90308-5

NO. 43359-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DAVID WILLIAM CARSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald E. Culpepper

No. 10-1-04754-1

Response Brief

MARK LINDQUIST
Prosecuting Attorney

By
THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was a ***Petrich*** instruction unnecessary where the State elected each act the jury should rely on during their deliberations on defendant's charges?

2. Has defendant met his burden to demonstrate that his counsel's performance was both deficient and prejudicial to his defense where counsel's performance may be characterized as legitimate trial tactics?

3. Was the trial court's refusal to give a ***Petrich*** instruction harmless error where the State proved each charge of molestation beyond a reasonable doubt?

4. Concerning defendant's right to a public trial, has defendant met his burden to identify where in the record a closure occurred that would require a ***Bone-Club*** analysis?

5. Has defendant met his burden to provide this Court an adequate record for review?

B. STATEMENT OF THE CASE.

1. Procedure

On November 9, 2010, the Pierce County Prosecuting Attorney's Office (State) charged David William Carson (defendant) with one count

of rape of a child in the first degree, and one count of child molestation in the first degree. CP 1–2. The State later amended defendant's charges to three counts of child molestation in the first degree. CP 9–10.

Defendant's jury trial began on February 16, 2012, before the Honorable Ronald E. Culpepper. RP 89. When reviewing the parties proposed jury instructions, defendant objected to the giving of a ***Petrich***[1] instruction because he feared it would confuse the jury. RP 404–10. The trial court granted defendant's motion over the State's objection. RP 409–10. The jury found defendant guilty as charged. CP 75–77. On April 27, 2012, the court sentenced defendant to 105 months to life in custody.[2] CP 105 (Judgment and sentence, paragraph 4.5).

2. Facts

During the spring of 2009, defendant moved in with his friend Dustin Halbert and Mr. Halbert's fiancé, Ms. H.[3] RP 147, 303. Ms. H.'s children, a five year-old son (C.C.), her two-year old son, and her one-year old daughter also lived in the house. RP 100, 144–45. In exchange for quarters, defendant gave the family part of his food stamp allowance, paid a small rent, watched the children, and performed chores around the home.

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[1] 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984).
[2] Defendant had an offender score of 6 with a standard range of 98–130 months. CP 102 (Judgment and sentence, paragraph 2.3).
[3] The victim in this case was Ms. H.'s minor son. For purposes of the family's anonymity, the State will refer to Mr. Halbert's fiancé as "Ms. H." and her son—the victim—as "C.C." in its brief.

RP 152, 304–05. Defendant moved out of the home in May 2010, after having a disagreement with Mr. Halbert . RP 198.

In August 2010, Ms. H. and her children were traveling in their car to see a family friend. RP 162–63. While traveling, C.C. repeatedly tried getting Ms. H.'s attention over the noise from the other children. RP 163–64. When Ms. H. finally responded, C.C. told her that defendant had tried putting his penis in C.C.'s anus. RP 164. Startled, Ms. H. pulled over, got out of her vehicle, called Mr. Halbert, and then drove to her destination where she called the police. RP 165–68. While driving, C.C. explained that defendant had placed C.C.'s hands behind his back, zip-tied them with plastic ties, and put duct tape over his mouth during the incident. RP 168.

Shortly thereafter in a forensic interview, C.C. told Cornelia Thomas, a forensic interviewer at Mary Bridge Child Advocacy Center, that defendant had tried putting his penis[4] in C.C.'s "bottom," which C.C. clarified as his anus by pointing to it during the interview, in Ms. H.'s bedroom and again in C.C.'s bedroom. RP 246; Ex. 5 (13:55:29, 13:59:15, 14:03:00–14:06:30, 14:11:45, 14:18:00–14:20:30). C.C. explained that on a different occasion, defendant had "twisted" C.C.'s penis in the bathroom. Ex. 5 (13:55:29–13:56:10, 14:02:38, 14:08:55). C.C. also told

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[4] C.C. referred to defendant's penis as defendant's "business," but clarified that "business" meant "penis" in his forensic interview. Ex 5 (13:55:35, 14:03:35).

