

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

|                      |   |                                   |
|----------------------|---|-----------------------------------|
| STATE OF WASHINGTON, | ) | No. 64422-0-I                     |
|                      | ) |                                   |
| Respondent,          | ) | (Consolidated with No. 64423-8-I) |
| v.                   | ) |                                   |
|                      | ) | PUBLISHED IN PART OPINION         |
| MOHAMMED J.L. KONE,  | ) |                                   |
|                      | ) |                                   |
| Appellant.           | ) | FILED: December 12, 2011          |

---

Schindler, J. — A jury convicted Mohammed J.L. Kone of rape in the second degree of Anita Coppola and attempted rape in the second degree and indecent liberties of Arlene Barg. Kone contends he is entitled to dismissal of the conviction of attempted rape in the second degree and indecent liberties because the trial court erred in denying his motion to dismiss under CrR 8.3(b). Kone asserts he is entitled to reversal of the conviction of rape in the second degree because the trial court erred in admitting evidence of prior consistent statements. Kone also asserts the court violated double jeopardy by failing to vacate the indecent liberties conviction, and erred in imposing a number of community custody conditions. We affirm the conviction of rape in the second degree of Coppola and attempted rape in the second degree of Barg but remand to vacate the indecent liberties conviction and strike the community custody

condition that prohibits access to the Internet and requires payment of counseling fees.

## FACTS

### Rape in the Second Degree of Anita Coppola

On June 26, 2007, Anita Coppola met Mohammed Kone while waiting at a bus stop near the QFC grocery store in Des Moines. Kone asked Coppola if she wanted to “go have a couple of beers at the park” near his house. Coppola agreed. Kone and Coppola took the bus to get to West Fenwick Park. Before going to the park, Kone purchased beer and wine. After drinking some beer and wine, Kone and Coppola walked to his house. Kone lived downstairs and his brother lived upstairs.

At the house, Kone became sexually “aggressive” and told Coppola he wanted to have sex with her. Kone grabbed Coppola’s breasts and her vaginal area, and told her to take her pants off. When Coppola said “that’s not going to happen,” Kone got angry. Kone removed Coppola’s pants and repeatedly hit her on the buttocks with a paddle. Coppola was “screaming telling him to stop.” After forcing Coppola to get on her knees, Kone digitally penetrated her anus and then her vagina.<sup>1</sup> Coppola went to the bathroom and locked the door, and tried to escape out the bathroom window. But Kone was standing outside. After Kone pushed her back inside, Coppola ran to the front door to escape, but Kone stopped her. Kone then hit Coppola again with the paddle and called her a “bad girl.” Shortly thereafter, Coppola was able to climb out the bathroom window and run to a neighbor’s house. Kone chased after her, yelling at her to stop.

---

<sup>1</sup> Coppola could not remember if Kone penetrated her with his penis, but she remembered seeing a condom wrapper.

Wearing only a tee shirt and underpants, Coppola pounded on the neighbor's door, yelling for help and saying "don't let him in, don't let him in." The neighbor, Ngoc Thach, let Coppola in and called 911. Coppola told Thach that Kone "picked her up, and they were playing around, or having fun at his house, and he started . . . hurting her, and that's when she was scared and ran." Another neighbor, Kathleen France, also called 911 after hearing a woman screaming "help, help, help, rape, rape, rape," and an angry male voice yelling.

Officer Kevin Bateman arrived a couple of minutes after the 911 call, at approximately 2:45 a.m. Officer Bateman said Coppola was "crying so hysterically" that he "couldn't make out anything she was saying." Eventually, Coppola said that "Mo had beat her with what she described as a paddle and prevented her from trying to escape." Coppola told Officer Bateman, "I was like a prisoner in his dungeon."

Officer Bateman saw the open window to the bathroom and a window screen lying on the ground at Kone's house. Kone did not respond to the officers loudly knocking on his door. However, Kone's brother responded, and agreed to get a key and let them in. When the police tried to open the door to Kone's apartment, the deadbolt was in place and the police left.

