SUPREME COURT NO. 90552-5
COURT OF APPEALS NO. 43557-8-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

RESPONDENT,

VS.

TODD D. PHELPS,

DEFENDANT/PETITIONER,

PETITION FOR REVIEW

TODD D. PHELPS, PRO SE
DEFENDANT / PETITIONER
357684 / FA-42
COYOTE RIDGE CORRECTIONS CENTER
1301 N. EPHRATA AVE.
CONNELL, WA 99326

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A. IDENTITY OF PETITIONER

Petitioner, Todd D. Phelps, asks this Court to accept review of the Court of Appeals decision to affirm conviction and sentence, designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The petitioner asks this Court to review the unpublished opinion of the Court of Appeals Division II filed under case number 43557-8-II in which petitioners appeal was affirmed June 17, 2014. A copy of the Unpublished Opinion is in the Appendix at pages A-1 through 22.

C. ISSUE'S PRESENTED FOR REVIEW

1. Do voir dire violations automatically require and warranted a new trial when the court overlooks and blantanly violates the constitutional requirements that criminal trials be open and public guaranteed under United States Constitution Amendment Six and Fourteenth; Washington Constitution article I, section 10 and 22?

2. Does this Court automatically reverse and remand for a new trial because the lower court violated the Fourteenth Amendment right to be present at all critical stages of a trial?

3. Doesn't a Sixth and Fourteenth Amendment and Washington Constitution article I, section 22 violation for deficient charging information and states concession automatically require dismissal of count two with prejudice?

4. Doesn't the State Constitution guarantee the petitioner the right to a unanimous veridct under Washington Constitution article I, section 21?

5. Doesn't the State and Federal Constitutions secure for the petitioner the right to a fair trial and prosecutor misconduct require automatic reversal and new trial when the prosecutor introduces or vouches for evidence, or give personal opinion?

B. STATEMENT OF THE CASE

On November 10, 2011, the State charged Petitioner Phelps with third degree rape and second degree sexual misconduct with a minor. The State later amended the Information to include two aggravating circumstances for third degree rape charge. (See Appendix A page 3 of Unpublished Opinion). Now at this time the State did not amend or correct the conviction charged in count two that required that they must prove the element that sexual contact occurred with a person who was not twenty-one. RCW 9A.44.096(1)(b). Also the Respondent conceded that the Information did not include language explaining this element, because A.A's date of birth sufficiently appraised Mr. Phelps of this element. (See Appellant's Reply Brief page 6 in Appendix B and Brief of Respondent, pp. 30-31).

A list of prospective jurors was prepared for use during voir dire were in this case, jurors were questioned and excused behind closed doors. RP (4/17/12 voir dire) 2-128; CP 256-57. This came to light when a couple of jurors number 18 and 62 mistakenly put on the court record, that they have already been excused in a proceeding that took place outside the courtroom. (See Appendix B page 1 of Appellant's Reply Brief). Juror No. 18 states "Yeah, I previously was excused. I ..." Page 6 line 13 of Verbatim Report Of Proceedings, hereafter VRP, and were the Court actually put on record that juror 62 was actually alredy excused from this case earlier. See VRP Page 21 line 17 through 25. (See Appendix C pages 6 and 21 of Verbatim Report Of Proceedings).

Now this is just two violations that are clearly on the court record that communication with juror members occurred during voir dire, which should automatically call for a reversal and new trial. But lets go even farther with this issue. Even the State has put on record through the Respondent's Brief that numerous voir dire violations occurred. See Respondent's Brief page I under A.4., it states "The Four Other Alleged In Chambers Conferences Did Not Violate Phelp's Public Trial Right ... 21." (See Appendix D Respondent's Brief page I). So the question must be answered, how many violations must thier be, before this Court finds Mr. Phelps Constitutional Right to a Public Trial and Voir Dire were violated?

During closing arguments the prosecutor told jurors (a) that he'd just learned of Mr. Phelps defense (implying that the defense had been forced to change theories based on the evidence), and (b) that defense counsel wasn't present for an interview with A.A. and thus had "no idea of context was of the interview [sic]," that defense counsel "doesn't even know what the notes were about," and that the prosecution was "obligated to give [the notes] to him," RP 1580, 1582. There was, of course, no evidence supporting any of these statements. (See Appendix E Appellnt's Opening Brief page 28). The prosecutor concluded that defense counsel was "grasping at straws to get anything." This was not argument based on facts introduced at trial; instead it is a improper statement of the prosecutor's personal opinion. By making this statement, the

PROSECUTOR EFFECTIVELY TESTIFIED, THROWING "THE PRESTIGE OF HIS PUBLIC OFFICE ... INTO THE SCALES AGAINST THE ACCUSED." (SEE APPENDIX E PAGE 28 APPELLANT'S OPENING BRIEF).

E. ARGUMENT WHY REVIEW SHOULD ACCEPTED

THIS COURT SHOULD ACCEPT REVIEW OF THESE ISSUE'S BECAUSE THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH OTHER DECISIONS MADE BY THIS COURT AND THE COURT OF APPEALS. RAP 13.4(B)(1) AND (2). SPECIFICALLY, THE TRIAL COURT HAD NUMEROUS DISCUSSIONS OFF RECORD WITH JUROR MEMBERS OUTSIDE OF THE DEFENDANTS PRESENCE DURING VOIR DIRE AND THE TRANSCRIPTS AND COURT RECORD WILL SHOW THAT ATLEAST TWO JUROR MEMBERS WERE EXCUSED FROM VOIR DIRE, BEFORE THEY EVEN CAME INTO THE COURTROOM. (SEE APPENDIX C VRP PAGES 6 AND 21).

THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 22 OF THE WASHINGTON STATE CONSTITUTION GUARANTEE A DEFENDANT THE RIGHT TO A PUBLIC TRIAL. STATE V. WISE, 176 WN.2D 1, 9, 288 P.3D 1113 (2012). THIS COURT REVIEWS ALLEGED VIOLATIONS OF THE PUBLIC TRIAL RIGHT DE NOVO. WISE, 176 WN.2D AT 9. IN UNNECESSARY CLOSURE OF A PORTION OF JURY SELECTION REQUIRES UTOMATIC REVERSAL. STATE V. STRODE, 167 WN.2D 222, 217 P.3D 310 (2009); PRESLEY V. GEORGIA, 558 U.S. 209, 130 S.CT. 721, 175 L.ED.2D 675 (2010). COURTS LOOK TO THE PLAIN LANGUAGE OF TRIAL TRANSCRIPTS TO DETERMINE WHETHER OR NOT A CLOSURE OCCURRED, STATE V. BRIGHTMAN, 155 WN.2D 506, 516, 122 P.3D 150 (2005).

1. VOIR DIRE VIOLATIONS AUTOMATICALLY REQUIRE AND WARRANTED A NEW TRIAL WHEN THE COURT OVERLOOKS AND BLANTANTLY VIOLATES THE CONSTITUTIONAL REQUIREMENTS THAT CRIMINAL TRIALS BE OPEN AND PUBLIC, GUARANTEED UNDER UNITED STATES CONSTITUTION AMENDMENT SIX AND FOURTEENTH; WASHINGTON CONSTITUTION ARTICLE I, SECTION 10 AND 22.

NOW THE PETITIONER IS ONLY ASKING THIS COURT TO REVIEW AND LOOK AT THE TRIAL COURT RECORD, RESPONDENTS BRIEF, APPENDIX A, AND APPENDIX C, NOT "COURTROOM CLOSURE'S," BECAUSE THIS COURT WILL FIND NUMEROUS VIOLATIONS AND CONVERSATIONS WITH THE JUROR MEMBERS, WITHOUT THE DEFENDANTS PRESENCE OR KNOWLEDGE. THE PETITIONER ALSO ASKS THIS COURT TO DIRECT THEIR ATTENTION AND LOOK AT THE UNPUBLISHED OPINION SUBMITTED BY THE COURT OF APPEALS IN APPENDIX A, SPECIFICALLY, PAGE 11. THE COURT OF APPEALS BASED THEIR DECISION ON THE FACT, THAT PHELPS DID NOT HAVE ENOUGH PROOF AT THIS TIME, FOR THEM TO RULE THAT A VIOLATION HAPPENED. SEE PAGE 11:

> "HERE, THE RECORD IS UNCLEAR AS TO WHEN, WHERE, OR WHY THE TRIAL COURT PREVIOUSLY SPOKE WITH JUROR NO. 62. THUS, THIS CLAIM RELIES, AT LEAST IN PART, ON FACTS OUTSIDE THE RECORD ON APPEAL, AND WE DO NOT ADDRESS ISSUES ON DIRECT APPEAL THAT RELY ON FACTS OUTSIDE THE RECORD. STATE V. MCFARLAND, 127 WN.2D 322, 335, 899 P.2D 1251 (1995). ACCORDINGLY, WE HOLD THAT, ON THE RECORD BEFORE US, PHELPS HAS NOT ESTABLISHED THAT A PUBLIC TRIAL RIGHT VIOLATION OCCURRED IN REGARD TO THE QUESTIONING OF JUROR NO. 62."
>
> SEE APPENDIX A PAGE 11 OF UNPUBLISHED OPINION.

SO THIS SHOULD TELL US ALL, THAT THE COURT OF APPEALS, ALMOST GRANTED APPEAL, BUT BECAUSE THEIR WAS NOT ENOUGH ON RECORD, THAT IT HAD TO SAY, AT THIS TIME, THE RECORD DOESN'T SUPPORT THIS ISSUE OR CLAIM. IN BECAUSE OF THIS POINT MADE BY THE COURT OF APPEALS. PETITIONER WILL ONLY SAY ON THIS ISSUE OF JUROR NO. 62, THAT HE HAS FILED A MOTION WITH DECLARATIONS, TO GIVE MORE WEIGHT AND PROVE,

THAT, NOT ONLY DID JUROR NO. 62, GET EXCUSED BY THE JUDGE (SEE COA OWN WORDS ON PAGE 4, WERE THE COURT INTERRUPTED THE TRIAL AND PUT ON THE RECORD, THAT JUROR NO. 62 KEPHART WAS ALREADY EXCUSED, APPENDIX A), BUT IT IS ALSO CLEAR FROM THE SUBMITTED MOTION, THAT JUROR NO. 62 WAS EXCUSED THE DAY BEFORE HE EVEN SHOWED UP FOR VIOR DIRE.

NOW LETS EVALUATE WHAT WE CAN SEE AND PROVE. IT IS CLEAR, THAT JUROR NO. 62 WAS EXCUSED FROM VOIR DIRE, AND THAT HE WAS EXCUSED WITHOUT THE PETITIONER BEING PRESENT, THE FIRST TIME. IT IS ALSO QUITE CLEAR AND WILL EVEN SAY POSSIBLE, THAT HE WAS EVEN SEEN THE DAY BEFORE VOIR DIRE AND EXCUSED. IN JUST TO MAKE SURE HE WAS IN-FACT EXCUSED, HE SHOWED UP FOR VOIR DIRE, WHERE THE "TRIAL JUDGE" REMINDED JUROR NO. 62 THAT HE WAS IN-FACT ALREADY EXCUSED. SEE APPENDIX A PAGE 4.

NOW PETITIONER WOULD ASK THIS COURT TO LOOK AT APPENDIX C PAGE 6 IN THE VOIR DIRE PAGES. IF YOU LOOK AT PAGE 6, LINE 13, YOU WILL SEE, THAT JUROR NO. 18 STATES THE FOLLOWING: "YEAH, I PREVIOUSLY WAS EXCUSED. I... ." THIS IS THE SAME THING, THAT HAPPENED WITH JUROR NO. 62.

SO LETS DIRECT OUR ATTENTION TO JUROR NO. 18, BECAUSE IF EVER, EVER, DID THIS COURT NEED MORE PROOF, THAT A VIOLATION OCCURRED. IT IS CLEAR THAT JUROR NO. 62 IS POSSIBLE SOME TYPE OF VIOLATION OCCURRED. BUT IF WE LOOK AT JUROR NO. 18 ALSO, THIS COURT CAN CLEARLY SEE THAT NOT ONE, BUT AT LEAST TWO JUROR VIOLATIONS OCCURRED. IN THIS COURT AND THE CONSTITUTION CLEARLY STATES: "UNNECESSARY CLOSURE OF A PORTION OF JURY SELECTION

REQUIRES AUTOMATIC REVERSAL. STRODE, 167 WN.2D AT 231 (PLURALITY); PRESLEY V. GEORGIA, 558 U.S. 209, 130 S.CT. 721, 175 L.ED.2D 675 (2010).

COURTS LOOK TO THE PLAIN LANGUAGE OF THE TRIAL TRANSCRIPTS TO DETERMINE WHETHER OR NOT A CLOSURE OCCURRED. STATE V. BRIGHTMAN, 155 WN.2D 506, 516, 122 P.3D 150 (2005). PETITIONER WOULD ONLY LIKE TO POINT OUT TO THIS COURT THE FOLLOWING COURT RECORD: 1) APPENDIX A UNPUBLISHED OPINION OF THE COA PAGE 4 HAS THE JUDGE TELLING THE JUROR NO. 62, HE WAS ALREADY EXCUSED; 2) APPENDIX C PAGE 6 AND 21, SHOWS THAT JUROR NO. 18 WAS PREVIOUSLY EXCUSED PAGE 6 LINE 13 AND PAGE 21 LINE 20 THE JUDGE TELLS JUROR NO. 62 EXCUSED; 3) APPENDIX D RESPONDENTS BRIEF PAGE I, TABLE OF CONTENTS A4 SAYS, 4. THE FOUR OTHER ALLEGED IN CHAMBERS CONFERENCES DID NOT VIOLATE PHELP'S PUBLIC TRIAL RIGHT. THIS RECORD SHOULD BE MORE THAN ENOUGH PROOF, THAT NUMEROUS JUROR VIOLATIONS OCCURRED. THIS SHOULD SATISFY ANY AND ALL DOUBTS, PLUS FORGET THE POINT OF A COURTROOM CLOSURE HAPPENING. LETS LOOK AT HOW MANY JUROR MEMBERS SAY ON RECORD, THAT THEY WERE ALREADY EXCUSED. THIS ALONE SHOULD PROVE THAT PHELPS RIGHT TO A FAIR AND PUBLIC TRIAL WAS VIOLATED, AND THAT THE ONLY REMEDY IS REVERSAL AND A NEW TRIAL ORDERED IMMEDIATELY. STATE V. WISE, 176 WN.2D 1, 11, 288 P.3D 1113 (2012); STATE V. PAUMIER, 176 WN.2D 29, 288 P.3D 1126 (2012); UNITED STATES V. IVESTER, 316 F.3D 955, 959-60 (9TH CIR. 2003).

Now the Petitioner Mr. Phelps is not going to waste this Courts time by, citing and quoting over and over case law that this same Court used to overturn, reverse and remand back for a new trial winning case's. Because as stated above, this Court should have more than enough trial transcripts and a record, to find that, that no matter how you look at this case, it is clear that some type of violations happened. So the petitioner, should not have to prove to this Court, what was said, done, and when, where, or why the trial court previously spoke with jurors. (See Appendix A page 11). The petitioner should only have to show that these violations, happened more than once. Now for the petitioner to prove this, this Court only has to go to trial court transcripts and court records, Appendix C pages 6 and 21. Page 6 will show that juror no. 18 says that he was previously excused and page 21 will show that juror no. 62 was told by the trial judge, that he was already excused. In the petitioner would like to point out, that no where is it transcribed or talked about or any waiver signed, saying that the petitioner knew, was present or agreed to any of these jurors being excused.

This record and case shows, the court erroneously conducted proceedings behind closed doors. Where closed proceedings are not transcribed, the state should bear the burden of establishing what transpired. See Appellant's Opening Brief, pp. 11-12 Appendix E. Respondent does seek to avoid this burden. Brief of Respondent, pp. 12-24 Appendix D. The absence of this argument on this issue

SHOULD BE TREATED AS THEM CONCEDING. SEE IN RE PULLMAN, 167 WN.2D 205, 212 N.4, 218 P.3D 913 (2009). RESPONDENT MERELY, GOES ON TO ARGUE THAT "EXPIRENCE AND LOGIC" EXCUSES THE CLOSED-DOOR PROCEEDINGS. RESPONDENT'S ARGUMENT UNDER THE TEST CANNOT RESOLVE THE ISSUE, BECAUSE THE RECORD FAILS TO ESTABLISH WHAT TRANSPIRED IN CAMERA. WITHOUT A COMPLETE AND ACCURATE PICTURE OF THE PROCEEDINGS, THE "EXPIRENCE AND LOGIC" TEST DOES NOT SUPPORT RESPONDENT'S POSITION. SO NOW IF THIS COURT FINDS, THAT THEIR WERE IN-FACT SOME TYPE OF CLOSURE OR IN-CHAMBERS DISCUSSIONS, THAT DEALT WITH THE JURORS OR TRIAL, THEN THE PROCEEDINGS SHOULD HAVE BEEN OPEN TO THE PUBLIC. SEE APPELLANT'S OPENING BRIEF, PP. 14-17 APPENDIX E. BECAUSE RESPONDENT FAILS TO PROVE WHAT HAPPENED IN THE JUDGE'S CHAMBERS, MR. PHELP'S CONVICTION CANNOT STAND. U.S. CONST. AMEND. VI; U.S. CONST. AMEND. XIV; WASH. CONST. ART. I, §§ 10 AND 22; BONE-CLUB WN.2D AT 259. ACCORDINGLY, PETITIONERS CONVICTION MUST BE REVERSED AND THE CASE REMANDED BACK FOR A NEW TRIAL. ID.

NOW THE COURT OF APPEALS STATED IN THEIR UNPUBLISHED OPINION, THATIN ORDER FOR PHELPS TO WIN OR PROVE THAT THEIR WAS IN-FACT A CLOSURE, HE MUST PROVE THAT A CLOSURE DID IN-FACT HAPPENED. ALSO THAT EVEY CASE THAT WAS CITED BY PHELPS IN HIS BRIEFING, THE RECORD CLEARLY ESTABLISHED THAT A COURT ROOM CLOSURE DID IN-FACT HAPPEN. SEE APPENDIX A PAGE 8 AND 9. SO THE QUESTION THAT PETITIONER PHELPS IS ASKING THIS COURT IS, DOES PETITIONER HAVE TO PROVE THAT A COURT ROOM CLOSURE HAPPENED? OR DOES THE PETITIONER ONLY HAVE TO PROVE THAT, THIER WERE PROCEEDINGS AND DISCUSSIONS HELD OFF RECORD?

Is this sufficient to prove that some type of court room closure occurred, to warrant a Bone-Club analysis, and for the courts failure to not apply Bone-Club, should this case be automatically reversed and remanded back for a new trial. State v. Erickson, 146 Wn.App. 200, 189 P.3d 245 (Wash.App. Div. 2 2008).

Here is what is on the trial court record. Now whether these are considered court room closure's, without a transcribed record. This Court should give more credit to the petitioner, and make the state be more accountable and prove that these were in-fact issue's that belong in the "expirence and logic test." In this is why a Bone-Club analysis was not necessary. Look at Appendix C Verbatim Report Of Proceedings April 17, 2012 - Voir Dire page's:

> Page 6, line's 3 through 21, it shows that juror no. 18 says that he was previously excused.
>
> Page 11, line 18, DISCUSSION HELD OFF RECORD, INCIDENT #1.
>
> Page 21, line 17 through 25 and Page 22, line's 1 through 9, were trial judge reminds the court that juror no. 62 was previously excused, and because of this miscommunication the judge asked the prosecutor and defense attorney if he could see them.
>
> Page 22, line 10, DISCUSSION HELD OFF RECORD, INCIDENT #2.
>
> Page 33, line 1, BRIEF INTERRUPTION, INCIDENT #3.
>
> Page 127, line 4, DISCUSSION HELD OFF RECORD, INCIDENT #4.
>
> SEE APPENDIX C, FOR COURT RECORD OF THE ABOVE FACTS.

ONCE AGAIN, THE PETITIONER ASKS THIS COURT TO JUST USE JURISPRUDENCE, BECAUSE ANY JURIST SHOULD FIND, THAT THEIR WERE NUMEROUS DISCUSSIONS HELD OFF RECORD, AND CAN WE CLASSIFY THESE DISCUSSIONS AS COURT ROOM CLOSURES? IF SO, WHY WASN'T ANY BONE-CLUB ANALYSIS DONE? IN IF NOT, THEN WHAT WOULD THIS COURT FIND THESE DISCUSSION'S HELD OFF RECORD TO BE? WHEN THERE IS NO RECORD OF WHAT THESE DISCUSSIONS WERE ABOUT, OR WHY THEY HAPPENED DURING VOIR DIRE, OR IF HE TALKED IN-COURT ROOM OR IN THE JUDGES CHAMBERS. WHEN ALL WE KNOW FOR SURE, IS THAT A NUMBER OF DISCUSSIONS DURING VOIR DIRE, WERE HELD OFF RECORD AND WHY AND WHERE THEY HAPPENED IS A WILD GUESS. SO IF THE STATE IS AFFORDED THE RIGHT TO BE ABLE TO USE THE "EXPIRENCE AND LOGIC TEST." THEN THE PETITIONER SHOULD BE ABLE TO ARGUE THAT THEIR WAS A BONE-CLUB VIOLATION, AND THIS REQUIRES A NEW TRIAL. BECAUSE IF A CLOSURE HAS OCCURRED, "[F]AILURE TO CONDUCT A BONE-CLUB ANALYSIS IS STRUCTURAL ERROR WARRANTING A NEW TRIAL." PAUMIER, 176 WN.2D AT 35.

