THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 65766-6-I
Respondent,	)	DIVISION ONE
v.	)	
ALLEN JAMES ROOT,	)	UNPUBLISHED
Appellant.	)	FILED: January 23, 2012

COX, J. — To ensure jury unanimity in a case where multiple acts could constitute a charged crime, "the State must tell the jury which act to rely on in its deliberations or the [trial] court must instruct the jury to agree on a specific criminal act."[1] Because the prosecutor in this case told the jury which acts to rely on for each of three identical charges, and because the information, evidence, and instructions reinforced that election, unanimity was ensured. We therefore affirm.

Based on allegations that Allen Root raped A.M. on three separate occasions, the State charged him with three counts of Rape of a Child in the First Degree. The counts in the amended information were identically worded and included the phrase "in an act separate and distinct from [the other counts]."

[1] State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988).

The trial court read the information to the jury at the outset of voir dire.

At trial, A.M. testified to only three incidents. The first occurred when she was about four. Root was babysitting her and her brothers and she was wearing a favorite yellow outfit. Root took her to her brother's room, had her get on her knees, and forced her to perform fellatio. She did not remember whether he ejaculated. A few months later, Root had A.M. do the same thing in her parents' bedroom. A.M. was "pretty sure" he ejaculated. The last incident occurred at Root's home when she was about five. She was staying at the Roots because her parents had gone to Las Vegas for a vacation. Root again had her perform fellatio on her knees. He ejaculated into a towel.

The trial court gave the jury three identical "to convict" instructions for the three counts of rape. These instructions did not mention any dates or other facts that might link each of them to one of the three incidents. But in closing argument, the prosecutor stated:

> **Count I**, the easiest way to think of that is the yellow outfit. You heard her description of the oral sex that takes place when she is wearing that yellow outfit. . . . As we've heard in the testimony, this occurred when she was four years old. . . .She told you in detail on that first occasion when she was four years old that she comes home after preschool. . . . She is giving him oral sex. That's the sexual intercourse in **Count I** that we're talking about.
> . . .
> **Count II**, you can think of as the parents' bedroom. And she said this happened a few months later. And similar, age four years old, within that time period. . . . She described what happened. He brought her back to the bedroom again, had her get down on her knees and again perform oral sex. In both cases, **the first count and second count**, she was able to describe what he was wearing, **and the first one** she described what she was wearing as well.
> . . .

> **The third instance** is at the Root home. Again, around five years old, was her testimony. . . . [She] describes the home. She describes where they were and this Vegas trip. . . . The defense brought on Forrest Root with regard to **Count III** and only **Count III**. "She never stayed at our home." Well, that's incredible.[2]

The jury found Root guilty on counts 1 and 3, and not guilty on count 2. Root appeals.

DECISION

Criminal defendants in Washington have a right to a unanimous jury verdict.[3] When the State presents evidence of multiple acts that could constitute a crime charged, "the State must tell the jury which act to rely on in its deliberations or the [trial] court must instruct the jury to agree on a specific criminal act."[4] Failure to elect the act, coupled with the court's failure to instruct the jury on unanimity, is constitutional error.[5] "The error stems from the 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."[6]

For the first time on appeal, Root contends an instruction or election was required in this case because the three identical to-convict instructions did not identify any specific incidents, and any of the three acts identified by A.M. could constitute the crime charged in any of the counts. Unanimity was not ensured,

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[2] Report of Proceedings (March 23, 2010) at 169-76 (emphasis added).

[3] Wash. Const. art. I, § 21; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994).

[4] Kitchen, 110 Wn.2d at 409; State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

[5] Kitchen, 110 Wn.2d at 411.

[6] Id.

he argues, because the court did not give a "Petrich" unanimity instruction[7] and the State did not make a proper election. The State does not dispute that the rule set forth in Petrich and Kitchen applies in this case. It argues, however, that Root cannot raise a unanimity claim for the first time on appeal because the alleged error, while constitutional, is not "manifest."[8] We disagree. Our courts have repeatedly held that a Petrich error is manifest constitutional error that can be raised for the first time on appeal.[9] The State's reliance on decisions addressing a different type of instructional error are inapposite.[10]

Turning to the merits, we note initially that Root misstates the requirements for jury unanimity. He states that "[t]o ensure jury unanimity on any count, either (1) the court had to give a Petrich instruction, or (2) the prosecutor had to elect an act to underlie that count, *and the court had to give some version of WPIC 4.26*."[11] Root cites no authority, nor are we aware of any, supporting

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[7] WPIC 4.25 sets forth the standard Petrich instruction as follows: The [State] [County] [City] alleges that the defendant committed acts of (identify crime) on multiple occasions. To convict the defendant [on any count] of (identify crime), one particular act of (identify crime) must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of (identify crime).

[8] RAP 2.5(a)(3).

[9] State v. Bobenhouse, 166 Wn.2d 881, 892 n.4, 214 P.3d 907 (2009); State v. O'Hara, 167 Wn.2d 91, 103, 217 P.3d 756 (2009); State v. Furseth 156 Wn. App. 516, 519 n.3, 233 P.3d 902, review denied, 170 Wn.2d 1007 (2010); State v. Kiser, 87 Wn. App. 126, 129, 940 P.2d 308 (1997); State v. Fiallo-Lopez, 78 Wn. App. 717, 725, 899 P.2d 1294 (1995); see Kitchen, 110 Wn.2d at 411 (unanimity error is presumed prejudicial).