Officer Bateman took photographs of Coppola's injuries and she agreed to give a taped-recorded statement at the police station. The taped interview lasted for approximately 30 minutes and ended because Coppola was too upset to continue. During the interview, Coppola told Officer Bateman that while at the park, Kone made her touch his penis, hit her on the buttocks, removed her pants, digitally raped her, and

then forced her to go to his house.

Later, Coppola told medical treatment providers at the emergency room that she was vaginally and anally raped, and beaten with a paddle. Coppola had heavy bruising on her buttocks, lower back, and thighs that later turned purple and black. Forensic testing established the presence of sperm.

Later that day, Detective Kathy Holt met with Coppola. Coppola agreed to drive with Detective Holt to West Fenwick Park. When they arrived at the park, Kone was standing in the parking lot. Coppola told Detective Holt, "That's him," and "almost jump[ed] out of her seat and cower[ed] down in the car." Detective Holt called for backup before contacting Kone.

After reading Kone his Miranda<sup>2</sup> rights, Kone agreed to talk with Detective Holt. Kone told Detective Holt that he met Coppola at the bus stop. He said that Coppola had some beer and told him she was having a bad day. He said that after talking to her, "they decided to drink some beer together" at his house. Kone said they took the bus to his house, but went to the park because his brother was home. He said that they had sex at the park. Kone said that while at the park, "she started becoming sexual towards him, and that she wanted to have sex with him." Kone told Detective Holt that Coppola wanted to have vaginal and anal sex.

And I asked, what type of sex basically they were talking about? And I said, Did you have vaginal sex?

And he said, Yes.

And I asked if they had anal sex?

And he said, Yes.

He told me that she asked him to do this, and so they stayed in the park for a while.

Q By asking him to do this, was he referring to the vaginal sex, anal

---

<sup>2</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

- sex, or both in general?
- A I took that to mean both.
- Q Did he indicate whether or not they were drinking at the apartment?
- A Yes.
- Q How much did he say and what did he say they were drinking?
- A He said he had had two beers, and they drank the Cisco, and he said that she had had more because she told him she had been drinking all day.
- Q Where did they go after the park, according to the Defendant?
- A After that, then they did walk back to his house.

Kone denied “putting his fingers in [Coppola’s] vaginal area” but admitted putting his fingers “in her rectal area” because “he said she asked him to feel her rectal area.”

Kone told Detective Holt that when they were at his house, Coppola left by going out the bathroom window but he did not know why. Kone said that after Coppola left, he went to bed.

When Detective Holt asked Kone about whether he used a paddle, he said that Coppola asked him if he had a paddle because she wanted him to hurt her.

And he said, Okay. He said that at the park she had asked him to hurt her and asked him if he had a paddle. He said he might have one at home.

And I asked him why he didn’t tell me that previously?

And he said that in his opinion that wasn’t considered the sex with her that he had been talking about.

- Q Did he describe the paddle that he found?
- Did you in fact find a paddle?
- A Yes, I did.
- Q Well, I am asking, did he find a paddle?
- A Yes.
- Q Or did he?
- A He did.
- Q Did he confirm that he did in fact use a paddle with her?
- A Yes.
- Q And did he describe the paddle that he used on her?
- A Yes.

Two days later, Detective Holt and a prosecutor conducted a joint interview with

Coppola. During the interview, Coppola said that contrary to her statements to Officer Bateman, she willingly went with Kone to his house and the sexual contact she described took place at Kone's house, and not at the park. The State did not file charges against Kone until after filing charges of attempted rape of Arlene Barg in 2009.

#### Attempted Rape of Arlene Barg

Arlene Barg has been homeless off and on since 1978. Barg stays primarily in San Francisco, California but was in Washington from January to April 2009.

In the early morning of February 21, 2009, Barg was drinking with some of friends in an alley in Federal Way. At some point, Kone joined the group, and Barg offered him some beer. Kone invited Barg to his house to "smoke some pot and like stay the night, take a shower." Kone's friend agreed to drive them to Kone's house. On the way, Barg asked the driver for a cigarette. The friend dropped off Kone and Barg in the parking lot of West Fenwick Park.

