

FILED
July 30, 2014
Court of Appeals
Division III
State of Washington

32053-7-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ROBERT L. HUTSELL, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S BRIEF

Janet G. Gemberling
Attorney for Appellant

JANET GEMBERLING, P.S.
PO Box 9166
Spokane, WA 99209
(509) 838-8585

INDEX

A. ASSIGNMENTS OF ERROR1

B. ISSUES1

C. STATEMENT OF THE CASE.....2

D. ARGUMENT7

 1. THE CONVICTIONS WERE OBTAINED IN
 VIOLATION OF MR. HUTSELL’S SIXTH
 AMENDMENT RIGHT TO A UNANIMOUS
 JURY VERDICT.7

E. CONCLUSION.....12

TABLE OF AUTHORITIES

WASHINGTON CASES

STATE V. A.M., 163 Wn. App. 414,
260 P.3d 229, 232-33 (2011) 10

STATE V. ALLEN, 57 Wn. App. 134,
787 P.2d 566 (1990)..... 9

STATE V. COLEMAN, 159 Wn.2d 509
150 P.3d 1126, 1128-29 (2007) 7

STATE V. FITZGERALD, 39 Wn. App. 652,
694 P.2d 1117 (1985)..... 7

STATE V. GITCHEL, 41 Wn. App. 820,
706 P.2d 1091, *review denied*, 105 Wn.2d 1003 (1985)..... 8

STATE V. HARSTAD, 153 Wn. App. 10,
218 P.3d 624, 628 (2009)..... 11

STATE V. HOLLAND, 77 Wn. App. 420
891 P.2d 49, *review denied*, 127 Wn.2d 1008 (1995)..... 8

STATE V. KITCHEN, 110 Wn.2d 403,
756 P.2d 105, 107 (1988)..... 8, 9

STATE V. PETRICH, 101 Wn.2d 566,
683 P.2d 173, 178 (1984)..... 8

STATE V. YORK, 152 Wn. App. 92
216 P.3d 436 (2009)..... 7

CONSTITUTIONAL PROVISIONS

SIXTH AMENDMENT..... 1, 2, 8

STATUTES

RCW 9A.44.073..... 9
RCW 9A.44.010..... 9, 11

COURT RULES

RAP 2.5(a) 8

OTHER AUTHORITIES

WPIC 4.25..... 8

A. ASSIGNMENTS OF ERROR

1. The verdict finding Mr. Hutsell guilty of rape violated his Sixth Amendment right to a jury trial.
2. The verdict finding Mr. Hutsell guilty of child molestation violated his Sixth Amendment right to a jury trial.

B. ISSUES

1. The State presented evidence from which a juror could find that the accused committed acts of oral vaginal or oral anal intercourse. The State did not elect a specific act on which it relied to support conviction. The State did not request, and the court did not give, an instruction requiring the jury to agree on a specific criminal act. Did the guilty verdict violate the defendant's Sixth Amendment right to a unanimous jury verdict?
2. The State presented evidence from which a juror could find that the accused committed any of several acts constituting sexual contact. The State did not elect a specific act on which it relied to support conviction. The State did not request, and the court did not give, an instruction requiring the jury to agree on a specific criminal act. Did the guilty

verdict violate the defendant's Sixth Amendment right to a unanimous jury verdict?

C. STATEMENT OF THE CASE

Jimmy Moore and Michelle Lebsack could never go out on their own together because they always had the kids. (RP 362) So When Mr. Moore's friend, Robert Hutsell, offered to babysit, Mr. Moore thought it was awesome. (RP 362)

The Friday before Valentine's Day, Mr. Hutsell picked up all four kids and took them to his house to spend the night. (RP 394) They had dinner, watched movies, and played video games and Mr. Hutsell brought them home the following evening. (RP 314-16) The two girls spent the night with Mr. Hutsell again a couple of weeks later. (RP 369, 395)

A few weeks later, Mr. Moore was talking with Mr. Hutsell on the phone when the older daughter, E.L., told her mother she never wanted to see Mr. Hutsell again or go to his house. (RP 396) Asked why, E.L. told her mother that Mr. Hutsell had "licked her and touched her in her private area." (RP 397) Ms. Labich immediately called the police. (RP 398)

Karen Winston is a forensic interviewer with extensive training and experience interviewing children. (RP 523-24) Ms. Winston interviewed E.L., and shortly thereafter the state charged Mr. Hutsell with

one count of first degree rape of a child and one count of child molestation in the first degree. (RP 524, CP 1)

Ms. Winston testified at a hearing on the admissibility of E.L.'s hearsay statements. (RP 148) Ms. Winston told the court:

And I asked what he did then after that. And she said then he started taking off her clothes, and then he started licking her.

