

NO. 47965-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA REEVES,

Appellant.

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

The Honorable Gregory Gonzales, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	3
1. <u>Charges, verdicts, and sentence</u>	3
2. <u>Trial testimony</u>	6
C. <u>ARGUMENT</u>	9
1. THE JURY INSTRUCTION THAT TELLS JURORS “A REASONABLE DOUBT IS ONE FOR WHICH A REASON EXISTS” UNCONSTITUTIONALLY DISTORTS THE REASONABLE DOUBT STANDARD, UNDERMINES THE PRESUMPTION OF INNOCENCE, AND SHIFTS THE BURDEN OF PROOF TO THE ACCUSED.....	9
a. <u>WPIC 4.01’s articulation requirement misstates the reasonable doubt standard, shifts the burden of proof, and undermines the presumption of innocence</u>	10
b. <u>No appellate court in recent times has directly grappled with the challenged language in WPIC 4.01</u>	19
c. <u>WPIC 4.01 rests on an outdated view of reasonable doubt that equated a doubt for which a reason exists with a doubt for which a reason can be given</u>	21
d. <u>This structural error requires reversal</u>	26
2. INADEQUATE JURY INSTRUCTIONS VIOLATED REEVES’S RIGHT TO BE FREE FROM DOUBLE JEOPARDY, EXPOSING HIM TO MULTIPLE PUNISHMENTS FOR THE SAME OFFENSE.	27

TABLE OF CONTENTS (CONT'D)

	Page
a. <u>The jury instructions</u>	28
b. <u>The law protects the accused from multiple punishments for the same offense</u>	29
c. <u>The failure to instruct the jury that it needed to find separate and distinct acts of attempted child rape and attempted child molestation, versus a separate act for each particular charge, exposed Reeve to multiple punishments for a single offense.</u>	34
3. THE COURT ERRED IN ORDERING A MENTAL HEALTH EVALUATION AND TREATMENT WITHOUT FINDING REEVES WAS A MENTALLY ILL PERSON WHOSE CONDITION INFLUENCED THE OFFENSE.	38
4. THE PLETHYSMOGRAPH CONDITION VIOLATES REEVES’S RIGHT TO BE FREE FROM BODILY INTRUSIONS.....	40
5. THIS COURT SHOULD NOT AWARD THE COSTS OF APPEAL.	42
D. <u>CONCLUSION</u>	44

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>Anfinson v. FedEx Ground Package Sys., Inc.</u> 174 Wn.2d 851, 281 P.3d 289 (2012).....	11
<u>Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1</u> 124 Wn.2d 816, 881 P.2d 986 (1994).....	20
<u>In re Borrero</u> 161 Wn.2d 532, 167 P.3d 1106 (2007) <u>cert. denied</u> 552 U.S. 1154 (2008).....	35
<u>In re Electric Lightwave, Inc.</u> 23 Wn.2d 530, 869 P.2d 1045 (1994).....	20
<u>In re Marriage of Parker</u> 91 Wn. App. 219, 957 P.2d 256 (1998).....	41
<u>Staats v. Brown</u> 139 Wn.2d 757, 991 P.2d 615 (2000).....	42
<u>State v. Anderson</u> 53 Wn. App. 417, 220 P.3d 1273 (2009).....	16
<u>State v. Bahl</u> 164 Wn.2d 739, 193 P.3d 678 (2008).....	38
<u>State v. Barnett</u> 139 Wn.2d 464, 987 P.2d 626 (1999).....	38
<u>State v. Bennett</u> 161 Wn.2d 303, 165 P.3d 1241 (2007).....	15, 19, 20
<u>State v. Blazina</u> 182 Wn2d 827, 344 P.3d (2015).....	42
<u>State v. Borsheim</u> 140 Wn. App. 357, 165 P.3d 417 (2007).....	17, 29, 36, 37

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Dana</u> 73 Wn.2d 533, 439 P.2d 403 (1968).....	10, 18
<u>State v. Emery</u> 174 Wn.2d 741, 278 P.3d 653 (2012).....	15, 19, 20, 24, 25
<u>State v. Harras</u> 25 Wash. 416, 65 P. 774 (1901).	23, 25
<u>State v. Harsted</u> 66 Wash. 158, 119 P. 24 (1911)	24, 25
<u>State v. Johnson</u> 158 Wn. App. 677, 243 P.3d 936 (2010).....	15
<u>State v. Jones</u> 118 Wn. App. 199, 76 P.3d 258 (2003).....	40
<u>State v. Kalebaugh</u> 183 Wn.2d 578, 355 P.3d 253 (2015).....	18, 19, 20, 24, 25
<u>State v. Kier</u> 164 Wn.2d 798, 194 P.3d 212 (2008).....	36
<u>State v. Land</u> 172 Wn. App. 593, 295 P.3d 782 (2013).....	31, 32, 33, 34, 35, 41, 42
<u>State v. LeFaber</u> 128 Wn.2d 896, 913 P.2d 369 (1996).....	10, 17
<u>State v. Lizarraga</u> 191 Wn. App. 530, 364 P.3d 810 (2015).....	20
<u>State v. Mutch</u> 171 Wn.2d 646, 254 P.3d 803 (2011).....	29, 30, 35, 36, 37
<u>State v. Nabors</u> 8 Wn. App. 199, 505 P.2d 162 (1973).....	22

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Noel</u> 51 Wn. App. 436, 753 P.2d 1017 (1988).....	11
<u>State v. O’Hara</u> 167 Wn.2d 91, 217 P.3d 756 (2009).....	11
<u>State v. Paumier</u> 176 Wn.2d 29, 288 P.3d 1126 (2012).....	26
<u>State v. Simon</u> 64 Wn. App. 948, 831 P.2d 139 (1991) <u>rev’d on other grounds</u> , 120 Wn.2d 196, 840 P.2d 172 (1992).	10
<u>State v. Sinclair</u> __ Wn. App. __, __ P.3d __, 2016 WL 393719 (Jan. 27, 2016)	43
<u>State v. Smith</u> 174 Wn. App. 359, 298 P.3d 785 <u>review denied</u> , 178 Wn.2d 1008, 308 P.3d 643 (2013).	11
<u>State v. Tanzymore</u> 54 Wn.2d 290, 340 P.2d 178 (1959).....	22
<u>State v. Thompson</u> 13 Wn. App. 1, 533 P.2d 395 (1975).....	21, 22, 23
<u>State v. Townsend</u> 147 Wn.2d 666, 57 P.3d 255 (2002).....	34
<u>State v. Venegas</u> 155 Wn. App. 507, 228 P.3d 813 (2010).....	16
<u>State v. Vladovic</u> 99 Wn.2d 413, 662 P.2d 853 (1983).....	32
<u>State v. Walker</u> 164 Wn. App. 724, 265 P.3d 191 (2011).....	15

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Watkins</u> 136 Wn. App. 240, 148 P.3d 1112 (2006).....	17, 29

FEDERAL CASES

<u>In re Winship</u> 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).....	13, 15
--	--------

<u>Jackson v. Virginia</u> 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).....	12
--	----

<u>Johnson v. Louisiana</u> 406 U.S. 356, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972).....	12, 16
---	--------

<u>Sandstrom v. Montana</u> 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979).....	11
--	----

<u>Sullivan v. Louisiana</u> 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).....	26
--	----

<u>United States v. Johnson</u> 343 F.2d 5 (2d Cir. 1965)	12
--	----

OTHER JURISDICTIONS

<u>Burt v. State</u> 48 Am. St. Rep. 574, 16 So. 342 (Miss. 1894).....	23
---	----

