

NO. 48331-9-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

LUIS G. GOMEZ-ESTEBAN,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THURSTON COUNTY

Before the Honorable Carol Murphy, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court failed to clarify for the jury that it must unanimously agree on the underlying act in a multiple acts case, thereby denying Luis Gomez-Esteban his right to a unanimous jury verdict as mandated by Article I, section 21 of the Washington Constitution and the right to a fair trial by jury under the Sixth and Fourteenth Amendments.

2. Based on the evidence and argument presented at trial there is no way to determine which alleged incident provided the basis for the jury's guilty verdicts for second degree child molestation charged in Count II and Count III.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where the State presents evidence of more than one incident that could constitute the charged offense, the jury must unanimously find that a certain act has been proven beyond a reasonable doubt. The prosecution charged Mr. Gomez-Esteban with three counts of second degree child molestation occurring between March 18, 2013 and August 26, 2013, and presented evidence that the same acts occurred three separate times, as well as acts of kissing and giving the complaining witness a "hickey." A jury

inquiry expressed confusion regarding which specific incidents constituted the three counts alleged by the state. Where the general verdicts do not demonstrate that the jury unanimously agreed upon a certain act underlying a conviction and may have relied on any of several acts, has the court failed to ensure the unanimity of the jury's verdict as required by the state and federal constitutions? Assignment of Error 1.

2. Where the evidence is insufficiently specific and there is no way for the reviewing court to determine which alleged act the jury has based its convictions in Count II and III, should those convictions be reversed? Assignment of Error 2.

C. STATEMENT OF THE CASE

1. Procedural history:

By amended information filed March 11, 2014, the Thurston County Prosecutor charged Luis Gomez-Esteban with three counts of second degree child molestation (counts I, II, and III), and one count of communication with a minor for immoral purposes (count IV). The alleged victim in each of the counts was A.K.B. In each count the state alleged that the crime occurred during the period between March 18, 2013 and August 25, 2013. Clerk's Papers (CP) 23-24. The language in the body of the charges in counts II and III are essentially identical, and read as follows:

COUNT II – CHILD MOLESTATION IN THE SECOND DEGREE, RCW 9A.44.086 – CLASS B FELONY

In that the defendant, LUIS GERALDO GOMEZ-ESTEBAN, in the State of Washington, on or between March 18, 2013, and August 25, 2013, in a separate and distinct incident than alleged in Counts I and III, did engage in sexual contact with A.K.B., and was at least thirty-six months older than a person who was at least twelve years of age but less than fourteen years of age and not married to the defendant.

COUNT III – CHILD MOLESTATION IN THE SECOND DEGREE, RCW 9A.44.086 – CLASS B FELONY

In that the defendant, LUIS GERALDO GOMEZ-ESTEBAN, in the State of Washington, on or between March 18, 2013, and August 25, 2013, in a separate and distinct incident than alleged in Counts I and II, did engage in sexual contact with A.K.B., and was at least thirty-six months older than a person who was at least twelve years of age but less than fourteen years of age and not married to the defendant.

CP 23-24.

Following a CrR 3.5/3.6 suppression hearing on September 15, 2014, the parties stipulated that statements by Mr. Gomez-Esteban to Detective Schumacher and Detective Claridge would not be admitted in the state's case-in-chief, and that the warrant affidavit used to search Mr. Gomez-Esteban's cell phone and to obtain a buccal swab was sufficient, even without his statement to the detectives. An Agreement and Stipulation of the Parties Regarding

CrR 3.5 and CrR 3.6 Issues was filed March 2, 2015. CP 254.

After several continuances requested by both the prosecution and defense, jury trial in the matter started September 14, 2015, the Honorable Carol Murphy presiding. Jury selection occurred on September 14 and 15, and testimony began September 16, 2015. 1Report of Proceedings (RP) at 27.¹

a. Jury instructions and jury question.

