No. 39044-6-III

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

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM B. ROWAN,

Appellant.

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

The Honorable Judge Randall C. Krog

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF THE ARGUMENT

The State charged William Blake Rowan with two counts of first degree rape of a child, S.R. A jury found Mr. Rowan guilty as charged.

Mr. Rowan now appeals, arguing the evidence was insufficient to find him guilty of first degree rape of a child (Count II), because the State failed to prove two separate and distinct acts of first degree rape of a child during the charging period. The State presented only general testimony by S.R. of more than one act of sexual intercourse within the alleged time frame.

Mr. Rowan also argues the trial court commented on the evidence, in violation of the Washington Constitution, when it gave a non-corroboration jury instruction regarding S.R.'s testimony. Finally, Mr. Rowan asserts the judgment and sentence contains three errors that should be corrected, and that the trial court erred in entering five challenged conditions of community custody.

B. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to find Mr. Rowan guilty of first degree rape of a child (Count II), where the State failed to prove Mr. Rowan committed two specific and distinct acts of first degree rape of a child during the charging period.

2. The trial court commented on the evidence, in violation of the state constitution, when it instructed the jury over defense objection that it is not necessary that the testimony of the alleged victim be corroborated (Instruction No. 9).

3. The judgment and sentence contains three errors that should be corrected.

4. The trial erred in imposing certain conditions of community custody.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the evidence was insufficient to find Mr. Rowan guilty of first degree rape of a child (Count II), where the State failed to prove Mr. Rowan committed two specific and distinct acts of first degree rape of a child during the charging period.

Issue 2: Whether the trial court commented on the evidence, in violation of the state constitution, when it instructed the jury over defense objection that it is not necessary that the testimony of the alleged victim be corroborated (Instruction No. 9).

Issue 3: Whether the judgment and sentence contains three errors that should be corrected.

Issue 4: Whether the trial erred in imposing certain conditions of community custody.

D. STATEMENT OF THE CASE

S.R. was born on February 28, 2010. (RP 343). She lived in a house in Wishram, Washington with her grandfather and his wife. (RP 345-350). Three of her uncles also lived in the same house, including William Blake Rowan. (RP 346-349). S.R. had her own room. (RP 350).

When S.R. was nine years old, Mr. Rowan moved from inside the house out to a trailer located on the property. (RP 348-350). He had access to the house after he moved out to the trailer. (RP 350).

In November 2020, S.R. told a school counselor that Mr. Rowan was sexually abusing her. (RP 353-355, 406-409). The counselor reported this information to CPS (Child Protective Services). (RP 394, 408-409). S.R. was removed from house

in Wishram by CPS on November 5, 2020, and placed in foster care. (RP 353-354, 397-398).

Subsequently, Detective Jason Ritoch of the Klickitat County Sheriff's Office and CPS investigator Jessica Zenger went to the foster home to speak to S.R. (RP 329, 333-335, 358, 394, 398-399). After this conversation, Detective Ritoch and Ms. Zenger scheduled S.R. for a forensic interview. (RP 334-335, 398-399).

S.R. was interviewed by forensic interviewer Michelle Tremblay in November 2020. (RP 399, 410-411, 413-417). Prior to the interview, Dr. Robin Henson conducted a medical exam of S.R. (RP 415, 423-431). Following Ms. Tremblay's interview of S.R., Mr. Rowan was arrested. (RP 335-336).

The State charged Mr. Rowan with two counts of first degree rape of a child. (CP 148-149). Count I alleged the charged conduct occurred "on or about October 1, 2020 through 12/7/2020," and Count II alleged the charged conduct occurred "on or about October 24, 2020[.]" (CP 148-149).

The case proceeded to a jury trial.[1] (RP 207-497). Witnesses testified consistent with the facts stated above. (RP 328-436). In addition, Detective Ritoch testified on cross-examination that S.R. alleged the allegations she made "happened on multiple occasions for multiple years." (RP 339).

S.R. testified that when she was living in the house in Wishram, she was being forced to have sex with Mr. Rowan. (RP 351, 356-357). S.R. described what she meant by sex as follows:

> [S.R.:] He would make me get naked.
> [The State:] And then what would happen when he got you naked?
> [S.R.:] He would force me to do things that I didn't want to.
> [The State:] What would he make you do?
> [S.R.:] He would make me suck on his penis.
> [The State:] Would he ejaculate in your mouth?
> [S.R.:] Yes.
> [The State:] Did he do anything else besides making you perform oral sex on him?

[1] The case proceeded to a jury trial on an earlier date, but after the jury was selected, the parties learned a material witness (Ms. Tremblay) had COVID symptoms, and as a result, could not appear in-person to testify. (CP 151-154; RP 51-181). Mr. Rowan moved for a mistrial, and the trial court granted the motion. (CP 150; RP 171-181).

> [S.R.:] Not that I remember of.
> [The State:] Did he ever have vaginal sex with you?
> [S.R.:] What does that mean?
> [The State:] Did he ever put his penis in your vagina?
> [S.R.]: Yes.
> [The State:] Would he ejaculate inside your vagina?
> [S.R.]: What does that mean?
> [The State:] Did he come inside your vagina?
> [S.R.]: Yes.

(RP 352).

S.R. testified to the following time frame for when these acts occurred:

> [The State:] When did this start?
> [S.R.:] Ever since I could remember. I was two years old when I first remembered.
> [The State:] How long had it been going on? I mean, how often would it be going?
> [S.R.:] Well, it would happen every day; then it started happening once a week or two . . . .
> [Defense counsel:] And you remember that this happened back when you were two years old?
> [S.R.:] Yes. I've had a memory ever since I was two years old.
> [Defense counsel:] All right. And so this would have happened for eight years?
> [S.R.:] Yes.

