No. 91710-8

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

DARRELL LEE WITTE,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 45720-2-II
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 12-1-03874-2
The Honorable John McCarthy, Judge

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I. IDENTITY OF PETITIONER

The Petitioner is DARRELL LEE WITTE, Defendant and Appellant in the case below.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division 2, case number 45720-2-II, which was filed on April 7, 2015. (Attached in Appendix A) The Court of Appeals affirmed the conviction entered against Petitioner in the Pierce County Superior Court.

III. ISSUES PRESENTED FOR REVIEW

1. By failing to request a constitutionally required Petrich unanimity instruction, does a defendant invite the instructional error and waive the right to raise a challenge for the first time on appeal?

2. Was Darrell Lee Witte denied his constitutional right to a unanimous jury verdict, where the State presented evidence of multiple possible acts of molestation but failed to elect which three acts it was relying on to convict Witte of three counts of child molestation, where there was insufficient evidence to establish that some of the acts were of "intimate parts" of the alleged victims' body or that they were touched for the purpose of sexual gratification, and where the trial court failed to instruct the jury that it must be unanimous as to which act established each count?

IV. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Darrell Lee Witte with three counts of

child molestation in the first degree (RCW 9A.44.083). (CP 1-2, 34-35) The testimony presented at trial established multiple possible acts for each count. The alleged victim, J.W.-H., testified about four specific acts of possible sexual contact. (10/22 RP 211-26) J.W.-H. described these acts to a child psychologist, but also described other incidents where Witte supposedly touched or kissed various parts of her body. (Exh. 4)

The to-convict instructions for each count were identical, and required the State to prove that Witte had sexual contact with J.W.-H. between December 1, 2009 and November 30, 2011. (CP 52-54) Each to-convict instruction informed the jury that the act of sexual contact for that count must be "separate and distinct" from the acts alleged for the other two counts (CP 52-54), but the instructions did not inform the jury that it must be unanimous as to which "separate and distinct" act they were relying on for each count.

The jury convicted Witte of all three counts of child molestation in the first degree (RCW 9A.44.083). (10/29 RP 463-64; CP 62-64) The trial court imposed a standard range sentence of 98 months to life. (12/20 RP 15; CP 75) Witte timely appealed. (CP 89) In an unpublished opinion filed April 7, 2015, the Court of

Appeals affirmed Witte's convictions and sentence, finding that by failing to request a Petrich unanimity instruction he invited the instructional error and is not entitled to raise a challenge for the first time on appeal. (Opinion at 2-3) The Court denied Witte's Motion to Reconsider by Order entered April 23, 2015. (Attached in Appendix B)

B. SUBSTANTIVE FACTS

Nellie Wills has a daughter J.W.-H., and two sons, L.W.-H. and R.W.-H. (10/22 RP 201, 203-04) J.W.-H. is the youngest, and was born on December 1, 2003. (10/22 RP 241, 259; 10/28AM RP 267) From 2009 through October of 2011, Wills dated Darrell Witte, and she and her children lived with Witte and his grandfather in a yellow house in Tacoma. (10/22 RP 201-02, 204-05, 206; 10/28AM RP 270-71)

For a short period of time, Wills and her children shared a bedroom with Witte. (10/22 RP 206-07; 10/28AM RP 273-74) But eventually a second bedroom was cleared out and the children slept there. (10/22 RP 206-07; 10/28AM RP 273) Witte was not regularly employed at the time, so he often took care of the children. (10/28AM RP 275, 10/28PM RP 392) The children did not seem to have problems with Witte and did not complain about

him to the other adults in their lives. (10/28AM RP 285-86, 287, 306; 10/28PM RP 367, 368)

However, according to J.W.-H., on a number of occasions Witte touched her in inappropriate ways. J.W.-H. testified that the first incident occurred when she and Witte and her mother were all asleep in the same bed. (10/22 RP 211-12) She awoke and felt Witte's finger touching her vagina through her clothes. (10/22 RP 211-12, 213) When she looked at Witte, he was wide awake and his face was red. (10/22 RP 212, 214)

J.W.-H. testified that another incident also occurred when J.W.-H. still lived with Witte. (10/22 RP 222) According to J.W.-H., Witte kissed her on the mouth in a "grownup" manner, the way a husband and wife would kiss. (10/22 RP 222, 223)

