statement to Officer Bateman is misguided in this regard. The statement the State sought to admit was admissible because it rebutted the defendant's assertion that Coppola was lying when she testified he sexually assaulted her at his house.

**d. ER 106, The Rule Of Completeness.**

ER 106, also known as "the rule of completeness," states that:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, **or any other writing or recorded statement**, which ought in fairness to be considered contemporaneously with it.

ER 106 (emphasis added).

Under this rule--as with any other rule of admissibility, the evidence the proponent seeks to admit must be relevant to an issue in the case. State v. Larry, 108 Wn. App. 894, 910, 34 P.3d 241 (2001). While not a requirement, generally a four part test is used to determine admissibility under the rule of completeness. Under this test, the court should ask whether the offered evidence (1) explains the admitted evidence, (2) places it in context, (3) avoids misleading the trier of fact, and (4) insures a fair and impartial understanding of the evidence. Larry, 108 Wn. App. at 910 (citing United States v. Velasco, 953 F.2d 1467, 1475 (7th Cir.1992)).

The defendant's argument that the court erred in applying this rule is twofold. First, the defendant argues the rule is limited to the confines of a single statement. This is easily disposed of as the plain language of the rule is to the contrary. The rule provides that "**any other** writing or statement which ought in fairness to be considered contemporaneously with it." ER 106. Thus, the rule fully contemplates the admission of "other" statements that the trial court believes should be admissible to explain or put into context the statement or portion of a statement already admitted.

Second, the defendant claims that the admission of Coppola's subsequent statement was not relevant because "repetition of a statement does not show veracity." Def. br. at 30. This misses the point of the relevance of admitting Coppola's subsequent statement. The court did not admit the subsequent statement to show repetition nor was that the issue. Coppola made a statement to Officer Bateman shortly after being assaulted in which she admitted she lied. The defense used this statement to impeach her. The court ruled that her subsequent statement taken just a few days later put into context that she did not continue this lie. The statement helped explain that Coppola lied because she was angry and that when she cooled down, she did not continue this lie. The statement helped place her initial statement in context and helped avoid misleading the trier of fact that she continued in this lie until confronted at trial. This helped insure a fair and impartial understanding of the facts. The defendant cannot show no reasonable judge would have so ruled.

**e. The Defendant Opened The Door.**

In addition, Coppola's subsequent statement was also admissible because the defendant "opened the door," to its

admission. Generally, once a party has raised a material issue, the opposing party is permitted to explain, clarify, or contradict the evidence. State v. Berg, 147 Wn. App. 923, 939, 198 P.3d 529, 537 (2008) (citing State v. Price, 126 Wn. App. 617, 109 P.3d 27, rev. denied, 155 Wn.2d 1018 (2005)). This is the long-recognized rule that when a party opens up a subject of inquiry, that party “contemplates that the rules will permit cross-examination or redirect examination ... 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). Otherwise, “[t]o close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths.” Id. As the Supreme Court stated in State v. West, the defendant “was not at liberty to explore broad areas at will, seek to leave inferences with the jury and then preclude the state from attempting to explain or rebut the inferences.” State v. West, 70 Wn.2d 751, 754, 424 P.2d 1014 (1967), see also Walder v. United States, 347 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954) (defendant opened the door to admission of otherwise inadmissible evidence).

The defendant was the party who sought to use Coppola's statement that he sexually assaulted her in the park. This opened the door to the State's ability to explain why Coppola said this and to show that she very quickly distanced herself from this falsity.

The few sentences admitted from Coppola's subsequent statement during the joint interview were admissible under any of the above three rules. The defendant has failed to prove that no reasonable judge would have ruled the statements admissible. In any event, the admission of the few statements, if admitted in error, was harmless.

**f. Harmless Error.**

Evidentiary error is harmless unless a defendant can show that there is a reasonable probability the admission of the evidence affected the outcome of trial. State v. Smith, 106 Wn.2d 772, 725 P.2d 951 (1986). Here, the defendant was able to use Coppola's first statement to show she lied. The admission of the few sentences from Coppola's subsequent statement wherein she does not repeat this lie, while relevant, it is minimally damaging to the defendant because Coppola admitted at trial that she had in fact lied.

