No. 45720-2-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

DARRELL LEE WITTE,

Appellant.

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On Appeal from the Pierce County Superior Court
Cause No. 12-1-03874-2
The Honorable John McCarthy, Judge

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# OPENING BRIEF OF APPELLANT

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## I. ASSIGNMENTS OF ERROR

1. Darrell Lee Witte was denied his constitutional right to a unanimous jury verdict.

2. The trial court erred when it failed to instruct the jury that it must be unanimous as to which act established each count, after the State presented evidence of multiple possible acts of molestation but failed to elect which three acts it was relying on to convict Darrell Lee Witte of three counts of child molestation.

## II. ISSUE PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Was Darrell Lee Witte denied his constitutional right to a unanimous jury verdict, where the State presented evidence of multiple possible acts of molestation but failed to elect which three acts it was relying on to convict Witte of three counts of child molestation, where there was insufficient evidence to establish that some of the acts were of "intimate parts" of the alleged victims' body or that they were touched for the purpose of sexual gratification, and where the trial court failed to instruct the jury that it must be unanimous as to which act established each count? (Assignments of Error 1 & 2)

## III. STATEMENT OF THE CASE

### A. PROCEDURAL HISTORY

The State charged Darrell Lee Witte with three counts of child molestation in the first degree (RCW 9A.44.083). (CP 1-2, 34-35) Following a hearing, the trial court ruled that statements made by the alleged juvenile victim to her family and a child sexual assault interviewer were admissible under the child hearsay statute (RCW 9A.44.120). (10/17 RP 32-162)[1] Statements made by Witte to investigators were also ruled admissible under CrR 3.5. (1RP 30-31)

The jury convicted Witte as charged. (10/29 RP 463-64; CP 62-64) The trial court imposed a standard range sentence of 98 months to life. (12/20 RP 15; CP 75) This appeal timely follows. (CP 89)

### B. SUBSTANTIVE FACTS

Nellie Wills has a daughter J.W.-H., and two sons, L.W.-H. and R.W.-H. (10/22 RP 201, 203-04) J.W.-H. is the youngest, and was born on December 1, 2003. (10/22 RP 241, 259; 10/28AM RP 267) From 2009 through October of 2011, Wills dated Darrell Witte,

[1] The transcripts will be referred to by the date of the proceeding contained therein.

and she and her children lived with Witte and his grandfather in a yellow house in Tacoma. (10/22 RP 201-02, 204-05, 206; 10/28AM RP 270-71)

For a short period of time, Wills and her children shared a bedroom with Witte. (10/22 RP 206-07; 10/28AM RP 273-74) But eventually a second bedroom was cleared out and the children slept there. (10/22 RP 206-07; 10/28AM RP 273) Witte was not regularly employed at the time, so he often took care of the children. (10/28AM RP 275, 10/28PM RP 392) The children did not seem to have problems with Witte and did not complain about him to the other adults in their lives. (10/28AM RP 285-86, 287, 306; 10/28PM RP 367, 368)

However, according to J.W.-H., on a number of occasions Witte touched her in inappropriate ways. J.W.-H. testified that the first incident occurred when she and Witte and her mother were all asleep in the same bed. (10/22 RP 211-12) She awoke and felt Witte's finger touching her vagina through her clothes. (10/22 RP 211-12, 213) When she looked at Witte, he was wide awake and his face was red. (10/22 RP 212, 214)

J.W.-H. testified that another incident also occurred when J.W.-H. still lived with Witte. (10/22 RP 222) According to J.W.-H.,

Witte kissed her on the mouth in a "grownup" manner, the way a husband and wife would kiss. (10/22 RP 222, 223)

J.W.-H. also testified that, once when she and Witte were alone, Witte grabbed her hand and put it against his penis. (10/22 RP 225) He was dressed at the time. (10/22 RP 225-26)

Finally, J.W.-H. described another incident that occurred when she spent the night at Witte's house, after her family had moved into her grandparents' house. (10/22 RP 220-21) According to J.W.-H., Witte grabbed her bottom as they watched television together in Witte's bedroom. (10/22 RP 219-20) According to J.W.-H., Witte told her not to tell anyone because he would go to jail and she would never see him again, and that he would kill himself because he did not do anything to hurt her. (10/22 RP 229)

