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Court of Appeals  
Division III  
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 33022-2-III

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STATE OF WASHINGTON, Respondent,

v.

JEREMIAH RAY LOGAN, Appellant.

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APPELLANT'S BRIEF

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## **I. INTRODUCTION**

Jeremiah Logan was convicted of one count each of rape of a child in the second degree and child molestation in the second degree, following a trial in which the State presented evidence of multiple instances of sexual contact occurring over a three month period. The State did not elect which single incidents supported the charge, nor did the court give a unanimity instruction informing the jury that it had to unanimously agree which underlying event comprised the charged conduct. This error requires a new trial.

## **II. ASSIGNMENTS OF ERROR**

**ASSIGNMENT OF ERROR 1:** The trial court erred in failing to give a unanimity instruction pursuant to *State v. Petrich* when the State presented evidence of multiple acts that could comprise the charged crimes and did not elect which act it relied upon to support each charge.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**ISSUE 1:** Did the State present evidence of multiple acts that could comprise the factual basis for each of the counts charged without electing which act comprised the charged offense? YES.

ISSUE 2: Do the multiple acts alleged to have occurred over a three month period comprise a continuous course of conduct? NO.

#### **IV. STATEMENT OF THE CASE**

The State charged Jeremiah Logan with one count of rape of a child in the second degree and one count of child molestation in the second degree, both perpetrated against his step-daughter, B.E.H. CP 1-2. At trial, B.E.H. described several incidents that occurred after she started seventh grade. I RP 115. During the first incident, B.E.H. testified that she fell asleep in front of the fire in the living room when Logan lied behind her, put his hands down her pants and touched her vagina. I RP 115-16. On another occasion, B.E.H. went into the master bedroom to play on the computer when Logan again put his hands down her skirt and touched her vagina underneath her clothes. I RP 120-21. She stated that she felt his fingers go into her vagina. I RP 121. Other incidents that B.E.H. described included allegations that Logan performed oral sex on her, fondled her breasts, and attempted twice to penetrate her with his penis. I RP 122-26. She also described a separate incident when Logan was playing pornography on the computer while rubbing her vagina when her mother interrupted it. I RP 129-30. B.E.H. told her mother that she was watching porn and Logan pretended to be asleep. I RP 130-31. The incidents occurred over a period of three months. I RP 135.

The court's instructions to the jury included no unanimity instruction and Logan's counsel did not take exception to the court's instructions. CP 52-71; II RP 174. Both of the "to convict" instructions identified the incidents as occurring on or between September 15, 2011 and February 17, 2012. CP 64, 68. The jury convicted Logan of both counts. CP 73, 74.

At sentencing, the trial court imposed a low-end standard range sentence of 210 months to life on the rape charge. II RP 293. Logan now appeals. CP 119.

#### **V. ARGUMENT**

A *Petrich* instruction was required to ensure juror unanimity when the State presented evidence of multiple acts that could constitute the crimes charged.

The court reviews the adequacy of jury instructions *de novo* as a question of law. *State v. Boyd*, 137 Wn. App. 910, 922, 155 P.3d 188 (2007). When the State presents evidence of multiple distinct acts to support a single charge, it must either elect which act it relies upon to support the charge, or the jury must be instructed that it must unanimously agree that the same underlying act has been proven beyond a reasonable doubt. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). When

the evidence presented at trial discloses two or more violations in support of a single charge, a *Petrich* instruction is required to prevent some jurors from convicting on the basis of one violation, and other jurors convicting on the basis of another, thereby resulting in a lack of unanimity as to the facts necessary to support a conviction. *State v. Hanson*, 59 Wn. App. 651, 657, 800 P.2d 1124 (1990).

Because the instruction implicates the constitutional right to a unanimous jury verdict, failure to give a *Petrich* instruction when required can be raised for the first time on appeal. *Boyd*, 137 Wn. App. at 922-23; *see also State v. Crane*, 116 Wn.2d 315, 325, 804 P.2d 10 (1991).

“Failure to give the *Petrich* instruction, when required, violates the defendant's constitutional right to a unanimous jury verdict and is reversible error, unless the error is harmless.” *State v. Bobenhouse*, 166 Wn.2d 881, 894, 214 P.3d 907 (2009) (citing *State v. Camarillo*, 115 Wn.2d 60, 64, 794 P.2d 850 (1990)). In evaluating whether the error is harmless, the court presumes the error was prejudicial and only affirms the conviction if no rational juror could have a reasonable doubt as to any one of the events alleged. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988).

A *Petrich* instruction is not required when the evidence presented shows a continuing course of conduct rather than distinct acts. *Crane*, 116 Wn.2d at 326 (citing *Petrich*, 11 Wn.2d at 571). To determine whether the conduct may be charged as a continuous offense rather than distinct acts, the court must evaluate the facts in a commonsense manner. *Petrich*, 101 Wn.2d at 571.

