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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 36008-3-III

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STATE OF WASHINGTON, Respondent,

v.

DANIEL JOSEPH WEST, Appellant.

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**APPELLANT'S BRIEF**

---

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## **I. INTRODUCTION**

During a period of intense family conflict, Daniel West's then-14-year old daughter, R.W., and stepdaughter, K.M., accused him of sexually abusing them for several years. Although both girls testified to multiple instances of abuse that could have constituted the crime charged, no unanimity instruction was requested or given. This omission, compounded by the State's erroneous argument to the jury in closing that it could convict as long as it believed each girl had been abused at least once, failed to guarantee a unanimous jury verdict, requiring retrial. Additional sentencing errors should be corrected.

## **II. ASSIGNMENTS OF ERROR**

**ASSIGNMENT OF ERROR NO. 1:** The trial court erred in failing to give a unanimity instruction.

**ASSIGNMENT OF ERROR NO. 2:** The trial court erred in imposing a condition of community custody requiring prior approval of West's romantic relationships.

**ASSIGNMENT OF ERROR NO. 3:** The \$200 criminal filing fee should be stricken due to West's indigency.

ASSIGNMENT OF ERROR NO. 4: The notation pertaining to interest accruing on the financial obligations should be stricken in light of revisions to the applicable statutes.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

ISSUE NO. 1: Whether the jury was correctly advised that to convict West on each count charged, it must unanimously agree upon a single act constituting the crime.

ISSUE NO. 2: Whether the term “romantic relationships” is sufficiently definite to give fair warning of what conduct is prohibited and to protect against arbitrary enforcement.

ISSUE NO. 3: Whether West should obtain the benefit of House Bill 1783’s revisions to statutes concerning legal financial obligations when his case was pending on appeal at the time the revisions became effective.

### **IV. STATEMENT OF THE CASE**

Daniel West and Rachel Smith raised their children from prior relationships together from a young age. III RP 523-25, VIII RP 1534-35. West’s daughter, R.W., was close in age to Smith’s daughter, K.M.. IV RP 630. In 2005, when both girls were about 5 or 6 years old, West and Smith moved in together along with West’s foster son, N.M., and Smith’s

son, A.M. IV RP 626, 628, V RP 940-41, 945-46, VI RP 1110-13, VIII RP 1535-36. R.W. and K.M. grew extremely close, like real sisters. VI RP 1078, 1168, 1171.

When R.W. was 14, she started dating a boy, A.N., against her father's wishes. IV RP 654, 754-55, 757, V RP 963, VI RP 1150.

Although West wanted the girls to wait until they were 16 to start dating, he allowed R.W. to go to homecoming with A.N. and even drove them to the dance. IV RP 656-57, 758-59, VIII RP 1553. But shortly before Christmas, West came home from work for lunch unexpectedly and caught R.W. and A.N. in her bedroom, partially unclothed in her bed, apparently engaging in oral sex.<sup>1</sup> VIII RP 1554. A.N. admitted that he snuck in through R.W.'s window and he knew he would not have been allowed over without adults present. IV RP 760-61, 774.

After he caught A.N. in R.W.'s bedroom, West forbid them from continuing to see each other, but they snuck around behind his back. IV RP 658-59, 775, V RP 966, VI RP 1056, 1151, VIII RP 1555. At the semester break, West moved R.W. to a different school to separate her from A.N. IV RP 763, V RP 966, VI RP 1151, VIII RP 1556. But A.N.

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<sup>1</sup> R.W. and A.N. disputed this, claiming that they were fully clothed and watching a movie while sitting on R.W.'s bed. IV RP 658, 760-61.

also transferred to the new school. IV RP 661, 686, 763, VIII RP 1557.

About 11 days after the new semester started, R.W. and A.N. posted a picture of themselves on social media captioned "Together forever." IV RP 707, 764, 789.

The day before the image was posted, R.W. told her school counselor that West was sexually assaulting K.M. CP 3; VIII RP 1425-26, 1429, 1437, 1440-41, 1450. A.N. also called the police around the same time to report possible abuse of K.M.. VII RP 1220, 1234. He told them he did not want West to know about the report. VII RP 1249-50. Police interviewed K.M. either the same day or the next day. CP 2; VII RP 1216, 1218-20, 1231. She was happy during the interview and repeatedly denied that West abused her. VII RP 1221-22, 1238, 1240, 1242. When the officer told K.M. that A.N. had made the report, she began laughing and told him that A.N. had been caught in bed with her sister. VII RP 1240, 1256.

