NO. 30790-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

ANTONIO CUEVAS CORTES

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY

The Honorable Michael G. McCarthy, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

RULES, STATUTES AND OTHER AUTHORITIES

TABLE OF AUTHORITIES (CONT'D)

Page

A. ASSIGNMENT OF ERROR

The court violated Appellant's right to be free from double jeopardy.

Issue Pertaining to Assignment of Error

In addition to other charges, Appellant was charged with third degree child rape, third degree child molestation, first degree incest and second degree incest, all allegedly committed against the same daughter. At trial the prosecution presented evidence of numerous acts of alleged misconduct, each of which could constitute commission of any of these four offenses. The State failed to elect which act it was relying on for each specific charge. The jury was instructed that to convict it must be unanimous as to which act constituted commission of the offense, but it was never instructed it had to find a separate and distinct act to convict on each charge. Where the jury could have relied on the same act to convict Appellant of more than one charge, was Appellant's right to be free from double jeopardy violated?

B. STATEMENT OF THE CASE

1. Procedural History

Appellant Antonio Cuevas-Cortes was charged with two counts of second degree incest (Counts 1 & 8), alien in possession of a firearm (Count 2), second degree child rape (Count 3), second degree child

molestation (Count 4), third degree child rape (Count 5), third degree child molestation (Count 6), and first degree incest (Count 7). CP 4-6; RCW 9.41.171; RCW 9A.64.020(1) & (2); RCW 9A.44.076. .079, .086, & .089. The alleged victim for Count 1 was G.C., one of Cuevas-Cortes's daughters. The alleged victim for Counts 3 through 8 was E.C., another daughter. CP 4-6.

The prosecution dismissed the alien in possession of a firearm charge (Count 2) pretrial. 1RP 3-4.[1] Counts 3 and 4 were dismissed at the conclusion of the prosecution's case in chief. 1RP 200-01. A jury convicted Cuevas-Cortes of the remaining counts (1, 5, 6, 7 and 8). CP 37-41; 1RP 247.

The trial court imposed a standard range sentence of 90 months on Count 7 (first degree incest), and concurrent 60-month sentences on the remaining counts. CP 77-87; 2RP 10. Cuevas-Cortes appeals. CP 88-99.

[1] There are four volumes of verbatim report of proceedings referenced as follows: **1RP** - three-volume consecutively paginated set for February 13 & 14 (Volume I), February 15, 2012 (Volume II), and February 16, 2012 (Volume III); and **2RP** - April 10, 2012 (sentencing).

2. Trial Testimony

Nineteen-year old[2] G.C. testified that in the early morning of May 31, 2011, Cuevas-Cortes came into her room and sexually molested her. 1RP 52, 55-57. It was this alleged incident that the prosecution relied on to prosecute Count 1. CP 17 (Instruction 5); 1RP 225, 227, 236-37, 240-41.

E.M. testified that her father began sexually molesting her when she was 13 or 14 years old and in middle school. 1RP 86. E.C. claimed the first molestation occurred when she was on the couch in the living room watching TV, and that Cuevas-Cortes touched her breast and vagina under her clothes, but did not penetrate her vagina. 1RP 87-89. E.C. claimed that some months later, she was again on the couch and her father touched her breasts and vagina under the clothes again, but this time he also put his fingers into her vagina. 1RP 89-90.

According to E.C., the first time her father had penile-vaginal intercourse with her was when she was 15 years old and in 9th grade. 1RP 86, 91. E.C. claimed it occurred at night in her bedroom, and that he wore a condom. 1RP 91-93. E.C. estimated that between her father molesting her when she was in middle school, until the time he first had penile-

[2] All of the ages specified herein are those of the person at the time of the trial, which was held February 13-16, 2012, before the Honorable Michael G. McCarthy. 1RP. The actual birth dates for Cuevas-Cortes's daughters were never established at trial.

vaginal intercourse with her, he would touch her in a sexual way "a few times a month", and mostly at night. 1RP 94-95.

E.C. claimed one time Cuevas-Cortes gave money to her mother and sisters to go to the store, leaving her alone with him during the day, and that he made her have sex with him on the living room floor. 1RP 95-96. E.C. claimed another time when she was on a ladder in the garage, her father came up from below and licked her vagina, although she did not specify when this event allegedly occurred. 1RP 97-98. Similarly, E.C. claimed her father had penile-vaginal intercourse with her on the laundry room floor, but did not indicate when this occurred. 1RP 99-100.

