SUPREME COURT NO. 94212-9

NO. 72359-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHNSON AYODEJI,

Petitioner.

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

The Honorable Eric Z. Lucas, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Johnson Ayodeji asks this Court to grant review of the Court of Appeals' unpublished decision in State v. Ayodeji, No. 72359-6-1, filed January 17, 2017 (appendix).

B. ISSUES PRESENTED FOR REVIEW

1a. The trial court purposefully played video evidence so only the jury could view it. Is this Court's review warranted under RAP 13.4(b)(3) to determine whether this constitutes a courtroom closure, thereby violating Ayodeji's constitutional right to a public trial?

1b. Is this Court's review warranted under RAP 13.4(b)(1) and (b)(2) to clarify whether courts should use the experience and logic test to determine whether a closure occurred?

2. Is this Court's review warranted under RAP 13.4(b)(1), (b)(2), and (b)(3) to correct a conflict and determine whether a verdict is ambiguous and dismissal therefore necessary when several acts in a multiple acts case are not supported by sufficient evidence, and the court is unable to determine the acts upon which the jury relied?

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

C. STATEMENT OF THE CASE

The State charged Ayodeji with one count of first degree child rape (Count I) and two counts of first degree child molestation (Counts III and IV) of his daughter E.A., born January 8, 2001. CP 105-06. The State also charged Ayodeji with one count of second degree child rape of E.A. (Count VII), alleged to have occurred between January 9, 2013 and May 17, 2013, after E.A. turned twelve. CP 105-06. The State further charged Ayodeji with one count of first degree child rape (Count II) and two counts of first degree child molestation (Counts V and VI) of his younger daughter F.A., born February 9, 2002. CP 105-06.

1. Ruth's Testimony

Ayodeji and Ruth Ayodeji married in September 1998. 7RP 22-23, 32-33. Ruth said that in September 2008, F.A. told her Ayodeji touched her and E.A.'s private parts. 7RP 54-55; 8RP 30-31. When asked, E.A. agreed Ayodeji touched her, but refused to talk more about it. 7RP 56.

Ruth testified that in 2009, she caught E.A. and F.A. performing oral sex on each other. 7RP 65-67. E.A. refused to talk about it, but F.A. said "daddy did that." 7RP 67-68. Ruth reported this to their counselor, who met with the girls. 7RP 68-73. F.A. told the counselor Ayodeji "did that to us" in the computer room, but E.A. again refused to talk about it. 7RP 74. The counselor reported this to CPS. 7RP 75; 8RP 25-36. CPS investigated and

interviewed the girls, but ultimately dropped the case because the girls were uncooperative. 7RP 75-78; 8RP 40.

Ayodeji then moved away for several years. 7RP 79, 92-95. During that time, E.A. and F.A. told their mother what they wrote in their diaries about Ayodeji touching them was not true. 7RP 85-86, 102-03. F.A. explained they made it up because they were mad at Ayodeji because he was not living with them. 7RP 105. Ayodeji moved back in with the family in early 2013. 7RP 97-98.

Ruth testified that on May 17, 2013, she caught Ayodeji having sex with F.A. 7RP 121-25. Ruth said she woke up in the middle of the night and Ayodeji was not in bed. 7RP 123-24. She went downstairs and found Ayodeji in F.A.'s room on top of F.A., "making sexual motions," and kissing F.A.'s face. 7RP 128-29. Ayodeji explained he was only hugging F.A., telling Ruth his penis was not even erect. 7RP 130-31. When Ruth asked the girls why they did not tell her, they said "that is just what daddy normally does." 7RP 133.

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

F.A. also testified to the incident on May 17, 2013. 8RP 78-82. She remembered hearing her father walk downstairs, and then "he gets on my bed and he gets all touchy." 8RP 82-83. F.A. told child interview specialist

Gina Coslett she had her clothes on during this incident, but testified at trial she was naked. 8RP 136-37; 9RP 54-55.

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

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

In a letter to her mother, F.A. wrote, "Yes daddy did touch me. What I was touched with his butt not his hand. [Where] I was in bed he was on top of me . . . I did not feel right." 7RP 142-44; Ex. 70. F.A. could not

remember when she wrote the letter, but thought it might be sometime after her eleventh birthday in February 2013. 8RP 144-45.

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

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

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

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

3. Child Hearsay Testimony

CPS investigator Stacy Lowry interviewed the girls on January 10, 2010. 6RP 18-19. E.A. told Lowry the "stuff with her dad" happened in the computer room. 6RP 23-24. E.A. said she would lie down on the floor and Ayodeji would get on top of her and use his hands underneath her underwear. 6RP 24-25. On a stick figure, E.A. circled the crotch area to indicate where Ayodeji touched her. 6RP 26-27. Lowry testified, though,

that F.A. would not talk about the alleged abuse, and instead "grabbed the inside of her crotch and just grabbed and cupped her crotch area." 6RP 29.

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

4. Forensic Examinations and Police Investigation

The girls underwent a sexual assault examination on February 1, 2010. 6RP 43-44, 51-52. F.A. told the nurse she did not remember any sexual touching by their father and E.A. denied any abuse. 6RP 46-47, 57-58. Neither girl showed any signs of sexual abuse, such as damaged hymen tissue. 6RP 50-52, 57-58.

The girls underwent another sexual assault examination on May 17, 2013. 9RP 37, 44-45. Though F.A. was reluctant to allow the exam, the nurse did not see any signs of sexual abuse. 9RP 38-43. The nurse also did not observe any signs E.A. had been sexually abused, and E.A. told the nurse she was a virgin. 9RP 51-52.

A State's expert found partial male "touch" DNA on E.A.'s sanitary napkin. 9RP 94, 100. Touch DNA is usually transferred from the skin by handling an object. 9RP 112. The expert concluded the partial male profile matched Ayodeji's DNA profile, and the match was not expected to occur more frequently than one in 3,500 men in the United States. 9RP 100-01.

Detective Sally Van Beek arrested Ayodeji and seized the cell phone on his person. 9RP 129-30, 160; 10RP 22-25. Ruth also gave Van Beek two micro SD cards Ruth claimed she found in Ayodeji's car using a spare key. 7RP 148-49; 10RP 27-28. Several deleted photos on Ayodeji's phone showed an adult male with his penis exposed and a girl's hand on his penis. 9RP 167, 172-73. Ruth identified E.A. in the photos and identified Ayodeji based on his underwear and his private parts. 7RP 150-51. However, E.A. told Coslett that Ayodeji never took photos of her. 9RP 81-82. On one of the SD cards was a video created on May 8, 2013, which depicted E.A. performing oral sex on a man, but it did not show the man's face. 5RP 47; 7RP 150-51; 9RP 129-33; 11RP 36. E.A. testified Ayodeji took a video of her on his phone in her room. 8RP 177-80.