FINALLY, THIS CASE IS SIMILIAR TO THAT OF STATE V. SLERT, 169 WASH.APP. 766, AUG. 8, 2012, WERE THE COURT OF APPEALS DIVISION II, NO. 40333-1-1, VAN DEREN, J., HELD THAT:

> 1 FILLING OUT JURY QUESTIONNAIRES WAS PART OF "JURY SELECTION," TO WHICH THE PUBLIC TRIAL RIGHT APPLIED; 2 BECAUSE COURT FAILED SUA SPONTE TO CONSIDER REASONABLE ALTERNATIVES TO CLOSURE AND FAILED TO MAKE APPROPRIATE FINDINGS SUPPORTING THE CLOSURE, THE CLOSURE VIOLATED DEFENDANT'S PUBLIC TRIAL RIGHTS; AND 3 TRIAL COURT'S VIOLATION OF DEFENDANT'S PUBLIC TRIAL RIGHTS, BY EXCLUDING THE PUBLIC FROM TRIAL PROCEEDINGS BY HOLDING A PORTION OF JURY SELECTION IN CHAMBERS, WAS STRUCTAL ERROR AND REQUIRED REVERSAL AND REMAND FOR A NEW TRIAL.

Now Slert is similiar to Phelps case, because instead of 4 jurors, at least 2 juror's have been excused in chambers, without the knowledge or presence of Phelps. Now is Slert, the trial court excused 4 juror's and then excused all 4 juror's on record, so they can say that they did it all in open court. When in-fact they already excused all 4 jurors previously. Just like here in Phelps. It shouldn't matter if their was a court room closure. It should only matter that Phelps can prove that the record shows, that at least 2 juror's were previously excused before voir dire and then excused again in open court. See State v. Slert, 169 Wash.App. 766 (Aug. 8, 2012); Ayala v. Speckard, 131 F.3d 62, 69 (2nd Cir. 1997).

Our Supreme Court held that conducting individual juror voir dire in chambers did not constitute structural error where the defendant had "affirmatively accepted the closure, argued for the expansion of it." Momah, 167 Wash.2d at 156, 217 P.3d 321. In here, in this case at hand. The record is clear, that the petitioner never knew or argue for any closure of proceedings that were held off record, and no where will you find on record that petitioner actively participated in it.

For all the above reasons, this Court must find that "in nullo est erratum" on the petitioners part, but on the state, there were many "erratum's." In because of all the discussions held off record and the many numerous juror's who have put on record, that they have already been excused, during voir dire. That prejudice is presumed and that the appeallate court should have automatically "remanded back for a new trial," anytime a trial court fails to

APPLY THE LAWS OF THE LAND, AND VIOLATES A DEFENDANT/PETITIONERS RIGHT TO A OPEN AND PUBLIC TRIAL. THIS IS A CLEAR VIOLATION OF U.S. CONST. AMEND. VI, U.S. CONST. AMEND. XIV; WASH. CONST. ART. I, § 10, 22; WELLONS V. HALL, 130 S.CT. 727 (JAN. 19, 2010). ACCORDINGLY, THIS CONVICTION MUST BE REVERSED AND THIS CASE REMANDED BACK FOR A NEW TRIAL.

2. THIS COURT SHOULD AUTOMATICALLY REVERSE AND REMAND FOR A NEW TRIAL, BECAUSE THE LOWER COURT VIOLATED THE FOURTEENTH AMENDMENT RIGHT TO BE PRESENT AT ALL CRITICAL STAGES OF A OPEN AND PUBLIC TRIAL.

THE RIGHT OF A CRIMINAL DEFENDANT TO BE PRESENT AT EVERY STAGE OF HIS TRIAL HAS BEEN VARIOUSLY CHARACTERIZED AS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FIFTH (AND, IN STATE CASES, THE FOURTEENTH) AMENDMENT, THE CONSTITUTION CLAUSE OF THE SIXTH AMENDMENT OR SOME COMBINATION THEREOF. SEE E.G. U.S. V. GAGNON, 470 U.S. 522, 526, 105 S.CT. 1482, 84 L.ED.2D 486 (1985). THE RIGHT TO BE PRESENT ENCOMPASSES JURY SELECTION. THIS ALLOWS THE ACCUSED PERSON "TO GIVE ADVISE OR SUGGESTIONS OR EVEN SUPERSEDE HIS LAWYERS." SYNDER V. MASSACHUSETTS, 291 U.S. 97, 106, 54 S.CT. 330, 332, 78 L.ED 674 (1934).

HERE IN THIS CASE, THE COURT OF APPEALS STATED IN THEIR OPINION THAT THEY DISAGREE WITH PHELPS, BECAUSE NOTHING IN THE RECORD REFLECTS THAT THE TRIAL COURT EXCUSED JURORS IN PHELP'S ABSENCE. SEE APPENDIX A PAGE 12.

SO PETITIONER PHELPS WILL JUST SHOW THIS COURT WHAT HAPPENED BEFORE OR DURING VOIR DIRE IN THIS CASE. PLEASE LOOK AT APPENDIX C VERBATIM REPORT OF PROCEEDINGS: 1) PAGE 6, LINE 13 AND SEE FOR

YOURSELF, THAT JUROR NO. 18 SAYS, "YEAH, I PREVIOUSLY WAS EXCUSED."; 2) NOW TURN TO PAGE 11, AND SEE LINE 18 AND SEE THAT A (DISCUSSION HELD OFF RECORD.); 3) NOW PAGE 21, LINE 17 THROUGH 25, WERE THE TRIAL JUDGE, TELLS JUROR NO. 62, THAT JUROR 62 WAS ACTUALLY EXCUSED FROM THIS CASE EARLIER AND I THOUGHT HE KNEW THAT; 4) NOW LOOK AT PAGE 22, LINE 10 (DISCUSSION HELD OFF RECORD.); 5) NOW LOOK AT PAGE 33, LINE 1 (BRIEF INTERRUPTION.); 6) NOW FINALLY, PAGE 127, LINE 4 (DISCUSSION HELD OFF RECORD.). HERE ARE 6 OCCURRENCES THAT HAPPENED WITH THIS TRIAL, THAT ARE ON COURT RECORD. TWO JUROR'S BEING EXCUSED WITHOUT THE PETITIONERS KNOWLEDGE OR PRESENCE, AND FOUR DISCUSSIONS HELD OFF RECORD, WITHOUT THE PETITIONER BEING PRESENT OR ALLOWED TO ATTEND. ROGERS V. UNITED STATES, 422 U.S. 35, 39, 95 S.CT. 2091, 2094, 45 L.ED.2D 1 (1975).

SO THE QUESTION ONCE AGAIN MUST BE ASKED? HOW MANY OCCURRENCES AND DISCUSSIONS WITHOUT THE PETITIONER BEING PRESENT OR ALLOWED TO ATTEND, MUST HAPPEN, BEFORE IT IS A VIOLATION OF HIS RIGHT TO BE PRESENT? THEREFORE, THE COURTS DECISION TO QUESTION AND EXCUSE JURORS IN PHELPS ARSENCE IS A CLEAR VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO BE PRESENT. IN THIS CONVICTION MUST BE REVERSED AND THIS CASE REMANDED BACK FOR A NEW TRIAL. SEE U.S. V. GORDON, 829 F.2D 119, 124 (D.C. CIR. 1987).

NOW PETITIONER PHELPS STRONGLY FEELS, THAT THE ABOVE TWO ISSUES ALONE SHOULD BE MORE THAN ENOUGH, TO WARRANT A REVERSAL AND A NEW TRIAL ORDERED. SO PHELPS WILL JUST BRIEFLY ADDRESS AND VALIDATE THE REMAINING ISSUE'S.

3. A SIXTH AND FOURTEENTH AMENDMENT AND WASHINGTON CONSTITUTION ARTICLE I, SECTION 22 VIOLATION FOR DEFICIENT CHARGING INFORMATION AND STATES CONCESSION AUTOMATICALLY REQUIRE DISMISSAL OF COUNT TWO WITH PREJUDICE.

MR. PHELPS THE PETITIONER WOULD ONCE AGAIN, LIKE TO REMIND THIS COURT, THAT THE RESPONDENT CONCEDED, THAT THE INFORMATION AND ESSENTIAL ELEMENTS OF COUNT TWO WERE DEFECTIVE. SEE APPENDIX B PAGE 6.

THE DEFECTIVE INFORMATION REQUIRES REVERSAL OF THE CONVICTION. U.S. CONST. AMEND. VI; WASH. CONST. ART. I, § 22. STATE V. KJORSVIK, 117 WN.2D AT 104-106. THE ONLY FOR THIS COURT IS TO "DISMISS WITH PREJUDICE," COUNT TWO.

MR. PHELPS WOULD ALSO LIKE TO INCORPORATE THE ARGUMENTS IN APPENDIX B, APPELLANT'S REPLY BRIEF PAGES 5 AND 6; APPENDIX E, APPELLANT'S OPENING BRIEF, PAGES 19 THROUGH 21 FOR FURTHER ARGUMENT AND CASE LAW.

4. THE STATE CONSTITUTION GUARANTEE THE PETITIONER THE RIGHT TO A UNANIMOUS VERDICT UNDER WASHINGTON CONSTITUTION ARTICLE I, SECTION 21.

MR. PHELPS THE PETITIONER RESTS WITH THE ARGUMENTS ALREADY PRESENTED IN APPENDIX B, PAGES 7 THROUGH 10; APPENDIX E, PAGES 21 THROUGH 24 FOR FURTHER ARGUMENT AND CASE LAW.

5. THE STATE AND FEDERAL CONSTITUTIONS SECURE FOR THE PETITIONER THE RIGHT TO A FAIR TRIAL AND PROSECUTOR MISCONDUCT REQUIRE AUTOMATIC REVERSAL AND NEW TRIAL WHEN THE PROSECUTOR INTRODUCES OR VOUCHES FOR EVIDENCE, OR GIVE PERSONAL OPINION.

MR. PHELPS THE PETITIONER RESTS WITH THE ARGUMENT PRESENTED IN APPENDIX E, PAGES 25 THROUGH 28 FOR FURTHER ARGUMENT AND CASE LAW.

In Closing, Mr. Phelps the Petitioner, only asks this Court to find, that they have no choice, but to find "prejudicial error's." In because of the vast and numerous error's that were committed before and during voir dire. The only course of action, would be to grant this Petition For Review, and remand back for a new trial.

CONCLUSION

For all the above mentioned reasons set forth, this conviction must be reversed. Count One must be reversed and remanded back for a new trial; Count Two must be dimissed with prejudice.

Respectfully Submitted on August 26, 2014.

Todd D Phelps

TODD D. PHELPS, PRO SE
PETITIONER / DEFENDANT

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DECLARATION OF SERVICE

GR 3.1

I, TODD DALE PHELPS, DECLARE THAT ON THE 26 DAY OF AUGUST, 2014, I DEPOSITED THE FOLLOWING DOCUMENTS:

1. PETITION FOR REVIEW

2. APPENDIX A THROUGH E (ONLY SUPREME COURT)
(CANNOT AFFORD 2 MORE COPIES)

3. MOTION TO ACCEPT RE-TYPED PETITION FOR REVIEW

4. MOTION TO SUPPLEMENT THE RECORD BY USE OF DECLARATIONS AND REQUEST FOR AN EVIDENTIARY HEARING

5. DECLARATION OF SERVICE BY MAILING 6. Letter To Court

OR A TRUE AND CORRECT COPY THEREOF, IN THE INTERNAL MAIL SYSTEM OF COYOTE RIDGE CORRECTIONAL COMPLEX, IN FRONT OF ONE OR MORE CORRECTIONAL STAFF AND MADE ARRANGEMENTS FOR POSTAGE, ADDRESSED AS FOLLOWS:

WASHINGTON STATE SUPREME COURT
TEMPLE OF JUSTICE
HON. RONALD R. CARPENTER, CLERK
PO BOX 40929
OLYMPIA, WA 98504-0929

COURT OF APPEALS, DIVISION II
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I, TODD DALE PHELPS, DECLARE UNDER PENALTY OF PERJURY, UNDER THE LAWS OF THE STATE OF WASHINGTON, THAT THE FORGOING IS TRUE AND CORRECT.

DATED THIS 26 DAY OF AUGUST, 2014, IN CONNELL, WA.

Todd Dale Phelps

TODD DALE PHELPS, PRO SE
PETITIONER / DEFENDANT
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TODD DALE PHELPS, Appellant.	No. 43557-8-II UNPUBLISHED OPINION

LEE, J. — In 2012, a jury found Todd Dale Phelps guilty of third degree rape and second degree sexual misconduct with a minor. Phelps appeals, arguing: (1) the trial court violated his and the public's right to an open and public trial during jury selection, (2) the trial court violated his right to be present during jury selection, (3) the information charging Phelps with second degree sexual misconduct with a minor was deficient, (4) the trial court failed to give a unanimity instruction for the second degree sexual misconduct with a minor charge, (5) the prosecutor committed misconduct during closing arguments, and (6) Phelps's trial counsel was ineffective for failing to object to prosecutorial misconduct during closing arguments. We affirm.

FACTS

A. Background

In the summer of 2010, 16-year-old AA[1] played fastpitch softball on a travelling team with Todd Phelps's 18-year-old daughter. Phelps served as an assistant coach on the team. Because AA's family could not travel to her tournaments that summer, she generally travelled with the Phelpses and came to think of them as a "second family." 3 Report of Proceedings (RP) at 444. AA often stayed the night at the Phelps's home and viewed Phelps as a role model and father figure.

AA began experiencing personal issues during the summer that continued into the fall of her sophomore year. She cut herself, experienced depression, tried drugs, and contemplated suicide.

In the spring of 2011, AA began playing softball for the Pe Ell High School team. Phelps was a paid employee of the school, working as an assistant softball coach. Having heard rumors about AA's drug usage, Phelps confronted her during softball practice in March 2011. AA told Phelps about some of her personal issues, but later indicated through social media that she wanted to talk with him more.

On March 26, Phelps drove AA to watch a softball game between two rival schools. Before returning her home, Phelps stopped in a Pe Ell church parking lot to speak with AA. During their conversation in the car, Phelps graphically recounted to AA a number of his sexual experiences over the years. According to AA, Phelps related these stories so that she would have "dirt on him" and, in turn, she could trust him with her problems. 3 RP at 457. Phelps told AA

[1] To provide some confidentiality in this case, we use initials in the body of the opinion to identify the minor victim.

that he was going to help her get through her problems but, in return, she would need to repay him sexually once she turned 18. Phelps also told AA he would start texting her to make sure she was not cutting herself. When Phelps finally dropped AA at home, he instructed her to tell her parents that she was late getting home because they had stopped to eat.

Over the next few months, Phelps and AA texted each other thousands of times, often using other people's phones, and also communicated frequently through social media and e-mail. AA's parents and school officials became aware of Phelps's frequent communications with AA, and ultimately, Phelps was forced to resign his coaching position because of his involvement with AA. Additionally, Phelps engaged in the following conduct with AA during this time:

On April 2, Phelps engaged in sexual contact with AA.

On April 6, Phelps kissed AA.

On April 9, 12 and April 21, Phelps inappropriately touched AA.

On July 27, Phelps engaged in sexual intercourse with AA.

In September, AA disclosed having sexual intercourse with Phelps to her family. AA's father reported the incident to police.

B. Procedure

On November 10, 2011, the State charged Phelps with third degree rape and second degree sexual misconduct with a minor. The State later amended the information to include two aggravating circumstances for the third degree rape charge: (1) that Phelps used his position of trust to facilitate the rape and (2) that AA was a particularly vulnerable victim.

Jury selection for Phelps's trial began on April 17, 2012. Prior to voir dire beginning, the court informed the parties that it would conduct hardship questioning at the beginning of voir

dire, reserve its ruling until just before peremptory challenges, then "inform counsel as to who will be excused." 1 RP (Voir Dire) at 3.

During voir dire, juror no. 28 indicated that serving on the jury would be an inconvenience because he had previously committed to chaperoning a trip. Juror no. 48 told the trial court that serving on the jury would create a hardship because he was the only income-earner in his household and his employer would not pay for jury duty. Without having excused either juror, the court then indicated that it would revisit hardship excusals later.

The trial court then questioned jurors about potential conflicts or bias. 1 RP (Voir Dire) at 8-10. The court asked whether any of the potential jurors had "read or heard anything about this matter," whether "what you heard or read [has] caused you to form any opinions that would affect your ability to sit as a fair and impartial juror," and whether anyone was "acquainted with the parties, their attorneys, or the potential witnesses." 1 RP (Voir Dire) at 9. Juror no. 62 raised his hand in response to all three questions.

During the State's voir dire, juror no. 62 stated:

> I live in the town of Pe Ell. I know almost every person on [the witness] list. I know them from church. I know—my wife worked at the school, coached some of these girls. And I run the day care which has some of the family members there.

1 RP (Voir Dire) at 20. The following exchange then occurred:

> [The Court]: . . . [C]ould I interrupt just for a moment?
> [The State]: Yes.
> [The Court]: Juror 62 was actually excused from this case earlier and I thought he knew that. You're Mr. Kephart; is that right?
> [Juror no. 62]: Yes, sir.
> [The Court]: Yes.
> [Juror no. 62]: I was. But you also told me I had to come and go through the process, so I'm here.

> [The Court]: I think we had a miscommunication. But you told me all of those things and I thought . . . Well, at any rate, your [sic] excused today—

1 RP (Voir Dire) at 21-22. Following a sidebar, voir dire continued with both parties eliciting responses from the venire. The parties then had a sidebar discussion to pick the jury. Juror no. 28 and 48 were not selected for the jury.

Phelps's jury trial began later that day. AA testified to the incidents described above and, specifically, that she did not consent to the July 27, 2011 sexual intercourse with Phelps. On cross-examination, Phelps's attorney questioned AA about whether she told prosecutors that she had consented to the intercourse:

> [Defense Attorney]: During one of your interviews or maybe more than one interview with [the prosecutor], did you tell her that you used the word rape later but the sex was consensual or that you consented?
> [AA]: No, I don't remember saying that.
> [Defense Attorney]: All right. And let me follow that up. When you tell us "I don't remember saying that," does that mean that you could have told [the prosecutor] that?
> [AA]: Because when it first happened I tried to make myself believe it was consensual anyways because I didn't want [Phelps]—I didn't want that to be who he was because, in all honesty, I really, really, really, really respected him. I didn't want this to happen. I didn't want to have to do this. But no, I don't remember ever saying that. But because of the fact that I tried to make myself believe that it was consensual, and there is a chance I probably could have said that.

5 RP at 880.

After the State rested, Phelps had four witnesses testify on his behalf: his mother, his wife, his daughter, and his sister-in-law. Phelps's mother testified that Phelps was with her at the time of the charged sexual misconduct on April 2. Phelps did not testify.

During closing arguments, Phelps's attorney argued that AA either consented to sexual intercourse with Phelps or that the July 27 incident never occurred. In its closing rebuttal, the

State commented that, "I got to be quite honest with you today, I didn't know the defense was one of consent." 8 RP at 1580. Following this, the State argued without objection that, even if a deputy prosecutor had written a note about consent during an interview with AA, the defense attorney was not there at the time and "has no idea of [what the] context was of the interview. He doesn't even know what the notes were about, but we're obligated to give them to him." 8 RP at 1582. The State then argued that looking at all the evidence—especially AA's trial testimony—it was clear that AA did not consent to sexual intercourse.

The jury found Phelps guilty of second degree sexual misconduct with a minor and third degree rape and also found, as aggravating factors to the rape conviction, that AA was particularly vulnerable and that Phelps used his position of trust to facilitate the rape. Phelps appeals.

ANALYSIS

A. PUBLIC TRIAL RIGHT

Phelps first argues that the trial court violated his and the public's right to a public trial when it privately excused jurors during voir dire and held various in-camera proceedings throughout trial. Because Phelps fails to meet his burden of establishing that public trial violations occurred, we disagree.

1. Standard of Review

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee a defendant the right to a public trial. *State v. Wise*, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012). This court reviews alleged violations of the public trial right de novo. *Wise*, 176 Wn.2d at 9.

Generally, a trial court must conduct the five-part test set forth in *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), to determine if a closed proceeding is warranted.[2] However, "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." *State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). Accordingly, the threshold determination when addressing an alleged violation of the public trial right is whether the proceeding at issue even implicates the right. *Sublett*, 176 Wn.2d at 71.

In *Sublett*, the Washington Supreme Court adopted a two-part "experience and logic" test to address this issue: (1) whether the place and process historically have been open to the press and general public (experience prong), and (2) whether the public access plays a significant

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[2] The five criteria in *Bone-Club* are:

> 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.

Bone-Club, 128 Wn.2d at 258-59 (alteration in original) (quoting *Allied Daily Newspapers of Washington v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

positive role in the functioning of a particular process in question (logic prong).[3] 176 Wn.2d at 72-73. Both questions must be answered affirmatively to implicate the public trial right. *Sublett*, 176 Wn.2d at 73. If the public trial right is implicated, reviewing courts then look at whether a closure actually occurred without the requisite *Bone-Club* analysis. *State v. Paumier*, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012). If a closure has occurred, "[f]ailure to conduct the *Bone-Club* analysis is structural error warranting a new trial." *Paumier*, 176 Wn.2d at 35.

2. Jurors no. 28 and 48

Phelps contends that the "record does not reflect how or when [jurors no. 28 and 48] were excused" and, accordingly, we should *assume* the trial court violated his right to an open and public trial. Br. of Appellant at 13. We reject this argument because it misrepresents the record in this case, and on appeal, Phelps carries the burden to demonstrate that a public trial violation occurred.

We have previously addressed the burden of proof on appeal for a public trial violation claim. In both *State v. Halverson*, 176 Wn. App. 972, 977, 309 P.3d 795 (2013), *review denied*, 179 Wn.2d 1016 (2014), and *State v. Miller*, 179 Wn. App. 91, 316 P.3d 1143 (2014), we stressed that the appellant bears the burden of establishing a public trial violation. In every public trial right case cited by Phelps in his briefing, the record clearly established a courtroom closure.

[3] Although only four justices signed the lead opinion in *Sublett*, a majority adopted the "experience and logic" test with Justice Stephens's concurrence. 176 Wn.2d at 136 (Stephens, J., concurring). More recently, our Supreme Court cited *Sublett* in unanimously applying the "experience and logic" test in *In re Personal Restraint of Yates*, 177 Wn.2d 1, 28-29, 296 P.3d 872 (2013).

