

NO. 45720-2

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

DARRELL WITTE, APPELLANT

**Appeal from the Superior Court of Pierce County
The Honorable John McCarthy, Judge**

No. 12-1-03874-2

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. Did defendant invite the error he alleges on appeal when he failed to request a *Petrich* instruction or object to the jury instructions, and in fact adopted the State's proposed jury instructions?..... 1

2. Whether a *Petrich* instruction is unnecessary where the state elected each act that formed the basis of defendant's charges and where the jury instructions as a whole properly informed the jury of its duty to return a unanimous verdict? 1

B. STATEMENT OF THE CASE. 1

1. Procedure 1

2. Facts..... 2

C. ARGUMENT..... 6

1. THE MATTER IS NOT PROPERLY BEFORE THIS COURT WHERE DEFENDANT INVITED THE ERROR HE ALLEGES ON APPEAL: DEFENDANT FAILED TO REQUEST A *PETRICH* INSTRUCTION, FAILED TO OBJECT TO THE JURY INSTRUCTIONS, AND IN FACT ADOPTED THE STATE'S PROPOSED JURY INSTRUCTIONS 6

2. EVEN IF THE COURT CONSIDERS DEFENDANT'S ALLEGED ERROR, A *PETRICH* INSTRUCTION WAS NECESSARY BECAUSE THE STATE MADE A PROPER ELECTION AND THE JURY INSTRUCTIONS AS A WHOLE PROPERLY INFORMED THE JURY OF ITS DUTY TO RETURN A UNANIMOUS VERDICT. 9

D. CONCLUSION. 14-15

Table of Authorities

State Cases

<i>State v. Bailey</i> , 114 Wn.2d 340, 345, 787 P.2d 1378 (1990)	7
<i>State v. Carson</i> , 179 Wn. App. 961, 973, 320 P.3d 185 (2014).....	6, 7
<i>State v. Coleman</i> , 159 Wn.2d 509, 511, 150 P.3d 1126 (2007).....	9, 10
<i>State v. Corbett</i> , 158 Wn. App. 576, 592, 242 P.3d 52 (2010)	6, 13
<i>State v. Davis</i> , 173 Wn. App. 623, 638, 300 P.3d 465 (2013)	12
<i>State v. Henderson</i> , 114 Wn.2d 867, 870–71, 792 P.2d 514 (1990)	6
<i>State v. Jacobson</i> , 74 Wn. App. 7715, 724, 876 P.2d 916 (1994)	7
<i>State v. Johnson</i> , 180 Wn.2d 295, 306, 325 P.3d 135 (2014)	12
<i>State v. Kitchen</i> , 110 Wn.2d 403, 411, 756 P.2d 105 (1988).....	10, 12
<i>State v. Mounsey</i> , 31 Wn. App. 511, 518, 643 P.2d 892 (1982).....	7
<i>State v. Petrich</i> , 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984).....	9
<i>State v. Proctor</i> , 71 Wn.2d 882, 431 P.2d 703 (1967)	6
<i>State v. Ryan</i> , 103 Wn.2d 165, 91 P.2d 197 (1984).....	2
<i>State v. Schaler</i> , 169 Wn.2d 274, 282, 236 P.3d 858 (2010)	7
<i>State v. Sibert</i> , 168 Wn.2d 306, 311, 230 P.3d 142 (2010).....	13
<i>State v. Smith</i> , 174 Wn. App. 359, 363, 298 P.3d 785 (2013).....	7
<i>State v. Studd</i> , 137 Wn.2d 533, 546–47, 973 P.2d 1049 (1999).....	6
<i>State v. Sublett</i> , 176 Wn.2d 58, 75–76, 292 P.3d 715 (2012)	7

Constitutional Provisions

Const. art. 1, § 219

Statutes

RCW 9A.44.08314

RCW 9A.44.1202

Rules and Regulations

CrR 6.15(c)7, 8

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did defendant invite the error he alleges on appeal when he failed to request a *Petrich* instruction or object to the jury instructions, and in fact adopted the State's proposed jury instructions?

2. Whether a *Petrich* instruction is necessary where the state elected each act that formed the basis of defendant's charges and where the jury instructions as a whole properly informed the jury of its duty to return a unanimous verdict?

