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FILED
Mar 12, 2014
Court of Appeals
Division III
State of Washington

SUPREME COURT NO. ________
NO. 30790-5-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTONIO CUEVAS-CORTES,

Petitioner.

FILED
MAR 20 2014
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

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

The Honorable Michael G. McCarthy, Judge

PETITION FOR REVIEW

CHRISTOPHER H. GIBSON
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. IDENTITY OF PETITIONER

Petitioner Antonio Cuevas-Cortes, the appellant below, asks this Court to review the Court of Appeals decision referred to in Section B.

B. COURT OF APPEALS DECISION

Cuevas-Cortes requests review of the Court of Appeals decision in State v. Cuevas-Cortes, 2014 WL 197767 (Court of Appeals No. 30790-5-III, filed January 16, 2014), a copy of which is attached as Appendix A. An order denying Cuevas-Cortes' motion to reconsider was entered on February 11, 2014, a copy of which is attached as Appendix B.

C. ISSUE PRESENTED FOR REVIEW

On appeal of right, Petitioner argued two of his criminal convictions violated the prohibition against double jeopardy because the trial court failed to instruct the jury it had to find a separate and distinct act to convict on each charge. The Court of Appeals addressed all but one of the arguments advanced. The unaddressed issue involved whether the jury could have relied on the same act to convict Petitioner of both first and second degree incest. The motion to reconsider alerting the court of its failure to address all the arguments made was summarily denied. Did the Court of Appeals' refusal to address all of the arguments raised deprive Petitioner of his right to appeal when the unaddressed argument was properly raised, is not moot and has arguable merit?

D. STATEMENT OF THE CASE

1. Procedural History

Petitioner 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 victim for Count 1 was G.C., one of Cuevas-Cortes's daughters. The 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.

On appeal, Cuevas-Cortes argued his convictions for third degree child molestation (Count 6) and second degree incest (Count 8) must be reversed and dismissed because the court's instructions allowed the jury to

[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).

convict him of those two offenses based on a single act, the same act it relied on to convict him of third degree child rape (Count 5) and first degree incest (Count 8). BOA at 7-15.[2]

In rejecting this claim, the Court of Appeals first held that under State v. French, 157 Wn.2d 593, 141 P.3d 54 (2006), Cuevas-Cortes could be convicted of both rape and molestation for the same act. Appendix A at 3. Next, the court held that because incest and rape are not the same in fact and law, it was not a double jeopardy violation to be convicted of both for the same act. Id. Applying the same reasoning, the court also held a conviction for incest and molestation based on the same act does not violate double jeopardy principles. The Court then concluded its analysis by stating, "we hold that incest can be prosecuted in conjunction with either child rape or child molestation." Appendix A at 4.

In a motion to reconsider, Cuevas-Cortes did not contest any of the holdings reached by the Court of Appeals. Motion to Reconsider at 3. He argued instead that the holdings made, while not incorrect, failed to resolve all the issues on appeal. Id. Left unaddressed, he noted, was whether the

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[2] In making this argument, Cuevas-Cortes acknowledged his third degree child rape and first degree incest conviction should stand even if based on the same act because it is clear the Legislature intended to treat them separately for purposes of punishment. BOA at 7 n.3 (citing State v. Calle, 125 Wn.2d 769, 782, 888 P.2d 155 (1995)).

first and second degree incest convictions (Counts 7 and 8, both involving E.C.) violated double jeopardy because the jury could have relied on the same act to convict him of both. The Court of Appeals summarily denied Cuevas-Cortes' request for a ruling on that issue. Appendix B.

2. Trial Testimony

Nineteen-year old[3] 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 incident the prosecution relied on to prosecute the second degree incest charge involving G.C. (Count 1). CP 17 (Instruction 5); 1RP 225, 227, 236-37, 240-41.

E.C. testified her father began 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. 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.

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

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-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. also claimed that 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 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).

The to-convict instruction for Count 1, the second degree incest 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 7 and 8, (the first and second degree incest charges involving E.C.), specified the offenses 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.

E. ARGUMENT IN FAVOR OF REVIEW

REVIEW IS WARRANTED BECAUSE THE COURT OF APPEALS' REFUSAL TO ADDRESS A PROPERLY RAISED ISSUE ON APPEAL RAISES A SIGNIFICANT QUESTION OF LAW UNDER THE STATE CONSTITUTION AS TO WHETHER SUCH REFUSAL DEPRIVES CUEVAS-CORTES OF HIS CONSTITUTIONAL RIGHT TO APPEAL.

The Washington Constitution grants the right to appeal in all criminal cases. Const. art. 1, § 22 (amend. 10)[4]; State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d 579 (1978). Once a person exercises that right, the

[4] Const. art. 1, § 22 (amend. 10) provides; "In criminal prosecutions the accused shall have the . . . right to appeal in all cases."

appeal cannot be withdrawn or dismissed unless the government proves a knowing, intelligent and voluntary waiver. Such a waiver will not be presumed and the right to appeal cannot be involuntarily forfeited. State v. Kells, 134 Wn.2d 309, 313, 949 P.2d 818 (1998); State v. Tomal, 133 Wn.2d 985, 988, 948 P.2d 833 (1997); Sweet, 90 Wn.2d at 286.

