Supreme Court No. 100026-0
Court of Appeals No. 37980-9-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RAMIL AGLES SERRANO,

Petitioner.

PETITION FOR REVIEW

PETER B. TILLER
Attorney for Petitioner
THE TILLER LAW FIRM
118 North Rock Street
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

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A. IDENTITY OF PETITIONER

Petitioner Ramil Serreno, appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review that is designated in part B of this petition.

B. DECISION OF THE COURT OF APPEALS

Serrano seeks review of the unpublished opinion of the Court of Appeals in ***State v. Serrano***, No. 37980-9-III, 2021 WL 2768825, filed July 1, 2021. A copy of the decision is in the Appendix A at pages A-1 through A-9.

C. ISSUES PRESENTED FOR REVIEW

Principles of due process require the State present sufficient evidence to prove each of the elements of a criminal offense beyond a reasonable doubt. Should this Court grant review and hold that the State has failed to sustain its burden of proving guilt beyond a reasonable doubt the Serrano committed first degree rape of a child and first degree child molestation where no physical evidence and no independent witness to the charged offenses were presented, where the case boiled down to S.S.'s word against the petitioner's word, and where S.S.'s testimony was contradictory regarding the critical element of "penetration" required to sustain a conviction for first degree rape of a child? RAP 13.4(b)(1); RAP 13.4(b)(2)[1]?

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[1] (b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:
(1) If the decision of the Court of Appeals is in conflict with a decision of

D. STATEMENT OF THE CASE

1. Procedural history

The State charged Serrano with rape of a child in the first degree and child molestation in the first degree. ***State v. Serrano***, 2021 WL 2768825, at *1. Mr. Serrano was convicted following a bench trial. ***Serrano***, at *1.

2. Trial testimony

Mr. Serrano was charged in Grays Harbor County Superior Court on October 12, 2018, with first degree rape of a child, contrary to RCW 9A.44.073, and first-degree child molestation, contrary to RCW 9A.44.083. CP 1-3. The State alleged that during the period between April 1, 2016, and May 31, 2018, Mr. Serrano had sexual intercourse and sexual contact with S.S. CP 1-3. Mr. Serrano waived his right to a jury trial and the matter proceeded to bench trial. CP 18.

Ramil Serrano met Poung Jo Sem when they were both working at the Quinault Beach Resort and Casino. 2Report of Proceedings (RP) at 190. Poung Sem has a six-year-old son and daughter, S.S., both of whom live with her. 1RP at 91. Her children live in a large, main house and Ms. Serrano and

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the Supreme Court; or
(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

his uncle, Danilo Cambronero, moved into the main house with Ms. Sem and her children and lived with them for about two years. 1RP at 99, 115. A smaller house is also located on the property. 1RP at 98.

Ms. Sem said that the children played with Mr. Serrano and called him uncle. 1RP at 101. The children were left alone with Mr. Serrano when she went to work at the casino on occasions when her schedule and Mr. Serrano's schedules at the casino did not overlap. 1RP at 102.

Ms. Sem said that in April or May 2018 her husband, who was in the Philippines, thought that he was going to get his visa to come to United States, and she told Mr. Serrano that he and his uncle would have to move out of the house. 1RP at 100. Ms. Sem said that Mr. Serrano may have been mad at her for being asked to move out of the house. 1RP at 103. Later it developed that her husband could not get his visa. 1RP at 100. Ms. Sem said that after Mr. Serrano moved out, she told him that he owed her rent. 1RP at 107.

In court, S.S. testified that Mr. Serrano was alone with her in her mother's bedroom watching TV and he told her take off her clothes and that he took off his clothes. 1RP at 48-49. S.S. said that Mr. Serrano "put his private in my private," but also stated that he "put his private on my private" and "[o]n my skin." 1RP at 48, 50, 51, 55-56.

Chhrick Sumalabe, Ms. Sem's sister, stated that S.S. made a disclosure of abuse to her. 1RP at 82, 83. Ms. Sumalabe told her sister, Ms.

