

**NO. 67357-2-I**

IN THE COURT OF APPEALS – STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON  
Respondent,

v.

**RAMOS NOEL ORTIZ-LOPEZ,**  
Appellant.

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

The Honorable John M. Meyer, Judge

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**RESPONDENT’S BRIEF**

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**I. SUMMARY OF ARGUMENT**

Ramos Noel Ortiz-Lopez was convicted of two counts of Rape of a First Degree and one count of Rape of a Child in the Second Degree.

Ortiz-Lopez contends the two convictions for Rape of a Child in the First Degree of his daughter may not have been based upon separate and distinct acts given the ongoing conduct alleged. However, the jury was given a Petrich instruction requiring unanimity of acts to support each offense, the defendant's defense was general denial and because the jury chose to acquit Ortiz-Lopez on two of the counts, it is manifestly apparent the jury found Ortiz-Lopez guilty of separate acts.

Ortiz-Lopez claims the failure to provide a unanimity instruction on the count of Rape of a Child in the Second Degree was reversible error. The unanimity instruction should have been given. However since the victim described multiple acts of conduct and the defendant denied the incidents, the error was harmless beyond a reasonable doubt.

Ortiz-Lopez contends sealing the jury questionnaire without a Bone-Club analysis was structural error meriting reversal. The State contends improper sealing after jury selection merits a hearing on sealing not reversal.

Thus, the convictions must be affirmed.

The State agrees with Ortiz-Lopez that improper conditions of community custody were imposed which should be stricken.

## **II. ISSUES**

1. Where ongoing intercourse was alleged, the jury was given a Petrich instruction requiring unanimity of acts, the defendant's defense was general denial and the jury chose to acquit Ortiz-Lopez on two counts, is it manifestly apparent the jury found Ortiz-Lopez guilty of separate acts?
2. Where the victim described multiple acts of intercourse and the defendant denied the incidents, was the error in providing the unanimity instruction as to the single count of Rape of a Child in the Second Degree harmless beyond a reasonable doubt?
3. Where the jury questionnaire was improperly sealed after jury selection was completed, is the remedy reversal of the conviction or remand for the trial court to properly evaluate Bone-Club factors?
4. Where conditions of community custody which did not relate to the offense were imposed, should the conditions be stricken?

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

### **1. Statement of Procedural History**

On February 18, 2010, Ramos Noel Ortiz-Lopez was charged with four counts of Rape of a Child in the First Degree and one count of Rape of a Child in the Second Degree of A.M.W.O ("A."). CP 1-3. The four counts of Rape of a Child in the First Degree were each alleged to have occurred in the same time period on or about and between July 28, 2004 and July 27, 2008

“in an act separate and distinct from” the other such counts. CP 1-2. “A” had alleged her father had engaged in penile-vaginal intercourse with her multiple times from the age of eight up until the fall of 2008, when she was age thirteen. CP 5.

On April 25, 2011, the case proceeded to trial.<sup>1</sup> 4/25/11 RP 3. The jury completed a questionnaire. 4/25/11 RP 3. Toward the close of the jury selection process certain jurors were interviewed separately from the other jurors. CP 136. Rather than engage in a Bone-Club analysis for closing the courtroom to interview the jurors, the jurors were interviewed outside the presence of other jurors but in an open courtroom. CP 136. At the close of the jury selection process, the trial court directed the clerk to hold the questionnaires under seal. CP 137. An order sealing was entered sixteen days later on May 11, 2011. CP 150.

Testimony was taken from April 26 to April 28, 2011. 4/26/11 RP 38 to 4/28/11 RP 135. At the close of the jury selection, instructions were

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<sup>1</sup> The State will refer to the verbatim report of proceedings by using the date followed by “RP” and the page number. The report of proceedings in this case are as follows:

4/25/11 RP	Jury Selection and Pretrial Motions (Appellant cites as 1RP)
4/25/11 RP Supp	Jury Selection excerpt (Requested by the State)
4/26/11 RP	Opening Statement and Testimony (Appellant cites as 1RP)
4/27/11 RP	Testimony Day 2 (Appellant cites as 2RP)
4/28/11 RP	Testimony Day 3 (Appellant cites as 3RP)
4/29/11 RP	Closing argument (Appellant cites as 4RP)
6/2/11 RP	Motion for New Trial (Appellant cites as 5RP)
7/1/11 RP	Motions and Sentencing (Appellant cites as 4RP).
7/5/11 RP	Sentencing (Appellant cites as 6RP).

discussed. 4/28/11 RP 136-8. Except for a modified reasonable doubt instruction, the defense did not have any exceptions to the instructions proposed. 4/28/11 RP 138.

On April 29, 2011, the jury returned verdicts of guilty of Rape of a Child in the First Degree in counts 1 and 4 and Rape of a Child in the Second Degree in count 5. CP 30. The jury found Ortiz-Lopez not guilty of counts of Rape of a Child in the First Degree in counts 2 and 3. CP 30.

On July 5, 2011, the trial court sentenced Ortiz-Lopez to 216 months in prison. CP 96, 104, 7/5/11 RP 71-2.

On July 6, 2011, Ortiz-Lopez timely filed a notice of appeal.

