72359-6

NO. 72359-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOHNSON AYODEJI,

Appellant.

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

The Honorable Eric Z. Lucas, Judge

BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The evidence is insufficient to support several of the acts alleged to constitute child molestation.

2. The trial court erred in failing to instruct the jury that it must unanimously agree on the acts that constituted the child rape offenses.

3. The trial court erred in admitting ER 404(b) evidence for an improper purpose.

4. The trial court erred in admitting ER 404(b) evidence without conducting the requisite four-part balancing test.

5. The trial court erred in failing to give a limiting instruction on the ER 404(b) evidence.

6. The trial court violated appellant's constitutional right to a public trial when it purposefully played video evidence so only the jury could see without first conducting the five-part Bone-Club[1] test.

7. The trial court erred by imposing a discretionary domestic violence legal financial obligation (LFO) without first determining whether appellant had the current or future ability to pay.

Issues Pertaining to Assignments of Error

1. When several acts in a multiple acts case are not supported by sufficient evidence, and the court is unable to determine the acts upon

[1] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 629 (1995).

which the jury relied, must the court reverse the related convictions and dismiss the charges to avoid violating double jeopardy?

2. Where multiple acts of child rape were alleged, but the jury was not instructed it had to unanimously agree on the acts supporting the child rape convictions, was appellant prejudicially denied his right to a unanimous verdict on the three child rape charges?

3. The trial court admitted ER 404(b) evidence that appellant violated a no-contact order by sending his family a Christmas card after his arrest. Is reversal required when the court admitted this domestic violence evidence for an improper purpose and without first conducting the requisite four-part balancing test?

4. The trial court purposefully played video evidence so only the jury could view it. Did this courtroom closure violate appellant's constitutional right to a public trial?

5. Did the trial court fail to comply with RCW 10.01.160(3) when it imposed a discretionary domestic violence LFO without first considering appellant's current and future ability to pay?

B. STATEMENT OF THE CASE

The State charged Johnson Ayodeji with one count of first degree child rape (Count I) and two counts of first degree child molestation (Counts III and IV) of his daughter E.A., born January 8, 2001. CP 105-06. These

incidents were alleged to have occurred between January 8, 2006 and January 7, 2013. CP 105-06. The State also charged Ayodeji with one count of second degree child rape of E.A. (Count VII), alleged to have occurred between January 9, 2013 and May 17, 2013, after E.A. turned twelve. CP 105-06. The State further charged Ayodeji with one count of first degree child rape (Count II) and two counts of first degree child molestation (Counts V and VI) of his younger daughter F.A., born February 9, 2002. CP 105-06. These were alleged to have occurred between February 9, 2007 and May 17, 2013. CP 105-06.

1. Pretrial Rulings

Before trial, the State sought to admit a Christmas card Ayodeji sent his wife, R.A., and their children after he was arrested. 5RP 15-16.[2] Defense counsel objected, arguing it was not relevant and it was inadmissible as a collateral bad act. 5RP 16. The State agreed the Christmas card showed Ayodeji violated the no-contact order in place. 5RP 17. Nevertheless, the State argued the card was relevant "in explaining [R.A.]'s mind set, her role as the mother of the children, her role as kind of the driving force in reporting these incidents." 5RP 17. The State also believed

[2] This brief refers to the verbatim reports of proceedings as follows: 1RP – September 20, 2013; 2RP – May 8, 2014; 3RP – May 9, 2014; 4RP – July 21, 2014; 5RP – July 22, 2014; 6RP – July 23, 2014; 7RP – July 24, 2014; 8RP – July 25, 2014; 9RP – July 28, 2014; 10RP – July 29, 2014; 11RP – July 30, 2014; 12RP – July 31 and August 21, 2014.

the card showed Ayodeji's "attempts to manipulate and control [R.A.] and through her the children -- she is not to question him. She is to stand by him and forgive him. They are not to air their dirty laundry in public." 5RP 18-19. The trial court admitted the Christmas card for "the cultural aspect and the affect on the witness." 5RP 19; Ex. 65.

2. R.A.'s Testimony

R.A. testified at trial that she and Ayodeji met in Nigeria and married there in September 1998. 7RP 22-23, 32-33. Ayodeji moved to the United States the following month and R.A. moved to Canada shortly thereafter because she could not enter the United States. 7RP 32-33. R.A. later entered the United States and E.A. was born while they lived in Chicago. 7RP 34. Ayodeji joined the Navy and they moved to Oak Harbor, Washington, where F.A. was born. 7RP 35-38. The family then moved to Everett, Washington. 7RP 38.

R.A. testified that around 2004, she and Ayodeji separated, and she moved into a domestic violence shelter with the girls. 7RP 43-44. R.A. said Ayodeji then stalked them from shelter to shelter. 7RP 43-44. In 2005, however, R.A. explained she moved back in with Ayodeji because she had nowhere else to go, and she subsequently had twins with Ayodeji. 7RP 45.

R.A. said that in September 2008, on a Sunday morning before church, F.A. told her Ayodeji touched her and E.A.'s private parts. 7RP 54-

55; 8RP 30-31. When asked, E.A. agreed Ayodeji touched her, but refused to talk more about it. 7RP 56. R.A. immediately reported this to Child Protective Services (CPS). 7RP 55-59; 8RP 28. CPS questioned R.A. about whether she was using her children to get rid of Ayodeji, and did not investigate further. 7RP 58-59; 8RP 30-31.

R.A. then said that on Thanksgiving Day 2009, she caught E.A. and F.A. performing oral sex on each other. 7RP 65-67. E.A. refused to talk about it, but F.A. said "daddy did that." 7RP 67-68. R.A. reported this to their counselor, who met with the girls. 7RP 68-73. F.A. told the counselor Ayodeji "did that to us" in the computer room, but E.A. again refused to talk about it. 7RP 74. The counselor reported this to CPS. 7RP 75; 8RP 25-36. CPS investigated and interviewed the girls, but ultimately dropped the case because the girls were uncooperative. 7RP 75-78; 8RP 40.

R.A. and her children did not hear from Ayodeji for almost two years after the charges were dropped. 7RP 79. However, Ayodeji called R.A. during the holidays in 2011 and told her he was living in California. 7RP 82-85. He returned to Washington to help the family move into a new house in Everett. 7RP 84, 91. Ayodeji left again for another year. 7RP 92-95. Around this time, E.A. and F.A. told their mother what they wrote in their diaries about Ayodeji touching them was not true. 7RP 85-86, 102-03. F.A.

explained they made it up because they were mad at Ayodeji because he was not living with them. 7RP 105.

Then, in 2012, Ayodeji returned and R.A. allowed him to visit the family, and he began spending the night more often. 7RP 92-95. Ayodeji moved back in with the family in early 2013. 7RP 97-98. R.A. testified there were still red flags, though. 7RP 108-09. For instance, Ayodeji showed her a video on his phone of E.A. masturbating. 7RP 108-09.

R.A. then testified that on May 17, 2013, she caught Ayodeji having sex with F.A. 7RP 121-25. R.A. said she woke up in the middle of the night and Ayodeji was not in bed. 7RP 123-24. She went downstairs and found Ayodeji in F.A.'s room on top of F.A., "making sexual motions," and kissing F.A.'s face. 7RP 128-29. R.A. remembered Ayodeji was wearing boxers and the hole in the front was wet. 7RP 128-30. R.A. said she screamed, Ayodeji jumped up, and started exclaiming, "my life, my life, my life." 7RP 130. Ayodeji explained he was only hugging F.A., telling R.A. his penis was not even erect. 7RP 130-31. When R.A. asked the girls why they did not tell her, they said "that is just what daddy normally does." 7RP 133. R.A. called the police shortly thereafter. 7RP 135-36.

