61776-1

61776-1

NO. 61776-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CHAD PIERCE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE GEORGE MATTSON

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether defendant Chad Pierce has failed to establish that he received ineffective assistance of counsel because his trial attorney did not propose a jury instruction stating that unconsciousness is a defense to child molestation.

2. Whether Pierce has failed to establish that he received ineffective assistance of counsel because his attorney did not call Child Protective Services Social Worker Eric Applebee as a witness at trial.

3. Whether the prosecutor's argument that Pierce fled to Kelso was proper and supported by the evidence at trial.

4. Whether the failure to give a unanimity instruction was harmless because no rational juror could have distinguished among the acts of child molestation.

B. STATEMENT OF THE CASE

The State charged Pierce with molesting his 7-year-old step-daughter. A jury convicted him of two counts of first-degree child molestation. After the verdict, Pierce, acting pro se, brought numerous post-trial motions challenging the verdicts. More than

two years later, the trial court denied Pierce's motions and sentenced him.

1. SUBSTANTIVE FACTS.

B.L. was born on December 5, 1996. RP 1160.[1] She is the daughter of Michael Chapman and Connie Lawrence. RP 813, 1160. She has three older siblings: Jackie, Darrell, and Mika. RP 813, 1099-1100, 1159, 1204-07. For over a decade, the family lived in an apartment in Des Moines, Washington. RP 814-15. Chapman and Lawrence never married, and their relationship ended in early 2003. RP 814.

In July of 2003, Lawrence met Chad Pierce. RP 1161. They married three months later. RP 817, 1161-62. Pierce moved into the Des Moines apartment and began living with Lawrence and the four children. RP 814-20, 1163. According to Lawrence, Pierce told her that he did not want the children sleeping in their bed because he was concerned that he could be accused of molestation. RP 1163-64.

[1] The State adopts the abbreviations for the report of proceedings used in the Brief of Appellant.

The older children did not get along with Pierce; he kicked Jackie and Darrell out of the apartment. RP 1106-07, 1163. By spring of 2004, B.L. was the only child left living with Pierce and Lawrence. RP 1163.

One night in early 2004, B.L woke up from a bad dream, went into her mother's bedroom and tried to wake her up. RP 1109; Ex. 5 at 8-10. When her mother did not wake up, B.L. woke up Pierce. RP 1109; Ex. 5 at 8-9. He told her to climb into bed. RP 1109; Ex. 5 at 8-9. After she did, Pierce started rubbing her belly and moved his hand down to her private area. RP 1110-21; Ex. 5 at 8-9. He placed his finger inside B.L.'s vagina. Ex. 5 at 10-11. She could not sleep the rest of the night. RP 1111.

Pierce molested B.L. again during 2004. Ex. 5 at 13. Once again she had a bad dream, got into bed with her mother and Pierce, and he began touching her. Id. at 14. At trial, B.L. testified that Pierce molested her three or four times. RP 1121-23. Lawrence testified that one day, Pierce told her that he had woken up the previous day and discovered that his hands were between B.L.'s legs. RP 1164-65.

In the fall of 2004, Lawrence and Pierce moved to Everett and left B.L. in the Des Moines apartment, living with her older

sister Jackie. RP 819-20, 1166. One night in early 2005, B.L. and Tia, B.L.'s seven-year-old niece, spent the night at her aunt Amy Rhodes' house. RP 813, 821. That night, Rhodes heard her son yell from another room that Tia was talking "nasty." RP 821-23. Rhodes told Tia to stop. RP 821-23. B.L. ran up to Rhodes and complained that Tia was telling others what Pierce had done to her.[2] RP 823.

Rhodes inquired what Pierce had done, and B.L. explained that one night she had a nightmare, had gotten into her mother's bed and Pierce had put his hands down her pants. RP 823-24. She stated that this had occurred a few times. RP 824. Rhodes was shocked, but tried to hide her feelings from B.L. RP 824. Two days later, Rhodes called Child Protective Services. RP 826.

On February 11, 2005, Des Moines Police Officer Casey Emly contacted Connie Lawrence to discuss B.L.'s report that Pierce had molested her. RP 838-40. Lawrence responded that she was aware of the allegation and that, a few months earlier, she had talked to B.L. about it. RP 840-44. She also stated that she had talked with Pierce and that he explained that he had

[2] B.L. first told her sister Mika about the molestation, and Mika then told Tia. Ex. 5 at 12.

accidentally placed his hands between B.L.'s legs, thinking she was Lawrence. RP 841. He told Lawrence that he stopped when he realized it was B.L. RP 841. Lawrence told B.L. that the touching was an accident, and they did not discuss it again. RP 842.

Later that day, Officer Emly talked to B.L. RP 844-46. B.L. described how she had woken up from a nightmare and went into her mother's bedroom. RP 847. She explained that she woke up Pierce and lay down next to him, and that he then started to rub her breast and vaginal area. RP 847-48. B.L. reported he placed his hands under her clothing and rubbed her bare skin. RP 849. She told the officer that she had talked about the incident with her mother, who told her it was an accident. RP 849.[3]

A few days later, Des Moines Detective George Jacobowitz left a message with Lawrence, stating that he wanted to meet with her. RP 889-90. On February 17, 2005, Lawrence went to the police station and contacted the detective. RP 889. She repeated that Pierce had admitted to accidentally touching B.L. between her legs. RP 891-92. The detective indicated that he wanted a child

[3] Pierce claims that B.L. told the officer that the molestation occurred only once. Brief of Appellant at 8. Officer Emly testified that B.L. described only one incident; the officer did not ask B.L. if it happened again or how many times it happened. RP 854-56.

interviewer to meet with B.L., and Lawrence reluctantly agreed to bring the child in for an interview on February 23, 2005. RP 892-93.

