Supreme Court No. 100914-3
COA No. 54761-9-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TRENT TYLER,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF GRAYS HARBOR COUNTY
The Honorable Stephen Brown

PETITION FOR REVIEW

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Trent Tyler was the appellant in COA No. 83461-4-I and is the Petitioner herein.

B. COURT OF APPEALS DECISION

Mr. Tyler seeks review of the decision in COA No. 83461-4-I issued April 11, 2022. Appendix A (decision).

C. ISSUES PRESENTED ON REVIEW

1. Trent Tyler was convicted of five offenses allegedly committed against his half-sister Stephanie Tyler, claimed to have begun in 2006. The Court of Appeals reversed counts 3 and 7. Appendix A.

Do the jury's verdicts on counts 1, 2, and 6[1] also manifestly lack the assurances of unanimity required by Article I, sections 21 and 22, and the Sixth and Fourteenth Amendments?

[1] The jury found the defendant not guilty on count 4 (rape of a child in the third degree by oral sexual intercourse), not guilty on count 5 (child molestation in the third degree), and not guilty on count 8 (communication with a minor). CP 97, 98, 101.

2. Do the judgments entered on counts 1, 2 and 6 therefore require reversal under State v. Petrich?[2]

D. STATEMENT OF THE CASE

1. Summary of convictions and *Petrich* challenges. Trent Tyler was convicted of five offenses allegedly committed against his half-sister Stephanie Tyler dating back to 2006, that Trent denied. AOB, at pp. 7, 8, 11. On appeal, Mr. Tyler argued that it was manifest that the jury's verdicts on counts 1, 2, 3, 6 and 7 lacked the assurances of unanimity required by Article I, sections 21 and 22, and the Sixth and Fourteenth Amendments, requiring reversal under State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

2. Court of Appeals decision. The Respondent conceded and the Court of Appeals ruled that the right to Petrich unanimity was violated with regard to counts 3 and 7, but the right to unanimity was also violated as to counts 1, 2 and 6. Appendix A (decision).

[2] State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

E. ARGUMENT

1. Review is warranted under RAP 13.4(b)(1) where the lack of unanimity on counts 1, 2 and 6 is manifest constitutional error under RAP 2.5(a)(3) and the question of unanimity raises a significant constitutional question.

Mr. Tyler assigned error to counts 1, 2 and 6 on appeal under RAP 2.5(a)(3). See State v. Knutz, 161 Wn. App. 395, 406, 253 P.3d 437 (2011). The issue is properly reached. Under RAP 2.5(a)(3), the alleged error must be constitutional and manifest first requires that the error involve a specific constitutional guarantee, which is the case here. See AOB, at pp. 19-20 (citing, *inter alia*, Jackson v. Virginia, 443 U.S. 307, 315, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); U.S. Const. amends. VI, XIV; Wash. Const. art. I, §§ 21, 22. Further, the facts establishing the error must be plain in the record:

> To fall within this exception, however, not only must the claimed error "implicate . . . a constitutional interest as compared to another form of trial error," but also it must be

> "manifest": The trial record must be sufficiently complete such that we can determine whether the asserted error "actual[ly] prejudice[d]" the appellant by having "practical and identifiable consequences [at] trial." State v. O'Hara, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009) (internal quotation marks omitted) (quoting State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)). But "[i]f 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).

State v. Knutz, 161 Wn. App. at 406-07. Our courts have recognized that the questions of RAP 2.5(a)(3) appealability in unanimity cases, and the record necessary to make out reversible Petrich error, are similar. State v. Knutz, 161 Wn. App. at 407; State v. Oeung, 196 Wash. App. 1011 (COA No. 46425-0-II, September 27, 2016, at *26 n. 22) (unpublished decision, cited for persuasive value only, under GR 14.1(a)) ("we address their claims on appeal because the test for determining whether an alleged constitutional error is 'manifest' is similar to the substantive issue of whether a

Petrich instruction is required.") (quoting State v. Knutz, at 407); see also Knutz, at 407 ("the test for determining whether an alleged [unanimity] error is 'manifest' is closely related to the test for the substantive issue of whether a Petrich instruction was required").

