

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Respondent,
Respondent on Review,

v.

SCOTT MICHAEL ASHKINS,

Defendant-Appellant,
Petitioner on Review.

Marion County Circuit
Court No. 10C42610

CA A150038

SC S062468

BRIEF ON THE MERITS OF
RESPONDENT ON REVIEW STATE OF OREGON

Review of the decision of the Court of Appeals
on appeal from a Judgment of the Circuit Court for Marion County,
Honorable ALBIN W. NORBLAD, Judge

Opinion Filed: May 29, 2014
Author of Opinion: Ortega, P. J.
Before: Ortega, Presiding Judge, and Sercombe
and Hadlock, Judges

Continued...

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TABLE OF CONTENTS

INTRODUCTION	1
QUESTION PRESENTED	2
PROPOSED RULE OF LAW	3
FACTUAL BACKGROUND	3
SUMMARY OF ARGUMENT	7
ARGUMENT	8
A. As a general rule, when the state presents evidence of multiple instances of conduct that could support a criminal charge, Article I, section 11, requires that the state elect a particular instance of criminal conduct or that the jury be given a special concurrence instruction.....	8
B. When the evidence of multiple acts does not give rise to a risk of juror confusion or disagreement as to the facts underlying a charge, the rationale for the general rule requiring a special concurrence instruction is not implicated.	14
1. The general concurrence rule fails to address the difficult issues of proof inherent in cases involving generic evidence of frequent, repeated instances of child sexual abuse.	14
2. In addressing how the concurrence rule should apply in such cases, courts have followed three analytical approaches.	18
3. This court should hold that, in multiple-acts cases involving generic evidence of abuse, no special concurrence instruction is necessary or appropriate.	21
C. Because the jurors in this case were not presented with evidence that would have allowed them to differentiate between multiple incidents, defendant was not entitled to a special concurrence instruction.	27
D. Even if the trial court erred by declining to give defendant's requested special concurrence instruction, the error was harmless because no risk of juror confusion or disagreement existed as to the factual basis for the charges.	29

E. The Sixth Amendment does not confer a right to jury concurrency in state criminal cases.	30
CONCLUSION	33

TABLE OF AUTHORITIES

Cases

<i>Commonwealth v. Kirkpatrick</i> , 432 Mass 436, 668 NE 2d 790 (Mass 1996).....	21, 25
<i>Commonwealth v. Sanchez</i> , 423 Mass 591, 670 NE 2d 377 (1996).....	26
<i>Cosio v. State</i> , 353 SW 3d 766 (Tex Crim App 2011)	20
<i>Dixon v. State</i> , 201 SW 3d 731 (Tex Crim App 2006)	30
<i>Johnson v. Louisiana</i> , 406 US 366, 92 S Ct 1635, 32 L Ed 2d 162 (1972)	31
<i>People v. Jones</i> , 51 Cal 3d 34, 792 P2d 643 (Cal 1990)	15, 16, 18
<i>People v. Luna</i> , 204 Cal App 3d 726 (Cal Ct App 1988).....	15
<i>R.L.G. v. State</i> , 712 So 2d 348 (Ala Crim App 1997)	15, 20, 29
<i>Richardson v. United States</i> , 526 US 813, 119 S Ct 1707, 143 L Ed 2d 985 (1999)	30, 31
<i>State v. Arceo</i> , 84 Haw 1, 928 P2d 843 (Haw 1996)	20
<i>State v. Ashkins</i> , 263 Or App 208, 327 P3d 1191 (2014), <i>rev allowed</i> , __ Or __ (Feb 4, 2015)	3
<i>State v. Bobenhouse</i> , 143 Wash App 315, 177 P3d 209 (Wash App 2008).....	30
<i>State v. Boots</i> , 308 Or 371, 780 P2d 725 (1989).....	8, 9, 10, 14, 21, 25

<i>State v. Brown</i> , 310 Or 347, 800 P2d 259 (1990).....	28
<i>State v. Brown</i> , 55 Wash App 738, 780 P2d 880, 885 (Wash Ct App 1989), rev den, 114 Wash 2d 1014, 791 P2d 897 (Wash 1990).....	16
<i>State v. Davis</i> , 336 Or 19, 77 P3d 1111 (2003).....	29
<i>State v. Garcia</i> , 211 Or App 290, 154 P3d 730, rev den, 343 Or 160 (2007)	20, 24, 25
<i>State v. Hale</i> , 335 Or 612, 75 P3d 448 (2003).....	10, 11, 13, 14, 21
<i>State v. Kitchen</i> , 110 Wash 403, 756 P2d 105 (Wash 1988)	20
<i>State v. Lotches</i> , 331 Or 455, 17 P3d 1045 (2000).....	10, 11, 13, 14, 21
<i>State v. Pervish</i> , 202 Or App 442, 123 P3d 285 (2005), rev den, 340 Or 308 (2006)	21, 23, 24
<i>State v. Phillips</i> , 354 Or 598, 317 P3d 236 (2013).....	31
<i>State v. Pipkin</i> , 354 Or 513, 316 P3d 255 (2013).....	9, 10
<i>State v. Sparks</i> , 336 Or 298, 83 P3d 304 (2004).....	10, 13, 31
<i>Thomas v. People</i> , 803 P2d 144 (Colo 1990)	17, 19, 29
<i>United States v. Kim</i> , 196 F3d 1079 (9th Cir 1999).....	32
<i>United States v. Lyons</i> , 472 F3d 1055 (9th Cir 2007).....	32
<i>United States v. Mancuso</i> , 718 F3d 780 (9th Cir 2013).....	31

Constitutional and Statutory Provisions

Or Const, Art I § 11	7, 8, 9, 10, 32
ORS 163.095	10
US Const, Amend VI.....	8, 30, 31, 32
US Const, Amend XIV	31

