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

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| STATE OF WASHINGTON, Respondent, vs. ANTONIO CUEVAS-CORTES, Appellant. | NO. 30790-5-III<br>MOTION ON THE MERITS |

I. IDENTITY OF MOVING PARTY.

The respondent, State of Washington, asks for the relief designated in Paragraph II.

II. STATEMENT OF RELIEF SOUGHT.

The respondent requests that the Court of Appeals, Division III, grant the respondent's request as set forth in this Motion on the Merits affirming the actions of the Superior Court of the State of Washington in and for the County of Yakima pursuant to RAP 18.14(e)(1) and dismiss this appeal.

This Motion on the Merits meets the requirement of the general rule regarding the use and filing of motions of this type. This transcript in this case is slightly more than four hundred pages the record including clerk's papers is just over five hundred

pages.

Further, the State shall address all allegations raised by Rizo in this document.

III. FACTS RELEVANT TO THE MOTION.

Appellant has set forth a sufficient general outline of the facts of this trial in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth additional facts section. The State shall as needed refer to specific areas of the record.

IV ARGUMENT.

Assignments of Error

1. Double jeopardy was violated.

Response to Assignment of Errors.

1. Double jeopardy was not violated.

The allegations raised in this appeal are clearly settled case law, are of a factual nature and were supported by the evidence or were matters of judicial discretion and the decisions made by the trial court were well within the discretion of the trial court. The Court of Appeals should grant the State's Motion on the Merits and affirm the actions of the trial court.

**1. DOUBLE JEOPARDY WAS NOT VIOLATED.**

The allegation is that Appellant will have been punished twice for the same criminal act if two of the convictions are allowed to stand. He argues that the

instruction given was insufficient to insure that the jury based its decision on separate acts.

By the time this case was submitted to the jury there were only five counts remaining. Those were counts 1, 5, 6, 7, and 8. Appellant concedes that Counts 1, 5 and 7 have been proven by the State and further indicates that there is no double jeopardy challenge to these counts. Appellant states "Because it was not made "manifestly apparent" to the jury that it had to rely on separate and distinct acts to convict Cuevas-Cortes of the rape and molestation charge, and separate and distinct act to convict him of first and second degree incest, this court should reverse E.C's conviction for third degree child molestation and second degree incest..."

Appellant argues that counts 6 and 8 must be dismissed because they violated double jeopardy due to a failure on the part of the trial court to properly instruct the jury with regard to the *Petrich* instruction. State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984) is the case which set forth the standard in this context as explained in State v. Handyside, 42 Wn. App. 412, 711 P.2d 379 (1985);

> When the State introduces evidence of more than one act of criminal misconduct which could be found beyond a reasonable doubt to support conviction for the crime charged, the State can be required to elect which incident it relies upon as proof of guilt, or, in the alternative, the jury must be instructed that its vote must be unanimous on the one or more incidents it relies upon in finding guilt. State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984)

See also State v. Ellis, 71 Wn.App. 400, 404, 859 P.2d 632 (Wash.App. Div. 2 1993):

> The first argument is based on State v. Petrich, 101 Wash.2d 566, 572, 683 P.2d 173 (1984); see also State v. Crane, 116 Wash.2d 315, 325, 804 P.2d 10, cert. denied, --- U.S. ----, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991); State v. Kitchen, 110 Wash.2d 403, 409, 756 P.2d 105 (1988) (citing State v. Stephens, 93 Wash.2d 186, 190, 607 P.2d 304 (1980); State v. Hanson, 59 Wash.App. 651, 656 n. 4, 800 P.2d 1124 (1990)). The Petrich court held that in cases in which the evidence discloses multiple acts, any one of which could form the basis for conviction, jury unanimity must be protected. One way to do this, it said, is to instruct "that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt...." 101 Wash.2d at 572, 683 P.2d 173.

Ellis argued that the jurors could have used a single act to find him guilty on two separate and that those same jurors could have found him guilty of two different crimes because in the mind of a juror "an act of rape is also and act of child molestation." Ellis at 406. The court dismisses this allegation stating "It is our view that the ordinary juror would understand that when two counts charge the very same type of crime, each count requires proof of a different act.... As before, it is our view that the ordinary juror would understand that when two counts charge similar crimes, each count requires proof of a different act." Ellis at 406.

The question then in this appeal is did the Court properly instruct with regard to the *Petrich* instruction? There was discussion between trial counsel and the court with regard to this issue;

> MR. KELLEY: Just o the to convict instructions, Judge. The addition that I would have made would the language from instruction –
> THE COURT: The Petrich instruction.
> MR. KELLEY: Yeah. And I had submitted those. I submitted them with Madame Clerk earlier.