The necessary facts are in the record where multiple acts of the crime were testified to, the prosecutor's closing argument failed to "elect the act upon which it will rely for conviction," and no "jury instruction [was] given to ensure the jury's understanding of the unanimity requirement. Petrich, at 572; see 11 Washington Practice, Pattern Jury Instr. Crim. WPIC 4.25 (5th Ed) ("Jury Unanimity-Several Distinct Criminal Acts - Petrich Instruction"). In this case, the complainant's testimony, the appellant's testimony, and that of the remaining witnesses, establishing evidence of multiple acts as to counts 1, 2 and 6, are in the direct appeal record, as are the jury instructions, and the parties' closing arguments. See VRP of 2/25/20 through 2/26/20; 2/2620RP at 468-88; CP 82-92.

In this appeal in particular, the trial record designated on direct appeal is sufficiently complete such that this Court can determine, by the record of trial, whether the asserted errors as to those counts were manifest "by having "practical and identifiable consequences [at] trial." O'Hara, 167 Wn.2d at 98-99.

2. <u>There were multiple claimed acts of sexual contact during the charging period for count 1, and no election</u>.

Mr. Tyler was charged with first degree child molestation in count 1, a charge that required proof of sexual contact with a person who is less than 12 years old. CP 85 (Instruction no. 6). The count went to the jury with a charging period of May 14, 2006 to May 12, 2009. CP 85. During this charging period, Ms. Tyler would have been age 9 years and 1 day, to age 11 years, 11 months, and 30 days. CP 5; 2/25/20RP at 387.

According to Ms. Tyler, Trent began touching her when she was between the age of nine and ten, by getting, in her words, "touchy" and then "very touchy" with her. 2/25/20RP at

387-88. This was consistent with the prosecutor's prediction to the jury in opening statement that Ms. Tyler would testify that there were multiple acts of "sexual contact" by Trent supposedly beginning when Ms. Tyler was between 9 and 10. 2/25/20RP at 387. Ms. Tyler stated that this touching was "sexual touching." 2/25/20RP at 388.

Ms. Tyler first stated that Trent touched her vagina, when she was around the age of 10 years. 2/25/20RP at 389. This happened when he picked her up for the day in his car and he put his hand on her inner thigh, and then "put his hands down my pants and started touching my vagina." 2/25/20RP at 389. At the same time, Trent showed her a video on his cell phone of him touching a woman "in the same way he was touching" her. 2/25/20RP at 389-90.

The prosecutor at this juncture of direct examination introduced the word "handsy" into the questioning, and elicited that this sort of behavior - touching Ms. Tyler sexually and showing her similar pictures of touching on his phone, similar

to as he had in the car - occurred when she was between nine years old and 12. 2/25/20RP at 389-90.

> Q: Okay. And he was inappropriately touching her [in the cell phone video) in the same way he was touching you?
> A: Yes.
> Q: And that was about when you were ten. How often did that sort of behavior happen?
> A: He would randomly show me things like that, whether it was him coming by the house, and him standing next to me, he would briefly show me his phone, hey, look at these pictures, he would show me naked pictures that he had.
> Q: And what about him getting handsy with you?
> A: That happened more frequently when I was between nine and 12.
> Q: Okay. But it happened on a regular basis?
> A: For the most part when he would come over, or if I had to go over there.

(Emphasis added.) 2/25/20RP at 389-90. The record cannot be construed to believe that the word "handsy" meant anything other than the phrases about touching, and sexual touching, used in Ms. Tyler's testimony claiming multiple incidents of sexual contact during the charging period in count 1, which allegedly occurred at multiple geographical locations. There

was no testimony that even suggested that the word "handsy" meant anything other than sexual touching that amounted to sexual contact. Ms. Tyler discussed the incident in the car, and not only stated that this would also happen at her home, and "over there" at his home, but also in "a room" and in "her room." 2/25/20RP at 390. She also stated precisely that touching of her vagina when she was under 12 occurred at multiple, particular locations, most when she was under 12 (acts going to count 1):

> Q: Okay. Now, all of these events that occurred, where did they occur?
> A: One of the times when he would touch my vagina was in his car. It would be at my dad's house on Salvaggi Lane. Or his house in -- it was a trailer, Murray Place.
> Q: 15 Murray Place?
> A: Yes.
> Q: And that's within the boundaries of Grays Harbor County?
> A: Yes.
> Q: And, all of these events that you described, you are under 12?
> A: Most of them.