Kone was angry because Barg tried to take his friend's pack of cigarettes, and called her a "bitch." Kone and Barg stopped at a table in the park. Kone was still angry and he continued to call Barg a "bitch." Barg told Kone, "I can't deal with this. Have a good night. It was nice to meet you . . . Thanks anyways, but no thanks." As Barg started walking away, Barg said that Kone grabbed her and "started hitting me in my butt with his . . . open hand" and "calling me a bitch." Kone told Barg to bend over because he wanted to have sex with her, saying "fuck you, bitch and bend over, . . . I want to have sex with you." Kone then grabbed Barg's breasts and tried to pull her

pants down. Barg broke away and tried to run to the parking lot but was unable to run very far because of an injured leg.

Barg said that she decided to “act crazy” so Kone would not rape her, and began pulling her hair out and hitting herself. Barg then tried to roll down a hill away from him. But before she rolled down the hill, Kone “started kicking me,” hitting her in the mouth. After Barg reached the bottom of the hill, she gave Kone some crumpled dollar bills and begged him to leave her alone. Barg then started yelling and tried to flag down cars in the road.

Christina Barton lives across the street from West Fenwick Park. Barton was awakened by a woman screaming in the park. Barton said that after she heard a woman screaming “help, help, help, and just sort of that gut wrenching horror, I need help, something that made my stomach drop,” she called 911. Barton watched as the police arrived. Barton said that the woman told the police, “I have been raped, help me,” and saw her point to a man walking away saying, “Stop him, stop him. She kept saying, That’s him.”

Officer Thomas Clark said that when he and Officer Joe Johnson were close to the intersection near the park, he “saw a female standing in the roadway yelling . . . . Her hair was all over the place. She had blood around her mouth, and she was hysterical, screaming.” Officer Johnson stayed with Barg while Officer Clark headed down the street toward Kone. Officer Johnson tried to get Barg to calm down. Officer Johnson said that “with her injuries that she had,” it appeared Barg was suffering “at least an early onset of a form of shock.” Officer Johnson said Barg was extremely

upset and described her injuries as follows:

- A . . . . She had fresh blood around her mouth and cuts under her right eyes [sic]. Her clothes were dirty and disheveled, and she was in a very erratic state, or upset state.
- Q How could you tell she was in an erratic or upset state?
- A Well, one, her condition, her facial area. She was definitely nursing a wound, holding her head, crying, repeating herself over and over again. It was very hard to get her to focus as in look me in the eye and focus so I could get what I needed out of her of what happened to her. It took a while just to calm her down.

When she calmed down, Barg told Officer Johnson that Kone came out of the woods, punched her in the face, and stole her money.

Officer Clark yelled at Kone to stop and chased after him. After catching up with Kone, Officer Clark noticed that he had grass stains and blood stains on his pants from the knees down. When Officer Clark asked about the stains, Kone said “that he had gotten those playing soccer in Federal Way earlier.” Kone told Officer Clark that he did not know Barg and did not assault her. After talking to Kone, Officer Clark found Barg’s backpack in the park north of the main parking lot and a large clump of Barg’s hair nearby.

The police took photos of Barg’s injuries. At the emergency room, the doctor noted contusions on Barg’s face, abrasions on her right buttock, a laceration on her face, and “hair ripped out.” Barg told the emergency room doctor that she was assaulted by a man who hit and kicked her while walking through the park.

Detective Tim Ford was assigned the case on February 23 and attempted to contact Barg. Detective Ford was not able to locate Barg until February 27. Detective Ford interviewed Barg. In the interview, Barg did not say that Kone “came running out



of the woods and that was the first time she met him.” Barg told Detective Ford that she met Kone in Federal Way at a convenience store.

