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Court of Appeals
Division III
State of Washington

NO. 308014-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

SIFA TIMAS TUTU, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 10-1-00934-9

BRIEF OF RESPONDENT

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I. ISSUE PRESENTED

1. **WAS THE DEFENDANT'S RIGHT TO A UNANIMOUS JURY VERDICT VIOLATED BY THE FAILURE TO EITHER ELECT A SINGLE ACT OR ISSUE A UNANIMITY INSTRUCTION, WHERE A CONTINUOUS COURSE OF CONDUCT WAS ALLEGED AND PROVEN BEYOND A REASONABLE DOUBT?**

2. **DID THE IMPOSITION OF $7,005.66 IN COURT COSTS DENY THE DEFENDANT DUE PROCESS, WHERE THE COSTS WERE DOCUMENTED, ITEMIZED, AND PROVEN?**

3. **DID THE COURT DENY THE DEFENDANT DUE PROCESS BY IMPOSING COSTS HE WAS FOUND UNABLE TO PAY?**

II. STATEMENT OF FACTS

Ms. Rachell Spears and her husband, Daniel, housed four small children at their home at 813 Hartford Street in Kennewick during the year of 2010. (RP[1] 242). One of these children was Ms. Spears' daughter, S.B., DOB: 1/30/2004. Ms. Spears had joint-custody of S.B. with her ex-husband during that time. (RP 242-43, 280). Mr. Sifa Tutu, the defendant, was a friend of Daniel's and frequently showed up at Ms. Spears' home. S.B. and the other children were familiar with the defendant and often accompanied him to the park and African parties.

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[1] Unless dated, "RP" refers to the Verbatim Report of Proceedings for the Jury Trial and 9A.44 Hearing filed by John McLaughlin.

(RP 308). The defendant would also occasionally watch S.B. and the other children play while everyone else was inside the house smoking and drinking. (RP 308). The defendant had an alcohol and marijuana problem and would visit Ms. Spears' home to abuse alcohol and drugs there with several other people. (RP at 308). The defendant had even lived with Ms. Spears, Daniel, and the kids for several months until the summer of 2010, when Ms. Spears told him he could not stay there anymore. (RP 243, 311).

While the defendant was living with Ms. Spears and her family, the defendant slept in a spare bedroom in the home. (RP 247-48, 306). After Ms. Spears kicked the defendant out of her home, she planned to turn that spare bedroom back into her daughters' bedroom. (RP 247-48). In an attempt to secure the room for her daughters, she barricaded the spare bedroom's window with sticks to prevent the defendant from climbing through it to sleep there. (RP 243). When S.B. and her sister came to Ms. Spears' house to visit from August 21 to August 24, 2010, they slept in that spare bedroom. (RP 243, 248, 252). S.B. slept on a mattress on the floor, while her sister slept in a bed in the room. (RP 252).

It was during those dates that the defendant chose to disobey Ms. Spears by breaking into the house through the spare bedroom window to sleep on the floor next to S.B. (RP 243). On Tuesday, August 23, 2010,

S.B. and her sister went into the spare bedroom at around 8:00 p.m. (RP 248, 259). Unbeknownst to Ms. Spears, the defendant had already entered the spare bedroom through the window and was on the floor with the light off. (RP 259, 271). S.B. went to sleep on the mattress next to the defendant while her sister slept in the bed. (RP 260). Around 3:00 a.m., the defendant reached up, placed his hands underneath S.B.'s nightgown, and inserted his left middle finger into S.B.'s vagina. (RP 251-55). The defendant then proceeded to roll S.B. off the mattress on top of him and insert his penis into S.B.'s "butt". (RP at 254-55). S.B. was still partially asleep, but could still feel the pain as the defendant raped her. (RP at 254-57). S.B.'s sister watched the defendant touch S.B. inappropriately from her position on the bed. (RP 277). After the defendant finished raping S.B., he rolled her back up onto the mattress and went back to sleep.

