72359-6

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Court of Appeals
Division I
State of Washington

NO. 72359-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOHNSON O. AYODEJI,

Appellant.

BRIEF OF RESPONDENT

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2. Should the convictions for counts I, II and VII be overturned for a failure of the trial court to include the child rape offenses in the unanimity instruction if it was invited error?

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on the defendant for the spectators in the courtroom as well as the jury if it was played in open court?

7. Did the defendant waive a claim of error when he failed to object to the trial court imposing the domestic violence legal financial obligation?

II. STATEMENT OF THE CASE

The State charged the defendant in the second amended information with seven counts. Counts 1, 2, 3, and 7 involved the victim E.A and were for the offenses of rape of a child in the first degree, 2 counts of child molestation in the first degree, and one count of rape of a child in the second degree respectively. The charging period for counts 1, 2, and 3 was from the 8th day of January, 2006 through the 7th day of January, 2013. E.A. turned 12 years old on January 8, 2013. Count 7 was for the period from on or about January 9, 2013 through May 17, 2013. Counts 4, 5, and 6 involved the victim F.A and were for the offenses of rape of a child in the first degree and two counts of child molestation in the first degree. The charging period for counts 4, 5, and 6 was on or about the 9th day of February, 2007 through the 17th day of May, 2013. With regard to the two counts of child molestation in the first

degree charged as to each victim, the charging language in each indicated in an in an act separate and distinct from the other charged count. All seven counts included a domestic violence enhancement and the aggravator that the crime was part of an ongoing pattern of sexual abuse of the same victim under the age of 18 years manifested by multiple incidents over a prolonged period of time. The defendant was convicted by jury verdict of all seven counts and all enhancements and aggravators. 1 CP 48-61; 105-107.

R.A. testified at trial that on May 17, 2013, she walked in on the defendant having sex with F.A., who was then 11 years old. The defendant was on top of F.A., in F.A.'s bed moving up and down on her while F.A.'s 2 years old sister was sleeping next to her. R.A. testified that she screamed and ran away up the stairs. The defendant followed her and was telling her to touch it, referring to his penis, claiming it was not even hard. R.A. saw that the area around the hole in the front of the defendant's boxer shorts was wet. R.A. kicked the defendant out of the house and contacted CPS and the police. 7/24/14 RP 125 – 130.

Through the investigation of this incident, F.A. and E.A. told the police the defendant had used his cell phone to film E.A.

performing oral sex on him. Pursuant to a search warrant, the detectives found a deleted video on a SM card identified as belonging to the defendant. The video showed E.A. performing oral sex on the defendant. In the video the defendant was wearing plaid boxer shorts and a white t-shirt. This video was shown to the jury. The date stamp on the video shows that it was created on May 8, 2013, E.A. was 12 years old at that time. Deleted still photographs from the video were also found on the defendant's phone. F.A.'s date of birth is February 9, 2002 and E.A. date of birth is January 8, 2001. 7-23-14 RP 16, 7-24-14 RP 34, 37; 7-25-14 RP 64.

E.A. and F.A. first reported the defendant was touching them and having sex with them in 2008 and again in 2009. R.A. testified that on a Sunday morning in 2008, F.A. told her that the defendant touched her in her private parts. F.A. told R.A. the defendant touched E.A. also and that E.A. had asked her to tell R.A.. R.A. reported the disclosure to CPS but nothing came of it. 7/24/14 RP 54-5.

On Thanksgiving of 2009, R.A. caught E.A. and F.A. having oral sex with each other. The two were 7 and 8 years old at the time. When R.A. asked them where they got this, they indicated the defendant did that to them. R.A. called a friend and a counselor

and E.A. and F.A. repeated what the defendant had done to the counselor, giving the additional detail that it took place in the computer room. When CPS became involved, E.A. and F.A. did not want to talk about it with anyone other than R.A. CPS referred the case to the Lynnwood Police Department. During a forensic interview that was video and audio recorded, F.A. was not able to say what the defendant had done to her, but was able to write it; she wrote "sex, sex" and circled the hand on the gingerbread person drawing to show what part of his body the defendant had used. Eventually it was determined E.A. and F.A. were not willing or not able to testify and the case was dismissed. R.A. sought counseling for E.A. and F.A. 7/24/14 RP 67, 74, 77.

