SUPREME COURT NO. 100269-6
NO. 54755-4-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

MICHAEL MARQUEZ,
Petitioner.

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

The Honorable Amber Findlay & Daniel Goodell,
Judges

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Michael Marquez asks this Court to grant review of the court of appeals' decision in State v. Marquez, No. 54755-4-II, filed August 10, 2021 (Appendix A). The court of appeals denied Marquez's motion for reconsideration on September 23, 2021 (Appendix B).

B. ISSUES PRESENTED FOR REVIEW

The complaining witness at Michael Marquez's jury trial described two instances of inappropriate touching. The record does not indicate when the two events occurred in relation to one another. No Petrich[1] instruction was given and the prosecutor did not make a clear election in closing argument.

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[1] State v. Petrich, 101 Wn.2d 566, 571, 683 P.2d 173 (1984), overruled on other grounds by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988)

Interpreting ambiguous evidence in favor of the prosecution, the court of appeals concluded the record established only one continuing course of conduct—rather than multiple distinct acts—and so Marquez's right to a unanimous jury verdict was not violated.

1a. Is the court of appeals decision in conflict with other published decisions by the court of appeals, which hold ambiguous evidence must be interpreted in favor of the party alleging a Petrich error, as well as decisions by this Court, which hold ambiguous jury verdicts must be interpreted in favor of the defense?

1b. Is this Court's guidance necessary to resolve a conflict among court of appeals decisions as to whether unit of prosecution analysis is relevant in evaluating when the record establishes multiple distinct acts, which necessitate an election or Petrich instruction, versus a continuing course of conduct, which does not?

C. STATEMENT OF THE CASE

K.R. was born in April of 2010. RP 301. In 2017, she lived with her mother, father, and two brothers. RP 302-03, 322-23. Michael Marquez was childhood friends with K.R.'s father and periodically stayed with the family, sleeping on the couch in the living room. RP 323, 328-30. Christina Feddema was also a longtime friend of the family and the kids call her "aunt." RP 306, 311.

On July 14, 2017, K.R.'s older brother approached Feddema with something to tell her. RP 311-12. Based on what Feddema learned, she confronted K.R. and asked her if an adult had ever touched her inappropriately. RP 312. Feddema said K.R. started to cry and told her Uncle Michael dared her to sleep with no underwear for a week. RP 317. K.R. claimed Marquez "then, at nighttime when she was sleeping, touched his penis to her vagina." RP 317.

On Feddema's prompting, K.R. told her father the same story. RP 318-19, 324-25 (K.R.'s father explaining she told him Marquez "touched her privates"). Feddema guessed the touching occurred two weeks earlier, around July 1, 2017. RP 389-90.

Two months later, K.R. spoke to a child forensic interviewer, Sue Villa. RP 339, 343. K.R. told Villa "about Michael and him touching her and licking her." RP 350. Villa explained K.R. said "her clothing had come off and that he licked her skin in her vaginal area." RP 351. K.R. claimed the touching happened in her bedroom, after Marquez asked her not to wear underpants to bed. RP 352.

K.R. also met with a nurse practitioner, Lisa Wahl. RP 356, 358. K.R. told Wahl that Marquez put his mouth on her "front private." RP 359. K.R. also told

Wahl that Marquez "put his front private, which was his penis, on her front private – again, her vagina." RP 359.

Based on K.R.'s allegations, the prosecution charged Marquez with one count of first degree child molestation. CP 6-7.

At Marquez's jury trial, K.R. testified Marquez "touched my vagina with his tongue." RP 303. K.R. said she did not remember any other touching and did not remember anything that happened with Marquez's penis. RP 304. K.R. remembered they played truth or dare but did not recall Marquez daring her to sleep without her underwear. RP 305-06. Feddema testified K.R. never told her anything about oral sex. RP 318.

Marquez denied the allegations. Ex. 1; RP 408-09.

The jury found Marquez guilty as charged. CP 28. With no prior criminal history, the trial court sentenced

Marquez to a minimum term of 68 months in confinement. CP 46.

