

NO. 67357-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

RAMOS ORTIZ-LOPEZ,

Appellant.

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

The Honorable John M. Meyer, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court's failure to provide a "separate and distinct" acts jury instruction on four of the charged crimes violated the appellant's right to be free from double jeopardy.

2. The appellant was deprived of his right to a unanimous jury verdict on the fifth and final charge.

3. The court violated the appellant's public trial rights by sealing the jury questionnaires without engaging in the required Bone-Club¹ analysis.

4. The sentencing court erred in entering various unauthorized computer- and Internet-related community custody conditions.

5. The community custody conditions prohibiting possession of pornography and possession of sexual stimulus material for the appellant's "deviancy" are unconstitutionally vague.

6. The condition prohibiting possession of drug paraphernalia is unconstitutionally vague and unauthorized under the circumstances..

¹ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). The Washington Supreme Court accepted review on this issue in State v. Tarhan under case no. 85737-7 and will hear arguments on Feb. 16, 2012. See http://www.courts.wa.gov/appellate_trial_courts/supreme/issues

Issues Pertaining to Assignments of Error

1. The State charged the appellant with four counts of first degree child rape based on allegations of multiple acts over the same four-year period. Did the court's failure to provide a "separate and distinct" act jury instruction violate the appellant's right to be free from double jeopardy?

2. The State charged the appellant with one additional count, second degree child rape. It offered evidence of multiple instances upon which the jury could have relied to find guilt and failed to make an election. Where the court failed to instruct jurors they must be unanimous as to which act formed the basis of the charge, was appellant deprived of his right to a unanimous verdict?

3. The trial court entered an order sealing juror questionnaires without first properly applying Bone-Club factors. Must this Court reverse and remand for a new trial?

4. Where appellant's crime did not involve computers or the Internet, must the sentencing court's computer- and Internet-related community custody conditions be stricken?

5. As a condition of community custody, the sentencing court prohibited appellant from possessing pornographic materials without prior approval by his community custody officer (CCO) or treatment provider and

sexual stimulus material for his “particular deviancy.” Must these prohibitions be stricken as unconstitutionally vague?

6. Must the condition prohibiting the appellant from possessing drug paraphernalia be stricken as unconstitutionally vague, as well as unauthorized under the Sentencing Reform Act?

B. STATEMENT OF THE CASE²

1. Charges, verdicts, and sentence

The State charged appellant Ramos Ortiz-Lopez (Ortiz) with four counts of first degree child rape occurring between 7/28/04 and 7/27/08, and one count of second degree child rape occurring between 7/28/08 and 12/31/08. The complaining witness was Ortiz’s daughter, A.W.-O. (“A.”), born July 28, 1996. CP 1-7.

Following jury selection, the court directed that the jury questionnaires – which were never filed – be held under seal by the Clerk. 1RP 3-4; Supp. CP __ (sub no. 58.100, Trial minutes, at 5); Supp. CP __ (sub no. 72, Order Sealing Questionnaires). The jury acquitted Ortiz of two counts of first degree child rape but convicted on the remaining counts (counts 1 and 4) and the second degree charge (count 5). CP 30.

² The brief refers to the verbatim reports as follows: 1RP – 4/25 and 4/26/11; 2RP – 4/27/11; 3RP – 4/28/11; 4RP – 4/29 and 7/1/11 (sentencing); 5RP – 6/2/11; and 6RP – 7/5/11.

The court sentenced Ortiz to a minimum high-end standard range sentence of 216 months on the first degree charges and 194 months on the second degree charge. CP 92-107. The court sentenced Ortiz to lifetime community custody, subject to numerous conditions set forth in the arguments section below.

2. Trial testimony

Complainant A. was a 14-year-old ninth grader at the time of the spring 2011 trial. She lived with her mother, father, and brothers as a small child, but her father, Ortiz, eventually left the family home. 1RP 39-40. A. and her brothers, who were close in age to A., went to live with Ortiz when A. was seven years old and in the second grade. 1RP 42, 82.

The family first lived in a one-bedroom apartment where A. shared a room with her brothers and Ortiz slept in the living room. 1RP 43. It was at that apartment Ortiz first touched A. sexually. 1RP 44. A. recalled going to sleep in her bed but waking up in the living room with her clothes removed. Ortiz's hands were on A.'s vagina. The touching felt "weird." A. asked her father to stop, but he told her to go back to sleep. A. was unsure how long the incident lasted.³ 1RP 46.

³ Contrary to her trial testimony, A. told a defense investigator that the first time sexual activity occurred, Ortiz put his tongue on her vagina. 1RP 86.

On one occasion, A. awoke to find blood on her underpants, and she complained about it to her father. 1RP 47-48. According to A., this incident occurred when she was seven years old, well before she started her period in sixth grade. 1RP 47. A. was uncertain whether the blood appeared following the above-described living room incident or after another incident. 1RP 47.

In third or fourth grade, A. and her family moved to a two-bedroom unit at the “Kulshan View” for about a year. 1RP 48, 51. A. had her own room, her brothers shared a room, and Ortiz slept downstairs, in a storage room, or on the couch. 1RP 49. A. began sleeping with her father, usually on the floor, after watching a scary movie one night. 1RP 50. Every night that A. slept with Ortiz, he performed oral sex on her, put his fingers in her vagina, or engaged in penile-vaginal intercourse. 1RP 49. A. estimated that Ortiz began engaging in penile-vaginal intercourse with her when she was in fourth grade. 1RP 51. When A. told Ortiz to stop, he would hold her down. 1RP 52, 54. Her vagina “stung” afterwards and slimy fluid would come out of her body, which she wiped away. 1RP 52, 54, 60.

Although A. screamed for her brothers, she was never able to wake them. 1RP 52, 87. A. testified the sexual activity occurred so frequently

A. became aware that her mother, M.W., had been released from prison when she was in sixth grade.⁴ 1RP 63. A.'s visits with M.W. increased in frequency until the spring of her seventh grade year, when A. spent a portion of March and April of 2009 with M.W. while recovering from tonsil surgery. 1RP 68, 82; 2RP 88, 106. After that, A. decided she wanted to live with M.W. and told Ortiz she would reveal the abuse if he did not permit it. 1RP 69.

The day after A. returned to her father's house in April of 2009, she disclosed the abuse to her friend, Jackie, after Ortiz refused to let A. stay overnight at Jackie's house. 1RP 71, 74, 83-85, 110-14, 169. Jackie told her sister, who told their stepfather, who called the police. 1RP 76, 170; 2RP 42-44.

A. kept her underpants in several places in her bedroom rather than immediately laundering them. 1RP 78-79. Police collected 25 pairs of underpants and submitted 10 pairs to the state forensic lab. 1RP 99-106, 126.

At the lab, each pair of underpants was assigned a letter A through J. 1RP 126. Underpants H tested positive for acid phosphatase (AP) and a protein known as p30; both substances are present in high quantities in

⁴ M.W. testified she was released from prison in the fall of 2006, when A. would have been in fifth grade. M.W. did not, however, immediately contact her children. 2RP 100-04; 3RP 127.

semen and less commonly in other bodily fluids. 1RP 129-30, 134-35, 154; 2RP 33; 3RP 36. Underpants G, which appeared to have been laundered, tested negative for AP but positive for p30.⁵ 1RP 129-30, 138-39. A suspected sperm cell was found on a cutting from "G." 1RP 128-30, 137.

