

**FILED**  
**Sep 16, 2013**  
Court of Appeals  
Division III  
State of Washington

No. 31544-4-III

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

AARON T. ANDLOVEC,  
Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT  
Honorable Annette S. Plese, Judge

---

BRIEF OF APPELLANT

---

Jill S. Reuter, WSBA No. 38374  
Of Counsel  
Susan Marie Gasch, WSBA No. 16485  
Gasch Law Office  
P.O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149

**TABLE OF CONTENTS**

A. ASSIGNMENTS OF ERROR.....1

B. STATEMENT OF THE CASE.....1

C. ARGUMENT.....5

    1. The trial court violated Mr. Andlovec’s constitutional right to a unanimous jury verdict by failing to give a unanimity instruction for each count.....5

    2. The trial court erred in imposing community custody conditions that are unrelated to the charged crimes.....12

D. CONCLUSION.....14

**TABLE OF AUTHORITIES**

<u>Cases</u>	<u>Page</u>
<i>State v. Autrey</i> , 136 Wn. App. 460, 150 P.3d 580 (2006).....	13
<i>State v. Bahl</i> , 164 Wn.2d 739, 193 P.3d 678 (2008).....	12
<i>State v. Bobenhouse</i> , 166 Wn.2d 881, 214 P.3d 907 (2009).....	8
<i>State v. Camarillo</i> , 115 Wn.2d 60, 794 P.2d 850 (1990)...	5, 6, 8, 9, 10, 11
<i>State v. Coleman</i> , 159 Wn.2d 509, 150 P.3d 1126 (2007).....	5, 6, 8, 11
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	12
<i>State v. Jones</i> , 118 Wn. App. 199, 76 P.3d 258 (2003).....	12
<i>State v. Kiser</i> , 87 Wn. App. 126, 940 P.2d 308 (1997).....	6
<i>State v. Kitchen</i> , 110 Wn.2d 403, 756 P.2d 105(1988) .....	5, 8, 9, 10, 11
<i>State v. O'Cain</i> , 144 Wn. App. 772, 184 P.3d 1262 (2008).....	13
<i>State v. Petrich</i> , 101 Wn.2d 566, 683 P.2d 173 (1984).....	5, 9, 10
<i>State v. Thompson</i> , 169 Wn. App. 436, 290 P.3d 996 (2012).....	8
<i>State v. York</i> , 152 Wn. App. 92, 216 P.3d 436 (2009).....	6, 8
<i>State v. Zimmer</i> , 146 Wn. App. 405, 190 P.3d 121 (2008).....	13

**Statutes**

U.S. Const. amend 6.....	6
Const. art. 1, § 22 (amend 10).....	6
RCW 9A.44.076(1).....	7
RCW 9A.44.079(1).....	7
RCW 9.94A.030(10).....	13
RCW 9.94A.703(3)(e).....	12
RCW 9.94A.703(3)(f).....	13

**A. ASSIGNMENTS OF ERROR**

1. The trial court violated Mr. Andlovec’s constitutional right to a unanimous jury verdict by failing to give a unanimity instruction for each count.

2. The trial court erred in imposing conditions of community custody prohibiting Mr. Andlovec from possessing or purchasing alcohol, and from going to establishments where alcohol is the prime commodity for sale.

*Issues Pertaining to Assignments of Error*

1. Did the trial court violate Mr. Andlovec’s constitutional right to a unanimous jury verdict by failing to give a unanimity instruction for each count?

2. Did the trial court exceed its statutory authority by imposing conditions of community custody that are not crime-related?

**B. STATEMENT OF THE CASE**

Aaron T. Andlovec lived at 2923 West Boone in Spokane, with his cousin Bryan Jones. (RP<sup>1</sup> 92-93, 137, 166, 218-219, 231, 389-390, 392,

---

<sup>1</sup> The Report of Proceedings consists of three consecutively paginated volumes, and one separate volume containing a pretrial hearing from June 13, 2012. References to the “RP” herein refer to the three consecutively paginated volumes.