Lawrence did not bring B.L. to the appointment on February 23rd. RP 893. After Detective Jacobowitz left messages for her, Lawrence called him on March 15th. RP 894-96. She claimed to be out of state and, when the detective asked where she was, she refused to reveal her whereabouts. RP 896. When the detective asked why Lawrence had not brought B.L. to the interview, Lawrence responded that nothing had happened to B.L. and that B.L.'s older sisters were putting things into her mind. RP 897. Lawrence claimed that B.L. had told her that Pierce had rubbed only her back and belly. RP 897. Lawrence claimed that she was not with Pierce and that she did not know where he was. RP 897.

In fact, Lawrence and Pierce were together in Washington State. In March of 2005, Lawrence called a friend, Debra Colby, who lived in Kelso, and asked if she, Pierce and B.L. could stay with Colby for a few days. RP 1050-51. Lawrence claimed that they were finishing up a job and were in the area. RP 1052. They ended up staying with Colby for two to three weeks. RP 1051. At trial, Lawrence testified that she took B.L. to Kelso because she

wanted to get away and to observe how B.L. acted around Pierce. RP 1169.

In front of B.L., Lawrence and Pierce discussed with Colby the molestation allegations. RP 1054-55. Pierce stated that he had rubbed B.L.'s stomach after she complained of stomach aches and insisted that he never went under her "panty line." RP 1055-56. He demonstrated on B.L. for Colby. RP 1055-56. He also stated that one time he was sleeping with B.L. and woke up to find his hand "on the wrong place." RP 1075-78. He claimed that B.L.'s siblings were trying to brainwash her against him. RP 1058.

While at Colby's house, Lawrence and Pierce discussed bringing B.L. back to King County to give a statement. RP 1063-64. Pierce was hyper and high-strung over the issue and paced around the house. RP 1064.

On March 16, 2005, Lawrence called Detective Jacobowitz and stated that she would be in the Seattle area on March 18th and offered to bring B.L. in for an interview on that day. RP 898. On March 18, 2005, B.L. met with child interviewer Ashley Wilske. RP 898. B.L. was reluctant to provide information and uncomfortable during the interview. RP 917-18, 963. She stated that she and her mother had recently moved in with friends, whose

names she forgot. Ex. 4 at 3. B.L. claimed that she had no idea where Pierce was and not seen him for a year or two. Ex. 4 at 6. When Wilske asked her about a time she had a nightmare and got into bed with her dad, B.L. responded that nothing had happened. Ex. 4 at 5. B.L. acknowledged that her mother had helped her with what to say. Ex. 4 at 5. When Wilske asked whether B.L. knew what happened and was not supposed to talk about it, B.L. answered "yeah." Ex. 4 at 6-7.

Wilske took a break and, after Detective Jacobowitz spoke with a prosecutor, it was decided to terminate the interview and place B.L. into protective custody. RP 899-900. Lawrence refused to answer when the detective asked her where she was living. RP 922-24. B.L. was later placed in the home of her cousin, Shawna Hill. RP 901-02, 1082.

Lawrence returned to Colby's house in Kelso. RP 1072. Pierce complained to her that he had known that they would keep B.L. if they took her to the interview. RP 1072. A day or two later, Lawrence and Pierce left Kelso. RP 1072.

On March 24, 2005, Dr. Rebecca Wiester examined and interviewed B.L. RP 1141-42. B.L. acknowledged that something bad had happened but said that she did not want to talk about it.

RP 1147-48. She explained that her mother had told her that it was nobody's business. RP 1148. After Wiester inquired further, B.L. reluctantly acknowledged that Pierce had touched her crotch inside her underwear. RP 1149. She stated that it happened once. RP 1149.

On April 5, 2005, child interviewer Ashley Wilske interviewed B.L. again. RP 902. This time, B.L. was more forthcoming and willing to answer questions. RP 928. B.L. described how she woke up one night in February of 2004, and got into bed with her mother and Pierce. Ex. 5 at 8-10. She stated that Pierce placed his finger inside her vagina and that it felt weird. Id. at 10-11. She stated that Pierce did it again during 2004. Id. at 13.

2. THE TRIAL, THE DEFENSE, AND POST-TRIAL PROCEEDINGS.

On April 14, 2005, the State charged defendant Chad Pierce with one count of first-degree child molestation. CP 1. Prior to trial, the State amended the information to add a second count. CP 7-8.

Trial began in February of 2006. Pierce's defense was that the touching was accidental. CP 15. "This case is about an accidental incidental touching that got blown out of proportion...."

RP 803. Pierce called Doctor Ralph Pascauly, who specializes in sleep disorders. RP 1292-98. He described parasomnia behavior as behavior that occurs while one is asleep. RP 1302. After interviewing Pierce for an hour, he opined that Pierce's behavior was consistent with someone who was exhibiting parasomnia behavior. RP 1322-24, 1328. During cross-examination, the doctor acknowledged that he had made no attempt to confirm any of the information provided to him by Pierce. RP 1336. He did not talk with Pierce's wife about Pierce's behavior while sleeping. RP 1330-31.

On March 23, 2006, a jury convicted Pierce as charged. CP 71-72. Sentencing was postponed for more than two years due to Pierce's post-trial motions and conflicts with attorneys. After the verdict, Pierce claimed that he received ineffective assistance of counsel, and the trial court appointed a new attorney, Ruth Warner, to represent him. RP 1505-26. By October 10, 2006, Pierce was unhappy with Warner, and the court granted Pierce's motion to proceed pro se. RP 1548-1611. Pierce then retained attorney Teri Rogers-Kemp as standby counsel. RP 1652. The court allowed Kemp to withdraw after Pierce accused her of supporting the prosecutor. RP 1826-47.

