

NO. 39148-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

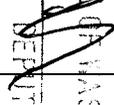
RAYMOND HERNANDEZ, JR.,

Appellant.

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

The Honorable James Lawler, Judge

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STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. <u>Procedural Facts</u>	1
2. <u>Substantive Facts</u>	2
3. <u>Jury Instructions</u>	3
C. <u>ARGUMENT</u>	5
INADEQUATE JURY INSTRUCTIONS VIOLATED HERNANDEZ'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY BECAUSE THEY EXPOSED HIM TO MULTIPLE PUNISHMENTS FOR THE SAME OFFENSE.....	5
D. <u>CONCLUSION</u>	15

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Berg

147 Wn. App. 923, 198 P.3d 529 (2008) 5-8, 10-14

State v. Bland

71 Wn. App. 345, 860 P.2d 1046 (1993)..... 13

State v. Borsheim

140 Wn. App. 357, 165 P.3d 417 (2007) 5-11, 14

State v. Ellis

71 Wn. App. 400, 859 P.2d 632 (1993) 5, 8-10

State v. Hayes

81 Wn. App. 425, 914 P.2d 788
review denied, 130 Wn.2d 1013 (1996)..... 12-13

State v. Kier

164 Wn.2d 798, 194 P.3d 212 (2008)..... 12-14

RULES, STATUTES AND OTHER AUTHORITIES

RCW 9A.44.083 1

Wash. Const. art. I, § 9..... 5

U.S. Const. amend. V 5

A. ASSIGNMENT OF ERROR

Appellant's multiple child molestation convictions violate double jeopardy.

Issue Pertaining to Assignment of Error

Appellant was convicted on five counts of child molestation. Inadequate jury instructions exposed him to multiple punishments for the same offense. Must four of the five convictions be vacated?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Lewis County Prosecutor's Office charged Raymond Hernandez with five counts of first-degree child molestation. CP 87-90; RCW 9A.44.083. For each count, the prosecutor alleged Hernandez;

on or about and between November 1, 2003, and September 20, 2006, in Lewis County, Washington, then and there being at least 36 months older than G.M.H., did have sexual contact with G.M.H., DOB: 07/02/1996, who was less than 12 years of age and not married to the defendant; and furthermore, this offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time; and the defendant used his position of trust or confidence to facilitate the commission of the current offense; . . .

CP 87-89.

A jury convicted Hernandez on all five counts, and the aggravating factors of "ongoing pattern of sexual abuse" and use of "position of trust."

CP 46-60. The court imposed an aggravated exceptional sentence by imposing a minimum sentence 198 months on each count, and then ordering that the sentences on three of the counts to be served consecutively to each other, for a total sentence length of 594 months. CP 19-33.

2. Substantive Facts

Beginning in about 2002 or 2003, Hernandez lived in a home at 332 Meier Rd., Winlock, Washington, with his long time girlfriend, Michelle Rothbauer, and their teenage son, Kalen Rothbauer (d.o.b. May 30, 1988). 2RP¹ 370-71; 473; 481, 493-94. In November 2004, the James and Shandra Housley moved into the home next door with their five minor children. 2RP 23-24.

Over time, the Housley's came to consider Hernandez "the quintessential good neighbor"; Hernandez would help the Housley's and the Housley's would help Hernandez. 2RP 25. Hernandez would walk with Shandra Housley several mornings a week, and would often allow the Housley children, who were home schooled by their mother, to play at his home. 2RP 28, 63, 66-70.

On September 20, 2006, the Housley's 10-year old daughter,

¹ There are six volumes of verbatim report of proceedings referenced as follows: 1RP - January 8, 2008 (pretrial); 2RP - four volume consecutively paginated set for the dates of February 9-12, 2009 (trial); 3RP April 8, 2009 (sentencing).

G.M.H., told her parents that Hernandez had molested her, and the allegation was reported to police. 2RP 21, 37-38, 74. Charges were subsequently filed against Hernandez on June 8, 2007, and later amended on October 8, 2008. CP 96-98.²

At trial, G.M.H. claimed Hernandez would show her pornography and would tell her that he preferred her over other girls her age who wanted to be with him. 2RP 103-07, 123. G.M.H. also claimed Hernandez sexually molested her on several occasions in various places, like his car, his shop, or in a back room. 2RP 109-126.