<u>Butler v. State</u> 78 N.W. 590 (Wis. 1899).....	25
--	----

<u>Siberry v. State</u> 33 N.E. 681 (Ind. 1893)	19
--	----

<u>State v. Cohen</u> 78 N.W. 857 (Iowa 1899)	19
--	----

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Jefferson</u> 43 La. Ann. 995, 10 So. 119 (La. 1891)	23
<u>State v. Morey</u> 25 Or. 241, 36 P. 573 (1894)	23
<u>Vann v. State</u> 9 S.E. 945 (Ga. 1889)	23

RULES, STATUTES AND OTHER AUTHORITIES

11 Wash. Practice: Wash. Pattern Jury Instructions: Criminal 4.01 (3d ed. 2008)	9-12, 14-21, 23, 25, 26, 27
11 Wash. Practice: Wash. Pattern Jury Instructions: Criminal 100.05	34
Steve Sheppard, <u>The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence</u> 78 Notre Dame L. Rev. 1165 (2003)	14
Laws of 2008, ch. 231, § 55	39
RAP 2.5	26
RAP 14	42
RAP 15.2	43
RCW 9.94A.703	38, 39
RCW 9A.28.020	3
RCW 9A.44.010	32
RCW 9A.44.073	3

TABLE OF AUTHORITIES (CONT'D)

	Page
RCW 9A.44.079	32
RCW 9A.44.083	3
RCW 9A.44.089	32
RCW 9.94B.080 (2008)	39
RCW 10.73.160	42
RCW 71.24.025,	39
Sentencing Reform Act.....	38, 40
U.S. Const. amend. V	29
U.S. Const. amend. VI	10
U.S. Const. amend. XIV	10, 41
Const. art. I, § 3.....	10, 41
Const. art. I, § 9.....	29
Const. art. I, § 22.....	10
Webster’s Third New Int’l Dictionary 1892 (1993)	12, 13

A. ASSIGNMENTS OF ERROR

1. Washington's pattern jury instruction on reasonable doubt is unconstitutional.

2. The appellant's convictions for attempted child rape and attempted child molestation violate the constitutional prohibition on double jeopardy.

3. The sentencing court erred when it ordered mental health evaluation and treatment without finding that the appellant was a mentally ill person whose condition influenced the offense.

4. The sentencing court erred when it entered a condition requiring the appellant to "submit to plethysmography exams . . . at the direction of the community corrections officer [(CCO)] and copies shall be provided to the Prosecuting Attorney's Office upon request." CP 111.

Issues Pertaining to Assignments of Error

1. Did the reasonable doubt instruction stating a "reasonable doubt is one for which a reason exists," incorrectly describe the burden of proof, undermine the presumption of innocence, and shift the burden to the appellant to provide a reason for why reasonable doubt exists?

2. The State alleged two possible acts supporting allegations of attempted child rape and attempted child molestation. Based on the State's evidence and argument, the offenses were the same in fact and in

law. But the jury was not instructed it needed to find the two crimes were based on separate and distinct acts. Under the circumstances, did convictions for both offenses violate the appellant's right to be free from double jeopardy?

3. Did the court err in ordering a mental health evaluation and treatment as a condition of community custody without finding the appellant was a mentally ill person whose condition influenced the offense?

4. Did the sentencing court exceed its authority by requiring the appellant to submit to a penile plethysmograph exam whenever requested by a CCO?

B. STATEMENT OF THE CASE¹

1. Charges, verdicts, and sentence

The State charged Joshua Reeves with attempted first degree child rape² and attempted first degree child molestation³ as to complainant L.B., counts 1 and 2. CP 21. The State also charged Reeves with first degree child molestation and attempted first degree child molestation as to complainant M.L., counts 3 and 4. CP 21-22. The charging period was between 2004 and 2014, but the State alleged the incidents in question occurred some time in 2011, when the girls were six or seven years old

¹ This brief refers to the verbatim reports as follows: 1RP – 1/28/15; 2RP – 6/3/15; 3RP – 6/22/15; 4RP – 6/23/15 (morning); 5RP – 6/23/15 (afternoon); 6RP – 6/24/15; 7RP – 6/25 & 6/26/15; and 8RP – 8/13/15. The volumes are consecutively paginated. However, 4RP contains two sets of pages 443-458 covering different content. Those pages will be referred to by their page number and “1st” or “2nd.”

² Under RCW 9A.44.083(1), a person is guilty of first degree child molestation “when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the” person and the person is at least 36 months older than the complainant. Under RCW 9A.28.020, moreover, “[a] person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.”

³ Under RCW 9A.44.073(1), a person is guilty of first degree child rape “when the person has sexual intercourse with another who is less than twelve years old and not married” to the person and the person is at least 24 months older than the complainant.

and Reeves was 17. CP 1-2; 4RP 424, 434-35, 456(2nd), 458(2nd), 466, 509, 513.

Reeves is developmentally disabled and, although he was over 18 when he was tried in the superior court, his mother served as his legal guardian. 1RP 83-84. Reeves presented expert witnesses challenging his capacity to understand the nature of the proceedings and to assist in his defense. After a competency hearing, the court nonetheless found him competent to stand trial.⁴ 1RP 143-75. Based on the defense experts' recommendations, a second attorney was appointed to help Reeves understand the proceedings against him. 1RP 45, 73, 120; 8RP 981.

The case proceeded to trial, where the jury was given the following instruction:

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

⁴ All the experts generally agreed that Reeves suffered from "mild intellectual disability" as that diagnosis is defined under the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5). 1RP 18, 28-30, 38-39, 44, 155, 170. The only expert to administer full-scale testing found an IQ of 64. 1RP 59. As one expert testified, a diagnosis of "mild" intellectual disability still denotes a serious condition. 1RP 65-66. For example, another expert had never met anyone with a "moderate" or "severe" intellectual disability, which would denote *very* serious impairment. 1RP 105-06.

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

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

CP 69 (Instruction 21).

The jury convicted Reeves as charged as to the first two counts involving L.B., but it acquitted him of the counts involving M.L. CP 73-76.

At the sentencing hearing, the court ruled that counts 1 and 2 constituted the same criminal conduct, and it sentenced Reeves to a low end standard range sentence, running the sentences concurrent to each other, finding Reeves's mental disability served as a mitigating factor. CP 95-96; 8RP 979. The court also ordered 36 months of community custody. CP 97.

As a condition of community custody, the court ordered that Reeves "submit to plethysmography exams at [his] own expense, at the direction of the community corrections officer[,] and copies shall be provided to the Prosecuting Attorney's Office upon request." CP 111 (condition 23). The court also ordered that Reeves complete a mental

health evaluation and “successfully complete all recommended phases of any recommended treatment as established by the [CCO] and/or treatment facility.” CP 111 (condition 19);⁵ see also CP 113 (Appendix F to Judgment and Sentence, fourth bulleted condition).

Reeves timely appeals. CP 114.

2. Trial testimony

In the fall of 2013, L.B. then nine years old, told her father that she thought someone had molested her, although she did not pronounce the word “molest” correctly. 3RP 409-10. The father asked if someone who was not supposed to touch L.B. had touched her. 3RP 412. L.B. said yes. 3RP 412. L.B.’s father said he would talk to her mother. 3RP 412.

The next morning, the mother asked L.B. what she had told her father. 3RP 426. L.B. said that “Julie’s taller son,” i.e., Reeves, had touched her. 3RP 427.⁶ The mother initially asked L.B. to tell her what happened. However, remembering techniques she had seen on television, the mother stopped L.B. and asked L.B. to *show* her using some teddy bears. 3RP 429.

⁵ The court entered a separate condition requiring Reeves to participate in a sexual deviancy treatment program. CP 111 (condition 20).

⁶ Reeves’s family members were close friends of M.L.’s family, as well as acquaintances of L.B.’s family. 3RP 459. L.B.’s mother testified she was “best friends” with M.L.’s mother. 3RP 431.