Sperm cells are, in theory, harder to break apart than other cells, so a process called "differential extraction" attempts to separate the DNA from sperm cells from the DNA from more fragile cells, such as skin cells. 1RP 144-45. The process does not always work, however, and DNA from other cells is often mixed in. 1RP 144-45, 156; 3RP 11-12. The state lab was able to obtain a trace amount of DNA from "G" only. 1RP 147-48. However, the lab was unable to proceed with conventional DNA testing because the amount was too small. 1RP 148, 157.

The laboratory therefore sent the samples to a private laboratory for a process known as "Y-STR" testing, which looks at sites on the Y chromosome only and therefore examines the characteristics of only the male DNA from a given sample. 1RP 150.

The private laboratory obtained a complete profile from the DNA obtained from "G." 2RP 25, 32. The profile matched Ortiz. However, all

⁵ The defense expert opined that if semen was present on "G" he would expect to find both chemicals. 3RP 10.

males descendants in the same family have the same Y-STR profile, so a “match” does not indicate the evidentiary sample came from the same individual as the reference sample; instead it indicates that the individual, as well as certain male relatives, “cannot be excluded” as the DNA source.⁶ 2RP 17, 25-26, 36; 3RP 29, 69.

Ortiz's DNA expert agreed with the State's experts that sperm cells could be transferred in the laundry. 1RP 136, 159, 163. They also agreed that AP and p30 are water soluble. 1RP 161; 3RP 51.

The defense expert testified the presence of a single sperm cell, or even the slightly larger amount that could have produced the Y-STR profile, did not necessarily indicate sexual abuse occurred. For example, a single ejaculation would produce 500 million sperm cells. 2RP 27; 3RP 10, 12-13, 47, 56. So if “G” were worn after intercourse and not washed (accounting for the presence of water-soluble p30), one would expect to collect far more DNA from the underpants. 3RP 35. Moreover, Y-STR testing is vulnerable to contamination because, unlike conventional

⁶ No one in the private laboratory's database of approximately 12,000 had the same profile, although certain ethnic groups were poorly represented. 2RP 28, 37, 39-40. The defense expert testified that based on his analysis of larger, publicly available databases, 1 in 40 Native Americans and 1 in 500 Hispanic males shared Ortiz's profile. 3RP 33-34, 55. But current databases were too small and not diverse enough to accurately predict the commonality of the profile. 3RP 31-34, 55.

testing, it produces results from extremely small amounts of DNA. 3RP 66.

A. was examined by a nurse practitioner in May 2009. 2RP 63-64. A. told the nurse she was abused when she was about eight years old. A. said Ortiz⁷ touched her breasts and vagina with his penis, mouth, and chest. 2RP 66. A. told the nurse "watery stuff," which she described as "blah," came out of the penis." 2RP 66-67. A. also said she bled from her vaginal area when she was "about eight." 2RP 66.

The results of A.'s exam were normal. The physical findings were inconclusive for abuse, yet arguably consistent with the history provided by A. 1RP 68-71, 74-75. This could be explained by A.'s inability to understand that her vagina was not fully "penetrated" because the pressure of the penis against the hymen wall can be painful in prepubescent children. 2RP 73-74.

A.'s cousins, the daughters of Ortiz's sister, testified that A. told them her accusations were false and M.W. was forcing her to pursue the case. 3RP 78-79, 89-90. The cousins could not agree as to the date of A.'s confession, but agreed it occurred when they secretly met A. at the mall to

⁷ The nurse was permitted to testify regarding selected statements by A. under the "medical diagnosis or treatment" hearsay exception, but was not permitted to testify as to the identity of the abuser and other details. ER 803(a)(4); 2RP 60-61.

see a movie. 3RP 78, 80-81, 92, 94-95. The girls' mother, Ortiz's sister, spoke with A. over the phone. A. told her aunt she loved and missed Ortiz and that M.W. was making her pursue the case. 3RP 104.

Ortiz denied any sexual contact with A. 3RP 107. He noted his relationship with A. deteriorated after she turned 12 and believed she should be able to do what she wanted without his permission. 3RP 113-14. Ortiz, a single father, typically did the family's laundry in big machines at the Laundromat. 3RP 117-18. He had unprotected sex with his girlfriend during the spring of 2009 and hypothesized that his DNA could have transferred from the sheets to other household laundry. 3RP 115-18.

3. Jury instructions

The court instructed the jury in part that “[a] separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.” CP 17 (Instruction 5). It also provided four identical to-convict instructions listing the elements of first-degree child rape, as well as a to-convict instruction for second degree child rape occurring during a later charging period. CP 18-21 (Instructions 6-9). The Court also instructed the jury:

The State alleges that the defendant committed acts of [first degree child rape] on multiple occasions. To convict the defendant on any count of [first degree child rape], one particular act of [first degree child rape] must be proven beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of [first degree child rape].

CP 25 (Instruction 13).

C. ARGUMENT

1. THE MULTIPLE CONVICTIONS FOR FIRST DEGREE CHILD RAPE VIOLATE DOUBLE JEOPARDY BECAUSE THE COURT FAILED TO INSTRUCT THE JURY IT MUST FIND A “SEPARATE AND DISTINCT” ACT FOR EACH COUNT.

The double jeopardy clauses of the state and federal constitutions protect individuals from being “punished multiple times for the same offense.” State v. Linton, 156 Wn.2d 777, 783, 132 P.3d 127 (2006); see U.S. Const. amend. V; Wash. Const. art. I, § 9. This Court reviews double jeopardy claims de novo. State v. Mutch, 171 Wn.2d 646, 661–62, 254 P.3d 803 (2011).

In Mutch, a jury convicted the defendant of five counts of second degree rape. 171 Wn.2d at 652. The complaining witness testified Mutch forced her to engage in five distinct episodes that each included oral sex and vaginal intercourse over the course of a night and the next morning. Id. at 651. The trial court gave separate but “nearly identical” to-convict

instructions for the five rape counts and a “separate crime is charged in each count” instruction. Id. at 662. The court provided a unanimity instruction identical to Instruction 13 in the present case. Id. at 662 (citing State v. Carter, 156 Wn. App. 561, 567, 234 P.3d 275 (2010)).⁸ But the Mutch trial court failed to give a “separate and distinct” act instruction. 171 Wn.2d at 663.

Relying on two decisions by the Court of Appeals, Mutch held the instructions were flawed because they did not include a “separate and distinct” act instruction. 171 Wn.2d at 663 (citing Carter, 156 Wn. App. 561 and State v. Berg, 147 Wn. App. 923, 198 P.3d 529 (2008)). This flaw revealed a *potential* double jeopardy violation, but that was not the end of the Court’s inquiry. 171 Wn.2d at 663-64.