[10] See, e.g., State v. Nunez, 160 Wn. App. 150, 248 P.3d 103 (2011).

[11] Brief of Appellant at 12. WPIC 4.26 states:

JURY UNANIMITY–SEVERAL DISTINCT CRIMINAL ACTS—ELECTION TO SPECIFY A PARTICULAR ACT

the emphasized portion of this statement. Root correctly points out that an instruction apparently based on WPIC 4.26 was mentioned in State v. Corbett, 158 Wn. App. 576, 592, 242 P.3d 52 (2010). But the court did not hold that its use is required to ensure unanimity. The rule remains that unanimity is ensured if either a Petrich instruction is given or the State tells the jury which act or acts to rely on for each count.[12]

In this case, the jury was presented with evidence of three acts of rape, any one of which could have constituted the crime charged in the three identical counts. To ensure unanimity, the State needed to either offer a Petrich instruction or tell the jury which acts applied to which counts.[13] The State chose the latter option, telling the jury in closing that count 1 involved the yellow dress incident, count 2 involved the incident in A.M.'s parents' bedroom, and count 3 involved the incident that happened at the Root home.

Root contends the prosecutor's election did not ensure unanimity because no instruction told the jury it was bound by the election during closing

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In alleging that the defendant committed (name of crime), the [State] [County] [City] relies upon evidence regarding a single act constituting [each count of] the alleged crime. To convict the defendant [on any count], you must unanimously agree that this specific act was proved.

[12] Kitchen, 110 Wn.2d at 409.

[13] Had the jury returned three guilty verdicts, a failure to ensure unanimity would be harmless since it would be clear that all the jurors found Root guilty of all the acts presented, even if some jurors had different acts in mind while convicting on particular counts. See State v. Holland, 77 Wn. App. 420, 425, 891 P.2d 49 (1995); compare State v. Vander Houwen, 163 Wn.2d 25, 39, 177 P.3d 93 (2008) (error lies in the inability of the State to assure us that 12 jurors who acquitted Vander Houwen of most charges agreed that the same underlying criminal act, proved beyond a reasonable doubt, attached to the two counts of conviction).

argument, and because the following instruction actually precluded them from considering the argument:

> The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.[14]

We reject Root's contention for several reasons.

First, nothing in Petrich or Kitchen requires that elections be made in, or accompanied by, an instruction. If anything, Kitchen contemplates a verbal election when it states that "the State must *tell* the jury which act to rely on in its deliberations. . . ."[15] Second, under the facts in this case, we do not think a reasonable juror would read the instruction quoted above as precluding their consideration of remarks linking acts to counts. To do so, a juror would have to conclude that the remarks were "not supported by the evidence or the law in [the] instructions." This is not a reasonable conclusion, especially in light of the fact that "the ordinary juror would understand that when two counts charge the very same type of crime, each count requires proof of a different act."[16]

Finally, Root's argument overlooks the fact that we may consider other aspects of the record, including the evidence, information, and instructions, in determining whether an election ensured unanimity.[17] The evidence established

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[14] Instruction No. 1, Clerk's Papers at 116.

[15] Kitchen, 110 Wn.2d at 409.

[16] State v. Ellis, 71 Wn. App. 400, 406, 859 P.2d 632 (1993).

[17] State v. Bland, 71 Wn. App. 345, 351-52, 860 P.2d 1046 (1993); cf. State v. Corbett, 158 Wn. App. 576, 593, 242 P.3d 52 (2010) (considering

three distinct acts of rape occurring on three separate dates at three separate locations. The information, which was read during voir dire, and all three to-convict instructions stated that each count was based on "an act separate and distinct from [the other counts]." Other instructions stated:

> A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.[18]
>
> Because this is a criminal case, *each of you must agree for you to return a verdict*. When all of you have so agreed, fill in the verdict forms to express your decision.[19]

An ordinary juror considering the instructions, information, and evidence in this case would understand that the jury had to agree on Root's guilt for one act before they could return a verdict on any particular count.[20] Thus, the record here supports and reinforces the prosecutor's election in closing argument.

This fact distinguishes this case from a case cited by Root -- State v. Kier, 164 Wn.2d 798, 813, 194 P.3d 212 (2008). In Kier, the supreme court considered whether assault and robbery convictions should merge because "a reasonable jury" could read the court's instructions as allowing them to base their convictions on the same victim. The State contended the prosecutor

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instructions, evidence and closing arguments, any reasonable jury would have known that it must find separate and distinct acts for each of four guilty verdicts).

[18] Instruction No. 6; Clerk's Papers at 122.

[19] Instruction No. 13; Clerk's Papers at 130 (emphasis added).

[20] As we said in State v. Noel, 51 Wn. App. 436, 440, 753 P.2d 1017, review denied, 111 Wn.2d1003 (1988), "[t]he issue before us . . . is not whether it is possible to interpret [the] instruction . . . to mean one can be convicted without unanimity as to the act proved, but whether the ordinary juror would so interpret it." See also State v. Moultrie, 143 Wn. App. 387, 393-94, 177 P.3d 776 (2008).

remedied the instructional problem by electing different victims for the two counts in closing argument. In concluding that the State had not made "a clear election," the Kier court held that the instructions and evidence both allowed the jury to base its verdicts on the same victim. Here, by contrast, a reasonable jury would not read the instructions as allowing them to convict on a count without agreeing on a particular act for that count.

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Appelwick, J.

Becker, J.