Following the close of the defendant's case, the court instructed the jury. 3RP at 416-429; CP 319-340. Neither exceptions nor objections were taken to the jury instructions were taken by counsel for the defense. 3RP at 415.

Instruction No. 7 stated as follows:

The State alleges that the defendant committed acts of Child Molestation in the Second Degree on multiple occasions. To convict the defendant on any count of Child Molestation in the

¹The record of proceedings consists of the following:

RP (9/10/13) (arraignment), RP (9/30/13), RP (10/7/13), RP (12/30/13), RP (1/27/14), RP (1/30/14), RP 2/26/14), RP (3/5/14), RP (3/17/14), RP 3/27/14), RP (4/10/14), RP (5/15/14), RP (6/30/14), RP (8/18/14), RP (8/28/14), RP (9/15/14) (CrR 3.5 suppression hearing), RP (10/30/14), RP (2/4/15), RP (7/8/15), RP (7/15/15), RP (9/2/15), RP (9/9/15) (pretrial hearings);

1RP—August 28, 2013, July 21, 2014, October 29, 2014, June 17, 2015, September 14, 2015 (jury trial, day 1), September 15, 2015 (jury trial, day 2), September 16, 2015 (jury trial, day 3);

2RP—September 17, 2015 (jury trial, day 4), September 18, 2015 (jury trial, day 5), September 21, 2015 (jury trial, day 6), September 22, 2015 (jury trial, day 7);

3RP—September 23, 2015 (jury trial, day 7), September 24, 2015 (jury trial, day 8); and

4RP—October 29, 2015 (sentencing).

Second Degree, one particular act of Child Molestation in the Second Degree 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 Second Degree.

CP 319-340.

The court also gave the following "to convict" instruction pertaining to count II:

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

- (1) That on or about and between March 18, 2013, and August 25, 2013, in a separate and distance incident than alleged in Counts I and III, the defendant had sexual contact with [A.K.B.];
- (2) That [A.K.B.] was at least twelve years old but less than fourteen years old at the time of the sexual contact and was not married to the defendant;
- (3) That [A.K.B.] was at least thirty-six months younger than the defendant; and
- (4) That this act occurred in the State of Washington.

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

On the other hand, if, after weighing all of 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 319-340. Instruction 12.

The court's "to convict" instruction in count III was identical to the preceding "to convict" except that it substituted a "II" for the "III" the in the first instruction. Instruction 13.

Given the fact that the state's witness A.K.B. had claimed multiple instances of potential sexual contact, including kissing and receiving a "hickey" from Mr. Gomez-Esteban, and had testified to three events in the bathroom of the family's restaurant, the unanimity and "to convict" instructions left the jury wondering what specific conduct the state was arguing constituted Counts I, II and III, as evidenced by the injury jurors sent during deliberations:

Are the three counts referring to the three bathroom incidents, or do the hickey, kissing, and one bathroom incident count as three?

CP 342.

The court declined to answer the question, instead telling the jury the following in writing: "After speaking with the attorneys, the court is directing you to re-read the court's instructions and continue to deliberate."

CP 342.

b. Verdicts and sentencing

The jury acquitted Mr. Gomez-Esteban of count I, but returned verdicts of "guilty" in counts II, III, and IV. 3RP at 471-72; CP 345-348. A sentencing hearing was held October 29, 2015. The trial court imposed a standard range sentence of 75 months in counts II and III, and 29 months in count IV, to be served concurrently. RP (10/29/15) at 17; CP 395.

Timely notice of appeal was filed October 29, 2015. CP 375. This appeal follows.

2. Trial testimony:

A.K.B. worked with her family in a family-owned restaurant, Great Cuisine of India, located in Olympia, Washington. 1RP at 29. A.K.B. was born January 16, 2001, and was 12 years old in 2013, at time of the alleged offenses. 1RP at 28, 35, 72. She started helping her family in the restaurant in 2012 and would usually work there on weekends. 1RP at 31, 74.