> THE COURT: Yes.
> MR. KELLEY: And –
> THE COURT: Instruction 21 is the Petrich instruction.
> MR. KELLEY: Right, and I would ask the court to consider adding those into each individual to convict instruction that was relevant to EC and also to GC. That was the only thing I would have asked the Court to do and I take exception to the Court not adding them to the individual to convict instructions. (RP 210)

The trial courts denied this request stating;

> In regard to the other issue of the elements to inserting essentially folding the Petrich instruction into the elements instruction, I don't think that's required. Instruction 21 is the WPIC Petrich instruction and I think it adequately and correctly advises the jury about what they have to do in order to find somebody guilty where there are multiple instance of sexual contact or sexual intercourse testified to. (RP 211)

The defendant was not taking exception to the "*Petrich*" instruction, he was taking exception to the fact that the court was not going to "add" that very same instruction to each "to convict" instruction. There was in effect no objection to the proposed instruction, just the form by which it was to be presented to the jury. The instructions proposed by appellant which "fold" the "Petrich" instruction into the "to convict" instruction are listed at CP 62 – 67. From the citation at the bottom of these instructions it is clear that what was done by trial counsel was that he merely combined the cited WPIC's, 46.06 and 4.25 into one instruction. (CP 62-67) The trial court in its discretion declined to take this course and instead determined that it would submit instruction "21" the Petrich instruction as a separate instruction. This instruction is in fact one of the two cited in the proposed instructions, WPIC 4.25.

This is the pertinent portion of the proposed instruction related to the count of incest in the second degree:

> The State alleges that the defendant committed acts of incest on multiple occasions. To convict the defendant on any count of incest, one particular act of incest must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proven. You need not unanimously agree that the defendant committed all the acts of incest.
> WPIC 46.06, 4.25

For all intent and purpose these are the same instruction. The difference is that the defendant proposed to add this to each and every "to convict" instruction and, he inserted the statutory name for the crime into the instruction.

This is the instruction which the court indicated was the correct "*Petrich*" instruction and which was submitted to the jury:

> INSTRUCTION NO. 21
> The State alleges that the defendant committed acts of sexual intercourse or sexual contact on multiple occasions. To convict the defendant on any count, one particular act of sexual intercourse or sexual contact 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 the acts of sexual intercourse or sexual contact.
> (CP 34, RP 220)

This is WPIC 4.25 as set forth in the pattern jury instructions:

> **WPIC 4.25 Jury Unanimity—Several Distinct Criminal Acts—*Petrich* Instruction**
>
> The *[State] [County] [City]* alleges that the defendant committed acts of _____ on multiple occasions. To convict the defendant *[on any count]* of _____, one

particular act of _____ 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 the acts of _____.

Appellant proposed to use the very instruction. His proposal was to "fold" the two instructions, the element WPIC instruction for each charge and the *Petrich* instruction into one instruction. The trial court in its discretion stated that it felt that the separate *Petrich* instruction "adequately and correctly" advised the jury of what had to be proven to support a conviction for each count that was charged. (RP 211) There was no error here.

This court will review de novo claimed legal errors in jury instructions. State v. Vander Houwen, 163 Wn.2d 25, 29, 177 P.3d 93 (2008). "Jury instructions are improper if they do not permit the defendant to argue his theories of the case, mislead the jury, or do not properly inform the jury of the applicable law." *Id* However, under the invited error doctrine, "'[a] party may not request an instruction and later complain on appeal that the requested instruction was given.'" State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999) (alteration in original) (quoting State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990)).

As this court can see the instruction is in fact WPIC 4.25 the very instruction the Appellant proposed, albeit in the modified form. The trial court's instruction in this case "explicitly" instructed the through the "Petrich" instruction approved as the proper instruction to use in this type of factual situation. In In re Delgado, 160

Wn.App. 898, 251 P.3d 899 (2011) the court determined that there was error because the trial court failed to use a *Petrich* instruction. The court in Delgado stated:

> "[I]n sexual abuse cases where multiple identical counts are alleged to have occurred within the same charging period," the trial court must explicitly instruct the jury that they are to find "separate and distinct acts" for convictions on each count or must otherwise make "the need for a finding of 'separate and distinct acts' manifestly apparent to the average juror." Borsheim, 140 Wash.App. at 367-68, 165 P.3d 417; accord State v. Berg, 147 Wash.App. 923, 932, 198 P.3d 529 (2008). In the absence of such instruction, it is possible for the jury, consistent with its instructions, to unanimously find that only one act had been proved beyond a reasonable doubt and yet base multiple convictions on proof of that single act. Berg, 147 Wash.App. at 931-35, 198 P.3d 529; Borsheim, 140 Wash.App. at 366-70, 165 P.3d 417. Where this trial error has been found to be present in cases on direct appeal, the proper remedy has been to vacate all but one of the defendant's convictions of the same offense. See, e.g., Berg, 147 Wash.App. at 937, 198 P.3d 529; Borsheim, 140 Wash.App. at 371, 165 P.3d 417.

