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STATE OF WASHINGTON

Supreme Court No. _____
COA No. 54171-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN COLEMAN,

Petitioner.

2005 SEP 23 11:44 AM
[Signature]

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable James D. Cayce

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

John Coleman, petitioner herein, was the appellant in State v. John Coleman, Court of Appeals case no. 54171-4-I, and the defendant in King County Superior Court criminal cause no 02-1-05896-1.

B. COURT OF APPEALS DECISION

John Coleman seeks review of the decision in State v. Coleman, Court of Appeals case no. 54171-4-I (issued June 13, 2005). The Court of Appeals decision is attached as Appendix A. The Court of Appeals decision denying Mr. Coleman's motion for reconsideration (issued July 21, 2005) is attached as Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. Whether, in the defendant's jury trial on two counts of child molestation in the first degree (one count for each victim, C.V. and M.D.), the violation of the requirement of assurances of jury unanimity under State v. Petrich¹ was harmless as to count II, the count involving child C.V., where the evidence elicited at trial from C.V. and the other prosecution witnesses clearly alleged distinct and separately identifiable instances of alleged sexual contact,

¹State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984).

occurring at different times and different locations, during the three-year charging period.

2. Whether the Court of Appeals decision warrants review by this Court under the standards of RAP 13.4.

D. STATEMENT OF THE CASE

The defendant was charged and convicted by jury trial of one count first degree child molestation (sexual contact) as to each of two alleged victims, M.D. and C.V., allegedly occurring at various times during a charging period of January 1, 1999 through January 31, 2002. CP 1-5.

The children M.D. and C.V. both testified at trial. 9/15/03 at 8, 73. The trial court did not give a unanimity instruction and the State did not elect any of the specific instances of molestation in closing argument to the jury. 9/16/03 at 3-49; CP 164-178. The jury convicted Mr. Coleman as charged of one count first degree child molestation as to each child. CP 162-63.

Mr. Coleman appealed, CP 200, arguing inter alia that the convictions violated the requirement of jury unanimity of State v. Petrich. The Court of Appeals found that the defendant's right to jury unanimity was violated as to both counts, but that it was

harmless as to count II, the count involving child C.V. Appendix A, at p. 11.

E. ARGUMENT

THE VIOLATION OF MR. COLEMAN'S RIGHT TO A UNANIMOUS JURY WAS NOT HARMLESS AS TO THE MOLESTATION COUNT INVOLVING C.V.

(1). The Court of Appeals decision warrants review by this Court under RAP 13.4(b)(1) and (3). In the present case, Mr. Coleman raises issues which warrant review by the Supreme Court under RAP 13.4(b). First, he argues that the petitioner's conviction on count II violated his right to a conviction bearing adequate assurances of jury unanimity. Under RAP 13.4(b)(3), review by this Court is appropriate where the issue raised involves a significant question of constitutional law. In addition, the Court of Appeals decision conflicts with this Court's previous decisions in State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850 (1990). Review by this Court is therefore also appropriate under RAP 13.4(b)(1).

(2). No election or unanimity instruction. At trial, the children and the State's hearsay witnesses testified that there were multiple incidents of touching of the children, and many of these incidents were described in general terms, such as statements by

the children that the defendant “would” touch them. But the State also elicited several or more specific instances of touching of M.D. and C.V. by the defendant, including discrete incidents of molestation, distinguished with particularity, and occurring at different locations and on different dates and times. See infra.

Nonetheless, in closing argument, the State did not elect from any of these incidents and argue to the jury that a particular incident or incidents were proved beyond a reasonable doubt, and did not tell the jury it was required to unanimously decide on one such incident with respect to each count charged as to each victim. Instead, the prosecutor told the jury merely that “this case comes down to basically one simple question: Did the defendant touch those girls?” 9/16/03 at 7. The State reiterated later in closing argument that the purpose of the jury’s deliberations was to agree as a jury whether the defendant touched the victims:

[Y]our purpose during the course of your deliberations is to answer the question to the best of your ability, as a group of twelve of you, did Uncle Johnny touch these girls.

9/16/03 at 23. Following closing argument the case was submitted to the jury without a unanimity instruction. CP 164-78; see WPIC 4.25.

(3). The right to a unanimous verdict means that in multiple act cases the State must make an election or the court must instruct on unanimity. Criminal defendants have a right to a unanimous jury verdict. Wash. Const. art. 1, sec. 21. This right includes the right to an expressly unanimous verdict. State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). In addition, under federal law, the Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to a unanimous jury verdict. U.S. Const., Amend. 6; United States v. Linn, 31 F.3d 987, 991 (10th Cir.1994).

Under this right, a defendant may be convicted only when a unanimous jury concludes that the specific criminal act charged in the information (including proper amendments and lesser offenses) has been committed. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984) (failure to compel State to elect which of numerous incidents of sexual contact was to be relied on for conviction for each charge coupled with failure to instruct jury that

all jurors must agree that same underlying criminal act had been proved beyond a reasonable doubt warranted a new trial). When the prosecutor presents evidence of several acts by the defendant, any of which might if proved form the basis of the count charged, either the State must tell the jury which particular act to consider in its deliberations as the alleged crime (an election by the prosecutor), or the court must instruct the jury that it is required to agree on a particular criminal act (by including a unanimity, or, in Washington, a "Petrich" instruction). State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing Petrich, 101 Wn.2d at 570). Federal law also recognizes the right to a specific unanimity instruction in multiple act cases. United States v. Payseno, 782 F.2d 832, 836 (9th Cir.1986) ("When it appears . . . that a conviction may occur as the result of different jurors concluding that the defendant committed different acts, the general unanimity instruction does not suffice. To correct any potential confusion in such a case, the trial judge must augment the general instruction to ensure the jury understands its duty to unanimously agree to a particular set of facts").

The unanimity instruction issue (referred to here as the Petrich issue) affects the defendant's state and federal constitutional rights, and a failure by the defense to request a unanimity instruction below should not preclude the reviewing court from addressing the question. State v. Simonson, 91 Wn. App. 874, 883, 960 P.2d 955 (1998), review denied, 137 Wn.2d 1016 (1999) ("A unanimity instruction is required, whether requested or not, when a jury could find from the evidence that the defendant committed a single charged offense on two or more distinct occasions").

The Petrich rule therefore applies to this "multiple act" case, a case where multiple acts apparently were committed, any one of which could constitute the crime charged. See also State v. Workman, 66 Wash. 292, 119 P. 751 (1911). As the Court of Appeals correctly ruled, the absence of an election or a unanimity instruction in this case was error. Appendix A, at pp. 6-7.

(4). The absence of the unanimity instruction was not harmless as to the count involving child C.V., because it cannot be said that any reasonable juror could only find that every one of the alleged incidents were proved beyond a

reasonable doubt. Both victims in this case were clearly able to and did testify to specific discrete acts. The hearsay witnesses and the victims identified distinct instances of conduct in time. The same evidence also established that various incidents occurred at different places. And finally, critical to the reversible error analysis, there were varying degrees of proof and evidence regarding the different incidents, as shown below.

