33022-2-III

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

STATE OF WASHINGTON,

Respondent,

v.

JEREMIAH RAY LOGAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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INDEX

TABLE OF AUTHORITIES

WASHINGTON CASES

STATUTES

RULES

I. APPELLANT'S ASSIGNMENT OF ERROR

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.

II. ISSUES PRESENTED

A. Whether the defendant may allege for the first time on appeal that his Constitutional right to a unanimous verdict was violated where he has failed to demonstrate the existence of a manifest error affecting a constitutional right?

B. Whether the trial court erred in failing to provide the jury with a *Petrich* instruction where the evidence presented established a "continuing conduct" rather than a "multiple acts" case?

III. STATEMENT OF THE CASE

Defendant/Appellant, Jeremiah Logan, was charged by information in Spokane County Superior Court with one count of second degree rape of a child and one count of second degree child molestation occurring on or about between September 15, 2011 and February 17, 2012. (CP 1).

Between 2011 and 2012, twelve year old B.E.H. lived with her mother, Desiree Logan; her stepfather, Defendant Jeremiah Logan; and her three younger siblings, ages ranging from nine years to one year old. (1RP 78).

B.E.H. had known her stepfather for most of her life. (1RP 112). Her mother and stepfather had known each other for approximately 15 years and were married in 2009. (1RP 77-78). Her mother worked as a home health aide. (1RP 79). During the time Ms. Logan was at work, the younger children would be left in the care of B.E.H. and Mr. Logan, who was unemployed at the time. (1RP 79, 81).

B.E.H. started the seventh grade in September of 2011. (1RP 78). Before she entered the seventh grade, her relationship with her stepfather was good and she felt as though she could talk to him about almost anything. (1RP 114). However, B.E.H.'s relationship with Mr. Logan deteriorated after she entered the seventh grade, and she began to ask her mother to allow her to live with her father instead. (1RP 82, 98, 107, 115).

One night, during a cold snap, sometime close to Christmas, B.E.H. decided to sleep near the fireplace in the living room to keep warm. (1RP 115-116). Mr. Logan came out of the bedroom, laid down behind B.E.H. and touched her vagina with his hands, rubbing it in a circular motion. (1RP 116-117). B.E.H. was unable to remember the specifics of this incident; she could not recall the specific date that the assault occurred, whether Mr. Logan touched her over or under her clothing, how long the assault lasted, or what Mr. Logan said to her as he touched her. (1RP 115, 117). What she did recall was that she was "trying to ignore him" and that she never confronted

Mr. Logan about it. (1RP 117-118). Mr. Logan told B.E.H. at a later date that she should not tell her mother about the incident because he did not want to ruin his relationship with B.E.H.'s mother. (1RP 118-119).

B.E.H. recalled another incident that occurred in the master bedroom of the residence. B.E.H. went into the master bedroom to use the only computer in the home. (1RP 113, 120). Mr. Logan left the room to take a shower, and B.E.H. asked if she could take a shower after he was finished. (1RP 120). He responded that he could join her in the shower; however, she declined his "invitation." (1RP 120). After he returned to the bedroom, Mr. Logan lay down on the bed, pulled B.E.H. onto the bed from the computer chair, and put his hands down her skirt, again touching her vagina, rubbing it in a circular motion, and penetrating her vagina with his fingers. (1RP 120-122). The only other detail B.E.H. was able to recall about this incident was that at some point Mr. Logan turned on pornography on the computer, although she could not recall the type of pornography. (1RP 121).

Additionally, B.E.H. remembered that another incident occurred while her mother was out shopping and that she had again requested to use the computer in the master bedroom. (1RP 122). Mr. Logan stated he wanted to "try something," pulled up her skirt, and placed his mouth on her vagina and touched her breasts. (1RP 122-123). B.E.H. was unable to describe how long this lasted or whether he said anything else to her. (1RP 124).