When the 2009 charges were dropped by the State, the defendant moved to California. He denied having done anything to E.A. and F.A. All the children, including E.A. and F.A., were asking for the defendant. In 2011, R.A. and the children moved into a house in Everett. A year later, the defendant had moved back to Washington and began seeing R.A. and the children again. R.A. indicated she was confused, the children began saying they learned the sex acts from her computer, not the defendant.

Eventually R.A. relented and by late January 2013, the defendant had moved back in with the family. 7/24/14 RP 85-91.

F.A. was 12 years old at the time she testified at trial. She was 11 years old or younger during the charging period of these offenses. When asked about the defendant, F.A. described him as two people, 'dad' who is caring and 'Johnson' who is not. F.A. explained that "in the daytime he's okay, but in the nighttime he's like a werewolf in the full moon." 7/25/14 RP 77.

F.A. testified about what happened on May 17, 2013, when her mother walked in and caught the defendant having sex with her. She and her then two years old sister were asleep in F.A.'s bed. Early in the morning, F.A. heard the defendant come down the stairs. He came into her room, moved her sister out of the way and moved F.A.'s legs, so they were open and laid down on top of her. The defendant then removed F.A.'s clothing and placed his penis inside her 'va-jj'. F.A. explained that the va-jj was the part of the body she used to go to the bathroom and that she could feel the defendant touching inside of her. The defendant did not take off his boxers to do this, but used the hole in the front. F.A. further explained that she tried to block it out; she would try to go into deep sleep, if she was in deep sleep she would not be moving. Her

mother came in while the defendant was doing this to F.A. and screamed. F.A. testified that she was scared when her mom caught the defendant doing that to her. She explained it as, "when someone gets someone else in trouble, you feel like it's your fault. So I felt like it was my fault. I got someone else in trouble." (7/25/14 RP 90.)

When asked if that was the only time the defendant had done that to her, F.A. responded that it was not. She said he does it all the time. F.A. described the time from the defendant's return as going from bad to good to bad again. When he first came back, he was ignoring F.A. The defendant told F.A. that he was upset with her because she had talked last time. In the middle he would take her to the mall and they got volley balls and stuff. In the end he started doing "the crazy stuff he usually does." (7/25/14 RP 112.) F.A. clarified by that she meant he started doing what her mom caught him doing. When explaining how she felt about it, F.A. said at first she felt guilty but then she got used to it. 7/25/14 RP 86-93. 98-112, 116.

F.A. testified the defendant would also make her "make his dick hard." F.A. explained that most of the time she would try to leave, but that didn't really work. The defendant would get lotion

and she would have to do that. She explained that it was different than what her mom caught him doing. She said to make his dick hard she used her hand. The defendant would keep his boxers on but his penis would be out of the hole. She explained that this would happen during the day in her bedroom. She also said the defendant would every once in a while touch her on her va-jj with his hand and his mouth. F.A. denied touching the defendant with her mouth. 123

F.A. said most of the times the defendant had sex with her it was in her room, but it also happened one to five times upstairs in his bedroom when her mom was at work. F.A. said the defendant also had sex with her once or twice in E.A.'s bedroom while her mom was at work. F.A. explained that when it was in E.A.'s bedroom the defendant would do it to them together. F.A. said those were the only times she saw the defendant touching E.A.

F.A. and E.A. would go to the Boys and Girls Club after school until they were picked up by either their mother or the defendant. On May 17, 2013, after he had been caught by R.A., the defendant came to the Boys and Girls Club to see F.A. and E.A. He was crying and told F.A. something to the effect of 'make it

right'. F.A. took that to mean she was to help him get out of it. 7/25/14 RP 98-100.