In re Fletcher, 113 Wn.2d 42, 47, 776 P.2d 114 (1989):

> The double jeopardy clause does not prohibit the imposition of separate punishments for *different* offenses. State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983) held that:
>
> > In order to be the "same offense" for purposes of double jeopardy the offenses must be the same in law and in fact. If there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses.
>
> The test set forth in Vladovic involves two components. First, the offenses must be factually the same. If "proof of one offense would not necessarily also prove the other", double jeopardy would not

> protect against multiple punishments. Vladovic, at 423. In State v. Claborn, 95 Wn.2d 629, 628 P.2d 467 (1981) the defendant was charged with first degree assault, second degree burglary, and first degree theft. The burglary and theft charges also included special allegations that the defendant was armed with a deadly weapon. The charges arose out of an incident in which the defendant and two accomplices broke into a tool shop and stole tools and a truck. A jury found the defendant guilty on all three counts and also found that he had been armed with a deadly weapon on the burglary and theft counts. Claborn, at 631.

Here there are completely separate facts which had to be proven for a conviction for each and every crime charged; the Information set forth each separate act. The "to convict" instructions given were not word for work identical – there were four distinct types of crime charged;

Third Degree Rape of a Child committed on, about, during or between November 18 202 and November 16, 2004 the defendant had sexual intercourse with E.C in count 5 (CP 5, 21);

Third Degree Child Molestation committed on, about, during or between November 18 202 and November 16, 2004 the defendant had sexual contact with E.C. in count 6 (CP 5, 24);

First Degree Incest on, about, during or between November, 2000 and July, 2010, the defendant engaged in sexual intercourse with E.C. in count 7;

Second Degree Incest on, about, during or between November 2000 and July 2010, the defendant engaged in sexual contact with E.C. in Count 8;

The victim EC testified that the first incident was when she was 13 or 14 and defendant touched her breast and vagina. She stated that on this first occasion he touched her skin under her bra and panties and touched the skin of her nipples and vagina. (R 85-89) There was no penetration.

It was months before he did this again and "only" sometimes she did not testify to any specific acts. (RP 89)

Next was same age 13-14 and lying on the sofa again and her father pushed his finger(s) into her vagina during this incident. (RP 89-90

EC testified that the actual acts of sexual intercourse were when she was in high school, at the time he placed his penis in her vagina. She states she was she was in the ninth grade (RP 90-94) Very specific that it was with a condom and that she was 15.

She testified that this occurred on a monthly basis but did not testify to specific acts.

EC specifically testified as to and act of sexual intercourse in the living room where that occurred in the day and she was there by herself because appellant gave the others in the family money to get them to go to the store. (RP 95-96)

Once again EC testified to another specific incident where the defendant licked her vagina while she was on a ladder in the garage (RP 97-98)

Her testimony after this is back to general statements that he put his penis in my vagina. (RP 98) and testified that he put his hands in her vagina. (RP 99) She

testified to one specific act that occurred in the laundry room where the defendant placed a blanket on the floor and made EC have sex with him there. (RP 99-100) Then back to general "would he do something like that" (RP 100)

One of EC sisters corroborates the act of sexual intercourse in the front room. She was lying down "and I seen like moving motions and like – what I didn't get though is why didn't she scream when she was -- like when something was happening to her... and then the last time I seen my sister giving my day (inaudible) why was she doing that. Why didn't she push him off?" (RP 167) She confirms at RP 188 that she saw her father in the front room under the covers with EC

The State in its closing argued that there were separate acts which would support the individual counts. It is clear from this argument that the State is not indicating to the jury that they can convict the defendant based on one of the crimes which was either confessed to or was testified to by the witnesses. (RP 224-28) The Deputy Prosecutor discusses in a disjunctive manner the crimes he proof for that crime and the separate elements which must be proven to support each of those crimes. He directly addresses each of the remaining counts and states indicates there was separate testimony to support those acts. Regarding the two instances of incest he makes it clear that they are separate acts:

> Incest 1, Esmeralda is the victim. And so this is having intercourse with someone that you are related to. And of course she testified about a lot of instances where he had intercourse with her. Incest 2, sexual contact with someone you are related to and she testified about numerous instances of that.