Instead, reviewing courts must look at “the entire trial record” in evaluating whether such a claim occurred. Id. at 664. A double jeopardy violation occurs if it is not “manifestly apparent to the jury” from the evidence, arguments, and instructions that “the State [was] not seeking to impose multiple punishments for the same offense and that each count was

⁸ See State v. Borsheim, 140 Wn. App. 357, 369, 165 P.3d 417 (2007) (finding that, absent language that the jury must “unanimously agree that at least one particular act has been proved beyond a reasonable doubt for *each* count,” the unanimity instruction did not protect against a double jeopardy violation, quoting State v. Ellis, 71 Wn. App. 400, 402, 859 P.2d 632 (1993)).

based on a separate act.” Mutch, 171 Wn.2d at 664 (internal quotation marks omitted) (quoting Berg, 147 Wn. App. at 931).

Applying these standards, the Mutch Court observed the case “present[ed] a *rare circumstance* where, despite deficient jury instructions, it is nevertheless manifestly apparent that the jury found [Mutch] guilty of five separate acts of rape to support five separate convictions.” 171 Wn.2d at 665 (emphasis added). The Court based its conclusion on the following circumstances: (1) The information charged Mutch with five counts “based on allegations that constituted five separate units of prosecution”; (2) the victim testified to five separate episodes of rape, which was the exact number of “to convict” instructions given to the jury; (3) Mutch’s cross-examination of the victim focused on the issue of consent, not on the number of alleged sexual acts; (4) a detective testified that Mutch had admitted to engaging in “multiple sexual acts” with the victim; (5) the State discussed five episodes of rape in its arguments; and (6) Mutch argued that the victim consented and that she was not credible only to the extent that she denied consenting. Id.

Accordingly, the Mutch court concluded, “In light of all this, we find that it was manifestly apparent to the jury that each count represented a separate act; if the jury believed [the victim] regarding one count, it would as to all.” Id. at 665-66.

Applying Mutch to Ortiz's case shows the trial court violated Ortiz's double jeopardy rights.

Ortiz was charged with four identical counts occurring between A.'s eighth birthday in 2004 and the day before she turned 12 in 2008. CP 18-1-7. The court gave the jury identical instructions for each count. CP 18-21. A. testified to the type of sexual activity that occurred, but could not estimate the number of times such activity occurred at each location. 1RP 46, 49-56, 58-60. Nor A. specify when such activity might have instead taken place within the count 5 charging period. 1RP 56-60.

Unlike in Mutch, therefore, the number of counts did not correspond with the number of acts alleged. Mutch, 171 Wn.2d at 665-66 (at least three out of six factors analyzed discuss fact that number of charges matched the number of alleged rapes); cf. State v. Wallmuller, 164 Wn. App. 890, 265 P.3d 940, 943 (2011) (State identified discrete acts corresponding to each charge and also told jurors "[t]he acts are separate and distinct. There are five separate and distinct acts that the State has alleged that the defendant committed.").

Furthermore, unlike in those cases, the prosecutor gave jurors no guidance in analyzing the evidence. For example, the prosecutor did not say count 1 went to acts of intercourse, count 2 to oral sex, etc. Instead,

the prosecutor acknowledged State's closing argument provided no more clarity in this respect than did the jury instructions.⁹

Closing argument can be summarized as follows: The State acknowledged that the testimony suggested many more acts than were charged. 4RP 11-12. The State argued that A. testified regarding one incident of sexual abuse occurring at the first apartment when she was eight years old.¹⁰ 4RP 14. The State also argued that A. testified, and told the nurse, she woke up in the living room while being digitally penetrated and had blood in her underpants.¹¹ 4RP 14, 16. The State next argued that A. testified multiple acts of oral sex, digital penetration, and penile-vaginal intercourse occurred at the second residence. 1RP 15. Thus, "we know that sexual intercourse occurred more than two times at that second house . . . [a]nd we know that oral sex occurred at least once at that

⁹ The State argued that under instruction 13, to convict Ortiz of any act, each juror must unanimously agree the act occurred. But instruction 13 was the same unanimity instruction found inadequate by Mutch and its predecessors. See, e.g., Carter, 156 Wn. App. at 567.

¹⁰ The examining nurse testified A. told her the sexual activity occurred more than once and occurred when she was "about eight" years old. The nurse did not testify A. told her about any specific apartment. 2RP 66-67.

¹¹ Again, the State's argument was incorrect. In fact, A. could not recall if the underpants incident (which, according to her testimony, occurred when she was seven) was the result of the living room incident or some other incident. 1RP 48. Moreover, A. did not explicitly testify to digital penetration during the living room incident. 1RP 46.

residence.” 1RP 15. Finally, the State argued that multiple incidents of intercourse, oral sex, and digital penetration occurred at the third apartment. 4RP 15.

It is true the jury acquitted Ortiz of two counts of first degree child rape, a fact apparently relied on by the court in denying Ortiz’s motion to dismiss one of the counts. 5RP 16. Those acquittals, however, could just as easily be explained by significant evidentiary deficiencies as to at least two of the incidents the State told the jury it was relying on. For example, according to A’s clear testimony, the “bloody underpants” incident occurred before the charging period, when A. was seven years old. 1RP 48. And regarding the “living room” incident, A. said only that Ortiz’s hands were “on [her] vagina” and explicitly stated she could not be more specific than that. 1RP 44-47, 85.

The acquittals thus do not excuse the trial court’s failure to instruct the jury it needed to base its verdicts on separate and distinct acts for each count. Much of the remaining testimony, regarding an inestimable number of acts, was even less specific than the potentially deficient incidents described above. Because it was not made “manifestly apparent” to the jury that it could only find a count proven based on a separate and distinct act, this Court should dismiss one of two remaining counts of first degree child rape. Mutch, 171 Wn.2d at 664-65.

2. ORTIZ WAS DEPRIVED OF HIS RIGHT TO A UNANIMOUS VERDICT ON THE SINGLE SECOND-DEGREE CHILD RAPE CHARGE.

Criminal defendants in Washington have a right to a unanimous jury verdict. Wash. Const. art. I, § 21. When the State presents evidence of multiple acts that could constitute a crime charged, “the State must tell the jury which act to rely on in its deliberations or the [trial] court must instruct the jury to agree on a specific criminal act.” State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), overruled on other grounds by Kitchen, 110 Wn.2d 403. The State's failure to elect the act, coupled with the court's failure to instruct the jury on unanimity, is constitutional error. Kitchen, 110 Wn.2d at 411. “The error stems from the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction.” Id.

State v. York is instructive. 152 Wn. App. 92, 216 P.3d 436 (2009). Richard York was convicted of four counts of second degree child rape. The first three counts were based on three specific instances described by the complainant, S.B. S.B. also testified the sex occurred on many other occasions, but she could not remember specific dates or instances other than those already identified. Rather, she testified she

spent the night at Cindy York's house "like, every Friday night" and that York would have sex with her "[m]ost of the time." Id. at 93-94.

In closing argument, the prosecutor supported count four by stating that: "[S.B.] talked about a pattern . . . she said it happened a lot It's not anything you can hang a number on." Id. at 94.