5. Ayodeji's Testimony

Ayodeji denied ever sexually assaulting his daughters. 10RP 54-55. He explained Ruth fabricated the allegations because of several incidents that turned her against him. First, Ruth carried a grudge against him because

he failed to complete the proper paperwork for her to enter the United States from Nigeria. 10RP 70. Ruth fabricated the domestic violence between her and Ayodeji so she could attain a green card. 10RP 77-78. Ayodeji also defaulted on a loan from Ruth's family, so she always resented him. 10RP 74-75, 151-52. Ayodeji explained Ruth brainwashed the girls and staged the video with E.A. to get back at him. 10RP 149; 11RP 43-44.

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

The jury found Ayodeji guilty on all counts. CP 48-61. Ayodeji received an indeterminate sentence of 486 months, 168 months above the standard range. CP 10-13. Ayodeji appealed. CP 8.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

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

At Ayodeji's trial, the State introduced a two-minute video of E.A. allegedly performing oral sex on Ayodeji. 5RP 46-47; 9RP 150-52. The

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

On appeal, Ayodeji argued that playing recorded media exhibits implicates the public trial right under the experience and logic test, and the procedure used at his trial of purposefully excluding the public from viewing the exhibit constituted a courtroom closure. Br. of Appellant, at 36-45.

Noting no published Washington decision had yet considered this issue, the court of appeals held the public trial right attaches to the presentation of exhibits under the experience and logic test. Opinion, at 7-8. The court explained the admission and introduction of evidence has historically taken place in open court, meeting the experience prong. Opinion, at 7. Providing access to all admitted exhibits encourages witnesses to come forward, meeting the logic prong. Opinion, at 7.

The court, however, held there was no courtroom closure. Opinion, at 9-10. In so concluding, the court used the experience and logic test to determine whether there was a closure, citing In re Yates. 177 Wn.2d 1, 28-

29, 296 P.3d 872 (2013). Opinion, at 8. The Yates court stated only that "[a] commonly used test to determine if a closure occurred is the experience and logic test." 177 Wn.2d at 28-29. Since Yates, however, the relevant test for closure is whether a portion of the trial was held someplace inaccessible to spectators. State v. Love, 183 Wn.2d 598, 606, 354 P.3d 841 (2015).

The experience and logic test is used to determine whether the public trial right attaches, not whether a closure occurred. See State v. Gomez, 183 Wn.2d 29, 33-34, 347 P.3d 876 (2015) (conducting closure analysis without applying experience and logic test). This Court's review is warranted under RAP 13.4(b)(1) and (b)(2) to clarify Yates and correct the court of appeals' conclusion that the experience and logic test applies to the closure analysis.

The court of appeals next acknowledged it was "clear from the record that the parties deliberately prevented the public from viewing the video." Opinion, at 9. The court nevertheless concluded that under Love, there was no closure because "the public was able to observe the State offer the video into evidence, see who authenticated the exhibit, and get a general sense of its content from the testimony about it." Opinion, at 9-10. The court believed Ayodeji's case was "nearly indistinguishable from Love," where the parties exercised their peremptory challenges in writing, but the public was present during all of jury selection and saw which jurors were ultimately empaneled. Opinion, at 10; Love, 183 Wn.2d at 607.

This Court's review is warranted under RAP 13.4(b)(3) to determine whether Love applies in this scenario. So far this Court has applied Love only in the context of jury selection. See, e.g., State v. Marks, 185 Wn.2d 143, 144-45, 368 P.3d 485 (2016) (no closure where peremptory challenges were exercised at a sidebar). It remains an open question whether Love applies so broadly as to encompass the purposeful exclusion of the public from viewing published exhibits. In Ayodeji's case, the identity of the man in the video was a primary issue at trial. The public trial goal of encouraging witnesses to come forward was destroyed without public scrutiny. See State v. Sublett, 176 Wn.2d 58, 72, 292 P.3d 715 (2012).

2. DISMISSAL IS NECESSARY WHERE THERE IS INSUFFICIENT EVIDENCE TO SUPPORT SOME OF THE MULTIPLE ACTS ALLEGED.

Ayodeji was charged and convicted of two counts of first degree child molestation of F.A., counts V and VI. These charges were based on multiple alleged acts. Some of the acts are supported by substantial evidence, for the purposes of the sufficiency standard of review. The trial court properly instructed the jury it had to unanimously agree as to which acts of molestation had been proved. CP 72.

However, F.A. alleged two incidents that involved touching over her clothing and touching of a body part outside the primary erogenous zones. 7RP 13-14; 8RP 121-23. Under Washington law, additional

evidence of Ayodeji's sexual gratification was therefore required. State v. Powell, 62 Wn. App. 914, 917, 816 P.2d 86 (1991). But there was no such evidence, like rubbing the areas in question or that Ayodeji's penis was erect. Given this lack of evidence, no inference can be made that the touching occurred for Ayodeji's sexual gratification. Hence, there is insufficient evidence that these incidents constituted molestation.

In State v. Kier, 164 Wn.2d 798, 808, 194 P.3d 212 (2008), the State argued Kier's assault and robbery convictions did not merge because they were committed against separate victims. Noting the case before it was "somewhat analogous to a multiple acts case," the court indicated it was at best unclear whether the jury believed Kier committed the crimes against the same or different victims. Id. at 811. The rule of lenity requires ambiguous jury verdicts to be resolved in the defendant's favor. Id. Therefore, because the evidence and instructions allowed the jury to consider whether a single person was the victim of both the robbery and assault, the verdict was ambiguous and it would violate double jeopardy to not merge offenses. Id. at 814.

In State v. Whittaker, 192 Wn. App. 395, 400-01, 367 P.3d 1092 (2016), Kier was convicted of felony stalking and felony violation of a no-contact order. The no-contact order violation elevated the stalking offense to a felony. Id. at 415. At trial, the State introduced evidence of several

instances when Whittaker violated the no-contact order. Id. at 416. The verdict was therefore ambiguous as to which of these multiple acts elevated stalking to a felony. Id. at 415. The rule of lenity required the conviction for violation of the no-contact order to merge into the stalking conviction. Id. at 417.

Under Kier and Whittaker, the verdict in Ayodeji's case is ambiguous as to which acts the jury relied on to convict for child molestation of F.A. Thus, Ayodeji argued on appeal, the court could not say whether the jury believed Ayodeji molested F.A. by one of the insufficient acts. Br. of Appellant, 21. The rule of lenity requires this ambiguous verdict to be resolved in Ayodeji's favor. Dismissal of the two child molestation convictions related to F.A. is therefore necessary to safeguard against the risk that the jury relied on acts not supported by sufficient evidence.

The court of appeals rejected Ayodeji's argument, holding "[t]he jury could not have relied on acts for which there is insufficient proof because the court instructed the jury on the elements of child molestation and the court presumes that jurors follow their instructions." Opinion, at 10. In reaching this conclusion, the court relied on State v. Stark, 48 Wn. App. 245, 738 P.2d 684 (1987). Opinion, at 11-12.