Sem, about the disclosure, and ultimately contacted Aberdeen Police Department. 1RP at 83-84. Ms. Sem stated that Ms. Sumalabe told her that S.S. said that she was abused by Mr. Serrano and that she needed to file a police report about the alleged abuse. 1RP at 104.

Mr. Serrano was taken into custody on October 19, 2018. 1RP at 120, 125-28. Aberdeen police Detective Jeffrey Weiss initially questioned Mr. Serrano after he was arrest, and he denied molesting S.S. or touching her inappropriately. 1RP at 131. Police questioned him again the following morning. 1RP at 131-33. Mr. Serrano initially denied molesting S.S., and after about 45 minutes he started crying and said that he and S.S. wrestled on the bed and that S.S. would pull down his pajama pants, exposing him, and that S.S. wore thin pajama bottoms and that when she was on top of him, his penis was against her vagina. 1RP at 131-32, 133-34. The recorded interviews were played to the court. 1RP at 135-37. Exhibit 3.

Lisa Wahl, a nurse at Providence St. Peter Hospital Sexual Assault Clinic and Child Maltreatment Center, evaluated S.S. on September 27, 2018. 1RP at 144, 153. Ms. Wahl stated that during the examination, S.S. told her that "she was in her house when over ten times put his penis in her vagina, causing her pain when he tried to, what she said, push it in." 1RP at 155, 156. The recorded interview with S.S. was played to the court. 1RP at 158, 2RP at 173. Exhibit 4.

Ms. Wahl stated that the findings of a genital exam of S.S. were

normal. 1RP at 160. Following a blood draw, S.S. tested positive for herpes simplex virus 1, which Ms. Wahl stated was not diagnostic of sexual abuse, but could be the result of skin-to-skin contact. 1RP at 161-62.

Mr. Serrano stated that the grandparents took care of the children when Ms. Sem was not there. 2RP at 191. He stated that the children did not have internet access at the grandparent's house and that they would come back to the main house to use internet and that he would also cook for the children when Ms. Sem was at work. 2RP at 192. He stated that he would tell Ms. Sem when the children came from the grandparents to the main house. 2RP at 192.

Mr. Serrano testified that the children were horsing around on the top of the bed with him while he was playing "single poker" on his cell phone, and the younger boy jumped on him and then S.S. jumped on him. 2RP at 193. Mr. Serrano said that they pulled down his thermal underwear while playing. 2RP at 193. He was wearing boxers underneath his thermal underwear. 2RP at 194. He said that S.S. told her "It was bad" for her to do that. 2RP at 194. Mr. Serrano denied that S.S. rubbed her vaginal area against him, denied that he touched S.S. with his penis, and he denied having sexual contact with her. 2RP at 194.

Mr. Serrano said that he and Ms. Sem broke up because her husband was expected to arrive from Cambodia, and she asked him to move out of the house. 2RP at 195. He denied that there was a disagreement but said that

Ms. Sem believed that he still owed her rent and stated that a second problem developed when Ms. Sem refused to give him a set of license plates that were mailed to her house, and he went to the Aberdeen police over the matter. 2RP at 194-95.

Lois Pacheco dated Mr. Serrano for about seven years, and they lived together during that time. 2RP at 177. She continued to see Mr. Serrano three to four times a week after they broke up. 2RP at 177-78. Ms. Pacheco's license plates had been mailed to Ms. Sem's address when she got her car. 2RP at 178. Mr. Serrano sent messages to Ms. Pacheco that Ms. Sem was demanding money from him and that she was holding the license to Ms. Pacheco's car as "hostage" until he paid her the money that she said he owed her. 2RP at 178. Ms. Pacheco said that they had to contact the Aberdeen police to retrieve her license plates from Ms. Sem. 2RP at 178.

Ms. Pacheco saw Mr. Serrano in public with S.S. and testified that S.S. was "hopping and skipping and they were laughing, and they were all smiles." 2RP at 180.

The trial court found Mr. Serrano guilty of the offenses as charged. 2RP at 212-16.

At sentencing, the court imposed a standard range sentence of 160 months to life for Count 1, and 89 months to life for Count 2, to be served concurrently. 2RP at 212-16; CP 74.