L.B. had one of the bears lie down. She demonstrated that the other bear tried to remove the first bear's pants. L.B. said, "They didn't come all the way off." 3RP 429.

The mother asked what happened next. 3RP 429. L.B. said she tried to get up, but "he" pushed her back down. 3RP 429-30. L.B. got up again, but she realized the door was locked. Then, according to L.B., "[h]e showed me this," and she pointed to the bear's private area. 3RP 430.

The mother told L.B. to stop. She contacted M.L.'s mother, who was a close friend of Reeves's mother. After the women spoke with Reeves's mother, they called the police. 3RP 431-32.

A forensic interviewer from the prosecutor's office interviewed L.B. soon after her disclosure. 4RP 477; 6RP 719-21. A digital video disk of the interview was admitted at trial. Ex. 2; 6RP 721.

L.B.'s testimony was largely consistent with her interview statements. 4RP 508. She estimated she was six years old when the incident occurred. 4RP 513-14. L.B. recalled being at friend M.L.'s house for a "playdate." 4RP 515. L.B. was inside M.L.'s house at the top of the stairs to the second floor when Reeves asked her to come with him. 4RP 516. They went into M.L.'s older brother's room. 4RP 517. Reeves

shut the door and may have locked it, although L.B. was not sure. 4RP 517-18.

Reeves picked up L.B. and laid her on the floor, on her back. 4RP 518. L.B. got up, but Reeves made her lie down again. 4RP 519. Reeves then tried to pull down L.B.'s pants, although they did not come down very far. 4RP 520.

L.B. crawled away toward the wall. 4RP 520-21. Reeves then asked, "Will you suck on this[?]" 4RP 521. L.B. shouted, "No[!]," and left the room. 4RP 521. Before leaving, however, L.B. turned and saw that Reeves's genitals were exposed. 4RP 521. On the way down the stairs, Reeves told L.B. not to tell anyone. 4RP 523. L.B. rejoined M.L. outside but did not tell anyone that day. 4RP 523-24. L.B. told her father about two years after the incident occurred. 4RP 524.

Reeves testified at trial. He knew who L.B. was. 6RP 793. Consistently with his interview with a Vancouver police detective, 5RP 629-30, he denied the incident with L.B. occurred.⁷ 6RP 793-94.

⁷ Regarding M.L., Reeves acknowledged he did touch M.L. on her crotch outside her clothes (as she alleged), but he said the touching occurred by accident, while he was tickling M.L. 7RP 791-92.

C. ARGUMENT

1. THE JURY INSTRUCTION THAT TELLS JURORS “A REASONABLE DOUBT IS ONE FOR WHICH A REASON EXISTS” UNCONSTITUTIONALLY DISTORTS THE REASONABLE DOUBT STANDARD, UNDERMINES THE PRESUMPTION OF INNOCENCE, AND SHIFTS THE BURDEN OF PROOF TO THE ACCUSED.

The jury was instructed, “A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence.” CP 69 (Instruction 21). This instruction, based on WPIC 4.01,⁸ is constitutionally defective for two related reasons.

First, it tells jurors they must be able to articulate a reason for having a reasonable doubt, either to themselves or to fellow jurors. This engrafts an additional requirement onto reasonable doubt. Not only must jurors have a reasonable doubt, they must also have an articulable doubt. This makes it more difficult for jurors to acquit and easier for the prosecution to obtain convictions.

Second, telling jurors a reason must exist for reasonable doubt undermines the presumption of innocence and is substantively identical to fill-in-the-blank arguments that Washington courts have invalidated in prosecutorial misconduct cases. If fill-in-the-blank arguments

⁸ 11 Wash. Practice: Wash. Pattern Jury Instructions: Criminal 4.01, at 85 (3d ed. 2008).

impermissibly shift the burden of proof, so does an instruction requiring the same exact thing.

WPIC 4.01 violates due process and the jury-trial guarantee. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. Instructing jurors with WPIC 4.01 is structural error and requires reversal.

- a. WPIC 4.01's articulation requirement misstates the reasonable doubt standard, shifts the burden of proof, and undermines the presumption of innocence.

Jury instructions must be “readily understood and not misleading to the ordinary mind.” State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). “The rules of sentence structure and punctuation are the very means by which persons of common understanding are able to ascertain the meaning of written words.” State v. Simon, 64 Wn. App. 948, 958, 831 P.2d 139 (1991), rev'd on other grounds, 120 Wn.2d 196, 840 P.2d 172 (1992). In examining how an average juror would interpret an instruction, appellate courts look to the ordinary meaning of words and rules of grammar. See, e.g., State v. LeFaber, 128 Wn.2d 896, 902-03, 913 P.2d 369 (1996) (proper grammatical reading of self-defense instruction allowed jury to find actual imminent harm was necessary for self defense, resulting in court's determination that jury could have applied erroneous self defense standard), overruled in part on other

grounds by State v. O’Hara, 167 Wn.2d 91, 217 P.3d 756 (2009); State v. Noel, 51 Wn. App. 436, 440-41, 753 P.2d 1017 (1988) (relying on grammatical structure of unanimity instruction to determine ordinary reasonable juror would read clause to mean jury must unanimously agree upon same act); State v. Smith, 174 Wn. App. 359, 366-68, 298 P.3d 785 (discussing different between use of “should” and use of word indicating “must” regarding when acquittal is appropriate), review denied, 178 Wn.2d 1008, 308 P.3d 643 (2013).

The error in WPIC 4.01 is obvious to any English speaker. Having a “reasonable doubt” is not, as a matter of plain English, the same as having a reason to doubt. But WPIC 4.01 requires both for a jury to return a not guilty verdict. A basic examination of the meaning of the words “reasonable” and “a reason” reveals this grave flaw in WPIC 4.01.

Appellate courts consult the dictionary to determine the ordinary meaning of language used in jury instructions. See, e.g., Sandstrom v. Montana, 442 U.S. 510, 517, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) (looking to dictionary definition of “presume” to determine how jury may have interpreted instruction); Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 874-75, 281 P.3d 289 (2012) (turning to dictionary definition of “common” to ascertain the jury’s likely understanding of the word in instruction).

“Reasonable” is defined as “being in agreement with right thinking or right judgment : not conflicting with reason : not absurd : not ridiculous . . . being or remaining within the bounds of reason . . . having the faculty of reason : RATIONAL . . . possessing good sound judgment . . .” Webster’s Third New Int’l Dictionary 1892 (1993). For a doubt to be reasonable under these definitions it must be rational, logically derived, and have no conflict with reason. See Jackson v. Virginia, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) (“A ‘reasonable doubt,’ at a minimum, is one based upon ‘reason.’”); Johnson v. Louisiana, 406 U.S. 356, 360, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972) (collecting cases defining reasonable doubt as one “‘based on reason which arises from the evidence or lack of evidence’”) (quoting United States v. Johnson, 343 F.2d 5, 6, n.1 (2d Cir. 1965)).

Thus, an instruction defining reasonable doubt as “a doubt based on reason” would be proper. WPIC 4.01 does not do that, however. WPIC 4.01 requires “a reason” for the doubt, which is different than a doubt based on reason.

The placement of the article “a” before “reason” in WPIC 4.01 inappropriately alters and augments the definition of reasonable doubt. “[A] reason” in the context of WPIC 4.01, means “an expression or statement offered as an explanation of a belief or assertion or as a

justification.” Webster’s, supra, at 1891. In contrast to definitions employing the term “reason” in a manner that refers to a doubt based on reason or logic, WPIC 4.01’s use of the words “a reason” indicates that reasonable doubt must be capable of explanation or justification. In other words, WPIC 4.01 requires more than just a reasonable doubt; it requires an explainable, articulable, reasonable doubt.

Due process “protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Washington’s pattern instruction on reasonable doubt is unconstitutional because its language requires more than just a reasonable doubt to acquit. It instead explicitly requires a justification or explanation for why reasonable doubt exists.

