

NO. 64853-5-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

2010 OCT 15 PM 4:54  
COURT OF APPEALS  
STATE OF WASHINGTON  
WJ

---

STATE OF WASHINGTON,

Respondent,

v.

ROY ALANIZ,

Appellant.

---

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

---

APPELLANT'S OPENING BRIEF

---

NANCY P. COLLINS  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, WA 98101  
(206) 587-2711

TABLE OF CONTENTS

A.	ASSIGNMENT OF ERROR .....	1
B.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	1
C.	STATEMENT OF THE CASE.....	2
D.	ARGUMENT .....	4
	THE COURT'S FAILURE TO REQUIRE JUROR UNANIMITY FOR THE UNDERLYING ACTS DENIED ALANIZ HIS RIGHT TO A FAIR TRIAL BY JURY .....	4
	1. The jury must unanimously agree that the State proved certain acts underlying a criminal offense .....	4
	2. The court did not instruct the jury on the mandatory requirement of unanimous agreement for each underlying act charged .....	6
	3. Reversal is required .....	10
E.	CONCLUSION.....	12

## TABLE OF AUTHORITIES

### **Washington Supreme Court Decisions**

<u>In re Detention of Pouncey</u> , 168 Wn.2d 382, 229 P.3d 768 (2010)	9
<u>State v. Byrd</u> , 125 Wn.2d 707, 887 P.2d 396 (1995) .....	4
<u>State v. Aumick</u> , 126 Wn.2d 422, 894 P.2d 1325 (1995).....	9
<u>State v. Kier</u> , 164 Wn.2d 798, 194 P.3d 212 (2008) .....	7, 8, 9
<u>State v. Kitchen</u> , 110 Wn.2d 403, 756 P.2d 105 (1988).....	7
<u>State v. LeFaber</u> , 128 Wn.2d 896, 913 P.2d 369 (1996) .....	5
<u>State v. Petrich</u> , 101 Wn.2d 566, 683 P.2d 173 (1984) .....	5
<u>State v. Sargent</u> , 62 Wash. 692, 114 P. 868 (1911) .....	7
<u>State v. Vander Houwen</u> , 163 Wn.2d 25, 177 P.3d 93 (2008) .....	6
<u>State v. Wanrow</u> , 88 Wn.2d 221, 559 P.2d 548 (1977) .....	10
<u>State v. Williams-Walker</u> , 167 Wn.2d 887, 225 P.3d 913 (2010)....	4
<u>State v. Workman</u> , 66 Wash. 292, 119 P.2d 751 (1911) .....	5

### **Washington Court of Appeals Decisions**

<u>State v. Borsheim</u> , 140 Wn.App. 357, 165 P.3d 417 (2007) .....	9
<u>State v. Cowen</u> , 87 Wn.App. 45, 939 P.2d 1249 (1997) .....	5

**United States Supreme Court Decisions**

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705  
(1967) ..... 10

In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368  
(1970) ..... 4

**United States Constitution**

Fourteenth Amendment ..... 1, 4

Sixth Amendment..... 1, 4

**Washington Constitution**

Article I, section 21 ..... 1, 4

Article I, section 22..... 4

Article I, section 3..... 4

**Other Authorities**

11 Wash. Practice, WPIC 3.01, Note on Use (3d. ed. 2008) ..... 9

A. ASSIGNMENT OF ERROR.

The court failed to clearly instruct the jury that it must unanimously agree on the underlying act in a multiple acts case, thereby denying Roy Alaniz his right to a unanimous jury verdict as mandated by Article I, section 21 of the Washington Constitution and the right to a fair trial by jury under the Sixth and Fourteenth Amendments.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

When the State presents evidence of more than one incident that could constitute the charged offense, the jury must unanimously find that a certain act has been proven beyond a reasonable doubt. The prosecution charged Alaniz with two counts of third degree child molestation occurring in the same three week period but presented evidence that the same acts occurred three separate times. The court did not instruct the jury on the requirement of unanimity for the underlying act. Where the general verdicts do not demonstrate that the jury unanimously agreed upon a certain act underlying a conviction, has the court failed to ensure the unanimity of the jury's verdict as required by the state and federal constitutions?