Michele Breland, a nurse at Mary Bridge who performed a physical examination on C.C., that when defendant tried putting his penis in him, it felt "[k]ind of crazy and gross and it made me feel like I had to go to the bathroom." RP 366, 385, 389. Similar to his statements to Mr. Thomas, C.C. told Ms. Breland that defendant had twisted his penis. RP 391.

When defendant met with Pierce County Sheriff's Department Detective Thomas Catey for an interview regarding C.C.'s statements above, he denied the allegations. RP 194–96. Defendant claimed that Mr. Halbert and Ms. H. were fabricating the story because they were mad at him for moving out of the home. RP 199–200.

At trial, C.C.—though slightly more vague than how he described the acts to his mother and forensic interviewers—testified that defendant had once put his hands on C.C.'s penis, and on other occasions placed his penis on C.C.'s anus in several rooms throughout the house. RP 106–17. Similar to what C.C. had told his mother in the car, C.C. stated that on one occasion defendant tied C.C.'s hands with plastic ties, put duct tape on C.C.'s mouth, and placed his penis in C.C.'s anus. RP 112–17.

Defendant testified that he did not do anything to C.C., and called several witnesses—friends and relatives—who testified that defendant had a good relationship with C.C. RP 266–332. None of the witnesses, however, could testify as to what occurred between defendant and C.C. for a large majority of their time together. *See* RP 266–300.

C. ARGUMENT.

1. A ***PETRICH*** INSTRUCTION WAS UNNECESSARY BECAUSE THE STATE ELECTED EACH ACT THAT FORMED THE BASIS OF DEFENDANT'S CHILD MOLESTATION CHARGES

Criminal defendants have a right to a unanimous jury verdict. Const. art. 1, § 21; ***State v. Coleman***, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). Jury unanimity issues can arise when the State presents evidence of multiple acts that could form the basis of one count charged. ***State v. Petrich***, 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984). When the prosecution presents evidence of several acts that could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations, or the court must instruct the jury to agree on a specific criminal act. *Id.* at 570-572; ***State v. Kitchen***, 110 Wn.2d 403, 411, 756 P.2d 105 (1988) (finding that there is error only where the State fails to make a proper election and the trial court fails to instruct the jury on unanimity). This assures that the unanimous verdict is based on the same act proved beyond a reasonable doubt. ***Coleman***, 159 Wn.2d at 511–12.

a. A ***Petrich*** instruction was not required because the State elected which acts the jury should rely on during their deliberations for conviction

A unanimity instruction was not necessary in this case because the record is clear that the prosecutor elected each act that the jury should rely on during their deliberations. These acts, involving different locations and facts, include the following: (1) in the bathroom, where defendant twisted C.C.'s penis, (2) in Ms. H.'s room, where defendant forcibly tied down C.C. with zip-ties and duct tape and put his penis in C.C.'s anus, and (3) in C.C.'s bedroom, where defendant undressed C.C. and made him look at a Spiderman blanket while defendant placed his penis in C.C.'s anus. RP 424–36.

During closing argument, the prosecutor elected defendant's twisting CC's penis as the first act upon which the jury should rely to convict:

> The allegations in this case are that the defendant placed his hand and twisted, according to [C.C.], his penis on one occasion while he was in the bathroom. The penis is an intimate part of a child's body.
>
> *Now, as to that specific allegation*, you're also required to find that the defendant did so for purposes of sexual gratification. . . . .