## **2. Summary of Trial Testimony.**

A testified that her birthday was July 28, 1996. 4/26/11 RP 38. At the time of trial, she was attending Sedro Woolley high school. 4/26/11 RP 38, 40. She identified her father sitting in the courtroom as the defendant Noel Ortiz. 4/26/11 RP 39.

At the time of trial A was living with her mother and three younger siblings: two brothers and half-sister. 4/26/11 RP 39.

A testified she first recalled living with her father and mother at an apartment in Sedro Woolley. 4/26/11 RP 41. After her father left, she next resided with her great grandmother when she was going into the second grade. 4/26/11 RP 41-2. A moved in with her great grandmother because

her mother went to jail for drugs. 4/26/11 RP 42. While A was still in the second grade, she started residing part time with her aunt and part time with her father. 4/26/11 RP 42-3. A testified her father's apartment had one bedroom. 4/26/11 RP 43. Her father slept in the living room while A and her two younger brothers slept in the bedroom. 4/26/11 RP 43.

At first, her relationship with her father was happy but then it started getting "wobbly." 4/26/11 RP 43. Her father started getting angry faster would hit the children and spank them. 4/26/11 RP 43. Her father then started doing things with her sexually. 4/26/11 RP 43.

A testified she fell asleep in the bedroom but woke up on the green carpet in the living room to her father doing things to her sexually. 4/26/11 RP 44-5. A's clothes were off. 4/26/11 RP 46. He told her to go back to sleep. 4/26/11 RP 44. But her father started touching A's vagina, placing his hands in the vaginal area which felt weird to A. 4/26/11 RP 44-5. A could not recall if her father's clothes were on. 4/26/11 RP 46. A could not recall her father touching her with anything other than his hands. 4/26/11 RP 47. A could not recall how many times the incidents occurred in the first apartment. 4/26/11 RP 47.

A recalled on one occasion waking up with blood in her underwear and that she hurt really. 4/26/11 RP 47. A could recall the type of underwear she wore on that occasion. 4/26/11 RP 47. She told her father

“let’s not to do this anymore.” 4/26/11 RP 48. A was seven at the time. 4/26/11 RP 48. She had not started her period by that point. 4/26/11 RP 48. A had her first period in the sixth grade. 4/26/11 RP 48.

A testified she was in the third or fourth grade when they moved to the Kulshan View apartments. 4/26/11 RP 48. The apartment had two bedrooms. 4/26/11 RP 48. A was to sleep in one bedroom and her brothers in the other. 4/26/11 RP 49-50. A’s father slept downstairs in a storage room or on the couch. 4/26/11 RP 49.

A recalled watching a scary moving and began sleeping with her father every night. 4/26/11 RP 49-50. A began sleeping on the couch or the floor. 4/26/11 RP 50. The sexual activity occurred every time she slept with her father. 4/26/11 RP 50. The sexual activity occurred multiple times. 4/26/11 RP 50-1. The sexual activity included her father licking her vagina, put his fingers in her vaginal area and putting his penis inside her vagina. 4/26/11 RP 50-1.

A was in the fourth grade when her father put his penis inside her vagina. 4/26/11 RP 51. She recalled going to the bathroom right afterwards because it “really hurt.” 4/26/11 RP 51. A was able to describe that incident in more detail. 4/26/11 RP 52. A testified that her father held her hands locked together above her head and his feet would touch her feet. 4/26/11 RP 52. He was able to hold her feet down if she kicked. 4/26/11 RP 52. A

would scream for her brothers, but they were asleep. 4/26/11 RP 52. A's vagina hurt right afterward and she recalled it stinging really bad. 4/26/11 RP 52. A recalled sleeping with her father until the fall of the seventh grade. 4/26/11 RP 52.

At the time of the last sexual activity when A was in seventh grade, they had moved to a third address. 4/26/11 RP 52. This was a different address in the same apartment complex as the second address. 4/26/11 RP 56. This apartment had three bedrooms upstairs. 4/26/11 RP 56. A had one bedroom, her brothers another and her father slept in his own bedroom. 4/26/11 RP 56. In the third apartment, the defendant made A do oral sex on him as well as him engaging with oral sex on her. 4/26/11 RP 57. A was often scared of sleeping alone and slept with her father. 4/26/11 RP 58, 89. A was also scared of the dark, scared of movies she would watch and scared of closets and attics. 4/26/11 RP 89. A's father had a bed and the sexual activity occurred in the bed in his room. 4/26/11 RP 58. A described that her father became more physically aggressive when they moved to the second and third apartments. 4/26/11 RP 58-9. Her father would grab her hair and bang her face into the stairs. 4/26/11 RP 59. He would throw her into walls, kick her, punch her and throw shoes at her. 4/26/11 RP 59. A testified the inappropriate touching by her father occurred at all three apartments she lived in with her father. 4/26/11 RP 47.

The defendant did threaten A to have her perform oral sex on him. 4/26/11 RP 53. He told A that if she told, her family would hate her, she would be placed in a foster home and her mother would not keep her. 4/26/11 RP 53. The oral sex did not occur very often. 4/26/11 RP 53. A recalled her father doing oral sex on A. 4/26/11 RP 49.