B.E.H. recalled that Mr. Logan tried to insert his penis into her vagina during a fourth incident, with date and time unknown. (1RP 124). She stated that this incident again occurred in the master bedroom where she had gone to play on the computer. (1RP 124). She remembered that during this incident, Mr. Logan pulled her up to the bed, stripped her naked, kissed her, and told her that he wanted to "try something" and then began to insert his penis into her vagina. (1RP 124-125). She recalled that it hurt her and that she tried to push him out of her by tensing up. (1RP 125). B.E.H. did not verbally tell him to stop, but believed the look on her face made it evident that she was in pain. (1RP 126). She testified that there was a second time that he tried to insert his penis inside of her vagina but was unable to recall any of the details of the second time this occurred, other than it made her cry which made him stop. (1RP 126-127).

Approximately a week before B.E.H. found the courage to report the abuse, Mrs. Logan came home while B.E.H. was again alone with Mr. Logan in the bedroom.[1] (1RP 86, 129). B.E.H. stated the bedroom door was locked, and Mr. Logan had again viewed pornography on the computer and touched

[1] Mrs. Logan testified to another incident about six months before law enforcement became involved where she arrived home to discover B.E.H. sitting on Mr. Logan's lap in front of the computer with her arm around him. It instantly made Mrs. Logan feel uncomfortable as she did not believe it was appropriate. (RP 84-85).

B.E.H.'s vagina with his hands.[2] (1RP 129). Mr. Logan told B.E.H. not to tell her mother, and he pretended to be asleep when Mrs. Logan used a key to unlock the door. (1RP 86, 129). B.E.H. lied to her mother at Mr. Logan's request and told her that she had been watching porn while Mr. Logan slept. (1RP 130-131).

Approximately a week after this incident, B.E.H.'s friends finally convinced her to report the assaults to the police. (1RP 134). Until this time, B.E.H. had been afraid to tell her mother and was afraid of Mr. Logan. (1RP 132). During the night of February 16, 2012, (1RP 80), B.E.H. took her siblings from the home, went to a friend's house and called police, reporting that she had been sexually abused by her stepfather for three months. (1RP 135). Law enforcement officers testified that B.E.H. reported to them that Mr. Logan had touched her inappropriately ten to fifteen times over the past three months. (1RP 159).

At trial, the state argued that this pattern of conduct was an "ongoing criminal course of conduct" that began sometime after B.E.H. entered the

[2] B.E.H. was again unable to recall whether Mr. Logan assaulted her during this incident by touching her on the outside of her clothing or underneath her clothing. (1RP 130).

seventh grade, while she was twelve and thirteen years old.[3] (2RP 244-245). The state argued that with the exception of the assault at the fireplace, all assaults took place in the master bedroom. (2RP 245). The State argued that each of these acts were a "series of sexual interests by the defendant toward his stepdaughter" who was transitioning into adulthood. (2RP 248).

Mr. Logan denied the allegations at trial, just as he had when he gave his original statement to law enforcement. (1RP 160, 2RP 193-194). However, he told the jury that on one occasion he had become aroused while B.E.H. and her sister were sitting on his lap, as "they were seesawing back and forth … pulling [his] pants back and forth," (2RP 191),[4] but denied that he ever sexually touched or molested his stepdaughter. (2RP 193-194).

Through counsel, Mr. Logan attacked B.E.H.'s credibility by portraying her as a selfish teenager who felt angry and disrespected that she had to care for the younger children, cook for them, and clean the house while her mother was either working or out with friends, and while Mr. Logan played video games on the computer. Further, he tried to highlight the inconsistencies

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[3] B.E.H. turned thirteen years old in January of 2012, sometime after the first incident of molestation but before she alerted law enforcement. (1RP 78).

[4] Mr. Logan told the jury he had disclosed this incident that had apparently occurred in July of 2011 to law enforcement in an effort to help law enforcement understand how B.E.H. could be "confused." (2RP 192).

between what she had told police in 2012, and what she was able to recall while she testified to the jury two years later. (1RP 139-150, 2RP 261-263).

A jury found Mr. Logan guilty of both second degree rape of a child and second degree child molestation. (2RP 275-279). The court sentenced the defendant to a low-end standard range sentence of 210 months to life (as the rape charge subjected Mr. Logan to the Indeterminate Sentence Review Board). (2RP 293). Mr. Logan timely appealed.

IV. ARGUMENT

A. THE APPELLANT, ALLEGING FOR THE FIRST TIME ON APPEAL THAT HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT WAS VIOLATED, HAS NOT DEMONSTRATED THE EXISTENCE OF A MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT PURSUANT TO RAP 2.5(A)(3) BECAUSE HIS FAILURE TO RAISE THE ISSUE AT TRIAL WAS A TACTIC BY COUNSEL.