Other Authorities

Carol A. Beier, <i>Lurching Toward the Light: Alternative Means and Multiple Acts Law in Kansas</i> , 44 Washburn L J 275 (2005).....	18, 22
Charles M. Jones II, <i>Guilty of What? Unanimous Verdicts in Texas: Developing a Test to Distinguish Between Acts Constituting One Offense and Acts Constituting Separate Offenses</i> , 40 Texas Tech L Rev 391 (2008).....	18
<i>Jury Unanimity and the Problem With Specificity: Trying to Understand What Jurors Must Agree About By Examining the Problem of Prosecuting Child Molesters</i> , 91 Texas Tech L Rev 1203 (2013)	18

**BRIEF ON THE MERITS OF
RESPONDENT ON REVIEW, STATE OF OREGON**

INTRODUCTION

The facts of this case present a variation on a common theme in cases involving frequent, repeated acts sexual abuse of a child by a parent or other person with regular access to the child over a prolonged period. Often, the frequency of the abuse and the resulting psychological trauma renders the victim unable to recall or relate with specificity when the abuse occurred, how many times it occurred, or the particular details of any single incident. But the victim is nonetheless able to describe how the defendant repeatedly committed conduct that meets all the elements of a sexual offense. At issue is whether a defendant in such a case is entitled to have the jury instructed that at least 10 of their number must agree on which specific incident underlies their verdict on a particular count.

The state charged defendant with committing sexual offenses against his developmentally delayed stepdaughter over the course of more than three years, starting when she was about 11 years old. Although the victim reported that defendant had repeatedly abused her, she could not provide specific dates or say how many times it happened. Given that lack of detail, the state charged defendant with only a single count of three different crimes: first-degree rape, sodomy, and unlawful sexual penetration, with each charge alleging that the

offense occurred during a three-year period. At trial, the victim testified to repeated acts of sexual abuse, which defendant categorically denied. The trial court declined to give the special concurrence instruction requested by defendant.

This court should affirm the trial court's ruling and hold that a special concurrence instruction in this type of case is neither necessary nor appropriate. No risk of juror confusion exists in such a case, because the evidence provides no basis for the jurors to reach differing conclusions as to individual incidents. Instead, such cases turn entirely on an assessment of whether the abuse occurred at all. Furthermore, to instruct jurors that they must reach agreement on a single, isolated occurrence of abuse would require them to do the impossible, because they have no evidentiary basis to delineate between individual acts of abuse. A special concurrence instruction—which is intended to *prevent* juror confusion—would instead *cause* confusion. Requiring such an instruction would also perversely insulate from prosecution a defendant who commits frequent, repeated acts of abuse precisely *because* he committed the crimes so frequently and with such regularity that the victim cannot distinguish between individual incidents.

QUESTION PRESENTED

When the state has charged only one count of a crime and the evidence at trial indicates that the criminal conduct occurred on more than one occasion, but

that evidence is so nonspecific and undifferentiated that it provides no rational basis for the jury to distinguish between multiple incidents, is a defendant entitled to a special concurrence instruction?

PROPOSED RULE OF LAW

No. In cases where the evidence establishes multiple occurrences of a crime but the evidence is nonspecific and undifferentiated, a trial court need not and should not give a special concurrence instruction, because no genuine risk exists that the jurors will reach differing conclusions as to specific incidents.

FACTUAL BACKGROUND

Defendant married the victim's mother in 2003. In February 2010, when the victim was 15 years old, she told a detective that defendant "had sexual intercourse with her in the bedroom, bathroom, kitchen, and living room of the family home. She also told [the detective] that defendant had vaginally penetrated her eight times with a toy rocket and that she had performed oral sex on him approximately three times." *State v. Ashkins*, 263 Or App 208, 209-10, 327 P3d 1191 (2014), *rev allowed*, ___ Or ___ (Feb 4, 2015). The state charged defendant with one count each of first-degree rape, first-degree sodomy, and second-degree unlawful sexual penetration, all alleging a date range "on or between January 1, 2007 to March 23, 2010." The sexual-penetration charge "specifically identified defendant's finger" as the object used to penetrate the victim. 263 Or App at 210.

The victim testified at trial about defendant's sexual conduct toward her, but did not identify any particular occurrence. The Court of Appeals summarized her testimony as follows:

“The victim testified that defendant touched her in a sexual way ‘more than once’ with his penis and fingers, and that those acts occurred ‘[s]ometimes on the couch[,]’ ‘sometimes on a table[,]’ and ‘[s]ometimes in Mom and [defendant]’s—Mom’s room.’ In response to questioning, the victim provided some detail about those locations—for example, that her autistic brother would be in his room engrossed in video games and that her mom would be at work when defendant would have sex with her on the kitchen table, during which defendant would pull off her clothes, and that she was too afraid to scream or yell for help. She answered affirmatively to the state’s question, ‘When [defendant] would put his penis in your vagina, did he ever use a lubricant?’ The victim testified that when she was 11 or 12 years old, defendant would use his fingers to penetrate her ‘sometimes on the couch.’ She also testified that defendant would remain silent ‘when’ he vaginally penetrated her with a toy rocket. The victim also testified that defendant engaged in sodomy with her, saying that defendant ‘used to grab my hair and put my face on him, on his [penis]’ and that he would have her put her face against his penis ‘most of the time.’”

Id. at 211-12 (brackets in original). The detective to whom the victim reported the abuse also testified at trial. Although the victim told him that defendant had vaginally penetrated her with the toy eight times and had her perform oral sex on him three times, the detective explained that

“‘it was hard to get details from [the victim] and specifics’ and that ‘it was real difficult for her to kind of capture what I was looking for and explain it.’ He noted, however, that ‘victims of continued abuse [when] it happens over a prolonged period of time, that a lot of times, you know, details get mixed up and—and—and everything kind of gets mooshed together.’”

Id. at 212 (brackets in original). Defendant testified at trial and categorically denied that he had ever engaged in sexual conduct with the victim. *Id.* The defense asserted that the victim had made the accusations in the midst of her mother's contentious divorce from defendant. (Tr 334-37).