J.W.-H. told her brothers and, eventually, her mother. (10/22 RP 251-52, 268-69, 270; 10/28AM RP 277-78) But no one contacted the authorities. (10/22 RP 255; 10/28AM RP 280)

In October of 2011, Wills and her children moved out of Witte's house and moved in with Wills' mother and step-father, Paulette Wills and Robert Wendlandt. (10/22 RP 282; 10/28AM RP 291) A few months after the move, J.W.-H. disclosed to Wendlandt and Paulette Wills that Witte had touched private parts of her body. (10/22 RP

284-85; 10/28AM RP 296-27) Once again, no one immediately contacted the authorities. Paulette Wills testified that she was afraid for Nellie Wills' health, because she was suffering from severe mental illness and had recently attempted suicide. (10/28AM RP 300)

In July of 2012, Paulette Wills finally contacted the police to report what J.W.-H. had said. (10/28AM RP 300-01, 306) J.W.-H. was interviewed by Keri Arnold-Harms, a child interviewer. (10/28AM RP 312, 329) J.W.-H. described a number of times that Wills touched or kissed various parts of her body. (Exh. 4)

Detective Scott Yenne investigated the case and interviewed Witte. (10/22 RP 175, 179) Witte told Yenne that he did not purposefully touch J.W.-H.'s private parts (10/22 RP 185-86) He thought he may have touched her private parts when he tickled her, but if he did it was inadvertent and not done for sexual gratification. (10/22 RP 185-86)

Witte testified, and denied intentionally touching J.W.-H. in a sexual manner. (10/28PM RP 388) He testified that they engaged in normal roughhousing and tickling, but that he never tried to touch her private parts and never did so for sexual purposes. (10/28PM RP 385, 388, 391, 393)

## IV. ARGUMENT & AUTHORITIES

"Criminal defendants in Washington have a right to a unanimous jury verdict." State v. Ortega–Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). For a criminal defendant's conviction to be constitutionally valid, a unanimous jury must conclude that the accused committed the criminal act charged. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). Accordingly, when the State presents evidence of multiple acts that could each form the basis of one charged crime, "either the State must elect which of such acts is relied upon for 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 P.3d 1126 (2007). This requirement "assures a unanimous verdict on one criminal act" by "avoid[ing] the risk that jurors will aggregate evidence improperly." Coleman, 159 Wn.2d at 512.[2]

In this case, the testimony established multiple possible acts for each count. J.W.-H. testified about four specific acts of possible sexual contact. (10/22 RP 211-26) J.W.-H. described these acts to

[2] Alleged instructional errors are reviewed de novo. State v. Sibert, 168 Wn.2d 306, 311, 230 P.3d 142 (2010). And this issue may be raised for the first time on appeal because failure to provide a unanimity instruction in a multiple acts case amounts to manifest constitutional error. RAP 2.5(a); State v. Kiser, 87 Wn. App. 126, 129, 940 P.2d 308 (1997); State v. Holland, 77 Wn. App. 420, 424, 891 P.2d 49 (1995).

Arnold-Harms, but also described other incidents where Witte supposedly touched or kissed various parts of her body. (Exh. 4)

The State charged Witte with three counts of first degree child molestation. (CP 34-35) The to-convict instructions for each count were identical, and required the State to prove that Witte had sexual contact with J.W.-H. between December 1, 2009 and November 30, 2011. (CP 52-54; a copy of the to-convict instructions is attached in the Appendix) The jury instructions defined "sexual contact" as "any touching of the sexual or other intimate parts of a person done for the purposes of gratifying sexual desires of either party." (CP 56) The term "intimate parts" was not defined.

Each to-convict instruction informed the jury that the act of sexual contact for that count must be "separate and distinct" from the acts alleged for the other two counts (CP 52-54), but the instructions did not inform the jury that it must be unanimous as to which "separate and distinct" act they were relying on for each count. The jury received no unanimity instruction. And the prosecutor did not elect which act it was relying on for each count.

If there is no election and no instruction, the resulting constitutional error is harmless only if no rational trier of fact could have had a reasonable doubt that each incident established the

crime beyond a reasonable doubt. State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10 (1991). The rationale for this protection in multiple acts cases stems from possible confusion regarding which of the acts a jury has used to determine a defendant's guilt. State v. King, 75 Wn. App. 899, 902, 878 P.2d 466 (1994).