J.W.-H. also testified that, once when she and Witte were alone, Witte grabbed her hand and put it against his penis. (10/22 RP 225) He was dressed at the time. (10/22 RP 225-26)

Finally, J.W.-H. described another incident that occurred when she spent the night at Witte's house, after her family had moved into her grandparents' house. (10/22 RP 220-21) According to J.W.-H., Witte grabbed her bottom as they watched television together in Witte's bedroom. (10/22 RP 219-20)

According to J.W.-H., Witte told her not to tell anyone because he would go to jail and she would never see him again, and that he would kill himself because he did not do anything to hurt her. (10/22 RP 229)

J.W.-H. told her brothers and, eventually, her mother. (10/22 RP 251-52, 268-69, 270; 10/28AM RP 277-78) But no one contacted the authorities. (10/22 RP 255; 10/28AM RP 280)

In October of 2011, Wills and her children moved out of Witte's house and moved in with Wills' mother and step-father, Paulette Wills and Robert Wendlandt. (10/22 RP 282; 10/28AM RP 291) A few months after the move, J.W.-H. disclosed to Wendlandt and Paulette Wills that Witte had touched private parts of her body. (10/22 RP 284-85; 10/28AM RP 296-27) Once again, no one immediately contacted the authorities. Paulette Wills testified that she was afraid for Nellie Wills' health, because she was suffering from severe mental illness and had recently attempted suicide. (10/28AM RP 300)

In July of 2012, Paulette Wills finally contacted the police to report what J.W.-H. had said. (10/28AM RP 300-01, 306) J.W.-H. was interviewed by Keri Arnold-Harms, a child interviewer. (10/28AM RP 312, 329) J.W.-H. described a number of times that

Wills touched or kissed various parts of her body. (Exh. 4)

Detective Scott Yenne investigated the case and interviewed Witte. (10/22 RP 175, 179) Witte told Yenne that he did not purposefully touch J.W.-H.'s private parts (10/22 RP 185-86) He thought he may have touched her private parts when he tickled her, but if he did it was inadvertent and not done for sexual gratification. (10/22 RP 185-86)

Witte testified, and denied intentionally touching J.W.-H. in a sexual manner. (10/28PM RP 388) He testified that they engaged in normal roughhousing and tickling, but that he never tried to touch her private parts and never did so for sexual purposes. (10/28PM RP 385, 388, 391, 393)

V. ARGUMENT & AUTHORITIES

The issues raised by Darrell Lee Witte's petition should be addressed by this Court because the Court of Appeals' decision conflicts with settled case law of the Court of Appeals and the Supreme Court and involves a significant question of law under the Constitution of the State of Washington and of the United States. RAP 13.4(b)(1), (2) and (3).

"Criminal defendants in Washington have a right to a unanimous jury verdict." State v. Ortega–Martinez, 124 Wn.2d 702,

707, 881 P.2d 231 (1994). For a criminal defendant's conviction to be constitutionally valid, a unanimous jury must conclude that the accused committed the criminal act charged. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). Accordingly, when the State presents evidence of multiple acts that could each form the basis of one charged crime, "either the State must elect which of such acts is relied upon for a conviction 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). This requirement "assures a unanimous verdict on one criminal act" by "avoid[ing] the risk that jurors will aggregate evidence improperly." Coleman, 159 Wn.2d at 512.[1]

In this case, the testimony established multiple possible acts for each count. J.W.-H. testified about four specific acts of possible sexual contact. (10/22 RP 211-26) J.W.-H. described these acts to Arnold-Harms, but also described other incidents where Witte supposedly touched or kissed various parts of her body. (Exh. 4)

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[1] Alleged instructional errors are reviewed de novo. State v. Sibert, 168 Wn.2d 306, 311, 230 P.3d 142 (2010). And this issue may be raised for the first time on appeal because failure to provide a unanimity instruction in a multiple acts case amounts to manifest constitutional error. RAP 2.5(a); State v. Kiser, 87 Wn. App. 126, 129, 940 P.2d 308 (1997); State v. Holland, 77 Wn. App. 420, 424, 891 P.2d 49 (1995).

