

NO. 77706-3

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN E. COLEMAN, JR.,

Petitioner.

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SUPREME COURT
STATE OF WASHINGTON

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. When there is evidence of multiple acts supporting a single criminal charge, the failure to give a unanimity instruction is harmless if there is no possibility that some jurors may have relied on one act and some on another, resulting in a lack of jury unanimity. Here, the child victim testified that the defendant sexually molested her multiple times over a period of many months. The description of the acts of molestation was similar and not specific. The defense was general denial. Was the omission of a unanimity instruction harmless given that there was no rational basis for the jurors to differentiate among the multiple acts of sexual molestation testified to by the victim?

2. A defendant has a constitutional right to have a jury find exceptional sentence aggravating circumstances. Recent amendments to the Sentencing Reform Act provide that the jury shall decide the existence of aggravating circumstances at trial. In addition, CrR 6.16(b) provides that the trial court may seek special findings from the jury required under the law. At a retrial, may the State seek a jury finding on aggravating circumstances?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged defendant John Coleman with two counts of first-degree child molestation, alleging that he had sexually molested two nine-year-old girls, C.V. and M.D. CP 1-4. One count was charged for each victim. Id.

A jury found Coleman guilty as charged. CP 162-63. On April 23, 2004, the trial court imposed exceptional sentences on both counts based upon the following aggravating factors: (1) an abuse of trust and (2) the offenses were part of an ongoing pattern of sexual abuse. 13RP 10-11; CP 204.

On appeal, Coleman raised several challenges for the first time, including a claim that the trial court erred by failing to give a unanimity instruction. He also challenged his exceptional sentences in light of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

The Court of Appeals reversed the conviction on count II (victim M.D.) due to the failure to give a unanimity instruction. Slip op. at 7-8. The court affirmed Coleman's conviction with respect to count I (victim C.V.), finding the instructional error harmless. Slip op. at 7. The court further held that "Coleman is

entitled to be re-sentenced within the standard range.” Slip op. at 11.

Coleman sought review on the Court of Appeals' holding that the instructional error was harmless as to count I. The State filed an answer and sought review on the portion of the opinion restricting the trial court to a standard range sentence on remand.

2. SUBSTANTIVE FACTS

The facts of the case are set forth in detail in the Brief of Respondent filed with the Court of Appeals. However, given the issue raised by Coleman in his petition, a focus on the evidence concerning the molestation of C.V. is warranted.

C.V. provided general testimony concerning the sexual abuse; she did not describe a specific time that it occurred. 10RP 30, 53. She testified that Coleman touched her "in the wrong places;" and, upon further questioning, explained he touched her in the private area where she went to the bathroom. 10RP 27-28. She stated the touching mostly occurred at his house in the bedroom. 10RP 29, 31. Coleman sometimes touched her under the clothes and sometimes over her clothes. 10RP 32. C.V.

explained that the abuse did not hurt, nor did it feel good, but that it made her feel "weird." 10RP 61-62.

When asked how many times he touched her, C.V. responded, "I don't remember." 10RP 29. She then stated that it was more than five times but was unsure if it was more than ten times. 10RP 32. She stated the abuse occurred in the summer before the fourth grade. 10RP 39. She could not recall when the touching first occurred, and stated it stopped shortly before she reported it. 10RP 50-51. C.V. testified that Coleman had taken her to a movie theater to see "Snow Dogs" but that nothing bad happened there. 10RP 63-64.

Fourth grade teacher Sarah McAlpin testified that she briefly spoke with C.V. during school recess and learned about the abuse. 9RP 38-39. C.V. was very general in her description of the abuse and did not discuss specific incidents. 9RP 39, 48.

Similarly, school counselor Christine Barnes spoke with C.V. for only about twenty minutes. 9RP 61-68, 73. Barnes testified that C.V. told her that "Uncle Johnny" had been touching her in places where she wore her bathing suit, "down there." 9RP 70. She indicated that the touching occurred at her house and his house. Id. She further stated that it occurred while she was in the third and

fourth grade. 9RP 71. C.V. did not mention any particular incident. 9RP 71. C.V. mentioned seeing the movie "Snow Dogs" with Coleman and stated that nothing happened at the movie. 9RP 81.