In this case, a rational trier of fact could have had a reasonable doubt that some of the acts occurred, could have had a reasonable doubt that some of the acts met the definition of "sexual contact," or could have had a reasonable doubt that some of the contact involved an "intimate part." J.W.-H. described several touchings, only two of which specifically involved the sexual organs. The remainder involved kissing or touching clothed parts of her body. (2-3RP 211-23; Exh. 4)

Whether or not these other parts of J.W.-H's body rose to the level of "intimate parts" was something the jury was free to decide. *See* In re Adams, 24 Wn. App. 517, 520, 601 P.2d 995, 997 (1979) ("The determination of which anatomical areas apart from the genitalia and breasts are intimate is a question to be resolved by the trier of the facts.") And whether or not the touching was done for the purpose of sexual gratification was also for the jury to determine.

Based on the evidence presented at trial, the jurors could

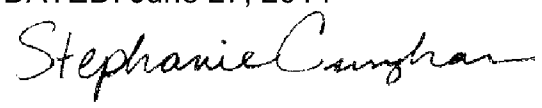
have found that some of the reported incidents involved touching of an "intimate part" and some did not, and that some of the touchings were inadvertent and some were not. A number of the incidents described by J.W.-H. arguably did not involve "intimate parts." And it was not clear from J.W.-H.'s description whether all of the touchings were intentional and for the purpose of sexual gratification. But without a unanimity instruction, it is impossible to know whether the jury agreed on which three acts rose to the level of a sexual contact with an intimate part of J.W.-H.'s body for the purposes of sexual gratification.

## V. CONCLUSION

Because the State presented evidence of multiple possible acts of touching of parts of J.W.H.'s body that could be considered "intimate" and that could be considered as having been done for the purpose of sexual gratification, but did not elect which three acts supported the three charged counts, Witte was entitled to a unanimity instruction in order to preserve his constitutional right to a unanimous jury verdict. The failure to give a unanimity instruction was not harmless because there was insufficient evidence that some of the incidents testified to by J.W.-H involved "intimate parts" or that the touching was for the purpose of "sexual gratification." The

instructional error therefore requires that Witte's convictions be reversed and his case remanded for a new trial.

DATED: June 27, 2014



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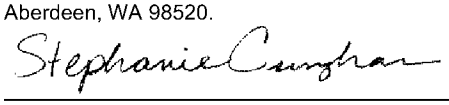
**CERTIFICATE OF MAILING**

I certify that on 06/27/2014, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Darrell Lee Witte, DOC# 370003, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.



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# APPENDIX

TO-CONVICT INSTRUCTIONS

INSTRUCTION NO. 8

To convict the defendant of the crime of child molestation in the first degree as charged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the period between December 1, 2009 and November 30, 2011, the defendant had sexual contact with J.W.-H , separate and distinct from those acts alleged in counts II and III;

(2) That J W.-H was less than twelve years old at the time of the sexual contact and was not married to the defendant or in a state-registered domestic partnership with the defendant;

(3) That J.W.-H. was at least thirty-six months younger than the defendant; and

(4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty

INSTRUCTION NO 9

To convict the defendant of the crime of child molestation in the first degree as charged in count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the time period between December 1, 2009 and November 30, 2011, the defendant had sexual contact with J.W.-H., separate and distinct from those acts alleged in counts I and III;

(2) That J.W.-H. was less than twelve years old at the time of the sexual contact and was not married to the defendant or in a state registered domestic partnership with the defendant,

(3) That J.W.-H. was at least thirty-six months younger than the defendant; and

(4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 10

To convict the defendant of the crime of child molestation in the first degree as charged in count III, each of the following elements of the crime must be proved beyond a reasonable doubt

(1) That on or about the time period between December 1, 2009 and November 30, 2011, the defendant had sexual contact with J.W.-H., separate and distinct from those acts alleged in count I and II;

(2) That J.W.-H. was less than twelve years old at the time of the sexual contact and was not married to the defendant or in a state registered domestic partnership with the defendant;

(3) That J.W.-H. was at least thirty-six months younger than the defendant; and

(4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty

# CUNNINGHAM LAW OFFICE

## June 27, 2014 - 1:46 PM

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