3. Direct appeal

Serrano appealed his convictions and sentence arguing that there was insufficient evidence to find him guilty of either count. ***Serrano***, at *1. He also challenged the imposition of interest on non-legal financial obligations. By unpublished opinion filed July 1, 2021, the Court of Appeals, Division III, affirmed the convictions. See ***Serrano***, *1.

Serrano now petitions this Court for discretionary review pursuant to RAP 13.4(b).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations that govern the decision to grant review are set forth in RAP 13.4(b). Petitioner submits that this Court should accept review of these issues because the decision of the Court of Appeals is in conflict with other decisions of this Court and the Court of Appeals (RAP 13.4(b)(1) and (2)).

1. THIS COURT SHOULD ACCEPT REVIEW BECAUSE THE ALLEGED VICTIM'S TESTIMONY WAS HOPELESSLY INCONSISTENT REGARDING THE CRITIAL ELEMENT OF PENETRATION IN COUNT ONE, AND WHERE THE EVIDENCE CONSISTED ALMOST ENTIRELY OF THE PETITIONER'S WORD AGAINST THE WORD OF THE ALLEGED VICTIM

The alleged victim S.S.'s contradictions during her testimony are so pronounced, extreme, and confusing that a rational finder of fact could not have found beyond a reasonable doubt that Mr. Serrano committed rape or molestation. In ***State v. Alexander***, 64 Wn. App. 147, 822 P.2d 1250 (1992),

Division One of this court overturned multiple child rape convictions, in part because of extreme inconsistencies in the child victim's testimony at trial. ***Alexander***, 64 Wn.App. at 157–58. The Court also held that that the victim's testimony was impermissibly bolstered, the prosecutor's questioning elicited impermissible evidence that the defendant was the abuser, and the prosecutor's attempts to repeatedly instill inadmissible evidence in the juror's minds amounted to misconduct. *Id.* at 153–56. The court reasoned that "[w]e cannot conclude that a rational jury would have returned the same verdict had ... [the] bolster[ed] testimony and the prosecutor's improper remarks been properly excluded." *Id.* at 158.

The ***Alexander*** court held that because of the "extreme" inconsistencies in the victim's testimony coupled with other errors, the evidence was "too confused" to allow the jury to find the defendant guilty. ***Alexander,*** 64 Wn.App. at 158.

Here, S.S.'s testimony was inconsistent and extremely contradictory. In particular, the testimony supporting the required element of penetration in Count 1 was extraordinarily inconsistent. Lisa Wahl testified that during the SANE evaluation that S.S disclosed vaginal penetration by Mr. Serrano, and said that it had happened over ten times, that it caused her pain and that it felt "weird." 1RP at 153, 155-56. But Ms. Wahl said that a genital exam of S.S. showed "[n]ormal findings." 1RP at 160. S.S was tested and was positive for herpes simplex virus 1 which Ms. Wahl said was a "nonspecific finding" and that it "does not state

diagnostic of sexual abuse." 1RP at 161.

S.S.'s testimony was inconsistent to the point of unreliability, which was one of the issues addressed in ***Alexander***. Initially, it should be noted that the interpreters and court had chronic difficulty in hearing and understanding S.S. 1RP at 34, 38, 48, 56, 58, 59, 64, 65, 67, 69. Throughout her testimony, S.S. was at times barely audible, and trial court judge repeatedly stopped S.S.'s testimony to say that he could not hear S.S. and that she needed to speak more clearly and slowly. 1RP at 37, 45, 48-49, 58,59, 63.

The quality of S.S.'s testimony is especially relevant because there was no clear testimony regarding the required element of penetration. When describing what appeared to be the same incident, S.S.'s testimony was wildly inconsistent, stating variously at times that he started to put his "private" "in" her "private", that he put his "private" "in" her "private," and also testified that he started to put his "private" was "on" her private," that he put his "private" "on" her "private," and "on my skin."