B. STATEMENT OF THE CASE.

1. Procedure

On October 12, 2012, the Pierce County Prosecutor's Office charged appellant, Darrell Lee Witte ("defendant"), with three counts of child molestation in the first degree. CP 1–2. On October 17, 2013, the State filed an Amended Information that corrected the mistaken classification of the charges as a "domestic violence incident." CP 34–35; 1 RP 33–34.¹

¹ The verbatim report of proceedings contains five volumes, sequentially paginated with one exception: Volume 3 contains pages 170–293, and Volume 4 contains pages 264–339. The contents of overlapping pages 264–293 are different in each volume. Also, Volume 4 is separated into two parts, one for the morning and one for the afternoon session. The State will refer to the verbatim report of proceedings by volume number followed by RP, and the afternoon Volume 4 will be referred to by 4 RP (pm) [page number]. The sentencing hearing will be referred to by date.

On October 17, 2013, the case proceeded to a jury trial before the Honorable John A. McCarthy. 1 RP 1. Trial began with a CrR 3.5 hearing in which the court ruled that statements defendant made during an interview with Tacoma Police Detective Scott Yenne would be admissible at trial. 1 RP 30–31. Trial proceeded with a child hearsay hearing in which the court ruled that statements JWH made to third parties would be admissible at trial in light of the factors set forth in *State v. Ryan*, 103 Wn.2d 165, 175–76, 91 P.2d 197 (1984). 1 RP 161–62; *see also* RCW 9A.44.120. The court also determined that JWH was competent to testify at trial. 1 RP 161.

The State proposed jury instructions, which the defense adopted. 4 RP (pm) 404–05; CP97–119.

The jury convicted defendant as charged. 5 RP 463–64. On December 20, 2013, the court sentenced defendant to 98 months to life on each of the three counts. CP 69–83; 12/20/13 RP 15. Defendant timely filed his notice of appeal on the same day. CP 89.

2. Facts

Defendant met Ms. Nellie Wills sometime between the years 2007–2008 while the two worked for the same motor freight company in Kent, WA. 4 RP 271; 4 RP (pm) 379–80. Defendant lived with his grandfather, Jimmy Kard, in Tacoma and Ms. Wills soon moved into the same house. 4 RP 271. Ms. Wills' three children, RWH (born in 2000), LWH (born in

2002), and JWH (born in 2003), lived with their biological father until moving in with defendant and Ms. Wills in 2009. 4 RP 269, 271–72, 383.

In 2009, the freight company fired defendant and around the same time, Ms. Wills resigned and started serving tables at a family diner in Puyallup. 4 RP 272–74. Ms. Wills worked from 5–11 p.m. and defendant assumed responsibility for taking care of the three children. 4 RP 274–75. Defendant and Ms. Wills separated toward the end of 2011. Ms. Wills moved with her children into her parents' house in Tacoma.² 4 RP 268. There, Ms. Wills' youngest child, JWH, reported instances of sexual abuse at the hands of defendant that occurred between 2009 and 2011.

At trial, JWH identified four separate incidents of sexual touching. The jury watched a forensic interview of JWH in which she revealed a fifth incident.³ Each instance is discussed separately below.

Incident #1 (The "finger on vagina" incident)

One night, at Jimmy Kard's house, JWH was sleeping between her mom and defendant and wearing a pink skirt with built in shorts. 3 RP 211–213. JWH woke up to defendant's "finger"⁴ "trying to push inside" the middle of JWH's vagina, over her clothing. 3 RP 212–13; Exhibit 4 (11:34:24). Defendant was wide awake and had a "super red" face. 3 RP

² Ms. Wills' parents, Ms. Paulette Wills and Mr. Robert Wendlandt, testified at trial.

³ The forensic interview was admitted as Exhibit 4. In referring to the forensic interview, the State will reference the timestamp on the video itself, rather than the time elapsed into the interview.

⁴ JWH believed she felt a *finger* because she "didn't think there would be anything else." 3 RP 214. The touching occurred beneath the covers. 3 RP 214.

212; Exhibit 4 (11:07:38). JWH was six years old. 3 RP 216.

Incident #2 (The "penis squeezing" incident)

Defendant and JWH stayed up late waiting for JWH's mother to return from work. 3 RP 224–25. Defendant grabbed JWH's hand and made her squeeze his penis, over his clothing. 3 RP 225; Exhibit 4 (11:21:28). JWH felt disgusted. Exhibit 4 (11:21:35).

Incident #3 (The "vagina kissing" incident)

JWH was watching television while wearing a black knee length dress with shorts underneath. Exhibit 4 (11:12:00); (11:13:01). Defendant kissed her upper legs and then kissed her vagina, over her clothing. Exhibit 4 (11:12:30). When JWH's mother approached the room, defendant ran to a separate area. Exhibit 4 (11:13:09).

