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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

DANIEL WEST, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

---

**BRIEF OF RESPONDENT**

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## **I. APPELLANT'S ASSIGNMENTS OF ERROR**

1. The trial court erred in failing to give a unanimity instruction.
2. The trial court erred in imposing a condition of community custody requiring prior approval of West's romantic relationships.
3. The \$200 criminal filing fee should be stricken due to West's indigency.

## **II. ISSUES PRESENTED**

1. Whether the defendant's claim that a unanimity instruction was needed is preserved for appeal and whether the defendant invited any error with respect to the court's failure to provide such an instruction?
2. Whether this case involved a continuing course of conduct, such that no unanimity instruction was necessary?
3. Whether the Supreme Court's decision in *State v. Nguyen*, 191 Wn.2d 671, 425 P.3d 847 (2018), requires this Court to order the term "romantic relationship" to be stricken from West's community custody provision?
4. Whether this Court should require the criminal filing fee to be stricken from the judgment pursuant to *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018)?

### **III. STATEMENT OF THE CASE**

Daniel West was charged by amended information with two counts of first degree rape of a child and two counts of second degree rape of a child. CP 128-29. The State alleged in the two counts of first degree child rape that, between May 11, 2006, and May 10, 2009, Mr. West raped R.W., who was less than twelve years old. CP 128. The State alleged in counts three and four that Mr. West raped K.M. between October 19, 2011 and October 17, 2017, when K.M. was 12 years old, and again between October 18, 2012 and October 17, 2013, when K.M. was 13 years old. CP 128-29. West's case proceeded to trial.

Mr. West began a romantic relationship with Rachel Smith in 2003 or 2004. RP 945, 1053. They blended their families in 2005, and moved into a Spokane apartment together. RP 629, 946, 1053. Mr. West's biological daughter, R.W., and his stepson, N.M., lived with the couple, as did Ms. Smith's two children, K.M. and A.M. RP 628, 802, 1053. R.W. was only five months older than K.M. and the two became close. RP 630.

In 2008, the family moved from the apartment to a house on Mallon Street. RP 629, 949, 1053. The family continued to live in that residence until 2014. RP 971, 990, 1138-39. Ms. Smith was often away from the house, either at work or at school. RP 636, 960, 961. While Ms. Smith was away, Mr. West took care of the children. RP 1118. Although Mr. West

was kind to the children at first, he soon began to hit them, including R.W. and K.W., throw dishes at them, yell at them, spank them, and call them names.<sup>1</sup> RP 631-35, 946-48, 951, 1115, 1119-20, 1122-24.

When R.W. was seven years old, and while the family still lived in the apartment, she stayed home from school one day for a dentist appointment, and, at the time, was wearing a dress with tights underneath. RP 641-42. She took off the tights because she was warm and Mr. West told her “[she] shouldn’t have done that.” RP 642. He then proceeded to anally rape her, in the bedroom, despite her demands that he stop. RP 643-44. Mr. West said nothing to her besides, “stop moving.” RP 645. Afterwards, Mr. West told her not to tell anyone because, if she did, she would “break the family up.” RP 645-46. Her father raped her at least 10 times over a long period of time.<sup>2</sup> RP 647. However, shortly after the family moved to the Mallon house, her father stopped raping her. RP 648, 676, 689. R.W. recalled that the abuse occurred at both the apartment and at the Mallon

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<sup>1</sup> The jury was repeatedly instructed that Mr. West was not charged with abusing his children (or physically disciplining them) and that it may only consider this evidence for purpose of bias, fabrication, or other motivation of the witnesses. *See, e.g.*, RP 1120.

<sup>2</sup> R.W. testified that the rapes occurred after her next birthday as well. RP 647.

residence. RP 718. R.W. did not report the abuse until much later.<sup>3</sup>  
RP 650.

After the family moved into the Mallon house, Mr. West took an increasing interest in K.M. and “always wanted to spend more time with her.” RP 652. R.W. later suspected that Mr. West stopped raping her because he “moved on to [K.M.]” RP 649, 652. He would lock K.M. and himself in his bedroom and R.W. could hear K.M. crying through the door. RP 653. Even K.M.’s younger brother could recall K.M. being locked in the master bedroom with Mr. West, and hearing her cry. RP 810-12. R.W. recalled that this occurred whenever Mr. West “got the opportunity” when N.M. and Ms. Smith were away from the house. RP 653. However, K.M. never told R.W. about the rapes. RP 653-54.

