91165-7

Supreme Court No. _____

COA No. 31820-6-III

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JASON LEE DUTCHER,

Petitioner.

PETITION FOR REVIEW

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TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner is Jason Lee Dutcher, the appellant below and the defendant who was convicted of third degree child molestation.

B. DECISION FOR WHICH REVIEW IS SOUGHT

Mr. Dutcher requests review of the Court of Appeals' unpublished decision in *State v. Dutcher*, No. 31820-6-III, 2014 WL 6601994 (Wash. Ct. App. Nov. 20, 2014). A copy of the slip opinion is attached as Appendix A

C. ISSUE PRESENTED FOR REVIEW

Whether the Court of Appeals' decision that Mr. Dutcher's acts were a continuous course of conduct conflicts with *State v. Soonalole's* holding that the proper unit of prosecution for third degree child molestation is each act of sexual contact and *State v. Coleman's* holding that a unanimity instruction is required in multiple acts cases?

D. STATEMENT OF THE CASE

The State charged Jason Lee Dutcher, in relevant part, with one count of third degree child molestation, alleging that 20-year-old Mr. Dutcher had sexual contact with 14-year-old H.N.D. on January 3, 2012:

> On or about the 3rd day of January, 2012, in the County of Grant, State of Washington, the above-named Defendant, being at least forty-eight (48) months older than the victim, had sexual contact with another person who was at least fourteen (14) years old but less than sixteen (16) years old and not married to the Defendant, to-wit: HND, 02/10/1997; contrary to Revised code of Washington 9A.44.089.

Clerk's Papers (CP) at 29-30.

The case proceeded to jury trial. 1RP[1] 2. H.N.D., her mother (Judy Diamond), their housemate (Stephanie Long), and Deputy Darrik Gregg testified for the State. 2RP 49-236.

H.N.D. testified that Mr. Dutcher, a family friend, touched her on January 3, 2012. 2RP 49, 51, 63, 68. H.N.D., Mr. Dutcher, and H.N.D.'s friend, Shana, fell asleep around midnight while watching a movie on H.N.D.'s bed. 2RP 52-53. H.N.D. was between her two friends. 2RP 54-56, 59. She woke up when she felt Mr. Dutcher touch her on her left side between her rib cage and her hip for a few seconds and then removed his hand. 2RP 60, 92. One minute later, Mr. Dutcher reached under H.N.D.'s panties and touched her clitoris for a few seconds. 2RP 61, 63, 92-93, 97. H.N.D. stated but was not sure Mr. Dutcher next pulled his penis out of his pants and rubbed it on her. 2RP 64-65, 102. She did not feel his penis. 2RP 64, 102. She believed he thrust his hips into her back for a couple seconds a few minutes after touching her clitoris. 2RP 98, 102-05. Mr. Dutcher then tried to reach up her shirt, but she pulled her knees to her chest, crossed her arms, and told him to keep his hands to himself. 2RP 63, 66. Mr. Dutcher never said a word. 2RP 109. He did not threaten her. 2RP 112. He rolled over and appeared to be sleeping. 2RP 66.

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[1] "1RP" refers to Volume I of III of the verbatim report of proceedings dated June 12, 2013. Volume II of III dated June 13, 2013, will be cited as "2RP," Volume III of III

Thirty minutes to an hour later, H.N.D. got out of bed and told Stephanie Long, her housemate, what happened. 2RP 67. Ms. Long confronted Mr. Dutcher with H.N.D.'s allegations, who said he had been sleeping and did not know what she was talking about. 2RP 180-81. Ms. Long told Mr. Dutcher to leave the house, so he did. 2RP 181.

Later that day, Mr. Dutcher told Deputy Gregg he had watched a movie in H.N.D.'s bedroom and then Ms. Long woke him and accused him of grabbing H.N.D. 2RP 224-26. Mr. Dutcher said he sometimes pulls people close to him when he sleeps. 2RP 226. But he denied touching H.N.D. 2RP 231.