In 2012, A.K.B.'s father hired Luis Gomez-Esteban as a cook in the restaurant. 1RP at 30, 74. Mr. Gomez-Esteban, who was born April 27, 1989, was 24 years old in 2013. 2RP at 246.

A.K.B. testified that when they were together in the restaurant, Mr. Gomez-Esteban would sometimes make "heart" shapes with his hand and show her. 1RP at 32. She said that he told her that the "anniversary" of the day they met was March 18, 2013. 1RP at 32. She said that he would kiss her on the lips "[a]bout every day" that she was at the restaurant. 1RP at 36. She stated that this happened in the storage room in the back of the restaurant. 1RP at 36. A.K.B. testified that she and Mr. Gomez-Esteban had exchanged text messages. 1RP at 37. In the texts to her, he would refer to

her as “baby” or “lover.” 1RP at 40.

The state introduced a series of text messages between 878-7399, which is a number assigned to Mr. Gomez-Esteban’s phone, and A.K.B.’s iPod, which she used for commination. Exhibit 24. A text message in Spanish from 878-7399 to A.K.B.’s iPod was translated as “My baby, I love you forever my beautiful baby.” 2RP at 193. Another text in Spanish from the number was translated to read “My love, if you’re listening to me, just tell me that you are.” 2RP at 193. A response from A.K.B.’s iPod in Spanish was translated by law enforcement to read “What do you mean my love.” 2RP at 193. On August 24, 2013, a message from 878-7399 to A.K.B.’s iPod stated “love, let’s run away to another state,” and a text from A.K.B.’s iPod to 878-7399 responded “yes” followed by a ‘happy face’ emoticon. 2RP at 194. Message in response from 878-7399 stated: “I’m telling the truth. I was going to leave last night,” and a text from A.K.B.’s iPod responded “I want to go, but I don’t know how we’re going to go. I mean, I have to get my clothes and then there will be all together, and then the only night that we can leave is when my folks are in the casino together.” 2RP at 195. A response from 878-7399 stated: “okay. Just let me know.” 2RP at 195. On August 24, 2013, a text from 878-7399 to A.K.B.’s iPod stated: “I love you baby.” 2RP

at 196.

The following day, August 25, 2013, she was in the restaurant with her mother helping her set up the buffet for the day. 1RP at 46. Mr. Gomez-Esteban was working that day and she testified that he asked her to go to the men's bathroom, and she went in and he turned off the lights and locked the door. 1RP at 47, 50. She stated that he pulled down her pants and put his penis between her buttocks. 1RP at 47-53.

A.K.B's mother—Maria Singh—found them together the same day in the storage room located in the back of the restaurant. 1RP at 109. She stated when she found them, they were sitting close together and laughing and talking. 1RP at 109. Ms. Singh slapped her and told her to go to the front of the restaurant. 1RP at 59. She called her husband—Mukesh Singh—who arrived at the restaurant and called the police. 1RP at 60.

After Mr. Mukesh arrived at the restaurant he asked Mr. Gomez-Esteban what had happened. 1RP at 100. Mr. Singh stated that he denied doing anything. 1RP at 100. He stated that he was going to hit him but his wife pulled him back. RP at 100. He said that he talked with A.K.B. and said that Mr. Gomez-Esteban had done it before and also that he had also sent her text messages, which he said made him even more upset. 1RP at

101.

Mr. Singh then spoke to the police, who were still at the restaurant, and told them what she said. 1RP at 102. A.K.B. initially told police that he kissed her, but did not allege that he put his penis in her buttocks. 1RP at 61, 65. Olympia Police Officer Amy King questioned Mr. Gomez-Esteban on the sidewalk outside the restaurant and asked why he had kissed a twelve year old. 1RP at 300. Mr. Gomez-Esteban said that A.K.B. told him that she liked him and that she asked him to kiss her, and he told her “no” because she is “just a baby” and that he has a wife. 2RP at 300. Officer King testified that she continued to question him and that eventually Mr. Gomez-Esteban said that he kissed her, but that it was “only once.” 2RP at 300. He was not placed under arrest at the time, and was picked up from outside the restaurant by his wife. 2RP at 302.