In August 2013, R.W. and A.N. began dating each other. At the time, R.W. was 14 years old and was a freshman at Lewis and Clark High School. RP 639, 654, 757. Although Mr. West allowed the two to attend a dance together, he disapproved of R.W. dating A.N. RP 656-57, 757-58. In December 2013, Mr. West came home from work to find R.W. and A.N. in R.W.’s bed – R.W. and A.N. claimed they were watching a movie, but

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<sup>3</sup> During her interview with Detective Hensley, R.W. indicated that the rapes occurred between 2006 and 2008, when she was between the ages of seven and nine. RP 1285. She also stated that the rapes occurred at least 15 times per year. RP 1287.

Mr. West claimed they were engaging in oral sex. RP 658, 761, 1554. Mr. West prohibited R.W. from seeing A.N., screwed her windows shut, locked her bedroom door at night, and took her cell phone away. RP 659, 675, 689. A few weeks later, in mid-January 2014, Mr. West took R.W. out of Lewis and Clark High School and enrolled her at North Central High School. RP 659, 661, 687, 763. A.N. also registered at North Central High School. RP 661, 763.

R.W. reported the potential sexual abuse of K.M. to her school counselor in early February 2014. RP 660-62, 689, 704-05. On February 5, 2014, when law enforcement initially spoke with K.M. about the allegations, she denied that Mr. West had ever raped her and told police that R.W. was lying. RP 690, 1152, 1157, 1221-22, 1240. The same officer who spoke to K.W. spoke with R.W. the next day; when he informed R.W. that K.W. denied having been raped, R.W. began crying, and disclosed that she, too, had been raped by Mr. West a few years before, and it was for that reason that she suspected Mr. West was raping K.W. when the two were alone in a locked room. RP 1225-26.

A few weeks later, on February 19, 2014, R.W. reported the abuse again, upset that nothing had been done after her first report. RP 665-66, 971-72. Because R.W. had previously reported the sexual abuse, and

detectives had opened an investigation, R.W. was taken to the police station for an interview. RP 667, 1262.

Detective Jerry Hensley contacted Mr. West and Ms. Smith to notify them that R.W. was at the police station. RP 974-75, 1283. Detective Hensley informed them that R.W. was claiming that Mr. West had raped K.M. and her. RP 976. As Ms. Smith drove Mr. West to the police station, Mr. Smith stated, “why are you making me do this?” and threatened to kill himself. RP 977,

Mr. West and Ms. Smith arrived at the police station, went inside and waited to meet with Detective Hensley. RP 979. The detective first took Ms. Smith into an interview room; the two spoke briefly, and when they returned to the waiting area, Mr. West had left. RP 982, 1291-93, 1295. Mr. West claimed that he was so distraught over R.W.’s allegations against him that he attempted to end his life. RP 1565, 1567, 1587.

For their safety, police accompanied Ms. Smith to the house on Mallon, where she and the children packed their belongings. RP 990, 1138-39, 1303. R.W. stayed with Ms. Smith, K.M. and A.M. at the house of Ms. Smith’s friend. RP 991-92.

After Ms. Smith and the children left the Mallon house, K.M. felt safe enough to disclose to her mother that Mr. West had sexually abused her. RP 1140. K.M. estimated that the sexual abuse began when she was

12 years old. RP 1126. The abuse first started when the two were watching television; Mr. West locked the bedroom doors, and undressed K.M. and himself. RP 1126. K.M. confirmed that the abuse would occur when R.W. and A.M. were home, but when her mother was away. RP 1126, 1130. Although K.M. asked Mr. West to stop, he refused to do so, telling her “I need this.” RP 1127. K.M. cried when Mr. West anally raped her because he hurt her when doing so. RP 1128. K.M. estimated that, the rapes occurred for a period of two years, sometimes three times per week, and up to five separate times per day. RP 1129-30. Mr. West told K.M. that if she reported the sexual abuse, it would be her fault if the family was torn apart. RP 1130. She also feared that if she disclosed the sexual abuse, the physical abuse would worsen. RP 1131.

The defendant’s theory of the case was that many of the witnesses had reason to lie, and specifically, that R.W. was angry with Mr. West for preventing her from dating A.N. RP 1253. As a result, the defense claimed, R.W. fabricated a story that Mr. West had abused the girls so that she would be taken out of Mr. West’s home and would be allowed to date A.N.<sup>4</sup> RP 1753, 1758-59, 1764. The defendant also theorized that K.M. told the truth when she denied that any abuse occurred, and only changed her story

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<sup>4</sup> R.W. admitted that she wanted “away from her dad” but denied fabricating the allegations. RP 665, 672-74.

based upon what other people suggested to her had occurred. *See e.g.*, RP 1748.