2/25/20RP at 398-99. See also 2/25/20RP at 407 (describing the times when Trent allegedly would "grab[ ] her butt . . . from the time I was a younger girl."). In the Court of Appeals, Mr. Tyler's Opening Brief related further incidents of sexual contact alleged to have occurred during the charging period of count 1, first degree child molestation. But even just the foregoing claimed incidents, alleged to have happened at different times, in vastly different places, renders this a multiple acts case. Ms. Tyler described the car incident in more "detail" than the other allegations of sexual contact but this in no way removes count 1 in this case from the Petrich category of allegations of multiple, "distinct" acts, one (or more) of which could be relied on by some jurors as supporting the count. Petrich, at 570, 572 (discussing "distinct" acts).

This is the very essence of a criminal verdict that carries no assurance of an identified incident of the crime found by all 12 jurors. In Kitchen, to Justice Utter, writing for the Court, the direct connection between Petrich and the fundamental State's

burden to prove a crime charged to a unanimous jury beyond a reasonable doubt was obvious. Absent the option of either an election in closing, or a jury unanimity instruction,

> [w]hen the prosecution presents evidence of several acts that could form the basis of one count charged, . . . No party disputes that failure to follow one of these options is error, violative of a defendant's state constitutional right to a unanimous jury verdict and United States constitutional right to a jury trial.

State v. Kitchen, supra, 110 Wn.2d at 409 (citing Const. art. 1, § 22; U.S. Const. amend. 6).

The prosecutor's discussion in closing argument of the vagina touching incident involving Trent's car was not an election. 2/26/20 RP 471-72. This was not an election. In closing argument, the prosecutor correctly told the jury that sexual contact involved not just touching of a person's private parts, but any contact for sexual gratification. 2/26/20RP at 470. The prosecutor told the jury that the "first time" Trent allegedly touched Ms. Tyler's vagina was when Ms. Tyler was

in the car with Trent, and noted that the crime of sexual contact with a person under twelve was molestation under count 1.

> And sexual contact, though, is a little different. It is not even -- you don't have to touch the private parts, you know, any contact with a person for sexual gratification is sexual contact, if you are rubbing the breasts, caressing the buttocks. In this case, it was actual touching of the vagina on multiple occasions.
> * * *
> Now, Stephanie Tyler testified that the first time he ever crossed that line, into that sexual behavior, he was in a car, he had showed her a video of him sexually touching a woman, and then he put his hands down her pants and touched her vagina with his bare hand. And she said she was probably ten at that time. So she is definitely under 12. It is definitely sexual contact.

(Emphasis added.) 2/26/20RP at 470-72. It is not an election to simply direct the jury's attention to the "first time" of one of the "multiple occasions" of sexual contact that Ms. Tyler claimed occurred in the charging period for count 1. An "election" must be clear. To clearly elect, the State "must not only discuss the acts on which it is relying, it must in some way disclaim its

intention to rely on other acts." State v. Carson, 184 Wn.2d 207, 228 n. 15, 357 P.3d 1064 (2015).

Thus in Carson, the elections for acts constituting child molestation were clear because the "State specifically disclaimed its intention to rely on any other instances" of molestation. Carson, at 228.

In contrast, this case is more like in Williams, where there was no clear election by a prosecutor during closing argument when the prosecutor "emphasized" one act over others but did not "expressly elect to rely only on" one act "in seeking the conviction." State v. Williams, 136 Wn. App. 486, 497, 150 P.3d 111 (2007); see also State v. Coleman, 159 Wn.2d 509, 515, 150 P.3d 1126 (2007) (where there were claims of distinct acts of molestation, reversal could only have been avoided by an election, which did not occur because the jury was not directed to disregard the incident of alleged sexual contact at the movie, which other witnesses said did not occur). Here, the prosecutor in closing expressly said that there

was “actual touching of the vagina on multiple occasions,” of which the incident in the car was only the first (Emphasis added.) 2/26/20RP at 470. The State never limited the jury to reliance on one incident. There was no election.