The right to appeal is a vital component of the criminal justice system. The essential function of appellate review is to reduce the risk of erroneous conviction. State v. Rolax, 104 Wn.2d 129, 139, 702 P.2d 1185 (1985), quoting Lobsenz, *A Constitutional Right to an Appeal: Guarding Against Unacceptable Risks of Erroneous Conviction* 8 U. Puget Sound L. Rev. 375, 383 (1985). "All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to correct adjudication of guilt or innocence." Griffin v. Illinois. 351 U.S. 12, 18, 76 S.Ct. 585, 100 L.Ed.2d 891 (1956) (while the U.S. Constitution does not guarantee the right to appeal, equal protection requires that indigent appellants be provided with transcripts necessary for appellate review provided by state law).

> Appeals make a difference in criminal cases. A significant number of appeals lead to the modification or reversal of convictions, supporting the conclusion that abridgment of the right to appeal would subject defendants to a material risk of erroneous conviction. . . .

> In addition, recognition of a constitutional right to a criminal appeal insulates basic procedural requirements from the winds of legislative change and invests them with a dignity that otherwise may be lacking.

M. Arkin, *Rethinking The Constitutional Right To A Criminal Appeal*, 39 UCLA Law Rev. 503, 514, 519 (1992) (observing that Washington has placed "stringent requirements on waivers of criminal appeals.")

Here, there is no basis to find Cuevas-Cortes waived his right to appeal, whether in general or for any of the issues raised and argued to the Court of Appeals. Moreover, nothing in the Court of Appeals decision indicates Cuevas-Cortes waived, failed to preserve or inadequately presented the double jeopardy challenge as to the two incest convictions involving E.C. See State v. Fuentes, __ Wn.2d __, 318 P.3d 257, 264 (Slip op. filed February 6, 2014)(failure to object at trial may waive some issues for appeal); State v. Thomas, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004) ("this court will not review issues for which inadequate argument has been briefed or only passing treatment has been made."). To the contrary, the Court of Appeal found the double jeopardy claims presented (at least those it addressed) were properly raised pursuant to RAP 2.5(a)(3), which provides that "manifest error affecting a constitutional right" may be raised for the first time on appeal. Appendix A at 2.

Instead it appears the Court of Appeals simply failed to analyze the double jeopardy claim with respect to the two incest convictions involving E.C., and for whatever reason chose to ignore this when it denied Cuevas-Cortes' motion to reconsider. Appendix B. The question is, did this failure deprive Cuevas-Cortes of his constitutional right to appeal?

This appears to be an issue of first impression. Counsel has been unable to find a single case in Washington, or elsewhere, that addressing this circumstance. Although there are plenty of decisions with regard to a party's failure to properly preserve an issue for appeal, (see e.g., Fuentes, supra and Thomas, supra), there seem to be none addressing an appellate court's wholesale failure to address a properly raised issue that is not otherwise moot. This is probably because such failures are normally corrected following the filing of a motion to reconsider that points out the missing analysis. For whatever reason, that process failed to cure the oversight here. Appendix B.

The Court of Appeals' refusal to address the double jeopardy claim with respect to Counts 7 and 8 renders hollow Cuevas-Cortes' right to appeal with regard to those convictions. Whether this amounts to improper deprivation of that right involves a significant question of law under Wash. Const. art. 1, § 22 (amend. 10). Therefore, this Court should grant review, reverse the Court of Appeals, and remand to that court with

a directive to issue a new decision in which all of Cuevas-Cortes' double jeopardy claims are addressed. RAP 13.4(b)(3).

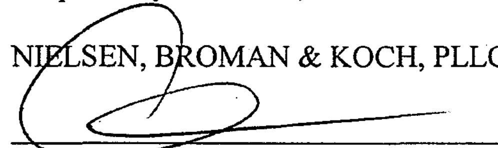
F. CONCLUSION

Cuevas-Cortes respectfully asks this Court to accept review.

DATED this 12th day of March, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



CHRISTOPHER H. GIBSON
WSBA No. 25097
Office ID No. 91051

Attorneys for Petitioner

Appendix A

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In the Office of the Clerk of Court
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	No. 30790-5-III
Respondent,	)	
	)	
v.	)	
	)	
ANTONIA CUEVAS CORTES,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

KORSMO, C.J. — Antonio Cuevas Cortes challenges his convictions for child rape, child molestation, and incest in the first and second degree, alleging that double jeopardy precludes the multiple convictions. We believe the Washington Supreme Court has settled these challenges against his position and affirm.

FACTS

Mr. Cuevas Cortes was convicted by a jury of one count of second degree incest related to victim G.C., and of third degree child rape, third degree child molestation, and first and second degree incest involving E.C. With respect to the counts involving E.C., the charging period for the rape and molestation offenses was the same two year period

from late 2002 to late 2004. The two incest counts were charged over a period from 2000 to 2010 and overlapped the rape and molestation counts.

