

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 64853-5-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
ROY ORTIZ ALANIZ,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: July 25, 2011
_____	)	

Becker, J. — Roy Alaniz was charged with and convicted of two counts of third degree child molestation. The victim, his stepdaughter JW, testified that there were three separate acts of molestation. The court did not instruct the jury to reach a unanimous decision that a particular act occurred supporting conviction on each count. We affirm because the State elected which of those incidents supported each count.

JW was 14 years old when Alaniz allegedly molested her in December of 2008. Alaniz had been married to JW's mother for five years at the time.

According to JW's testimony at trial, in late December 2008, Alaniz disciplined JW by taking away her cell phone. A few days later, JW went down to the basement where Alaniz was using the family computer to ask for her phone back. Alaniz told her, "Only if you'll let me see butt." When she treated

his demand as a joke, he pulled her pants down, bent her over the computer chair, unzipped his zipper, and pressed some part of himself between her buttocks. She eventually freed herself, pulled up her pants, and ran upstairs.

Another incident occurred later that December. JW went to the basement to ask for her phone back. Alaniz again pulled her pants down, bent her over the computer chair, and pressed his penis between her buttocks. He asked her for lotion "to make it more slippery." She could not find any. This time she felt that her "butt got wet and stuff like that." Alaniz took a towel from the laundry pile and "wiped it up." Alaniz told her that would be the last time it happened and asked her not to tell anyone about it.

JW testified that a similar incident occurred at some point between the other two incidents that was "just the same thing as the first one."

A disclosure by JW to a friend on January 1, 2009, led to police involvement. The State charged Alaniz with two counts of third degree child molestation.

Alaniz testified that his house was so full of relatives and neighborhood children that there was no chance to be alone with JW for more than a minute. He denied ever touching JW in a sexual manner. In closing, he argued that he had not had the opportunity to commit the alleged acts and that JW made up the incidents in rebellion against his discipline. The jury convicted Alaniz on both counts.

On appeal, Alaniz argues that the absence of a Petrich unanimity

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instruction was reversible error because the evidence supported three acts of

molestation and he was charged with only two counts. See State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984), modified by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988).

To convict a defendant in Washington, a unanimous jury must conclude that the criminal act charged in the information has been committed. “When the prosecution presents evidence of several acts that could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act.” Kitchen, 110 Wn.2d at 409.

The trial court did not give a unanimity instruction. However, the State elected the two events it was relying upon for conviction on the two counts.

So what I’m asking you to consider are two particular events. The first time that she described for us that she went down and got the phone and he touched her, the show me butt, you can have your phone, but show me butt; or the second time, excuse me, and the second time, looking for the lotion and feeling her buttocks get wet.

Those are two separate incidents. Those reflect each of count one and count two, and you have to decide them separately. You have to agree unanimously separately.

Alaniz argues that these statements in closing argument were insufficient to constitute an election under State v. Kier, 164 Wn.2d 798, 813, 194 P.3d 212 (2008). Kier is a double jeopardy case, not a Petrich case. The election by the prosecutor satisfied the well-developed Petrich case law.

Affirmed.

Becker, J.

WE CONCUR:

Dyer, C. S.

Leach, A. C. J.