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2017-1-18-13

NO. 65766-6-I

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

STATE OF WASHINGTON

Respondent

v.

ALLEN J. ROOT,

Appellant

BRIEF OF RESPONDENT

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I. ISSUES

1. May the defendant raise an issue of juror unanimity for the first time on appeal when he did not propose a unanimity instruction and did not except to the Court's failure to give a unanimity instruction?

2. Was a unanimity instruction necessary where the State elected which acts constituted each count of the charged offenses?

II. STATEMENT OF THE CASE

A.M., born 7-30-93¹, moved to Gold Bar with her family when she was one year old. The M. family and the Root family were neighbors. Zachary and Allen Root, the defendant, are two of the Roots sons. The M. family met the Root family through the friendship between Zachary Root and A.M.'s brother M.M. 2 RP 58, 60-61, 117-118.²

The defendant is ten years older than A.M. A.M. was four years old when the defendant began to babysit her and her brothers. One day when A.M. was four years old she came home from pre-school where the defendant was babysitting A.M. and her

¹ The report of proceeding erroneously states A.M.'s date of birth was 7-30-83. She testified that she was 16 years old at the time of trial which would make her date of birth 7-30-93.

² Reference to the report of proceedings is as follows: 1 RP – voir dire, 2 RP - Jury Trial, March 22 and 23, 2010, 3 RP – Sentencing July 2, 2010.

brothers. Zachary Root was also there. A.M. was wearing her favorite yellow outfit that she had recently received. The defendant walked A.M. back to her brother's room and Zachary followed. The defendant instructed Zachary to go outside. Zachary did so, bringing A.M.'s brothers with him. The defendant dislodged a toy from the VCR in A.M.'s brother's room and put in a Betty Boop movie to play. He then made A.M. get on her knees and told her to suck on his penis. The defendant held her head moving it back and forth. A.M. gagged, and asked to be allowed to go to the bathroom. The defendant told A.M. to wait. Eventually A.M. wet her pants. When the defendant stopped A.M. ran into the bathroom and locked the door to wait for her parents to come home. 2 RP 61-65, 118, 120, 139.

A few months after that first incident when A.M. was almost five years old the defendant was again babysitting A.M. The defendant walked A.M. back to her parent's bedroom and had her get on her knees again. The defendant took his pants down and again made A.M. suck on his penis. This time the defendant ejaculated. 2 RP 66-69.

Approximately one year later A.M.'s parents went on a vacation to Las Vegas. The M. children were at the Root's home.

When Zachary and the M. brothers were in Zachary's room playing video games the defendant directed A.M. back to his bedroom. Once there the defendant put his hands on A.M.'s shoulders and forced her onto her knees. He pulled down his pants and again and forced her to suck on his penis. The defendant ejaculated into a towel. When he was done he sent A.M. out of the room to join the other boys. A.M. did not join the boys, but sat in the living room. 2 RP 69-73.

The defendant told A.M. not to tell anyone or he would come after her and harm her. A.M. did not tell her parents what happened at that time. 2 RP 65, 73.

A.M.'s mother, Gina M., noticed a change in A.M.'s behavior when she was about four years old. Ms. M. noticed that while A.M. had been a happy child, after age four she was more aggressive and defensive. When the defendant came over to babysit A.M. would become angry and say that she did not like the defendant or Zachary, and that she did not want the defendant babysitting her. A.M. made it clear over the years that she did not like the Roots, and did not like having them in their home. A.M. felt so unsafe and insecure in her own home that her mother and A.M. moved to Kent to live in her grandmother's house. 2 RP 74-75, 126-127.

Eventually A.M. told three of her friends that the defendant had made her perform oral sex on him. One friend, A.B.M. had gone through a similar experience. The girls agreed they should tell their parents. 2 RP 75-76, 143-144.