Social worker Majorie Trudnowski testified that she interviewed C.V. at the school for thirty minutes on January 23, 2002. 9RP 99-100. Trudnowski stated that C.V. told her that Coleman had been touching her "down there a lot" and pointed to her vagina. 9RP 103. C.V. told Trudnowski that the abuse mainly occurred in Coleman's house, though it had also occurred in his car and C.V.'s grandmother's house. 9RP 105-06. According to Trudnowski, C.V. stated that she had seen the movie "Snow Dogs" with Coleman the previous Friday and that he touched her at the movies. 9RP 103, 118.

Child interview specialist Christine Liebsack testified that C.V. was not forthcoming with details when Liebsack interviewed her. 9RP 146. When Liebsack asked what happened when she was with Coleman, C.V. responded, "When I'm there, he touches me in places he shouldn't...." 9RP 149. When asked when the last time the touching happened, C.V. replied, "It was a long time ago. I don't remember." 9RP 150. When asked for specifics, she repeatedly replied that she did not remember. 9RP 150-51.

Liebsack showed her a body sketch and asked her to show where Coleman had touched her. 9RP 152. C.V. pointed to the crotch area and the buttocks. 9RP 152. Liebsack asked her how she felt when Coleman touched her, and C.V. responded, "I didn't like it." 9RP 153. Liebsack proceeded to ask where the touching occurred, and C.V. stated it mostly occurred at Coleman's house in his bedroom. 9RP 154. C.V. indicated that Coleman had only used his hand to touch her. 9RP 156. C.V. told Liebsack that the last movie she saw with Coleman was "Snow Dogs" and that Coleman's daughter Melissa was with them and "nothing really happened." 9RP 149, 159, 185.

M.D. testified that that she saw Coleman touch C.V. underneath her shirt while they were on his bed together. 10RP 98. She saw "something happen" to C.V. three or four times. 10RP 99.

In closing argument, neither the prosecutor nor defense counsel distinguished between individual incidents. In closing argument, the prosecutor argued that "this case boils down to two possibilities." The first was "that these incidents that these girls described didn't happen, and for some unknown reason, they are lying to you about that." The other possibility was "that these incidents they described did happen...." 11RP 6-7. When

discussing the elements of the crime, the prosecutor indicated that the State was relying upon the sexual abuse that occurred in Coleman's apartment and C.V.'s grandmother's house. 11RP 24. There was no argument that any abuse at the movie theater occurred or supported the charge.

In contrast, the defense argued that the girls were lying. 11RP 36. Defense counsel claimed that C.V. decided to lie about the abuse in order to avoid getting in trouble with teacher McAlpin. 11RP 37-38.

C. ARGUMENT

1. THE FAILURE TO GIVE A UNANIMITY INSTRUCTION WAS HARMLESS BECAUSE NO RATIONAL JUROR COULD HAVE DISTINGUISHED AMONG THE ACTS OF CHILD MOLESTATION.

When there is evidence of multiple acts supporting a single criminal charge, the failure to give a unanimity instruction is harmless if the appellate court concludes that there is no possibility that some jurors may have relied on one incident while other jurors relied on another incident when returning a verdict of guilty. Here, C.V. testified to a pattern of sexual molestation committed by Coleman over several months. Coleman's defense was one of

general denial – he claimed C.V. was lying. The jury clearly found that C.V. was credible and convicted Coleman. Though no unanimity instruction was given, the error was clearly harmless because there was no rational way for a juror to differentiate among the various acts of child molestation described by C.V.

A defendant has a constitutional right to be convicted by a jury that unanimously agrees that the crime charged in the information has been committed. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). When there is evidence that several distinct criminal acts have been committed and the State has not elected the act upon which it relies for conviction, the trial court should provide the jury with a unanimity instruction. Petrich, 101 Wn.2d at 572.