3. F.A.'s and E.A.'s Testimony

F.A. also testified to the incident on May 17, 2013. 8RP 78-82. She remembered hearing her father walk downstairs, and then "he gets on my

bed and he gets all touchy." 8RP 82-83. She explained Ayodeji moved her legs open and she felt his penis inside her vagina. 8RP 84-89. F.A. told child interview specialist Gina Coslett she had her clothes on during this incident, but testified at trial she was naked. 8RP 136-37; 9RP 54-55.

F.A. testified that similar incidents happened in Ayodeji's bedroom, her bedroom, and once or twice in E.A.'s bedroom. 8RP 86, 112-13, 119-21, 125-26. F.A. said these occurred after Ayodeji moved in with them around E.A.'s birthday in January 2013. 8RP 109. She could not remember the frequency with which they occurred. 8RP 118. F.A. previously told Coslett the incidents with her father did not happen in any other room besides her bedroom. 8RP 138.

F.A. also testified Ayodeji touched her "upper parts," but said these parts would not be covered by a bra if she was wearing one. 8RP 121-23. She could not provide any further description. 8RP 121-23. F.A. testified Ayodeji used his mouth on her upper parts and her lips, but she told Coslett that Ayodeji never used his mouth on her. 8RP 123, 140. F.A. also wrote a police statement where she described using lotion to "make his dick hard" with her hand. 8RP 104, 112-14. She said this happened more than once, but could not remember how many times. 8RP 120-21.

In a letter to her mother, F.A. wrote, "Yes daddy did touch me. What I was touched with his butt not his hand. [Where] I was in bed he was on top

of me . . . I did not feel right." 7RP 142-44; Ex. 70. F.A. could not remember when she wrote the letter, but thought it might be sometime after her eleventh birthday in February 2013. 8RP 144-45.

E.A. testified Ayodeji started touching her when the family lived in YWCA housing, when she was about seven or eight years old. 8RP 167. She remembered the touching occurred in the living room and the computer room. 8RP 180. The State introduced a letter E.A. wrote to R.A. around the same time. 8RP 181-83; Ex. 71. E.A. wrote "he would touch me in the butt and my bubs [sic]," and put his "dick in my butt." 8RP 183-84; Ex. 71. At trial, E.A. said Ayodeji used his hands to touch her breasts, but could not remember what he used to touch her buttocks. 8RP 184. Nor could E.A. remember whether "butt" meant her vagina or her anus. 8RP 185.

E.A. testified Ayodeji also touched her while living at the family's current home. 8RP 171-73. She testified Ayodeji touched her with his penis, but could not remember where on her body. 8RP 172-80. E.A. said this occurred downstairs in her room and the computer room, and upstairs in Ayodeji's room. 8RP 175. E.A. testified it happened more than once, after her father moved in with the family around her twelfth birthday in January 2013. 8RP 175-76. E.A. also told Coslett that Ayodeji made her have sex with him when he returned from California. 8RP 187-88. But E.A.

explained this touching was "different" than what happened at their old YWCA apartment. 8RP 175-80.

On cross-examination, defense counsel introduced an interview with E.A. where she said she was uncertain whether she actually remembered the incidents or only remembered what people told her about them. 8RP 193-94. E.A. said her memory was "kind of from stories." 8RP 194. E.A. also told the defense investigator that Ayodeji gave her money after the May 17th incident, but testified at trial he never did. 8RP 195-96. E.A. agreed both of these statements could not be true. 8RP 196.

On re-direct, at the prosecutor's urging, E.A. testified for the first time that Ayodeji put his penis in her vagina. 8RP 205. First she said she could not remember when this occurred or where the family lived at the time. 8RP 205. Then she said she remembered it happening only at the family's current home, but was uncertain whether it happened before or after she turned 12. 8RP 206-07.

4. Child Hearsay Testimony[3]

CPS investigator Stacy Lowry interviewed the girls on January 10, 2010. 6RP 18-19. Lowry testified at trial that she attempted to speak with E.A. about the alleged abuse, but E.A. immediately hid her face and said she

[3] This testimony was admitted at a pretrial hearing pursuant to RCW 9A.44.120. 4RP 19-192.

did not want to talk about it. 6RP 22-25. However, E.A. then told Lowry the "stuff with her dad" happened in the computer room. 6RP 23-24. E.A. said she would lie down on the floor and Ayodeji would get on top of her and use his hands underneath her underwear. 6RP 24-25. On a stick figure, E.A. circled the crotch area to indicate where Ayodeji touched her. 6RP 26-27. Lowry testified, though, that F.A. would not talk about the alleged abuse, and instead "grabbed the inside of her crotch and just grabbed and cupped her crotch area." 6RP 29.

Child forensic interviewer Amanda Harpell-Franz also spoke with the girls on January 29, 2010. 6RP 99-101, 108-11. E.A. refused to talk about any of the alleged abuse. 6RP 112-13. F.A., however, wrote down on a piece of paper "sex." 7RP 7-11; Ex. 68. F.A. told Harpell-Franz this also happened to E.A. 7RP 11-12. F.A. said Ayodeji touched her with his fingers on top of her clothes, but did not remember where on her body. 7RP 13-14, 17. On a drawing of a person, F.A. circled the hand to indicate how Ayodeji touched her. 7RP 13-14, Ex. 68.

5. Forensic Examinations

The girls underwent a sexual assault examination on February 1, 2010. 6RP 43-44, 51-52. F.A. told the nurse she did not remember any sexual touching by their father and E.A. denied any abuse. 6RP 46-47, 57-

58. Neither girl showed any signs of sexual abuse, such as damaged hymen tissue. 6RP 50-52, 57-58.

The girls underwent another sexual assault examination on May 17, 2013. 9RP 37, 44-45. Though F.A. was reluctant to allow the exam, the nurse did not see any signs of sexual abuse. 9RP 38-43. The nurse took oral and perineal vulvar swabs from F.A., and collected F.A.'s underwear for DNA testing. 9RP 43. No semen, saliva, or male DNA was detected on any of the swabs or F.A.'s underwear. 9RP 90-92.

The nurse also did not observe any signs E.A. had been sexually abused, and E.A. told the nurse she was a virgin. 9RP 51-52. The nurse collected E.A.'s underwear and the sanitary napkin she was wearing, as well as oral and perineal vulvar swabs. 9RP 47-49. No semen or saliva was detected. 9RP 93-94. Forensic scientist Lisa Yoshida found male DNA on E.A.'s perineal vulvar swab, but was unable to develop a meaningful DNA profile. 9RP 94.

There was also partial male "touch" DNA on E.A.'s sanitary napkin. 9RP 94, 100. Touch DNA is usually transferred from the skin by handling an object. 9RP 112. There is no way to determine where on the individual's

body the DNA came from. 9RP 113. Using YSTR testing,[4] Yoshida concluded the partial male profile matched Ayodeji's DNA profile, and the match was not expected to occur more frequently than one in 3,500 men in the United States. 9RP 100-01. However, none of Ayodeji's paternal male relatives could be excluded as possible matches. 9RP 108.

6. Police Investigation

Detective Sally Van Beek testified regarding her investigation and arrest of Ayodeji. 10RP 6-8, 22. She spoke with the girls on June 5, 2013, at which time F.A. told her E.A. said Ayodeji used his cell phone to video E.A. performing oral sex on him. 10RP 23-24. When Van Beek arrested Ayodeji, she seized the cell phone on his person and obtained a search warrant for it. 9RP 129-30, 160; 10RP 22-25. Van Beek also explained that R.A. gave her two micro SD cards that R.A. claimed she found in Ayodeji's car using a spare key. 7RP 148-49; 10RP 27-28.