It is a fundamental principle of appellate jurisprudence in that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). This principle is embodied in Washington under RAP 2.5.

RAP 2.5 is principled as it "affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal." *State v. Strine,* 176 Wn.2d at 749, quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984). This rule supports a basic

sense of fairness, perhaps best expressed in *Strine,* where the court noted the rule requiring objections helps prevent abuse of the appellate process:

> [I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from "riding the verdict" by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.
> BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6–2(b), at 472–73 (2d ed. 2007) (footnotes omitted).

Strine, 176 Wn.2d at 749-50.

Under RAP 2.5(a), a party may not raise a claim of error on appeal that was not first raised at trial unless the claim involves a manifest error affecting a constitutional right.[5] Specifically regarding RAP 2.5(a)(3), our courts have indicated that "the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can 'identify a constitutional issue not litigated below.'" *State v. Scott,* 110 Wn.2d 682, 687, 757 P.2d 492 (1988).

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[5] An issue may also be raised for the first time on appeal if it involves trial court jurisdiction or failure to establish facts upon which relief can be granted. RAP 2.5(a)(1) and (2).

Here, defendant alleges that the trial court erred by failing to give a *Petrich* [6] instruction even though such an instruction was neither proposed by the defendant nor did he take any exception to the court's instructions. (CP 52-71; 2RP 174). The failure to assert this issue at the trial court is not reviewable on appeal, because there is not a showing that the alleged error is manifest.

1. <u>Manifest Error</u>

To establish that the alleged constitutional error is reviewable, the defendant must establish that the error is "manifest." Here, any error relating to the trial court's failure to *sua sponte* supply a *Petrich* instruction was not manifest or obvious, as is required by RAP 2.5.

> In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is *so obvious on the record* that the error warrants appellate review. *See Harclaon,* 56 Wn.2d at 597, 354 P.2d 928; *McFarland,* 127 Wn.2d at 333, 899 P.2d 1251. It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the

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[6] *State v. Petrich,* 101 Wn.2d 566, 683 P.2d 173 (1984) requires that in cases presenting evidence of several acts, any of which 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 specified criminal act. *State v. Kitchen,* 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing *Petrich,* 101 Wn.2d at 570, 683 P.2d 173).

> appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

State v. O'Hara, 167 Wn.2d 91, 99-100, 217 P.3d 756, 761 (2009), *as corrected* (Jan. 21, 2010) (footnote omitted) (emphasis added).

There is nothing in defendant's claim of manifest error that is plain and indisputable, or so apparent on review that it amounts to a complete disregard of the controlling law or the credible evidence in the record, such that the judge trying the case should have clearly noted a *Petrich* violation and remedied it. Contrary to the defendant's claims, no election or unanimity instruction is required in cases like the instant one, where the evidence establishes a "continuing course of conduct."[7] *State v. Petrich,* 101 Wn.2d 566, 683 P.2d 173 (1984). The fact that the defendant attempts to argue that this case is a "multiple acts" and not a "continuing course of conduct" case demonstrates that the issue is *debatable* and therefore not *manifest* – not obvious or flagrant as is required by RAP 2.5 for this court to grant review absent preservation of the issue for appeal by timely objection at trial.

[7] That this case is a continuing course of conduct case is argued below.

2. Trial Tactics

Moreover, Mr. Logan's failure to timely raise the claim at trial is attributable to trial tactics.[8] If the defendant's attorney had raised the claim that a unanimity instruction was necessary, he would have alleged that the factual circumstances amount to more than the two crimes charged.[9] If he raised this claim before the close of the State's case, the State could have moved to add additional counts of child molestation or child rape pursuant to CrR 2.1(d).[10] Additional convictions could have exposed the defendant to additional incarceration, especially where, as here, the defendant has an offender score of above a "9" under the Sentencing Reform Act (SRA)

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[8] *See State v. Carson*, No. 90308-5 (Sept. 17, 2015) (En Banc) (holding that in a multiple acts/multiple counts case where the state proposed a *Petrich* instruction, defense counsel's objection to the instruction was a legitimate trial tactic, finding that a *Petrich* instruction could be confusing and potentially prejudicial especially where, as here, defense's theory of the case was that the allegations were altogether fabricated.)