A.M. was 14 years old when she finally told her mother what the defendant had done to her. A.M. also disclosed that Zachary Root had similarly abused her. During the police investigation into A.M.'s report Zachary admitted that he had touched A.M.'s vagina with his finger. 2 RP 127, 141-142.

The defendant was charged by amended information with three counts of Rape of a Child in the First Degree. 1 CP 147. At trial the defendant neither proposed a Petrich³ instruction nor did he except to the court's failure to give that instruction. 1 CP 145-146, 2 RP 161. During closing argument the prosecutor argued count I involved the yellow dress incident, count II involved the incident in A.M.'s parent's bedroom, and count III involved the incident that happened at the Root house. 2 RP 169-172.

The jury convicted the defendant on count I and III. The jury acquitted the defendant on count II. 1 CP 111-113.

³ State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984).

III. ARGUMENT

A. THE DEFENDANT HAS NOT PRESERVED THE ISSUE OF JURY UNANIMITY FOR REVIEW.

For the first time on appeal the defendant argues that the trial court's failure to instruct the jury that it must be unanimous was error. The defendant did not except to the court's failure to give a unanimity instruction at trial. 2 RP 161. Nor did he propose his own unanimity instruction. 1 CP 145-146. "No error can be predicated on the failure of the trial court to give an instruction where no request for such an instruction was ever made." State v. Kroll, 87 Wn.2d 829, 843, 558 P.2d 173 (1977).

Generally an appellate court will not consider issues raised for the first time on appeal. RAP 2.5(a), State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). The policy underlying the rule is to "encourage[e] the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial." State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009), quoting, State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988).

An exception to the general rule applies when a party raises an issue that constitutes “manifest constitutional error.” RAP 2.5(a)(3). In order for a party to demonstrate that the alleged error should be considered for the first time on appeal he must first show that he suffered actual prejudice. O’Hara, 167 Wn.2d at 98. To demonstrate that the alleged error is manifest the defendant must make a “plausible showing ... that the asserted error had practical and identifiable consequences in the trial of the case.” State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). Second, the defendant must establish that the error is truly of constitutional dimension. O’Hara, 167 Wn.2d at 98. If an alleged error meets these criteria, the error is subject to harmless error analysis. Id. The “actual prejudice” analysis requires a showing that the error is so obvious on the record that the error warrants appellate review. O’Hara, 167 Wn.2d at 99-100. “It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to act.” Id.

Where evidence is presented of several distinct acts constituting a crime occurred the Court has required the State to

elect which act is relied upon for a conviction in order to ensure juror unanimity. State v. Workman, 66 Wash. 292, 294-95, 119 P. 751 (1911). The Court announced a modified Workman rule in State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984). “The State may, in its discretion, elect the act upon which it will rely for conviction. Alternatively, if the jury is instructed that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt, a unanimous verdict on one criminal act will be assured. When the State chooses not to elect, this jury instruction must be given to ensure the jury’s understanding of the unanimity requirement.” Id. at 572.

Here the defendant has failed to establish any error in failing to give a unanimity instruction was manifest within the meaning of RAP 2.5(a)(3). The prosecutor adhered to Petrich rule by making an election regarding which specific acts constituted each charged incident. The prosecutor charged three incidents of rape, alleging each count was “an act separate and distinct from” the other two counts. He then produced evidence of three distinct incidents of rape. In closing argument he assigned each distinct act to a specific charged count. There is no evidence in the record that the

jury did not adhere to the acts assigned to each count when rendering their verdicts.

“If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The defendant speculates that the jury may have rendered non-unanimous verdicts as to each count, while still returning verdict of guilty on count I and III⁴. BOA at 16-17. But speculation is not sufficient to establish the actual prejudice required to meet the manifest standard necessary to review a claimed error for the first time on appeal.