(RP 352-353, 360).

S.R. testified something happened around Halloween, October of 2020. (RP 354, 379). She testified as follows:

> [The State:] Were there -- you've described both oral and vaginal sex. Did both of those happen in October of that year -- of that month in 2020?
> [S.R.:] What does that mean again?
> [The State:] Did -- did you have sexual acts with the Defendant in October of 2020? Before you -- before you told the school counselor.
> [S.R.:] Yes.
> [The State:] Was there any particular day or act that stood out to you?
> [S.R.:] Not that I remember of.
> [The State:] Were there any days where he assaulted you more than once?
> [S.R.:] Yes.
> [The State:] And that happened in October?
> [S.R.:] Yes.
> [The State:] And what -- describe that incident to the jury, please.
> [S.R.:] Could you repeat that, please?
> [The State:] You say it happened twice in one day, I guess, for lack of a better way to describe it. Could you tell the jury what happened that day?
> [S.R.:] I really don't remember much, but I remember it happened at -- in the morning and then it sort of happened like when the sun was going down.
> [The State:] And what happened in the morning? Was it oral sex or vaginal sex?
> [S.R.:] I don't remember.
> [The State:] And then later that day, as it was getting dark, it happened again?

[S.R.:] Yes.
[The State:] And was it oral sex or vaginal sex?
[S.R.:] I don't remember.

(RP 355-356).

On re-direct examination, S.R. acknowledged she told Ms. Tremblay that around Halloween in 2020, that Mr. Rowan "made me suck his dick" while sitting on the toilet in his trailer. (RP 379-380). S.R. testified she was telling Ms. Tremblay the truth. (RP 374-375, 381).

Dr. Henson testified that during her medical exam of S.R. "I did not see any notches or definite tears of the hymen that either current or that old healed [sic] - - I didn't see anything that was concerning in that way." (RP 427, 430). She testified that other than "a little bit of redness of the vulva, which is the outer part of the - - the genital area[,]" S.R.'s exam was otherwise normal. (RP 427). Dr. Henson acknowledged her findings were that S.R.'s hymen was normal. (RP 430).

Dr. Henson testified to her medical opinion:

> [The State:] And as a result of your examination, were you able to develop an opinion as to whether or not she'd been a victim of any type of sexual abuse?
> [Dr. Henson:] Not solely based on the examination, no.
> [The State:] Do you have an opinion?
> [Dr. Henson:] Yes.
> [The State:] And what is that opinion?
> [Dr. Henson:] My opinion is that she was sexually assaulted over time, multiple times.
> [The State:] And that's based upon what?
> [Dr. Henson:] It's based upon the history that she gave while I was examining her and asking her questions. And during the forensic interview, the information that she came forward with.
> [The State:] But as terms of physical, you can't rule it out or rule it in -- just looking at the physical examination.
> [Dr. Henson:] That's correct.

(RP 429).

The defense rested without putting on a case. (RP 433-436).

The State proposed the following jury instruction:

> In order to convict a person of the crime of rape of a child in the first degree, as defined in these instructions, it shall not be necessary that the testimony of the alleged victim be corroborated.

> The jury is to decide all questions of witness credibility.

(CP 193-194; RP 439).

Mr. Rowan objected to this proposed instruction, arguing that "it could be considered to be an unconstitutional comment upon the evidence." (RP 441-443, 446-449). Defense counsel requested that if the trial court disagreed and gave the instruction, it should strike the second sentence of the proposed instruction, stating "[t]hat is already within the introductory Instruction and that is not part of 9A.44.020(1)." (RP 442).

The trial ruled the first sentence of the proposed instruction was appropriate, because it is an accurate statement of the law. (RP 442, 448-449). The trial court struck the second sentence of the proposed instruction. (RP 442-443).

Accordingly, in Instruction No. 9, the trial court instructed the jury:

> In order to convict a person of rape of a child in the first degree, as defined in these instructions, it shall not be necessary that the testimony of the alleged victim be corroborated.

(CP 218; RP 461).

The jury was instructed that in order to convict Mr. Rowan of first degree rape of a child, as charged in Count I, it had to find the following elements beyond a reasonable doubt:

> (1) That on or between October 1, 2020 and December 7, 2020, the defendant had sexual intercourse with S.R.;
> (2) That S.R. was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;
> (3) That S.R. was at least twenty-four months younger than the defendant; and
> (4) That this act occurred in the State of Washington.

(CP 220; RP 462).

The jury was instructed that in order to convict Mr. Rowan of first degree rape of a child, as charged in Count II, it had to find the following elements beyond a reasonable doubt:

> (1) That on or about October 24, 2020, the defendant had sexual intercourse with S.R.;
> (2) That S.R. was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;
> (3) That S.R. was at least twenty-four months younger than the defendant; and

> (4) That this act occurred in the State of Washington.

(CP 221; RP 462-463).

Sexual intercourse was defined for the jury as follows:

> Sexual intercourse means that the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration, however slight; any penetration of the vagina or anus however slight, by an object, including a body part, when committed on one person by another, whether such persons are of the same or opposite sex; or any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

(CP 222; RP 463).

The jury was 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 the other count.

(CP 216; RP 461).

The jury was given a *Petrich*[2] instruction:

> The State alleges that the defendant committed acts of rape of a child in the first degree on

[2] *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

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

(CP 217; RP 461).

The jury found Mr. Rowan guilty as charged. (CP 226-227; RP 494-497).

At sentencing, the trial court imposed a term of confinement within the standard range: "160 months to life on the Counts 1 and Counts 2." (CP 285, 287; RP 516-517, 519).