In closing argument, the prosecutor argued to the jury that defendant "knowingly performed three very distinctive acts. Had sexual intercourse with [the victim]. Had deviate sexual intercourse with [the victim], which you'll hear it means oral sex. And digital penetration of [the victim] with his finger when she was under the age of 14 years old. All these other two happened when she was under the age of 16." (Tr 312). The prosecution and the defense both argued that the case turned on the victim's credibility. (Tr 327, 344).

Defendant asked the trial court to give the following special concurrence instruction:

"[I]n order to reach a lawful guilty verdict as to any count, 10 jurors must agree on what factual occurrence constituted the crime. Thus, in this case, in order to reach a guilty verdict on any count, 10 jurors must agree on which factual occurrence constituted the offense."

263 Or App at 213. The trial court declined to give the instruction,¹ instead instructing the jury "that 10 of the 12 of them must agree that the state established beyond a reasonable doubt the elements indicated in the charges of

¹ The record contains no discussion of jury instructions other than defendant's post-instruction exceptions. (Tr 352-53).

the indictment.” *Id.* After deliberating, the jury returned a unanimous guilty verdict on all charges. (Tr 353-54).

On appeal, defendant raised multiple assignments of error, including a claim that the trial court erred by failing to give a special concurrence instruction. The Court of Appeals, applying this court’s case law as well as its own, rejected defendant’s argument:

“*Lotches*, *Hale*, and *Sparks* teach that, when the record supports the possibility of more than one occurrence of the crime charged, the court must give a jury concurrence instruction if (1) the occurrences differ as to some factual element—such as the identities of the victim or the perpetrator—that is material or, as described in *Boots*, ‘essential to the crime,’ and (2) the instruction is necessary to avoid causing an ‘impermissible danger of jury confusion.’ *Hale*, 335 Or at 627, 75 P3d 448; *see Lotches*, 331 Or at 467-71, 17 P3d 1045. Neither concern is implicated where the evidence suggests that the crime was committed on multiple occasions but does not provide the jurors with enough specifics to distinguish one occasion from another in a way that would allow them to draw conflicting conclusions regarding the crime committed. That is particularly true where factual distinctions between different incidents are not contested.”

263 Or App at 222-23. Because “the factual details suggesting incidents of the crimes in this case were not of the type—such as the identity of the victim or the perpetrator—that have been held to be material facts requiring jury concurrence, and those details did not create an impermissible risk that the jury would be confused in distinguishing one occasion from another or would draw conflicting conclusions regarding the crime committed,” the trial court did not err in refusing to give the instruction “because the instruction did not correctly

state the law as applied to the evidence in this case.” *Id.* at 224. Accordingly, the Court of Appeals affirmed. *Id.*

SUMMARY OF ARGUMENT

Article I, section 11, of the Oregon Constitution requires that jurors reach concurrence as to the material facts that underlie their verdict. When the state presents evidence of more factual occurrences than crimes charged, generally the jurors must concur as to which single incident forms the basis for their verdict. To ensure that concurrence and prevent confusion as to which set of facts forms the basis for the verdict, generally, a trial court should give a special concurrence instruction.

But not all cases involving multiple occurrences of a charged crime present the risk of juror confusion or disagreement. In some cases—in particular, cases involving generic evidence of frequent and repeated incidents of sexual abuse of a child over a prolonged period—no evidentiary basis exists that would permit the jurors to reach differing conclusions about which particular incident forms the basis for the charge. This court should hold that, in such cases, a special concurrence instruction is neither required nor appropriate.

In this case, the evidence of multiple instances of abuse was generic. The victim did not testify about any particular incident, instead testifying only generally about the abuse, and the defendant categorically denied any sexual

impropriety. Therefore, the jurors were not presented with evidence that would have permitted them to differentiate between incidents, and no risk of confusion existed as to the facts underlying the verdict. Accordingly, defendant was not entitled to a special concurrence instruction. But even if this court concludes that the trial court erred by not giving the instruction, the error was harmless, for all of the same reasons.

Finally, defendant's argument that he was entitled to a special concurrence instruction under the Sixth Amendment has no merit. No court has held that the Sixth Amendment right to concurrence applies in state criminal trials.

ARGUMENT

- A. As a general rule, when the state presents evidence of multiple instances of conduct that could support a criminal charge, Article I, section 11, requires that the state elect a particular instance of criminal conduct or that the jury be given a special concurrence instruction.**

The concurrence rule in Oregon is well established. It first appeared in *State v. Boots*, 308 Or 371, 780 P2d 725 (1989), an aggravated murder case in which the state charged the defendant with two counts of aggravated murder for killing one person, with each count alleging a distinct aggravating factor—felony murder and murder to conceal a robbery. 308 Or at 374. In *Boots*, this court held that the jurors had to agree unanimously not only that defendant was guilty of some form of aggravated murder, but also on which of the two

statutory subcategories of aggravated murder the state had proved. Without that concurrence, the jurors would not have to “agree that any factual requirement of aggravated murder has been proved beyond a reasonable doubt.” *Id.* at 375.

This court cautioned, however, that jurors need not concur on all factual details surrounding a crime, “such as whether a gun was a revolver or a pistol and whether it was held in the left or right hand.” *Id.* Rather, the jury need only agree on “facts that the law (or the indictment) has made essential to the crime.”

Id. Although it was not entirely clear from *Boots*, the right to jury concurrence arises from Article I, section 11, of the Oregon Constitution.² *See State v. Pipkin*, 354 Or 513, 518 n 6, 316 P3d 255 (2013) (so stating).

² Article I, section 11, of the Oregon Constitution provides:

“In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor; provided, however, that any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise; provided further, that the existing laws and constitutional provisions relative to criminal prosecutions shall be continued and remain in effect as to all prosecutions for crimes committed before the taking effect of this amendment.”