### Procedural History

On February 25, 2009, the State charged Kone with robbery in the second degree of Barg, Cause Number 09-1-02489-4. Kone was arraigned on March 10, and a case scheduling hearing was scheduled for March 24. On March 20, the State notified the defense that it planned to amend the information to charge Kone with attempted rape. At the case scheduling hearing, the court set a trial date of May 7 with a time-to-trial expiration date of May 9, and scheduled the omnibus hearing for April 24.

On March 31, the State filed charges against Kone for rape in the second degree of Coppola, Cause Number 09-1-02912-8. Kone was arraigned on April 13, an omnibus hearing was set for May 29, and the trial was scheduled to begin on June 10.

At the April 24 omnibus hearing on the charges in the Barg case, the State moved to amend the information to charge Kone with attempted rape in the second degree instead of robbery in the second degree. Kone did not object. The State also filed a motion for joinder of the Barg case and the Coppola case for trial, and argued that the evidence was cross admissible under RCW 10.58 and ER 404(b). The court scheduled a hearing for May 1 on the State’s motion for joinder of the cases for trial. Following the April 24 omnibus hearing, Detective Ford and the prosecutor attempted to locate Barg to schedule a defense interview and obtain a DNA<sup>3</sup> sample.

At the May 1 hearing on the motion for joinder, the State moved to dismiss the charges against Kone for the attempted rape of Barg without prejudice. The prosecutor

---

<sup>3</sup> (Deoxyribonucleic acid.)

told the court that the efforts to contact Barg were unsuccessful but the State planned to refile the charges after locating her. Kone objected and argued the court should dismiss the case with prejudice based on governmental mismanagement. Kone claimed that the State's failure to locate Barg impacted his time-to-trial rights and prevented him from receiving effective assistance of counsel. The trial court granted the State's motion to dismiss the case without prejudice, but ruled that "the defense has the right to file a motion to dismiss with prejudice should there be a refiling."

After locating Barg, the State refiled charges against Kone on May 28, Cause Number 09-1-03352-4. The information alleged attempted rape in the second degree of Barg and, in the alternative, indecent liberties. The trial court granted the State's motion for joinder of the Barg and Coppola cases for trial. The defense filed a motion to dismiss both cases with prejudice under CrR 8.3(b). The defense argued that the State failed to make reasonable efforts to locate Barg and failed to respond to discovery requests in the Coppola case. The trial court denied the CrR 8.3(b) motion to dismiss.

Over the course of an eight-day trial, a number of witnesses testified, including police officers, the emergency room doctors, Detective Holt, Detective Ford, a forensic expert, Coppola, and Barg. The defense theory at trial was that neither Coppola nor Barg were credible and sex with Coppola was consensual.

Coppola testified that what she told Officer Bateman about what happened was true but "[t]he location was wrong." Coppola said she exaggerated what happened because she was mad at Kone and vindictive.

Q Do you recall telling Officer Bateman that he tried to pull down your

- pants at the park?
- A      If I said it, I probably exaggerated it because he really -- I wouldn't have gone to his house had he done something like that.
- Q      Why would you have exaggerated it?
- A      The night that it happened.
- Q      You were pretty mad at the defendant that night; is that fair to say?
- A      Yes, vindictive, we call it.
- Q      Why were you vindictive?
- A      I was very mad at him. He just, what he had done and --
- Q      And I don't mean to be jesting by this question. I want to make it very plain for the jury.
- Were you mad at him for anything other than putting his finger into you against your will, assaulting you as he did?
- A      No. The paddling and the pushing me back, not letting me get out.
- Q      Did he try to put his finger inside you at the park?
- A      No.
- Q      You actually wound up indicating that he put his fingers inside of you at the park to Officer Bateman; is that correct?
- A      Yes.
- Q      Is that correct?
- A      No, it's not. I believe I was confused at the time also because anything that happened happened at the house. It didn't happen at the park. It was a little, you know, like I said, just goofing around stuff.

Barg admitted that she lied to the police when she said that she was "just walking in the park" and the defendant came out of the woods, assaulted her, and took her money. Barg said she did not tell the truth about what happened because she thought the police would think she was a "drug addict" and would not believe her. The forensic evidence established the blood on Kone's pants was from Barg.