On appeal, Marquez argued his right to a unanimous jury verdict was violated, where the record revealed two alleged acts of child molestation, but no Petrich instruction was given and no election was made in closing argument. Br. of Appellant, 6-15. In closing, the prosecution referenced only one instance of alleged touching—tongue contact, which K.R. testified to at trial. RP 400-06, 412-17. The prosecution did not discuss, or expressly disavow its reliance on, the other instance of alleged touching—penile contact, testified to by Feddema and other witnesses. Br. of Appellant, 10-12 (discussing the lack of clear election).

In response, the prosecution conceded (1) no Petrich instruction was given and (2) it did not make a clear election in closing argument. Br. of Resp't, 2. The

prosecution's primary contention, instead, was that the two alleged acts of molestation were part of a continuing course of conduct, so no Petrich instruction or election was necessary. Br. of Resp't, 4-5.

The court of appeals adopted the prosecution's argument, concluding the record established only "one continuing course of conduct." Opinion, 7. In so holding, the court interpreted the evidence in the prosecution's favor, reasoning, "there was no indication that these [two instances of touching] occurred in separate locations or at separate times." Opinion, 7. The court further believed "[t]he State also presented the allegations as a single incident in its closing argument." Opinion, 7 (citing RP 404). The court also summarily dismissed Marquez's reliance on double jeopardy case law, reasoning unit of prosecution analysis is irrelevant to multiple acts analysis. Opinion, 8.

Marquez moved for reconsideration, pointing out the court of appeals' decision conflicted other Division Two case law holding the record must be interpreted in favor of the defense when a Petrich error is alleged. Mot. for Reconsideration, 3-5. Marquez also emphasized conflicting case law among the divisions about whether unit of prosecution cases are pertinent in determining whether the record establishes multiple distinct acts. Mot. for Reconsideration, 5-7.

The court of appeals denied Marquez's motion for reconsideration without calling for an answer from the State. Appendix B.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court's review is warranted to resolve multiple conflicts in the case law regarding how courts evaluate Petrich errors, in particular when the record establishes multiple distinct acts versus a continuing course of conduct.

This Court recognized in Petrich that, "[u]nder appropriate facts, a continuing course of conduct may form the basis of one charge in an information." 101 Wn.2d at 571. In such circumstances, no Petrich instruction or election in closing is necessary. See id. at 571-72. However, "'one continuing offense' must be distinguished from 'several distinct acts,' each of which could be the basis for a criminal charge." Id. at 571. Simply because incidents involve the same individuals "is not enough to call the offense one transaction." Id.

This case presents two significant questions that need resolution by this Court. First, how must appellate courts evaluate the evidence in determining whether a case involves multiple distinct acts or a continuing course of conduct? Second, is unit of prosecution analysis relevant in making this determination?

As discussed, the court of appeals concluded the record in Marquez's case established "one continuing course of conduct." Opinion, 7. In so holding, however, the court of appeals repeatedly overstated the record and interpreted ambiguous evidence in the prosecution's favor (i.e., in favor of not needing a Petrich instruction).

For instance, the court of appeals emphasized K.R. "told Feddema that [the touching] 'happened after they had a family movie night down at the movie theaters which was . . . around the 1st [of July].'" Opinion, 7 (quoting RP 389-90). The court of appeals theorized

"[t]his testimony showed that Marquez's acts were part of a single incident." Opinion, 7.

But Feddema never testified K.R. told her the touching happened around July 1 after the family went to the movies. RP 389-90. Rather, Feddema said only that she was able to "discern" when the reported incident happened. RP 389.

Moreover, K.R. told Feddema about only *one* instance of touching, when Marquez allegedly "touched his penis to her vagina." RP 317. K.R. did not remember this touching at trial, describing only Marquez touching her vagina with his tongue. RP 303-04. But K.R. did not tell Feddema anything about this latter incident. RP 318. Thus, it cannot be concluded that K.R.'s report to Feddema established *both* instances of touching occurred on July 1.

The court of appeals further reasoned there was a continuing course of conduct because "[t]he State also presented the allegations as a single incident in its closing argument." Opinion, 7 (citing RP 404). But, again, the prosecution in closing addressed only one instance of alleged touching—tongue contact, which K.R. testified to at trial—completely ignoring the other instance of alleged touching—penile contact, which Feddema and other witnesses testified to at trial. RP 400-06, 412-17. Thus, it cannot be said the prosecution presented the "allegations" as a "single incident," where the prosecution really discussed only a single allegation and ignored the other (without expressly disavowing it, as required for a satisfactory election).