E.C. estimated her father touched her sexually or had intercourse with her every other day while she was in high school. 1RP 100. The last time she claimed they had intercourse was in January or February of 2010, in her bedroom at night. 1RP 101-02.

3. Jury Instructions

Each of defense proposed to-convict instructions included the following language:

> The State has alleged that the defendant committed acts of [incest/rape of a child in the third degree/child molestation in the third degree] on multiple occasions. To convict the defendant on any count of [incest/rape of a child in the third degree/child molestation in the third degree], one particular act of [incest/rape of a child in the third degree/child molestation in the third degree] must be

> proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proven. You need not unanimously agree that the defendant committed all the act of [incest/rape of a child in the third degree/child molestation in the third degree].

CP 62-67.

Over defense objection, however, the court instead gave the following instruction;

> The State has alleged that the defendant committed acts of sexual intercourse or sexual contact on multiple occasions. To convict the defendant on any count, one particular act of sexual intercourse or sexual contact must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the act of sexual intercourse or sexual contact.

CP 34 (Instruction 21).

Regarding the phrase "sexual intercourse", the court instructed the jury:

> Sexual intercourse means that the sexual organs of the male entered and penetrated the sexual organs of the female and occurs upon any penetration, however slight. Sexual intercourse also means any penetration of the vagina however slight, by an object, including a body part, when committed on one person by another, or any act of sexual contact between persons involving the sex organs of one person and the mouth of another.

CP 22 (Instruction 10)

Regarding the phrase "sexual contact", the court instructed the jury:

> Sexual contact means any touching of the sexual or other intimate body parts of a person done for the purpose of gratifying the sexual desires of either party.

CP 19 (Instruction 7).

The to-convict instruction for Count 1, the charge involving G.C., specified the alleged offense occurred "on or about May 31, 2011". CP 17 (Instruction 5). The to-convict instructions for Counts 5 and 6, (the third degree child rape child and third degree child molestation charges involving E.C.), specified the alleged offense occurred "on, about, during or between November 18, 2002 and November 16, 2004. CP 21, 24 (Instructions 9 & 12). The to-convict instructions for Counts 7 and 8, (the first and second degree incest charges involving E.C.), specified the alleged offense occurred "on, about, during or between November, 2000 and July 2010". CP 26-27 (Instructions 14 & 15).

4. Closing Arguments

The only specific act the prosecutor relied on in closing argument to convict Cuevas-Cortes of any of the charges was the alleged molestation of G.C. on May 31, 2011 (count 1), to which Cuevas-Cortes confessed following his arrest. 1RP 128-29, 227. As to the charges involving E.C., the prosecutor noted that she testified to multiple instances of misconduct by Cuevas-Cortes, any one of which could satisfy the elements of each of the charged offenses. 1RP 225, 227.

C. ARGUMENT

FAILURE TO INSTRUCT THE JURY IT COULD NOT RELY ON THE SAME ACT TO CONVICT CUEVAS-CORTES OF BOTH RAPE AND MOLESTATION, AND BOTH FIRST AND SECOND DEGREE INCEST, VIOLATED CUEVAS-CORTES'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY.

In light of the evidence at trial, Cuevas-Cortes's jury could have relied on a single act by Cuevas-Cortes to conclude the prosecution proved every element of each of the four charges involving E.C. Because the trial court failed to instruct the jury that it must find a separate and distinct act to convict Cuevas-Cortes of any particular charge, there is no way to conclude it did not rely on the same act to convict Cuevas-Cortes of each of the charges involving E.C. This violated Cuevas-Cortes's right to be free from double jeopardy. This Court should therefore reverse and dismiss the third degree child molestation and second degree incest convictions and remand for resentencing.[3]

The double jeopardy clauses of the state and federal constitutions protect individuals from being "punished multiple times for the same offense." State v. Linton, 156 Wn.2d 777, 783, 132 P.3d 127 (2006); see U.S. Const. amend. V; Wash. Const. art. I, § 9. This Court reviews double

[3] Although potentially based on the same act, Cuevas-Cortes's convictions for third degree child rape and first degree incest do not violate double jeopardy because it is clear the Legislature intended to treat them separately for purposes of punishment. State v. Calle, 125 Wn.2d 769, 782, 888 P.2d 155 (1995).

jeopardy claims de novo. State v. Mutch, 171 Wn.2d 646, 661–62, 254 P.3d 803 (2011).

