IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOSHUA T. REEVES, Appellant.	No. 47965-6-II UNPUBLISHED OPINION

BJORGEN, C.J. — Joshua Reeves appeals his convictions for attempted first degree child rape and attempted first degree child molestation, as well as community custody conditions requiring him to participate in a mental health evaluation and treatment and to submit to plethysmography examinations. In response to Reeves's challenges, we hold that (1) the reasonable doubt instruction given in this case was appropriate, (2) as the State concedes, Reeves's convictions of attempted first degree child rape and attempted first degree child molestation subjected him to double jeopardy, (3) the trial court abused its discretion in requiring a mental health evaluation and treatment as part of community custody conditions, (4) the trial court abused its discretion by ordering plethysmography examinations for the purpose of monitoring Reeves, rather than as part of crime-related treatment for sexual deviancy. We also (5) waive Reeves's appellate costs.

Accordingly, we vacate Reeves's conviction of attempted first degree child molestation and affirm his conviction of attempted first degree child rape. We also vacate Reeves's community custody conditions requiring him to undergo a mental health evaluation and treatment and to submit to plethysmography examinations. We remand to the trial court (1) for resentencing, taking into account the vacation of Reeves's conviction of attempted first degree

child molestation, (2) to strike Reeves's community custody conditions requiring him to undergo a mental health evaluation and treatment and to submit to plethysmography examinations, and (3) to decide whether to impose a condition of mental health evaluation and treatment consistently with this opinion.

FACTS

Reeves was charged with one count of attempted first degree child rape and one count of attempted first degree child molestation based on contact with LB.[1] [2] At trial, LB testified that when she was six years old she was having a play date at ML's house when Reeves, who was present there, asked her to come with him into a bedroom. According to LB's testimony, once she was in the room, Reeves picked her up, put her on her back, and proceeded to pull down her pants. After Reeves partially pulled down LB's pants, LB got up and moved away from Reeves. When LB turned around, she stated that she saw Reeves's exposed genitalia and that he asked her, "Will you suck on this?" Verbatim Report of Proceedings (VRP) (June 23, 2015) at 521-22. LB responded negatively and left the room.

The court provided the jury with several jury instructions. Instructions 12 and 17 are the to convict instructions for attempted first degree child rape and attempted first degree child molestation, respectively, and instruction 21 addresses reasonable doubt. They provided, in pertinent part:

Instruction No. 12

> The State alleges that the defendant committed acts of Attempted Rape of a Child in the First Degree on multiple occasions with respect to [LB]. To convict the defendant on any count of Attempted Rape of a Child in the First Degree, one

[1] We refer to the victims in this case by their initials to protect their privacy.

[2] Reeves was also charged with child molestation and attempted child molestation with respect to ML, but was acquitted of those charges.

> separate and distinct act of Attempted Rape of a Child in the First Degree as to that particular count must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Attempted Rape of a Child in the First Degree.
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> Instruction No. 17
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> The State alleges that the defendant committed acts of Attempted Child Molestation in the First Degree on multiple occasions with respect to [LB]. To convict the defendant on any count of Attempted Child Molestation in the First Degree, one separate and distinct act of Attempted Child Molestation in the First Degree as to that particular count must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Attempted Child Molestation in the First Degree.
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> Instruction No. 21
>
> The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.[3]

Clerk's Papers (CP) at 60, 65, 69.

The jury convicted Reeves on one count of attempted first degree child rape and one count of attempted first degree child molestation with respect to LB. The trial court sentenced

[3] This instruction is identical to 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008).

him to 69.75 months' confinement, in addition to 36 months of community custody. The court included the following requirements as part of Reeves's community custody conditions:

> 19. [Reeves] shall attend an evaluation for abuse of [sic] . . . mental health . . and shall attend and successfully complete all phases of any recommended treatment as established by the community corrections officers and/or treatment facility.
> . . . .
> 23. [Reeves] shall submit to plethysmography exams, at [his] own expense, at the direction of the community corrections officer and copies shall be provided to the Prosecuting Attorney's Office upon request.

CP at 111. The trial court also issued an order of indigency allowing Reeves to seek an appeal at public expense. Reeves appeals.

ANALYSIS

1. Reasonable Doubt Instruction

Reeves argues that the jury instruction given in this case for reasonable doubt, instruction 21, violates the Sixth and Fourteenth Amendments of the United States Constitution and article 1, sections 3 and 22 of the Washington State Constitution. He contends that the instruction requires a juror to articulate a reason for having a reasonable doubt and shifts the burden of proof to the defense, thereby undermining the presumption of innocence in a manner similar to the fill-in-the-blank arguments our Supreme Court has previously rejected.[4]

We review challenges to jury instructions de novo, examining the instruction in the context of the instructions as a whole. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). Instructions must convey to the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. *Id*. An instruction must

[4] In *State v. Emery*, our Supreme Court held that the prosecutor improperly stated the reasonable doubt standard by describing the standard as requiring a juror to fill-in-the-blank with a reasonable doubt in order to find the defendant not guilty. 174 Wn.2d 741, 759-60, 278 P.3d 653 (2012).

inform the jury of the proper applicable law, avoid misleading the jury, and permit each party to argue its theory of the case. *Id*. An instruction to the jury that relieves the State of its burden to prove every element of a crime beyond a reasonable doubt constitutes reversible error. *Id*.