414). Mr. Jones' stepdaughter, A.C., date of birth December 16, 1995, also lived at this residence. (RP 92-93, 219, 221, 231, 389, 392). Mr. Andlovec moved in during the spring of 2008, and lived there approximately two years. (RP 92-93, 139, 180, 232, 390, 392, 422-423). On May 19, 2010, A.C. told her mother that Mr. Andlovec had raped her. (RP 107-108, 155-157, 168-171, 181, 225). A.C.'s mother contacted the police. (RP 170).

During the police investigation, an officer collected the top of a mattress from the Boone residence. (RP 351-355). The mattress was submitted for DNA (deoxyribonucleic acid) testing. (RP 193-200). The mattress contained DNA matching A.C. and Mr. Andlovec. (RP 200-204).

The State charged Mr. Andlovec with three separate counts against A.C.: one count of second degree rape of a child, alleged to have occurred on, about, or between September 1, 2009 and December 15, 2009; one count of second degree child molestation, alleged to have occurred on, about, or between September 1, 2009 and December 15, 2009; and one count of third degree rape of a child, alleged to have occurred on, about, or

between December 16, 2009 and May 17, 2010. (CP 1-2).<sup>2</sup> The case proceeded to a jury trial. (RP 91-427).

A.C. testified that Mr. Andlovec touched her vagina, when she was twelve or thirteen years old. (RP 99-101). She told the court she did not know when this event occurred, stating “I think I was in school perhaps. I don’t know. It may have been summer maybe.” (RP 101).

A.C. also testified that she had sex with Mr. Andlovec twice a week for one year. (RP 104, 145). She told the court that the sex took place in her bed, located in the upstairs of the house. (RP 104-105, 114, 145). A.C. testified that touching of her body by Mr. Andlovec would lead to them having sex. (RP 101-103, 138). She told the court this consisted of Mr. Andlovec “[t]ouching my breasts and my legs and my arms.” (RP 138). A.C. testified that this touching happened “[a]bout twice a week.” (RP 138).

A.C. told the court that Mr. Andlovec moved into the Boone residence about one year before they started having sex. (RP 93, 146-147). On cross-examination, A.C. admitted that in a previous interview, this was not the time frame she provided. (RP 146-147). Her previous

---

<sup>2</sup> The State also alleged an aggravating factor for each count. (CP 1-2).

statement was that the sex began a few months after Mr. Andlovec moved into the Boone residence. (RP 146-147).

DNA scientist Stephen Greenwood testified that the male DNA found on the mattress, matching Mr. Andlovec, came from sperm. (RP 194, 204, 215). He told the court the female DNA found on the mattress, matching A.C., came from epithelial, or skin, cells. (RP 194, 202, 216). Mr. Greenwood testified “[w]hether they were from just surface skin cells or vaginal secretions, we can’t tell that.” (RP 216). He acknowledged that skin cells could be transferred to the mattress by rubbing skin along the surface, or by sweating while sleeping on the mattress at night. (RP 216-217).

Mr. Andlovec testified in his own defense, and denied having sex or any sexual contact with A.C. (RP 390, 413). He testified that he masturbated while watching adult movies on A.C.’s bed, and that he had sex with A.C.’s mother on A.C.’s bed upstairs. (RP 394, 406-408, 413-414). Mr. Andlovec told the court there could have been semen on this bed from either instance. (RP 407, 414-415).

The jury found Mr. Andlovec guilty as charged. (CP 142-147, 178-192; RP 475-478). At sentencing, the trial court imposed a condition of community custody stating that Mr. Andlovec “shall not use, possess or

purchase alcohol, nor go to establishments where alcohol is the prime commodity for sale.” (CP 171).

Mr. Andlovec appealed. (CP 174-175).

### C. ARGUMENT

1. The trial court violated Mr. Andlovec’s constitutional right to a unanimous jury verdict by failing to give a unanimity instruction for each count.