The State charged Witte with three counts of first degree child molestation. (CP 34-35) The to-convict instructions for each count were identical, and required the State to prove that Witte had sexual contact with J.W.-H. between December 1, 2009 and November 30, 2011. (CP 52-54; a copy of the to-convict instructions is attached in the Appendix) The jury instructions defined "sexual contact" as "any touching of the sexual or other intimate parts of a person done for the purposes of gratifying sexual desires of either party." (CP 56) The term "intimate parts" was not defined.

Each to-convict instruction informed the jury that the act of sexual contact for that count must be "separate and distinct" from the acts alleged for the other two counts (CP 52-54), but the instructions did not inform the jury that it must be unanimous as to which "separate and distinct" act they were relying on for each count. The jury received no unanimity instruction. And the prosecutor did not elect which act it was relying on for each count.

If there is no election and no instruction, the resulting constitutional error is harmless only if no rational trier of fact could have had a reasonable doubt that each incident established the crime beyond a reasonable doubt. State v. Crane, 116 Wn.2d 315,

325, 804 P.2d 10 (1991). The rationale for this protection in multiple acts cases stems from possible confusion regarding which of the acts a jury has used to determine a defendant's guilt. State v. King, 75 Wn. App. 899, 902, 878 P.2d 466 (1994).

In this case, a rational trier of fact could have had a reasonable doubt that some of the acts occurred, could have had a reasonable doubt that some of the acts met the definition of "sexual contact," or could have had a reasonable doubt that some of the contact involved an "intimate part." J.W.-H. described several touchings, only two of which specifically involved the sexual organs. The remainder involved kissing or touching clothed parts of her body. (2-3RP 211-23; Exh. 4)

Whether or not these other parts of J.W.-H's body rose to the level of "intimate parts" was something the jury was free to decide. *See* In re Adams, 24 Wn. App. 517, 520, 601 P.2d 995, 997 (1979) ("The determination of which anatomical areas apart from the genitalia and breasts are intimate is a question to be resolved by the trier of the facts.") And whether or not the touching was done for the purpose of sexual gratification was also for the jury to determine.

Based on the evidence presented at trial, the jurors could

have found that some of the reported incidents involved touching of an "intimate part" and some did not, and that some of the touchings were inadvertent and some were not. A number of the incidents described by J.W.-H. arguably did not involve "intimate parts." And it was not clear from J.W.-H.'s description whether all of the touchings were intentional and for the purpose of sexual gratification. But without a unanimity instruction, it is impossible to know whether the jury agreed on which three acts rose to the level of a sexual contact with an intimate part of J.W.-H.'s body for the purposes of sexual gratification.

However, the Court of Appeals held that by failing to request a Petrich unanimity instruction, and by not objecting the State's failure to include on in in its proposed instructions, Witte invited the instructional error and is not entitled to raise a challenge for the first time on appeal. (Opinion at 2-3) The Court reasoned:

> The invited error doctrine prohibits a party from setting up an error at trial and then challenging that error on appeal. In re Pers. Restraint of Coggin, 182 Wn.2d 115, 119, 340 P.3d 810 (2014). This doctrine applies to unanimity instructions. State v. Carson, 179 Wn. App. 961, 973, 320 P.3d 185 (2014), *review granted*, 181 Wn.2d 1001 (2014). Specifically, where a defendant's proposed instructions do not include a unanimity instruction, the invited error doctrine precludes the defendant from appealing the trial court's failure to give such an instruction. State v.

> Corbett, 158 Wn. App. 576, 591-92, 242 P. 3d 52 (2010). Corbett may not directly apply because Witte did not propose any instructions. However, Witte adopted the State's proposed jury instructions that did not include a unanimity instruction. The invited error doctrine also applies in this situation. "Under the doctrine of invited error, even where constitutional rights are involved, we are precluded from reviewing jury instructions when the defendant has proposed an instruction *or agreed to its wording*." State v. Winings, 126 Wn. App. 75, 89, 107 P.3d 141 (2005) (emphasis added); see also In re the Detention of Gaff, 90 Wn. App. 834, 845, 954 P.2d 943 (1998) (holding that the parties' agreement as to the wording of a jury instruction precluded the court's review of the omission of the instruction).