The jury convicted Kone of rape in the second degree of Coppola, and attempted rape in the second degree and indecent liberties of Barg. Kone appeals.

#### ANALYSIS

##### CrR 8.3(b) Motion to Dismiss

Kone argues the trial court erred in denying his CrR 8.3(b) motion to dismiss the

charges against him in the Barg case. Kone asserts the State's failure to locate Barg before the originally scheduled trial date of May 7 constituted governmental mismanagement and prejudiced his right to a speedy trial under CrR 3.3.

CrR 8.3(b) states:

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

The dismissal of charges under CrR 8.3(b) is an “ ‘extraordinary remedy.’ ” State v. Rohrich, 149 Wn.2d 647, 658, 71 P.3d 638 (2003) (quoting State v. Baker, 78 Wn.2d 327, 332, 474 P.2d 254 (1970)). A trial court may dismiss charges under CrR 8.3(b) if the defendant shows by a preponderance of the evidence (1) arbitrary action or governmental misconduct and (2) prejudice affecting the defendant's right to a fair trial. Rohrich, 149 Wn.2d at 654. Governmental misconduct need not be evil or dishonest. Simple mismanagement is sufficient. State v. Blackwell, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993). However, the defendant must show actual prejudice, not merely speculative prejudice affected his right to a fair trial. Rohrich, 149 Wn.2d at 657.

We review the trial court's decision to deny a motion to dismiss under CrR 8.3 for abuse of discretion, that is, whether the decision was manifestly unreasonable, based on untenable grounds, or made for untenable reasons. State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997); Blackwell, 120 Wn.2d at 830.

Below, Kone argued that because the State did not make reasonable efforts to locate Barg before the originally scheduled May 7 trial date, the court should grant his

CrR 8.3(b) motion to dismiss the charges. The trial court rejected Kone's argument. The ruling states, in pertinent part:

Ultimately, she didn't tell them where she was. And with respect to the California address, there's no evidence that that is, in fact, where she was, at least not from what the Court can glean from the record. Ms. Barg is a homeless person, and the Court concludes that it may have been possible for the State to contact her sooner, but there's really no concrete evidence that this is the case; and therefore, the Court concludes that under 8.3(b) there was no misconduct.

The record supports the trial court's decision.<sup>4</sup> When Barg contacted Detective Ford on March 19, she told him that she planned to move to Tacoma on April 1, and told the Detective she would provide him with the new phone number after she moved. After the omnibus hearing on April 24, the prosecutor contacted Detective Ford to arrange a defense interview with Barg. Detective Ford attempted to contact Barg using the contact information she had given them. The State paid for additional minutes on her cell phone. But calls to that phone were not answered. Detective Ford contacted Barg's family members asking them to tell Barg to immediately call. Because Detective Ford was not able to locate Barg, the trial court granted the State's motion to dismiss the case without prejudice and strike the May 7 trial date.

On May 5, Barg's brother in Oregon told Detective Ford that Barg hitchhiked to San Francisco. The Detective continued to leave messages on Barg's cell phone but she did not respond. The Detective also left messages with Barg's family members in California.

---

<sup>4</sup> CrR 8.3(a) states:

**On Motion of Prosecution.** The court may, in its discretion, upon written motion of the prosecuting attorney setting forth the reasons therefor, dismiss an indictment, information or complaint.

Barg contacted Detective Ford on May 7. Barg was in San Francisco. Barg told Detective Ford that she lost her cell phone and her identification. The State helped Barg arrange to return to Seattle. Barg arrived in Seattle on May 27. On May 28, the State refiled the charge of attempted rape in the second degree and indecent liberties. The trial court did not abuse its discretion in deciding that the State's efforts to contact Barg were reasonable under the circumstances and did not amount to governmental mismanagement. See State v. Wilson, 149 Wn.2d 1, 65 P.3d 657 (2003).

In an attempt to establish prejudice under CrR 8.3(b), for the first time on appeal, Kone asserts the trial court's "unjustified dismissal without prejudice violated [his] right to a speedy trial" under CrR 8.3(b). We do not consider an argument raised for the first time on appeal unless it is a manifest error affecting a constitutional right. RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995).

