

64853-5

64853-5 5/10

NO. 64853-5-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ROY ALANIZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE MICHAEL HAYDEN

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

AMY R. MECKLING
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. SUBSTANTIVE FACTS	1
2. PROCEDURAL FACTS	3
C. <u>ARGUMENT</u>	4
1. ALANIZ'S CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT WAS PROTECTED BECAUSE THE STATE ELECTED WHAT ACTS SUPPORTED EACH COUNT	4
2. THE TRIAL COURT'S FAILURE TO GIVE A <u>PETRICH</u> INSTRUCTION WAS HARMLESS ERROR	10
D. <u>CONCLUSION</u>	14

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Allen, 57 Wn. App. 134,
787 P.2d 566 (1990)..... 12, 14

State v. Bobenhouse, 143 Wn. App. 315,
177 P.3d 209 (2008)..... 11, 14

State v. Bobenhouse, 166 Wn.2d 881,
214 P.3d 907 (2009)..... 12

State v. Brown, 55 Wn. App. 738,
780 P.2d 880 (1989)..... 5, 6

State v. Camarillo, 115 Wn.2d 60,
794 P.2d 850 (1990)..... 11, 12, 13, 14

State v. Ellis, 71 Wn. App. 400,
859 P.2d 632 (1993)..... 9

State v. Jones, 71 Wn. App. 798,
863 P.2d 85 (1993)..... 11

State v. Kier, 164 Wn.2d 798,
194 P.3d 212 (2008)..... 8, 9, 10

State v. Kitchen, 110 Wn.2d 403,
756 P.2d 105 (1988)..... 5, 10

State v. Petrich, 101 Wn.2d 566,
683 P.2d 173 (1984)..... 4, 5, 6, 8, 10

State v. Vander Houwen, 163 Wn.2d 25,
177 P.3d 93 (2008)..... 6

State v. Workman, 66 Wn. 292,
110 P. 751 (1911)..... 5

A. ISSUES PRESENTED

1. Whether the defendant's right to a unanimous jury verdict was protected when the State specifically told the jury what evidence to rely on for each count?

2. Whether the failure to give a unanimity instruction was harmless because no rational juror could have distinguished among the acts of child molestation.

B. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS

In December 2008, J.W. was fourteen years old. 10/21/09 RP 46. Appellant Alaniz was married to J.W.'s mother and lived with J.W., her two sisters, and her mother. J.W. referred to Alaniz as "Dad" and characterized her relationship with him at the time as "good." 10/21/09 RP 47, 49, 66. Alaniz was responsible for disciplining J.W., and would frequently take away her cell phone. 10/21/09 RP 71-72. Although J.W. generally got along with Alaniz, he did several things shortly before the charged incidents that made her uncomfortable, including asking her to massage his "third foot" and hiding her cell phone down the front of his pants. 10/21/09 RP 68-74.

During the month of December 2008, J.W. was out of school a number of days due to a snowstorm and due to the holiday break. 10/21/09 RP 64. A couple of days after winter break started, J.W. went downstairs to where Alaniz was using the computer, and asked him if she could have her cell phone back. He told her that the only way she could have the cell phone back was to show him her "butt." 10/21/09 RP 74-75, 98. She took this as a joke and laughed, but Alaniz was insistent, and all of a sudden, he pulled J.W.'s pants down, turned her around and bent her over, with her hands touching the computer chair in front of her. He unzipped his pants and pressed his penis between her buttocks. 10/21/09 RP 75-78. He squeezed her butt and "tried to move." 10/21/09 RP 78. J.W. pulled up her pants and ran upstairs. 10/21/09 RP 79. She left the house and went over to a friend's, where she took a shower. 10/21/09 RP 80.

Four or five days later, J.W. again went downstairs to retrieve her cell phone from Alaniz. 10/21/09 RP 80-81, 98. Again, Alaniz was using the computer when J.W. asked him for her cell phone back. Alaniz's response was essentially the same: "I'm gonna have to see butt." 10/21/09 RP 81. Like the first time, Alaniz pulled J.W.'s pants down, faced her away from him, and placed his

penis against her bottom. This time, Alaniz asked for some lotion to make it more "slippery" and J.W.'s "butt got wet." 10/21/09 RP 82-83. Afterward, J.W. grabbed her phone and went upstairs. She texted her friend Lyric and told her what had happened. 10/21/09 RP 84.

