71224-1 71224-1

NO. 71224-1

COURT OF APPEALS, DIVISION I

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

PATRICK CRICK, Appellant,

REPLY BRIEF OF APPELLANT

John R. Crowley

Attorney for Appellant

The Crowley Law Firm, P.L.L.C.

216 1st Avenue South

Suite 204

Seattle, Washington 98104

Tel (206) 625-7500 ♦ Fax (206) 625-1223

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR 1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

III. STATEMENT OF THE CASE 2

IV. ARGUMENTS 2

Mr. Crick's constitutional right to a jury trial was violated when the jury was not instructed on unanimity of the same criminal act when the evidence indicated that multiple criminal acts had been committed, and Mr. Crick was only charged with one count of criminal conduct 2

V. CONCLUSION 11

TABLE OF AUTHORITIES

Washington Supreme Court Cases

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

State v. Handran, 113 Wn.2d 11, 775 P.2d 453 (1989) 3

State v. Coleman, 159 Wn.2d 509, 150 P.3d 1126 (2007) 6

Washington Appellate Court Cases

State v. King, 75 Wn. App. 899, 902, 878 P.2d 466 (1994) 2

State v. Kitchen, 46 Wn. App. 232, 730 P.2d 103 (1986) 2

State v. Gooden, 51 Wn. App. 615, 754 P.2d 1000 (1988) 3

State v. Grantham, 84 Wn. App. 854, 932 P.2d 657 (1997).....8

I. ASSIGNMENT OF ERROR

Mr. Crick's constitutional right to a jury trial was violated when the jury was not instructed on unanimity of the same criminal act when the evidence indicated that multiple criminal acts had been committed, yet Mr. Crick was only charged with one count of criminal conduct.

II. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Whether Mr. Crick's constitutional right to a jury trial was violated when the jury was not instructed on unanimity of the same criminal act when the evidence indicated that multiple criminal acts had been committed, yet Mr. Crick was only charged with one count of criminal conduct

III. STATEMENT OF THE CASE

Petitioner incorporates by reference the facts of the case as outlined in the initial brief of the appellant. See initial brief of appellant.

IV. ARGUMENTS

Mr. Crick's constitutional right to a fair jury trial was violated when the jury was not instructed on unanimity of the same criminal act when the evidence indicated that multiple criminal acts had been committed, and Mr. Crick was only charged with one count of criminal conduct.

A defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. *State v. King*, 75 Wn. App. 899, 902, 878 P.2d 466 (1994), *review denied*, 125 Wn.2d 1021, 890 P.2d 463 (1995). Where the State charges one count of criminal conduct and presents evidence of more than one criminal act, there is a danger that a conviction may not be based on a unanimous jury finding that the defendant committed any given single criminal act. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). In order to ensure jury unanimity, the State must elect a single act upon which it will rely for conviction, or the jury must be instructed that all must agree as to what act or acts were proved beyond a reasonable doubt. *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984).

Where the State presents evidence of multiple acts which indicate a "continuing course of conduct," however, neither an election nor a unanimity instruction is required. *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). But one continuing offense must be distinguished from several distinct acts, each of which could be the basis for a criminal charge. *Petrich*, 101 Wn.2d at 571. Where evidence involves conduct at different times and places, or different victims, then the evidence tends to show several distinct acts. *Handran*, 113 Wn.2d at 17; *Petrich*, 101 Wn.2d at 571. A continuing course of conduct requires an ongoing enterprise with a single objective. *State v. Gooden*, 51 Wn. App. 615, 619–20, 754 P.2d 1000, *review denied*, 111 Wn.2d 1012 (1988). Common-sense must be utilized to determine whether multiple acts constitute a continuing course of conduct. *Handran*, 113 Wn.2d at 17. Failure to follow *Petrich's* protections is constitutional error. *Kitchen*, 110 Wn.2d at 411. The jury verdict will be overturned if a rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt. *Id.*

In *State v. King*, as police officers made a traffic stop they noticed the passenger, King, trying to reach down between the seats of the car. 75 Wn. App. at 901. As King stepped from the car, an officer saw King toss something toward the car's interior. *Id.* The officer then noticed that King's

fanny pack was unzipped. *Id*. As the driver exited the car, he seemingly discarded something, as well. *Id.* Upon searching the car, the officers found a bottle containing cocaine between the seats, but were unable to determine whether the bottle belonged to King or the driver. *Id*. King was arrested; at the precinct, King's fanny pack was searched and another rock of cocaine was found. *Id.* The State charged King with only one count of possession of cocaine. *Id*. King was tried without a unanimity instruction. *Id.* at 900. At the trial, the State presented evidence both of the cocaine found in the car and that found in the fanny pack, and failed to elect the cocaine upon which it relied for conviction. *Id*. at 903-904.

In considering whether the two instances of possession constituted a continuing course of conduct, the *King* court stated: "The State's evidence tended to show two distinct instances of cocaine possession occurring at different times, in different places, and involving two different containers. . .one alleged possession was constructive, the other actual." *Id.* at 903.