For example, in *Bone-Club*, the trial court expressly ordered a courtroom closure during a pretrial suppression hearing. 128 Wn.2d at 256. Also, in *State v. Brightman*,[4] *In re Pers. Restraint of Orange*,[5] and *State v. Njonge*,[6] the trial court explicitly ordered closures or told the public that they could not attend voir dire proceedings because of space and security concerns. And in *State v. Leyerle*, 158 Wn. App. 474, 477, 242 P.3d 921 (2010), the record clearly reflected (and both parties agreed) that the trial court and both parties questioned a potential juror in a hallway outside the courtroom. Finally, in *Paumier*, 176 Wn.2d at 33, *Wise*, 176 Wn.2d at 7, and *State v. Strode*, 167 Wn.2d 222, 224, 217 P.3d 310 (2009), the trial court individually questioned jurors in camera during voir dire. In all these cases, the appellate record clearly established that the public was inappropriately excluded from some portion of a public trial.

Here, in contrast, nothing in the record establishes that a closure occurred during voir dire or that jurors no. 28 and 48 were privately questioned or dismissed from the jury pool. Before voir dire commenced, the trial court stated that "if there are people, as I assume there will be, indicating that the length of the trial is a problem, I will do the questioning on that and then reserve ruling until I see—until just before peremptory challenges and I'll inform counsel as to who will be excused and who will be retained." 1 RP at 3.

During voir dire, jurors no. 28 and 48 both indicated that the timing and length of the trial would be a hardship. Just as the trial court indicated, it refrained from excusing these jurors at

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[4] 155 Wn.2d 506, 511, 122 P.3d 150 (2005).

[5] 152 Wn.2d 795, 802, 100 P.3d 291 (2004).

[6] 161 Wn. App. 568, 571-72, 255 P.3d 753 (2011), *review granted*, No. 86072-6 (Wash. Apr. 8, 2013)

this preliminary phase of voir dire. Instead, the record reflects that juror no. 28 was actively involved during voir dire, and that juror no. 48 was at least mentioned at the end of voir dire.

At the close of voir dire, the parties had a sidebar discussion to exercise peremptory challenges and pick the jury. Jurors no. 28 and 48 were not selected for the jury. The record does not reflect that jurors no. 28 and 48 were excused outside of the courtroom or that any type of courtroom closure occurred. Because the record does not establish that jurors no. 28 and 48 were excused during a closed proceeding, Phelps has failed to meet his burden of establishing a public trial violation.

To the extent that Phelps argues that a public trial right violation occurred when the parties selected the jury at sidebar, this argument has been rejected. In *State v. Love*, 176 Wn. App. 911, 920, 309 P.3d 1209 (2013), Division Three of this court held that "[n]either prong of the experience and logic test suggests that the exercise of cause or peremptory challenges must take place in public," and "the trial court did not erroneously close the courtroom by hearing the defendant's for cause challenges at sidebar." 176 Wn. App. at 920. In so holding, the *Love* court reasoned that logic "does not indicate that [cause or peremptory] challenges need to be conducted in public," and that, with regard to *Sublett*'s experience prong, "over 140 years of cause and peremptory challenges in this state" showed "little evidence of the public exercise of such challenges, and some evidence that they are conducted privately." *Love*, 176 Wn. App. at 919. We adopt the reasoning of the *Love* court and hold that exercising for cause challenges at sidebar during jury selection does not implicate the public trial right.[7]

[7] In *State v. Dunn*, ___ Wn. App. ____, 321 P.3d 1283 (2014), we adopted the reasoning of the *Love* court and held that exercising peremptory challenges at the clerk's station does not implicate the public trial right.

3. Juror no. 62

Phelps next argues that the colloquy between the trial court and juror no. 62 "suggests that jurors were questioned and excused behind closed doors." Br. of Appellant at 13. Phelps further argues that although juror no. 62 was excused for cause on the record in open court, we should assume a public trial violation occurred before or during voir dire.

This argument again misstates the defendant's burden of proof on appeal for a public trial violation claim. While Phelps is correct that in camera or outside-of-the-courtroom questioning of venire members may violate the public trial right, it is Phelps's burden to establish a violation and perfect the record for appellate review. *Miller*, 179 Wn. App. ___ at ¶ 14, 316 P.3d at 1148.

Here, the record is unclear as to when, where, or why the trial court previously spoke with juror no. 62. Thus, this claim relies, at least in part, on facts outside the record on appeal, and we do not address issues on direct appeal that rely on facts outside the record. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Accordingly, we hold that, on the record before us, Phelps has not established that a public trial right violation occurred in regard to the questioning of juror no. 62.

4. Other Proceedings

Phelps next argues that "[t]he trial court erroneously held additional in camera hearings without undertaking *Bone-Club* analysis." Br. of Appellant at 14. But Phelps fails to adequately explain what these in camera proceedings concerned, whether they implicated the public trial right, and how any violation of the public trial right occurred. We do "not consider conclusory arguments unsupported by citation to authority." *State v. Mason*, 170 Wn. App. 375, 384, 285 P.3d 154 (2012), *review denied*, 176 Wn.2d 1014 (2013); *see also* RAP 10.3(a)(6). "Such

'[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.'" *West v. Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012) (quoting *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998)). Accordingly, we refrain from addressing this argument.

B. RIGHT TO BE PRESENT

Phelps next argues that the trial court "violated his Fourteenth Amendment right to be present at all critical stages of trial" by excusing jurors in his absence. Br. of Appellant at 17. Because nothing in the record reflects that the trial court excused jurors in Phelps's absence, we disagree.

Whether a defendant's constitutional right to be present has been violated is a question of law reviewed de novo. *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). A criminal defendant has a constitutional right to be present at all critical stages of the proceedings. *Irby*, 170 Wn.2d at 880. "[A] defendant has a right to be present at a proceeding 'whenever his presence has a relation, reasonably substantial, to the fulness [sic] of his opportunity to defend against the charge." *Irby*, 170 Wn.2d at 881 (quoting *Snyder v. Mass.*, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934), *overruled in part on other grounds by Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)). "The core of the constitutional right to be present is the right to be present when evidence is being presented." *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994). "A violation of the due process right to be present is subject to harmless error analysis." *Irby*, 170 Wn.2d at 885. "[T]he burden of proving harmlessness is on the State and it must do so beyond a reasonable doubt." *State v. Caliguri*, 99 Wn.2d 501, 509, 664 P.2d 466 (1983)).

Here, Phelps argues that "[a]t some point, the trial court questioned and excused jurors outside the courtroom" and, this process "affected the makeup—and hence the fairness—of the jury that presided over [his] fate." Br. of Appellant at 18. As explained above, nothing in the record suggests that any jurors were dismissed in Phelps's absence. Jurors no. 28 and 48 were excused for cause in open court, in Phelps's presence. And juror no. 62 was excused for cause on the record in open court. Phelps has failed to meet his burden of establishing error.

To the extent that Phelps argues that his right to be present was violated because jurors were dismissed at sidebar, this claim also fails. Here, the record is not clear as to whether Phelps was present when the attorneys exercised their for cause challenges at sidebar. Phelps was present during voir dire, and it appears that Phelps's claim is based on the allegation that he did not join counsel at sidebar when they exercised for cause challenges.[8] There is no indication in the record that he did or did not accompany counsel when counsel exercised for cause challenges at sidebar. Because the record is unclear whether Phelps was present at sidebar during the exercise of for cause challenges, the claim relies, at least in part, on facts outside the record on appeal. We do not address issues on direct appeal that rely on facts outside the record. *McFarland*, 127 Wn.2d at 335.

C. DEFICIENT CHARGING DOCUMENT

Phelps next argues that the information charging him with second degree sexual misconduct with a minor was deficient because it failed to allege that AA was not more than 21 years old at the time of the offense. Because this apparently missing element may be fairly implied from the charging document, we disagree.

[8] Phelps has presented no authority that "being present" requires standing beside counsel during a sidebar.

We review challenges to the sufficiency of a charging document de novo. *State v. Williams*, 162 Wn.2d 177, 182, 170 P.3d 30 (2007). When, as here, a defendant challenges an information's sufficiency for the first time on appeal, we liberally construe the document in favor of validity. *State v. Kjorsvik*, 117 Wn.2d 93, 105, 812 P.2d 86 (1991). "Words in a charging document are read as a whole, construed according to common sense, and include facts which are necessarily implied." *Kjorsvik*, 117 Wn.2d at 109. This court's standard of review comprises an essential-elements prong and an actual-prejudice prong. *Kjorsvik*, 117 Wn.2d at 105. Under the essential-elements prong, the reviewing court looks to the information itself for *some* language that gives the defendant notice of the allegedly missing element of the charged offense. *Kjorsvik*, 117 Wn.2d at 105-06. If that language is vague or inartful, then this court determines under the actual-prejudice prong whether such language prevented the defendant from receiving actual notice of the charged offense, including the allegedly missing element. *Kjorsvik*, 117 Wn.2d at 106.

Here, the third amended information states:

> On or about and between March 25, 2011 through April 3, 2011, in the County of Lewis, State of Washington, the above-named defendant, (b) being at least sixty (60) months older than the student and being a school employee and not being married to the student and not being in a state registered domestic partnership with the student, did have, or knowingly cause another person under the age of eighteen (18) to have, sexual contact with a registered student of the school who is at least sixteen (16) years old, to-wit: [AA] (DOB: [1994]); contrary to the Revised Code of Washington 9A.44.096.

Clerk's Papers (CP) at 43.

To convict Phelps of second degree sexual misconduct with a minor, the State had to prove beyond a reasonable doubt that (1) Phelps had sexual contact with AA, (2) AA was at least 16 at the time of the contact but younger than 21, (3) AA was not married to Phelps, (4) Phelps

was at least 60 months older than AA at the time of the sexual contact, (5) Phelps was employed by the school, and (6) AA was an enrolled student of the school employing Phelps. RCW 9A.44.096.

Phelps argues that the charging document is insufficient under the essential-elements prong of the *Kjorsvik* test because it failed to explicitly state that AA was younger than 21 at the time of the crime. Although inartfully written, the State's charging document plainly states AA's date of birth, indicating that she was 16 at the time of the alleged sexual misconduct. Moreover, the document lists the charged crime itself as "sexual misconduct with a minor in the second degree," implying the involvement of a "minor."[9] CP at 43. Keeping in mind the liberal standard in *Kjorsvik*, it is clear that, whether the age of majority specific to these circumstances was 18 or 21, Phelps had notice that the charged crime involved sexual contact with someone younger than the age of majority. Accordingly, the missing element can be "fairly implied" in these circumstances. *Kjorsvik*, 117 Wn.2d at 104.

Although the missing element can be fairly implied, we must determine under the actual-prejudice prong whether the defendant can "show that he or she was nonetheless actually prejudiced by the inartful language which caused lack of notice." *Kjorsvik*, 117 Wn.2d at 106. Here, Phelps cannot establish prejudice.

Even if the charging document explicitly stated that the victim must be under 21 years of age, Phelps's potential defenses (consent or alibi) were not affected as it was undisputed throughout trial that AA was 16 years old at the time the alleged sexual misconduct occurred.

[9] Although "minor" is not defined in RCW 9A.44.096, under Washington law "[e]xcept as otherwise specifically provided by law, all persons shall be deemed and taken to be of full age for all purposes at the age of eighteen years." RCW 26.28.010. RCW 9A.44.096 is one of the rare exceptions where it is possible for someone over 18 to be treated as a minor.

"The primary goal of the essential elements rule is to give notice to an accused of the nature of the crime that he must be prepared to defend against." *State v. Lindsey*, 177 Wn. App. 233, 245, 311 P.3d 61 (2013) (citing *Kjorsvik*, 117 Wn.2d at 101). Therefore, based on facts in this record, whether Phelps thought he was defending against the charge that he had inappropriate sexual contact with a 16-year-old or with someone under the age of 18 or under the age of 21 is immaterial. Accordingly, Phelps has failed to show that he was prejudiced by the inartful language in the charging document, and Phelps's argument fails.

D. UNANIMITY INSTRUCTION

Phelps next argues that the trial court violated his right to a unanimous jury verdict by failing to give a unanimity instruction for the second degree sexual misconduct with a minor charge. Specifically, he argues that the State "presented evidence that Mr. Phelps had sexual contact with [AA] on multiple occasions." Br. of Appellant at 23. While it is true that the State presented evidence of multiple acts of sexual misconduct in this case, the jury instructions clearly indicated that the charged crime only involved acts "on or about and between March 26, 2011 through April 2, 2011." CP at 152. At trial, the only evidence presented of sexual contact during this time frame involved the April 2 incident. Accordingly, no election or unanimity instruction was required.

We review alleged instructional errors de novo. *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010). "Criminal defendants in Washington have a right to a unanimous jury verdict." *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). Accordingly, when the State presents evidence of multiple acts that could each form the basis of one charged crime, "either the State must elect which of such acts is relied upon for a conviction or the court must

instruct the jury to agree on a specific criminal act." *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). This requirement "assures a unanimous verdict on one criminal act" by "avoid[ing] the risk that jurors will aggregate evidence improperly." *Coleman*, 159 Wn.2d at 512. "Where there is neither an election nor a unanimity instruction in a multiple acts case, omission of the unanimity instruction is presumed to result in prejudice." *Coleman*, 159 Wn.2d at 512. Reversal is required unless we determine the error is harmless beyond a reasonable doubt. *Coleman*, 159 Wn.2d at 512.

Here, the trial court instructed the jury that, to convict Phelps of second degree sexual misconduct with a minor, the State needed to prove beyond a reasonable doubt "[t]hat on or about and between March 26, 2011 through April 2, 2011, the defendant had sexual contact with [AA]." CP at 152. The trial court defined "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. Contact is "intimate" if the conduct is of such a nature that a person of common intelligence could fairly be expected to know that, under the circumstances, the parts touched were intimate and therefore the touching was improper.
>
> When considering whether a particular touching is done for the purpose of a gratifying sexual desire, you may consider among other things the nature and the circumstances of the touching itself.

CP at 153.

At trial, the State presented evidence of only one incident involving sexual contact between AA and Phelps *during the date range in question.* This was the April 2 incident where Phelps straddled AA while she was on his bed, kissed her on the lips, put his tongue in her mouth, and ground his erection between her legs. Because the State presented evidence of only one incident involving sexual contact between AA and Phelps during the date range in question,

it was not required to make an election, and the trial court did not err in refraining from giving a unanimity instruction in this situation.

Phelps also argues that a unanimity instruction was required because the State presented evidence of more sexual misconduct after April 2. This argument is unavailing. As already discussed, the State charged Phelps with committing sexual misconduct between a specified date range, March 26 to April 2, and the jury instructions repeated that the jury had to find that the misconduct occurred during that date range. We presume that juries follow the trial court's instruction. *State v. Hanna*, 123 Wn.2d 704, 711, 871 P.2d 135, *cert. denied*, 513 U.S. 919 (1994). Accordingly, while the State admittedly presented evidence of other acts involving sexual contact, none of those acts took place in the specified date range and could not have been the basis for the jury's conviction on the sexual misconduct charge.

E. PROSECUTORIAL MISCONDUCT

Phelps last argues that the prosecutor committed misconduct during closing argument. We disagree.

To prevail on a prosecutorial misconduct claim, the defendant must establish "'that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.'" *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (quoting *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). We look to "the evidence presented, 'the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury'" when looking at the context of the entire record. *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011) (quoting *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006)). Moreover, a defendant's failure to object to an

improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

During closing statements, Phelps's attorney argued to the jury that:

> You can find [Phelps] not guilty for the rape for two reasons. There was no rape and [Phelps] wasn't there. And I'm going to give you arguments for both. [AA] tells us that she disclosed to her aunt, disclosed to her mom and dad, and disclosed to [police] that she had sexual intercourse with Todd Phelps.
>
> And on cross-examination, I asked her about some of that stuff. And on some of my questions she agreed, "I didn't say no." And she can come in here and testify this is the detailed sequence of events, but she can't get away from the other things she's already told her aunt and mom and dad and [police].
>
> And then the prosecutor, why would the prosecutor have in her notes that [AA] said she consented? Why would the prosecutor have in her notes that [AA] said she consented if [AA] didn't consent?". . .
>
> . . . .
>
> And I guess during their conversations during their seemingly private conversations when she was talking with the prosecutor and not with me, she told them that it was consensual. She can't get away from that.

8 RP at 1571-72.

In its rebuttal, the State argued the following without objection,

> I will be as brief as possible, but I definitely need to address these points that [defense counsel] has raised because I got to be quite honest with you today, I didn't know the defense was one of consent. So I guess [Phelps] was either there or he wasn't. If he was there, you are to believe that [AA] consented somehow. Well, let's work through that. So if you believe [AA] that [Phelps] was there, is there any evidence at all, at all, that [AA] consented?
>
> The only evidence that [defense counsel] wants you to hang your hat on is that he had [AA] when she was cross-examined, say—agreed that . . . when she was giving a statement that she said, "No, I didn't stop him." But when I questioned her with regard to that as to when that conversation was in relation to, she was specific. It was after he had already entered her with his penis. She was clear about that. It was not beforehand. It was after.
>
> . . . .
>
> Now, the other thing that [defense counsel] tries to discredit [AA] with regard to consent is some notes that the Prosecutor's Office had. He asked her, well, didn't you have an interview with the Prosecutor's Office? Unfortunately,

> [defense counsel] wasn't there. He's grasping at straws to get anything. He has no idea of [what the] context was of the interview. He doesn't even know what the notes were about, but we're obligated to give them to him. Not dated.
>
> . . . .
>
> So which is it? Was [Phelps] there and he raped [AA] or had sex with her or he wasn't there?

8 RP at 1580-82.

Phelps contends that the prosecutor's statement that he did not realize that consent was at issue implied "that the defense had been forced to change theories based on the evidence." Br. of Appellant at 28. "[T]he prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel." *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995) Here, a fair reading of the record does not reflect that the prosecutor's comment was "calculated to inflame the passions or prejudices of the jury." *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Instead, although the prosecutor was surprised[10] by the defense's argument that AA had consented to sexual intercourse with Phelps and expressed that surprise in its brief comment, the prosecutor then went on to explain why the evidence could not support a theory of consent, especially in light of AA's extensive testimony. "It is not misconduct . . . for a prosecutor to argue that the evidence does not support the defense theory." *Russell*, 125 Wn.2d at 87.

Phelps also argues that the prosecutor's statement that defense counsel was "grasping at straws to get anything" while discussing AA's interview with the prosecutor's office was an

[10] Throughout trial, Phelps's defense focused almost exclusively on establishing that Phelps could not have committed the rape when the State argued it occurred and, additionally, that no evidence of the rape remained at the crime scene.

inappropriate comment on the evidence and that this expressed the prosecutor's personal opinion about Phelps's guilt. 8 RP at 1582. This argument is unpersuasive.

First, Phelps's argument about consent relied exclusively on a handwritten note in the margin of a statement seemingly written by one of the prosecutors. It was appropriate for the prosecution to point out that defense counsel was not at the interview and could not know the context of the note or what the prosecutor was thinking when the note was written. *Russell*, 125 Wn.2d at 87. Second, the "grasping at straws" comment was clearly directed to defense counsel's theory of the case and did not reflect the prosecutor's personal view of Phelps's guilt or innocence. 8 RP at 1582. Phelps fails to establish prosecutorial misconduct in these circumstances.

F. INEFFECTIVE ASSISTANCE OF COUNSEL

Phelps also argues that his trial counsel was ineffective for failing to object to the prosecutor's above-described statements in closing argument. To demonstrate ineffective assistance, a defendant must show that (1) defense counsel's representation was deficient because it fell below an objective standard of reasonableness; and (2) the deficient representation prejudiced the defendant because there is a reasonable probability that the result of the proceeding would have been different except for counsel's errors. *McFarland*, 127 Wn.2d at 334-35. Here, because Phelps fails to establish prosecutorial misconduct, he cannot show that his trial counsel was deficient for failing to object, and this argument necessarily fails.

We affirm.

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

Lee, J.

We concur:

Bjorgen, P.J.

Maxa, J.

APPENDIX B

APPELLANT'S REPLY BRIEF PAGES 1 THROUGH 11

APPENDIX B

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APPELLANT'S REPLY BRIEF PAGES 1 THROUGH 11

No. 43557-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Todd Phelps,

Appellant.

Lewis County Superior Court Cause No. 11-1-00790-6

The Honorable Judge Nelson E. Hunt

Appellant's Reply Brief

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I. THE TRIAL COURT VIOLATED THE CONSTITUTIONAL REQUIREMENT THAT CRIMINAL TRIALS BE OPEN AND PUBLIC.

A. The court unconstitutionally closed a portion of jury selection.

The obligation to hold criminal trials in public attaches to jury selection. U.S. Const. Amend. VI, U.S. Const. Amend. XIV; Wash. Const. art. I, §§10, 22; *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009); *State v. Wise*, 176 Wn.2d 1, 11, 288 P.3d 1113 (2012).

Unnecessary closure of a portion of jury selection requires automatic reversal. *Strode,* 167 Wn.2d at 231 (plurality); *Presley v. Georgia*, 558 U.S. 209, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010). Courts look to the plain language of the trial transcript to determine whether or not a closure occurred. *State v. Brightman*, 155 Wn.2d 506, 516, 122 P.3d 150 (2005).

In this case, jurors were questioned and excused behind closed doors. RP (4/17/12 voir dire) 2-128; CP 256-57. This came to light when Juror 62 mistakenly appeared for jury selection, even though he'd already been excused in a proceeding that took place outside the courtroom. RP (4/17/12 voir dire) 21-23. The court removed Juror 62 for reasons related to Mr. Phelps's case. RP (4/17/12 voir dire) 21-23. There may also have

been other prospective jurors excused outside the courtroom. *See* Appellant's Opening Brief, pp. 13-14 (noting that Juror 62's name was added to the list by hand when he showed up despite having been excused). In addition, the court's decision to excuse Juror 28 and Juror 48 did not occur on the record in open court. RP (4/17/12 voir dire) 5, 25, 106; *See* CP 256-57. This suggests that the court excused them behind closed doors as well.

Respondent argues that the court excused Juror 62 in open court. Brief of Respondent, pp. 19-20. But the in-court decision to excuse Juror 62 followed a prior out-of-court decision relieving him from serving for case-related reasons. RP (4/17/12 voir dire) 21-23. Respondent does not dispute this. Instead, Respondent claims—without citation to the record—that this occurred "at some unknown time prior to trial." Brief of Respondent, p. 20.