The judgment and sentence lists the term of confinement as follows:

(c) ***Confinement.*** RCW 9.94A.507 (Sex offenses only): The court orders the following term of confinement in the custody of DOC:

Count 1 minimum term: 160 maximum term: Statutory Maximum

Count 2 minimum term: 160 maximum term: Statutory Maximum

(CP 287).

The warrant of commitment lists the term of confinement as follows:

> 160 months on Count 1
> 160 months on Count 2

(CP 301).

The trial court imposed a term of lifetime community custody. (CP 288, 308; RP 510). The trial court imposed numerous conditions of community custody, including the following conditions, in relevant part:

> (b) OTHER CONDITIONS: Defendant shall comply with the following other conditions during the term of community placement / custody:
> . . . .
> (13) Do not possess or peruse pornographic materials unless given prior approval by your sexual deviancy therapist and/or supervising CCO. Pornographic materials are to be defined by the deviancy therapist and/or CCO.
> . . . .
> (18) Avoid places where minor children are known to congregate without the specific permission of the supervising CCO and sexual deviancy therapist, and in the company of an approved adult sponsor.
> (19) Inform the supervising CCO of any romantic relationships to verify there are no victim-age

> children involved, and that the adult is aware of your conviction history and conditions of supervision.
> . . . .
> (22) Do not purchase, possess, control or use any firearm or deadly/intimidating weapon and submit to reasonable searches of your person, residence, property and vehicle by the CCO to monitor compliance.
> (23) Submit to polygraph and plethysmograph testing upon the request of your therapist and/or supervising CCO, at your own risk.

(CP 298-299; RP 519).

For legal financial obligations, the trial court imposed a $500 victim assessment fee and a $100 DNA collection fee. (CP 289-290; RP 517). The judgment and sentence does not list a total for the legal financial obligations. (RP 290).

The judgment and sentence lists the date of crime for both Count I and Count II as "10/1/2020 through 12/7/2020." (CP 282).

Mr. Rowan appealed. (CP 252-272).

E. ARGUMENT

Issue 1: Whether the evidence was insufficient to find Mr. Rowan guilty of first degree rape of a child (Count II), where the State failed to prove Mr. Rowan committed two specific and distinct acts of first degree rape of a child during the charging period.

The evidence was insufficient to find Mr. Rowan guilty of first degree rape of a child (Count II), because the State failed to prove Mr. Rowan committed two specific and distinct acts of first degree rape of a child during the charging period. Mr. Rowan's conviction for first degree rape of a child (Count II) should be reversed and the charge dismissed with prejudice.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*,

119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id*. (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Furthermore, "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id*. (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)).

"In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); *see also State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). The appellate court "defer[s] to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *Thomas*, 150 Wn.2d at 874-875. The remedy for insufficient evidence to

prove a crime is reversal, and retrial is prohibited. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

Here, in order to find Mr. Rowan guilty of first degree rape of a child, as charged in Count II, the jury had to find, beyond a reasonable doubt:

> (1) That on or about October 24, 2020, the defendant had sexual intercourse with S.R.;
> (2) That S.R. was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;
> (3) That S.R. was at least twenty-four months younger than the defendant; and
> (4) That this act occurred in the State of Washington.

(CP 221; RP 462-463); *see also* RCW 9A.44.073(1).

Count I alleged the same crime, with the only difference beginning that the crime occurred "on or between October 1, 2020 and December 7, 2020." (CP 148-149, 220; RP 462).

In order to convict a defendant of a criminal charge, the jury must be unanimous that the criminal act charged has been committed. *State v. Camarillo*, 115 Wn.2d 60, 63, 794 P.2d 850 (1990); *see also State v. Petrich*, 101 Wn.2d 566, 569, 683

P.2d 173 (1984), *modified in part by State v. Kitchen*, 110 Wn.2d 403, 405-06, 756 P.2d 105 (1988). In cases where multiple acts are alleged, any one of which could constitute the crime charged, the jury must unanimously agree on the act or incident that constitutes the crime. *Kitchen*, 110 Wn.2d at 411; *see also Petrich*, 101 Wn.2d at 572. In such a multiple acts case, the State must either "elect which of such acts is relied upon for a conviction or the court must instruct the jury to agree on a specific criminal act." *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). Here, the jury was instructed to agree on a specific criminal act. (CP 217; RP 461).

Where the State alleges multiple counts of sexual abuse within the same charging period, the State's evidence must clearly delineate specific and distinct acts that occurred during the charging period. *State v. Hayes*, 81 Wn. App. 425, 430-31, 914 P.2d 788 (1996). The *Hayes* court recognized "[m]ultiple count sexual assault convictions have been affirmed under Washington case law notwithstanding the State's reliance on

'generic' child testimony." *Id*. at 435. The court developed a three-part test for determining whether "generic testimony" is specific enough to prove sexual abuse:

> First, the alleged victim must describe the kind of act or acts with sufficient specificity to allow the trier of fact to determine what offense, if any, has been committed. Second, the alleged victim must describe the number of acts committed with sufficient certainty to support each of the counts alleged by the prosecution. Third, the alleged victim must be able to describe the general time period in which the acts occurred.

Id. at 438.

In *State v. Edwards*, the defendant was convicted of two counts of first degree child molestation. *State v. Edwards*, 171 Wn. App. 379, 385-86, 294 P.3d 708 (2012). The trial court vacated the defendant's conviction on one of the two counts (count II) based on insufficient evidence of juror unanimity. *Id*. at 386. The defendant appealed, and the State cross-appealed, arguing the trial court erred in vacating count II because of insufficient evidence of separate and distinct acts. *Id*. at 400-403.