(Opinion at 2-3) The Court's decision misapplies the law to the facts of this case, conflicts with existing cases from the other Divisions of the Court of Appeals and this Court, and results in Witte being deprived of his constitutional right to unanimous jury verdict.

First, this case is easily distinguishable from the cases cited by the Court of Appeals. In this case, Witte's trial counsel did not propose any jury instructions, and agreed to the instructions as proposed by the State. (RP 404) But in Corbett, the defendant proposed the jury instruction he sought to challenge on appeal. 158 Wn. App. at 591-92. In Carson, the defendant objected to the inclusion of a unanimity instruction. 179 Wn. App. at 973. In those

cases, the defendant took specific actions to influence what jury instructions would and would not be included. Witte's attorney took no similar action here.

This Court's reliance on Winings and Gaff is also misplaced. Winings proposed an identical instruction to the one he later challenged on appeal, and Gaff agreed to the unique wording of the instruction he later challenged on appeal. The appellate courts held that review was precluded because the defendants either proposed the instruction or "agreed to its wording." 126 Wn. App. at 89; 90 Wn. App. at 845. But here, Witte did not agree to the wording of a unanimity instruction. *There was no unanimity instruction.* A defendant cannot agree to wording that does not exist. Winings and Gaff are therefore distinguishable, and the holdings are inapplicable here.

Furthermore, this Court's holding that the failure to raise or object to a constitutional deficiency in the jury instructions is an improper extension of the invited error doctrine and renders RAP 2.5 meaningless. RAP 2.5(a)(3) specifically states that a party may raise a "manifest error affecting a constitutional right" for the first time on appeal. By its plain and obvious language, RAP 2.5 allows a defendant to raise, and the appellate court to consider, a

constitutional error that was not objected to below. *See* State v. Clark, 139 Wn.2d 152, 156, 985 P.2d 377 (1999) ("RAP 2.5(a)(3) excepts 'manifest error affecting a constitutional right,' allowing us to consider an error of constitutional magnitude even though that issue was not raised at trial").

Finally, both Division 1 and Division 3 of the Washington Court of Appeals have held that the trial court's failure to give a unanimity instruction may be reviewed for the first time on appeal. State v. Kiser, 87 Wn. App. 126, 129, 940 P.2d 308 (1997); State v. Holland, 77 Wn. App. 420, 424, 891 P.2d 49 (1995) ("Although [Holland] did not except to the court's instructions, the right to a unanimous verdict is a fundamental constitutional right and may, therefore, be raised for the first time on appeal").

The Court of Appeals incorrectly held that Witte's failure to request a constitutionally required unanimity instruction and failure to object to the State's omission of such an instruction was equivalent to agreeing to the wording of instructions. The Court also erred by holding that such a failure to object is invited error and precludes appellate review, despite the plain language of RAP 2.5, which allows a defendant to raise a constitutional error for the first time on appeal.

VI. CONCLUSION

Witte did not invite the instructional error by failing to request a Petrich unanimity instruction, and he is entitled to raise a challenge for the first time on appeal.

Because the State presented evidence of multiple possible acts of touching of parts of J.W.H.'s body that could be considered "intimate" and that could be considered as having been done for the purpose of sexual gratification, but did not elect which three acts supported the three charged counts, Witte was entitled to a unanimity instruction in order to preserve his constitutional right to a unanimous jury verdict.

The failure to give a unanimity instruction was not harmless because there was insufficient evidence that some of the incidents testified to by J.W.-H involved "intimate parts" or that the touching was for the purpose of "sexual gratification." The instructional error therefore requires that Witte's convictions be reversed and his case remanded for a new trial. Witte respectfully requests that this Court accept review of his case, reverse the Court of Appeals' opinion, and reverse his convictions.

