67039-5

67039-5

NO. 67039-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MAX ORTIZ-TRIANA,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BARBARA MACK

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the trial court properly instructed the jury where the instructions given have been approved by the Washington Supreme Court and where there was no factual basis for the jury to conclude that the defendant committed third-degree rape instead of first-degree rape or second-degree rape.

2. Whether there was no need for either a unanimity instruction or an election by the prosecutor where the defendant's rape of the victim constituted a continuing course of conduct.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Max Ortiz-Triana, with rape in the first degree with a deadly weapon enhancement and with child molestation in the third degree based on two incidents involving his girlfriend's daughter, M. CP 1-5, 17-18. A jury trial on these charges took place in January and February 2011 before the Honorable Barbara Mack. At the conclusion of the trial, the jury found Ortiz-Triana guilty of the lesser-included and lesser-degree offense of rape in the second degree; the jury acquitted Ortiz-

Triana of both first-degree rape and third-degree child molestation. CP 81-84.

The trial court imposed a minimum sentence of 102 months with a maximum sentence of life in prison. CP 111-21. Ortiz-Triana now appeals. CP 109-10.

2. SUBSTANTIVE FACTS

In May 2010, Sophie P. was living in a town house in Auburn with her four daughters, including the oldest, 16-year-old M. RP (1/26/11) 59-62. Sophie P. worked two jobs: one during the day, and another from midnight until 7:00 a.m. RP (1/26/11) 57-58. Sophie P. had been dating Ortiz-Triana since March 2007. RP (1/26/11) 69.

In the early morning hours of May 11, 2010, Sophie P. spoke with Ortiz-Triana on the telephone for approximately two hours while she was working her night job. At the end of this conversation, Ortiz-Triana asked her if he could come over to her house to wait for her to get home from work. RP (1/26/11) 73-74. Ortiz-Triana admitted that he had been drinking, but Sophie P. thought he was being "extra sweet," so she agreed to let him come over. RP (1/26/11) 74.

Ortiz-Triana drove to Sophie P.'s workplace to pick up a key. RP (1/26/11) 76. Sophie P. could tell that he had been drinking, and expressed concern that he was driving. Ortiz-Triana assured her that he was going straight to her house to get some sleep. RP (1/26/11) 76-77. This was the only time that Sophie P. had allowed Ortiz-Triana to go to her house at night when she wasn't there. RP (1/26/11) 78.

M. went to bed that morning at approximately 1:00 a.m., a little more than an hour after her mother had left for work. RP (1/27/11) 13, 23. Two of M.'s younger sisters were asleep in the home that morning as well. RP (1/27/11) 23-24. M. awoke sometime after 1:00 a.m. because Ortiz-Triana was in her bed, rubbing her leg with his hand. RP (1/27/11) 26.

M. sat up and called for her mother. Ortiz-Triana told M. that her mother was at work. At that point, M. noticed that Ortiz-Triana was holding one of the knives from a set in her kitchen. Ortiz-Triana told M. he was going to kill her in a "low," "whispering" voice. RP (1/27/11) 27-29. He pointed the knife at her. RP (1/27/11) 30. M. was afraid, and thought he was going to kill her. RP (1/27/11) 34. M. was also afraid for her sisters, who were asleep in her mother's room. RP (1/27/11) 35, 117.

Ortiz-Triana told M. to lie down, and she complied. He put her legs around him and proceeded to have penile-vaginal intercourse with her. RP (1/27/11) 32-39. After a minute or so, M. told Ortiz-Triana that she needed to go to the bathroom. He allowed her to get up and go to the bathroom, but he followed her and stood in the doorway holding the knife while she went. RP (1/27/11) 39-40. When M. was finished, they went back to M.'s room. M. sat on her sister's bed[1] in an attempt to stall, but Ortiz-Triana told her to get back on her bed. She complied. RP (1/27/11) 41. Ortiz-Triana then resumed having intercourse with M. RP (1/27/11) 42. M. "just kept saying no," but Ortiz-Triana ignored her. RP (1/27/11) 42.