In order to convict a defendant of a criminal charge, the jury must be unanimous that the criminal act charged has been committed. *State v. Camarillo*, 115 Wn.2d 60, 63, 794 P.2d 850 (1990); *see also State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), *modified in part by State v. Kitchen*, 110 Wn.2d 403, 405-06, 756 P.2d 105 (1988). In cases where multiple 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. *Kitchen*, 110 Wn.2d at 411; *see also Petrich*, 101 Wn.2d at 572. In such a multiple acts case, the State must either “elect which of such acts is relied upon for a conviction or the court must instruct the jury to agree on a specific criminal act.” *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007).

“These precautions assure that the unanimous verdict is based on the same act proved beyond a reasonable doubt.” *State v. York*, 152 Wn. App. 92, 94, 216 P.3d 436 (2009) (citing *Coleman*, 159 Wn.2d at 511-12). The failure of the trial court to follow this rule is “violative of a defendant's state constitutional right to a unanimous jury verdict and United States constitutional right to a jury trial.” *Camarillo*, 115 Wn.2d at 64; *see also* Const. art. 1, § 22 (amend 10); U.S. Const. amend 6. The failure to give a unanimity instruction may be raised for the first time on appeal. *State v. Kiser*, 87 Wn. App. 126, 129, 940 P.2d 308 (1997).

Here, the evidence supporting count one and count three was A.C.'s testimony that she and Mr. Andlovec had sex twice a week for one year, in her bed located in the upstairs of the Boone residence. (RP 104-105, 114, 145). This testimony presented the jury with multiple acts of misconduct within the charged time frame, and any one act could support the charge. Because the State did not specify a single act for count one and a single act for count three, the trial court erred in failing to give a unanimity instruction to ensure that the jurors agreed on a specific act to support each conviction. *See Coleman*, 159 Wn.2d at 511; *see also York*, 152 Wn. App. at 95.

Furthermore, A.C.'s testimony that she and Mr. Andlovec had sex twice a week for one year covered a time frame when she was both thirteen and fourteen years old. (RP 104-105, 114, 145). For count one, the jury had to find that A.C. was "at least twelve years old but less than fourteen years old." RCW 9A.44.076(1). The charged time frame for this count was September 1, 2009 and December 15, 2009, when A.C. was thirteen years old. (CP 1; RP 92). For count three, the jury had to find that A.C. was "at least fourteen years old but less than sixteen years old." RCW 9A.44.079(1). The charged time frame for this count was December 16, 2009 and May 17, 2010, when A.C. was fourteen years old. (CP 2; RP 92). A unanimity instruction was required to ensure that the jury agreed on a specific act, when A.C. was the age required, to support a conviction on counts one and three.

The evidence supporting count two (child molestation) could have been either (1) A.C.'s testimony that Mr. Andlovec touched her vagina, when she was thirteen years old, or (2) A.C.'s testimony that Mr. Andlovec would touch her breasts prior to having sex with her, "[a]bout twice a week." (RP 99-103, 138). Because this testimony presented the jury with multiple acts of misconduct within the charged time frame, any one of which could support the conviction, and the State did not specify a

single act for count two, the trial court erred in failing to give a unanimity instruction to ensure that the jurors agreed on a specific act to support the conviction. *See Coleman*, 159 Wn.2d at 511; *see also York*, 152 Wn. App. at 95.

In addition, in its closing argument, the State did not elect an act it was relying on to support each conviction. (RP 449-461; 471-473); *cf. State v. Thompson*, 169 Wn. App. 436, 474-75, 290 P.3d 996 (2012) (no unanimity instruction was required, where the State told the jury during closing argument the act it was relying on).

