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STATE OF WASHINGTON
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NO. 38185-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

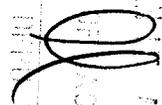
STATE OF WASHINGTON,

Respondent,

v.

RICHARD E. YORK,

Appellant.

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STATE OF WASHINGTON
BY 
DEPUTY

COURT OF APPEALS
STATE OF WASHINGTON

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable James B. Sayer, II, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was denied his right to a unanimous jury in violation of his constitutional rights under Wash. Const. art. 1, § 22; U.S. Const. Amend. 6.

Issue Pertaining to Assignment of Error

Appellant was charged with four counts of second degree child rape, but the victim could describe details for only three of the alleged incidents. In closing, the prosecutor argued the jury should convict on the fourth count based on the victim's testimony that sex occurred "a lot." There was no jury unanimity instruction, and the prosecutor elected to rely on specific evidence for only three of the four counts. Under these circumstances, was appellant denied his right to a unanimous jury verdict on the fourth count?

B. STATEMENT OF THE CASE

1. Procedural History

The Mason County Prosecutor charged Appellant Richard E. York with four counts of second degree child rape. CP 69-71, 75-77. A jury trial held March 24-28, 2008, ended in a mistrial (Trial I). RP 1-214.¹

A second jury trial was held July 8-10, 2008, before the Honorable James B. Sawyer II, which resulted in conviction on all four counts (Trial

¹ There are four consecutively paginated volumes of the verbatim report of proceedings, collectively referenced as "RP."

II). RP 215-456; CP 22-25. The court sentenced York to an indeterminate sentence of 280 months to life, the top of his standard range. RP 453, 455; CP 8-10. York appeals. CP 4.

2. Substantive Facts²

In January 2008, when she was twelve years old, SB (d.o.b. 1/23/95) was friends with Shalisa N.³ and periodically stayed the night at Shalisa's home. RP 226, 278, 280, 300-01. During a sleepover on January 11, 2008, SB disclosed to Shalisa's foster mother that she had recently had sex with York, the ex-boyfriend of SB's mother. RP 226-27, 279-81. Shalisa's foster mother called police. RP 227, 263-64, 281.

Detective Paul Campbell of the Shelton Police Department interviewed SB. RP 233-34, 265, 281. SB reported she had been having sex with York for about two years, sometimes in the woods in front of his aunt's home and sometimes in his basement bedroom in his aunt's home. RP 238-42, 247, 249, 317. SB could not tell Detective Campbell the number of times she had sex with York; she could only say it was "a lot." RP 368. She also could not -- despite specific questioning -- relate any of

² Because the jury unanimity issue is dependent upon the specific facts and argument at trial, all facts cited in this memorandum are from Trial II, except where noted otherwise.

³ In Trial I, Shalisa was identified as fifteen years old. RP 16.

the activities to any specific dates, such as holidays or birthdays. RP 368-69.

At trial, SB explained she frequently went to York's house on Fridays because her little brother Eliot was York's son, and she would take Eliot to visit with his father. RP 279, 287. York allegedly lived in the converted basement garage of his aunt Cindy York's ("Cindy") home. RP 289-90. Cindy's three daughters and her oldest daughter's boyfriend also lived in the home. RP 303-04, 308-09, 389.

SB claimed that on January 9, 2008, everyone in Cindy's home were upstairs with her, Eliot, and York. RP 282-83. SB claimed she and York drank vodka provided by York. RP 250, 283. In front of all the residents of the house, York allegedly gave SB "about three glasses" of vodka. RP 296-97.⁴ Then York and SB left, SB believed to buy cigarettes. RP 284,

⁴ SB said York usually gave her "straight vodka." RP 283. SB also claimed Cindy saw her drinking or intoxicated on this and other occasions but never did anything about it. RP 283, 304. Moreover, SB said she was frequently hung over on Saturdays upon returning to her own home, but her grandparents -- who were her caretakers -- never inquired about her condition. RP 206.

299.⁵ The pair entered a patch of woods across the street from Cindy's house. RP 284.

Trails through the woods were used year-round by local residents cutting through the area, including children on bicycles. RP 248-49, 303, 308. According to SB, York spread his jacket -- a gray hooded sweatshirt -- on the ground near a fork in the trail and told SB to take off her clothes. RP 238-39, 285, 307-08. SB took off one pant leg, pulled her panties down, and lay down on the sweatshirt, and York began having sex with her. RP 285-86. Before orgasm, York pulled out of SB and ejaculated to the side. RP 286-87. Then they both returned to Cindy's home. RP 287.