Furthermore, the to-convict instruction did not limit the jury's consideration to a single date or instance of touching, instead specifying a broad date range of "on

or about and/or between, January 1, 2017 and July 4, 2017." CP 25. This further undermines the court of appeals' conclusion that the prosecution presented the allegations as a single incident.

The court of appeals nevertheless likened Marquez's case to the recent Division One decision in State v. Lee, 12 Wn. App. 2d 378, 460 P.3d 701, review denied, 195 Wn.2d 1032 (2020). Opinion, 7. In Lee, however, the complaining witness offered clear testimony that the rapes and assaults all occurred over the course of a single evening at her apartment, beginning around 10:30 p.m., when Lee came over intoxicated and belligerent. 12 Wn. App. 2d at 383-84. The acts of penetration constituting rape occurred in a brief time period of less than 10 minutes. Id. at 397. The testimony in Lee is nothing like the vague testimony in Marquez's case, where K.R. offered no

description of when the two instances of touching occurred in relation to one another.

In short, the record is at best ambiguous as to when the two alleged events occurred. The court of appeals all but recognized as much, noting "there was no indication that these [two instances of touching] occurred in separate locations or at separate times." Opinion, 7. But nor was there any indication they occurred at the same time. The court of appeals interpreted the ambiguous evidence in the prosecution's favor, i.e., to find no unanimity error. There is no dispute the record must be evaluated in a commonsense manner. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). But common sense does not allow for speculative leaps in favor of the prosecution.

Indeed, Division Two previously held just that. In State v. Hanson, 59 Wn. App. 651, 656, 800 P.2d 1124

(1990), Division Two recognized that, in determining whether a unanimity error occurred, courts must "look[] at the evidence in the light most favorable to the proponent of the [Petrich] instruction." This wording is admittedly a bit odd, because Hanson did not propose a Petrich instruction at trial, instead challenging the unanimity error for the first time on appeal, like Marquez. Id. at 659. But reading Hanson in its entirety makes clear the continuing course of conduct analysis requires viewing the evidence in the light most favorable to the party who is arguing multiple separate acts necessitated a Petrich instruction or election.[2] Id. at 656 & n.6.

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[2] The Hanson court explained: "This concept, easy to use in most situations, can take on an Alice-in-Wonderland quality when the issue is whether to give a Petrich instruction. If the defendant is the proponent of such an instruction, it will be necessary to take the evidence in the light most favorable to him or her. But to do this, it is necessary to discern whether the

The rule of Hanson makes good sense, because the rule of lenity demands that ambiguous jury verdicts be interpreted in a criminal defendant's favor. State v. Kier, 164 Wn.2d 798, 811, 194 P.3d 212 (2008). The record in Marquez's case does not establish whether the two instances of touching occurred at the same or different times. Jurors might have thought the latter, exposing Marquez to a nonunanimous jury verdict. Resolving this ambiguity in the prosecution's favor is contrary to Hanson, Kier, and the rule of lenity. Under the circumstances, RAP 13.4(b)(1), (2), and (3) review criteria are all met.

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evidence is such that jurors *could* find more than one event sufficient to convict. This in turn can be determined only by taking the evidence in the light most favorable to the State. Thus, to view the evidence in the light most favorable to the defendant, it is necessary to view it in the light most favorable to the State." 59 Wn. App. at 656 n.6.

The court of appeals also summarily dismissed Marquez's reliance on State v. Tili, 139 Wn.2d 107, 985 P.2d 365 (1999), because it involved a double jeopardy issue rather than a unanimity issue. Opinion, 8. This, too, is contrary to Hanson, as well as Division One's decision in State v. Furseth, 156 Wn. App. 516, 233 P.3d 902 (2010).