This case can be analogized to *King*. In that case, "*sufficient conflicting evidence exist[ed]* as to which one of the car's occupants constructively possessed the Tylenol bottle [] to conclude that a rational trier of fact could entertain reasonable doubt as to whether King was responsible for the Tylenol bottle. The evidence [wa]s also conflict[ed] as

to King's alleged possession of the cocaine in the fanny pack. King testified that he was unaware of the cocaine in his fanny pack and asserted that the officers must have planted it. King's testimony requires a determination of credibility that is uniquely the jury's to make. [The court could not] say that no rational trier of fact would entertain a reasonable doubt about King's responsibility for the cocaine in his fanny pack." *Id.* at 903-904. (Emphasis added).

In this case, there is sufficient conflicting evidence as to whether Mr. Crick's acts occurred as K.B. had testified. First, Mr. Crick testified, contrary to K.B.'s testimony, that he had never touched K.B. underneath her clothing. CP 542-543. Second, Mr. Crick testified, contrary to K.B.'s testimony, that he had pulled down K.B's shirt to cover her exposed torso. CP 539-540. Third, K.B. testified that she told R.C. of the incident, however, R.C. did not corroborate her account of the alleged incident or her testimony. CP 432. Moreover, the States' evidence tended to show two distinct acts of touching, one on K.B.'s breasts and one on K.B.'s vaginal area. These separate acts were not distinguished as two different acts; both of which were offered to the jury to collectively constitute guilt of Child Molestation in the First Degree.

In *State v. Coleman*, the defendant was charged with molesting two children, C.V. and M.D., over a period of three years. *State v. Coleman*,

159 Wn.2d 509, 511, 150 P.3d 1126 (2007). Count I charged Coleman with molestation of C.V.; count II with molestation of M.D. The jury found Coleman guilty on both counts. *Id.* Coleman appealed the omitted unanimity instruction. Based on the lack of a unanimity instruction, the Court of Appeals reversed on count II (the count regarding M.D.). *Id.* As to count I (regarding molestation of C.V.), the Court of Appeals affirmed; the omitted unanimity instruction was not prejudicial because the State did not emphasize specific incidents of molestation. *Id.* The Supreme Court of Washington then reversed because it considered this a case of multiple acts with a risk of lack of unanimity on all elements, the State conceded that a unanimity instruction was necessary, and a rational juror could have entertained reasonable doubt whether one or more of the acts occurred. *Id.* at 513.

Although the present case is distinguishable from *Coleman* because there were multiple victims, alleging multiple acts, in different locations, and the State conceded that a unanimity instruction was necessary, this case also bears similarities. For instance, the inconsistency of testimony regarding the alleged acts are sufficient for a rational trier of fact to have a reasonable doubt and as a result should have been instructed as to a particular act, elected by the State, to constitute the crime charged.

The alleged conduct in the present case is not continuous conduct and therefore falls without the exception.

The alleged touching can be analyzed in three distinct ways, each of which has to be viewed through a lens to determine whether such acts were a part of an ongoing enterprise with a singular objective, and whether common-sense dictates that the multiple acts would constitute a continuing course of conduct. First, as Mr. Crick testified, he pulled down only K.B.'s shirt to cover her exposed abdomen, and did not touch her breasts or vagina; therefore, there is no illicit conduct.

Second, as only K.B. testified, Mr. Crick touched both her breasts and her vagina, minutes apart. The State can only speculate as to whether such acts were a part of an ongoing enterprise with a singular objective because there is no evidence to suggest what that objective would have been. In the context of child molestation, the objective would have to be sexual gratification, but again the State can only speculate as to whether Mr. Crick sought that objective. Moreover, common sense dictates that touching one's breast and touching one's vagina, minutes apart, are two very distinct acts, at two different times. The fact that the alleged acts occurred in the same location, the tent, is not dispositive of a continuing course of conduct. Courts have only suggested that these factors, i.e. type of act or acts, time between act or acts, and location at which each act or

acts have occurred, may be considered when determining whether there is a continuing course of conduct.

Furthermore, assuming arguendo that Mr. Crick did in fact touch both K.B.'s breast and vaginal area, each touch constitutes a separate criminal conduct. This case is most properly analogized to the court's reasoning in *State v. Grantham*. In *Grantham*, the defendant and victim had attended a party and left to go to a nearby apartment to meet some of the defendant's friends. *State v. Grantham*, 84 Wn. App. 854, 856, 932 P.2d 657 (1997). Once at the apartment, the defendant grabbed the victim and tried to kiss her which she resisted. *Id.* The defendant then forcibly removed the victims clothing and anally raped her. *Id.* The defendant then removed himself, then told the victim to get up and turn around and perform oral sex on him. *Id.* The State charged the defendant with two counts of second degree rape by means of forcible compulsion: one count for each incident. *Id* at 857. The defendant contended that the two crimes constituted the same criminal conduct, whereas the State argued that the two rapes were separate criminal acts because the defendant had the intent to first commit anal intercourse, stopped, and then formed a second intent to commit oral intercourse. *Id.* at 857-859. The court focused on whether the defendant's intent, viewed objectively, changed from one crime to the next, while taking into consideration the Legislative intent to construe the

phrase, "same criminal conduct," narrowly. *Id.* at 858. The Court of Appeals reasoned that, "the trial court could find that the defendant, upon completing the act of forced anal intercourse, had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act…the evidence also supports…that each act of sexual intercourse was complete in itself; one did not depend upon the other or further the other." *Id.* at 859.