While Ortiz-Triana was raping her, M. told Ortiz-Triana that she needed to go to the bathroom one or two additional times. Each time, Ortiz-Triana allowed M. to go to the bathroom, but followed her and kept her under observation with the knife in his hand. RP (1/27/11) 45-47. After each trip to the bathroom, Ortiz-Triana resumed having intercourse with M. RP (1/27/11) 47-48. At some point, M. also told Ortiz-Triana that she wanted to get a bottle

[1] M.'s sister J., with whom M. shared a bedroom, was staying at her father's house that night. RP (1/27/11) 24.

of water. Ortiz-Triana followed her downstairs, still holding the knife, and got a bottle of water for himself as well. RP (1/27/11) 57.

Eventually, Ortiz-Triana ejaculated; M. felt ejaculate on her mattress. RP (1/27/11) 48-49. M. asked Ortiz-Triana if he was really going to kill her, and Ortiz-Triana said he would not because he had a young son. RP (1/27/11) 48. Ortiz-Triana told M. that he wished that he could pay her to be his girlfriend. He said he had tried to get into M.'s bedroom in the house she had lived in previously, but he couldn't get in because the door was locked. RP (1/27/11) 50. Then he said, "okay, just one more time," and resumed having intercourse with M. RP (1/27/11) 54. M. did not see where the knife was at this point. RP (1/27/11) 54. When Ortiz-Triana finally stopped, M. looked at the clock and saw that it was 4:00 a.m. RP (1/27/11) 56-58. After allowing M. to use the bathroom one last time, Ortiz-Triana told her not to tell anyone what had happened, and left. RP (1/27/11) 58-59.

M. did not tell her mother what had happened. She stopped living with her mother because she did not "feel comfortable or safe," and began living with her father instead. RP (1/27/11) 63-65. M.'s father noticed that M. was quiet and withdrawn, which was not her normal behavior. RP (1/26/11) 10-11. M. started having

problems at school, and she got suspended for fighting. RP (1/27/11) 67.

On June 2, 2010, M. was taken to the principal's office for drinking at school. RP (1/26/11) 22. School counselor Karen Brown spoke with M. at the principal's request; she noted that M. was "sobbing." RP (1/26/11) 22, 24. Eventually, M. told Brown what had happened. Brown notified the principal, the school security officer, and the police. RP (1/26/11) 30-32.

As a result of the ensuing investigation, several Auburn Police officers attempted to arrest Ortiz-Triana on June 7, 2011. RP (1/25/11) 9, 21-22, 50-51, 72-75. Officer Todd Glenn and K-9 Officer Ryan Pryor located Ortiz-Triana at an apartment complex in Pacific that night. RP (1/25/11) 52-54. When Ortiz-Triana came out of an apartment in the company of an adult female, Officers Glenn and Pryor identified themselves and told Ortiz-Triana he was under arrest. RP (1/25/11) 56. Ortiz-Triana made eye contact with Officer Pryor, turned around, and started running. Pryor's K-9 dog, Myk, apprehended Ortiz-Triana after a very brief pursuit. RP (1/25/11) 57-59.

After initially reporting the rape, M. also reported that Ortiz-Triana had molested her during her freshman year of high school.

M. reported that Ortiz-Triana had put his hand down the front of her pants while showing her a pornographic video when M. was trying to do her homework. RP (1/27/11) 76-77, 80. M. stated that she did not report this incident at the time because it only happened once, and she did not think anything would happen.[2] RP (1/27/11) 84.

The police neglected to collect the set of knives from Sophie P.'s kitchen as evidence, and M. was unable to identify which knife in the set Ortiz-Triana had displayed.[3] RP (1/31/11) 15, 21-22. However, samples were collected from M.'s mattress that yielded two DNA profiles that conclusively matched Ortiz-Triana and M. RP (1/27/11) 151-66. Although Ortiz-Triana gave a tape-recorded statement in which he told the case detective that he had not had sex with M., he testified at trial that M. had sex with him willingly. RP (1/31/11) 52-53, 66. During his testimony, Ortiz-Triana described himself as a "womanizer." RP (1/31/11) 40.