The Court of Appeals held the trial court erred in failing to provide a unanimity instruction, noting that "[t]he greater the number of offenses in evidence, the greater the possibility, or even probability, that all of the jurors may never have agreed as to the proof of any single one of them." Id. at 95 (quoting Petrich, 101 Wn.2d at 570 (quoting State v. Workman, 66 Wash. 292, 294-95, 119 P. 751 (1911))).

The same is true here. The jury was not told it had to unanimously rely on the same act as to count 5. In fact, contrary to the State's closing argument, instruction 13 omitted count 5. 4RP 12. Given the omission, and the manner in which the State presented its case, with few counts standing in for multiple acts, it would have been reasonable for jurors to assume they were *not* required to be unanimous as to count 5. York, 152 Wn. App. at 95. Nor did the State elect which incident the jury should

rely on for count 5 in closing.¹² 4RP 3-30, 48-53. The result was constitutional error.

Prejudice is presumed in a “multiple acts” case where there is neither an election nor a unanimity instruction. State v. Coleman, 159 Wn.2d 509, 510, 150 P.3d 1126 (2007). An election or unanimity instruction may not be required in a multiple acts case where there is “no evidence upon which the jury could discriminate between the incidents.” State v. Bobenhouse, 166 Wn.2d 881, 214 P.3d 907 (2009) (quoting State v. Camarillo, 115 Wn.2d 60, 70, 794 P.2d 850 (1990)). In other words, “if the jury reasonably believed one incident occurred, all the incidents must have occurred.” Camarillo, 115 Wn.2d at 71. But once evidence is introduced of separate identifiable incidents, such an instruction is required. Coleman, 159 Wn.2d at 514 (holding reversal is required where rational juror could have a reasonable doubt whether at least one incident supporting the charge occurred).

As in Coleman, the State cannot show the error here was “clearly harmless.” The State argued multiple acts could have satisfied count 5,

¹² It should be noted that in any event a prosecutor’s election in closing argument may be insufficient to insure unanimity. State v. Kier, 164 Wn.2d 798, 813, 194 P.3d 212 (2008) (closing argument insufficient to constitute “clear election” where evidence and jury instructions allowed jury to rely on either victim for robbery count).

and pointed to multiple incidents of intercourse, oral sex, and digital penetration occurring at the third apartment where A. was living in the fall of 2008 when the alleged sexual activity ceased. 4RP 11, 15.

But the quality and quantity of the evidence as to each type of sexual activity varied: For example, the incidents of penile-vaginal intercourse were arguably corroborated by physical evidence found on the underpants, whereas the allegations of oral sex were uncorroborated. Moreover, A.'s descriptions of oral sex were more generalized than her graphic descriptions of penile-vaginal intercourse involving burning vaginal pain and leaking semen. 1RP 54, 57, 60.

Conversely, the jury might have believed the incidents of oral sex, and not penile-vaginal intercourse, because (1) A. claimed she cried out in pain, yet never managed to awaken her brothers and (2) the nurse's testimony called into question whether penetration could have occurred in the manner that A. claimed. 1RP 52; 2RP 73-74.

Finally, as mentioned above, it was unclear from A.'s testimony when the activity constituting the first degree crime transitioned to activity constituting the second degree crime, given that A. was living in the third apartment at the time and made no reference to her birthday. This injects even more uncertainty as to which incident individual jurors may have relied on in reaching a verdict.

Given the foregoing, there is a high risk the count 5 verdict was not unanimous. Reversal is, therefore, required. Coleman, 159 Wn.2d at 515.

3. THE TRIAL COURT ERRED IN SEALING JURY QUESTIONNAIRES WITHOUT CONDUCTING A BONE-CLUB ANALYSIS.

- a. A Bone-Club analysis must precede sealing of completed jury questionnaires.

The public trial guarantees of article I, section 22 and the Sixth Amendment extend to voir dire proceedings. In re Personal Restraint of Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004). In complementary fashion, article I, section 10, and the First Amendment guarantee a public right of access to judicial proceedings *and* court records. Tacoma News, Inc. v. Cayce, 172 Wn.2d 58, 65-66, 256 P.3d 1179 (2011).

The written questionnaire and prospective jurors' answers thereto were as much a part of jury selection as were the questions posed and answers given in open court. See State v. Coleman, 151 Wn. App. 614, 621, 214 P.3d 158 (2009) (finding no meaningful difference between court records containing written responses to questionnaires and oral responses during voir dire); Huber v. Rohrig, 280 Neb. 868, 879, 791 N.W.2d 590, 601 (Neb. 2010) ("Other courts"¹³ that have addressed when such

¹³ "Press-Enterprise Co. v. Superior Court of Cal., 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (presumptive right of access under First Amendment extends to voir dire examination of prospective jurors); State

that have addressed when such questionnaires can be given to the media have concluded that voir dire begins with the juror questionnaires and that unless good cause is established, voir dire should be open to the public.”).

In Coleman, this Court held that filed and sealed jury questionnaires are court records for purposes of article I, section 10. 151 Wn. App. at 621. Because there is no meaningful difference between written responses to a questionnaire and spoken responses during voir dire, the court held the trial court was required to conduct a five-part Bone-Club analysis before sealing the questionnaires. Coleman, 151 Wn. App. at 621-23; see also State v. Tarhan, 159 Wn. App. 819, 824-25, 246 P.3d 580 (2011) (trial court’s failure to weigh Bone-Club factors before sealing questionnaires was “inconsistent with the public’s right of open access to court records” under article I, section 10).

ex rel. Beacon Journal v. Bond, 98 Ohio St.3d 146, 781 N.E.2d 180 (2002) (explaining that because purpose behind juror questionnaires is merely to expedite examination of prospective jurors, it follows that such questionnaires are part of voir dire process); Copley Press v. San Diego County, 228 Cal.App.3d 77, 89, 278 Cal.Rptr. 443, 451 (1991) (“[t]he fact that the questioning of jurors was largely done in written form rather than orally is of no constitutional import”).” Huber, 280 Neb. at 879, 791 N.W.2d at 601.

- b. The failure to apply Bone-Club before sealing completed jury questionnaires is structural error.

The Coleman court referred to the questionnaires as "court records containing written responses to questionnaires" that were "filed with the clerk and sealed by the court." Coleman, 151 Wn. App. at 621. Division One found the trial court did not seal the questionnaires "until several days after the jury was seated and sworn." Id. at 624. This delay in sealing caused the court to conclude, "Unlike answers given verbally in closed courtrooms, there is nothing to indicate that the questionnaires were not available for public inspection during the jury selection process." Id.

Because the record did not show the questionnaires were *unavailable* to the public during voir dire, the Coleman court held, the sealing order had no effect on Coleman's public trial right and thus did not cause the type of fundamental trial defect that has been found to accompany structural error. 151 Wn. App. at 624; see State v. Momah, 167 Wn.2d 140, 149, 217 P.3d 321 (2009) ("An error is structural when it 'necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'") (alteration in original) (quoting Washington v. Recuenco, 548 U.S. 212, 218-19, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)), cert. denied, 131 S. Ct. 160 (2010).