Additionally, the evidence against the defendant was particularly compelling. The defendant chose two separate homeless women and using the same ruse, enticed them back to his surroundings where he sexually assaulted them. In both cases, his victims were found by the police and civilians hysterical. In the case of Coppola, she fled from the defendant's house, screaming wildly, half naked and telling responding officers that the defendant had beaten her with a paddle and raped her. The defendant's explanation, he just happened upon Coppola at a park, she just happened to ask him if he had a paddle and if he would beat her with it, that it "got her off," and that after he anally penetrated her at her request, she left through the bathroom window but that he had no idea why. He claimed he then just went to sleep, although the evidence was that the police pounded on his door and windows and even yelled through the bathroom window that was open with a screen on the ground below it. With these facts, the defendant cannot meet his burden of showing there is a reasonable probability that but for the alleged evidentiary error, the outcome of trial would have been different.

**3. THE TRIAL COURT PROPERLY HANDLED THE POTENTIAL DOUBLE JEOPARDY ISSUE.**

The defendant contends that his convictions for count II, attempted rape in the second degree, and count III, indecent liberties violate principles of double jeopardy. This is incorrect. The trial court complied with the dictates of the Supreme Court, did not enter judgment on the lesser-penalty offense (indecent liberties) and did not hold that conviction in abeyance.

The defendant's convictions for indecent liberties and attempted second-degree rape arguably violate double jeopardy. See State v. Theifault, 160 Wn.2d 409, 413, 158 P.3d 580 (2007). The trial court was aware of this potential issue when it sentenced the defendant. To avoid this problem, the court did not enter judgment on the indecent liberties conviction and it is not referenced at all in his judgment and sentence. See CP 198-208. The court stated that "[t]he court will not reduce count three to judgment and, therefore, double jeopardy doesn't apply." 20RP 27.

Washington's double jeopardy clause is coextensive with the federal double jeopardy clause, with both prohibiting being "punished" twice for the same offense where not authorized by the legislature. State v. Turner, 169 Wn.2d 448, 454, 238 P.3d 461

(2010). If a defendant is not "punished," then no double jeopardy problem exists. Id. Thus, a series of cases have discussed what "punishment" means for double jeopardy purposes. See e.g., Turner, supra; State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007); State v. Ward, 125 Wn. App. 138, 104 P.3d 61 (2005); State v. Trujillo, 112 Wn. App. 390, 49 P.3d 935 (2002), rev. denied, 149 Wn.2d 1002 (2003) .

For double jeopardy purposes, punishment encompasses more than just a defendant's sentence. Turner, 169 Wn.2d at 454. The conviction alone may trigger double jeopardy protections. Id. Still, "it is important to distinguish between charges and convictions--the State may properly file an information charging multiple counts under various statutory provisions where evidence supports the charges, even though convictions may not stand for all offenses where double jeopardy protections are violated." Womac, 160 Wn.2d at 657-58 (citing State v. Calle, 125 Wn.2d 769, 777 n.3, 888 P.2d 155 (1995)).

The mere returning of jury verdicts for charges based on the same evidence does not violate double jeopardy. Whether double jeopardy is violated depends on what the trial court does with the convictions, i.e., is "punishment" imposed for the convictions. In

Ward and Trujillo, cited with approval in Turner and Womac, the trial court did not reduce the lesser conviction to judgment, thus, there was no "punishment" and no double jeopardy violation. In this situation, actual vacation of the lesser conviction is not required. See Womac, at 658-59.

In contrast, in Womac the trial court entered judgment on three convictions but attempted to avoid double jeopardy problems by only entering a sentence on one of the three offenses. This, the entering of judgment on the lesser offenses, the Supreme Court said, still implicates double jeopardy principles. Womac, at 659. Under such a situation where the lesser conviction is actually reduced to judgment, the remedy is vacation of the lesser offense. Id.

