SC#93234-4

SUPREME COURT OF THE STATE OF WASHINGTON

NO. 33022-2-III

PETITION FOR DISCRETIONARY REVIEW

STATE OF WASHINGTON

Respondent,

V.

JEREMIAH RAY LOGAN

Appellant,

TABLE OF CONTENTS

AUTHORITIES CITED

* State v. Badda, 63 Wash.2d 176, 385 P.2d 859 (1963)
* People v. Bender, 20 Ill.2d 45, 54, 169 N.E.2d 328 (1960)
* State v. Camarillo, 115 Wash.2d 60 (1990)
* Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 17 L.Ed.2d 705, 24 A.L.R.3d 1065 (1967)
* State v. Dozier, 163 W.Va. 192, 195, 255 S.E.2d 552 (1979)
* United States v. Espinal, 757 F.2d 423, 426 (1st Cir 1985)
* People v. Graham, 71 Cal.2d 303, 455 P.2d 153, 78 Cal.Rptr. 217, 227 (1969)
* State v. Hargrove, 48, Kan.App.2d 522, 293 P.3d 787 (2013)
* State v. Henderson, 114 Wash.2d 867 (1990)
* State v. Kitchen, 110 Wash.2d 403, 409, 756 P.2d 105 (1988)
* State v. Mak, 105 Wash.2d 692, 718 P.2d 407, Cert.denied, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986)
* State v. Jennings, 111 Wash.App. 54, 62, 44 P.3d 1 (2002)
* United States v. Neder, 527 U.S. 1, 18, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)
* ~~State v. Pam, 101 WN.2d 507, 513, 683 P.2d 173 (1984)~~ For Legal Use Only
* State v. Pam, 101 Wash.2d 507, 511, 680 P.2d 762 (1984)
* State v. Petrich, 101 WN.2d 566, 572, 683 P.2d 173 (1984)
* State v. Rouse, 63 Or.App. 161, 163, 662 P.2d 798 review denied, 295 Or. 618, 670 P.2d 1034 (1983)
* State v. Sargent, 62 Wash. 692, 114 P. 868 (1911)
* United States v. Solis, 841 F.2d 307, 309 (9th Cir 1988)
* States v. Stephens, 93 Wash.2d 186, 190, 607 P.2d 304 (1980)
* State v. Workman, 66 Wash. 292, 119 P. 751 (1911)

I. IDENTITY OF PETITIONER

Comes now the petitioner, Jeremiah Ray Logan, appearing Pro Se and an inmate at the Spokane County Jail 1100 West mallon Ave. Spokane, W.A. 99260.

II. COURT OF APPEALS DECISION

Pursuant to R.A.P. 13.4, petitioner seeks review of the order of the court of Appeals Division III, entered on April 28, 2016 that denied to review and affirmed convictions on Spokane County Superior Court # 121022438 A copy of the court's decision is attached hereto as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. That failure by trial court to give Petrich instructions when required violated petitioners constitutional rights to a unanimous jury verdict.

2. By state failing to follow WPIC 4.25 when giving evidence of several incidents lessens the states burden to prove all elements beyond a reasonable doubt.

3. Invited error analysis should not apply when trial court and state have burden and responsibility, and defense did not diliberately create error by giving pattern instructions.

IV. STATEMENT OF THE CASE

On April 28, 2016 the court of Appeals Div. III filed an unpublished opinion declining to review my appeal and affirming convictions in case NO. 33022-2-III. The court of appeals has used the invited error analysis stating since my attorney failed to propose the Petrich instructions, trial court failed to propose, and state failed to elect when the cause warranted by constitutional rights to jury unanimity. Since this case is clearly not one where counsel purposely invited the error and because constitutional rights are in question I am respectfully asking for review.