At trial, SB recalled having sex in the woods with York on January 9, 2008, and on another occasion "about a month" earlier. RP 288-89. SB also testified to one occasion in York's room when she passed out from too much alcohol. RP 289-90. She allegedly awoke to York unzipping her pants and they had sex shortly afterward. RP 290-91.

⁵ Cindy and the boyfriend of Cindy's oldest daughter both testified Cindy demanded everyone leave the house except her daughters because Cindy's landlord was coming over. RP 269, 388, 392, 406. SB did not remember this happening, and testified the only people who left the house at that time were herself and York. RP 284, 299.

SB testified she had sex with York "about, I don't know, probably five, six" times in York's room at Cindy's house, but she "really d[id]n't remember" any specifics about any other times. RP 291.⁶ Other people would be in the home when these acts occurred -- including Cindy in the bedroom next door -- but they would all be asleep. RP 291, 304. At a different point in the testimony, SB testified she went to York's home "like, every Friday night," and she and York would have sex there "most of the time" she went over. RP 295-96.

When York was arrested on January 12, 2008, he was wearing a gray hooded sweatshirt, which was taken into evidence and identified by SB at trial as the sweatshirt she lay down on for the sex on January 9. RP

⁶ SB had perennial difficulty explaining how many times the sex had occurred. In the first trial, she initially claimed she had sex with York twice and didn't remember any other times. RP 63. Then, upon being shown her prior statement to Detective Campbell, she acknowledged she had told Campbell she had sex with York "a lot." RP 64. She next estimated that she had sex with York maybe 30-35 times in the past year. RP 65. Indeed, in the first trial, SB could only provide enough details for the State to make a proper election in closing argument on Counts I and II. RP 190. In the second trial, all of these numbers changed, but SB was never impeached on the variations. RP 282-91, 295-96. Both Detective Campbell and the sexual assault clinic ARNP testified juveniles often have difficulty following time linearly and being able to remember and relate how frequently a given thing happened. RP 318-19, 368.

236, 247, 258-59, 307; CP 44.⁷ The sweatshirt had no obvious stains and was never tested for the presence of any bodily fluids. RP 247, 259-61, 370-72. Detective Campbell never examined York's alleged room in the basement of Cindy's house and never attempted to obtain a search warrant for the York residence, so no other physical evidence was collected. RP 241-42, 248.

Detective Campbell referred SB to a sexual assault clinic in Olympia, where she was seen on January 17, 2008. RP 243, 294, 315. During the medical history, SB disclosed the alleged sexual activity, but did not give a number of times intercourse occurred. RP 295, 316-18. She described only two specific incidents to the examining ARNP, the first time⁸ and the last time on January 9 in the woods. RP 317-19, 341, 343. Regarding any other incidents, SB reported to the ARNP only that it had occurred "a lot" over the past two years. RP 319.

The ARNP examined SB's genitals with a video colposcope -- a non-penetrating microscope -- but saw no damage to SB's genitals including her

⁷ Interestingly, at the first trial, SB had claimed the clothing she lay down on during the January 9 incident was a heavy brown coat, not a gray sweatshirt, and also that the gray sweatshirt in evidence was not used on January 9, but had been used on a previous occasion. RP 59-60, 71. Again, she was not impeached on these inconsistencies.

⁸ Per the ARNP, the first time happened when SB was ten years old, which was outside the charging period. RP 343; CP 45-48.

hymen. RP 314, 322-23, 326, 355, 360-61. The ARNP said that because SB's menstrual cycles had started when she was eleven, her body might have provided sufficient lubrication to avoid damage to the hymen, or else any damage caused might have healed in the intervening time without obvious notching or scarring. RP 323-28, 359-60.⁹

At the clinic, the ARNP also observed a severe rash and some scratch marks over SB's genitals, belt line, sternum, buttocks, thighs, wrists, and the webs of her fingers. RP 294, 321, 347-50. SB told the nurse the rash itched and she'd had it for about a year. RP 320.¹⁰ Indeed, on one place on her abdomen, SB had scratched the rash until it had become an infected sore. RP 349-50.

The nurse diagnosed a severe scabies infection. RP 321, 350, 352. She prescribed medicated cream for the scabies and antibiotics for the infection. RP 321-23, 353.

⁹ SB reported to the ARNP that the first time York had sex with her, she experienced pain and bled a small amount. RP 354. SB further reported she had no pain or bleeding on the last incident. Id.

¹⁰ At Trial II, SB said she had only had the rash for a "couple months" before she was seen at the clinic. RP 295. At Trial I, SB seemed to testify she only contracted the rash about a week after her interview with Detective Campbell, but the testimony was ambiguous. RP 88. However, at both trials, the ARNP testified SB told her she'd had the rash for a year prior to coming to the clinic, and the nurse also testified that the severity of the rash, including the infected sore on SB's abdomen, was consistent with a chronic, long-term infection. RP 102, 112, 320, 350, 352.