James Kindred, a private investigator, interviewed H.N.D. on July 26, 2012. 3RP 269. H.N.D. denied that Mr. Dutcher penetrated her with his fingers. 3RP 281. She had told him only that Mr. Dutcher "reached down there." 3RP 281. Deputy Gregg said H.N.D. never told him that Mr. Dutcher touched her clitoris. 3RP 300.

Neither attorney objected to the court's proposed jury instructions. 3RP 315. But the instructions did not include a unanimity instruction. CP 34-44. And the State did not elect one act from among the several acts it presented as the basis for the single child molestation charge. 3RP 328-43,

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dated June 14, 2013, will be cited as "3RP."

370-79. The State relied on several of the alleged acts. 3RP 333, 336, 340, 374.

The jury found Mr. Dutcher guilty. CP 45-46. A jury poll confirmed that each general verdict was unanimous. 3RP 386-89, 389-91.

The court sentenced Mr. Dutcher to nine months of confinement and 12 months of community custody. CP 64-65.

Mr. Dutcher appealed. CP 82.

E. ARGUMENT

The Court of Appeals' decision that Mr. Dutcher's acts were a continuous course of conduct conflicts with *State v. Soonalole's* holding that the proper unit of prosecution for third degree child molestation is each sexual contact and *State v. Coleman's* holding that a unanimity instruction is required in multiple acts cases.

The Supreme Court will grant review of a Court of Appeals' decision if it conflicts with another decision of the Court of Appeals or the Supreme Court. RAP 13.4(b)(1), (2).

In *State v. Soonalole*, Division I of the Court of Appeals held that the proper unit of prosecution for third degree child molestation is each separate act of sexual contact. 99 Wn. App. 207, 212, 992 P.2d 541 (2000). H.N.D. testified that Mr. Dutcher touched her clitoris, breasts, and side with his hand, and thrust his penis or hips into her back. These

five touches constitute five separate invasions of a potentially protected area.

When the State presents evidence of several acts of like misconduct, any one of which could form the basis of one count charged, either the State must tell the jury which act to rely on in deliberations or the court must instruct the jury to agree on a specific criminal act. *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). If, like here, the State fails to elect an act and the trial court fails to instruct the jury to be unanimous, constitutional error results from the possibility that some jurors may have relied upon one act while other jurors may have relied on another act, resulting in lack of unanimity on all of the elements necessary for a valid conviction. *Id.* at 512. Such an error is presumed prejudicial and is harmless only if no fact finder could have entertained a reasonable doubt that each act established the crime beyond a reasonable doubt. *State v. Kitchen*, 110 Wn.2d 403, 405-06, 756 P.2d 105 (1988).

Based on *Soonalole*, *Coleman*, and the evidence of multiple acts of sexual contact presented by the State here, Mr. Dutcher argued on appeal the trial court erred by omitting a unanimity instruction on the third degree child molestation charge. Without mentioning *Soonalole's* holding, Division III of the Court of Appeals held, in relevant part, that the

evidence of sexual contact presented in this case was a continuing course of conduct and the court did not err in its instructions to the jury. *State v. Dutcher*, 2014 WL 6601994 at 2 (2014). This decision in *Dutcher* is in direct conflict with *Soonalole* and *Coleman* and should be reversed.

F. CONCLUSION

Based on the foregoing, Mr. Dutcher respectfully requests that this Court grant review of the error in this case pursuant to RAP 13.4(b)(1) and (2).

Respectfully submitted on December 20, 2014.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on December 20, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of petition for review:

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CASE # 318206
State of Washington v. Jason Lee Dutcher
GRANT COUNTY SUPERIOR COURT No. 121000746

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:ko
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NOV. 20, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. JASON LEE DUTCHER, Appellant.	)	No. 31820-6-III
	)	UNPUBLISHED OPINION

KORSMO, J. — Jason Dutcher challenges his conviction for third degree child molestation, arguing that the evidence was insufficient, the jury was incorrectly instructed, and two of the court's sentencing conditions were improper. We partially agree with his latter arguments and remand for correction of the sentence, but otherwise affirm the conviction.