Hernandez testified at trial and denied ever molesting G.M.H. 2RP 514. To the contrary, Hernandez testified he was concerned about G.M.H.'s sexualized behavior towards him, so he avoided being alone with her and he and Michelle planned to confront G.M.H.'s parents about their daughter's alarming behavior, but never got the chance before allegations were made against Hernandez. 2RP 505-07.

3. Jury Instructions

Except for identification of the count number, each of the "to convict" instructions provided the exact same language:

² The originally charging period for each counts was of April 1, 2005 through September 20, 2006. CP 96-98. In amending the charges, the prosecutor broadened the charging period to between November 1, 2003 and September 20, 2006. CP 87-89.

To convict the defendant of the crime of Child Molestation in the First Degree as charged in Count ["I", "II", "III", "IV" or "V"], each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about and between November 1, 2003 and September 20, 2006, the defendant had sexual contact with [G.M.H.];

(2) That [G.M.H.] was less than twelve years old at the time of the sexual contact and was not married to the defendant;

(3) That the defendant was at least thirty-six months older than [G.M.H.]; and

(4) That the acts 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.

CP 71-75 (Instructions 8-12).

No where do any of these instructions indicate the jury's verdict for each count must be based on an act "separate and distinct" from every other count. Nor do any of the verdict forms impose this requirement. See CP 56-60.

C. ARGUMENT

INADEQUATE JURY INSTRUCTIONS VIOLATED
HERNANDEZ'S RIGHT TO BE FREE FROM DOUBLE
JEOPARDY BECAUSE THEY EXPOSED HIM TO MULTIPLE
PUNISHMENTS FOR THE SAME OFFENSE

The trial court was required to clearly instruct the jury that it could not convict Hernandez more than once on the basis of a single act. The instructions given failed to do so and subjected Hernandez to double jeopardy. Four of Hernandez's five convictions must be vacated.

"The right to be free from double jeopardy . . . is the constitutional guarantee protecting a defendant against multiple punishments for the same offense." *State v. Borsheim*, 140 Wn. App. 357, 366, 165 P.3d 417 (2007); Wash. Const. art. I, § 9; U.S. Const. amend. V. A defendant's right to be free from double jeopardy is violated if instructions do not make it manifestly apparent to the jury that the State is not seeking to impose multiple punishments for the same offense. *State v. Berg*, 147 Wn. App. 923, 931-32, 198 P.3d 529 (2008).

Although Hernandez's attorney did not object to the instructions, this issue can be raised for the first time on appeal because it involves a manifest error of constitutional magnitude. *Berg*, 147 Wn. App. at 931; *see also State v. Ellis*, 71 Wn. App. 400, 404, 859 P.2d 632 (1993) (similar claim considered despite lack of objection).

This Court reviews challenges to jury instructions de novo, within the context of the instructions as a whole. *Berg*, 147 Wn. App. at 931 "Jury instructions must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror." *Borsheim*, 140 Wn. App. at 366 (citation and internal quotation marks omitted). The jury instructions in Hernandez's case do not satisfy this standard.

Borsheim and *Berg* control the outcome here. In *Borsheim*, this Court held that where multiple crimes are alleged to have occurred within the same charging period, an instruction that the jury must find "separate and distinct" acts for convictions on each count is required. *Borsheim*, 140 Wn. App. at 368. In the absence of such an instruction, a defendant is exposed to multiple punishments for the same offense, in violation of his right to be free from double jeopardy. *Id.* at 364, 366-67. In *Berg*, this Court followed *Borsheim* in vacating a conviction on double jeopardy due to inadequate jury instructions. 147 Wn. App. at 937

Hernandez case is the same as Borsheim and Berg in dispositive respects. As in those cases, multiple counts of the same crime were alleged to have occurred within the same charging period. Borsheim, 140 Wn. App. at 367; Berg, 147 Wn. App. at 934-35. All of the charges against Hernandez used the period from November 1, 2003 through September 20, 2006. CP 71-75 ("to-convict" instructions), 87-89 (amended information). Notably, neither G.M.H. nor any other State's witness could identify any specific time when any alleged act of molestation occurred, other than it was after they moved next door to Hernandez and before G.M.H. made the allegations on September 20, 2006.

The single "to convict" instruction in Borsheim and the multiple "to convict" instructions in Berg did not specify each count was based on an act separate and distinct from that charged in another count. Borsheim, 140 Wn. App. at 367; Berg, 147 Wn. App. at 934-35. Similarly, the instructions in Hernandez's case are missing this critical language, exposing him to multiple punishments for the same crime, based on the same act. Borsheim, 140 Wn. App. at 367, 369; Berg, 147 Wn. App. at 934-35.