In Turner, the Court addressed another situation, where the trial court attempted to avoid double jeopardy problems by "conditionally" vacating the lesser offense--the idea being that the lesser conviction could be reinstated if the greater offense were to be reversed on appeal. Turner, at 461. This, the Court said, amounted to declaring that the lesser conviction "retained validity" and was being held "in abeyance." This conflicted with the holding of Womac. Thus, the Court held, "a court may violate double

jeopardy *either* by reducing to judgment both the greater and the lesser of two convictions for the same offense *or* by conditionally vacating the lesser conviction while directing, in some form or another, that the conviction nonetheless remains valid." Turner, at 465 (emphasis in original).

Here, the trial court did not reduce the defendant's conviction for indecent liberties to judgment. The court also did not conditionally vacate or hold in abeyance the conviction. The defendant's argument to the contrary is incorrect. While the State wanted to hold the conviction in abeyance, the court did not so rule. The court simply and correctly held that "[t]he court will not reduce count three to judgment and, therefore, double jeopardy does not attach." 20RP 27. It is the court's ruling that governs, not the desire or statements of the prosecutor.

**4. THE DEFENDANT INCORRECTLY ARGUES THAT THE COURT ORDERED HIM TO UNDERGO MENTAL HEALTH COUNSELING AND SUBSTANCE ABUSE TREATMENT.**

The defendant contends that the trial court erred in ordering him to undergo a mental health evaluation and a substance abuse evaluation and to follow all treatment recommendations of both. He

argues that these conditions are not "crime related" as required by statute for the court to impose the conditions. The defendant's argument is without merit because the trial court did not order these conditions. Rather, the defendant must submit to these requirements only if ordered by a treatment specialist or a community corrections officer.<sup>13</sup> This statutory authority does exist.

The defendant was sentenced under RCW 9.94A.712 (recodified at RCW 9.94A.507). Under RCW 9.94A.712, certain sex offenders must serve at least the minimum term set by the trial court in total confinement, and, if approved for release from total confinement by the Indeterminate Sentencing Review Board ("board"), must serve the remainder up to the maximum term on community custody.

In imposing conditions of community custody, the trial court must comply with RCW 9.94A.700(4) and (5). In this respect, the

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<sup>13</sup> As part of the terms of community custody were the following provisions:

Defendant shall comply with the following other conditions during the term of community custody...

(13) If directed by your sexual deviancy treatment specialist or Community Corrections Officer, obtain a mental health evaluation from a qualified provider and complete all treatment recommendations.

(14) If directed by your sexual deviancy treatment specialist or Community Corrections Officer, undergo an evaluation regarding substance abuse at your expense and follow any recommended treatment as a result of that evaluation.

CP 117, 206 (conditions 13 and 14).

defendant is correct that any treatment or counseling services ordered by the trial court must be crime-related. But the Department of Corrections ("DOC") and the board are granted the authority to impose additional conditions of community custody above and beyond those ordered by the trial court at sentencing. See RCW 9.94A.713 (since repealed). Under this statute, the DOC is required to conduct a risk assessment and "recommend to the board any additional or modified conditions of the offender's community custody based upon the risk to community safety." RCW 9.94A.713(1). This provision specifically requires the DOC to recommend appropriate "rehabilitative programs" in which the offender may be required to participate or any other "affirmative conduct" the offender may be required to perform. Id. Although the DOC and the board may not impose conditions of community custody "that are contrary to those ordered by the court, and may not contravene or decrease court-imposed conditions," the DOC and the board are clearly authorized to impose conditions in addition to those imposed by the court. RCW 9.94A.713(2), see also RCW 9.95.420(2).