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[2] This incident was the basis for count II, which resulted in an acquittal.

[3] This most likely explains why the jury rejected first-degree rape and convicted on second-degree rape instead.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE DEFENSE OF CONSENT AND THE STATE'S BURDEN OF PROOF, AND PROPERLY REJECTED INSTRUCTIONS ON THIRD-DEGREE RAPE ON FACTUAL GROUNDS.

Ortiz-Triana claims that his conviction should be reversed because the trial court did not instruct the jury properly. More specifically, Ortiz-Triana argues that the trial court erred in rejecting his proposed instruction on the defense of consent, and in rejecting instructions on rape in the third degree as a lesser-degree offense. Opening Brief of Appellant, at 14-23. These arguments are without merit. The standard instruction on the defense of consent that the trial court gave has been approved by the Washington Supreme Court, and the instructions were clear as to the State's burden of proof on the element of forcible compulsion. In addition, there was no factual basis for a reasonable juror to conclude that Ortiz-Triana committed third-degree rape to the exclusion of first- or second-degree rape. Accordingly, this Court should affirm.

It is well-established that "[j]ury instructions are sufficient if they are supported by the evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law." State v. Clausing, 147 Wn.2d 620, 626,

56 P.3d 550 (2001). An error of law in a jury instruction is reviewed de novo. State v. Brightman, 155 Wn.2d 506, 519, 122 P.3d 150 (2005). "If, on the other hand, a jury instruction correctly states the law, the trial court's decision to give the instruction will not be disturbed absent an abuse of discretion." State v. Aguirre, 168 Wn.2d 350, 364, 229 P.3d 669 (2010). A trial court's rejection of an instruction on factual grounds is also reviewed for abuse of discretion. Brightman, 155 Wn.2d at 519. These principles apply to Ortiz-Triana's arguments, which will now be discussed in turn.

a. The Standard Instructions Accurately Stated The Applicable Law On The Defense Of Consent And The State's Burden Of Proof.

It is axiomatic that the State bears the burden of proving the elements of a crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 361-64, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). As is relevant in this case, both rape in the first degree and rape in the second degree contain an element of forcible compulsion that the State must establish beyond a reasonable doubt. RCW 9A.44.040; RCW 9A.44.050(1)(a). On the other hand, a criminal defendant accused of rape in the first or second degree who claims that the victim consented bears the burden of establishing that defense by a

preponderance of the evidence. State v. Camara, 113 Wn.2d 631, 635-40, 781 P.2d 483 (1989).

In State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006), the court considered a claim that instructing the jury that the defense of consent must be established by the defendant by a preponderance of the evidence violates due process. Gregory, 158 Wn.2d at 801. More specifically, defendant Gregory claimed that "the jury could have become confused [by the standard instructions], thinking it could acquit only if consent is proved by a preponderance of the evidence, even if a reasonable doubt may have been raised with regard to the element of forcible compulsion." Id. at 801-02. But in rejecting this claim and holding that the standard instructions accurately stated the law, the court concluded,

> Therefore, so long as the jury instructions allow the jury to consider all of the evidence, including evidence presented in the hopes of establishing consent, to determine whether a reasonable doubt exists as to the element of forcible compulsion, the conceptual overlap between the consent defense and the forcible compulsion element does not relieve the State of its burden to prove forcible compulsion beyond a reasonable doubt. We decline to overrule *Camara* and conclude that the jury instructions here complied with due process.

Id. at 803-04.