For example, the school counselor, Ms. Barnes, testified that C.V. told her that she and the defendant and M.D. would go on outings, and C.V. specifically stated that she, M.D. and the defendant had gone to the movies a week previously to see “Snow Dogs.” However, C.V. testified that there was no touching by Mr. Coleman during this outing. 9/11/03 at 80-81.

But social worker Trudnowski testified that was told by C.V. on January 23, 2002, that the defendant had touched her the previous week (“Last Friday”) when they all went to see the movie “Snow Dogs.” 9/11/03 at 103. C.V. told Ms. Trudnowski that the defendant touched her on her privates, and that the touching had been under her clothes. 9/11/03 at 103. She indicated that the defendant was sitting in between the two girls. 9/11/03 at 104. In

further contrast, victim M.D. told the police interviewer, Ms. Liebsack, about the time she, C.V. and the defendant went to see the movie "Snow Dogs," and she stated that the defendant's daughter was there, "so nothing really happened." 9/11/03 at 185.

Social worker Trudnowski also testified that C.V. described specific different locations where the touching would occur, including her grandmother's home, the defendant's home, and the defendant's car. 9/11/03 at 105. She described a specific instance in which she and M.D. were in the defendant's bedroom at his condominium, in which the defendant touched both of them. 9/11/03 at 105.

M.D. also recalled an instance in which she saw the defendant touching C.V. underneath her shirt. 9/15/03 at 98. M.D. stated that Mr. Coleman was rubbing C.V., and M.D. was sleeping on the floor but could see the defendant and C.V. on the bed. 9/15/03 at 98-99.

This evidence rendered the lack of a unanimity instruction or election harmless not only as to M.D., but also victim C.V. When, as here, the evidence presented tends to involve separate actions taking place at specific, identified different times and locations, and

over a longer rather than a short period of time, the lack of a unanimity instruction or an election is error and is not harmless. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989); State v. Stockmyer, 83 Wn. App. 77, 87-88, 920 P.2d 1201 (1996). Without a short time period, without any evidence showing the conduct all occurred in one place, and most importantly, where the evidence established particular identifiable instances of criminal conduct, the absence of a unanimity instruction or an election by the State in closing argument is not harmless. The verdicts in Mr. Coleman's case offer no assurances that the jurors chose specific instances of the crime and agreed those particular instances were proved beyond a reasonable doubt, and this error of unanimity requires reversal. State v. Kitchen, 110 Wn.2d at 409; Petrich, 101 Wn.2d at 570.

In addition, the fact that these various incidents were supported by different levels of detail and proof goes to the prejudice of the Petrich error, because the jury may well have aggregated weak claims to conclude the defendant must have touched the victims at some point in the several-year charging period. State v. Workman, at 294-95. This case is like Petrich and

State v. Kitchen, sexual offense cases in which the State's evidence was of significantly varying weight as to some of the incidents of touching compared to others, and in our case also including outright inconsistencies as to whether certain incidents occurred. Petrich, at 573; State v. Kitchen, at 412.

A Petrich error is presumed to be prejudicial and is not harmless " 'if a rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt.' " Kitchen, 110 Wn.2d at 411 (quoting State v. Loehner, 42 Wn. App. 408, 411, 711 P.2d 377 (1985) (Scholfield, A.C.J., concurring), review denied, 105 Wn.2d 1011 (1986)). This approach presumes that the error was prejudicial and allows for the presumption to be overcome only if no rational juror could have a reasonable doubt as to any one of the incidents alleged. See State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976); Pope v. Illinois, 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987). This means that affirmance in the face of a Petrich error requires the conclusion that reasonable jurors could come to only one conclusion: that every single incident of sexual contact alluded to by the State's evidence in this case, including those on which there were varying

degrees of evidence and certain outright inconsistencies, was proved beyond a reasonable doubt. For example, in Kitchen, the Court was faced with the danger that the jurors had not been constrained by an election or unanimity requirement from the possibility of some of them choosing to rely on different incidents than other jurors, to find guilt on the counts charged.

Applying the above test to the cases at bench, we affirm the Court of Appeals decision to reverse and remand [Kitchen]. . . and we reverse and remand Mr. Coburn's conviction. In both Mr. Coburn's and Mr. Kitchen's trials the prosecution placed testimony and circumstantial proof of multiple acts in evidence. There 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. For example, some jurors may have based their verdict in State v. Albert Coburn on the testimony of the complaining witness in count 1 that Mr. Coburn touched her and attempted to touch her cousin when they were in the woods, while others may have based their decision on incidents that allegedly took place in the bedroom. Some jurors may have believed that Mr. Coburn touched the complaining witness in count 3 on the night she became upset while others determined that she was upset that night for other reasons, relying upon another act as basis for their verdict. Similarly, a reasonable juror could have doubted the Kitchen complaining witness' testimony that incidents occurred in a shower and believed that only those acts before school in the trailer actually occurred. Faced with these trial records, we cannot say that failure to ensure that Mr. Coburn and Mr. Kitchen

were afforded a unanimous jury verdict was harmless error. Their convictions are therefore reversed.

Kitchen, at 412.

The absence of the unanimity instruction was not harmless as to the count involving child C.V., because it cannot be said that any reasonable juror could only find that every one of the alleged incidents were proved beyond a reasonable doubt. Respondent State of Washington correctly admitted in its responsive brief below that the absence of a unanimity instruction violated the requirement of jury unanimity under State v. Petrich, 101 Wn.2d at 569.

The State contended, however, that the error was harmless because the jury must have believed the children about all of the alleged incidents since it found the defendant guilty. Respondent's Brief, at 11. The State then attempted to argue that the appellant's contentions as to significant inconsistencies and contradictions in the testimony are incorrect, but only did so as to one of the alleged instances of touching. Respondent's Brief, at 15-16. The State ignored and failed entirely to rebut the petitioner's thorough discussion and argument showing that multiple of the alleged incidents were testified to with widely divergent levels of

consistency and more than just one incident was based on contradictory testimony. Appellant's Opening Brief, at 22-28.

The State's argument to the Court of Appeals was a remarkably incorrect statement of the harmless error standard in Petrich cases. It was not enough for the State in this case to convince the reviewing court to reject one or even some of appellant's claims of serious inconsistencies in the proof and contradictions as to certain of the incidents the children testified to. Rather, if any juror could rationally have found that even one of the alleged touching incidents was not proved beyond a reasonable doubt, the lack of a unanimity instruction requires reversal of the verdicts. The standard bears an obvious relationship to the constitutional error standard applicable where an element of the crime was not submitted to the jury. See State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (where the error concerns a misstated or omitted element of a crime, the error is harmless if the element at issue is supported by overwhelming and uncontroverted evidence). As Justice Utter noted in his Camarillo concurrence:

Because nothing in the record suggests that the credibility of the two principals varied as to any of the incidents and no other direct evidence of the acts was

introduced, I agree that given the credibility judgment the jury must have made, no reasonable juror could have concluded that the defendant was innocent of any of the acts alleged. [But] [s]uch a conclusion will never be appropriate if the record reveals any evidence which could justify a reasonable doubt in any juror's mind about any given incident, even if the jury obviously believed the victim and not the defendant.

(Emphasis added.) State v. Camarillo, 115 Wn.2d 60, 73-74, 794 P.2d 850 (1990) (Utter, J., concurring).