The court held "the trial court did not err in vacating the count II conviction for insufficient evidence of separate and distinct acts of first degree child molestation." *Id*. at 401. Applying the three-pronged test from *Hayes*, the court reasoned "[t]he evidence does not clearly delineate between specific and distinct incidents of sexual abuse during the charging period." *Id*. at 403; *see also Hayes*, 81 Wn. App. at 438. The court reached this conclusion based on the following facts:

> The trial court found that "the testimony of the victim was that this occurred 10 to 15 times under the same circumstances in the exact same way. There was nothing differentiating any of those 10 to 15 circumstances."
> . . . .
> [The alleged victim] testified that the first time she remembered [the defendant] touching her was when she was about five years old but she could have been six. There was no evidence defining the time period in which any other act occurred. [The alleged victim] testified to the specifics of the "first time" but generally stated that [the defendant] touched her "front private" 10 to 15 times.

Id. at 402-03.

In *State v. Jensen*, the defendant was convicted of three counts of first degree child molestation and one count of indecent exposure. *State v. Jensen*, 125 Wn. App. 319, 323, 104 P.3d 717 (2005). On appeal, the court reversed and dismissed one of the counts of first degree child molestation for insufficient evidence. *Id*. at 325-28.

The charging period alleged for the three counts of first degree child molestation was "on or about August 1, 2001 through February 19, 2002." *Id*. at 326. The alleged victim testified to an instance of indecent exposure involving a mirror and two incidents where the defendant touched her between the legs and on her breast during the summer of 2001. *Id*. at 323, 326-27. The alleged victim testified the defendant touched her private area "a few times." *Id*. at 327. She also testified the defendant entered her room at night on two other occasions, though it was not clear what, if any, sexual contact took place during those incidents. *Id*. at 328. Applying the three-prong analysis from *Hayes*, the court found the victim's testimony did

not describe a third act of molestation with sufficient specificity. *Id*.; *see also Hayes*, 81 Wn. App. at 438. The court reversed the third count of first degree child molestation. *Id*. at 327-28.

Here, there was insufficient evidence presented at trial that Mr. Rowan committed two specific and distinct acts of first degree rape of a child during the charging period.

The generic testimony of S.R. fails the second and third prongs of the *Hayes* test, which require S.R. to "(2) describe the number of acts committed with specific certainty to support each count the prosecution alleged; and (3) be able to describe the general time period in which the acts occurred." *See Edwards*, 171 Wn. App. at 402; *see also* Hayes, 81 Wn. App. at 438.

S.R. testified to two types of sexual intercourse, that Mr. Rowan would make her suck on his penis and that he put his penis in her vagina. (RP 352); *see* RCW 9A.44.010(14) (defining sexual intercourse); *see also* CP 222; RP 463. S.R.

said this started "[e]ver since I could remember. I was two years old when I first remembered." (RP 352, 360). She testified "it would happen every day; then it started happened once a week or two." (RP 353). S.R. testified it happened for eight years. (RP 360).

S.R. testified she had "sexual acts" with the Mr. Rowan in October of 2020. (RP 355). She testified there was a day in October were it happened "in the morning and then it sort of happened like when the sun was going down." (RP 355). S.R. did not remember the nature of the sexual acts that occurred on this day, whether it was oral sex or vaginal sex. (RP 356).

S.R. later testified she told Ms. Tremblay that around Halloween in 2020, that Mr. Rowan "made me suck his dick" while sitting on the toilet in his trailer. (RP 379-380).

Despite this testimony of one act of sexual intercourse during the charging period, the State presented only general testimony by S.R. of *more than one act* of sexual intercourse within the alleged time frame. (RP 352-356, 360). Other than

the one specific act that S.R. testified occurred around Halloween in 2020, her remaining testimony was non-specific regarding the number of acts and alleged times it occurred. (RP 352-356, 360). S.R. generally testified sexual intercourse took place for eight years, without further specifics. (RP 352-353, 360); *cf. State v. Yallup*, 3 Wn. App. 2d 546, 552-56, 416 P.3d 1250 (2018) (upholding convictions for two counts of first degree rape of a child, finding the *Hayes* factors were met, where the victim testified acts of sexual intercourse occurred more than 10 times, and provided specific testimony about location and age).

Although S.R. testified there was day in October 2020 where "sexual acts" occurred more than once, she did not testify to the nature of all sexual acts that occurred on this day; she did not testify to two occurrences of sexual intercourse. (CP 222; RP 355-356, 463); *see also* RCW 9A.44.010(14) (defining sexual intercourse).

The testimony of S.R. was not specific enough to sustain separately each of the counts charged. *See Hayes*, 81 Wn. App. at 430-31. Mr. Rowan's conviction for first degree rape of a child (Count II) should be reversed because the evidence did not prove distinct and separate criminal acts. *See Edwards*, 171 Wn. App. at 401-03; *Jensen*, 125 Wn. App. at 325-28.

When the evidence presented at trial is viewed in the light most favorable to the State, a rational trier of fact could not find, beyond a reasonable doubt, that Mr. Rowan committed two specific and distinct acts of first degree rape of a child during the charging period. *See Salinas*, 119 Wn.2d at 201 (citing *Green*, 94 Wn.2d at 220-22). Mr. Rowan's conviction for first degree rape of a child (Count II) should be reversed and the charge dismissed with prejudice. *See Smith*, 155 Wn.2d at 505.

Issue 2: Whether the trial court commented on the evidence, in violation of the state constitution, when it instructed the jury over defense objection that it is not necessary that the testimony of the alleged victim be corroborated (Instruction No. 9).

The trial court commented on the evidence, in violation of Article 4, section 16 of the Washington Constitution, when it gave Instruction No. 9, instructing the jury that it shall not be necessary that the testimony of the alleged victim be corroborated. Because of this error, Mr. Rowan's convictions should be reversed.