E.A. testified at trial. As R.A. had indicated E.A. was very shy. E.A. indicated her birthday was January 8, 2001. E.A. turned 12 after them moved into the house she was residing at the time of trial. E.A. testified that the defendant started touching her when she was 7 or 8 years old and living in the YWCA apartment. E.A. said at the YWCA housing, the defendant started touching her and explained he was using his penis to touch her. She described the touching in the YWCA housing as occurring in the computer room and living room there. In a letter she wrote, E.A. stated the first time it happened was in the apartment, before they moved into the house, the defendant touched her in her butt. She also wrote that when they moved to the house, 10 weeks after the defendant moved in with them, he again would touch her in the butt and on her boobs. The letter also indicated he put his dick in her butt. E.A. testified that the defendant touched her with his penis at their current house as well. She explained it happened more than once and described it happening in the computer room, in the living room and in the defendant's room. She again said the defendant used his

penis and eventually she testified to the defendant putting his penis in her vagina. 7/24/14 RP 55; RP 155; 173, 175-6, 180-84.

That Christmas, the defendant sent the family a very lengthy letter. The theme of the letter was unconditional love and forgiveness and included numerous references to Scripture. R.A. is a very devout Christian. She explained that based on her beliefs and the Nigerian church to which she belonged, the letter emphasized that above all she should stand by the defendant and forgive him. R.A. took the letter to mean the defendant wanted her, F.A., and E.A. to forgive him and not to prosecute the case. The letter was also in violation of the protective order issued in this case. 7/25/14 RP 9-18.

The defendant testified and denied the allegations of child molestation and child rape. The defendant blamed R.A. for manipulating their children, the police, the prosecutor, and the system to bring about the charges. The defendant's response to the video of E.A. performing oral sex was to comment on the vile thing she was doing. 7/29/14 RP 54-5; 92-94; 131-133; 7/30/14 RP 37.

III. ARGUMENT

1. The Convictions For Counts V And Vi Of First Degree Child Molestation Should Not Be Overturned Based On Testimony Of Other Acts Of The Defendant That Did Not Amount To Child Molestation When There Was Ample Evidence To Support The Convictions And The Jury Was Properly Instructed On The Law Including Unanimity.

In a case where the evidence indicates that several distinct criminal acts were committed, but the defendant is only charged with one count of criminal conduct, "a unanimous verdict will be assured if either (1) the State elects the act upon which it will rely for conviction, or (2) the jury is instructed that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt. State v. Stark, 48 Wn. App. 245, 251, 738 P.2d 684 (1987). The defendant does not argue that the jury was not properly instructed on the law regarding child molestation. The defendant concedes the jury was also properly instructed on unanimity. The defendant argues that because the jury did not specify which acts it relied upon to convict the defendant, it may have relied upon acts that did not support the conviction. BOA at 15-16.

The State was required to prove each element of each count of first degree child molestation beyond a reasonable doubt. A person commits the crime of first degree child molestation when the

person has sexual contact with another person who is less than 12 years, and the perpetrator is not married to the victim and is at least 36 months older than the victim. RCW 9A.44.083. The jury was properly instructed on the elements of first degree child molestation and unanimity. CP 72, 77-80. The court instructed the jurors regarding the definition of "sexual contact" as "Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party." CP 81. The defendant does not contend that this definition is not legally sufficient.

The defendant concedes that some of the acts are supported by substantial evidence. BOA at 15. For example, F.A.'s testified that on multiple occasions, the defendant made her "make his dick hard" with her hand. 7/25/14 RP 112-14.

The defendant contends, however, that from the several acts of physical contact presented at trial, the jurors could have erroneously relied on an act that did not amount to sexual contact as defined. BOA at 18. The defendant argues that because the jury did not specify which acts it relied upon to convict him, this court cannot be sure it did not rely upon one of the acts for which there was not sufficient evidence. This is precisely the argument in

State v. Stark, supra. In Stark, the defendant was charged with one count of statutory rape based upon three contacts. The jury heard testimony regarding the three acts. Two of the acts met the definition of sexual intercourse and one did not. Stark, like the defendant here, argued the court could not be certain the jury did not rely on the act that was insufficient to support his conviction. Stark, 48 Wn. App. 251, 738 P.2d 684.