The next morning, Wednesday, August 24, 2010, Ms. Spears awoke to find the defendant on her couch and told him to leave. (RP 245-46). Later in the day S.B.'s aunt, Ms. Andrea Connet, came to pick up the girls to take them to the fair. (RP 183). Ms. Connet noticed the girls smelled like smoke and became concerned about their home life. (RP 185). S.B's sister informed Ms. Connet that the defendant was sleeping on the floor near S.B.'s mattress. (RP 185). When Ms. Connet asked S.B. if the defendant had ever touched her inappropriately, she said yes and that

she didn't like it. (RP 186). Ms. Connet informed her husband, who then notified S.B.'s father, Mr. Ernest Bass. (RP 187, 281). Mr. Bass then contacted the Kennewick Police Department and filed a report. (RP 281). Detective Mary Buchan was assigned to the case. (RP 206). On September 1, 2010, S.B. was taken to Kids Haven, where child interviewer Ms. Mari Murstig conducted an interview with S.B. (RP 201). During the interview, S.B. indicated on a body map that the defendant had placed his finger in her vagina and that he also placed his penis in her "butt." (RP 204). After the interview, Detective Buchan contacted the defendant and he voluntarily agreed to come to the police station to answer questions. (RP 216, 218). The defendant freely admitted that he had been at Ms. Spears' house during those dates and had been smoking and drinking. (EX. 11). He also admitted to having a sexual encounter with S.B. at around 3:00 a.m., and told Detective Buchan that he placed his left middle finger inside S.B. (EX 11). Following this interview, the defendant was arrested and placed in custody. On September 9, 2010, the defendant was charged by Information with Rape of a Child in the First Degree, pursuant to RCW 9A.44.073. (CP 1).

At trial, S.B. testified that the defendant placed his finger in her vagina and that he also placed his penis "inside" her "butt" and it felt "bad". (RP 254-55). Ms. Murstig testified S.B. disclosed to her during

her interview at Kids Haven that the defendant put his finger in her and put his penis in her "butt". (RP 204). S.B.'s sister testified that she saw the defendant touch S.B. inappropriately. (RP 268, 277). When the defendant testified, however, he generally denied ever touching S.B. and said he didn't even remember talking to Detective Buchan about the incident. (RP 312-13). The defendant also denied being in Ms. Spears' house that night. (RP 311-12).

At the close of the trial, the jury was not instructed that they must all rely on the same act to constitute the rape of S.B. (CP 14-30). The State did not elect a single act for the jury to rely on either. The jury returned a unanimous verdict finding the defendant guilty of one count of Rape of a Child in the First Degree. (CP 31). The defendant was sentenced to 103 months to life in prison. (CP 42-43). The court also imposed over $8,000.00 in legal financial obligations, including $7,005.66 in court costs. CP 40-41, 48).

The defendant now appeals his conviction and alternatively, the imposition of the legal financial obligations. (CP 49).

III. ARGUMENT

1. THE DEFENDANT'S RIGHT TO A UNANIMOUS JURY VERDICT WAS NOT VIOLATED BY THE ABSENCE OF A UNANIMITY INSTRUCTION AFTER THE STATE DID NOT ELECT A SINGLE UNDERLYING ACT.

The defendant contends his due process right to a unanimous jury verdict was violated because the State alleged he committed two separate acts, either of which could constitute Rape of a Child in the First Degree, and did not elect which single act they were relying on for conviction, nor did the trial court issue a unanimity instruction to the jury. (Appellant's Brief, 1). The defendant argues there needed to be an election or unanimity instruction requiring the jury to base their verdict either solely on the digital penetration of S.B's vagina, or solely on the penetration of S.B.'s anus with his penis. (Appellant's Brief, 10). This argument should be rejected.

An election of a single act by the State or a unanimity instruction to the jury is only required when multiple, separate acts are alleged, not when the acts constitute a continuous course of conduct. *See State v. Crane*, 116 Wn.2d 315, 330, 804 P.2d 10 (1991); *State v. Petrich*, 101 Wn.2d 566, 571, 683 P.2d 173 (1984). The acts underlying the defendant's conviction were part of a continuous course of conduct rather

than multiple, separate acts, and therefore, neither election by the State, nor a unanimity instruction by the trial court was required.

Furthermore, even if this was considered a "multiple acts" case, the error committed by not electing a single act or issuing a unanimity instruction is not prejudicial and the defendant's rights are not violated if the error is shown to be harmless beyond a reasonable doubt. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). The error based on a failure to elect a single act or issue a unanimity instruction is harmless beyond a reasonable doubt if any rational trier of fact could find each separate act was proved beyond a reasonable doubt. *State v. Camarillo*, 115 Wn.2d 60, 66, 794 P.2d 850 (1990). The defendant's general denial of the alleged incident, testimony from the victim, and lack of conflicting evidence left jurors no rational basis for distinguishing between the two acts, and a rational juror could have found each act was proven beyond a reasonable doubt. Therefore, even if there were multiple acts and error was committed, the error was harmless beyond a reasonable doubt.