In Hanson, Division Two articulated a three-part test for analyzing Petrich errors. First, what must be proven under the applicable statute? Hanson, 59 Wn. App. at 656. Some offenses, like possession of child pornography or promoting prostitution are ongoing criminal enterprises, and so a series of actions does not constitute multiple separate acts necessitating a Petrich instruction or election. Id.; Furseth, 156 Wn. App. at 522. Unlike these crimes, however, child molestation is

not necessarily a continuing course of conduct. See, e.g., Petrich, 101 Wn.2d at 573.

Second, what does the evidence disclose? Hanson, 59 Wn. App. at 656. This requires looking at the evidence in the defendant's favor, as discussed above. Id.

And, third, does the evidence disclose more than one violation of the statute? Id. This requires a comparison of what the statute requires with what the evidence proves:

> If the evidence proves only one violation, then no Petrich instruction is required, for a general verdict will necessarily reflect unanimous agreement that the one violation occurred. *On the other hand, if the evidence discloses two or more violations, then a Petrich instruction will be required, for without it some jurors might convict on the basis of one violation while others convict on the basis of a different violation.* In the latter situation, the result is a lack of jury unanimity with respect to the facts necessary to support conviction, and a consequent abridgment of the right to jury trial.

Id. at 657 (emphasis added).

Based on Division Two's discussion in Hanson, Marquez's reliance on Tili cannot be dispensed with so easily. This Court in Tili held each act of penetration constitutes an independent act of rape, or, a separate unit of prosecution. 139 Wn.2d at 117. The same is true for child molestation; the unit of prosecution is "each separate act of sexual contact." State v. Soonalole, 99 Wn. App. 207, 212, 992 P.2d 541 (2000). In Marquez's case, the evidence disclosed two independent acts of sexual contact—touching with the tongue and touching with the penis—and therefore two violations of the child molestation statute.

In Furseth, Division One recognized, consistent with Division Two's decision in Hanson, that "the prosecution for a single count of rape based on evidence of multiple, separate acts, 'each of which is capable of

satisfying the material facts required to prove' the charged crime, constitutes a multiple acts case." Furseth, 156 Wn. App. at 520 (quoting State v. Bobenhouse, 166 Wn.2d 881, 894, 214 P.3d 907 (2009)). The Furseth court relied on the unit of prosecution analysis from double jeopardy cases to evaluate the claimed unanimity violation: "The unit of prosecution analysis is pertinent . . . because the analysis . . . concerns 'what *act* or course of conduct' the legislature has proscribed."[3] Id. at 521 (quoting State v. Sutherby, 165 Wn.2d 870, 879, 204 P.3d 916 (2009)).

The court of appeals in Marquez's case, citing Lee, reasoned "an election or unanimity instruction is not automatically required just because the State *could have*

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[3] Furseth finds further support in Petrich, where this Court recognized "'one continuing offense' must be distinguished from 'several distinct acts,' *each of which could be the basis for a criminal charge*." 101 Wn.2d at 571 (emphasis added).

filed multiple charges and declined to do so." Opinion, 6. But this appears to be in conflict with Furseth, as well as Division Two's own decision in Hanson. This meets the RAP 13.4(b)(2) and (3) review criteria.

In summary, there are multiple problems with the court of appeals' decision in Marquez's case. It overstates the record of when the two instances of touching occurred in relation to one another. It then takes this ambiguous evidence and interprets it against Marquez, in favor of finding no unanimity error. And, finally, it disregards the unit of prosecution analysis, which Division One and Division Two have both held is pertinent in evaluating whether a unanimity error occurred.

The decision in Marquez conflicts with multiple published court of appeals decisions and further conflicts with decisions from this Court, including Kier. RAP

13.4(b)(1), (2). Moreover, the defendant's right to a unanimous jury verdict involves a significant question of constitutional law. RAP 13.4(b)(3). Consequently, this Court should grant review, reverse the court of appeals, and remand for a new trial at which Marquez's jury is either given a Petrich instruction or the prosecution makes a clear election in closing argument.

E. CONCLUSION

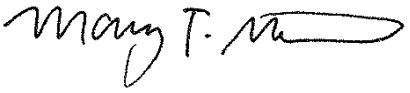
For the reasons discussed above, Marquez respectfully requests that this Court grant review and reverse the court of appeals.

DATED this 4th day of October, 2021.