A few days later, the same thing happened a third time. 10/21/09 RP 85. Then, on New Years Day, J.W. went to her friend Lyric's house. On the way to Lyric's house the two girls texted each other. During the texts, J.W. talked about what Alaniz had done. 10/21/09 RP 89-90. Lyric's mother, Tina, saw the texts the next day and approached J.W. about it. J.W. disclosed the abuse. 10/21/09 RP 91. Tina called the police. 10/21/09 RP 95.

2. PROCEDURAL FACTS

Alaniz was charged with two counts of third degree child molestation, both counts alleged to have occurred during a period of time intervening between December 10 and December 31, 2008. CP 5-6. Alaniz testified during a jury trial. He denied the acts alleged by J.W., and testified that he had never touched J.W. in a sexual manner. 11/03/09 RP 68. During closing argument, Alaniz argued that J.W. had completely made up the molestation.

11/03/09 RP 125, 132. The jury convicted Alaniz of both counts.
CP 28-29.

C. ARGUMENT

1. ALANIZ'S CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT WAS PROTECTED BECAUSE THE STATE ELECTED WHAT ACTS SUPPORTED EACH COUNT.

For the first time on appeal, Alaniz claims that the trial court erred by not submitting a unanimity instruction, commonly referred to as a Petrich¹ instruction, to the jury. However, the court is only required to provide such an instruction to the jury in the absence of a clear election by the State regarding which act it is relying on for conviction. Here, during closing arguments, the prosecutor specifically told the jury which acts the State was relying on for each of the two counts against Alaniz, and told the jury that they had to be unanimous as to each. Because the State specifically elected what evidence it was relying on for each count the court was not required to provide a unanimity instruction to the jury and Alaniz's conviction should be affirmed.

¹ State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984).

A defendant has a constitutional right to be convicted by a jury that unanimously agrees that the crimes charged in the information have been committed. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). When there is evidence and testimony of multiple acts, any one of which could form the basis of a charged count, *either* the State must tell the jury which act to rely on in its deliberations *or* the court must instruct the jury to agree unanimously on a specific criminal act. Kitchen, 110 Wn.2d at 409 citing State v. Petrich, 101 Wn.2d at 570, and State v. Workman, 66 Wn. 292, 294-95, 110 P. 751 (1911).

This "either/or" rule, originally outlined in Petrich, modified the previous holding in Workman, that required an election by the State. Petrich, 101 Wn.2d at 572; State v. Brown, 55 Wn. App. 738, 746, 780 P.2d 880 (1989). Petrich recognized that there are situations in which an election by the State is impractical. Petrich, 101 Wn.2d at 572. This court has noted one such situation:

Particularly when the accused resides with the victim or has virtually unchecked access to the child, and the abuse has occurred on a regular basis and in a consistent manner over a prolonged period of time, the child may have no meaningful reference point of time or detail by which to distinguish one specific act from another. The more frequent and repetitive the abuse, the more likely it becomes that the victim will be unable to recall specific dates and places.

Moreover, because the molestation usually occurs outside the presence of witnesses, and often leaves no permanent physical evidence, the state's case rests on the testimony of a victim whose memory may be clouded by a blur of abuse and a desire to forget.

Brown, 55 Wn. App. at 746. Since Petrich, it is well settled that the requirement of jury unanimity is met by either an election on the part of the State or an instruction by the court. See State v. Vander Houwen, 163 Wn.2d 25, 177 P.3d 93 (2008) (Because the State did not articulate what evidence related to which count, in the absence of a unanimity instruction, it was impossible to ensure that all of the jurors voted to convict based on the same evidence).

During the trial, J.W. testified that three incidents of molestation occurred. She testified that during the "first" time, she went downstairs to where the defendant was on the computer, and asked him for her phone back. She testified that he conditioned return of her phone on showing him her buttocks. She told the jury how the defendant pulled her pants down and rubbed himself on her. 10/21/09 RP 74-75. She also testified that a very similar incident occurred several days later, but that during the second incident, the defendant was looking for or asked for lotion and she felt her buttocks get wet. 10/21/09 RP 80-83. J.W. testified that a third incident occurred, indicating that it was last in time, and that

"it was just the same thing as the first one . . . my pants are down and he tried to do it again." 10/21/09 RP 85, 98.