The defense stipulated that A.K.B. told Officer King during a first interview that that Mr. Gomez-Esteban kissed her on August 25, 2013, that she told her mother that he kissed her, and that A.K.B. told Officer King during a second conversation that he “put his thing in” in her rear. The defense stipulated that her statements to Officer King were admissible under the excited utterance exception to the hearsay rule contained at ER 803(a)(2)

and a Stipulation and Agreement Between Parties Regarding Testimony of Olympia Police Officer Amy King was entered September 22, 2015. CP 309-310.

Ms. Singh testified that she suspected that Mr. Gomez-Esteban had had sexual contact with her daughter in the past because A.K.B. had previously had a hickey on her neck. 1RP at 62. Ms. Singh said that she was unaware of contact between her daughter and Mr. Gomez-Esteban, but said that in August 2013 she noticed that her daughter was spending a long time in the bathroom and that she noticed a hickey on her neck at one point, which A.K.B. said was an allergy. 1RP at 109.

Ms. Singh testified that when he found them in the storeroom together on August 25, they were "very close to each other talking and laughing." 1RP at 109. She said that they said that they were showing photos to each other. 1RP at 110. She said that she become angry and slapped A.K.B., who was crying at that point. 1RP at 110.

Detective Cori Schumacher of the Olympia Police Department conducted a forensic interview of A.K.B. on August 26, 2013. 2RP at 274. Detective Schumacher stated that A.K.B. brought clothing to the interview that she stated she was wearing the previous day at the restaurant. 2RP at

272. Detective Schumacher separated the clothing, which was put in evidence bags. 2RP at 272-73. These items included leggings and underwear. 2RP at 287.

A buccal swab was obtained from Mr. Gomez-Esteban by Detective Schumacher on September 5, 2013. 2RP at 283. Samples from the underwear received from A.K.B. on August 26, 2015 were examined by Marion Clark, a scientist in the the DNA section of the Washington State Patrol Crime Laboratory. 2RP at 310. Ms. Clark stated that three sperm heads were found in a sample obtained from a test of the fabric from the underwear, and that a male profile developed from the sperm fraction matches the DNA profile obtained from Mr. Gomez-Esteban on September 5, 2013. 2RP at 326, 3RP at 401. Ms. Clark stated that Mr. Gomez-Esteban was a “trace contributor or very low-level contributor” of the DNA. 2RP at 325.

A.K.B.'s trial testimony was vague and contradictory at best. She stated on the day that her mother found them together in the restaurant storage room, Mr. Gomez-Esteban had directed her to go in the bathroom. 1RP at 48-50. She said she went into the bathroom and he pulled down her pants and his own pants, and then he rubbed his penis against her buttocks.

IRP at 49. She stated that he had done the same thing two times in the past. IRP at 51, 53, 55. She was unable to provide specific dates that the first two incidents occurred, but said that the incidents took place after he told her about the “anniversary” on March 18, 2013. IRP at 56. A.K.B. stated that after the first incident, which took place in one of the bathrooms, he left the bathroom first and told her to wait before she left. IRP at 55. She said that he did this “so no one would think that anything happened.” IRP at 55. She said that second time was in the bathroom and that he locked the door and pulled down her pants and put his penis between her buttocks. IRP at 57.

A.K.B. was examined on August 26, 2013, by Lisa Wahl, a family nurse practitioner at the Providence St. Peter Sexual Assault Clinic. 2RP at 209, 213. She stated that A.K.B. said that he put his penis in her anus. 2RP at 218. Ms. Wahl did not clarify if his penis penetrated her anus. 2RP at 217. She stated that A.K.B. did not report any discomfort. 2RP at 218. When examined, Ms. Wahl did not note any scars or fissures. 2RP at 220. She stated that A.K.B. was sexually naive and was worried she was pregnant, and that she believed that she was in a relationship with Mr. Gomez-Esteban. 2RP at 212-19.