The defendant argues that the error is preserved because it is a constitutional error, citing State v. Bobenhouse, 143 Wn. App. 315, 325, 177 P.3d 209 (2008), affirmed 166 Wn.2d 881, 214 P.3d 907 (2009) and State v. Kiser, 87 Wn. App. 126, 129, 940 P.2d 308 (1997), review denied, 134 Wn.2d 1002, 953 P.2d 95 (1998). Bobenhouse only cited Kiser for the proposition that failure to give a unanimity instruction may be raised for the first time on appeal because it is manifest constitutional error, with no analysis as to

⁴ The defendant assigns the guilty verdicts to counts I and II. In reality the jury found the defendant guilty of counts I and III, and not guilty of count II. 1 CP 111-113.

why the error was manifest in that case. The Court in Kiser similarly did not analyze whether the issue was manifest. Rather it simply justified considering the issue for the first time on appeal by citing to State v. Holland, 77 Wn. App. 420, 424, 891 P.2d 49, review denied, 126 Wn.2d 1008, 898 P.2d 308 (1995). Kiser, 87 Wn. App. at 129 n. 2. The Court in Holland considered whether failure to give a unanimity instruction was error for the first time on appeal because “the right to a unanimous verdict is a fundamental constitutional right and may, therefore, be raised for the first time on appeal.” Holland, 77 Wn. App. at 424 citing State v. Gitchel, 41 Wn. App. 820, 821-22, 706 P.2d 1091, review denied, 105 Wn.2d 1003 (1985).

The Court should not accept this line of authority as an exception to the general requirement that an unpreserved error must be manifest to be raised on appeal. Neither Bobenhouse nor Kiser engaged in any analysis as to whether the alleged error in those cases was manifest. Nor did either case discuss why a juror unanimity issue was so unique as to set it apart from other kinds of claimed constitutional error. Holland likewise failed to conduct the requisite analysis. Instead it relied on Gitchell, supra. Like these other cases, Gitchell neither discussed the manifest requirement,

nor did it explain why this type of alleged constitutional error required different treatment than any other kind of constitutional error.

The Court has recently indicated that juror unanimity is not such a unique question that it should be exempt from the requirement that defendant establish such error was manifest constitutional error if he failed to raise the issue in the trial court in State v. Nunez, ___ Wn. App. ___, ___ P.3d ___ (2011 WL536431). There the defendant argued the jury was improperly instructed that it was required to unanimously agree the sentencing enhancement had not been proved, relying on State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010). Nunez rejected the defendant's claim because he had not objected to the court's instructions at trial, and he had not established the alleged error was either of constitutional magnitude or that if it was constitutional error that it was manifest. Id.

In addition, had the Court in Bobenhouse, Holland, and Gitchell addressed the manifest requirement, each Court could have found under the circumstances that that requirement had been met. In Bobenhouse, Holland, and Gitchell the State charged the defendant with one or more counts of a particular crime, but

produced evidence that the criminal conduct occurred on more occasions than the charged counts. In none of these cases did the court give a unanimity jury instruction. In Gitchell the Court noted the prosecutor did not elect which acts constituted the charged crime. Gitchell, 41 Wn. App. at 823. Neither Bobenhouse nor Holland specifically states the prosecutor made an election. Since the Court did not discuss an election it can reasonably be assumed that no election was made in either of these cases. With no election, and no unanimity instruction the potential for error is more obvious than under the circumstances of this case.

In Kiser the Court was faced with a different issue; whether under the assault of a child statute the State was required to elect which assault was the principal assault in a series of assaults which constituted the offense. Kiser, 87 Wn. App. at 129. Although the Court made a cursory reference to Holland to justify consideration of the issue, it could have easily considered it for another reason. RAP 2.5(a) is not mandatory, but rather is a matter within the reviewing court's discretion. Bennett v. Hardy, 113 Wn.2d 912, 918, 784 P.2d 1258 (1990). The issue raised in Kiser involved the interpretation of a relatively new statute which was likely to recur. The Court could have in its discretion considered the question in its

discretion because it was a matter of public interest. Nunez, supra at ¶ 28.