A described that when her father put his penis inside of her, it would burn really bad and it would hurt. 4/26/11 RP 54. He would hold her down while doing so. 4/26/11 RP 54. The intercourse lasted less than ten minutes when it occurred. 4/26/11 RP 54. A described that her father would also place his fingers inside of her and move them around. 4/26/11 RP 54. After her father engaged in intercourse with her, A described that a slimy clear fluid would come out of her. 4/26/11 RP 60. A would clean up afterwards, sometimes going to the bathroom and wiping herself and looking in her underwear. 4/26/11 RP 60.

When she was being touched, A felt violated. 4/26/11 RP 54. A described that the sexual activity never occurred in the day time. 4/26/11 RP 54. A had her first period while she was in the sixth grade. 4/26/11 RP 60. A did ask her father to stop, but he told her he had a sex addiction. 4/26/11 RP 62. A said she never told anyone because she was scared her father would hurt her because he had hurt her physically. 4/26/11 RP 62. A's father told her that if she told, she would go to a foster home, her brothers

and her would be destroyed, she would never see them again and her family would hate her. 4/26/11 RP 63.

The last instance of sexual activity by A's father with her occurred in the fall of 2008. 4/26/11 RP 60. The sexual activity stopped whenever A's father had a girlfriend. 4/26/11 RP 61. A could recall her father's girlfriends, names: Angie, Heather and Corrina. 4/26/11 RP 61. Angie and Heather were her father's girlfriends when they were living in the second apartment. 4/26/11 RP 62.

A began seeing her mother after her mother got out of prison when A was in the sixth grade. 4/26/11 RP 63. A's mother was living with A's stepfather and his three children. 4/26/11 RP 65. A started to go see her every other weekend. 4/26/11 RP 63. At first A did not want to see her mother. 4/26/11 RP 64. A's father had A go visit her mother every weekend, but A did not want to go. 4/26/11 RP 64. A testified her mother did not say negative things about A's father. 4/26/11 RP 66. A went to stay with her mother for two or three weeks around Spring break in the seventh grade when A had her tonsils out. 4/26/11 RP 67. A started bonding with her mother. 4/26/11 RP 68. A saw that her stepbrothers and stepsisters had good grades, were on the honor role, were responsible, clean and healthy. 4/26/11 RP 68. A wanted to be "one of those people." 4/26/11 RP 68. The

sexual activity with A's father had stopped the previous fall when he had a new girlfriend. 4/26/11 RP 68.

After spring break in March or April of 2009, A started asking her father about moving back in with her mother. 4/26/11 RP 69, 82. A threatened her father that she would tell her mother about the rape and abuse. 4/26/11 RP 69. A told her father this in person and by text messages. 4/26/11 RP 69. A was supposed to go back one Sunday but did not want to go back to live with her father. 4/26/11 RP 70. A ended up going home. 4/26/11 RP 70. The next day A went to her friend Jackie's house. 4/26/11 RP 71. A said she wanted to spend the night at Jackie's house, so she used the rapes to try to get to stay at Jackie's house. 4/26/11 RP 71. After her father told her to come home she told Jackie what had occurred. 4/26/11 RP 71, 74. A was scared to tell, but was aware that if her father broke up with his girlfriend, he would do sexual things again. 4/26/11 RP 75. A was also concerned that if she told on her father, she would be placed in foster care. 4/26/11 RP 75.

When A told Jackie, A was crying. 4/26/11 RP 75-6. A told her sister Jasmine and Jasmine told her stepfather, Ray. 4/26/11 RP 76. A recalled the police coming and asking questions. 4/26/11 RP 76. A's mother and her aunt, Shirley Starkovich came over. 4/26/11 RP 76. A had been living in the third apartment, and after she told she moved in with her

mother. 4/26/11 RP 60, 77. A also started going to counseling with Ms. Wolff. 4/26/11 RP 77. A told her mother, most of her family, her boyfriend and some of her closest friends. 4/26/11 RP 77. A said people at school would ask her if it was true and she said yes. 4/26/11 RP 78. She denied ever telling anyone she made it up. 4/26/11 RP 78.

A testified that she was not good at throwing her underwear with other laundry. 4/26/11 RP 78. She would leave her underwear in the closet and they would on occasion eventually get laundered. 4/26/11 RP 78. It was not unusual for months to pass before underwear would be washed. 4/26/11 RP 79. A told Detective Thompson where she left her underwear in the apartment. 4/26/11 RP 79.

On cross-examination, A was questioned about the context of the texts she sent to her father. 4/26/11 RP 83. A acknowledged that on April 4, 2009, she texted her father stating "K, I'll just tell mom. You'll go to jail. I'll just transfer." 4/26/11 RP 84. On Monday April 6<sup>th</sup>, A's father texted her three times telling her to come home. 4/26/11 RP 84-5.

A believed she told her cousin, Sarah Segueda, that A's father had done things to her. 4/26/11 RP 90. A did not tell her details and did not tell her the allegations were a lie or her mother made her do it. 4/26/11 RP 90.

Jacqueline Nokelby-Taylor was the friend to whom A first disclosed. 4/26/11 RP 166, 169-70. A was staying over at Jacqueline's when A didn't

want to go back to her father's house. 4/26/11 RP 168-9. A told Jacqueline why and was freaking out, crying, with tears in her eyes and a shaky voice when she described what occurred. 4/26/11 RP 169. Jacqueline told her sister, Jasmine, who told her father and he called police. 4/26/11 RP 170. Jasmine described A as usually being happy and excited but was down the day she disclosed. 4/27/11 RP 41-2. She described A as crying and scared after she told. 4/27/11 RP 42. Ray Mayville described A as being hysterical and crying uncontrollably when she disclosed. 4/27/11 RP 44-5. Ray called police. 4/27/11 RP 45.