Both the State and the defense proposed jury instructions. CP 66-90, CP 232-55.<sup>5</sup> Prior to closing arguments, the court instructed the attorneys to confer regarding their proposed jury instructions. After conferring, the attorneys disputed only two instructions – the reasonable doubt instruction, and a non-WPIC proposed by the State. RP 1663-64. After the court prepared its instructions, based on counsels’ agreement, the court gave the parties an opportunity to object to the instructions as prepared by the court. RP 1676-77. The parties found that the court had inadvertently omitted one requested instruction which informed the jury that its verdict on one count should not control its verdict on any other count. RP 1677. After the omitted instruction was included, the Court asked, for the final time, whether the parties had any objections to the instructions as proposed and prepared by the court. RP 1678. Neither the State nor the defendant had any other objection to the instructions. RP 1678.

The jury found Mr. West guilty of one count of rape pertaining to R.W., and to both counts of rape pertaining to K.M. The court sentenced

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<sup>5</sup> The State filed, contemporaneously with the filing of its response brief, a Supplemental Designation of Clerks’ Papers, designating the State’s proposed jury instructions, filed on January 26, 2018. The State anticipates these instructions will be designated as CP 232-55.

Mr. West to a minimum sentence of 189 months on count one and concurrent minimum terms of 170 months on counts three and four, with a maximum term of life in prison. The court imposed lifetime community custody; one of the conditions of his community custody requires that he “do[es] not enter into a romantic/sexual relationship without prior approval of [his] CCO and therapist.” CP 202. Lastly, the court imposed \$800 in mandatory legal financial obligations. The defendant timely appealed.

#### IV. ARGUMENT

##### **A. THE DEFENDANT’S UNANIMITY CLAIM FAILS BECAUSE IT IS NOT A MANIFEST CONSTITUTIONAL ERROR, IF ERROR, IT WAS INVITED, AND LASTLY, NO UNANIMITY INSTRUCTION WAS NECESSARY BECAUSE THE FACTS ESTABLISH A CONTINUING COURSE OF CONDUCT.**

1. In cases presenting evidence of several distinct acts, any of which could form the basis of one count charged, either the State must inform the jury which act to rely upon in its deliberations or the court must instruct the jury to agree on a specified criminal act by a *Petrich* instruction.

“To convict a person of a criminal charge, the jury must be unanimous that the defendant committed the criminal act.” *State v. Bobenhouse*, 166 Wn.2d 881, 892, 214 P.3d 907 (2009) (quoting *State v. Camarillo*, 115 Wn.2d 60, 63, 794 P.2d 850 (1990)). When the evidence indicates that several *distinct* criminal acts have been committed, but the defendant is charged with only one count of criminal conduct, jury unanimity must be protected. *State v. Petrich*, 101 Wn.2d 566, 572,

683 P.2d 173 (1984) (emphasis added), *overruled in part on other grounds* by *State v. Kitchen*, 110 Wn.2d 403, 406 n. 1, 756 P.2d 105 (1988), *abrogated in part on other grounds* by *In re Stockwell*, 179 Wn.2d 588, 316 P.3d 1007 (2014). To protect unanimity, the State may elect the act upon which it relies for conviction, or the jury must be instructed that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt. *State v. Barrington*, 52 Wn. App. 478, 480, 761 P.2d 632 (1988). A trial court's failure to give such a *Petrich* instruction when warranted violates a defendant's state constitutional right to a unanimous jury verdict and the United States constitutional right to a jury trial. *Camarillo*, 115 Wn.2d at 64 (quoting *Kitchen*, 110 Wn.2d at 409).

2. The appellant, alleging for the first time on appeal that his constitutional right to a unanimous verdict was violated, has not demonstrated the existence of a manifest error affecting a constitutional right pursuant to RAP 2.5(a)(3).

It is a fundamental principle of appellate jurisprudence in that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). This principle is embodied in Washington under RAP 2.5.

RAP 2.5 is principled as it "affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal." *Strine*, 176 Wn.2d at 749, (quoting *New Meadows Holding Co. v. Wash. Water*

*Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984)). This rule supports a basic sense of fairness, perhaps best expressed in *Strine*, where the court noted the rule requiring objections helps prevent abuse of the appellate process:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from “riding the verdict” by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6–2(b), at 472–73 (2d ed. 2007) (footnotes omitted).