Here, Kone did not argue below that the court should grant his motion to dismiss under CrR 8.3(b) for violating CrR 3.3, the time-to-trial rule, nor could he.<sup>5</sup> The trial court granted the State's motion to dismiss without prejudice on May 1; the trial date was scheduled for May 7 with an expiration date of May 9. Under CrR 3.3(e)(4), "[t]he time between the dismissal of a charge and the refileing of the same or related charge" is excluded in computing the time for trial. In addition, under CrR 3.3(b)(5), "[i]f any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period."

Equally problematic is Kone's effort to raise a violation of CrR 3.3 as a basis for

---

<sup>5</sup> As the State noted below in response to Kone's motion to dismiss under CrR 8.3(b), "[t]he Defendant notes that a speedy trial violation may form the basis for prejudice under St. v. Michielli but does not argue that a speedy trial violation occurred in this case."

dismissal in a motion to dismiss under CrR 8.3(b). CrR 3.3 states, in pertinent part: “No case shall be dismissed for time-to-trial reasons except as expressly required by this rule, a statute, or the state or federal constitution.” CrR 3.3(h). We interpret court rules as we do statutes drafted by the legislature. State v. George, 160 Wn.2d 727, 735, 158 P.3d 1169 (2007). We look to the plain language of the rule and construe the rule in accord with the drafting body's intent. Gourley v. Gourley, 158 Wn.2d 460, 466, 145 P.3d 1185 (2006). If the rule's meaning is unambiguous, we need look no further. Spokane County v. Specialty Auto & Truck Painting, Inc., 153 Wn.2d 238, concurrence/dissent at 249, 103 P.3d 792 (2004).

In 2003, the Washington Supreme Court amended the time-for-trial rule based on the recommendations of the Time-for-Trial Task Force. George, 160 Wn.2d at 737. One of the stated goals of the amendments was to “[r]educe the likelihood that criminal cases will need to be dismissed with prejudice.”<sup>6</sup>

In the Final Report, the Task Force also specifically addresses judicial interpretation of the time-for-trial rule, and the intent to amend the rule to eliminate ambiguity.

Task Force members are concerned over the degree to which the time-for-trial standards have become less governed by the express language of the rule and more governed by judicial opinions. To address this concern, the task force has tried to fashion a rule that is simpler, has fewer ambiguities, and covers more of the field of time-for-trial issues, with the hope that a reader of the rule will have a better understanding of the overall picture than currently exists. The Task Force also recommends adopting a provision in CrR 3.3 expressly stating that the rule is intended to cover all the reasons why a case should be dismissed under the rule. Courts should not read into the rule any other reasons beyond those that are expressly stated in the rule. Any other reasons

---

<sup>6</sup> The Time-for-Trial Task Force Final Report can be found at [http://www.courts.wa.gov/programs\\_orgs/pos\\_tft/?fa=pos\\_tft.reportHome](http://www.courts.wa.gov/programs_orgs/pos_tft/?fa=pos_tft.reportHome).

should be analyzed under the corresponding constitutional provisions (Wash. Const. Art. I, § 22, and U.S. Const., Amend. 6).<sup>7]</sup>

The plain and unambiguous language of CrR 3.3 prohibits dismissal of a case under CrR 8.3(b) for violation of a defendant's time-to-trial rights under CrR 3.3 unless a defendant can show a violation of CrR 3.3, a statute, or the state or federal constitution. Here, Kone does not assert a violation of a statute or that his constitutional rights were violated. State v. Thomas, 146 Wn. App. 568, 575, 191 P.3d 913 (2008) (dismissal is not a permissible remedy unless the defendant's constitutional right to a trial under CrR 3.3 is violated).