This closing argument is very specific in its dissection of the separate acts that were committed and the testimony which related to those acts. The testimony of the victim of the two crimes which Appellant now says must be dismissed is replete with instance that support these as separate acts. There is no possibility this jury convicted this man based on one act that was testified to by victim EC. In fact the State specifically addressed two of the specific acts, the "laundry room and the garage incident." (P 243-4)

The Prosecutor goes into more detail later in his rebuttal discussing separate acts of sexual contact with EC. RP 236-39) From this section of closing alone it is obviously clear that that State was not relying on one act.

The defense appears to be that Appellant was just a poor unsophisticated field worker who essentially broke under the pressure if the interrogation and confessed to the police just to get out of the room.

The defendant admitted to Det. Oja that he had raped GC and that he had touched EC on two occasions. Det. Oja interviewed Appellant. When questioned with regard to what he did to his two daughters Appellant indicated that he had in fact touched both of them and had had sex with GC. His responses while equivocal could and were clearly understood to mean that he in fact had had sex with or sexual contact with his daughters. One of the very first questions asked and answered by appellant was,

Q. How old was she more of less when it happened the first time?

A – No, I don't remember.

The interview progressed;

Q. More than 12
A. No, I don't even remember.
Q. Do you remember if she was in school and what school—
A. She had graduated.
Q. What?
A. She had graduated. She finished secondary.
Q. When was the last time it happened to Esmeralda?
A. I don't remember any more,
Q. Where did it usually happen, in her room or did she come to your room?
A. She would open the door.
Q. Did you open the door?
A. She would open the door.
Q Okay, in the room?
A Her room.
Q. In her room
A. -uh-huh, huh-hum (affirmative.)
Q. Okay did – okay you did something with Esmeralda, okay. You judt told me because she was more than 12 year old. She was still at Davis when those things were happening between the two of you?
A. She was in secondary school.
(RP 124-8)

Appellant then goes on to state that he had touched the breasts of GC. The interview continues and Det. Oja comes back to discussing what Appellant had done to EC;

Q. Okay, did you touch Esmeralda's breasts?
A. Yes, I tried to – I tried to touch to (unintelligible) Her breast but no. No nothing happened because if not they'd both be pregnant.
Q. Over the clothes
A. Uhm-hm (affirmative.)
Q. You were touching the skin?

A. Yes, she what me and she told me in the living room and she said daddy what are you doing, are you crazy? That is what she told me.
Q. And how old was she when –
A. It was around – after she turned 18 years old.
...

One of the most significant statements by Appellant follows the question;

Q. Okay, hum were you touching Esmeralda lots of time s during the week or once in awhile?
A. Just like two times that I tried to touch her right here..." (The officer then clarifies that at that time the defendant "raised his hands and he squeezed the front of his shirt...in the area of the breasts or nipples.")
(RP 133)
...
Q. Okay, and you told me that you touched Esmeralda two time on her breast?
A. Yes, but jut there because I said to myself am I crazy, what am I doing. I can get my daughters pregnant and what am I doing and so instead I would turn around and leave.
(RP 134)
...

Det. had not interviewed EC at the time that he interviewed the Appellant, the Appellant admitted things such as the location this happened in, the bedroom, before the officer had that information from the victim. (RP 156-7)

Appellant states that the clarification made by the court during the State's closing only exacerbated this alleged error. The State would disagree. The court during the State's rebuttal further insured that there could be no error. The court in more "layman" terms indicated that the jury needed to agree as to which "particular act of sexual intercourse or sexual contact you have to all agree as to which one is was..." The court stated in full;

> THE COURT: You gotta clarify that. Let me give this -- if the jury were to believe -- if six people were to believe that the event alleged to have occurred in the garage occurred and the other six were to believe that the event which was alleged to have occurred in

> the laundry room then there would not be jury unanimity and you could not return a guilty verdict. You would all have to -- the garage incident in particular, all twelve would have to say what she testified to about what happened in the garage, we all believe that. So that is what that instruction requires you to do. As to one particular act of sexual intercourse or sexual contact you have to all agree as to which one it was, okay. (RP 243)

As far back as State v. Hayes, 81 Wash.App. 425, 439-40, 914 P.2d 788 (1996) Division one of this court reiterated our Supreme Court's holding that no double jeopardy violation results when the information, instructions, testimony and argument clearly demonstrate that the State was not seeking to impose multiple punishments for the same offense.