Article 4, section 16 of the Washington Constitution states that "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Wash. Const. art. 4, § 16. This provision prohibits judges from making any statement that amounts to a "comment on the evidence." *State v. Jacobsen*, 78 Wn.2d 491, 495, 477 P.2d 1 (1970).

Further, the Washington Constitution prohibits a judge from giving instructions that single out specific parts of the

prosecution's case or emphasize specific evidence. *State v. Lewis*, 6 Wn. App. 38, 41-42, 492 P.2d 1062 (1972). The provision also prohibits judicial officers from conveying their personal attitudes towards the merits of the case or instructing a jury that matters of fact have been established as a matter of law. *State v. Jackman*, 156 Wn.2d 736, 743-44, 132 P.3d 136 (2006).

"In determining whether a trial judge's conduct or remarks amount to a comment on the evidence, reviewing courts evaluate the facts and circumstances of the case." *State v. Sivins*, 138 Wn. App. 52, 58, 155 P.3d 982 (2007) (citing *Jacobsen*, 78 Wn.2d at 495). "Once it has been established that a trial judge's remarks constitute a comment on the evidence, the reviewing court presumes they were prejudicial." *Id*. at 58-59 (citing *Jackman*, 156 Wn.2d at 743). "[T]he burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have

resulted." *State v. Levy*, 156 Wn.2d 709, 723, 132 P.3d 1076 (2006).

Here, over Mr. Rowan's objection, in Instruction No. 9, the trial court instructed the jury:

> In order to convict a person of rape of a child in the first degree, as defined in these instructions, it shall not be necessary that the testimony of the alleged victim be corroborated.

(CP 218; RP 441-443, 446-449, 461).

RCW 9A.44.020(1) provides that "[i]n order to convict a person of any crime defined in this chapter it shall not be necessary that the testimony of the alleged victim be corroborated." RCW 9A.44.020(1). In sex offenses cases, trial courts have given what is referred to as a "noncorroboration jury instruction." *See, e.g.*, *State v. Chenoweth*, 188 Wn. App. 521, 535-38, 354 P.3d 13 (2015).

The Washington Supreme Court addressed the non-corroboration jury instruction in *State v. Clayton*. *See State v. Clayton*, 32 Wn.2d 571, 202 P.2d 922 (1949). In *Clayton*, the

State charged the defendant with "an unlawful and felonious attempt to carnally know and abuse a female child, not his wife, of the age of fifteen years." *Id*. at 572. At trial, the trial court instructed the jury as follows:

> You are instructed that it is the law of this State that a person charged with attempting to carnally know a female child under the age of eighteen years may be convicted upon the uncorroborated testimony of the prosecutrix alone. That is, the question is distinctly one for the jury, and if you believe from the evidence and are satisfied beyond a reasonable doubt as to the guilt of the defendant, you will return a verdict of guilty, notwithstanding that there be no direct corroboration of her testimony as to the commission of the act.

Id.

The defendant argued on appeal that the instruction was an impermissible comment on the evidence. *Id*. at 572-73. The Court gave a cursory examination of the instruction, agreed with the defendant's concession that it was a correct recitation of the law, and upheld the instruction. *Id*. at 573-78.

The Washington Supreme Court has not addressed the instruction again since *Clayton* in 1949.[3] Notably, however, the Washington Pattern Criminal Jury Instructions (WPIC) do not include a non-corroboration instruction. *See, e.g., State v. Zimmerman*, 130 Wn. App. 170, 182, 121 P.3d 1216 (2005), *review granted, cause remanded*, 157 Wn.2d 1012 (2006). Importantly, the Washington Supreme Court Committee on Jury Instructions has explicitly recommended against such instruction:

> The matter of corroboration is really a matter of sufficiency of the evidence. An instruction on this

[3] The Washington Supreme Court granted review of the noncorrobation jury instruction in March 2020, but it terminated review in that case without deciding the issue, following the death of the Appellant. *See State v. Svaleson*, 195 Wn.2d 1008 (2020) (granting review); *see also State v. Garza*, 53194-1-II, 2021 WL 351991, at *7 (Wash. Ct. App. Feb. 2, 2021) (outlining what occurred with the *Svaleson* case); GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals as nonbinding authority). In addition, as addressed below, a petition for review asking the Washington Supreme Court to address the noncorroboration jury instruction was filed on December 13, 2022, in *State v. Carey*, No. 84234-0, 2022 WL 16915941 (Wash. Ct. App. Nov. 14, 2022). The petition for review is currently scheduled to be considered by the Washington Supreme Court on April 4, 2023.

> subject would be a negative instruction. The proving or disproving of such a charge is a factual problem, not a legal problem. *Whether a jury can or should accept the uncorroborated testimony of the prosecuting witness or the uncorroborated testimony of the defendant is best left to argument of counsel*.

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 45.02 cmt. (5th Ed. 2021) (emphasis added).

The Court of Appeals has also expressed misgivings about the constitutionality of the non-corroboration jury instruction. *See Zimmerman*, 130 Wn. App. at 182-183; *Chenoweth*, 188 Wn.2d at 538 (J. Becker, concurring); *State v. Amador*, No. 54594-2-II, 2022 WL 842539, at *7-9 (Wash. Ct. App. March 22, 2022); *State v. Steenhard*, No. 35578-1-III, 2019 WL3302416, at *7-9 (Wash. Ct. App. July 23, 2019); GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals as nonbinding authority).