Thus, some of Trent’s jurors might well have relied on an incident in the car to convict on count 1, while others found credible that sexual contact most likely occurred “over” at Trent’s house, or “over” at Ms. Tyler’s home, and other jurors on yet another, depending on the complainant’s testimony. 2/25/20RP at 398-99.

Not only were there multiple acts offered in the evidence as to count 1, but they were specifically countered by defense conflicting evidence - this was not a case where the defendant’s testimony merely denied all the accusations generally - although he of course did indeed deny that any of them were true.

For one example among the others set forth in the Opening Brief, Trent’s testimony controverted the notion that

he was actually living in the Grays Harbor / Elma area for a significant portion of the time comprised by the *broadly expanded* charging period that the prosecutor vigorously sought, and secured, for count 1.

This included any time when Ms. Tyler was nine years old and a large portion of the time she was ten. 2/26/20RP at 438-40, 442. And with regard to the year 2010, Kimberly Fazio lived in the same homes as Trent Tyler for a total of approximately 5 years, until 2010 when she moved out to live with her biological father, and Ms. Fazio never saw any sexual behavior toward Ms. Tyler by Trent during that time. 2/25/20RP at 383-84. Ms. Fazio never even saw Trent "seek privacy in the house with" Ms. Tyler in a way that would show an opportunity for sexual contact. 2/25/20RP at 380.

The constitutional gravamen of the unanimity error is patent. State v. Petrich requires reversal unless it can be said that no rational jury could do anything except find the defendant guilty of every single one of the multiple acts alleged

as to a count. Here, as to count 1 this was something the jury could not do, where it cannot be said that the evidence of every act was overwhelming and uncontroverted. Reversal of count 1 is required.

3. Count 2 involving attempted rape in the second degree lacked the required *Petrich* assurances of unanimity.

Count 2, a charge of attempted rape of a child in the second degree, overlapped with and entirely subsumed the charging periods of counts 1 and 3. This crime, pursuant to the jury instructions, is committed by attempted sexual intercourse with another who is less than 14 years old, and was assigned a charging period of May 14, 2006 to May 12, 2011. During that charging period Ms. Tyler was 9 years and 1 day old, to 13 years, 11 months, and 30 days old - a span of approximately five years.

In discussing count 2, attempted rape of a child in the second degree, the prosecutor noted Ms. Tyler's testimony that she was at Trent and Aminda's house, and she claimed that

Trent came in to the bathroom and tried to engage in penile-vaginal intercourse with her. 2/25/20RP at 391. In her confrontation telephone call to Trent, Ms. Tyler stated to Trent that "you touched me multiple times and you would try to have sex with me." Call transcript, at p. 10.

According to Ms. Tyler's trial testimony, when was questioned immediately after she described this instance of attempted rape, and then the oral intercourse, Trent's behavior "continue[d] . . . for a while" and "was worse from when I was around twelve." 2/25/20RP 391-93. This was squarely within the charging period of count 2. CP 86 (Instruction no. 11). Trent allegedly would tell Ms. Tyler, at the time "when he was doing all of this," that he "wanted to lick [her] vagina but in a more inappropriate way," although he apparently did not succeed in doing that. 2/25/20RP at 398. The jury is presumed to follow the court's instructions including the definition of intercourse, and attempt. See State v. Kitt, 9 Wn. App.2d 235,

247, 442 P.3d 1280, review denied, 194 Wn.2d 1010, 452 P.3d 1239 (2019).

Petrich was certainly violated. Whether the State relied on this incident, or relied on any attempt to engage in acts constituting the expansive definition of intercourse and described by the complainant – which was the basis for count 4, which the jury found inadequately persuasive to support guilt at all - one or more of these alleged instances was not proved by overwhelming, uncontroverted evidence. The Petrich error was not harmless, and reversal is required. The presumption of reversibility "is overcome only if no rational juror could have a reasonable doubt as to any of the incidents alleged," which cannot be said here Coleman, 159 Wn.2d at 512.