Since *Boots*, this court has held that jury concurrence is required in two kinds of cases. The first type “occurs when a statute defines one crime but specifies alternative ways in which that crime can be committed.” *State v. Pipkin*, 354 Or at 516. The second category “arises when the indictment charges a single violation of a crime but the evidence permits the jury to find multiple, separate occurrences of that crime.” *Pipkin*, 354 Or at 517; *State v. Hale*, 335 Or 612, 75 P3d 448 (2003); *State v. Lotches*, 331 Or 455, 17 P3d 1045 (2000). The two categories of cases stem from a single concern: that, without a concurrence instruction, the jury will be relieved “from seriously confronting the question whether they agree that any factual requirement [of a crime] has been proved beyond a reasonable doubt.” *Boots*, 308 Or at 375. But jurors need concur only on material elements of a crime. *State v. Sparks*, 336 Or 298, 317, 83 P3d 304 (2004) (distinguishing between “factual detail[s]” and “material element[s]”). Put another way, a special concurrence instruction is required when the evidence gives rise to a possibility that fewer than the requisite number of jurors could agree on the specific set of material facts that underlies a charge.

(...continued)

In aggravated murder cases, the right to jury unanimity is based on an amalgam of Article I, section 11, and the aggravated murder statute, ORS 163.095. *See Pipkin*, 354 Or at 524-25 (noting that *Boots* was based “primarily on [this court’s] interpretation of the aggravated murder statute”).

Two of this court's cases illustrate how that principle applies when the evidence indicates multiple occurrences of a crime: *Lotches* and *Hale*. In *Lotches*, defendant was charged with three counts of aggravated murder on three theories: in the course of a robbery, in the course of attempted kidnapping, and to conceal his identity as the perpetrator of an attempted murder. 331 Or at 461. The problem for the state was that the evidence indicated that the defendant had committed multiple robberies and attempted multiple kidnappings, so there was no way to tell from the jury's general verdict whether the jurors had agreed on a single occurrence of those crimes.

"[B]ecause the aggravated murder instructions that were given did not either limit the jury's consideration to a specified underlying felony or require jury unanimity concerning a choice among alternative felonies, each instruction carried the same danger that this court had condemned in *Boots*." *Id.* at 469.

Thus, there was a "substantial likelihood of jury confusion as to the underlying felony that was applicable to each count," and the trial court should have given a special concurrence instruction. *Id.* at 471.

Hale was similar. As in *Lotches*, the defendant in *Hale* was charged with multiple counts of aggravated murder for killing three people to conceal the crime of third-degree sexual abuse, with the defendant acting as either a principal or as the aider and abettor to his codefendant. 335 Or at 617-18. The charges did not identify the victim or surrounding circumstances of the third-

degree sexual abuse, nor did they specify whether the perpetrator was the defendant or his codefendant:

“[B]ecause the instructions that the jury was given with respect to each of the aggravated murder counts based on the crimes of third-degree sexual abuse and murder did not either limit the jury’s consideration of a specific instance of third-degree sexual abuse or murder, committed by a particular perpetrator against a particular victim, or require jury unanimity concerning a choice among alternative scenarios, each instruction carried an *impermissible danger of jury confusion* as to the crime underlying each count.”

Id. at 627 (emphasis added). To avoid that risk of confusion, the trial court should have given a special concurrence instruction. *Id.* The error was not harmless because, although “the jury could not have been confused with respect to either the victims or the perpetrator of the crime of murder,” the same was not true of the predicate sex-abuse charge. *Id.* at 629-30. Because it was “impossible to determine” from the jury’s general verdict “whether, in convicting defendant of a particular count, each individual juror had in mind the same victim, perpetrator, and surrounding circumstances making up that crime,” this court reversed and remanded the case for a new trial. *Id.*

Those cases demonstrate that, as a general rule, when the state presents evidence of multiple occurrences of a crime, a special concurrence instruction (or an election by the state limiting the jury’s consideration to a particular act) is necessary to avoid the risk that the jurors will be confused as to *which* criminal act forms the basis for their verdict—and the resulting possibility that

fewer than the requisite number of jurors would find that any single culpable act occurred.³

³ Multiple-acts cases should be distinguished from cases in which the evidence supports alternative conclusions as to the means of committing a single act. In cases where the evidence could lead jurors to decide that the defendant committed a single criminal act by different means, no special concurrence instruction is required. *See State v. Sparks*, 336 Or 298, 83 P3d 304 (2004). In *Sparks*, another aggravated murder case, the defendant was charged with aggravated murder for killing a girl in the course of a rape, among other theories of aggravated murder. *Id.* at 302. The evidence at trial could have allowed the jury to conclude that he committed the rape in either, or both, of two potential locations—the bedroom where he initially took the victim, or the railroad embankment where police eventually found her body. On appeal, the defendant argued that the trial court plainly erred by not giving a special concurrence instruction, citing *Lotches* and *Hale*, because “there was a substantial likelihood of jury confusion” as to the “factual circumstances that constituted the elements of each underlying crime.” *Id.* at 313. This court rejected that argument:

“[I]t is not ‘obvious’ that a jury’s failure to agree unanimously on the precise location where [the] defendant may have perpetrated the underlying crimes against a single victim would violate the jury unanimity rule. Nothing about the crimes charged in this case indicates that the precise location of the underlying crimes constitutes a material element of those crimes on which the jury must agree unanimously. In fact, the location of those crimes more logically constitutes a ‘factual detail’ that does not require jury unanimity.”

Id. at 317.

B. When the evidence of multiple acts does not give rise to a risk of juror confusion or disagreement as to the facts underlying a charge, the rationale for the general rule requiring a special concurrence instruction is not implicated.

Citing *Lotches* and *Hale*, defendant argues that he was entitled to a special concurrence instruction because, as in those cases, the state presented evidence of multiple occurrences of the crimes charged. But, as explained further below, the risk of juror confusion that underlies the concurrence rule does not necessarily exist in all cases involving multiple criminal acts. In cases, like this one, where the evidence of multiple acts—although legally sufficient to establish the elements of a crime—is so undifferentiated and nonspecific that it provides no reasonable basis for jurors to reach differing conclusions on individual acts, no risk exists that the requisite number of jurors will fail to agree on any single incident.