RP 424 (emphasis added). After describing this first act of molestation, the prosecutor told the jury the second and third acts that constituted the remaining of defendant's charges:

> The defendant tried to put his penis in [C.C.'s] bottom: This was the initial disclosure. This was the very first disclosure that was made to Tiffany Hagen on August 13th, 2010. That one incident, because [CC], you'll remember, described several different times the defendant tried to put his penis in his bottom: In his room, in his mom's room, in the office. He described several different occasions.
>
> Some [C.C.] was able to describe with greater specificity than others, *and there's two that the State is focusing on and would like you to focus on for purposes of your deliberations, one that occurred in his room, and the instant one that I'm referring to right now that occurred allegedly in his mother's room, in Tiffany's room.*
>
> *The one incident occurred in his mother's room* at the old house. That the defendant zip-tied his hands behind his back and placed black tape on his mouth, where does a six-year-old come up with this? . . . .
>
> *And on another occasion the defendant again tried to put his penis in his bottom in his bedroom.* He remembers he was wearing jeans and boxer shorts and that they had been taken down. The defendant was also wearing jeans, 'Like me,' he said enthusiastically in his forensic interview. The defendant made him look at his Spider Man blanket.

RP 428–30 (emphasis added). Later during closing argument, the State reiterated these three acts constituted the basis of defendant's charges:

> [The defense witnesses] can't tell you what happened when [Mr. Halbert] and [Ms. H.] were at work. *They can't tell you what happened in [Ms. H.]'s bedroom when it was just [C.C.] and the defendant. They can't tell you what happened in [C.C.]'s bedroom when it was just [C.C.] and the defendant. They can't tell you what happened in that bathroom.* And the explanation is simple: They weren't there.

RP 436 (emphasis added).

As identified by the prosecutor above, there was evidence of multiple acts that defendant molested C.C. on more occasions than those the State relied on for defendant's charges. For example, there was evidence defendant put his penis in C.C.'s anus in C.C.'s room, Ms. H.'s room, the office, and the bathroom. RP 109–10, 114, 127; Ex. 5. (13:58:15, 14:00:40, 14:03:00, 14:11:45, 14:18:00–14, 14:20:00). Defendant relies on this evidence to argue that a unanimity instruction was required. Brief of Appellant at 13–16. However, defendant's argument ignores that the prosecutor elected only three of those instances in closing argument as the basis for defendant's charges. A ***Petrich*** instruction is not required where the State elects accordingly. ***Kitchen***, 110 Wn.2d at 411.

The trial court was not required to give a ***Petrich*** instruction because the State elected which acts the jury should rely on during their deliberations as to each charge. The trial court thus properly granted defendant's motion not to give a ***Petrich*** instruction, and this Court should deny defendant's claim in this regard.

b. Defendant invited the error, if any, when he requested the trial court not to offer a ***Petrich*** instruction

"The invited error doctrine 'prohibits a party from setting up an error at trial and then complaining of it on appeal.'" ***State v. Ellison***, ___ Wn. App. ___, 291 P.3d 921 (2013) (quoting ***State v. Pam***, 101 Wn.2d

507, 511, 680 P.2d 762 (1984), *overruled on other grounds by* ***State v. Olson***, 126 Wn.2d 315, 321, 893 P.2d 629 (1995)).

The case authority on the invited error doctrine, in cases concerning challenges to the jury instructions for the first time on appeal, generally involves a situation where the defendant proposed the instructions below. *See, e.g.*, ***State v. Henderson***, 114 Wn.2d 867, 869, 792 P.2d 514 (1990); ***State v. Boyer***, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979); ***State v. Summers***, 107 Wn. App. 373, 380–82, 28 P.3d 780 (2001), *modified on other grounds*, 43 P.3d 526 (2002). The reviewing courts have found the invited error doctrine to bar such challenges. *See, e.g.*, ***Henderson***, 114 Wn.2d at 869; ***Boyer***, 91 Wn.2d at 345; ***Summers***, 107 Wn. App. at 380–82.

In the present case, defendant argues the converse of the situation in ***Henderson***, ***Boyer***, and ***Summers***: specifically, that the trial court erred by granting his motion *not* to give a unanimity instruction. Brief of Appellant at 9–17. But these arguments are not unlike. The trial court in this case acted on defendant's motion in defendant's favor—similar to the trial courts in ***Henderson***, ***Boyer***, and ***Summers***—though it exercised its discretion not to give an instruction as opposed to giving one. RP 404–09. In each of the cases, the defendants invited the trial court to exercise its discretion in a manner the defendants challenged on appeal. The invited error doctrine bars such challenges.