Digital imaging specialist Traci Youmans searched the SIMM card from Ayodeji's seized cell phone. 9RP 157, 166-67, 174. She recovered several deleted photos of an adult male with his penis exposed and a girl's hand on his penis. 9RP 167, 172-73. Youmans was unable to recover any corresponding dates for these images. 9RP 176-77. R.A. identified E.A. in

[4] The standard DNA test is referred to as STR (short tandem repeat). 9RP 94. A YSTR test focuses only on the male Y-chromosome, and was used here because of the large amount of female DNA on E.A.'s sanitary napkin. 9RP 94, 98.

the photos, and also identified Ayodeji based on his underwear and his private parts. 7RP 150-51. However, E.A. told Coslett that Ayodeji never took photos of her. 9RP 81-82.

Detective Chris Roberts also searched the micro SD cards R.A. said she found in Ayodeji's car. 9RP 118. He recovered a deleted video created on May 8, 2013, which depicted E.A. performing oral sex on a man, but it did not show the man's face. 5RP 47; 7RP 150-51; 9RP 129-33; 11RP 36. E.A. testified Ayodeji took a video of her on his phone in her room. 8RP 177-80. The State played the video for the jury. 9RP 148-52. In doing so, the State purposefully faced the television away from the courtroom gallery so only the jury could see it. 5RP 47; 9RP 104-06, 150. Defense counsel pointed out this could present a public trial issue. 9RP 106.

7. Ayodeji's Testimony

Ayodeji denied ever sexually assaulting his daughters. 10RP 54-55. He explained R.A. fabricated the allegations because of several incidents that turned her against him. First, R.A. carried a grudge against him because he failed to complete the proper paperwork for her to enter the United States from Nigeria. 10RP 70. This was consistent with R.A.'s testimony that she had to live in Canada before she could enter the United States. 7RP 32-33. R.A. also fabricated the domestic violence between her and Ayodeji so she could attain a green card. 10RP 77-78. Ayodeji further explained he

defaulted on a loan from R.A.'s family, and so she always resented him. 10RP 74-75, 151-52. Ayodeji explained that R.A. brainwashed the girls and staged the video with E.A. to get back at him. 10RP 149; 11RP 43-44.

Ayodeji also described an incident where F.A. was sitting on his lap watching a movie when R.A. entered the room. 10RP 120-21. R.A. told him not to let F.A. do that because F.A. "will make up any story" and "will misinterpret anything." 10RP 120-21. For instance, F.A. wrote in her school journal she was pregnant and about to have a baby. 10RP 129-30. Likewise, Ayodeji explained that on May 17, 2013, he was simply laying in bed in F.A., holding her because she could not fall asleep. 10RP 138.

The court gave a unanimity instruction on the molestation charges:

> The State alleges that the defendant committed multiple acts of Child Molestation in the First Degree on multiple occasions. To convict the defendant on any count of Child Molestation in the First Degree, one particular act of Child Molestation 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 Child Molestation in the First Degree.

CP 72. The court did not give a unanimity instruction on the first or second degree child rape charges. See CP 63-95.

The jury found Ayodeji guilty on all counts. CP 48-61. The jury also returned special verdicts finding E.A., F.A., and Ayodeji were family members, and the crimes were part of an ongoing pattern of sexual abuse.

CP 48-61. Ayodeji received an indeterminate sentence of 486 months, 168 months above the standard range. CP 10-13. Ayodeji appeals. CP 8.

C. ARGUMENT

1. DOUBLE JEOPARDY REQUIRES REVERSAL AND DISMISSAL OF AYODEJI'S CONVICTIONS ON COUNTS V AND VI BECAUSE THERE IS INSUFFICIENT EVIDENCE TO SUPPORT SOME OF THE MULTIPLE ACTS ALLEGED.

Ayodeji was charged and convicted of two counts of first degree child molestation of F.A., counts V and VI. CP 51-53, 79-80, 105-06. These charges were based on multiple alleged acts. Some of the acts are supported by substantial evidence, for the purposes of the sufficiency standard of review. However, other acts are insufficient to sustain a molestation conviction.

The trial court properly instructed the jury it had to unanimously agree as to which acts of molestation had been proved. CP 72. Because courts presume jurors follow the trial court's instructions, Ayodeji does not dispute the verdicts on the two molestation counts were unanimous. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). Rather, the issue is the appropriate remedy given that several distinct acts of molesting F.A. do not sufficiently support Ayodeji's convictions. Because we do not know which acts the jury relied on, any retrial on the two molestation charges would place Ayodeji twice in jeopardy for the same offenses. To ensure the State

does not violate Ayodeji's double jeopardy rights, this Court should reverse the convictions for counts V and VI and dismiss the charges.

In every criminal prosecution, due process requires the State to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A reviewing court must reverse a conviction for insufficient evidence where no rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt, viewing all evidence in the light most favorable to the State. State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013). "[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation." Id. at 16. Such inferences must "logically be derived from the facts proved, and should not be the subject of mere surmise or arbitrary assumption." Bailey v. Alabama, 219 U.S. 219, 232, 31 S. Ct. 145, 55 L. Ed. 191 (1911).

The state and federal constitutions prohibit placing a person twice in jeopardy for the same offense. U.S. CONST. amend. V; WASH. CONST. art. I, § 9. Where a conviction is overturned on appeal for insufficient evidence, a person may not be retried for that offense without violating this prohibition against double jeopardy. Burks v. United States, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978); State v. Souza, 60 Wn. App. 534, 538, 805 P.2d 237 (1991). Thus, the remedy for insufficient evidence is to reverse the

conviction and dismiss the charge with prejudice. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

In Washington, an accused also has the constitutional right to a unanimous jury verdict. WASH. CONST. art. 1, § 22; State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), overruled in part by Kitchen, 110 Wn2d 403.[5] Therefore, when the State presents evidence of multiple acts, any one of which could constitute the crime charged, the jury must unanimously agree on which incident constitutes the crime. Petrich, 101 Wn.2d at 569; Kitchen, 110 Wn.2d at 411. This means either the State must elect the act on which it relies, or the trial court must instruct the jury to unanimously agree the State proved the same criminal act beyond a reasonable doubt—a Petrich instruction. Kitchen, 110 Wn.2d at 411.

A person is guilty of first degree child molestation "when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and . . . the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.083. "Sexual contact" means "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of

[5] Petrich was overruled in part because it applied the incorrect harmless error standard to multiple acts cases. Kitchen, 110 Wn.2d at 405-06.

either party or a third party." RCW 9A.44.010(2). The term "intimate parts" has been interpreted broadly to include "parts of the body in close proximity to the primary erogenous areas," including the hips, buttocks, and lower abdomen. In re Welfare of Adams, 24 Wn. App. 517, 519-21, 601 P.2d 995 (1979); State v. Powell, 62 Wn. App. 914, 917 n.3, 816 P.2d 86 (1991).

However, where the evidence "shows touching through clothing, or touching of intimate parts of the body other than the primary erogenous areas," courts require "some additional evidence of sexual gratification." Powell, 62 Wn. App. at 917. For instance, rubbing the zipper area of a boy's pants for 5 to 10 minutes was sufficient evidence of sexual gratification. State v. Camarillo, 115 Wn.2d 60, 63, 794 P.2d 850 (1990); see also State v. Johnson, 96 Wn.2d 926, 639 P.2d 1332 (1982) (evidence that accused wiped a five-year-old girl's genitals with a wash cloth might be insufficient to prove he acted for purposes of sexual gratification had that act not been followed by her performing oral sex on him).