...

And E.L. indicated, because earlier she had used the word vagina to describe where she had been licked, and she circled the crotch area on the front of the body diagram and identified it as vagina.

(RP 160-64) According to Ms. Winston, E.L. described other acts:

A. I asked if, you know, he had touched her with anything besides his tongue. And that's when she said, "Well, yes, his finger."

Q. How did you follow up with that?

A. So I started "his finger where" and she interrupted me and said "and his private part."

Q. Did you clarify what she meant by that?

A. I asked where his finger had gone, and she said "his finger had gone to the same place," and pointed to the crotch area on the body diagram.

Q. Did you follow up with the same line of questioning like the tongue, whether it was inside, outside, that type of questioning?

A. Yes. But before I had that chance to do that, I asked about his private part, because she had said his finger and his private part. And so I asked where his private part had gone, and she said -- she pointed to the buttocks on the body diagram and circled that and called that her butt.

And so I asked her to show me the part he had put on her butt, and she pointed to the penis on the male body diagram and indicated that's what he had used.

Q. Was she using the appropriate name for that?

A. I believe she did. Yes, she said it was the penis.

...

Q. So did you follow up after she used the word "penis?" How did you follow up with getting some details about that?

A. Well, after she identified it on the body diagram, I asked if it was outside of her butt or ever go inside and she said it went inside her butt.

...

A. Yes. I asked her about his finger and she identified that on the body diagram. And I asked if that was on top of her clothes or underneath her clothes and she told me it was underneath her clothes. And I asked if the finger was on the outside of her vagina or ever went inside, and she said it went on the outside. So then I said to her, "Whoa, now I remember you said his tongue went on the inside, but his finger went on the outside. And she said "on the outside."

(RP 165-68)

E.L.'s testimony at a hearing was somewhat different:

Q. Okay. Did you get licked on parts of your body?

A. Yes.

Q. What part?

A. My private area.

Q. Lots of people say "private area" for lots of different areas. Was it a specific private area? What was the specific private area?

A. My bottom private area.

Q. And you were on your stomach?

A. My back.

Q. On your back. And about how long did that occur?

A. I don't remember.

Q. Did it end?

A. Yes.

Q. What happened when it ended?

A. I told him I had to go to the bathroom.

Q. What did you do?

- A. I took my clothes and went to the bathroom, put them back on, and went out into the livingroom.
- Q. While you were in the room, was there any other private areas ever touched?
- A. No.

(RP 119-20)

At Mr. Hutsell's trial, E.L.'s testimony was similar to her testimony at the hearsay hearing:

- A. He started licking me.
- Q. Where?
- A. In my private area.
- Q. Is there a name that you give to the private area?
- A. My front area.

(RP 323)

- Q. So when you were licked, describe how that happened, if you could.
- A. I don't remember.
- Q. Do you know how long it lasted?
- A. Huh-uh.
- Q. Did it stop?
- A. Yes.
- Q. How did it stop?
- A. When I said I had to go to the bathroom.
- Q. When you said that, what did he do?
- A. He stopped.