This argument lacks merit for three reasons. First, nothing in the record suggests that Juror 62 was excused prior to the start of trial. Second, by excusing Juror 62 for case-related reasons, the judge started the process of selecting the jury—even if this occurred before the scheduled start of jury selection. *See, e.g., State v. Irby,* 170 Wn.2d 874, 886, 246 P.3d 796 (2011) (holding that jury selection included email exchange that occurred before general questioning was scheduled to start,

for purpose of defendant's right to be present.) Third, there is no "prior to trial" exception to the requirement that criminal justice be administered openly and publicly. Indeed, the right attaches to certain pretrial proceedings. Respondent cites no contrary authority, suggesting none exists. *See Coluccio Constr. v. King County*, 136 Wn. App. 751, 779, 150 P.3d 1147 (2007).

Respondent also claims that the court "clearly" excused Juror 28 and Juror 48 during a sidebar. Brief of Respondent, p. 19. This is incorrect: the record does not "clearly" establish that the jurors were excused during a sidebar. The "plain language" of the transcript suggests that the court excused the jurors outside the courtroom. *Brightman*, 155 Wn.2d at 516. Accordingly, the state bears the burden of showing that no closure occurred. *Id.*

By dismissing jurors behind closed doors, the court violated the constitutional requirement that criminal trials be administered openly. U.S. Const. Amend. VI, U.S. Const. Amend. XIV; Wash. Const. art. I, §§10, 22; *State v. Bone-Club,* 128 Wn.2d 254, 259, 906 P.2d 325 (1995). Mr. Phelps's convictions must be reversed and the case remanded for a new trial. *State v. Paumier*, 176 Wn.2d 29, 288 P.3d 1126 (2012).

B. The court erroneously conducted proceedings behind closed doors.

Where closed proceedings are not transcribed, the state should bear the burden of establishing what transpired. *See* Appellant's Opening Brief, pp. 11-12. Respondent does not seek to avoid this burden. Brief of Respondent, pp. 12-24. The absence of argument on this point may be treated as a concession. *See In re Pullman,* 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

Instead, Respondent assumes that the trial judge made an adequate record of everything that took place in chambers. Brief of Respondent, pp. 21-24. This is incorrect. The trial judge made a record of some decisions that had been made in chambers, but did not explicitly state that nothing else occurred *in camera* and did not reveal how each decision was reached. The court may have resolved some issues after hearing argument; the record does not reveal the extent of any disputes between the parties. Absent a transcript of the *in camera* proceedings, the state cannot meet its burden of proving what happened behind closed doors.[1]

Respondent goes on to argue that "experience and logic" excuses the closed-door proceedings. Respondent's arguments under the test cannot resolve the issue because the record fails to establish what

[1] In some circumstances, a summary could prove sufficient, but only if the parties agree on the record that the summary is complete and accurate. The parties did not make an agreement of that sort here.

transpired *in camera.* Without a complete and accurate picture of the proceedings, the "experience and logic" test does not support Respondent's position.

If any of the in-chambers discussions involved disputed issues, the proceedings should have been open to the public. *See* Appellant's Opening Brief, pp. 14-17. Because Respondent fails to prove what happened in the judge's chambers, Mr. Phelps's conviction cannot stand. U.S. Const. Amend. VI, U.S. Const. Amend. XIV; Wash. Const. art. I, §§10, 22; *Bone-Club,* 128 Wn.2d at 259. Accordingly, his conviction must be reversed and the case remanded for a new trial. *Id.*

II. THE TRIAL COURT VIOLATED MR. PHELPS'S RIGHT TO BE PRESENT BY EXCUSING JURORS IN MR. PHELPS'S ABSENCE.

Mr. Phelps rests on the argument set forth above and in Appellant's Opening Brief.

III. RESPONDENT'S CONCESSION THAT THE INFORMATION OMITS LANGUAGE DESCRIBING AN ESSENTIAL ELEMENT REQUIRES DISMISSAL OF COUNT TWO WITHOUT PREJUDICE.

A charging document must inform the accused person of each element of the offense. U.S. Const. Amend. VI; XIV; Wash. Const. art. I, § 22; *State v. Johnson*, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992). This requirement applies even when the accused raises a challenge post-verdict. *State v. Kjorsvik*, 117 Wn.2d 93, 102-105, 812 P.2d 86 (1991). The

Information must include all essential elements, although a diminished standard for clarity applies for challenges made after conviction. *Id.*, at 105-106.

Conviction in count two required proof of sexual contact with a person who was not more than twenty-one. RCW 9A.44.096(1)(b).

Respondent concedes that the Information did not include language explaining this element. Brief of Respondent, p. 30. Respondent does not claim that the Information somehow communicated the element in an inartful fashion. Brief of Respondent, p. 30. Instead, Respondent contends that the allegation of A.A.'s date of birth sufficiently apprised Mr. Phelps of the element. Brief of Respondent, pp. 30-31. This is incorrect.

A.A.'s date of birth did not tell Mr. Phelps what the state was required to prove. Whether A.A. was 16, 18, 21, or 30 at the time of the alleged offense, her date of birth did nothing to inform Mr. Phelps of the element the state was required to establish to obtain a conviction. RCW 9A.44.096(1)(b). Accordingly, the Information did not charge a crime.

The defective Information requires reversal of the conviction. U.S. Const. Amend. VI; Wash. Const. art. I, § 22. *Kjorsvik,* 117 Wn.2d at 104-106. The charge must be dismissed without prejudice. *Id.*

IV. RESPONDENT CONCEDES THAT THE COURT FAILED TO PROVIDE A UNANIMITY INSTRUCTION IN THIS MULTIPLE ACTS CASE.

The state constitution guarantees an accused person the right to a unanimous verdict. Wash. Const. art. I, §21; *State v. Elmore*, 155 Wn.2d 758, 771 n. 4, 123 P.3d 72 (2005). Even absent objection in the trial court, failure to provide a unanimity instruction must be considered on appeal "because of [the] constitutional implications" resulting from such failure. *State v. Fiallo-Lopez*, 78 Wn. App. 717, 725, 899 P.2d 1294 (1995); RAP 2.5(a)(3).[2] Where the circumstances require a unanimity instruction, a court's failure to give one *necessarily* creates manifest error affecting the accused person's constitutional right to a unanimous verdict.[3] *State v. Watkins*, 136 Wn. App. 240, 244-245, 148 P.3d 1112 (2006); *State v. Greathouse*, 113 Wn. App. 889, 916, 56 P.3d 569 (2002); *State v. Tang*, 75 Wn. App. 473, 478 n. 6, 878 P.2d 487 (1994) *on reconsideration,* 77 Wn. App. 644, 893 P.2d 646 (1995).

---

[2] Courts have reviewed such errors for the first time on appeal even prior to the adoption of the Rules of Appellate Procedure. *See State v. Fitzgerald*, 39 Wn. App. 652, 655, 694 P.2d 1117 (1985); *State v. Green*, 94 Wn.2d 216, 231, 616 P.2d 628 (1980).

[3] Furthermore, "the test for determining whether an alleged error is 'manifest' is closely related to the test for the substantive issue of whether a [unanimity] instruction was required." *State v. Knutz*, 161 Wn. App. 395, 407, 253 P.3d 437 (2011). Thus a reviewing court may appropriately "conflate these two analyses and address [the] substantive argument" without first finding the error manifest. *Id.*

Respondent concedes that this case involves multiple acts, and that the court's failure to give a unanimity instruction raises a constitutional issue. Brief of Respondent, pp. 31-34, 35. Respondent contends that the prosecutor made an election, thus rendering a unanimity instruction unnecessary. Brief of Respondent, pp. 34-38.[4] According to Respondent, the prosecutor's closing argument reference to the April 2nd incident constituted an election, when combined with the charging date. Brief of Respondent, p. 35, 37. This is incorrect.

In a multiple acts case, juror unanimity is achieved only when all jurors agree that the state has proved a particular incident beyond a reasonable doubt. *State v. Coleman,* 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). Because of this, a prosecutor's election must have two components. First, the state must clearly communicate which incident it relies upon to prove the charged crime. Second, the prosecutor must indicate that none of the other incidents can provide the basis for conviction. This second component is more important than the first: if jurors don't know they are limited to the incident mentioned by the prosecutor, they will not know they must explicitly agree on that incident.

[4] Respondent claims this means the error does not qualify as "manifest." Brief of Respondent, pp. 34-38. In fact, however, Respondent addresses the merits of the issue, and does not suggest it cannot be reviewed.

Indeed, without both components of the election, jurors may not even discuss which incident forms the basis for their verdict. Absent a two-component election, a significant risk remains that a divided jury will render the verdict, with some jurors voting based on one incident and others voting based on another.

Even assuming the prosecutor's reference to the April 2nd incident sufficiently communicated the state's intent to rely upon that incident, nothing in the prosecutor's arguments or the court's instructions prohibited jurors from considering one of the other incidents. RP 1486-1553, 1580-1592; CP 281-300. In other words, the purported election was incomplete. Jurors who did not agree to convict based on the April 2nd incident were free to consider any of the other incidents. Nothing—not even the charging period—limited them to the April 2nd incident. *See, e.g., State v. Hayes*, 81 Wn. App. 425, 432, 914 P.2d 788 (1996) ("[W]here time is not a material element of the charged crime, the language 'on or about' is sufficient to admit proof of the act at any time within the statute of limitations, so long as there is no defense of alibi.") And nothing in the instructions (or the argument) made the unanimity requirement clear, so long as jurors agreed that the crime had been committed.

In the absence of a proper two-component election or a unanimity instruction, a divided jury might have voted to convict. Some jurors may

have believed Mr. Phelps had sexual contact with A.A. at his house, while others believed sexual contact occurred on the bus but not at the house. RP (04/19/2012) 474, 483, 487, 512-513, 519, 526, 528-530; RP (04/20/2012) 566.

Because Mr. Phelps may have been convicted by a jury divided in this manner, his conviction cannot stand. Count two must be reversed and the charge remanded for a new trial. *Coleman,* 159 Wn.2d at 511. Upon retrial, the state must elect a single act or the court must give a unanimity instruction. *Id.*

V. THE PROSECUTOR COMMITTED MISCONDUCT THAT WAS FLAGRANT AND ILL-INTENTIONED.

Mr. Phelps rests on the argument set forth in the Appellant's Opening Brief.

VI. MR. PHELPS WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

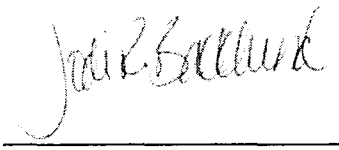
Mr. Phelps rests on the argument set forth in Appellant's Opening Brief.

CONCLUSION

Mr. Phelps's convictions must be reversed, and the case remanded. Count two must be dismissed without prejudice.

Respectfully submitted on July 15, 2013,

BACKLUND AND MISTRY



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Attorney for the Appellant

Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Todd Phelps, DOC #357684
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

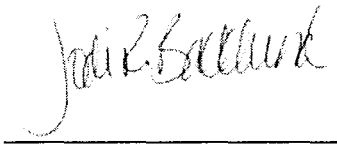
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Lewis County Prosecuting Attorney
appeals@lewiscountywa.gov

I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 15, 2013.



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Attorney for the Appellant

APPENDIX C

VERBATIM REPORT OF PROCEEDINGS APRIL 17, 2012

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APPENDIX C

VERBATIM REPORT OF PROCEEDINGS APRIL 17, 2012

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APPENDIX C

VERBATIM REPORT OF PROCEEDINGS APRIL 17, 2012

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF LEWIS

STATE OF WASHINGTON,	)	No. 11-1-00790-6
Plaintiff,	)	Court of Appeals No. 43557-7-II
vs.	)	
TODD DALE PHELPS,	)	
Defendant.	)	

VERBATIM REPORT OF PROCEEDINGS

April 17, 2012

JURY TRIAL - VOLUME I - VOIR DIRE

A P P E A R A N C E S

For the Plaintiff: WILL HALSTEAD
DEBRA EURICH
DEPUTY PROSECUTORS
Chehalis, Washington

For the Defendant: DON BLAIR
ATTORNEY AT LAW
Chehalis, Washington

Presiding Judge: NELSON HUNT
DEPARTMENT 1

CHERYL L. HENDRICKS, CCR NO. 2274
OFFICIAL COURT REPORTER
LEWIS COUNTY SUPERIOR COURT
CHEHALIS, WASHINGTON 98532
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****

THE COURT: Will all the prospective jurors please raise your right hand for administration of the voir dire oath.

(WHEREUPON THE PROSPECTIVE JURORS WERE DULY SWORN.)

THE COURT: All right. Please be seated.

This is cause number 11-1-790-6, State of Washington versus Todd Dale Phelps. The State is represented by Deputy Prosecuting Attorneys Debra Eurich and Will Halstead.

MS. EURICH: Good morning.

MR. HALSTEAD: Good morning.

THE COURT: The defense attorney is Don Blair.

MR. BLAIR: Good morning, ladies and gentlemen. This is my client Todd Phelps.

THE DEFENDANT: Good morning.

THE COURT: This is a criminal action. The charge -- there are two charges -- are: In count one, rape in the third degree. And the allegation is that on or about July 27th, 2011, in Lewis County, the defendant engaged in sexual intercourse with another person to whom he was not married, to wit, Amanda Alden, and Amanda Alden did not consent to the sexual intercourse and such lack of consent

doing voir dire for this or is Ms. Eurich?

MR. HALSTEAD: I am, Your Honor.

THE COURT: Do you have any objection to excusing this juror?

MR. HALSTEAD: No.

THE COURT: Mr. Blair?

MR. BLAIR: No, Your Honor.

THE COURT: All right. Juror number 12, you are excused from further attendance on this matter. Please continue to use the telephone to find out when you may next be needed.

Juror number 18, and your reason for hardship?

JUROR NO. 18: Yeah, I previously was excused. I manage a business in town. I have one assistant manager and he's out of town on the two days on the card you've already given us.

THE COURT: And you've been previously excused from those two days?

JUROR NO. 18: Right.

THE COURT: All right. You are excused then from today.

Juror number 28?

JUROR NO. 28: Yes. I committed myself to be a chaperone for an orchestra trip to Central Washington University on Friday.

I'm now going to ask you several questions of the entire panel. When I'm through the attorneys will have an opportunity to ask you questions. If any of these questions are of a sensitive nature or you do not feel comfortable in answering them in front of the other jurors, please let us know or let me know and we'll attempt to have you interviewed in a somewhat less public circumstance. However, that is not always possible.

If your answer to any of my questions is yes, please raise your hand until your juror number is announced by the bailiff.

The first question is does the length of the trial create an inconvenience or undue hardship for any of you that will prohibit your attendance?

THE BAILIFF: Number 12, 18, number 40, number 28, number 48, 47. That's it, Your Honor.

THE COURT: All right. I'm going to interrupt my own questioning here to ask each individual juror.

Number 12, what is your convenience or hardship that would prohibit your further attendance?

JUROR NO. 12: I pulled a ligament or something to my right knee and I can't keep my foot down. It has to be elevated. I can't get in to see the doctor until tomorrow at 4:00. And the more I sit, the more it hurts.

THE COURT: Okay. Mr. Halstead, are you going to be

victim, as a witness, or as a defendant with a similar type of case or incident?

THE BAILIFF: Number 10, 14, 17.

UNIDENTIFIED SPEAKER: Did you say friend?

THE COURT: I said friend or relative. The first question was whether you personally and now it's friend or relative.

THE BAILIFF: Number 40, 52, 57, 49, and 61.

THE COURT: For those of you who answered yes to that question, is there anything about that that would influence your consideration of this case?

THE BAILIFF: 17, 40, 52, 57, 61.

THE COURT: All right. Those are all the questions that I have.

Mr. Halstead, you're first up for your 20 minutes.

MR. HALSTEAD: May we have a side-bar, Your Honor?

THE COURT: Yes.

(DISCUSSION HELD OFF RECORD.)

MR. HALSTEAD: Good morning, ladies and gentlemen. Come on. Good morning.

How many people want to be here today? Raise your hand high. I know, that's part of being on the jury panel here. But I thank you all for coming in today.

My name is Will Halstead. And this is Debra Eurich. We're co-counsel on this case. And to her right is

Detective Bruce Kimsey.

We're going to have quite a few questions with regard to this case today, between myself and defense attorney. Quite a few of you raised your hand when you were asked if you've read or heard something about this case. So that's going to lead to probably quite a few questions for you.

There are two types of questions that I will ask of you. One will be to the entire panel. Okay. If you want to respond to the question, raise your hand so I can call your number because the court reporter here has to take down your number. That way we can tell who's responding to the question.

The other type of question I will ask is a question directly of a particular person. And when I do that I don't mean, if I do, to put you on the spot or to embarrass you and put you in an uncomfortable situation. The whole point of this process is to make sure that both sides get a fair and impartial jury. So if I ask you a question at any point in time that you feel uncomfortable answering in front of the entire panel, just tell me and then we can ask The Court if we can ask further questions outside the presence of everybody. Okay?

So this goes a lot quicker if everybody participates, obviously. This is kind of an Oprah or Donahue method. It's interactive.

even though --

JUROR NO. 62: I could be.

MR. HALSTEAD: What's that?

JUROR NO. 62: I could, yes.

MR. HALSTEAD: What does your wife do?

JUROR NO. 62: She runs a day care.

MR. HALSTEAD: Is she somehow affiliated with softball or...?

JUROR NO. 62: She used to coach some of the girls in volleyball.

MR. HALSTEAD: Oh, okay. At the high school?

JUROR NO. 62: At the high school, yes.

MR. HALSTEAD: When was that?

JUROR NO. 62: I'd say three or four years ago.

MR. HALSTEAD: Thank you, number 62.

Number 57?

THE COURT: Mr. Halstead, could I interrupt just for a moment?

MR. HALSTEAD: Yes.

THE COURT: Juror 62 was actually excused from this case earlier and I thought he knew that.

You're Mr. Kephart; is that right?

JUROR NO. 62: Yes, sir.

THE COURT: Yes.

JUROR NO. 62: I was. But you also told me I had to

come and go through the process, so I'm here.

THE COURT: I think we had a miscommunication. But you told me all of those things and I thought... Well, at any rate, your excused today --

JUROR NO. 62: Thank you.

THE COURT: -- so you can leave.

JUROR NO. 62: Appreciate it.

THE COURT: Mr. Halstead and Mr. Blair, could I see you for just a second, please?

(DISCUSSION HELD OFF RECORD.)

MR. HALSTEAD: Okay. Number 57?

JUROR NO. 57: I'm acquainted with Brad Althauser and his family.

MR. HALSTEAD: Okay. Do you know what Brad does for a living?

JUROR NO. 57: He works for the phone company.

MR. HALSTEAD: Anything about your relationship with him that would --

JUROR NO. 57: No.

MR. HALSTEAD: Okay. So anybody else know anybody else off of that list? I'll start over here.

Number 60, who do you know?

JUROR NO. 60: I know both sides.

MR. HALSTEAD: You know both sides?

JUROR NO. 60: The plaintiff and the defendant's

(BRIEF INTERRUPTION.)

THE COURT: Mr. Blair.

MR. BLAIR: Hold on just for a second.

Anybody here work for the railroad?

Number 17, you indicated that you have a daughter.

JUROR NO. 17: That was involved in a similar case. This thing happened and I'm afraid I would have a hard time being impartial.

MR. BLAIR: Okay. Now, that's kind of equivocal, having a hard -- I would have a hard time, somebody -- and I'm not saying it's going to be an easy time for everyone, but having a hard time isn't the same as, yeah, I couldn't do it.

JUROR NO. 17: I couldn't do it.

MR. BLAIR: All right. Number 17 I would ask be excused for cause.

THE COURT: Do you wish to follow up, Mr. Halstead?

MR. HALSTEAD: No, Your Honor, I don't.

THE COURT: Do you have an objection?

MR. HALSTEAD: No, I don't.

THE COURT: Number 17, thank you for your participation. Please give up your badge to the bailiff. And continue to use the phone to determine when you will next be needed.

MR. BLAIR: Number 25, you indicated that you

shouldn't be allowed to sit. If you are selected for the jury do you believe you could be fair and impartial to all the parties?

JUROR NO. 25: Yes.

MR. BLAIR: Okay. Number 32? 32.

JUROR NO. 32: No, I don't think I could be fair and impartial.

MR. BLAIR: And that's based on what you've already told us?

JUROR NO. 32: Yes, what I've read and...

MR. BLAIR: Ask that number 32 be excused for cause, Your Honor.

MR. HALSTEAD: I don't think we're there on that.

THE COURT: I haven't heard it either.

MR. BLAIR: So you're the young woman whose mother works for the school district; is that right?

JUROR NO. 32: Mm-hmm.

MR. BLAIR: And are you basing your statement I couldn't be fair and impartial based on what you've read?

JUROR NO. 32: Yes.

MR. BLAIR: And we're talking about the local paper; is that right?

JUROR NO. 32: Yes.

MR. BLAIR: And it's based on what you've read in the local paper you've made a decision that you couldn't fair?

Thank you very much for your attention.

THE COURT: Thank you. Could I see counsel at the bench, please.

(DISCUSSION HELD OFF RECORD.)

THE COURT: All right. Ladies and gentlemen, we have finished our jury selection process. We've selected two alternates. I'd like to have them seated first. First juror number 37 in the front row farthest from me and 39 in the back row farthest from me. All right. Then next to juror number 39 will go juror number 4, number 5, number 9, number 14, number 19, and number 21. And in the front row next to juror number 37, number 22, number 23, number 24, number 29, number 30, and number 33.

All right. Will all the jurors in the box please rise and raise your right hand for administration of the juror oath.

(WHEREUPON THE JURORS WERE DULY SWORN BY THE CLERK OF THE COURT.)

THE COURT: Please be seated.

All right. For the rest of you, thank you very much for your participation throughout this process. We can't do this case without you, and I appreciate your patience. It's a little longer than we normally take. You're excused for today. Please give your badge number to the bailiff on the way out and please remember to use the answering

machine to find out when you will next be needed.

