IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 66837-4-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
JEFFRY DAVID SANDVIG,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: July 23, 2012

Spearman, A.C.J. — Following a jury trial, Jeffry Sandvig was convicted of two counts of rape of a child in the second degree, one count of molestation of a child in the second degree, and one count of rape of a child in the third degree. All charges were based on Sandvig's acts toward his girlfriend's daughter, T.W. Sandvig appeals his conviction for rape of a child in the third degree, arguing that he was denied his right to a unanimous jury verdict where the trial court did not give a multiple acts unanimity instruction and the State did not elect the act upon which it relied. The State concedes error but contends it was harmless. We conclude the error was not harmless and, accordingly, reverse Sandvig's conviction for rape of a child in the third degree.

FACTS

Sandvig and T.W.'s mother began a relationship in 1996 and moved in together when T.W. (DOB: 7/13/1993) was three years old. In 2005, when T.W. was 12 years old, Sandvig began having a sexual relationship with her. The incidents as testified to by T.W. at trial are as follows.

During the first incident, Sandvig put T.W.'s hand on his penis, inserted his finger into her vagina, rubbed his penis between her buttocks, and ejaculated on her back. The second incident took place about one week later, when Sandvig had T.W. masturbate him until he ejaculated. On another occasion, when T.W. was 12, Sandvig had her perform fellatio on him and stopped when he saw her mother's car pull up in the driveway. T.W. estimated that when she was 12 to 13, she performed fellatio on Sandvig at least four times, he digitally penetrated her vagina at least five times, and he put his penis between her buttocks and moved it back and forth "a lot" or more than ten times. Verbatim Report of Proceeding (VRP) at 89, 92, 97, 127-28.

When T.W. was 13 or 14 years old, Sandvig attempted to have vaginal intercourse with her on one occasion and anal intercourse with her on another occasion. He achieved slight penetration both times before it became too painful for T.W. At trial, T.W. recalled one occasion of performing fellatio on Sandvig when she was 14. She testified that Sandvig came into her bedroom, climbed on top of her, took her shirt off, and put his penis between her breasts, moving it back and forth. He then put his penis in her mouth and ejaculated on her chest.

The family moved to an apartment when T.W. was 15 years old. On one

occasion when T.W. was 15, Sandvig put his penis between her buttocks, moved his penis back and forth, and ejaculated on her back. On several occasions, also when T.W. was 15, Sandvig used a massager with her. One side of the massager had a ridge on it. The other side had a plate that got hot and cold. Sandvig used the ridge side on his penis. He then either handed the massager to T.W. to use, or used the plate side of the massager on T.W.'s vagina.

Once when T.W. was 16, Sandvig had her come into his bedroom and take her clothes off, after which he digitally penetrated her. He commented that her vagina looked different, so T.W. confessed she had lost her virginity to her boyfriend. In January 2010, in a different incident, Sandvig put his penis between her buttocks, then took her into the bathroom, had her sit on the toilet, and ejaculated on her chest, saying that he had to take a shower so they might as well do it in the bathroom. This was the last incident of sexual contact described by T.W. at trial. In March 2010, when T.W. was still 16, she got into a fight with Sandvig and subsequently disclosed the sexual contact to her mother.

Sandvig was charged by amended information with two counts of rape of a child in the second degree (Counts I and II), one count of molestation of a child in the second degree (Count III), and one count of rape of a child in the third degree (Count IV). Counts I, II, and III are based on acts occurring between July 13, 2005 and July 12, 2007, when T.W. was at least 12 years old but less than 14 years old. Count IV alleges the act occurred between July 13, 2007 and July

12, 2009, when T.W. was at least 14 years old but less than 16 years old.

Although Sandvig proposed jury instructions on unanimity for rape of a child in the second and third degree, he did not object when the court failed to give the latter. Thus, the jury was instructed that it had to agree on a specific act for the second degree counts, but received no such instruction for the third degree count.