When the trial court erroneously fails to give such an instruction, the jury verdict will be affirmed only if the error was harmless beyond a reasonable doubt. State v. Camarillo, 115 Wn.2d 60, 64, 794 P.2d 850 (1990). The failure to give a unanimity instruction is harmless error if a rational trier of fact could not have a reasonable doubt as to whether the evidence of each incident alleged establishes the commission of the crime. Camarillo, 115 Wn.2d at 65. In other words, the error is harmless if a rational trier

of fact, having believed the testimony of one incident, necessarily would not have a reasonable doubt as to the other incidents because the acts are indistinguishable. See State v. Jones, 71 Wn. App. 798, 822, 863 P.2d 85 (1993).

Consistent with this standard, this Court has found the error not to be harmless when there was testimony concerning several distinct criminal acts, and a realistic possibility that the jury may not have been unanimous as to which act was proven. See State v. Kitchen, 110 Wn.2d 403, 412, 756 P.2d 105 (1988) (reversing the convictions 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 occurred").

On the other hand, the instructional error is harmless when no rational juror would have a basis for distinguishing among the different incidents. In Camarillo, the victim testified similarly to three distinct instances of sexual molestation, and the defense was general denial. This Court concluded that, while a unanimity instruction should have been given, the error was harmless. "The uncontroverted evidence upon which the jury could reach its verdict reveals no factual difference between the incidents." 115 Wn.2d at 70.

In Camarillo, this Court found the Court of Appeals' reasoning in State v. Allen, 57 Wn. App. 134, 787 P.2d 566 (1990) persuasive. In Allen, the victim testified that defendant Dixon, sexually molested her in the same manner on a daily basis for several months. Dixon's defense was general denial and he did not attempt to distinguish among or question any specific incidents charged. The court found the error harmless:

In view of Dixon's general denial of any improper physical contact and C.P.'s testimony that substantially the same contact occurred during each visit, we find no rational basis for jurors to distinguish among the acts charged in Count I. The jurors had either to believe Dixon and acquit or believe C.P. and convict. There is no possibility that "some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction."

57 Wn. App. at 139.

Other courts confronting the exact issue presented here -- the failure to provide a unanimity instruction in a sex abuse case with general testimony from the child victim -- have employed an analysis similar to that used in Camarillo and Allen. The Colorado Supreme Court found the error harmless beyond a reasonable doubt where there was evidence of repeated acts of sexual abuse, and the defense was general denial of all the incidents. The court

concluded “[t]he evidence presented no rational basis for some jurors to predicate guilt on one act while other jurors based it on another.” Thomas v. People, 803 P.2d 144, 155 (Colo. 1990). Likewise, in California, “[t]he erroneous failure to give a unanimity instruction is harmless if disagreement among the jurors concerning the different specific acts proved is not reasonably possible.” People v. Napoles 104 Cal.App.4th 108, 119, 127 Cal.Rptr.2d 777, 786 (2002).

Non-specific testimony about multiple incidents of sexual abuse is not unusual when a child is sexually assaulted by a relative.

Particularly when the accused resides with the victim or has virtually unchecked access to the child, and the abuse has occurred on a regular basis and in a consistent manner over a prolonged period of time, the child may have no meaningful reference point of time or detail by which to distinguish one specific act from another. The more frequent and repetitive the abuse, the more likely it becomes that the victim will be unable to recall specific dates and places. Moreover, because the molestation usually occurs outside the presence of witnesses, and often leaves no permanent physical evidence, the state's case rests on the testimony of a victim whose memory may be clouded by a blur of abuse and a desire to forget.

State v. Brown, 55 Wn. App. 738, 746-47, 780 P.2d 880 (1989).

When a child victim provides testimony about multiple, similar

incidents of sexual molestation, the issue at trial is normally credibility, not whether a particular incident occurred. Brown, 55 Wn. App. at 748; State v. Hayes, 81 Wn. App. 425, 433, 914 P.2d 788 (1996); see also People v. Jones, 51 Cal.3d 294, 270 Cal.Rptr. 611 (1990) (discussing at length issues raised by "generic" testimony in a child sex abuse case and jury unanimity).