1. The general concurrence rule fails to address the difficult issues of proof inherent in cases involving generic evidence of frequent, repeated instances of child sexual abuse.

Although this court's opinions in *Boots*, *Lotches*, and *Hale* set out the general rule requiring special concurrence instructions in multiple-acts cases and the rationale for that rule, they do not answer the question posed in this case: whether a specific concurrence instruction is required when the evidence of multiple acts is so undifferentiated that no risk for juror confusion exists, and the rationale for the rule is therefore not implicated.

Other courts have addressed the problems inherent in applying the general concurrence rule in sexual abuse cases involving frequent, repeated acts of abuse of a child by a parent or other person with regular access to the child over a prolonged period. Such cases differ significantly from cases involving a single, isolated criminal act in that they leave the young victim with “no practical way of recollecting, reconstructing, distinguishing or identifying by specific incidents or dates all or even any such incidents. (Indeed, even a mature victim might understandably be hard pressed to separate particular incidents of repetitive molestations by time, place or circumstance.).” *People v. Jones*, 51 Cal 3d 34, 792 P2d 643, 648 (Cal 1990). The repeated acts of abuse over a prolonged period “are very likely to result in an amalgamation of the crimes in the child’s mind. * * * Where the number of offenses is so numerous even an adult would not be able to count them, a child’s testimony will often be reduced to a general, and customarily abbreviated, recitation of what happened on a continuing basis.” *People v. Luna*, 204 Cal App 3d 726, 748 (Cal Ct App 1988). In cases involving frequent, repeated abuse by a person who lives with a child, “the young child loses any frame of reference in which to compartmentalize the abuse into distinct and separate transactions. Such evidence of abuse has been termed generic evidence.” *R.L.G. v. State*, 712 So 2d 348, 456 (Ala Crim App 1997). Because child molestation is generally committed away from witnesses, and “often leaves no permanent physical

evidence, the state's case rests on the testimony of a victim whose memory may be clouded by a blur of abuse and a desire to forget." *State v. Brown*, 55 Wash App 738, 746-47, 780 P2d 880, 885 (Wash Ct App 1989), *rev den*, 114 Wash 2d 1014, 791 P2d 897 (Wash 1990).

The difficulty in multiple-acts cases involving generic evidence lies in "accommodating all legitimate due process concerns" and a defendant's right to jury concurrence "without immunizing resident child molesters from prosecution." *Jones*, 792 P2d at 645. In *Jones*, the California Supreme Court rejected the defendant's argument that a prosecution based on generic evidence of long-term sexual abuse necessarily violated his state constitutional right to a unanimous jury, explaining:

"In such cases, although the jury may not be able to readily distinguish between the various acts, it is certainly capable of unanimously agreeing that they took place in the number and manner described. * * * [E]ven generic testimony describes a repeated series of *specific*, though indistinguishable, acts of molestation."

792 P2d at 658 (emphasis in original).⁴ Although the testimony in a "resident child molester" case may be legally sufficient to support a conviction, it may

⁴ In *Jones*, the California Supreme Court recognized the due process and other concerns implicated when the state relies on generic evidence. In response to those concerns, the court adopted three-part test to ensure that generic evidence is constitutionally sufficient to support a conviction:

"The victim * * * must describe the kind of act or acts committed with sufficient specificity, both to assure that unlawful conduct indeed has occurred

Footnote continued...

not be specific enough to enable the jury to precisely separate specific incidents of abuse. In other words, the testimony of child victims may, if believed, convince the factfinder that they “were the victims of a number of criminal acts by the defendant, [but] the difficulty of isolating and identifying one or more sexual acts for consideration by the jury is manifest.” *Thomas v. People*, 803 P2d 144, 153 (Colo 1990). Given of that difficulty, “it is simply impossible * * * for jurors to select one from a string of undifferentiated incidents to arrive at a verdict.” Carol A. Beier, *Lurching Toward the Light: Alternative Means*

(...continued)

and to differentiate between the various types of proscribed conduct (*e.g.*, lewd conduct, intercourse, oral copulation or sodomy). Moreover, the victim must describe the number of acts committed with sufficient certainty to support each of the counts alleged in the information or indictment (*e.g.*, ‘twice a month’ or ‘every time we went camping’). Finally, the victim must be able to describe the general time period in which these acts occurred (*e.g.*, ‘the summer before my fourth grade,’ or ‘during each Sunday morning after he came to live with us’), to assure the acts were committed within the applicable limitation period. Additional details regarding the time, place or circumstance of the various assaults may assist in assessing the credibility or substantiality of the victim’s testimony, but are not essential to sustain a conviction.”

Jones, 792 P2d at 655-56. Several other states have adopted that test or something similar. *See, e.g.*, *Commonwealth v. Kirkpatrick*, 668 NE 2d 790 (Mass 1996); *Washington v. Hayes*, 914 P2d 788 (Wash Ct App 1996); *North Dakota v. Vance*, 537 NW 2d 545 (ND 1995). In this case, defendant does not contend that the evidence was legally insufficient to support his conviction.

and *Multiple Acts Law in Kansas*, 44 Washburn L J 275, 324 (2005).⁵ For that reason,

“neither an election nor a unanimity instruction is very helpful where the victim is unable to distinguish between a series of acts, any one of which could constitute the charged offense. In a case consisting of only ‘generic’ evidence of repeated sex acts, it would be impossible for the prosecutor to select a specific act he relies on to prove the charge, or for the jury to unanimously agree the defendant committed the same specific act.”

Jones, 792 P2d at 650.