Incident #4 (The "buttocks rubbing" incident)

JWH was lying down on a bed watching television when defendant sat behind her and "rubbed and then squeezed" her buttocks "in a way that would make the front of [her] pants go unbuttoned." 3 RP 219; Exhibit 4 (11:26:27). JWH scooted forward on the bed to button her pants back up, and defendant got in front of JWH and told her, "I thought you loved me" and "[Y]ou don't love me the way that I love you." 3 RP 220. Defendant also told JWH that if she told anybody about the touching that defendant would go to jail, and if he went to jail he would kill himself. 3 RP 229.

Incident #5 (The "french kissing" incident)

Defendant and JWH stayed up late waiting for JWH's mother to come home while watching television on defendant's bed. 3 RP 223. With JWH's brothers in another room sleeping, defendant kissed JWH "the way girlfriend and boyfriend kiss, the way husband and wife kiss." 3 RP 222. JWH felt defendant's tongue go into her mouth. 3 RP 223–224. JWH didn't feel well and put her head under the pillow after defendant finished kissing her. Exhibit 4 (11:02:52).

JWH reported the abuse to her brothers, and then ultimately to her mother and grandparents. 3 RP 216, 235.

Tacoma Police Detective Scott Yenne interviewed defendant and asked whether he inappropriately touched JWH at any time. Defendant admitted that "it was possible that it was excessive tickling and it was possible that during that tickling episode, he could have touched her genital area." 3 RP 185; 4 RP (pm) 399. Defendant told JWH not to tell anybody else about the excessive tickling because they might get "the wrong idea." 3 RP 186. Detective Yenne asked whether defendant kissed JWH, and defendant recalled one instance where he blew into her mouth as a kiss. 3 RP 186.

C. ARGUMENT.

1. THE MATTER IS NOT PROPERLY BEFORE THIS COURT WHERE DEFENDANT INVITED THE ERROR HE ALLEGES ON APPEAL: DEFENDANT FAILED TO REQUEST A *PETRICH* INSTRUCTION, FAILED TO OBJECT TO THE JURY INSTRUCTIONS, AND IN FACT ADOPTED THE STATE'S PROPOSED JURY INSTRUCTIONS.

"The invited error doctrine is a strict rule that precludes a criminal defendant from seeking appellate review of an error he helped create, even when the alleged error involves constitutional rights." *State v. Carson*, 179 Wn. App. 961, 973, 320 P.3d 185 (2014) *citing State v. Studd*, 137 Wn.2d 533, 546–47, 973 P.2d 1049 (1999); *State v. Henderson*, 114 Wn.2d 867, 870–71, 792 P.2d 514 (1990). "This doctrine applies to alleged failures to provide a *Petrich* unanimity instruction." *Carson*, 179 Wn. App. at 973; *see also State v. Corbett*, 158 Wn. App. 576, 592, 242 P.3d 52 (2010).

- a. Defendant failed to propose a *Petrich* instruction.

"No error can be predicated on the failure of a trial court to give an instruction when no request for an instruction was ever made." *State v. Proctor*, 71 Wn.2d 882, 431 P.2d 703 (1967). "If a party does not propose an appropriate instruction, it cannot complain about the court's failure to

give it." *State v. Jacobson*, 74 Wn. App. 7715, 724, 876 P.2d 916 (1994); see also *State v. Mounsey*, 31 Wn. App. 511, 518, 643 P.2d 892 (1982).

Here, defendant assigns error to the trial court's failure to give a *Petrich* instruction. Brief of Appellant, 1. But, defendant did not propose a *Petrich* instruction. The failure to request the instruction precludes review of this issue. See *State v. Carson*, 179 Wn. App. 961, 973, 320 P.3d 185 (2014).

- b. Defendant did not object to the State's proposed jury instructions and, in fact, expressly agreed with them.

"Generally, a party who fails to object to jury instructions in the trial court waives a claim of error on appeal." *State v. Smith*, 174 Wn. App. 359, 363, 298 P.3d 785 (2013); see also *State v. Bailey*, 114 Wn.2d 340, 345, 787 P.2d 1378 (1990); *State v. Schaler*, 169 Wn.2d 274, 282, 236 P.3d 858 (2010). "Counsel has duty to lodge formal objections even if instructions [were] discussed during informal hearing." *State v. Sublett*, 176 Wn.2d 58, 75–76, 292 P.3d 715 (2012).