During closing argument, the State specifically informed the jury what evidence to rely on for each of the two counts. The State also told the jury that all twelve jurors must agree as to the evidence as to each count separately:

Now, I want to go back to this idea of these two counts right here for just a second. The important thing to remember is that, although the elements are the same, you have to be unanimous on each one. Six of you can't agree on count one, and six of you on count two, and that's enough and we get to the middle. You have to be -- everybody has to agree on each count, okay? And you also have to agree that it's at different times, okay? So what I'm asking you to consider are two particular events. The first time that she described for us that she went down and got the phone and he touched her, the show me butt, you can have your phone, but show me butt; or the second time, excuse me, and the second time, looking for the lotion and feeling her buttocks get wet. Those are two separate incidents. Those reflect each of count one and count two, and you have to decide them separately. You have to agree unanimously separately.

11/03/09 RP 111-12.

It was abundantly clear from the prosecutor's remarks what evidence the State relied on for each of the two charged counts. There was no ambiguity. Because the State specifically told the jury which of the three acts of molestation related to count one and

which of the three acts related to count two, the defendant's constitutional right to a unanimous jury verdict was protected. The court did not err when it did not provide a Petrich instruction to the jury.

Alaniz cites to State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008) for the proposition that remarks during the State's closing argument cannot constitute the "clear" election required to protect juror unanimity. But Alaniz misapplies the holding of Kier, a double jeopardy case, to the jury unanimity issue here.

Kier considered whether charges of second degree assault and first degree robbery merged for purposes of double jeopardy. Kier had pointed a gun at Hudson, who was outside of his vehicle, and then Kier went over to the vehicle and pointed the gun at Ellison, the passenger in Hudson's vehicle, and then stole the vehicle. Kier, 164 Wn.2d at 802-03. The "to-convict" instruction on the robbery count did not specify who the victim of the robbery was. However, the "to-convict" instruction on the assault count specified that Ellison was the victim of the assault. Therefore, the court determined that there was a possibility that the jury could have found Ellison to be both the victim of the robbery as well as the assault, and thus it was possible that the assault was used to

elevate the robbery to that of first degree. Citing the rule of lenity, the court merged the two convictions. Id. at 811-14.

The court in Kier determined that even though the State made remarks during its closing argument supporting Hudson as the victim of the robbery, the evidence and the instructions were ambiguous on the issue of whether the assault was used to elevate the robbery, and thus applied the rule of lenity. There, the remarks were not sufficient by themselves to cure a double jeopardy violation. Id. at 811-12.

Although the Kier court noted that the facts at issue were "somewhat analogous" to a multiple acts case, double jeopardy and jury unanimity raise fundamentally different concerns. State v. Ellis, 71 Wn. App. 400, 403-04, 859 P.2d 632 (1993) (requiring the jury to unanimously agree on the underlying act implicates the right to a jury trial, while assuring that the jury does not use the same act as a factual basis for more than one count assures that a defendant will not be convicted twice for the same crime). Alaniz does not claim a double jeopardy violation; in fact he notes that the court instructed the jury that the act underlying count one must be different from that underlying count two. Brf. of Appellant at 9.

Here, the court told the jury that count one had to be based on a different act than that in count two. CP 22-23. The court also told the jury that its verdict on each count must stand alone. CP 20. The court finally told the jury that in order to return a verdict each juror must agree. CP 27. Although these instructions alone are not sufficient to ensure jury unanimity, in conjunction with the State's clear remarks during closing argument, there is no danger that the jury was not unanimous as to each of the acts underlying the two counts. Unlike Kier, there is no ambiguity among the evidence, the court's instructions and the State's remarks.

The State made the clear election that Petrich and Kitchen specifically authorize. Kier should be limited to its facts and does not hold that the remarks of counsel during closing can *never* constitute a valid election for purposes of jury unanimity. Alaniz's right to a unanimous verdict was sufficiently protected.