(RP 324)

E.L.'s brother told the jury that in the morning, while they were still at Mr. Hutsell's home, E.L. said that Mr. Hutsell had "licked her privates." (RP 346) E.L.'s mother testified some weeks later that E.L. had told her "that he had licked her and touched her in her private area"

and that “he had pulled her pants and her underwear down while she was laying on his bed on the computer and had licked her and touched her in her no-no area.” (RP 397)

Detective Paul Lebsock told the jury he interviewed Mr. Hutsell in the course of investigating E.L.’s allegations. (RP 441) According to the detective, Mr. Hutsell admitted that he briefly used his tongue “to touch her vagina” but that he denied touching E.L. with his finger or penis. (RP 453-55)

Mr. Hutsell told the jury that he had never told Detective Lebsock that he’d performed sexual acts on E.L.. (RP 606-607) He denied molesting any of the children during their visit to his home or committing any of the acts E.L. had described. (RP 586-87)

During closing argument, the prosecutor argued that the jury could find Mr. Hutsell guilty of rape based on either of two alleged acts:

[P]enetration of the vagina or anus, however slight, by an object, including a body part -- tongue is a body part -- or any sexual contact between the sex organs and the mouth organs. So there are two, 2 and 3 actually apply in this case.

(RP 673)

The jury found Mr. Hutsell guilty. (RP 708) At sentencing, the state presented evidence that Mr. Hutsell had a prior sex offense. (RP

714-15) The court sentenced Mr. Hutsell to life in prison without parole.
(RP 717)

D. ARGUMENT

1. THE CONVICTIONS WERE OBTAINED IN VIOLATION OF MR. HUTSELL'S SIXTH AMENDMENT RIGHT TO A UNANIMOUS JURY VERDICT.

The right to a unanimous verdict is derived from the fundamental constitutional right to a trial by jury. *State v. Fitzgerald*, 39 Wn. App. 652, 694 P.2d 1117 (1985). “A criminal defendant has the right to a unanimous jury verdict.” *State v. York*, 152 Wn. App. 92, 94, 216 P.3d 436 (2009). “When the prosecution presents evidence of multiple acts of like misconduct, any one of which could form the basis of a count charged, either the State must elect which of such acts is relied upon for a conviction or the court must instruct the jury to agree on a specific criminal act.” *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). The pattern instruction to be used under these circumstances is known as a “*Petrich*” instruction:

The [State] [County] [City] alleges that the defendant committed acts of (identify crime) on multiple occasions. To convict the defendant [on any count] of (identify crime), one particular act of (identify crime) must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not

unanimously agree that the defendant committed all the acts of (identify crime).

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 4.25 (3d Ed); *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984) (“if the jury is instructed that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt, a unanimous verdict on one criminal act will be assured”).

If the State fails to elect the act on which it relies, failure to give a unanimity instruction is an error of constitutional magnitude. derived from the Sixth Amendment right to a jury trial. See *State v. Kitchen*, 110 Wn.2d 403, 406, 756 P.2d 105, 107 (1988); *State v. Gitchel*, 41 Wn. App. 820, 823, 706 P.2d 1091, *review denied*, 105 Wn.2d 1003 (1985). Although Mr. Hutsell failed to request a unanimity instruction, because the error is of constitutional magnitude it may be raised for the first time on appeal. RAP 2.5(a); *State v. Holland*, 77 Wn. App. 420, 424, 891 P.2d 49, *review denied*, 127 Wn.2d 1008 (1995).

The failure to give a unanimity instruction is “presumed to be prejudicial and is deemed harmless only if no rational juror could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt.” *State v. Allen*, 57 Wn. App. 134, 137-38, 787 P.2d

566 (1990) (*citing State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)).

The essential act constituting rape of a child is sexual intercourse, which is defined by statute to include “any penetration of the vagina or anus however slight, by an object, when committed on one person by another” and “any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another” RCW 9A.44.073; RCW 9A.44.010(a)(b) and (c). The evidence as to either of these acts is not so overwhelming as to preclude the possibility that some jurors may have reached their verdict based on only one act and others may have relied on another.

In the interview with Ms. Winston, E.L. described three different acts that might arguably fall within one of these definitions. She suggested Mr. Hutsell contacted or penetrated an area that might include her vagina with his tongue, and she also indicated that he penetrated her “butt” with his penis. While her testimony appears sufficient to support a conviction of rape based on either of these allegations, the evidence is insufficient to establish that “no rational juror could have a reasonable doubt” as to one or the other of these alleged acts.