Mr. Rowan recognizes that, at present, this issue is controlled by *Clayton*. *See Clayton*, 32 Wn.2d 573-78. However, a petition for review asking the Washington Supreme

Court to address the non-corroboration jury instruction was filed on December 13, 2022, in *State v. Carey*, No. 84234-0, 2022 WL 16915941 (Wash. Ct. App. Nov. 14, 2022). *See* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals as nonbinding authority). The petition for review is currently scheduled to be considered by the Washington Supreme Court on April 4, 2023. Therefore, Mr. Rowan raises the issue here to preserve his challenge to the non-corroboration jury instruction. Mr. Rowan asserts the trial court commented on the evidence, in violation of Article 4, section 16 of the Washington Constitution, when it gave Instruction No. 9, and as a result, his convictions should be reversed.

Should this Court find the trial court erred in giving the non-corroboration instruction, the next question is prejudice. When a judge comments on the evidence in a jury instruction, prejudice is presumed. *Jackman*, 156 Wn.2d at 743. The State

bears the burden of showing there was no prejudice. *Levy*, 156 Wn.2d at 723.

Here, the State cannot show there was no prejudice as a result of the trial court giving a non-corroboration jury instruction. (CP 218; RP 461). S.R.'s statements, many of which were inconsistent, were the only evidence supporting the charges. (RP 339, 343-389, 410-417, 429). There was no other physical evidence or eyewitness testimony corroborating her allegations. (RP 328-436). Dr. Henson acknowledged her findings were that S.R.'s hymen was normal. (RP 430). She opined that S.R. was sexually assaulted, but her opinion was based upon S.R.'s statements to her during the exam. (RP 429). Dr. Henson acknowledged she could to rule in or rule out sexual assault by just looking at S.R.'s physical examination. (RP 429).

The State cannot demonstrate that there was no prejudice as a result of the trial court instructing the jury that S.R.'s testimony did not need to be corroborated. If the non-

corroboration jury instruction is ultimately be held invalid, Mr. Rowan's convictions should be reversed.

Issue 3: Whether the judgment and sentence contains three errors that should be corrected.

"A scrivener's error is a clerical mistake that, when amended, would correctly convey the trial court's intention based on other evidence." *State v. Wemhoff*, 519 P.3d 297, 299 (Wash. Ct. App. 2022). When a judgment and sentence contains a scrivener's error, the remedy is remand to the trial court to correct the error. *See, e.g., State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.2d 1280 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, erroneously stating the defendant stipulated to an exceptional sentence); *State v. Healy*, 157 Wn. App. 502, 516, 237 P.3d 360 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, incorrectly stating the terms of confinement imposed).

The judgment and sentence contains three errors that should be corrected.

First, the judgment and sentence lists an incorrect date of crime for Count II. (CP 282). The date of crime is listed as "10/1/2020 through 12/7/2020." However, the date of crime for Count II was October 24, 2020. (CP 149, 221, 227; RP 462-463).

Second, the judgment and sentence does not indicate that the terms of confinement run concurrently. (CP 287). The judgment and sentence lists the term of confinement as a minimum term of 160 months, and a maximum term of the statutory maximum, on both Count I and Count II. (CP 287). In addition, the warrant of commitment lists the term of confinement as 160 months on each count, and does not indicate that the terms of confinement run concurrently. (CP 301).

"Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed

under the exceptional sentence provisions of RCW 9.94A.535." RCW 9.94A.589(1)(a). In addition, for a sentence imposed under RCW 9.94A.507, "[e]xcept as provided in (c)(ii) of this subsection, the minimum term shall be either within the standard sentence range for the offense, or outside the standard sentence range pursuant to RCW 9.94A.535, if the offender is otherwise eligible for such a sentence." RCW 9.94A.507(3)(c)(i). A trial court can impose consecutive sentences for sex offenses sentenced under RCW 9.94A.507, as an exceptional sentence. *See, e.g.*, *State v. Butterfield*, No. 54279-0-II, 2021 WL 2444937, at *3-4 (Wash. Ct. App. June 15, 2021 (upholding exceptional sentences imposed on eight sex offenses); *see also* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals as nonbinding authority).

Here, the trial court imposed a term of confinement within the standard range, and did not impose an exceptional sentence. (CP 285, 287; RP 516-517, 519). Therefore, both the

judgment and sentence and warrant of commitment should be corrected to indicate the sentences on Count I and Count II run concurrently. *See* 9.94A.507(3)(c)(i); RCW 9.94A.589(1)(a).

Finally, the trial court imposed $600 in legal financial obligations, but the judgment and sentence does not list that total. (CP 289-290; RP 517). The trial court must designate a total. *See* RCW 9.94A.760(1) (stating "[t]he court must on either the judgment and sentence or on a subsequent order to pay, designate the total amount of a legal financial obligation and segregate this amount among the separate assessments made for restitution, costs, fines, and other assessments required by law.").

Therefore, this court should remand this case to: correct the date of crime for Count II to October 24, 2020; indicate that the sentences on Count I and Count II run concurrently; and list a $600 total for the legal financial obligations. *See*, *e.g.*, *Naillieux*, 158 Wn. App. at 646; *Healy*, 157 Wn. App. 502, 516, 237 P.3d 360 (2010).

Issue 4: Whether the trial erred in imposing certain conditions of community custody.

Mr. Rowan challenges the imposition of five conditions of community custody imposed by the trial court. Each of these five conditions is addressed below. Each of these community custody conditions should be stricken, or modified, as requested.

Mr. Rowan challenges these community custody conditions for the first time on appeal. (RP 519). Sentencing errors may be raised for the first time on appeal. *See State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (stating that "'[i]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.'") (*quoting State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)).

"Conditions of community custody may be challenged for vagueness for the first time on appeal, and where the challenge involves a legal question that can be resolved on the

existing record, the challenge may be addressed before any attempted enforcement of the condition." *State v. Padilla*, 190 Wn.2d 672, 677, 416 P.3d 712 (2018) (citing *Bahl*, 164 Wn.2d at 744).