Stark was convicted of first degree statutory rape. Stark, 48 Wn. App. at 250-51. The complaining witness described three separate instances of sexual abuse, two of which could have constituted "sexual intercourse." Id. at 246-47. The other instance was insufficient to support a statutory rape conviction. Id. at 251. On appeal, Stark argued the verdict was defective because the jury did not specify the act upon which they agreed. Id. at 251. Therefore, Stark asserted, the court could not be sure the jury did not rely on the insufficient act. Id. This court disagreed because the jury was instructed they must unanimously agree that "the same act of sexual intercourse had been proven beyond a reasonable doubt." Id. The court presumed the jury followed this instruction, and concluded the jury could not have relied on the one act that did not come within the definition of "sexual intercourse." Id.

Stark cannot be squared with this Court's decision in Kier, or the court of appeals' decision in Whittaker. Ambiguous verdicts, like the ones there and here, must be resolved in the defendant's favor. Stark did not do so, and is therefore in conflict with the more recent jurisprudence discussed. This Court should grant review under RAP 13.4(b)(1), (b)(2), and (b)(3) to correct Stark's longstanding misapplication of the law.

3. THE TRIAL COURT'S FAILURE TO GIVE A PETRICH INSTRUCTION FOR THE RAPE CHARGES PREJUDICIALLY DENIED AYODEJI HIS RIGHT TO A UNANIMOUS JURY VERDICT.

To protect the accused's constitutional right to a unanimous jury verdict in a multiple acts case, either the State must elect the act on which it relies, or the trial court must instruct the jury to unanimously agree the State proved the same criminal act beyond a reasonable doubt—a Petrich[1] instruction. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988).

The trial court gave a Petrich instruction on child molestation. CP 72. However, multiple acts of rape were also alleged for both girls. The trial court failed to give a Petrich instruction on the two first degree child rape charges, as well as the second degree child rape charge. The State did not elect the specific acts in closing, either. On appeal, Ayodeji argued this violated his right to a unanimous jury verdict on the rape convictions and required reversal. Br. of Appellant, 15-22.

The court of appeals agreed in part: "the court failed to give a Petrich instruction for the child rape counts. Although the evidence for each count focused on a specific act, the State provided evidence of multiple acts for two of the counts. The State did not elect specific acts in its closing argument. This failure is a constitutional error." Opinion, at 14.

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[1] State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), overruled in part by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988).

The court nevertheless concluded "the error was harmless because if the jury believed E.A.'s and F.A.'s testimony for the rapes described in detail it would have no reasonable doubts about the other rapes." Opinion, at 15. Failure to give a Petrich instruction in a multiple acts case is presumed prejudicial. Kitchen, 110 Wn.2d at 411. This presumption is overcome only if no rational juror could have a reasonable doubt as to any of the incidents alleged. Id..

For instance, in Kitchen, this Court reversed where the child detailed the place and circumstances of several incidents that could constitute statutory rape. 110 Wn.2d at 406, 412. Yet some evidence weakened her story. For example, she was not always certain as to exact dates. Id. The defense also introduced several of her past contradictory statements, including where she said the allegations were fabricated. Id. at 406-07.

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

made the unanimity error prejudicial. State v. Coleman, 159 Wn.2d 509, 513, 150 P.3d 1126 (2007).

Here, the court of appeals acknowledged there were several inconsistencies and recantations in E.A.'s and F.A.'s testimony, which this petition recounts at length in the statement of the case. Opinion, at 17-18. However, the court held that, given those inconsistencies and recantations, the jury must have not considered several of the multiple acts. For instance, on the first degree rape charge related to E.A., the court noted several other acts, but then concluded "evidence of these acts, consisting only of contradicted hearsay, was insufficient to consider them part of the multiple acts submitted to the jury." Opinion, at 17 n.18. But that hearsay was never objected to or excluded, so it was properly before the jury. The court likewise discounted another act of sexual intercourse involving E.A. where she could not remember whether it happened before or after she turned 12 years old: "We do not consider this one of the acts for count 1."[2] Opinion, at 17 n.18. This is plainly inconsistent with Petrich and Kitchen.

The court essentially discounted those acts that were inconvenient for reaching the result that it wanted. The court seemingly applied the

[2] The court conveniently discounted E.A.'s testimony that lacked dates, which allowed it to conclude "there were not multiple acts" of first degree rape as to E.A. Opinion, at 17. Later, however, the court concluded "there is no need for dates and times because Ayodeji's defense was blanket denial." Opinion, at 19. These two conclusions cannot be squared.

Stark case, discussed above, to Petrich cases, to conclude the jury will not consider any act that is not supported by sufficient evidence. In doing so, the court rendered the Petrich harmless error standard a nullity. Of course in a case where there is prejudicial Petrich error some of the acts will not be supported by overwhelming evidence. This is exactly the standard: whether the jury could have entertained a reasonable doubt as to any one of the acts alleged. Ayodeji has met this standard.

The court further misconstrued the harmless error standard by discounting E.A.'s and F.A.'s numerous denials of sexual abuse. Opinion, at 18. For instance, sometime after 2009 but before 2013, both girls said they lied about Ayodeji touching them. 7RP 85-86, 102-03. In 2010, during a sexual assault examination, E.A. denied any sexual abuse. 6RP 46-47, 57-58. In 2013, E.A. told a nurse she was a virgin. 9RP 51-52.

The court rejected these denials as being either too specific or too general. For instance, the court discounted the denials because they "were unrelated to any particular act." Opinion, at 18. Contradicting this reasoning, the court then discounted the girls' recantations because they "were earlier and for different acts." Opinion, at 18. Thus, it seems, neither general nor specific denials, inconsistencies, or recantations can meet the Petrich prejudice standard under the court's logic. One wonders

what type of inconsistencies *could* meet the court's exceedingly high standard, which has no basis in the well-established law in Washington.

Without an election, this Court has no way of knowing which alleged acts of rape the jury relied on to convict. Without a Petrich instruction, there is no guarantee the jury unanimously agreed on the acts supporting the rape convictions. With so many different acts and so many inconsistencies, there is no way to ensure Ayodeji's right to a unanimous verdict was protected without retrial. This Court's review is thus warranted under RAP 13.4(b)(1), (b)(2), and (b)(3), given the court of appeals' erroneous broadening of the Petrich harmless error standard.

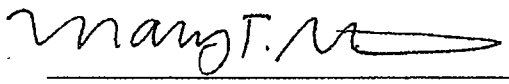
E. CONCLUSION

For the aforementioned reasons, Ayodeji respectfully asks this Court to grant review under RAP 13.4(b)(1), (b)(2), and (b)(3).

DATED this 16th day of February, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOHNSON OMOTERE AYODEJI, Appellant.	)	No. 72359-6-I DIVISION ONE UNPUBLISHED OPINION FILED: January 17, 2017

TRICKEY, A.C.J. — A jury convicted Johnson Ayodeji of several counts of child molestation and child rape against two of his daughters. He appeals, raising several issues, including a right to a public trial violation and the lack of a jury instruction on unanimity for some of the multiple acts charges. We hold that the trial court did not violate Ayodeji's right to a public trial because it did not close the courtroom. We also hold the only instructional error was harmless beyond a reasonable doubt. We affirm.