*Strine*, 176 Wn.2d at 749-50.

Under RAP 2.5(a), a party may not raise a claim of error on appeal that was not first raised at trial unless the claim involves a manifest error affecting a constitutional right.<sup>6</sup> Specifically regarding RAP 2.5(a)(3), our courts have indicated that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever

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<sup>6</sup> An issue may also be raised for the first time on appeal if it involves trial court jurisdiction or failure to establish facts upon which relief can be granted. RAP 2.5(a)(1) and (2).

they can ‘identify a constitutional issue not litigated below.’” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988).

Here, defendant alleges that the trial court erred by failing to give a *Petrich* instruction even though such an instruction was neither proposed by the defendant nor did he take any exception to the court’s instructions, despite being given the opportunity. CP 78, 80-81; RP 1663-64, 1676-77, 1678. The failure to assert this issue at the trial court is not reviewable on appeal because there is not a showing that the alleged error is manifest.

*a. Manifest error.*

To establish that the alleged constitutional error is reviewable, the defendant must establish that the error is “manifest.” Here, any error relating to the trial court’s failure to *sua sponte* supply a *Petrich* instruction was not manifest or obvious, as is required by RAP 2.5.

In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is *so obvious on the record* that the error warrants appellate review... It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

*State v. O'Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010) (footnote and internal citation omitted) (emphasis added).

There is nothing in defendant’s claim of manifest error that is plain and indisputable, or so apparent on review that it amounts to a complete disregard of the controlling law or the credible evidence in the record, such that the judge trying the case should have clearly noted a *Petrich* violation and remedied it. Contrary to the defendant’s claims, no election or unanimity instruction is required in cases like the instant one, where the evidence establishes a “continuing course of conduct.”<sup>7</sup> *Petrich*, 101 Wn.2d at 571. The fact that the defendant attempts to argue that this case is a “multiple acts” and not a “continuing course of conduct” case demonstrates that the issue is *debatable* and therefore not *manifest* – not obvious or flagrant as is required by RAP 2.5 for this court to grant review absent preservation of the issue for appeal by timely objection at trial.

*b. Trial tactics.*

Moreover, Mr. West’s failure to timely raise the claim at trial is attributable to trial tactics.<sup>8</sup> If the defendant’s attorney had raised the claim that a unanimity instruction was necessary, he would have alleged that the

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<sup>7</sup> That this case is a continuing course of conduct case is argued below.

<sup>8</sup> See *State v. Carson*, 184 Wn.2d 207, 357 P.3d 1064 (2015) (holding that in a multiple acts/multiple counts case where the state proposed a *Petrich* instruction, defense counsel’s objection to the instruction was a legitimate trial tactic, finding that a *Petrich* instruction could be confusing and potentially prejudicial especially where, as here, defense’s theory of the case was that the allegations were altogether fabricated).

factual circumstances amounted to more than the four crimes charged.<sup>9</sup> If he raised this claim before the close of the State's case, the State could have moved to add additional counts of child rape pursuant to CrR 2.1(d).<sup>10</sup> Additional convictions could have exposed the defendant to additional incarceration, and the court could have imposed an exceptional sentence if it found that the defendant had committed multiple current offenses, and the defendant's high offender score resulted in some of the current offenses going unpunished. RCW 9.94A.535(2)(c). For that matter, the defendant also used the *lack* of additional counts in his closing argument to claim that the allegations were less credible because the State chose not to file separate charges for each incident alleged:

Prosecutor says does it matter how many times the rapes happened? He also talked about murder crimes. Now if somebody killed 15 people a year, they would get charged for 15 crimes. Sex offenses are not charged that way. Instead, there are many accusations and only a few charges filed. Now, the State certainly has the right to file whatever

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<sup>9</sup> See *State v. Crane*, 116 Wn.2d 315, 804 P.2d 10 (1991) (discussing the difference between a multiple acts case, where the complaint is the lack of unanimity where there are two or more acts, each individually supporting a conviction, and alternative means cases, where the crime can be committed in different or alternate ways.)

<sup>10</sup> CrR 2.1(d) (formerly CrR 2.1(e)) “permits an amendment ‘at any time before verdict or finding if substantial rights of the defendant are not prejudiced.’ Amendments are addressed to the sound discretion of the trial court. *State v. Collins*, 45 Wn. App. 541, 551, 726 P.2d 491 (1986), *review denied*, 107 Wn.2d 1028 (1987).” *State v. Wilson*, 56 Wn. App. 63, 65, 782 P.2d 224 (1989).

charges they think are proper. But what I would ask you is why are all the other allegations less credible than the ones they chose to file?