I certify this document contains 3,019 words, excluding those portions exempt under RAP 18.17.

Respectfully submitted,

NIELSEN KOCH, PLLC



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Appendix A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL LEE JOHN MARQUEZ, Appellant.	No. 54755-4-II UNPUBLISHED OPINION

GLASGOW, A.C.J.—Michael Lee John Marquez was staying with a friend's family when Marquez molested his friend's seven-year-old daughter. Marquez appeals his conviction for one count of first degree child molestation, arguing that his right to a unanimous jury verdict was violated because multiple acts of inappropriate touching were alleged, but the State did not elect one act to rely on and the trial court did not give a unanimity instruction to the jury. He also challenges two conditions of community custody, which the State largely concedes were improperly imposed. Finally, Marquez contends that the trial court did not mean to impose the supervision fee and that the provision allowing interest on his legal financial obligations should be stricken.

We hold that Marquez's right to a unanimous jury was not violated because the State proved one continuous course of conduct. Therefore, we affirm Marquez's conviction. We accept the State's concessions and remand for the trial court to modify Marquez's conditions of community custody accordingly. The trial court may address the supervision fee and must strike the interest provision on remand.

FACTS

When she was seven years old, KR disclosed to a family friend, Christina Feddema, that Marquez had touched her inappropriately. Marquez was a childhood friend of KR's father and was staying with KR's family. There were times when Marquez was the only adult home with the children. After KR's disclosure, Feddema told KR's mother and reported the allegations to law enforcement. The State charged Marquez with one count of first degree child molestation.

A. Trial

At the jury trial, KR testified that Marquez "touched [her] vagina with his tongue." Verbatim Report of Proceedings (VRP) (Feb. 27, 2020) at 303. She did not remember whether anything else happened, including whether Marquez touched her with his penis. She did not know what time of day it was when the touching occurred, but she knew it happened in her bedroom. KR told her older brother about the touching, and he told Feddema.

Feddema testified that she then asked KR, "[H]as an adult in your life ever touched you inappropriately?" *Id.* at 312. KR began to cry and said that Marquez "dared her to sleep with no underwear on, because they were playing truth or dare. He dared her to sleep with no underwear on for a week . . . [and] at nighttime when she was sleeping, touched his penis to her vagina." *Id.* at 317. KR did not mention oral sex to Feddema. When asked if she could discern when the molestation occurred, Feddema responded, "I know that it had happened after they had a family movie night down at the movie theaters, which was approximately two weeks prior to the 14th [of July, when KR disclosed to Feddema,] . . . so around the 1st [of July]." VRP (Feb. 28, 2020) at 389-90.

KR's father testified that KR disclosed the molestation to him, but he did not remember very much from the conversation. After KR said that Marquez "touched her privates," KR's father "tried to block out what else she was saying." VRP (Feb. 27, 2020) at 324.

KR was also interviewed by two professionals. Sue Villa, a child specialist forensic interviewer, testified that KR told Villa about Marquez "touching her and licking her . . . in her vaginal area." VRP (Feb. 28, 2020) at 351. KR "talked about the fact that [Marquez] told her not to tell and that if she did that he wouldn't be able to take her to movies anymore." *Id.* "[S]he also talked about the fact that [Marquez] had asked her to not wear her underpants to bed, that that was something that she remembered." *Id.* at 352.

Lisa Wahl, a family nurse practitioner, similarly testified that, using diagrams, KR described that Marquez "put his mouth on her front private, which was identified as the vagina, and that he put his front private, which was his penis, on her front private - again, her vagina." *Id.* at 359. Wahl recalled that as KR was describing what happened with Marquez, she was coloring and getting "more and more aggressive" with the crayon, and that she "went from coloring to stabbing at" the male diagram with the crayon. *Id.* at 360-61.

KR did not testify that Marquez touched her inappropriately more than once, nor did any witness testify that KR said he touched her this way on more than one occasion.

The jury was not given a *Petrich*[1] instruction, informing them of the need to be unanimous as to a single act. Marquez did not object to the proposed instructions, and he did not request any additional instructions.