As argued above, a ***Petrich*** instruction was not required because the State properly elected which acts constituted defendant's charges. But even if this Court were to find error in the trial court's refusal to give the unanimity instruction, this Court should dismiss defendant's argument because he invited the error.

2. DEFENDANT FAILS TO DEMONSTRATE THAT HIS COUNSEL'S PERFORMANCE WAS DEFICIENT BECAUSE IT CAN BE CHARACTERIZED AS LEGITIMATE TRIAL STRATEGY, AND HE CANNOT SHOW THAT THE PERFORMANCE PREJUDICED THE DEFENSE

To establish a claim of ineffective assistance of counsel, defendant must show (1) that counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984); ***State v. Thomas***, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987). "Surmounting Strickland's high bar is never an easy task." ***Padilla v. Kentucky***, __ U.S. __, 130 S. Ct. 1473, 1485 (2010).

Counsel's performance is deficient when it falls below an objective standard of reasonableness under prevailing professional norms. ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). There is a strong presumption that counsel's performance was not deficient. *Id.* The court reviews counsel's performance in the context of all of the circumstances. *Id.* at 334–35. Performance is not deficient where counsel's conduct can be

characterized as legitimate trial strategy or tactics. ***State v. Kyllo***, 166 Wn.2d 856, 863, 215 P.3d 177 (2009); ***McFarland***, 127 Wn.2d at 336.

A defendant establishes prejudice by showing there is a reasonable probability that the result of the proceeding would have been different but for counsel's unprofessional errors. ***McFarland***, 127 Wn.2d at 335. When a defendant challenges a conviction, "the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt *respecting guilt*." ***Strickland***, 466 U.S. at 695 (emphasis added).

Defendant fails to show his counsel's performance was deficient because the record indicates his counsel's decision not to request a unanimity instruction was a legitimate trial strategy. When the State proposed the unanimity instruction at trial, defense counsel objected because he believed the instruction would have unnecessarily confused the jury:

> Generally, when you read the comments to the Petrich instruction, it doesn't apply, as I understand it, to multi-count cases because the way it's read could confuse the jury. Normally it's when you have one count but you have like six possible acts that could have accounted for.
>
> Say, for example, hypothetically the State charged him with one count of child molestation and yet the child describes perhaps an incident in one bedroom, something in an office, and something in another bedroom. The jury, under Petrich, would have to decide which of those one acts unanimously do they agree on to support the charge beyond a reasonable doubt.
>
> It becomes a problem when you have multiple counts because look what it says in the second sentence:

> "To convict the defendant on any count of child molestation, one particular act of child molestation in the first degree must be proved beyond a reasonable doubt."
>
> The reason that comment is there and even though the jury is given Instruction 3.01, that each count is to be considered by you separately and your verdict on one doesn't affect your verdict on the other, the reason that they give you that little warning under the comment is to avoid the possibility that, well, if you find that he committed one act, then he must have committed all the counts.
>
> *So I elected, when reading the comment, when reading and looking at this case, saying we're going to confuse the heck out of this jury and there's a possibility they could be misled into thinking that this means to convict him on any count, they must agree on, at least, one act.*

RP 405–06 (emphasis added).[5]

After hearing argument, the trial court asked defense counsel three times whether he objected to the ***Petrich*** instruction. RP 408. In response to each of those inquiries defense counsel requested the court not to give the instruction. RP 408–09. Defense counsel made it clear that he strategically opted not to offer a ***Petrich*** instruction because he feared the jury would convict defendant of three counts of molestation if they found evidence to support only a single act. This was a legitimate trial strategy, and thus counsel's performance cannot be considered deficient. ***McFarland***, 127 Wn.2d at 336.