Berg and Borsheim distinguished State v. Ellis, which rejected a similar argument that jury instructions allowed jurors to use the same underlying act to convict the defendant on more than one count. Berg, 147 Wn. App. at 933 (citing State v. Ellis, 71 Wn. App. 400, 859 P.2d 632 (1993)). Ellis was distinguishable because the trial court there gave separate "to convict" instructions for each count, the instruction for one of two identically charged counts explicitly stated that the act underlying that count had to have occurred "on a day other than [the other count]," *and* the two other identically charged counts alleged that the charged act occurred during a different time period. Berg, 147 Wn. App. at 933. (quoting Ellis, 71 Wn. App. at 401-02).

Although the court provided a separate "to convict" instruction for each count against Hernandez, this was also true in Berg. 147 Wn. App. at 934. The more salient fact is that these instructions did not indicate the acts had to involve a different act and, as just noted, all five alleged acts fell within the same time period. In contrast to Ellis, it was therefore critical that jurors be instructed they must base their verdicts on "separate and distinct acts for each count."

Hernandez's jury did receive a unanimity instruction. But this did not cure the problem. That instruction provides:

The State alleges that the defendant committed acts

of Child Molestation in the First Degree on multiple occasions. To convict the defendant on any count . . . one particular act . . . must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Child Molestation in the First Degree.

CP 68 (Instruction 5).

The trial court in Borsheim gave the following unanimity instruction:

There are allegations that the Defendant committed acts of rape of child on multiple occasions. *To convict the Defendant, one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt.* You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.

140 Wn. App. at 364 (emphasis in original).

Although the unanimity instruction here and in Borsheim adequately informed jurors they had to be unanimous on the act that formed the basis for any given count, the instructions fail to protect against double jeopardy. 140 Wn. App. at 367, 369. In Ellis, the trial court gave a unanimity instruction stating "you must unanimously agree that at least one particular act has been proved beyond a reasonable doubt for each count." Ellis, 71 Wn. App. at 406. The Borsheim unanimity instruction did not "convey the need to base each charged count on a 'separate and distinct' underlying event" because it did not contain the "for each count" language used in Ellis. Borsheim, 140 Wn. App. at 367. Nor does Hernandez's instruction contain

this language.

A unanimity instruction in *Berg* -- similar to the one Hernandez's jury received -- likewise failed to protect the defendant from double jeopardy:

The State alleges that the defendant committed acts of child molestation in the third degree on multiple occasions. To convict the defendant on *any count* of child molestation in the third degree, one particular act of child molestation in the third degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved beyond a reasonable doubt. You need not unanimously agree that the defendant committed all the acts of child molestation in the third degree.

Berg, 147 Wn. App. at 934-35 (emphasis added).

The State in *Berg* argued this unanimity instruction adequately protected *Berg* from double jeopardy because it contained the "for any count" language. 147 Wn. App. at 936. This Court rejected the State's argument because, unlike in *Ellis*, *Berg*'s "to convict" instructions did not contain language distinguishing the counts. *Id.* Hernandez's "to convict" instructions likewise fail to distinguish the counts.

Moreover, in *Borsheim* and *Berg*, the jury was instructed, "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." *Borsheim*, 140 Wn. App. at 364; *Berg*, 147 Wn. App. at 935. Hernandez's jury received an identical instruction. CP 65 (Instruction 4).

This instruction, even read with the jury instructions as a whole, is still insufficient to guard against double jeopardy because it fails to adequately inform the jury that each crime requires proof of a different act. Borsheim, 140 Wn. App. at 367; Berg, 147 Wn. App. at 936.

The State may argue that any error in the instructions given to Hernandez's jury was cured in closing argument, when the prosecutor told the jury:

For five counts you have to be convinced beyond a reasonable doubt molestation happened on five different occasions. That's all [Instruction 5] means. One act equals one count. You have to be convinced that there was a different act for each of the five counts. That's all.

2RP 603.

Any such argument, however, should be rejected, just as it was in

Berg:

We are not persuaded by the State's argument to the contrary. The State first argues that Berg was adequately protected from double jeopardy because the prosecutor presented evidence of separate acts to support both convictions and explained in closing that the jury had to agree that two particular acts occurred. But the double jeopardy violation at issue here results from omitted language in the instructions, not the State's proof or the prosecutor's arguments. The State offers no authority for the proposition that evidence or argument presented at trial may remedy a double jeopardy violation caused by deficient instructions. And our courts have recognized that "[t]he jury should not have to obtain its instruction on the law from the arguments of counsel." Rather, it is the judge's "province alone to instruct the jury on relevant legal standards."