Beginning in November of 2007 and over the course of seven days, the court heard argument from Pierce on his various motions. See 1RP. Among many other issues raised, Pierce complained that his trial counsel refused to pursue his defense that the touching never happened. 1RP 227, 1152. He insisted that he never stated that he had accidentally touched B.L. 1RP 228; Post-trial Ex. 30. He complained that "[t]he sleep defense was the attorney's defense." 1RP 1205.[4] He "was against that from day one." RP 1806.

On May 9, 2008, in a written ruling, the trial court denied Pierce's post-trial motions. CP 1019-25. On June 2, 2008, the court sentenced Pierce, imposing an indeterminate sentence consisting of a 108-month minimum term and a maximum term of life. CP 1035-39.

Pierce appealed. His appeal was delayed over litigation as to whether he could fire his appellate attorneys and/or proceed pro se with standby counsel.

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[4] However, Pierce's trial attorney testified that Pierce told him that he had woken up to find his hand cupped between B.L.'s thighs. 1RP 450, 494. Lawrence also told the attorney that Pierce had admitted that he had held B.L. in "a compromising position." 1RP 447.

C. ARGUMENT

1. PIERCE HAS NOT ESTABLISHED THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO THE FAILURE TO PROPOSE AN UNCONSCIOUSNESS INSTRUCTION.

Pierce claims that he received ineffective assistance of counsel because his attorney did not create and propose an instruction stating that unconsciousness is a defense to child molestation. However, the jury instructions, as given, allowed Pierce to argue his theory of defense: they required that the jury find that Pierce touched B.L. for the purpose of his sexual gratification. No one suggested or argued that he could be guilty of the crime if he molested B.L. while he was asleep. Because Pierce's counsel was able to argue his theory of the case based upon the instructions given, the failure to create and request an additional instruction does not constitute ineffective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, Pierce must show that "(1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances, and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's

unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either element of the test is not satisfied, the inquiry ends. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

The Supreme Court has held that the failure to request a particular jury instruction will not establish ineffective assistance of counsel if defense counsel is able to argue his theory of the case based upon the instructions given. State v. Cienfuegos, 144 Wn.2d 222, 224-30, 25 P.3d 1011 (2001). Cienfuegos was charged with first-degree escape based upon his escape while being transported from the courthouse to the jail. Id. at 225-26. There was evidence that he had taken drugs the previous day, and the defense presented expert testimony that Cienfuegos was in severe withdrawal and probably did not know what he was doing. Id. at 226.

On appeal, Cienfuegos claimed that he received ineffective assistance of counsel because counsel did not ask for a diminished capacity instruction. Id. at 227. The Supreme Court held that Cienfuegos was entitled to such an instruction, but rejected the

argument that the failure to propose one constituted per se ineffective assistance of counsel. Id. at 227-29. The court noted that the jury was instructed on the definition of knowledge and that during closing argument the prosecutor and defense counsel argued extensively about Cienfuegos's ability to have knowledge and form the requisite intent. Id. at 229-30. The Court concluded:

> From this instruction, the jury could have taken into account Cienfuegos's impairment. The diminished capacity instruction would have highlighted that fact and should have been given, but even without it defense counsel was able to argue his theory of the case. Cienfuegos has not met the Strickland requirement that his counsel's errors were so serious as to deprive him of a fair trial.

Id. at 229-30.

Here, the jury instructions were sufficient to allow Pierce to argue his theory that he could not be guilty of child molestation if he was asleep when he touched B.L. The jury was instructed that an element of the crime of child molestation was that Pierce had "sexual contact" with B.L. CP 64-65. "Sexual contact" was defined as "[a]ny touching of the sexual or other intimate parts of a person done *for the purpose* of gratifying sexual desires of either party or a third party." CP 66 (emphasis added). The court presumes the juror will interpret a term by its common meaning. State v. Phillips,

98 Wn. App. 936, 946, 991 P.2d 1195 (2000). The term "purpose" means "something set up as an object or end to be attained" or "intention." Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/purpose (last visited Oct. 23, 2010). Based upon the instructions given, defense counsel could and did argue that Pierce could not be guilty of the crime if he was asleep when the contact occurred. RP 1392-1414.

On appeal, Pierce speculates that the jury could have thought that he was guilty of the crime under a theory that a person could be acting in his sleep for the purpose of sexual gratification. Brief of Appellant at 31. There was no testimony to support such a theory and it was contrary to the arguments of both the prosecutor and defense counsel. Dr. Pascauly never suggested that a person acting in his sleep could be acting purposefully. His testimony was that parasomnia behaviors, which occur during a non-dream state, were "distinct" from the very same behaviors done when the person is wide awake. RP 1302.

In closing argument, the prosecutor never suggested that Pierce could be guilty of the crime if he was actually asleep when he touched B.L. RP 1380-86. Instead, she anticipated that the defense would argue that Pierce "was asleep at the time of this

touching, and thus it couldn't have been for the purpose of sexual gratification," and proceeded to argue that the evidence did not support the theory that he was asleep. RP 1382-83. "You have to decide whether it is realistic or believable to believe that a person who is asleep on multiple occasions is reaching into a child's underwear and touching her, whether that is -- those are activities that a person is doing when they're asleep." RP 1383; see also RP 1423.