FACTS

Mr. Dutcher, then 20, was watching a movie with H.N.D., then 14, and her school friend when all three fell asleep in H.N.D.'s bedroom sometime after 2:00 a.m. H.N.D. awoke later in the night to find Dutcher touching her. He put his hand down her shorts and under her panties, touching her clitoris and vaginal area. Dutcher then thrust his hips against her lower back. H.N.D. believed his penis was outside his clothing at that time, but she was facing away and did not see him. When Dutcher reached for her breast,

H.N.D. blocked him and told him to keep his hands to himself. Dutcher rolled over and pretended he was asleep.

H.N.D. later left the room for the stated purpose of going to the bathroom. Dutcher announced that he "didn't do it." H.N.D. reported the touching to an adult housemate who then ordered Mr. Dutcher from the premises. He denied any wrongdoing and insisted he had been asleep. He subsequently told the same thing to police.

The prosecutor filed charges of third degree child molestation and indecent liberties. A jury acquitted Mr. Dutcher of indecent liberties, but did convict him on the molestation count. At sentencing, the trial court imposed community custody conditions that Mr. Dutcher not possess pornography and be subject to plethysmograph testing at the direction of his community corrections officer (CCO). Mr. Dutcher then timely appealed to this court.

ANALYSIS

Mr. Dutcher raises two challenges to his conviction and challenges the two sentencing conditions noted above. We first address his challenges to the conviction before jointly addressing the sentencing arguments.

Sufficiency of the Evidence

Mr. Dutcher initially argues that there was insufficient evidence that he acted for the purpose of sexual gratification. The evidence amply permitted the jury to reach its decision.

Appellate courts review sufficiency of the evidence challenges to see if there was evidence from which the trier of fact could find each element of the offense proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). The reviewing court will consider the evidence in a light most favorable to the prosecution. *Id.*

To prove third degree child molestation as charged here, the State was required to establish that H.N.D. was less than 16 years old, Mr. Dutcher was at least 48 months older than she was, and that he had sexual contact with her. RCW 9A.44.089(1). "Sexual contact" means "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire." RCW 9A.44.010(2). The effect of that definition is that the State must prove defendant acted intentionally. *State v. Stevens*, 158 Wn.2d 304, 311, 143 P.3d 817 (2006).

Initially, the prosecutor argues that "sleep sexual contact" should be an affirmative defense as it is in cases of child rape. *See State v. Deer*, 175 Wn.2d 725, 287 P.3d 539 (2012). Mr. Dutcher argues in rejoinder that unknowing sexual contact would simply negate the State's case and should not be an affirmative defense on which he would have to bear the burden of proof. We are inclined to Mr. Dutcher's view of the argument in

light of recent[1] authority, but need not reach the issue in this case because he does not contend that he was denied an appropriate instruction or not permitted to argue his theory of the case. He styles his challenge solely as a sufficiency of the evidence argument and, thus, that is our focus.

The evidence supported the verdict. The age-related elements are not in issue, nor does Mr. Dutcher contend that his touching did not involve H.N.D.'s "sexual or intimate parts." Instead, he simply asserts his alleged sleeping condition as the basis for establishing that he acted without intent. However, our focus in reviewing a jury's verdict is on the evidence in support of that verdict—in other words, the evidence supporting the State's case. *Green*, 94 Wn.2d at 222. That evidence squarely puts Mr. Dutcher awake and in control of his actions.[2] The victim described the touching as purposeful. It was oriented solely to her intimate bodily parts without additional contact that might support a theory of unknowing behavior. Even more significantly, Mr. Dutcher's actions in thrusting his hips against her strongly suggested that his purpose was sexual gratification, regardless of whether he had removed his penis from his clothing.

The jury did not have to believe that Mr. Dutcher's actions were accidental or without purpose. Indeed, his protestation to H.N.D. when she left the room strongly

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[1] *See State v. W.R.*, No. 88341-6, 2014 WL 5490399 (Wash. Oct. 30, 2014).

[2] Mr. Dutcher did not testify, so the only evidence that he was allegedly sleeping came from his statements to others.

suggested that he was fully aware of his actions. Nonetheless, our focus is on what the State proved rather than what the defense argued. Here, the victim described purposeful acts of intimate contact that belied the defendant's argument and supported the jury's determination about the purpose of the behavior.