Because jurors are assumed to follow the instructions of the court, the court's instruction that defined sexual contact is assumed to have been followed. State v. Willis, 67 Wn.2d 681, 409 P.2d 669 (1966). Therefore, the jury could not have relied on any act that did not meet the definition of sexual contact.

2. The Invited Error Doctrine Precludes The Defendant From Seeking Appellate Review Of The Court's Failure To Include The Child Rape Charges In The Unanimity Instruction.

The invited error doctrine is a strict rule that precludes a criminal defendant from seeking appellate review of an error he helped create, even when the alleged error involves constitutional rights. State v. Studd, 137 Wn.2d 533, 546–47, 973 P.2d 1049 (1999). The invited error doctrine applies where the defendant engages in some affirmative action by which he knowingly and voluntarily set up the error. State v. Corbett, 158 Wn. App. 576,

592, 242 P.3d 52, 59 (2010). This doctrine applies to alleged failures to provide a Petrich unanimity jury instruction. "[W]e held that where the defendant proposed jury instructions that did not include a Petrich instruction, the invited error doctrine precluded him from challenging on appeal for the first time the trial court's failure to provide a Petrich unanimity instruction: State v. Carson, 179 Wn. App. 961, 973, 320 P.3d 185, 190 (2014) aff'd. on other grounds, 184 Wn.2d 207, 357 P.3d 1064 (2015).

Here, the defendant proposed only one jury instruction regarding the weight and credibility to be given to any alleged out of court statements of the defendant. CP 96-98. The defendant did not propose a Petrich unanimity instruction. During the discussion of the proposed instructions, the defendant specifically addressed the unanimity instruction. The defendant did not request that the child rape charges be included in the instruction but did request the court include language in the 'to convict' instructions to clarify that the state had to prove an act separate and distinct from the act relied upon in the other offenses as to each victim. The court followed that proposal and clarified each 'to convict' instruction. The defendant then affirmatively agreed to the Petrich instruction that excluded the child rape charges and the court's other

instructions to the jury. 7/30/14 RP 3-12. When the final packet of instructions was prepared, the court formally went through the instructions and requested objections and exceptions. The defendant did not object or except to any instruction. 7/30/14 RP 47-54. Through his participation in the discussion regarding the proposed Petrich instruction, the defendant knowingly and voluntarily set up the error.

It can be legitimate trial strategy to not seek a Petrich instruction. Carson, 184 Wn.2d at 218, 357 P.3d 1064. Clearly, the defendant raised an issue with regard to the confusion the Petrich instruction could create based on the many different counts charged. The defendant chose to clarify the Petrich instruction and its application to the multiple counts of child molestation and how they related to the each other and the counts of child rape, but did not request the child rape charges be included in the unanimity instruction. Since the evidence of the child rape offenses was very strong, the video tape and the eye witness account of R.A. in addition to the testimony of F.A. and E.A., it was a reasonable trial strategy for the defendant, similarly to the defendant in Carson, to not want the child rape charges included in the Petrich instruction.

3. The Jury Instructions As A Whole Properly Instructed The Jury Of Its Duty To Unanimity.

Here, the two separate "to-convict" instructions for first degree child rape and one "to-convict" instruction for second rape of a child listed all the required elements of the alleged crimes. The trial court instructed the jury that "[a] separate crime is charged in each count," that each count should be decided separately, and that verdicts for one count should not influence verdicts on any other count. CP at 71. The trial court also instructed the jury that "Because this is a criminal case, each of you must agree for you to return a verdict." CP at 85. Read together, the jury instructions accurately informed the jury that it must decide each count separately and that its verdicts must be unanimous.