S.S. testified that Mr. Serrano would tell her to take her clothes off and that he would take off his clothes. 1RP at 48. She said that "[h]e would like put his private in my private." 1RP at 48. The prosecutor asked S.S. to say it louder and the trial court judge then stated:

> Counsel, the issue is I can't even hear what she's saying and I'm the fact-finder. And I can't have you repeating her answer because that's most certainly leading and that's going to create a huge issue on appeal, especially as to the most important relevant questions.

1RP at 48-49.

The court said that S.S. would have to clearly pronounce her words and keep her volume up. 1RP at 49.

The court told S.S. that she was in "a safe place" and that "nothing is going to happen to you at all." 1RP at 50. The prosecution then resumed:

> Q: Okay, so if we could go back a little bit. So, you were in your mom's room.
> A: Yeah.
> Q: Okay. And you are watching TV. And if you could tell us-so after-his clothes-he would take his clothes off and you-he told you to take your clothes off. And then what would happen?
> A: He started to put his private on my private.
>
> 1RP at 50.

The interpreter then stated, "interpreter didn't understand," and the court stated that he could not understand either. S.S. was asked to speak up by the prosecutor and said, "can you say it again." S.S. said:

> A: He started to put his private on my private.
> Q: Okay. And when you say private, what do you mean? What body part are you talking about?
> A: Like . . .
> Q: On yourself, so when you say your private, what part is that?
> A: Right here.
> Q: Okay, so I see that you're gesturing with your hands to your pelvic vaginal area?
> A: Yeah.
> Q: Okay. And when you say that he put his private on your private, what do you mean about his private? What area is that?
> A: Like-like in.
> Q: Okay. I mean what-what body part? What's it used for?
> A: Like to-
>
> 1RP at 51.

The court reporter then made a clarifying interruption and defense counsel said that they could not hear S.S. 1RP at 51. The prosecutor continued:

> Q: So when you say—when you say it was his private, what area on the body is his private?
> A: For clothes.
> Q: For clothes. What do you mean?
> A: Like . . .
> Q: Like can you show me on yourself like where his private is, too?
> A: (Indicating.)
> Q: So you're again gesturing to that same area. Okay. And was-was that-did he actually touch your body with his private?
> A: Yeah.
> Q: And did he say anything when he was doing this?
> A: No.
>
> 1RP at 51-52.

S.S.'s testimony at first was that he put his "private" "in" her "private," but when asked to recount what happened in her mother's room, said that he "started" to put his "private" "on" her "private." 1RP at 50. When asked to speak louder, she said the same thing: that she "started" to put his private on her private. 1RP at 51. After another interruption, S.S. said that while in her mother's room with Mr. Serrano, he was touching her with "[h]is private." 1RP at 54. When asked what she meant by "private," S.S. initially said, "I forgot," and then was told by the court that there where "are no bad words," and that she would not get in trouble. 1RP at 54-55. The prosecutor then asked if there was another word for the body part, and S.S. shook her head. 1RP at 55. The prosecutor attempted by way of clarifying questions to get S.S. to specify where Mr. Serrano put his "private," and S.S. again alternatively said that he put his "private" "on" her

"private" and also used the word "in":

> Q: So—so what's another word for that body part? Do you know another word or no?
> A: (Shakes head.)
> Q: No? Where – like where on his body is that? Can you point to your body to show me where that would be?
> A: (Indicating).
> Q: So, you're pointing to this area here?
> A: Yeah.
> Q: Yeah. Okay. Make sure you're saying yes and then we can understand you. Okay.
> And then what-what did he do with his private?
> A: He put it on my private.
> Q: Okay. And to-when you say he put it on your private, what do you mean?
> A: Like in.
> Q: In. Okay. And was that on your clothes, under your clothes, something else?
> A: On my skin.
> Q: Make sure you speak up. You can move the microphone closer if you need to. On your skin?
> A: (Nods head.)

1RP at 55-56.

S.S.'s testimony is confused and contradictory. She first said that he put his private on her private, and then when asked what she meant, said, "like in," and then said it was "on her skin." 1RP at 56.