Shirley Starkovich, A's great aunt, testified that she took in A and her brothers when A's mother was unable to care for them and went to prison. 4/27/11 RP 78-80. After living with Shirley for nine months, A went to live with her father. 4/27/11 RP 82-3. Shirley described that they lived in a one-bedroom apartment in Mount Vernon before moving to a second place. 4/27/11 RP 83. They moved to a third apartment in the same complex as the second place. 4/27/11 RP 84. Shirley noticed that A's father treated her differently from her brothers. 4/27/11 RP 85. Shirley testified A's mother began to have contact with A and her two brothers after A's mother got out of prison. 4/27/11 RP 87-8. A's mother had done nothing try to get custody of A and her brothers before April of 2009. 4/27/11 RP 91.

Miranda Wilson, A's mother, testified to the same information about placement of her children when she went to prison. 4/27/11 RP 95-9. After she got out of prison, Miranda, began regular visitation with her children with the defendant's approval. 4/27/11 RP 104. One night Miranda received a text from A's friend Jackie, and Miranda went over to Jackie's house with Shirley. 4/27/11 RP 107-8. A was talking to the police and was crying in a way she couldn't hold it inside. 4/27/11 RP 108. The next day Miranda went to pick up A and her and the boys came to live with her. 4/27/11 RP 109.

Sergeant Thompson was the detective assigned to the case. 4/26/11 RP 94. Sergeant Thompson testified A disclosed April 6, 2009. 4/29/11 RP 95. On May 7, 2009, Thompson conducted a search of Ortiz-Lopez's apartment. 4/26/11 RP 97. Thompson located 25 pairs of underwear in A's room. 4/26/11 RP 98-9. Using an alternate light source Thompson identified underwear likely to have bodily fluid which he sent off for testing. 4/26/11 RP 100-1,106.

Forensic Scientist Lisa Casey of the State Patrol Crime Laboratory testified that samples from some of the underwear contained elevated levels of a protein found in semen. 4/26/11 RP 127, 129. On one of the underwear a spermatozoa was located. 4/26/11 RP 130. Kristina Hoffman, another scientist, concurred in Casey's evaluation. 4/26/11 RP 141-2. Hoffman also

swabbed around the areas sampled by Casey. 4/26/11 RP 144-5. Samples from the one pair yielded an extraction which could possibly be tested with Y-STR testing by another laboratory. 4/26/11 RP 147-50

Barbara Leal, a forensic scientist, completed Y-STR testing on the extracts Hoffman prepared. 4/27/11 RP 8,15, 17, 20-1. Comparing the results to the DNA of Ortiz-Lopez from buccal swabs, Leal found Ortiz - Lopez could not be excluded as a contributor to the sample. 4/26/11 RP 106-7, 4/27/11 RP 25-6.

Nurse Practitioner Caryn Young testified about her sexual assault evaluation of A on May 5, 2009. 4/27/11 RP 46-50, 63-4. Caryn received a history from A. 4/27/11 RP 65-6. A described that the events occurred more than once and started at age 8. 4/27/11 RP 66. A was scared of what other people would think. 4/27/11 RP 66. A described that watery stuff came out of his penis. 4/27/11 RP 66. During the physical examination Caryn noted A had tags or a tattered area which could have occurred by a penetrating injury which had healed or could have been normal for A. 4/27/11 RP 71-2. The physical findings were consistent with the history. 4/27/11 RP 75.

Lisa Wolff, a therapist at Compass Health, testified about her counseling of A. 4/27/11 RP 121-2. Wolff diagnosed A with post-traumatic stress disorder. 4/27/11 RP 124. A was placed on medication to help with the disorder. 4/27/11 RP 126.

Defense called Dr. Donald Riley to testify about his review of the materials and examinations by the Washington State Patrol Crime Laboratory and Orchard Cellmark. 4/28/11 RP 5, 7-8, 9-35.

Defense also called relatives of the defendant to testify about denials they claim A stated. Sarah Segueda, A's cousin, testified that after she found out about the allegation, she ran into A at a movie theater. 4/28/11 RP 76-8. Sarah claimed A told her it was a lie and A's mother made her do it. 4/28/11 RP 79. On cross-examination, Sarah had admitted she told a Detective the conversation occurred in April or May of 2010. 4/28/11 RP 80.

Maria Lopez Mendoza, Ortiz-Lopez's mother, testified she had a conversation with A in the summer of 2008, when A stated her mother told her that if she wanted to have sex that she could blame it on A's grandfather or Maria's husband. 4/28/11 RP 86.

Amy Seguda, another of A's cousins, also testified about the conversation at the movie theater recounting the same things Sara said. 4/28/11 RP 88, 90. Amy gave conflicting information about when the visit to the movie occurred. 4/28/11 RP 92-4, 101.

Narda Segueda, Ortiz-Lopez's sister, testified about a phone call she said occurred when her daughters went to a movie. 4/28/11 RP 103-5. Narda claimed A stated her mother was making her do it. 4/28/11 RP 104.