2. In addressing how the concurrence rule should apply in such cases, courts have followed three analytical approaches.

In attempting to accommodate a defendant’s right to concurrence while recognizing the practical realities of cases involving generic evidence of multiple acts, courts have followed three general approaches. The first is exemplified by the California Supreme Court in *Jones*, which held that a

⁵ In response to the difficulties inherent in prosecuting cases involving repeated incidents of child sexual abuse, some states—California and Texas, among others—have enacted “continuous sexual abuse of a child” (CSA) statutes, which “allow a defendant to be convicted without jury agreement on particular specific acts committed, as long as the requisite number of acts can be agreed on, with other requirements depending on the state.” Note, *Jury Unanimity and the Problem With Specificity: Trying to Understand What Jurors Must Agree About By Examining the Problem of Prosecuting Child Molesters*, 91 Texas Tech L Rev 1203, 1208-17 (2013) (reviewing CSA statutes); see also Charles M. Jones II, *Guilty of What? Unanimous Verdicts in Texas: Developing a Test to Distinguish Between Acts Constituting One Offense and Acts Constituting Separate Offenses*, 40 Texas Tech L Rev 391, 411-413 (2008) (discussing several states’ CSA laws).

“modified unanimity instruction” should be given in cases involving generic evidence of child sexual abuse:

“[W]hen there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of them, the jury should be given a modified unanimity instruction which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim.”

792 P2d at 659.⁶ Several state courts have followed California’s lead, but have concluded that failure to give the modified instruction in a generic evidence case is harmless error. *See Thomas v. People*, 803 P2d at 153-54 (Colorado; error in failing to give modified instruction, but harmless because “[t]he evidence presented no rational basis for some jurors to predicate guilt on one

⁶ California has since adopted a uniform “modified unanimity instruction” for use in multiple-acts cases:

“The People have presented evidence of more than one act to prove that the defendant committed (this/these) offense[s]. You must not find the defendant guilty unless:

1 You all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed [for each offense];

OR

2 You all agree that the People have proved that the defendant committed all the acts alleged to have occurred during this time period [and have proved that the defendant committed at least the number of offenses charged].”

CALJIC 3501 (brackets in original).

act while other jurors based it on another”; under those circumstances, “the jury verdicts reflected the unanimous agreement required by law”); *see also* *R. L. G. v. State*, 712 So 2d at 368 (Alabama; error harmless because the evidence provided “absolutely no rational basis by which the jury could have found that the appellant committed one of the incidents but not the others” and , because the jury returned unanimous guilty verdicts, “the jury in fact unanimously agreed on the act forming the basis for the verdicts”).

Courts taking the second approach have held that trial courts should give a standard special concurrence instruction—*viz.*, that the jurors must reach unanimity concerning the incident or incidents on which they relied in reaching their verdict—in multiple-acts cases involving generic evidence, but that their failure to do so is subject to harmless-error analysis. *See, e.g., Cosio v. State*, 353 SW 3d 766, 777-78 (Tex Crim App 2011); *State v. Arceo*, 84 Haw 1, 12, 928 P2d 843, 854 (Haw 1996); *State v. Kitchen*, 110 Wash 403, 405-06, 756 P2d 105, 106-07 (Wash 1988).

Still other courts—including the Oregon Court of Appeals—have taken a third approach: that, in multiple-acts cases involving undifferentiated evidence, no special concurrence instruction need be given if no genuine risk exists of juror confusion or disagreement as to the acts underlying a charge, because such cases do not implicate the rationale for the concurrence rule. *See State v. Garcia*, 211 Or App 290, 154 P3d 730, *rev den*, 343 Or 160 (2007); *State v.*

Pervish, 202 Or App 442, 123 P3d 285 (2005), *rev den*, 340 Or 308 (2006); *Commonwealth v. Kirkpatrick*, 432 Mass 436, 437, 668 NE 2d 790 (Mass 1996).

3. This court should hold that, in multiple-acts cases involving generic evidence of abuse, no special concurrence instruction is necessary or appropriate.

Of the three approaches outlined above, the third best comports with the rationale underlying Oregon’s concurrence requirement. As noted earlier, *Lotches*, *Hale*, and *Boots* explain that the purpose of the rule is to ensure that the requisite number of jurors agree on the same set of material facts underlying a verdict. Where the evidence is so general that there can be no risk that jurors will reach differing conclusions as to which occurrence forms the basis for the verdict, the rationale for the concurrence rule is not implicated.

Applying the standard special concurrence rule in multiple-acts cases involving generic evidence would not prevent juror confusion, as the concurrence rule is intended to do—instead, it would cause confusion, undermining the very purpose of the concurrence requirement. To require trial courts to give the standard special concurrence instruction in this class of cases would be to assign the jury an impossible task. In such cases, the jury—although presented with legally sufficient evidence to convict—would have no evidentiary basis to differentiate between multiple incidents. To instruct the jurors that they nevertheless must settle on a particular incident could lead them

to believe, incorrectly, that they must acquit because no evidence could allow them to conclude that any individual incident occurred. In this category of cases,

“[r]igid adherence to the elect-or-instruct rule would disable or derail prosecution altogether, removing from the reach of the law those whose depredations were so frequent or so long-term or so aimed at the inarticulate that generic testimony is all that can be marshaled against them.”

Beier, Lurching Toward the Light: Alternative Means and Multiple Acts Law in Kansas, 44 Washburn L J at 324.

Requiring trial courts to give a “modified” special concurrence instruction in this class of cases would serve no apparent purpose. If the evidence is truly generic and provides no basis for juror confusion or disagreement as to which among several nonspecific incidents forms the basis for the verdict, the verdict itself will necessarily reflect that the jury reached the requisite concurrence. In such cases, failure to give a “modified” special concurrence instruction would always be harmless error. Moreover, as with the standard special concurrence instruction, the modified instruction could cause confusion by directing the jurors to consider whether the state has presented evidence to prove individual incidents, when no such evidence exists. Instead, this court should conclude that, in multiple-acts cases involving generic evidence, no special concurrence instruction—standard or modified—should or need be given, because the evidence does not give rise to the possibility of juror

confusion or disagreement as to the specific act that underlies the verdict, and the rationale for the concurrence rule is not implicated.