[1] *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984) ("When the evidence indicates that several distinct criminal acts have been committed, but defendant is charged with only one count of criminal conduct," the State must either "elect the act upon which it will rely for conviction" or

In its closing, the State emphasized that KR had "made consistent statements" to multiple people. *Id.* at 401. The State only discussed the testimony and allegation that Marquez put his mouth on KR's vagina and did not mention any other specific type of sexual contact. In reviewing the elements of the crime, the State noted that the date range in the to convict instruction was "on or about and/or between January 1st, 2017 and July 4th, 2017," but it told the jury that the incident "would have been on the 1st [of July]." *Id.* at 404.

The jury found Marquez guilty of one count of first degree child molestation.

B. Sentencing

The trial court sentenced Marquez to a minimum of 68 months and a maximum of life and 36 months of community custody. The trial court stated at sentencing, "With regard to legal financial obligations the Court is only going to impose the mandatory minimum of $600. Mr. Marquez has limited ability to meet his legal financial obligations. . . . [Y]our total legal financial obligations are $600." VRP (Apr. 2, 2020) at 439-40.

The trial court imposed conditions of community custody, including a requirement that Marquez "pay for all counseling services/therapy costs incurred by [KR] and members of [her] immediate family as a direct result of [the] assault." Clerk's Papers (CP) at 57. It also included a requirement that Marquez "undergo, at [his] expense, periodic polygraph and/or plethysmograph testing to measure treatment progress and compliance at a frequency determined by [his] Sexual

instruct the jury "that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt."), *abrogated by State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988).

Offender Treatment Provider (SOTP), [community corrections officer], or [Department of Corrections] Policy." CP at 58.

The judgment and sentence included language that ordered Marquez to "pay supervision fees as determined by [the Department of Corrections]" and that permitted his financial obligations to "bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments." CP at 49, 51; *see also* CP at 57 (requiring payment of supervision fee as a condition of community custody).

Marquez appeals his conviction, the conditions of community custody described above, and the imposition of the supervision fees and interest.

ANALYSIS

I. JURY UNANIMITY

Marquez argues his right to a unanimous jury was violated because two distinct acts of child molestation were alleged, but the State did not elect one act to rely on and the trial court did not give a *Petrich* instruction. He also claims that this error was prejudicial. We disagree.

A. Unanimity Requirement

The federal and state constitutions guarantee criminal defendants the right to a unanimous jury verdict. U.S CONST. amend. VI; WASH. CONST. art. I, § 22. "When the evidence indicates that several distinct criminal acts have been committed, but defendant is charged with only one count of criminal conduct," there are two ways to protect jury unanimity. *Petrich*, 101 Wn.2d at 572. Either the State may elect one act to rely on in seeking a conviction, or the trial court may instruct the jury that it must unanimously agree that "the same underlying criminal act" has been proved beyond a reasonable doubt. *Id.*; *see also State v. Carson*, 184 Wn.2d 207, 228, 357 P.3d 1064

(2015) (concluding that the State satisfied this requirement where it "clearly and explicitly elected the three acts on which it was relying for conviction" and "specifically disclaimed its intention to rely on any other instances").

Where there is no election or unanimity instruction, "some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction." *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988), *abrogated on other grounds by In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 316 P.3d 1007 (2014). This is an error of constitutional magnitude that may be raised for the first time on appeal. *State v. Crane*, 116 Wn.2d 315, 325, 804 P.2d 10 (1991), *abrogated on other grounds by In re Pers. Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002).

However, an election or unanimity instruction is not automatically required just because the State *could have* filed multiple charges and declined to do so. *State v. Lee*, 12 Wn. App. 2d 378, 397, 460 P.3d 701, *review denied*, 195 Wn.2d 1032 (2020). Neither an election nor a unanimity instruction is required if the State filed a single charge based on "a continuing course of conduct." *Petrich*, 101 Wn.2d at 571; *State v. Gooden*, 51 Wn. App. 615, 618, 754 P.2d 1000 (1988).

We review whether an election or unanimity instruction was required de novo. *Lee*, 12 Wn. App. 2d at 393. We determine whether the acts alleged may constitute "one continuing offense" by evaluating the facts "in a [commonsense] manner." *Petrich*, 101 Wn.2d at 571. This includes considering whether the acts "occurred in a separate time frame and identifying place." *Id.*

In *Lee*, Division One concluded that where the defendant's "acts of sexual penetration involved the same victim, . . . occurred in one place, . . . occurred within a brief period of time, . .