Jury instruction 21 is identical to *Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01*, at 85 (3d ed. (2008) (WPIC), the pattern jury instruction on reasonable doubt. In *Bennett*, 161 Wn.2d at 318, our Supreme Court approved WPIC 4.01, and mandated its use in unusually categorical terms:

> We have approved WPIC 4.01 and conclude that sound judicial practice requires that this instruction be given until a better instruction is approved. Trial courts are instructed to use the WPIC 4.01 instruction to inform the jury of the government's burden to prove every element of the charged crime beyond a reasonable doubt.

The Supreme Court reiterated its approval of WPIC 4.01 in *State v. Kalebaugh*, 183 Wn.2d 578, 584-85, 355 P.3d 253 (2015). Consistently with these rulings, we recently rejected a challenge to WPIC 4.01 resting on the same bases urged by Reeves, holding that "[w]e are bound by the Supreme Court's approval of WPIC 4.01." *State v. Parnel*, 195 Wn. App. 325, 328, 381 P.3d 128, *review denied*, 186 Wn.2d 1031 (2016) (footnote omitted).

The trial court issued the reasonable doubt instruction as directed by the Supreme Court. Reeves's claim that this constitutes error thus fails.

2. Double Jeopardy

Reeves argues that in this case, the to convict jury instructions given on attempted child rape and attempted child molestation exposed him to double jeopardy because they failed to inform the jury that they must find separate and distinct acts for each charge, "rather than a separate act within the context of each particular charge." Br. of Appellant at 27 (emphasis omitted). The State concedes this argument, based on the facts of this particular case and the State's failure to clarify the separate offenses to the jury. We accept the State's concession.

We review claimed double jeopardy violations de novo. *State v. Mutch*, 171 Wn.2d 646, 661-62, 253 P.3d 803 (2011). The constitutional guaranty against double jeopardy protects a defendant against multiple punishments for the same offense, among other actions. *Id*. at 661. A double jeopardy claim may be raised for the first time on appeal. *Id*.

Where a single act could form the basis for multiple counts, failure to instruct the jury that each count must be based on a "separate and distinct criminal act" in order to convict raises the potential for a double jeopardy violation. *Id*. at 662-63. An instruction to the jury that it must decide each count separately does not remedy the potential double jeopardy violation, because it fails to inform the jury that each count requires proof of a different act. *Id*.

In this case, the State admitted in closing that both of the acts[5] of which it accused Reeves could form the basis for either count. Consequently, Reeves's right to be free from double jeopardy was violated,

> if it is not clear that it was "*manifestly apparent* to the jury that the State [was] not seeking to impose multiple punishments for the same offense" and that each count was based on a separate act.

Mutch, 171 Wn.2d at 664 (alteration in original). Stated another way, no double jeopardy violation results "when the information, instructions, testimony, and argument clearly demonstrate that the State was not seeking to impose multiple punishments for the same offense." *State v. Hayes*, 81 Wn. App. 425, 440, 914 P.2d 788 (1996). We may consider the information, instructions, testimony, and argument in making these determinations. *Mutch*, 171 Wn.2d at 664.

In applying these principles, *Mutch* held that the defendant's right to be free from double jeopardy was not violated, despite the fact that the jury was not expressly instructed that it must

[5] Partially disrobing LB on the bed and asking LB to "suck on this."

base each count on a separate and distinct act. *Mutch*, 171 Wn.2d at 662-66. The court explained that the fact that the information charged the defendant with five different counts that constituted five different units of prosecution, supported by the victim's testimony as to five different incidents of rape, made it manifestly apparent to the jury it must base each count on a distinct act. *Id*. at 665-66. The court also noted that the State discussed all five acts of rape in its arguments and the defense had not challenged the sufficiency of the evidence, only the victim's credibility regarding consent. *Id*. at 665. The court concluded that "it was manifestly apparent to the jury that each count represented a separate act; if the jury believed J.L. regarding one count, it would as to all." *Id*. at 665-66.

Reeves asserts that the jury instructions on attempted child rape and attempted child molestation exposed him to double jeopardy because they did not instruct the jury that each count must be based on a separate and distinct act. Each to convict instruction contained the statement:

> To convict the defendant on any count of [charge name], one separate and distinct act of [the charge] as to that particular count must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved.