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[5] As identified by defense counsel at trial, the notes and comments to the pattern jury instruction on unanimity highlight this confusion. *See* 11 *Washington Practice*, Criminal Pattern Instruction 4.25 (2010). Additionally, the notes and comments to the pattern jury instruction stress that a ***Petrich*** instruction is not necessary where the prosecutor elects to rely upon a specific occurrence to support a conviction—which the prosecutor ultimately did during closing arguments. *See id.*, Note on Use.

Defendant cannot demonstrate prejudice because, as argued above in section one, the case law is clear that a defendant's constitutional rights are protected when either the State elects which acts the jury should rely on to convict, or the trial court offers a ***Petrich*** instruction. ***Petrich***, 101 Wn.2d at 570-572; ***State v. Kitchen***, 110 Wn.2d at 411. Defendant's right to a fair trial was not prejudiced because the State expressly told the jury that they were to consider evidence of only three acts during their deliberations.[6] Defendant cannot show prejudice because the evidence supported the jury's determinations, and the jury unanimously convicted defendant of all three counts of molestation. First, the evidence showed that defendant had twisted C.C.'s penis in the bathroom. RP 391; Ex. 5 (13:55:29–13:56:10, 14:02:38, 14:08:55). Second, there was evidence that on only one occasion in Ms. H.'s room, defendant tied C.C.'s hands with plastic ties, put duct tape on C.C.'s mouth, and put his penis on C.C.'s anus. RP 116, 168, 246; Ex. 5 (13:55:29–14:06:30, 14:11:45, 14:14:10, 14:27:50). Finally, the evidence showed that defendant had undressed C.C. in C.C.'s room and asked C.C. to look at a Spiderman blanket while he again put his penis on C.C.'s anus. RP 127; Ex. 5 (13:58:15, 14:11:45,

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[6] The State elected the following three acts for the jury to consider during deliberations: where defendant (1) twisted C.C.'s penis in the bathroom, (2) tied C.C.'s hands behind his back with plastic ties, placed duct tape over C.C.'s mouth, undressed C.C., and put his penis on C.C.'s anus in Ms. H.'s room, and (3) undressed C.C., made C.C. look at a Spiderman blanket, and put his penis on C.C.'s anus in C.C.'s room.

14:18:00–14:20:00). These three events involved unique circumstances (i.e., defendant twisting C.C.'s penis, the duct tape and zip ties, and the Spiderman blanket) which the prosecutor relied on to distinguish the basis for each of defendant's charges.

This Court should reject defendant's claim of ineffective assistance of counsel because he has failed in his burden to show that his counsel's performance was deficient and prejudiced his defense. Counsel's decision not to offer a ***Petrich*** instruction can be characterized as a legitimate trial tactic. Defendant sustained no prejudice because a ***Petrich*** instruction was not even required in this case. Moreover, the evidence from trial supported the three acts the jury was asked to consider during deliberations.

3. THE ERROR, IF ANY, WAS HARMLESS BECAUSE THE STATE PROVED EACH CHARGE OF MOLESTATION BEYOND A REASONABLE DOUBT

The failure to give a required unanimity instruction is subject to a harmless error analysis. *See* ***Kitchen***, 110 Wn.2d at 405–06. This Court conducts a harmless error test only where the State has failed to elect which acts it relies on for the basis of defendant's charges and the trial court fails to give a ***Petrich*** instruction. *Id.*

This harmless error test turns on whether a rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt. *Id.* In ***State v. Camarillo***, the Court described the inquiry this way:

> Our task is to determine whether a rational trier of fact could have a reasonable doubt as to whether any of the incidents did not establish the crime. In other words, whether the evidence of each incident established the crime beyond a reasonable doubt.

115 Wn.2d 60, 71, 794 P. 2d 850 (1990).

This Court need not conduct a harmless error analysis because, as argued in part one, the State elected which of the acts the jury was to consider during deliberations.