Shortly after his arrest, York was seen in the jail clinic for an abscess at the base of his penis. RP 384-85; CP 42.¹¹ York had to be taken to an outside hospital to have the abscess drained. RP 385; CP 43. After a culture, the abscess was identified as caused by methicillin-resistant staph aureus (MRSA). Id. York did not have signs of scabies. Id.¹²

The ARNP from the sexual assault clinic acknowledged scabies could be transmitted through skin-to-skin contact as brief as shaking hands, or else through non-direct contact such as sharing the same bed. RP 328-30, 332, 352. Moreover, she acknowledged transmission was much more likely through sexual contact. RP 346, 352.

The ARNP also agreed that, given the damaged condition of the skin in SB's genital area, transmission of MRSA from an infected sexual partner to SB was more likely than it would have been had the skin not been so traumatized. RP 355. She also said, however, that spread of both scabies

¹¹ The LPN from the jail testified at the first trial. RP 142-52. At the second trial, the LPN left the State the day before her testimony because her mother was reportedly dying. RP 374. Instead of waiting for her to return, the parties agreed to stipulate to her expected testimony. RP 378-80; CP 42-43. The stipulation was read aloud to the jury by the trial court. RP 384-85.

¹² At Trial I, the jail nurse specifically testified that any signs of scabies infection would be treated very seriously by the jail, because scabies is so easily transmitted. RP 145-46. In part for this reason, she was certain York did not have signs of scabies when she examined him. RP 145-46, 152.

and MRSA are unpredictable, so she was not surprised neither the scabies nor MRSA were transmitted. RP 329-30, 332-34, 357-58.

In the defense case-in-chief, Cindy York testified: 1) SB had no alcohol to drink in her house on January 9, nor had SB ever, to her knowledge, consumed alcohol in her house; 2) York had never lived in her house in the basement -- the room SB claimed was York's was merely a storage room next to Cindy's bedroom and no one slept there; and 3) York and SB had never gone downstairs together, and Cindy would have noticed if they had, as her own bedroom was the only bedroom in the basement. RP 390-92, 394, 397-98. Cindy also testified that on January 9, 2008, York's girlfriend was in Cindy's house visiting along with him when SB came over. RP 389, 395-96.

In closing argument, York pointed out SB had no damage to her hymen, despite allegedly frequent sexual contact starting as early as the age of ten, before her menarche. RP 323, 360-61, 437-38. York also argued the police investigation was poorly done, given the complete lack of investigation of Cindy's home and the lack of forensic testing of the gray hooded sweatshirt for bodily fluids. RP 434-36, 442-43.

Moreover, although the State alleged York had regular sexual contact with SB, York did not contract scabies from her. RP 385; CP 43.¹³ And although SB had open sores on her body from the scabies rash and resulting scratching, she apparently never contracted MRSA from York. The defense therefore argued in closing that there was reasonable doubt sexual contact ever occurred between York and SB. RP 437-41. The jury nonetheless convicted on all four counts. CP 22-25.

C. ARGUMENT

YORK WAS DENIED HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY FOR COUNT IV.

A defendant may only be convicted when a unanimous jury concludes the act charged has been committed. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); Wash. Const. art. 1, § 22; U.S. Const. Amend. 6. In multiple-count cases, where different acts could form the basis of a given count, either: 1) the State must elect the act on which it will rely for conviction; or 2) the trial court must instruct the jury to agree unanimously, beyond a reasonable doubt, on a specific criminal act as the basis of conviction for each count. State v. Petrich, 101 Wn.2d 566,

¹³ York also pointed out that SB's grandfather was treated for scabies a few weeks after she was. RP 329-30. York argued in closing this was another sign of sloppy investigation, as the grandfather had never been investigated. RP 439.

572, 683 P.2d 173 (1984); State v. Vander Houwen, 163 Wn.2d 25, 37-38, 177 P.2d 93 (2008). This is an issue of constitutional magnitude that can be raised for the first time on appeal. State v. Watkins, 136 Wn. App. 240, 244, 148 P.3d 1112 (2006), review denied, 161 Wn.2d 1028 (2007), cert. denied, 128 S. Ct. 1707 (2008); Vander Houwen, 163 Wn.2d at 38.

Here, there was no unanimity instruction given to the jury. CP 26-41. Moreover, the State only elected what acts it was relying on for counts I-III. In closing argument, the State specified Count I was the January 9th incident in the woods, Count II was the incident in the woods SB described as "about a month" earlier, and Count III was the incident in York's alleged basement bedroom where she claimed she awoke to find him unzipping her pants. RP 428-430.