From the instructions given, the jury could consider Pierce's defense that he accidentally touched B.L. when he was asleep. Pierce has not shown that he was prejudiced by his attorney's failure to request an additional instruction.

Nor has Pierce shown that his attorney acted deficiently in not creating and proposing a special instruction that unconsciousness is a defense to child molestation. There is no standard instruction supporting the notion that unconsciousness is a defense to a crime. Rather, the sole authority cited by Pierce for this proposition is one 40-year-old case, State v. Utter, 4 Wn. App. 137, 479 P.2d 946 (1971), which did not involve an issue about a possible jury instruction, but instead addressed a claim that the trial

court erred by instructing the jury to disregard certain evidence offered by the defense.

Utter was charged with murdering his son. He testified that he had been drinking and did not recall what had occurred. Id. at 138. A psychiatrist called by Utter testified about "conditioned response," which he described as "an act or a pattern of activity occurring so rapidly, so uniformly as to be automatic in response to a certain stimulus." Id. at 139. Utter testified that as a result of his experiences in World War II, he reacted violently toward people approaching him unexpectedly from the rear. Id. The trial court ruled that conditioned response was not a defense in Washington and instructed the jury to disregard all evidence introduced on this subject. Id.

On appeal, the Court of Appeals recognized that "[a]n 'act' committed while one is unconscious is in reality no act at all. It is merely a physical event or occurrence for which there can be no criminal liability." Id. at 143. However, the court held that the evidence offered by the defense was insufficient to present the issue of defense of unconsciousness to the jury. Id.

Utter did not address whether a special jury instruction was required, and defense cites no subsequent Washington case where

the court held that such an instruction is necessary. In light of the fact that defense counsel was capable of arguing that the State had not proven sexual gratification if the jury found that Pierce had been asleep, Pierce has not shown that his attorney acted deficiently in not creating and proposing an unconsciousness instruction.

2. PIERCE HAS NOT ESTABLISHED THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY DID NOT CALL ERIC APPLEBEE AS A WITNESS.

Pierce also claims that he received ineffective assistance of counsel because his attorney did not call Child Protective Services ("CPS") social worker Eric Applebee as a witness. The decision whether to call a witness is a strategic decision that normally cannot support an ineffective assistance of counsel claim. Here, considering the probative value of Applebee's testimony against the possible prejudice, defense counsel could reasonably decide not to call him. In addition, Pierce has not shown that he suffered prejudice: the record does not establish that Applebee's testimony would have been admissible under the rules of evidence.

a. Relevant Facts

In early 2004, Applebee investigated an allegation that Pierce had inappropriately touched B.L.'s older sister Mika. Supp. CP __ (Sub No. 63B at 12-13); Post-trial Ex. 1. On April 21, 2004, Applebee talked with B.L. and questioned her about Pierce and Mika. Post-trial Ex. 1. According to Applebee's report, he asked B.L. "if she was concerned for anyone at school or at home who might have talked about bad touch or been bad touched and she said no." Id.

Prior to trial, defense counsel Sandro Parrotta and his investigator interviewed Applebee. 1RP 262, 850. Applebee acknowledged that he had concluded that Mika's allegations were unfounded, but he did not say it with a lot of conviction, and Parrotta did not feel as though he was getting a straight answer. 1RP 850-51. Parrotta's notes indicate that prior to trial he apparently decided not to call Applebee as a witness. 1RP 267, 981; Post-trial Ex. 56. On an entry dated February 2, 2005, Parrotta listed the names of possible witnesses and next to Applebee's name is the notation "not call." Post-trial Ex. 56.

Parrotta was adamant that the jury not hear that Applebee had investigated Pierce about Mika's allegations. 1RP 462. He

moved to exclude any mention of the sexual misconduct allegations involving her. CP 25-27. "I believe if the jury would have heard that, that Mr. Pierce allegedly had done this to somebody else, they would have convicted him." 1RP 462-63.

During a discussion of the child hearsay witnesses, the court inquired how many individuals had spoken to B.L. about the molestation. RP 441. In response, attorney Parrotta noted that Applebee had talked to B.L. about "bad touch" though "he didn't ask [B.L.] directly did Pierce touch her...." Id. The court commented, "That's relevant evidence." RP 443.

During a pretrial hearing, defense counsel indicated that he was reconsidering whether he would call B.L.'s sister Jackie Lawrence as a witness. RP 698-706. According to defense counsel, shortly after B.L. disclosed the molestation, Jackie spoke to B.L. in private and asked whether Pierce had molested her, and B.L. said no. RP 698. However, counsel perceived Jackie as a hostile witness and informed the court that he was "reconsidering calling her as a witness because of the way a lot of these rulings are taking place. And also with, I think which is quite obvious, the direction of our defense...." RP 698-99. When the State called her, Parrotta did not examine her about this subject. RP 1205.

After defense counsel successfully convinced the court to exclude numerous state witnesses,[5] he indicated that it was his intent to keep the case "streamlined." RP 771. "[T]here's a whole slew of witnesses out there that could potentially come in and, to tell you the truth, Your Honor, I think it's just going to complicate the case and make it very convoluted...." RP 775.

The defense did not call Applebee at trial. In his post-trial motion, Pierce complained that his attorney did not call Applebee as a witness. At the post-trial hearing, Parrotta's recollection was that he wanted Applebee to testify but thought the court had ruled that he could not call him. 1RP 461-62, 661-62.

b. Pierce Has Failed To Show That The Decision To Not Call Applebee Was Unreasonable.

