No. 43557-8-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TODD DALE PHELPS,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

By: ______________________
SARA I. BEIGH, WSBA No. 35564
Senior Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

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I. ISSUES

A. Did the trial court violate Phelps' public trial right?

B. Did the trial court violate Phelps' right to be present by excusing jurors outside the courtroom?

C. Did the third amended information fail to contain all the essential elements of the crime Sexual Misconduct with a Minor in the Second Degree?

D. Can Phelps raise the issue of an alleged violation of his right to a unanimous verdict for the first time on appeal?

E. Did the deputy prosecutor commit misconduct during his closing argument?

F. Did Phelps receive ineffective assistance from his trial counsel?

II. STATEMENT OF THE CASE

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

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[1] The victim, AA will be referred to by her initials. Everyone in AA's family will be referred to by their first name in order to protect AA's identity and avoid confusion, no disrespect intended.
[2] Pe Ell has approximately 670 residents. RP 1161
[3] There are nine continuously numbered volumes for the jury trial, which will be referred to as RP. Other hearings will have the date in the citation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. ARGUMENT

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

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

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

1. Standard Of Review.

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

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

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

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

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

> 1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than the accused's right to a fair trial, the proponent must show a "serious imminent threat" to that right.
>
> 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
>
> 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
>
> 4. The court must weigh the competing interests of the proponent of closure and the public.
>
> 5. The order must be no broader in its application or duration than necessary to serve its purpose.

State v. Bone-Club, 128 Wn.2d at 258-59. A criminal defendant's public trial rights are violated if there is a closed proceeding that is subject to the public trial right and the trial court fails to conduct the *Bone-Club* inquiry. *State v. Brightman*, 155 Wn.2d 506, 515-16, 122 P.2d 150 (2005).

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

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

> The first part of the test, the experience prong, asks whether the place and process have historically been open to the press and general public. The logic prong asks 'whether public access plays a significant role in the functioning of the particular process in question. If the answer to both is yes, the public trial attaches and the *Waller*[8] or *Bone-Club* factors must be considered before the proceeding may be closed to the public.

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

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

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

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

Id. at 77.

3. Substantive Voir Dire Occurred In Open Court.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Standard Of Review

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

2. Phelps Was Present When The Jurors Were Excused.

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

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

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

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

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

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

1. Standard Of Review.

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

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

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

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

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

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

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

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

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

CP 43.

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

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

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

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

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

1. Standard Of Review.

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

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

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

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

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

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

a. The alleged error is of constitutional magnitude.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Standard Of Review.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. PHELPS RECEIVED EFFECTIVE ASSISTANCE FROM HIS TRIAL COUNSEL.

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

1. Standard Of Review.

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

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

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

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

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

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

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

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

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

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

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

V. CONCLUSION

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

RESPECTFULLY submitted this 13th day of June, 2013.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by:______________________________
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

LEWIS COUNTY PROSECUTOR

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