In Mutch, a jury convicted Mutch of five counts of second degree rape. 171 Wn.2d at 652. The complaining witness testified Mutch forced her to engage in five distinct episodes that each included oral sex and vaginal intercourse over the course of a night and the next morning. Id. at 651. The trial court gave separate but "nearly identical" to-convict instructions for the five rape counts and a "separate crime is charged in each count" instruction. Id. at 662. The court provided a unanimity instruction similar to unanimity instruction given here. Id. at 662 (citing State v. Carter, 156 Wn. App. 561, 567, 234 P.3d 275 (2010)). But, as here, the Mutch trial court failed to give a "separate and distinct" act instruction. 171 Wn.2d at 663.[4]

Relying on two decisions by the Court of Appeals, the Mutch Court held the instructions were flawed because they did not include a "separate and distinct" act instruction. 171 Wn.2d at 663 (citing Carter, 156 Wn. App. 561 and State v. Berg, 147 Wn. App. 923, 198 P.3d 529

[4] See State v. Borsheim, 140 Wn. App. 357, 369, 165 P.3d 417 (2007) (finding that, absent language that the jury must "unanimously agree that at least one particular act has been proved beyond a reasonable doubt for *each* count," the unanimity instruction did not protect against a double jeopardy violation, quoting State v. Ellis, 71 Wn. App. 400, 402, 859 P.2d 632 (1993)).

(2008)). This flaw revealed a potential double jeopardy violation, but that was not the end of the inquiry. 171 Wn.2d at 663-64.

Instead, reviewing courts must look at "the entire trial record" in evaluating whether such a violation occurred. Id. at 664. A double jeopardy violation occurs if it is not "manifestly apparent to the jury" from the evidence, arguments, and instructions that "the State [was] not seeking to impose multiple punishments for the same offense and that each count was based on a separate act." Mutch, 171 Wn.2d at 664 (internal quotation marks omitted) (quoting Berg, 147 Wn. App. at 931).

Applying these standards, the Mutch Court observed those facts "present[ed] a rare circumstance where, despite deficient jury instructions, it is nevertheless manifestly apparent that the jury found [Mutch] guilty of five separate acts of rape to support five separate convictions." 171 Wn.2d at 665 (emphasis added). The Court based its conclusion on the following circumstances:

(1) The information charged Mutch with five counts "based on allegations that constituted five separate units of prosecution";

(2) The victim testified to five separate episodes of rape, which was the exact number of "to convict" instructions given to the jury;

(3) Mutch's cross-examination of the victim focused on the issue of consent, not on the number of alleged sexual acts;

(4) A detective testified that Mutch had admitted to engaging in "multiple sexual acts" with the victim;

(5) The State discussed five episodes of rape in its arguments; and

(6) Mutch argued that the victim consented and that she was not credible only to the extent that she denied consenting. Id.

Accordingly, the Mutch court concluded, "In light of all this, we find that it was manifestly apparent to the jury that each count represented a separate act; if the jury believed [the victim] regarding one count, it would as to all." Id. at 665-66.

Applying the Mutch court's analysis here, however, shows the trial court violated Cuevas-Cortes's double jeopardy rights.

Cuevas-Cortes's jury was required to deliberate on four counts involving E.C.; first degree incest, second degree incest, third degree child molestation and third degree child rape. CP 21, 24, 26, 27 (Instructions 9, 12, 14, 15, respectively). The charging periods for the two incest charges were identical, "between November, 2000 and July 2010". CP 26, 27. Similarly, the charging periods for the rape and molestation charges were identical, "Between November 18, 2002 and November 16, 2004", and fall within the charging period for the incest charges. CP 21, 24.

E.C. testified to numerous instances of sexual misconduct allegedly committed against her by Cuevas-Cortes, which she claimed

began when she was in middle school and thirteen to fourteen years old. 1RP 86. For example, E.C. testified her father engaged in at least monthly acts of rape and molestation when she was thirteen to fourteen years old, but that he did not have penile-vaginal intercourse with her until she was fifteen years old. 1RP 86-91, 94. E.C. claimed that once she was in high school her father would molest or rape her every other day until about January or February 2010. 1RP 100-01.

In addition to accusing her father of numerous general acts of sexual misconduct, E.C. also testified regarding at least six specific episodes with her father, any one of which could, if believed, satisfy the elements for all four charges. For example, E.C. said the first time her father ever did anything sexual towards her she was "13 or 14" and "in the living room . . . on the sofa." 1RP 86-87. E.C. claimed Cuevas-Cortes touched her breast and vagina, but did not penetrate her vagina with his fingers. 1RP 88-89. Although she denied he committed "sexual intercourse" as defined by the court (see CP 22, Instruction 10), she claimed that several times thereafter, when she was still thirteen or fourteen years old, he would penetrate her vagina with his finger, but that "He mostly just touched me." 1RP 89-91. As such, the jury could have concluded that during at least one of these incidents Cuevas-Cortes had sexual contact and sexual intercourse with E.C., who was undisputedly his

daughter, when she was at least fourteen but less than sixteen years. Under the instructions provided, the jury could find Cuevas-Cortes guilty of all four charges involving E.C. as a result this single incident. See CP 16, 19-27 (Instructions 4, 7-15).