The Court found that her use of the terms "in" and "on" "may well have been accurate and coincides with the trial court convicting Serrano of both child rape and child molestation." ***Serrano***, at *5. Her testimony, however, was unquestionably elicited to describe a single, specific incident (1RP at 151), which was seemingly overlooked by the appellate court on review.

In addition to the contradictory, unclear, confusing testimony, S.S. did not testify to any details that would be expected in an allegation of rape. She did not use the word "penis" and instead used the word "private," but did not specify what "private" meant, other than by gesturing to her vaginal area. 1RP at 51-52. Moreover, S.S. did not describe any act or event that would normally be expected with sexual contact other than it felt "weird." 1RP at 58. She did not state that he ejaculated, and she denied that his body moved during the alleged incidents. 1RP at 57, 59, 60. S.S. did not know what made him stop. 1RP at 57. She said that Mr. Serrano did not talk to her about not telling anyone. 1RP at 62. S.S. said that the incident she described in her mother's bedroom happened "[a] lot," but had no estimate as to how many times it occurred, contrary to the testimony of Ms. Wahl, who said that S.S. said it happened more than ten times. 1RP at 62, 64. She was not able to say when the alleged abuse happened and did not know when Mr. Serrano moved out. 1RP at 65.

The highly questionable nature of S.S.'s testimony, particularly in conjunction with the repeated admonitions by counsel, the interpreter, and the judge for S.S. speak louder and to enunciate, leave open the question as to the nature of the abuse or whether the alleged acts of rape and molestation even occurred at all. The inconsistencies in S.S.'s testimony reach and surpass the level of those detailed in ***Alexander***.

In addition, the evidence was far from overwhelming. The alleged abuse was not reported immediately, and the time frame was vague; the offenses were

alleged to have occurred between April 2016 and May 31, 2018. CP at 1-3. The trial court found that Lisa Wahl could testify about her findings in general about victim behavior but could not testify that S.S.'s behavior was consistent with that in this case. 1RP at 18. At trial Ms. Wahl testified that the finding that S.S.'s genital examination was normal and that the finding that she was positive for herpes simplex one is a "nonspecific finding" and does not necessarily denote sexual abuse, but that the herpes virus "can" be transmitted sexually. 1RP at 160-62. Ms. Wahl testified that delayed disclosure of abuse is "very common in children" when there is a relationship with the alleged offender within the family unit and based on the age of the child. 1RP at 159. Ms. Wahl did not specifically testify that S.S. met the criteria for delayed disclosure, but her testimony [1RP at 159] left little doubt for the jury that S.S. fit most of the criteria she cited, leading to the conclusion that S.S. was in fact raped or molested and that she delayed her disclosure. The testimony went beyond a mere opinion that delayed reporting is not unusual and, instead, amounted to either profile evidence or generalized statements about the behavior of sexually abused children as a class and strongly implied that S.S. was in that class of abused children who delay reporting.

A witness is not qualified to judge the truthfulness of a child's story. ***United States v. Azure***, 801 F.2d 336, 341 (8th Cir. 1986); ***State v. Dunn***, 125 Wn. App. 582, 594, 105 P.3d 1022 (2005). In ***State v. Carlson***, 80 Wn.App. 116, 906 P.2d 999 (1995), Division Two reversed a conviction based on the admission of the pediatrician's opinion the child was abused when there was no

physical evidence of abuse or independent witness to the charged events. The case boiled down to the victim's word against the defendants. ***Carlson***, 80 Wn.App. at 129. Similarly, in ***State v. Fitzgerald***, 39 Wn.App. 652, 694 P.2d 1117 (1985), the results of the children's physical examinations were inconclusive, and the pediatrician's opinion of sexual molestation was based solely upon her evaluation of the children's version of the events. ***Fitzgerald***, 39 Wn.App. at 656–57. In ***Fitzgerald***, the court reasoned: "Dr. Griffith's opinion is based solely on her evaluation of the children's version of the events. ' "An expert may not go so far as to usurp the exclusive function of the jury to weigh the evidence and determine credibility." ' " ***Fitzgerald***, 39 Wn.App. at 657, 694 P.2d 1117 (quoting 5A KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE § 292, at 39 n. 4 (2d ed.1982) (quoting ***United States v. Samara***, 643 F.2d 701, 705 (10th Cir.1981))).