Furthermore, the prosecutor emphasized the unanimity requirement for all seven counts. During his closing argument, the prosecutor addressed Instruction number 7, the Petrich instruction. CP 72. He brought the jury's attention to the instruction and talked about the testimony from the girls saying, "there's a lot more than seven different instances of sexual abuse alleged." 7/30/14 66 at lines 1-2. The prosecutor goes on to say, "So we have evidence to support a lot more than seven charges. So the problem that

creates, you as jurors, with your collective experience and notes from trial and paying attention to what was presented, begin deliberating, you need to make sure that all of you are talking about the same act, the same description of conduct for each of the charges." 7/30/14 RP 65-66.

The jury was properly instructed to decide each count separately and that they must be unanimous, including to the act supporting the verdict, to reach a verdict. The defendant was not denied his right to a unanimous verdict.

4. Even If The Failure To Include The Child Rape Offenses In The Petrich Instruction Does Not Fall Under The Invited Error Doctrine, And The Instructions Were Not Sufficient, The Error Was Harmless.

Failure of the court to follow the rule in Workman and Petrich is violative of a defendant's state constitutional right to a unanimous jury verdict and United States constitutional right to a jury trial. When error occurs during a trial the jury verdict will be affirmed only if that error was harmless beyond a reasonable doubt. State v. Camarillo, 115 Wn.2d 60, 64, 794 P.2d 850, 852 (1990) (citing State v. Workman, 66 Wash. 292, 119 P. 751 (1911) and State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984)).

In Camarillo, the defendant did not request that the State elect which act it relied upon for conviction, not did the defendant request a unanimity instruction. Camarillo, 115 Wn.2d at 63. The victim testified to three different sexual abuse incidents to support one count of indecent liberties. Id., at 66–68. The defendant did not dispute the specifics of any one incident, but instead offered only a general denial that he had abused the victim. The Supreme Court held the error was harmless, noting that the jury had to believe either the victim's story or the defendant's story. Id. at 72.

Similarly, in State v. Allen, the defendant was convicted of indecent liberties based on the testimony of a child victim. The victim in Allen testified that almost every day for a period of time the defendant would touch her in an inappropriate way. He might kiss her, touch her between the legs over her clothing or under her clothing, put her hand on his penis, or touch her chest. The defendant did not challenge any specific incidents, but issued only a general denial. The State failed to elect which act it was relying upon, and the trial court did not give a unanimity instruction. The court held the failure to give the instruction was harmless, because again, the jury's choice was to either believe the defendant or

believe the victim. State v. Allen, 57 Wn. App. 134, 136-9, 788 P.2d 1084 (1990).

In other words, if a juror believed beyond a reasonable doubt that one act occurred, that juror would then necessarily believe that the others occurred as well. State v. Bobenhouse, 143 Wn. App. 315, 328, 177 P.3d 209, 215 (2008) aff'd, 166 Wn.2d 881, 214 P.3d 907 (2009).

The defendant claims that the testimony of the victims in this case was vague and inconsistent and their credibility was undercut at trial. The defendant points to E.A.'s obviously reluctance to use the words for what the defendant did to her during trial, likening it to the testimony in Petrich and Kitchen. BOA 24-5. This disregards the corroborating evidence in this case. Not only was there a video of the defendant making E.A. perform oral sex on him, but there was also the eye witness account of F.A. regarding times when the defendant would engage in sexual acts with her and E.A. together. "Well, when it was me and E.A., he would do it to us together and I would see it." 7/25/14 RP 125-6. The defendant claims F.A. credibility was called in question on a number of incidents. BOA 27. However, the record does not support these claims. When F.A. was asked on cross-examination about telling Ms. Coslett the

incidents did not happen anywhere except in her bedroom, F.A. responded by pointing out her response was to a very specific question. The defendant's trial attorney stopped F.A. as she was explaining that her answer was only to the question of when the defendant was on top "not to anywhere like I wasn't on my knees or anything else." 7/25/14 RP 138. The defendant also claims F.A. was impeached because she told Ms. Coslett the defendant never used his mouth on her but testified at trial that he did. BOA 27. However, the question was, "Did you ever tell [Ms. Coslett] that he does anything with his mouth to you?" and her answer was "no". 7/25/14 RP 140.