Here, although the case is distinguishable from *Grantham* because Mr. Crick is arguing that the touches constitute separate conduct, whereas the defendant in *Grantham* argued that his acts constituted the same conduct, it is similar in that the touching was committed against the same victim, at the same place, but not simultaneously. Following the reasoning of the *Grantham* court, and again assuming that both touches occurred, Mr. Crick would have formulated an intent to touch K.B.'s breasts, stopped, and then some time later formulated a second intent to touch her vaginal area. This would constitute separate criminal conduct where one touch did not depend on or further the other, which is exactly how Mr. Crick was charged, ipso facto, the distinct nature of the conduct requires a unanimity instruction.

Finally, assuming that Mr. Crick pulled K.B.'s shirt down, as he testified, and touched K.B.'s vagina, as she testified, the jury would have

to be instructed to determine if a rational trier of fact would not have a reasonable doubt as to whether the vaginal touching occurred. Due to the fact that both the vaginal touch and the touching of the breasts were presented to the jury as sufficient to prove child molestation in the second degree, Mr. Crick was denied his constitutional right to a fair jury trial based on lack of jury unanimity because the State did not elect which touching constituted the charge. The result would be the same if K.B. alleged that Mr. Crick only touched her breasts.

The State seeks to analogize the current case with *Handran*. In *Handran*, the defendant was seen climbing in the window to his ex-wife's apartment. *Handran*, 113 Wn.2d at 12. The victim awoke to find Handran leaning over her, nude and kissing her. *Id.* She demanded that he leave immediately. *Id.* Instead, he pinned her down, offered her money and at one point hit her in the face. *Id.* The victim got up and called the police, who later arrested Handran. *Id.* The defendant argued that the trial court erred in failing to instruct the jury that it must be unanimous as to which act alleged constituted the "assault" element of first degree burglary. *Id.* at 17. The defendant contended that the jury could have found an assault in his kissing the victim or in his hitting her, but that the jury should have been instructed to reach a unanimous decision that one or the other of

those acts constituted the underlying assault. *Id*. The court ruled that two acts of assault were part of a continuing course of conduct. *Id*.

Handran may be properly distinguished from the case at bar. First, unlike *Handran*, there is not *clear and unequivocal evidence* of intent to commit the crime of child molestation in the first degree. The evidence presented consisted of conflicting stories between Mr. Crick and K.B., a diary that was referenced but never offered into evidence, and a speculative correlation between this alleged act and K.B.'s rebellious conduct in school. Second, in *Handran*, the underlying crime was burglary for which the act of kissing and hitting the victim were considered to be a continuing course of conduct sufficient to prove the "assault" element of Burglary in the First Degree. The case at bar is markedly different because the alleged acts are not used to *prove elements* of an underlying crime, rather, each one is being used as independently sufficient to *prove* the crime.

As a matter of policy, the court has the unique ability to view this case devoid of emotional stimulus, which the jury may have had trouble doing given the nature of the alleged acts. The issue turns on whether, as a matter of law, no reasonable juror could have found a reasonable doubt that the illicit touching occurred. If a reasonable doubt is could be found as to the conflicting story regarding the touching of K.B.'s breasts, a

unanimity instruction is mandatory because the jury would have to unanimously find guilty based on the touching of the vaginal area. However, even if we assume that the alleged touching occurred as K.B. testified, the acts are too distinct to constitute an exception to the requirement of unanimity in jury instruction.

The State contends that even if the acts of the defendant are considered to be distinct, the failure to instruct on unanimity or to elect which act constituted the crime is harmless because a rational trier of fact could have found each incident to prove the crime charged beyond a reasonable doubt. Although that may be true if each incident is observed in a vacuum, the conflicting evidentiary support tends to affirm that the opposite is true. To clarify, although a rational trier of fact could find that the defendant committed the crime based on the touching either of her breasts or her vagina, a rational trier of fact may entertain reasonable doubt that either event occurred due to the evidentiary conflicts. That reasonable doubt mandates an instruction on unanimity or an election of a particular act.

V. CONCLUSION

Patrick Crick respectfully requests that the court reverse the trial court's decision. Such request is based on the conflicting evidentiary support, the distinctive nature of each act and the time between each act

which does not constitute a continuing course of conduct, the probability that a rational trier of fact would have found reasonable doubt, and the lack of instruction for unanimity or election of a singular act.

DATED this 12th day of January, 2014.

John R. Crowley, WSBA# 19868
The Crowley Law Firm, PLLC
216 1st Avenue S., Ste 204
Seattle, WA 98104
Attorney for Appellant