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No. 54171-4-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOHN COLEMAN,

Appellant.

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

The Honorable James D. Cayce

APPELLANT'S REPLY BRIEF

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A. REPLY ARGUMENT

1. The absence of the unanimity instruction was not harmless because it cannot be said that any reasonable juror could only find that every one of the alleged incidents were proved beyond a reasonable doubt. Respondent State of Washington admits the absence of a unanimity instruction violated the requirement of jury unanimity under State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984).

The State contends, however, that the error is harmless because the jury must have believed the children about all of the alleged incidents since it found the defendant guilty. Respondent's Brief, at 11. The State then attempts to argue that the appellant's contentions as to significant inconsistencies and contradictions in the testimony are incorrect, but only does so as to one of the alleged instances of touching. Respondent's Brief, at 15-16. The State ignores and fails entirely to rebut the appellant's thorough discussion and argument showing that multiple of the alleged incidents were testified to with widely divergent levels of consistency and more than just one incident was based on

completely contradictory testimony. Appellant's Opening Brief, at 22-28.

The State's argument is a remarkably incorrect statement of the harmless error standard in Petrich cases. It is not enough for the State in this case to convince the reviewing court to reject one or even some of appellant's claims of serious inconsistencies in the proof and contradictions as to certain of the incidents the children testified to. A Petrich error presumptively requires reversal, and is harmless only if no rational juror could have any reasonable doubt as to any one of the incidents alleged. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988); State v. Loehner, 42 Wn.App. 408, 411, 711 P.2d 377 (1985) (Scholfield, A.C.J., concurring), review denied, 105 Wn.2d 1011 (1986)).

This means that if any juror could rationally have found that even one of the alleged touching incidents was not proved beyond a reasonable doubt, the lack of a unanimity instruction requires reversal of the verdicts. The standard bears an obvious relationship to the constitutional error standard applicable where an element of the crime was not submitted to the jury. See State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (where the error

concerns a misstated or omitted element of a crime, the error is harmless if the element at issue is supported by overwhelming and uncontroverted evidence). As Justice Utter noted in his Camarillo concurrence:

Because nothing in the record suggests that the credibility of the two principals varied as to any of the incidents and no other direct evidence of the acts was introduced, I agree that given the credibility judgment the jury must have made, no reasonable juror could have concluded that the defendant was innocent of any of the acts alleged. [But] [s]uch a conclusion will never be appropriate if the record reveals any evidence which could justify a reasonable doubt in any juror's mind about any given incident, even if the jury obviously believed the victim and not the defendant.

(Emphasis added.) State v. Camarillo, 115 Wn.2d 60, 73-74, 794 P.2d 850 (1990) (Utter, J., concurring).

The standard makes obvious sense. If it is not possible that a rational juror could do anything other than find that every incident described by the children at the trial was proved beyond a reasonable doubt, reversal is unnecessary. In such circumstances, it does not matter that the jury was not instructed that it had to agree on a discrete incident. If the Court can say it has the level of confidence required by this standard – confidence that every

incident was overwhelmingly proved – it makes sense to affirm, because even if the jury did not unanimously settle on one particular incident, they must each have picked an incident that was overwhelmingly proved, because all the described incidents were overwhelmingly proved. See Camarillo, at 70 (“The uncontroverted evidence upon which the jury could reach its verdict reveals no factual difference between the incidents”). The constitutional problem in Petrich cases is that a reviewing court cannot be sure that the jurors all agreed on a particular incident as the proved basis for each count, since the jury was never told they had to do so. Some jurors could have believed one of the incidents was proved and find guilt on a given count on that basis, while other jurors might have believed that this particular incident was not proved, because of the children’s conflicting testimony as to whether it occurred or not. This latter group of jurors might instead have chosen another incident they felt was proved and used that as a basis for the count. Indeed all twelve jurors might each pick different incidents they believed were proved. These possibilities are so contrary to the fundamental constitutional requirement of all the jurors agreeing on one incident for each count, that the absence

of a Petrich instruction in multiple act cases is presumed prejudicial. But if a reviewing court can say that every single incident the children testified to was proved without controversion, the court will excuse the error of the jury not being instructed on unanimity. The reasoning is that this level of uniformly uncontroverted evidence as to every incident means there is no chance some juror or jurors relied on an incident that was not overwhelmingly proved, and the reviewing court therefore deems the error “no harm, no foul,” even in the face of the error being a constitutional one and thus presumptively prejudicial. Of course, this harmless error reasoning allows verdicts to stand in which the court still has no assurances that the jurors actually did agree on one incident, and criminal defendants are entitled to juries that are actually unanimous. But whatever the criticism of the harmless error analysis, it is manifestly true that under that analysis, any showing of significant inconsistencies and contradictions in the evidence as to any single incident described by the children renders the error not harmless, because without a Petrich instruction the reviewing court cannot say there is no possibility some juror might have picked an incident that was not uncontrovertibly proved.

In Kitchen, this court reversed the conviction and remanded for a new trial because "(t)here was conflicting testimony as to each of those acts and a rational juror could have entertained reasonable doubt as to whether one or more of them actually occurred." Kitchen, 110 Wash.2d at 412, 756 P.2d 105. State v. Coburn, 110 Wash.2d 403, 409, 756 P.2d 105 (1988), a case consolidated with Kitchen, reversed Coburn's conviction because the testimony of the child victim was impeached and [f]urthermore, as in Kitchen's case, the jury heard conflicting testimony "as to each of those acts and a rational juror could have entertained reasonable doubt as to whether one or more of them actually occurred." Kitchen, 110 Wash.2d at 412, 756 P.2d 105. In State v. Petrich, supra, the defendant's conviction was overturned because this court was not satisfied that the failure of the State to elect error was not harmless due to the child's testimony. The victim in Petrich was able to describe with some detail and specificity the acts committed against her, but other details were acknowledged "with attendant confusion as to date and place, and uncertainty regarding the type of sexual contact that took place." Petrich, 101 Wash.2d at 573, 683 P.2d 173.

