

No. 67262-2-1

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

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STATE OF WASHINGTON,

Respondent,

v.

CLIFFORD LAND,

Appellant.

---

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

---

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

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

Mr. Land was convicted of one count of rape of a child in the third degree and one count of child molestation in the third degree in Counts 9 and 10, which involved the same victim during the same time period. The convictions violated Mr. Land's right to be free from double jeopardy because (1) the jury instructions did not explain the convictions for Counts 9 and 10 had to be based upon separate and distinct acts, and (2) the evidence, instructions argument of counsel did not make it manifestly apparent to the jury that it could not base convictions for both counts upon the same act. U.S. Const. amends. V, XIV; Const. art. I, § 9; State v. Mutch, 171 Wn.2d 646, 663-65, 254 P.3d 803 (2011).

The State contends, however, the double jeopardy does not apply because rape of a child in the third degree and child molestation in the third degree are not the "same offense." Respondent's Brief (RB) at 8-10. The "same evidence" test used to determine whether punishment for two offenses violates double

jeopardy rests on whether offenses are the same in law and the same in fact. Blockberger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932); State v. Hughes, 166 Wn.2d 675, 682, 212 P.3d 558 (2009). The test, however, does not require that the two offenses be identically defined. Brown v. Ohio, 432 U.S. 161, 164, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977) (“It has long been understood that separate statutory crimes need not be identical, either in constituent elements or in actual proof in order to be the same within the meaning of the constitutional prohibition.”).

Instead, the court looks at whether each offense requires separate and distinct elements, looking at the case as prosecuted rather than the generic offense definition. Hughes, 166 Wn.2d at 683-84.

Two sex offenses are the same in fact if they arose out of one act of sexual contact with the same victim. Hughes, 166 Wn.2d at 684. Thus, convictions for second degree rape and rape of a child in the second degree in the second degree violated double jeopardy where they were based on a single act of sexual intercourse with a child who was unable to consent due to mental incapacity. Id. at 683-84. Mere facial differences between the two statutes are not sufficient. Id.

The State is correct that child molestation and rape of a child include different statutory elements. State v. French, 157 Wn.2d 593, 610, 141 P.3d 54 (2006). The differences between rape of a child in the third degree and third degree child molestation, however, are illusory in this case. SH testified that sexual contact and intercourse occurred a number of times without identifying specific incidents. RP 151-53. While rape of a child does not require the act be done for sexual gratification, RCW 9A.44.079(1), SH's testimony establishes the same purpose for all of the acts. And, while child molestation does not require sexual intercourse, sexual intercourse is included within the definition of sexual contact. RCW 9A.44.010(1), (2); RCW 9A.44.089(1). Thus, the jury should have been instructed that it was required to unanimously agree as to separate and distinct acts to convict Mr. Land of both child molestation and rape of a child for the counts involving SH. State v. Noltie, 116 Wn.2d 831, 842-43, 809 P.2d 190 (1991); State v. Borsheim, 140 Wn.App. 357, 367, 165 P.3d 417 (2007) ("in sexual abuse cases where multiple identical counts are alleged to have occurred within the same charging period, the trial court 'must instruct the jury that they are to find "separate and distinct acts" for each count.'").

The State next argues that the remedy for any double jeopardy violation in this case is not automatic vacation of one of the convictions. RB at 10-15. Normally a double jeopardy violation results in the dismissal of any conviction that violates the constitution. See Hughes, 166 Wn.2d at 686. When the trial court fails to instruct the jury that separate convictions for sexual offenses against the same victim during the same time period must be based upon separate and distinct acts, however, the reviewing court cannot definitely determine if double jeopardy was violated in the absence of special verdict forms to address the issue. Mutch, 171 Wn.2d at 663-644. Mr. Land therefore analyzed his case under the two standards of review suggested by the Mutch Court: (1) rigorous review of the entire record to determine if the jury instructions caused a double jeopardy error, and (2) review of the erroneous jury instructions under the constitutional harmless error standard. Id.; Brief of Appellant (BOA) at 20-26.

A rigorous review of the entire record shows that the jury instructions did create a double jeopardy error. First, the jury instructions in Mr. Land's case were similar to those found lacking in Mutch, State v. Carter, 156 Wn.App. 561, 234 P.3d 275 (2010) and State v. Berg, 147 Wn.App. 923, 198 P.3d 529 (2008).