The next day, R.W. called police again to report that K.M. had been raped for the past couple of years. VII RP 1243-44. The officer who spoke to K.M. the day before met with R.W. at school and told her K.M. had denied everything. VII RP 1223-24, 1244-45. R.W. cried and said it was not true. VII RP 1224. She told the officer she had been raped by

West when she was 9 and when she found West and K.M. behind a locked door, she recognized what was happening. VII RP 1224, 1227. R.W. asked the officer to take her out of the house became upset when she learned that he was not going to remove her that day. VII RP 1227, 1246. She said a friend went through the same thing and was removed from the home. VII RP 1228.

About two weeks later, on February 19, A.N. called police again to ask them to talk to R.W. VII RP 1259-60. R.W. told the officer she had reported a sexual assault involving her stepsister and wanted to know what was happening. VII RP 1261-62. She told him an assault had occurred as recently as the night before. VII RP 1266. She said nothing about being a victim herself. VII RP 1261. The officer transported R.W. and A.N. to the police department to speak to a detective. VII RP 1262.

At the station, a detective separated R.W. and A.N. to speak with them separately. VII RP 1281. During this interview, R.W. told the detective that West had forced anal intercourse with her when she was between seven and nine years old. VII RP 1284-85. She told him that she was sexually active and she believed West was also assaulting her sister. VII RP 1286. R.W. said the assaults on her had occurred at least 15 times a year, when they lived in a house on East Mallon, during times when

Smith was not in the house. VII RP 1287. They occurred in her father's bedroom with the door locked. VII RP 1287. According to R.W., West was behaving the same way with K.M. as he had with her and she had heard K.M. say stop, and had also observed them cuddling under a blanket and saw West grab K.M.'s butt. VII RP 1288-89. She reported hearing West tell K.M. that he was not going to stop and he needed this. VII RP 1289. R.W. explained that she did not say anything earlier because she did not want to break up the family. VII RP 1285.

The detective phoned West and Smith to tell them R.W. and A.N. were at the station and asked them to come down and talk. VII RP 1283. Although the detective did not remember telling them the nature of the allegations, Smith and West were driving around looking for R.W. after she did not come home from school and the detective called while they were in the car, telling them on the speaker phone that R.W. was accusing West of sexual assault. V RP 972-76, VIII RP 1563-64. West said several times that he did not do it. VI RP 1071. When they arrived, the detective asked Smith to accompany him to an interview room and left West in the lobby. VII RP 1290, 1292. After a short conversation with Smith, he went back out to the lobby and found that West was gone. VII RP 1295. Police looked for West in the area but were unable to find him, and Smith could not reach him by phone. VII RP 1299-1300. They later learned

West had attempted suicide and was hospitalized. VII RP 1312, VIII RP 1525, 1565.

Smith decided to leave the family home and returned briefly that night with the police on standby to pack their belongings. V RP 990, VII RP 1303-05. The detective told K.M. that he would interview her if she wanted to talk. VII RP 1309. However, even though R.W. had accused West of raping K.M. less than 24 hours earlier, the detective did not suggest a sexual assault examination or recover any of K.M.'s clothing. VI RP 1160, VIII RP 1484, 1492-93, 1495.

The following day, Smith called the detective and told him K.M. was beginning to make disclosures to her. VII RP 1313. The detective arranged to interview K.M. at her school five days later. VII RP 1313-14, 1320. At the beginning of the interview, when she was asked if she knew why they were there, K.M. said, "I get told stuff about us being abused and stuff like that." VI RP 1163. But as the interview progressed, K.M. said that West had been having anal intercourse with her in his bedroom beginning when she was 12 years old. VII RP 1315. She said the rapes occurred up to five times a day, sometimes every day. VI RP 1150, 1163-64.

Police referred the case to the prosecuting attorney, who charged West about nine months later with multiple counts of rape of a child against both R.W. and K.M.. VIII RP 1490; CP 1-2. Ultimately, the State sought to convict West of two counts of first degree child rape against R.W., both occurring between May 11, 2006 and May 10, 2009, and two counts of second degree child rape against K.M., one count occurring between October 18, 2011 and October 17, 2012, the second occurring between October 18, 2012 and October 17, 2013. CP 128-29. No unanimity instruction was requested or given. CP 96-117.