CrR 6.15(c) identifies the following requirements for objecting to jury instructions:

Before instructing the jury, the court shall supply counsel with copies of the proposed numbered instructions, verdict and special finding forms. The court shall afford to counsel an opportunity in the absence of the jury to *object to the giving of any instructions* and the *refusal to give a requested instruction* or submission of a verdict or special finding form. *The party objecting shall state the reasons for*

the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused. The court shall provide counsel for each party with a copy of the instructions in their final form.

Id. (emphasis added).

Here, defendant failed to object to the jury instructions as required under CrR 6.15(c). In fact, defendant expressly agreed with the State's proposed instructions:

THE COURT: I've got the State's proposed instructions. Did you have any separate ones?

DEFENSE COUNSEL: I did not, Your Honor. *I am adopting*, with an argument against some⁵, which I think will be in agreement. Our defense is general denial. We are not seeking a lesser included.

THE COURT: So I'm looking at their proposed ones. I'm up through, "The defendant is not required to testify." So we'll take that one out?

DEFENSE COUNSEL: Yes.

THE COURT: *Did I understand from you that the rest look okay to you?*

DEFENSE COUNSEL: *The rest look over [sic?] to me*, Your Honor.

THE COURT: Okay. Let's just go through and double check.

⁵ The only instruction defendant took issue with was one that stated "The defendant is not required to testify[...]" because it was no longer applicable as defendant was planning on testifying. 4 RP (pm) 404-05.

DEFENSE COUNSEL: That would be fine.

[...] (Adjourned).

4 RP (pm) 404–05 (emphasis added).

Defendant's argument that the trial court erred when it failed to give a *Petrich* instruction overlooks that defendant had the opportunity to propose a *Petrich* instruction and duty to do so, if one was required, but did not. Because defendant failed to object to the jury instructions and expressly agreed with the State's proposed instructions, he is precluded from raising this issue on appeal.

2. EVEN IF THE COURT CONSIDERS DEFENDANT'S ALLEGED ERROR, A *PETRICH* INSTRUCTION WAS UNNECESSARY BECAUSE THE STATE MADE A PROPER ELECTION AND THE JURY INSTRUCTIONS AS A WHOLE PROPERLY INFORMED THE JURY OF ITS DUTY TO RETURN A UNANIMOUS VERDICT.

Criminal defendants have a right to a unanimous jury verdict. Const. art. 1, § 21; *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). Jury unanimity issues can arise when the State presents evidence of multiple acts that could form the basis of one count charged. *State v. Petrich*, 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984). When the prosecution presents evidence of several acts that 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 specific criminal act. *Id.* at 570-572; *State v. Kitchen*, 110 Wn.2d 403,

411, 756 P.2d 105 (1988) (finding that there is error only where the State fails to make a proper election and the trial court fails to instruct the jury on unanimity). This assures that the unanimous verdict is based on the same act proved beyond a reasonable doubt. *Coleman*, 159 Wn.2d at 511–12.

- a. A *Petrich* instruction was not required because the State made a proper election during closing argument.

The prosecutor began closing argument by informing the jury that "Count 1 is separate and distinct from the act that supports Count II and Count III. The act that supports Count II must be different than the one that supports Count III and Count I, et cetera; otherwise, they are the same." 5 RP 417–18.

Next, the prosecutor told the jury to disregard the buttocks rubbing incident (*supra* at pp. 4-5) and the french kissing incident (*supra* at p. 5) in determining defendant's guilt on the three counts of first degree child molestation. As to the buttocks rubbing incident, the prosecutor stated that: "[...] that particular touching was not of her private area or the sexual or intimate parts. *That is not an act of molestation.* It was rubbing of her legs and behind area." 5 RP 418 (emphasis added). Regarding the french kissing incident, the prosecutor stated that:

[JWH] described [defendant] doing things like the french kissing and she described it as the way that adults kiss, boyfriend/girlfriend or husband and wife, and him touching her again, like I said earlier [as to the buttocks rubbing

incident], on other areas of her body that aren't her private parts. [...] **These aren't acts of molestation. *It's not sexual contact as defined by your instructions, but it shows how the defendant sees JWH. It shows that he is attracted to her.***"

5 RP 428 (emphasis added).

The exclusion of the buttocks rubbing and french kissing incidents left only three acts of inappropriate touching (the finger on vagina, penis squeezing, and vagina kissing incidents) to support the three counts of first degree child molestation. The prosecutor argued that each of these remaining three acts supported convictions for first degree child molestation.