Although the jury was instructed to decide each count separately and that the verdict had to be unanimous, CP 66-67, the “to convict” instructions for Counts 9 and 10 covered the same time period and differed only in that Count 9 required sexual intercourse and Count 10 required sexual contact. CP 88-89. More importantly, neither “to convict” instruction informed the jury that it was required to base its verdict for the two counts on separate and distinct acts. CP 88-89. Jury instructions that do not include this requirement are “flawed” and do not protect the defendant from double jeopardy. Mutch, 171 Wn.2d at 662-63; Carter, 156 Wn.App. at 654-65, 567-68; Berg, 147 Wn.App. at 935.

SH’s testimony did not cure the problem, as she did not identify separate incidents but simply explained Mr. Land touched her on her breasts and “lower part” and put his finger in her vagina several times, all in the same place and during the same time period. RP 251-53. In addition, neither the prosecutor nor Mr. Land’s attorney cleared up the problem in closing argument, as neither told the jury that they were required to base convictions for Counts 9 and 10 on separate and distinct acts. RP 404-07, 415-16.

Thus, Mr. Land’s case is a far cry from the cases relied upon by the State. RB at 12-13. In Noltie, for example, the jury was

specifically told that in order to convict the defendant of either count, it was required to unanimously agree that “at least one separate act of sexual intercourse pertaining to each count has proved beyond a reasonable doubt.” Noltie, 116 Wn.2d at 843. And in State v. Ellis, 71 Wn.App. 400, 406, 859 P.2d 632 (1993) and State v. Hayes, 81 Wn.App. 425, 431 n.9, 914 P.2d 788, rev. denied, 130 Wn.2d 1013 (1996), the “to convict” instructions made it clear that convictions for different counts had to be based upon acts occurring on separate dates. The jury was not so instructed in Mr. Land’s case.

The Mutch Court explained it is a “rare circumstance” when a rigorous review of the entire record shows that a jury verdict was based upon separate acts in the absence of instruction on the requirement of separate and distinct acts. Mutch, 171 Wn.2d at 665. After a rigorous review of the record, this Court cannot be convinced that the jury verdicts on Counts 9 and 10 did not violate double jeopardy.

Under the second test mentioned in Mutch, the reviewing court must determine if the erroneous jury instructions were harmless beyond a reasonable doubt. Mutch, 171 Wn.2d at 664-65. Jury instructions “must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to

the average juror.” State v. LaFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996), abrogated on other grounds, State v. O’Hara, 167 Wn.2d 91 (2009). An erroneous jury instruction given on behalf of the prevailing party is presumed to be prejudicial unless the prevailing party clearly demonstrates the error was harmless. State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977). When erroneous jury instructions impact the accused’s constitutional rights, the State must demonstrate the error was harmless beyond a reasonable doubt. Mutch, 171 Wn.2d at 665 n. 6; State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

The jury instructions in Mr. Land’s case never told the jury of the requirement that it base convictions on Counts 9 and 10 upon separate and distinct acts. This Court must therefore presume that the instructions violated Mr. Land’s constitutional right to be free from double jeopardy. The State has not proved beyond a reasonable doubt that this error was harmless, academic or trivial, especially in light of EH’s inability to relate any specific acts. Mr. Land’s conviction for child molestation in the third degree, Count 10, must be dismissed. Carter, 156 Wn.App. at 568; Borsheim, 140 Wn.App. at 377-78.

2. STATE v. BOYD DEFINITELY ESTABLISHES THAT MR. LAND'S TERM OF COMMUNITY CUSTODY DOES NOT COMFORM WITH THE REQUIREMENTS OF RCW 9.94A.701

RCW 9.94A.701(9) requires the trial court, not the Department of Corrections, to set a term of community custody so that the offender's sentence does not exceed the statutory maximum sentence for the crime. State v. Boyd, \_\_\_ Wn.2d \_\_\_, 2012 WL 1570830 at \*2 (No. 86709-7, 5/3/12); State v. Winborne, \_\_\_ Wn.App. \_\_\_, 273 P.3d 454, 458 (2012). The statute reads:

The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

RCW 9.94A.701(9) (emphasis added). Instead of reducing Mr. Land's term of community custody, however, the sentencing court gave Mr. Land an indeterminate range of community in violation of RCW 9.94A.701(9). His case must be remanded for the court to amend the terms of community custody.

Mr. Land was sentenced on June 2, 2011, after the effective date of RCW 9.94A.701(9). CP 136; Laws of 2009 ch. 375 § 5. The maximum term for Count I, child molestation in the second degree, was 10 years or 120 months. RCW 9A.44.086(2); RCW

9A.20.021(1)(b); CP 130. The trial court imposed a 116-month sentence for that count. CP 131. Mr. Land's maximum term for the remaining three counts was five years, or 60 months, and he received a 60-month sentence. RCW 9A.44.079(2); RCW 9A.44.089(2); RCW 9A.20.021(1)(c); CP 130-31. Instead of setting a term of community custody within the maximum term, the sentencing court ordered:

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

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

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

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

CP 131-32.

