

65766-6

65766-6

Court of Appeals No. 65766-6-I
Snohomish County Superior Court No. 09-1-01009-3

IN THE COURT OF APPEALS, DIVISION ONE

THE STATE OF WASHINGTON

ALLEN JAMES ROOT,

DEFENDANT/APPELLANT,

v.

STATE OF WASHINGTON,

PLAINTIFF/APPELLEE.

2011-03-11 11:11 AM
COURT OF APPEALS
DIVISION ONE

REPLY BRIEF OF APPELLANT

DAVID S. MARSHALL
1001 Fourth Avenue, 44th Floor
Seattle, Washington 98154-1192
(206) 826-1400

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

I. ARGUMENT IN REPLY 1

 A. THE FAILURE TO ENSURE JURY UNANIMITY WAS
 MANIFEST CONSTITUTIONAL ERROR. 1

 B. THE TRIAL COURT DID NOT ENSURE JURY
 UNANIMITY. 5

 C. THE ERROR WAS NOT HARMLESS..... 9

II. CONCLUSION..... 10

TABLE OF AUTHORITIES

Cases

| | |
|--|---------|
| <i>State v. Allen</i> , 57 Wn.App. 134, 787 P.2d 566 (1990)..... | 4 |
| <i>State v. Bland</i> , 71 Wn. App. 345, 860 P.2d 1046 (1993)..... | 7, 8 |
| <i>State v. Fitzgerald</i> , 39 Wn. App. 652, 655, 694 P.2d 1117 (1985)..... | 1 |
| <i>State v. Gitchel</i> , 41 Wn. App. 820, 821-22, 706 P.2d 1091 (1985)..... | 1 |
| <i>State v. Holland</i> , 77 Wn. App. 420, 891 P.2d 49 (1995)..... | 9 |
| <i>State v. Kier</i> , 164 Wn.2d 798, 194 P.3d 212 (2008)..... | 5, 6, 8 |
| <i>State v. Kirkpatrick</i> , 160 Wn.2d 873, 880, 161 P.3d 990 (2007)..... | 1 |
| <i>State v. Kitchen</i> , 110 Wn.2d 403, 405-06, 756 P.2d 105 (1988). | 4 |
| <i>State v. Lynn</i> , 67 Wn.App. 339, 345, 835 P.2d 251 (1992) | 4 |
| <i>State v. Nunez</i> , ___ Wn.App. ___, 248 P.3d 103 (2011) | 4, 5 |
| <i>State v. O'Hara</i> , 167 Wn.2d 91, 99, 217 P.3d 756 (2009) | 1, 2, 3 |
| <i>State v. Petrich</i> , 101 Wn.2d 566, 573, 683 P.2d 173 (1984) | 4, 9 |
| <i>State v. Ryan</i> , ___ Wn. App. ___, ___ P.3d ___ (2011 WL 1239796)..... | 5 |
| <i>State v. Stein</i> , 144 Wn.2d 236, 240, 27 P.3d 184 (2001) | 1, 2, 3 |

Other Authorities

| | |
|--------------------|---|
| RAP 2.5(a)(3)..... | 1 |
| WPIC 4.26..... | 2 |

I. ARGUMENT IN REPLY

A. THE FAILURE TO ENSURE JURY UNANIMITY WAS MANIFEST CONSTITUTIONAL ERROR.

The State argues Root is not entitled to raise the failure to ensure jury unanimity on appeal because he did not object to it below and it is not a “manifest error affecting a constitutional right,” RAP 2.5(a)(3). Abundant authority shows such an error to be constitutional, *see, e.g., State v. Gitchel*, 41 Wn. App. 820, 821-22, 706 P.2d 1091 (1985), *reaffirming State v. Fitzgerald*, 39 Wn. App. 652, 655, 694 P.2d 1117 (1985), and the State does not argue otherwise. Rather, it argues any error here was not manifest.

An error must cause actual prejudice to be manifest. *State v. O’Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009), and cases there cited. To show actual prejudice, the appellant must show practical and identifiable consequences. *O’Hara*, 167 Wn.2d at 99. “An error is manifest when it has practical and identifiable consequences in the trial of the case.” *State v. Stein*, 144 Wn.2d 236, 240, 27 P.3d 184 (2001). An error that is “purely formalistic” is not manifest. *State v. Kirkpatrick*, 160 Wn.2d 873, 880, 161 P.3d 990 (2007).

Consequences are “identifiable” when the trial court record is “sufficient to determine the merits of the claim.” *O’Hara*, 167 Wn.2d at

99. Only errors the trial court could have corrected, given what it knew at the time, can be practical and identifiable. *O'Hara*, at 100.

The trial court could have avoided the error here by giving the jury an instruction such as WPIC 4.26, set forth in appellant's opening brief, at 11.

Had the jury found Root guilty of all three counts, there would have been no practical and identifiable consequence of the failure to ensure jury unanimity. It would be clear jury unanimity had nonetheless been achieved. But since it is possible the jury, while obeying its instructions, failed to agree Root had committed any act of rape, the failure to ensure jury unanimity did have a practical and identifiable consequence.