State v. Camarillo, 115 Wn.2d at 65-66.

The State does not respond to ninety-nine percent of appellant's discussion in his opening brief pointing out that there were inconsistencies in the degree of proof about multiple of the incidents of alleged touching. In addition, there were outright contradictions in the children's testimony about whether certain of the multiple incidents even happened. The State's failure to

dispute all of these contentions is in effect an admission that the Petrich error was not harmless, and this Court should reverse.

State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993), does not apply to this case because here, there was sufficient evidence of all of the acts alleged, despite the widely divergent testimony as to some of the incidents. This is patently not a case like Jones in which the reviewing court can say that the jury "must have" picked one particular incident to base a given count on, since the evidence of all the other incidents was wholly inadequate to support a guilty decision in the first place. Jones, at 822-23. Similarly, this case is entirely unlike State v. Allen, 57 Wn. App. 134, 787 P.2d 566 (1990). There, the victim testified with great consistency as to each incident of alleged touching. Allen, at 139. Here, the inconsistencies and contradictions in the children's testimony as to multiple of the alleged incidents was not only the subject of substantial cross-examination and the defense examination of other non-victim witnesses, Appellant's Opening Brief, at 22-28, but the defense closing argument also focused closely on these inconsistencies and contradictions regarding various incidents. 9/16/03 at 29 ("In this case, you have got testimony that is full of

inconsistencies”), at 30 (“the fundamental problem here is that the stories told by [the victims] don’t match each other), at 30-31 (“They also don’t match the testimony of the other witnesses”). These are only a few examples from the defense closing argument in which the defense argued the children’s accounts were inconsistent and contradictory, both individually and as compared to each other’s statements and testimony. 9/16/03 at 31-34. The case did not depend solely on whether the jury believed the children were lying or telling the truth, it also depended on the fact that the children’s differing accounts of various incidents were contradictory. In fact, it was the deputy prosecuting attorney who attempted to smooth over the significant inconsistencies and contradictions in the children’s testimony by arguing in closing, “this case comes down to basically one simple question: Did the defendant touch those girls?” 9/16/03 at 7. The Petrich error in this case was not harmless, and Mr. Coleman asks this Court to reverse his convictions, which were obtained in violation of his federal and state constitutional right to a verdict bearing assurances it was unanimous.

2. The Blakely error is not subject to harmless error analysis. Respondent State of Washington concedes the trial

court violated Blakely v. Washington when it imposed exceptional sentences of incarceration above the standard range without submitting the aggravating facts to the defendant's jury. Error under Blakely v. Washington in failing to submit aggravating factors to a jury, Blakely v. Washington, or in lieu of doing so obtaining a knowing waiver of that jury right, State v. Harris, 123 Wn. App. 906, 99 P.3d 902 (2004), is not subject to harmless error analysis. State v. Thomas, 150 Wn.2d 821, 849-50, 83 P.3d 970 (2004); State v. Fero, ___ Wn. App. ___, 104 P.3d 49 (2005). As stated in Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), harmless error cannot be applied to structural errors involving abridgment of a fundamental right, which are therefore subject to automatic reversal. Neder v. United States, 527 U.S. at 8.

3. Alternatively, the Blakely error was not harmless because the evidence at trial was not overwhelming and uncontroverted. Even if the error of failing to submit the aggravating facts to the defendant's jury is subject to harmless error analysis, it was not harmless in this case because the evidence was not overwhelming and uncontroverted. State v.

Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (where the error concerns a misstated or omitted element of a crime, the error is harmless if the element at issue is supported by overwhelming and uncontroverted evidence). But the evidence of sexual molestation by the defendant was anything but overwhelming or uncontroverted. In order to believe the State's contention that there was an abuse of trust and an ongoing pattern of abuse, the jury would have to have believed that the defendant committed the crimes of sexual molestation. Mr. Coleman of course disputed that he committed these acts of sexual abuse. In addition, there were significant inconsistencies in the children's testimony, as argued in discussing the Petrich issue. If harmless error analysis applies, it does not defeat reversal here, because the evidence was not overwhelming and uncontroverted. State v. Brown, 147 Wn.2d at 341.

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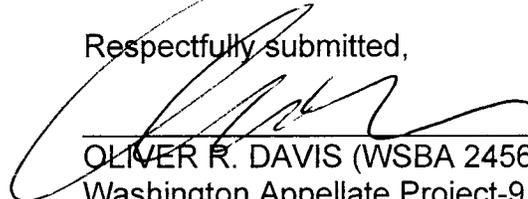
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B. CONCLUSION

For the reasons stated herein and in Appellant's Opening Brief, Mr. Coleman ask this Court to reverse his judgment and sentence.

DATED this 3 day of March, 2005.

Respectfully submitted,



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Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
RESPONDENT,)
)
v.) COA NO. 54171-4-1
)
JOHN COLEMAN,)
)
APPELLANT.)

DECLARATION OF SERVICE

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

ON THE 3RD DAY OF MARCH, 2005, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S REPLY BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KING COUNTY PROSECUTOR'S OFFICE
APPELLATE DIVISION
KING COUNTY COURTHOUSE, W-554
516 THIRD AVENUE
SEATTLE, WA 98104

SIGNED IN SEATTLE, WASHINGTON THIS 3RD DAY OF MARCH, 2005.

x Becky Crowley

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