FACTS

Johnson Ayodeji and Ruth Ayodeji[1] married in 1998. They had their first daughter, E.A., in early 2001, when they were living in Chicago, Illinois. The family moved to Oak Harbor, Washington shortly after E.A.'s birth. Their second daughter, F.A., was born in early 2002.

In the next few years they moved several times, with Ayodeji sometimes living with his family and sometimes not. In 2004, Ruth entered a domestic violence shelter with the girls. They moved among different shelters and YWCA [2]

[1] For the sake of clarity, we refer to Ruth Ayodeji by her first name. We intend no disrespect.
[2] The Young Women's Christian Association.

housing until 2005 or 2006. They lived together again as a family in Lynwood, Washington and had twin daughters.[3]

Ayodeji started abusing E.A. around this time or earlier. Her first memory of him abusing her was before they moved to their current house. E.A. described it in a letter to her mother. Ayodeji would touch her breasts and butt and, at least once, put his penis in her butt.

For unrelated reasons, Ruth obtained a restraining order against Ayodeji in 2008. Soon after they started living without Ayodeji, F.A. told Ruth that Ayodeji had touched her private parts and E.A.'s private parts. E.A. confirmed it but would not give more details. Ruth relayed F.A.'s account to Child Protective Services (CPS). The State did not bring charges based on those allegations.

In 2009, Ruth found F.A. and E.A. "having oral sex with each other."[4] F.A. told Ruth that "[D]addy did that."[5] Ruth brought her daughters to a family friend, who was a counselor, to talk about it. Both girls told the counselor that their father had done it to them in their family's computer room. The counselor notified CPS.

E.A. and F.A. would not talk to CPS or the prosecutor's office about the abuse. After several months, the authorities dropped the case. Ayodeji moved out of state and the family did not see him for almost three years.

Around this time, E.A. and F.A. would occasionally write letters to their mother. Some of these letters described sexual abuse by Ayodeji. Later, the girls told their mother that what they had written was not true. They said they had

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[3] Sometime later, Ruth and Ayodeji had another set of twins.
[4] Report of Proceedings (RP) (July 24, 2014) at 66.
[5] RP (July 24, 2014) at 67.

learned sexual activity from the computer and blamed it on their father because they were mad at him.

In January 2013 Ayodeji moved in with his family in Everett. Once, when Ayodeji was trying to show Ruth family pictures on his cell phone, Ruth saw that Ayodeji had a video of E.A. masturbating.

Ayodeji had begun abusing E.A. again. E.A. had just turned 12 years old. Ayodeji would touch E.A. with his penis in their computer room, his bedroom, and in her bedroom. At least once, Ayodeji video recorded E.A. in her bedroom being forced to perform oral sex. Ayodeji entered E.A.'s bedroom and raped her.

Ayodeji would make F.A. give him an erection by applying lotion with her hands. Sometimes Ayodeji would touch her vagina with his hands. Ayodeji usually molested F.A. in her own bedroom, but sometimes they were in his bedroom. Once or twice Ayodeji abused F.A. and E.A. simultaneously, in E.A.'s bedroom.

On May 17, 2013, sometime during the very early morning hours, Ruth found Ayodeji in F.A.'s bed, "having sex" with F.A.[6] Ayodeji was wearing only his boxer shorts. When Ruth discovered them, she screamed and ran upstairs. He followed after her, telling her that he had been just hugging F.A. and that his penis was not hard. Ruth noticed that the flap of his boxer shorts was wet.

Ruth spoke to a former co-worker, who was working for CPS at the time, about how to handle the situation. She reported the incident to the police. The State charged Ayodeji with several counts of child rape and child molestation. The charges included one count of child rape in the first degree and two counts of child

[6] RP (July 24, 2014) at 125; RP (July 25, 2014) at 88-89.

molestation of F.A., and one count of rape of a child in the first degree, one count of rape of a child in the second degree, and two counts of child molestation of E.A.

E.A. and F.A. were examined at a hospital and spoke with a child interview specialist. E.A. was very reserved with the interviewer when they began to discuss the abuse. To help make E.A. more comfortable, the interviewer had E.A. write down her answers.[7] E.A. told the interviewer that her father had not taken any pictures of her.

After they returned from the interviews, F.A. called the prosecutor's office and left a voicemail that E.A. had forgotten to tell the interviewer that their father had a video of E.A. "sucking his D."[8] E.A. told a detective that Ayodeji "videoed [sic] her on her bed . . . while she was giving him oral sex."[9]

Ruth provided the police with a removable secure digital (SD) card[10] from one of Ayodeji's cell phones, which she had found in Ayodeji's car. A computer forensic specialist found the video that E.A. had described on the SD card, though it had been deleted.

The forensic specialist determined that the video was created on May 8, 2013. The SD card also had two images that looked like they were from the same episode. A digital imaging specialist found similar images of a young girl touching an adult male penis on Ayodeji's cell phone. The man's face was not visible in the video or pictures.

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[7] RP (July 28, 2014) at 75.
[8] RP (July 29, 2014) at 23; RP (July 22, 2014) at 37.
[9] RP (July 29, 2014) at 24.
[10] An SD card is used to store data, including pictures and videos, in cell phones and cameras.

At trial, F.A. described the incident on May 17 in more detail and testified that it had happened more than once.

At trial, Ruth identified the man in the in pictures with E.A. as Ayodeji by his boxer shorts and private parts. She also testified that there were no other dark-skinned adult men who were in the house with any regularity. Ayodeji argued that Ruth was fabricating all the evidence to get him out of their lives and to get back at him for some misdeeds in the past.

The trial court admitted a Christmas card and letter that Ayodeji sent Ruth and the children after he was arrested. The letter and card were mostly about Christian values and Ayodeji's beliefs. Ruth testified that she felt he was using the Bible to tell her she should forgive him.

The trial court admitted the video of E.A. pulled from Ayodeji's SD card as an exhibit. The State played the video in the courtroom during the trial. The State intentionally set up the television so that the parties and jurors could see it but the spectators could not. Ayodeji took "no position" on how they displayed the video.[11]

The jury convicted Ayodeji of all charges. He appeals.

ANALYSIS

Public Trial

Ayodeji argues that the trial court violated his right to a public trial when it played the video recovered from the SD card so that the public could not see it. Because we hold that there was no courtroom closure, we disagree.

Criminal defendants have a right to a public trial, stemming from the

[11] RP (July 28, 2014) at 106.

constitutional guarantee that "[j]ustice in all cases shall be administered openly" and the defendant's constitutional right to a "speedy public trial." WASH. CONST. art. I, § 10, 22; State v. Love, 183 Wn.2d 598, 604-05, 354 P.3d 841 (2015). The right to a public trial "ensure[s] a fair trial, . . . remind[s] the prosecutor and [the] judge of their responsibility to the accused and the importance of their functions, . . . encourage[s] witnesses to come forward, and . . . discourage[s] perjury." State v. Sublett, 176 Wn.2d 58, 73, 292 P.3d 715 (2012).