If this Court were to find error, however, the error was harmless because the State proved that each act occurred beyond a reasonable doubt. The evidence showed that defendant molested C.C. on three occasions: in the bathroom, in Ms. H.'s room, and C.C.'s room. This was the only evidence the prosecutor asked the jury to consider during deliberations.[7] RP 428–30, 436. C.C.'s testimony was not merely an uncorroborated allegation against defendant. C.C.'s testimony was supported by testimony from Ms. H., a pediatric nurse, a forensic interviewer, and the video recording of C.C.'s forensic interview. No rational trier of fact could have had a reasonable doubt as to any of the charged offenses. Thus, even if the trial court erred in failing to give a unanimity instruction, the error was harmless.

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[7] *See supra*, part two, for a review of the evidence relating to these instances of molestation.

Defendant primarily argues that the alleged error was not harmless because C.C.'s testimony was "contradictory and confusing." Brief of appellant at 14–16. This argument fails because it questions the credibility of C.C.'s testimony, even though "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Also, any inconsistency within C.C.'s testimony does not undermine the remainder of the State's evidence. The State recognizes that based on C.C.'s testimony alone, there was some slight inconsistency as to when and where each act of molestation occurred. But defendant's trial occurred nearly two and a half years after the commission of the crimes, and C.C. was only five years old when they occurred—seven years old when he testified. RP 120. Surely the court might expect some inconsistency from a witness as young as C.C. and his inability to narrow down precisely when and where each act occurred. In the context of a harmless error analysis, what matters more is that C.C. was able to recall unique details as to each of the three instances of molestation (e.g., defendant twisting his penis in the bathroom, plastic ties and duct tape in Ms. H.'s room, and being forced to look at the Spiderman blanket in his bedroom).

Moreover, C.C.'s statements to his mother and other witnesses, and his answers during the forensic interview—which occurred chronologically closer to the crimes than C.C.'s trial testimony—are all

compelling evidence that defendant molested C.C. on at least the three charged incidents.

Any alleged error in this case was thus harmless because the State proved each charge of molestation beyond a reasonable doubt.

4. DEFENDANT FAILS TO IDENTIFY WHERE ANY CLOSURE OCCURED THAT WOULD REQUIRE A ***BONE-CLUB*** ANALYSIS[8]

The Sixth Amendment to the federal constitution and article I, section 22 of the state constitution, guarantee a defendant the right to a public trial. U.S. Const., amend. VI; Wash. Const., art. I, § 22. Also, article I, section 10 of the state constitution guarantees the public's right to public judicial proceedings. Wash. Const., art. I, § 10. This Court reviews de novo whether a defendant's right to a public trial has been violated. ***In re Stockwell***, 160 Wn. App. 172, 178–79, 248 P.3d 576 (2011).

Before determining whether either article I, sections 10 and 22 have been violated, however, the court must first determine *whether a closure occurred* to implicate those rights. ***State v. Beskurt***, ___ P.3d ___, 2013 WL 363135 (2013). Furthermore, the defendant carries the burden to identify where in the record an alleged error affected defendant's rights. *See, e.g.*, ***State v. Sisouvanh***, 175 Wn.2d 607, 619, 290 P.3d 942 (2012);

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[8] Arguments 4 and 5 in the State's response brief pertain to defendant's third assignment of error.

Holland v. City of Tacoma, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.").

Defendant broadly argues that a closure occurred and that "[t]he violation of the right to an open and public trial is a structural error and the remedy is a remand for a new trial." Brief of Appellant at 21. Defendant alleges a closure occurred without specifying anywhere in the record that might support such an assertion. Defendant even acknowledges that the record is void of any discussion regarding the trial court's sealing of the juror questionnaires or closure altogether. Brief of Appellant at 20.

There is also no support in the record as to *when* the court sealed the questionnaires. This Court has repeatedly held that sealing the questionnaires after voir dire does not constitute a closure and does not implicate defendant's rights. *See, e.g.*, ***State v. Smith***, 162 Wn. App. 833, 847, 262 P.3d 72 (2011); ***Stockwell***, 160 Wn. App. at 178–79. Without specifying when the alleged closure—if any—occurred, it is impossible to determine whether defendant's rights were implicated or violated.