Unanimity instructions have frequently been held required in cases alleging multiple instances of child sex abuse, such as this one, because “child molestation . . . is not an ongoing enterprise.” *State v. Gooden*, 51 Wn. App. 615, 620, 754 P.2d 1000 (1988). *Petrich* involved similar facts as the present case, where the child alleged multiple incidents of sexual contact occurring over about an eight month period, including four episodes that were discussed at length. 101 Wn.2d at 568. Likewise, in *Bobenhouse*, the court concluded that testimony about multiple incidents of abuse required a unanimity instruction, although it ultimately held that failure to give the instruction in that case was harmless error. 166 Wn.2d at 893-94. And in *State v. Coleman*, again, the court concluded that evidence of multiple instances of molestation occurring over a three year period required a unanimity instruction. 159 Wn.2d 509, 514, 150 P.3d 1126 (2007).



The present case plainly involves allegations of multiple instances of sexual contact and penetration, beginning with the incident in the living room and occurring multiple times afterward in the bedroom. The State presented at least three instances in which B.E.H. testified to contact by Logan that did not involve penetration, including the incident in the living room, the incident in which he fondled her breasts, and the incident when her mother interrupted them. I RP 116, 123, 130. B.E.H. also testified about four separate incidents of sexual intercourse: (1) Logan placing his fingers inside her vagina, I RP 121; (2) Logan performing oral sex on her, I RP 123; and (3) two incidents in which Logan attempted to put his penis inside her vagina, I RP 124-25, 126-27. B.E.H. testified that the incidents occurred multiple times, over a period of about three months. I RP 132, 135. Any one of the three non-penetrative contacts could have comprised the child molestation charge, and any one of the four penetrative contacts could have constituted the rape charge. Because the evidence shows multiple acts that could have comprised the charged crime, the unanimity instruction was required. *Hanson*, 59 Wn. App. at 657.

Because the *Petrich* instruction was required, the convictions must be reversed unless the State demonstrates beyond a reasonable doubt that the lack of the instruction did not affect the verdict because no rational juror could have had a reasonable doubt as to any of the incidents.

*Coleman*, 159 Wn.2d at 512. Generally, when the evidence is uncontested, a unanimity instruction may not be required. *Id.* at 514. When there is conflicting testimony, reversal may be necessary. *See Camarillo*, 115 Wn.2d at 65 (discussing *Kitchen* and *State v. Coburn*, 110 Wn.2d 403, 409, 759 P.2d 105 (1988)). Similarly, when the child is able to accurately describe some events with specificity but displays confusion and uncertainty as to others, failure to give the instruction may not be harmless. *Id.* at 65-66 (discussing *Petrich*).

In the present case, as in *Petrich*, B.E.H.'s testimony was clear and specific as to some incidents, and confused and uncertain as to others. Additionally, there was conflicting testimony about the incident when B.E.H.'s mother interrupted them. B.E.H. testified that Logan was touching her vagina with porn on the computer when her mother attempted to come in the room, and Logan pretended to be asleep while she told her mother she had been looking at porn. I RP 130-31. She testified that she was sitting at the computer when her mother came in the room, but she did not remember whether her clothing was undone and she denied telling her mother that she had watched porn on other occasions, including at her father's house. I RP 147-48. When B.E.H.'s mother testified, she said that B.E.H. was walking toward the door with her pants undone. I RP 85-86. According to B.E.H.'s mother, Logan woke up and

began “grilling” B.E.H. about looking at porn. I RP 87. B.E.H., however, testified that Logan said nothing to her about watching porn. I RP 132. B.E.H.’s mother also said that Logan admitted giving B.E.H. the password to a pornography site, saying that she was a teenager and was going to look at it anyway and he would rather have her looking at a safe site. I RP 88-89. B.E.H., however, denied knowing the password to the porn site. I RP 128. And B.E.H.’s mother and Logan both testified that B.E.H. admitted looking at porn in the past, including at her father’s house. I RP 102, II RP 185. Both parents confirmed that B.E.H. had been caught lying in the past and she was not happy around the time of the allegations because she wanted to go live with her father. I RP 97-98, II RP 181-82.

Under these circumstances, a rational juror certainly could have had reasonable doubt about the incident when B.E.H.’s mother entered the bedroom, but could have improperly aggregated evidence to reach a guilty verdict. *Coleman*, 159 Wn.2d at 512. In light of the conflicting testimony and B.E.H.’s uncertainty about several of the incidents to which she testified, the error cannot be harmless because a rational jury could have disagreed as to the underlying facts but convicted due to the cumulation of allegations.

**VI. CONCLUSION**

For the foregoing reasons, Logan respectfully requests that the court REVERSE the conviction and remand the case for a new trial.

RESPECTFULLY SUBMITTED this 27 day of July, 2015.

A handwritten signature in black ink, appearing to read "Andrea Burkhart", written over a horizontal line.

ANDREA BURKHART, WSBA #38519  
Attorney for Appellant

## DECLARATION OF SERVICE

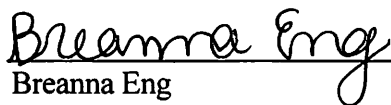
I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 27th day of July, 2015 in Walla Walla, Washington.

  
Breanna Eng