The court must determine first, whether the public trial right is implicated, second, whether there was a closure, and third, whether the closure was justified. State v. Smith, 181 Wn.2d 508, 513, 334 P.3d 1049 (2014). We review whether the trial court violated a defendant's right to a public trial de novo. Smith, 181 Wn.2d at 513.

Right to a Public Trial Implicated

"[N]ot 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." Sublett, 176 Wn.2d at 71. The court applies a two-prong "experience and logic" test to see whether the right to a public trial attaches to a particular proceeding. Sublett, 176 Wn.2d at 73. Under that test, the defendant must show both that the "'place and process have historically been open to the press and general public'" and that "'public access plays a significant positive role in the functioning of the particular process in question.'" Sublett, 176 Wn.2d at 73 (quoting Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8-10, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)).

No published Washington decision has determined whether the right to a public trial attaches to the presentation of exhibits in the courtroom. But exhibits are a form of evidence. And the right to a public trial attaches to evidentiary phases of the trial. Sublett, 176 Wn.2d at 71-72. The admission and the introduction of evidence has historically taken place in open court. Thus, the experience prong weighs in favor of holding that the right to a public trial attaches to this phase of proceedings.

The public cannot fully "observe the process and weigh the defendant's guilt or innocence" if it has no access to a crucial exhibit. See Smith, 181 Wn.2d at 518. Providing access to all admitted exhibits also encourages witnesses to come forward. Therefore, logic also weighs in favor of ensuring some access to trial exhibits.

Recently, in State v. Magnano, this court strongly suggested that the right to a public trial requires the playing of audio exhibits in court. 181 Wn. App. 689, 699, 326 P.3d 845 (2014). There, the court held that allowing the jury to replay audio recordings in a closed courtroom during deliberations did not violate the defendant's right to a public trial. Magnano, 181 Wn. App. at 700. But the court noted that the purposes of a public trial had already been "served by offering audio recording evidence, admitting it or not, and playing it for the jury in open court." Magnano, 181 Wn. App. at 699. We conclude that the right to a public trial does attach to the use of exhibits.

The State argues that the public trial right does not attach here because exhibits have not historically been made available for spectators to view and

handle.[12] But exhibits have historically been presented in open court. We conclude that the manner in which parties have historically presented evidence relates more to whether there was a closure, which we discuss next.

Closure

Two kinds of closures impact a defendant's right to a public trial. The first, an express closure, occurs "when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). The second kind of closure occurs when the proceeding is "held someplace 'inaccessible' to spectators, usually in chambers." Love, 183 Wn.2d at 606 (quoting Lormor, 172 Wn.2d at 93). The court uses the experience and logic test to determine whether there was a closure. In re Yates, 177 Wn.2d 1, 28-29, 296 P.3d 872 (2013).

Experience and logic do not suggest that there is a closure every time an admitted exhibit is not displayed to the spectators. Some exhibits go back to the jury for deliberations without ever being published to the jury in the courtroom.[13] The public gains access to those exhibits when they become part of the court

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[12] Relying on a similar argument, several federal cases have held that there was no violation of the public trial right when the court did not play audio evidence for all spectators to hear. Gillars v. United States, 182 F.2d 962, 977-78 (D.C. Cir. 1950); United States v. Lnu, 575 F.3d 298, 308 (3rd Cir. 2009); D'Aquino v. United States, 192 F.2d 338, 365 (9th Cir. 1951). But in those cases, the courts did not follow the three steps outlined in Smith. See 181 Wn.2d at 513.

In Gillars, the court also provided a limited number of earphones to spectators and members of the press. 182 F.2d 977-78. There may have been no violation because there was no closure, not because the right to a public trial did not attach. Similarly, in Lnu, the court noted "the limited nature of [its] holding" and emphasized that the recordings were already in the public record and available for public scrutiny when played via headphones. 575 F.3d at 308.

[13] In this case, for example, the State read some but not all of exhibit 65 during its examination of Ruth, and noted "the jury can read this later." RP (July 25, 2014) at 16.

record. GR 31(a), (c)(4).

In Love, the defendant argued that there was a closure during voir dire because the attorneys discussed challenges for cause at the bench, which the spectators could not hear, and exercised their peremptory challenges in writing. 183 Wn.2d at 604. The court rejected this argument because the public was present in the courtroom during all of jury selection, observed the questioning of jurors, and saw which jurors were ultimately empaneled. Love, 183 Wn.2d at 607. The court held that the public's presence during this process served to remind "those involved about the importance of their roles and [would] hol[d] them accountable for misconduct." Love, 183 Wn.2d at 606-07.

Noting that the transcript of the bench discussions and the struck juror sheet were "both publically available," the court held that the public "could scrutinize the selection of Love's jury from start to finish." Love, 183 Wn.2d at 607. The court emphasized the role that the public record plays in public trial cases by holding that, "written peremptory challenges are consistent with the public trial right so long as they are filed in the public record." Love, 183 Wn.2d at 607.

Here, Ayodeji does not maintain that there was an express closure. Instead, he argues that preventing the public from seeing the exhibit during trial amounted to a closure. It is clear from the record that the parties deliberately prevented the public from viewing the video. The public was not able to see the content of the video, just as the public could read not the written peremptory challenges in Love. But the public was able to observe the State offer the video into evidence, see who authenticated the exhibit, and get a general sense of its content from the testimony

about it. Thus, this case is nearly indistinguishable from Love. There was no closure.

Ayodeji argues that, unlike the written challenges in Love, the video never became a part of the public record. Therefore, it was never subject to public scrutiny. But, as the parties explained during oral argument, the decision not to place the video in the public record came after trial, and after proper consideration of the Ishikawa factors.[14] See Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 38, 640 P.2d 716 (1982). We hold that the trial court did not violate Ayodeji's right to a public trial.

Sufficiency of Evidence

Ayodeji argues next that it is impossible to determine whether the jury's verdict relied on acts of child molestation for which there was insufficient proof. The State alleged multiple acts of child molestation but provided insufficient evidence to convince a jury beyond a reasonable doubt that some of those acts occurred. Therefore, Ayodeji argues, the child molestation convictions should be vacated and dismissed. We disagree. The jury could not have relied on acts for which there is insufficient proof because the court instructed the jury on the elements of child molestation and the court presumes that jurors follow their instructions.

[14] Wash. Court of Appeals oral argument, State v. Ayodeji, No. 72359-6-I (July 26, 2016), at 13 min., 40 sec. to 14 min., 16 sec.; 20 min., 27 sec. to 21 min., 20 sec. During discovery, the parties agreed to a protective order, restricting either party from making copies of the image and audio evidence and requiring that it not be "given, loaned, sold, shown, displayed or in any way provided to any member or associate of the media, the public, or third parties unless expressly permitted by court order, or during trial." Clerk's Papers (CP) at 156. In his briefing, Ayodeji treated this order as sealing the exhibit.