Noel Ramos Ortiz-Lopez testified that he did not rape or physically harm his daughter. 4/28/11 RP 107. Ortiz-Lopez testified about texts in which A threatened "I'll just tell mom." 4/28/11 RP 113. Ortiz-Lopez claimed he had no idea what she was talking about. 4/28/11 RP 113, 134. The texts from A's phone showing she wanted to move from her father had been admitted during her testimony. 4/26/11 RP 110-4. Before that day Ortiz-Lopez claimed A was having conflicts with him and was refusing to go to school. 4/28/11 RP 114. On cross-examination, Ortiz-Lopez admitted that A had slept in the same bed with him in the third apartment. 4/28/11 RP 116.

### **3. Jury Questionnaires.**

A questionnaire was given to the jurors to complete. 4/25/11 RP 3. Some of the jurors were examined apart from the other jurors as a result of the responses to the questionnaire. 4/25/11 RP Supp 2-4, 7, 10, 11, . The jurors were questioned apart from the jurors in another courtroom. 4/25/11 RP Supp 3.

The trial court noted that because the proceedings were conducted in an open courtroom, there was no need for a Bone-Club analysis. 4/25/11 RP Supp 3. Given that the time was after 4:30 p.m., the defense counsel expressed concern that the courthouse doors were still open. 4/25/11 RP Supp 2-3. The trial court noted that "I don't believe there's been a member

in the courthouse all day long in the main courtroom all day long.” 4/25/11 RP Supp 3. The trial court went on to note “the record should reflect the courthouse doors are open.” 4/25/11 RP Supp 3.

The court and counsel examined the jurors. 4/25/11 RP Supp 4-15. The court then returned to the courtroom with the full panel and concluded the selection process. 4/25/11 RP Supp 16. The clerk’s minutes indicated that the court ordered the jury questionnaires be held under seal noting as follows:

The jurors not selected are excused at 5:50 pm and are released from further jury duty.  
Court gives jurors general admonishments.  
Court directs Clerk to hold questionnaires under seal. (Jury questionnaires are held under seal with trial exhibits in vault.)  
Jury excused @ 5:53.

CP 137.

However the transcript of the proceedings never indicated there was a mention of sealing of the questionnaires on the record and notes that proceeding concluded at 5:55 p.m. 4/25/11 RP Supp 16-19.

On May 11, 2011, the trial court entered an order sealing enhanced jury questionnaires. RP 150. The order indicated “that the enhanced jury questionnaires, used for the voire dire process at trial, are hereby sealed except for availability of the Appellate Court in the event of appeal, or as further ordered by the Court.” RP 150.

#### **4. Jury Instructions.**

Defense had no exceptions to the instructions other than requesting a modified reasonable doubt instruction. 4/28/11 RP 137-8.

The trial court provided a unanimity instruction as to the four counts of Rape of a Child in the First Degree which read as follows:

The State alleges that the defendant committed acts of Rape of a Child in the First Degree on multiple occasions. To convict the defendant on any count of Rape or a Child in the First Degree, one particular act or Rape of a Child in the First Degree must be proved 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 of the acts of Rape of a Child in the First Degree.

CP 25

#### **5. Sentencing and Community Custody Conditions**

On July 5, 2011, the trial court sentenced Ortiz-Lopez to 216 months in prison. CP 96, 104, 7/5/11 RP 71-2. Ortiz-Lopez did not contest imposition of the terms of community custody proposed in Appendix F. CP 105-7, 7/5/11 RP 70, 72. The conditions of community custody included conditions related to use of pornography, possession of drug paraphernalia and access to the internet.

7. Do not possess, access, or view pornographic materials, as defined by the sex offender therapist and/or Community Corrections Officer. Do not frequent establishments whose primary business pertains to sexually explicit or erotic material.

8. Do not possess sexual stimulus material for your particular deviancy as defined by a Community Corrections Officer and therapist except as provided for therapeutic purposes.

...

14. Do not possess drug paraphernalia.

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/digital telephones, or I-pads/I-pods). And you shall not be allowed to use another's persons' internet or use the internet through any venue until approved in advance by the Community Corrections Officer. 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 Community Corrections Officer. 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, DC/DVD burners, or any device to store or reproduce digital media or images.

CP 106-7.

#### IV. ARGUMENT

1. **Where the jury was given a unanimity instruction, the victim described sexual activity occurring in different apartments over years while her father made a general denial and the jury acquitted on two counts, it is apparent the jury found the defendant guilty for two separate acts of Rape of a Child in the First Degree.**

Ortiz-Lopez contends the convictions for two counts of Rape of a Child in the First Degree in counts 1 and 4 constitute double jeopardy. The State contends that the two convictions do not constitute double jeopardy because of the unanimity instructions given, the victim's allegations, the general denial of the defendant and the two acquittals on the other counts.