The defense to these charges was general denial. The defendant did not indicate that he had inadvertently touched the girls at some point or any other explanation for any of the multitude of instances of sexual abuse presented during the trial. The sole defense was to say the victims were fabricating the allegations. It is solely for the jury to determine the credibility of the witnesses at trial. As an initial matter, regardless of whether inconsistencies exist in [the victim]'s statements, we defer to the trier of fact, here the jury, on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Corbett, 158 Wn.

App. 576, 589, 242 P.3d 52, 58 (2010). Credibility determinations are for the trier of fact and cannot be reviewed on appeal. State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987). Camarillo, 115 Wn.2d at 71, 794 P.2d 850.

Given the totality of the circumstances in this trial, the failure to include the rape of a child counts in the Petrich instruction was harmless error.

5. The Trial Court Properly Admitted The Christmas Card As ER 404(B) Evidence.

A trial court's admission of evidence under Rule 404(b) is reviewed for abuse of discretion. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

For evidence of prior bad acts to be admissible, a trial judge must "(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. State v. Gunderson, 181 Wn.2d 916, 923, 337 P.3d 1090, 1093 (2014) A trial court has wide discretion in ruling on the admissibility of evidence. A decision to admit or exclude evidence will not be

reversed on appeal absent abuse of discretion. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001).

In a motion in limine, the State moved to admit a Christmas letter from the defendant sent to R.A. at her residence with the alleged victims. The defendant objected on the grounds that it was not relevant and it was a violation of a no contact order and therefore a collateral bad act. The State also pointed out that the letter was potentially grounds for charging the defendant with witness tampering, but that he was not going to do that. The State argued the letter was relevant to explain R.A.'s mind set, her role as the mother of E.A. and F.A. and as the driving force in reporting these incidents. As an offer of proof, the state offered R.A.'s response during her interview by the defense. R.A. said in her culture, they "met in Nigeria, part of a fairly strict religious community, a patriarchal community, with some mores and standards about a marital relationship." 7/22/14 RP 18. R.A. said that in their culture, in their church, husband and wife are together no matter what. There is no such thing as divorce. There is no such thing as separation. And framing that mind set is a significant amount of religious Christian doctrine. The State pointed out that the content of the letter was a constant appeal to that very

foundation, talking about what the Bible directs her to do and to offer forgiveness, talking about the defendant being delivered, God's plan for them, etc. 7/22/14 RP 18. The letter would help the jury in understanding the cultural circumstances of the witness and therefore in assessing her credibility. The court ruled that for the cultural aspect and the affect on the witness, the letter was admissible. 7/22/15 RP 19. The court properly sought the purpose of the evidence, ruled on the relevance and determined it was more probative than prejudicial for that purpose.

The letter was a communication by the defendant to the key witnesses in the case attempting to get them to forgive him and drop the charges as they had done before. Evidence that the defendant attempted to induce the key complaining witnesses to recant or end the prosecution against him, is a circumstance that can reasonably be considered to be consistent with guilty knowledge and therefore admissible in trial under ER 404(b). State v. Sanders, 66 Wn. App. 878, 886, 833 P.2d 452, 457 (1992).

The court properly admitted the Christmas letter as ER 404(b) evidence.

Defendant points to the prosecutor emphasizing the violation of the no contact order on cross-examination. BOA 34-5. It should

be noted this line of cross-examination was only pursued after obtaining a ruling from the court that the defendant had opened the door to it during his direct testimony. 7/30/14 RP 17. The prosecutor did not dwell on the violations and did not argue the defendants violations of the no contact order showed a criminal propensity to commit child molestation and child rape.

6. The 'Open Courtroom Doctrine' Does Not Require The Trial Court To Broadcast The Video Of The Victim Performing Oral Sex On The Defendant To The Spectators As Well As The Jury.