RP 1764.

Whether the instant case involves a continuing course of conduct, or involves a *Petrich* error is clearly open to debate, as is whether the belatedly claimed error is a result of trial tactics and waiver – therefore, the error is not obvious or manifest as is required by RAP 2.5(a)(3). This court should decline the invitation to address the unpreserved argument that the trial court should have *sua sponte* supplied a *Petrich* instruction to the jury.

3. Error, if any, was invited because the defendant proposed substantially similar instructions, did not request a *Petrich* instruction, and did not object to the instructions given by the court.

The defendant is also barred from belatedly raising the *Petrich* issue because, if error occurred, he invited it. The invited error doctrine precludes appellate review of an alleged error affecting even a constitutional right of a defendant. *State v. Henderson*, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990). “The invited error doctrine is a strict rule that precludes a criminal defendant from seeking appellate review of an error he helped create.” *State v. Carson*, 179 Wn. App. 961, 973, 320 P.3d 185 (2014), *aff’d*, 184 Wn.2d 207 (2015).

Here, Mr. West’s proposed jury instructions allowed him to be convicted if the jury found the criminal conduct pertaining to R.W.

“occurred between May 11, 2006 and May 10, 2009” (counts 1 and 2); and for K.M. occurred “between about October 18, 2011 and October 17, 2012” (count 3) and “October 18, 2012 and October 17, 2013” (count 4). CP 78, 80-81. The trial court’s jury instructions provided a substantially similar broad timeframe. CP 112, 114-15. When the trial court asked whether Mr. West had any comments to the court's instructions, defense counsel offered none, other than an objection to the reasonable doubt instruction proposed by the State. RP 1663-64, 1676-77, 1678. Because Mr. West proposed nearly identical instructions to those actually given by the trial court, failed to propose a *Petrich* instruction himself, and did not object to the court’s instructions as proposed or given, he invited the error he now raises. The Court should, therefore, decline to review that claim.

4. The evidence establishes that the defendant’s acts were a continuing course of conduct.

In the event this Court reaches the merits of defendant’s claim, the court should note that an election or unanimity instruction is not required in all cases where there are multiple acts, any of which could support a criminal charge. Where the State presents evidence of multiple acts that constitute a “continuing course of conduct,” no election or unanimity instruction is required. *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). To determine whether criminal conduct constitutes but one

continuing act, the court reviews the facts in a commonsense manner. *State v. Love*, 80 Wn. App. 357, 361, 908 P.2d 395 (1996); *see also State v. Fiallo-Lopez*, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995) (series of actions intended to secure the same objective supports the characterization of those actions as a continuing course of conduct). In distinguishing between distinct criminal acts and a continuing course of conduct, courts have held that “evidence that the charged conduct occurred at different times and places tends to show that several distinct acts occurred,” while “evidence that a defendant engages in a series of actions intended to secure the *same objective* supports the characterization of those actions as a continuing course of conduct.” *State v. Brown*, 159 Wn. App. 1, 13-15, 248 P.3d 518 (2010) (emphasis added); *see also, Love*, 80 Wn. App. at 361 (multiple acts tend to be shown by evidence of acts that occur at different times, in different places, or against different victims).

*State v. Craven*, 69 Wn. App. 581, 849 P.2d 681 (1993), is especially instructive in a case such as this, where a child victim is repeatedly victimized over a period of time. In *Craven*, the defendant repeatedly assaulted a child over the course of a three-week period. The State charged the defendant with one count of assault, based on a continuing course of conduct theory; the State’s theory of the case was that the defendant’s criminal actions were a systematic pattern of abuse. The court

found that no error occurred when the trial court failed to give a *Petrich* instruction, commenting:

We note that charging one count of assault for a continuous course of conduct seems particularly appropriate where, as here, the child victim is preverbal, the abusive conduct occurred outside the presence of witnesses, and no one could testify to any single act of abuse. Where evidence of the abuse can only come from a physical examination of the child, from the totality of the injuries, from an observation of the child's demeanor, and from the circumstances surrounding the incident which brings the child to the attention of health care professionals, basing a conviction upon distinct criminal acts is not the only theory upon which to proceed. Indeed, a fact pattern which evidences systematic abuse particularly lends itself to a continuing course of conduct analysis.