The record here, however, indicates the public did not have access to the completed questionnaires during or after voir dire. The questionnaires were not placed in the public file during voir dire. See Appendix (superior court docket for case no. 10-1-00148-3). After the jury was selected, according to the trial minutes, the court directed the clerk to “hold jury questionnaires under seal.” The minutes also note that “Jury questionnaires are held under seal with trial exhibits in vault.” Supp. CP ___ (sub no. 58.100, supra, at 5). While the minutes indicate a previous discussion of Bone-Club factors, Supp. CP ___ (sub no. 58.100, supra, at 4), no such discussion appears regarding the questionnaires. Finally, the court later ordered a written order sealing the questionnaires that did not cite to the Bone-Club factors. Supp. CP ___ (sub no. 72, supra).

Following the Coleman rationale, this Court should find structural error occurred. Alternatively, the Supreme Court's decision in Orange requires a finding of structural error here.

In Orange, the trial court excluded the accused's family members and all other spectators from jury selection because of purported space limitations. 152 Wn.2d at 807-08. In concluding the trial court erred by failing to apply the Bone-Club factors before closing voir dire, the Court

made clear the importance of spectators and family members during voir dire proceedings:

[W]e emphasize that, “[a]long with the general detriments associated with a closed trial, notably *the inability of the public to judge for itself and to reinforce by its presence the fairness of the process*, the present case demonstrates other kinds of harms: *the inability of the defendant's family to contribute their knowledge or insight to the jury selection and the inability of the venirepersons to see the interested individuals.*” Watters [v. State], 328 Md. [38] at 48, 612 A.2d 1288 [(1992)] (emphasis added).

Orange, 152 Wn.2d at 812; see State v. Brightman, 155 Wn.2d 506, 515-16, 122 P.3d 150 (2005) (trial court committed reversible error by closing voir dire to the public without first applying Bone-Club factors).

The Orange Court found that had counsel raised the constitutional violation on appeal, “the remedy for the presumptively prejudicial error would have been, as in Bone-Club, remand for a new trial.” Orange, 152 Wn.2d at 814. Indirectly finding structural error by finding counsel ineffective, the Court reversed the convictions and remanded for a new trial. To do otherwise, the Court emphasized, “would undermine 20 years of consistency on this legal issue.” Id. at 822.

- c. The issue of "standing" to assert article I section 10 should not preclude relief here.

In analyzing these “public access,” cases, courts must be mindful of the established interplay between the state and federal constitutions in

this area. As this Court said in Bone-Club, our state constitution "provides at minimum the same protection of a defendant's fair trial rights as the Sixth Amendment." State v. Bone-Club, 128 Wn.2d 254, 261, 906 P.2d 325 (1995) (finding the "section 10" test meets Waller's¹⁴ directive to consider alternatives).

The accused's Sixth Amendment right to a public trial extends to voir dire. Presley v. Georgia, ___ U.S. ___, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010). The Court in Presley highlighted the importance of public access to jury selection, holding trial courts must *sua sponte* consider alternatives to closure even when none are suggested by the parties. Presley, 130 S. Ct. at 724. This is because "[t]he process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." Presley, 130 S. Ct. at 724 (quoting Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)).

Therefore, "Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials[.]" even where one or even both parties seek closure. Presley, 130 S. Ct. at 724-25.

¹⁴ Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). The Court held that the Sixth Amendment right to a public trial required trial courts to consider reasonable alternative to closing a pretrial suppression hearing. Id. at 47-48.

In this way the Supreme Court recognized the accused's standing to assert the public's right of access to judicial proceedings and records:

[T]here is no legitimate reason, at least in the context of juror selection proceedings, to give one who asserts a First Amendment privilege greater rights to insist on public proceedings than the accused has. "Our cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant." Gannett Co. v. DePasquale, 443 U.S. 368, 380, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979). There could be no explanation for barring the accused from raising a constitutional right that is unmistakably for his or her benefit. That rationale suffices to resolve the instant matter.

Presley, 130 S. Ct. at 724.¹⁵ Thus, Ortiz may assert the public's right of access under article I, section 10 as well.

In summary, because the improper sealing of the jury questionnaires constituted structural error, the remedy is reversal of his convictions. Orange, 152 Wn.2d at 814.

¹⁵ To whom the right to public jury selection belonged was unimportant to the Court in Press-Enterprise:

[H]ow we allocate the "right" to openness as between the accused and the public, or whether we view it as a component inherent in the system benefiting both, is not crucial. No right ranks higher than the right of the accused to a fair trial. But the primacy of the accused's right is difficult to separate from the right of everyone in the community to attend the voir dire which promotes fairness.

Press-Enterprise Co., 464 U.S. at 508.

4. THE COURT ERRED IN IMPOSING VARIOUS
COMPUTER- AND INTERNET-RELATED
COMMUNITY CUSTODY CONDITIONS.

Illegal or erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). This Court reviews whether the trial court had statutory authority to impose community custody conditions de novo. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

The sentencing court imposed several Internet and computer-related prohibitions:

15. Do not access the Internet or subscribe to any internet service provider by modem, LAN, DSL or any other avenue (to include but not limited to, satellite dishes, PDAs, electronic games, web televisions, internet appliances and cellar [sic]/digital telephones, or I-pads/I-pods). And you shall not be allowed to use another's [sic] person's internet or use the internet through any venue until approved in advance by the [CCO]. Any electronic device, cell phone, or computer to which you have access is subject to search.

16. Do not use computer chat rooms.

....

18. Do not access or have an account to any social networking site.

19. You must subject to searches or inspections of any computer equipment to which you have regular access.

20. You may not possess or maintain access to a computer, unless specifically authorized by a [CCO] You may not possess any computer parts or peripherals, including but not limited to hard drives, storage devices, digital cameras, web cams, wireless video devices or receivers, CD/DVD burners, or any device to store or reproduce digital media or images.

CP 106-07.

These conditions are invalid because they are not directly related to the crimes. An individual convicted of first or second degree child rape for a crime committed between 2004 and 2008 must be sentenced under former RCW 9.94A.712.¹⁶ See RCW 9.94A.345 (“Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed.”). That statute provides that the trial court must impose a minimum term within the standard sentencing range and a maximum term equal to the statutory maximum. It also requires the trial court to impose community custody for any time the defendant is released before the expiration of the maximum sentence: in other words, for life.

Some conditions are mandatory, while the trial court has discretion in imposing others. . Under former RCW 9.94A.712(6)(a), the trial court may order the defendant to “perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community.” Under former RCW 9.94A.700(5)(e) (2003), the trial court may also order the defendant to “comply with any crime-related prohibitions.” A condition is "crime-

¹⁶ This statute was recodified as RCW 9.94A.507 in 2009.

related" only if it "directly relates to the circumstances of the crime."

RCW 9.94A.030(10)

In State v. O'Cain, a condition prohibiting the defendant from accessing the Internet without prior approval from his CCO or treatment provider was not crime-related and therefore was stricken. 144 Wn. App. 772, 773, 184 P.3d 1262 (2008). O'Cain controls. As in that case, there is no evidence in the record that the above conditions are crime-related. Id. at 775. For example, there is no evidence that Ortiz accessed the Internet before committing the crime or that Internet use contributed in any way to the crime, such as accessing pornography used to promote the offenses.¹⁷ Id. Moreover, insofar as any of the above-mentioned conditions can be considered "monitoring" conditions, they are invalid; so-called "monitoring" conditions must be limited to monitoring compliance with valid community custody conditions. State v. Combs, 102 Wn. App. 949, 952-53, 10 P.3d 1101 (2000).