Whether the right to a public trial has been violated is a question of law reviewed de novo. State v. Momah, 167 Wn.2d 140, 147, 217 P.3d 321 (2009) (citing Bone–Club, 128 Wn.2d at 256, 906 P.2d 325). There is a strong presumption that courts are to be open at all trial stages. A criminal defendant's right to a "speedy public trial" is found in article I, section 22 of the Washington Constitution, one of two constitutional components of our open courts doctrine. The other component to open courts, article I, section 10, guarantees the public that justice in all cases shall be administered openly, and without unnecessarily delay. These related constitutional provisions serve complementary and interdependent functions in assuring the fairness of our judicial

system, and are often collectively called the public trial right. State v. Love, 183 Wn.2d 598, 604-05, 354 P.3d 841, 844 (2015).

The public's right to an open trial is mirrored federally by the First Amendment. Press–Enter. Co. v. Superior Court, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). The public trial right is not absolute but may be overcome to serve an overriding interest based on findings that closure is essential and narrowly tailored to preserve higher values. State v. Lormor, 172 Wn.2d 85, 90-91, 257 P.3d 624, 627 (2011).

Our Supreme Court has set forth a three-step framework to guide analysis in public trial cases. "First, we ask if the public trial right attaches to the proceeding at issue. Second, if the right attaches we ask if the courtroom was closed. And third, we ask if the closure was justified. The appellant carries the burden on the first two steps; the proponent of the closure carries the third." Love, 183 Wn.2d at 605. When no closure exists, the trial court judge possesses broad discretion to provide orderly conduct to ensure a fair proceeding. State v. Smith, 181 Wn.2d 508, 520, 334 P.3d 1049, 1055 (2014).

Not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a

closure if closed to the public. To determine whether a proceeding implicates the right to a public trial, the Supreme Court adopted a two-part 'experience and logic' test. This test applies to the defendant's right to a public trial and the public's right to open proceedings. The experience prong asks 'whether the place and process have historically been open to the press and general public.' The logic prong asks 'whether public access plays a significant positive role in the functioning of the particular process in question.' Only if both questions are answered in the affirmative is the public trial right implicated. The defendant has the burden to satisfy the experience and logic test. State v. Magnano, 181 Wn. App. 689, 694-95, 326 P.3d 845, 848 (2014) review denied, 339 P.3d 635 (Wash. 2014).

Here, the defendant has not satisfied this burden. The defendant asserts that his right to a public trial has been violated because the video of him receiving oral sex from E.A., was played in open court, but it could be viewed by the entire courtroom. It was specifically positioned so only the jury, the trial judge and the parties could see its content. Defendant's Brief 1, 42. Although the marking, offering and admitting of exhibits is done in open court, there is no history supporting the assertion that exhibits must be

displayed to the spectators of the trial. Logic would dictate the opposite. Trial court judges have wide discretion to ensure orderly conduct and ensure fair proceedings. Traditionally, exhibits have not been passed through or displayed to the spectators in the gallery. The offering of exhibits, objections and rulings are done in open court to ensure the fair administration of justice. The defendant fails to establish a history of the content of exhibits admitted in open court being displayed to the public or how the court displaying of exhibits to the public would further promote the principles of a public trial.

The defendant also bears the burden of establishing that a closure took place. A closure occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave. A second type of closure occurs where a portion of a trial is held someplace inaccessible to spectators, such as, in chambers. The experience and logic test is used to determine whether a closure occurred in the absence of an express closure on the record. In re Pers. Restraint of Yates, 177 Wn.2d 1, 28–29, 296 P.3d 872 (2013); Love, 183 Wn.2d at 606.