The court instructed the jury that it must unanimously agree on the act that related to each count, but declined to give similarly worded instructions requested by the defense. The jury convicted on the five noted counts; three other charges were dropped during trial. The court imposed standard range terms. Mr. Cuevas Cortes then timely appealed to this court.

ANALYSIS

Mr. Cuevas Cortes argues that the trial court violated his constitutional right to be free from double jeopardy because the jury instructions could have allowed the jury to convict Mr. Cuevas Cortes of all four crimes involving E.C. based on a single act. Specifically, he challenges the court's failure to give a "separate and distinct acts" instruction.

Mr. Cuevas Cortes did not request such an instruction at the trial court. Accordingly, we will only review that claimed error if Mr. Cuevas Cortes can show that it was a manifest error affecting a constitutional right. RAP 2.5(a)(3). The alleged error is unquestionably constitutional in nature. The Fifth Amendment and article I, section 9, both prohibit "multiple punishments for the same offense imposed in the same proceeding." *In re Pers. Restraint of Percer*, 150 Wn.2d 41, 48-49, 75 P.3d 488 (2003).

However, the argument still fails. A "defendant's double jeopardy rights are violated if he or she is convicted of offenses that are identical both in fact and in law." *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995). "If there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses." *Id.* (quoting *State v. Valdovic*, 99 Wn.2d 413, 423, 662 P.2d 853 (1983).

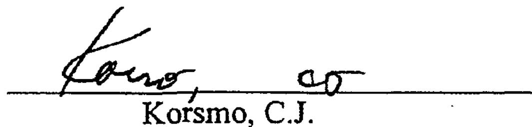
Mr. Cuevas Cortes has not established that the offenses are the same in law and in fact. Child molestation is not a lesser included offense of child rape. *State v. French*, 157 Wn.2d 593, 610-11, 141 P.3d 54 (2006). Because of that fact, a conviction for both child molestation and child rape does not violate double jeopardy. *Id.* at 611 n.11.

Similarly, incest and rape are not the same offenses in law because each offense contains elements that the other does not have. *Calle*, 125 Wn.2d at 778. Moreover, the legislature has shown that it desires to punish incest in addition to rape as the purpose of the incest statute is to preserve family security. *Id.* at 780-81. For that reason, we believe that Mr. Cuevas Cortes's argument also fails with respect to the molestation charge. The purpose of an incest prosecution is different than the purpose behind a prosecution for violating RCW 9A.44. *Id.* at 781.

Accordingly, we hold that incest can be prosecuted in conjunction with either child rape or child molestation. Thus, Mr. Cuevas Cortes has not shown any potential double jeopardy violation that would have required a separate and distinct act instruction.

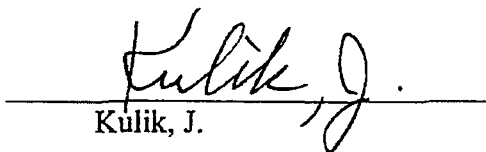
The convictions are affirmed.

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.

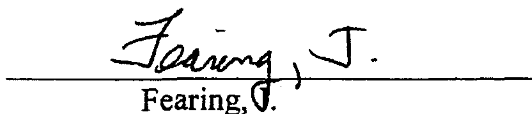


Korsmo, C.J.

WE CONCUR:



Kulik, J.



Fearing, J.

Appendix B

FILED
FEB 11, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ANTONIO CUEVAS CORTES, Appellant.	)))))))))	No. 30790-5-III ORDER DENYING MOTION FOR RECONSIDERATION

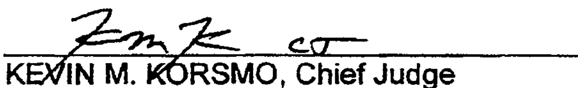
THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of January 16, 2014 is hereby denied.

DATED: February 11, 2014

PANEL: Judges Korsmo, Kulik, Fearing

FOR THE COURT:



KEVIN M. KORSMO, Chief Judge

LAW OFFICES OF

NIELSEN, BROMAN & KOCH, P.L.L.C.

1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488

WWW.NWATTORNEY.NET

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON

OFFICE MANAGER
JOHN SLOANE

LEGAL ASSISTANT
JAMILAH BAKER

DANA M. LIND
JENNIFER M. WINKLER
ANDREW P. ZINNER
CASEY GRANNIS
JENNIFER J. SWEIGERT

OF COUNSEL
K. CAROLYN RAMAMURTI
JARED B. STEED

State v. Antonio Cuevas-Cortes

COA 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 12th day of March, 2014, I caused a true and correct copy of the **Petition for Review** 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.

David Trefry
David.Trefry@co.yakima.wa.us

Antonia Cuevas-Cortes
DOC No. 356057
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

Signed in Seattle, Washington this 12th day of March, 2014.

x Patrick Mayovsky