This Court should strike the foregoing computer- and Internet-related conditions because they are not crime-related. Id.

¹⁷ In fact, the State explicitly argued based on the evidence that Ortiz did *not* show A. pornography. 3RP 127; 4RP 17.

5. THE CONDITIONS PROHIBITING POSSESSION OF PORNOGRAPHY AND POSSESSION OF SEXUAL STIMULUS MATERIAL FOR THE APPELLANT'S DEVIANCY ARE VAGUE AND MUST BE STRICKEN.

The sentencing court ordered Ortiz not to “possess, access, or view pornographic materials, as defined by the sex offender therapist and/or [CCO]. . . .” CP 106 (condition 7). The court also ordered Ortiz not to “possess sexual stimulus material for your particular deviancy as defined by [CCO] and therapist except as provided for therapeutic purposes.” CP 106 (condition 8).

These conditions are illegal. The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the state constitution requires that citizens have fair warning of proscribed conduct. Bahl, 164 Wn.2d at 752. The vagueness doctrine serves two main purposes. First, it provides citizens with fair warning of what conduct they must avoid. Second, it protects them from arbitrary, ad hoc or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is void for vagueness if either: (1) it does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited; or (2) it does not provide ascertainable standards of guilt to protect against arbitrary

enforcement. State v. Sullivan, 143 Wn.2d 162, 181-82, 19 P.3d 1012 (2001).

In State v. Sansone, 127 Wn. App. 630, 111 P.3d 1251 (2005), this Court held that the following condition of community placement was unconstitutionally vague:

[The defendant shall] not possess or peruse pornographic materials unless given prior approval by [his] sexual deviancy treatment specialist and/or Community Corrections Officer. Pornographic materials are to be defined by the therapist and/or Community Corrections Officer.

Id. at 634-35.

In Bahl, the Supreme Court found a pre-enforcement challenge to a similar condition was properly raised. 164 Wn.2d at 745-52. The unlawful condition in that case stated, “Do not possess or access pornographic materials, as directed by the supervising [CCO].” Id. at 743. Bahl found the condition was invalid even though it specified a third party could define what fell within the condition. As did Sansone, the Bahl Court noted such a condition “only makes the vagueness problem more apparent, since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement.” Bahl, 164 Wn.2d at 758.

The Bahl court also invalidated a condition identical to condition 8, pertaining to sexual stimulus material. The Court held, “[t]he condition cannot identify materials that might be sexually stimulating for a deviancy when no deviancy has been diagnosed, and this record does not show that any deviancy has yet been identified. Accordingly, the condition is utterly lacking in any notice of what behavior would violate it.” Id. at 761.

Because the foregoing conditions are unconstitutionally vague, the prohibitions should be stricken. Sansone, 127 Wn. App. at 642.

6. THE CONDITION PROHIBITING POSSESSION OF DRUG PARAPHERNALIA IS NOT CRIME-RELATED AND IS UNCONSTITUTIONALLY VAGUE.

Condition 14 in Ortiz's judgment and sentence states, “Do not possess drug paraphernalia.” CP 106. There was, however, no evidence that drugs or drug paraphernalia were related to Ortiz's crimes. For the aforementioned reasons, this condition should therefore be stricken.

A different reason warrants the same remedy. In State v. Sanchez Valencia, the Court addressed a sentencing condition that prohibited possession of “any paraphernalia” used to ingest, process, or facilitate the sale of controlled substances. 169 Wn.2d 782, 785, 239 P.3d 1059 (2010). The court unanimously concluded that the provision was vague because it failed to provide fair notice and to prevent arbitrary enforcement. Id. at

794-95. Condition 14 here is even less specific and must likewise be stricken.

D. CONCLUSION

The court's failure to provide a "separate and distinct" act jury instruction on four of the charged crimes violated Ortiz's right to be free from double jeopardy, and the remedy is dismissal of one of the two counts he was convicted of. Count 5 must be reversed, moreover, because Ortiz was denied his right to a unanimous jury verdict on that count.

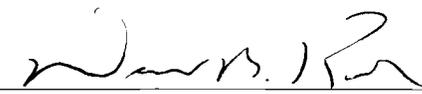
Alternatively, each conviction should be reversed, and the case remanded for retrial, based on the violation of the constitutional rights to open judicial proceedings.

In any event, the invalid community custody conditions should be stricken.

DATED this 9th day of February, 2012.

Respectfully submitted,

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APPENDIX

SKAGIT COUNTY SUPERIOR COURT Case#: 101001483
STATE OF WASHINGTON VS ORTIZ LOPEZ, RAMOS NOEL

Sub#	Date	Description/Name
1	02/18/2010	INFORMATION
2	02/18/2010	AFFIDAVIT/DECLARATION PROB CAUSE
3	02/18/2010	OMNIBUS APPLICATION OF PROS ATTY
4	02/18/2010	BAIL RECOMMENDATION
5	02/18/2010	ORDER FOR WARRANT
	02/18/2010	ORDER SETTING BAIL @ \$100,000/WA ST JUDGE DAVID R. NEEDY
6	02/18/2010	WARRANT OF ARREST
7	02/18/2010	COVER SHEET
8	02/18/2010	DECLARATION OF MAILING
9	02/19/2010	MOTION HEARING JUDGE DAVID R. NEEDY
	02/19/2010	COURT REPORTER NOTES CD BX JS
10	02/19/2010	ORDER SETTING \$25,000
	02/19/2010	ORDER SETTING
	02/19/2010	ORDER ESTABLISHING COND. OF RELEASE
	02/19/2010	ORDER TAKING DEFT IN CUSTODY JUDGE DAVID R. NEEDY
11	02/22/2010	BAIL BOND POSTED \$25,000
12	02/23/2010	SHERIFF'S RETURN WARRANT OF ARREST
13	02/25/2010	MOTION HEARING JUDGE JOHN M. MEYER
	02/25/2010	COURT REPORTER NOTES CD B-1 M.W
14	02/25/2010	MOTION AND AFFIDAVIT/DECLARATION FOR ORDER FORFEITING BAIL
15	02/25/2010	ORDER FORFEITING BAIL/BOND JUDGE JOHN M. MEYER
16	02/25/2010	NOTICE TO BAILOR TO FORFEIT
17	02/25/2010	ORDER DIR ISSUANCE OF BENCH WARRANT
	02/25/2010	ORDER SETTING BAIL \$200,000/NTWIDE JUDGE JOHN M. MEYER
18	02/25/2010	BENCH WARRANT ISSUED - COPY FILED
19	02/26/2010	MOTION HEARING JUDGE JOHN M. MEYER
	02/26/2010	COURT REPORTER NOTES CD B-1 M.W
20	02/26/2010	ORDER OF CONTINUANCE
	02/26/2010	ORDER SETTING BAIL @ \$200,000 JUDGE JOHN M. MEYER
21	03/01/2010	SHERIFF'S RETURN ON A BENCH WARRANT
22	03/02/2010	NOT OF APPEAR AND REQ FOR DISCOVERY RICHARDS, C. WESLEY
23	03/04/2010	INITIAL ARRAIGNMENT JUDGE DAVID R. NEEDY
	03/04/2010	COURT REPORTER NOTES DE/CD 1
24	03/04/2010	ORDER SEALING DOCUMENT #25 JUDGE DAVID R. NEEDY