C. STATEMENT OF THE CASE.

In late December 2008, Seattle suffered an intractable snow storm that closed the schools and roads.<sup>1</sup> 10/21/09RP 64.<sup>2</sup> At that time, Roy Alaniz lived in a small home with his wife, two stepdaughters, two biological daughters, and an assortment of other relatives who visited and stayed for nights at a time. 10/21/09RP 21-22, 37-39; 11/3/09RP 48-49, 53-54. During the snow storm and its aftermath, many neighborhood children came and went from the home throughout each day. 10/21/09RP 39. Alaniz also had three teenage children from his first marriage and those children visited and stayed over often during December 2008. 10/21/09RP 65, 86. Alaniz's mother spent nights in their home because she could not get to her job from her own home due to the snow. 10/21/09RP 22; 10/22/09RP 25; 11/3/09RP 49. Alaniz's wife was home all day, caring for her six month old daughter and tending to a kidney stone that required pain medication. 10/21/09RP 21-22, 33; 11/3/09RP 77.

---

<sup>1</sup> See William Yardley, "Seattle Sees Most Snow in a Decade," New York Times (Dec. 21, 2008); Carol Pucci, Marc Ramirez and Jennifer Sullivan, "Travelers in holding pattern for holidays," Seattle Times. (Dec. 23, 2008).

<sup>2</sup> The verbatim report of proceedings are cited here by the date of the proceeding followed by the page number.

When staying at a friend's house on January 2, 2009, 14 year-old J.W. accused Alaniz of sexually molesting her by rubbing some part of his body that she could not see against her buttocks, after instructing her to show him her butt. 10/21/09RP 74-85, 95. J.W. testified that this happened three times in mid or late December 2008. 10/21/09RP 77, 81, 85. J.W. said it happened the same way each time. 10/21/09RP 80, 85. Each time it happened when she was trying to retrieve her cell phone from Alaniz, who had taken it as punishment. 10/21/09RP 75, 80, 85. One time she said Alaniz tried to use lotion but made a mess and needed a towel to wipe it up. 10/21/09RP 80-81. The third time was like the others, also in December when other people were home. 10/21/09RP 85. She had reported to the police that it happened two or three times. 10/21/09RP 97. She denied telling a Tyrone Savage none of it happened. 11/3/09RP 13, 17, 19.

The State charged Alaniz with two counts of third degree child molestation. CP 5-6. It initially defined the charging period for both counts as December 18 through 28, 2008, but expanded the charging period to December 10 through 31, 2008. CP 1-2, 5-6. Alaniz was convicted and received a standard range sentence. CP 28, 29, 51-54.

D. ARGUMENT.

THE COURT'S FAILURE TO REQUIRE JUROR  
UNANIMITY FOR THE UNDERLYING ACTS  
DENIED ALANIZ HIS RIGHT TO A FAIR TRIAL BY  
JURY

1. The jury must unanimously agree that the State proved certain acts underlying a criminal offense. In a criminal case, the jury must unanimously find the prosecution proved every element necessary for imposing punishment. State v. Williams-Walker, 167 Wn.2d 887, 900, 225 P.3d 913 (2010); Wash. Const. art. I, §§ 21, 22. Due process requires the prosecution to prove, beyond a reasonable doubt, all essential elements of a crime for a conviction to stand. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995); U.S. Const. amends. 6, 14; Wash. Const. art. I, §§ 3, 21, 22. Washington's more protective jury trial right mandates that the jury must authorize the court's imposition of punishment by unanimously finding the State proved all essential elements. Williams-Walker, 167 Wn.2d at 895-96.