The standard makes obvious sense. If it is not possible that a rational juror could do anything other than find that every incident described by the children at the trial was proved beyond a reasonable doubt, reversal is unnecessary. In such circumstances, it does not matter that the jury was not instructed that it had to agree on a discrete incident. If the Court can say it has the level of confidence required by this standard – confidence that every incident was overwhelmingly proved – it makes sense to affirm, because even if the jury did not unanimously settle on one particular incident, they must each have picked an incident that was overwhelmingly proved, because all the described incidents were overwhelmingly proved. See Camarillo, at 70 (“The uncontroverted evidence upon which the jury could reach its verdict

reveals no factual difference between the incidents"). Any showing of significant inconsistencies and contradictions in the evidence as to any single incident described by the children renders the error not harmless, because without a Petrich instruction the reviewing court cannot say there is no possibility some juror might have picked an incident that was not uncontrovertibly proved.

In Kitchen, this court reversed the conviction and remanded for a new trial because "(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." Kitchen, 110 Wash.2d at 412, 756 P.2d 105. State v. Coburn, 110 Wash.2d 403, 409, 756 P.2d 105 (1988), a case consolidated with Kitchen, reversed Coburn's conviction because the testimony of the child victim was impeached and [f]urthermore, as in Kitchen's case, the jury heard 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." Kitchen, 110 Wash.2d at 412, 756 P.2d 105. In State v. Petrich, supra, the defendant's conviction was overturned because this court was not satisfied that the failure of the State to elect error was not harmless due to the child's testimony. The victim in Petrich was able to describe with some detail and specificity the acts committed against her, but other details were acknowledged "with attendant confusion as to date and place, and uncertainty regarding the type of sexual contact that took place." Petrich, 101 Wash.2d at 573, 683 P.2d 173.

State v. Camarillo, 115 Wn.2d at 65-66.

State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993), does not apply to this case because here, there was sufficient evidence of all of the acts alleged, despite the widely divergent testimony as to some of the incidents. This is patently not a case like Jones in which the reviewing court can say that the jury “must have” picked one particular incident to base a given count on, since the evidence of all the other incidents was wholly inadequate to support a guilty decision in the first place. Jones, at 822-23. Similarly, this case is entirely unlike State v. Allen, 57 Wn. App. 134, 787 P.2d 566 (1990). There, the victim testified with great consistency as to each incident of alleged touching. Allen, at 139. Here, the inconsistencies and contradictions in the children’s testimony as to multiple of the alleged incidents was not only the subject of substantial cross-examination and the defense examination of other non-victim witnesses, Appellant’s Opening Brief, at 22-28, but the defense closing argument also focused closely on these inconsistencies and contradictions regarding various incidents. 9/16/03 at 29 (“In this case, you have got testimony that is full of inconsistencies”), at 30 (“the fundamental problem here is that the stories told by [the victims] don’t match each other), at 30-31

("They also don't match the testimony of the other witnesses").

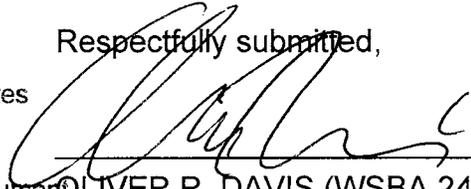
These are only a few examples from the defense closing argument in which the defense argued the children's accounts were inconsistent and contradictory, both individually and as compared to each other's statements and testimony. 9/16/03 at 31-34. The case did not depend solely on whether the jury believed the children were lying or telling the truth, it also depended on the fact that the children's differing accounts of various incidents were contradictory. The Petrich error was not harmless as to C.V.

F. CONCLUSION

For the reasons stated, Mr. Coleman submits this Court must reverse the Court of Appeals, reverse his conviction as to C.V., and remand for a new trial.

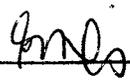
DATED this 28 day of July, 2005.

Respectfully submitted,


OLIVER R. DAVIS (WSBA 24560)
Washington Appellate Project-91052
Attorneys for Petitioner

Today I deposited in the mail of the United States of America a properly stamped and addressed envelope directed to the attorneys of record of plaintiff/defendant containing a copy of the document to which this declaration is attached.

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


Name

JUL 28 2005
Date

Done in Seattle, Washington

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APPENDIX A

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2005 Wash. App. LEXIS 1356, *

STATE OF WASHINGTON, Respondent, v. **JOHN COLEMAN**, Appellant.

No. 54171-4-I

COURT OF APPEALS OF WASHINGTON, DIVISION ONE

2005 Wash. App. LEXIS 1356

June 13, 2005, Filed

NOTICE: [*1] RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

PRIOR HISTORY: Appeal from Superior Court of King County. Docket No: 02-1-05896-1. Date filed: 04/23/2004. Judge signing: Hon. Joan B Allison.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant challenged a decision from the Superior Court of King County (Washington), which convicted him of two counts of first degree child molestation.

OVERVIEW: Two girls contended that defendant touched them improperly. They told a teacher, a school counselor, a parent, and a social worker. Defendant was convicted of two counts of child molestation, and an exceptional sentence was imposed. Defendant then sought review. On appeal, the court determined that defendant's constitutional rights to a unanimous verdict and jury trial were violated as to one of the victims because a unanimity instruction was not given. The case involved multiple acts, so the State was required to elect the act it was relying upon or the trial court was required to give the instruction. As to one victim, the error was harmless because that victim was not able to identify an particular incident of abuse; the evidence was the general pattern of ongoing abuse. However, the error was not harmless as to the second victim because she described two specific instances in detail. Next, the statements of the victims were properly admitted under Wash. Rev. Code § 9A.44.120(1). The trial court examined the relevant factors in determining that the statements were reliable. Finally, the exceptional sentence imposed was improper under Blakely, and the error was not harmless.

OUTCOME: The court affirmed one conviction, reversed the other conviction, and remanded the case for further proceedings. On remand, the trial court was instructed to resentence defendant within the standard range.

CORE TERMS: touching, girls, touch, unanimity instruction, juror, declarant, touched, reasonable doubt, bedroom, harmless error, prosecutor, general character, closing argument, general denial, unanimous jury, exceptional, harmless, sentence, deputy, interviewer, night, clothes, constitutional right, motion to dismiss, motive to lie, resentenced, reliability, hearsay, interview, bathroom

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[Criminal Law & Procedure > Trials > Defendant's Rights > Right to Jury Trial](#)

HN1 ↓ When the State presents evidence of several distinct criminal acts, each of which could form the basis for one charged count, either the State must "elect" the act that it is relying upon for conviction or the court must instruct the jury to agree on a specific act. The court's failure to follow this rule may result in a violation of the defendant's constitutional right to a unanimous jury verdict and right to a jury trial. An appellate court can affirm the jury's verdict only if the error was harmless beyond a reasonable doubt. Such an error in a multiple acts case is presumed to be prejudicial, and the presumption can be overcome only if no rational juror could have a reasonable doubt as to any of the incidents alleged. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Appeals](#) > [Standards of Review](#) > [Abuse of Discretion](#) 

[Evidence](#) > [Hearsay Rule & Exceptions](#) > [Child's Statement of Sexual Abuse](#) 