Under the current instruction, jurors could have reasonable doubt but also have difficulty articulating or explaining why their doubt is reasonable. A case might present such voluminous and contradictory evidence that jurors having legitimate reasonable doubt would struggle putting it into words or pointing to a specific, discrete reason for it. Yet, despite reasonable doubt, acquittal would not be an option. Scholarship on the reasonable doubt standard elucidates similar concerns with requiring jurors to articulate their doubt:

An inherent difficulty with an articulability requirement of doubt is that it lends itself to reduction without end. If the juror is expected to explain the basis for a doubt, that explanation gives rise to its own need for justification. If a juror's doubt is merely, 'I didn't think the state's witness was credible,' the juror might be expected to then say why the witness was not credible. The requirement for reasons can all too easily become a requirement for reasons for reasons, ad infinitum.

One can also see a potential for creating a barrier to acquit for less-educated or skillful jurors. A juror who lacks the rhetorical skill to communicate reasons for a doubt is then, as a matter of law, barred from acting on that doubt. This bar is more than a basis for other jurors to reject the first juror's doubt. It is a basis for them to attempt to convince that juror that the doubt is not a legal basis to vote for acquittal.

A troubling conclusion that arises from the difficulties of the requirement of articulability is that it hinders the juror who has a doubt based on the belief that the totality of the evidence is insufficient. Such a doubt lacks the specificity implied in an obligation to 'give a reason,' an obligation that appears focused on the details of the arguments. Yet this is precisely the circumstance in which the rhetoric of the law, particularly the presumption of innocence and the state burden of proof, require acquittal.

Steve Sheppard, The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence, 78 Notre Dame L. Rev. 1165, 1213-14 (2003) (footnotes omitted). In these various scenarios, despite having reasonable doubt, jurors could not vote to acquit in light of WPIC 4.01's direction to articulate a reasonable doubt. Because the State will avoid supplying a reason to doubt in its own

prosecutions, WPIC 4.01 requires that the defense or the jurors supply a reason to doubt, shifting the burden and undermining the presumption of innocence.

The beyond-a-reasonable-doubt standard enshrines and protects the presumption of innocence, “that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law.” Winship, 397 U.S. at 363. The presumption of innocence, however, “can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve.” State v. Bennett, 161 Wn.2d 303, 316, 165 P.3d 1241 (2007). The “doubt for which a reason exists” language in WPIC 4.01 does just that by directing jurors they must have a reason to acquit rather than a doubt based on reason.

In prosecutorial misconduct cases, appellate courts have consistently condemned arguments that jurors must articulate a reason for having reasonable doubt. As discussed above, fill-in-the-blank arguments “improper impl[y] that the jury must be able to articulate its reasonable doubt” and “subtly shift[] the burden to the defense.” State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); accord State v. Walker, 164 Wn. App. 724, 731, 265 P.3d 191 (2011); State v. Johnson, 158 Wn. App. 677, 682, 243 P.3d 936 (2010); State v. Venegas, 155 Wn. App. 507, 523-24 &

n.16, 228 P.3d 813 (2010); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). These arguments are improper “because they misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence.” Id. at 759. Simply put, “a jury need do nothing to find a defendant not guilty.” Emery, 174 Wn.2d at 759.

These improper burden shifting arguments are not the mere product of prosecutorial malfeasance, however. The offensive arguments did not originate in a vacuum but sprang directly from WPIC 4.01’s language. In Anderson, for instance, the prosecutor recited WPIC 4.01 before arguing, “in order to find the defendant not guilty, you have to say, ‘I don’t believe the defendant is guilty because,’ and then you have to fill in the blank.” 153 Wn. App. at 424. In Johnson, likewise, the prosecutor told jurors “What [WPIC 4.01] says is ‘a doubt for which a reason exists.’ In order to find the defendant not guilty, you have to say, ‘I doubt the defendant is guilty and my reason is’ To be able to find a reason to doubt, you have to fill in the blank; that’s your job.” 158 Wn. App. at 682.

If telling jurors they must articulate a reason for reasonable doubt is prosecutorial misconduct because it undermines the presumption of innocence, it makes no sense to allow the same undermining to occur through a jury instruction. The misconduct cases make clear that WPIC

4.01 is the true culprit. Its doubt “for which a reason exists” language provides a natural and seemingly irresistible basis to argue that jurors must give a reason why there is reasonable doubt in order to have reasonable doubt. If trained legal professionals mistakenly believe WPIC 4.01 means reasonable doubt does not exist unless jurors are able to provide a reason why it does exist, then how can average jurors be expected to avoid the same hazard?

Jury instructions ““must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror.”” State v. Borsheim, 140 Wn. App. 357, 366-67, 165 P.3d 417 (2007) (quoting State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006)). An ambiguous instruction that permits erroneous interpretation of the law is improper. LeFaber, 128 Wn.2d at 902. Even if it is possible for an appellate court to interpret the instruction in a manner that avoids constitutional infirmity—which Reeves does not concede—that is not the correct standard for measuring the adequacy of jury instructions. Courts have arsenals of interpretative aids at their disposal whereas jurors do not. Id.

WPIC 4.01 fails to make it manifestly clear that jurors need not be able to give a reason for why reasonable doubt exists. Far from making the proper reasonable doubt standard manifestly apparent to the average

juror, WPIC 4.01's infirm language affirmatively misdirects the average juror into believing a reasonable doubt cannot exist unless and until a reason for it can be articulated. Instructions must not be "misleading to the ordinary mind." Dana, 73 Wn.2d at 537. WPIC 4.01 is readily capable of misleading the average juror into thinking that acquittal depends on whether a reason for reasonable doubt can be stated. The plain language of the instruction, and the fact that legal professionals have been misled by the instruction in this manner, compels this conclusion.

Recently, in State v. Kalebaugh, the Washington Supreme Court held a trial court's preliminary instruction that a reasonable doubt is "a doubt for which a reason can be given" was erroneous because "the law does not require that a reason be given for a juror's doubt." 183 Wn.2d 578, 585, 355 P.3d 253 (2015). This conclusion is sound:

Who shall determine whether able to give a reason, and what kind of a reason will suffice? To whom shall it be given? One juror may declare he does not believe the defendant guilty. Under this instruction, another may demand his reason for so thinking. Indeed, each juror may in turn be held by his fellows to give his reasons for acquitting, though the better rule would seem to require these for convicting. The burden of furnishing reasons for not finding guilt established is thus cast on the defendant, whereas it is on the state to make out a case excluding all reasonable doubt. Besides, jurors are not bound to give reasons to others for the conclusion reached.

State v. Cohen, 78 N.W. 857, 858 (Iowa 1899); see also Siberry v. State, 33 N.E. 681, 684-85 (Ind. 1893) (criticizing instruction “a reasonable doubt is such a doubt as the jury are able to give reason for” because it “puts upon the defendant the burden of furnishing to every juror a reason why he is not satisfied of his guilt with the certainty which the law requires before there can be a conviction. There is no such burden resting on the defendant or a juror in a criminal case”).

- b. No appellate court in recent times has directly grappled with the challenged language in WPIC 4.01.

In Bennett, the Washington Supreme Court directed trial courts to give WPIC 4.01, at least “until a better instruction is approved.” 161 Wn.2d at 318. In Emery, the court contrasted the “proper description” of reasonable doubt as a “doubt for which a reason exists” with the improper argument that the jury must be able to articulate its reasonable doubt by filling in the blank. Emery, 174 Wn.2d at 759. In Kalebaugh, the court similarly contrasted “the correct jury instruction that a ‘reasonable doubt’ is a doubt for which a reason exists” with an improper instruction that “a reasonable doubt is ‘a doubt for which a reason can be given.’” 183 Wn.2d at 585. The Kalebaugh court concluded the trial court’s erroneous instruction—“a doubt for which a reason can be given”—was harmless, accepting Kalebaugh’s concession at oral argument “that the judge’s

remark ‘could live quite comfortably’ with the final instructions given here.” Id.