The rule in RAP 2.5(a)(3) providing an exception for errors not objected to below is a narrow one. Scott, 110 Wn.2d at 687. The question presented by the defendant is not unique. As he demonstrates in his briefing how juror unanimity is achieved in cases where there are multiple acts charged and testified to has been analyzed in many cases. Unlike the questions in Kiser or in Bashaw the question here is not one that should be addressed despite his failure to preserve the issue at trial because of the public interest generated by the question. While juror unanimity is a constitutional question, the defendant has not demonstrated that it is manifest from the record at trial. This Court should decline to consider this issue for the first time on appeal.

B. THE PROSECUTOR ELECTED THE ACTS WHICH CONSTITUTED EACH CHARGED OFFENSE.

Where several acts are alleged, and any one of them could constitute the crime charged the jury must be unanimous in regard to which act constituted the charged crime. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). In order to ensure juror unanimity the prosecution must either elect which act it relies upon

to support the charge or the court must instruct the jury that all 12 must agree that the same underlying act was proved beyond a reasonable doubt. Petrich, 101 Wn.2d at 572. The Court did not explain how a prosecutor would make an election sufficient to satisfy the unanimity requirement.

One case has held an election was adequately made when considering the manner in which the case was charged, the instructions as a whole, and the prosecutor's closing arguments. State v. Bland, 71 Wn. App. 345, 860 P.2d 1046 (1993), disapproved on other grounds, State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007). There the defendant assaulted victim Jefferson by punching him in the face. He then assaulted victim Jefferson by pointing a gun at Jefferson. As Jefferson fled the defendant fired a shot. The shot went through victim Carrington's front room window, narrowly missing Mr. Carrington. The defendant was charged with two counts of second degree assault with a deadly weapon. The defendant argued that either assault could have been based on one of the three acts of assault so that the court should have given a unanimity instruction. Id. at 350. This Court disagreed and found the State had made a proper election. This Court looked to the Information and jury instructions which made it clear that the State's

case was based on the two assaults involving a deadly weapon. In addition the prosecutor's closing argument made it clear that the threat to Jefferson constituted count I and the near shooting of Carrington constituted count II. Id. at 351-52.

Here the State made an election which was sufficient to ensure juror unanimity. First, as the defendant notes, jury was informed that the defendant was charged with three counts of rape of a child first degree. The court read the Information to the jurors. Each count included the language "in an act separate and distinct from" the other two counts. 1 RP 5. The jurors given the following instructions at the close of evidence

You have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict."

1 CP 118.

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

1 CP 122.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision

1 CP 130.

In addition each of the “to convict” instructions made it clear that each count was a separate incident from the other two. 1 CP 126-128.

Jury instructions are considered as a whole and viewed in the manner in which an ordinary juror would interpret them. Bland, 71 Wn. App. at 351, State v. Noel, 51 Wn. App. 436, 440, 753 P.2d 1017, review denied, 111 Wn.2d 1003 (1988). An ordinary reading of these instructions informed the jury that (1) each count was based on separate and distinct act, and (2) the juror must unanimously agree that each count has been proved in order to return a guilty verdict.

In addition the prosecutor’s argument made it clear that the State elected certain acts as each charged count. A.M. testified that the earliest incident she remembered occurred when she came home from pre-school one day, wearing her favorite yellow outfit. She testified to specific details surrounding the event, including what room the rape occurred in and what the defendant played on the VCR while he raped her. The prosecutor made it clear in closing argument that count I was the rape associated with the yellow outfit incident. 2 RP 62-65, 169.

A.M. testified to a second incident occurring in her parent's bedroom a few months after the first incident occurred. She described how the defendant disrobed just enough for him to have her perform fellatio on him. The prosecutor clearly indicated that count II related to this incident. "Count II, you can think of as the parent's bedroom. And she said this happened a few months later." 2 RP 66-69, 171.