[9] *See State v. Crane*, 116 Wn.2d 315, 804 P.2d 10 (1991) (discussing the difference between a multiple acts case, where the complaint is the lack of unanimity where there are two or more acts, each individually supporting a conviction, and alternative means cases, where the crime can be committed in different or alternate ways.)

[10] CrR 2.1(d) (formerly CrR 2.1(e)) "permits an amendment 'at any time before verdict or finding if substantial rights of the defendant are not prejudiced.' Amendments are addressed to the sound discretion of the trial court. *State v. Collins*, 45 Wn. App. 541, 551, 726 P.2d 491 (1986), *review denied*, 107 Wn.2d 1028 (1987)." *State v. Wilson*, 56 Wn. App. 63, 65, 782 P.2d 224, 226 (1989).

(CP 106), and the court could have imposed an exceptional sentence if it found that the defendant had committed multiple current offenses, and the defendant's high offender score resulted in some of the current offenses going unpunished.[11] RCW 9.94A.535(2)(c).

That is the likely situation here, where the instruction conference and objections to instructions occurred *before* the State rested. (2RP 174-175).[12] [13] Had the defendant felt compelled to timely complain about the lack of a unanimity instruction, he would have had to do so at the time the jury instructions were discussed. *See,* CrR 6.15 (c) (objection to instructions). Because the jury instructions were agreed to before the State rested, (2RP 175), a properly objecting defendant could have faced an amendment adding several additional felony sex offenses, opening him up to the possibility of additional incarceration. Interestingly, if that amendment had occurred, he would now be raising a double jeopardy claim on appeal, the other side of the *Petrich*

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[11] At sentencing, the Court did not have before it any "specific reasons" to depart from a standard range sentence. (2RP 292-293).

[12] The court instructed the jury with Washington Pattern Jury Instructions (e.g., WPIC 1.04, 3.01, 151.00) as anticipated by the parties, requiring unanimity of verdict by the jurors as to each individual count charged. (CP 52- 71; 2RP 174, 232-242).

[13] Neither party objected to the trial court's instructions. (2RP 174).

gambling coin. *See*, *eg*., *State v. Brown*, 159 Wn. App. 1, 248 P.3d 518 (2010):

> Brown argues that his "multiple convictions for violating the no[-]contact order on consecutive days in October and December violate the prohibition against double jeopardy, as [his] conduct was continuing." Br. of Appellant at 23. The State counters that the legislature intended to make each no-contact order violation a chargeable offense, and therefore, under a unit of prosecution analysis, the convictions do not violate double jeopardy. We agree.

Brown, 159 Wn. App. 1, 9, 248 P.3d 518.

Whether the instant case involves a continuing course of conduct, or involves a *Petrich* error is clearly open to debate, as is whether the belatedly claimed error is a result of trial tactics and waiver – therefore, the error is not obvious or manifest as is required by RAP 2.5(a)(3). This court should decline the invitation to address the unpreserved argument that the trial court should have *sua sponte* supplied a *Petrich* instruction to the jury. This untimely debate is simply a product of defense counsel's trial tactic to mitigate defendant's possible exposure to additional incarceration.

B. THE TRIAL RECORD IS NOT SUFFICIENTLY DEVELOPED TO ALLOW THE APPELLANT TO RAISE A MANIFEST CONSTITUTIONAL ERROR CLAIM BASED ON THE ALLEGED FAILURE TO GIVE A UNANIMITY INSTRUCTION, WHERE, AS HERE, THE EVIDENCE ESTABLISHES THAT THE DEFENDANT'S ACTS WERE A CONTINUING COURSE OF CONDUCT.