You are also welcome to stay and watch this case if you wish to, but if you take me up on that offer you will be the first ones to ever do that. So you are free to go.

(JURY PANEL EXITS THE COURTROOM.)

APPENDIX D

RESPONDENT'S BRIEF PAGES 1 THROUGH 50

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RESPONDENT'S BRIEF PAGES 1 THROUGH 50

No. 43557-8-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TODD DALE PHELPS,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

---

Respondent's Brief

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II. STATEMENT OF THE CASE

AA[1] was born on August 1, 1994 and has lived in the small town of Pe Ell,[2] Washington, since she was born. RP 431-32.[3] AA is the daughter of Donna and Matthew and has two sisters, Ashley and Andrea. RP 36, 140. AA was a fun-loving child with a good sense of humor and was always on the honor roll. RP 37. AA has never been married. RP 433.

[1] The victim, AA will be referred to by her initials. Everyone in AA's family will be referred to by their first name in order to protect AA's identity and avoid confusion, no disrespect intended.

[2] Pe Ell has approximately 670 residents. RP 1161

[3] There are nine continuously numbered volumes for the jury trial, which will be referred to as RP. Other hearings will have the date in the citation.

In the summer of 2010 AA played fastpitch on a select team as a pickup player. RP 37-38. The Appellant, Todd Phelps,[4] was one of AA's fastpitch coaches. RP 433. Phelps' daughter, Angelina, is three years older than AA and also a fastpitch player. RP 1178-81. Angelina and AA became good friends. RP 1181. The select fastpitch team traveled extensively, going to tournaments throughout Washington, Oregon, and had one tournament in California. RP 444. AA's parents could not travel with AA to the tournaments so AA went with the Phelps family. RP 444.

AA was having some personal issues over the summer of 2010, such as depression, cutting herself and she had tried marijuana and cocaine. RP 446. AA's relationship with her family was okay, though rocky at times. RP 444-46. AA liked spending time with the Phelps family and they became like a second family to AA. RP 444-46. AA looked up to Phelps as a father figure and a coach. RP 444-45.

In the fall of 2010 AA's mother discovered she was cutting herself and took AA to the doctor, who put AA on antidepressants and recommended AA see a counselor. RP 39-40, 447. Matthew

[4] Todd Phelps will hereafter be referred to as Phelps and members of his family will be referred to by their first names to avoid confusion, no disrespect intended.

reacted poorly when he found out AA was cutting. RP 142. AA distanced herself from Matthew. RP 142.

AA attended Pe Ell High School beginning fall 2010. RP 432, 439-40. AA did not have contact with the Phelpses during the fall. RP 41, 448. Fastpitch season began at the end of February or beginning of March 2011. RP 41, 449. Phelps was a paid employee of the Pe Ell school district as an assistant fastpitch coach until April 26, 2011. RP 300. At the start of fastpitch season AA's relationship with Phelps was a coach/player relationship. RP 449. AA began to confide in Phelps about some of her problems. RP 449-50.

Towards the end of March 2011, after attending a Toutle Lake versus Adna fastpitch game, AA and Phelps had a long conversation in the church parking lot in Pe Ell. RP 454. During this conversation Phelps told AA a number of dirty stories regarding Phelps' past sexual relationships with different woman. RP 457. Phelps told AA he was telling her this information because he had dirt on her and now she had dirt on him, that way AA could trust Phelps. RP 457. When Phelps dropped AA off at her house he told her to tell Donna that they had stopped to eat and that is why it took so long to get home. RP 468.

Phelps began texting with AA under the pretext that he wanted to make sure she was not cutting herself. RP 469. While over at Phelps' house, a few days after the conversation in the church parking lot, Phelps asked to see the cuts on AA's legs. RP 470. To show Phelps the cuts AA had to pull her pants down. RP 472. When AA began to cry Phelps hugged her. RP 472. AA believed that Phelps was trying to help her and she tried to do what he told her to do, including breaking up with her boyfriend. RP 475.

AA went over to the Phelps' house on April 2, 2011. RP 482. Phelps told AA that he was going to need to see the new cuts she had inflicted on herself. RP 481. Phelps took AA's shoes into his bedroom, AA eventually followed him, and showed Phelps the cuts on her thighs. RP 483-84. Phelps hugged AA pulling her on top of him. RP 483-84. Phelps pushed AA off and made a comment that he got sexually excited by her being on top of him. RP 486. Phelps then crawled on top of AA and began kissing her, starting out with a peck on the lips, then escalating to putting his tongue in her mouth. RP 487-88. AA was scared but did not take off because Phelps was an important part of her life and she did not want to upset him or have him think less of her. RP 489. Phelps continued to kiss AA

and then started grinding on her. RP 489-90. While clothed, Phelps rubbed his erect penis on AA's vagina. RP 490.

AA was not being truthful with her parents about her relationship and her contact with Phelps. RP 144-45, 472, 489. Yvonne Keller, an assistant softball coach and school employee, contacted Donna in March 2011 and told Donna she was concerned about the relationship she saw developing between Phelps and AA. RP 42-43, 185-86. On April 3, 2011 AA disclosed to Melody Porter[5], the wife of the youth pastor, about the April 2nd kiss between AA and Phelps. RP 218, 499. Melody told AA that the kiss was reportable and that she would report the kiss. RP 218. Phelps and AA continued to text. RP 507.

On April 6, 2011 AA spent the night at the Phelpses' house, sleeping on the couch with Angelina.[6] RP 509-12. The morning of the seventh Angelina caught Phelps kissing AA. RP 514-15. Angelina told her friend, Haley Pace and Haley's mother, Kristin, about the kiss. RP 1457-58, 1464.

On April 13, 2011 the secret of the April 2nd kiss was revealed when Melody forced the issue on April 13, 2011. RP 47-

[5] Melody and Ben Porter are both discussed in the transcript therefore the State will refer to each one by their first name to avoid confusion, no disrespect intended.
[6] There is conflicting testimony whether AA spent a second night at the Phelps house that same week. RP 509-10, 1195.

49, 219-20, 532-34. Melody told Kyle MacDonald, the superintendent of Pe Ell School District, that AA had "shared with me that Todd Phelps had kissed her on the cheek and it went to the lips and she was ashamed and felt uncomfortable because it didn't stop." RP 220. AA was upset Melody reported the kiss. RP 48-49. AA knew Phelps would be texting her so she took off to the bathroom with her iPod and deleted the texts off of it. RP 49-50, 535-36.

Phelps was called into Mr. MacDonald's office on April 14, 2011. RP 304. Phelps admitted to being alone with AA and to texting AA. RP 305-07. Phelps was placed on administrative leave while an investigation was conducted. RP 302. Phelps and his wife, Annette, had a meeting with Donna and Matthew regarding AA on April 18, 2011. RP 50. At the meeting Phelps read from a piece of paper and disclosed a number of AA's secrets to her parents. RP 51, 145-47. Matthew and Donna made it clear that the only relationship they wanted Phelps to have with AA was as her coach and he was not permitted to text with her anymore. RP 52, 147. Phelps and Matthew went to Mr. MacDonald and Matthew explained how he did not believe Phelps should be fired and Phelps agreed not to text AA anymore. RP 147.

Phelps and AA continued to text daily. RP 549. On April 21, 2011 Phelps grabbed AA in the crotch/butt area while on the fastpitch bus. RP 563-66. On April 26, 2011, AA was caught by one of her teachers texting with Phelps. RP 260-61, 569. AA was called into the office and asked if she was still texting with Phelps and AA lied and denied it. RP 570. AA later admitted to Matthew that she had been texting with Phelps. RP 148. Mr. MacDonald gave Phelps the option to resign or be terminated. RP 23. Phelps chose to resign. RP 323.

Matthew contacted Phelps and told Phelps, "he was to have absolutely no more contact with my daughter whatsoever." RP 149. Phelps told Matthew that he respected Matthew's family and would abide by his wishes. RP 149. Phelps did not abide by those wishes. RP 149.

After AA's parents took away her iPod and cellphone she and Phelps remained in contact using AA's friends' phones. RP 581. AA also gave Phelps her email password, which allowed Phelps to send AA emails from her own account. RP 585. AA set up a folder, called "For You Little Star", in her email account for Phelps to put the messages in. RP 587. Between May and July 14, 2011 AA had face-to-face contact with Phelps one time. RP 593.

AA had contact with Phelps on July 14, 2011 while Mattie Miller was with her. RP 347-49, 596. The next contact AA had with Phelps, AA was with Kelsey Castro. RP 597.

On July 27, 2011 AA agreed to meet Phelps at Phelps' brother, Dennis', house. RP 629. AA lied to her dad and told him she was going for a walk and taking her book with her to read. RP 630. When AA arrived at Dennis' house she saw Phelps' four-wheeler in the carport. RP 634-35. Phelps let her in the house. RP 634. Phelps forced AA to show him her cuts on her legs. RP 655. Phelps took off AA's pants, began kissing her, and put his hands down the front of AA's panties. RP 655-59. Phelps eventually removes AA's panties and she covers herself up with her hands. RP 662. Phelps tells AA she can trust him and slides his hand up in between her legs and inserts a finger into her vagina. RP 662-63. Phelps gets up, picks ups AA's pants, grabs a towel, and calls her into the bedroom. RP 666-69. AA wanted to leave but Phelps had her pants. RP 669. Phelps attempted to force AA to perform oral sex on him and when she refused he forcefully performed oral sex on her. RP 672-75. AA told Phelps, "No, please don't do this...I don't want to do this. This is really gross. " RP 674-75. Phelps next pushed his penis inside AA's vagina as she was telling him, "No.

But Wait. I don't want to do this." RP 678. Once the rape was over, AA collected her panties and pants and left. RP 680-86.

AA did not disclose the rape to her parents until September 24, 2011. RP 700. AA had been living with her aunt in Auburn and told her aunt about the rape. RP 699. AA's aunt drove her down to Pe Ell so AA could tell her parents. RP 285-86. Matthew called the Sheriff's Office on September 24, 2011 to report the rape. RP 158.

On November 10, 2011 the State charged Phelps by information with Count I, Rape in the Third Degree, and Count II, Sexual Misconduct with a Minor in the Second Degree. 1-3. The State filed a notice of intent to seek an exceptional sentence. CP 5. The State filed a third amended information which included a special allegation for Count I, alleging Phelps used his position of trust to facilitate the offense and that AA was a particularly vulnerable victim. CP 42-45. Phelps elected to have his case tried in front of a jury of his peers. *See* RP.

The State called Deputy Matt Schlect, Donna, Matthew, Ms. Keller, Melody, Deputy Gabe Frase, Benjamin Porter, Tory Duncan, Kelsey Castro, AA, Mattie Miller, Mark Miller, Kelsey Castro, Lisa Parente, Gary Malmberg, Detective Bruce Kimsey, and Brad Althauser to testify on behalf of the State. RP 13, 36, 140, 185, 215,

237, 244, 258, 266, 276, 343, 384, 411, 431, 912, 1042. During cross-examination of AA, Phelps' trial attorney presented her with a document that claimed she said the sexual intercourse with Phelps was consensual. RP 877. This allegation was based upon some handwritten note, possibly written by a deputy prosecutor, on a piece of discovery that was provided to Phelps' trial counsel from the prosecutor's office. RP 879-80. AA denied telling the deputy prosecutor the sex was consensual. RP 879-81.

Phelps had four witnesses testify on his behalf, his mother, Jean Schmitt, Annette, Angelina, and his sister-in-law, Lisa. RP 1161, 1176, 1256, 1286. Ms. Schmitt testified as an alibi witness for the April 2, 2011 incident. RP 1164-69. Ms. Schmitt testified that Phelps was with her all afternoon and evening and he was not on his phone because he was leaving it open so Annette could call him. RP 164-69. According to Ms. Schmitt the only time Phelps left her home to pick up Angelina and then returned to Ms. Schmitt's house. RP 1164-65. Ms. Schmitt also testified that Phelps resigned from his fastpitch coaching position so he could save AA's life. RP 1175.

Angelina testified that she and AA had been good friends but AA's constant need for attention wears you out and their

relationship began to dissolve in April 2011. RP 1181. Angelina denied seeing her dad kiss AA on April 7, 2011. RP 1234. Angelina also testified that on July 27, 2011 Phelps got home from work around 3:30 p.m., left, and was back home by 5:15 p.m. RP 1216. Angelina explained Phelps was home prior to Angelina and Annette leaving for Chehalis at 5:15 p.m. RP 1216-17. Angelina testified that when she returned about an hour later Phelps was mowing the lawn. RP 1217. Angelina said Phelps' four-wheeler had not been running since before fastpitch season 2011. RP 1254

Lisa Phelps, who is married to Dennis, testified that she met Annette at the Starbucks in Chehalis on July 27, 2011 to go grocery shopping in Olympia. RP 1257, 1271. When Lisa arrived back home nothing appeared out of place. RP 1273-74.

Annette testified that she did not believe the texting between Phelps and AA started prior to March 25, 2011. RP 1299. Annette also did not believe AA and Phelps texted after his resignation on April 26, 2011. RP 1216. Annette told the deputy prosecutor that she did not believe that Mattie Miller and AA met Phelps on July, 14, 2011. RP 1406. Annette said Phelps told her he resigned as coach because he did not want AA's problems publically aired. RP 1391.

Both Annette and Angelina admitted that they spoke to each other and Phelps while using receipts and a calendar to create a timeline of events in preparation for trial. RP 1220-21, 1330-34.

The State introduced a number of phone records to corroborate the dates and times AA stated she or others contacted Phelps and when AA's parents called her. RP 970-1026. The records show thousands of texts between Phelps and AA. RP 989-991. The State called Angelina's friend Haley Pace to rebut Angelina's statement that Angelina did not see her father kiss AA. RP 1458. The State also recalled Ms. Keller. RP 1438. Ms. Keller explained that Phelps' four-wheeler was used to drag the field up until the time he resigned and even produced a picture of the four-wheeler being used on March 31, 2011. RP 1438-42

Phelps was convicted on both counts and answered yes to both special verdicts. RP 1600; CP 165-67. Phelps was sentenced to five years and 363 days in prison. CP 220-235. Phelps timely appeals his conviction. CP 237-253.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE TRIAL COURT DID NOT VIOLATE PHELPS' PUBLIC TRIAL RIGHT.

Phelps alleges the public trial right was violated on numerous occasions throughout Phelps' trial. Brief of Appellant 16-17. The only violations of open court proceedings Phelps describes or argues in any detail are the ones relating to voir dire. Brief of Appellant 12-17.[7]

The trial court did not violate Phelps' right to a public trial. The matters regarding voir dire were done in open court. RP (4/17/12 voir dire) 1-129. The other in chambers conferences did not violate Phelps' public trial right and this Court should affirm the convictions.

1. Standard Of Review.

Whether a trial court has violated the public trial right is a question of law and reviewed de novo. *State v. Momah,* 167 Wn.2d 140, 147, 217 P.3d 321 (2009).

2. The Public Trial Right Is Not Implicated By Every Matter Or Discussion Taken Up Between The Trial Court and The Parties.

The United States Constitution and the Washington State Constitution guarantees that a criminal defendant has the right to a

[7] The State will also address the four hearings Phelps alleged violate the open courts doctrine listed on page 16 of his brief. There is no argument or analysis in regards to each alleged *in camera* violation beyond the broad statement that these four hearings were *in camera* and therefore violate the open courts doctrine. Brief of Appellant 16.

public trial. U.S. Const. amend. IV; Const. art. I, § 22. The Washington State Constitution also requires that "[j]ustice in all cases shall be administered openly and without undue delay." Const. art. I, § 10. A court must weigh the five *Bone-Club* factors prior to closing a courtroom in a criminal hearing or trial. *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). The five *Bone-Club* factors are:

> 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 the accused's right to a fair trial, the proponent must show a "serious 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 at 258-59. A criminal defendant's public trial rights are violated if there is a closed proceeding that is subject to the public trial right and the trial court fails to conduct the *Bone-Club* inquiry. *State v. Brightman*, 155 Wn.2d 506, 515-16, 122 P.2d 150 (2005).

The public trial requirement is primarily for the benefit of the accused. *Momah*, 167 Wn.2d at 148. "[T]he right to a public trial serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." *State v. Sublett,* 176 Wn.2d 58, 72, 292 P.3d 715 (2012) (citations omitted). The right to a public trial is closely linked to the defendant's right to be present during critical phases of the trial. *State v. Sadler,* 147 Wn. App. 97, 114, 193 P.3d 1108 (2008) (citations omitted).

The Supreme Court recently adopted the use of the experience and logic test to determine if a public trial right violation occurred. *Sublett,* 176 Wn.2d at 72-78. The Supreme Court adopted this rule, formulated by the United States Supreme Court, "to determine whether the core values of the public trial rights are implicated." *Id.* at 73.

> The first part of the test, 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 role in the functioning of the particular process in question. If the answer to both is yes, the public trial attaches and the *Waller*[8] or *Bone-Club* factors must be considered before the proceeding may be closed to the public.

[8] *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

Id. at 73 (internal quotations omitted), *citing Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7-8, 106 S. Ct. 2735, 92 L. Ed.2d 1 (1986). The reviewing court is also required to "consider whether openness will enhance both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Id.* at 75 (citations and internal quotations omitted). The appellant bears the burden of establishing a violation under this test. *In re Yates*, 177 Wn.2d 1, 29, 296 P.3d 872 (2013).

In *Sublett*, the Supreme Court considered whether the right to a public trial was violated when the trial court answered a jury question in chambers with only the judge, deputy prosecutor and defense counsel present. *Id.* at 70, 75-78. Employing the experience and logic test to determine, the Court asked if jury questions regarding jury instructions had historically been open to the general public. *Id.* at 75. The Court analyzed this question by looking at proceedings for jury instructions in general, finding that jury instruction proceedings have not historically been required to be conducted in an open courtroom and therefore the public trial right was not implicated by the answering of the jury question in chambers. *Id.* at 75-78. The Court further explained:

> None of the values served by public trial right is violated under the facts of this case. No witnesses are involved at this stage, no testimony is involved, and no risk of perjury exists. The appearance of fairness is satisfied by having the questions, answer, and any objections placed on the record pursuant to CrR 6.15... This is not a proceeding so similar to the trial itself that the same rights attach, such as the right to appear, to cross-examine witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence.

Id. at 77.

3. Substantive Voir Dire Occurred In Open Court.

The public trial right extends to jury selection. *State v. Wise*, 176 Wn.2d 1, 11, 288 P.3d 1113 (2012), *citing Presley v. Georgia*, 558 U.S. 209, 130 S. Ct. 721, 724, 175 L.Ed.2d 675 (2010). Jury selection is important to the criminal justice system, not simply the adversaries in a particular matter. *Wise*, 176 Wn.2d at 11 (citations and internal quotations omitted). The public trial right more specifically attaches to voir dire, the actual questioning of individual prospective jurors. *Id.*

Phelps argues that the trial court violated the public trial right by excusing three jurors for case-related reasons outside of open court.[9] Brief of Appellant 13-14. Phelps' argument mischaracterizes

[9] Phelps does not make this argument about Juror 40 even though the circumstances surrounding Juror 40's excusal from the jury are similar to 28 and 48.

the record. Voir dire was conducted in open court of all of the prospective jurors and jurors 28, 48, and 62 were dismissed inside the courtroom. *See* RP (4/17/12) 2-107.

Jurors 28 and 48 indicated they could not serve due to hardship, along with jurors 12, 18, 40 and 47. RP (4/17/12) 5. During the initial discussion with the trial judge regarding the nature of the hardship, jurors 12, 18 and 47 were immediately excused. RP (4/17/12) 5-8. Juror 28 explained, "I committed myself to be a chaperone for an orchestra trip to Central Washington University on Friday." RP (4/17/12) 6. Juror 48 informed the trial court, "I'm the only one in my household that has an income and my employer does not pay for jury duty." RP (4/17/12) 8. The trial court told jurors 28, 40 and 47 that they would revisit the issue of possible excusal. RP (4/17/12) 7-8. Voir dire continued with both parties eliciting responses from the venire. RP (4/17/12) 11-127. Juror 48 was mentioned towards the end of voir dire when Phelps' trial counsel attempted to ascertain who was answering a question. RP (4/17/12) 93. Juror 28 was actively part of voir dire during numerous exchanges on the record, the last occurring just before the parties selected the jury. RP (4/17/12) 25, 80, 83, 107, 117.

After the interactive portion of voir dire, the parties had a sidebar discussion to pick the jury.[10] RP 126-27. Once the sidebar was finished, the trial court announced the numbers of the jurors who were selected for the jury. RP 127. While there was no statement by the trial court judge that he was excusing 28 and 48 for cause, and the Clerk's minutes do not reflect the excusal, both jurors had a notation next to their name on the struck juror list that said, "EXC." RP (4/17/12) 8-127; CP 256-57, 278-79. This clearly happened during the sidebar the parties engaged in at the end of voir dire. RP (4/17/12) 127. While it would have been beneficial for the trial court to acknowledge on the record that Jurors 28 and 48 were now being excused for cause, there was no violation of the right to a public trial because the sidebar occurred in open court. *Id.*

Phelps also takes issue with the excusal of Juror 62. Brief of Appellant 13. Phelps' allegation that jurors were questioned and excused behind closed doors is a complete mischaracterization of the record. Brief of Appellant 13. Phelps further states that Juror 62 had already been questioned by the trial judge outside the courtroom. Brief of Appellant 13. The record does not suggest there was questioning of Juror 62 outside of the courtroom. RP (4/17/12)

[10] Phelps does not argue to this Court that the sidebar violated the right to a public trial.