HN2 ↓ An out-of-court statement by a testifying child victim is admissible under [Wash. Rev. Code § 9A.44.120\(1\)](#) if the court finds that the time, content, and circumstances of the statement provide sufficient indicia of reliability. In determining the reliability of child hearsay, a court considers nine nonexclusive factors, including (1) whether the declarant had an apparent motive to lie; (2) the declarant's general character; (3) whether more than one person heard the statements; (4) the spontaneity of the statements; and (5) the timing of the declaration and the relationship between the declarant and the witness. The court should also consider (6) whether the statements contain express assertions of past fact; (7) whether the declarant's lack of knowledge could be established by cross-examination; (8) the possibility of the declarant's recollection being faulty; and (9) whether the circumstances suggest the declarant misrepresented the defendant's involvement. The final four factors are often "not very helpful" in assessing the reliability of child hearsay. The trial court considers the foregoing factors as a whole; not every factor must be satisfied. No single factor is decisive. An appellate court reviews the trial court's determination of reliability solely for a manifest abuse of discretion. [More Like This Headnote](#)

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HN3 ↓ Under *Blakely*, any fact that increases the penalty for an offense beyond that authorized by the verdict must be submitted to a jury and proved beyond a reasonable doubt. A harmless error analysis cannot be applied to *Blakely* errors. [More Like This Headnote](#)

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[Criminal Law & Procedure](#) > [Pretrial Motions](#) > [Dismissal](#) 

HN4 ↓ Dismissal of a criminal prosecution is an extraordinary remedy and is reviewed for an abuse of discretion. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Appeals](#) > [Reviewability](#) > [Preservation for Review](#) 

HN5 ↓ When an issue is raised for the first time on appeal, an appellate court will not consider it. [Wash. R. App. P. 2.5\(a\)](#). [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Trials](#) > [Closing Arguments](#) > [Fair Comment & Fair Response](#) 

HN6 ↓ A deputy prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence. [More Like This Headnote](#)

COUNSEL: For Appellant(s): Washington Appellate Project, Attorney at Law, Seattle, WA; John (info Only) Coleman (Appearing Pro se) Monroe, WA; Oliver Ross Davis, Washington Appellate Project, Seattle, WA.

For Respondent(s): Prosecuting Atty King County, King Co Pros/App Unit Supervisor, Seattle, WA; Brian Martin McDonald, King County Prosecutor's Office, Seattle, WA.

JUDGES: Authored by Ronald Cox. Concurring: Susan Agid, William Baker.

OPINION: Per Curiam. A jury found **John Coleman** guilty of two counts of first degree child molestation.

We agree that the trial court's failure to give a unanimity instruction violated Coleman's constitutional right to a unanimous jury as to Count II. But the error was harmless as to Count II. We further conclude that the trial court did not abuse its discretion in admitting child hearsay statements and that Coleman's pro se arguments are without merit. Finally, Coleman's exceptional sentences are [*2] invalid under Blakely v. Washington, and he is entitled to be resentenced within the standard range. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

John Coleman was charged with two counts of first degree child molestation involving C.V. and M.D. In January 2002, C.V. and M.D. were friends and in the same fourth grade class. Coleman was the brother of C.V.'s grandfather and frequently took the girls out to dinner, shopping, and to the movies. The girls also visited Coleman in his condo on a number of occasions. Coleman's daughter recalled that Coleman had spent time "rough housing" with the girls in his bedroom with the door closed.

On January 22, 2002, M.D. approached Sarah McAlpin, the girls' teacher, and complained that C.V. was threatening to reveal one of M.D.'s "secrets." McAlpin, who was aware that M.D. had been abused by a relative at some time in the past, talked to C.V. about M.D.'s concern. During the course of the conversation, C.V. revealed that Coleman had been touching her "where her bathing suit covered her body." C.V. indicated that Coleman had touched her both on and under her clothes. McAlpin also spoke to M.D., who said [*3] that "Uncle Johnny" had been touching her as well.

McAlpin reported her conversation to Christine Barnes, the school's counselor, and Barnes spoke with C.V. later that same day. C.V. said that "Uncle Johnny" had been touching her "down there," meaning her crotch area, and that the touching had occurred both at C.V.'s house and at Coleman's house. C.V. also said that Coleman had been touching M.D.

Marjorie Trudnowski, a CPS social worker, interviewed C.V. on January 23, 2002. C.V. pointed to her vagina and said that Coleman had been touching her under her clothes "down there." She said that the touching had occurred both at her house and in the car, and that it had occurred most often at Coleman's house. C.V. described specific incidents of touching that had occurred when C.V. and M.D. spent the night at Coleman's house and when Coleman, C.V., and M.D. were at the movie "Snow Dogs." C.V. indicated that Coleman had also done "the same thing" to M.D. in the past. Coleman told C.V. not to tell anyone about the touching because he would get into "deep, deep trouble."

At about this time, C.V. and M.D. also revealed the touching to M.D.'s mother. The girls said that C.V. had talked to [*4] someone at school and wanted to tell M.D.'s mother before she heard from someone else. M.D. said that Coleman had touched her on her breast and vaginal areas while trying to explain sex to her. The girls indicated that they had not said anything earlier because they were still hoping to go on a trip to Hawaii that Coleman had been planning.

Christine Liebsack, an interview specialist for the King County Prosecutor's Office, spoke with C.V. on February 21, 2002. While reluctant to provide many details, C.V. eventually admitted that Coleman had been touching her "in places where he shouldn't." C.V. pointed to the crotch and buttocks of a body sketch to explain where Coleman had touched her. C.V. said that the touching had occurred mostly at Coleman's house. She indicated that the last time she had gone to the movies with Coleman and M.D., "nothing really happened." C.V. also saw Coleman touch M.D.

Liebsack interviewed M.D. on March 13, 2002. M.D. acknowledged that Coleman had been touching her on her chest, crotch, and buttocks areas, under her clothes. She described one incident of touching that had occurred when she and C.V. spent the night at Coleman's house. M.D. said that Coleman [*5] would occasionally ask her to touch him, but she "would just lie there." She denied that Coleman had ever made her touch him.

Both C.V. and M.D. also testified at trial. C.V. testified that Coleman had touched her in the "wrong places," by which she meant her vagina. C.V. was unable to recall many details about the touching incidents, but indicated they occurred primarily in the bedroom or living room of Coleman's house. C.V. also saw Coleman touch M.D. During cross-examination, C.V. denied that anything bad had happened when she and M.D. went to the movies with Coleman.

M.D. testified that Coleman would touch her on her breast and vagina, under her clothes. When this

happened, M.D. would just "sit there quietly" because she was afraid her parents might find out. M.D. said that the touching always occurred in Coleman's house and that it occurred "a lot."

M.D. described one specific incident that occurred at Coleman's house while she and C.V. were watching "The Mummy Returns." M.D. sat in a leather chair next to Coleman, who reached up her shirt and started rubbing. After a few minutes, M.D. said she had to go to the bathroom and left the room. When she returned, she sat on the floor. [*6] M.D. also described an incident in the bedroom. While she was lying on the bed telling jokes, Coleman reached under M.D.'s pants and underwear and began rubbing. To stop the touching, M.D. moved down to the floor.