*Craven*, 69 Wn. App. at 589 n.7.

Even *Petrich* impliedly condoned the State charging and proving “continuing course of conduct” cases with minor child victims:

[I]n the majority of cases in which this issue will arise, the charge will involve crimes against children. Multiple instances of criminal conduct with the same child victim is a frequent, if not the usual, pattern... Whether the incidents are to be charged separately or brought as one charge is a decision within prosecutorial discretion. Many factors are weighed in making that decision, ***including the victim's ability to testify to specific times and places***. Our decision in this case is not intended to hamper that discretion or encourage the bringing of multiple charges when, in the prosecutor's judgment they are not warranted. The criteria used to determine that only a single charge should be brought, may indicate that election of one particular act for conviction is impractical. In such circumstances, a

defendant's right to a unanimous verdict will be protected with proper jury instructions.

*Petrich*, 101 Wn.2d at 572 (internal citation omitted) (emphasis added).

Where an accused resides with a child victim, or has virtually unchecked access to the child, and the abuse occurs on a regular basis and in a consistent manner over a period of time, the child may have no meaningful reference point of time or detail to distinguish one specific act from another. The more frequently the abuse occurs, the less likely that the child will remember any particular incident in detail. Furthermore, in resident child molester cases, neither alibi nor misidentification is likely to be a reasonable defense; generally, the defense will be a complete denial of the charges or an attack on the child victim's credibility, as was the case here.

This case is the epitome of a resident child molester case. Mr. West had unchecked access to R.W., his daughter, and K.M., as K.M.'s mother was often out of the house. Mr. West had developed a relationship of trust with both girls; both girls loved him, and even K.M. called Mr. West her father. Both girls feared the repercussions of telling anyone about the repeated abuse – both claimed that they feared “breaking up the family” if they disclosed the abuse and both feared corporal punishment as well. Assuming R.W.'s estimate that the abuse had occurred at least 10 times over

the course of two years, it is logical that she would be unable to recall the details of each incident.<sup>11</sup> Similarly, assuming K.M.'s estimate that the abuse sometimes occurred once daily when Mr. West had the opportunity, if not more frequently, it is logical that K.M. would also be unable to recall the details of any specific incident.

The abuse both R.W. and K.M. endured exemplifies the type of abusive pattern contemplated in *Craven* and *Petrich* that would qualify as an “ongoing criminal course of conduct.” The victims were the same, the abuse occurred repeatedly over a significant amount of time, and always occurred in the same place: Mr. West repeatedly victimized the two girls in their home by anal rape; the rapes occurred in the master bedroom, with the door locked, while Ms. Smith was away, and while the other siblings could not see what was occurring. Under these facts, and especially for K.M., who never testified to a singular, specific act,<sup>12</sup> it would have been impractical,

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<sup>11</sup> She did recall, with specificity, the first incident. RP 642-46. Otherwise, she testified generally that the rapes occurred, in the same manner as the first, “always in his room on his bed.” RP 649.

<sup>12</sup> However, in the recorded interview between K.M. and detectives, K.M. talked about the “first time” she was sexually abused by Mr. West: “He locked his bedroom doors then took his pants off and then he took mine and then was rubbing that around and then stuck it in my butt.” Ex. D-176 at 6. She described that the abuse took place at the Mallon house, starting when she was 12, while R.W. and A.M. were home, but while her mother was away, and that it happened “a lot” over a period of two years. Ex. D-176 at 7-9, 12.

if not impossible, for the state to elect one or two particular incidents to prove to the jury. And, regarding R.W., because she testified specifically about the first time Mr. West sexually abused her, and testified in generalities regarding subsequent incidents, the court may be assured that the jury's verdict was unanimous as to a particular event. The jury found Mr. West guilty of Count 1, but not guilty of count 2. From that verdict, this court may infer that the jury was only able to find, beyond a reasonable doubt, that one specific event occurred – the only incident of sexual abuse described by R.W. in graphic detail.<sup>13</sup>

The facts of this case make clear that the abuse R.W. and K.M. suffered was a continuing course of conduct. No *Petrich* instruction was necessary.