A trial court may impose a sentence only if it is authorized by statute. *In re Postsentence Review of Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). Whether the trial court has statutory authority to impose a community custody condition is reviewed de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

"As part of any term of community custody, the court may order an offender to . . . [c]omply with any crime-related prohibitions." RCW 9.94A.703(3)(f). The Court of Appeals "has struck crime-related community custody conditions when there is 'no evidence' in the record that the circumstances of the crime related to the community custody condition." *State v. Irwin*, 191 Wn. App. 644, 656–57, 364 P.3d 830 (2015).

Whether a community custody condition is crime-related is reviewed for an abuse of discretion. *State v. Autrey*, 136 Wn. App. 460, 466, 150 P.3d 580 (2006) (citing *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993)). "A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons[.]" *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009). "It is manifestly unreasonable to impose an unconstitutional condition of community custody." *State v. Johnson*, 197 Wn.2d 740, 744, 487 P.3d 893 (2021).

Where the trial court lacked authority to impose a community custody condition, the appropriate remedy is to remand to strike the condition. *See, e.g., State v. O'Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

The five conditions of community custody imposed by the trial court and challenged here by Mr. Rowan are each addressed below.

[1] Do not possess or peruse pornographic materials unless given prior approval by your sexual deviancy therapist and/or supervising CCO. Pornographic materials are to be defined by the deviancy therapist and/or CCO.

The trial court imposed the following community custody condition: "[d]o not possess or peruse pornographic materials unless given prior approval by your sexual deviancy therapist and/or supervising CCO. Pornographic materials are to be defined by the deviancy therapist and/or CCO." (CP 298). This condition should be stricken, because it is unconstitutionally vague and not crime-related.

First, "[a] legal prohibition, such as a community custody condition, is unconstitutionally vague if (1) it does not sufficiently define the proscribed conduct so an ordinary person can understand the prohibition or (2) it does not provide sufficiently ascertainable standards to protect against arbitrary enforcement." *Padilla*, 190 Wn.2d at 677.

The condition here is unconstitutionally vague, because "it does not sufficiently define the proscribed conduct so an

ordinary person can understand the prohibition[,]" and "it does not provide sufficiently ascertainable standards to protect against arbitrary enforcement." *Id.* Similar conditions have been ruled to be unconstitutional vague by our Supreme Court. *See Id.* at 678-79; *see also Bahl*, 164 Wn.2d at 758.

Second, as acknowledged above, "[a]s part of any term of community custody, the court may order an offender to . . . [c]omply with any crime-related prohibitions." RCW 9.94A.703(3)(f). There must be a connection in the record between the offense conduct and the type of materials identified in the challenged community custody condition. *See State v. Johnson*, 4 Wn. App. 2d 352, 359, 421 P.3d 969 (2018) (citing *Padilla*, 190 Wn.2d at 684). Whether this condition is crime-related can be raised for the first time on appeal. *Id*. at 359-60; *see also Padilla*, 190 Wn.2d at 682-684.

Here, there is no evidence in the record that possessing or perusing pornography was related to Mr. Rowan's offenses. The crimes did not involve pornography. Therefore, the trial

court erred by imposing this community custody condition, because it was not crime-related.

Accordingly, this court should strike the community custody condition prohibiting Mr. Rowan from possessing or perusing pornographic materials without prior approval by his sexual deviancy therapist and/or supervising CCO, because it is unconstitutionally vague and not crime-related.

[2] Avoid places where minor children are known to congregate without the specific permission of the supervising CCO and sexual deviancy therapist, and in the company of an approved adult sponsor.

The trial court imposed the following community custody condition: "[a]void places where minor children are known to congregate without the specific permission of the supervising CCO and sexual deviancy therapist, and in the company of an approved adult sponsor." (CP 299). This condition should be stricken, because it is unconstitutionally vague.

In *State v. Irwin*, the court found the following community custody condition unconstitutionally vague and

struck the condition: "[d]o not frequent areas where minor children are known to congregate, as defined by the supervising CCO." *State v. Irwin*, 191 Wn. App. 644, 652-55, 364 P.3d 830 (2015). The court reasoned that "[w]ithout some clarifying language or an illustrative list of prohibited locations . . . the condition does not give ordinary people sufficient notice to "understand what conduct is proscribed." *Id*. at 655. The court found that "[i]f ordinary people cannot understand what conduct is proscribed, the statute is unconstitutionally vague." *Id*. (citing *Bahl*, 164 Wn.2d at 753).

Accordingly, this court should strike the community custody condition prohibiting Mr. Rowan from avoiding places where minor children are known to congregate, because it is unconstitutionally vague. *See Irwin*, 191 Wn. App. at 652-55; *cf. State v. Wallmuller*, 194 Wn.2d 234, 237, 245, 449 P.3d 619 (2019) (upholding a condition that the defendant "shall not loiter nor frequent places where children congregate such as parks, video arcades, campgrounds, and shopping malls"

against a vagueness challenge, reasoning that the condition was sufficiently specific when modified by a non-exclusive list of places illustrating its scope).

[3] Inform the supervising CCO of any romantic relationships to verify there are no victim-age children involved, and that the adult is aware of your conviction history and conditions of supervision.

The trial court imposed the following community custody condition: "[i]nform the supervising CCO of any romantic relationships to verify there are no victim-age children involved, and that the adult is aware of your conviction history and conditions of supervision." (CP 299).

This condition is unconstitutionally vague. *See Padilla*, 190 Wn.2d at 677 (explaining when a community custody condition is unconstitutionally vague).

In *State v. Peters*, this Court held that the term "romantic relationships" in a community custody condition challenged for the first time on appeal, is unconstitutionally vague. *State v. Peters*, 10 Wn. App. 2d 574, 591, 455 P.3d 141 (2019). The

vagueness problem was solved by substituting the term "dating relationships." *Id*.