A. The acts underlying the defendant's rape conviction constituted a "continuous course of conduct," and therefore, neither a unanimity instruction, nor the election of a specific act by the State were required.

The incident underlying the defendant's conviction consists of a single, continuous course of conduct over one night during a short period

of time, so no election or unanimity instruction was required. Criminal defendants in the State of Washington have a right to a unanimous jury verdict. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994); Wash. Const. art. I, § 21. A unanimous jury verdict requires the verdict to reflect a unanimous finding of the act underlying the charged crime. *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004). When multiple criminal acts are alleged, any one of which could constitute the charged crime, the right to a unanimous jury verdict requires the jury unanimously agree as to which single underlying act constitutes the crime. *State v. Noltie*, 116 Wn.2d 831, 842-843, 809 P.2d 190 (1991); *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). In these "multiple acts" cases, the law requires that either the State elect the act upon which it will rely for conviction, or that the trial court instruct the jurors that they must all agree that the same underlying act constituting the crime has been proven beyond a reasonable doubt. *Noltie*, 116 Wn.2d at 843; *Kitchen*, 110 Wn.2d at 411; *Petrich*, 101 Wn.2d at 572.

However, this rule only applies when there are several distinct acts, any of which could constitute the charged offense. *Crane*, 116 Wn.2d at 325; *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). If evidence of multiple acts indicates a "continuous course of conduct" rather

than separate distinct acts, a unanimous verdict is not required as to each separate offense during the time-frame. *Crane*, 116 Wn.2d at 330; *Petrich*, 101 Wn.2d at 571. Accordingly, when the State presents evidence of acts that indicates a continuous course of conduct rather than multiple distinct acts, neither an election nor unanimity instruction is required. *Crane*, 116 Wn.2d at 330; *Handran*, 113 Wn.2d at 17; *State v. Love*, 80 Wn. App. 357, 361, 908 P.2d 395 (1996).

A continuous course of conduct must be distinguished from several distinct acts. *Petrich*, 101 Wn.2d at 571. To determine whether the offense constitutes one continuous course of conduct, the facts must be analyzed in a common sense manner. *Handran* 113 Wn.2d 11 at 17; *Petrich*, 101 Wn.2d at 571. *See also Love*, 80 Wn. App. at 362 (defendant's possession of cocaine on his person and cocaine later found in his home constituted a continuous drug trafficking enterprise).

For example in *Crane*, the Court held multiple incidents of assault on the same victim, in the same place, over a several hour period constituted a continuous course of conduct, and therefore, no election or unanimity instruction was required. *Crane*, 116 Wn.2d at 330. There, the defendant appealed his conviction for second degree murder, contending the jury verdict needed to be unanimous as to which particular incident of assault caused the victim's death. *Id.* at 324. The three-year-old victim

became unresponsive in the defendant's care, and during his attempts to revive the child in the bathtub, the victim received severe burns and was violently shaken or hit, resulting in his death two days later. *Id.* at 320-321. Medical experts testified that the fatal injuries to the child occurred within 72 hours of his death. *Id.* at 323. The Court reasoned that a continuous course of conduct analysis was more appropriate than a multiple acts analysis in this case, because the most logical timeframe for the injuries to have occurred was from 3:00 p.m. to 5:00 p.m. on the date the child became unresponsive. *Id.* at 330.

Similarly, in *Handran*, the Washington State Supreme Court rejected the defendant's challenge to his first degree burglary conviction, holding that the multiple alleged acts of assault during the commission of a single burglary constituted a continuous course of conduct and did not require an election or unanimity instruction. *Handran*, 113 Wn.2d at 17. The defendant climbed through the window of his ex-wife's home and began kissing her while she slept, and when she demanded he leave, he offered her money and hit her in the face. *Id.* at 12. The defendant argued that both kissing the victim against her will and hitting her could constitute the "assault" element necessary to convict him of burglary, so a unanimity instruction to the jury or election was necessary. *Id.* at 17. The Court reasoned that the defendant's criminal conduct occurred over a short

period of time between the same victim and aggressor, in the same place and therefore, constituted a continuous course of conduct so no unanimity was required. *Id.*