V. ARGUMENT

Due process violation, when the evidence indicates that several distinct acts have been comitted, but the defendant is charged with only one count of criminal conduct, the constitutional requirement of jury unanimity is assured by either: (1) requiring the prosecution to elect the act upon which it will rely for conviction; or (2) instructing jury that all 12 jurors must agree that the same criminal act has been proven beyond a reasonable doubt. State V. Petrich, 101 Wash.2d 566, 572, 683 p.2d 173 (1984). Failure to follow one one of these options violates a defendant's state constitutional right to a unanimous jury verdict and his or her Federal constitutional rights to jury trial. State V. Kitchen, 110 Wash.2d 403,409,756 P.2d 105 (1988). By state and trial courts failure to follow WPIC 4.25 in my case this therefore lessened the burden to prove all elements of the crime. In State V. Jennings, 111 Wash.App.54,62,44 P.3d 1 (200@). The Jennings court explains in Nader V. United States, 527 U.S. 1, 119,S.CT.1827, 144 L.Ed.2d 35 (1999), The U.S. Supreme court determined

that a jury instruction that relieves the prosecution of its burden to prove an element of a crime is subject to harmless error analysis. Jennings,111 wash.App. at 62-63,44 P.3d 1 (citing Neder, 527 U.S. at 8,119 S.ct.1827). Under Neder, an error is harmless if it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict. Neder, 527 U.S at 15,119 S.ct.1827 (citing Chapman V. California, 386 U.S. 18,24,87 S.ct.824,17 L.Ed 705 (1967). Applied to an element omitted from, or misstated in, a jury instruction the error was harmless if that element is supported by uncontroverted evidence, Jennings, 111 Wash.App. at 64,44, P.3d 1 (citing Neder,527 U.S. at 18,119 S.ct.1827). Furthermore in state V Camarillo,115 Wash.2d 60 (1990) *63, to convict a person of a criminal charge, the jury must be unanimous that the defendant committed the criminal act. State V. Stephens,93 Wash.2d 186,190,607 P.2d 304 (1980); State V. Badda, 63 Wash.2d 176, 385 P.2d 859 (1963). In cases where there is evidence of multiple acts of like misconduct which relate to one charge **852 against the defendant, the state is required to elect which act it is relying

upon for a conviction. State V. Workman,66 Wash. 292, 119 P.751 (1911); *64 State V. Sargent, 62 Wash. 692,114 P.868 (1911); Workman states: While evidence of separate commissions of the offense may be admitted as tending to prove the commission of the specific act relied upon, the proper course in such a case, after the evidence is in is to require the state to elect which of such acts is relied upon for a conviction. Workman,66 Wash. at 295, 119 P. 751. State V. Petrich, Supra, construed the rule in Workman to require the trial court to instruct the jury that all 12 members had to agree that the same underlying act has been proven beyond a reasonable doubt if the state neglects to elect which act constituted the crime. The Workman-Petrich rule assures a unanimous verdict on one criminal act thereby protecting a criminal defendant's right to a unanimous verdict. Failure of the court to follow the rule in Workman and Petrich is 'violative of a defendant's state constitutional right to a jury trial." State V. Kitchen, 110 Wash.2d 403,409,756 P.2d 105 (1988) Const. Art. 1,22 (amend.10); U.S. const. amend.6 when error occurs during a trial the jury verdict will be

affirmed only if the error was harmless beyond a reasonable doubt. Chapman V. California, 386 U.S. 18, 87 S.ct.824,17 L.Ed.2d 705,24 A.L.R.3d 1065) (1967) State V kitchen,Supra. This should place burden on state and trial court to uphold constitutional rights in a trial proceeding.

Defense counsel in my case proposed pattern jury instructions as did the state, (I was not able to get a copy of the clerk papers with both proposed instruction as the 30 days I had to file this brief did not provide me with enough time although I did request a copy without answer) The state gave evidence of distinct seperate acts and never elected which act it wanted the jury to agree upon. This required the state by law to use the set Petrich instructions. Simply because defense counsel failed to call the state on this error and because trial court failed to move state to elect should not deny a defendant's constitutional right to a fair trial. In my case it is clear that defense counsel did not intend error as it would not of been a reasonable strategy to do so and that is plain common sense. To reject all cases based on the

strict one principle is unconstitutionally prejudice.