We hold that because CrR 3.3(h) specifically prohibits dismissal for time-to-trial reasons unless expressly required by the rule, a statute, or constitution, the plain and unambiguous language of CrR 3.3(h) precludes Kone from arguing that the trial court erred in denying his motion to dismiss under CrR 8.3(b). CrR 3.3(b) provides the exclusive means to challenge a violation of the time-to-trial rule.<sup>8</sup>

Because the remainder of this opinion has no precedential value, the panel has determined it should not be published in accordance with RCW 2.06.040.

#### Admission of Out-of-Court Statements

Next, Kone asserts the trial court abused its discretion by allowing the State to elicit during direct examination statements Coppola made to Detective Holt that were consistent with Coppola's testimony at trial.

A trial court has wide discretion in ruling on the admissibility of evidence. The

---

<sup>7</sup> Washington Courts Time-For-Trial Task Force, Final Report I. B at 6 (Oct. 2002) (on file with Admin. Office of Courts), available at [http://www.courts.wa.gov/programs\\_orgs/pos\\_tft](http://www.courts.wa.gov/programs_orgs/pos_tft).

<sup>8</sup> In his statement of additional authorities, Kone cites State v. Chhom, 162 Wn.2d 451, 173 P.3d 234. Chhom is distinguishable. The court in Chhom avoided a literal interpretation of the words "detained . . . outside the county" in order to prevent absurd results. Chhom, 162 Wn.2d at 458.



trial court's decision to admit or exclude evidence will not be reversed on appeal absent abuse of discretion. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). A trial court abuses its discretion only if no reasonable person would adopt the view espoused by the trial court. Demery, 144 Wn.2d at 758. Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion. Demery, 144 Wn.2d at 758.

Kone asserts the trial court erred in admitting consistent statements that Coppola made to Detective Holt under ER 106, the rule of completeness. Kone argues “repetition of a statement does not show veracity.”

ER 106 allows admission of “any other writing or recorded statement.”

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce

any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it.

ER 106. Once the trial court determines that a statement is relevant, the court must determine whether the statement 1) explains the admitted evidence, 2) places the admitted evidence in context, 3) avoids misleading the trier of fact, and 4) ensures fair and impartial understanding of the evidence. State v. Larry, 108 Wn. App. 894, 910, 34 P.3d 241 (2001).

Here, the record shows that the court did not admit the statements Coppola made in a joint interview with Detective Holt and the prosecutor to show consistency or “repetition.” The court ruled, in pertinent part:

The court is concerned that if we don’t introduce the statement that Ms. Coppola made shortly thereafter, that the jury will be left with a false impression, which is that basically throughout, since the time of this incident, up until she took the witness stand in this case she was maintaining a different version of the events, which isn’t the case.

There was no dispute that Coppola lied to Officer Bateman when she told him that Kone assaulted her in the park. During direct examination, the prosecutor asked Coppola about her statement to Officer Bateman. Coppola said that her statement was not true and she exaggerated because she was traumatized, in pain, and angry. The court allowed the State to elicit testimony about what Coppola said in the joint interview two days later to put the statements she made to Officer Bateman in context. In the joint interview, Coppola said the sexual assault took place at Kone’s house, and not in the park. We conclude that the trial court did not abuse its discretion by admitting the

statement.<sup>9</sup>

Moreover, even if the trial court abused its discretion in admitting statements from the joint interview under ER 106, the error was harmless. Kone cannot show there is a reasonable probability the evidence affected the outcome of the trial. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). Coppola admitted lying to Officer Bateman, and Kone engaged in extensive cross examination about the inconsistencies in the statements Coppola made to Officer Bateman and Detective Holt. On redirect, the State would have been allowed to introduce the prior consistent statements.

#### Double Jeopardy

Kone contends that his conviction for attempted rape in the second degree and indecent liberties of Barg violate double jeopardy and the trial court erred in refusing to vacate the indecent liberties conviction. We agree.

Below, the State conceded, and the trial court agreed, that the conviction for attempted rape in the second degree and indecent liberties violated double jeopardy. However, the prosecutor expressed concern that if the indecent liberties conviction was vacated and the conviction for attempted rape was reversed on appeal, a new trial would be necessary. To avoid double jeopardy and preserve conviction for indecent liberties, the court did not include the indecent liberties conviction in the judgment and sentence.