Multiple distinct acts, conversely, are characterized by evidence involving conduct at different times, places, or concerning different victims. *Handran*, 113 Wn.2d at 17; *Petrich,* 101 Wn.2d at 571. For example, in *State v. Coleman*, testimony was introduced at trial that indicated the defendant molested the child victim on numerous occasions over an extended period of time, on different days, both out in public at the movies and back at the defendant's residence and car. *State v. Coleman*, 159 Wn.2d 509, 514- 515, 150 P.3d 1126 (2007). The State did not unambiguously elect a specific act to rely on, and no unanimity instruction was given. *Id.* at 510. The State conceded, and the Court concluded, that the various separate allegations of molestation at different times and places constituted multiple acts. *Id.* The Court held there was harmful error because there was no clear election or instruction as required and the jurors could have based their verdict on any of the incidents described at trial. *Id.* at 514.

The defendant relies on *Coleman* in his attempt to show this was a multiple acts case that required an election or unanimity instruction. However, the analysis in *Coleman* is inappropriate here. Unlike the

defendant in *Coleman*, who was accused of molesting the victim on different occasions, on different days, in different locations, the defendant is alleged to have raped S.B. over the course of a short period of time during the same night, in the same bedroom. (RP 169, 318). *Id.* at 514-515. The allegations that the defendant inserted his left middle finger into S.B's vagina and that he also rolled her on top of him and inserted his penis into her anus arose from the same isolated incident of sexual conduct, whereas the defendant in *Coleman* was accused of molesting the victim both at the movies and also on separate occasions at his home and in the car. (RP 169, 254-55, 318). *Id.* at 514.

More like the defendants in *Crane* and *Handran*, who committed multiple criminal acts in the course of one continuous series of events, there was no interruption between the two acts the defendant committed. *Crane*, 116 Wn.2d at 320-321; *Handran*, 113 Wn.2d at 12; RP 254-255. One act ccurred immediately after the other on the same night and same mattress without any disruption. The continuous course of conduct resulting in the child's death in *Crane* was estimated to last around two hours and could have potentially involved injuries within a 72 hour period. *Crane*, 116 Wn.2d at 323. The timeframe concerning the defendant's conduct here is even more definite and brief than that in *Crane*. It involved two alleged acts within one sexual encounter that began at

around 3 a.m. on a single night. (RP 224, 226, 252-253). The defendant's alleged conduct is also very similar to the conduct of the defendant in *Handran*. Like the defendant there, who committed two assaults directly after one another during the brief burglary, the defendant allegedly committed two rapes, one directly after another, within the same sexual encounter on the night in question. (RP 253-56). *Handran*, 113 Wn.2d at 12. There was no evidence presented that the defendant raped S.B. at different times or places. (RP 257). The evidence here has none of the indicia of a multiple acts case. Rather, by analyzing the facts of this case in a common sense manner, it is clear the two alleged acts constituting the rape of S.B. were part of the same continuous course of conduct by the defendant on the night in question.

B. Under the "continuous course of conduct" exception, evidence does not need to support several criminal acts which would each sustain a conviction, but instead, only needs to support that the crime occurred within the timeframe of the continuous conduct.

The defendant acknowledges that Courts have forgiven the failure to make an election or instruct the jury on unanimity under the continuous course of conduct exception. (Appellant's Brief, 11). The defendant still argues though, that his conviction should be reversed because there is not sufficient proof he placed his penis inside S.B.'s anus. (Appellant's Brief,

9). However, the defendant misinterprets the law with his argument that, under a continuous course of conduct analysis, the State's failure to provide sufficient proof of each of the two separate alleged acts individually still violates his right to unanimity and due process.

The defendant cites *Petrich* as saying "the failure to instruct on unanimity is forgiven only when the events constituting a course of conduct have been adequately proven and are rationally supported by the evidence." (Appellant's Brief, 11). This is not an accurate interpretation. Instead, *Petrich* only requires sufficient proof of each event separately when the evidence supports *several distinct criminal acts*, each of which could constitute the charged offense; not when the evidence indicates a continuous course of conduct. *Petrich*, 101 Wn.2d at 571-572. *See Handran*, 113 Wn.2d at 17-18 (contrasting the need for sufficient proof of each act in a multiple acts case with the proof required under the continuous course of conduct exception). When the continuous course of conduct exception is implicated, the evidence only needs to support that the offense occurred during the timeframe of the course of conduct. *Crane*, 116 Wn.2d at 330. Under this analysis, a unanimous verdict is not required as to each alleged incident constituting the course of conduct, and the jury only need be unanimous in determining that the offense occurred

during the timeframe of the conduct. *Crane*, 116 Wn.2d at 330. *See Petrich*, 101 Wn.2d at 571.