DATED: May 13, 2015

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSB #26436
Attorney for Petitioner Darrell Lee Witte

CERTIFICATE OF MAILING

I certify that on 05/13/2015, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Darrell Lee Witte, DOC# 370003, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSBA #26436

CUNNINGHAM LAW OFFICE

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DARRELL LEE WITTE, Appellant.	No. 45720-2-II UNPUBLISHED OPINION

MAXA, J. — Darrell Witte appeals his conviction for three counts of first degree child molestation. At trial, the State presented evidence of multiple separate acts that could establish that Witte had sexual contact with a minor, but the trial court failed to instruct the jury that it was required to unanimously agree on the criminal conduct that supported each count. Witte argues that the trial court erred in not giving a unanimity instruction and thereby violated his constitutional right to a unanimous jury verdict. However, at trial Witte adopted the State's proposed jury instructions even though they did not include a unanimity instruction. As a result, we hold that Witte invited the error he challenges on appeal, and we decline to address this issue. Accordingly, we affirm Witte's convictions.

FACTS

Witte was charged with three counts of first degree child molestation based on allegations that he molested JW-H over a period from December 2009 to November 2011. At trial, the State presented evidence of five separate instances showing Witte's sexual conduct.

When the parties discussed jury instructions, the State submitted proposed instructions that did not include a unanimity instruction. When the trial court asked if the defendant's counsel had prepared jury instructions, counsel replied, "I did not, Your Honor. I am adopting, with an argument against some, which I think will be in agreement." Report of Proceedings (RP) at 404. The trial court clarified the instruction to be removed and then asked defense counsel, "Did I understand from you that the rest look okay to you?" RP at 404. Defense counsel responded, "The rest look over [sic] to me, Your Honor." RP at 404.

The jury convicted Witte of each charge. Witte appeals his convictions.

ANALYSIS

Witte argues that he was entitled to a unanimity instruction[1] to protect his constitutional right to a unanimous jury verdict. We hold that Witte is precluded from raising this issue because he invited the error he complains of on appeal, and we affirm Witte's convictions.

The invited error doctrine prohibits a party from setting up an error at trial and then challenging that error on appeal. *In re Pers. Restraint of Coggin*, 182 Wn.2d 115, 119, 340 P.3d 810 (2014). This doctrine applies to unanimity instructions. *State v. Carson*, 179 Wn. App. 961, 973, 320 P.3d 185 (2014), *review granted*, 181 Wn.2d 1001 (2014). Specifically, where a defendant's proposed instructions do not include a unanimity instruction, the invited error

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[1] In *State v. Petrich* our Supreme Court held:

> When the evidence indicates that several distinct criminal acts have been committed, but defendant is charged with only one count of criminal conduct, jury unanimity must be protected. . . . The State may, in its discretion, elect the act upon which it will rely for conviction. . . . When the State chooses not to elect, this jury instruction must be given to ensure the jury's understanding of the unanimity requirement.

101 Wn.2d 566, 572, 683 P.2d 173 (1984), *overruled on other grounds by State v. Kitchen*, 110 Wn.2d 403 (1988).

doctrine precludes the defendant from appealing the trial court's failure to give such an instruction. *State v. Corbett*, 158 Wn. App. 576, 591-92, 242 P.3d 52 (2010).

Corbett may not directly apply because Witte did not propose any instructions. However, Witte *adopted* the State's proposed jury instructions that did not include a unanimity instruction. The invited error doctrine also applies in this situation. "Under the doctrine of invited error, even where constitutional rights are involved, we are precluded from reviewing jury instructions when the defendant has proposed an instruction *or agreed to its wording.*" *State v. Winings*, 126 Wn. App. 75, 89, 107 P.3d 141 (2005) (emphasis added); *see also In re the Detention of Gaff*, 90 Wn. App. 834, 845, 954 P.2d 943 (1998) (holding that the parties' agreement as to the wording of a jury instruction precluded the court's review of the omission of the instruction).

Here, the State proposed jury instructions that did not include a unanimity instruction, and Witte's counsel told the trial court that he was adopting those instructions except for an instruction that is not relevant here. Later, when the trial court asked Witte's counsel if the instructions were acceptable, counsel responded that the rest of the instructions looked okay. These comments were the equivalent to agreeing to the exclusion of a unanimous jury instruction from the trial court's instructions.

Witte did not propose a unanimity instruction and agreed to the trial court's jury instructions that did not include a unanimity instruction. Therefore, we hold that the invited error doctrine prohibits Witte from challenging on appeal the trial court's failure to give such an instruction.

We affirm Witte's convictions.

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.

MAXA, J.

We concur:

BJORGEN, A.C.J.

SUTTON, J.