CP at 60, 65. This language explicitly requires a "separate and distinct act" for each count. It does not, however, explicitly "'inform[ ] the jury that each [count] required proof of a different act,'" although it could be taken to imply such a requirement. *Mutch*, 171 Wn.2d at 662-63 (quoting *State v. Borsheim*, 140 Wn. App. 357, 367, 165 P.3d 417 (2007)). The instructions' unanimity requirement "allude[s] to the requirement that each charged count must be based on a different act," *Borsheim*, 140 Wn. App. at 369, but again falls short of a clear directive.

Following *Mutch*, we examine now whether the information, the evidence, or the arguments made at trial made it manifestly apparent to the jury that the State was not seeking to

impose multiple punishments for the same offense. On one hand, the State alleged that Reeves committed two criminal acts with respect to LB and provided the jury with separate to convict instructions for each count, which suggests to the jury that each count charged the commission of a separate offense. *Borsheim*, 140 Wn. App. at 369. Further, as in *Mutch*, the State's charges against Reeves with respect to LB corresponded with the number of acts that LB attested to: two counts stemming from two distinct acts. 171 Wn.2d at 665.

On the other hand, the State's closing argument blended the two alleged acts together to the extent that it was not manifestly apparent to the jury that they had to rest each conviction on a separate and different act. In its argument on double jeopardy, the State explained that either act by itself could stand as a count of either attempted child rape or attempted child molestation. The prosecutor also explained that the jury must unanimously agree whether each alleged act occurred. The prosecutor then continued:

> Now, what that means is if 12 of you agree that the incident with the pants being pulled down constituted a crime and it occurred, you're good to go. What it means is if you all think that the incident by the wall occurred where he asked her to essentially give him oral sex, then you're good to go. If you think both of those incidents occurred and taken together they're evidence that he was attempting to rape her or that he was attempting to molest her, you're good to go. So it only applies where you guys can't agree on the factual basis. I would argue in this case it's probably an all or nothing. It's probably that you believe beyond a reasonable doubt that both of these incidents happened or you don't. I, I would argue it's hard to envision that you believe one incident occurred and not the other from a factual perspective.

VRP (June 25, 2015) at 864-65.

These remarks, especially the comment, "[i]f you think both of those incidents occurred and taken together they're evidence that he was attempting to rape her or that he was attempting to molest her, you're good to go," joined the acts and offenses together in a way that could easily mislead the jury. VRP (June 25, 2015) at 865. Considering the information, instructions,

testimony, and argument, it was not manifestly apparent to the jury that the State was not seeking to impose multiple punishments for the same offense. Thus, under *Mutch*, the defendant was placed in double jeopardy. Under *State v. Weber*, 159 Wn.2d 252, 266, 269, 149 P.3d 646 (2006), the remedy for double jeopardy in these circumstances is to vacate the conviction for the lesser offense; that is, the offense carrying the lesser sentence. In this appeal, that is attempted first degree child molestation.

3. Community Custody Conditions

Reeves argues that the trial court abused its discretion by ordering a mental health evaluation and treatment and plethysmography examinations as community custody conditions. We agree.

a. Standard of Review

We review the imposition of community custody conditions for an abuse of discretion. *State v. Johnson*, 184 Wn. App. 777, 779, 340 P.3d 230 (2014). A trial court abuses its discretion if its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). Among the ways a condition is manifestly unreasonable is if it is beyond the court's authority to impose. *Johnson*, 184 Wn. App. at 779.

b. Mental Health Evaluation and Treatment

Reeves argues that the trial court exceeded its authority in imposing this condition because it failed to find that Reeves was mentally ill as defined by former RCW 71.24.025 (2008) and that any mental illness influenced his offense.

Under former RCW 9.94A.703(3)(c) (2009), a trial court may order an offender to participate in "crime-related treatment or counseling services," as a condition of community

custody. However, former RCW 9.94B.080 (2008) limits a court's discretion to order mental health evaluations and treatment to situations where "the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense."[6] RCW 9.94B.080 has been interpreted as permitting the trial court to "order a mental health evaluation *only if* the court finds [the defendant] 'is a mentally ill person as defined in RCW 71.24.025' and mental illness likely 'influenced the offense.'" *State v. Shelton*, 194 Wn. App. 660, 675-76, 378 P.3d 230 (2016), *review denied*, 187 Wn.2d 1002 (2017) (emphasis added).