And although E.C. could not recall how old she was at the time, her recollection of him licking her vagina while he was below her on a ladder in the garage similarly could have provided the jury with a single event to convict him of all four charges. 1RP 97-98.

Similarly, E.C. recalled having sexual intercourse with her father in her bedroom, in the laundry room and on the living room floor. 1RP 92, 95, 99. The jury could have relied on any one of these incidents to convict Cuevas-Cortes of all four charges because they each involve acts of "sexual contact" and "sexual intercourse" between a father and his fourteen to fifteen year-old daughter.

Unlike in Mutch, the number of counts against Cuevas-Cortes involving E.C. did not correspond to the number of acts alleged. Mutch, 171 Wn.2d at 665-66 (at least three out of six factors analyzed discuss fact that number of charges matched the number of alleged rapes); cf. State v. Wallmuller, 164 Wn. App. 890, 265 P.3d 940, 943 (2011) (State identified discrete acts corresponding to each charge and also told jurors "[t]he acts are separate and distinct. There are five separate and distinct acts that the

State has alleged that the defendant committed."). To the contrary, E.C. testified her father raped or molested her at least several dozen to hundreds of times over the years, yet only four charges were prosecuted.

Furthermore, unlike in Mutch and Wallmuller, the prosecutor here gave jurors no guidance in analyzing the evidence during closing remarks. For example, the prosecutor did not say Counts 5 and 7, the third degree rape and first degree incest charges, involved only the intercourse that occurred in the laundry room, or that Counts 6 and 8 (third degree child molestation and second degree incest) involved only the initial incident. To the contrary, the prosecutor in closing failed to identify any specific act the state relied on for any of the charges involving E.C. 1RP 227.

Moreover, at the conclusion of rebuttal the prosecutor attempted to explain the unanimity instruction, to the jury. 1RP 241-44. The prosecutor stated that "[t]he point" of Instruction 21 was to ensure that "all twelve of you have been convinced beyond a reasonable doubt about at least one act." 1RP 242-43 (emphasis added). When the prosecutor went on to explain that if the jurors believed everything Cuevas-Cortes's daughters testified about then they did not need to concern themselves with Instruction 21, defense counsel objected, to which the trial court responded;

> You gotta [sic] clarify that [Mr. Prosecutor]. Let me give this -- if the jury were to believe -- if six people were to believe that the event alleged to have occurred in the garage occurred and the other six were to believe that the event which was alleged to have occurred in the laundry room then there would not be jury unanimity and you could not return a guilty verdict. You would all have to -- the garage incident in particular, all twelve would have to say what she testified about what happened in the garage, we all believe that. So that is what that instruction requires you to do. As to one particular act of sexual intercourse or sexual contact you have to all agree as to which one it was, okay.

1RP 243.

Unfortunately, neither the instructions, the prosecutor, nor the court ever made it clear that the jury could not rely on the same act to convict Cuevas-Cortes of both rape and molestation, or both first and second degree incest. In fact, both the prosecutor and trial court's remarks to the jury imply that as long as the jury could unanimously agree that one act occurred, it could convict him of all the charges involving E.C. Because it was not made "manifestly apparent" to the jury that it had to rely on separate and distinct acts to convict Cuevas-Cortes of the rape and molestation charges, and separate and distinct acts to convict him of first and second degree incest, this Court should reverse E.C.'s conviction for third degree child molestation and second degree incest, and remand for resentencing. Mutch, 171 Wn.2d at 664 ("remedy . . . is to vacate the potentially redundant convictions.").

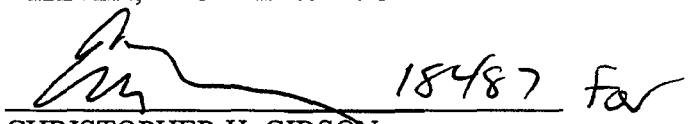
D. CONCLUSION

This Court should reverse Cuevas-Cortes's third degree child molestation and second degree incest convictions involving E.C. and remand for resentencing.

DATED this 6th day of September 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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No. 30790-5-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 6th day of September, 2012, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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