Even if this Court were to consider the merits of defendant's argument, in light of the Washington State Supreme Court's recent

decision in ***Beskurt***,[9] defendant must identify who's rights (i.e., the defendant's rights or the public's rights) were implicated by a closure. *See* ***Beskurt***, 2013 WL 363135 at *2–4. (finding that the court's inquiry shifts depending on whose rights are implicated). In ***Beskurt***, the court held that neither the defendant's nor the public's rights are violated where (1) the questionnaires are completed prior to voir dire, (2) the questionnaires are used by the parties as a screening tool, (3) the questionnaires do not substitute oral voir dire, and (4) the public has the opportunity to observe voir dire. *See id.* at *3.

In this case, it seems defendant's right to a public trial was not implicated because it appears (from the record available) the questionnaires were completed before voir dire, the parties used them as a screening tool, and that the parties conducted oral voir dire. *See* RP 6–8, 19, 85–87. Although the record is ambiguous as to whether the public was able to attend voir dire—defendant has identified nothing from the record that might indicate otherwise.

This Court should deny defendant's alleged violation of his right to a public trial because he has not satisfied his burden to identify where in the record a closure occurred. It is thus impossible to determine whether a

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[9] Defendant's brief was filed before this decision was released.

Bone-Club analysis was necessary, or whether defendant's—or possibly the public's—right to an open and public trial was implicated or violated.

5. DEFENDANT FAILS HIS BURDEN TO PROVIDE AN ADEQUATE RECORD FOR REVIEW

It is the defendant's burden to provide the reviewing court a record sufficient for review. RAP 9.2(b). An insufficient appellate record precludes review of the alleged errors. ***In re Detention of Morgan***, 161 Wn. App. 66, 83, 253 P.3d 394 (2011), *modified on other grounds by* ***State v. Sublett***, ___ Wn.2d ___, 292 P.3d 715, 721–22 (2012).

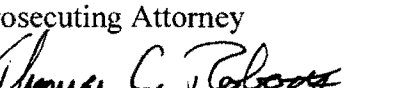
Further complicating defendant's failure to identify where in the record a closure occurred, defendant has not included the verbatim report of proceedings for voir dire—where a closure, if any, might have occurred. Thus, even if the trial court at some point did conduct a ***Bone-Club*** analysis, that portion of the transcript—insofar as the State has been able to determine—has not been included for review. This Court should deny defendant's argument in this regard because he failed his burden to provide an adequate record for review, as well as identify anything that might support his argument from the current record.

D. CONCLUSION.

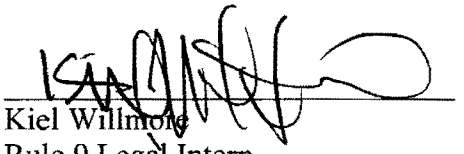
A ***Petrich*** instruction was not required in this case because the State elected which acts constituted defendant's charges, and instructed the jury to consider evidence for only those acts in their deliberations. For this same reason, defendant cannot show how his counsel's performance was deficient, or that the performance prejudiced his defense. Even if there were error, the error was harmless because the State proved each instance of molestation beyond a reasonable doubt. Finally, defendant has not satisfied his burden to provide this Court an adequate record for review concerning his right to a public trial. For the reasons argued above, the State respectfully requests this Court to affirm defendant's convictions.

DATED: February 28, 2013.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442



Kiel Willmore
Rule 9 Legal Intern

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S.~~ mail or ABC-LMI delivery to the attorney of record for the appellant ~~and~~ appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3.1.13 Theresa Ka
Date Signature

PIERCE COUNTY PROSECUTOR

March 01, 2013 - 3:36 PM

Transmittal Letter

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Comments:

Second filing of this brief. I inadvertently omitted the TOC in first brief.

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