Ortiz-Lopez relies significantly on State v. Mutch, 171 Wn. 2d 646, 254 P.3d 803 (2011). In Mutch, the Washington State Supreme Court held that there was no double jeopardy violation resulting from deficient "to convict" instructions that failed to instruct the jury that identically charged counts must be based on separate and distinct acts. The court explicitly disapproved of State v. Berg, 147 Wn. App 923, 198 P.3d 529 (2008) and State v. Carter, 156 Wn. App. 561, 234 P.3d 275 (2010) and disagreed that a double jeopardy violation in those cases automatically resulted from omitted language in the instructions. Instead, the court recognized that the deficient instructions created only the "possibility" of a double jeopardy violation:

[F]lawed jury instructions that permit a jury to convict a defendant of multiple counts based on a single act do not necessarily mean that the defendant received multiple punishments for the same offense; it simply means that the defendant *potentially* received multiple punishments for the same offense.

State v. Mutch, 171 Wn.2d at 663.

The court disapproved of the limited review in Berg and Carter, which did not go beyond the instructions or engage in further inquiry, and reiterated that when considering a double jeopardy claim, an appellate court may review the entire record. State v. Mutch, 171 Wn.2d at 663-4. The court then acknowledged that such review is “rigorous and is among the strictest” and a double jeopardy violation only results when considering the evidence, arguments, and instructions, “it is not clear that it was ‘*manifestly apparent* to the jury that the State [was] not seeking to impose multiple punishments for the same offense’ and that each count was based on a separate act.” State v. Mutch, 171 Wn.2d at 664. Reviewing the record in Mutch, the court concluded that the deficient instructions did not actually effect a double jeopardy violation because it was manifestly apparent that the jury found him guilty of five separate acts of rape to support five convictions. The court noted that the information charged five counts based on allegations that constituted five separate units of prosecution, the victim testified to five different episodes of rape,

the State discussed all five episodes in closing argument, and the defense did not argue insufficiency of evidence for each count but argued instead that the victim consented and was not credible. In addition, there was apparently no unanimity instruction pursuant to Petrich given and the jury reached verdicts on all counts.

Similar to the situation in Mutch, the victim here testified to multiple acts of intercourse occurring over an extended period of time and the defense in this case was one of general denial and arguing the victim's version of the events were not credible. Although there was not the detail of the events as in Mutch supporting specific events, the jury was given the instruction requiring they "unanimously agree as to which act has been proved." CP 25. Given the jury's decision to acquit the defendant on two of the counts which occurred over this same time frame, the State contends it is manifestly apparent that the jury found Ortiz-Lopez guilty of two separate acts of rape supporting two convictions.<sup>2</sup>

- 2. Where the victim testified that after age twelve there were repeated acts of sexual intercourse where she resided with her father and the defendant made a general denial, the lack of unanimity instruction as to Rape of a Child in the Second Degree was harmless beyond a reasonable doubt.**

Ortiz-Lopez contends the Petrich instruction for juror unanimity was required for Count 5. Brief of Appellant at page 18. Count 5 was the only

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<sup>2</sup> See also State v. Wallmuller, 164 Wn. App. 890, 265 P.3d 940 (2011).

charge of Rape of a Child in the Second Degree. CP 3. The charging time period started July 28, 2008, and extended through to the end of the year. The testimony of the victim, however, was that the abuse stopped in the fall of 2008. So, the time period is approximately two months.

The State agrees that multiple incidents were alleged and therefore there should have been a unanimity instruction as to Count 5. However, the State also contends that under the facts of this case, the error was harmless beyond a reasonable doubt.

The testimony of the victim was that the abuse happened multiple times, always at night, always in the defendant's bed or where he was sleeping. 4/26/11 RP 50. Her testimony was that the abuse consisted of vaginal/penile intercourse, oral intercourse, and touching. 4/26/11 RP 50-1. She was unable to be any more specific than that in terms of the abuse itself for the instances occurring after her birthday on July 28, 2008. 4/26/11 RP 52, 60. A did testify that at this third apartment is where the defendant made her perform oral sex on him as well as him performing oral sex on her. 4/26/11 RP 57. In contrast, the testimony of the defendant was that the abuse never happened. 4/28/11 RP 107.

In "multiple acts" cases, the jury must unanimously agree as to which incident constituted the crime charged. Where multiple acts relate to one charge, the State must elect the act on which it relies to convict the defendant, or the trial court must provide a unanimity instruction-a Petrich instruction.

State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). The failure to do so in multiple acts cases is constitutional error. “The error stems from the possibility that some jurors may have relied on one act or incident and some [jurors a different act], resulting in a lack of unanimity on all of the elements necessary for a valid conviction.” State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). Under Petrich, where this error occurs, we apply constitutional harmless error analysis.

State v. Bobenhouse, 166 Wn. 2d 881, 893, 214 P.2d 907 (2009).

Where a victim testifies to multiple acts in a way where the jury cannot rationally discriminate amongst them, where evidence is sufficient to establish that each criminal act occurred, and where the defendant generally denies all the criminal allegations, then any failure to give the Petrich instruction is harmless beyond a reasonable doubt. See State v. Bobenhouse, 166 Wn.2d at 894-895; State v. Camarillo, 115 Wn.2d 60, 62-72, 794 P.2d 850 (1990); State v. Allen, 57 Wn. App. 134, 787 P.2d 566 (1990).