That is the approach that the Oregon Court of Appeals followed in *State v. Pervish*, a case involving, among other charges, a charge that the defendant promoted prostitution by a woman named Walford. 202 Or App 442. Walford testified that she lived in the defendant's house and "regularly engaged in prostitution while living there"; "[e]very night," she turned her earnings over to the defendant. *Id.* at 446. She "had so many customers that she could not distinctly remember any of them." *Id.* The defendant was convicted and, on appeal, argued that the trial court plainly erred by failing to give a special concurrence instruction that would have required the jurors to reach agreement on a single incident of promoting prostitution. The Court of Appeals rejected that argument, holding that "the rationale for the concurrence requirement is not implicated in these circumstances. The very generality of the evidence pertaining to [the promoting charge involving Walford] ameliorated any risk that members of the jury could have picked different factual incidents in convicting defendant of that charge." *Id.* at 463.⁷

⁷ The Court of Appeals noted that the defendant in *Pervish* did not challenge the sufficiency of the evidence to support the conviction, but recognized that "[i]n some circumstances, generic testimony may be insufficient, as a matter of law, to support a conviction on a specific act and therefore fail to satisfy the due process requirement of proving guilt beyond a

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In another case, the Oregon Court of Appeals recognized that, to instruct the jury that must reach concurrence when the evidence provides no basis to do so would cause confusion rather than alleviating it. In *State v. Garcia*, the defendant was charged with committing several sex offenses against the daughter of his live-in girlfriend, over the course of several years (as well as other crimes). 211 Or App at 292. With respect to that victim, the state charged defendant with two counts of rape, six counts of sodomy, 10 counts of unlawful sexual penetration, and 30 counts of first-degree sex abuse, with each of the counts “consist[ing] of a generic allegation that [the] defendant committed the respective offense at some point when he lived with [the victim’s] family,” over a date range spanning five years. *Id.* at 292-93. At trial, the victim was able to provide only general testimony. She testified that the

“defendant abused her frequently over the four and one-half years that he lived with the family. She testified that the abuse took place both when the family lived in an apartment and after they had moved into her grandmother’s home. In her testimony, [the victim] did not relate detailed accounts of specific occasions of abuse. Instead, in response to the prosecutor’s questions, she attempted to estimate the number of times defendant had touched a particular part of her body, and where in the home in which they were living the abuse took place[.]”

(...continued)

reasonable doubt. *Jackson v. Virginia*, 443 US 307, 99 S Ct 2781, 61 L Ed 2d 560 (1979).” *Pervish*, 202 Or App at 463 n 9. Here, as in *Pervish*, defendant does not challenge the sufficiency of the evidence to support his convictions.

Id. at 293. The defendant argued on appeal that the trial court plainly erred by failing to instruct the jury that it had to agree on a specific incident for each count. *Id.* at 294-95. Applying *Boots* and the cases that followed it, the Court of Appeals concluded that no special concurrence instruction was necessary:

“[A] *Boots* instruction is required only when there is a real possibility of juror confusion with respect to the evidence as it relates to each charge. When the state’s evidence is so general that it simply is not possible that the jurors might have disagreed about specific instances underlying the various charges—because they were not given evidence of specific instances on which they might disagree—it is not error for the court to fail to give a *Boots* instruction.”

Garcia, 211 Or App at 296. Because the victim in *Garcia* testified in only general terms, there was no “plausible reason why a juror might have credited the victim’s generalized testimony with respect to one incident or location versus another[.]” *Id.* at 297. Accordingly, the trial court did not plainly err by failing to give a concurrence instruction.

In cases that provide no basis for differentiating between multiple incidents of abuse, the jury can only believe the victim’s testimony entirely or disbelieve it entirely. In either event, it has reached the requisite concurrence. *See Commonwealth v. Kirkpatrick*, 432 Mass 436, 437, 668 NE 2d 790 (1996) (case involving generic evidence that the defendant abused the child victim “approximately three times a week” for two years; in such a case, “a jury will either believe that a consistent and repetitive pattern of abuse has occurred, of

necessity encompassing a number of discrete acts, or they will disbelieve it. Because, in a case of this kind, a jury is not offered a choice between discrete incidents of abuse to support a single charge,” there is no risk that the jury will fail to reach unanimity on any specific act). *See also Commonwealth v. Sanchez*, 423 Mass 591, 598-601, 670 NE 2d 377, 382-83 (1996) (in case involving similar facts, no special concurrence instruction required because “[t]he critical issue for the jury was whether to believe her testimony that the defendant had raped her repeatedly”; thus, “there was no significant likelihood” that the jury would convict based on “some jurors being satisfied that one or more specific events occurred and others finding the defendant guilty on the basis of different events”).

Of course, those opinions do not bind this court. But they are well-reasoned and persuasive, and therefore helpful to understanding how the concurrence rule should apply in multiple-acts cases involving generic evidence. For all of the reasons discussed above, this court should hold that, in this class of cases, a special concurrence instruction is neither required nor appropriate.

C. Because the jurors in this case were not presented with evidence that would have allowed them to differentiate between multiple incidents, defendant was not entitled to a special concurrence instruction.

Defendant's case was a "generic evidence" case. As the Court of Appeals' factual summary in this case reflects,⁸ the victim's testimony—although legally sufficient to establish the elements of rape, sodomy, and sexual penetration—contained no details differentiating between multiple incidents. The victim testified only about representative incidents, rather than specific ones. For his part, defendant categorically denied having any sexual contact with the victim. The case therefore hinged on the victim's credibility *in toto*: the jury would either believe her when she said that defendant had repeatedly abused her, or it would not. To instruct the jury that it had to agree on a particular incident would have given the jurors an impossible task, creating a risk of confusion rather than alleviating one.