It is clear that the invited error doctrine was brought about to prevent parties from setting up an error at trial to later complain about it on appeal as in State V. Pam,101 Wash.2d 507, 511,680 P.2d 762 (1984); State V. Mak, 105 Wash.2d 692,718, P.2d 407, cert.denied, 479 U.S. 995, 107 S.ct. 599, 93 L.Ed.2d 599(1986). In State V. Henderson, 114 Wash.2d 867 (1990) * 872 in Utter J. dissenting opinion, "Normally, the doctrine of invited error would prevent the defendant from objecting on appeal to a jury instruction he proposed at trial. However, the doctrine should be applied prudently, with respect to the facts of each case, to prevent denial of a constitutional right. State V. Henderson * 874-876. Some courts have applied the rule without exception or without discussion, but see United States V. Solis, 841 F.2d 307,309 (9th cir.1988) allowing review for plain error where defendants failed to object to instruction, expressly stated they had no objection, and helped prepare instruction court gave). Other courts, after carefully balancing the rights involved,

have concluded that the doctrine "connot be without exception." State V. Dozier,163 W.Va. 192,195,255 S.E.2d 552 (1979) See also People V. Bender,20 Ill.2d 45,54,169, N.E.2d 328 (1960); People V. Graham,71 Cal.2d 303,455 P.2d 153,78 Cal. Rptr. 217,227 (1969); State V. Rouse,63 Or.App 161,163,662 P.2d 798, review denied, 295 Or. 618,670 P.2d 1034 (1983); United States V. Espinal 757, F.2d 423,426 (1st cir.1985).

After gathering cases from other jurisdictions, the West Virgina Supreme Court found that authorities "compel the conclusion" that general rule must yield if application violates due process.Dozier, 163 W.Va. at 195,255 S.E. 2d 552. While such a rule [invited error doctrine] is normally applicable in cases involving mere error, it will not operate to deprive an accused of his constitutional right to due process. Dozier, 163 W.Va. at 195,255 S.E.2d 552, quoting People V. Bender, 20 Ill.2d 45,54,169 N.E.2d 328 (1960). The court pointed out that an error of constitutional dimension exists regardless of who requested the instruction, and that it is ultimately the responsibility of the trial court to ensure that proposed instructions

correctly state the law. Dozier,163 W.Va. at 196,255 S.E.2d 552. The court concluded: **We are of the opinion that it would be a travesty of justice to hold the accused invited the error and thus effectively waived a fundamental constitutional right. It is extremely unlikey that the defendant had any knowledge that a constitutionally erroneous instruction was being offered on her behalf. It is even more unlikely that she made a knowing and intelligent waiver of her constitutional rights, and we shall not presume that she did in the face of a silent record. In Dozier, the court noted that it would use the plain error standard of review to prevent manifest injustice if the defendant had merely failed to object to an instruction proffered by the prosecution. The court, following the lead of California courts, refused to treat a mere "unfortunate mistake" of invited error differently. In State V Henderson,114 Wash.2d 867 (1990) Utter J. dissenting opinion was recognized by State V. Hargrove,48 Kan.App.2d 522,293 P.3d 787 (2013). In State V. Hargrove, It was found that an invited error of constitutional import in a jury instruction

should not be immune from review on direct appeal if defense counsel requested a defective instruction through inadvertence and without strategic design; to hold otherwise would deprive an accused of individual fairness. State V. Hargrove *530 The omission of an element of a charged offense from an instruction compromises the defendant's right to trial by jury protected in the sixth amendment to the United States constitution. See Neder V. United States,527 U.S. 1, 18,119 S.ct.1827,144 L.Ed.2d 35 (1999) It therefore, erodes a fundamental right. The failure to instruct a jury on an element of a criminal offense may amount to harmless error in some limited circumstances. The United States Supreme Court determined the omission could be treated that way if the element were "uncontesed and supported by overwhelming evidence."
In my case the missing Petrich instructions were not harmless as it allowed the jury to improperly aggregate evidence to reach a guilty verdict. with conflictiong testimony and uncertainty about several of the alleged incidents a rational jury could have disagreed as to the underlying facts but convicted due to a cumulation of allegations.

I have attached my appellant brief to further support my arguments. See Appendix B.
In the light of the undeliberate error by state, trial court and defense counsel I could not of knowingly and intelligently waive my constitutional rights to an unanimous jury verdict

VI. CONCLUSION

For the foregoing reasons, I respectfully request that the court Reverse the convictions and remand for new trial.