Mr. Land's sentence must be vacated and his case remanded for resentencing to (1) amend the term of community custody or (2) resentence Mr. Land consistent with RCW 9.94A.701(9). Boyd, 2012 WL 1570830 at \*2; Winborne, 273 P.3d at 458.

3. THE CONDITION OF COMMUNITY CUSTODY PROHIBITING MR. LAND FROM POSSESSING DRUG PARAPHERNALIA IS NOT A MONITORING TOOL

The sentencing court has the discretion include “crime-related prohibitions” as conditions of offender’s community custody. RCW 9.94A.703(3)(f). A “crime-related prohibition” must be directly related to the circumstances of the crime for which the offender is being sentenced. RCW 9.94A.030(10). There was no evidence presented at trial or sentencing that demonstrated that drug use contributed to Mr. Land’s involvement in his offenses or that he was a drug addict. The condition of community custody that prohibited Mr. Land from possessing “drug paraphernalia” must be stricken because it is not crime related and because it is unconstitutionally vague. SuppCP 150 (Special Condition 14).

The State does not argue that this prohibition is related in any way to Mr. Land’s offenses. RB at 26-27. Instead, the State argues this prohibition is really a “monitoring tool.”<sup>1</sup> RB at 26. The language of the conditions, however, shows the folly of the State’s argument. The condition states, “Do not possess drug paraphernalia,” and is thus clearly a prohibition.

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<sup>1</sup> Mere possession of drug paraphernalia is not a crime in Washington. State v. George, 146 Wn.App. 906, 918, 193 P.3d 393 (2008); RCW 69.50.412.

Additionally, the cases cited by the State do not support its position. In State v. Vant, 145 Wn.App. 592, 603-04, 186 P.3d 1149 (2008), the court upheld requirements that the defendant undergo polygraph testing and random urinalysis, both of which are monitoring tools. See State v. Riles, 135 Wn.2d 326, 342, 957 P.2d 655 (1998) (polygraph testing is monitoring condition). And State v. Julian, 102 Wn.App. 296, 9 P.3d 851 (2000), rev. denied, 143 Wn.2d 1003 (2001), supports Mr. Land's argument. The Julian Court struck a condition of community supervision requiring the defendant to abstain from alcohol because the prohibition was not crime-related. Julian, 102 Wn.App. at 305. The court, however, did not disturb a requirement that the defendant submit to polygraph testing, as this was a monitoring tool. Id.

Forbidding the defendant from possessing drug paraphernalia is a prohibition, not a monitoring tool. Because this prohibition was not related to Mr. Land's offense, it must be stricken. Riles, 135 Wn.2d 326 at 353.

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

The trial court ordered Mr. Land to undergo plethysmograph examinations as required by his community corrections officer (CCO). SuppCP 151 (Special Condition 23). Penile plethysmograph testing is used in the diagnosis and treatment of sexual offenses; the court cannot order an offender submit to such testing for use by the Department of Corrections as a monitoring tool. Given the invasive nature of the test, the condition requiring Mr. Land to submit to plethysmograph testing at the discretion of a CCO rather than a qualified treatment provider violates Mr. Land's constitutional right to be free from bodily intrusions.

The State responds that the community custody condition is constitutional because two Washington cases have upheld conditions requiring sex offenders to undergo plethysmograph testing upon request of the offender's sexual deviancy treatment provider "and/or" the community corrections officer. RB at 28-29 (citing Riles, 135 Wn.2d at 337; State v. Castro, 141 Wn.App. 485, 493, 170 P.3d 78 (2007)). Penile plethysmograph testing, however,

is for “diagnosing and treating sex offenders” by qualified treatment providers; it is not a tool for monitoring offenders by the DOC.

Riles, 135 Wn.2d at 344-45; Castro, 141 Wn.App. at 493.

The Washington Administrative Code section establishing sex offender treatment provider standards states plethysmography may be useful in providing information about an offender’s arousal patterns, not as a monitoring tool. WAC 246-930-310(7)(c). The WAC cautions the practitioner to utilize this form of testing only on a case-by-case basis after reviewing the available literature concerning its usefulness. Id.