F.A. testified Ayodeji sometimes used his hand to touch her "upper parts." 8RP 121-23. She was unable to describe what she meant by "upper parts," but explained these parts would not be covered by a bra if she was wearing one. 8RP 122-23. In other words, "upper parts" did not mean her breasts. 8RP 121-23. Harpell-Franz likewise testified F.A. told her Ayodeji touched her on top of her clothes, but she could not remember where he

touched her. 7RP 13-14. On a drawing of a person, F.A. circled the hand to indicate how Ayodeji touched her. 7RP 13-14, Ex. 68.

These incidents involved touching over clothing and touching of a body part outside the primary erogenous areas. Additional evidence of Ayodeji's sexual gratification was therefore required. Powell, 62 Wn. App. at 917. But there was no such evidence, like rubbing the areas in question or that Ayodeji's penis was erect. Given this lack of evidence, no inference can be made that the touching occurred for Ayodeji's sexual gratification. Hence, there is insufficient evidence that these incidents constituted molestation.[6]

In response, the State may rely on State v. Stark, 48 Wn. App. 245, 738 P.2d 684 (1987). This Court should reject the State's attempt to do so. In that case, Stark was convicted of first degree statutory rape. Id. at 250-51. The complaining witness described three separate instances of sexual abuse, two of which could have constituted "sexual intercourse." Id. at 246-47. The other instance was insufficient to support a statutory rape conviction. Id. at 251. On appeal, Stark argued the verdict was defective because the jury did not specify the act upon which they agreed. Id. at 251. Therefore, Stark asserted, the court could not be sure the jury did not rely on the insufficient

[6] This Court should reject any argument by the State that the alleged child molestation constituted one continuing offense rather than multiple acts: "child molestation, unlike promoting prostitution, is not an ongoing enterprise." State v. Gooden, 51 Wn. App. 615, 620, 754 P.2d 1000 (1988).

act. Id. This court disagreed because the jury was instructed they must unanimously agree that "the same act of sexual intercourse had been proven beyond a reasonable doubt." Id. The court presumed the jury followed this instruction, and concluded the jury could not have relied on the one act that did not come within the definition of "sexual intercourse." Id.

This case differs from Stark. There were several instances of contact that the State alleged were "sexual contact." However, there is insufficient evidence that each of these alleged acts were done for the purpose of "sexual gratification." Unlike Stark, this Court cannot be certain the jury did not rely on acts that were insufficient, as a matter of law, to support Ayodeji's convictions for child molestation of F.A.

State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008), provides helpful instruction. There, the State argued Kier's assault and robbery convictions did not merge because they were committed against separate victims. Id. at 808. Noting the case before it was "somewhat analogous to a multiple acts case," the court indicated it was at best unclear whether the jury believed Kier committed the crimes against the same or different victims. Id. at 811. Because the evidence and instructions allowed the jury to consider whether a single person was the victim of both the robbery and assault, the verdict was ambiguous and it would violate double jeopardy to not merge offenses. Id.

at 814; see also State v. DeRyke, 110 Wn. App. 815, 823-24, 41 P.3d 1225 (2002) (ambiguous verdict required merger to avoid double jeopardy).

As in Kier, this Court cannot say whether the jury believed Ayodeji molested F.A. by one of the insufficient acts. Given this ambiguous verdict, it would violate double jeopardy to permit the possibility that Ayodeji would be retried based on an act that was not supported by sufficient evidence. Moreover, it is unfair to impose the result of the State's nonelection on Ayodeji. The State has the discretion to choose which act it believes supports conviction. State v. Workman, 66 Wash. 292, 294-95, 119 P. 751 (1911). When the State argues that multiple acts support a conviction and deliberately decides not to elect a specific act, the State should bear the risk of its choice. Likewise, when the State argues that multiple alleged acts form the basis for conviction but fails to support one or more of the acts with sufficient evidence, the State assumes the risk of reversal and dismissal.

The trial court instructed the jury it must unanimously agree on the specific acts of molestation in order to convict. Despite the unanimity instruction, there was insufficient evidence to support several of the multiple acts related to molestation of F.A. Because this Court cannot know which act(s) on which the jury relied to convict, and some of the acts are not supported by sufficient evidence, the instruction did not fully protect Ayodeji's constitutional right to unanimity. Therefore, the only

constitutionally adequate remedy is to reverse and dismiss. Any lesser remedy would gamble on the possibility that Ayodeji would be placed twice in jeopardy for acts the State has failed to support with sufficient evidence.

2. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON UNANIMITY FOR THE RAPE CHARGES PREJUDICIALLY DENIED AYODEJI HIS RIGHT TO A UNANIMOUS JURY VERDICT.

The trial court gave a Petrich instruction on child molestation. CP 72. However, multiple acts of rape were also alleged for both girls. The trial court failed to give a Petrich instruction on the two first degree child rape charges, as well as the second degree child rape charge. See CP 63-95. The State did not elect the specific acts in closing, either.[7] See 11RP 61-105 (closing); 11RP 128-40 (rebuttal). This violated Ayodeji's right to a unanimous jury verdict on the rape charges and requires reversal.

Failure to give a Petrich instruction in a multiple acts case is a manifest constitutional error that may be raised for the first time on appeal. RAP 2.5(a); State v. Holland, 77 Wn. App. 420, 424, 891 P.2d 49 (1995). Such an error is presumed prejudicial. Kitchen, 110 Wn.2d at 411. This presumption is overcome only if no rational juror could have a reasonable

[7] In closing, the State emphasized the need for the jury to unanimously agree on the specific act. 11RP 65-67. However, the State discussed this unanimity requirement only in relation to the molestation charges. 11RP 65-67.

doubt as to any of the incidents alleged. Id.; State v. Coleman, 159 Wn.2d 509, 512, 150 P.3d 1126 (2007).

This unanimity error was not harmless. In Kitchen, the court reversed because a rational juror could have entertained reasonable doubt as to whether one or more of the alleged acts occurred. 110 Wn.2d at 412. There, the child detailed the place and circumstances of several incidents that could constitute statutory rape. Id. at 406. Yet some evidence weakened her story. For example, she was not always certain as to exact dates. Id. The defense also introduced several of her past contradictory statements, including where she said the allegations were fabricated. Id. at 406-07.

Similarly, in Petrich, the complaining witness discussed at least four episodes of indecent liberties and rape at length. 101 Wn.2d at 568. She also acknowledged other incidents, explaining they usually occurred on weekends or vacation at her grandparent's home or in a truck. Id. But she was unsure about dates and places of all these incidents, as well as the type of contact. Id. Though the Petrich court applied the wrong harmless error standard, Kitchen, 110 Wn.2d at 410-11, the supreme court subsequently recognized the child's uncertainty as to some of the incidents in Petrich made the unanimity error prejudicial. Coleman, 159 Wn.2d at 513.

By contrast, in Camarillo, the child testified in detail regarding three sexual encounters each independently capable of supporting one count of

indecent liberties. 115 Wn.2d at 62. There was no conflicting testimony about what happened each time, and no attendant confusion about dates or places. Id. at 71. Camarillo's general denial did not create a reasonable doubt as to whether some of the acts occurred, and so the unanimity error was harmless. Id. at 70-72; see also State v. Bobenhouse, 166 Wn.2d 881, 894-95, 214 P.3d 907 (2009) (same).