Berg, 147 Wn. App. at 935-36 (footnotes and citations omitted).

Similarly, the State may encourage this Court not to follow this holding in Berg based on the decisions in State v. Hayes, 81 Wn. App. 425, 914 P.2d 788, review denied, 130 Wn.2d 1013 (1996), and State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008). This invitation should also be rejected.

Hayes, a unanimity case, stands for the unremarkable proposition that “[n]o double jeopardy violation results when the information, instructions, testimony, and argument clearly demonstrate that the State was not seeking to impose multiple punishments for the same offense.” Hayes, 81 Wn. App. at 440. The Hayes Court was never asked to decide whether the arguments of counsel could cure defective jury instructions.

In contrast, in Kier, the Washington Supreme Court was asked this question and, consistent with Berg, answered in the negative. In Kier, the Court looked to “the charges, evidence, and instructions” to determine whether it had been made clear to jurors they could not base two convictions (for assault and robbery) on the same act against the same victim. Kier, 164 Wn.2d at 802, 808.

The Supreme Court noted that the amended information was not evidence in the case. Id. at 808. Turning to the jury instructions, there

was nothing that required jurors to base the convictions on separate victims. *Id.* at 808-09, 812. Finally, there was nothing about the evidence that avoided a double jeopardy violation, either. Depending on which evidence jurors focused on, they might or might not have based their verdicts on the same act against the same victim. *Id.* at 809-812.

During closing argument in *Kier*, the prosecutor clearly identified for jurors separate victims and separate acts for each count. *Id.* at 811. As in *Berg*, the State argued that this “election” avoided any risk jurors would have based their verdicts on the same act and therefore avoided any double jeopardy violation. *Id.* at 811, 813. The Supreme Court flatly rejected this argument:

The problem with this argument is that we cannot consider the closing statement in isolation. The evidence presented to the jury identified both Hudson and Ellison as victims of the robbery Furthermore, the jury instructions did not specify [who] was to be considered a victim of the robbery. While the prosecutor at the close of the trial attempted to require this finding, the jury was properly instructed to base its verdict on the evidence and instructions and not on the arguments of counsel. Accordingly, this is not a situation in which a clear election was made.

Id. at 813 (citation omitted).

The *Kier* Court contrasted the situation with that in *State v. Bland*, 71 Wn. App. 345, 860 P.2d 1046 (1993). Describing *Bland*, and using language similar to that in *Hayes*, the Court said “the evidence, jury

instructions, and closing argument all supported the election of a specific criminal act” in that case. *Kier*, 164 Wn.2d at 219 (emphasis added). That was not the situation in *Kier*, in *Berg*, or here.

To the extent the information filed against Hernandez makes clear the charges were based on separate acts, it is irrelevant because "the information is not evidence." *Kier*, 164 Wn.2d at 808. To the extent there was evidence supporting a jury finding of five separate and distinct acts of molestation, that begs the question. The question is whether jurors “could not have found” Hernandez guilty using the same act for each count. See *Kier*, 164 Wn.2d at 808 (emphasis added). Based on the jury instructions, nothing prevented jurors from doing so.

The double jeopardy error here is identical in all dispositive respects to the errors in *Borsheim* and *Berg*. The remedy is to vacate four of Hernandez's five convictions. *Borsheim*, 140 Wn. App. at 371; *Berg*, 147 Wn. App. at 937.

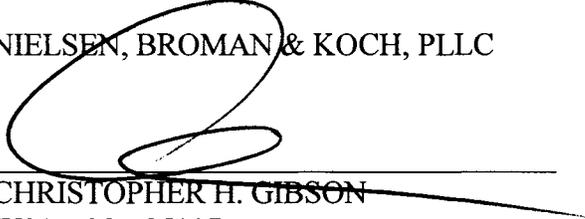
D. CONCLUSION

This Court should vacate four of Hernandez's five convictions and remand for resentencing on a single conviction.

DATED this 5th day of September 2009.

Respectfully Submitted,

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)	
Respondent,)	
)	
vs.)	COA NO. 39148-1-II
)	
RAYMOND HERNANDEZ, JR.,)	
)	
Appellant.)	

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 30TH DAY OF SEPTEMBER 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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x *Patrick Mayovsky*

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