Double jeopardy claims raise questions of law, which we review de novo. State

---

<sup>9</sup> The State also argues the evidence was also admissible under ER 801(d)(1). While Kone correctly notes that “ [p]rior out-of-court statements consistent with the declarant’s testimony are not admissible simply to reinforce or bolster the testimony, ” the record shows the State sought to admit the statements to rebut the assertion that Coppola lied when she testified the assault occurred at the park. (Quoting State v. Osborn, 59 Wn. App. 1, 4, 795 P.2d 1174 (1990).)

v. Kelley, 168 Wn.2d 72, 76, 226 P.3d 773 (2010). Both our federal and state constitutions protect persons from being twice put in jeopardy for the same offense. U.S. Const. amend. V; Wash. Const. art. I, § 9. “Washington's double jeopardy clause is coextensive with the federal double jeopardy clause and ‘is given the same interpretation the Supreme Court gives to the Fifth Amendment.’” State v. Eggleston, 164 Wn.2d 61, 70, 187 P.3d 233 (2008) (quoting State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995)). Both clauses have been interpreted so as to protect against “being (1) prosecuted a second time for the same offense after acquittal, (2) prosecuted a second time for the same offense after conviction, and (3) punished multiple times for the same offense.” State v. Linton, 156 Wn.2d 777, 783, 132 P.3d 127 (2006). The prohibition against imposing multiple punishments for the same criminal conduct is implicated here.

The Washington Supreme Court has held that a conviction alone, without an accompanying sentence, can constitute “punishment” sufficient to trigger double jeopardy protections. State v. Womac, 160 Wn.2d 643, 656-58, 160 P.3d 40 (2007). Consistent with the federal courts, Washington requires that when a jury convicts a defendant of two offenses and double jeopardy is violated, the court should enter a final judgment on the greater offense and vacate the conviction on the lesser offense. State v. Turner, 169 Wn.2d 448, 459, 238 P.3d 461 (2010). If the greater offense is reversed and vacated on appeal for reasons unrelated to the lesser offense, the lesser conviction should be reinstated. Turner, 169 Wn.2d at 459.

Community Custody Conditions

Kone challenges the imposition of community custody conditions prohibiting him from accessing the Internet, ordering him to pay victim counseling fees, following the completion of a sexual deviancy evaluation, and obtaining a mental health evaluation and a substance abuse evaluation if directed “by your sexual deviancy treatment specialist or Community Corrections Officer.”

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). We review whether the trial court had statutory authority to impose community custody conditions de novo. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

Kone argues that under RCW 9.94A.703, the court may only impose crime related prohibitions. The State concedes that imposition of the prohibition against accessing the Internet is not crime related. We accept the concession as well taken. See State v. O’Cain, 144 Wn. App. 772, 774, 184 P.3d 1262 (2008). We also conclude that payment of victim counseling fees is not authorized as a condition of community custody. Former 9.94A.700 (2003).<sup>10</sup>

Kone also contends the court did not have the authority to require him to obtain a substance abuse evaluation or a mental health evaluation following completion of a sexual deviancy evaluation, and if directed to do so by his sexual deviancy treatment specialist or Community Corrections Officer. But as the State points out, and Kone does not dispute, the Department of Corrections had authority to require evaluations and treatment under former RCW 9.94A.715(2)(b) (2006 and 2008) (“the court shall

---

<sup>10</sup> Although the court could have ordered the payment of counseling fees as part of restitution under former RCW 9.94A.753(3) (2003), it did not do so.

also require the offender to comply with any conditions imposed by the department under RCW 9.94A.720”).

We affirm the jury conviction of Kone for rape in the second degree of Coppola and attempted rape in the second degree of Barg but remand to vacate the conviction for indecent liberties and strike the conditions of community custody prohibiting Internet use and requiring Kone to pay counseling costs as a condition of community custody.

Schiveller, J.

WE CONCUR:

Dupre, C. S.

Cox, J.