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

STATE OF WASHINGTON, RESPONDENT

v.

NESTOR POZOS RIVERA, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Gretchen Leanderson

No. 16-1-03115-5

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
ROBIN SAND
Deputy Prosecuting Attorney
WSB # 47838

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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

1. Should this Court dismiss the defendant's double jeopardy claim where the State made clear elections as to which acts supported each charge of child molestation in the first degree?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On August 2, 2016, the State charged Nestor Ricardo Pozos Rivera, hereinafter referred to as "the defendant", with two counts of child molestation in the first degree, domestic violence related. CP 1-2. The Honorable Judge Gretchen Leanderson presided over jury trial which began on May 22, 2017. 1RP 105.¹ On June 1, 2017, a jury found the defendant guilty beyond a reasonable doubt of two counts of child molestation in the first degree. 4RP 540-541.

On July 28, 2017, the court sentenced the defendant to 89 months in custody, the high end of the sentencing range, on both counts to run concurrently. 4RP 554, CP 71-87. The court also imposed the

¹ There are five volumes of verbatim report of proceedings. They are not paginated consecutively. The State will refer to each as follows: 4-17-17RP, 1RP for Volume 1, 2RP for Volume 2, 3RP for Volume 3 and 4RP for Volume 4.

mandatory legal financial obligations and a lifetime no-contact order with the victim. 4RP 554, CP 71-87.

2. FACTS

S.M.M.,² was born on October 4, 2005. 2RP 117-119. Her mother Cassie Pozos Rivera³ married the defendant in 2011. 2RP 120. Cassie gave birth to S.M.M.'s little sister J.P.R. on January 17, 2012. 2RP 119, 121, 164-165. In 2013, they all moved into a mobile home. 2RP 167-168.

In 2015, the defendant assaulted S.M.M.'s mother and yelled at S.M.M. to watch as he kicked Cassie. 3RP 389-390. Shortly after, Cassie separated from the defendant and moved out of the mobile home with her children. 2RP 169-170, 185, 389-390. Beginning in late October to early November of 2015, Cassie allowed the defendant to have visitation with the children because he was the only father figure in S.M.M.'s life. 2RP 117-119. S.M.M.'s biological father died when she was only two years old. 2RP 117-119. The defendant had visitation with the children from Friday through Sunday each week. 2RP 187.

S.M.M. had a difficult childhood. 3RP 421. The defendant often left S.M.M. by herself to take care of 3 year old J.P.R. while he was gone

² The State refers to S.M.M. by her initials because she is a juvenile.

³ The defendant and Cassie Pozos Rivera have the same last name. To avoid confusion, the State will refer to Cassie Pozos Rivera as "Cassie" for the purposes of clarity. No disrespect is intended.

all day, often returning at night. 3RP 398. The mobile home was a mess. 3RP 397. S.M.M. and J.P.R. was forced to share a bed with the defendant because the other bed was too cluttered to sleep on. 3RP 397. S.M.M. cleaned the defendant's clothes and did his laundry while he was gone. 3RP 398. There were flies in the home because of the dirty dishes left all over. 3RP 399. S.M.M. had to find herself and J.P.R. food testifying, "[p]retty much wherever we could find it. If it was good, we ate it. We didn't have that much good food in this house." 3RP 400.

On Friday December 4, 2015, the defendant picked S.M.M. and J.P.R. up for visitation. 2RP 190-191. That night after S.M.M. fell asleep, she woke up with the defendant's hand inside her underwear. 3RP 401. The defendant moved his fingers around S.M.M. vagina in a circular motion. 3RP 402. Scared, S.M.M. pretended to go use the bathroom to get away. 3RP 403. Although S.M.M. flushed to toilet to make it seem as if she was using the bathroom, she sat on the toilet crying before returning to bed. 3RP 403-404.

The defendant molested S.M.M. again the next morning. 3RP 404-405. The defendant asked S.M.M. if she wanted to play a biting game while she was still in bed from the night before. 3RP 404. Although S.M.M. said no, the defendant rolled onto her, pinned her down, pushed up her shirt and bra and sucked and licked her nipple. 3RP 407-410. The

defendant did this until Juan, who lived in their storage area, walked into the home. 3RP 410-411. The defendant quickly got off of S.M.M. and walked out of the room. 3RP 411. S.M.M. pulled her shirt down and cried. 3RP 411. She couldn't call for help because the phone was disconnected from the defendant failing to pay the bills. 3RP 411. At the end of the weekend, the defendant dropped S.M.M. and J.P.R. off back at Cassie's. 3RP 413.

On Thursday December 10, 2015, Cassie told S.M.M. and J.P.R. to pack because they were going back to the defendant's home for visitation. 2RP 196-197. S.M.M. was sullen and refused to pack. 2RP 198. S.M.M. asked Cassie if she had to go to the defendant's house. 2RP 199. Cassie answered "yes" and S.M.M. started crying and shaking. 2RP 199-200. S.M.M. disclosed to Cassie that the defendant molested her. 2RP 200, 3RP 415. Upset, Cassie called her mother, threw her phone and punched the wall. 3RP 416. Cassie then contacted law enforcement. 2RP 201.