*Harmless error.* The trial court's failure to give a unanimity instruction for each of the three charged counts is constitutional error. *State v. Bobenhouse*, 166 Wn.2d 881, 893, 214 P.3d 907 (2009). Therefore, the constitutional harmless error analysis applies. *Id.* In order to find a constitutional error harmless, the appellate court must find the error harmless beyond a reasonable doubt. *Camarillo*, 115 Wn.2d at 65. Prejudice is presumed. *Coleman*, 159 Wn.2d at 512. "The presumption of error is overcome only if no rational juror could have a reasonable doubt as to any of the incidents alleged. *Id.* (citing *Kitchen*, 110 Wn.2d at 411-12); *see also Camarillo*, 115 Wn.2d at 65.

In *Kitchen*, the court found the trial court's failure to give a unanimity instruction was not harmless error, in two of three cases consolidated for appeal. *Kitchen*, 110 Wn.2d at 412. The court reasoned "the prosecution placed testimony and circumstantial proof of multiple acts in evidence." *Id.* The court further reasoned "[t]here was conflicting testimony as to each of those acts and a rational juror could have entertained reasonable doubt as to whether one or more of them actually occurred." *Id.*

In *Petrich*, the court found the trial court's failure to give a unanimity instruction was not harmless error, where the evidence presented multiple instances of conduct to support two charges. *Petrich*, 101 Wn.2d at 573. The court reasoned that while the victim testified to some of the instances of conduct with detail and specificity, "[o]thers were simply acknowledged, with attendant confusion as to date and place, and uncertainty regarding the type of sexual contact that took place." *Id.*; *cf. Camarillo*, 115 Wn.2d at 72 (finding the failure to give a unanimity instruction harmless where "[t]here was no uncertainty on the part of the boy regarding the type of sexual contact; there was no conflicting testimony about what had occurred on the three occasions testified to by

the boy; the boy's testimony was unimpeached; and there was no attendant confusion as to dates and places on the part of the victim.”).

This case is indistinguishable from *Kitchen* and *Petrich*. See *Kitchen*, 110 Wn.2d at 412; *Petrich*, 101 Wn.2d at 573. Mr. Andlovec offered more than a general denial of having sex or sexual contact with A.C. Cf. *Camarillo*, 115 Wn.2d at 68. He offered conflicting testimony to the instances of sex testified to by A.C. (RP 394, 406-408, 413-415). Mr. Andlovec testified that he masturbated while watching adult movies on A.C.’s bed, and that he had sex with A.C.’s mother on A.C.’s bed upstairs. (RP 394, 406-408, 413-414). He testified there could have been semen on this bed from either instance. (RP 407, 414-415). Mr. Greenwood’s testimony support Mr. Andlovec’s testimony. (RP 194, 202, 216). He testified that the male DNA found on the mattress, matching Mr. Andlovec, came from sperm. (RP 194, 204, 215). Mr. Greenwood could not say whether the female DNA found on the mattress came from surface skin cells or vaginal secretions, and he acknowledged that skin cells could be transferred to the mattress while sleeping. (RP 216-217).

In addition, A.C. exhibited confusion regarding the dates of when she and Mr. Andlovec had sex. See *Petrich*, 101 Wn.2d at 573; cf.

*Camarillo*, 115 Wn.2d at 72. A.C. testified at trial that Mr. Andlovec moved into the Boone residence about one year before they started having sex. (RP 93, 146-147). However, on cross-examination, she admitted that in a previous interview, she stated that the sex began a few months after Mr. Andlovec moved into the Boone residence. (RP 146-147).

Furthermore, for count two, A.C. testified to multiple acts of misconduct, occurring in two different ways: touching her vagina on one occasion, and touching her breasts, prior to sex, twice a week. (RP 99-103, 138). “The focus of a trial, at least for jurors, potentially changes once evidence is introduced of separate identifiable incidents.” *Coleman*, 159 Wn.2d at 514. In *Coleman*, the court found “it was not harmless error to fail to give a unanimity instruction where the State introduced evidence of distinguishable acts that could satisfy the crime charged.” *Id.* at 516-17. Here, given A.C.’s testimony of two separate types of misconduct to support count two, it was not harmless error to fail to give a unanimity instruction for this count. *See Coleman*, 159 Wn.2d at 514, 516-17.