25 03/04/2010 ORDER FOR SEXUAL ASSAULT PROTECTION
*****SEALED*****
JUDGE DAVID R. NEEDY

26 03/04/2010 ACKNWLDGMT OF ADVICE OF RIGHTS
JUDGE DAVID R. NEEDY

27 03/04/2010 ORDER SETTING EXP; 05/03/2010
03/04/2010 ORDER SETTING OMNIBUS HEARING
03/04/2010 ORD SETTING TRIAL CONFIRMATION HRG
03/04/2010 ORDER SETTING TRIAL DATE
03/04/2010 ORDER SETTING BAIL @ \$100,000
03/04/2010 ORDER ESTABLISHING COND. OF RELEASE
JUDGE DAVID R. NEEDY

28 03/04/2010 DECLARATION OF MAILING

29 03/25/2010 HEARING CONTINUED: STIPULATED
JUDGE SUSAN K. COOK

30 03/25/2010 ORDER TO CONTINUE OMNIBUS HRG
03/25/2010 ORD TO CONT TRIAL CONFIRMATION HRG
03/25/2010 ORD FOR CONTINUANCE OF TRIAL DATE
SPEEDY TRIAL 7/14
JUDGE SUSAN K. COOK

31 05/13/2010 HEARING CONTINUED: STIPULATED
JUDGE MIKE RICKERT

32 05/13/2010 ORDER TO CONTINUE OMNIBUS HRG
05/13/2010 ORD SETTING TRIAL CONFIRMATION HRG
05/13/2010 ORDER SETTING TRIAL DATE
JUDGE MIKE RICKERT

33 07/15/2010 HEARING CONTINUED: STIPULATED
JUDGE JOHN M. MEYER

34 07/15/2010 ORDER TO CONTINUE OMNIBUS HRG
07/15/2010 ORD TO CONT TRIAL CONFIRMATION HRG
07/15/2010 ORD FOR CONTINUANCE OF TRIAL DATE
JUDGE JOHN M. MEYER

35 09/02/2010 HEARING CONTINUED: STIPULATED
JUDGE MIKE RICKERT

36 09/02/2010 ORDER TO CONTINUE OMNIBUS HRG
09/02/2010 ORD TO CONT TRIAL CONFIRMATION HRG
09/02/2010 ORD FOR CONTINUANCE OF TRIAL DATE
JUDGE MIKE RICKERT

37 11/04/2010 OMNIBUS HEARING
JUDGE JOHN M. MEYER
11/04/2010 COURT REPORTER NOTES CD B-1 J.S

38 11/04/2010 ORDER SETTING STATUS CONFERENCE
JUDGE JOHN M. MEYER

39 11/04/2010 OMNIBUS APPLICATION OF PROS ATTY
11/04/2010 OMNIBUS APPLICATION BY DEFENDANT
11/04/2010 OMNIBUS ORDER
11/04/2010 ORDER SETTING
3.5
JUDGE JOHN M. MEYER

40 11/18/2010 STATE'S LIST OF WITNESSES
41 11/24/2010 MOTION HEARING
JUDGE MIKE RICKERT
11/24/2010 COURT REPORTER NOTES CD B-1 D.E
42 11/24/2010 ORDER SETTING STATUS CONFERENCE
11/24/2010 ORD TO CONT TRIAL CONFIRMATION HRG
11/24/2010 ORD FOR CONTINUANCE OF TRIAL DATE
JUDGE MIKE RICKERT
43 12/16/2010 MOTION HEARING
JUDGE SUSAN K. COOK
12/16/2010 COURT REPORTER NOTES AE B-649
44 12/16/2010 ORDER SETTING STATUS CONFERENCE
12/16/2010 ORD TO CONT TRIAL CONFIRMATION HRG
12/16/2010 ORD FOR CONTINUANCE OF TRIAL DATE
JUDGE SUSAN K. COOK
45 01/06/2011 ORDER SETTING STATUS CONFERENCE
JUDGE DAVID R. NEEDY
46 01/06/2011 HEARING CONTINUED: STIPULATED
JUDGE DAVID R. NEEDY
47 01/13/2011 MOTION HEARING
JUDGE SUSAN K. COOK
01/13/2011 COURT REPORTER NOTES DE CD BOX 2
48 01/13/2011 ORDER SETTING STATUS CONFERENCE
01/13/2011 ORD TO CONT TRIAL CONFIRMATION HRG
01/13/2011 ORD FOR CONTINUANCE OF TRIAL DATE
JUDGE SUSAN K. COOK
49 01/14/2011 DEFENDANT'S LIST OF WITNESSES
50 02/24/2011 MOTION HEARING
JUDGE SUSAN K. COOK
02/24/2011 CD RECORD OF PROCEEDINGS DST CT
51 02/25/2011 STATE'S LIST OF WITNESSES
52 03/03/2011 MOTION HEARING
JUDGE DAVID R. NEEDY
03/03/2011 COURT REPORTER NOTES CD BX 2 DE
53 03/03/2011 ORDER SETTING STATUS CONFERENCE
03/03/2011 ORD TO CONT TRIAL CONFIRMATION HRG
03/03/2011 ORD FOR CONTINUANCE OF TRIAL DATE
JUDGE DAVID R. NEEDY
54 03/24/2011 HEARING CONTINUED: STIPULATED
JUDGE JOHN M. MEYER
55 03/24/2011 ORDER SETTING STATUS CONFERENCE
JUDGE JOHN M. MEYER
56 03/31/2011 MOTION HEARING
JUDGE DAVID R. NEEDY
03/31/2011 CD RECORD OF PROCEEDINGS DC/11:34
57 04/21/2011 MOTION HEARING
JUDGE SUSAN K. COOK
04/21/2011 CD RECORD OF PROCEEDINGS
58 04/22/2011 BRIEF DEFENSE TRIAL