"The decision to call a witness is generally a matter of legitimate trial tactics and will not support a claim of ineffective assistance of counsel." State v. Byrd, 30 Wn. App. 794, 799, 638 P.2d 601 (1981). The failure to call a witness will constitute ineffective assistance of counsel if that failure was unreasonable

[5] The court excluded the testimony of two potential child hearsay witnesses and Community Corrections Officer Shandra Robertson. RP 657-59, 694-97.

and results in prejudice, i.e., a reasonable probability that, had the lawyer presented the witness, the outcome of trial would have been different. State v. Sherwood, 71 Wn. App. 481, 484, 860 P.2d 407 (1993).

Pierce cannot show that it was unreasonable strategy to not call Applebee as a defense witness. While at the hearing on the post-trial motions, counsel did not correctly recall the circumstances behind not calling Applebee,[6] the ineffective assistance reasonableness standard is an objective, not a subjective, one. See Strickland, 466 U.S. at 688, 104 S. Ct. 2052 ("[T]he defendant must show that counsel's representation fell below an *objective* standard of reasonableness."). As long as counsel performed as a competent lawyer would, his subjective reasoning is beside the point. Cofske v. United States, 290 F.3d 437, 444 (1st Cir. 2002).

The decision to not call Applebee was not an unreasonable decision. The probative value of Applebee's testimony was limited. Applebee was not investigating whether B.L. had been molested,

[6] Defense counsel's recollection that the trial court prohibited him from calling Applebee is not supported by the record. Instead, defense counsel's notes for the date of 2/2/05, several weeks before trial began, list a series of potential witnesses and list "Applebee not call." Post-trial Ex. 56.

and he did not directly ask her if she had been molested. Moreover, the claim that Pierce had never touched B.L. was inconsistent with his defense that he accidentally touched her in his sleep. The evidence was also somewhat cumulative - B.L. stated that Pierce had not molested her during her first interview with Ashley Wilske. Finally, Applebee was not a forthcoming witness, and counsel described the interview of Applebee as "pulling teeth." 1RP 850-51.

There was a danger of prejudice to Pierce if Applebee was called as a witness. The jury would hear that, around the time of the actual molestation and before any disclosures by B.L., CPS was apparently concerned that B.L. or someone close to her had been molested. In order to place the interview in context and explain why Applebee did not directly question B.L. as to whether she had been molested, the State would have been entitled to elicit some background as to why Applebee was questioning B.L. Given these circumstances, a reasonable attorney could decide not to call Applebee as a witness.

In a similar vein, defense counsel made the reasonable decision to not attempt to elicit testimony from Jackie Lawrence that B.L. denied that Pierce had molested her. In discussing this

decision, counsel alluded to the fact that Jackie's testimony might not be consistent with the "direction of our defense." No error has been assigned to that decision.

Moreover, in order to show prejudice, Pierce must show (1) that Applebee's testimony would have been admissible and (2) a reasonable probability that, had Applebee testified, the outcome of trial would have been different. The record does not clearly establish that Pierce would have been entitled to call Applebee as a witness. In order to present Applebee's hearsay testimony about B.L.'s statements, Pierce would have had to satisfy the requirements of ER 613. Under that rule, "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." ER 613(b). If the witness responds to foundation questions by admitting making the prior inconsistent statement, then extrinsic evidence of the statement is inadmissible. State v. Dixon, 159 Wn.2d 65, 76, 147 P.3d 991 (2006).

Before Applebee's testimony would have been admissible, defense counsel would first have to cross-examine B.L. about her

meeting with Applebee. Only if she denied her statements to him, would Pierce have been entitled to call Applebee. Counsel never questioned B.L. about this subject, and it is pure speculation as to how she would have answered any questions.[7] The record here is not sufficient to show that Pierce would have been entitled to call Applebee.

Pierce also has not shown a reasonable probability that, had Applebee testified, the outcome of trial would have been different. At best, Applebee would have testified that he asked B.L. "if she was concerned for anyone at school or at home who might have talked about bad touch or been bad touched and she said no." Post-trial Ex. 1. Applebee did not specifically ask whether Pierce had touched B.L. The testimony at trial had established that B.L.'s mother had told her that it was an accident and had discouraged her from discussing it with others. It is hardly surprising that B.L. would not have disclosed the abuse to Applebee – she had reacted the same way during the first interview with Wilske. Finally, Pierce's primary defense was not that he had never touched B.L.,

[7] Pierce has not assigned error to the failure to cross-examine B.L. about any statements she made to Applebee.

but that it had been an accidental touching. Pierce has failed to establish prejudice.

3. PIERCE IS NOT ENTITLED TO A NEW TRIAL BASED UPON PROSECUTORIAL MISCONDUCT.

Pierce claims that the prosecutor committed misconduct by arguing that Pierce and Lawrence fled the area when they went to Kelso. Though Pierce claims that the trial court prohibited such argument, the court made no such ruling. This argument was supported by the testimony at trial, was not objected to and was proper.

a. Relevant Facts

As noted above, the police began investigating the molestation allegations in February of 2005. On February 23, 2005, Lawrence did not bring B.L. to a scheduled child interview, and did not talk with the investigating detective for several weeks. RP 893-96. Sometime in early March of 2005, Lawrence, Pierce and B.L. moved to Kelso and began living with Colby. RP 1050-51. At trial, Lawrence claimed that they went to Kelso because she wanted to get away and see how B.L. acted around Pierce. RP 1169.

