

FILED

OCT 24 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

31544-4-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

AARON T. ANDLOVEC, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

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STATUTES

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I.

ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Andlovec's constitutional right to a unanimous jury verdict by failing to give a unanimity instruction for each count.
2. The trial court erred in imposing conditions of community custody prohibiting Mr. Andlovec from possessing or purchasing alcohol, and from going to establishments where alcohol is the prime commodity for sale.

II.

ISSUES

- A. DID THE TRIAL COURT ERR BY FAILING TO GIVE A UNANIMITY INSTRUCTION WHEN THE STATE DID NOT ELECT A PARTICULAR ACT?
- B. DID THE TRIAL COURT EXCEED ITS AUTHORITY BY IMPOSING ALCOHOL RESTRICTIONS AS PART OF THE SENTENCING CONDITIONS?

III.

STATEMENT OF THE CASE

For the purposes of this appeal, the State accepts the defendant's version of the Statement of the Case.

IV.

ARGUMENT

A. THE TRIAL COURT DID NOT ERR BY FAILING TO GIVE A GENERAL UNANIMITY INSTRUCTION.

The defendant argues that there was no unanimity instruction given for the charged counts nor did the State elect a particular act of sexual contact/intercourse. According to the defendant, the failure of the trial court to give a general unanimity instruction and the State's failure to elect a specific act caused a violation of the defendant's right to a unanimous jury. The State agrees that it did not argue separate acts of sexual intercourse, did not elect a specific act in closing, nor did the trial court submit a unanimity instruction. However, this is not a "multiple acts" case, so unanimity instructions were not needed.

The reason that this case is not a "multiple acts" case is because the sexual activity continued for many months, constituting a single course of action. A "commonsense" analysis is used by the court in deciding whether a series of events should be counted as a continuing course of conduct. The sexual activity

by the defendant occurred repeatedly over a period of months. The informations were worded such that the sexual acts were stated to have occurred over expanses of time. The State did not provide evidence of separate acts by the defendant. In defense's closing argument, defense counsel never attempts to break down the sex acts into separate events. RP 466, 470. This court must determine whether "no rational juror could have a reasonable doubt as to any of the incidents alleged. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). In this case there was no rational basis for the jurors to distinguish between the sexual acts allegedly committed by the defendant. The defense did not present evidence that distinguished among the acts charged, but instead defended on the basis that the DNA evidence was flawed, the victim's mother was the person having sex on the examined bed, the defendant did not write "love letters" to the victim and the victim was not telling the truth. Given the testimony presented in this case, the jurors considering the evidence of sexual acts by the defendant could not have rationally reached a different conclusion about the occurrence of any of the hundreds of acts of a sexual nature perpetrated by the defendant. Thus the court's failure to give a unanimity instruction was harmless error because this is not a "multiple acts case. *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989).

"Multiple acts tend to be shown by evidence of acts that occur at different times, in different places, or against different victims." *State v. Love*, 80 Wn. App. 357, 361, 908 P.2d 395 (1996).

Courts must distinguish, though, between one continuous offense and several distinct acts, each of which could be the basis for the criminal charge. *Love*, 80 Wn. App. at 361. A multiple acts unanimity instruction is not required when the State presents evidence of multiple acts that indicate a “continuing course of conduct.” *State v. Crane*, 116 Wn.2d 315, 326, 804 P.2d 10 (1991); *Love*, 80 Wn. App. at 361. “A continuing course of conduct requires an ongoing enterprise with a single objective.” *Love*, 80 Wn. App. at 361. To determine whether multiple acts constitute a continuing course of conduct, we evaluate the facts in a commonsense manner. *Love*, 80 Wn. App. at 361.

The facts shown in the State’s case show a pattern of continuing sexual activity between the defendant and the victim. The victim is the same for all incidents. The acts of the defendant clearly indicated a single objective of having sex with the defendant. The defendant’s argument regarding a missing unanimity instruction fails as this case is not a “multiple acts” case.

Additionally, the evidence used to convict one of the three charged crimes could not be used to prove other counts. The evidence used to prove the charge of second degree rape of a child required proof of sexual penetration as defined by the jury instructions. A touching of the victim’s breasts or vagina is not proof of sexual penetration. Thus the evidence that might support a molestation charge could not support a rape charge. Further, Count Three was charged under a

different time period. Again, evidence from Counts One and Two could not be used for Count Three.

Because there could be no overlap of evidence from the three counts, again it is shown that this not a case requiring the giving of a *Petrich* instruction. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

B. THE SENTENCING COURT HAD STATUTORY AUTHORITY TO PROHIBIT THE DEFENDANT FROM CONSUMING ALCOHOL.

RCW 9.94A.703(3)(e) succinctly states that the sentencing court has the authority to prohibit the defendant from consuming alcohol. RCW 9.94A.703(3)(e). The trial court also prohibited the defendant from possessing alcohol, purchasing alcohol or frequenting businesses whose prime commodity for sale is alcohol.

There appears to be nothing in the record regarding alcohol being part of the crimes. Since there is no obvious connection between alcohol and the crimes, the State agrees with the defendant that the alcohol restrictions beyond that supported by RCW 9.94A.703(3)(e) should be stricken.

V.

CONCLUSION

For the reasons stated above, the State respectfully requests that the defendant's convictions be affirmed.

Dated this 24th day of October, 2013.

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Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 31544-4-III
v.)	
)	CERTIFICATE OF MAILING
AARON T. ANDLOVEC,)	
)	
Appellant,)	

I certify under penalty of perjury under the laws of the State of Washington, that on October 24, 2013, I e-mailed a copy of the Respondent's Brief in this matter, pursuant to the parties' agreement, to:

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10/24/2013
(Date)

Spokane, WA
(Place)

Kathleen Owens
(Signature)