Respectfully submitted this 24 day of 05 2016

Jeremiah Logan

Jeremiah Logan

Appendix - A

FILED
April 28, 2016
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,	)	No. 33022-2-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
JEREMIAH RAY LOGAN,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, J. — A jury convicted Jeremiah Ray Logan of second degree rape of a child and second degree child molestation. In his appeal, he asserts that his constitutional right to a unanimous jury verdict was violated because the trial court failed to give a *Petrich*[1] instruction. We conclude that Mr. Logan invited this error and we decline to review it. We therefore affirm.

FACTS

Desiree Logan married Jeremiah Logan in 2009. Desiree had a daughter, B.E.H., who was not Jeremiah's daughter. B.E.H. was born on January 22, 1999. The Logans

---

[1] *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), *overruled in part on other grounds by State v. Kitchen*, 110 Wn.2d 403, 406 n.1, 756 P.2d 105 (1988), *abrogated in part on other grounds by In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 316 P.3d 1007 (2014).

had three younger children together, and for a period of time, all six lived in a three bedroom trailer. They had a single computer in the home, which they kept in the master bedroom on a computer desk next to the head of the bed.

Around September or October 2011, Ms. Logan came home from work to find B.E.H. sitting on her husband's lap, alone in the master bedroom, watching YouTube videos on the computer. The way they were sitting "instantly" made Ms. Logan feel uncomfortable, and she thought it was inappropriate. Report of Proceedings (RP) at 84.

Around February 9, 2012, Desiree Logan came home from work and the master bedroom door was locked. B.E.H. and her stepfather were alone in the room. Ms. Logan unlocked the door with a key, and opened the door to find B.E.H. walking toward the door with her pants unzipped and Jeremiah sleeping in bed. When Desiree asked B.E.H. why her pants were unzipped, B.E.H. said she was looking at pornography on the computer. However, much later she stated that her stepfather had been rubbing her vagina while they sat on the bed watching pornography, and when her stepfather heard the door being unlocked he pretended to be asleep.

On February 16, 2012, a confidant convinced B.E.H. to report the abuse. Just prior to reporting the abuse, and while Mr. Logan was asleep, B.E.H. took her younger half-siblings to a neighbor's house and the neighbor called the police.

PROCEDURE

On June 27, 2012, the State charged Jeremiah Logan with second degree rape of a child and second degree child molestation, occurring "on or about between September 15, 2011 and February 17, 2012." Clerk's Papers (CP) at 1. At trial, B.E.H. testified to roughly half a dozen instances in which her stepfather molested or raped her. She testified that these sexual assaults occurred after she started seventh grade in the fall of 2011, and continued almost until she left the trailer.

Both the State and Mr. Logan filed proposed jury instructions. Both sets permitted the jury to find guilt based on the broad timeframe charged. Specifically, Mr. Logan's proposed to-convict instruction for rape of a child in the second degree stated in relevant part:

> To convict the defendant of the crime of rape of a child in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the Fall of 2011 to February 16, 2012, the defendant had sexual intercourse with [B.E.H.];

CP at 45.

Similarly, Mr. Logan's proposed to-convict instruction for second degree child molestation stated in relevant part:

> To convict the defendant of the crime of child molestation in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about Fall 2011 to February 16, 2012, the defendant had sexual contact with [B.E.H.];

CP at 47. Neither the State nor Mr. Logan proposed a *Petrich* instruction.

The trial court later prepared its jury instructions. In its to-convict instructions, the trial court gave a broad timeframe substantially similar to the timeframe quoted above. The trial court presented its instructions to both counsel, and asked for their comments. The State had no objections or exceptions. Mr. Logan's counsel said, "No exceptions or objections from the defense, either." RP at 174.

The jury found Mr. Logan guilty of second degree rape of a child and second degree child molestation. The trial court sentenced him to 210 months to life imprisonment.

LAW AND ANALYSIS

A. *Failure to give a* Petrich *instruction*

Mr. Logan contends the trial court erred because it did not instruct the jury on unanimity. He argues a unanimity instruction was required because the State presented evidence of multiple acts that could constitute the crimes charged.