Because the defendant failed to provide or request a *Petrich* instruction at trial, the record does not clearly or adequately support his present claim. If he had properly raised the issue at the trial level, the court and the parties, perhaps through additional testimony and briefing, could have clarified and developed the issue. Instead, the defendant invites this court to determine and ponder whether this is, or is not, a "multiple acts" case or "continuing course of conduct" case. This court should decline to consider the allegation of instructional error when the record lacks specificity for review. *See, State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

However, in the event this court reaches the merits of defendant's claim, the court should note that an election or unanimity instruction is not required in all cases where there are multiple acts, any of which could support a criminal charge. Where the State presents evidence of multiple acts that constitute a "continuing course of conduct," no election or unanimity instruction is required. *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). To determine whether criminal conduct constitutes but one continuing act, the court reviews the facts in a commonsense manner. *State v. Love*, 80

Wn. App. 357, 361, 908 P.2d 395 (1996); *see also State v. Fiallo–Lopez,* 78 Wn. App. 717, 724, 899 P.2d 1294 (1995) (two discrete acts of delivering cocaine where purchaser was the same and acts occurred close in time was a continuing course of conduct). In distinguishing between distinct criminal acts and a continuing course of conduct, courts have held that "evidence that the charged conduct occurred at different times and places tends to show that several distinct acts occurred ...," while "evidence that a defendant engages in a series of actions intended to secure the ***same objective*** supports the characterization of those actions as a continuing course of conduct...." *State v. Brown,* 159 Wn. App. at 13-15 (emphasis added).[14]

State v. Craven, 69 Wn. App. 581, 849 P.2d 681 (1993), is especially instructive in a case such as this, where a child victim is repeatedly victimized over a period of time. In *Craven,* the defendant repeatedly assaulted a child over the course of a three week period. The State charged the defendant with one count of assault, based on a continuing course of conduct theory; the State's theory of the case was that the defendant's criminal actions were a systematic pattern of abuse. The court found that no error occurred when the trial court failed to give a *Petrich* instruction, commenting:

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[14] *See also, Love*, 80 Wn.App. 357, 361, 908 P.2d 395 (1996) ("Multiple acts tend to be show by evidence of acts that occur at different times, in different places, or against different victims").

> We note that charging one count of assault for a continuous course of conduct seems particularly appropriate where, as here, the child victim is preverbal, the abusive conduct occurred outside the presence of witnesses, and no one could testify to any single act of abuse. Where the evidence of the abuse can only come from a physical examination of the child, from the totality of the injuries, from an observation of the child's demeanor, and from the circumstances surrounding the incident which brings the child to the attention of health care professionals, basing a conviction upon distinct criminal acts is not the only theory upon which to proceed. Indeed, a fact pattern which evidences systematic abuse particularly lends itself to a continuing course of conduct analysis.

Craven, 69 Wn. App. 581, 589 n.7.

Even *Petrich* impliedly condoned the State charging and proving "continuing course of conduct" cases with minor child victims:

> [I]n the majority of cases in which this issue will arise, the charge will involve crimes against children. Multiple instances of criminal conduct with the same child victim is a frequent, if not the usual, pattern…. Whether the incidents are to be charged separately or brought as one charge is a decision within prosecutorial discretion. Many factors are weighed in making that decision, ***including the victim's ability to testify to specific times and places***. Our decision in this case is not intended to hamper that discretion or encourage the bringing of multiple charges when, in the prosecutor's judgment they are not warranted. The criteria used to determine that only a single charge should be brought, may indicate that election of one particular act for conviction is impractical. In such circumstances, a defendant's right to a unanimous verdict will be protected with proper jury instructions.

Petrich, 101 Wn.2d at 572 (internal citation omitted) (emphasis added).

Where an accused resides with a child victim, or has virtually unchecked access to the child, and the abuse occurs on a regular basis and in a

consistent manner over a period of time, the child may have no meaningful reference point of time or detail to distinguish one specific act from another. The more frequently the abuse occurs, the less likely that the child will remember any particular incident in detail; in fact, it is more likely that the child will want to forget the details of the repeated horrors he or she has endured. Furthermore, in resident child molester cases, neither alibi nor misidentification is likely to be a reasonable defense; generally, the defense will be a complete denial of the charges or an attack on the child victim's credibility.

This case is the epitome of a resident child molester case. Mr. Logan had unchecked access to B.E.H. as her mother was often out of the house. (RP 79). Mr. Logan had developed a relationship of trust with B.E.H. as she had known him nearly her whole life. (RP 114). B.E.H. feared the repercussions of telling anyone about the abuse. (RP 118-119, 132). Assuming B.E.H.'s initial estimates to law enforcement that the abuse had occurred ten to fifteen times over the course of approximately three months, it is logical that she would be unable to recall the details of each incident; based on this estimate, on average Mr. Logan sexually assaulted B.E.H. once a week for three months.