2. THE TRIAL COURT'S FAILURE TO GIVE A PETRICH INSTRUCTION WAS HARMLESS ERROR.

This court should hold that the trial court did not err by not providing a Petrich instruction to the jury. However, even if this court holds otherwise, it is well settled that such an error is

harmless when the appellate court concludes that, if a rational fact-finder believed the testimony about one incident, it would have necessarily believed the testimony about the other incidents. Here, the evidence supporting the multiple incidents was the same: J.W.'s testimony and Alaniz's statements to J.W. that were overheard by Tina on the phone. Alaniz's defense was one of general denial – he claimed that J.W. had made the whole thing up. It is inconceivable that the jury would have distinguished between the incidents described by J.W., believing that one occurred but not the others. Accordingly, any error was harmless.

When the trial court erroneously fails to give a unanimity instruction, the jury verdict will be affirmed only if the error was harmless beyond a reasonable doubt. State v. Camarillo, 115 Wn.2d 60, 64, 794 P.2d 850 (1990). The failure to give a unanimity instruction is harmless error if the evidence did not permit the jury to rationally discriminate between the incidents. State v. Bobenhouse, 143 Wn. App. 315, 327-28, 177 P.3d 209 (2008); State v. Jones, 71 Wn. App. 798, 822, 863 P.2d 85 (1993).

In Camarillo, the victim testified similarly to three distinct instances of sexual molestation, and the defense was general denial. This Court concluded that, while a unanimity instruction

should have been given, the error was harmless. "The uncontroverted evidence upon which the jury could reach its verdict reveals no factual difference between the incidents." 115 Wn.2d at 70.

In Camarillo, the Court found the Court of Appeals' reasoning in State v. Allen, 57 Wn. App. 134, 787 P.2d 566 (1990) persuasive. In Allen, the victim testified that defendant Dixon sexually molested her in the same manner on a daily basis for several months. Dixon's defense was general denial and he did not attempt to distinguish among or question any specific incidents charged. The court found the error harmless:

In view of Dixon's general denial of any improper physical contact and C.P.'s testimony that substantially the same contact occurred during each visit, we find no rational basis for jurors to distinguish among the acts charged in Count I. The jurors had either to believe Dixon and acquit or believe C.P. and convict. There is no possibility that "some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction."

57 Wn. App. at 139.

More recently, in State v. Bobenhouse, 166 Wn.2d 881, 214 P.3d 907 (2009), the court held the failure to give a unanimity instruction harmless where one count of first-degree rape of a child

was based upon evidence that the defendant regularly forced his son to perform fellatio on him and on at least one occasion inserted his finger into his son's anus. Again, the court found the error harmless:

Bobenhouse offered only a general denial to these allegations, and, consequently, the jury had no evidence on which it could rationally discriminate between the two incidents (i.e., fellatio and digital penetration of John's anus). Put otherwise, if the jury in Bobenhouse's case reasonably believed that one incident happened, it must have believed each of the incidents happened. In applying the reasoning of Camarillo to this case... we conclude the trial court's failure to instruct the jury on unanimity constituted harmless error.

Id. at 895.

Here, during closing argument, neither the prosecutor nor the defense counsel distinguished among individual incidents. The defendant focused solely on convincing the jury that J.W. was not credible due to an alleged motivation to avoid punishment. 11/03/09 RP 125-26, 128, 132. However, in finding Alaniz guilty, the jury necessarily had to find J.W. credible. Because the evidence presented no rational basis for some jurors to predicate guilt on one act while other jurors on another, any error was harmless.

The facts of this case are similar to those in Bobenhouse, Camarillo, and Allen, and there was no rational basis for a juror to distinguish between the acts described in J.W.'s testimony. This Court should hold that the error was harmless.

D. CONCLUSION

The State respectfully requests this Court to affirm Alaniz's conviction.

DATED this 20 day of December, 2010.

Respectfully submitted,

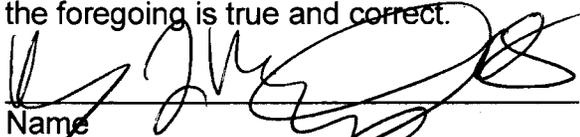
DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
AMY R. MECKLING, WSBA #28274
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

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 Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Respondent's Brief, in STATE V. ROY ALANIZ, Cause No. 64853-5-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.


Name
Done in Seattle, Washington

12/20/10
Date

2010 DEC 20 PM 4:36
DEPARTMENT OF COMMUNITY & CRIMINAL JUSTICE