Admittedly, the charge of unlawful sexual penetration presents the most difficulty for the state's argument. The state presented evidence that defendant penetrated the victim with his finger, as well as evidence that he penetrated her with a toy rocket. Although the indictment specified that the charge was for penetration with defendant's finger, the trial court did not so instruct the jury, and the record does not indicate whether the jury was given a copy of the

⁸ See *supra* p 3-4.

indictment in its deliberations. In opening and closing arguments, the prosecutor referred to the charge as penetration with a finger, but during her argument she also referred to evidence that defendant penetrated the victim with the toy. Therefore, it is theoretically possible that some of the jurors may have thought that the charge was based on penetration with the finger, while others believed the charge was based on penetration with the toy, despite the prosecutor having specifically identified the finger as the object in opening and closing argument. *See State v. Brown*, 310 Or 347, 356, 800 P2d 259 (1990) (“[N]either the sufficiency of the evidence nor the completeness of counsel’s arguments concerning that evidence is a substitute for the sufficiency of the instructions.”).

But nothing in the victim’s testimony about defendant penetrating her with his finger versus the object gave the jury a basis to believe the victim as to one but not the other; both were part and parcel of her generalized testimony about a pattern of abuse, with no part more credible than another. The jury would either believe the victim’s account or not—and they believed her, as evidenced by their unanimous guilty verdicts.

D. Even if the trial court erred by declining to give defendant's requested special concurrence instruction, the error was harmless because no risk of juror confusion or disagreement existed as to the factual basis for the charges.

Even if this court were to conclude that a special concurrence instruction is always required in multiple-acts cases, the error is harmless, for all of the reasons discussed above. *See State v. Davis*, 336 Or 19, 32, 77 P3d 1111 (2003) (“Oregon’s constitutional test for affirmance despite error consists of a single inquiry: Is there little likelihood that the particular error affected the verdict?”). Because the evidence presented no rational basis for jurors to differentiate between multiple incidents, the trial court’s failure to give a special concurrence instruction could not have affected the jury’s verdict. *See, e.g., Thomas v. People*, 803 P2d at 153-54 (Colorado; error in failing to give modified instruction, but harmless because “[t]he evidence presented no rational basis for some jurors to predicate guilt on one act while other jurors based it on another”; under those circumstances, “the jury verdicts reflected the unanimous agreement required by law”); *R. L. G. v. State*, 712 So 2d at 368 (Alabama; error harmless because the evidence provided “absolutely no rational basis by which the jury could have found that the appellant committed one of the incidents but not the others” and the jury returned unanimous guilty verdicts, “the jury in fact unanimously agreed on the act forming the basis for the verdicts”) . *See also State v. Bobenhouse*, 143 Wash App 315, 320, 177 P3d

209, 215 (Wash App 2008) (similar, harmless error); and *Dixon v. State*, 201 SW 3d 731, 736 (Tex Crim App 2006).

E. The Sixth Amendment does not confer a right to jury concurrence in state criminal cases.

In addition to his argument that he was entitled to a special concurrence instruction under Oregon law, defendant also argues that he was entitled to a special concurrence instruction under the Sixth Amendment.⁹ But neither this court nor the United States Supreme Court has held that the Sixth Amendment right to jury unanimity applies in state criminal cases. To be sure, the Sixth Amendment requires jury unanimity in federal criminal cases. “[A] jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element.” *Richardson v. United States*, 526 US 813, 821-22, 119 S Ct 1707, 143 L Ed 2d 985 (1999).¹⁰ But, in state criminal

⁹ The Sixth Amendment to the United States Constitution provides:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel in his defense.”

¹⁰ The two decisions of the United States Supreme Court on jury concurrence—*Richardson v. United States* and *Schad v. Arizona*, 501 US 624, 111 S Ct 2491, 115 L Ed 2d 555 (1991) (a plurality opinion on the concurrence issue)—are not a model of analytical clarity. Together, those cases “advance

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trials, the source of the right to a jury trial is not the Sixth Amendment, but the Due Process Clause of the Fourteenth Amendment—and “due process does not require that the States apply the federal jury-trial right with all its gloss.”

Johnson v. Louisiana, 406 US 366, 371, 92 S Ct 1635, 32 L Ed 2d 162 (1972) (Powell, J., concurring); *see also Richardson*, 526 US at 821 (in state criminal cases, “this Court has not held that the Constitution imposes a jury-unanimity requirement”; citing Justice Powell’s concurrence in *Johnson*). *See also State v. Phillips*, 354 Or 598, 608-09, 317 P3d 236 (2013) (“[b]oth Article I, section 11, of the Oregon Constitution and *the Due Process Clause* place limits on the legislature’s ability to define alternative factual means of proving a single element”; emphasis added); *State v. Sparks*, 336 Or at 313 n 13 (federal right to unanimous jury verdict in aggravated murder case is a due process right). In all events, even under the Sixth Amendment analysis, a special unanimity instruction is only required when there is a “genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts.” *United States v. Mancuso*, 718 F3d 780, 792-93 (9th Cir 2013), *quoting United States v. Lyons*,

(...continued)

five constitutional tests [for when concurrence is required], four of which come from *Schad*, and one of which inheres in Justice Kennedy’s dissent in *Richardson*.” Peter Westen & Eric Ow, *Reaching Agreement On When Jurors Must Agree*, New Crim L Rev 153, 167 (2007).

472 F3d 1055, 1068 (9th Cir 2007), *quoting United States v. Kim*, 196 F3d 1079, 1082 (9th Cir 1999). For the reasons already discussed, in a generic evidence case like this one, the evidence provides no basis for jurors to premise their verdicts on different acts, and therefore does not give rise to a “genuine possibility of jury confusion.” Thus, even if this court were to hold that the Sixth Amendment confers a right to jury concurrence in state criminal cases in Oregon, the rationale for the Sixth Amendment jury concurrence requirement is the same rationale that underlies the concurrence requirement of Article I, section 11. Therefore, if this court rejects defendant’s argument under Article I, section 11, it should also do so under the Sixth Amendment.

CONCLUSION

This court should affirm the decision of the Court of Appeals and the judgment of the trial court.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on March 27, 2015, I directed the original Brief on the Merits of Respondent on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Jason Edward Thompson, attorney for appellant, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 8,260 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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