M.D. also described an incident in the bedroom in which Coleman made her touch his penis. In order to stop the touching, M.D. got up to go to the bathroom. She admitted that she had not told any of the interviewers about this incident. When asked why, she explained she was afraid that no one would believe her "because some people don't believe me a lot of times." On several occasions, M.D. watched Coleman rub C.V. underneath her shirt.

The jury found Coleman guilty as charged. The court then imposed concurrent 300-month exceptional sentences based on findings that Coleman abused a position of trust and that the offense was part of an on-going pattern of abuse.

Coleman first contends that his constitutional right to a unanimous jury was violated because the trial court failed to give a unanimity instruction. ^{HN1} When the State presents evidence of several distinct criminal acts, each of which could form the basis for one charged count, either the State must "elect" the act [*7] that it is relying upon for conviction or the court must instruct the jury to agree on a specific act. State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10 (1991); see also State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984). The court's failure to follow this rule may result in a violation of the defendant's constitutional right to a unanimous jury verdict and right to a jury trial. State v. Camarillo, 115 Wn.2d 60, 64, 794 P.2d 850 (1990).

The State concedes that it failed to make an election in this case and that a unanimity instruction was required, but argues the error was harmless. Accordingly, we can affirm the jury's verdict only if the error was harmless beyond a reasonable doubt. State v. Camarillo, 115 Wn.2d at 64. Such an error in a multiple acts case is presumed to be prejudicial, and the presumption can be overcome only "if no rational juror could have a reasonable doubt as to any of the incidents alleged." State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988) (quoting State v. Loehner, 42 Wn. App. 408, 411, 711 P.2d 377 (1985) (Scholfield, A.C.J., concurring)).

Our [*8] Supreme Court elaborated upon the harmless error test in State v. Camarillo, *supra*, a prosecution for 1 count of indecent liberties. In Camarillo, the 11-year-old victim testified in detail about three similar incidents of sexual contact occurring over a period of about a year. The defendant offered a general denial of the allegations, but did not otherwise challenge the victim's account or attempt to controvert or impeach the victim's testimony. Camarillo, 115 Wn.2d at 69-70. Under these circumstances, the failure to give a unanimity instruction was harmless error because a rational juror could not have distinguished among the incidents and would therefore have believed or disbelieved the victim as to all three incidents. Camarillo, 115 Wn.2d at 72.

In reaching its decision, the Camarillo court relied on a similar analysis in State v. Allen, 57 Wn. App. 134, 788 P.2d 1084 (1990). In Allen, the defendant flatly denied any physical contact with the victim, who had described multiple similar incidents of touching. In concluding that the absence of a unanimity instruction was harmless error, the Allen [*9] court noted the defendant had offered only a general denial as to all incidents and that he had failed to challenge or distinguish any of the specific incidents or offer any prior inconsistent statements or defense character witnesses. Allen, 57 Wn. App. at 139, 788 P.2d 1084.

Both the Camarillo and Allen courts distinguished the facts in State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988). In Kitchen, the court held that the absence of a unanimity instruction was not harmless error in two of the three consolidated cases. In these cases, the victims described several incidents of sexual contact. In addition to general denials, the defense had impeached the victims with prior inconsistent statements and presented general character witnesses or witnesses who had controverted some aspect of the victims' accounts. Given the conflicting testimony, the Kitchen court concluded that a rational juror

could have entertained a reasonable doubt as to whether one or more of the alleged acts had occurred:

For example, some jurors may have based their verdict in *State v. Albert Coburn* on the testimony of the complaining witness in count 1 that Mr. Coburn [*10] touched her and attempted to touch her cousin when they were in the woods, while others may have based their decision on incidents that allegedly took place in the bedroom. Some jurors may have believed that Mr. Coburn touched the complaining witness in count 3 on the night she became upset while others determined that she was upset that night for other reasons, relying upon another act as basis for their verdict. Similarly, a reasonable juror could have doubted the *Kitchen* complaining witness' testimony that incidents occurred in a shower and believed that only those acts before school in the trailer actually occurred. Faced with these trial records, we cannot say that failure to ensure that Mr. Coburn and Mr. Kitchen were afforded a unanimous jury verdict was harmless error.

Kitchen, 110 Wn.2d at 412.

Here, C.V. described multiple similar incidents of abuse, but only in very general terms. When asked, C.V. was unable to identify any particular incident that stuck out in her memory; the focus of the evidence was the general pattern of the ongoing abuse. The deputy prosecutor did not attempt to distinguish among specific incidents during closing argument, [*11] noting that "[t]his case comes down to one simple question: Did the defendant touch these girls?" Coleman's defense was a general denial, and he maintained that C.V. was lying about all of the alleged touching. As in *Camarillo* and *Allen*, a rational juror could not have distinguished among the charged acts described by C.V. and would have had to believe C.V. as to all of the incidents in order to find Coleman guilty. See State v. Camarillo, 115 Wn.2d at 72.

But the failure to give a unanimity instruction as to M.D. was not harmless. In addition to testifying to a general pattern of ongoing abuse, M.D. described two specific incidents in detail. One incident involved touching that occurred while M.D. was sitting with Coleman in a leather chair in the living room, watching "The Mummy Returns." M.D. described how Coleman reached up under her shirt and started rubbing. In order to stop the touching, M.D. pretended to go to the bathroom and then sat on the floor. M.D. also described an incident that occurred in Coleman's bedroom when he told her that "it was his turn" and then made her touch his penis. M.D. acknowledged that she had not previously told anyone [*12] about this incident because she thought no one would believe her.

In addition to a general denial of M.D.'s allegations, the defense relied on general character evidence. M.D.'s mother testified that M.D.'s reputation for truthfulness was "bad," an assessment that M.D. herself acknowledged. The defense also impeached M.D. with her prior statement to the prosecution interview specialist, who testified that M.D. had denied touching Coleman. At trial, however, M.D. revealed for the first time that she had touched Coleman's penis. Defense counsel underscored the prior inconsistent statement during cross examination and closing argument.

Given the factually different incidents that M.D. described, and the presence of controverting character evidence and a prior inconsistent statement, the evidence is more comparable to that in *Kitchen* than in *Camarillo*. Under the circumstances, a rational juror could have had a reasonable doubt as to some of the incidents described by M.D. The failure to give a unanimity instruction was therefore not harmless beyond a reasonable doubt.

Coleman next contends that the trial court erred in admitting statements by C.V. and M.D. under RCW 9A.44.120 [*13], which sets forth the child hearsay exception. The challenged statements were admitted though testimony by the girls' teacher, the school counselor, a CPS social worker, an interviewer from the prosecutor's office, and M.D.'s mother.