Around this time, on March 3, 2005, Pierce met with his Community Corrections Officer Shandra Robertson, who was supervising him on his prior attempted robbery conviction. RP 75-83, 678-79. During this meeting, Pierce discussed the molestation allegations. RP 83-84. Pierce told Robertson that he did not do anything; he explained that B.L. had come into his bedroom because she was having a nightmare and that he cradled her and rubbed her stomach "like a good father would." RP 84. Robertson scheduled a polygraph examination for Pierce for March 8, 2005, but Pierce did not appear and then missed his regular appointments with Robertson. RP 86-87.

Pierce moved to exclude Robertson's testimony because it would reveal that Pierce was on community custody and that he had been convicted of another crime. RP 679. The court indicated that evidence relating to the polygraph examination would not be admitted and questioned why Robertson's testimony was necessary, noting another witness to whom Pierce had made similar statements about the molestation allegations. RP 682-90. The court excluded Robertson after observing that the evidence relating to flight was "marginally probative," but that the testimony would cause considerable prejudice because it would reveal

Pierce's commission of a prior offense. RP 694-97. The court later denied the State's motion for reconsideration and, while conducting an ER 403 balancing analysis, again noted that Robertson's testimony was marginally probative but unduly prejudicial. RP 764-67.

During opening statement, the prosecutor mentioned the evidence of flight:

> The evidence will show that at this point, while the officers and while the detectives are trying to have contact with [B.L.] to get to the bottom of this, that the Defendant and Connie Lawrence fled the area. They drove down about a hundred miles south down to Kelso where they stayed in the home of Debbie Colby.

RP 800. There was no objection.

Defense counsel also discussed the move to Kelso:

> There was an investigation, and we'll hear Ms. Lawrence testify, I was an abused child. I know what to look for. I wanted to get away from this viper pit of allegations.... She wanted to get away from the allegations and that she took her daughter and Mr. Pierce down to Kelso where he was going to do some work for a friend so she could see the interaction between Mr. Pierce and [B.L.].

RP 805.

During closing argument, defense counsel attempted to explain Pierce and Lawrence's decision to take B.L. to Kelso:

> Connie Lawrence testified. You heard her testify. And she testified to some important things. Okay. Now, Ms. Lawrence isn't going to win mother of the year awards. No doubt about it. Ms. Lawrence did some things incorrect. There's no doubt about it....
>
> In her mind, after what Mr. Pierce told her what happened, she thought it was an accident. In her mind, okay, it was an accident, it's nobody's business. Well, that was her reaction. Nothing can change that. However, she also says that she took [B.L.] down to Kelso for several reasons. And one of those reasons was, I was molested as a little kid, I wanted to see my little girl interact with Mr. Pierce. And she's giving him the benefit of the doubt, because Mr. Pierce never denied that there was an uncomfortable situation in the bed.
>
> Yes, there was discussions about taking Connie -or [B.L.] back for the interview. Well, if Connie and Mr. Pierce were a little hesitant about this thing in King County, is that so unreasonable? The little girl who, all of a sudden out of nowhere, makes allegations about Mr. Pierce.

RP 1406-08.

In rebuttal argument, the prosecutor argued that the jury could make a different inference from the move to Kelso:

> Second, what does a guilty person do? They run. And when the police wanted to have [B.L.] start to meet with a child interviewer, when the police started getting concerned about what was happening in that house, they ran. They showed up on Debbie Colby's doorstep and they said that, we're in town, can we stay with you for a while.
>
> Ms. Lawrence admitted it. She said, I just wanted to get away from here. She also -- she said that

> she was going to Debbie Colby's house for a visit. Now you heard Ms. Colby say they called when they were in town. They didn't plan this visit. They didn't intend to come ahead of time. They just drove to somewhere that they knew no one would find them.
>
> Now I want you to remember what Connie Lawrence told the detective on March 15th. The detective testified that Connie Lawrence called him and she said, [B.L.] and I are out of the state, we're not coming back, and I have no idea where the Defendant is. What are they doing? They're trying to hide. They're trying to prevent the police from having contact, finding out what's going on with [B.L.]. What do they also -- what do people do? They hide. And Connie Lawrence herself admitted it. She said she didn't want anybody to know where they were.

RP 1425-26. There was no objection to this argument.

In his motion for a new trial, Pierce complained about this argument, suggesting that the prosecutor should have known that he went to Kelso because he had been evicted. 1RP 900, 956-57. The prosecutor responded that the testimony at trial contradicted this claim; Connie Lawrence had testified that they went because she wanted to put B.L. in a different environment. 1RP 1084-85.

b. The Legal Standard Governing Pierce's Claim.

The law governing Pierce's claim is well-settled. When a defendant claims prosecutorial misconduct, he bears the burden of

establishing that the prosecuting attorney's comments were both improper and prejudicial. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). To establish prejudice, the defendant must show a substantial likelihood that the instances of misconduct affected the jury's verdict. State v. Stenson, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997). "The prejudicial effect of a prosecutor's improper comments is not determined by looking at the comments in isolation but by placing the remarks 'in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

"Where the defense fails to object to an improper comment, the error is considered waived 'unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.'" McKenzie, 157 Wn.2d at 52 (quoting Brown, 132 Wn.2d at 561). Defense counsel's failure to object to the remarks at the time that they are made strongly suggests to a court that the

argument in question did not appear critically prejudicial to the defendant in the context of the trial. 157 Wn.2d at 53 n.2.

c. Pierce Has Not Shown That The Prosecutor's Argument Was Flagrant And Ill-Intentioned.

Given that he did not object, Pierce must show that the prosecutor's comments were flagrant and ill-intentioned. He cannot meet this standard.

Pierce argues that the prosecutor's argument was improper for two reasons. First, he claims that it "relied more on Lawrence's actions than Pierce's" and that "Lawrence's actions do not reflect on Pierce's state of mind." Brief of Appellant at 39-40.