In this case, the defendant argues that denying the spectators the ability to view the video amounted to a closure of the

courtroom, relying on State v. Anderson 187 Wn. App. 706 (May 19, 2015; reversed by State v. Anderson ____ Wn.2d ____, 359 P.3d 792 (Nov. 4, 2015). The Supreme Court has rejected a similar argument in State v. Love, (supra). In Love, the defendant argued that the possibility that spectators at his trial could not hear the discussion about 'for cause' challenges or see the struck juror sheet used for peremptory challenges rendered this portion of his trial inaccessible to the public. Love, 183 Wn.2d at 606. The court found no merit in this argument, finding there was no closure and pointing out that the public's presence in the courtroom achieves the purpose of a public trial by reminding those involved about the importance of their roles and holding them accountable for misconduct. Id at 606-07. The defendant has failed to meet his burden of establishing a closure took place.

If this court determines the defendant has met his burden and established a closure took place violating his right to a public trial, the record shows compelling interest that overrides the defendant's public trial rights. While the right to a public trial applies to all judicial proceedings, including jury selection, the right is not absolute. The presumption in favor of openness may be overcome by an overriding interest based on findings that closure is

essential to preserve higher values and narrowly tailored to serve that interest. Thus, the court may close a courtroom under certain circumstances. State v. Momah, 167 Wn.2d 140, 148, 217 P.3d 321, 325 (2009).

To assure careful, case-by-case analysis of a closure motion, the trial court must perform a weighing test consisting of five criteria:

> 1. The proponent of closure or sealing must make some showing of a compelling interest, and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right. 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. 5. The order must be no broader in its application or duration than necessary to serve its purpose.

State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325, 327-28 (1995).

Although the trial court did not conduct a specific Bone-Club analysis, there is sufficient evidence in the record to determine the court weighed the defendant's public trial right against other compelling interests. When a court fails to conduct an express Bone–Club analysis a reviewing court may examine the record to

determine if the trial court effectively weighed the defendant's public trial right against other compelling interests. State v. Smith, 181 Wn.2d 508, 520, 334 P.3d 1049, 1055-56 (2014).

7. The Defendant Waived Any Claim Of Error When He Failed To Object To The Trial Court Imposing The Domestic Violence Legal Financial Obligation.

When an appellant fails to raise an issue below, this court may refuse to review it. RAP 2.5(a). A party's objection or argument preserves an issue only if the party actually raises that particular issue before the trial court. Cotton v. Kronenberg, 111 Wn. App. 258, 273, 44 P.3d 878 (2002). In State v. Blazina, 182 Wn.2d 827, 832–33, 344 P.3d 680 (2015), our Supreme Court reaffirmed that appellate courts in this state may decline to review the imposition of discretionary LFOs where the defendant failed to object to the imposition of LFOs at sentencing. Blazina, 182 Wn.2d at 681. Here, the court sentenced the defendant after the published Division II decision in Blazina, wherein they declined to review the trial court's imposition of discretionary LFOs because the defendant did not object at sentencing. State v. Blazina, 174 Wn. App. 906, 911, 301 P.3d 492 (May 21, 2013), remanded by 182 Wn.2d 827 (2015).

The purpose of preserving the issue at the trial court is put the trial court on notice and allow for correction at the time of the ruling. After May 21, 2013, the parties were on notice that objections to imposition of legal financial obligations (LFOs) needed to be preserved for appeal. To continue to allow parties to object to this now well established issue for the first time on appeal, is to encourage a waiting in the wings approach and an inefficient use of court time. Because here the defendant did not object to the trial court's imposition of LFOs at sentencing, after the issue had been well established, this court should decline to review this issue for the first time on appeal.

IV. CONCLUSION

For the forgoing reasons the State asks the court to affirm the defendant's conviction and sentence.

Respectfully submitted on December 18, 2015.

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Snohomish County Prosecuting Attorney

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

THE STATE OF WASHINGTON, Respondent, v. JOHNSON O. AYODEJI, Appellant.	No. 72359-6-I DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 18th day of December, 2015, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Mary Swift, Nielsen, Broman & Koch, swiftm@nwattorney.net; and Sloanej@nwattorney.net.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 18th day of December, 2015, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office