^{HN2} An out-of-court statement by a testifying child victim is admissible under RCW 9A.44.120(1) if the

court finds "that the time, content, and circumstances of the statement provide sufficient indicia of reliability." In determining the reliability of child hearsay, a court considers nine nonexclusive factors, including (1) whether the declarant had an apparent motive to lie; (2) the declarant's general character; (3) whether more than one person heard the statements; (4) the spontaneity of the statements; and (5) the timing of the declaration and the relationship between the declarant and the witness. State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984). The court should also consider (6) whether the statements contain express assertions of past fact; (7) whether the declarant's lack of knowledge could be established by cross-examination; (8) the possibility of the declarant's recollection being faulty; [*14] and (9) whether the circumstances suggest the declarant misrepresented the defendant's involvement. State v. Ryan, 103 Wn.2d at 176. The final four factors are often "not very helpful" in assessing the reliability of child hearsay. State v. Henderson, 48 Wn. App. 543, 551 n.5, 740 P.2d 329 (1987).

The trial court considers the foregoing factors as a whole; not every factor must be satisfied. State v. Swan, 114 Wn.2d 613, 652, 790 P.2d 610 (1990). No single factor is decisive. State v. Young, 62 Wn. App. 895, 902, 802 P.2d 829, 817 P.2d 412 (1991). We review the trial court's determination of reliability solely for a manifest abuse of discretion. State v. Pham, 75 Wn. App. 626, 631, 879 P.2d 321 (1994).

In ruling that the statements were reliable, the trial court found that the girls did not have an apparent motive to lie. The evidence strongly supports this finding. While there was testimony that C.V. could be defensive and apparently did not like being called out "on the carpet" by the teacher, nothing supports an inference that she had a motive to lie about Coleman. In fact, both girls repeatedly [*15] stated that they liked Coleman and generally enjoyed being with him. Both C.V. and M.D. indicated that they had still been looking forward to going to Hawaii with Coleman. Nothing in the record provides significant support for an inference that the girls had some reason to fabricate the allegations.

The general character of the victims also supported admission of the statements. On appeal, Coleman suggests that both girls had a reputation for lying and that M.D. had made false allegations of abuse in the past. But as the trial court observed, when the specific allegations against C.V. and M.D. were examined in detail, they indicated that the girls' statements were essentially true or represented an understandable characterization given the girls' young age. The record supports the trial court's determination that C.V. and M.D. were "normal girls of their age," even though not everything they had said in the past was entirely true.

As to the third factor, C.V. and M.D. made similar statements describing the abuse to several different people. See State v. Lopez, 95 Wn. App. 842, 853, 980 P.2d 224 (1999). Contrary to Coleman's assertions, the inconsistencies or variations [*16] were minor; the girls consistently described the frequency and nature of the abuse.

The statements were also generally spontaneous. McAlpin testified that she did not think that C.V. had planned on telling her about the abuse and that C.V. remained hesitant during the questioning. Barnes, Trudnowski, and Liebsack were all trained interviewers who stated that they asked the girls non-leading and open-ended questions. The professional training of most of the interviewers also supported the fifth factor: the timing of the statements and the relationship between the declarant and the witness. See State v. Lopez, 95 Wn. App. at 853.

Coleman does not challenge application of any of the remaining factors. When the Ryan factors are viewed in their totality, we cannot say that the trial court abused its discretion in finding the statements to be reliable.

Coleman next contends that his exceptional sentence must be reversed under Blakely v. Washington, ___ U.S. ___, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), because the court, rather than a jury, found the aggravating circumstances. ^{HN3} Under Blakely, any fact that increases the penalty for an offense [*17] beyond that authorized by the verdict must be submitted to a jury and proved beyond a reasonable doubt. Blakely, 124 S. Ct. at 2536. The State concedes that Coleman's exceptional sentences are invalid under Blakely, but argues the error was harmless because the jury necessarily found the aggravating circumstances when it found Coleman guilty. But our Supreme Court has rejected this argument, concluding that a harmless error analysis cannot be applied to Blakely errors. State v. Hughes, 110 Wn.2d 183, 110 P.3d 192 (No. 75063-7, April 14, 2005). Accordingly, Coleman is entitled to be resentenced within the standard range. State v. Hughes, *supra*.

Coleman raises several additional issues in his pro se statement of additional grounds. See RAP 10.10. He first alleges that his speedy trial rights were violated. But Coleman has not submitted a sufficient record of the challenged rulings to permit review. He also suggests that the trial court erred by refusing to rule on the speedy trial issues and "deferring" the matter for the Court of Appeals. But the trial court effectively denied Coleman's motions to dismiss, correctly noting that he would [*18] have to raise any further challenge on appeal.

Coleman next contends that the trial court erred in denying his motion to dismiss because of the State's failure to comply fully with a discovery order. The motion concerned the late disclosure of the CPS social worker's interview of the victims. The trial court denied the motion to dismiss and granted the defense a continuance to investigate the evidence. ^{HN4} Dismissal of a criminal prosecution is an "extraordinary remedy," and the trial court did not abuse its discretion in denying the motion to dismiss. See State v. Ramos, 83 Wn. App. 622, 636-37, 922 P.2d 193 (1996).

Coleman next contends that the CPS social worker's testimony should have been excluded because she failed to complete an official investigation report within 14 days as required by statute. ^{HN5} Because this issue is raised for the first time on appeal, we will not consider it. RAP 2.5(a).

Coleman next contends that the deputy prosecutor committed reversible misconduct during closing argument by asking the jury to overlook inconsistencies in the victims' testimony. But ^{HN6} the deputy prosecutor has wide latitude in closing argument to draw reasonable inferences [*19] from the evidence. State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). The deputy prosecutor here properly argued that the jurors could draw reasonable inferences from the evidence; no misconduct occurred.

Finally, Coleman asserts that the trial judge was biased. But he has failed to identify the nature of the alleged errors sufficiently to permit meaningful review. See RAP 10.10(c).

We affirm Coleman's conviction on Count I (involving C.V.), reverse Coleman's conviction on Count II (involving M.D.), and remand for further proceedings. On remand, Coleman is entitled to be resentenced within the standard range.

Affirmed in part, reversed in part, and remanded.

For the court:

/s/ COX, C.J.

/s/ AGID, J.

/s/ BAKER, J.

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APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 JOHN COLEMAN,)
)
 Appellant.)

No. 54171-4-I **RECEIVED**
JUL 21 2005
ORDER DENYING
APPELLANT'S ~~Motion~~ Motion on Appellate Project
FOR RECONSIDERATION

Appellant, John Coleman, has moved for reconsideration of the opinion filed in this case on June 13, 2005. The panel hearing the case has considered the motion and has determined that the motion for reconsideration should be denied. This court hereby

ORDERS that the motion for reconsideration is denied.

Dated this 21st day of July 2005.

FOR THE PANEL:

Cox, CJ
Judge

FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON
2005 JUL 21 PM 3:36

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 54171-4-1
Respondent,)	
)	DIVISION ONE
v.)	
)	
JOHN COLEMAN,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: <u>June 13, 2005</u>
)	

Per Curiam. A jury found John Coleman guilty of two counts of first degree child molestation. We agree that the trial court's failure to give a unanimity instruction violated Coleman's constitutional right to a unanimous jury as to Count II. But the error was harmless as to Count I. We further conclude that the trial court did not abuse its discretion in admitting child hearsay statements and that Coleman's pro se arguments are without merit. Finally, Coleman's exceptional sentences are invalid under Blakely v. Washington, and he is entitled to be resentenced within the standard range. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

John Coleman was charged with two counts of first degree child molestation involving C.V. and M.D. In January 2002, C.V. and M.D. were friends and in the same fourth grade class. Coleman was the brother of C.V.'s grandfather and frequently took the girls out to dinner, shopping, and to the movies. The girls also visited Coleman in his condo on a number of occasions. Coleman's daughter recalled that Coleman had spent time "rough housing" with the girls in his bedroom with the door closed.

