

**DON'T DESPAIR: JURY UNANIMITY
IN SEX CASES AFTER *LAWRENCE***

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I. The Court of Appeals Decisions

In *State v. Gary Lawrence*, 165 N.C. App. 548, 599 S.E.2d 87 (2004), the Court of Appeals unanimously reversed nine of Mr. Lawrence's ten second degree sex offense convictions. To support one count of second degree sex offense, victim C.L. testified to three separate incidents occurring on different days: (1) an act of oral sex while watching a pornographic movie, (2) an act of oral sex after defendant poured wine in her vagina, and (3) an act of digital penetration before a massage. To support five counts of second degree sex offense, victim G.L. testified about six separate incidents of anal or oral sex and testified generically about many other incidents. To support two counts of second degree sex offense, victim S.L. testified to an act of digital penetration, oral sex, and application of a lubricant to her vagina that occurred during a single incident. To support the remaining two counts, the victims C.L. and S.L. described multiple sex acts committed on different dates.

The Court of Appeals ruled that Mr. Lawrence's right under Article I, §24 of the North Carolina Constitution to a unanimous jury verdict was violated because the jury received no guidance from the indictments, jury instructions, and verdict forms which of the multitude of sexual acts supported which charge. The only second degree sex offense conviction upheld related to S.L., as the Court of Appeals ruled that the single incident of three sex acts constituted one of the two charged counts.

The Court noted that several distinct problems were raised by the manner in which these charges were prosecuted. First, the jury was not instructed that generic testimony (victim testifies that so many different incidents occurred that victim cannot pinpoint any specific incident) can only support one conviction. Second, the jury was not instructed that multiple acts occurring within a single incident (such as S.L.'s claim of digital penetration, oral sex, and application of lubricant during the same episode) add up to a single crime. Third, the jury was not instructed, as to the indictments for which more incidents than counts were alleged, to select which incident it was unanimously finding to support a guilty verdict.

In *State v. Markeith Lawrence*, 170 N.C. App. 200, 612 S.E.2d 678 (2005), a divided panel of the Court of Appeals vacated five statutory rape convictions and three taking indecent liberties convictions. As to the five statutory rape counts, the victim testified that she and the defendant engaged in a total of thirty-two acts of sexual intercourse. She specifically described (1) partial penetration when her mother was in the hospital, (2) penetration on a bedroom couch, (3-5) three separate incidents of penetration on the living room couch, (6-21) fifteen separate acts

of sexual intercourse occurring on the living room couch or floor, (22) penetration on the bedroom floor, (23) penetration (the “screwdriver” incident) (24) penetration (the “hairbrush” incident), and (25-26) two separate incidents of penetration after being directed to masturbate. As to the three indecent liberties counts, the victim described (1) the defendant exposing himself after lifting her shirt, (2) moving aside her nightgown and almost penetrating, (3) a single incident in which the defendant masturbated, kissed her while masturbating, and simulated sexual intercourse, (4) defendant putting his hand up her shirt while the two watched pornography, (5-31) the acts of sexual penetration described above, (32-38) the remaining acts of sexual intercourse to bring the total acts of sexual intercourse to thirty-two, (39) penetration with a screwdriver, (40) penetration with a hairbrush followed by fellatio, (41-42) two separate incidents of being directed to masturbate, (43) partial anal penetration, (44) penetration with broom, (45) penetration with cucumber, and (46-69) nearly thirty-two acts of fellatio.

The majority of the Court of Appeals reversed, reasoning that Mr. Lawrence’s state constitutional right to a unanimous jury verdict was violated as the indictments, jury instructions, and verdict forms did not specify any particular incidents which were to form the basis of verdicts. One judge dissented, finding that the jury rested the indecent liberties verdicts on (1) the defendant exposing himself while lifting the victim’s shirt, (2) simulated sexual intercourse, and (3) the defendant masturbating in front of the victim. The judge did not explain how she divined that the verdicts rested on those bases. The judge gave herself an escape hatch, ruling that even if jurors relied on incidents other than those three, it would not have mattered as the law on indecent liberties does not require unanimity on the act constituting the crime. As to the statutory rape counts, the judge determined that the jury relied on (1) partial penetration, (2) penetration on bedroom couch, (3) penetration on living room couch, (4) penetration (the “screwdriver” incident), and (5) penetration on the floor. No indication is given in the opinion as to why those five incidents were selected.

(2) The Supreme Court decisions

In *State v. Markeith Lawrence*, No. 293A05, 2006 N.C. LEXIS 30 (4/7/06), the Supreme Court reversed the Court of Appeals by ruling that the State only presented as many acts as there were charges. The Court described the five counts of statutory rape as (1) partial penetration, (2) penetration on bedroom couch, (3) penetration on living room couch, (4) penetration (the “screwdriver” incident), and (5) penetration on the bedroom floor. The Court determined that the three acts of indecent liberties were (1) the defendant exposing himself after lifting the victim’s shirt, (2) simulated sexual intercourse, and (3) defendant masturbating in front of the victim. Since the Court disregarded all of the remaining testimony, it should come as no surprise that the Court found that there was no risk of a non-unanimous verdict.