The State bears the burden of proving every element of a charged crime beyond a reasonable doubt. State v. Larson, 184 Wn.2d 843, 854, 365 P.3d 740 (2015). We review all evidence in the light most favorable to the State. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In State v. Stark, the State charged the defendant with one count of rape and one count of indecent liberties. 48 Wn. App. 245, 246-47, 738 P.2d 684 (1987). The victim recounted three times that the defendant had abused her. Stark, 48 Wn. App. at 250. Only two of these acts would have met the statutory definition of rape. Stark, 48 Wn. App. at 250-51. The jury convicted the defendant. Stark, 48 Wn. App. at 247. The defendant argued that the court could not tell whether the jury relied on the one act that did not meet the definition. Stark, 48 Wn. App. at 251. The trial court instructed the jury on the elements of the crime. Stark, 48 Wn. App. at 251. The court held that, because reviewing courts assume that juries follow their instructions, the jury could not have relied on the act that did not satisfy the elements of the crime. Stark, 48 Wn. App. at 251.

Here, the trial court instructed the jury on the elements of child molestation: the defendant must have had sexual contact with a victim who is less than 12 years old, not married to the defendant, and at least 36 months younger than the defendant. The instructions also defined sexual contact as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party."[15] Finally, the court instructed the jury that it must unanimously agree on which acts of child molestation it relied.

[15] CP at 81.

Ayodeji argues that many of his contacts with his daughters do not fit the definition of sexual contact because there is insufficient evidence that those acts were for the purpose of sexual gratification. Accordingly, this court cannot be certain that the jury relied on acts supported by sufficient proof. We disagree.

This case is indistinguishable from Stark. Ayodeji concedes that some of the child molestation acts are supported by sufficient evidence. Assuming that the jury followed its instructions, it could not have convicted Ayodeji without unanimously concluding that, on specific occasions, he touched the sexual parts of his daughters for sexual gratification. There was no error.

Jury Unanimity

Ayodeji argues that the trial court erred by failing to give an instruction on jury unanimity for the rape of a child charges in this multiple acts case, and that the error was not harmless beyond a reasonable doubt. We agree that this was error but conclude it was harmless.

The jury's verdict must be unanimous. WASH. CONST. art. 1, § 22. Thus, when the evidence shows that the defendant committed multiple acts, the jury must agree upon which act it is relying for a guilty verdict. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), holding modified by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988). An instruction on jury unanimity for a multiple acts case is commonly referred to as a Petrich instruction.

Invited Error & Issue Preservation

As an initial matter, the State argues that Ayodeji invited any error on this issue by failing to propose a Petrich instruction for the child rape counts while

suggesting other modifications to the to-convict instruction for those counts. We disagree. Ayodeji had no duty to request a Petrich instruction and his suggestions regarding the to-convict instruction concerned double jeopardy, not jury unanimity.

A defendant cannot seek appellate review of an error he creates. State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990). This court has refused to review the failure to give a Petrich instruction where the defendant "strenuously opposed the trial court's plan to give" one. State v. Carson, 179 Wn. App. 961, 973-74, 320 P.3d 185 (2014) aff'd, 184 Wn.2d 207, 357 P.3d 1065 (2015). But acquiescing in a trial court's erroneous instruction, or failing to object to it, is not the same as inviting that error. State v. Corn, 95 Wn. App. 41, 56, 975 P.2d 520 (1999). The State "ordinarily assumes the burden of proposing an appropriate and comprehensive set of instructions." State v. Hood, 196 Wn. App. 127, 382 P.3d 710, 713 (2016).

Here, Ayodeji did not propose an erroneous jury instruction. Ayodeji did not object to giving a Petrich instruction for the child rape counts. He had no opportunity to object to the instruction—no one proposed one. During the parties' discussion about jury instructions, Ayodeji pointed out that the to-convict instructions needed to make it clear that, for each count of child molestation, the act needed to be "separate and distinct" not only from the other acts of child molestation, but also from the acts constituting child rape.[16] Ayodeji expressed his concern that, without that modification, the jury could say that the same conduct constituted sexual intercourse and child molestation. It is clear from the record

[16] RP (July 29, 2014) at 160.

that Ayodeji's suggestions were geared toward avoiding double jeopardy, rather than securing jury unanimity. Ayodeji did not invite this error.

But Ayodeji also did not object to the trial court's failure to give a Petrich instruction for child rape charges. Ordinarily, this court does not review issues raised for the first time on appeal. RAP 2.5(a). But, because of the constitutional implications of failing to give a Petrich instruction, courts have held that a defendant may raise the issue for the first time on appeal. RAP 2.5 (a)(3); State v. Fiallo-Lopez, 78 Wn. App. 717, 725, 899 P.2d 1294 (1995); State v. Holland, 77 Wn. App. 420, 424, 891 P.2d 49 (1995). Ayodeji may raise this issue.

Jury Instructions

Ayodeji argues that the failure to give a Petrich instruction for the child rape counts violated his right to a unanimous verdict. The State responds that, when viewed as a whole, the jury instructions informed the jury that it had to be unanimous about which act it relied on for each count of child rape. We disagree.

As mentioned above, a criminal defendant has a constitutional right to a unanimous jury verdict. Petrich, 101 Wn.2d at 572. If the State presents evidence of multiple acts, it must either elect which act it wishes the jury to rely on for the conviction, or have the court instruct the jury that it must unanimously agree on a specific act to support the conviction. Petrich, 101 Wn.2d at 572.

Here, the court failed to give a Petrich instruction for the child rape counts. Although the evidence for each count focused on a specific act, the State provided evidence of multiple acts for two of the counts. The State did not elect specific acts in its closing argument. This failure is a constitutional error.

The State argues that the instructions informed the jury that it had to reach a unanimous decision on the child rape counts. We disagree. The only Petrich instruction that the trial court gave focused exclusively on the child molestation counts. There is no reason for a reviewing court to assume that the jury would have known that the Petrich instruction also applied to the child rape counts. The State asserts that a combination of the child molestation Petrich instruction, unanimous verdict instruction, and "separate and distinct" act language in the to-convict instruction was sufficient here.[17] But the State cites no authority for the position that other jury instructions can remedy the lack of a proper Petrich instruction.

The State also argues that there was no error because the State told the jury that it had to be unanimous on each of the seven counts during its closing argument. Again, the State cites no authority that discussing unanimity in its closing argument, which at best supplements the trial court's instructions, renders a Petrich instruction unnecessary.

Harmlessness

Ayodeji contends that the failure to give a unanimity instruction for these counts was not harmless. He argues his daughters' credibility was undermined by their past recantations and the inconsistencies between their trial testimony and previous reports of abuse. We conclude that the error was harmless because if the jury believed E.A.'s and F.A.'s testimony for the rapes described in detail it would have no reasonable doubts about the other rapes.