As for Count IV, the State noted SB testified the sex between her and York happened "a lot" in York's bedroom in Cindy's house, and argued the jury should therefore convict on Count IV. RP 429-30. The prosecutor, however, had difficulty defining the testimony on which the jury should base the fourth conviction:

But she talked about a pattern, ladies and gentlemen. She said it happened -- I'm trying to remember her testimony.

I know she said it happened a lot, and a lot is not very quantitative. It's not anything you can hang a number on. And she said it happened all of the time or some of the time

or none of the time. I don't know why the numbers -- I don't know why there are numbers floating around in my head, so I don't want to put that out there, because what matters in this case is your memory of the testimony.

RP 430.

Testimony that the act happened "a lot," without a unanimity instruction, is insufficient to convict York on Count IV, however, as the jury had to find unanimously that a specific act or acts occurred which constituted the fourth count. State v. Hayes, 81 Wn. App. 425, 430-31, 914 P.2d 788 (when the State relies on "generic evidence" of multiple occasions of abuse, the State need not elect individual acts, but a unanimity instruction must be given), review denied, 130 Wn.2d 1013 (1996). The prosecutor's argument to convict based on SB's testimony that it happened "a lot" invited the jury to convict on Count IV without regard for unanimity. This was error. Kitchen, 110 Wn.2d at 409.

This error was not harmless. See Vander Houwen, 163 Wn.2d at 38-40 (standard is whether such error is harmless beyond a reasonable doubt); Kitchen, 110 Wn.2d at 409, 411-12 (same). There was evidence of an alleged act of sexual intercourse separate from those relied on by the prosecutor for counts I-III, but it did not come from SB. The ARNP reported there was a "first time" when York put alcohol in SB's pop bottle.

RP 318.¹⁴ No one addressed this testimony during closing argument. RP 420-47. It is therefore possible some jurors, in the absence of an election or unanimity instruction, relied on this alleged incident to convict on Count IV, while others merely relied on SB's testimony that the sex happened "a lot." Thus, York's jury may have convicted him of Count IV without being unanimous about which specific act constituted the offense.

Because the trial court failed to give any unanimity instruction, and the State only elected acts upon which it relied for Counts I-III, York was denied his constitutional right to a unanimous jury on Count IV. When the State fails to elect the basis of each count in a multiple-count case, and no unanimity instruction is given, the error is "fatal." Vander Houwen,

¹⁴ In Trial I, the ARNP testified this "first time" happened when SB was ten. RP 101. In Trial II, the ARNP mentioned on cross-examination that "it started" when SB was 10, but the testimony was more ambiguous about whether "it" referred to the same, allegedly first incident. RP 343. This alleged incident therefore should not have supported conviction because it would have been outside the charging period, which began with SB's twelfth birthday. CP 45-48. If the first incident happened when SB was ten, then it would not support conviction as second-degree child rape, but rather first-degree child rape, a crime with which York was not charged. RCW 9A.44.073, .076. See also City of Auburn v. Brooke, 119 Wn.2d 623, 629-30, 836 P.2d 212 (1992) (a charging document must contain the elements of the crime charged and must contain factual allegations that meet those elements). The fact that this allegation would not support conviction, however, was never pointed out to the jury either in closing argument or even clearly in testimony, so the jury could have relied upon it for conviction. RP 420-47.

163 Wn.2d at 38. Any affected counts must be reversed, unless the error is harmless beyond a reasonable doubt. Vander Houwen, 163 Wn.2d at 38-40; Kitchen, 110 Wn.2d at 409, 411-12. The error here was not harmless and Count IV must therefore be reversed.

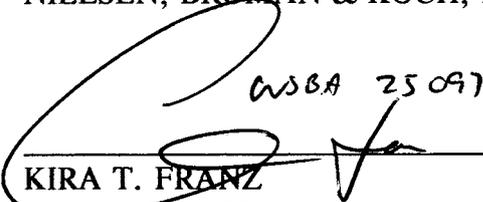
D. CONCLUSION

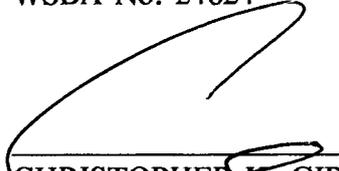
This Court should reverse York's conviction for Count IV because York was denied his constitutional right to a unanimous jury verdict on that count.

DATED this 15th day of January, 2009.

Respectfully Submitted,

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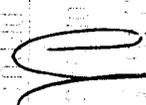
DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13TH DAY OF JANUARY 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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COA NO. 38185-1-II
STATE OF WASHINGTON
BY 
DATE: 1/13/09

SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF JANUARY 2009.

x *Patrick Mayovsky*