At trial, much of the testimony conflicted. R.W. testified that she told A.N. about her abuse shortly after transferring schools and she did not tell him her suspicions that West was abusing K.M. IV RP 659-60. But according to A.N., she first told him West was doing inappropriate things to her stepsister. IV RP 765-66. It was not until later that A.N. learned her allegations involved other females in the house. IV RP 769. A.N. denied talking to the police before February 19, but the responding officer testified that A.N. made the first call reporting the suspected abuse of K.M. about two weeks before. IV RP 784, VII RP 1220, 1234. R.W. told detectives she was raped 15 times a year at the house in Mallon in her father's bedroom, but told the jury it happened around 10 times, mostly in the apartment they lived in before moving to the Mallon house. IV RP

647, 698, 712, 718, VII RP 1287. And although R.W. initially reported that she saw West appear to have sex with K.M. under a blanket in the living room and saw him grab K.M.'s buttocks, K.M. testified that West never touched her with his hands and never abused her except in the bedroom. IV RP 705, VI RP 1126, 1130, 1173, VII RP 1288-89, VIII RP 1440.

A substantial portion of the State's case was devoted to testimony that West physically abused his children and called them names, to explain the girls' delay in reporting. III RP 594-97. But R.N. said nothing to police in her initial conversations about physical abuse or being afraid of West, instead appearing to be upset that he had taken her cell phone away so that she could not call her boyfriend. VII RP 1246-47. The State also questioned Smith about her sex life with West, theorizing that West assaulted the girls when Smith refused to have anal sex with him, but Smith testified that she never refused to have anal sex and most of the time they had ordinary vaginal sex. III RP 581-84, V RP 969-70, VI RP 1094.

In its closing argument, the State explained its theory of the multiple charges as follows:

The evidence that you would have to find to convict the defendant on Count I and II is essentially from the same period of time and the same allegations. Sometime

between May 11, 2006, and May 10, 2009, Daniel West engaged in sexual intercourse with [R.W.]. And we'll talk about what sexual intercourse mean under these instructions. And that's Count I and II.

So what you would have to find in order for -- in order to find the defendant guilty of this crime is you would have to find on at least two occasions that are charged, two separate occasions, not the same day, on two separate occasions in that charging period, the defendant raped his daughter.

. . . I will suggest the way to analyze this for you folks is to consider was [R.W.] raped at least one time in the apartment and was she raped at least one time in the house, and those are the two counts.

Rape of a child in the second degree . . .

So in this case, it would have to be for Count III only during [K.M.]'s 12th year, that she was raped anally by the defendant on one occasion. So it doesn't matter if you believe that she was raped five times, ten times, a hundred times. As long as you believe beyond a reasonable doubt that she was raped once during the period of time that she was 12 years old, you can answer guilty on this charge.

. . .

As for the final count, Count IV, the only difference between that and Count III is that now [K.M.]'s 13 years old. All the other elements are the same.

IX RP 1707-09. No objection was lodged to this argument.

The jury convicted West on counts I, III, and IV, and acquitted him as to count II involving R.W. IX RP 1779-80, CP 118-21. The court imposed a mid-range sentence of 189 months to life on count I and 170 months to life on counts III and IV, with the terms running concurrently.

X RP 1844-45, CP 208. The sentence included a condition of community custody “[t]hat you do not enter into a romantic/sexual relationship without prior approval of your CCO and Therapist.” X RP 1847, CP 202. Additionally, the court imposed a \$200 criminal filing fee, although it did not inquire into West’s ability to pay it, West had been represented by a public defender throughout the case, and the court found West indigent for appeal purposes the same day. X RP 1847, CP 199, 203, 210. The judgment and sentence also included a notation that the financial obligations would bear interest from the date of the judgment until they were paid in full. CP 212.

West now appeals, and has been found indigent for that purpose.  
CP 197, 199

## **V. ARGUMENT**

Both R.W. and K.M. testified to multiple instances of abuse over a period of several years. The State charged West with two counts of rape of a child as to each girl, each count representing a different time period during which the abuse was alleged to have occurred. Neither party requested, and the trial court did not give, an instruction advising the jury that it must unanimously agree upon the acts constituting the crimes charged. The error was not harmless when the evidence of guilt was not

overwhelming and when the State, in its closing argument, compounded the error by erroneously informing the jury that it needed only determine whether the girls had been abused once during the charged period in order to convict. Accordingly, a new trial is required.

In the alternative, three sentencing errors require correction. First, the trial court imposed a condition of community custody requiring West to obtain approval of his corrections officer of any romantic relationships. This condition unconstitutionally vague and should be stricken. Additionally, the trial court imposed a \$200 criminal filing fee that is not authorized by law in light of West's indigency. The filing fee should also be stricken from the judgment and sentence. Lastly, the judgment and sentence includes a provision directing that interest at the civil judgment rate will accrue on the financial obligations until paid in full. Because revisions to the statute forbid the accrual of interest on non-restitution legal financial obligations ("LFOs") after June 7, 2018, the provision should be stricken or revised.