That the jury might have been unanimous on two acts does not change this. Showing manifest constitutional error in instructing a jury does not require excluding the possibility that the jury made the legally-necessary findings even without being told to do so. *Stein, supra*, illustrates this.

There, the evidence was that Stein asked Norberg to arrange "accidents" for people he believed were trying to deny him his inheritance and offered to pay \$10,000 for each person eliminated. In response, Norberg and others made three unsuccessful attempts to kill or intimidate

Hall. *Stein*, 144 Wn.2d at 239. Stein was found guilty of burglary and three counts of attempted murder on a theory of vicarious liability. The jury instructions omitted an element: that Stein knew the principals intended to murder the victim. They required the jury merely to find that the murder attempts were foreseeable. *Stein*, at 246. Stein had not excepted to the instructions in question. *Id.* at 240.

It is likely all jurors found that Stein had known the principals intended to murder the victim. After all, he had asked them to eliminate him by faking an accident. But that likelihood was irrelevant to the showing of manifest constitutional error. It was enough to show the jury had not been told what it needed to find, and that its verdicts did not exclude the possibility it failed to make all necessary findings.

Likewise, in *Root* it is enough that the jury was not told it needed to find a particular act for each count unanimously, and that its verdicts did not ensure unanimity.

Stein also illustrates that the trial court record is sufficient to show manifest constitutional error when it shows all parts of the trial in which the jury received information—evidence, instructions, verdict forms—and its verdicts.

O'Hara, 167 Wn.2d at 100-101, 103, twice identifies failure to ensure a unanimous verdict as manifest constitutional error. And indeed,

counsel for Root has not been able to find a single Washington appellate case rejecting a claim of *Petrich* error on the basis it was not manifest constitutional error.¹ This suggests that failure to guarantee jury unanimity is itself a practical and identifiable consequence, that a complete record of information received by the jury and jury verdicts is never insufficient to evaluate it, and that the trial court is always in a position to avoid the error through its instructions to the jury.

State v. Nunez, ___ Wn.App. ___, 248 P.3d 103 (2011), relied upon by the State, is not to the contrary. It did not concern the requirement that a guilty verdict be unanimous. It concerned instructing a jury that its verdict finding an aggravating factor had *not* been proven had to be unanimous. *Nunez* ruled it was common law, not constitutional law, that entitled the defendant to a non-unanimous verdict rejecting an aggravating factor. *Id.*, at 108-09. Hence the error could not be initially asserted on appeal.

In dictum, *Nunez* added that even if the error had been constitutional, it would not have been manifest constitutional error. *Id.*, at 109-110. It distinguished this kind of instructional error from kinds that

¹ Some have found *Petrich* error harmless, e.g., *State v. Allen*, 57 Wn.App. 134, 787 P.2d 566 (1990), by the standard of harmlessness made clear in *State v. Kitchen*, 110 Wn.2d 403, 405-06, 756 P.2d 105 (1988). Whether constitutional error is harmless and whether it is manifest are different questions. *State v. Lynn*, 67 Wn.App. 339, 345, 835 P.2d 251 (1992).

are manifest constitutional error, listing in the latter group “failing to require a unanimous verdict.” *Id.*, at 109.

In any event, *Nunez*’s value as precedent is in question now because its holding has been rejected in *State v. Ryan*, ___ Wn. App. ___, ___ P.3d ___ (2011 WL 1239796). But even aside from that, *Nunez* would not support the State’s contention that the error here was not manifest constitutional error.

In sum, not only was the error here constitutional, it was manifest.

B. THE TRIAL COURT DID NOT ENSURE JURY UNANIMITY.

In closing argument, the prosecutor linked each incident alleged in A.M.’s testimony to one of the three counts before the jury. The court, though, did not instruct the jury it was bound by the prosecutor’s statements. On the contrary, the court’s instructions and other statements told the jury that any incident could support conviction on any count and that the lawyers’ arguments did not bind it. Nothing ensured jury unanimity.

In *State v. Kier*, 164 Wn.2d 798, 194 P.3d 212 (2008), the supreme court reasoned in like fashion. At page 18 of Brief of Respondent, the State attempts to distinguish *Kier*, but each of its points of distinction is either erroneous or irrelevant.

The State notes that in the case at bar, unlike *Kier*, the evidence showed three distinct events. That is true but meaningless, since the jury was never instructed to connect any event with any count.

The State asserts there could have been no confusion in this case which event “was under consideration when discussing a specific act making up each charge.” *Id.* The State seems to assume the jury used count numbers when it discussed the evidence. There is no basis for that assumption.

The State notes both the information and the court’s instructions told the jury “each count was a separate count,” and a verdict on any count had to be unanimous. This did not instruct the jury that any incident in evidence underlay any count, or that it had to agree unanimously on an incident in order to convict on a count.