Since the alleged acts in the defendant's case constitute a continuous course of conduct, the evidence does not need to support several criminal acts that could each constitute Rape of a Child in the First Degree. *See Crane*, 116 Wn.2d at 330. The evidence need only support that the rape of S.B. occurred during a course of conduct within a certain small timeframe. *See Crane*, 116 Wn.2d at 330; *Handran*, 113 Wn.2d at 17; *Petrich*, 101 Wn.2d at 571. This is the precise difference between a "multiple acts" and "continuous course of conduct" analysis. Therefore, the defendant's argument, that touching S.B.'s "butt" with his penis did not meet the statutory requirements of rape without evidence of actual penetration, is irrelevant. (Appellant's Brief, 9). *See* RCW 9A.44.010(1). There was no requirement for the State to produce evidence meeting the statutory elements of rape for each allegation individually. Rather, the evidence just needed to prove that the statutory elements of the rape were met at some point during the timeframe in which the continuous course of conduct, as a whole, occurred. *See Crane*, 116 Wn.2d at 330. Since the second allegation was merely part of a single continuous course of conduct that was adequately proven by evidence of the defendant digitally

penetrating S.B., the defendant has not been denied his right to due process or a unanimous verdict.

C. Even if the defendant did commit multiple distinct acts, the failure to elect a single act or issue a unanimity instruction was harmless error.

The defendant was not denied due process even if the allegations against him were to be characterized as multiple distinct acts. Due process requires the State to prove all elements of the charged crime beyond a reasonable doubt. *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995); U.S. CONST. amend. 5, 14; Wash. Const. art. I, § 3, 21, 22. A defendant may be convicted only when a unanimous jury concludes the charged crime has been proven beyond a reasonable doubt. *Kitchen*, 110 Wn.2d at 409. When multiple criminal acts are alleged, each of which could constitute the charged crime, and neither an election by the State has been made, nor a unanimity instruction been given, the defendant's right to a unanimous verdict has been violated and constitutional error has been committed. *Id.* at 411. When error occurs during a trial, the Court applies constitutional harmless error analysis. *State v. Bobenhouse*, 166 Wn.2d 881, 893, 214 P.3d 907 (2009). The verdict will be affirmed only when the error is shown to be harmless beyond a reasonable doubt. *Camarillo*, 115 Wn.2d at 65; *Kitchen*, 110 Wn.2d at 411. An error is harmless

beyond a reasonable doubt when a rational trier of fact could find each incident was proved beyond a reasonable doubt. *Camarillo*, 115 Wn.2d at 66;

A failure to unambiguously elect a single act or issue a unanimity instruction in a multiple acts case is harmless beyond a reasonable doubt if uncontroverted evidence and testimony prevents a rational juror from distinguishing between the several incidents. *See Bobenhouse*, 166 Wn.2d at 894; *Camarillo*, 115 Wn.2d at 70. *See also Kitchen*, 110 Wn.2d at 413-414; *State v. Allen*, 57 Wn. App. 134, 787 P.2d 556 (1990) (error was harmless because the defense offered no evidence controverting the victim's testimony that would allow jurors to distinguish between incidents). The jury, if they rationally believe one of the incidents occurred, is free to conclude the other incidents must necessarily have occurred as well. *Bobenhouse*, 166 Wn.2d at 894; *Camarillo*, 115 Wn.2d at 70.