58.100 04/25/2011 JURY TRIAL
JUDGE JOHN M. MEYER
04/25/2011 COURT REPORTER NOTES CD BX 2 JS
59 04/25/2011 ST'S MOTION IN LIMINE
60 04/25/2011 ST'S MOTION TO COMPEL
61 04/26/2011 DEFENDANT'S PROPOSED INSTRUCTIONS
04/26/2011 COURT REPORTER NOTES CD BX 2 JS
62 04/27/2011 REPORT
04/27/2011 COURT REPORTER NOTES CD BX 2 JS
63 04/28/2011 PLAINTIFF'S PROPOSED INSTRUCTIONS
04/28/2011 COURT REPORTER NOTES CD BX 2 JS
04/29/2011 COURT REPORTER NOTES CD BX 2 JS
64 04/29/2011 EXHIBIT LIST
65 04/29/2011 COURT'S INSTRUCTIONS TO JURY
JUDGE JOHN M. MEYER
66 04/29/2011 JURY NOTE
67 04/29/2011 VERDICT FROM
68 04/29/2011 ORDER SETTING NO BAIL
04/29/2011 ORDER SETTING
04/29/2011 PRESENTENCE INVESTIGATION ORDER
JUDGE JOHN M. MEYER
69 05/09/2011 DEFT'S MOTION FOR NEW TRIAL
70 05/09/2011 MOTION FOR DNA TEST'G BY DEF
71 05/11/2011 STIP TO RETURN OR DESTROY EXHIBIT
JUDGE JOHN M. MEYER
72 05/11/2011 ORDER SEALING JURY QUESTIONNAIRES
JUDGE JOHN M. MEYER
73 05/12/2011 NOTE FOR CALENDAR COURT ADMIN
SPECIAL SET @9:00/MAB
MT FOR NEW TRIAL
74 05/27/2011 RESPONSE TO MT FOR DNA
75 05/27/2011 RESPONSE TO MT FOR NEW TRIAL
76 06/01/2011 DEFT'S REPLY ST'S RSP MT NEW TRIAL
77 06/01/2011 DEFT'S REPLY ST'S RSP MT FOR DNA
78 06/02/2011 MOTION HEARING
JUDGE JOHN M. MEYER
06/02/2011 COURT REPORTER NOTES CD B-2 L.W
79 06/06/2011 ORDER
JUDGE JOHN M. MEYER
80 06/09/2011 ORDER DENYING MOTION
COMMISSIONER G. BRIAN PAXTON
81 06/13/2011 MT SHTN TIME; W/D EVIDENCE BY DEF
82 06/14/2011 DEFT'S MOTION TO DISMISS
83 06/16/2011 MOTION HEARING
JUDGE JOHN M. MEYER
06/16/2011 COURT REPORTER NOTES CD B-2 J.S
84 06/16/2011 ORDER WAIVING SPEEDY SENTENCING
JUDGE JOHN M. MEYER
85 06/21/2011 NOTE FOR CALENDAR COURT ADMIN

SPECIAL SET @ 1:30 BEFORE JMM
DEF MT DISMISS/SENTENCE

86 06/28/2011 RESPONSE TO MOTION FOR DISMISSAL

87 07/01/2011 SENTENCING HEARING
JUDGE JOHN M. MEYER

07/01/2011 COURT REPORTER NOTES JS CDBOX 2

88 07/01/2011 ORDER SEALING DOCUMENT 89
JUDGE JOHN M. MEYER

89 07/01/2011 NO CONTACT ORDER
**** SEALED DOC ****
JUDGE JOHN M. MEYER

89.100 07/01/2011 FELONY JUDGMENT AND SENTENCE
07/01/2011 RPT SENT TO FIREARMS UNIT
07/01/2011 ORDER SETTING RESTITUTION
JUDGE JOHN M. MEYER

89.200 07/01/2011 ADVICE OF RIGHTS TO APPEAL
JUDGE JOHN M. MEYER

90 07/05/2011 MOTION HEARING
JUDGE JOHN M. MEYER

07/05/2011 CD RECORD OF PROCEEDINGS 1/8:31

91 07/05/2011 ORDER SETTING BAIL @ \$1,000,000.
07/05/2011 ORDER ESTABLISHING COND. OF RELEASE
JUDGE JOHN M. MEYER

92 07/05/2011 ORDER GRANTING MT TO WITHDRAW EVIDE
JUDGE JOHN M. MEYER

93 07/05/2011 ORDER DENYING MOTION/PETITION
JUDGE JOHN M. MEYER

94 07/06/2011 NOTICE OF APPEAL TO COURT OF APPEAL

95 07/06/2011 MOTION FOR ORDER OF INDIGENCY

96 07/06/2011 ORDER AUTHORIZING APPEAL IN FORMA
PAUPERIS
JUDGE SUSAN K. COOK

97 07/06/2011 AFFIDAVIT OF SERVICE

98 07/08/2011 TRANSMITTAL LETTER - COPY FILED
NOTICE TO COURT OF APPEALS

99 07/13/2011 RECEIPT(S) COA NOTICE OF APPEAL

100 07/26/2011 PERFECTION NOTICE FROM CT OF APPLS

101 08/17/2011 DESIGNATION OF CLERK'S PAPERS
NIELSEN

101.100 08/22/2011 TRANSMITTAL LETTER - COPY FILED
NIELSEN DESIGNATION TO COA

08/22/2011 CLERK'S PAPERS - FEE ASSESSED

08/24/2011 CLERK'S PAPERS - FEE RECEIVED

102 08/24/2011 CANCELLED: PLAINTIFF/PROS REQUESTED

103 08/24/2011 ORDER CLARIFY ORD GRNT'G MOTION
TO W/D EVIDENCE
JUDGE JOHN M. MEYER

104 08/25/2011 NOTE FOR CALENDAR
REST

105 08/25/2011 RECEIPT(S) COA CLERK'S PAPERS
NIELSEN

106 08/26/2011 RECEIPT FOR EXHIBIT #4

106.100 08/26/2011 RECEIPT FOR EXHIBIT #2

*** 10/03/2011 VERBATIM REPORT OF PROCEEDINGS
(1) VOL 6/2/11 L WEBER

107 10/04/2011 VERBATIM RPT TRANSMITTED COA

108 10/07/2011 RECEIPT(S) CRT APPEAL

*** 10/14/2011 VERBATIM REPORT OF PROC (4 VOL) JS
4-25/26/27/28/29-11; 7/1/11

*** 10/14/2011 VERBATIM REPORT OF PROC (1 VOL) BL
7/5/11

109 10/17/2011 VERBATIM RPT TRANSMITTED COA

110 10/21/2011 RECEIPT(S) COA

111 10/26/2011 HEARING CONTINUED: STIPULATED
JUDGE DAVID R. NEEDY

112 10/26/2011 ORDER SETTING RESTITUTION
JUDGE DAVID R. NEEDY

113 10/27/2011 ORD ESTABLISHING AMT OF RESTITUTION
JUDGE DAVID R. NEEDY

114 11/09/2011 RECEIPT(S) OF EXHIBIT 2 & 4

115 11/16/2011 CANCELLED: PLAINTIFF/PROS REQUESTED

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 67357-2-1
)	
RAMOS ORTIZ-LOPEZ,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 9TH DAY OF FEBRUARY 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] ERIK PEDERSEN
 SKAGIT COUNTY PROSECUTOR'S OFFICE
 COURTHOUSE ANNEX
 605 S. THIRD
 MOUNT VERNON, WA 98273

- [X] RAMOS ORTIZ-LOPEZ
 DOC NO. 349223
 COYOTE RIDGE CORRECTIONS CENTER
 P.O. BOX 769
 CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 9TH DAY OF FEBRUARY 2012.

x 

**FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 FEB - 9 PM 4:25**