The term "romantic relationship" is unconstitutionally vague, and the language should be stricken from the challenged community custody condition. *See Peters*, 10 Wn. App. at 591.

[4] Do not purchase, possess, control or use any firearm or deadly/intimidating weapon and submit to reasonable searches of your person, residence, property and vehicle by the CCO to monitor compliance.

The trial court imposed the following community custody condition: "[d]o not purchase, possess, control or use any firearm or *deadly/intimidating weapon* and submit to reasonable searches of your person, residence, property and vehicle by the CCO to monitor compliance." (CP 299) (emphasis added). The trial court erred in imposing the portion of this condition prohibiting purchase, possession, control, or use of any "deadly/intimidating weapon." (CP 299).

"As a sentence condition and requirement, offenders under the supervision of the department of corrections pursuant

to chapter 9.94A RCW shall not own, use, or possess firearms or ammunition." RCW 9.41.045. However, this statute does not prohibit ownership, use, or possession of a "deadly/intimidating weapon." RCW 9.41.045; *see also State v. Acevedo*, 159 Wn. App. 221, 231, 233, 248 P.3d 526 (2010) (vacating a community custody condition prohibiting the defendant from purchasing, owning, possessing, or controlling any deadly weapon, on the basis that the trial court exceeded its authority, because no statute prohibited an offender from possessing all deadly weapons).

Because there is no legal authority for prohibiting Mr. Rowan from purchasing, possessing, controlling, or using any "deadly/intimidating weapon[,]" that portion of the challenged condition should be stricken.

[5] Submit to polygraph and plethysmograph testing upon the request of your therapist and/or supervising CCO, at your own risk.

The trial court imposed the following community custody condition: "[s]ubmit to polygraph and plethysmograph testing

upon the request of your therapist and/or supervising CCO, at your own risk." (CP 299).

With respect to polygraph testing, our Supreme Court has expressly held that polygraph testing is a valid community custody monitoring condition. *See State v. Riles*, 135 Wn.2d 326, 342, 957 P.2d 655 (1998), *abrogated on other grounds by State v. Valencia*, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010). "Trial courts have authority to require polygraph testing . . . to monitor compliance with other conditions of community placement." *Id*. at 351-52. Therefore, a community custody condition authorizing polygraph testing should contain language setting forth this "monitoring compliance" limitation. *See, e.g., State v. Combs*, 102 Wn. App. 949, 953, 10 P.3d 1101 (2000).

The community custody condition requiring Mr. Rowan to "[s]ubmit to polygraph . . . testing upon the request of your therapist and/or supervising CCO" is overbroad because it gives the therapist and supervising CCO unfettered discretion to

include any subject in the polygraph; it does not limit the polygraph testing to monitor compliance with community custody. (CP 299). Thus, this condition should be modified to specify a more narrow application, limiting the polygraph testing to monitor compliance with other community custody conditions.

With respect to plethysmograph testing, it is permissible for the trial court to order, if crime-related treatment is also ordered. *See Riles*, 135 Wn.2d at 345. "The testing can properly be ordered incident to crime-related treatment by a qualified provider." *State v. Land*, 172 Wn. App. 593, 605, 295 P.3d 782 (2013). However, "it may not be viewed as a routine monitoring tool subject only to the discretion of a community corrections officer." *Land*, 172 Wn.2d at 605.

Here, the challenged community custody condition requires Mr. Rowan to submit to plethysmograph testing at the request of his therapist *or* his supervising CCO. (CP 299). The portion of the condition allowing plethysmograph testing at the

request of his supervising CCO should be stricken. *See Land*, 172 Wn.2d at 605 (holding that the reference to plethysmograph examinations in the following condition must be stricken: "[p]articipate in urinalysis, breathalyzer, polygraph and plethysmograph examinations as directed by your Community Corrections Officer."); *see also State v. Smith*, No. 55665-1-II, 2022 WL 2132755, at *10-11 (Wash. Ct. App. June 14, 2022) (finding the trial court erred in imposing a condition allowing plethysmograph testing at a frequency determined by the defendant's "CCO, or DOC Policy" and "[t]he community custody condition should be amended to limit the CCO and DOC employees' authority to require plethysmograph testing for purposes of sexual treatment only."); GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals as nonbinding authority).

F. CONCLUSION

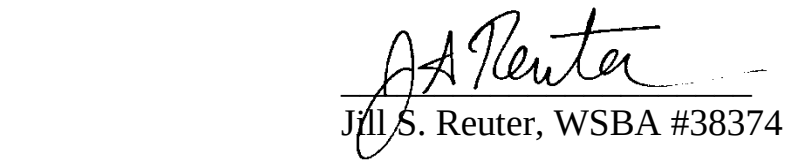
The evidence was insufficient to find Mr. Rowan guilty of first degree rape of a child (Count II). The conviction should be reversed and the charge dismissed with prejudice.

In addition, the trial court impermissibly commented on the evidence, when it instructed the jury that it shall not be necessary that the testimony of the alleged victim be corroborated. Mr. Rowan's convictions should be reversed.

At a minimum, this Court should remand this case to correct the errors in the judgment and sentence and the five challenged community custody conditions outlined above.

I certify this document contains 8,608 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 12th day of January, 2023.



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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Plaintiff/Respondent vs. WILLIAM B. ROWAN Defendant/Appellant	) COA No. 39044-6-III) Klickitat Co. No.) 20-1-00070-20)) PROOF OF SERVICE)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on January 12, 2023, having obtained prior permission, I served the attached Appellant's opening brief on the Respondent at paappeals@klickitatcounty.org using the Washington State Appellate Courts' Portal.

Dated this 12th day of January, 2023.

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