A jury must unanimously agree on the act that underlies a conviction, and this act must be the same one charged in the information. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173

(1984); State v. Workman, 66 Wash. 292, 294-95, 119 P.2d 751 (1911). When multiple acts are charged that could independently prove one count, the court should explain to the jury that its verdict must be based on a unanimous finding that a certain act was proven beyond a reasonable doubt. Petrich, 101 Wn.2d at 572. An instruction explaining the requirement of unanimity for the underlying act protects juror unanimity. Id.

Jurors are not legal scholars or legislators presumed to parse technical meanings or to judge ambiguities. State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996) (legal standard must be “manifestly apparent” in instruction); see State v. Cowen, 87 Wn.App. 45, 49, 939 P.2d 1249 (1997) (reversing because grammatical reading of instruction could have left jury with incorrect impression of law). Where jury instructions could be read to permit an erroneous interpretation of the law, they are fatally flawed. LeFaber, 128 Wn.2d at 902. This absolute clarity is required since jurors are neither required nor expected to guess at the precise meanings of terms nor required to apply interpretive tools. Id.

2. The court did not instruct the jury on the mandatory requirement of unanimous agreement for each underlying act

charged. The trial court did not give the jury an instruction explaining the requirement that it base its verdict for each count on unanimous agreement of the underlying act. Because the complainant accused Alaniz of engaging in the same conduct on three separate occasions, Petrich requires such an instruction. State v. Vander Houwen, 163 Wn.2d 25, 37, 177 P.3d 93 (2008) (“In the absence of a unanimity jury instruction, each juror could have convicted Vander Houwen based on different criminal acts”).

The State charged Alaniz with two counts of child molestation in the third degree, occurring over the identical charging period of December 10 through 31, 2008. CP 5-6. But the complainant, J.W., testified that the same thing happened three times in the exact same way in this same time period. 10/21/09RP 80, 85. She did not know which date any incident occurred, other than it was in December after the craft fair. 10/21/09RP 85. She seemed to have more distinct descriptions of two incidents, but insisted that the same thing occurred three separate times, even though she told the police it happened two or three times. 10/21/09RP 74-85, 97. She once testified these three incidents were two days apart and later testified they were four or five days apart. 10/21/09 78, 98.

To ensure jury unanimity in cases involving multiple acts in the absence of a clear court instruction, the prosecution must specifically elect the particular criminal act upon which it will rely for a conviction. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). An “election” requires a clear and unambiguous pronouncement that other allegations are not to be considered in deliberations. See State v. Sargent, 62 Wash. 692, 695, 114 P. 868 (1911) (State must announce particular act on which it relies).

Remarks by a prosecutor in the course of closing argument do not constitute the clear pronouncement required to ensure the jury’s verdict rested on a particular act. State v. Kier, 164 Wn.2d 798, 813, 194 P.3d 212 (2008). In Kier, the Supreme Court rejected the prosecution’s claim that the arguments of counsel in closing may constitute a clear election. 164 Wn.2d at 813. Rather, the instructions, charging document, special verdict form, and evidence must support the election. Id. Otherwise, when the evidence supports alternative acts and the instructions do not require clear consideration of a specific allegation, the basis of the jury’s verdict is ambiguous and the rule of lenity requires the court to interpret the ambiguity in the light most favorable to the accused. Id. at 814.

The prosecution offered evidence explicitly accusing Alaniz of committing three separate incidents during the same time period. The jury instructions told the jury that counts one and two must be based on separate incidents, but never explained that the jury must agree on the underlying acts. CP 22-23. Similarly to Kier, the court's instructions contained no specificity as to which of the underlying acts must serve as the basis of the jury's verdict, and allowed the jurors to consider any qualifying act within the 21-day charging period, as long as it was not the same act as used in the other count. The evidence supported three separate incidents, but the jury was asked to convict Alaniz of having committed two offenses.

The prosecutor's closing argument suggested that the jury consider the "first" incident and the other one where Alaniz allegedly spilled lotion and reached for a towel. 11/3/09RP 111. But the jury was instructed, appropriately, that it "must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." CP 15.