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[17] CP at 73-74.

A reviewing court presumes that the failure to give a Petrich instruction is prejudicial. State v. Coleman, 159 Wn.2d 509, 512-13, 150 P.3d 1126 (2007). The court will uphold the conviction "only if no rational juror could have a reasonable doubt as to any of the incidents alleged." Coleman, 159 Wn.2d at 512. This court considers the error harmless when there is "no rational basis for jurors to distinguish among the acts." State v. Allen, 57 Wn. App. 134, 139, 787 P.2d 566 (1990). But, the error is not harmless when there is "conflicting testimony" about the different acts, including when the complaining witness has made contradictory statements. Kitchen, 110 Wn.2d at 412.

In State v. Loehner, a child victim described one act of rape in detail and then said that the same thing happened other times. 42 Wn. App. 408, 409-10, 711 P.2d 377 (1985). The court held that the error was harmless because "[i]f the rational trier of fact entertained a reasonable doubt as to the episode described in detail, of necessity [it] would have a reasonable doubt as to the subsequent ones, also." Loehner, 42 Wn. App. at 410; see also Allen, 57 Wn. App. at 139; State v. Camarillo, 115 Wn.2d 60, 71-72, 794 P.2d 850 (1990).

In Kitchen, the court held that the error was not harmless because the jury heard "conflicting testimony" about each act. 110 Wn.2d at 412. But, in State v. Bobenhouse, the court held that a unanimity instruction error was harmless when the uncontroverted evidence was that a father had forced his son "to regularly perform fellatio on him and . . . inserted his finger into [the son's] anus on at least one occasion." 166 Wn.2d 881, 886, 894-95, 214 P.3d 907 (2009).

Here, Ayodeji was charged with three counts of child rape. The charging

period for the first count, first degree child rape of E.A., was January 8, 2006 through January 7, 2013. The evidence for this count was a letter that E.A. wrote to her mother saying that Ayodeji put his penis in her butt. The State did not submit other acts for this count.[18] Because there were not multiple acts, there was no error.

The second count, first degree child rape of F.A., had a charging period of February 9, 2007 through May 17, 2013. The main episode for this count was that, on May 17, 2013, Ruth caught Ayodeji on top of F.A., apparently "having sex."[19] F.A. testified that it had happened several other times.

Finally, the third count was second degree child rape of E.A. Because the charging period for this count started after E.A. turned 12, it was considerably shorter, only January 9, 2013 through May 17, 2013. There was a video of E.A. being forced to perform oral sex acts within this period.[20] Ayodeji also put his penis in E.A.'s vagina, after she turned 12.

Relying on alleged inconsistencies and recantations, Ayodeji argues that

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[18] There was also testimony, from Ruth, that Ayodeji had performed oral sex on both of his daughters in 2009, which is during the charging periods for the first two rape of a child counts. Ruth testified that her daughters told her Ayodeji had performed oral sex on them, after Ruth had caught them having oral sex with each other. But, later, the girls told her that they had learned the sexual information from the computer but blamed it on their father because they were "mad" at him and "he was gone." RP (July 24, 2014) at 105. E.A. and F.A. did not testify about these incidents.

The evidence of these acts, consisting only of contradicted hearsay, was insufficient to consider them part of the multiple acts submitted to the jury. See State v. Jones, 71 Wn. App. 798, 822-23, 863 P.2d 85 (1993).

Similarly, E.A. testified that her father "came in [her] room and made [her] have sex with him." RP (July 25, 2014) at 188. No one, including E.A., provided any evidence from which a jury could conclude that this occurred before E.A. turned 12. We do not consider this one of the acts for count I. See Jones, 71 Wn. App. at 822-23.

[19] RP (July 24, 2014) at 124-25.

[20] There were also photographs of E.A. with her hand on an adult male's penis, but those are relevant to other counts because they are evidence of child molestation, not child rape.

the error was not harmless. Most of the inconsistencies Ayodeji points out between E.A.'s and F.A.'s trial testimony and their earlier reports of abuse related to acts not amounting to rape or related to events before the rapes that E.A. and F.A. described.[21] Similarly, most of the recantations Ayodeji cites were earlier and for different acts.[22]

Ayodeji also challenges his daughters' credibility in general and cites their denials of sexual abuse that were unrelated to any particular act.[23] But, in order to convict Ayodeji, the jury would have had to find E.A. and F.A. credible. This is not a case where either E.A. or F.A. recanted their allegations for some of the rapes within the charging period but remained consistent about other acts. The various challenges to their credibility would not allow a jury to distinguish between the rapes.

Ayodeji argues that the instruction was not harmless for the second rape of a child count because F.A.'s testimony about the other rapes was too uncertain and vague. F.A. testified that the rapes happened "all the time" but could not

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[21] For example, F.A. testified that her father had made her use lotion to make his penis hard and that it had happened in various rooms. She did not mention that during earlier interviews.

[22] Both E.A. and F.A. denied the abuse or said they could not remember some aspects of the abuse in 2010. E.A. told an interviewer in 2013 that her father had never taken sexual pictures of her. The sexual photographs recovered in this case show E.A. touching Ayodeji's penis. The visual evidence of acts amounting to rape was a video. Ayodeji does not point out any testimony in which E.A. told someone her father had never taken video of her.

[23] For example, both E.A. and F.A. said at one point that Ayodeji gave them money after the May 17, 2013 incident, but later said he had not. Ayodeji testified that Ruth had said F.A. would "makeup [sic] any story." RP (July 29, 2014) at 120-21. F.A. also, apparently, wrote in her journal that Ayodeji had gotten her pregnant. E.A. told a nurse practitioner that she was a virgin in 2010, but she made that statement during a forensic examination that she did not want to cooperate with, and there was also no testimony showing that E.A. knew what the word meant.

explain the frequency with any more specificity.[24] In Kitchen, the uncertainty about dates and times mattered because there was conflicting testimony about each of the acts. 110 Wn.2d at 406-07, 412. But, here, there is no need for dates and times because Ayodeji's defense was a blanket denial. This case more closely resembles Bobenhouse, where the same acts occurred regularly. See 166 Wn.2d at 886, 894-95. F.A.'s testimony did not suggest any confusion about what Ayodeji had done. There was nothing to distinguish this act from the others. The error was harmless for the second count.

Ayodeji argues the error was not harmless for the third count because E.A.'s testimony about the times that Ayodeji put his penis in her vagina was too vague, showing she was uncertain. A fair reading of E.A.'s testimony shows she was reluctant to talk, not uncertain of what happened. The State had E.A. spell some words, like penis, rather than say them, and used nonsexual language to describe relevant body parts to avoid naming them.[25] E.A. frequently testified that she could not remember details about Ayodeji's acts or when he did them. But when the prosecutor asked her if she was "having trouble remembering" or "uncomfortable talking about it entirely" she said she was "uncomfortable talking about it."[26] She struggled to say what part of her body Ayodeji had touched with his penis, but, on redirect, agreed with her earlier statement that it was her vagina.