The court’s recognition that the instruction “a doubt for which a reason can be given” can “live quite comfortably” with WPIC 4.01’s language amounts to a tacit acknowledgment that WPIC 4.01 is readily interpreted to require the articulation of a reasonable doubt. Jurors are undoubtedly interpreting WPIC 4.01 as requiring them to give a reason for their doubt. The plain language of WPIC 4.01 requires this articulation. No Washington court has ever explained how this is not so.

Kalebaugh provided no answer, as appellate counsel conceded the correctness of WPIC 4.01 in that case. In fact, none of the appellants in Kalebaugh, Emery, or Bennett argued the doubt “for which a reason exists” language in WPIC 4.01 misstates the reasonable doubt standard. Cf. State v. Lizarraga, 191 Wn. App. 530, 567, 364 P.3d 810 (2015), as amended (Dec. 9, 2015) (citing Bennett discussion of WPIC 4.01 with approval). “In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised.” Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994); accord In re Electric Lightwave, Inc. 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) (“We do not rely on cases that fail to specifically raise or decide an issue.”). Because

WPIC 4.01 was not challenged on appeal in those cases, the analysis in each flows from the unquestioned premise that WPIC 4.01 is correct. As such, their approval of WPIC 4.01's language does not control.

- c. WPIC 4.01 rests on an outdated view of reasonable doubt that equated a doubt for which a reason exists with a doubt for which a reason can be given.

Forty years ago, Division Two addressed an argument that “[t]he doubt which entitled the defendant to an acquittal must be a doubt for which a reason exists’ (1) infringes upon the presumption of innocence, and (2) misleads the jury because it requires them to assign a reason for their doubt, in order to acquit.” State v. Thompson, 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975) (quoting jury instruction). Thompson brushed aside the articulation argument in one sentence, stating “the particular phrase, when read in the context of the entire instruction does not direct the jury to assign a reason for their doubts, but merely points out that their doubts must be based on reason, and not something vague or imaginary.” Thompson, 13 Wn. App. at 5.

Thompson's cursory statement is untenable. The first sentence on the meaning of reasonable doubt plainly requires a reason to exist for reasonable doubt. The instruction directs jurors to assign a reason for their doubt and no further “context” erases the taint of this articulation requirement. The Thompson court did not explain what “context” saved

the language from constitutional infirmity. Its suggestion that the language “merely points out that [jurors’] doubts must be based on reason” fails to account for the obvious difference in meaning between a doubt based on “reason” and a doubt based on “a reason.” Thompson wished the problem away by judicial fiat rather than confront the problem through thoughtful analysis.

The Thompson court began its discussion by recognizing “this instruction has its detractors” but noted it was “constrained to uphold it” based on State v. Tanzymore, 54 Wn.2d 290, 291, 340 P.2d 178 (1959), and State v. Nabors, 8 Wn. App. 199, 505 P.2d 162 (1973). Thompson, 13 Wn. App. at 5.

In holding the trial court did not err in refusing the defendant’s proposed instruction on reasonable doubt, Tanzymore simply stated that the standard instruction “has been accepted as a correct statement of the law for so many years” that the defendant’s argument to the contrary was without merit. State v. Tanzymore, 54 Wn.2d 290, 291, 340 P.2d 178 (1959). Nabors cites Tanzymore as its support. Nabors, 8 Wn. App. at 202. Neither case specifically addressed the “doubt for which a reason exists” language in the instruction, so it was not at issue.

The Thompson court observed “[a] phrase in this context has been declared satisfactory in this jurisdiction for over 70 years,” citing State v.

Harras, 25 Wash. 416, 65 P. 774 (1901). Thompson, 13 Wn. App. at 5. Harras found no error in the following language: “It should be a doubt for which a good reason exists,—a doubt which would cause a reasonable and prudent man to hesitate and pause in a matter of importance, such as the one you are now considering.” Harras, 25 Wash. at 421. Harras simply maintained the “great weight of authority” supported it, citing the note to Burt v. State, 48 Am. St. Rep. 574, 16 So. 342 (Miss. 1894). However, this note cites non-Washington cases using or approving instructions that define reasonable doubt as a doubt for which a reason can be given.⁹

So our supreme court in Harras viewed its “a doubt for which a good reason exists” instruction as equivalent to those instructions requiring a reason to be given for the doubt. And then Thompson upheld the doubt “for which a reason exists” instruction by equating it with the instruction in Harras. Thompson did not grasp the ramifications of this equation, as it amounts to a concession that WPIC 4.01’s doubt “for which

⁹ See, e.g., State v. Jefferson, 43 La. Ann. 995, 998-99, 10 So. 119 (La. 1891) (“A reasonable doubt, gentlemen, is not a mere possible doubt; it should be an actual or substantial doubt as a reasonable man would seriously entertain. It is a serious, sensible doubt, such as you could give a good reason for.”); Vann v. State, 9 S.E. 945, 947-48 (Ga. 1889) (“But the doubt must be a reasonable doubt, not a conjured-up doubt,—such a doubt as you might conjure up to acquit a friend, but one that you could give a reason for.”); State v. Morey, 25 Or. 241, 255-59, 36 P. 573 (1894) (“A reasonable doubt is a doubt which has some reason for its basis. It does not mean a doubt from mere caprice, or groundless conjecture. A reasonable doubt is such a doubt as a juror can give a reason for.”).

a reason exists” language means a doubt for which a reason can be given. This is a serious problem because, under current jurisprudence, any suggestion that jurors must be able to give a reason for why reasonable doubt exists is improper. Kalebaugh, 183 Wn.2d at 585; Emery, 174 Wn.2d at 759-60. The Kalebaugh court explicitly held, moreover, that it was a manifest constitutional error to instruct the jury that reasonable doubt is “a doubt for which a reason can be given.” Kalebaugh, 183 Wn.2d at 584-85.

State v. Harsted, 66 Wash. 158, 119 P. 24 (1911), sheds further light on this dilemma. Harsted took exception to the instruction, “The expression, ‘reasonable doubt’ means in law just what the words imply—a doubt founded upon some good reason.” Id. at 162. The court explained the meaning of reasonable doubt:

[I]f it can be said to be resolvable into other language, that it must be a substantial doubt or one having reason for its basis, as distinguished from a fanciful or imaginary doubt, and such doubt must arise from the evidence in the case or from the want of evidence. As a pure question of logic, there can be no difference between a doubt for which a reason can be given, and one for which a good reason can be given.

Id. at 162-63. In support of its holding that there was nothing wrong with the challenged language, the Harsted court cited a number of out-of-state cases upholding instructions defining a reasonable doubt as a doubt for

which a reason can be given. Id. at 164. Among them was Butler v. State, 78 N.W. 590, 591-92 (Wis. 1899), which stated, “A doubt cannot be reasonable unless a reason therefor exists, and, if such reason exists, it can be given.” While the Harsted court noted some courts had disapproved of similar language, it was “impressed” with the view adopted by the other cases it cited and felt “constrained” to uphold the instruction. 66 Wash. at 165.

We now arrive at the genesis of the problem. More than 100 years ago, the Washington Supreme Court in Harsted and Harras equated two propositions in addressing the standard instruction on reasonable doubt: a doubt for which a reason exists means a doubt for which a reason can be given. This revelation annihilates any argument that there is a real difference between a doubt “for which a reason exists” in WPIC 4.01 and being able to give a reason for why doubt exists. Our supreme court found no such distinction in Harsted and Harras.