1. Because the evidence established multiple acts that could have constituted the crimes charged, a unanimity instruction was required.

The court reviews the adequacy of jury instructions de novo as a question of law. *State v. Boyd*, 137 Wn. App. 910, 922, 155 P.3d 188

(2007). When the State presents evidence of multiple distinct acts to support a single charge, it must either elect which act it relies upon to support the charge, or the jury must be instructed that it must unanimously agree that the same underlying act has been proven beyond a reasonable doubt. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). Because the instruction implicates the constitutional right to a unanimous jury verdict, failure to give a *Petrich* instruction when required can be raised for the first time on appeal. *Boyd*, 137 Wn. App. at 922-23; *see also State v. Crane*, 116 Wn.2d 315, 325, 804 P.2d 10 (1991).

“Failure to give the *Petrich* instruction, when required, violates the defendant's constitutional right to a unanimous jury verdict and is reversible error, unless the error is harmless.” *State v. Bobenhouse*, 166 Wn.2d 881, 894, 214 P.3d 907 (2009) (citing *State v. Camarillo*, 115 Wn.2d 60, 64, 794 P.2d 850 (1990)). In evaluating whether the error is harmless, the court presumes the error was prejudicial and only affirms the conviction if no rational juror could have a reasonable doubt as to any one of the events alleged. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988).

Here, both R.W. and K.M. testified that they were raped multiple times over a period of years. The charging document did not specify

which of the incidents during the charged period constituted the crime, and the jury was not instructed that it must unanimously agree upon the act that constituted the crime as to each count. Moreover, the State's closing argument advised the jury that it only needed to believe that each girl was raped one time during the charged period to convict. This incorrectly stated the law because the jurors could have relied upon different allegations to reach a guilty verdict.

Accordingly, it was error to fail to give a *Petrich* instruction on juror unanimity. This error was of constitutional significance because "some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction." *Kitchen*, 110 Wn.2d at 411. The error is presumed prejudicial and is only harmless if no rational juror could have a reasonable doubt as to any of the incidents alleged. *Id.*

Here, there was ample reason for the jury to be skeptical of the accounts in light of their inconsistencies, the circumstances and timing of the reports, and the lack of corroboration of the allegations. For example, R.W. told police that K.M. was raped as recently as February 18, but K.M. denied being raped at that time. VIII RP 1484, 1492. Similarly, R.W. described a rape she witnessed that took place under a blanket in the living

room, but K.M. denied that she was ever raped outside of the bedroom. IV RP 705, VI RP 1126, 1130, 1173, VII RP 1288-89, VIII RP 1440. It is clear that the jury disbelieved some of the allegations because it voted to acquit West as to count II, but because of the structure of the charges, the verdict does not reveal which instances the jury believed were proven beyond a reasonable doubt and which instances it did not believe.

Consequently, it is unclear which allegations the jury believed and which allegations it did not, with the result that unanimous agreement upon particular allegations cannot be assured. Accordingly, the convictions should be reversed and the case remanded for a new trial.

2. The condition of community custody requiring prior approval of West's romantic relationships is unconstitutionally vague and intrudes on West's constitutional right to intimate association.

Under the Sentencing Reform Act, the sentencing court must impose certain conditions of community custody, may impose others, and has discretion to impose crime-related prohibitions. RCW 9.94A.703(3)(f). Unlike statutes and ordinances, community custody conditions are not presumed to be constitutional, and unconstitutional conditions are an abuse of the sentencing court's discretion. *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008).

As a matter of fundamental personal liberty, the Fourteenth Amendment to the U.S. Constitution protects a person's freedom of intimate association. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984); *City of Bremerton v. Widell*, 146 Wn.2d 561, 575, 51 P.3d 733 (2002). This freedom encompasses the intimate relationships associated with marriage, childrearing, and cohabitation with relatives. *Roberts*, 468 U.S. at 617-19.

The due process clause further requires that citizens receive fair warning of proscribed conduct, by ensuring that violations are described with sufficient definiteness that ordinary people can understand what is prohibited and to provide ascertainable standards of guilt to protect against arbitrary enforcement. *Bahl*, 164 Wn.2d at 752-53.