"'To convict a person of a criminal charge, the jury must be unanimous that the defendant committed the criminal act.'" *State v. Bobenhouse*, 166 Wn.2d 881, 892, 214 P.3d 907 (2009) (quoting *State v. Camarillo*, 115 Wn.2d 60, 63, 794 P.2d 850 (1990)). When the evidence indicates that several distinct criminal acts have been committed, but the defendant is charged with only one count of criminal conduct, jury unanimity must be protected. *State Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), *overruled in part on other grounds by State v. Kitchen*, 110 Wn.2d 403, 406 n.1, 756 P.2d 105 (1988), *abrogated in part on other grounds by In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 316 P.3d 1007 (2014). To protect unanimity, the State may elect on which act it relies for conviction, or the jury must be instructed that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt. *State v. Barrington*, 52 Wn. App. 478, 480, 761 P.2d 632 (1988). Washington labels such a jury instruction a "*Petrich* instruction." A trial court's failure to give a *Petrich* instruction when warranted violates a defendant's state constitutional right to a unanimous jury verdict and the United States constitutional right to a jury trial. *Camarillo*, 115 Wn.2d at 64 (quoting *Kitchen*, 110 Wn.2d at 409).

Nevertheless, the invited error doctrine precludes appellate review of an alleged error affecting even a constitutional right of a defendant. *State v. Henderson*, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990). "The invited error doctrine is a strict rule that precludes a criminal defendant from seeking appellate review of an error he helped create." *State v. Carson*, 179 Wn. App. 961, 973, 320 P.3d 185 (2014), *aff'd*, 184 Wn.2d 207, 357 P.3d 1064 (2015).

Here, Mr. Logan's proposed jury instructions for both charged offenses allowed him to be convicted if the jury found the criminal conduct to have occurred from "on or about the Fall of 2011 to February 16, 2012." CP at 45, 47. The trial court's jury instructions provided a substantially similar broad timeframe. When the trial court asked whether Mr. Logan had any comments to the court's instructions, defense counsel answered, "No exceptions or objections from the defense, either." RP at 174. We conclude that Mr. Logan, by proposing near identical instructions as those actually given by the trial court, by not proposing a *Petrich* instruction, and by not objecting to the court's instructions, has invited the error he now raises. We decline to review this alleged error.

Affirmed.

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.

Lawrence-Berrey, A.C.J.

WE CONCUR:

Fearing, C.J.

Pennell, J.

Appendix - 13

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 33022-2-III

STATE OF WASHINGTON, Respondent,

v.

JEREMIAH RAY LOGAN, Appellant.

APPELLANT'S BRIEF

Andrea Burkhart, WSBA #38519
Burkhart & Burkhart, PLLC
6 ½ N. 2nd Avenue, Suite 200
PO Box 946
Walla Walla, WA 99362
Tel: (509) 529-0630
Fax: (509) 525-0630
Attorney for Appellant

TABLE OF CONTENTS

AUTHORITIES CITED

State Cases

I. INTRODUCTION

Jeremiah Logan was convicted of one count each of rape of a child in the second degree and child molestation in the second degree, following a trial in which the State presented evidence of multiple instances of sexual contact occurring over a three month period. The State did not elect which single incidents supported the charge, nor did the court give a unanimity instruction informing the jury that it had to unanimously agree which underlying event comprised the charged conduct. This error requires a new trial.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in failing to give a unanimity instruction pursuant to *State v. Petrich* when the State presented evidence of multiple acts that could comprise the charged crimes and did not elect which act it relied upon to support each charge.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Did the State present evidence of multiple acts that could comprise the factual basis for each of the counts charged without electing which act comprised the charged offense? YES.

ISSUE 2: Do the multiple acts alleged to have occurred over a three month period comprise a continuous course of conduct? NO.

IV. STATEMENT OF THE CASE

The State charged Jeremiah Logan with one count of rape of a child in the second degree and one count of child molestation in the second degree, both perpetrated against his step-daughter, B.E.H. CP 1-2. At trial, B.E.H. described several incidents that occurred after she started seventh grade. I RP 115. During the first incident, B.E.H. testified that she fell asleep in front of the fire in the living room when Logan lied behind her, put his hands down her pants and touched her vagina. I RP 115-16. On another occasion, B.E.H. went into the master bedroom to play on the computer when Logan again put his hands down her skirt and touched her vagina underneath her clothes. I RP 120-21. She stated that she felt his fingers go into her vagina. I RP 121. Other incidents that B.E.H. described included allegations that Logan performed oral sex on her, fondled her breasts, and attempted twice to penetrate her with his penis. I RP 122-26. She also described a separate incident when Logan was playing pornography on the computer while rubbing her vagina when her mother interrupted it. I RP 129-30. B.E.H. told her mother that she was watching porn and Logan pretended to be asleep. I RP 130-31. The incidents occurred over a period of three months. I RP 135.