This problem has continued unabated to the present day. There is an unbroken line from Harras to WPIC 4.01. The root of WPIC 4.01 is rotten. Emery and Kalebaugh condemned any suggestion that jurors must give a reason for having reasonable doubt. Yet Harras and Harsted explicitly contradict Emery’s and Kalebaugh’s condemnation. The law has evolved, and what was acceptable 100 years ago is now forbidden.

But WPIC 4.01 remains stuck in the past, outpaced by this court's modern understanding of the reasonable doubt standard and swift eschewal of any articulation requirement.

It is time for a Washington appellate court to seriously confront the problematic language in WPIC 4.01. There is no appreciable difference between WPIC 4.01's doubt "for which a reason exists" and the erroneous doubt "for which a reason can be given." Both require a reason for why reasonable doubt exists. This repugnant requirement distorts the reasonable doubt standard to the detriment of the accused.

d. This structural error requires reversal.

Defense counsel did not object to the instruction at issue here. See RP 652-56 (discussion regarding exceptions or objections to jury instructions). However, the error may be raised for the first time on appeal as a manifest error affecting a constitutional right under RAP 2.5(a)(3). Structural errors qualify as manifest constitutional errors for RAP 2.5(a)(3) purposes. State v. Paumier, 176 Wn.2d 29, 36-37, 288 P.3d 1126 (2012).

The failure to properly instruct the jury on reasonable doubt is structural error requiring reversal without resort to harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). An instruction that eases the State's burden of proof and

undermines the presumption of innocence violates the Sixth Amendment's jury trial guarantee. Id. at 279-80. Where, as here, the "instructional error consists of a misdescription of the burden of proof, [it] vitiates all the jury's findings." Id. at 281. Failing to properly instruct jurors regarding reasonable doubt "unquestionably qualifies as 'structural error.'" Id. at 281-82.

WPIC 4.01's language requires more than just a reasonable doubt to acquit; it requires an articulable doubt. Its articulation requirement undermines the presumption of innocence, shifts the burden of proof, and improperly instructs jurors on the meaning of reasonable doubt. The trial court's use of WPIC 4.01 was structural error and requires reversal of Reeves's convictions and a new trial.

2. INADEQUATE JURY INSTRUCTIONS VIOLATED REEVES'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY, EXPOSING HIM TO MULTIPLE PUNISHMENTS FOR THE SAME OFFENSE.

The court's failure to instruct the jury that it needed to find separate and distinct acts of attempted child rape and attempted child molestation, *rather than a separate act within the context of each particular charge*, exposed Reeves to multiple punishments for a single offense. This violated his right to be free from double jeopardy. Reeves's conviction for attempted first degree child molestation must be vacated.

a. The jury instructions

The court instructed the jury as to each charge involving L.B. as follows:

The State alleges that [Reeves] committed acts of Attempted Rape of a Child in the First Degree on multiple occasions with respect to [L.B.]. To convict [Reeves] on any count of Attempted Rape of a Child in the First Degree, one separate act of Attempted Rape of a Child in the First Degree as to that count must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Attempted Rape of a Child in the First Degree.

CP 60 (Instruction 12). The court gave an analogous instruction as to attempted first degree child molestation, count 2. That instruction informed jurors that the State alleged Reeves to have committed multiple acts of attempted first degree child molestation, but the jury must agree on the “one separate act” of that crime to find him guilty of that crime. CP 64 (Instruction 17).¹⁰

But the jury was not told that it must rely on separate and distinct acts for counts 1 and 2, i.e., that it could not use the same act to find Reeves guilty of both crimes. Based on the evidence presented in this case, as well as the State’s theory of the case, the trial court was required to clearly instruct the jury that it could not convict on both counts on the

¹⁰ The State drafted and proposed the instructions the court used. 6RP 686-91, 699-701.

basis of a single act. The instructions failed to do this, and subjected Reeves to double jeopardy.

- b. The law protects the accused from multiple punishments for the same offense.

The right to be free from double jeopardy “is the constitutional guarantee protecting a defendant against multiple punishments for the same offense.” State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007) (citing U.S. Const. amend. V; Const. art. I, § 9). A double jeopardy claim is reviewed de novo and may be raised for the first time on appeal. State v. Mutch, 171 Wn.2d 646, 661-62, 254 P.3d 803 (2011).

Jury instructions “must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror.” Borsheim, 140 Wn. App. at 366 (quoting State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006)). The reviewing court considers insufficient instructions “in light of the full record” to determine if they “actually effected a double jeopardy error.” Mutch, 171 Wn.2d at 664. Double jeopardy is violated if, after this review, it is not “manifestly apparent to the jury that each count represented a separate act.” Id. at 665-66.

The jury instructions in Reeves’s case do not satisfy this standard. Three cases are instructive. First, the Borsheim court held an instruction

that the jury must find a “separate and distinct” act for each count is required when multiple counts of sexual abuse are alleged to have occurred within the same charging period. 140 Wn. App. at 367-68. Without this instruction, the accused is exposed to multiple punishments for the same offense, violating his right to be free from double jeopardy. Id. at 364, 366-67. The court vacated three of Borsheim’s four child rape convictions for this instructional omission. Id. at 371.

In Mutch, the State charged five identical counts of rape, all within the same charging period. 171 Wn.2d at 662. There was sufficient evidence of five separate acts of rape, but the jury was not instructed that each count must arise from a separate and distinct act in order to convict. Id. at 662-63. The possibility that the jury convicted Mutch on all five counts based on a single criminal act created a potential double jeopardy problem. Id. at 663.

The Mutch court held, however, that the case “presented a rare circumstance where, despite deficient jury instructions,” it was nevertheless manifestly apparent jurors based each conviction on a separate and distinct act. Id. at 665. Specifically: (1) the victim, J.L., testified to precisely the same number of rape episodes, five, as there were counts charged and to convict instructions; (2) the defense was consent rather than denial; (3) Mutch admitted to a detective that he engaged in

multiple sex acts with J.L.; and (4) during closing, the prosecutor discussed each of the five alleged acts individually and defense counsel did not challenge the number of episodes, but merely argued consent. Id. The court concluded, “[i]n light of all of this, we find it was manifestly apparent to the jury that each count represented a separate act.” Id. at 665-66. The Mutch court was convinced beyond a reasonable doubt that a double jeopardy violation did not follow from the deficient jury instructions. Id. at 666.

In State v. Land, Division One of this Court considered whether a double jeopardy violation occurred where the jury was not instructed it must find separate and distinct acts, not of the same charged crime, but of child rape and child molestation. 172 Wn. App. 593, 598-603, 295 P.3d 782 (2013).

Land was convicted of one count of child molestation and one count of child rape, both involving the same child and the same charging period. Id. at 597-98. Land argued these convictions violated double jeopardy because they might have been based on the same act of oral-genital intercourse. Id. at 598-99. The State countered that the jury did not have to find separate and distinct acts because child molestation is not the “same offense” as child rape for double jeopardy purposes. Id. at 599.

Two offenses are not the same when “there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other.” Id. (quoting State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983)). Child rape and child molestation do not have identical elements. Land, 172 Wn. App. at 599. Child molestation requires proof of “sexual contact,” which means “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.” RCW 9A.44.089(1); RCW 9A.44.010(2). Child rape requires proof of “sexual intercourse,” which includes penetration, as well as “any act of *sexual contact* between persons involving the sex organs of one person and the mouth or anus of another.” RCW 9A.44.079(1); RCW 9A.44.010(1) (emphasis added).

The Land court explained that where the evidence of sexual intercourse supporting a count of child rape is evidence of penetration, “rape is not the same offense as child molestation.” 172 Wn. App. at 600. The touching of sexual parts for sexual gratification constitutes molestation until the point of actual penetration. Id. At that point, the act of penetration alone supports a separately punishable conviction for child rape. Id.

