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

STATE OF WASHINGTON,	)	No. 61776-1-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
CHAD A. PIERCE,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: July 11, 2011
	)	

Ellington, J. — When the State charges two counts of the same crime and presents evidence of several similar acts of misconduct but fails to elect which acts it relies upon for each count, the jury must be instructed to agree on the specific criminal act underlying the verdict on each count. Because no such instruction was given in this case, Chad Pierce was denied his constitutional right to a unanimous jury verdict. Given the evidence and defense theory, we cannot say this error was harmless beyond a reasonable doubt. We reverse and remand for a new trial.

BACKGROUND

The State charged Pierce with two counts of child molestation in the first degree involving B.L., his seven-year-old stepdaughter. At trial, B.L. testified Pierce touched her when she climbed into bed with him and her mother after a nightmare. She testified this happened on three or four occasions, but gave no details about any

of the other incidents.

After discussing the matter with counsel, the court declined to instruct the jury it must be unanimous as to the specific act that constituted each count. The jury convicted Pierce on both counts.

DISCUSSION

The State concedes the absence of a unanimity instruction was error,[1] but argues it is harmless beyond a reasonable doubt. Failure to give a unanimity instruction is harmless "only if no rational juror could have a reasonable doubt as to any one of the incidents alleged."[2]

The State relies on State v. Camarillo,[3] State v. Allen,[4] and State v. Bobenhouse[5] to argue the error was harmless because there was no way for the jury to rationally discriminate between the incidents. In each of those cases, however, the defense was a general denial and the victim testified with specificity to several incidents, any of which would support the charged counts.[6] Failure to give a unanimity instruction was therefore harmless in each case because the general defense gave the jury no way to discriminate between the incidents; thus, "'a rational

---

[1] Although Pierce arguably invited the error by agreeing that no such instruction was necessary, review is still appropriate as a matter of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996).

[2] State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988).

[3] 115 Wn.2d 60, 65, 794 P.2d 850 (1990).

[4] 57 Wn. App. 134, 787 P.2d 566 (1990).

[5] 143 Wn. App. 315, 177 P.3d 209 (2008).

[6] Camarillo,115 Wn.2d at 66-68; Allen, 57 Wn. App. 136; Bobenhouse, 143 Wn. App. at 326.

juror believing one of the incidents actually occurred would necessarily believe that the others occurred as well.'"[7] Accordingly, the jury had either to believe the victim and convict, or to believe the defendant and acquit.[8] There was "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.'"[9]

The State contends the same is true here because B.L. described one incident and simply stated the same thing happened a total of three or four times so there was no way for some jurors to predicate guilt on one act while other jurors based it on another.

But Pierce's defense was not one of general denial. He contended he accidentally touched B.L. on one occasion when he was asleep and that she was manipulated to say he had touched her more than once. He presented expert testimony to support the sleep-touching theory. He also presented evidence that B.L. was subject to influence by her father and sisters who hate him. B.L. testified that one or both of her sisters encouraged her to tell "a bad lie" about Pierce.[10] Further, B.L.'s testimony was to some extent undermined by the child hearsay witnesses, to whom B.L. said the abuse happened once, twice, a few times, and not at all.

It is thus possible that some jurors believed the first time Pierce touched B.L.

---

[7] Camarillo, 115 Wn.2d at 70 (quoting State v. Camarillo, 54 Wn. App. 821, 828, 776 P.2d 176 (1989)).

[8] See Allen, 57 Wn. App. at 139.

[9] Id. (quoting Kitchen, 110 Wn.2d at 411).

[10] Report of Proceedings (Mar. 20, 2006) at 1126-27. B.L. testified she never told lies about Pierce.

really was an accident but that he did so purposefully on subsequent occasions, while others believed the touching occurred intentionally once but that B.L. was manipulated to report it happened more than that. Thus, a rational juror who believed one of the incidents occurred would not necessarily believe that the others occurred as well.[11] The error was not harmless.

Through counsel and pro se, Pierce raises numerous additional grounds for review. Because we conclude the failure to properly instruct the jury violated Pierce's right to a unanimous jury verdict and requires a new trial, it is unnecessary to reach the remaining issues and we decline to do so.

Reversed and remanded for a new trial.

Ellington, J.

WE CONCUR:

Leach, A.C.J.

Cox, J.

[11] It is no answer that the jury convicted Pierce of two counts. While this might suggest jurors were not persuaded by Pierce's defense, at least in part, there is still no way to know. Further, in the absence of an instruction that the jury must find separate and distinct acts for convictions on each count, the two convictions raise the possibility that Pierce was exposed to double jeopardy. See State v. Borsheim, 140 Wn. App. 357, 367-68, 165 P.3d 417 (2007) (to guard against a double jeopardy violation in sexual abuse cases where multiple identical counts are alleged to have occurred within the same charging period, the court must explicitly instruct the jury it must find separate and distinct acts for convictions on each count or otherwise make this requirement manifestly apparent).