In this case, the trial court gave the same standard instructions that were given in Gregory. Gregory, 158 Wn.2d at 801. Accordingly, the trial court correctly instructed the jury that in order to convict the defendant of either first-degree rape or the lesser-included offense of second-degree rape, the State bore the burden of proving all the elements, including forcible compulsion, beyond a reasonable doubt. CP 64, 71. Moreover, the trial court also correctly instructed the jury that the defendant had the burden of proving the defense of consent by a preponderance of the evidence. CP 72. Thus, in accordance with Gregory, the trial court's instructions in this case were proper and accurately stated the applicable law. In addition, the instructions allowed Ortiz-Triana's trial counsel to argue that the jurors should acquit if they had a reasonable doubt about forcible compulsion, even if they concluded that consent had not been established by a preponderance of the evidence. RP (2/1/11) 13-14, 60-61.

In sum, the instructions were legally accurate and allowed Ortiz-Triana to argue his theory of the case, and therefore, the trial court did not abuse its discretion in giving them.

Nonetheless, Ortiz-Triana argues that the trial court erred in rejecting his proposed modified consent instruction, which included

language to the effect that the jury should acquit if the evidence of consent was sufficient to raise a reasonable doubt as to the element of forcible compulsion. CP 53. But the trial court rejected this instruction because it determined that the standard instructions were "simpler for the jury," and because they were sufficient for the defense to argue its theory of the case. RP (2/1/11) 12-14. And again, the standard instructions that the trial court gave were approved as legally accurate in Gregory. Accordingly, even if this Court were to disagree with the trial court and conclude that Ortiz-Triana's proposed instruction is preferable to the standard instructions, there is still no basis to reverse because the standard instructions are not erroneous, and there was no abuse of discretion. Ortiz-Triana's arguments to the contrary must be rejected.

b. The Trial Court Properly Exercised Its Discretion In Rejecting The Proposed Instructions On Third-Degree Rape Due To A Lack Of A Factual Basis.

When the crime that the defendant has been accused of is a crime consisting of multiple degrees, either party is entitled to request jury instructions on an inferior degree of the crime charged

if there is a sufficient factual basis for the lesser crime. More specifically, instructions on an inferior degree of the charged crime may be given to the jury if "there is evidence that [the defendant] committed only the lesser degree offense." State v. Ieremia, 78 Wn. App. 746, 755, 899 P.2d 16 (1995), rev. denied, 128 Wn.2d 1009 (1996). Put another way, "the evidence must support an inference that the defendant committed the lesser offense *instead of* the greater one." Id. (emphasis in original).

In the context of third-degree rape as an inferior degree crime of second-degree rape, Washington appellate courts have consistently held that third-degree rape instructions should not be given when the victim testifies that the defendant used forcible compulsion, but the defendant testifies that the victim consented to sexual intercourse. *See, e.g.,* State v. Charles, 126 Wn.2d 353, 894 P.2d 558 (1995); State v. Wright, 152 Wn. App. 64, 214 P.3d 968 (2009), rev. denied, 168 Wn.2d 1017 (2010); Ieremia, *supra*. As this Court explained in Ieremia,

> As the trial court noted, Ieremia's consent defense left the jury with the choice of finding him guilty of second degree rape or acquitting him of the charge altogether. As in *Charles*, there was no affirmative evidence that the intercourse was unforced but still nonconsensual, and Ieremia was not entitled to an instruction on third degree rape.

Ieremia, 78 Wn. App. at 756. The same situation exists in this case.

In this case, M. testified that she submitted to sexual intercourse with Ortiz-Triana because he displayed a knife and he verbally threatened to kill her. RP (1/27/11) 27. On the other hand, Ortiz-Triana testified that he had consensual sex with M.; he denied displaying a knife or threatening M. in any way. RP (1/21/11) 53, 55. As in Ieremia and the other cases cited above, either M. was subjected to forcible compulsion to engage in intercourse (as M. testified), or there was no crime at all because the intercourse was consensual (as Ortiz-Triana testified). In other words, there was no affirmative evidence that the intercourse was unforced, yet nonconsensual. Thus, in accordance with the authorities cited above, the trial court exercised sound discretion in rejecting third-degree rape instructions for lack of a factual basis. RP (2/1/11) 5.