Where the evidence of sexual intercourse is evidence of oral-genital contact, however, “that single act of sexual intercourse, if done for sexual gratification, is both the offense of molestation and the offense of rape.” Id. In such a circumstance, the two offenses “are the same *in fact and in law* because all the elements of the rape as proved are included in molestation, and the evidence required to support the conviction for molestation also necessarily proves the rape.” Id. (emphasis in original). Because of this potential double jeopardy problem, the court considered Land’s claim that the jury instructions exposed him to multiple punishments for the same offense. Id.

Land’s jury was not instructed that the two counts involving the same child, S.H., required proof of separate and distinct acts. Id. at 601. But S.H. did not testify Land’s mouth came in contact with her sex organs. Id. The only evidence of rape was S.H.’s testimony that Land used his finger to penetrate her vagina. Id. at 602. Consistent with this testimony, the prosecutor argued in closing that S.H.’s testimony about penetration was the “crucial element proving rape.” Id. The prosecutor also emphasized that S.H.’s testimony about sexual contact proved molestation and her testimony about penetration proved rape. Id. Given all these factors, the Land court concluded the lack of a separate and distinct

instruction “did not violate Land’s right to be free from double jeopardy.”

Id. at 603.

- c. The failure to instruct the jury that it needed to find separate and distinct acts of attempted child rape and attempted child molestation, versus a separate act for each particular charge, exposed Reeves to multiple punishments for a single offense.

This case is similar to Land in some ways: Reeves was convicted of two facially different charges, one count of attempted child rape and one count of attempted child molestation, alleged to have occurred within the same charging period and involving the same complainant. CP 1-2, 73-74. Here, Reeves’s jury was given instructions consistent with the statutory definitions of sexual contact and sexual intercourse discussed in Land. CP 58 (Instruction 10, defining sexual intercourse); CP 64 (Instruction 16, defining sexual contact).¹¹ Like Land, moreover, Reeves’s jury was not instructed that the count of attempted child rape and the count of attempted child molestation must be based on separate and distinct acts. CP 60, 64 (inadequate instructions described above).

¹¹ Because the crimes were charged as attempt, the jury was also instructed on the definition of “substantial step.” CP 56 (Instruction 8). A “substantial step” is “conduct that strongly indicates a criminal purpose and that is more than mere preparation.” State v. Townsend, 147 Wn.2d 666, 679, 57 P.3d 255 (2002); WPIC 100.05; CP 56.

But this case is unlike Land in crucial ways that mandate reversal. As the evidence demonstrated and the State argued, the two acts that could have supported the two separate charges (the “substantial step”¹²) were the attempt to pull down L.B.’s pants and the request for oral-genital contact. 7RP 864-65. But, in part because this case involved attempt rather than a completed crime, the precise aim of each act was far from certain. The State argued in closing, for example, that either act could form the basis of either charge. 7RP 863-65 (attached to this brief as “Appendix”).

Moreover, unlike in Land, the primary evidence supporting attempted child rape was the request for oral-genital contact. But because oral-genital contact constitutes both rape and molestation, this too created a potential double jeopardy problem. Land, 172 Wn. App. at 600.

Considering the record as a whole, moreover, it is not manifestly apparent that the jury based each conviction on a separate and distinct act. In contrast to Mutch, Reeves’s defense was denial, not consent. See, e.g., 6RP 794 (Reeves’s testimony). Also unlike Mutch, the prosecutor did not discuss each of the alleged acts individually or attempt to separate them by

¹² In assessing a double jeopardy claim in the context of an attempt crime, the “abstract” term “substantial step” is analyzed by examining the actual facts constituting the “substantial step.” In re Borrero, 161 Wn.2d 532, 537, 167 P.3d 1106 (2007), cert. denied 552 U.S. 1154 (2008).

charge. Rather, the prosecutor conflated them by arguing either act could support either charge. 8RP 863-65. Thus, unlike the five clearly delineated acts in Mutch, this case involved a more amorphous “intent” to commit a crime or crimes, and the prosecutor even argued the acts in evidence should be “taken together” to evaluate Reeves’s intent toward L.B. 8RP 865.

The jury did not specify which acts it relied on to convict for rape or molestation. See State v. Kier, 164 Wn.2d 798, 814, 194 P.3d 212 (2008) (holding a verdict is ambiguous are multiple acts were alleged but the jury does not specify which act it relied on to convict). Thus, this Court cannot be certain the jury did not rely on the same act to convict for both attempted child rape and attempted molestation. This case is certainly not the “rare circumstance” where the jury plainly based each conviction on a separate and distinct act. Mutch, 171 Wn.2d at 665.

The State may argue that the jury was instructed it needed to be unanimous as to each count. The trial court in Borsheim also gave a unanimity instruction:

There are allegations that the Defendant committed acts of rape of child on multiple occasions. *To convict the Defendant, one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt. You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.*

140 Wn. App. at 364 (emphasis in original). This unanimity instruction, like the one in Reeves's case, did not "convey the need to base each charged count on a 'separate and distinct' underlying event." Id. at 367, 369-70. Although the Borsheim instruction informed jurors they had to be unanimous on the act that formed the basis for any given count, it failed to protect against double jeopardy. Id. at 367, 369.¹³

In summary, the failure to instruct the jury that it needed to find separate and distinct acts of attempted child rape and attempted child molestation, versus a separate act within the context of each particular charge, exposed Reeves to multiple punishments for a single offense. This violated his right to be free from double jeopardy. This Court should reverse and remand for the trial court to vacate the child molestation conviction. Borsheim, 140 Wn. App. at 371.

¹³ Reeves's jury was also instructed, "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." CP 53 (Instruction 5). The Borsheim court held this instruction is insufficient to guard against double jeopardy because it fails to adequately inform the jury that each crime requires proof of a different act. 140 Wn. App. at 367, 369-70; see also Mutch, 171 Wn.2d at 663 (agreeing with Borsheim).

3. THE COURT ERRED IN ORDERING A MENTAL HEALTH EVALUATION AND TREATMENT WITHOUT FINDING REEVES WAS A MENTALLY ILL PERSON WHOSE CONDITION INFLUENCED THE OFFENSE.

As a condition of community custody, the sentencing court ordered that Reeves complete a mental health evaluation and “successfully complete all recommended phases of any recommended treatment as established by the [CCO] and/or treatment facility. CP 111 (condition 19);¹⁴ see also CP 113 (Appendix F to Judgment and Sentence, fourth bulleted condition). The applicable statutes, however, did not authorize the imposition of this condition.

A court may impose only a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). Illegal or erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

Under the Sentencing Reform Act (SRA), some community custody conditions are mandatory, while the sentencing court has discretion in imposing others. RCW 9.94A.703. RCW 9.94A.703(3)(c) provides that a sentencing court may order an offender to “[p]articipate in crime-related treatment or counseling services.” Under RCW

¹⁴ The court entered a separate condition requiring Reeves to participate in a sexual deviancy treatment program. CP 111 (condition 20).

9.94A.703(3)(d), a sentencing court may order the defendant to “perform affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.”

Mental health counseling and treatment may be required as a sentencing condition under RCW 9.94A.703(3)(c) and (d) as long as the counseling and treatment is “crime-related” or “reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.” However, former RCW 9.94B.080 (2008)¹⁵ further requires that mental health evaluation and treatment may only be imposed

if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment must be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity.[¹⁶]

¹⁵ The current version of the statute, which went into effect in July of 2015, provides that the order “may” be based on a presentence report. Laws of 2015, ch. 80, § 1.

¹⁶ Although the heading of chapter 9.94B RCW states that the chapter applies to crimes committed prior to July 1, 2000, the relevant provision, RCW 9.94B.080, authorizing the trial court to order an offender to undergo a mental status evaluation and mental health treatment, is applicable to crimes committed *after* 2000. Laws of 2008, ch. 231, § 55.