C. ARGUMENT.

1. THE DEFENDANT'S DOUBLE JEOPARDY CLAIM FAILS WHERE THE STATE MADE A CLEAR ELECTION AS TO WHICH ACTS SUPPORTED EACH CHARGE OF CHILD MOLESTATION IN THE FIRST DEGREE.

To convict a criminal defendant, a unanimous jury must conclude that the criminal act charged has been committed. *State v. Petrich*, 101

Wn.2d 566, 569, 683 P.2d 173 (1984). In cases where several acts are alleged, any one of which could constitute the crime charged, the jury must unanimously agree on the act or incident that constitutes the crime. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988), *Petrich*, 101 Wn.2d at 752. In such, “multiple acts” cases, Washington law applies the “either or rule” where “either the State must elect the particular criminal act upon which it will rely for conviction, or... the trial court [must] instruct the jury that all of them must agree that the same underlying criminal act has been proven beyond a reasonable doubt.” *State v. Hayes*, 81 Wn. App. 425, 430-431, 914 P.2d 788 (1996) (quoting *Kitchen*, 110 Wn.2d at 411). For an election to be effective, “either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act.” *Kitchen*, 110 Wn.2d at 409.

The State’s election of an act does not need to be ratified by the court or incorporated into the charging document or jury instructions in order to be effective. *State v. Carson*, 184 Wn.2d 207, 227, 357 P.3d 1064 (2015). On the contrary, and as the phrase “tell the jury” in *Kitchen* suggests, *Id.* (emphasis added), an election can be made by the prosecuting attorney in a verbal statement to the jury as long as the prosecution “clearly identifies the act upon which “the charge in question is based. *State v. Thompson*, 169 Wn. App. 436, 474-475, 290 P.3d 996 (2012)

(“[b]ecause the State clearly identified the act upon which the sexual motivation allegation was based in its closing argument, “no unanimity instruction was necessary”); compare, e.g., *Id.* and *In re Personal Restraint of Delgado*, 190 Wn. App. 898, 902, 251 P.3d 899 (2011) (prosecutor “clearly elected the criminal acts associated with the two counts during its closing arguments”) with *State v. Williams*, 136 Wn. App. 486, 497, 150 P.3d 111 (2007) (no clear election in closing argument where prosecutor “emphasized” one act over others but did not note “expressly elect to rely only on” one act” in seeking the conviction”).

Petrich’s multiple acts instruction applies only when the State fails to “elect the act upon which it will rely for conviction.” *Petrich*, 101 Wn.2d at 572; *see also* 11 WPIC 4.25 note on use at 110 (“If there is evidence of multiple distinct occurrences of the crime, but the prosecution elects to rely upon a specific occurrence to support a conviction, then this *Petrich* instruction should not be used.”).

In multiple acts cases, “when the State fails to elect which incident it relies upon for the conviction or the trial court fails to instruct the jury that all jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt, “we will find this error harmless “only if no rational trier of fact could have entertained a reasonable doubt that

each incident established the crime beyond a reasonable doubt.” *Kitchen*, 110 Wn.2d 405-406.

Here, the State charged the defendant with two counts of child molestation in the first degree. CP 1-2, 5-6. The charging language listed the dates of both offenses as occurring “during the period between the 4th day of December, 2015 and the 7th day of December, 2015”. CP 5-6. Accordingly, the court instructed the jury that in order “[t]o convict the defendant of the crime of child molestation in the first degree as charged in [Counts I and II],” they had to find “[t]hat on or about the time period between December 4, 2015, and December 7, 2015, the defendant had sexual contact with S.M.M.”. CP 15-36 (Jury Instructions No. 4 & 5), 4RP 481.

At trial, the State made explicit elections as to which act supported each charge stating the following:

...count one pertains to the evening of the 5th or 6th. It’s not clear if it was before or after midnight – that’s why we have a date range right there – when he fondled her vagina. And count two pertains to the next day when he sucked on and bit her nipples.

4RP 491-492.

Defendant raises a double jeopardy issue, claiming that the jury instructions were insufficient to “ensure that each conviction was based on separate and distinct conduct.” Brief of Appellant (BOA) at 9. This claim

fails where the State made a clear election as to which act supported each charge. 4RP 491-492. The record reflects that the State elected that count one is supported by the defendant's actions of rubbing S.M.M.'s vagina while she was sleeping. 4RP 491-492. The State also made a clear election that count two is supported by the defendant's act of sucking and biting S.M.M.'s nipple. 4RP 491-492.

Defendant acknowledges that the State made an explicit election stating "the [S]tate may argue the prosecutor's election in closing remedied Pozos-Rivera's exposure to double jeopardy... [b]ut counsel's closing argument is just that: argument." BOA at 9-10. This claim also fails because the Supreme Court held that an election does not need to be ratified by the court or incorporated into the charging document or jury instructions in order to be effective. *Carson*, 184 Wn. 2d at 227. On the contrary, there is no legal authority to suggest otherwise.

D. CONCLUSION.

The State made a clear election as to which act supported each charge. As such, double jeopardy is not violated and this Court should dismiss the defendant's claim and affirm his convictions.

DATED: May 15, 2018

MARK LINDQUIST
Pierce County
Prosecuting Attorney



ROBIN SAND
Deputy Prosecuting Attorney
WSB # 47838

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The undersigned certifies that on this day she delivered by *Efile* ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5/15/18 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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