The evidence supported the jury's verdict.

Unanimity Instruction

Mr. Dutcher argues that H.N.D. described multiple instances of sexual contact and that the court therefore erred by failing to instruct the jury on the need to be unanimous in its view of what action occurred. We believe a commonsense view of the evidence establishes that this was one continuing course of conduct and the court did not err in its instruction.

Only a unanimous jury can return a "guilty" verdict in a criminal case. *State v. Camarillo*, 115 Wn.2d 60, 63, 794 P.2d 850 (1990). Where the evidence shows multiple acts occurred that could constitute the charged offense, the State must either elect which act it relies upon or the jury must be instructed that it must unanimously agree upon which act it found. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). Constitutional error occurs if there is no election and no unanimity instruction is given. *State v. Bobenhouse*, 166 Wn.2d 881, 893, 214 P.3d 907 (2009); *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). This type of error requires a new trial unless shown to be harmless beyond a reasonable doubt. *Camarillo*, 115 Wn.2d at 64.

However, no election or unanimity instruction is needed if the defendant's acts were part of a continuing course of conduct. *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). Appellate courts must "review the facts in a commonsense manner to decide whether criminal conduct constitutes one continuing act." *State v. Fiallo–Lopez*, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995). A continuing course of conduct exists when actions promote one objective and occur at the same time and place. *Petrich*, 101 Wn.2d at 571; *State v. Love*, 80 Wn. App. 357, 361, 908 P.2d 395 (1996).[3]

That is the situation here. All of the acts of child molestation occurred at the same time and place—just moments apart in the victim's bedroom. All of these brief incidents of sexual touching were done for the same purpose of achieving Mr. Dutcher's sexual gratification. A commonsense view of this evidence confirms that there was one continuing course of criminal conduct. The jury did not need to parse this episode down into its individual components. It was one incident and there was no need for either an election or a unanimity instruction.

The jury was properly instructed. There was no *Petrich* violation.

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[3] A continuing course of conduct also exists when the charged criminal behavior is an "ongoing enterprise." *State v. Gooden*, 51 Wn. App. 615, 620, 754 P.2d 1000 (1988) (promoting prostitution was ongoing enterprise).

Sentencing Conditions

Mr. Dutcher also argues that the trial court erred by imposing two of its sentencing conditions. He challenges the condition that he not possess pornography as well as the condition that he submit to plethysmograph testing at the direction of his CCO. The State concedes that the first condition is improper, but argues that the second challenge is not yet ripe. We accept the concession and remand to clarify the judgment and sentence.

We agree with the parties that the no possession of pornography condition is unconstitutionally vague. *State v. Bahl*, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008). Although it would be possible to remedy the condition by more explicitly describing the prohibited behavior in the judgment and sentence, the parties simply ask that the condition be stricken rather than corrected. We therefore direct the trial court to strike the condition.

Mr. Dutcher contends that the trial court impermissibly empowered the CCO to order plethysmograph monitoring. In *State v. Riles*, 135 Wn.2d 326, 345, 957 P.2d 655 (1998), the court concluded that plethysmograph testing could be ordered to support treatment or other affirmative obligations imposed on an offender, but could not be used merely to monitor compliance with sentence conditions. Mr. Dutcher was directed to enter into treatment counseling as directed by his CCO. Clerk's Papers at 80. He apparently fears that the CCO might require plethysmograph monitoring without imposing the treatment counseling.

There is nothing in this record to suggest that the assigned CCO will violate his or her obligations under the law and order monitoring without treatment. Since there is no factual basis for believing the condition is improper, we doubt this issue is ripe for review. *State v. Valencia*, 169 Wn.2d 782, 788-89, 239 P.3d 1059 (2010). Nonetheless, because we are remanding the matter to strike the pornography condition, we also direct the trial court to clarify that a CCO can only order plethysmograph testing at the direction of the treatment provider.

Affirmed and remanded.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Fearing, J.

Lawrence-Berrey, J.