For example, in *Camarillo*, the State failed to elect which of the three alleged incidents of indecent liberties of an 11-year-old boy it would rely on for a conviction. *Camarillo,* 115 Wn.2d at 62. The victim testified to three separate instances where the defendant touched him inappropriately. *Id.* at 62-63. The defendant's testimony contained only a general denial he had ever touched the boy and no evidence was

introduced to contradict the victim's testimony. *Id.* at 70-71. The defendant challenged his conviction, asserting the absence of an election or instruction was harmful error, but the Court disagreed. *Id.* at 72. The Court reasoned that besides the bare general denial of the allegations by the defendant, no direct contravening evidence was introduced regarding the occurrence of the incidents, so a rational juror could find each incident was proven beyond a reasonable doubt. *Id.* at 70. The Court noted that the jury is allowed to consider the totality of the evidence regarding several incidents to reach the conclusion there was proof beyond a reasonable doubt of one incident. *Id.* at 71. The Court further stated that the jury, if they rationally believe one incident occurred, may reasonably find the others must have as well. *Id.*

The Supreme Court applied this reasoning again in *Bobenhouse*. There, the defendant was charged with Rape of a Child in the First Degree. *Bobenhouse*, 166 Wn.2d at 886. At trial, the victim testified the defendant forced him to perform oral sex on him. *Id.* at 893. When asked if the defendant ever made him do anything other than perform oral sex, the victim testified that the defendant inserted a finger in his "butt" during a separate incident. *Id.* The defendant offered no evidence other than a general denial of the allegations and there was no election or unanimity instruction given. *Id.* at 887. The Court held the absence of an election or

unanimity instruction was harmless error because the defendant's general denial and the lack of conflicting evidence rebutting the victim's testimony gave the jury no basis for discriminating between the two alleged events. *Id.* at 894-895. The Court concluded a rational juror could have believed that if one of the incidents was proven beyond a reasonable doubt, the other incident must have necessarily happened as well. *Id.* at 895.

If the allegations against the defendant were to be characterized as multiple acts, it would be clear that the jury here had no rational basis for distinguishing between the two alleged acts. Based on the totality of the evidence, a rational juror could reasonably believe that if it was proven beyond a reasonable doubt that the defendant inserted his finger into S.B's vagina, then he must have also inserted his penis into her anus. When S.B. was asked at trial if anything else happened the night the defendant placed his finger in her vagina, she testified that he rolled her on top of him and placed his penis "inside" her "butt". (RP 253-56). More evidence was introduced indicating S.B. said the defendant placed his penis inside her "butt" during her interview at Kids Haven. (RP 204). During his interview with police, the defendant admitted to having sex with S.B., and said he inserted his finger into S.B.'s vagina. (EX 11). He also stated he was drunk and high during the incident and it was possible he had rolled

S.B. off her mattress on top of him. (EX 11). However, when the defendant testified at trial he generally denied all the allegations, stating he didn't even remember talking to police about touching S.B. (RP 308-09, 312-13). The only evidence that could possibly serve to contradict the testimony indicating the defendant placed his penis inside S.B. were the statements made at trial by S.B's sister, who only indicated that she saw the defendant touch S.B. (RP 268, 277).

Like in *Bobenhouse* and *Camarillo*, where the uncontroverted testimony of the victim and general denial by the defendant were enough to allow jurors to rationally conclude that if one act was proven beyond a reasonable doubt, both must have happened, S.B's testimony and this defendant's bare denial during trial were enough for the jury to reach the conclusion that both acts happened here. *Bobenhouse*, 166 Wn.2d at 894-895; *Camarillo*, 115 Wn.2d at 70-71. The Court in *Camarillo* observed "there was no conflicting testimony which would have placed any reasonable doubt in the mind of a juror that the events did not happen as described by the boy." *Camarillo*, 115 Wn.2d at 71. The same is true here as well. There was no testimony or evidence presented at trial that directly contravened S.B's testimony. At best, S.B. merely omitted a description of the second alleged incident when she initially reported the rape to family members. She testified to it at trial and disclosed it during

her interview at Kids Haven. (RP 204, 253-56). There was no conflicting evidence that could have possibly put a reasonable doubt in any jurors mind that S.B. did not accurately describe to them what happened to her. As in *Bobenhouse* and *Camarillo*, no rational juror could distinguish between the multiple incidents here. *Bobenhouse*, 166 Wn.2d at 894-895; *Camarillo*, 115 Wn.2d at 70. Therefore, a rational juror could have found each incident was proven beyond a reasonable doubt, and the error in failing to elect a single act or issue a unanimity instruction here was harmless beyond a reasonable doubt. *See Camarillo*, 115 Wn.2d at 66.