Similarly, in State v. Loehner, Loehner was charged with one count of statutory rape based on multiple incidents. 42 Wn. App. 408, 408-09, 711 P.2d 377 (1985). Failure to give a Petrich instruction was harmless, because the complaining witness described the first incident in detail and testified Loehner "did the same thing" during subsequent incidents. Id. at 409-10. Thus, in Camarillo and Loehner, the evidence was refuted only by the accused's general denial of the allegations. This left the jury to determine which witness was credible, and the verdict clearly revealed the jury's unanimous answer on that question.

Ayodeji's case is analogous to Petrich and Kitchen. The video depicting E.A. performing oral sex is the only incident involving E.A. that could be described in any detail. Instead, much like the children in Petrich and Kitchen, E.A. was uncertain about dates, the type of touching, and other specifics of the alleged incidents. For instance, E.A. wrote a letter to her mother that Ayodeji put his "dick in my butt." 8RP 183-84. But E.A. could

not remember how old she was when she wrote this letter. 8RP 181-83. Nor could she remember whether "butt" meant her vagina or anus. 8RP 185. E.A. said this touching was "different" than what occurred later at the family's current home, calling into question whether these earlier incidents involved penetration. 8RP 175-80. E.A. also told Lowry in 2010 that her father touched her with his hand underneath her underwear, but did not tell Lowry anything about penetration or Ayodeji using his penis. 6RP 24-27.

E.A.'s testimony was vague and inconsistent in many other ways. For instance, she said Ayodeji touched her with his penis more than once, but could not remember where on her body. 8RP 172-80. She said this occurred after her twelfth birthday. 8RP 175-76. It therefore could only correlate with the second degree rape charge, but is insufficient to support a rape conviction. 8RP 175-76. Then, only at the State's urging on re-direct examination, E.A. testified Ayodeji put his penis in her vagina. 8RP 205-07. She first testified she did not remember when or where this occurred, but then said it happened at the family's current home. 8RP 205-07. She was still unsure whether it occurred before or after she turned 12, again calling into question the timeframe for both the first and second degree rapes, which were based on E.A.'s age. 8RP 206-07.

Furthermore, E.A.'s truthfulness was undermined several times at trial. First, R.A. testified both E.A. and F.A. recanted their earlier stories of

sexual abuse, telling their mother they lied in their journals because they were mad at Ayodeji for leaving home. 7RP 85-86, 102-05. E.A. also told defense counsel in an interview that her memories of the sexual abuse were "kind of from stories," rather than her own recollection. 8RP 194. Defense counsel also caught E.A. in a lie about whether Ayodeji gave her money after the May 17th incident with F.A. 8RP 195-96. Furthermore, E.A. denied any sexual abuse when speaking with the forensic nurse in 2010. 6RP 46-47. E.A. likewise told the nurse in 2013 she was a virgin and told Coslett that Ayodeji never took photos of her. 9RP 51-52, 81-82. All these statements are inconsistent with E.A.'s trial testimony.

In Camarillo and Loehner, the children testified to each of the alleged incidents with specificity, and only a general denial undercut their testimony. Conversely, in both Kitchen and Petrich, the children were uncertain about dates, places, and the type of contact. Their credibility was undercut with past contradictory statements and fabrication. E.A.'s testimony was equally uncertain, if not even more so. Her credibility was undermined with several contradictory statements. The jury could have entertained a reasonable doubt as to several of the alleged rapes involving E.A. The Petrich error was therefore prejudicial as to the first and second degree rape convictions involving E.A.

F.A. was similarly uncertain about dates and specifics. She testified that incidents similar to the one on May 17, 2013 also occurred in Ayodeji's bedroom, her bedroom, and once or twice in E.A.'s bedroom. 8RP 86, 112-13, 119-21, 125-26. But, like the children in Kitchen and Petrich, F.A. could not remember any dates or the frequency of these incidents. 8RP 118. F.A. likewise testified Ayodeji made her use lotion to "make his dick hard," but could not remember how many times this occurred. 8RP 120-21.

F.A.'s credibility was also undermined because she told Coslett the incidents did not happen anywhere except in her bedroom. 8RP 138. F.A. likewise told Coslett that Ayodeji never used his mouth on her, but testified at trial that he used his mouth on upper parts and her lips. 8RP 123, 140. Similarly, when she was interviewed in 2010, F.A. wrote "sex" on a piece of paper, but then told the interviewer Ayodeji touched her with his fingers on top of her clothes and could not remember where on her body. 7RP 11-14, 17. This suggests F.A. did not understand the type of touching involved and possibly exaggerated or even fabricated the allegations.

To this end, Ayodeji also testified R.A. told him F.A. "will make up any story" and "will misinterpret anything." 10RP 120-21. For instance, F.A. wrote in her school journal she was pregnant by Ayodeji, which was not true. 10RP 129-30. F.A. likewise told the forensic nurse in 2010 that she did not remember any touching sexual touching by Ayodeji. 6RP 57-58.

For all these reasons, the jury could have reasonable doubt regarding several of the alleged rapes related to F.A. The Petrich error was therefore prejudicial as to the first degree rape charge involving F.A.

"The greater the number of offenses in evidence, the greater the possibility, or even probability, that all of the jurors may never have agreed as to the proof of any single one of them." Petrich, 101 Wn.2d at 570 (quoting Workman, 66 Wash. 292). The trial court's failure to give a Petrich instruction on the rape charges was prejudicial error that violated Ayodeji's right to a unanimous jury verdict. This Court should reverse the rape convictions and remand for a new trial. Kitchen, 110 Wn.2d at 414.

3. THE COURT ERRED IN ADMITTING ER 404(b) DOMESTIC VIOLENCE EVIDENCE FOR AN IMPROPER PURPOSE AND WITHOUT CONDUCTING THE REQUISITE BALANCING TEST.

Ayodeji sent his family a Christmas card in violation of the pre-trial no-contact order. The trial court admitted this ER 404(b) domestic violence evidence for an improper purpose and without conducting the requisite four-part balancing test. Given the State's repeated emphasis on the card, the error was prejudicial and this Court should reverse.

a. Admitting the ER 404(b) evidence was error.

ER 404(b) bars admission of "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in

conformity therewith." This rule applies to evidence of other acts regardless of whether they occurred before or after the charged crime. State v. Bradford, 56 Wn. App. 464, 467, 783 P.2d 1133 (1989).

However, such evidence may be admissible for other purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). Before admitting ER 404(b) evidence, the trial court must: (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose of the evidence, (3) determine whether the evidence is relevant to prove an element of the charged crime, and (4) weigh the probative value against the prejudice. State v. Gunderson, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014). This analysis must be conducted on the record. Id. at 922.

With regard to this balancing test, the Washington Supreme Court has stated: "We cannot overemphasize the importance of making such a record." State v. Jackson, 102 Wn.2d 689, 694, 689 P.2d 76 (1984). "The process of articulating the prejudice, and comparing it to probative value, ensures a 'thoughtful consideration' of their relative weight." State v. Carleton, 82 Wn. App. 680, 686, 919 P.2d 128 (1996) (quoting Jackson, 102 Wn.2d at 694). Thus, the trial court errs when it does not balance the four factors on the record. Id. at 685-86; see also State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009) ("A trial court abuses its discretion where it fails to

abide by the rule's requirements."). The court's decision to admit evidence is reviewed for abuse of discretion. Gunderson, 181 Wn.2d at 922.

In State v. Magers, the court held that prior acts of domestic violence are admissible under ER 404(b) "to assist the jury in judging the credibility of a recanting victim." 164 Wn.2d 174, 186, 189 P.3d 126 (2008) (plurality opinion); id. at 194 (Madsen, J., concurring). However, the court recently declined to extend Magers to cases where the complaining witness "neither recants nor contradicts prior statements." Gunderson, 181 Wn.2d at 925.