21-22. The record states that Juror 62, at some unknown time prior to trial, informed the trial judge of a number of facts, specific to this case, which would make Juror 62 not a candidate for the jury. RP (4/17/12) 20-22.[11] Juror 62 was being asked questions by the deputy prosecutor when he revealed he lived in Pe Ell for most of his life and knew almost everyone on the witness list. RP (4/17/12) 20. The trial judge interrupted the process, told Juror 62 that he had previously been excused due to this information, and acknowledged there was a miscommunication. RP (4/17/12) 21-22. Phelps and his trial counsel were present and neither objected when the trial judge informed 62 he was excused and could leave. RP (4/17/12) 22. A trial judge has duty to excuse any juror if the grounds for challenge are present. RCW 4.44.150; RCW 4.44.190; CrR 6.4(c). There was also a brief sidebar discussion immediately following Juror 62's excusal at which the judge presumably informed counsel of the reason for it. RP (4/17/12) 22. This entire exchange occurred in open court. *Id.*

Voir dire occurred in open court. The jurors were questioned and excused in open court. The fact that excusals occurred during

[11] The record does not make clear when Juror 62 spoke to the judge. For all that we know, the exchange occurred two weeks prior at a coffee shop.

a sidebar does not mean that the trial court violated the public trial right. This Court should affirm Phelps' convictions.

4. The Four Other Alleged In Chambers Conferences Did Not Violate Phelps' Public Trial Right.

Phelps cites to four other in chambers conferences he claims violated the public trial right. Brief of Appellant. But, Phelps does not articulate an argument as to why each of these in chamber conferences violates the public trial right. *See* Brief of Appellant 16. His cursory argument that any exclusion of the public from any conference violates the public trial right does not meet his burden under the experience and logic test. This cursory analysis, without applying it to the actual facts of each conference, should not be sufficient for this Court to find a violation.

On the merits, none of the in chambers discussions cited by Phelps offend the requirement of open courts. Phelps first cites to the deputy prosecutor's explanation of why a 404(b) hearing is not warranted. RP (4/13/3). The deputy prosecutor explains to the judge that the State, as discussed in chambers previously, would not pursue any 404(b) evidence regarding other victims. RP (4/13/12) 3-4.

Next, Phelps cites to the trial court's statements the first day of trial, summarizing an in chambers conference that the trial court

called a "jury conference." RP 3. The trial court, in open court, explained the procedure that would be followed for voir dire. RP 3. It is clear from the record the discussion in chambers was in regards to the procedures for the voir dire process. RP 3.

Third, Phelps cites to a discussion in open court regarding Phelps' trial attorney's review of a notebook belonging to AA. RP 626-27. The State provided Phelps' trial counsel an opportunity to view this notebook even though the State was not seeking to admit it and the notebook had no evidentiary value. RP 620-27. The trial court stated on the record that the parties discussed the matter in chambers and Phelps' trial counsel acknowledged that he did not see any use for the notebook. RP 627.

Finally, Phelps cites to a comment by the trial court that Phelps' trial counsel informed the trial court and the State in chambers that Phelps was not going to testify. RP 1427. It would also appear from the record that the State informed the trial court and Phelps' trial counsel of its rebuttal witnesses in chambers. RP 1427.

When evaluating whether the in chambers conferences violated the public trial right, the first determination is whether historically the process had been open to the public. *Sublett*, 176

Wn.2d at 73. Washington law has long recognized that certain legal discussions can occur in chambers without offending the requirement of open courts. For example, answering a jury question during the trial may sometimes be done in chambers. *See* CrR 6.15; *Sublett*, 176 Wn.2d at 75-77 (opinion of C. Johnson, J.). The thoughtful opinion in *In Det. of Ticeson*, 159 Wn. App. 374, 384-87, 246 P.3d 550 (2011), *overruled by Sublett*, 176 Wn.2d at 72, describes how judges have long had powers to be informed of legal issues in chambers. *See also State v. Irby*, 170 Wn.2d 874, 881-82, 246 P.3d 796 (2011) (recognizing several types of sidebar or in-chambers conferences); *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 306-07, 868 P.2d 835 (1994) (same). It would be a fundamentally new proposition that the parties are not permitted to inform the judge, in chambers, that they agree on certain matters to be addressed when the court session begins.

The ministerial matters of informing the adverse party and the court regarding what witnesses may testify and the trial court informing the parties of the procedure for voir dire are not matters that have historically not been dealt with in open court. Further, the legal discussion regarding the State's decision not to attempt to elicit 404(b) evidence also does not fall within the category of

proceedings that are normally conducted in open court. Lastly, trial counsel's review of inadmissible evidence and informing the trial court that he sees no use for the item does not fall within the category of proceedings that occur in open court.

Next, this Court considers the logic portion of the test to determine whether public access "plays a significant positive role in the functioning of the particular process." *In re Yates*, 177 Wn.2d at 29. The public does not play a significant positive role in the function of any of the proceedings/conferences cited by Phelps. None of these conferences violate the core values served by the public trial right. *Sublett*, 176 Wn.2d at 74. There are no witnesses to be called to testify, no testimony given and therefore no possible perjury. *Id.* Further, these are not "proceeding[s] so similar to the trial itself that the same rights attach, such as the right to appear, to cross-examine witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence." *Id.* The in-chambers conferences in this case did not violate Phelps' public trial right and his convictions should be affirmed.[12]

[12] None of the challenges to the right to a public trial were raised in the trial court below. Phelps has not met his burden required in RAP 2.5(a) to raise this issue for the first time on appeal because the alleged error is not manifest, as argued above.

B. THE TRIAL COURT DID NOT VIIOLATE PHELPS' RIGHT TO BE PRESENT FOR ALL CRITICAL STAGES OF THE PROCEEDINGS.

Phelps is claiming his right to be present during a critical stage of the proceedings was violated when the trial court questioned and excused jurors outside of the courtroom. Brief of Appellant 18-19. None of the jurors were excused outside of Phelps' presence. There was no violation of Phelps' right to be present during all critical stages of the proceedings.

1. Standard Of Review

A claim of a violation of the right to be present during all critical stages of the proceedings is reviewed de novo. *Irby*, 170 Wn.2d at 880.

2. Phelps Was Present When The Jurors Were Excused.

"A defendant has a due process right to be present at a proceeding whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge....The presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985) (citations and internal quotations omitted). This fundamental right to be

present extends to voir dire and the empanelling of the jury. *Irby*, 170 Wn.2d at 880.

Phelps argues that "[a]t some point, the trial court questioned and excused jurors outside the courtroom." Brief of Appellant 18. This is not an accurate statement. As argued above, the trial court learned some information about one potential juror, Juror 62, outside of the courtroom, but that juror was questioned in open court and excused in open court while Phelps was in attendance. RP (4/17/12) 2, 20-22. Jurors 28, 40 and 48 were questioned in Phelps' presence in open court. RP (4/17/12) 5-9, 11, 25, 29-30, 80, 83, 93, 107, 111. At the conclusion of the interactive portion of voir dire there was a sidebar where the parties exercised their preemptory challenges and the jury was chosen. RP 127. After that sidebar the jurors who were chosen to be part of the jury were informed in open court and the remainder of the prospective jurors were released. RP 127-28. Jurors 28, 40 and 48 were present throughout voir dire as evidenced by their numbers being addressed during voir dire. It is obvious that at the conclusion of the interactive portion of voir dire, during the sidebar which occurred in open court and while Phelps was present, that Jurors 28, 40, and 48 were excused. RP 127-28; CP 255-57, 277-80.

Voir dire occurred while Phelps was present. None of the jurors were questioned by the trial court or dismissed while Phelps was absent. Therefore, Phelps right to be present for all critical phases of the trial was not violated and this Court should affirm his convictions.

C. THE THIRD AMENDED INFORMATION CONTAINS ALL ESSENTIAL ELEMENTS OF THE CRIME SEXUAL MISCONDUCT WITH A MINOR IN THE SECOND DEGREE.

Phelps argues that the third amended information was deficient because it failed to allege an essential element of the crime, that the victim was not more than 21 years old at the time of the offense. Brief of Appellant 20-21. Under the liberal construction rule the charging document is sufficient because it contains all the essential elements of the crime of Sexual Misconduct With A Minor In The Second Degree.

1. Standard Of Review.

This court reviews challenges regarding the sufficiency of a charging documents de novo. *State v. Williams*, 162 Wn.2d 177, 182, 170 P.3d 30 (2007). The correct standard of review is determined by when the sufficiency challenge is made. *City of Bothell v. Kaiser*, 152 Wn. App. 466, 471, 217 P.3d 339 (2009). A charging document challenged for the first time on appeal is

"liberally construed in favor of validity." *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991).

2. Liberally Construed, The Third Amended Information Contained All The Essential Elements Of Sexual Misconduct With A Minor In The Second Degree.

The State is required by the Sixth Amendment of the United States Constitution and Article I, section 22 of the Washington State Constitution to include all essential elements of the crime in its charging document. The court first looks "to the statute because the legislature defines elements of crimes..." *State v. Williams*, 162 Wn.2d at 182. The statutory language contains the elements the prosecution is required to prove to sustain a conviction. *Id.* The essential elements include statutory and nonstatutory elements to inform the defendant of the charge against him or her and to allow the defendant to prepare his or her defense. *State v.* Hopper, 118 Wn.2d 151, 155, 822 P.2d 775 (1992), *citing State v. Kjorsvik*, 117 Wn.2d at 102.

The liberal construction applies a two part test. *Kjorsvik*, 117 Wn.2d at 105-06. There must be, "at least some language in the information giving notice of the allegedly missing element(s). *Id* at 106. "[A]nd, if the language is vague, an inquiry may be required into whether there was actual prejudice to the defendant." *Id.* The

reviewing court therefore looks to see if within the charging document the necessary facts appear in any form, or if by fair construction those facts can be found. *Id.* at 105. If the necessary facts are within the information the defendant is still able to prevail if he or she can show the inartful language caused a lack of notice and thereby prejudiced the defendant. *Id.* at 106.

The State charged Phelps in Count II of the third amended information with Sexual Misconduct with a Minor in the Second Degree. RCW 9A.44.096(2); CP 42-45. The statutory elements of Sexual Misconduct with a Minor in the Second Degree require the State to prove that the accused is, a "school employee who has, or knowingly causes another person under the age of eighteen to have, sexual contact with an enrolled student of the school who is at least sixteen years old and not more than twenty-one years old and not married to the employee, if the employee is at least sixty months older than the student." RCW 9A.44.096(1)(b). The charging document in this case states,

> On or about and between March 25, 2011 through April 3, 2011, in the County of Lewis, State of Washington, the above-named defendant, (b) being at least sixty (60) months older than the student and being a school employee and not being married to the student and not being in a state registered domestic partnership with the student, did have, or knowingly cause another person under the age of eighteen (18)

> to have, sexual contact with a registered student of the school who is at least sixteen (16) years old to-wit: A.K.A. (DOB: 08/01/1994); contrary to the Revised Code of Washington 9A.44.096.

CP 43.

Phelps argues that the essential element of, "not more than twenty-one years old" is missing from the charging document, and therefore the charging document is deficient and the conviction should be reversed and dismissed without prejudice. Brief of Appellant 21. What Phelps overlooks is that this is a post-conviction challenge to the charging document. Phelps did not make this argument in the trial court. *See* RP. The charging document must be liberally construed in favor of validity. *Kjorsvik*, 117 Wn,2d at 102-06. The necessary facts appear, or by fair construction can be found, in the third amended information. *Id.* at 105; CP 43. The State concedes that the phrase "not more than twenty-one years old" is missing from Count II. But, AA's actual date of birth, 08/01/1994, is contained within the charging document. CP 43.

From March 25, 2011 to April 3, 2011 AA was 16 years old. CP 43. This information is sufficient to satisfy the requirement that Phelps be on notice that AA could not be more than 21 years old for him to commit the crime of Sexual Misconduct of a Minor in the Second Degree. Further, Phelps was not prejudiced by the State's

inartful wording of the information because AA was not more than 21 years old. The State respectfully requests this Court to affirm the conviction.

D. PHELPS CANNOT RAISE THE ISSUE OF THE ALLEGED VIOLATION OF HIS RIGHT TO A UNANIMOUS JURY VERDICT BECAUSE THE ERROR IS NOT MANIFEST.

For the first time on appeal, Phelps argues that the trial court violated his right to a unanimous jury verdict by failing to give the unanimity instruction for Count II, Sexual Misconduct with a Minor in the Second Degree. Brief of Appellant 23-24. This alleged error presumes that the State did not elect a single action, making the instruction necessary. The alleged error, while constitutional in magnitude, was not manifest and therefore Phelps may not raise it for the first time on appeal.

1. Standard Of Review.

A claim of a manifest constitutional error is reviewed de novo. *State v. Edwards*, 169 Wn. App. 561, 566, 280 P.3d 1152 (2012).

2. Phelps Did Not Request A Unanimity Instruction, Or Raise The Issue Regarding The State's Lack Of Election In The Trial Court, Therefore, Phelps Must Demonstrate That The Error Is A Manifest Constitutional Error.

Phelps did not raise the unanimity issue at trial. *See* RP. An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *O'Hara*, 167 Wn.2d at 98. The exception to this rule is "when the claimed error is a manifest error affecting a constitutional right." *Id., citing* RAP 2.5(a). There is a two part test in determining whether the assigned error may be raised for the first time on appeal, "an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension." *Id. (citations omitted)*.

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must be assessed to make a determination of whether a constitutional interest is implicated. *Id.* If an alleged error is found to be of constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *McFarland*, 127 Wn.2d at 333. An error is manifest if the appellant can show actual prejudice. *O'Hara* 167 Wn.2d at 99. The appellant must show that

the alleged error had an identifiable and practical consequence in the trial. *Id.* There must be a sufficient record for the reviewing court to determine the merits of the alleged error. *Id. (citations omitted).* No prejudice is shown if the necessary facts to adjudicate the alleged error are not part of the record on appeal. *McFarland*, 127 Wn.2d at 333. Without prejudice the error is not manifest. *Id.*

Phelps did not raise any objections or exceptions to the jury instructions given by the trial court. RP 1466-67. Phelps' trial counsel apparently did not propose any jury instructions of his own. *See* RP 1466. Therefore, Phelps has the burden of proving the alleged error was of constitutional magnitude and manifest.

a. The alleged error is of constitutional magnitude.

A criminal defendant has the right to have a jury unanimously agree on a verdict finding him or her guilty. *State v. Smith*, 159 Wn.2d 778, 783, 154 P.3d 873 (2007) (citations omitted). This right is guaranteed by the Washington State Constitution. Const. art. I, § 21. If the State presents evidence of multiple distinct acts, any of which could form the basis for the charge, the State must elect which acts it is relying upon for the conviction or the trial court must give a unanimity instruction. *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). The

unanimity instruction ensures the jury is unanimous in the act it finds the State proved beyond a reasonable doubt to convict the defendant. *Coleman*, 159 Wn.2d at 511-12. Therefore, the alleged error, a non-unanimous verdict, is of constitutional magnitude. Phelps still must show that the error was manifest. *State v. Knutz*, 161 Wn. App. 395, 406-07, 253 P.3d 437.

b. The alleged error is not manifest because no error occurred and therefore, Phelps was not prejudiced.

Phelps cannot meet the necessary burden of showing his alleged error, a non-unanimous verdict, actually prejudiced him. An error is manifest if a defendant can show actual prejudice. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). Actual prejudice requires a defendant to make a "plausible showing... that the asserted error had practical and identifiable consequences in the trial of the case." *O'Hara*,167 Wn.2d at 99 (internal citations and quotations omitted).

Phelps argues to this Court that multiple acts of conduct could have been used by the jurors when they decided Phelps was guilty of Count II, Sexual Misconduct with a Minor in the Second Degree. Brief of Appellant 23-24. Phelps lists a number of actions that could have been considered sexual misconduct that happened

a number of different times and points out that the court did not give a unanimity instruction and argues that the State did not identify a particular act for the basis of Count II. Brief of Appellant 23-24. Phelps ignores the charging document and more specifically the jury instructions which give a small window of time that the Sexual Misconduct with a Minor offense occurred. It is clear the Sexual Misconduct of a Minor that was the basis for Count II occurred on approximately April 2, 2011. RP 481-88, 1492, 1501, 1590-91; CP 43, 152. There was no need for a unanimity instruction as the prosecutor clearly elected, and argued, that the Sexual Misconduct with a Minor occurred on April 2, 2011. RP 1492, 1501-02, 1590-91.

There was testimony of multiple acts which could have constituted sexual misconduct, the State does not deny that. The State charging language stated, on or about or between March 26, 2011 and April 2, 2011. CP 43. There was testimony from AA that the first time she showed Phelps her cuts, around March 26, 2011, he pulled her over on top of him and hugged her. RP 470-74. AA described the hug as a standing up together hug and nothing happened. RP 474-75. This interaction does not meet the definition of sexual contact, an essential element of Sexual Misconduct with a

Minor in the Second Degree. CP 152, 153. Sexual contact is defined as,

> [A]ny touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party. Contact is "intimate" if the conduct is of such a nature that a person of common intelligence could fairly be expected to know, that under the circumstances, the parts touched were intimate and the therefore the touching improper.

CP 153, *citing* WPIC 45.07; *Matter of Welfare of Adams*, 24 Wn. App. 517, 519-20, 601 P.2d 995 (1979).

In this case the act alleged to be sexual misconduct occurred on April 2, 2011. RP 481-88.

AA described, in vivid detail, the sexual contact that occurred between Phelps and AA on April 2, 2011. RP 481-490. The incident started with Phelps telling AA that he needed to see her cuts and taking her into his bedroom. RP 481-82. AA showed the cuts and Phelps hugged her, pulling AA on top of him. RP 483-84. Phelps kissed AA, starting with a peck on the lips and progressing to putting his tongue into her mouth. RP 487-88. The incident continued to escalate and Phelps, who was clothed, began rubbing his erect penis into AA's vagina and telling her sex was no big deal, it was like what they were doing, but without clothes and then he began thrusting. RP 489-90.

The State acknowledges there was testimony about later incidents, after April 2, 2011, that could be considered sexual misconduct, such as the kiss on the lips on April 7, 2011 or the incidents that occurred on the bus. RP 512, 525-30, 563-66. But these incidents are not the sexual misconduct the State charged in its information, including in the jury instructions, and argued during its closing. RP 1492, 1501-02, 1590-91; CP 43, 152.

The deputy prosecutor mentioned sexual misconduct five times during his closing argument. RP 1486, 1489, 1492, 1501, 1553. One time was in regards to the crime charged. RP 1486. The second time was in regards to the jury instruction listing the elements the State must prove to convict Phelps of sexual misconduct. RP 1489. The third time the deputy prosecutor was discussing that sexual contact applies to the sexual misconduct charge. RP 1492. The fourth time, the deputy prosecutor stated:

> April 2nd, sexual misconduct. [AA] goes to Todd's house because he wants, again, to see her cuts. No one else is home when [AA] gets there if you recall her testimony...And you heard her testimony that he had an erection, and he was poking her in her private spot. She could feel it. And of course, they are kissing.

RP 1501. Finally, the fifth time the deputy prosecutor used the words, "sexual misconduct" was when he asked the jury to convict

Phelps of Sexual Misconduct with a Minor in the Second Degree. RP 1553.

There was no error in this case. There was no need for a unanimity instruction. The State elected the sexual misconduct that occurred on April 2, 2011 as the conduct necessary to convict Phelps of Count II. Phelps has not shown the error was manifest and he, therefore, cannot raise the issue for the first time on appeal. This Court should decline to review this issue and affirm Phelps' conviction for Sexual Misconduct with a Minor.

c. If it was error to fail to give a unanimity instruction it was harmless beyond a reasonable doubt.

While not conceding any error occurred, arguendo, if it was error to not include a unanimity instruction, any error is harmless beyond a reasonable doubt. To be harmless beyond a reasonable doubt the State must show, "no rational juror could have a reasonable doubt as to any of the incidents alleged." *Coleman*, 159 Wn.2d at 512. The only other incident, other than the two described above that could even remotely be considered "On or about March 26, 2011 and April 2, 2011," was the kiss on the lips Phelps gave AA on April 7, 2011 when she spent the night at the Phelpses' house. RP 512-15. Angelina witnessed that kiss, even though she

denied it while testifying. RP 514, 1234. Angelina was so bothered by seeing her father kiss AA that she told her friend Haley Pace and Haley's mom, Kristin Pace, about the incident. RP 1458, 1464.

No rational juror would have had a reasonable doubt that Phelps had sexual contact with AA on those two occasions and therefore, committed the crime of Sexual Misconduct in the Second Degree. Any error is harmless beyond a reasonable doubt and this Court should affirm Count II.

E. THE DEPUTY PROSECUTOR DID NOT COMMIT MISCONDUCT DURING HIS CLOSING ARGUMENT.

Phelps argues the deputy prosecutor committed misconduct by vouching for evidence and giving his personal opinion of Phelps' guilt. Brief of Appellant 28. Phelps takes the arguments made in the deputy prosecutor's rebuttal closing out of context and does not even acknowledge that this is the deputy prosecutor's rebuttal to Phelps' trial counsel's closing argument.

The deputy prosecutor did not commit misconduct because his statements regarding the law in this case were correct. Further, if the deputy prosecutor's comments were improper Phelps has not sufficiently established that the remarks prejudiced his case.

1. Standard Of Review.

The standard for review of claims of prosecutorial misconduct is abuse of discretion. *State v.* Ish, 170 Wn.2d 189, 195, 241 P.3d 389 (2010).

2. The Deputy Prosecutor Did Not Give A Personal Opinion Of Phelps' Guilt Or Vouch For Evidence During His Rebuttal Closing Argument.

To prove prosecutorial misconduct, it is the defendant's burden to show that the deputy prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. *State v. Gregory*, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006), *citing State v. Kwan Fai Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986); *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). In regards to a prosecutor's conduct, full trial context includes, "the evidence presented, 'the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" *State v. Monday*, 171 Wn. 2d 667, 675, 257 P.3d 551 (2011), *citing State v. McKenzie,* 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (other internal citations omitted). A comment is prejudicial when "there is a substantial likelihood the misconduct affected the jury's verdict." *State v. Brown,* 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied,* 523 U.S. 1007(1998).

It is prosecutorial misconduct for a prosecutor to reference to evidence outside the record. *State v. Fisher*, 165 Wn. 2d 727, 747, 202 P.3d 937 (2009) (citation omitted). The reviewing court is not required to reverse for such misconduct when the defendant's trial counsel failed to request a curative instruction. *Id.* (citation omitted).