This argument is without merit. In closing argument, the prosecutor has wide latitude in drawing reasonable inferences from the evidence admitted and expressing such inferences to the jury. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). The evidence established that Pierce and Lawrence acted together in taking B.L. to Kelso after the police began investigating B.L.'s disclosures. At Kelso, Pierce and Lawrence together discussed the molestation allegations and whether to bring B.L. to the child interview. When Lawrence finally brought B.L. to the child

interview, the child had been coached to deny that she was living with Pierce or knew where he was. When Lawrence returned to Kelso without B.L., Pierce complained that he had predicted that would happen. It was a reasonable inference from this evidence that Lawrence and Pierce were acting in concert in attempting to avoid the investigation.

Second, Pierce claims that the argument violated the trial court's *in limine* ruling. However, the court's pretrial ruling concerned the admissibility of the testimony of one witness; it did not purport to limit the scope of the prosecutor's closing argument.

The trial court did not prohibit any argument about whether Lawrence and Pierce fled the area after the police began investigating the molestation allegations. Not surprisingly, defense counsel did not believe this argument was prohibited. As he later explained to Pierce at a post-trial hearing: "I thought the court ruled that they couldn't argue that you took flight from the probation officer. But I believe the State was arguing flight was when you and Connie took [B.L.] to Kelso. They might have been arguing that she was supposed to be going to an interview, but you took her to Kelso." 1RP 900-01. The prosecutor's argument was not in violation of the trial court's pretrial ruling.

Pierce argues that the prosecutor's argument was misleading because there was an excluded reason for why he may have fled the area: because he was threatened with a polygraph examination. However, the fact that Pierce may have had multiple (and related) reasons for fleeing does not mean that the prosecutor was somehow barred from making an argument based upon the admitted evidence.[8] The testimony at trial supported the argument that he fled because of the police investigation – he and Lawrence left for Kelso shortly after the police requested that Lawrence bring in B.L. for an interview. The evidence established that in Kelso, Pierce was agitated when discussing the proposed interview and that he later complained after Lawrence returned from the first interview without B.L. The prosecutor's argument was properly based upon the evidence admitted at trial.

Pierce cites a comment from the trial court during post-trial hearings suggesting that an argument that Pierce fled would have been a violation of the State's duty not to mislead the jury. Brief of Appellant at 22. However, this passing comment, made by the

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[8] On appeal, Pierce suggests that he fled to Kelso to avoid the polygraph, but in his post-trial motion, he insisted that this was not true. Instead, he claimed that the CCO asked him to take a polygraph examination weeks earlier and that he left for Kelso because he was being evicted. 1RP 237-40.

court before reviewing the record or hearing argument from the prosecutor on the issue, was in response to an argument by Pierce not raised in this appeal. In his post-trial motion, Pierce complained that he went to Kelso because he was being evicted and he suggested that the State knew this. RP 1808; see also 1RP 900, 956-57. In response, the court noted that if there was evidence that he had not fled but had simply been evicted, "there'd probably be some duty not to mislead...." RP 1810. The trial court never held that the prosecutor's argument was misleading, and a review of the record reveals that it was entirely proper.

Even if the prosecutor's argument was somehow improper, Pierce has not shown that the comments were flagrant and ill-intentioned. The trial court did not expressly prohibit the prosecutor from arguing that Pierce fled, and Pierce's trial counsel acknowledged that he did not think the argument violated any pretrial ruling.

Finally, Pierce has not established that a proper and timely objection could not have neutralized any prejudice. McKenzie, 157 Wn.2d at 52. Had the trial court agreed that the argument was improper, the court could have struck the comments and instructed the jury to disregard them. The argument was based upon

admissible evidence and was not so inflammatory that the jury would have been incapable of putting it aside if instructed by the trial court to do so.

4. THE FAILURE TO GIVE A UNANIMITY INSTRUCTION WAS HARMLESS.

For the first time on appeal, Pierce claims that the trial court erred by failing to give a unanimity instruction. Such an instruction is necessary when there is evidence of multiple acts supporting a single criminal charge. Because B.L. testified that she was molested 3 or 4 times, a unanimity instruction should have been given. However, the failure to give a unanimity instruction is harmless if the evidence did not permit the jury to rationally discriminate between the incidents. Here, B.L. described only one incident in any detail, and Pierce's defense was one of general denial. Though no unanimity instruction was given, the error was clearly harmless because there was no rational way for a juror to differentiate among the various acts of child molestation.

A defendant has a constitutional right to be convicted by a jury that unanimously agrees that the crime charged in the information has been committed. State v. Petrich, 101 Wn.2d 566,

569, 683 P.2d 173 (1984). When there is evidence that several distinct criminal acts have been committed and the State has not elected the act upon which it relies for conviction, the trial court should provide the jury with a unanimity instruction. Petrich, 101 Wn.2d at 572.

When the trial court erroneously fails to give such an instruction, the jury verdict will be affirmed only if the error was harmless beyond a reasonable doubt. State v. Camarillo, 115 Wn.2d 60, 64, 794 P.2d 850 (1990). The failure to give a unanimity instruction is harmless error if the evidence did not permit the jury to rationally discriminate between the incidents. State v. Bobenhouse, 143 Wn. App. 315, 327-28, 177 P.3d 209 (2008); State v. Jones, 71 Wn. App. 798, 822, 863 P.2d 85 (1993).