Gunderson was charged with felony violation of a no-contact order based on an altercation between him and his ex-girlfriend, Christina Moore. Id. at 918-20. Moore's testimony at trial regarding the incident was not inconsistent with any prior statements she made to police or the prosecutor. Id. at 920. Nonetheless, the trial court admitted evidence of two prior incidents between Gunderson and Moore for the purpose of impeaching Moore's credibility. Id. at 920-21. The supreme court reversed, agreeing with Gunderson that the significant prejudicial effect of the prior acts outweighed their probative value. Id. at 923-24. The court explained: "the mere fact that a witness has been the victim of domestic violence does not relieve the State of the burden of establishing why or how the witness's testimony is unreliable." Id. at 924-25.

The Gunderson court further held:

> Much like in cases involving sexual crimes, courts must be careful and methodical in weighing the probative value against the prejudicial effect of prior acts in domestic violence cases because the risk of unfair prejudice is very high. To guard against this heightened prejudicial effect, we confine the admissibility of prior acts of domestic violence to cases where the State has established their overriding probative value, such as to explain a witness's otherwise inexplicable recantation or conflicting account of events. Otherwise, the jury may well put too great a weight on a past conviction and use the evidence for an improper purpose.

Id. at 925 (citations omitted). The trial court therefore abused its discretion in admitting evidence of Gunderson's past domestic violence. Id.

Other acts of domestic violence may also be admissible to show the complaining witness's state of mind. Magers, 164 Wn.2d at 182-83. For instance, Magers's prior violent misconduct was properly admitted to show the victim's "reasonable fear of bodily injury." Id. at 183. Importantly, the victim's fear of bodily injury was an element the State needed to prove to convict Magers of assault. Id. Evidence of prior physical abuse may also be admissible for the limited purpose of explaining delayed reporting. State v. Fisher, 165 Wn.2d 727, 745-46, 202 P.3d 937 (2009).

The State acknowledged there was a no-contact order in place when Ayodeji sent the Christmas card. 5RP 15-18; Supp. CP __ (Sub. No. 48, State's Trial Memorandum, at 10). "Domestic violence" includes "[v]iolation of the provisions of a restraining order, no-contact order, or protection order" when committed by one family or household member

against another. RCW 10.99.020(5)(r). Ayodeji's violation of the no-contact order by sending the Christmas card therefore constitutes domestic violence, bringing it within Gunderson's gamut.

The State nevertheless sought to admit the card under ER 404(b) to show "the kind of control and manipulation that the defendant employed in his relationship with his family." 5RP 15-18; Supp. CP __ (Sub. No. 48, at 10). The State explained R.A. was "prepared to testify about how in the context of their relationship, coming from a patriarchal Nigerian society with rigid cultural and religious norms, the defendant's letter was an attempt at manipulating and controlling her." Supp. CP __ (Sub. No. 48, at 11). The State also argued the card was relevant to show R.A.'s state of mind and her role as "the driving force in reporting these incidents." 5RP 17. The court admitted the evidence, saying only: "after listening to the argument, I do see that -- I do see the relevance of this type of communication. So for those purposes I will allow it, meaning the cultural aspect and the affect on the witness."[8] 5RP 19.

Given the clear holdings in Magers and Gunderson, no proper purpose supported admission of the Christmas card. First, R.A. was not a recanting witness like in Magers. Her testimony was not inconsistent with

[8] Counsel had a standing objection because he lost the motion in limine. 5RP 16; State v. Kelly, 102 Wn.2d 188, 193, 685 P.2d 564 (1984).

prior statements. Second, R.A.'s state of mind was not relevant to any elements of the charged crimes, as in Magers. R.A. was not even an alleged victim. Third, R.A. reported the incidents immediately—there was no delay in reporting. 7RP 55-59, 68-73, 135-36; 8RP 28.

The record further demonstrates the trial court did not conduct the requisite four-part balancing test. Although the court identified "the cultural aspect and the affect on the witness" as the purpose for admission, 5RP 19, the court failed to determine whether the evidence was relevant to prove an element of the charged crimes. Had the court done so, it would have been clear the evidence was inadmissible. The card was admitted only to show R.A.'s state of mind and her cultural background with Ayodeji. But, again, R.A. was not an alleged victim. Her state of mind had nothing to do with the elements of child rape and child molestation. See CP 73-80 (to-convict instructions). Nor was her cultural background relevant to establishing whether Ayodeji had sexual intercourse or sexual contact with his daughters. See CP 73-80.

The court further failed to weigh the probative value of the Christmas card against its prejudicial effect. The Christmas card served only to prejudice Ayodeji, with no probative value. His violation of the no-contact order suggested disregard for the law and a propensity to commit crimes. It further served to portray him as manipulative, with callous disregard for the

court order prohibiting contact. This is contrasted, then, with the card's complete lack of relevance to the *charged crimes*.

It was manifestly unreasonable, and therefore an abuse of discretion, for the trial court to admit evidence of Ayodeji's violation of the no-contact order through the Christmas card. Gunderson, 181 Wn.2d at 925. The trial court further erred by failing to balance the four ER 404(b) factors on the record. Carleton, 82 Wn. App. at 685-86.

b. The error was prejudicial.

Improper admission of ER 404(b) evidence should lead to reversal where there is a reasonably probability the outcome of the trial would have been different without the inadmissible evidence. Gunderson, 181 Wn.2d at 926; State v. Grower, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014).

The State repeatedly emphasized the Christmas card during R.A.'s testimony, Ayodeji's testimony, and closing argument. R.A. explained she received the card "after the restraining order is in place." 8RP 9; Ex. 65. She testified she "start[ed] shaking" as soon as she saw it was from Ayodeji. 8RP 12. She explained the card "is Johnson saying, well, you can do whatever you want to do, but I will still be free." 8RP 15. R.A. said "one area that actually gets me the most" in the card was Ayodeji's words: "By the special grace of God, my bottom might be sitting in cell but my spirit is not. I will never, ever again underestimate what you can do, even though I

knew for sure how much you really love me as you used to say." 8RP 17. R.A. explained this meant Ayodeji was instructing her to forgive him and "it is a guilt game like, how can you call yourself a Christian when you can not let it go, when you cannot forgive." 8RP 17-18. The State ended R.A.'s direct examination on this note. 8RP 18.

The State then cross-examined Ayodeji about the Christmas card, emphasizing Ayodeji sent it in violation of the no-contact order: "despite the fact that there was a no contact order, you wrote that letter to [R.A.] and your children at Christmas, right?" 11RP 23. When Ayodeji pointed out the letter had nothing to do with his current charges, the State again asked, "What I'm asking you about right now is the fact that despite the Court said you are not to talk to your wife or children while this case is pending, you still wrote them a letter to contact them, right?" 11RP 23.

Then, in closing, the State invited the jury to review the card again in deliberations. 11RP 86-87. The State pointed to Ayodeji's testimony, where he said "[e]very year he would send the family a Christmas card, even this year in the middle of this, when the case is pending, he wanted them to know that he loved them and he was thinking about them." 11RP 87. The State argued, "Take a very good look at this Christmas card once you have access to it during your deliberations, and ask yourself whether or not that explanation of what this card was all about makes any sense whatsoever."

11RP 87. The State then read a portion of the card. 11RP 87-88. The State then emphasized Ayodeji wrote "about forgiveness and unconditional love," rather than "Merry Christmas and Happy New Year." 11RP 88.