No. 54171-4-1/2

On January 22, 2002, M.D. approached Sarah McAlpin, the girls' teacher, and complained that C.V. was threatening to reveal one of M.D.'s "secrets." McAlpin, who was aware that M.D. had been abused by a relative at some time in the past, talked to C.V. about M.D.'s concern. During the course of the conversation, C.V. revealed that Coleman had been touching her "where her bathing suit covered her body." C.V. indicated that Coleman had touched her both on and under her clothes. McAlpin also spoke to M.D., who said that "Uncle Johnny" had been touching her as well.

McAlpin reported her conversation to Christine Barnes, the school's counselor, and Barnes spoke with C.V. later that same day. C.V. said that "Uncle Johnny" had been touching her "down there," meaning her crotch area, and that the touching had occurred both at C.V.'s house and at Coleman's house. C.V. also said that Coleman had been touching M.D.

Marjorie Trudnowski, a CPS social worker, interviewed C.V. on January 23, 2002. C.V. pointed to her vagina and said that Coleman had been touching her under her clothes "down there." She said that the touching had occurred both at her house and in the car, and that it had occurred most often at Coleman's house. C.V. described specific incidents of touching that had occurred when C.V. and M.D. spent the night at Coleman's house and when Coleman, C.V., and M.D. were at the movie "Snow Dogs." C.V. indicated that Coleman had also done "the same thing" to M.D. in the past. Coleman told C.V. not to tell anyone about the touching because he would get into "deep, deep trouble."

At about this time, C.V. and M.D. also revealed the touching to M.D.'s mother. The girls said that C.V. had talked to someone at school and wanted to tell M.D.'s

mother before she heard from someone else. M.D. said that Coleman had touched her on her breast and vaginal areas while trying to explain sex to her. The girls indicated that they had not said anything earlier because they were still hoping to go on a trip to Hawaii that Coleman had been planning.

Christine Liebsack, an interview specialist for the King County Prosecutor's Office, spoke with C.V. on February 21, 2002. While reluctant to provide many details, C.V. eventually admitted that Coleman had been touching her "in places where he shouldn't." C.V. pointed to the crotch and buttocks of a body sketch to explain where Coleman had touched her. C.V. said that the touching had occurred mostly at Coleman's house. She indicated that the last time she had gone to the movies with Coleman and M.D., "nothing really happened." C.V. also saw Coleman touch M.D.

Liebsack interviewed M.D. on March 13, 2002. M.D. acknowledged that Coleman had been touching her on her chest, crotch, and buttocks areas, under her clothes. She described one incident of touching that had occurred when she and C.V. spent the night at Coleman's house. M.D. said that Coleman would occasionally ask her to touch him, but she "would just lie there." She denied that Coleman had ever made her touch him.

Both C.V. and M.D. also testified at trial. C.V. testified that Coleman had touched her in the "wrong places," by which she meant her vagina. C.V. was unable to recall many details about the touching incidents, but indicated they occurred primarily in the bedroom or living room of Coleman's house. C.V. also saw Coleman touch M.D. During cross-examination, C.V. denied that anything bad had happened when she and M.D. went to the movies with Coleman.

No. 54171-4-1/4

M.D. testified that Coleman would touch her on her breast and vagina, under her clothes. When this happened, M.D. would just “sit there quietly” because she was afraid her parents might find out. M.D. said that the touching always occurred in Coleman’s house and that it occurred “a lot.”

M.D. described one incident that occurred at Coleman’s house while she and C.V. were watching “The Mummy Returns.” M.D. sat in a leather chair next to Coleman, who reached up her shirt and started rubbing. After a few minutes, M.D. said she had to go to the bathroom and left the room. When she returned, she sat on the floor. M.D. also described an incident in the bedroom. While she was lying on the bed telling jokes, Coleman reached under M.D.’s pants and underwear and began rubbing. To stop the touching, M.D. moved down to the floor.

M.D. also described an incident in the bedroom in which Coleman made her touch his penis. In order to stop the touching, M.D. got up to go to the bathroom. She admitted that she had not told any of the interviewers about this incident. When asked why, she explained she was afraid that no one would believe her “because some people don’t believe me a lot of times.” On several occasions, M.D. watched Coleman rub C.V. underneath her shirt.

The jury found Coleman guilty as charged. The court then imposed concurrent 300-month exceptional sentences based on findings that Coleman abused a position of trust and that the offense was part of an on-going pattern of abuse.

Coleman first contends that his constitutional right to a unanimous jury was violated because the trial court failed to give a unanimity instruction. When the State presents evidence of several distinct criminal acts, each of which could form the basis

for one charged count, either the State must “elect” the act that it is relying upon for conviction or the court must instruct the jury to agree on a specific act. State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10 (1991); see also State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984). The court’s failure to follow this rule may result in a violation of the defendant’s constitutional right to a unanimous jury verdict and right to a jury trial. State v. Camarillo, 115 Wn.2d 60, 64, 794 P.2d 850 (1990).

The State concedes that it failed to make an election in this case and that a unanimity instruction was required, but argues the error was harmless. Accordingly, we can affirm the jury’s verdict only if the error was harmless beyond a reasonable doubt. State v. Camarillo, 115 Wn.2d at 64. Such an error in a multiple acts case is presumed to be prejudicial, and the presumption can be overcome only “if no rational juror could have a reasonable doubt as to any of the incidents alleged.” State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988) (quoting State v. Loehner, 42 Wn. App. 408, 411, 711 P.2d 377 (1985) (Scholfield, A.C.J., concurring)).

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Kitchen, 110 Wn.2d at 412.

Here, C.V. described multiple similar incidents of abuse, but only in very general terms. When asked, C.V. was unable to identify any particular incident that stuck out in her memory; the focus of the evidence was the general pattern of the ongoing abuse. The deputy prosecutor did not attempt to distinguish among specific incidents during closing argument, noting that “[t]his case comes down to one simple question: Did the defendant touch these girls?” Coleman’s defense was a general denial, and he maintained that C.V. was lying about all of the alleged touching. As in Camarillo and Allen, a rational juror could not have distinguished among the charged acts described by C.V. and would have had to believe C.V. as to all of the incidents in order to find Coleman guilty. See State v. Camarillo, 115 Wn.2d at 72.

But the failure to give a unanimity instruction as to M.D. was not harmless. In addition to testifying to a general pattern of ongoing abuse, M.D. described two specific incidents in detail. One incident involved touching that occurred while M.D. was sitting with Coleman in a leather chair in the living room, watching “The Mummy Returns.” M.D. described how Coleman reached up under her shirt and started rubbing. In order to stop the touching, M.D. pretended to go to the bathroom and then sat on the floor. M.D. also described an incident that occurred in Coleman’s bedroom when he told her that “it was his turn” and then made her touch his penis. M.D. acknowledged that she had not previously told anyone about this incident because she thought no one would believe her.