4. Count 6, the charge of first degree incest by sexual intercourse, with a charging period of over *ten years* beginning May 14, 2006 and ending March 27, 2017, suffers from the same unanimity error.

The jury is presumed to follow the court's instructions. State v. Kitt, 9 Wn. App.2d at 247. Count 6 -

incest first degree - was instructed for the jury as sexual intercourse with a person the defendant knew was related to the defendant as a sibling of the half-blood, with charging period of May 14, 2006 to March 27, 2017. CP 89 (Instruction no. 22).

During this time, Ms. Tyler was *9 years and 1 day old, to 19 years, 10 months, and 14 days old - an approximate 10 years, 10 months, and 13 days year period of time*. In turn, sexual intercourse was defined for the jury as follows

> Sexual intercourse means that the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration. however slight or any penetration of the vagina or anus, however slight, by an object, including a body part, when committed on one person by another, whether such persons are of the same or opposite sex or any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

CP 87 (Instruction no. 18). During closing argument, the prosecutor told the jury, "Incest. If you believe that he engaged in sexual contact with her, and sexual intercourse with her, any

time that she was under age, then he is guilty of incest, because he has admitted it's his half sister, that is how incest is defined." 2/26/20RP at 477-78.

This completely non-specific argument was not an election. Combined with the prosecutor's recitation of the definition of incest as including penile-vaginal penetration however slight, along with any act of sexual contact involving the sex organs of one person and the mouth of another - and the lengthy charging period - this crime could be deemed committed by many of the many alleged acts that were described in Ms. Tyler's testimony.

The prosecutor's argument permitted the jury to rely on any instance of this definition of intercourse, including oral - penile contact, described by the witness, necessarily including acts that could also satisfy other counts. Convictions for both incest and for a sexual offense against a related child based on the same act are permissible. See State v. Chenoweth, 185 Wn.2d 218, 221, 370 P.3d 6 (2016) (citing State v.

Bobenhouse, 166 Wn.2d 881, 214 P.3d 907 (2009) and State v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995)).

The alleged oral - penile contact described by Ms. Tyler -- when she stated that Trent had him performed oral sex on him - was one distinct claim of incest that some jurors could have relied on for count 6. 2/25/20RP at 392-93 And the instance where Trent allegedly put his penis in her vagina, allegedly trying to engage in ongoing sexual intercourse with her, was another distinct act of intercourse that other jurors could have relied on for count 6. 2/25/20RP at 390-91. The unanimity requirement was violated.

5. Reversal of the convictions is required.

Because the error of any verdict that lacks assurances of unanimity is constitutional, reviewing courts must presume prejudice and reverse the conviction. State v. Coleman, 159 Wn.2d at 512. The presumption of reversibility "is overcome only if no rational juror could have a reasonable doubt as to any of the incidents alleged," which cannot be concluded in this

case where the evidence was highly controverted as to the specified counts, as it was here to a far greater degree than many Petrich violation cases. AOB, at pp. Coleman, 159 Wn.2d at 512. Reversal is required.

F. CONCLUSION

This Court should grant review, and, based on the foregoing and on his Opening Brief, Mr. Tyler respectfully requests that this Court reverse his convictions and remand to the trial court.

This Petition for Review is formatted in Times New Roman font size 14 and contains 3,916 words.

DATED this 6th day of May, 2022.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. TRENT WAYNE TYLER, Appellant.	No. 83461-4-I DIVISION ONE UNPUBLISHED OPINION

SMITH, J. — The State charged Trent Wayne Tyler with multiple counts related to sexual assault of his younger half-sister, S.T. On appeal, he alleges violation of his constitutional right to a unanimous jury verdict. We accept the State's concession that unanimity was not assured for two of the convictions and reversal is required on those counts. We affirm the remaining convictions.