In Bobenhouse, the victim detailed what appeared to be separate incidents that were each independently capable of constituting rape of a child in the second degree. State v. Bobenhouse, 166 Wn.2d at 894. In response, the defendant offered only a general denial to the allegations and therefore “the jury had no evidence to discriminate between the two acts of fellatio and digital penetration.” State v. Bobenhouse, 166 Wn.2d at 895. The Court reasoned if the jury believed one incident occurred, it must have believed each of the incidents occurred. State v. Bobenhouse, 166 Wn.2d at

895. As a result, the court determined the failure to instruct as to unanimity constituted harmless error.

In Camarillo, the victim testified to three different sexual abuse incidents. State v. Camarillo, 115 Wn.2d at 66–68. The defendant did not dispute any one incident, but instead offered only a general denial of abuse of the victim. The Supreme Court noted the evidence showed there were “no factual differences between the incidents[,]” and as such, there was no basis for the jury to distinguish among the acts described. State v. Camarillo, 115 Wn.2d at 70. The Court held the error was harmless, noting that the jury had to believe either the victim's story or the defendant's story. State v. Camarillo, 115 Wn.2d at 72.

Similarly, in State v. Allen, the defendant was convicted of indecent liberties based on the testimony of the child victim. The defendant did not challenge any specific incidents, but gave a general denial. The State did not elect which act it was relying upon, and there was no unanimity instruction given. The Court of Appeals held the failure to give the instruction was harmless, because again, the jury's choice was to either believe the defendant or believe the victim. State v. Allen, 57 Wn. App. at 139.

The State contends the facts pertaining to the Rape of a Child in the Second Degree which occurred in the narrow window after A turned age 12

and before the sexual intercourse ended in the fall of 2008, were statements of multiple acts of intercourse. In response, Ortiz-Lopez gave only a general denial. As a result any error was harmless beyond a reasonable doubt.

**3. The claimed sealing of the jury questionnaire did not result in a closure of the court proceedings meriting a new trial.**

Ortiz-Lopez contends there was sealing of the questionnaires without a Bone-Club analysis and the remedy is to reverse the conviction. The State contends the sealing order was entered after jury selection was completed. The order for sealing was entered weeks after trial was completed and as a result, the appropriate remedy is to reconsideration of the order to seal.

**i. There was no order for sealing of the questionnaires until after trial was concluded.**

Ortiz-Lopez relies upon a clerk minute to indicate the trial court had entered an order sealing the questionnaires after the conclusion of the jury selection. That minute reads:

Court directs Clerk to hold questionnaires under seal. (Jury questionnaires are held under seal with trial exhibits in vault.)

CP 137. The transcript of the hearing that day does not mention the sealing order. In addition, the clerk minutes indicates that the court addressed the sealing prior to the conclusion of the calendar at 5:53 p.m., but the transcript indicates that the proceedings concluded at 5:55 p.m. Since the matter was

not addressed on the record in the trial court, and there was no sealing order entered that day, the full record does not support that there was such sealing.

Given that an order to seal the questionnaires was not entered until May 11, 2012, the record shows that there was no sealing order entered while the trial was pending. Had there been such an order, it would have been entered at the time of trial. RP 150. There was no court hearing on the case on May 11, 2012, and the order to seal the questionnaires did not include the basis for the court's order to seal under GR 15.<sup>3</sup>

**ii. Improper sealing of questionnaires is not structural error**

Ortiz-Lopez contends the sealing of the jury questionnaires without a Bone-Club analysis is structural error meriting reversal of the conviction. Brief of Appellant at pages 24, 28.

The State contends that where the jury instructions were available to the public at least through the conclusion of the jury selection process, there was no structural error. As a result the remedy should be to remand the case to the trial court to complete a Bone-Club analysis.

The State agrees that a Bone-Club analysis is required to seal court records pertaining to a criminal proceeding.

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<sup>3</sup> As in State v. Coleman, 151 Wn. App. 614, 214 P.3d 158 (2009), and State v. Tarhan, 159 Wn. App. 819, 246 P.3d 580, 584-87 rev. granted, 172 Wn. 2d 1013, 259 P.3d 1109 (2011), the alleged sealing here occurred after the jury selection process was completed.

In State v. Coleman, 151 Wn. App. 614, 214 P.3d 158 (2009), the Court of Appeals determined the trial court's failure to conduct a Bone-Club analysis prior to sealing the juror questionnaires did not violate Coleman's right to a public trial under article 1, section 22 but did violate the public's right to open and accessible court proceedings under article I, section 10 of the state constitution. State v. Coleman, 151 Wn. App. at 619. The Court of Appeals in Coleman determined the error was not structural, the defendant did not suggest any possible prejudice and the proper remedy was to remand for reconsideration of the sealing order. State v. Coleman, 151 Wn. App. at 619.

Court records are not the same as court proceedings. The State has not found any case that has held the improper sealing of a document was structural error that required reversal. A record remains static. It can be unsealed at any time and it will contain the same information as when pen was first put to paper. A court proceeding, on the other hand, is qualitatively different. It is dynamic. People's response are not simply the spoken word; an observer can see the person's demeanor and hear the inflection in his or her voice. Consequently, an improper closure of a proceeding cannot be remedied in the way that an improper sealing of a document can be. Because the remedy should fit the violation, the differences between improper sealing of records versus proceedings

should result in different remedies. The remedy for an open court violation versus court records should be remand for a Bone-Club hearing, unless a defendant can demonstrate prejudice. Ortiz-Lopez cannot demonstrate prejudice.