Nonetheless, Ortiz-Triana argues that there was affirmative evidence supporting a third-degree rape instruction. More specifically, Ortiz-Triana argues that when he resumed having sexual intercourse with M. for the third or fourth time, he told M. that he did not really intend to kill her and M. said that she "wasn't

paying attention to the knife anymore" and "did not know where it was." Opening Brief of Appellant, at 22-23 (citing RP (1/27/11) 54). But as will be discussed in detail below in the next argument section, Ortiz-Triana's rape of M. constituted a continuing course of conduct. Therefore, this portion of the evidence is not a basis to give an instruction on rape in the third degree because it does not constitute a discrete offense. Moreover, to overturn Ortiz-Triana's conviction on this basis, this Court would have to conclude that the trial court abused its discretion in viewing the evidence as a single, continuing offense and rejecting instructions on third-degree rape on factual grounds. Brightman, 155 Wn.2d at 519. Ortiz-Triana has not shown an abuse of discretion, and thus, this Court should affirm.

2. THIS CRIME CONSTITUTED A CONTINUING COURSE OF CONDUCT; NEITHER A UNANIMITY INSTRUCTION NOR AN ELECTION WAS REQUIRED.

Ortiz-Triana also claims that he is entitled to a new trial because his right to a unanimous jury was violated. More specifically, he argues that there were multiple acts of rape, and thus, the lack of a unanimity instruction from the trial court or an

election of a specific act by the prosecutor resulted in a violation of his right to a unanimous jury. Opening Brief of Appellant, at 23-29. This claim should also be rejected. Ortiz-Triana's crime constituted a continuing course of conduct; therefore, neither a unanimity instruction nor an election was required.

A criminal defendant may be convicted of a crime only when a unanimous jury concludes that the defendant committed the act charged in the information. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). When the evidence proves multiple discrete acts of similar misconduct, any one of which could support a conviction for the crime charged, either the trial court must instruct the jurors that they must agree on the same underlying act beyond a reasonable doubt or the State must elect which act it is relying upon as the basis for the charge. State v. Coleman, 159 Wn.2d 509, 511-12, 150 P.3d 1126 (2007); Kitchen, 110 Wn.2d at 409. When there has been neither a unanimity instruction nor an election in a multiple acts case, the defendant's right to a unanimous jury is violated. Coleman, 159 Wn.2d at 512; Kitchen, 110 Wn.2d at 409.

But when the evidence proves a continuing course of conduct rather than multiple distinct acts, neither a unanimity instruction nor an election is required. State v. Handran, 113

Wn.2d 11, 17, 775 P.2d 453 (1989) (citing State v. Petrich, 101 Wn.2d 566, 571, 683 P.2d 173 (1984)). To determine whether a defendant engaged in a continuing course of conduct rather than multiple distinct acts, the facts of the case must be evaluated in a commonsense manner. Petrich, 101 Wn.2d at 571. When the conduct occurs within the same time frame against the same victim, a commonsense approach strongly suggests that the defendant has engaged in a continuing course of conduct. *See, e.g.,* Handran, 113 Wn.2d at 17; State v. Fiallo-Lopez, 78 Wn. App. 717, 724-25, 899 P.2d 1294 (1995); State v. Craven, 69 Wn. App. 581, 587, 849 P.2d 681, rev. denied, 122 Wn.2d 1019 (1993).

For example, in State v. Crane, 116 Wn.2d 315, 804 P.2d 10 (1991), the Washington Supreme Court applied this principle in a case where the defendant was convicted of second-degree felony murder in the death of his 3-year-old nephew. The evidence presented at trial showed that the boy suffered multiple assaults at the hands of the defendant in a 2-hour time frame, during which the fatal injuries were inflicted. Crane, 116 Wn.2d at 330. In rejecting the Court of Appeals' conclusion that Crane's right to jury unanimity was violated, the Crane court concluded that "a continuous course of conduct analysis is better suited to the evidence presented." Id.