5. The prosecutor's closing argument does not change the above discussed analysis.

The defendant claims this alleged *Petrich* error was compounded by the prosecutor's closing argument. The defendant claims that the prosecutor advised the jury that it only needed to believe that each girl was

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<sup>13</sup> In this regard, any error in failing to give a *Petrich* instruction (with regard to R.W.'s abuse), was harmless beyond a reasonable doubt. *See Bobenhouse*, 166 Wn.2d at 894 (*Petrich* error is subject to harmless error review.) Here, no rational juror would have used the other incidents of sexual abuse, spoken of only in generalities by R.W., as the basis for the jury's verdict, when the victim testified, in detail regarding one specific instance of abuse.

raped one time during the charged period to convict. Br. at 14. The prosecutor's statement to the jury was:

The court told you about what the elements of these offenses are and, frankly, in terms of criminal charges, this is one of the least complicated types of case in terms of what has to be proved. 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 Rose West. And we'll talk about what sexual intercourse means 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 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* [R.W.]

You also have to find beyond a reasonable doubt that [R.W.] was under 12 years old. Well, she testified she was between seven and nine, so it doesn't matter where in that range you believe the charges happened.

*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.*

...

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.*

...

[K.M.] told you not only did this all happen in Washington, it all happened in the same house. Not only did it happen all in the same house, it happened in the same room, the master bedroom.

*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.*

RP 1707-09 (emphasis added).

There was no objection to this argument, even though defense counsel objected to other statements made by the prosecutor during closing argument. *See, e.g.*, RP 1726, 1772.

Other than generally asserting that the State's closing argument exacerbated the alleged instructional error, defendant fails to articulate how this statement affected the jury's verdict – especially when the jury was instructed that the lawyer's comments are intended to help the jury understand the evidence and apply the law, but those statements were not evidence, and the correct law was contained in the court's oral and written instructions. RP 1681. In fact, the defendant does not make a claim of prosecutorial misconduct based on this argument, nor does he claim ineffective assistance of counsel for defense counsel's failure to object.

If anything, this argument was inarticulate, rather than incorrect. It could easily be that the prosecutor was merely attempting to caution the jury that it simply need to find the existence of one incident beyond a reasonable doubt in order to convict the defendant; in other words, with regards to R.W.'s assaults, the State need only prove that Mr. West raped her on two occasions, rather than on the 10 or 15 occasions *she* alleged at trial, and with regards to K.M., the State need only prove that Mr. West raped her once during each charged time period, rather than prove he raped her up to three times per day.

The prosecutor *did not argue* or suggest that, so long as each juror believed at least one incident occurred, regardless of whether the jurors believed the *same* incident occurred, then it could convict Mr. West. The argument actually made by the prosecutor, while perhaps inarticulate, was not improper, and even if improper, could have been cured by an objection by defense counsel and a curative instruction from the court.

**B. THE STATE AGREES THAT THE WORD “ROMANTIC” SHOULD BE STRICKEN FROM THE COMMUNITY CUSTODY CONDITION.**

The defendant claims that the court erred when it ordered him, at sentencing: “[D]o not enter into a romantic/sexual relationship without prior approval of your CCO and therapist.” CP 202. It appears that Mr. West takes issue only with language requiring that he obtain approval for his

“romantic relationships,” apparently conceding that the court may order he obtain prior approval of his “sexual relationships.” Br. at 15-17.

1. Standard of review.

The court reviews community custody conditions for an abuse of discretion. *State v. Irwin*, 191 Wn. App. 644, 652, 364 P.3d 830 (2015). The abuse of discretion standard applies whether this court is reviewing a crime-related community custody condition or reviewing a community custody condition for vagueness. *See id.* at 652, 656; *State v. Valencia*, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010). Imposing an unconstitutional condition is always an abuse of discretion. *Irwin*, 191 Wn. App. at 652. Defendants may generally challenge community custody conditions that are contrary to statutory authority for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744-45, 193 P.3d 678 (2008).

2. The term “romantic relationship” should be stricken.

“The due process vagueness doctrine under the Fourteenth Amendment ... requires that citizens have fair warning of proscribed conduct.” *Bahl*, 164 Wn.2d at 752. The purpose of the vagueness doctrine is to ensure criminal offenses are defined ““with sufficient definiteness that ordinary people can understand what conduct is proscribed,”” and to ““provide ascertainable standards of guilt to protect against arbitrary enforcement.”” *Id.* at 752-53 (quoting *City of Spokane v. Douglass*,

115 Wn.2d 171, 178, 795 P.2d 693 (1990)). Because violations of community custody conditions subject a person to arrest and incarceration, vagueness prohibitions extend to community custody provisions. *Valencia*, 169 Wn.2d at 791-92.