Because the instructions tell the jury "to base its verdict on the evidence and instructions and not on the arguments of counsel," the prosecutor's closing argument alone may not

constitute a “clear election.” Kier, 164 Wn.2d at 813. “A jury should not have to obtain its instruction on the law from the arguments of counsel.” In re Detention of Pouncey, 168 Wn.2d 382, 392, 229 P.3d 768 (2010) (quoting State v. Aumick, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995)).

The court did not instruct the jury that its verdict must rest on unanimous agreement of the underlying acts. Rather, the court told the jury that their verdict on one count should not control its verdict on the second count, which attempts to alleviate the prejudice attached to multiple acts but does not speak to unanimity. CP 20; see 11 Wash. Practice, WPIC 3.01, Note on Use (3d. ed. 2008) (WPIC 3.01 may “guard against possible prejudice” where separate offenses tried together). The court also explained that the act underlying count one must be different from count two, thereby protecting against a double jeopardy violation. CP 22, 23; see State v. Borsheim, 140 Wn.App. 357, 367, 165 P.3d 417 (2007). In the general closing instruction, the court told the jury that all 12 “must agree” to return a verdict, but not that they must agree on the underlying act. CP 27. Thus, the instructions, as given, did not make the requirement of unanimity manifestly apparent to the average juror. Borsheim, 140 Wn.App. at 368.

3. Reversal is required. When there is an error of constitutional magnitude, reversal is required unless the prosecution proves beyond a reasonable doubt that it could not have affected the verdict. State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977); see also Chapman v. California, 386 U.S. 18, 23-24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (an error which possibly influenced the jury adversely cannot be harmless).

A trial court's instructions must set forth all essential legal requirements in a manner easily understood by the average juror. Since the trial court failed to explain the requirement that unanimity for each count must be based upon a different underlying act, jurors were not clearly and manifestly apprised of the correct legal standard. There is no basis to infer that the jurors individually based their verdicts upon unanimous agreement of two distinct acts. J.W. insisted that the incident occurred three times. The evidence was not equally strong as to all three. One instance was far more ambiguously described than the others, and the complainant initially reported the incident happened two or three times. 10/21/09RP 85, 98. Furthermore, the family lived in a small home occupied by many people who moved freely throughout the house. It is questionable whether Alaniz would have had the

opportunity to commit these acts on three separate occasions without being detected given the open layout of the house and the number of people nearby. After J.W. made these allegations, she confided in another person that none of it was true, although she later denied this recantation. 11/3/09RP 13, 17-19, 23.

Presumably, the State charged Alaniz with two offenses because it did not believe it could prove all three alleged incidents. Yet there is no reason to believe all 12 jurors agreed upon the underlying incidents for each count, and there was reason to doubt that each incident occurred. The convictions must be reversed due to the violation of Alaniz's right to a fair trial by a unanimous jury.

E. CONCLUSION.

For the foregoing reasons, Mr. Alaniz respectfully requests this Court reverse his convictions due to the violation of his right to a unanimous jury verdict.

DATED this 15<sup>th</sup> day of October 2010.

Respectfully submitted,



---

NANCY P. COLLINS (WSBA 28806)  
Washington Appellate Project (91052)  
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 64853-5-I
v.	)	
	)	
ROY ALANIZ,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15<sup>TH</sup> DAY OF OCTOBER, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

2010 OCT 15 PM 4:51  
COURT OF APPEALS  
DIVISION ONE  
FILED

[X] KING COUNTY PROSECUTING ATTORNEY	(X)	U.S. MAIL
APPELLATE UNIT	( )	HAND DELIVERY
KING COUNTY COURTHOUSE	( )	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

[X] ROY ALANIZ	(X)	U.S. MAIL
703225	( )	HAND DELIVERY
COYOTE RIDGE CC	( )	_____
PO BOX 769		
CONNELL, WA 99326		

**SIGNED** IN SEATTLE, WASHINGTON THIS 15<sup>TH</sup> DAY OF OCTOBER, 2010.

X \_\_\_\_\_  


**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710