It is particularly disturbing that the Supreme Court acknowledged that there might have been a fourth indecent liberties presented to the jury, but stated that if such occurred, it would not change the result in the case. Relying on *State v. Lyons*, 330 N.C. 298, 412 S.E.2d 308 (1991), the Court stated that jurors need not agree on the particular form of misconduct in returning a verdict of indecent liberties. The Court seems to be blatantly saying that they will not involve themselves in unanimity questions in sexual assault on children cases.

In *State v. Gary Lawrence*, No. 457PA04, 2006 N.C. LEXIS 25 (4/7/06), the Supreme Court reversed on the basis of its opinion in *Markeith Lawrence*. The Court thus did not even specify what acts had formed the basis of the convictions.

(3) Unanimity under the United States Constitution

Unanimity is not a requirement of due process under the Fourteenth Amendment. *Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972) (by state statute, unanimous verdicts required in capital cases tried by a jury of twelve or non-capital cases tried by a jury of five, but not non-capital cases tried by a jury of twelve). The return of a non-unanimous verdict does not violate the right to jury trial under the Sixth and Fourteenth Amendments. *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972) (state statute allowed for return of 10-2 verdicts). The Fourteenth Amendment does not require unanimity of theory of offense. *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991) (jury need not specify in first degree murder prosecution whether verdict based on premeditation or felony murder).

In *Schad*, the Supreme Court did leave a few avenues open for argument. First, the Court noted that due process would not permit a conviction under a crime so generic that any combination of jury findings would suffice. The Court gave as an example a crime that could be satisfied by “any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering...” *Id.* at 633, 111 S.Ct. at 2497-2498, 115 L.Ed.2d at 566. The Court cautioned that a crime must be examined to determine whether alternative means establish the offense or whether dissimilar crimes are being lumped into a single offense such that due process requires that each crime be denominated as separate crimes. Second, Justice Scalia suggested in concurrence in *Schad* that due process would never permit “an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday, despite the ‘moral equivalence’ of those two acts.” *Id.* at 651, 111 S.Ct. at 2507, 115 L.Ed.2d at 578.

Our Supreme Court and Court of Appeals have held that crimes like indecent liberties proscribe a single wrong which “is established by a finding of various alternative elements.” *State v. Hartness*, 326 N.C. 561, 566, 391 S.E.2d 177, 180 (1990). A completed rape constitutes not only the crime of rape, but the crime of taking indecent liberties as well. *State v. Etheridge*, 319 N.C. 34, 39, 352 S.E.2d 673, 682 (1987); *State v. Allen*, 92 N.C. App. 168, 174, 374 S.E.2d 119, 122 (1988), *cert. denied*, 324 N.C. 544, 380 S.E.2d 772 (1989). If the State alleged one count of indecent liberties, and then presented evidence that on one occasion the defendant fondled the minor victim and on a separate occasion the defendant engaged in sexual intercourse with the victim, seemingly the risk of a non-unanimous verdict remains. An instruction allowing “the jury to find a defendant guilty if he commits either of two underlying acts, *either of which is in itself a separate offense*, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense.” *State v. Lyons, supra*, 330 N.C. at 302-303, 412 S.E.2d at 308. Similarly, an indecent liberties indictment that produces a single guilty verdict based on the defendant either fondling the minor victim on Tuesday or raping the minor victim on Wednesday would seem to implicate Scalia’s concerns.

(4) The Future of Unanimity Issues in Sex Cases

In both *Lawrence* opinions, the Court of Appeals suggested that unanimity could be insured by the State specifying, at some point in the process, the acts that form the basis of the criminal charges. The State could do so either by indictment, in response to a bill of particulars, through particularized jury instructions, or by specific verdict forms. The Supreme Court did not address the utility of any of these methods, since it determined that no unanimity issues existed in the cases.

Defendants tried after the Court of Appeals issued its *Lawrence* opinions have achieved partial acquittals where the jury instructions and verdict forms specified particular incidents. When facing this type of prosecution, demand specific jury instructions and verdict forms and cite the Sixth and Fourteenth Amendments of the United States Constitution and Article I, §§18, 19, 23, and 24 of the North Carolina Constitution in support of each request.

The issues suggested by *Schad* could be raised by a pre-trial motion to dismiss the indictments. Cite the Sixth and Fourteenth Amendments of the United States Constitution and Article I, §§18, 19, 23, and 24 of the North Carolina Constitution in support of the request. Re-raise the argument at the close of the State's case, close of the defense case, during the jury instruction conference, and following the verdict.