In this case, the only evidence that S.S. was sexually abused was her own testimony and statements to Ms. Wahl. Ms. Wahl testified regarding delayed disclosure and her testimony strongly suggested that S.S. was one of the class of children who had been abused and that she delayed her reporting of the alleged offenses. Mr. Serrano denied the abuse and explained to the court his statements to law enforcement about physical contact with S.S. 1RP at 193-94. There is no physical evidence or independent witness to the charged events. Moreover, S.S.'s testimony was contradictory to the point of unreliability. See ***Alexander,*** supra. The State failed to meet its burden of proof regarding the element of

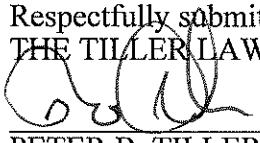
penetration. This Court should accept review and reverse the convictions.

F. CONCLUSION

For the foregoing reasons, this Court should grant review to correct the above-referenced errors in the unpublished opinion of the court below that conflict with prior decisions of this Court and the courts of appeals.

DATED: July 26, 2021.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835
ptiller@tillerlaw.com
Of Attorneys for Ramil Serrano

CERTIFICATE OF SERVICE

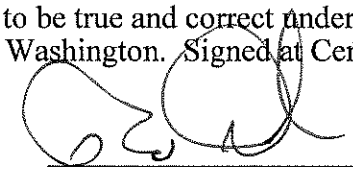
The undersigned certifies that on July 26, 2021, that this Appellant's Petition for Review was sent by the JIS link to Renee Townsley, Clerk of the Court, Court of Appeals, Division III, 500 N Cedar St, Spokane, WA 99201-1905, and a copy was mailed by U.S. mail, postage prepaid, to the appellant at the following address:

Erin Riley
Attorney at Law
Grays Harbor County Prosecutor's Office
102 West Broadway, Room 102
Montesano, WA 98563
EJany@co.grays-harbor.wa.us

Ms. Renee S. Townsley
Clerk of the Court
Court of Appeals III
500 N Cedar St
Spokane, WA 99201-1905

Mr. Ramil Serrano DOC# 413716
Coyote Ridge
PO Box 769
Connell, WA 99326
LEGAL MAIL/SPECIAL MAIL

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on July 26, 2021.



PETER B. TILLER

APPENDIX A

FILED
JULY 1, 2021
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 37980-9-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
RAMIL AGLES SERRANO,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, J. — Ramil Serrano appeals his convictions for rape of a child in the first degree and child molestation in the first degree. We affirm his convictions but remand for the trial court to strike the interest provision in the judgment and sentence.

FACTS

Poung Jo Sem has a daughter, S.S.[1] Around April 2016, Ms. Sem allowed a coworker, Ramil Serrano, to live with her and her daughter. S.S. was eight years old at the time. Two years later, Mr. Serrano moved out.

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[1] To protect the privacy interests of the child victim, we use her initials throughout this opinion. Gen. Order 2012-1 of Division III, *In re the Use of Initials or Pseudonyms for Child Victims or Child Witnesses*, (Wash. Ct. App. June 18, 2012), https://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=2012_001&div=III.

About six months after Mr. Serrano moved out, S.S.'s aunt visited. She spoke with S.S. about "good touch" and "bad touch." Report of Proceedings (RP) at 81. S.S. told her aunt that Mr. Serrano had touched her in a bad way. The aunt told Ms. Sem, and she reported it to police. In September 2018, Lisa Wahl, a sexual assault nurse examiner (SANE), performed a sexual assault evaluation on S.S.

Police arrested Mr. Serrano and the State charged him with one count of child rape in the first degree and one count of child molestation in the first degree. Mr. Serrano waived his right to a jury trial and the case proceeded to a bench trial.

At trial, Ms. Wahl testified that she spoke with S.S. at length about her body, covering everything from head to toe. S.S.'s demeanor changed when she began talking about why she was there and she had difficulty talking about what had happened.