. and occurred for the single purpose of [the defendant's] sexual gratification," the "acts were plainly a continuing course of conduct, and no election or unanimity instruction was required." 12 Wn. App. 2d at 397; *see also State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989) (concluding that there was no violation of the defendant's right to a unanimous jury verdict where the "two acts of assault" alleged, kissing and hitting, "occurred in one place during a short period of time between the same aggressor and victim" and "evidence[d] a continuing course of conduct to secure sexual relations").

B. Allegations Against Marquez

The record here shows that the State properly charged and the jury properly convicted Marquez with one continuing course of conduct. Although there was testimony regarding a touching with Marquez's tongue and a separate touching with his penis, there was no indication that these occurred in separate locations or at separate times. The only victim in this case was KR. She remembered that the touching occurred in her bedroom, and she told Feddema that it "happened after they had a family movie night down at the movie theaters, which was . . . around the 1st [of July]." VRP (Feb. 28, 2020) at 389-90. This testimony showed that Marquez's acts were part of a single incident. The State also presented the allegations as a single incident in its closing argument. *See id.* at 404 ("[I]t would have been on the 1st.").

Like in *Lee*, the record shows that the alleged acts "involved the same victim, . . . occurred in one place, . . . occurred within a brief period of time, . . . and occurred for the single purpose of [the defendant's] sexual gratification." 12 Wn. App. 2d at 397. Therefore, the "acts were plainly a continuing course of conduct, and no election or unanimity instruction was required." *Id.*

Marquez cites to *Gooden*, where Division One said that "child molestation, unlike promoting prostitution, is not an ongoing enterprise." 51 Wn. App. at 620. But Division One compared these two offenses to explain why, for the crime of promoting prostitution, the State was permitted to argue a continuing course of conduct that stretched over a 10-day period. *See id.* In context, it is clear that the *Gooden* court was distinguishing *Petrich*, which involved multiple incidents of rape and sexual abuse spanning more than one year. *Id.* ("This case is unlike the *Petrich* case which involved numerous incidents of criminal conduct with the same child victim; child molestation, unlike promoting prostitution, is not an ongoing enterprise."); *see also Petrich*, 101 Wn.2d at 568. Nothing in *Gooden* suggested that child molestation occurring at one time, in one place, and with one victim can never be a continuing course of conduct for purposes of a unanimity instruction.

Marquez also cites *State v. Tili*, 139 Wn.2d 107, 117, 985 P.2d 365 (1999), to support the proposition that "[e]ach act of sexual contact is separate and distinct." Br. of Appellant at 9. However, in *Tili*, the Supreme Court was engaging in a double jeopardy analysis, not considering whether the defendant's right to a unanimous jury had been violated, and that case involved separate acts of penetration where the prosecutor charged multiple counts of rape. *See Tili*, 139 Wn.2d at 117. Here, the prosecutor charged a single count of child molestation. Thus, neither *Gooden* nor *Tili* undermines the commonsense application of a continuing course of conduct analysis under *Petrich*.

Marquez's right to a unanimous jury verdict was not violated, and the trial court did not err. We affirm Marquez's conviction.

II. COMMUNITY CUSTODY CONDITIONS

A. Costs of Counseling

Marquez asks that the community custody provision requiring him to "pay for all counseling services/therapy costs incurred by [KR] and members of [her] immediate family as a direct result of [the] assault" be stricken because it is not authorized by the Sentencing Reform Act of 1981, chapter 9.94A RCW. CP at 57. The State concedes that this provision is not authorized and should be stricken.

Court-imposed restitution "may include the costs of counseling reasonably related to the offense." RCW 9.94A.753(3). However, to impose restitution, "the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days." RCW 9.94A.753(1). The court may not impose restitution as a condition of community custody. *See* RCW 9.94A.703; *State v. Land*, 172 Wn. App. 593, 604, 295 P.3d 782 (2013) (striking a condition of community custody requiring the defendant to "pay restitution to the victims in the form of payment for their counseling and medical treatment" because the court did not order restitution at sentencing and the "statutory time period [for] requesting restitution ha[d] passed").