Under the facts presented at trial here, it cannot be said that no rational juror could have a reasonable doubt as to any of the incidents alleged. *See Coleman*, 159 Wn.2d at 512 (citing *Kitchen*, 110 Wn.2d at

411-12). The failure to give a unanimity instruction for each count was not harmless beyond a reasonable doubt.

2. The trial court erred in imposing community custody conditions that are unrelated to the charged crimes.

The trial court imposed conditions of community custody prohibiting Mr. Andlovec from possessing or purchasing alcohol, and from going to establishments where alcohol is the prime commodity for sale.<sup>3</sup> (CP 171). Although Mr. Andlovec did not object to the imposition of these conditions, sentencing errors may be raised for the first time on appeal. *See State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (stating that “[i]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.”) (*quoting State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)).

---

<sup>3</sup> The trial court also imposed a condition of community custody preventing Mr. Andlovec from using alcohol. (CP 171). Mr. Andlovec does not dispute that prohibiting the use of alcohol as a condition of community custody is permitted by statute. *See* RCW 9.94A.703(3)(e) (authorizing the trial court, as a condition of community custody, to order an offender to not consume alcohol); *see also State v. Jones*, 118 Wn. App. 199, 207, 76 P.3d 258 (2003) (holding that a trial court can order that a defendant sentenced to community custody not consume alcohol despite the lack of evidence that alcohol had contributed to his offense).

“As part of any term of community custody, the court may order an offender to . . . [c]omply with any crime-related prohibitions.” RCW 9.94A.703(3)(f). Whether a community custody condition is crime-related is reviewed for an abuse of discretion. *State v. Zimmer*, 146 Wn. App. 405, 413, 190 P.3d 121 (2008) (citing *State v. Autrey*, 136 Wn. App. 460, 466-67, 150 P.3d 580 (2006)). A “[c]rime-related prohibition” is defined, in relevant part, as “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10); see also *State v. O’Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

There was no evidence in the record that alcohol was a factor in the crimes of conviction. Therefore, the conditions of community custody prohibiting Mr. Andlovec from possessing or purchasing alcohol, and from going to establishments where alcohol is the prime commodity for sale are not “[c]rime-related prohibition[s].” RCW 9.94A.030(10); see also *O’Cain*, 144 Wn. App. at 775. Accordingly, this court should remand this case with an order that the trial court strike these community custody conditions. See *O’Cain*, 144 Wn. App. at 775 (stating the remedy for an erroneous community custody condition was to strike it on remand).

**D. CONCLUSION**

The trial court violated Mr. Andlovec's constitutional right to a unanimous jury verdict by failing to give a unanimity instruction for each count. This error was not harmless. Mr. Andlovec's convictions should be reversed and remanded for a new trial. In the alternative, this court should order the trial court to strike the community custody conditions prohibiting Mr. Andlovec from possessing or purchasing alcohol, and from going to establishments where alcohol is the prime commodity for sale.

Respectfully submitted on September 14, 2013.



\_\_\_\_\_  
s/Jill S. Reuter, WSBA No. 38374  
Of Counsel  
Attorney for Appellant

\_\_\_\_\_  
s/Susan Marie Gasch, WSBA  
Gasch Law Office  
P.O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149  
FAX: None  
[gaschlaw@msn.com](mailto:gaschlaw@msn.com)

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on September 14, 2013, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

Aaron T. Andlovec (#364078)  
Washington Corrections Center  
PO Box 900  
Shelton, WA 98584

**E-mail:** [kowens@spokanecounty.org](mailto:kowens@spokanecounty.org)  
Mark E. Lindsey  
Deputy Prosecuting Attorney  
1100 West Mallon Avenue  
Spokane WA 99260-2043

---

s/Susan Marie Gasch, WSBA #16485