Recently, in *State v. Nguyen*, our Supreme Court recently discussed the vagueness doctrine with respect to the term “significant romantic relationship.” 191 Wn.2d 671, 682-83, 425 P.3d 847 (2018). Relying on *United States v. Reeves*, 591 F.3d 77, 79, 81 (2d Cir. 2010), our Supreme Court held that a community custody condition containing the term “significant romantic relationship” was unconstitutionally vague because the terms “significant” and “romantic” are each “highly subjective qualifiers.” 191 Wn.2d at 682-83. Because the Supreme Court has indicated that the term “romantic” is unconstitutionally vague in this context, the State concedes that it must be stricken.

However, the remaining language contained within the same community custody provision, which requires Mr. West not to enter into a “sexual relationship” without prior approval is not constitutionally vague.<sup>14</sup>

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<sup>14</sup> The meaning of a slash (/) in writing commonly signifies alternatives. See, e.g., Dictionary.com, “How do you use this slippery piece of punctuation: the slash?” available at <https://www.dictionary.com/e/slash/> (last accessed 3/13/19); see also, “The Slash or Virgule” available at <http://guidetogrammar.org/grammar/marks/slash.htm> (last accessed 3/19/19) (“The slash can be translated as *or* and should not be used where

“Sexual” is defined as “having sex” or “involving sex.” Webster’s Third New Int’l Dictionary 2082. When “sexual,” is used in conjunction with the term “relationship,” it is more analogous to another provision at issue in *Nguyen*, the term “dating relationships.” The Supreme Court did not find that term to be constitutionally vague. A “sexual relationship” has a common definition and an easily ascertainable time period – the persons are engaged in sex.

For that reason, this Court should grant the defendant relief by directing the lower court to strike only the word “romantic” from this community custody provision. This may be done without a resentencing. *See State v. Ramos*, 171 Wn.2d 46, 48, 246 P.3d 811 (2011) (defendant’s presence not required for ministerial correction). Because the State concedes the sentence must be corrected on vagueness grounds as required by *Nguyen*, it is unnecessary to address the defendant’s argument that the condition unconstitutionally burdens his right to intimate association.

**C. THE COURT SHOULD ORDER THE \$200 FILING FEE BE STRICKEN.**

Mr. West was ordered to pay a \$200 criminal filing fee. CP 210. The State agrees that under *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714

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the word *or* could not be used in its place.”) Thus, the use of the slash in the term “romantic/sexual relationship” should be understood to mean “romantic or sexual relationship.”

(2018), because Mr. West's matter was pending appeal at the time that the legislature enacted its LFO reform in 2018 (which prohibits the imposition of the filing fee on an indigent defendant), he is entitled to the benefit of the statutory change. This Court should order this fee stricken, but the defendant's presence is not required for the trial court to make this correction. *See Ramos*, 171 Wn.2d at 48 (defendant's presence not required for ministerial correction).

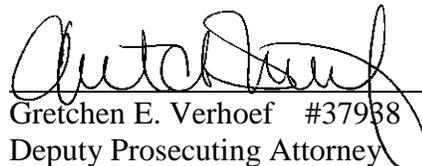
## V. CONCLUSION

No manifest or obvious constitutional error occurred under RAP 2.5 that would allow review by this Court, and, even if error occurred, it was invited by the defendant who proposed nearly identical instructions, did not request a *Petrich* instruction, and did not object to the court's instructions as prepared. Furthermore, the facts establish that the repeated rapes perpetrated by Mr. West against the young females in his home over a number of years were a continuing course of conduct – therefore, no *Petrich* instruction was necessary and the State was not required to elect a specific instance upon which to rely for a conviction.

However, this Court should strike the requirement that the defendant obtain prior approval for his “romantic relationships” pursuant to *Nguyen*, and should also strike the \$200 filing fee pursuant to *Ramirez*.

Dated this 5 day of April, 2019.

LAWRENCE H. HASKELL  
Prosecuting Attorney



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Gretchen E. Verhoef #37938  
Deputy Prosecuting Attorney  
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL WEST,

Appellant.

NO. 36008-3-III

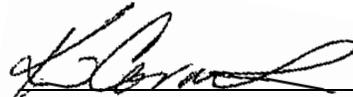
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on April 5, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Andrea Burkhart  
andrea@2arrows.net

4/5/2019  
(Date)

Spokane, WA  
(Place)

  
\_\_\_\_\_  
(Signature)

**SPOKANE COUNTY PROSECUTOR**

**April 05, 2019 - 9:04 AM**

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