The State also elected specific acts for both counts of rape of a child in the second degree and the count of molestation of a child in the second degree, but not for the count of rape of a child in the third degree.[1] Instead, the prosecutor told the jury during closing argument:

> [T.W.] told you multiple things that happened to her when she was fourteen years old, but she also told you about stuff that happened when she was older, 2009, after they moved out of that house into Blu Water Apartments. Remember she talked about the acts, three sexual acts and one that wasn't completed, the one that led to the final blowout.[2] She talked to you about a situation where the defendant came into her room and stuck and penetrated her vagina with his fingers at the Blu Water Apartment. This was in 2009. She is at least fourteen years old but she is less than

[1] During closing argument, the State elected the acts as follows: (1) for Count I, rape of a child in the second degree, the first incident, when Sandvig digitally penetrated T.W.'s vagina, then moved his penis between T.W.'s buttocks until he ejaculated on her back; (2) for Count II, rape of a child in the second degree, the incident when Sandvig had T.W. perform fellatio on him and stopped when he saw Tollefson had come home; and (3) for Count III, molestation of a child in the second degree, the second incident, when Sandvig had T.W. masturbate him until he ejaculated.

[2] The three sexual incidents referred to by the State were: (1) when T.W. was 15, Sandvig put his penis between T.W.'s buttocks, moved his penis back and forth, and ejaculated on her back; (2) when T.W. was 16, Sandvig had her come into his bedroom and take her clothes off, after which he digitally penetrated her and said her vagina looked different; (3) when T.W. was 16, Sandvig put his penis between her buttocks, took her into the bathroom, had her sit on the toilet, and then ejaculated on her chest, saying that he had to take a shower so they might as well do it in the bathroom. RP 133-38. The incident leading to the "final blowout" between Sandvig and T.W. took place in March 2010 when Sandvig laid himself down on T.W.'s bed, saying he was cold and wanted to snuggle. She told him she did not want to and to get off her bed. She grew angry and began yelling at him, which led to a "huge, huge argument." VRP 138-39.

> sixteen, and she told you when that happened.
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> Well, if you look at the acts that also happened when she was fourteen years old when the defendant would make her do certain things, several acts over a period of time like sticking his penis in her mouth and at some point in time coming back down to her breasts and then ejaculating on her chest, she's fourteen years old. There are all these multiple acts happening, and she's telling you that it happened not ten times, not twenty times, not thirty times, more than fifty times.[3] We have separated each count. When she was 14 years old, pick any of the counts that she testified to for you in which she either performed oral sex on him or when he stuck his fingers in her vagina when she was fourteen years old and less than sixteen years old.

VRP at 435-36. The jury convicted Sandvig on all counts. Sandvig was sentenced within the standard range.

DISCUSSION

Sandvig appeals his conviction for rape of a child in the third degree, claiming his constitutional right to jury unanimity was violated because the State did not elect the act it was relying on and the trial court did not instruct the jury it had to unanimously agree on which act supported the charge. The State concedes constitutional error, but contends it was harmless beyond a reasonable doubt. We conclude the error was not harmless beyond a reasonable doubt.

An accused has the right to a unanimous jury. Const. art. 1, § 22; U. S. Const. amend. 6; State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), overruled on other grounds, State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105

[3] Counsel was referencing T.W.'s testimony, in response to the question how many times Sandvig "molested" her, that he had done so "over fifty" times. VRP at 190.

(1988). To protect jury unanimity, where there is evidence of multiple distinct acts but the defendant is charged with one count of criminal conduct, the State must elect which act it will rely on for the conviction, or the court must instruct the jury that it must be unanimous on which act constituted the crime. Petrich, 101 Wn.2d at 571-72. Otherwise there is the possibility that some jurors may have relied on one act and other jurors a different act, "resulting in a lack of unanimity on all of the elements necessary for a valid conviction." Kitchen, 110 Wn.2d at 411. Failure to elect an act or give a unanimity instruction is constitutional error and subject to harmless error analysis. Id. at 403. The error is presumed prejudicial. State v. Coleman, 159 Wn.2d 509, 512, 150 P.3d 1126 (2007). A court will find it harmless only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt. Kitchen, 110 Wn.2d at 405-06. This issue asserts a manifest constitutional error and may be raised for the first time on appeal. State v. Bobenhouse, 166 Wn.2d 881, 912, 214 P.3d 907 (2009).