E.L. repeated the allegation of oral genital contact several times, but the only evidence that she suggested Mr. Hutsell had placed his penis

inside her anus was in the recorded interview with Ms. Winston. But she testified in court that the oral genital contact was the only sexual act that occurred.

Moreover, “penetration of the buttocks, but not the anus, does not meet the ordinary meaning of ‘sexual intercourse.’” *State v. A.M.*, 163 Wn. App. 414, 420-21, 260 P.3d 229 (2011). In the interview with Ms. Winston, E.L. used the term “butt,” and her statements were insufficiently explicit to ensure that she had distinguished penetration between the buttocks from penetration of or contact with the anus. (Exh. S-3) A juror could reasonably doubt whether anal sexual intercourse ever occurred.

During closing argument, the prosecutor argued that the jury could find Mr. Hutsell guilty of rape based on either of these two alleged acts:

[P]enetration of the vagina or anus, however slight, by an object, including a body part -- tongue is a body part -- or any sexual contact between the sex organs and the mouth organs. So there are two, 2 and 3 actually apply in this case.

(RP 673)

Similarly, although E.L. repeatedly alleged that Mr. Hutsell had licked her “private area” or her “bottom private area” and even used the term vagina, she explained the meaning of the term vagina by circling the “crotch area on the front of the body diagram.” (RP 164; Exh. S-3) Although the lack of more explicit description may well be understandable

in a child, a reasonable but careful juror might conclude this evidence was insufficient to establish oral sexual intercourse beyond reasonable doubt.

This court should conclude that a rational juror might entertain a reasonable doubt as to whether each incident established the crime of rape and thus the verdict was not unanimous as to the specific act that constituted the crime.

Similarly, E.L.'s description of several different acts that fit the definition of sexual contact creates a real possibility that the jury did not unanimously agree as to the specific act that constituted child molestation. The essential act constituting child molestation is the act of having sexual contact. *State v. Harstad*, 153 Wn. App. 10, 20-21, 218 P.3d 624 (2009). “‘Sexual contact’ means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party.” RCWA 9A.44.010(2). The courts have construed the term “intimate parts” to include the “upper inner thigh” “buttocks” and “hips” if there is sufficient evidence that the purpose of the touching was sexual gratification. 153 Wn. App. at 22. The court did not undertake to define the term “intimate parts” for the jury here.

Within this broad concept of intimate parts, a juror might predicate a finding of child molestation on E.L.'s assertion that Mr. Hutsell rubbed her back or her legs, while another might find that Mr. Hutsell touched

E.L.'s vagina with his finger. At the same time, given the inconsistency of E.L.'s description of these events, any juror might maintain a reasonable doubt as to any of the acts that could arguably constitute child molestation in the present case.

The prosecutor never elected which acts the State relied on to establish Mr. Hutsell's guilt. In light of the varied and inconsistent evidence in this case, the court's failure to instruct the jury on the necessity of unanimously finding the occurrence of a specific criminal act beyond a reasonable doubt violated Mr. Hutsell's right to a unanimous jury verdict and must be *presumed* prejudicial.

E. CONCLUSION

The conviction should be reversed and the matter remanded for retrial before a properly instructed jury.

Dated this 30th day of July, 2014.

JANET GEMBERLING, P.S.


Janet G. Gemberling #13489
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 32053-7-III
)	
vs.)	CERTIFICATE
)	OF MAILING
ROBERT L. HUTSELL,)	
)	
Appellant.)	

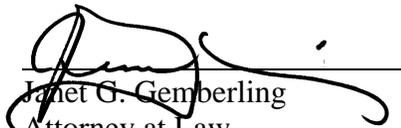
I certify under penalty of perjury under the laws of the State of Washington that on July 30, 2014, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Mark Lindsey
SCPAappeals@spokanecounty.org

I certify under penalty of perjury under the laws of the State of Washington that on July 30, 2014, I mailed a copy of the Appellant's Brief in this matter to:

Robert L. Hutsell
#968992, Rainier B-2-01
Washington State Penitentiary
1313 N. 13th Ave.
Walla Walla, WA 99362

Signed at Spokane, Washington on July 30, 2014.


Janet G. Gemberling
Attorney at Law