90308-5

NO. 43359-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID WILLIAM CARSON,

Appellant.

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

The Honorable Ronald E. Culpepper

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

A. ARGUMENT IN REPLY 1

REVERSAL IS REQUIRED WHERE THE TRIAL COURT ERRED IN REFUSING TO GIVE A UNANIMITY INSTRUCTION THEREBY VIOLATING CARSON'S CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT AND THE ERROR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT. 1

B. CONCLUSION 3

TABLE OF AUTHORITIES

Page

State v. Beskurt,
176 Wn.2d 441, 293 P.3d 1159 (2013) 3

State v. Coleman,
159 Wn.2d 509, 150 P.3d 1126 (2007) 3

State v. Kitchen,
110 Wn.2d 403, 756 P.2d 105 (1988) 1

A. ARGUMENT IN REPLY

REVERSAL IS REQUIRED WHERE THE TRIAL COURT ERRED IN REFUSING TO GIVE A UNANIMITY INSTRUCTION THEREBY VIOLATING CARSON'S CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT AND THE ERROR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

The State argues that "[a] unanimity instruction was not necessary in this case because the record is clear that the prosecutor elected each act that the jury should rely on during their deliberations." Brief of Respondent at 6-17. The State's argument is misguided and has no basis in fact or law.

The State acknowledges that it presented evidence of multiple acts of molestation, but asserts that the prosecutor "elected" three of the acts in his closing argument and therefore no unanimity instruction was required, citing State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). Brief of Respondent at 6-8. The State's argument fails because Kitchen does not support its claim that the prosecutor's closing argument constitutes an election. To the contrary, the Washington Supreme Court held that the State must "elect the particular criminal act upon which it will rely for conviction," or the trial court must "instruct the jury that all of them must agree that the same underlying criminal act has been proved beyond a reasonable doubt." Kitchen, 110 Wn.2d at 411.

The record substantiates that the State did not elect the particular act upon which it would rely for conviction. In proposing the unanimity instruction, the prosecutor told the trial court that the State did not elect a specific act as to a specific count:

> THE COURT: Have you failed to elect? You elected three separate incidents.
>
> MR. LEWIS: Well, not in the Information. What the State has done in this case is charge child molestation, three counts, during the same period of time, and that is due in large part to [C.C.'s] inability to specifically say on this day and at this time given, well, from the State's position, his age, so that is why the State essentially charged the charging period during which the defendant lived with Mr. Halbert and Ms. Hagen and their children. That's the only thing that C.C. could really say, was that the acts and the incidents occurred during the time that the defendant lived with them, but we don't specify or distinguish in the charging documents one count from the next.

RP 408.

The State's reliance on closing argument is further undermined by the court's instruction to the jury that "[i]t is important" to remember that "the lawyers's statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you." CP 60.

As in Kitchen, the State presented evidence of multiple acts and did not make a proper election. Consequently, because the trial court failed to give a unanimity instruction, "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." Kitchen, 110 Wn.2d at 411-12. Furthermore, contrary to the State's argument, the court's error was not harmless beyond a reasonable doubt because a rational juror could have had reasonable doubt as to whether one or more of the acts actually occurred. Kitchen, 110 Wn.2d at 412. See Appellant's opening brief at 13-17.

Reversal is required because the rest of the State's argument is likewise without merit.

B. CONCLUSION

For the reasons stated here and in appellant's opening brief, this Court should reverse Mr. Carson's convictions because the trial court violated his constitutional right to a unanimous jury verdict.[1] State v. Coleman, 159 Wn.2d 509, 515-17, 150 P.3d 1126 (2007).

DATED this 17th day of April, 2013.

Respectfully submitted,

/s/ Valerie Marushige
VALERIE MARUSHIGE
WSBA No. 25851
Attorney for Appellant, David William Carson

[1] Carson's alternative argument that reversal is required because the jury questionnaires were sealed without a Bone-Club hearing in violation of his right to a public trial was recently decided by the Washington Supreme Court, where the Court held that sealing jury questionnaires does not implicate public trial rights. State v. Beskurt, 176 Wn.2d 441, 447-48, 293 P.3d 1159 (2013).

DECLARATION OF SERVICE

On this day, the undersigned sent by e-mail, the document to which this declaration is attached to Thomas Roberts, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 17th day of April, 2013 in Kent, Washington.

/s/ Valerie Marushige
VALERIE MARUSHIGE
Attorney at Law
WSBA No. 25851

MARUSHIGE LAW OFFICE

April 17, 2013 - 3:54 PM

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