Admission of the Christmas card prejudiced the outcome of the trial because it made Ayodeji appear manipulative and willing to violate the no-contact order. This prejudice was further compounded by the lack of a relevant limiting instruction. Gunderson, 181 Wn.2d at 923 ("The trial court must also give a limiting instruction to the jury if the evidence is admitted."). The jury was left to consider the no-contact order violation as evidence of Ayodeji's propensity to commit crimes. This Court should reverse and remand for a new trial. Id. at 926-27.

4. ALLOWING ONLY THE JURY TO VIEW VIDEO EVIDENCE CONSTITUTED A COURTROOM CLOSURE, VIOLATING AYODEJI'S RIGHT TO A PUBLIC TRIAL.

The Sixth Amendment and article I, section 22 of the Washington Constitution guarantee the accused a public trial by an impartial jury. Presley v. Georgia, 558 U.S. 209, 213, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); Bone-Club, 128 Wn.2d at 261-62. Article I, section 10 of the Washington Constitution also provides that "[j]ustice in all cases shall be administered openly." This latter provision gives the public and the press

a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

The right to a public trial is a core safeguard in our justice system. State v. Wise, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). The open and public judicial process helps ensure fair trials, deters perjury and other misconduct, and tempers biases and undue partiality. Id. at 6. It is a check on the judicial system, provides for accountability and transparency, and assures that whatever transpires in court will not be secret or unscrutinized. Id.

A violation of the public trial right is structural error, presumed prejudicial, and not subject to harmless error analysis. Id. at 13-15; State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006); In re Pers. Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). Whether the public trial right has been violated is a question of law reviewed de novo, and may be raised for the first time on appeal. Wise, 176 Wn.2d at 9.

A trial court may restrict the public trial right only "under the most unusual circumstances." Bone-Club, 128 Wn.2d at 259. Before closing any part of trial, the court must apply the five Bone-Club factors on the record: (1) the proponent of closure must show a compelling interest for closure and, when closure is not based on the accused's right to a fair trial, a serious and

imminent threat to that compelling interest; (2) anyone present when the closure motion is made must be given an opportunity to object to the closure; (3) the proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; (4) the court must weigh the competing interests of the proponent of closure and the public; and (5) the order must be no broader in its application or duration than necessary to serve its purpose. Id. at 258-59; Wise, 176 Wn.2d at 12. A "*post hoc* determination" of these factors cannot cure the trial court's failure to do so. Bone-Club, 128 Wn.2d at 261; accord Wise, 176 Wn.2d at 12-13.

a. Experience and logic demonstrate recorded media evidence should be played in open court.

Not every interaction between the court, counsel, and the accused implicates the public trial right or constitutes a courtroom closure. State v. Sublett, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). Courts therefore employ a three-step framework for determining whether the trial court violated the public trial right: (1) whether the proceeding at issue implicated the public trial right under the experience and logic test; (2) whether there was a closure of the proceeding; and (3) whether the closure was justified (i.e., did the court conduct a Bone-Club analysis on the record prior to closing the proceeding?). State v. Gomez, __Wn.2d__, 347 P.3d 876, 878 (2015).

The experience prong of the experience and logic test asks whether the place and process have historically been open to the press and general public. Sublett, 176 Wn.2d at 73. The logic prong asks whether public access plays a significant role in the functioning of the particular process in question. Id. If the answer to both is yes, the public trial right attaches and the Bone-Club factors must be considered before the proceeding may be closed to the public. Id.

The public trial right applies to all evidentiary phases of trial, including "whenever evidence is taken, during a suppression hearing, and during voir dire." State v. Rivera, 108 Wn. App. 645, 652-53, 32 P.2d 292 (2001); Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)).[9] Washington case law reveals few, if any, instances where the public was excluded at trial during introduction of evidence like testimony or recorded media. This may be because the public trial right is so obvious in such instances. However, courtroom closures during suppression hearings provide useful analogies.

[9] The Sublett court rejected the distinction made in Rivera between "legal and ministerial issues," to which there is no public trial right, and "the resolution of disputed facts and other adversarial proceedings," to which there is. 176 Wn.2d at 72. The court held this distinction "will not adequately serve to protect defendants' and the public's right to an open trial." Id. However, this does not negate the general rule from Rivera that the public trial right attaches to evidentiary phases of trial.

In Waller v. Georgia, police placed wiretaps on several phones, revealing a large gambling operation. 467 U.S. 39, 41, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). When the defense moved to suppress the wiretaps, the prosecution requested the suppression hearing be closed to the public. Id. The prosecution argued the wiretaps incriminated individuals not yet indicted, and so the evidence might be tainted if revealed in open court. Id. at 42. The trial court agreed and closed the entire proceeding, including recordings of the intercepted conversations. Id. at 42-43. Even though closing some of the suppression hearing may have been justified, the Supreme Court held the closure violated the public trial right because the trial court failed to conduct the requisite balancing test. Id. at 48.

Similarly, in Bone-Club, the Washington Supreme Court held that a pretrial suppressing hearing implicated the public trial right. The trial court closed the courtroom during a police officer's testimony to protect the confidentiality of his undercover activities, without first applying the five-part test. 128 Wn.2d at 256-57. The supreme court rejected the court of appeals' post hoc attempt to justify the closure by identifying a compelling interest in protecting the undercover officer, explaining: "determination of a compelling interest was the affirmative duty of the trial court, not the court of appeals." Id. at 261. Moreover, the court held, "the existence of a compelling interest would not necessarily permit closure: the trial court must

then perform the remaining four steps to weigh thoroughly the competing interests." Id. The court therefore reversed and remanded for a new trial. Id. at 261-62.

Waller and Bone-Club show that evidence is historically presented in open court, even when it contains sensitive information. The wiretap recordings in Waller were also subject to the public trial right. This further demonstrates that recorded media evidence, like telephone and video recordings, has also traditionally been played in open court.

This court's recent decision in State v. Magnano, 181 Wn. App. 689, 326 P.3d 845, review denied __Wn.2d__, 339 P.3d 635 (2014), provides a useful comparison. There, the trial court replayed a 911 recording for the jury in a closed courtroom during deliberations. Id. at 691-93. This court held Magnano failed to establish the experience prong because deliberations have historically not been open to the press or public. Id. at 696-99.

The court further held Magnano failed to establish the logic prong because "[t]he process of replaying properly admitted evidence to a deliberating jury is not one that benefits from public access." Id. at 699. The public trial right serves to ensure a fair trial, remind the prosecutor and the judge of their responsibility to the accused, encourage witnesses to come forward, and discourage perjury. Id. "These purposes are served by offering audio recording evidence, admitting it or not, and playing it for the jury in

open court. No more is gained by requiring the jury to review the already-admitted evidence during deliberations in open court." Id. (emphasis added).

Magnano demonstrates that while recorded media does not need to be replayed in open court during deliberations, the public trial right requires it initially be played in open court.[10] This best serves the purposes of the public trial right by encouraging witnesses to come forward and discouraging perjury. Thus, both prongs of the experience and logic test are met, and so the public trial right attaches to playing admitted video evidence during trial.

b. The trial court impermissibly closed the courtroom without conducting the *Bone-Club* analysis.

The State introduced a two-minute video of E.A. allegedly performing oral sex on Ayodeji. 5RP 46-47; 9RP 150-52. The identity of the male in the video was an issue at trial. 7RP 150-51; 11RP 43-44, 123-25. There was no talking in the video, thus making the images the most important part of the evidence. 5RP 47. Once the video was admitted into evidence, the State set up the television so it faced the jury box and no one in the courtroom gallery could see it. 9RP 150-52. The purpose was to exclude the public from viewing the video. 5RP 47-48; 9RP 104-06, 150-52.