"[A] prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence." *State v. Lewis,* 156 Wn. App. 230, 240, 233 P.3d 891 (2010), *citing Gregory*, 158 Wn.2d at 860. That wide latitude is especially true when the prosecutor, in rebuttal, is addressing an issue raised by a defendant's attorney in closing argument. *Id.* (citation omitted).

Jurors are instructed that they must decide a case based upon the evidence that was presented at trial and accept the law as given in the jury instructions. WPIC 1.02. Jurors are also instructed that a lawyer's remarks, arguments or statements are not evidence, the law is contained in the instructions and the jury must disregard any statement, argument or remark by the lawyer that is not supported by the law in the instructions or the evidence. WPIC 1.02. A jury is presumed to follow the jury instructions. *State v.*

Yates, 161 Wn.2d 714, 163, 168 P.3d 359 (2007) (citations omitted).

Phelps argues that the deputy prosecutor improperly told the jury that he had just learned of Phelps' defense and that Phelps's trial counsel was not present for an interview with AA and therefore did not even know what the notes on the piece of paper were about. Brief of Appellant 28. Phelps states there is no evidence to support any of those statements by the deputy prosecutor. Brief of Appellant 28. Phelps also asserts that the deputy prosecutor improperly stated his personal opinion when he said defense counsel was "grasping at straws to get anything." Brief of Appellant 28. Phelps does not acknowledge his own trial counsels argument regarding the "consensual" note which the deputy prosecutor was responding to. *See* RP 1572. Phelps also presents snippets of the deputy prosecutor's statements and does not present the context surrounding those statements. The deputy prosecutor's comments were not misconduct.

The deputy prosecutor stated in the beginning of his rebuttal closing argument:

> I definitely need to address these points that Mr. Blair has raised because I got to be quite honest with you today, I didn't know the defense was one of consent. So I guess he was either there or he wasn't. If he was

> there, you are to believe that [AA] consented somehow.

RP 1580. This is in direct response to the following argument Phelps' trial counsel made, "[s]o let's move to July 27th. You can find Todd not guilty for the rape for two reasons. There was no rape and Todd wasn't there." RP 1571. Phelps's trial counsel then argues that Phelps was at his own house at the time of the alleged rape, or, in the alternative, AA consented to having sex with Phelps. RP 1571-73.

Up until Phelps' trial counsel's closing, the testimony Phelps presented, through his own witnesses, all appeared to be offered for the proposition that given the time Annette and Angelina left their house on July 27, 2011, Phelps could not have been at his brother's house raping AA. RP 1215-18, 1318-20. The deputy prosecutor even spoke about the timeline during his first closing argument, stating, "If she [Annette] left her house at 5:15, there's no way what happened on July 27th, based upon what the State's theory of the case is, could have happened because the defendant would have been home with her." RP 1544. The deputy prosecutor's comment during his rebuttal closing did not imply Phelps was forced to change theories based upon the evidence as Phelps claims on appeal. The deputy prosecutor's comments were

permissible as they related to how the case had been presented, by both the State and the defense, and now Phelps was arguing two opposing theories of his case.

Next, Phelps argues that the deputy prosecutor improperly stated the following:

> Now, the other thing that Mr. Blair tries to discredit [AA] with regard to consent is some notes that the Prosecutor's Office had. He asked her, well, didn't you have an interview with the Prosecutor's Office? Unfortunately, Mr. Blair wasn't there. He's grasping at straws to get anything. He doesn't know what the notes were about, but we're obligated to give them to him. Not dated.

RP 1582. Phelps states there is no evidence to support this statement. That is not the case.

First, the questioning Phelps' trial counsel conducted of AA regarding this "consensual" note would lead a reasonable person be believe that Phelps' counsel was not present for the whatever conversation AA had with one of the deputy prosecutors. RP 877-81. Second, this statement was in response to the following statement by Phelps' trial counsel, "And I guess during their conversations during their seemingly private conversations when she [AA] was talking with the prosecutor **and not with me**, she told them that it was consensual." RP 1572 (emphasis added).

Phelps' attorney is the one who injected the information that this note regarding consent came from a private meeting between AA and one of the deputy prosecutors. RP 1572. Therefore, the deputy prosecutor's response that Mr. Blair was not there and does not know the context of the note is a permissible argument and not misconduct. The flippant statement that Mr. Blair is grasping at straws is stated for the premise that Phelps' trial counsel is inserting his own spin and meaning into a note that he did not take and was not present for the statement that the note may or may not have been written about. Perhaps other wording would have been more appropriate, but the comment was not an improper statement of the deputy prosecutor's personal opinion. There was no misconduct and Phelps' convictions should be affirmed.

3. If This Court Were To Find That The Deputy Prosecutor Committed Misconduct, Phelps Was Not Prejudiced And The Misconduct Was Therefore Harmless Error.

The State does not concede that any of the statements the deputy prosecutor made were improper. Arguendo, if this court finds any or all of the statements improper and misconduct, any such misconduct was harmless error.

Because Phelps' trial counsel did not object to the statements of the deputy prosecutor he must also show that a

curative instruction would not be sufficient to eliminate the prejudice his client allegedly suffered due to the deputy prosecutor's improper statements. *State v. Belgrade,* 110 Wn.2d 504, 507, 755 P.2d 174 (1988). The question becomes, when evaluating the entire record, "is there a substantial likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial"? *State v. Davenport*, 100 Wn.2d 757, 762-63, 675 P.2d 1213 (1984). The context of the record includes the instructions that are given to the jury and evidence addressed in the argument. *Monday*, 171 Wn. 2d at 675.

Phelps argues that the deputy prosecutor's improper statements denied Phelps a fair trial. This is simply not the case. The jury was instructed:

> The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP 147; WPIC 1.02. A jury is presumed to follow the instructions given by the trial court. *State v. Foster*, 135 Wn. 2d 441, 472, 957 P.2d 712 (1998). The totality of the evidence in this case was so

overwhelming, the victim's and other witnesses' testimony, the voluminous phone records corroborating dates and times, and the rebuttal testimony calling into question Angelina and Annette's testimony, that there is not a substantial likelihood that the deputy prosecutor's misconduct affected the outcome of the jury verdict. This court should affirm Phelps' conviction.

F. PHELPS RECEIVED EFFECTIVE ASSISTANCE FROM HIS TRIAL COUNSEL.

Phelps' trial counsel provided competent and effective legal counsel by his attorney's conduct and his ineffective assistance claim therefore fails.

1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *State v. McFarland*, 127 Wn.2d at 335 (citations omitted).

2. Phelps' Trial Counsel Was Not Ineffective For Failing To Object To The Deputy Prosecutor's Statements During His Rebuttal Closing Argument.

To prevail on an ineffective assistance of counsel claim Phelps must show that (1) the attorney's performance was deficient

and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, *citing Strickland v. Washington*, 466 U.S. at 694.

Phelps has not met the requisite burden of showing his trial counsel's performance was deficient. When looking at trial counsel's performance throughout the trial, it is clear trial counsel was competent and effectively advocated for Phelps.

As argued above, the deputy prosecutor's statements responding to Phelps' trial counsel's closing argument were not improper. There is no requirement or necessity to object to permissible argument. Therefore, Phelps' ineffective assistance of counsel claim fails.

3. If This Court Finds That Phelps's Trial Counsel's Performance Was Deficient, Phelps Has Not Met His Burden To Show He Was Prejudiced By Trial Counsel's Failure To Object.

The State maintains that Phelps' trial counsel's performance was not deficient, arguendo, if this Court were to find trial counsel's performance deficient; Phelps has not met his burden to show he was prejudiced. Phelps must show that, but for trial counsel's errors in failing to object as raised above, the jury would not have found him guilty. *See Horton*, 116 Wn. App. at 921-22.

Phelps has not met his burden of showing that absent his trial counsel's errors it is highly likely that the jury would have acquitted him. As argued above the evidence presented by the State, proving Phelps raped AA and committed Sexual Misconduct

with a Minor in the Second Degree was overwhelming. This Court should affirm Phelps' convictions.

V. CONCLUSION

The public trial right was not violated and Phelps was present for every critical stage of the proceedings. The third amended information contained all the essential elements of Sexual Misconduct of a Minor in the Second Degree. Phelps cannot raise an alleged issue regarding non-unanimous verdict for the first time on appeal because the alleged error is not manifest. The deputy prosecutor did not commit misconduct during his rebuttal closing argument and Phelps' trial attorney was not ineffective for failing to object to the deputy prosecutor's alleged improper statements. For the foregoing reasons, this Court should affirm Phelps' convictions.

RESPECTFULLY submitted this 13th day of June, 2013.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by:_____
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Attorney for Plaintiff

APPENDIX E
APPELLANT'S OPENING BRIEF PAGES 1 THROUGH 32

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No. 43557-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Todd Phelps,

Appellant.

Lewis County Superior Court Cause No. 11-1-00790-6

The Honorable Judge Nelson E. Hunt

Appellant's Opening Brief

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4. The trial court violated the constitutional requirement of an open and public trial by holding additional proceedings in chambers.

5. The trial court violated Mr. Phelps's Sixth and Fourteenth Amendment right to be present by holding a portion of jury selection in his absence.

6. Mr. Phelps's conviction as to count two violated his constitutional right to adequate notice of the charges against him under the Sixth Amendment and Wash. Const. art. I, §22.

7. Count two of the charging document omitted an essential element of second-degree sexual misconduct with a minor.

8. The Information was deficient as to count two because it failed to allege that Mr. Phelps had sexual contact with a student who was under 21 years of age.

9. Mr. Phelps's state constitutional right to a unanimous jury was violated as to count two when the state failed to elect a particular act to prove that he had sexual contact with A.A.

10. Mr. Phelps's state constitutional right to a unanimous jury was violated as to count two when the judge failed to give a unanimity instruction for that charge.

11. The prosecutor committed prejudicial misconduct that violated Mr. Phelps's Fourteenth Amendment right to due process.

12. The prosecutor improperly expressed a personal opinion in closing arguments, in violation of Mr. Phelps's right to due process under the Fourteenth Amendment and Wash. Const. art. I, §3.

13. The prosecutor improperly "testified" in violation of Mr. Phelps's right to a jury trial and his right to a decision based solely on the evidence under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §3, 21, and 22.

14. Mr. Phelps was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

15. Defense counsel was ineffective for failing to object to prosecutorial misconduct in closing argument.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The state and federal constitutions require that criminal trials be administered openly and publicly. Here, the trial judge questioned and excused prospective jurors behind closed doors, and met with counsel in chambers on numerous occasions. Did the trial judge violate the constitutional requirement that criminal trials be open and public by holding closed proceedings without first conducting any portion of a *Bone-Club* analysis?

2. An accused person has the constitutional right to be present at all critical stages of trial, including jury selection. In this case, the court questioned and excused prospective jurors outside the courtroom in Mr. Phelps's absence. Did the trial judge violate Mr. Phelps's right to be present under the Sixth and Fourteenth Amendments and under Wash. Const. art. I, §22?

3. A criminal Information must set forth all of the essential elements of an offense. In count two, the Information failed to allege that Mr. Phelps had sexual contact with a student who was less than 21 years old. Did the Information omit essential elements of the charged crime in violation of Mr. Phelps's right

to adequate notice under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §22?

4. When evidence of multiple criminal acts is introduced to support a single conviction, the court must give a unanimity instruction unless the prosecution elects a single act upon which to proceed. Here, the state introduced evidence that Mr. Phelps may have had sexual contact with A.A. on multiple occasions during the charging period, but failed to elect a single act as the basis for the charge in count two. Did the trial court's failure to give a unanimity instruction violate Mr. Phelps's state constitutional right to a unanimous verdict?

5. A prosecutor may not express a personal opinion or "testify" to facts not in evidence. Here, the prosecutor "testified" to facts not in evidence, expressed a personal opinion, and made unconstitutional arguments suggesting Mr. Phelps had tailored his defense to the evidence after it was presented. Did the prosecutor commit reversible misconduct that was flagrant and ill-intentioned, in violation of Mr. Phelps's state and federal constitutional rights to a jury trial, to due process, to be present during trial, and to confront his accusers?

6. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. Here, counsel failed to object to prejudicial misconduct during the prosecuting attorney's closing. Was Mr. Phelps denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Todd Phelps was an assistant coach for the Pe Ell girls fastpitch softball team, and had been for 17 years (as of 2010). RP[1] 39, 298, 433, 1556. The team's season was in the spring, but there was also a select team that played in tournaments over the summer. RP 37-38, 1290.

In the summer of 2010, Mr. Phelps took his family and members of the team to various games and tournaments most weekends. One of the players that often traveled with the family was A.A. RP 37-39, 432, 440, 1290-1297. She was 16 and had a strained relationship with her own parents. RP 38, 41-42, 84-89, 105, 123, 142, 178, 222, 239, 535, 539, 719.

A.A. cut herself, experienced depression, resisted taking her anti-depression medication, lied to her parents frequently, contemplated suicide more than once, and generally preferred the company of the Phelps family. RP 39-41, 49-50, 99-101, 110, 113, 161, 226, 363, 379, 446, 517, 719. She often spent the night with Mr. Phelps's daughter Angelina who was 2 years older and tutored A.A. in math. RP 42, 184, 384, 438, 445, 509, 518.

[1] Citations to the trial will be RP, as those pages are consecutively numbered. All other citations to the transcripts will include the date.

After that summer season was over, A.A. rarely saw the Phelps family until the start of the school fastpitch season in February of 2011. RP 448. A.A. was continuing to have a difficult relationship with her family, and once the season started, she confided to Mr. Phelps that she had been cutting herself and had considered suicide. In late March, Mr. Phelps and A.A. talked in his truck in the parking lot of a church after watching a game. RP 450, 579, 695, 767-768.

Once Mr. Phelps learned of A.A.'s challenges, he worked to keep A.A. from self-harm and tried to help her improve her self-esteem. A.A. did not readily discuss her issues with adults, with the exception of Mr. Phelps. They developed a relationship that included phone calls and frequent texts, even late into the night. RP 469, 549, 984-1003, 1308. Mr. Phelps contacted several people to express his concerns about A.A., including A.A.'s mother, the head fastpitch coach, the other assistant coach, the pastor at A.A.'s church as well as the pastor's wife, and Mr. Phelps's own wife. RP 45-46, 50, 110-112, 188, 202, 205, 214, 217, 230, 245-6, 1298.

The first week of April, A.A. told her pastor's wife that Mr. Phelps had kissed her. While stories differed on where, how, and when, school authorities were notified of the allegation. RP 119, 144, 153-154, 218-220, 247, 269, 301, 306, 501, 513-516, 540, 1234, 1464.

While the school's investigation regarding the kiss was ongoing, Mr. Phelps met with A.A. and her parents. RP 50-51, 302. The two families agreed that Mr. Phelps should not lose his coaching job because he was trying to help A.A. RP 147, 314. The school agreed, and directed Mr. Phelps to have no further contact with A.A. via text or phone except as related to his coaching duties. RP 315-319. Mr. Phelps continued to have frequent contact with A.A. despite this directive, and later resigned his coaching job as a result. RP 64, 260-261, 300, 320-323, 984-1003.

In September of 2011, A.A. moved to her aunt's home near Fife. RP 131, 696. After being there a few weeks, she told her aunt (and then her parents) that she had sex with Mr. Phelps in July. RP 283, 286.

A police investigation led to charges of Rape in the Third Degree (with the allegation that Mr. Phelps held a position of trust and that A.A. was a particularly vulnerable victim) and Sexual Misconduct with a Minor in the Second Degree. CP 42-45 With respect to the second charge, the Information read:

> On or about July 27, 2011, in the County of Lewis, State of Washington, the above-named individual engaged in sexual intercourse with another person who was not married to the defendant to-wit: A.K.A (DOB: 08/01/1994), and A.K.A. (DOB: 08/01/1994) did not consent to the sexual intercourse and such lack of consent was clearly expressed by A.K.A's words or conduct, and/or under circumstances where there was a threat of substantial unlawful harm to property rights of A.K.A. (DOB: 08/01/1994); contrary to the Revised Code of Washington 9A.44.060(1).

CP 43.

A list of prospective jurors was prepared for use during *voir dire*. Struck Juror List (Clerk's Trial Minutes (4/17/12)), Supp. CP. Juror 62 was a handwritten addition to the list. Struck Juror List (Clerk's Trial Minutes (4/17/12)), Supp. CP. During jury selection, Juror 62 indicated there was a reason he "should not be allowed to serve" on the case. RP (4/17/12 *voir dire*) 8. He also indicated that he'd read or heard something about the case, and had formed opinions that would affect his ability to be fair and impartial. RP (4/17/12 *voir dire*) 9. He answered yes when asked if he was acquainted with the parties, the attorneys, or the prospective witnesses. RP (4/17/12 *voir dire*) 9.

The prosecutor questioned Juror 62, who revealed that he lived in Pe Ell and knew "almost every person" on the witness list. RP (4/17/12 *voir dire*) 20-21. After a few additional questions, the court interrupted, and spoke directly with Juror 62:

> THE COURT: Juror 62 was actually excused from this case earlier and I thought he knew that. You're Mr. Kephart; is that right?
> JUROR NO. 62: Yes, sir.
> THE COURT: Yes.
> JUROR NO. 62: I was. But you also told me I had to come and go through the process, so I'm here.
> THE COURT: I think we had a miscommunication. But you told me all of those things and I thought... Well, at any rate, [you're] excused today --
> JUROR NO. 62: Thank you.
> THE COURT: -- so you can leave.

> JUROR NO. 62: Appreciate it.
> RP (4/17/12 voir dire) 21-23.

There is no further indication of the record of when (or where) the court had spoken with Juror 62, or whether any other jurors had been excused outside the courtroom prior to the start of *voir dire*. RP (4/17/12 voir dire) 2-128; Struck Juror List (Clerk's Trial Minutes (4/17/12)), Supp. CP.

Juror 28 and Juror 48 were questioned in open court during *voir dire*. RP (4/17/12 voir dire) 5, 25, 106; Struck Juror List (Clerk's Trial Minutes (4/17/12)), Supp. CP. They were excused at some point; however, the record does not reflect when, where, how, or why this occurred. Struck Juror List (Clerk's Trial Minutes (4/17/12)), Supp. CP Nor does the record indicate whether or not either party objected. *See* RP (4/17/12 voir dire) *generally*.

Throughout the trial, there were references to proceedings that occurred outside the courtroom. The judge heard motions *in limine* in his chambers. RP (4/10/12) 9; *see also* RP (4/13/12) 3. The court also met with counsel in chambers prior to jury selection, and ruled on preliminary matters such as the procedures and time limits for *voir dire* and the need for alternate jurors. RP 3. Later in the trial, the parties met with the judge in chambers and discussed issues relating to A.A.'s journal. RP 627.

Another *in camera* meeting occurred following the defense case. RP 1427.

At trial, A.A. testified that during the season before Mr. Phelps had resigned, he'd kissed her on three separate occasions, rubbed her upper thigh, grabbed her crotch and butt, and pulled her on top of him three different times. RP 474, 483, 487, 512-513, 519, 526, 528-530, 566. She also stated that during the incident in which she alleged sexual intercourse, she shrugged when asked if they would have sex, and that she told the investigating officer that she never said no. RP 871-879.

The court did not instruct the jury with respect to the multiple possible acts that could comprise sexual misconduct, and the state did not elect one. Court's Instructions to Jury, Supp. CP; RP 1474-1553. In his closing argument, the prosecutor referred to all of the alleged sexual incidents that occurred during the fastpitch season, but did not elect one. RP 1501-1509.

In his closing argument, the defense attorney argued different theories supporting not guilty findings, including that if sexual intercourse had occurred in July, A.A. had consented to it. RP 1571. The prosecutor stated in his rebuttal that he was not aware until he heard it that the defense would claim that A.A. consented. RP 1580. He also

characterized the defense strategy as "grasping at straws." RP 1582. There was no defense objection. RP 1580-1583.

The jury voted to convict on both counts, and answered "yes" to the special verdict. Verdict Form A, Supp. CP; Special Verdict, Supp. CP; Verdict Form B, Supp. CP. After sentencing, Mr. Phelps timely appealed. CP 237.

ARGUMENT

I. THE TRIAL COURT VIOLATED THE CONSTITUTIONAL REQUIREMENT THAT CRIMINAL TRIALS BE OPEN AND PUBLIC.

A. Standard of Review

Constitutional questions are reviewed *de novo*. *McDevitt v. Harborview Med. Ctr.*, ___ Wn.2d___, ___, 291 P.3d 876 (2012). Whether a trial court procedure violates the right to a public trial is a question of law reviewed *de novo*. *State v. Njonge*, 161 Wn. App. 568, 573, 255 P.3d 753 (2011). Courtroom closure issues may be argued for the first time on review. *Id. at* 576.

B. The constitution requires that criminal trials be open and public.

Criminal cases must be tried openly and publicly. *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995); *Presley v. Georgia*, 558 U.S. 209, ___, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) (*per curiam*).

Proceedings to which the public trial right attaches may be closed only if the trial court enters appropriate findings following a five-step balancing process. *Bone-Club, at* 258-259.

The public trial right attaches to a particular proceeding when "experience and logic" show that the core values protected by the right are implicated. *State v. Sublett*, ___ Wn.2d ___, ___, ___ P.3d ___ (2012). A reviewing court first asks "'whether the place and process have historically been open to the press and general public,'" and second, "'whether public access plays a significant positive role in the functioning of the particular process in question.'" *Id, at* ___ (quoting *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7-8, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986)). If the place and process have historically been open and if public access plays a significant positive role, the public trial right attaches and closure is improper unless justified under *Bone-Club*.

The Supreme Court has yet to allocate the burden of proof when it comes to showing what occurred during a closed *in camera* proceeding. However, the court has provided some guidance: where the record shows the likelihood of a closure (in the form of "the plain language of the trial court's ruling impos[ing] a closure"), the burden shifts to the state "to overcome the strong presumption" that a closure actually occurred. *State v. Brightman*, 155 Wn.2d 506, 516, 122 P.3d 150 (2005).