When asked who they were talking about, S.S. wrote the name "Ramil." RP at 155. Ms. Wahl and S.S. then went over the male and female bodies with anatomically correct drawings to confirm which body parts were involved. S.S. told Ms. Wahl that she was in her house when Mr. Serrano put his penis in her vagina and this caused her pain. S.S. told Ms. Wahl that Ramil had done this over 10 times.

Ms. Wahl testified about her physical examination of S.S. She found S.S. to be healthy and normal, which she said was not unusual in cases where children delayed

disclosure of their abuse. A blood test revealed that S.S. had herpes simplex virus one. Ms. Wahl testified that the virus did not mean that S.S. was sexually abused, but could be the result of skin to skin contact.

Detective Jeff Weiss testified that he interviewed Mr. Serrano twice and both interviews were tape recorded. During the second interview, Mr. Serrano broke down and started crying. He admitted that he and S.S. liked to wrestle upstairs on the bed. He said that "[S.S.] wore silky bottom pajamas, which were really thin and tight, and when he—when [S.S.] pulled his pants down she was on top of him and obviously his penis was up against her vagina." RP at 134.

S.S. testified that when her mother was at work she and Ramil would watch TV on her mother's bed. While watching TV, he would tell her to take off her clothes and he would take his clothes off, too. S.S. testified that Ramil would then put his privates on her privates, on her skin, and put his privates in her privates. When asked what "privates" meant, S.S. gestured to her genital area. RP at 52. S.S. testified that she would be laying down on the bed and Ramil would be in front of her and she would be on her back. S.S. described the feeling of Ramil putting his privates inside hers as "weird." RP at 58. She testified this had happened "a lot" with Ramil. RP at 72.

The trial court convicted Mr. Serrano on both counts. It found S.S.'s testimony credible and Mr. Serrano's testimony not credible. It found that Mr. Serrano had placed his penis on S.S.'s bare skin without penetration and that it was clearly done for sexual gratification purposes. It additionally found that Mr. Serrano had penetrated S.S. multiple times.

The trial court sentenced Mr. Serrano to 160 months of confinement. In addition, it imposed nonrestitution financial obligations and ordered interest to accrue on those obligations. Mr. Serrano timely appealed.

ANALYSIS

SUFFICIENCY OF THE EVIDENCE

Mr. Serrano contends there was insufficient evidence to find him guilty of either count. We disagree.

When reviewing a claim of insufficiency of the evidence, this court looks to whether the facts, viewed in the light most favorable to the State, would allow a trier of fact to find a defendant guilty beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.*

When dealing with instances of conflicting testimony, this court defers to the finder of fact to evaluate the persuasiveness of the arguments and testimony. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). This court does not review the credibility determinations made by the trier of fact, which retains sole purview over such determinations. *State v. Cardenas-Flores*, 189 Wn.2d 243, 266, 401 P.3d 19 (2017).

In general, Mr. Serrano contends that S.S.'s testimony was contradictory and vague. He notes that S.S. interchangeably used the terms "in" and "on" when describing the sexual contact, she claimed she was abused on over 10 occasions yet her physical examination was normal, she described pain to Ms. Wahl but not to the court, and her testimony was so timid that she was asked several times to repeat what she said or speak louder.

We note that S.S. was 11 years old when she testified. One would expect a young girl to be very uncomfortable talking about sexual abuse to a group of mostly strangers. Also, her use of the terms "in" and "on" may well have been accurate and coincides with the trial court convicting Serrano of both child rape and child molestation.

We also note that six months had elapsed between when Mr. Serrano moved out and when Ms. Wahl physically examined S.S. That allowed time for minor injuries to

heal. Ms. Wahl testified that a significant percentage of child victims show no physical trauma because of delayed reporting.

Mr. Serrano is correct that S.S. described the sensations differently to Ms. Wahl and to the court. To Ms. Wahl, S.S. said the penetration was painful. To the court, S.S. testified the penetration felt weird.

Mr. Serrano argues that the inconsistencies here are comparable to those in *State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1992). We disagree.