Dr. Donald Riley, who testified for the defense, stated that it was

possible that the presence of semen heads noted by Ms. Clark was a false result due to contamination. 3RP at 365. Dr. Riley stated it would have been preferable to take samples from other items of her clothing because its possible that Mr. Gomez-Esteban's DNA would have been present in her clothing because he worked in the restaurant with A.K.B., so he would have shed cells that other people would pick up while working in the same area. 3RP at 365. Dr. Riley stated that there was "essentially zero male DNA" on the perineal swab and anal swab, and that both sites could have been in contact with the underwear, and that it could have come from a source such as a chair. 3RP at 391. He shed that skin cells, which are elliptical in shape, look different when viewed with a microscope, than sperm cells, which are ovoid in shape. 3RP at 391. Dr. Riley stated that other DNA cells can be confused with sperm heads, "especially if you're only seeing three of them on the whole slide." 3RP at 392. He stated that it can take up to fifteen minutes to search a microscope slide, and that when a source says only three cells were found during the each, "it's stunningly weak." 3RP at 392. He also said that it was unusual that the source did not take a picture of the cells. 3RP at 392. Dr. Riley stated that sperm cells have two distinguishing characteristics, which are that the cells are usually present in large numbers,

and that the cells have tails, which usually falls off about an hour after ejaculation. 3RP at 392. He stated if he receives a report that a person found sperm in a sample and did not take a picture of the object, he wonders “did they really see a sperm head or was it a yeast cell or was it a reticulocyte?” 3RP at 393.

D. ARGUMENT

1. THE COURT'S FAILURE TO ENSURE THE NECESSITY OF JUROR UNANIMITY FOLLOWING A JURY INQUIRY THAT SHOWED CONFUSION DENIED MR. GOMEZ-ESTEBAN HIS RIGHT TO A FAIR TRIAL BY JURY

a. Lack of specificity in the evidence violated Mr. Gomez-Esteban's state constitutional right to a unanimous jury verdict

In criminal matters tried to a jury, Washington law requires that the jury must unanimously find the prosecution proved every element necessary for imposing punishment. *State v. Williams-Walker*, 167 Wn.2d 887, 900, 225 P.3d 913 (2010); Wash. Const. art. I, §§ 21, 22. Due process requires the prosecution to prove, beyond a reasonable doubt, all essential elements of a crime for a conviction to stand. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995); U.S. Const. amends. 6, 14; Wash. Const. art. I, §§ 3, 21, 22.

Washington's more protective jury trial right mandates that the jury must authorize the court's imposition of punishment by unanimously finding the State proved all essential elements. *Williams-Walker*, 167 Wn.2d at 895-96.

A jury must unanimously agree on the act that underlies a conviction, and this act must be the same one charged in the information. *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). The Washington Supreme Court has always required a unanimous verdict in criminal trials. *State v. Franco*, 96 Wn.2d 816, 831, 639 P.2d 1320 (1982) (Utter, J., dissenting). The purpose of requiring a unanimous verdict is not only to preclude the possibility that jurors presented with multiple acts in support of a single criminal charge might actually disagree, but also to "impress on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." *Id.* (quoting *United States v. Gipson*, 553 F.2d 453,457 (5th Cir. 1977)). To make the unanimity rule an effective means of securing such certitude, the rule "requires jurors to be in substantial agreement as to just what the defendant did as a step preliminary to determining whether the defendant is guilty of the crime charged." *Id.* (quoting *Gipson*, 553 F.2d 453,457-58).