The abuse B.E.H. endured exemplifies the type of abusive pattern contemplated in *Craven* and *Petrich* that would qualify as an "ongoing

criminal course of conduct." Mr. Logan repeatedly victimized B.E.H. in their home, in the master bedroom, often with the use of pornographic material on the computer, while no other witness was present. Under these facts, and considering the obvious memory problems B.E.H. demonstrated at trial recalling the details of each event,[15] it would have been impractical for the state to elect one or two particular incidents to prove to the jury. It is also clear that the defense in this case was neither alibi nor misidentification, but rather a general denial of the charges and an attack on B.E.H.'s credibility.

The cases cited by defendant in support of his argument that this is a case in which either election or a *Petrich* instruction was required are distinguishable from this case. *State v. Gooden*, 51 Wn. App. 615, 754 P.2d 1000 (1988), was a case involving promoting prostitution, rather than child molestation and child rape, and in an attempt to distinguish the facts of *Gooden* from those of *Petrich*, the court mentioned in dicta that "child molestation…is not an ongoing enterprise." *Gooden*, 51 Wn. App. at 620. This passing comment has no precedential value to this case.

The defendant also cites to *State v. Coleman* and *Petrich*, to support his contention that this case was a multiple acts case requiring a unanimity

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[15] While B.E.H. was not "preverbal" as discussed in *Craven*, as one factor to be considered by the court, the record indicates that she did have difficulty recalling each event clearly.

instruction or election by the state. *Petrich* and *Coleman* were child molestation cases that were found to be "multiple acts" cases, unlike this case. *State v. Coleman*, 159 Wn.2d 509, 150 P.3d 1126 (2007), *Petrich*, 101 Wn.2d at 683. The facts of *Coleman* are distinguishable from this matter because, in *Coleman*, the abuse took place over the course of three years, the victim recounted four specific instances of misconduct at length and acknowledged additional instances of abuse in passing, and most importantly, the State conceded the case should be treated as a "multiple acts" case. *Coleman*, 159 Wn.2d at 511, 513. Similarly, the court held that *Petrich* was a "multiple acts" case as each incident of molestation occurred "in a separate time frame and identifying place [where] [t]he only connection between the incidents was that the victim was the same person." *Petrich*, 101 Wn.2d at 571.[16]

In this case, the state does not concede that this case should be analyzed as "multiple acts" case, as was conceded by the state in *Coleman*, and found to be the case in *Petrich*. Rather, the state asserts this is continuing course of conduct case because Mr. Logan systematically and regularly molested B.E.H. in the master bedroom of their shared residence while she used the computer

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[16] Additionally, *Petrich* is distinguishable from the instant case because the defense moved to compel the prosecutor to elect which act was to be relied upon for conviction, thus properly preserving the error for appeal. *Petrich*, 101 Wn.2d at 569.

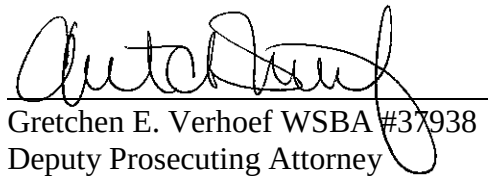
and while no other witnesses were present, taking advantage of his position of trust with his twelve year old step-daughter.

V. CONCLUSION

No manifest or obvious constitutional error occurred under RAP 2.5 that would allow review by this court, as these repeated incidents of child molestation and child rape constituted a continuing course of criminal conduct; thus, the trial court was not required to give a *Petrich* instruction to ensure jury unanimity – the general instructions given by the court were sufficient to ensure unanimity. This court should deny review and affirm the jury verdict.

Dated this 28th day of September, 2015.

LAWRENCE H. HASKELL
Prosecuting Attorney



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

STATE OF WASHINGTON, Respondent, v. JEREMIAH RAY LOGAN, Appellant,	NO. 33022-2-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on September 28, 2015, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Andrea Burkhart
Andrea@BurkhartandBurkhart.com

9/28/2015	Spokane, WA	Crystal McNees
(Date)	**(Place)**	**(Signature)**