[10] Furthermore, the video evidence was sealed pursuant to a protective order, so it was not accessible to the public after trial. Supp. CP __ (Sub. No. 14, Agreed Protective Order Regarding Image/Audio Evidence via CD/DVD Recording).

Washington courts recognize that a closure "occurs when the public is excluded from particular proceedings within the courtroom." State v. Anderson, No. 45497-1-II, slip op. at 4 (Wash. Ct. App. May 19, 2015). Therefore, proceedings inaccessible to the public qualify as closures. Id.; State v. Leyerle, 158 Wn. App. 474, 483, 242 P.3d 921 (2010) (holding that proceedings conducted in a hallway adjacent to the courtroom were closed to the public). In Anderson, the court held that a sidebar conference constituted a closure because its entire purpose was "to prevent anyone other than those present at the sidebar . . . from hearing what [was] being said." Slip op. at 4-5. This was true even though "the trial court neither barred the public from the courtroom during the sidebar conference nor held the conference in a physically inaccessible location."[11] Id. at 4.

The same is true here. The courtroom doors were not physically locked and the public was not told to leave the courtroom. Nevertheless, the public was purposefully excluded from viewing the video. The television screen was positioned so only the jury could see it. This is no different than playing the video for jurors in chambers or behind locked courtroom doors, and therefore constituted a courtroom closure.

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[11] The Washington Supreme Court held in State v. Smith that sidebar conferences on evidentiary matters do not implicate the public trial right. 181 Wn.2d 508, 520-21, 334 P.3d 1049 (2014). However, the court did not decide whether sidebars constituted closures. Id. at 520.

The fact that the video contained very sensitive material does not negate the Bone-Club requirement. Both Waller and Bone-Club involved sensitive information that could be harmful if exposed to the public. Reversal was nevertheless required. Similarly, in Wise, it violated the public trial right to question jurors privately in chambers about sensitive topics such as personal health, relationships with law enforcement, and criminal history. 176 Wn.2d at 7, 11-12. The U.S. Supreme Court has acknowledged there are undoubtedly special concerns that may warrant closing the courtroom. Presley, 558 U.S. at 215. But, "even assuming, *arguendo*, that the trial court ha[s] an overriding interest in closing [the courtroom], it [is] still incumbent upon it to consider all reasonable alternatives to closure." Id. at 216.

The trial court here failed to conduct the five-part Bone-Club test before playing the video only for the jurors. See 5RP 47-48; 9RP 104-06, 150-52. Failure to perform the Bone-Club analysis before closing the courtroom is structural error, no matter how brief the closure. Easterling, 157 Wn.2d at 181-82; State v. Shearer, 181 Wn.2d 564, 572-73, 334 P.3d 1078 (2014).

The Washington Supreme Court has recognized that "any one deprivation of the public trial right will not likely devastate our system of justice or even necessarily cause a particular trial to be unfair (though of this latter part we can never be sure)." Wise, 176 Wn.2d at 17. However, letting

deprivation of the public trial right go unchecked undermines "'the framework within which the trial proceeds.'" Id. at 17-18 (quoting Arizona v. Fulminante, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)). "To allow such deprivations would erode our open, public system of justice and could ultimately result in unjust and secret trial proceedings." Id. at 18.

This Court should likewise prevent erosion of the public trial right. If this Court does not reverse, then all recorded media can be played for the jury in secret and will no longer be subject to public scrutiny. Consequently, evidence such as video and audio recordings must be played in open court, unless the trial court first performs the Bone-Club analysis. The trial court failed to do so here. This Court should reverse and remand for a new trial. Wise, 176 Wn.2d at 19; Bone-Club, 128 Wn.2d at 262.

5. THE COURT FAILED TO MAKE AN INDIVIDUALIZED INQUIRY INTO AYODEJI'S ABILITY TO PAY BEFORE IMPOSING A DISCRETIONARY DOMESTIC VIOLENCE ASSESSMENT FEE.

Trial courts may order payment of LFOs as part of a sentence. RCW 9.94A.760. But RCW 10.01.160(3) specifies courts "shall not order a defendant to pay costs unless the defendant is or will be able to pay them." The trial court failed to consider Ayodeji's ability or future ability to pay before it imposed the discretionary domestic violence assessment fee.

The Washington Supreme Court recently held that RCW 10.01.160(3) requires trial courts to first consider an individual's current and future ability to pay before imposing LFOs. State v. Blazina, 182 Wn.2d 827, 837-39, 344 P.3d 680 (2015). This requirement "means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry." Id. at 838. Instead the record must reflect that the court made an "individualized inquiry" into the ability to pay. Id. The court should consider such factors as length of incarceration and other debts, including restitution.[12] Id. If the individual qualifies as indigent, "courts should seriously question that person's ability to pay LFOs." Id. at 839.

Under RCW 10.99.080(1), courts "may impose a penalty assessment not to exceed one hundred dollars on any person convicted of a crime involving domestic violence." (Emphasis added.) The Blazina court recognized the word "shall" creates a duty, but the word "may" confers discretion. 182 Wn.2d at 838. Because RCW 10.99.080(1) uses "may" rather than "shall," the domestic violence penalty is discretionary rather than mandatory. Compare RCW 10.99.080(1), with RCW 43.43.7541 (every sentence imposed must include a DNA fee of $100), and RCW

[12] The trial court here imposed $5,900 in restitution. 12RP 45.

7.68.035(1)(a) (a $500 victim assessment fee shall be imposed for each felony conviction).

The trial court was therefore required to make an individualized inquiry into Ayodeji's current and future ability to pay the domestic violence penalty before imposing it. Blazina, 182 Wn.2d at 838. At sentencing, the court noted its "custom" of waiving LFOs and found Ayodeji indigent. 12RP 45. The court then imposed only mandatory LFOs—a $500 victim assessment and $100 DNA fee—except for the discretionary $100 domestic violence penalty. CP 16. The court did not enter any boilerplate finding of ability to pay. CP 16-17. In his indigency declaration, Ayodeji reported no assets or savings whatsoever. Supp. CP __ (Sub. No. 90, Motion and Declaration for Order Authorizing Defendant to Seek Review at Public Expense and Appointing an Attorney on Appeal).

The record shows the court did not consider Ayodeji's current and future ability to pay before imposing the domestic violence fee. In fact, the record suggests the court would have waived the fee had it known the fee was discretionary. The court failed to comply with its statutory duty to consider Ayodeji's individual financial circumstances before imposing LFOs. Consequently, this Court should permit Ayodeji to challenge the

legal validity of the LFO order for first time on appeal, vacate the order, and remand for resentencing. Blazina, 182 Wn.2d at 838-39.

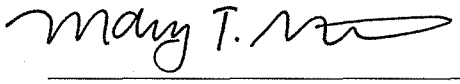
D. CONCLUSION

This Court should reverse and dismiss Ayodeji's convictions on counts V and VI because retrial would violate double jeopardy. This Court should reverse the rape convictions and remand for a new trial because Ayodeji's right to a unanimous jury verdict was violated. This Court should also reverse and remand for a new trial on all counts because the trial court erroneously admitted ER 404(b) evidence and Ayodeji's public trial right was violated. Finally, this Court should vacate the LFO order and remand for resentencing.

DATED this 19th day of June, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 72359-6-I
	)	
JOHNSON AYODEJI,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

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

THAT ON THE 19TH DAY OF JUNE 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOHNSON AYODEJI
DOC NO. 376222
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 19TH DAY OF JUNE 2015.

X Patrick Mayovsky