In "multiple acts" cases, where the State alleges several acts and any one of them could constitute the crime charged, the jury must be unanimous as to which particular act or incident constitutes the crime. *State*

v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988); *Petrich*, 101 Wn.2d at 572. To ensure jury unanimity in a multiple acts case, either the State must elect a particular act upon which is relying for each charge, or the jury must be instructed that all 12 must agree that the same underlying criminal act has been proved beyond a reasonable doubt. *Petrich*, 101 Wn.2d at 572.

Thus, *Petrich* requires the prosecution prove the commission of a specific distinct criminal act underlying each charge. That requirement was met in *Petrich*, where the child described at least four distinct episodes at length, each incident occurring in a separate time frame and identifying place. *Id.* at 568, 571.

Where jury instructions could be read to permit an erroneous interpretation of the law, they are fatally flawed. *State v. LeFaber*, 128 Wn.2d 896, 902, 913 P.2d 369 (1996). This absolute clarity is required since jurors are neither required nor expected to guess at the precise meanings of terms nor required to apply interpretive tools. *Id.* The complainant accused the defendant of engaging in the same conduct on multiple, separate occasions, *Petrich* requires an instruction explaining the requirement that the jury base its verdict for each count.

The State charged Mr. Gomez-Esteban with three counts of second degree child molestation, occurring over the identical charging period of

March 18, 2013 through August 25, 2013. CP 23-24. Cases involving allegations of child abuse frequently involve proof problems that affect the constitutional right to a unanimous verdict. The Court of Appeals has recognized the implication for jury unanimity of this kind of evidence:

Implicit in the Petrich court's conclusion that either an election or a unanimity instruction will protect the defendant's right to a unanimous verdict is an assumption that there is some evidence presented permitting either the prosecutor or jury to make a meaningful election between the numerous acts to which the victim testifies.

State v. Brown, 55 Wn.App. 738, 748, 780 P.2d (1989). *Petrich* cannot be complied with where the evidence is not sufficiently specific. A unanimity instruction is confusing for a jury when there is no specific act for them to agree upon.

In Mr. Gomez-Esteban's case, the State's "election" during closing was not sufficiently meaningful. Even assuming that the jury understood that each count was to represent a specific incident, and further assuming that the jury unanimously decided the incident, the problem of which specific act the jury found still exists.

A.K.B.'s statements were extremely vague, practically regarding the time when the acts allegedly occurred. A.K.B. testified that the same thing happened three times in the exact same way in this same time period in a

bathroom at the restaurant, but she did not know which date any incident occurred, other than it was after their “anniversary” on March 18, 2013.

However, as the jury indicted in its question to the court, A.K.B. also testified that Mr. Gomez-Esteban kissed her many times during the period between March 18 and August 25, 2013, and gave her a “hickey,” and that he put his penis in her buttocks three times in the restaurant bathroom. There is simply no way to discern with any certainty which act the jury found constituted the two acts of which he was convicted. Although there was an unanimity instruction was given for the “to convict” instructions, there was no special verdict forms provided to the jury; it is simply not possible to tell of which acts the jury relied upon.

To ensure jury unanimity in cases involving multiple acts in the absence of a clear court instruction, the prosecution must elect the particular criminal act upon which it will rely for a conviction. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). An "election" requires a clear and unambiguous pronouncement that other allegations are not to be considered in deliberations. See *State v. Sargent*, 62 Wash. 692, 695, 114 P. 868 (1911) (State must announce particular act on which it relies). The instructions, charging document, special verdict form, and evidence must support the election. Otherwise, when the evidence supports alternative acts and the

instructions do not require clear consideration of a specific allegation, the basis of the jury's verdict is ambiguous and the rule of lenity requires the court to interpret the ambiguity in the light most favorable to the accused. *State v. Kier*, 164 Wn.2d 798, 814, 194 P.3d 212 (2008).