This principle has also been applied in rape cases where the same victim is subjected to multiple acts of penetration within the same time frame. For example, in People v. Mota, 115 Cal. App. 3d 227, 171 Cal. Rptr. 212 (1981) (which is cited with approval in Petrich, 101 Wn.2d at 570-71), the victim was subjected to "continuous multiple acts of forced sexual intercourse" with the defendant and two other perpetrators over the course of an hour or more in the back of a van driven by an accomplice. Mota, 115 Cal. App. 3d at 230, 171 Cal. Rptr. at 214. Like Ortiz-Triana, defendant Mota argued that his right to a unanimous jury was violated because there were multiple acts of rape and only one rape charge. But in rejecting this argument, the California appellate court agreed with the trial judge that the defendant "could be properly charged with one count of rape, even though it was alleged that he had assaulted the victim three or four times . . . over a short period of time." Mota, 115 Cal. App. 3d at 233, 171 Cal. Rptr. at 215 (alteration in original).

Appellate courts in other jurisdictions have reached similar conclusions in rejecting defendants' claims that multiple acts of rape had occurred. *See, e.g.,* Commonwealth v. Thatch, 39 Mass. App. Ct. 904, 904-05, 653 N.E.2d 1121 (1995) (two acts of digital

penetration and one act of anal intercourse constituted a continuing offense where the victim described these acts as an ongoing episode); Scott v. State, 668 P.2d 339, 342-43 (Okla. 1983) (two acts of intercourse in a two-hour period constituted a single, continuing offense); State v. Bailey, 144 Vt. 86, 98-99, 475 A.2d 1045 (1984) (the court rejected a unanimity challenge where at least six acts of intercourse occurred within one-and-a-half hours at the defendant's apartment), *abrogation on other grounds recognized in* State v. Benoit, 158 Vt. 359, 609 A.2d 230 (1992); State v. Lomagro, 113 Wis.2d 582, 593, 335 N.W.2d 583 (1983) (multiple acts of intercourse occurring within two hours were conceptually similar and unanimity was not required); Steele v. State, 523 S.W.2d 685, 687 (Tex. Crim. App. 1975) (two acts of intercourse, one of which occurred in the victim's car and one of which occurred in her bedroom, were part of the same criminal transaction occasioned by the defendant's use of force and threats); Bethune v. State, 363 S.W.2d 462, 464 (Tex. Crim. App. 1962) (no election required in a case involving several acts of intercourse occurring in the same bed on the same night). The same conclusion should be reached in this case.

In this case, the evidence established that Ortiz-Triana vaginally raped M. in her own bedroom over the course of less than three hours.[4] The rape was interrupted two or three times when Ortiz-Triana allowed M. to go to the bathroom, and once when he allowed M. to go downstairs to get a drink of water. RP (1/27/11) 39, 45, 57, 58-59. During each of these interruptions, Ortiz-Triana followed M. to the bathroom or the kitchen and kept her under observation, and after each interruption, Ortiz-Triana resumed having intercourse with M. almost immediately. RP (1/27/11) 39-42, 46-48, 57, 58-59.

Viewing this evidence in a commonsense manner, the evidence shows that Ortiz-Triana engaged in a continuing course of conduct constituting a single count of rape. This crime involved the same victim, the same location, and the same time frame. The interruptions in the rape were relatively brief, and during each interruption, Ortiz-Triana continued to keep M. under his observation and control. And Ortiz-Triana continued to rape M. almost immediately after each interruption. In sum, there was no

[4] M. testified that she went to bed at approximately 1:00 a.m., and was awakened sometime later when the defendant got into her bed and rubbed her leg. RP (1/27/11) 23, 26. Both M. and Ortiz-Triana testified that he stopped having sex with her at 4:00 a.m. RP (1/27/11) 58; RP (1/31/11) 56.

need for a unanimity instruction or an election, and Ortiz-Triana's arguments to the contrary are without merit.

Nonetheless, Ortiz-Triana maintains that there were multiple rapes, and cites State v. Grantham, 84 Wn. App. 854, 932 P.2d 657 (1997), for support. Opening Brief of Appellant, at 26-27. Grantham is not on point.