Here, C.V.'s testimony concerning the sexual molestation was similar to that in Allen. C.V. testified at trial that no particular incident stuck out in her mind; she described how Coleman had molested her in general terms.¹ The disclosures to McAlpin, Barnes, Trudnowski and Liebsack also were of general abuse – that sexual molestation occurred several times over a period of months. Closing argument on both sides was devoted to the issue of the victims' credibility and motive; neither the prosecutor nor the defense counsel distinguished among individual incidents. In finding Coleman guilty, the jury necessarily had to find C.V.

¹ In contrast, victim M.D. testified to several specific incidents. For example, at trial, she stated, for the first time, that Coleman made her touch her penis. Slip op. at 4; 10RP 114, 125. The fact that she testified to several specific incidents and that there was inconsistent evidence concerning them led the Court of Appeals to conclude that there was a possibility that the jury may not have unanimously agreed as to which incident occurred. Slip op. at 8.

credible. The evidence presented no rational basis for some jurors to predicate guilt on one act while other jurors based it on another.

In his petition, Coleman notes that there was conflicting testimony about whether he sexually molested C.V. while watching "Snow Dogs" at a movie theater. At trial, C.V. testified that she recalled seeing the movie with Coleman and that nothing bad occurred when she went to the movies with Coleman. 10RP 17, 64. Both Barnes and Liebsack also testified that C.V. stated that she had not been molested at the movie. The only conflicting information came from Trudnowski, who recalled that C.V. told her that Coleman had molested her there. In closing, the prosecutor did not argue that molestation occurred at this movie, and, in fact, argued that the molestation only occurred in Coleman's car and condo and in C.V.'s house. 11RP 24.

Given that the State did not argue that molestation occurred at the movie and that C.V. denied any molestation occurred there in both her previous statements and her trial testimony, there is no possibility that testimony concerning "Snow Dogs" resulted in a lack of jury unanimity. A rational juror could not have convicted Coleman based upon the brief hearsay testimony concerning the "Snow Dogs" movie given the extraordinarily weak evidence

supporting that any molestation occurred there. See State v. Jones, 71 Wn. App. 798, 822-23, 863 P.2d 85 (1993) (finding failure to give unanimity instruction harmless where the victim testified that only one act of touching occurred though hearsay statements suggested multiple acts occurred).

Moreover, even assuming that a juror believed that C.V. had been molested at the "Snow Dogs" movie, such a belief would not mean that the jury was not otherwise unanimous as to another act of molestation. Here, C.V. testified to a general pattern of sexual molestation committed by Coleman, and the jury had to have unanimously found that her testimony was credible when finding Coleman guilty. In order for the jury to not have been unanimous, some jurors would have had to have doubted C.V.'s trial testimony concerning the sexual molestation, but voted to convict Coleman anyway based upon the conflicting testimony about the "Snow Dogs" movie. In other words, a juror would have (i) doubted C.V. when she testified that she was molested, and (ii) also believed that she was lying when she stated that she was not molested at the movie. There would have been no rational basis for a juror to reach such a conclusion. Certainly, no party at trial ever suggested or argued it.

The Court of Appeals properly found the error harmless with respect to C.V., explaining:

Here, C.V. described multiple similar incidents of abuse, but only in very general terms. When asked, C.V. was unable to identify any particular incident that stuck out in her memory; the focus of the evidence was the general pattern of the ongoing abuse. The deputy prosecutor did not attempt to distinguish among specific incidents during closing argument, noting that "{t}his case comes down to one simple question: Did the defendant touch these girls?" Coleman's defense was a general denial, and he maintained that C.V. was lying about all of the alleged touching. As in Camarillo and Allen, a rational juror could not have distinguished among the charged acts described by C.V. and would have had to believe C.V. as to all of the incidents in order to find Coleman guilty.

Slip op. at 7. This Court should affirm the Court of Appeals and hold that the failure to instruct the jury with a unanimity instruction was harmless.