The distinction between romantic relationships and ordinary friendships is not easily ascertainable or definable and varies significantly as a matter of culture, generational expectations, and individual opinion. *See U.S. v. Reeves*, 591 F.3d 77, 81 (2d Cir. 2010). Some individuals may engage in sex without romantic attachment, while others may develop romantic feelings with only minimal contact. Some individuals may cohabit while remaining friends, while others may be emotionally committed to each other while living apart. It is unrealistic to expect

consistent alignment of views on such issues, and different community custody officers and therapists may have sharply differing opinions about where the line is drawn between acceptable and unacceptable attachments. Consequently, the provision invites arbitrary enforcement and fails to give West adequate forewarning of what conduct will constitute a violation of the condition.

Accordingly, the condition requiring prior approval of West's romantic relationships is insufficiently definite to pass constitutional muster. As such, its imposition is an abuse of the sentencing court's discretion, and the condition should be stricken from the judgment and sentence.

3. Because West is indigent due to income below the federal poverty level, the \$200 criminal filing fee should be stricken.

Trial courts may not impose discretionary LFOs unless a defendant has the likely present or future ability to pay them. RCW 10.01.160(3); *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). To make this determination, the trial court must make an individualized inquiry into a defendant's ability to pay discretionary LFOs before imposing them, and the inquiry must, at a minimum, consider the effects of incarceration and

other debts, as well as whether the defendant meets the GR 34 standard for indigency. *Blazina*, 182 Wn.2d at 838-39.

Recently-enacted House Bill 1783 applies to West's case because it became effective while his appeal was pending. *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018). Under House Bill 1783, trial courts may not impose the \$200 criminal filing fee on defendants who are indigent under RCW 10.101.010(3)(a)-(c). *Id.* at 747; RCW 36.18.020(2)(h).

Here, the record suggests that the trial court declined to impose discretionary costs based upon West's lack of ability to pay them. West's report as to continued indigency, filed contemporaneously with this brief, indicates that he has no income or assets and has substantial debt. His lack of income renders him indigent within the meaning of RCW 10.101.010(3)(c) and therefore precludes imposition of the criminal filing fee under House Bill 1783.

Accordingly, the criminal filing fee should be stricken from the judgment and sentence.

4. Because House Bill 1783 eliminated the accrual of interest on legal financial obligations as of June 7, 2018, the provision of the judgment and sentence requiring interest until the obligations are paid in full should be stricken or modified.

Similarly, House Bill 1783 revised RCW 10.82.090(1), which now provides, “As of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations.” In *Ramirez*, the Washington Supreme Court determined that statutory revisions apply prospectively when the event precipitating its application occurs after its effective date. 191 Wn.2d at 749. Where the revision affects a sentence that is not yet final because it is pending on appeal, the defendant is entitled to benefit from the statutory revision. *Id.*

Here, West’s judgment and sentence provides for interest from the date of the judgment – April 20, 2018 – until it is paid in full. CP 203, 212. But RCW 10.82.090(1) deprives the sentencing court of authority to impose interest accruing after June 7, 2018. Accordingly, the notation pertaining to the accrual of interest should be stricken, or modified to provide that interest may only accrue between April 20, 2018 and June 7, 2018.

5. If West does not prevail on appeal, costs should not be imposed.

Pursuant to this court's General Court Order dated June 10, 2016 and RAP 14.2, appellate costs should not be imposed herein. West's report as to continued indigency is filed contemporaneously with this brief. He was previously found indigent for appeal, and the presumption of indigency continues throughout. RAP 15.2(f). He has fully complied with the General Order and remains unable to pay, having no assets, no income, and substantial debt. A cost award is, therefore, inappropriate.

**VI. CONCLUSION**

For the foregoing reasons, West respectfully requests that the court REVERSE his convictions and REMAND the case for a new trial, or in the alternative, to strike the community custody condition concerning West's romantic relationships, the \$200 criminal filing fee, and the accrual of interest on the judgment after June 7, 2018.

RESPECTFULLY SUBMITTED this 5 day of February, 2019.

TWO ARROWS, PLLC



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**CERTIFICATE OF SERVICE**

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Daniel J. West, DOC #406586  
Coyote Ridge Corrections Center  
PO Box 769  
Connell, WA 99326

And, pursuant to prior agreement of the parties, by e-mail to the following:

Brian Clayton O'Brien  
Deputy Prosecuting Attorney  
SCPAAppeals@spokanecounty.org

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

Signed this 5 day of February, 2019 in Kennewick, Washington.

  
Andrea Burkhart

**BURKHART & BURKHART, PLLC**

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**Transmittal Information**

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