D. Double jeopardy would not bar retrial if the defendant's conviction were reversed.

The defendant next argues that double jeopardy would bar retrial if his conviction were reversed. (Appellant's Brief, 12). This argument should also fail. Double jeopardy bars a second trial and multiple punishments for the same offense. *State v. Kelley*, 168 Wn.2d 72, 76, 226 P.3d 773 (2010). The double jeopardy clause applies when (1) jeopardy has previously attached, (2) that jeopardy has been terminated, and (3) the defendant is in jeopardy again for the same offense in fact and law. *State v. Ervin*, 158 Wn.2d 746, 754, 147 P.3d 567 (2006). Jeopardy is terminated upon a conviction that is final. *Id.* at 752-753. However, a successful appeal vacating the conviction for any reason other than

insufficient evidence successfully continues the jeopardy. *Id.* at 757 (citing *Burks v. United States*, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L. Ed. 2d. 1 (1978)).

As explained in the preceding sections, the allegations against the defendant were proven beyond a reasonable doubt, whether analyzed as a continuing course of conduct or multiple acts. However, if this Court were to reverse his conviction, the appropriate remedy is a new trial because the reversal would be based on a harmful constitutional error rather than insufficient evidence. When a failure to make an election or issue a unanimity instruction occurs at trial, the Court applies constitutional harmless error analysis. *Bobenhouse*, 166 Wn.2d at 893. Under this standard, the Court presumes the error is harmful and reverses and remands for a new trial unless the State meets the burden of proving the error was harmless beyond a reasonable doubt. *State v. Easter*, 130 Wn.2d 228, 236-237, 922 P.2d 1285 (1996); *State v. Fuller*, 169 Wn. App. 797, 813, 282 P.3d 126, (2012).

Since the defendant's conviction will be reviewed under the constitutional harmless error standard, his case would be remanded for a new trial if this Court were to reverse his conviction. *See Easter*, 130 Wn.2d at 236-237; *Fuller*, 169 Wn. App. at 813. The reversal would be based on a harmful constitutional error, not a successful challenge to the

sufficiency of the evidence, so jeopardy would continue. *See Ervin*, 158 Wn.2d at 757. Furthermore, the defendant offers no examples of instances where retrial was barred by double jeopardy after the conviction was reversed based on harmful constitutional error. However, there is authority indicating the case should be remanded for a new trial after the failure to elect or give a unanimity instruction is deemed a harmful error. *See, e.g., Coleman*, 159 Wn.2d at 516-517; *Kitchen*, 110 Wn.2d at 414. If the defendant's conviction were to be reversed, it would be due to harmful error stemming from the failure to make an election or issue a unanimity instruction. The clear standard when there is constitutional harmful error is to remand for a new trial. *See Coleman*, 159 Wn.2d at 516-517; *Kitchen*, 110 Wn.2d at 414. The reversal would not be based on insufficient evidence, so jeopardy would continue and the double jeopardy clause would not bar retrial. *See Ervin*, 158 Wn.2d at 757; *Burks v. U.S.*, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L. Ed. 2d. 1 (1978).

2. THE COURT'S IMPOSITION OF $7,005.66 IN COURT COSTS DID NOT VIOLATE THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW.

The defendant argues his right to due process was denied by the imposition of $7,005.66 in court costs at sentencing, and therefore, the costs should be stricken. (Appellant's Brief, 17). He claims that figure

listed on the Cost Bill is "unexplained" because the judge had no evidentiary basis for imposing the costs and no court finding was entered showing the costs were proven. (Appellant's Brief, 15-16; CP 48). However, the costs were proven and within the constitutional bounds of the imposition of court costs on convicted defendants.

When a person is convicted in superior court, the court may order the payment of legal financial obligations as part of the sentence. RCW 9.94A.760(1). These costs may be imposed only on a convicted defendant and are limited to those special costs incurred by the State in prosecuting the defendant. RCW 10.01.160. Formal findings on the record regarding court costs are not required. *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992).