2. UPON RETRIAL, THE STATE MAY SEEK A JURY FINDING ON AGGRAVATING CIRCUMSTANCES.

The Court of Appeals remanded the case for a trial on count II, but restricted the trial court to a standard range sentence upon remand. Slip op. at 11-12. That holding was in error. Because the case has been remanded for a new trial, the State is entitled to seek a jury finding on whether aggravating circumstances exist. If

the jury finds aggravating circumstances, the trial court may impose an exceptional sentence on count II.

In its opinion, the Court of Appeals relied upon this Court's decision in State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005). However, Hughes is distinguishable in an important respect: the current case has been remanded for a new trial on count II, while the consolidated cases in Hughes were only remanded for a new sentencing hearing. This Court carefully limited its opinion in Hughes to the circumstances before it. "We are presented only with the question of the appropriate remedy on *remand* – we do not decide here whether juries may be given special verdict forms or interrogatories to determine aggravating factors at trial." 154 Wn.2d at 149. This case presents the issue not decided in Hughes: whether, at trial, a jury may be given special verdict forms or interrogatories to determine aggravating factors.

As discussed in the State's Answer, the Sentencing Reform Act was amended after Blakely in order to expressly provide for a trial court to submit aggravating circumstances to a jury as part of a trial. See Laws of 2005, ch. 68. In a group of consolidated cases, this Court is already considering whether the 2005 amendments apply to cases, such as this one, where the crime occurred before

the amendment's effective date. State v. Pillatos et al., 75984-7.

Should the Court rule that the amendments are retroactive, there can be no question that the State may seek a jury finding on exceptional sentence aggravating circumstances at the new trial.

Even if the 2005 amendments to the SRA do not apply, there is clear authority permitting a trial court to submit to the jury a special verdict form concerning aggravating circumstances at trial. The criminal rules expressly allow the trial court to submit special verdict forms to the jury when such findings are required by law.

CrR 6.16(b) provides:

Special Findings. The court may submit to the jury forms for such special findings which may be required or authorized by law. The court shall give such instruction as may be necessary to enable the jury both to make these special findings or verdicts and to render a general verdict.

Consistent with this rule, previous appellate court decisions have required the trial court to submit special findings to the jury in a variety of contexts though no specific statutory authority required them to do so.²

² See State v. Roberts, 142 Wn.2d 471, 509 n.12, 14 P.3d 713 (2000) (in death penalty case involving accomplice liability issues, jury should be presented with special interrogatories concerning the defendant's level of involvement); State v. Manuel, 94 Wn.2d 695, 700, 619 P.2d 977 (1980) (when defendant seeks reimbursement for self-defense, special interrogatories should be submitted to jury).

Similarly, a Washington statute authorizes a trial court's submission of the special verdict forms to the jury when required by law. RCW 2.28.150 provides that "if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws." See Rogoski v. Hammond, 9 Wn. App. 500, 513 P.2d 285 (1973) (holding that RCW 2.28.150 allowed the trial court to hold a show cause procedure before ordering prejudgment attachment). Given that Blakely held that a defendant has a constitutional right to have a jury find aggravating circumstances, the trial court's submission of a special verdict form to the jury concerning aggravating circumstances is certainly a suitable mode of procedure that is "conformable to the spirit of the laws." See State v. Davis, __ Wn. App. __, Nos. 23834-2-III, and 24313-3-III (filed May 23, 2006) (holding that the trial court had authority to submit special interrogatory to the jury asking it to determine whether aggravating factor existed).

This Court should hold that the State may seek to prove aggravating circumstances at the retrial on count II. Should the Court reverse the conviction on count I and remand for a retrial on both counts, the State should be permitted to prove the existence of

aggravating circumstances on both counts.

D. CONCLUSION

For all the foregoing reasons, this Court should affirm the conviction on count I and further hold that the State may seek to prove aggravating circumstances at the retrial of count II.

DATED this 3/5 day of July, 2006.

Respectfully submitted,

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