In *State v. Brooks*, Division Three of our court held that the trial court abused its discretion by ordering a mental health evaluation and treatment without finding that the defendant was mentally ill and that the condition likely influenced the offense. 142 Wn. App. 842, 851-52, 176 P.3d 549 (2008). Although the State filed a motion for a competency evaluation, the court held that the trial court lacked authority to impose a mental health evaluation or treatment absent the required statutory findings. *Id.*[7] Similarly, in *Shelton*, Division One of our court held that the trial court abused its discretion by ordering a mental health evaluation without making the necessary statutory findings under former RCW 9.94B.080 (2008). 194 Wn. App. at 675-76. The court reasoned that despite the fact that the "court found 'mental health issues contributed to this offense' and '[t]reatment is reasonably related to the circumstances of this crime and reasonably necessary to benefit the defendant and the

[6] Although RCW 9.94B.010 limits the applicability of the chapter to crimes committed prior to June 2000, the legislative amendment that created RCW 9.94B.080 also states that it shall apply to all sentences imposed after August 1, 2009. LAWS OF 2008, ch. 231, § 55.

[7] The court in *Brooks* analyzed former RCW 9.94A.505(9) (2006) which contained identical language to the language used in RCW 9.94B.080. *Brooks*, 142 Wn. App. at 851.

community,'" such findings did not satisfy the requirements of former RCW 9.94B.080. *Id*. at 676 (quoting former RCW 9.94B.080).

In this case, the trial court ordered a competency hearing, the presentence report indicated that Reeves suffered from mental disorders, and the trial court opined at sentencing that Reeves may be able to improve himself in the correctional system.[8] However, the court did not make the required findings under former RCW 9.94B.080. Therefore, under the cases noted above, the trial court lacked statutory authority to order a mental health evaluation or treatment. By ordering such a condition, the trial court abused its discretion.

With that, the question of remedy remains. In *Brooks*, 142 Wn. App. at 851-52, Division Three of our court reversed the condition ordering a mental health evaluation and treatment, while in *Shelton*, 194 Wn. App. at 676-77, Division One remanded for a determination whether the requirements for the mental evaluation were met. Neither opinion discusses its reasons for reversing or remanding. Because public safety and Reeves's own well-being may be served by a mental health evaluation and treatment, we follow *Shelton* and remand for the trial court to consider this condition consistently with this opinion under currently applicable standards.

c. Plethysmography Exam

Reeves also challenges his community custody condition requiring he submit to plethysmography examinations at the direction of his community corrections officer, arguing that the condition violates his constitutional right to be free from bodily restraint. The State agrees with Reeves and concedes that this condition should be stricken on remand. We agree and accept the State's concession.

[8] At sentencing, the trial court judge commented, "I'm also providing, and hopefully the Corrections System for the State of Washington will provide some services to offer Mr. Reeves an opportunity to improve himself." VRP (Aug. 13, 2015) at 988.

We have previously acknowledged that plethysmograph testing does not serve a monitoring purpose and is only appropriate in the context of a comprehensive evaluation or treatment process. *Johnson*, 184 Wn. App. at 780. As such, a sentencing court may not require plethysmograph testing unless it also requires crime-related treatment for sexual deviancy. *Id.* Similarly, Division One stated in *State v. Land*, that "[plethysmograph] testing can properly be ordered incident to crime-related treatment by a qualified provider. . . . But it may not be viewed as a routine monitoring tool subject only to the discretion of a community corrections officer." 172 Wn. App. 593, 605, 295 P.3d 782 (2013) (internal citation omitted). In this case, the trial court required Reeves to submit to plethysmography examinations solely at the request of his community corrections officer and did not order crime-related treatment for sexual deviancy. Therefore, the trial court abused its discretion by requiring plethysmography examinations as a community custody condition.

4. Appellate Costs

Reeves argues that we should decline to impose appellate costs in his case should he not prevail in this appeal.

Under RCW 10.73.160(1), we have broad discretion whether to grant or deny appellate costs to the prevailing party. *Nolan*, 141 Wn.2d at 626. Reeves prevails in this appeal on his challenges based on double jeopardy and the sentencing court's authority to impose community custody conditions requiring mental health evaluation and treatment and plethysmography examinations. Although the State also prevailed on certain issues, it cannot be deemed the substantially prevailing party. Therefore, we decline to require Reeves to pay appellate costs.

CONCLUSION

We vacate Reeves's conviction of attempted first degree child molestation and affirm his conviction of attempted first degree child rape. We also vacate the community custody conditions requiring Reeves to undergo a mental health evaluation and treatment and to submit to plethysmography examinations. We remand to the trial court (1) for resentencing, taking into account the vacation of Reeves's conviction of attempted first degree child molestation, (2) to strike the community custody conditions requiring Reeves to undergo a mental health evaluation and treatment and to submit to plethysmography examinations, and (3) to decide whether to impose a condition of mental health evaluation and treatment consistently with this opinion. We also decline to require Reeves to pay appellate costs.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Bjorgen, C.J.

We concur:

Johanson, J.

Maxa, J.