The earlier statement came from an interview where E.A. was able to

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[24] RP (July 25, 2014) at 112, 118.
[25] For example, the prosecutor asked, "I'm trying to figure out a way to make you say it without having to say it again, in the front part of his body or the back part of his body?" RP (July 25, 2014) at 174.
[26] RP (July 25, 2014) at 173-74.

whisper the right words to one of the interviewers and have the interviewer write them down. Similarly, E.A. would not describe the specific acts that Ayodeji video recorded, but said they were different from the kind of touching she had already described. Ayodeji claimed he had never seen the video or pictures until they were shown in court. He claimed Ruth was setting him up. But he did not have any specific conflicting testimony about any of the acts alleged for this count. The error was harmless beyond a reasonable doubt.

Admission of Evidence

Ayodeji argues that the trial court abused its discretion by admitting a Christmas card and accompanying letter that Ayodeji sent to his family while there was a no-contact order in place. Ayodeji claims it was improper to admit it under ER 404(b) because the letter is proof that he violated the no-contact order. We hold that the trial court did not err because the substance of the letter was relevant and the State was not using it to show that Ayodeji violated the no-contact order.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Relevant evidence is generally admissible. ER 402. Evidence of a defendant's other bad acts is not admissible to show that the defendant has a propensity to commit crimes. ER 404(b). But it is admissible for other purposes, including "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b).

We review evidentiary decisions for an abuse of discretion. State v. Thang,

145 Wn.2d 630, 642, 41 P.3d 1159 (2002). A trial court abuses its discretion if the decision is manifestly unreasonable or based on untenable grounds or reasons. Thang, 145 Wn.2d at 642.

Here, the trial court admitted a letter that Ayodeji sent to Ruth after his arrest. Sending the letter was a violation of the no-contact order the court had imposed after Ayodeji's arrest. In the letter, Ayodeji repeatedly mentioned Christian values of forgiveness and unconditional love.

The State sought to introduce the letter to show how Ayodeji attempted to manipulate and control Ruth and their children, and to illustrate cultural expectations within their religion. Ayodeji objected because the letter would be evidence that Ayodeji violated the no-contact order. The State explained that it was interested in only the substance of the letter and offered to "avoid introducing evidence that [sending the letter] was violative of a court order."[27]

The court admitted the letter on the grounds that the cultural aspect and the letter's effect on Ruth were relevant. Because the State made it clear that Ayodeji's violation of the no-contact order would not be the focus of its evidence, the trial court admitted the letter simply as relevant evidence under ER 401, intending that the State would not use it as evidence of prior bad acts.

At trial, the State asked Ruth when she received the letter. Although Ruth mentioned that it was sent "after the restraining order [was] in place," the State did not pursue that angle during Ruth's testimony.[28] Then, during Ayodeji's cross-examination of Ruth, and Ayodeji's direct examination, Ayodeji brought up his

[27] RP (July 22, 2014) at 17.
[28] RP (July 25, 2014) at 9.

numerous past arrests for domestic violence. At that point, once Ayodeji had opened the door, the State discussed Ayodeji's history of domestic violence.

The trial court properly admitted the letter as relevant evidence. It was Ayodeji's own actions that allowed the State to discuss his prior bad acts.

Legal Financial Obligations

The trial court waived most discretionary legal financial obligations (LFOs) but did impose a $100 domestic violence fee. That fee is discretionary. RCW 10.99.080(1). The trial court may not impose discretionary LFOs without conducting an individualized inquiry into the defendant's ability to pay. RCW 10.01.160(3); State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). Here, the trial court did not make any individualized inquiry into Ayodeji's ability to pay. We remand for the court to make that individualized inquiry.

Statement of Additional Grounds for Review

Ayodeji raises numerous alleged errors in his statement of additional grounds for review. None merit reversal.

Ayodeji contends that there was insufficient evidence to support his convictions because there was no medical testimony corroborating E.A.'s and F.A.'s allegations. Medical evidence is not required for these charges. See, e.g., State v. Hayes, 81 Wn. App. 425, 439, 914 P.2d 788 (1996) (finding sufficient evidence to support child rape charges without medical testimony).

Ayodeji argues that the trial court erred by admitting the video evidence of E.A. performing oral sex. Ayodeji seems to be objecting to the admission of the video on the basis that Ruth found the SD card containing the video in his car. He

does not suggest that there was any illegal search or seizure.

Ayodeji argues that his trial counsel was ineffective for failing to move to suppress this video evidence. The video is direct evidence of one of the charges. Ayodeji offers no valid basis for suppressing it.

He also argues that Ruth's opinion testimony, identifying him as the male in the video and pictures was improper. Ruth properly testified that she believed the man in the pictures was Ayodeji based on her personal knowledge. ER 602; State v. Vaughn, 101 Wn.2d 604, 611, 682 P.2d 878 (1984).

Ayodeji argues that the trial court erred by denying his several motions for new counsel. Some of the motions are not in the record and some of Ayodeji's arguments rely on evidence that is not in the record. We do not review those motions or arguments. See RAP 10.10(c).

In the middle of trial, Ayodeji moved for assignment of new counsel and for a mistrial. His argument for both motions was that his attorney provided ineffective assistance by not objecting to leading questions and not cross-examining the witnesses sufficiently. The trial court denied both motions. Trial counsel's decision to object or not object to evidence is a "classic example" of trial tactics. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). None of these decisions were egregious enough to warrant a new trial. Madison, 53 Wn. App. at 763.

Ayodeji complains that, while the State turned over the video evidence to his trial counsel, he was not allowed to see it, in violation of CrR 4.7(a)(1)(v). Although Ayodeji's counsel confirmed that Ayodeji had not seen the video as of July 22, 2014, "because there was no way to bring him into the secured viewing

area" where counsel watched it, Ayodeji's trial counsel's comment does not provide enough context for this court to evaluate the issue.

Ayodeji also argues that the State violated Brady by failing to introduce, during trial, evidence that allegedly exculpated Ayodeji. See Brady v. Maryland, 373 U.S. 83, 87-88, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Although the State has a duty to disclose exculpatory evidence to the defense, the State does not have a duty to introduce exculpatory evidence at trial.

Finally, Ayodeji argues that the prosecutor committed misconduct during his closing statement and at sentencing. Ayodeji did not object to the prosecutor's comments at either time. None of the prosecutor's comments, at either stage of trial, appear flagrant or ill-intentioned. They do not warrant reversal. State v. Coleman, 155 Wn. App. 951, 956-57, 231 P.3d 212 (2010).

We affirm the judgment and sentence, but remand for the trial court to make an individualized inquiry into whether Ayodeji can pay the domestic violence LFO.

Trivkey, ACJ

WE CONCUR:

Duggan, J.

Becker, J.