The court's instructions to the jury included no unanimity instruction and Logan's counsel did not take exception to the court's instructions. CP 52-71; II RP 174. Both of the "to convict" instructions identified the incidents as occurring on or between September 15, 2011 and February 17, 2012. CP 64, 68. The jury convicted Logan of both counts. CP 73, 74.

At sentencing, the trial court imposed a low-end standard range sentence of 210 months to life on the rape charge. II RP 293. Logan now appeals. CP 119.

V. ARGUMENT

A *Petrich* instruction was required to ensure juror unanimity when the State presented evidence of multiple acts that could constitute the crimes charged.

The court reviews the adequacy of jury instructions *de novo* as a question of law. *State v. Boyd*, 137 Wn. App. 910, 922, 155 P.3d 188 (2007). When the State presents evidence of multiple distinct acts to support a single charge, it must either elect which act it relies upon to support the charge, or the jury must be instructed that it must unanimously agree that the same underlying act has been proven beyond a reasonable doubt. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). When

the evidence presented at trial discloses two or more violations in support of a single charge, a *Petrich* instruction is required to prevent some jurors from convicting on the basis of one violation, and other jurors convicting on the basis of another, thereby resulting in a lack of unanimity as to the facts necessary to support a conviction. *State v. Hanson*, 59 Wn. App. 651, 657, 800 P.2d 1124 (1990).

Because the instruction implicates the constitutional right to a unanimous jury verdict, failure to give a *Petrich* instruction when required can be raised for the first time on appeal. *Boyd*, 137 Wn. App. at 922-23; *see also State v. Crane*, 116 Wn.2d 315, 325, 804 P.2d 10 (1991). "Failure to give the Petrich instruction, when required, violates the defendant's constitutional right to a unanimous jury verdict and is reversible error, unless the error is harmless." *State v. Bobenhouse*, 166 Wn.2d 881, 894, 214 P.3d 907 (2009) (*citing State v. Camarillo*, 115 Wn.2d 60, 64, 794 P.2d 850 (1990)). In evaluating whether the error is harmless, the court presumes the error was prejudicial and only affirms the conviction if no rational juror could have a reasonable doubt as to any one of the events alleged. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988).

A *Petrich* instruction is not required when the evidence presented shows a continuing course of conduct rather than distinct acts. *Crane*, 116 Wn.2d at 326 (*citing Petrich*, 11 Wn.2d at 571). To determine whether the conduct may be charged as a continuous offense rather than distinct acts, the court must evaluate the facts in a commonsense manner. *Petrich*, 101 Wn.2d at 571.

Unanimity instructions have frequently been held required in cases alleging multiple instances of child sex abuse, such as this one, because "child molestation . . . is not an ongoing enterprise." *State v. Gooden*, 51 Wn. App. 615, 620, 754 P.2d 1000 (1988). *Petrich* involved similar facts as the present case, where the child alleged multiple incidents of sexual contact occurring over about an eight month period, including four episodes that were discussed at length. 101 Wn.2d at 568. Likewise, in *Bobenhouse*, the court concluded that testimony about multiple incidents of abuse required a unanimity instruction, although it ultimately held that failure to give the instruction in that case was harmless error. 166 Wn.2d at 893-94. And in *State v. Coleman*, again, the court concluded that evidence of multiple instances of molestation occurring over a three year period required a unanimity instruction. 159 Wn.2d 509, 514, 150 P.3d 1126 (2007).

The present case plainly involves allegations of multiple instances of sexual contact and penetration, beginning with the incident in the living room and occurring multiple times afterward in the bedroom. The State presented at least three instances in which B.E.H. testified to contact by Logan that did not involve penetration, including the incident in the living room, the incident in which he fondled her breasts, and the incident when her mother interrupted them. I RP 116, 123, 130. B.E.H. also testified about four separate incidents of sexual intercourse: (1) Logan placing his fingers inside her vagina, I RP 121; (2) Logan performing oral sex on her, I RP 123; and (3) two incidents in which Logan attempted to put his penis inside her vagina, I RP 124-25, 126-27. B.E.H. testified that the incidents occurred multiple times, over a period of about three months. I RP 132, 135. Any one of the three non-penetrative contacts could have comprised the child molestation charge, and any one of the four penetrative contacts could have constituted the rape charge. Because the evidence shows multiple acts that could have comprised the charged crime, the unanimity instruction was required. *Hanson*, 59 Wn. App. at 657.