The prosecution offered testimony explicitly accusing Mr. Gomez-Esteban of committing three separate incidents during the same time period. Jury instructions told the jury that counts I, II, and III must be based on separate incidents. Similar to *Kier*, the court's instructions contained no specificity as to which of the underlying acts must serve as the basis of the jury's verdict, and allowed the jurors to consider any qualifying act within the five-month charging period, as long as it was not the same act as used in the other count. During closing argument the prosecutor provided virtually no election of the acts it was relying on for each count. The prosecution stated:

Did sexual contact between [A.] and the defendant occur? Yes. You have evidence that supports that. you have the DNA. You have the testimony. Did it occur at least three times? Counts one, two and three? I submit to you that in fact you do have evidence that supports that the defendant, this defendant, Luis Gomez Esteban, had sexual contact with [A.b.] on at least three separate occasions between March 18th , 2013 and August 25, 2013.

3RP at 440.

The court explained that the act underlying each count must be

different from the other two, thereby protecting against a double jeopardy violation. See *State v. Borsheim*, 140 Wn.App. 357, 367, 165 P.3d 417 (2007). In the general closing instruction, the court told the jury that all 12 "must agree" to return a verdict. CP 319-340. However, the jurors demonstrated confusion regarding which of any acts qualified as "sexual contact" in the note submitted to court. The jury's question to the court asked:

Are the three counts referring to the three bathroom incidents, or do the hickey, kissing, and one bathroom incident count as three?

CP 342.

"Sexual contact" is defined as "any touching of the *sexual or other intimate parts* of a person done for the purpose of gratifying sexual desire of either party or a third party." (Emphasis added). RCW 9A.44.010(2). See also *State v. Lorenz*, 152 Wash. 2d 22,93 P.3d 133 (2004). Jury Instruction Number 9 comports with this definition of "sexual contact."

The problem in the case at bar is that the trial court did not attempt to clarify the jury's clear confusion concerning which act or acts may be considered as "sexual contact" and leaves open the question of which specific acts of abuse the jurors relied on in their verdict. This failure to clear up the jury's confusion denied the defendant his right to jury unanimity under

Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment. As a result, the defendant is entitled to a new trial.

b. Reversal is required

When there is an error of constitutional magnitude, reversal is required unless the state proves beyond a reasonable doubt that it could not have affected the verdict. *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977); see also *Chapman v. California*, 386 U.S. 18, 23-24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (an error which possibly influenced the jury adversely cannot be harmless).

A trial court's instructions must set forth all essential legal requirements in a manner easily understood by the average juror. Since the jurors were confused as to which specific acts constituted "sexual contact," there is no basis to infer that the jurors individually based their verdicts upon unanimous agreement of two distinct acts. A.K.B. stated that the defendant put his penis in her buttocks three times, but also testified as to a hickey and to multiple times that he kissed her.

Based on the jury question, there is no reason to believe all 12 jurors agreed upon the underlying incidents for each count. The convictions for molestation must be reversed due to the violation of Mr. Gomez-Esteban's right to a fair trial by a unanimous jury.

2. **LACK OF SPECIFICITY IN THE VERDICT VIOLATED MR. GOMEZ-ESTEBAN'S RIGHT TO APPEAL.**

The charges in the challenged counts also have an additional problem pertaining to sufficiency of the evidence. In a criminal sufficiency claim, the defendant admits the truth of the State's evidence and all inferences that may be reasonably drawn from the. *State v. Salinas*, 119 Wn.2d 192,201,829 P.2d 1068 (1992). Evidence is reviewed in the light most favorable to the State. *State v. Varga*, 151 Wn.2d 179,201,86 P.3d 139 (2004). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201,829 P.2d 1068 .

In a criminal matter, the State must prove every element of the crime charged. *State v. Teal*, 152 Wn.2d 333,337,96 P.3d 974 (2004); *In re Winship*, 397 U.S. 358,362-363, 90 s.Ct. 1068, 25 L.Ed.2d 368 (1979). The evidence in the case at bar was vague and undifferentiated. As noted above, multiple counts were charged and the information did not identify specific acts. The charging period for each count was identical. Although a general unanimity instruction was given to the jury, and the "to-convict" instructions specified that unanimity was required, it is unclear which acts the jury relied on to convict Mr. Gomez Esteban in counts II and III.