The State asserts, “Unlike *Kier* the prosecutor’s argument did not stand alone as the only fact which clearly delineated which act constituted each charged offense.” That assertion is incorrect. In this case as well as in *Kier*, only the prosecutor’s closing argument connected particular facts in evidence to a particular count. The State’s assertion that Root’s trial counsel adopted the prosecutor’s linkage of incidents to counts, Brief of Respondent at 16, is incorrect. In the cited passage, defense counsel spoke of “the third incident that [A.M.] mentioned 19 months later.” Defense

counsel was referring to A.M.'s reporting only one rape by Root in her first police interview, then two more in her interview many months later. She was not identifying an incident by a count number.

The State relies on *State v. Bland*, 71 Wn. App. 345, 860 P.2d 1046 (1993). On close inspection, though, *Bland* does not seem even to be a multiple acts case.

According to the evidence in *Bland*, Jefferson was sitting in his car when Bland pointed a gun at Jefferson's chest, uttered a threat, and socked Jefferson. Jefferson then sped away in the car. Bland aimed at the fleeing car and fired. The bullet missed the car but penetrated a house where it nearly struck Carrington. *Bland*, at 348-49.

The State charged Bland with one count of second-degree assault with a deadly weapon on Jefferson, and one count of second-degree assault with a deadly weapon, by transferred intent, on Carrington. (A third count of reckless endangerment of Carrington's wife is not relevant to this discussion. Bland pled guilty to it before trial.) *Bland*, at 347-48. In each of the two jury instructions identifying the elements of the two counts, the trial court named the victim alleged in that count. *Bland*, at 350 n.2. The jury convicted Bland of both counts and, by special verdict, found he was armed with a deadly weapon for both. *Bland*, at 348, 350.

On appeal, the *Bland* court noted the case might not be a multiple acts case and did not analyze whether it was. *Bland*, at 351 (“even if we were to accept Bland’s argument that this is a ‘multiple acts’ case as to either count . . .”) Since the jury found both counts committed with a deadly weapon, socking Jefferson could not have been the basis for convicting Bland of assaulting Jefferson. The court rejected Bland’s argument that it could have been.

Even if *Bland* had been a multiple acts case, it would not have been one in which the jury had only the prosecutor’s argument to tell it what it had to find to convict on a particular count. *Kier* focused on this distinction: “Contrary to the State’s assertion . . . the court in *Bland* did not rely on the closing argument alone. Rather, the evidence, jury instructions, and closing argument all supported the election of a specific criminal act.” *Kier*, at 813 (internal citations and quotations omitted). In *Bland*, as the *Bland* court noted, “closing argument . . . made it clear, *once more*, that Bland’s threatening of Jefferson with the gun was the act the State was relying on for count 1 and Bland’s near shooting of Carrington with the gun was the act relied upon for count 2.” *Bland*, at 352 (emphasis added). Here, the State’s closing argument was alone in connecting acts to counts.

C. THE ERROR WAS NOT HARMLESS.

As noted in Root's opening brief, Brief of Appellant, at 8, 16, *Petrich* error is harmless only if no reasonable juror could have had a reasonable doubt that any incident in evidence occurred. The State has not disputed this is the standard.

It is a matter of simple logic that, when the defendant has been acquitted of a count, a reasonable juror could have—in fact, several jurors *did* have—a reasonable doubt about at least one incident in evidence. Root cited *State v. Holland*, 77 Wn. App. 420, 891 P.2d 49 (1995), in his opening brief because the court there articulated this logic quite well.

It is by no means essential that *Holland* articulated the logic in response to a case similar to this one. Logic holds up in the abstract as well as in particular applications. Hence the State's attempt to distinguish *Holland*, Brief of Respondent, at 18-19, is beside the point.

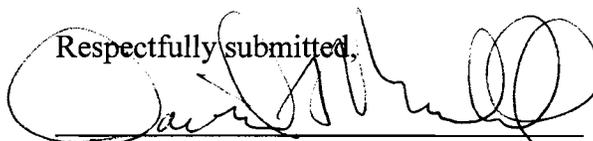
But in any event, the attempt to distinguish *Holland* fails. Contrary to the State's assertion, the jury in *Holland* was instructed that it must consider each count separately and agree unanimously to return a verdict on any count. *Holland*, at 429 (Munson, J., dissenting). And each "to convict" instruction in *Holland* told the jury the occasion constituting each count had to be different from the occasions constituting the other counts. *Id.*, at 428.

II. CONCLUSION

For these reasons and those set forth in Root's opening brief, the two convictions should be reversed and the case remanded for a new trial on them.

DATED this 4th day of May, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David S. Marshall", written over a horizontal line.

DAVID S. MARSHALL, WSBA #11716
Attorney for Allen James Root

CERTIFICATE OF SERVICE

I hereby certify that on the date shown below, I caused to be sent by ABC Legal Messenger one copy of the foregoing *Reply Brief of Appellant* to the following:

Snohomish Co. Prosecuting Attorney – Criminal Division
Kathleen Webber, Attorney for Plaintiff/Appellee
3000 Rockefeller Avenue, M/S 504
Everett, WA 98201

and by United States Mail to:

Allen J. Root
#339409
Coyote Ridge Corrections Center
Unit B, Cell # BA31U
P.O. Box 769
Connell, WA 99326

DATED this 4th day of May, 2011.


Tracey McDonald, Legal Assistant