Because the *Petrich* instruction was required, the convictions must be reversed unless the State demonstrates beyond a reasonable doubt that the lack of the instruction did not affect the verdict because no rational juror could have had a reasonable doubt as to any of the incidents.

Coleman, 159 Wn.2d at 512. Generally, when the evidence is uncontested, a unanimity instruction may not be required. *Id.* at 514. When there is conflicting testimony, reversal may be necessary. *See Camarillo*, 115 Wn.2d at 65 (discussing *Kitchen* and *State v. Coburn*, 110 Wn.2d 403, 409, 759 P.2d 105 (1988)). Similarly, when the child is able to accurately describe some events with specificity but displays confusion and uncertainty as to others, failure to give the instruction may not be harmless. *Id.* at 65-66 (discussing *Petrich*).

In the present case, as in *Petrich*, B.E.H.'s testimony was clear and specific as to some incidents, and confused and uncertain as to others. Additionally, there was conflicting testimony about the incident when B.E.H.'s mother interrupted them. B.E.H. testified that Logan was touching her vagina with porn on the computer when her mother attempted to come in the room, and Logan pretended to be asleep while she told her mother she had been looking at porn. I RP 130-31. She testified that she was sitting at the computer when her mother came in the room, but she did not remember whether her clothing was undone and she denied telling her mother that she had watched porn on other occasions, including at her father's house. I RP 147-48. When B.E.H.'s mother testified, she said that B.E.H. was walking toward the door with her pants undone. I RP 85-86. According to B.E.H.'s mother, Logan woke up and

began "grilling" B.E.H. about looking at porn. I RP 87. B.E.H., however, testified that Logan said nothing to her about watching porn. I RP 132. B.E.H.'s mother also said that Logan admitted giving B.E.H. the password to a pornography site, saying that she was a teenager and was going to look at it anyway and he would rather have her looking at a safe site. I RP 88-89. B.E.H., however, denied knowing the password to the porn site. I RP 128. And B.E.H.'s mother and Logan both testified that B.E.H. admitted looking at porn in the past, including at her father's house. I RP 102, II RP 185. Both parents confirmed that B.E.H. had been caught lying in the past and she was not happy around the time of the allegations because she wanted to go live with her father. I RP 97-98, II RP 181-82.

Under these circumstances, a rational juror certainly could have had reasonable doubt about the incident when B.E.H.'s mother entered the bedroom, but could have improperly aggregated evidence to reach a guilty verdict. *Coleman*, 159 Wn.2d at 512. In light of the conflicting testimony and B.E.H.'s uncertainty about several of the incidents to which she testified, the error cannot be harmless because a rational jury could have disagreed as to the underlying facts but convicted due to the cumulation of allegations.

VI. CONCLUSION

For the foregoing reasons, Logan respectfully requests that the court REVERSE the conviction and remand the case for a new trial.

RESPECTFULLY SUBMITTED this 27 day of July, 2015.

ANDREA BURKHART, WSBA #38519
Attorney for Appellant

DECLARATION OF SERVICE AND FILING BY AN INMATE CONFINED IN THE SPOKANE COUNTY JAIL
W 1100 MALLON
SPOKANE, WASHINGTON, 99260

I, Jeremiah Logan **, declare that on** May 24 **20** 16
I deposited the foregoing document(s), or a copy thereof, in the internal mail system of the SPOKANE COUNTY JAIL and made arrangements for postage, addressed to:

Name & Address of Court or Other Place of Filing:	**Documents:**
Court of Appeals Division III	Legal brief
N. 500 Cedar	
Spokane, WA 99201	

Name & Address of Parties or Attorneys to be served:

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated At Spokane, Washington on this 24 **day of** May **,20** 16

Jeremiah Logan
Signature[1]

[1] Washington Court Rule GR 3.1 2012.