In addition to a general denial of M.D.'s allegations, the defense relied on general character evidence. M.D.'s mother testified that M.D.'s reputation for truthfulness was "bad," an assessment that M.D. herself acknowledged. The defense also impeached M.D. with her prior statement to the prosecution interview specialist, who testified that M.D. had denied touching Coleman. At trial, however, M.D. revealed for the first time that she had touched Coleman's penis. Defense counsel underscored the prior inconsistent statement during cross examination and closing argument.

Given the factually different incidents that M.D. described, and the presence of controverting character evidence and a prior inconsistent statement, the evidence is more comparable to that in Kitchen than in Camarillo. Under the circumstances, a rational juror could have had a reasonable doubt as to some of the incidents described by M.D. The failure to give a unanimity instruction was therefore not harmless beyond a reasonable doubt.

Coleman next contends that the trial court erred in admitting statements by C.V. and M.D. under RCW 9A.44.120, which sets forth the child hearsay exception. The challenged statements were admitted though testimony by the girls' teacher, the school counselor, a CPS social worker, an interviewer from the prosecutor's office, and M.D.'s mother.

An out-of-court statement by a testifying child victim is admissible under RCW 9A.44.120(1) if the court finds "that the time, content, and circumstances of the statement provide sufficient indicia of reliability." In determining the reliability of child hearsay, a court considers nine nonexclusive factors, including (1) whether the declarant had an apparent motive to lie; (2) the declarant's general character; (3) whether more than one

person heard the statements; (4) the spontaneity of the statements; and (5) the timing of the declaration and the relationship between the declarant and the witness. State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984). The court should also consider (6) whether the statements contain express assertions of past fact; (7) whether the declarant's lack of knowledge could be established by cross-examination; (8) the possibility of the declarant's recollection being faulty; and (9) whether the circumstances suggest the declarant misrepresented the defendant's involvement. State v. Ryan, 103 Wn.2d at 176. The final four factors are often "not very helpful" in assessing the reliability of child hearsay. State v. Henderson, 48 Wn. App. 543, 551 n.5, 740 P.2d 329 (1987).

The trial court considers the foregoing factors as a whole; not every factor must be satisfied. State v. Swan, 114 Wn.2d 613, 652, 790 P.2d 610 (1990). No single factor is decisive. State v. Young, 62 Wn. App. 895, 902, 802 P.2d 829, 817 P.2d 412 (1991). We review the trial court's determination of reliability solely for a manifest abuse of discretion. State v. Pham, 75 Wn. App. 626, 631, 879 P.2d 321 (1994).

In ruling that the statements were reliable, the trial court found that the girls did not have an apparent motive to lie. The evidence supports this finding. While there was testimony that C.V. could be defensive and apparently did not like being called out "on the carpet" by the teacher, nothing supports an inference that she had a motive to lie about Coleman. In fact, both girls repeatedly stated that they liked Coleman and generally enjoyed being with him. Both C.V. and M.D. indicated that they had still been looking forward to going to Hawaii with Coleman. Nothing in the record provides

significant support for an inference that the girls had some reason to fabricate the allegations.

The general character of the victims also supported admission of the statements. On appeal, Coleman suggests that both girls had a reputation for lying and that M.D. had made false allegations of abuse in the past. But as the trial court observed, when the specific allegations against C.V. and M.D. were examined in detail, they indicated that the girls' statements were essentially true or represented an understandable characterization given the girls' young age. The record supports the trial court's determination that C.V. and M.D. were "normal girls of their age," even though not everything they had said in the past was entirely true.

As to the third factor, C.V. and M.D. made similar statements describing the abuse to several different people. See State v. Lopez, 95 Wn. App. 842, 853, 980 P.2d 224 (1999). Contrary to Coleman's assertions, the inconsistencies or variations were minor; the girls consistently described the frequency and nature of the abuse.

The statements were also generally spontaneous. McAlpin testified that she did not think that C.V. had planned on telling her about the abuse and that C.V. remained hesitant during the questioning. Barnes, Trudnowski, and Liebsack were all trained interviewers who stated that they asked the girls non-leading and open-ended questions. The professional training of most of the interviewers also supported the fifth factor: the timing of the statements and the relationship between the declarant and the witness. See State v. Lopez, 95 Wn. App. at 853.

Coleman does not challenge application of any of the remaining factors. When the Ryan factors are viewed in their totality, we cannot say that the trial court abused its discretion in finding the statements to be reliable.

Coleman next contends that his exceptional sentence must be reversed under Blakely v. Washington, ___ U.S. ___, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), because the court, rather than a jury, found the aggravating circumstances. Under Blakely, any fact that increases the penalty for an offense beyond that authorized by the verdict must be submitted to a jury and proved beyond a reasonable doubt. Blakely, 124 S. Ct. at 2536. The State concedes that Coleman's exceptional sentences are invalid under Blakely, but argues the error was harmless because the jury necessarily found the aggravating circumstances when it found Coleman guilty. But our Supreme Court has rejected this argument, concluding that a harmless error analysis cannot be applied to Blakely errors. State v. Hughes, ___ Wn.2d ___, 110 P.3d 192 (2005). Accordingly, Coleman is entitled to be resentenced within the standard range. State v. Hughes, supra.

Coleman raises several additional issues in his pro se statement of additional grounds. See RAP 10.10. He first alleges that his speedy trial rights were violated. But Coleman has not submitted a sufficient record of the challenged rulings to permit review. He also suggests that the trial court erred by refusing to rule on the speedy trial issues and "deferring" the matter for the Court of Appeals. But the trial court effectively denied Coleman's motions to dismiss, correctly noting that he would have to raise any further challenge on appeal.

Coleman next contends that the trial court erred in denying his motion to dismiss because of the State's failure to comply fully with a discovery order. The motion concerned the late disclosure of the CPS social worker's interview of the victims. The trial court denied the motion to dismiss and granted the defense a continuance to investigate the evidence. Dismissal of a criminal prosecution is an "extraordinary remedy," and the trial court did not abuse its discretion in denying the motion to dismiss. See State v. Ramos, 83 Wn. App. 622, 636-37, 922 P.2d 193 (1996).

Coleman next contends that the CPS social worker's testimony should have been excluded because she failed to complete an official investigation report within 14 days as required by statute. Because this issue is raised for the first time on appeal, we will not consider it. RAP 2.5(a).

Coleman next contends that the deputy prosecutor committed reversible misconduct during closing argument by asking the jury to overlook inconsistencies in the victims' testimony. But the deputy prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence. State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). The deputy prosecutor here properly argued that the jurors could draw reasonable inferences from the evidence; no misconduct occurred.

Finally, Coleman asserts that the trial judge was biased. But he has failed to identify the nature of the alleged error sufficiently to permit meaningful review. See RAP 10.10(c).

We affirm Coleman's conviction on Count I (involving C.V.), reverse Coleman's conviction on Count II (involving M.D.), and remand for further proceedings. On remand, Coleman is entitled to be resentenced within the standard range.

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Affirmed in part, reversed in part, and remanded.

For the court:

 /s/ COX, C.J.

 /s/ AGID, J.

 /s/ BAKER, J.

