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SEPT 09, 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

BRIEF OF RESPONDENT

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I. 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.

II. ISSUE PRESENTED

Is a jury unanimity instruction required when the defendant is charged with multiple acts occurring at the same time, place, and involving the same victim?

III. STATEMENT OF THE CASE

For the purposes of this appeal only, the State accepts the defendant's version of the Statement of the Case.

IV. ARGUMENT

No unanimity instruction is required when the multiple acts charging a defendant are a "continuing course of conduct." All of the charged events occurred on one evening in the defendant's home. At trial, the victim described the criminal events as occurring during one event at the defendant's house.

The *Petrich*¹ rule does not apply when a defendant's acts were a "continuous course of conduct." See, *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). Whether multiple acts are a continuing offense is evaluated in a commonsense manner. *Petrich, supra*, at 571.

The *Petrich* unanimity rule is applicable only in situations where the State presents evidence of "several distinct acts." *Handran, supra*, at 17. The rule does not apply where the evidence shows a "continuing course of conduct." *Id.* In determining whether the criminal conduct constitutes one continuing act, we evaluate the facts in a commonsense manner. *Id.* Evidence that the criminal conduct occurred at different times and places suggests that several distinct acts occurred. *Id.* In this case, the criminal conduct occurred at essentially the same time and in the same location and involved the same victim for all the charged acts.

This court recently addressed the issue raised here. In *State v. Howard*, this court held:

Here, there is no need for a *Petrich* unanimity instruction. The evidence shows a continuing course of conduct by Mr. Howard and not several distinct acts. Mr. Howard's two attempts to kill Ms. Howard occurred in an unbroken sequence of events, at the same home, and using the same

¹ *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

weapon. Mr. Howard's right to a unanimous jury verdict was not violated.

State v. Howard, __ Wn. App. __, 328 P.3d 969, Div. III, (June 24, 2014).

Even events as separate as the murder of two different women can still be continuing course of conduct and no unanimity instruction is required. *Id.*

“A continuing course of conduct requires an ongoing enterprise with a single objective.” *State v. Love*, 80 Wn.App. 357, 361, 908 P.2d 395 (1996). The obvious ongoing enterprise here is the sexual satisfaction of the defendant.

Should the defendant realize that his arguments do not touch on this issue, it can be expected that the defense will attempt to supplement his appeal with a parsing of the evening's events. The defense addition anticipated by the State would involve parsing the evening's event into multiple events separated by some unknown length of time. This will, of course, be an effort to avoid the case law cited by the State. Parsing the evening events into multiple events in an effort to avoid a label of “continuing course of conduct” will be lead to a completely illogical unknown line of argument. For example, if a victim were to be shot, the suspect might argue that placing a hand around the un is one act, withdrawing the gun from a pocket is another act, pointing the gun a separate act, and the pulling of the trigger yet another act. Such a parsed

analysis leads to nearly every crime being a “multiple acts” case requiring a *Petrich* instruction. The cases dealing with “continuing course of conduct” in the “multiple acts” scenario describe both what facts are “continuing course of conduct” and those scenarios that constitute acts separated by place and time.

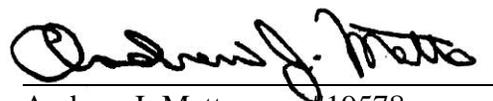
As argued above, the State contends this is a “continuing course of conduct.” The testimony from all of the State’s witnesses indicates the criminal acts occurred at the defendant’s house on one evening. Even the defendant’s Statement of the Case in his appellate brief supports the State’s positions.

V. CONCLUSION

The acts forming the basis for the defendant’s charges occurred at nearly the same time, on the same evening, with the same victim. Under Washington case law, there was no need for a unanimity instruction. The defendant’s arguments on appeal are without merit and the defendant’s convictions should be affirmed.

Dated this 9 day of September, 2014.

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ROBERT L. HUTSELL,

Appellant,

NO. 32053-7-III

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on September 9, 2014, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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9/9/2014

(Date)

Spokane, WA

(Place)

Kim Cornelius

(Signature)