As to the penis squeezing incident, the prosecutor stated that:

I submit to you that JWH vaginal area, what she describes as private areas that she uses for number one, and the defendant's penis, his groin area, his private areas, also used for number one, are both sexual parts. That is common sense. The defendant's touching of that area on her, her vaginal area and *making her touch his* is for no other purpose than for sexual gratification.

5 RP 420 (emphasis added).

As to the finger on vagina incident, the prosecutor stated that:

There simply is no other reason for an adult to touch a female child's vaginal area over the clothes, *by pushing his finger against it like JWH described in the forensic interview.*

and that:

she was sleeping between them and wearing a skirt with shorts underneath; that she woke up and could see that the defendant was awake, and she could tell his face was red.

5 RP 421, 427 (emphasis added).

As to the vagina kissing incident, the prosecutor stated that:

It's common sense. You have to use the reasonable inference about why someone touches someone else there if it's not for medical purposes or something like that. [...] There is no other reason for him to [...] *kiss her vaginal area*.

5 RP 421 (emphasis added).

The prosecutor elected three distinct acts to support the three counts of child molestation. The prosecutor expressly excluded two acts of touching from the jury's consideration. Finally, the prosecutor told the jury that the act supporting each count must be different from the other. These actions preserved defendant's right to a unanimous verdict. A *Petrich* instruction was not required. *Kitchen*, 110 Wn.2d at 411.

- b. A *Petrich* instruction was not required because the jury instructions as a whole adequately protected defendant's right to a unanimous verdict.

The court of appeals does not "review the adequacy of jury instructions in isolation; [but] as a whole." *State v. Davis*, 173 Wn. App. 623, 638, 300 P.3d 465 (2013); *see also State v. Johnson*, 180 Wn.2d 295, 306, 325 P.3d 135 (2014) ("We consider challenges to jury instructions in

the context of the jury instructions as a whole") *quoting State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010).

A *Petrich* instruction is not required to ensure jury unanimity where the jury instructions as a whole adequately inform the jury that it must return a unanimous verdict. For example, in *State v. Corbett*, 158 Wn. App. 576, 592, 242 P.3d 52 (2010), the jury instructions as a whole adequately informed the jury of its duty to return a unanimous verdict where the trial court instructed the jury that: (1) "[a] separate crime is charged in each count"; (2) each count should be decided separately; (3) the verdicts for one count should not influence verdicts on other counts; (4) "the State relies upon evidence regarding a single act constituting each count"; (5) "[t]o convict [Corbett] on any count, [they] must unanimously agree that this specific act was proved" (alteration in original); and where each to-convict instruction listed all the required elements of the charged crime. *Id.* at 592.

Here, as in *Corbett*, the jury instructions as a whole properly informed the jury of its duty to return a unanimous verdict. The trial court in the present case instructed the jury that:

- (1) "A separate crime is charged in each count" (Instruction 6);
- (2) "You must decide each count separately" (Instruction 6);
- (3) "Your verdict on one count should not control your verdict on any other count" (Instruction 6);

- (4) The act as to each count must be "separate and distinct from" acts alleged in the other two counts (Instructions 8, 9, and 10);
- (5) "As jurors, you have a duty to [...] deliberate in an effort to reach a unanimous verdict" (Instruction 13);
- (6) "Because this is a criminal case, each of you must agree for you to return a verdict" (Instruction 14).

CP 42–59. Finally, each to-convict instruction listed all the required elements of first degree child molestation. CP 42–59 (Instructions 8–10); RCW 9A.44.083.

Read as a whole, the jury instructions adequately informed the jury of its duty to return a unanimous verdict. The court did not error by failing to give a *Petrich* instruction.

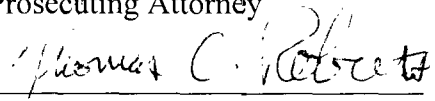
D. CONCLUSION.


Defendant waived his challenge by failing to request a *Petrich* instruction and by failing to object to the jury instructions. The State properly elected the three acts to support the three counts defendant was charged with. Moreover, the jury instructions as a whole properly

informed the jury of its responsibility to return a unanimous verdict. For these reasons, the State respectfully asks this Court to affirm defendant's conviction.

DATED: September 26, 2014.

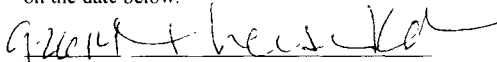
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