The prosecutor asked A.M. about a third incident. A.M. testified that it happened at the Root home, in the defendant's room while her parents were on vacation in Las Vegas. That rape occurred about one year after the second rape, when she was five years old. Although the prosecutor identified this third rape as the "third instance" he clearly was referring to count III in light of his earlier comments. 2 RP 69-73, 172.

The facts in this case are very similar to the facts in Bland. In addition, to the extent that the defense argued any of the specific facts related to each count, the defense adopted the State's election in its closing argument. 2 RP 186. When considering the manner in which the defendant was charged, the instructions to the jury, and the prosecutor's clear election regarding which acts were associated with each count, the prosecutor made an adequate

election sufficient to ensure the jury verdict would be unanimous as to which acts constituted the counts on which he was convicted. The defendant argues the prosecutor did not properly elect which rape related to each charged count, and in the absence of an instruction jury unanimity was not ensured. The defendant asserts that the prosecutor's closing argument was insufficient to constitute a valid election.

The defendant supports his position citing State v. Kier, 164 Wn.2d 798, 195 P.3d 212 (2008). Kier addressed whether convictions for second degree assault and first degree robbery merged when the evidence and instructions established two people were robbed during a car-jacking, but only one of those two people was assaulted. The Court analogized the circumstances to the multiple acts cases which required the State to make a clear election of the conduct forming the basis of each charge or otherwise instruct the jury to agree on a criminal act. Id. at 811. Given the manner in which the evidence was presented and the jury was instructed the Court concluded the prosecutor's argument suggesting that one victim was robbed and the other was assaulted was insufficient to establish a clear election. Id. at 813.

The evidence and instructions in this case are very different from that in Kier. In Kier the evidence showed that both of the victims were present and threatened by the defendant at the time he and his co-defendants stole the car the victims had occupied. Thus the evidence alone did not clearly indicate one robbery victim or another, but rather two robbery victims. In contrast the evidence presented in this case established three distinct events occurring at different time and in different places. There could be no confusion as to which event was under consideration when discussing a specific act making up each charge. In Kier the “to convict” instruction for robbery did not specify a particular victim. Here the instructions as well as the Information read to the jury clearly indicated that each count was a separate count, and the jury had to be unanimous to return a verdict on any count. Unlike Kier the prosecutor’s argument did not stand alone as the only fact which clearly delineated which act constituted each charged offense. Kier does not support the defendant’s argument that the jury was not unanimous as to which acts were committed in returning its verdicts.

The defendant further argues that the alleged error was not harmless relying on Holland, supra. Holland is also factually

different from this case. While A.M. testified to three distinct acts constituting rape, the victim in Holland only generally testified to an act of molestation occurring multiple times in the same way. Holland, 77 Wn. App. at 422-23. There is no indication in Holland that the jury was instructed that it must treat each count separately or be unanimous to reach a verdict on any count. The Court did not state that the prosecutor made an election as to what acts constituted each count in closing arguments; given the victim's testimony it is unlikely that the prosecutor could have done so. Consequently the Court concluded that it was impossible to determine whether the jury unanimously agreed on the same acts to support the convictions on two of the three counts. Id. at 425.

Holland did not rule out the possibility that error could be harmless depending on the manner in which the jury returned its verdict. Id. at 425. Even if this Court finds unanimity was not guaranteed as to counts I and III, given the testimony specifically distinguishing between each count, the instructions, and the prosecutor's argument this Court should find any error is harmless.

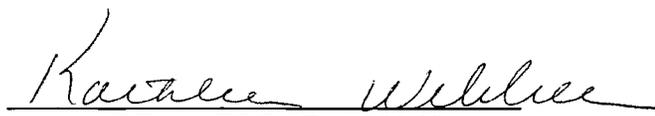
IV. CONCLUSION

For the forgoing reasons the State asks the Court to decline to review the issue because it is not a manifest constitutional error.

If the Court does review the issue the State asks the Court to find the State made a proper election as to each act of rape relating to each charged count.

Respectfully submitted on April 1, 2011.

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