FACTS

Tyler and S.T. are half-siblings. Tyler was approximately 11 years older than S.T. and acted as a father figure to her. When she was 19 years old, S.T. reported that Tyler had sexually assaulted her. She alleged that the assaults began when she was 10 years old and continued until she was 18 years old.

The State charged Tyler with eight counts related to S.T.'s allegations: (1) child molestation in the first degree; (2) attempted rape of a child in the second degree; (3) child molestation in the second degree; (4) rape of a child in the third degree; (5) child molestation in the third degree; (6) incest in the first degree; (7) incest in the second degree; and (8) communicating with a minor for immoral

purposes. A jury failed to reach a verdict on any of the charges and the court declared a mistrial.

The State retried Tyler on all charges. The jury acquitted him of rape of a child in the third degree as charged in count 4, child molestation in the third degree as charged in count 5, and communication with a minor for immoral purposes as charged in count 8. The jury convicted Tyler on the other counts.

Upon sentencing, the parties agreed that count 3 for child molestation in the second degree merged with count 1, child molestation in the first degree. The two incest charges, counts 6 and 7, also merged. The court sentenced Tyler to a standard range indeterminate sentence of 130 months to life in incarceration.

Tyler appeals.

ANALYSIS

Tyler argues the trial court violated his right to a unanimous verdict by failing to elect the specific acts underlying each charge or issue a Petrich[1] instruction to the jury.

Washington criminal defendants have a constitutional right to a unanimous jury verdict. WASH. CONST. art. I, sec. § 21, State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). When the prosecution presents evidence of multiple acts of misconduct which could form the basis of a charged count, the State must elect the act to support a conviction or the court must instruct the jury to agree on a specific criminal act. State v. Coleman, 159 Wn.2d 509, 511, 150

[1] State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), abrogated in part on other grounds by State v. Kitchen, 110 Wn.2d 403, 405–06, 756 P.2d 105 (1988).

P.3d 1126 (2007). "An election or instruction that all 12 jurors must agree that the same underlying act has been proved beyond a reasonable doubt assures a unanimous verdict on one criminal act." Coleman, 159 Wn.2d at 512.

"Whether or not a unanimity instruction was required in a particular case is a question of law reviewed de novo." State v. Lee, 12 Wn. App. 2d 378, 393, 460 P.3d 701, review denied, 195 Wn. 2d 1032, 468 P.3d 622 (2020). A unanimity instruction is not necessary where the State chooses to elect an act as the basis for conviction. State v. Carson, 184 Wn.2d 207, 229, 357 P.3d 1064 (2015). For an election to be effective, the State must tell the jury which act to rely on in its deliberations. Carson, 184 Wn.2d at 227. Without either an election or a unanimity instruction in a multiple acts case, omission of the unanimity instruction is presumed prejudicial. Coleman, 159 Wn.2d at 512. "A conviction beset by this error will not be upheld unless the error is harmless beyond a reasonable doubt." Coleman, 159 Wn.2d at 512. The error is harmless only if no rational juror could have a reasonable doubt as to any of the incidents alleged. Coleman, 159 Wn.2d at 512.

Counts 3 and 7

The State concedes that unanimity was not assured for count 3 (child molestation in the third degree) and count 7 (incest in the second degree). The State acknowledges that the testimony described multiple acts that could

constitute second degree child molestation[2] and second degree incest[3]. Tyler testified and denied the acts. Given the controverted testimony, the failure to elect the acts to support these two charges or provide unanimity jury instructions to the jury was prejudicial. Tyler's right to a unanimous verdict was violated on counts 3 and 7 and reversal is required for these convictions.

Counts 1, 2, and 6

The State contends that we should decline review of Tyler's arguments concerning unanimity in counts 1, 2, and 6 because he raises the issue for the first time on appeal.

We "may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). RAP 2.5(a) is permissive and does not automatically preclude introduction of a new issue on appeal. Pulcino v. Fed. Express Corp., 141 Wn.2d 629, 649, 9 P.3d 787 (2000) overruled on other grounds by McClarty v. Totem Elec., 157 Wn.2d 214, 137 P.3d 844 (2006). As an exception to the rule, a party may raise a manifest constitutional error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3). "The defendant must demonstrate that '(1) the error is manifest, and (2) the error is truly of constitutional dimension.' " State v. Dillon, 12 Wn. App. 2d 133, 139–40, 456

[2] "A person is guilty of child molestation in the second degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least twelve years old but less than fourteen years old and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.086(1).