A “structural error” is an error that “necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” State v. Momah, 167 Wn.2d 140, 155-56, 217 P.3d 321 (2009). A violation of open court proceedings may be structural error. *Compare* State v. Stode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009) (finding by a plurality of the Court that structural error occurred and the remedy was remand for a new trial) *with* State v. Momah, 167 Wn.2d at 156 (finding courtroom closure done for the defendant’s benefit and where no prejudice occurred was not structural error).

In Momah, where some voir dire occurred in chambers, this Court found no structural error and thus held that automatic reversal was unwarranted. State v. Momah, 167 Wn.2d at 155-56. The Court emphasized that the remedy must be appropriate to the violation. State v. Momah, 167 Wn.2d at 149, 154-56; *see also* Waller v. Georgia, 467 U.S. 39, 49-50, 105 S. Ct. 2210, 81 L.Ed.2d 31 (1984) (remanding for a new suppression hearing after finding a new trial could be a “windfall” for the defendant and “not in the public’s interest.”). There is nothing on the

record before this Court to even suggest the trial was “fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” *See State v. Momah*, 167 Wn.2d at 155.

The usual remedy, where the court finds that documents were sealed without the proper Bone-Club (or Ishikawa (Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982))) analysis, is to remand for the trial court to apply the correct rule and then unseal or maintain the documents sealed. Rufer v. Abbott Laboratories, 154 Wn.2d 530, 540, 114 P.3d 1182 (2005) (citing Dreiling v Jain, 151 Wn.2d 900, 907, 93 P.3d 861 (2004)). It was the remedy in Coleman: “The error was not structural. Coleman does not suggest any possible prejudice to him resulting from the order. Reversal is therefore not the remedy.” State v. Coleman, 151 Wn. App. at 624. Remand should be the remedy here, too. *C.f.* Yung v. Walker, 468 F.3d 169, 177 (2<sup>nd</sup> Cir. 2006) (“[A] new trial is not required to remedy a violation of the public trial guarantee if some other relief would cure the violation.”)

If the Court finds the confidential questionnaires are court records and that they were improperly sealed by the trial court, the Court should remand for a Bone-Club hearing. Reversal and remand for a new trial is not “appropriate to the violation,” and results in a windfall to Tarhan. *See State v. Momah*, 167 Wn.2d at 152.

**4. The trial court erred in imposing community custody conditions which were not contested but did not relate to the facts of conviction.**

Ortiz-Lopez did not contest the community custody conditions at the trial court. CP 105-7, 7/5/11 RP 70, 72. On appeal, Ortiz-Lopez contests community custody conditions regarding use of pornography, possession of drug paraphernalia and access to the internet. Brief of Appellant at pages 29-35.

Generally, the imposition of crime-related prohibitions is reviewed for abuse of discretion. State v. Ancira, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001). However, appellate courts review 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). And in State v. Bahl, the Supreme Court stated that established case law holds that illegal or erroneous sentences and specifically vagueness challenges to conditions of community custody may be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 753, 193 P.3d 678 (2008).

Thus, Ortiz-Lopez may challenge the conditions imposed for the first time on appeal.

The State agrees the community custody related conditions contested on appeal, 7, 8, 14, 15, 16, 18, 19 and 20, should be stricken and the case

should be remanded with the direction for the trial court to strike those conditions. The State briefly addresses why this Court must order those conditions stricken.<sup>4</sup>

**iii. Computer and internet related conditions.**

RCW 9.94A.700(5)(e) requires that conditions imposing prohibitions must be crime-related. The State acknowledges no testimony or evidence in the record indicates that Ortiz-Lopez accessed the internet before the offenses or that internet use contributed in any way to the crimes. And, the trial court made no finding that internet use contributed to the rape. 7/5/11 RP 71-2. This condition may later be set by the treatment provider during community custody.

Our holding does not preclude control over internet access being imposed as part of sex offender treatment if recommended after a sexual deviancy evaluation.

State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262, 1263 (2008).

**iv. Pornography and sexual stimulus materials.**

In State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008) the Supreme Court held that Bahl's community custody provision restricting his access to or possession of pornographic materials was unconstitutionally vague.

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<sup>4</sup> The requirement for a sexual deviancy evaluation is included under condition 21. Some of the conditions stricken may be required as part of sex offender treatment if recommended after a sexual deviancy evaluation. See State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262, 1263 (2008).

Similar conditions were set by the trial court here. The State agrees the conditions as requested contain the same degree of vagueness as those in Bahl. Therefore, the case should be remanded to the trial court with the instructions to strike those conditions.

**v. Possession of Drug Paraphernalia.**

In State v. Sanchez Valencia, 169 Wn.2d 782, 791, 239 P.3d 1059 (2010), 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 at 785, 239 P.3d 1059. The court unanimously concluded that the provision was vague because it failed to provide fair notice to the defendants and also failed to prevent arbitrary enforcement. Id. at 794–795, 239 P.3d 1059.

Here where the condition precluded Ortiz-Lopez from “possessing drug paraphernalia,” the condition likewise is vague because it fails to provide fair notice. The condition should be stricken.

**V. CONCLUSION**

For the foregoing reasons, this Court must affirm the convictions. However, given the uncontested but improper community custody conditions, the case should be remanded with an order to strike those conditions, but otherwise affirm the judgment and sentence.