In Grantham, the issue was not jury unanimity, but rather whether the defendant's two acts of intercourse should be treated as the "same criminal conduct" under the Sentencing Reform Act. Grantham, 84 Wn. App. at 857-58. In fact, as the court specifically observed in a footnote,

> Grantham does not challenge the State's decision to charge him with two counts. Nor did he move for merger of the two counts after conviction. Thus, our opinion assumes, without deciding, that the evidence was sufficient to support two separate convictions.

Id. at 845 n.1. Therefore, the only issue before the court was whether the trial court had abused its discretion in finding that two acts of sexual intercourse should be separately punished, not whether they posed a unanimity issue. The majority affirmed the trial court's ruling largely on policy grounds, and the concurring judge affirmed the trial court's ruling because the record would have

supported a finding either way (i.e., either same criminal conduct *or* separate offenses for sentencing purposes), and thus, there was no abuse of discretion. *See* id. at 860-61 (policy discussion), and at 861 (Morgan, J., concurring) (observing that "the record in this case supports a finding of *either* (a) same criminal conduct or (b) separate criminal conduct") (emphasis in original). In sum, Grantham does not support Ortiz-Triana's position because the issue presented is simply not analogous.[5]

Lastly, even if this Court were to conclude that this case involved multiple rapes rather than a continuing course of conduct, any error is harmless beyond a reasonable doubt.

The absence of a unanimity instruction or an election in a multiple acts case is harmless beyond a reasonable doubt "if no rational juror could have a reasonable doubt as to any one of the incidents alleged." Kitchen, 110 Wn.2d at 411. Stated in the converse, the error is harmless if "a 'rational trier of fact could find that each incident was proved beyond a reasonable doubt.'" State v. Camarillo, 115 Wn.2d 60, 65, 794 P.2d 850 (1990) (quoting State

[5] Moreover, this Court has previously held that multiple acts of intercourse were the same criminal conduct in two cases arguably similar to Grantham. *See* State v. Walden, 69 Wn. App. 183, 847 P.2d 956 (1993), and State v. Palmer, 95 Wn. App. 187, 975 P.2d 1038 (1999).

v. Gitchel, 41 Wn. App. 820, 823, 706 P.2d 1091, rev. denied, 105 Wn.2d 1003 (1985)); *see also* State v. Bobenhouse, 166 Wn.2d 881, 894-95, 214 P.3d 907 (2009) (victim's detailed testimony led the court to conclude that "if the jury . . . reasonably believed that one incident happened, it must have believed each of the incidents happened," and thus, the error was harmless).

In this case, there was no dispute that Ortiz-Triana had sexual intercourse with M. The only dispute was whether M. consented or whether she submitted to intercourse as a result of forcible compulsion. Accordingly, as in Bobenhouse, if the jurors reasonably believed that one act of intercourse occurred -- which clearly they did, given their verdict -- they must have believed that each act of intercourse occurred. Indeed, aside from the issue of consent versus forcible compulsion, both M. and Ortiz-Triana described the sequence of events in a similar way, in that both of them testified that intercourse was interrupted because M. went to the bathroom multiple times. RP (1/27/11) 39, 45-48; RP (1/31/11) 54. In sum, even if the lack of a unanimity instruction or an election was erroneous in this case, any error is harmless beyond a reasonable doubt, and Ortiz-Triana's claim fails on this basis as well.

D. CONCLUSION

The jury was properly instructed, and neither a unanimity instruction nor an election was required because Ortiz-Triana engaged in a continuing course of conduct. This Court should reject Ortiz-Triana's claims and affirm his conviction for rape in the second degree.

DATED this 21st day of December, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Dana Nelson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. MAX ORTIZ-TRIANA, Cause No. 67039-5-I, in the Court of Appeals, Division I, for the State of Washington.

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

LuBrame
Name

12/21/11
Date

Done in Seattle, Washington