In State v. Jones, this Court held that mental health treatment and counseling “reasonably relates” to the offender’s risk of reoffending and to the safety of the community “only if the court obtains a presentence report or mental status evaluation and finds that the offender was a mentally ill person whose condition influenced the offense.” 118 Wn. App. 199, 210, 76 P.3d 258 (2003).

Here, a presentence report submitted to the trial court indicated that in addition to intellectual disability, Reeves had, during his life, been medicated for behavioral issues. CP 87. It recommended that he “[c]omply with mental health treatment and medication schedule.” CP 89. At sentencing, the court recognized Reeves suffered from an intellectual disability. 8RP 983-84. But the trial court made no finding that Reeves was mentally ill or that any mental illness influenced his offenses. Under Jones, the trial court was not authorized to impose mental health counseling or treatment. The condition was unauthorized under the SRA and should be stricken.

4. THE PLETHYSMOGRAPH CONDITION VIOLATES REEVES’S RIGHT TO BE FREE FROM BODILY INTRUSIONS.

As a condition of community custody, the court also ordered Reeves to “[s]ubmit to plethysmography exams, at your own expense, at the direction of the [CCO] and copies shall be provided to the

[prosecutor].” CP 111 (condition 23). The condition is unconstitutional because it requires Reeves to submit to plethysmograph testing at the direction of the Department of Corrections.

Plethysmograph testing involves the restraint and monitoring of an intimate part of a person’s body while the mind is exposed to pornographic imagery. In re Marriage of Parker, 91 Wn. App. 219, 223-24, 957 P.2d 256 (1998). Such examination implicates the due process right to be free from bodily restraint. Id. at 224; U.S. Const. amend. XIV; Wash. Const. art. 1, § 3.

Requiring submission to plethysmograph testing at the discretion of a CCO violates Reeves’s constitutional right to be free from bodily intrusions. Land, 172 Wn. App. at 605. “Plethysmograph testing is extremely intrusive. The testing can properly be ordered incident to crime-related treatment by a qualified provider.” Id. But such testing is not a routine monitoring tool subject only to the discretion of a CCO. Id.; State v. Johnson, 184 Wn. App. 777, 780, 340 P.3d 230 (recognizing CCO’s scope of authority in ordering plethysmograph is limited to purpose of sexual deviancy treatment and not for monitoring purposes). In this case, there is no indication that the ordered testing is intended for treatment rather than as some sort of monitoring tool. CP 111.

The requirement that Reeves submit to the plethysmograph examination at the direction of the Department of Corrections must therefore be stricken. Land, 172 Wn. App. at 605-06.

5. THIS COURT SHOULD NOT AWARD THE COSTS OF APPEAL.

Finally, if Reeves does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 of the Rules of Appellate Procedure. This Court has ample discretion to deny the State's request for costs. For example, RCW 10.73.160(1) states the "court of appeals . . . *may* require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000).

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations. State v. Blazina, 182 Wn2d 827, 834, 344 P.3d (2015). Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id.

The existing record establishes any award of appellate costs would be unwarranted in this case. Here, recognizing that Reeves was disabled and had "no" ability to pay, the court waived all discretionary fees. CP 98-99; 8RP 988.

The trial court then found Reeves be indigent and found that he could not contribute anything to the costs of appellate review. CP 139-48. Indigence is presumed to continue throughout the appeal. State v. Sinclair, ___ Wn. App. ___, ___ P.3d ___, 2016 WL 393719 at *7 (Jan. 27, 2016) (citing RAP 15.2(f)).

In summary, in the event that Reeves does not substantially prevail on appeal, this Court should not assess appellate costs against him. Provided that this Court believes there is insufficient information in the record to make such a determination, however, this Court should remand for the superior court to consider the matter

D. CONCLUSION

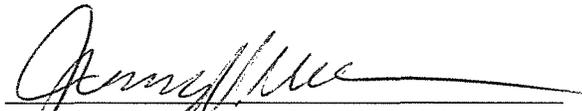
The defective reasonable doubt instruction given in Reeves's trial is structural error, requiring reversal and a new trial. In addition, the convictions for attempted child rape and attempted child molestation violate the constitutional prohibitions on double jeopardy. The latter conviction must be vacated. In addition, the two illegal community custody conditions must be stricken.

Finally, in the event that Reeves is not the substantially prevailing party on appeal, this Court should not award the costs of appeal.

DATED this 25th day of March, 2016.

Respectfully submitted,

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Attorneys for Appellant

APPENDIX

1 to accomplish at that point.

2 We have Count IV, which is attempted child moles-
3 tation in the first degree, and that has to do with well,
4 if he didn't maybe quite achieve, then, then that's what
5 that count is for.

6 Now, as to the child molestation, it's for the
7 purpose of sexual gratification, and that's an important
8 distinction. The Defendant doesn't have to have actually
9 achieved it, it's just simply done with that purpose. May-
10 be M [REDACTED] got up too quickly. Maybe it ended before he ac-
11 tually got any kind of gratification out of it. That is
12 completely irrelevant. What matters is the purpose behind
13 what he did and he asked her to sit on his lap, he asked,
14 "Can I feel something," and then he touched his hand on her
15 vagina.

16 So there's another instruction, and it's a bit
17 confusing, it's Instructions 12 and 17, and it has to do
18 with these multiple allegations surrounding L [REDACTED]. And
19 what that -- what those instructions say is that we've al-
20 leged multiple incidents of the attempted rape and the at-
21
22
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24

1 tempted molestation of L [REDACTED]. So what says is that stand-
2 ing on its own, when the Defendant is over L [REDACTED] and he's
3 pulling her shorts down, that that on its own can stand
4 alone as a count of attempted child rape in the first de-
5 gree and attempted molestation in the first degree.
6

7 Also separately from that, when L [REDACTED] is at the
8 wall and he asks, "Hey, will you suck on this," that,
9 standing on its own, can constitute attempted rape of a
10 child in the first degree or attempted child molestation in
11 the first degree. So the reason that instruction is there
12 is that if you're back there deliberating and this half of
13 the jury believes that the incident with the pants occurred
14 and this half believes that the incident with the wall oc-
15 curred and you don't unanimously agree on one factual situ-
16 ation, you have to come back not guilty. You can't have
17 half of you think it happened one way and half of you think
18 it happened another way. You all have to agree in the man-
19 ner in which it happened. Now, what that means is if 12 of
20 you agree that the incident with the pants being pulled
21 down constituted a crime and it occurred, you're good to
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23
24
25

1 go. What it means is if you all think that the incident by
2 the wall occurred where he asked her to essentially give
3 him oral sex, then you're good to go. If you think both of
4 those incidents occurred and taken together they're evi-
5 dence that he was attempting to rape her or that he was at-
6 tempting to molest her, you're good to go. So it only ap-
7 plies where you guys can't agree on the factual basis. I
8 would argue in this case it's probably an all or nothing.
9 It's probably that you believe beyond a reasonable doubt
10 that both of these incidents happened or you don't. I, I
11 would argue it's hard to envision that you believe one in-
12 cident occurred and not the other from a factual perspec-
13 tive.
14
15

16 So we've talked about the law. So let's talk
17 about, well, how is it proven? And in these cases they're
18 difficult cases. We're not going not have video surveil-
19 lance, we're not going to have independent eyewitnesses
20 that can sit there and say, "Oh, yeah, I saw him, you know,
21 grabbing her vagina," or, "I saw him, you know, wrestling
22 her to the ground and trying to pull her pants down," we're
23
24
25

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 47965-6-II
)	
JOSHUA REEVES,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 16TH DAY OF MARCH 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOSHUA REEVES
DOC NO. 383805
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 16TH DAY OF MARCH 2016.

X *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

March 25, 2016 - 3:16 PM

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