In *Alexander*, a defendant was charged with rape of a child. *Id.* at 149. The child had initially alleged two incidents occurred, one in a bathtub and one with baby oil. *Id.* at 149-50. During the trial, the child testified and said nothing inappropriate happened in the bathtub or with baby oil. *Id.* at 150. She also seemed to be inconsistent with the dates the incidents supposedly took place. *Id.* at 149. We held that the testimony was extremely inconsistent and no reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id.* at 157-58.

Here, S.S.'s testimony never strayed from her initial assertion that Mr. Serrano had sexual contact with her on numerous occasions. She described Mr. Serrano as having placed his penis both on her vagina and in her vagina. Although S.S. described the sensation caused by penetration differently to Ms. Wahl and the court, this inconsistency

is far less than those we saw in *Alexander*. We conclude that S.S.'s and Ms. Wahl's testimonies were sufficient for a reasonable trier of fact to find, beyond a reasonable doubt, that Mr. Serrano was guilty of rape of a child in the first degree.

Mr. Serrano also argues there was no evidence of sexual gratification offered by the State and thus no evidence of intimate contact. When dealing with a charge of child molestation in the first degree, this court looks to whether the contact between the defendant and the victim was intimate.

> Contact is "intimate" within the meaning of the statute if the conduct is of such a nature that a person of common intelligence could fairly be expected to know that, under the circumstances, the parts touched were intimate and therefore the touching was improper. A jury may determine that parts of the body in close proximity to the primary erogenous areas are intimate parts. Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touch was for the purpose of sexual gratification, although we require additional proof of sexual purpose when clothes cover the intimate part touched.

State v. Harstad, 153 Wn. App. 10, 21, 218 P.3d 624 (2009) (internal quotation marks and footnotes omitted).

Mr. Serrano argues that he told detectives his pants were pulled down by S.S. while wrestling and his penis only touched her vagina over her pajamas; thus, additional proof of sexual purpose was required. However, S.S. testified during trial that Mr. Serrano told her to take off her clothes. She testified that Mr. Serrano took off his

clothes. She also testified that he put his penis both on and in her vagina. The trial court found her testimony to be credible and found Mr. Serrano's testimony not to be credible. We defer to the trial court's determinations of credibility. We conclude that the evidence was sufficient for a reasonable trier of fact to find, beyond a reasonable doubt, that Mr. Serrano was guilty of child molestation in the first degree.

INTEREST ON NONRESTITUTION LEGAL FINANCIAL OBLIGATIONS (LFOs)

Mr. Serrano contends the trial court erred in imposing interest on his nonrestitution LFOs. RCW 10.82.090(1) eliminates accrual of interest on nonrestitution LFOs. The State concedes this issue. We accept the State's concession.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW (SAG): DOUBLE JEOPARDY

In his SAG, Mr. Serrano contends that both of his convictions should be reversed because the trial court *could have* convicted him of child rape based on one of the same incidents that formed the basis for his child molestation conviction. We disagree.

A person may not be placed in jeopardy of being punished twice for the same offense. U.S. CONST. amend. V; WASH. CONST. art. I, § 9; *State v. Land*, 172 Wn. App. 593, 598, 295 P.3d 782 (2013). However, as the court in *Land* held, child molestation and rape of a child are two separate offenses. *Id.* at 599. If the only evidence provided is of sexual intercourse, then only one conviction can stand. *Id.* at 601. However, even

where the acts happened at the same time and involved the same parties, the act of molestation can be distinct from the act of rape if there is evidence of sexual touching separate from intercourse. *Id.* at 601-02.

Here, there was evidence of both molestation and rape. Construing the evidence in the light most favorable to the State, Mr. Serrano put his privates both "on" S.S. and "in" S.S., and this happened on several occasions. The evidence refutes any claim that Mr. Serrano is being punished twice for the same offense.

Affirmed, but remanded to strike interest.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

WE CONCUR:

Pennell, C.J.

Fearing, J.

THE TILLER LAW FIRM

July 26, 2021 - 4:03 PM

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Appellate Court Case Title:	State of Washington, Respondent v Ramil Agles Serrano, Appellant
Superior Court Case Number:	18-1-00591-7

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