This is the same test that was set forth in State v. Mutch, 171 Wn.2d 646, 254 P.3d 803 (2011). The court in Mutch set out the standard of review; the court said that reviewing courts should look to the totality of the case, instructions, charging, testimony, closing arguments. The Court stated;

> While the Court of Appeals in both Berg and Carter recognized that the faulty jury instructions created only the possibility of a double jeopardy violation, Berg, 147 Wash.App. at 935, 198 P.3d 529; Carter, 156 Wash.App. at 568, 234 P.3d 275, it did not look beyond the jury instructions or engage in further inquiry, *see, e.g.*, Berg, 147 Wash.App. at 935, 198 P.3d 529 (" [T]he double jeopardy violation at issue here results from omitted language in the instructions, not the State's proof or the prosecutor's arguments." ). We disapprove of such limited review.
>
> This court has established that " [i]n reviewing allegations of double jeopardy, an appellate court may review the entire record to establish what was before the court." Noltie, 116 Wash.2d at 848-49, 809 P.2d 190

(applying this scope of review to find no double jeopardy violation based on information that identically charged separate counts). This court has similarly considered the full record in other double jeopardy cases. *See, e.g.,* State v. Kier, 164 Wash.2d 798, 809-11, 194 P.3d 212 (2008); *see also* Ellis, 71 Wash.App. at 404-05, 859 P.2d 632 (noting the parties' arguments in detail); State v. Hayes, 81 Wash.App. 425, 440, 914 P.2d 788 (1996) (" No double jeopardy violation results when the information, instructions, testimony, and argument clearly demonstrate that the State was not seeking to impose multiple punishments for the same offense.")

While the court may look to the entire trial record when considering a double jeopardy claim, we note that our review is rigorous and is among the strictest. Considering the evidence, arguments, and instructions, if 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, there is a double jeopardy violation. Berg, 147 Wash.App. at 931, 198 P.3d 529 (emphasis added). The remedy for such a violation is to vacate the potentially redundant convictions.
(Mutch at 663-4)

Mutch goes on to state the following:

Mutch's case presents a rare circumstance where, despite deficient jury instructions, it is nevertheless manifestly apparent that the jury found him guilty of five separate acts of rape to support five separate convictions. In fact, we are convinced beyond a reasonable doubt, based on the entire record, that the jury instructions did not actually effect a double jeopardy violation. The information charged Mutch with five counts based on allegations that constituted five separate units of prosecution. See State v. Adel, 136 Wash.2d 629, 634, 965 P.2d 1072 (1998); see also Tili, 139 Wash.2d at 115, 985 P.2d 365.

...

> In light of all of this, we find that it was manifestly apparent to the jury that each count represented a separate act; if the jury believed J.L. regarding one count, it would as to all. Mutch is not being punished multiple times for the same criminal act. We are convinced of this beyond a reasonable doubt: a double jeopardy violation did not actually follow from the jury instructions. (Mutch *Id* at 665-66)

The highlighted section from Mutch is exactly what the Deputy Prosecutor was stating. He too stated that is you believe them all, that is all of the information from EC;

> Because if you are convinced that both of them happened -- and in this evidence there is not a lot of point for distinguishing between them and saying I think this one happened and that one, but if you believe both of them happened then you would also be convinced. (RP 243)

## V. CONCLUSION.

The actions of the trial court should be upheld, the State's Motion on the Merits should be granted, and this appeal should be dismissed.

The evidence of guilt in this case was beyond a reasonable doubt. There was no instructional error. When this court reviews this record in its totality it will find that the edicts of Mutch are applicable here too. The instruction given, the testimony of all of the witnesses, the defense which appears to have been it just did not happen and the argument of the deputy prosecuting attorney clearly establish that the

The allegations here are without merit, controlled by clearly settled case law or were matters of discretion and the court did not abuse its discretion.

Respectfully submitted this 28th day of December 2012,

s/ David B. Trefry
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DECLARATION OF SERVICE

I, David B. Trefry state that on December 28th 2012, by agreement of the parties, emailed a copy of the States Motion on the Merits to: Christopher H. Gibson, at Sloane@nwattorney.net and to Antonio Cuevas-Cortes, #356057 Stafford Creek Corrections, 191 Constantine Way, Aberdeen, WA 98520

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 28h day of December, 2012 at Spokane, Washington.

s/ David B. Trefry
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