As noted above, during closing argument the prosecutor provided virtually no election of the acts she was relying on for each count. The prosecution stated:

Did sexual contact between [A.] and the defendant occur? Yes. You have evidence that supports that. you have the DNA. You have the testimony. Did it occur at least three times? Counts one, two and three? I submit to you that in fact you do have evidence that supports that the defendant, this defendant, Luis Gomez Esteban, had sexual contact with [A.B.] on at least three separate occasions between March 18th, 2013 and August 25, 2013.

3RP at 440.

The jury question submitted on September 24, 2015, however, indicates that the jury may have considered the kissing and hickey described by A.K.B. as sexual contact constituting second degree molestation. CP 342. Division One recognized that where there are multiple counts of child molestation and the information does not identify specific acts or segregate charging periods among the counts, where no special verdict form is used, and where the State does not elect which acts it is relying upon for each count, there is no way to know which allegations the based its verdict upon. *State v. Heaven*, 127 Wn.App. 156,162, 110 P.3d 835 (2005). In this case, as in *Heaven*, the record does not otherwise show which allegations the jury relied upon in convicting Mr. Gomez-Esteban.

Even considering the state's failure to elect which acts constitute each

specific count in closing argument, the record does not otherwise show which allegations the jury relied upon in convicting Mr. Gomez-Esteban. Under Article 1, section 22 of the Washington Constitution, criminal defendants have a constitutional right to appeal convictions. On appeal, the Court must reach and decide each issue raised. *State v. Jones*, 148 Wn.2d 719,722,62 P.3d 887 (2003).

Where it is impossible to discern the evidence upon which the jury relied in reaching a verdict, it is impossible for the defendant to challenge on appeal the sufficiency of the evidence supporting that conviction.

Here, the jury acquitted Mr. Gomez Esteban of count I . Given the jury question, it is impossible to discern the evidence upon which the jury relied for the two remaining counts for which he was convicted and which act resulted in the acquittal in count I. Therefore, permitting the convictions in count II and III to stand violates Mr. Gomez Esteban's state constitutional right to challenge on appeal the sufficiency of the evidence underlying those convictions.

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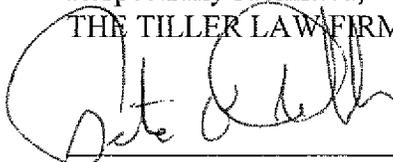
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F. CONCLUSION

For all of the foregoing reasons and conclusions, Mr. Gomez-Esteban respectfully requests that this Court reverse and dismiss his convictions for second degree child molestation.

DATED: June 17, 2016.

Respectfully submitted,
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read "Peter B. Tiller", is written over a horizontal line. The signature is cursive and somewhat stylized.

PETER B. TILLER-WSBA 20835
Of Attorneys for Luis Gomez-Esteban

CERTIFICATE OF SERVICE

The undersigned certifies that on June 16, 2016, that this Appellant's Opening Brief was sent by the JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to the Mr. Gomez Esteban and a copy was e-mailed to Carol La Verne:

Carol La Verne Thursday County Dep Pros Atty 2000 Lakeridge Dr. SW Bldg 2 Olympia, WA 98502-6045 <u>Lacernc@co.thurston.wa.us</u>	Mr. David Ponzoha Clerk of the Court Court of Appeals 950 Broadway, Ste.300 Tacoma, WA 98402-4454
Mr. Luis Gomez-Esteban DOC #385995 W.C.C. PO Box 900 Shelton, WA 98584 <u>LEGAL MAIL/SPECIAL MAIL</u>	

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on June 17, 2016.



PETER B. TILLER

TILLER LAW OFFICE

June 17, 2016 - 4:52 PM

Transmittal Letter

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