Similarly, the state should bear the burden of establishing that a closed proceeding does not implicate the core values of the open trial right. The prosecutor has an incentive to ensure that guilty verdicts are upheld, and is therefore the natural candidate to bear responsibility for putting on the record anything that transpired during a closed proceeding.[2] Thus, in this case, the burden should rest with the prosecution to establish what occurred outside of the courtroom. *See Brightman* (addressing state's burden once closure shown).

C. The trial court erroneously closed a portion of jury selection by questioning and dismissing jurors behind closed doors.

The state and federal Supreme Courts have repeatedly affirmed that the public trial right attaches to jury selection. *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009); *State v. Brightman, at* 515; *Presley, at* ___. A reviewing court need not apply the "experience and logic" test to jury selection, because it is well-settled that the public trial right applies. *State v. Wise*, ___ Wn.2d. ___, 288 P.3d 1113 (2012); *see also In re Morris*, ___ Wn.2d. ___, 288 P.3d 1140 (2012) (Chambers, J., concurring).

[2] Similarly, if a closed proceeding does implicate the core values of the public trial right, the prosecution should ensure that the court considers the five *Bone-Club* factors.

Where a portion of jury selection is unnecessarily closed, reversal is automatic. *Strode, at* 231 (plurality); *Presley, at* ___.

Here, the record suggests that jurors were questioned and excused behind closed doors.[3] RP (4/17/12 voir dire) 2-128; Struck Juror List (Clerk's Trial Minutes (4/17/12)), Supp. CP. This became clear during the examination of Juror 62. During *voir dire*, Juror 62 acknowledged that he'd already been questioned and excused by the judge for reasons related to the case[4] (although a miscommunication resulted in his appearance for *voir dire*.) RP (4/17/12 voir dire) 21-23. Unlike other jurors who were excused, Juror 62's name did not appear on the printed struck juror list; instead, it was handwritten at the end of the list. This suggests there may have been other similarly situated persons whose names did not even appear on the list. *See* Struck Juror List (Clerk's Trial Minutes (4/17/12)), Supp. CP. In addition, Juror 28 and Juror 48 were questioned in open court, but the record does not reflect how or when they were excused. RP (4/17/12 voir dire) 5, 25, 106; *See* Struck Juror List (Clerk's Trial Minutes

[3] Whether this occurred in chambers, in the clerk's office, or in the hallway, the public trial right was violated. *See State v. Leyerle*, 158 Wn. App. 474, 483-84, 242 P.3d 921 (2010).

[4] The colloquy between the judge and Juror 62 made clear that the earlier questioning and decision to excuse the juror related directly to the facts of the case, rather than illness or unrelated hardship. RP (4/17/12 voir dire) 21-23.

(4/17/12)), Supp. CP. This suggests that they, too, were excused behind closed doors, possibly during a recess.

By excusing jurors for case-related reasons outside the public's view, the court violated the constitutional requirement that criminal trials be administered openly. U.S. Const. Amend. VI, U.S. Const. Amend. XIV; Wash. Const. art. I, §10 and 22; *Bone-Club, supra.* Accordingly, Mr. Phelps's convictions must be reversed and the case remanded for a new trial. *State v. Paumier*, ___ Wn.2d. ___, 288 P.3d 1126 (2012).

D. The trial court erroneously held additional *in camera* hearings without undertaking *Bone-Club* analysis.

As the Supreme Court noted, "[t]the resolution of legal issues is quite often accomplished during an adversarial proceeding..." *Sublett, at* ___. Traditionally, adversarial proceedings have been open to the public. *See, e.g., Press-Enterprise at* 13 (addressing preliminary hearing in California); *United States v. Simone*, 14 F.3d 833 (3d Cir. 1994) (granting public access to post-trial examination of juror for misconduct); *United States v. Smith*, 787 F.2d 111, 114 (3d Cir. 1986) (granting public access to transcripts of sidebar and *in camera* rulings); *United States v. Criden*, 675 F.2d 550, 552 (3d Cir. 1982) (granting public access to transcript of

pretrial hearing held *in camera*). By contrast, the public trial right is less likely to attach to *ex parte* or nonadversarial matters.[5]

In keeping with this history, the experience prong suggests that proceedings must be open and public if they are adversarial in any way. Furthermore, where the record fails to establish what happened during a closed-door session, the hearing should be presumed to be adversarial. *See Brightman, supra* (allocating the burden on the issue of closure).

Open court proceedings are essential to proper functioning of the judicial system; this is especially true for hearings that have an adversarial tone, or for those that offer a possibility of prejudice to either party. Opening the courtroom doors to the public promotes public understanding of the judicial system, encourages fairness, provides an outlet for community sentiment, ensures public confidence that government (including the judiciary) is free from corruption, enhances the performance of participants, and (where evidence is taken) discourages perjury. *See Criden, at* 556 (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980)). Each of these benefits

[5] *See, e.g., In re Search of Fair Finance*, 692 F.3d 424, 430 (6th Cir. 2012) (refusing public access to search warrant documents); *United States v. Gonzales*, 150 F.3d 1246, 1257 (10th Cir. 1998) (refusing public access to indigent defendants' *ex parte* requests for public funds).

accrues when the public, the press, and any interested parties have a full opportunity to observe every aspect of a proceeding.

Here, the judge and counsel met *in camera* on several occasions. RP (4/13/12) 3; RP 3-5, 627, 1427. Although the court gave a brief of summary of certain closed proceedings, no record was made of the proceedings themselves. RP (4/13/12) 3; RP 3-5, 627, 1427.

The public was unable to observe arguments made by the attorneys, concerns expressed by the judge, the demeanor of the participants, and the means by which the ultimate decisions were reached. Mr. Phelps, any family members, the press, and other interested spectators were likely unaware that proceedings were even taking place, and had no opportunity to play the important role secured to them when proceedings are open.

Furthermore, the absence of a complete record should be held against the prosecution. Without evidence of what actually occurred in chambers, it is fair to presume that the *in camera* proceedings had an adversarial tone. *Brightman, supra.*

Under these circumstances, experience and logic suggest that the closed hearings should have been open to the public. The trial court's decision to close the courtroom violated both Mr. Phelps's constitutional rights and those of the public. U.S. Const. Amend. VI, U.S. Const.

Amend. XIV; Wash. Const. art. I, §10 and 22; *Bone-Club, supra.* Accordingly, his conviction must be reversed and the case remanded for a new trial. *Id.*

II. THE TRIAL COURT VIOLATED MR. PHELPS'S RIGHT TO BE PRESENT BY EXCUSING JURORS IN MR. PHELPS'S ABSENCE.

A. Standard of Review

Constitutional questions are reviewed *de novo. McDevitt, at ___.*

B. Mr. Phelps's conviction must be reversed because the trial judge violated his Fourteenth Amendment right to be present at all critical stages of trial.

A criminal defendant has a constitutional right to be present at all critical stages of a criminal proceeding. *U.S. v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985); *State v. Pruitt*, 145 Wn. App. 784, 788, 797-799, 187 P.3d 326 (2008). This right stems from the Sixth Amendment's confrontation clause and from the Fourteenth Amendment's due process clause. *Gagnon, at 526.*

Although the core of this privilege concerns the right to be present during the presentation of evidence, due process also protects an accused person's right to be present whenever "whenever his [or her] presence has a relation, reasonably substantial, to the fulness [sic] of his [or her] opportunity to defend against the charge." *Id.* Accordingly, "the

constitutional right to be present at one's own trial exists 'at any stage of the criminal proceeding that is critical to its outcome if [the defendant's] presence would contribute to the fairness of the procedure.'" *U.S. v. Tureseo*, 566 F.3d 77, 83 (2d Cir. 2009) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987)).

The right to be present encompasses jury selection. This allows the accused person "to give advice or suggestion or even to supersede his lawyers." *Synder v. Massachusetts*, 291 U.S. 97, 106, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934). Furthermore, "[a]s Blackstone points out, 'how necessary it is that a prisoner ... should have a good opinion of his jury the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice even without being able to assign a reason for his dislike.'" *U.S. v. Gordon*, 829 F.2d 119, 124 (D.C. Cir. 1987) (quoting 4 W. Blackstone, *Commentaries on the Laws of England*, 353 (1765)).

In this case, Mr. Phelps was denied his Fourteenth Amendment right to be present during a critical stage of the proceedings. At some point, the trial court questioned and excused jurors outside the courtroom. RP (4/17/12 voir dire) 21-23; Struck Juror List (Clerk's Trial Minutes (4/17/12)), Supp. CP. The trial court's decisions affected the makeup—and hence the fairness—of the jury that presided over Mr. Phelps's fate.

Excusing jurors for case-related reasons is functionally equivalent to excusing them for answers given during *voir dire*. The court's decision to question and excuse jurors in Mr. Phelps's absence violated his Fourteenth Amendment right to be present. *Gordon, supra; Gagnon, supra.* His conviction must be reversed and the case remanded for a new trial. *Id.*

III. MR. PHELPS'S CONVICTION FOR SEXUAL MISCONDUCT VIOLATED HIS RIGHT TO ADEQUATE NOTICE UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND WASH. CONST. ART. I, §22.

A. Standard of Review

Constitutional questions are reviewed *de novo*. *McDevitt, at* ___. A challenge to the constitutional sufficiency of a charging document may be raised at any time. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Id, at* 105. The test is whether the necessary facts appear or can be found by fair construction in the charging document. *Id, at* 105-106.

If the Information is deficient, prejudice is presumed and reversal is required. *State v. Courneya*, 132 Wn. App. 347, 351 n. 2, 131 P.3d 343 (2006); *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). On the other hand, if the missing element can be found by fair construction of the charging language, reversal is required only upon a showing of prejudice. *Kjorsvik, at* 104-106.

B. The Information was deficient as to count two because it failed to allege the essential elements of the charged crime.

The Sixth Amendment to the federal constitution guarantees an accused person the right "to be informed of the nature and cause of the accusation." U.S. Const. Amend. VI.[6] A similar right is secured by the Washington State Constitution. Wash. Const. art. I, §22. All essential elements—both statutory and nonstatutory—must be included in the charging document. *State v. Johnson*, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992). An essential element is "one whose specification is necessary to establish the very illegality of the behavior." *Id* (citing *United States v. Cina*, 699 F.2d 853, 859 (7th Cir.), *cert. denied*, 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983)).

A conviction for second-degree sexual misconduct with a minor requires proof that the accused person "is a school employee who has, or knowingly causes another person under the age of eighteen to have, sexual contact with an enrolled student of the school who is at least sixteen years old *and not more than twenty-one years old* and not married to the

[6] This right is guaranteed to people accused in state court, through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S.Ct. 514, 92 L.Ed. 644 (1948).

employee, if the employee is at least sixty months older than the student..." RCW 9A.44.096(1)(b) (emphasis added). An essential element thus requires proof that the registered student is not more than 21 years old.

In this case, the Information did not include this element. It included two references to age—age 16 and age 18. CP 43. Nowhere in the charging language did the prosecution make clear that the state was required to prove that the registered student was under age 21. CP 43.

Because the Information is deficient, the conviction violated Mr. Phelps's right to notice under the Sixth Amendment and art. I, §22. *Kjorsvik, at* 104-106. The conviction must be reversed and the case dismissed without prejudice. *Id.*

IV. MR. PHELPS'S CONVICTION FOR SEXUAL MISCONDUCT VIOLATED HIS RIGHT TO A UNANIMOUS VERDICT UNDER ART. I, §21.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *McDevitt, at* ___. A manifest error affecting a constitutional right may be raised for the first time on review.[7] RAP 2.5(a)(3); *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009). A reviewing court "previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed." *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001). An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wn.2d 428, 433, 197 P.3d 673 (2008).

[7] In addition, the court has discretion to accept review of any issue argued for the first time on appeal. RAP 2.5(a); *see State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011). This includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. *Id.*

B. The state constitution guarantees an accused person the right to a unanimous verdict.

An accused person has a state constitutional right to a unanimous jury verdict.[8] Wash. Const. art. I, §21; *State v. Elmore*, 155 Wn.2d 758, 771 n. 4, 123 P.3d 72 (2005). Before a defendant can be convicted, jurors must unanimously agree that he or she committed the charged criminal act. *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). If the prosecution presents evidence of multiple acts, then either the state must elect a single act or the court must instruct the jury to agree on a specific criminal act. *Id, at* 511.

[8] The federal constitutional guarantee of a unanimous verdict does not apply in state court. *Apodaca v. Oregon*, 406 U.S. 404, 406, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972).

In the absence of an election, failure to provide a unanimity instruction is presumed to be prejudicial.[9] *Coleman, at* 512; *see also State v. Vander Houwen*, 163 Wn.2d 25, 38, 177 P.3d 93 (2008). Without the election or instruction, each juror's guilty vote might be based on facts that her or his fellow jurors believe were not established. *Coleman, at* 512.

Failure to provide a unanimity instruction requires reversal unless the error is harmless beyond a reasonable doubt. *Coleman, at* 512. The presumption of prejudice is overcome only if no rational juror could have a reasonable doubt about any of the alleged criminal acts. *Id, at* 512.

C. The absence of a unanimity instruction requires reversal of the conviction in count two, because the prosecution relied on evidence of multiple acts.

The state presented evidence that Mr. Phelps had sexual contact with A.A. on multiple occasions. In particular, A.A. testified that Mr. Phelps kissed her on three separate occasions, rubbed her upper thigh, grabbed her crotch and butt, and pulled her on top of him three different times. RP 474, 483, 487, 512-513, 519, 526, 528-530, 566.

[9] Accordingly, the omission of a unanimity instruction is a manifest error affecting a constitutional right, and can be raised for the first time on appeal. RAP 2.5(a); *State v. Greathouse*, 113 Wn. App. 889, 916, 56 P.3d 569 (2002).

The prosecutor did not identify a particular act as the basis for count two. Instead, in closing, the prosecutor referenced more than one occasion on which Mr. Phelps allegedly had sexual contact with A.A. RP 1501-1506.

The court did not give a unanimity instruction as to count two. This violated Mr. Phelps's constitutional right to a unanimous jury, and gives rise to a presumption of prejudice.[10] *Coleman, at* 511-512.

In the absence of an election or a unanimity instruction, a divided jury might have voted to convict. Some jurors may have believed Mr. Phelps had sexual contact with A.A. at his house, while others believed sexual contact occurred on the bus but not at the house. RP 474, 483, 487, 512-513, 519, 526, 528-530, 566.

Because Mr. Phelps may have been convicted by a jury divided in this manner, his conviction cannot stand. Count two must be reversed and the charge remanded for a new trial. *Coleman, at* 511. If the same evidence is presented on retrial, the state must elect a single act as the basis for the charge or the court must give a unanimity instruction. *Id.*

[10] As a matter of law, it creates a manifest error affecting a constitutional right, and thus can be reviewed for the first time on appeal. RAP 2.5(a)(3); *State v. O'Hara*, 167 Wn.2d 91, 103, 217 P.3d 756 (2009) (failure to give a unanimity instruction is "deemed automatically [to be] of a constitutional magnitude.")

V. THE PROSECUTOR COMMITTED MISCONDUCT THAT WAS FLAGRANT AND ILL-INTENTIONED.

A. Standard of Review

Prosecutorial misconduct requires reversal if there is a substantial likelihood that it affected the verdict. *In re Glasmann*, ___ Wn.2d ___, 286 P.3d 673 (2012).[11] Even absent an objection, error may be reviewed if it is "so flagrant and ill intentioned that an instruction would not have cured the prejudice." *Id, at* ___.

Furthermore, prosecutorial misconduct may be argued for the first time on appeal if it is a manifest error that affects a constitutional right. Where prosecutorial misconduct infringes a constitutional right, prejudice is presumed. *State v. Toth*, 152 Wn. App. 610, 615, 217 P.3d 377 (2009). The burden is on the state to show harmlessness beyond a reasonable doubt. *State v. Irby*, 170 Wn.2d 874, 886, 246 P.3d 796 (2011).

[11] Citations are to the lead opinion in *Glassman*. Although signed by only four justices, the opinion should be viewed as a majority opinion, given that Justice Chambers "agree[d] with the lead opinion that the prosecutor's misconduct in this case was so flagrant and ill intentioned that a curative instruction would not have cured the error and that the defendant was prejudiced as a result of the misconduct." *Glasmann, at* ___ (Chambers, J., concurring). Justice Chambers wrote separately because he was "stunned" by the position taken by the prosecution. *Id.*

B. The convictions must be reversed because the prosecutor engaged in misconduct that was flagrant and ill-intentioned.

The state and federal constitutions secure for an accused person the right to a fair trial. *Glasmann, at* ___; U.S. Const. Amend. VI; U.S. Const. Amend. XIV; Wash. Const. art. I, §22. Prosecutorial misconduct can deprive an accused person of this right. *Glasmann, at* ___.

The constitutional right to a jury trial includes the right to a verdict based solely on the evidence developed at trial. U.S. Const. Amend. VI; *Turner v. Louisiana*, 379 U.S. 466, 472, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965); Wash. Const. art. I, §21 and 22. The due process clause affords a similar protection. U.S. Const. XIV; *Sheppard v. Maxwell*, 384 U.S. 333, 335, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966).

It is misconduct for a prosecutor to vouch for evidence, or to give a personal opinion on the guilt of the accused. *State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1984). A prosecutor may not "'throw the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused.'" *State v. Monday*, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (quoting *State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956)).

The state constitution further guarantees an accused person "the right to appear and defend in person... [and] to meet the witnesses against

him face to face." Wash. Const. art. I, §22. These state constitutional rights are broader than their federal counterparts, in that Washington prosecutors are prohibited from making certain arguments that are permissible under the federal constitution.[12] *State v. Martin*, 171 Wn.2d 521, 533-536, 252 P.3d 872 (2011). In *Martin*, the Supreme Court rejected the federal standard, and specifically adopted a standard based on Justice Ginsburg's dissent in *Portuondo*. *Martin, at* 533-536 (citing *Portuondo, at* 76-78 (Ginsburg, J., dissenting)).

The *Martin* court quoted extensively from Justice Ginsburg's opinion, noting that she "criticized the majority for 'transform[ing] a defendant's presence at trial from a Sixth Amendment right into an automatic burden on his credibility.'" *Martin, at* 534 (quoting *Portuondo, at* 76 (Ginsburg, J., dissenting)). Importantly, the *Martin* court highlighted Justice Ginsburg's opinion "that a prosecutor should not be permitted to make such an accusation during closing argument because a jury is, at that point, unable to 'measure a defendant's credibility by evaluating the defendant's response to the accusation, for the broadside is fired after the defense has submitted its case.'" *Martin, at* 534-35 (quoting *Portuondo, at* 78 (Ginsburg, J., dissenting)).

[12] The U.S. Supreme Court allowed such arguments in *Portuondo v. Agard*, 529 U.S. 61, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000).

Here, the prosecutor told jurors (a) that he'd just learned of Mr. Phelps's defense (implying that the defense had been forced to change theories based on the evidence), and (b) that defense counsel wasn't present for an interview with A.A. and thus had "no idea of context was of the interview [sic]," that defense counsel "doesn't even know what the notes were about," and that the prosecution was "obligated to give [the notes] to him." RP 1580, 1582. There was, of course, no evidence supporting any of these statements. *See* RP *generally*.

The prosecutor concluded that defense counsel was "grasping at straws to get anything." RP 1582. This was not argument based on facts introduced at trial; instead it was an improper statement of the prosecutor's personal opinion. By making this statement, the prosecutor effectively testified, throwing "the prestige of his public office ... into the scales against the accused." *Monday, at* 677 (citation and internal quotation marks omitted.)

The prosecutor's misconduct was flagrant and ill-intentioned. *Glasmann, at* ___. It pervaded the entire closing argument, thus an objection could not have cured any prejudice. *Id.* Accordingly, the conviction must be reversed and the case remanded for a new trial. *Id.*

VI. MR. PHELPS WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

B. An accused person is constitutionally entitled to the effective assistance of counsel.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, art. I, §22. of the Washington Constitution provides, "In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel...." Wash. Const. art. I, §22. The right to counsel is "one of the most fundamental and cherished rights guaranteed by the Constitution." *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, falling below an objective

standard of reasonableness; and (2) that the deficient performance resulted in prejudice - "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

The presumption that defense counsel performed adequately is overcome when there is no conceivable legitimate tactic explaining counsel's performance. *Reichenbach, at* 130. Further, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g.. State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of ... prior convictions has no support in the record.").

C. Mr. Phelps was denied the effective assistance of counsel by his attorney's failure to object to prosecutorial misconduct that was flagrant and ill intentioned.

Failure to object to improper closing arguments is objectively unreasonable under most circumstances:

> At a minimum, an attorney who believes that opposing counsel has made improper closing arguments should request a bench conference at the conclusion of the opposing argument, where he or she can lodge an appropriate objection out [of] the hearing of the jury.... Such an approach preserves the continuity of each closing argument, avoids calling the attention of the jury to any improper statement, and allows the trial judge the opportunity to

> make an appropriate curative instruction or, if necessary, declare a mistrial.

Hodge v. Hurley, 426 F.3d 368, 386 (6th Cir., 2005).

Here, defense counsel should have objected to the prosecutor's flagrant and ill-intentioned misconduct. The prohibitions against prosecutorial "testimony" and statements of personal opinion are well established. By failing to object, counsel's performance thus fell below an objective standard of reasonableness. At a minimum, Mr. Phelps's lawyer should have either requested a sidebar or lodged an objection when the jury left the courtroom. *Id.*

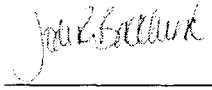
Furthermore, Mr. Phelps was prejudiced by the error. The prosecutor's improper comments substantially increased the likelihood that jurors would vote guilty based on improper factors. *See Glasmann, at* ___. The failure to object deprived Mr. Phelps of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *Hurley.* Accordingly, the convictions must be reversed and the case remanded for a new trial. *Id.*

CONCLUSION

For the foregoing reasons, the convictions must be reversed. Count one must be remanded for a new trial; count two must be dismissed without prejudice. If count two is not dismissed, it must be remanded for a new trial.

Respectfully submitted on February 26, 2013,

BACKLUND AND MISTRY



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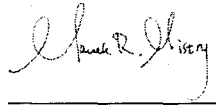

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Lewis County Prosecuting Attorney
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 26, 2013.

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