Because the trial court did not order restitution at sentencing and 180 days have passed, we accept the State's concession and direct the trial court to strike this provision on remand.

B. Plethysmograph Testing

As a condition of his community custody, Marquez is required to "undergo, at [his] expense, periodic polygraph and/or plethysmograph testing to measure treatment progress and compliance at a frequency determined by [his] Sexual Offender Treatment Provider (SOTP), [community corrections officer], or [Department of Corrections] Policy." CP at 58. He asks that

this provision be modified "to specify only Marquez's SOTP may order plethysmograph examinations." Br. of Appellant at 20. The State concedes that the reference to a community corrections officer should be stricken.

Division One has held that requiring an offender to "submit to plethysmograph testing at the discretion of a community corrections officer violates [the offender's] constitutional right to be free from bodily intrusions." *Land*, 172 Wn. App. at 605. This type of testing "can properly be ordered incident to crime-related treatment by a qualified provider. But it may not be viewed as a routine monitoring tool subject only to the discretion of a community corrections officer." *Id.* (citation omitted); *see also State v. Alcocer*, 2 Wn. App. 2d 918, 925, 413 P.3d 1033 (2018) (Division Three opinion rejecting a similar condition as "improperly authorizing the community corrections officer to require plethysmograph testing" and remanding to clarify that such testing "should only be used at the direction of the sexual deviancy evaluator and/or treatment provider"), *abrogated on other grounds by State v. Johnson*, 4 Wn. App. 2d 352, 421 P.3d 969 (2018).

We accept the State's concession and direct the trial court to strike the reference to the community corrections officer and Department of Corrections policy on remand, allowing only the SOTP to require plethysmograph testing.

III. LEGAL FINANCIAL OBLIGATIONS

A. Supervision Fee

According to his judgment and sentence, Marquez is required to "pay supervision fees as determined by [the Department of Corrections]," but he argues the imposition of this discretionary legal financial obligation was contrary to the trial court's stated intention to "only . . . impose the

mandatory minimum of $600." CP at 49; Br. of Appellant at 20.[2] The State claims that the trial court's intention is unclear and asks for clarification on remand.

"Unless waived by the court, as part of any term of community custody, the court shall order an offender to . . . [p]ay supervision fees as determined by the department." RCW 9.94A.703(2)(d). Because the court may waive supervision fees, they are a discretionary financial obligation. *State v. Spaulding*, 15 Wn. App. 2d 526, 536, 476 P.3d 205 (2020). This court has remanded for the trial court to "reevaluate the imposition of the supervision fee" where it is "unclear . . . whether the trial court actually intended to impose a supervision fee as [a legal financial obligation]." *Id.* at 537.

The trial court will have the opportunity to revisit the supervision fee and clarify its intention on remand.

B. Interest

Marquez's judgment and sentence states that his financial obligations will "bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments." CP at 51. However, RCW 10.82.090(1) provides, "As of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations." Because the trial court did not impose restitution and Marquez was sentenced in 2020, this provision should be stricken on remand.

CONCLUSION

We affirm Marquez's conviction for first degree child molestation and remand for the trial court to modify Marquez's conditions of community custody consistent with this opinion, revisit

[2] Marquez is also required to "[p]ay supervision fees as determined by the Department of Corrections" as a condition of his community custody. CP at 57.

the supervision fee, and strike the provision allowing interest to accrue on legal financial obligations.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, A.C.J.

We concur:

Cruser, J.

Veljacic, J.

Appendix B

Filed
Washington State
Court of Appeals
Division Two

September 23, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL LEE JOHN MARQUEZ, Appellant.	No. 54755-4-II ORDER DENYING MOTION FOR RECONSIDERATION

The unpublished opinion in this matter was filed on August 10, 2021. On August 20, 2021, appellant moved for reconsideration. After consideration, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

PANEL: Jj. Glasgow, Cruser, Veljacic

FOR THE COURT

Glasgow, ACJ

Glasgow, A.C.J.

NIELSEN, BROMAN & KOCH P.L.L.C.

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