Here, each cost making up the total of $7,005.66 imposed on the defendant was documented and proven. Furthermore, each cost imposed was a special cost incurred by the State in prosecuting the defendant. The $4,248.54 in "special cost reimbursements" on the Cost Bill challenged by the defendant is the sum of $3,252.54, which the defendant incurred in hiring a medical expert, and $996.00 the defendant incurred in hiring an investigator. (CP 51-52). The abbreviations "DR" and "Inv" at the bottom of the Cost Bill mentioned by the defendant correspond to the medical expert and investigator, respectively. (Appellant's Brief, 15; CP

51-52). The difference between the attorney costs of $2,100.00 listed on the Cost Bill and the $1,400.00 listed on the same document next to the abbreviation "Atty" is explained by the fact that the "Atty 1,400" corresponds to the daily charge for the defendant's defense attorney at trial. (Appellant's Brief, 16; CP 53). The defendant's trial lasted longer than one day. The other costs listed on the Cost Bill are all individually itemized, labeled, and have a clear origin. (CP 48).

Each one of the costs imposed on the defendant has an evidentiary basis on the record. Each cost corresponds to a cost incurred by the State in prosecuting the defendant. Furthermore, the judge was not required to enter a formal finding as to the court costs imposed. *Curry*, 118 Wn.2d at 916. Therefore, there was nothing "unexplained" about the total of $7,005.66 imposed on the defendant, and the imposition of these costs did not deny him due process. The costs should not be stricken.

3. BY FAILING TO OBJECT TO THE IMPOSITION OF COURT COSTS AT SENTENCING, THE DEFENDANT WAIVED HIS RIGHT TO A FORMAL FINDING ON HIS PRESENT OR FUTURE ABILITY TO PAY.

In order to impose court costs on an indigent defendant, the Court must find the defendant has the present or future likely ability to pay those costs. *Fuller v. Oregon*, 417 U.S. 40, 47-48, 94 S. Ct. 2116, 40 L.Ed.2d 642 (1974); *Curry*, 118 Wn.2d at 915-916; RCW 10.01.160(3). However,

a defendant cannot raise an issue for the first time on appeal unless it is of constitutional magnitude. *State v. Phillips*, 65 Wn. App. 239, 243, 828 P.2d 42 (1992); *State v. Curry*, 62 Wn. App. 676, 680-681, 814 P.2d 1252 (1991). The failure to enter findings as to a defendant's present or future likely ability to pay is not an error of constitutional magnitude that requires resentencing. *Phillips*, 65 Wn. App. at 243; *State v. Curry*, 62 Wn. App. at 680-681. A defendant's failure to object to the imposition of court costs under RCW 10.01.160(3) at sentencing acts as a waiver of his statutory, not constitutional, right to have a finding of his ability to pay entered. *Phillips*, 65 Wn. App. at 244.

The defendant argues the trial court's failure to check the box indicating he had the likely present or future ability to pay acted as a finding of his inability by the court. (Appellant's Brief, 18). If this Court finds the failure to check that box constitutes a formal finding, the State would request an additional hearing to determine the defendant's present or future ability to pay. However, if the failure by the trial court to check the box was not a formal finding, the defendant is not entitled to any other finding on his ability to pay. Imposition of fines is at the trial court's discretion *Curry*, 118 Wn.2d at 916. The defendant did not object to the imposition of the costs at sentencing under RCW 10.01.160(3), and therefore, cannot raise the issue of his inability to pay for the first time on

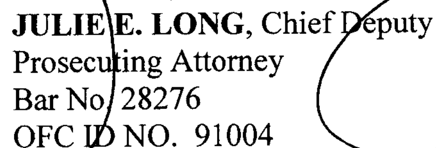
appeal. *See Phillips*, 65 Wn. App. at 243; *State v. Curry*, 62 Wn. App. at 680-681. The defendant's discussion of the circumstances on the record surrounding his financial hardship would be irrelevant, because his failure to object to the costs acted as a waiver of his right to a determination of his ability to pay. *Phillips*, 65 Wn. App. at 244. Therefore, the defendant's ability to pay should not be considered on appeal. If the issue is accepted for the first time on appeal, however, the State would request additional proceedings to determine the defendant's present or future likely ability to pay.

IV. CONCLUSION

For the foregoing reasons, the State of Washington respectfully requests that this Court affirm the defendant's conviction for Rape of a Child in the First Degree, and the imposition of $70,005.66 in court costs at the time of sentencing.

RESPECTFULLY SUBMITTED this 9th day of July 2013.

ANDY MILLER
Prosecutor



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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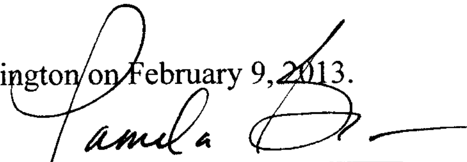

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