Rape of a child in the third degree requires the victim to be 14 or 15 years old. RCW 9A.44.079. This crime requires evidence that the defendant had sexual intercourse with the victim. RCW 9A.44.079. Sexual intercourse is defined by RCW 9A.44.010

> (1) "Sexual intercourse" (a) has its ordinary meaning and occurs upon any penetration, however slight, and
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> (b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically

recognized treatment or diagnostic purposes, and

> (c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.[4]

The State contends this case is similar to Bobenhouse, where the court concluded that any error in failing to instruct the jury on unanimity was harmless. In Bobenhouse, the defendant was charged with, among other things, one count of rape of a child in the first degree. Id. at 893. The victim testified about regularly having to perform fellatio on his father and one occasion when his father inserted a finger into his anus. Id. The court observed that each incident was independently capable of constituting rape of a child in the first degree. It noted that Bobenhouse offered only a general denial to the allegations, and consequently the jury had no evidence on which to rationally discriminate between the incidents (i.e., fellatio and digital penetration of the victim's anus). Id. at 895. "Put otherwise, if the jury in Bobenhouse's case reasonably believed that one incident happened, it must have believed each of the incidents

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[4] The trial court's definition of sexual intercourse instructed the jury in substantially similar language, as follows:

> Sexual intercourse means that the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration, however slight, or
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> any penetration of the vagina or anus however slight, by an object, including a body part, when committed on one person by another, whether such persons are of the same or opposite sex except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, or
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> any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

CP at 40.

happened." Id. Therefore, any error was harmless.

This case differs from Bobenhouse. Here, T.W. testified to only one act about which no rational trier of fact could have entertained a reasonable doubt that Sandvig committed rape of a child in the third degree: that he had her perform fellatio on him when she was 14 years old. But T.W. also testified to a number of other sexual acts upon which the jury may have relied to convict Sandvig, but about which a rational trier of fact could have entertained some doubt as to whether they established rape of a child in the third degree beyond a reasonable doubt. T.W. testified that on separate occasions Sandvig attempted vaginal and anal intercourse, achieving slight penetration. But she was equivocal about whether the incidents occurred when she was 13 or 14 years old. T.W. also testified to an incident in which Sandvig digitally penetrated her vagina when she was 16, and to another in which Sandvig used a massager on her vagina when she was 15.

The State argues that the jury could not have relied on T.W.'s testimony that Sandvig digitally penetrated her when she was 16 because the incident occurred outside the time period set forth in the relevant jury instruction. But we note that, below, the State argued to the jury that it could rely on that incident to convict Sandvig. The State also asserts that the jury could not have relied on the incident with the massager because there was no testimony about penetration. But because there was no unanimity instruction to guide the jury's consideration of the multiple acts alleged during the relevant time period, we cannot agree with

this assertion with any degree of certainty. Finally, the State correctly argues that the jury could have relied on the incidents of vaginal and anal penetration in order to convict Sandvig. But in the absence of a unanimity instruction, we cannot be sure whether the jurors were unanimous that either of the incidents occurred when T.W. was 14 years old rather than 13. Unlike in Bobenhouse, here, each of the incidents upon which the jury might have relied was not independently capable of constituting rape of a child in the third degree. Accordingly, we cannot find the failure to elect or give a unanimity instruction was harmless error.

Reversed and remanded.

Spearman, A.C.J.

WE CONCUR:

Dwyer, J.

Ellington, J.