The defendant here fails to recognize that additional conditions of community custody as may be deemed appropriate by

the DOC and the board under RCW 9.94A.713 need not be "crime related" or otherwise specifically authorized for the trial court to impose. Rather, they need only be "based upon the risk to community safety." RCW 9.94A.713(1). Therefore, because the conditions of community custody at issue here are contingent upon a finding by treatment specialist or community corrections officer, and will only be implemented upon a risk assessment and recommendation to the board by the DOC, the trial court has done no more than authorize the DOC and the board to do what they already have authority to do by statute. At worst, the community custody conditions at issue are arguably superfluous.<sup>14</sup>

**5. THE CONDITION OF COMMUNITY CUSTODY PROHIBITING INTERNET ACCESS SHOULD BE STRICKEN WITHOUT PREJUDICE.**

The State agrees that, as worded, the trial court lacked statutory authority to prohibit internet access without prior approval as order as a condition of community custody. See CP 118, 207 (condition 17). As this Court found in State v. O'Cain, 144 Wn.

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<sup>14</sup> Even if this Court were to find the defendant's claim has merit and the conditions struck, this Court should do so without prejudice to the DOC's authority to order such conditions if it deems such action necessary to protect community safety if and when the defendant becomes eligible for release from total confinement.

App. 772, 774, 184 P.3d 1262 (2008), a prohibition on internet usage is valid only if it is crime-related. With no such connection here, condition 17 should be stricken. However, as discussed in detail above, the DOC and the board have much broader authority to impose conditions of community custody than the trial court does. Therefore, the condition at issue should be stricken without prejudice to the DOC's authority to impose such a condition if deemed necessary to protect community safety.

**6. THE CONDITION OF COMMUNITY CUSTODY  
REQUIRING PAYMENT OF COUNSELING COSTS  
IS MOOT.**

The defendant challenges the authority of the trial court to impose as a condition of community custody that he "[p]ay for counseling costs for victims and their families." CP 118, 207 (condition 19). The trial court certainly has the authority to order restitution for counseling and while there does not appear to be any authority to order restitution as a condition of community custody, there has been no restitution costs imposed for counseling and therefore the issue is moot.

A trial court has the authority to order restitution, including a victim's counseling expenses. RCW 9.94A.753(3); State v.

Goodrich, 47 Wn. App. 114, 733 P.2d 1000 (1987). No restitution was ordered under cause number 09-1-03352-4. See CP 441. Restitution was ordered under cause number 09-1-02912-8, \$863.45 to be paid to the Crime Victims Compensation Fund for medical expenses incurred and paid with monies from the fund. See CP 305-06. The defendant does not challenge this order of restitution, an order properly entered as part of the defendant's sentence under RCW 9.94A.753(3).

The State is unaware of any authority allowing the court to impose restitution as part of community custody. However, it does not appear that any costs are actually being imposed against the defendant--there are no known counseling costs being incurred and the defendant cites to none. So whether or not restitution costs can be imposed as a condition of community custody is a moot point. In re Cross, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983) (a claim is moot if the court can provide no effective relief); State v. Turner, 98 Wn.2d 731, 733, 658 P.2d 658 (1983) (an issue is moot if the matter is "purely academic"); State v. Ross, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004) (the court "will not consider a question that is purely academic"); see also State v. Autrey, 136 Wn. App. 460, 470-71, 150 P.3d 580 (2006) (a challenge to a condition of

community custody is not ripe for review until the defendant is harmfully affected by that part of the condition).

**D. CONCLUSION**

For the reasons cited above, this Court should affirm the defendant's conviction and remand with instructions to correct the defendant's judgment and sentence.

DATED this 27 day of January, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

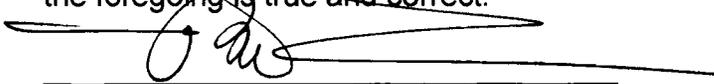
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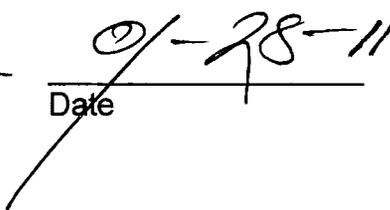
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Casey Grannis, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. KONE, Cause No. 64422-0-1, in the Court of Appeals, Division I, for the State of Washington.

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

  
\_\_\_\_\_  
Name  
Done in Seattle, Washington

  
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Date