In Camarillo, the victim testified similarly to three distinct instances of sexual molestation, and the defense was general denial. This Court concluded that, while a unanimity instruction should have been given, the error was harmless. "The uncontroverted evidence upon which the jury could reach its verdict reveals no factual difference between the incidents." 115 Wn.2d at 70.

In Camarillo, the Court found the Court of Appeals' reasoning in State v. Allen, 57 Wn. App. 134, 787 P.2d 566 (1990) persuasive. In Allen, the victim testified that defendant Dixson sexually molested her in the same manner on a daily basis for several months. Dixson's defense was general denial and he did not attempt to distinguish among or question any specific incidents charged. The court found the error harmless:

> In view of Dixson's general denial of any improper physical contact and C.P.'s testimony that substantially the same contact occurred during each visit, we find no rational basis for jurors to distinguish among the acts charged in Count I. The jurors had either to believe Dixson and acquit or believe C.P. and convict. There is no possibility that "some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction."

57 Wn. App. at 139.

More recently, in State v. Bobenhouse, 166 Wn.2d 881, 214 P.3d 907 (2009), the court held the failure to give a unanimity instruction harmless where one count of first-degree rape of a child was based upon evidence that the defendant regularly forced his son to perform fellatio on him and on at least one occasion inserted his finger into his son's anus. Again, the court found the error harmless:

> Bobenhouse offered only a general denial to these allegations, and, consequently, the jury had no evidence on which it could rationally discriminate between the two incidents (i.e., fellatio and digital penetration of John's anus). Put otherwise, if the jury in Bobenhouse's case reasonably believed that one incident happened, it must have believed each of the incidents happened. In applying the reasoning of Camarillo to this case... we conclude the trial court's failure to instruct the jury on unanimity constituted harmless error.

Id. at 895.

Here, there is no possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity. B.L. described one particular incident and simply stated that Pierce did the same thing a total of 3 to 4 times. During closing argument, neither the prosecutor nor the defense counsel distinguished among individual incidents. In finding Pierce guilty, the jury necessarily had to find B.L. credible. Because the evidence presented no rational basis for some jurors to predicate guilt on one act while other jurors based it on another, any error was harmless.

Pierce speculates that the jurors may not have been unanimous because they might have disagreed as to whether Pierce was asleep during some of the incidents. However, Pierce only argued that he was asleep during the first incident. He never

suggested or argued that he somehow managed to molest B.L. multiple times in sleep.

In his brief, Pierce cites State v. York, 152 Wn. App. 92, 96, 216 P.3d 436 (2009), for the proposition that the error was not harmless. In York, the defendant was charged with four counts of second-degree rape of a child. The first three counts were based upon specific instances and the fourth count was based upon the victim's general testimony that sex occurred on many other occasions but she could not remember other specific instances. Id. at 93. The victim testified that she spent the night at "Cindy's house" every Friday and York had sex with her there on most occasions. Id. at 94. On appeal, York challenged the fourth count for the failure to give a unanimity instruction.

The Court of Appeals held that the error could be harmless only if no rational juror could have a reasonable doubt as to any of the alleged incidents. Id. at 96. The court held that "we have no way to determine which specific act the jury relied on when considering the fourth count or whether it simply convicted him because the victim testified they had sex '[m]ost of the time.' Thus, we cannot evaluate the force of the evidence as to that count." Id. The court then concluded that the error was not harmless, noting

that there was conflicting evidence about whether York had sex with the victim at "Cindy's home" because Cindy testified that York never stayed at her home. Id.

To the extent that York suggests that the appellate court must be capable of determining which specific act the jury relied upon, the decision is inconsistent with Washington Supreme Court precedent. In any case where the error is the failure to give a unanimity instruction, the appellate court will not know what act or acts the jury ultimately relied upon. Instead, the court's proper focus is on whether there was a possibility that the jury was not unanimous as to the acts supporting the charge; accordingly, the court looks to whether the jury could rationally have discriminated between the incidents supporting the count. Bobenhouse, 166 Wn.2d at 895. In York, while not entirely clear, it appears that there was varying evidence supporting the acts that were the basis of the fourth count. However, here, the facts of this case are similar to those in Bobenhouse, Camarillo, and Allen, and there was no rational basis for a juror to distinguish between the acts described in B.L.'s testimony. This Court should hold that the error was harmless.

D. CONCLUSION

For the reasons cited above, this Court should affirm Pierce's convictions and sentence.

DATED this 25 day of October, 2010.

Respectfully submitted,

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Mr. Hudgens' determinate sentence specified a five-year maximum punishment. We requested additional briefing on this point. Mr. Hudgens' sentence is 26 months' confinement plus 36 to 48 months' community custody or the period of earned early release, whichever is longer. The potential combined terms of confinement and community custody are thus from 66 to 74 months, exceeding the statutory 60 month maximum. This violates RCW 9.94A.505(5) (a court may not impose a term of confinement and a term of community custody that exceeds the statutory maximum for the crime). RCW 9A.44.079; RCW 9A.20.021(1)(c). Accordingly, we remand to the trial court for an amended sentence establishing that the combination of confinement and community custody shall not exceed the statutory maximum. ***In re Pers. Restraint of Brooks*, 166 Wash.2d 664, 675, 211 P.3d 1023 (2009**).

In re Hudgens 156 Wash.App. 411, 422, 233 P.3d 566, 571 (Wash.App. Div. 3,2010)

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to

Dana Lind, the attorney for the appellant, at Nielsen Broman & Koch, 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. CHAD PIERCE, Cause No. 61776-1-I, in the Court of Appeals, Division I, for the State of Washington.

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

Name

Done in Seattle, Washington

10-25-10

Date

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