[3] "A person is guilty of incest in the second degree if he or she engages in sexual contact with a person whom he or she knows to be related to him or her, either legitimately or illegitimately, as an ancestor, descendant, brother, or sister of either the whole or the half blood." RCW 9A.64.020(2)(a).

P.3d 1199, review denied, 195 Wn.2d 1022, 464 P.3d 198 (2020) (quoting State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009)). "An error is manifest when it results in actual prejudice." Dillon, 12 Wn. App. 2d at 140.

While the State argues that any error related to jury unanimity is not manifest as to counts 1, 2, and 6, the concession that Tyler's constitutional rights were violated leads us to conclude that a thorough evaluation of all counts is necessary. We exercise our discretion to review the remaining counts in order to ensure that Tyler received the rights guaranteed by our constitution.

Tyler claims that the State argued multiple acts of sexual contact supporting counts 1, 2, and 6 but failed to elect supporting actions or request a jury unanimity instruction. However, S.T.'s trial testimony establishes three specific acts and the State's closing argument pairs these acts with the associated counts.

Count 1 charged Tyler with child molestation in the first degree for sexual contact with S.T. when she was less than 12 years old as defined in RCW 9A.44.083(1). The court's instructions to the jury included that conviction for first degree child molestation required proof beyond a reasonable doubt that Tyler had sexual contact with S.T. when she was less than 12 years old. The instructions defined "sexual contact" as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party."

S.T. described a specific incident of sexual contact that occurred when she was around 10 years old. Tyler and S.T. went for a drive in his car when he

began touching her leg and inner thigh. S.T. testified that Tyler eventually put his hand down her pants and started touching her vagina. In closing arguments, the State referred to this incident as evidence that Tyler had sexual contact with S.T. when she was less than 12 years old as required for child molestation in the first degree.[4] The State clearly designated this as the act the jury should consider for the first degree molestation count. A unanimity instruction was not necessary for count 1.

Count 2 charged Tyler with attempted rape of a child in the second degree. Second degree rape of a child occurs when "when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.076(1). The court instructions required the jury to find that Tyler performed "any act that is a substantial step toward" having sexual intercourse with S.T. when she was between 12 and 14 years of age.

S.T. testified about an event that occurred in the bathroom at Tyler's house. Tyler "started touching [her] and getting forceful with [her]." He pulled down S.T.'s pants and tried to have sex with her. He was interrupted by the sound of his baby crying in another room. This was the only testimony

[4] The State cited this incident as evidence of second degree child molestation but provided the elements of first degree molestation. "What evidence do you have that the defendant committed the crime of child molestation in the second degree? Now, this is when you have sexual contact with a person that is less than 12 years old." It is clear from the elements and the State's emphasis that S.T. was "probably ten at that time. So she is definitely under 12," that the State was referring to first degree child molestation as charged in Count 1.

supporting attempted rape of a child. During closing argument, the State specifically referenced this incident in the discussion of count 2. Because S.T. testified about only one act that could support a conviction of attempted rape of a child in the second degree, a unanimity instruction was not required.

In count 6, the State charged Tyler with first degree incest under RCW 9A.64.020(1)(a). A conviction for first degree incest required the jury to find that Tyler had engaged in sexual intercourse with a person he knew to be related to him by blood. The definition of sexual intercourse provided to the jury included sexual contact between "the sex organs of one person and the mouth . . . of another." S.T. testified to only one incident of sexual intercourse, when Tyler forced her to perform oral sex on him. As the State presented evidence of only one act of sexual intercourse that would support a charge of incest in the first degree, a Petrich instruction was not necessary.

We affirm counts 1, 2, and 6, but reverse counts 3 and 7 and remand for resentencing.

Smith, A.C.J.

WE CONCUR:

Andrus, C.J.

Appelwick, J.P.T.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 54761-9-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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