Plethysmograph testing cannot be used to determine if a person has committed a sex offense or to monitor compliance with community custody conditions. WAC 246-930-310(7)(c); compare WAC 246-930-310(7)(b) (periodic polygraph testing is “important asset in monitoring the sex offender in the community”). A treatment provider utilizing the plethysmograph would not share the test results with a community corrections officer, but use it as part of a comprehensive evaluation and treatment plan. Id.

When obtained, physiological assessment data shall not be used as the sole basis for offender risk assessment and shall not be used to determine if an individual has committed a specific sexually deviant act. Providers shall recognize that plethysmographic

data is only meaningful within the context of a comprehensive evaluation and/or treatment process. Sex offender treatment providers shall ensure that physiologic assessment data is interpreted only by sex offender treatment providers who possess the necessary training and experience. Sex offender treatment providers shall insure that particular care is taken when performing physiological assessment with juvenile offenders and other special populations, due to concerns about exposure to deviant materials. Given the intrusiveness of this procedure, care shall be given to the dignity of the client.

Id. (emphasis added). Thus, there is no legitimate reason for a community corrections officer to be requiring plethysmograph testing or receiving the test results.

In addition, the Riles and Castro Courts did not address the issue raised by Mr. Land – whether the imposition of a community custody conditions requiring plethysmograph testing at the pleasure of the CCO violates his constitutional right to be free from government intrusion into his body. AOB at 43-50; Riles, 135 Wn.2d at 335-36, 338 (Riles argued condition was not crime-related, Gholston made similar argument); Castro, 141 Wn.App. at 494 (court held condition was authorized by statute).

The State's only response to Mr. Land's constitutional argument is to state that offenders on community custody have "a diminished right to privacy and liberty." RB at 28. The cases cited,

however, do not address the type of physical and mental intrusion presented by plethysmograph testing. State v. Parris, 163 Wn.App. 110, 259 P.3d 331 (2011) (offender on community custody subject to warrantless search of residence if based on probable cause), rev. denied, 183 Wn.2d 1008 (2012); In re Detention of Campbell, 139 Wn.2d 341, 355, 986 P.2d 771 (1999) (no right to closed courtroom or sealed court file for RCW 71.09 commitment trial), cert denied, 531 U.S. 1125 (2001); State v. Olson, 164 Wn.App. 187, 262 P.3d 828 (2011) (DOC community corrections officer may issue arrest warrant). The State fails to provide this Court with authority that rejects Mr. Land's argument that submitting to plethysmograph testing at the direction of his CCO would violate his constitutional right to bodily integrity.

This and other courts have noted held that penile plethysmograph testing implicates the defendant's liberty interest in freedom from bodily restraint. In re Marriage of Ricketts, 111 Wn.App. 168, 43 P.3d 1258 (2002) (recognizing liberty interest); In re Marriage of Parker, 91 Wn.App. 219, 226, 957 P.3d 256 (1998) (test violated father's constitutional interests in privacy, noting no showing of reliability of penile plethysmograph testing or absence of less intrusive measures); United States v. Weber, 451 F.3d 552

562, 564 (9<sup>th</sup> Cir. 2006); Coleman v. Dretke, 395 F.3d 216, 223 (5<sup>th</sup> Cir. 2004) (concluding the “highly invasive nature” of the test implicates significant liberty interests), cert. denied, 546 U.S. 938 (2005). Moreover, the test results are not useful in determine if the subject has committed acts of sexual deviance or violated conditions of community custody.

Penile plethysmograph testing is an invasive procedure that should only be used by a licensed sexual offender treatment provider and not a DOC corrections officer. The court order requiring Mr. Land to submit to penile plethysmograph testing at the direction of his CCO is an invasion of his constitutional rights to privacy and freedom from bodily restraint, and it must be stricken. Riles, 135 Wn.2d at 353.

B. CONCLUSION

For the reasons stated above and in the Brief of Appellant, Mr. Land's conviction for child molestation in the third degree, Count 10, must be dismissed because it violates double jeopardy.

In addition, Mr. Land's case must be remanded for resentencing so the court can set a term of community custody that does not exceed the statutory maximum sentence and strike six conditions of community custody.

Respectfully submitted this 25<sup>th</sup> day of May 2012.



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Attorneys for Appellant

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

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

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 25<sup>TH</sup> DAY OF MAY, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| [X] CLIFFORD LAND<br>347496<br>STAFFORD CREEK CORRECTIONS CENTER<br>191 CONSTANTINE WAY<br>ABERDEEN, WA 98520                      | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

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STATE OF WASHINGTON  
2012 MAY 25 PM 4:42

**SIGNED** IN SEATTLE, WASHINGTON THIS 25<sup>TH</sup> DAY OF MAY, 2012.

X \_\_\_\_\_ 